No. 15-_____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state's interest in "increas[ing] . . . information concerning those who support the candidates," *Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (*per curiam*), permit it to condition a charity's publication of a nonpartisan voter education guide, which lists all candidates equally and makes no endorsements, upon the immediate and public disclosure of the names and addresses of individuals making unrelated donations over the previous four years?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, Plaintiff-Appellee below, is Delaware Strong Families ("DSF"). DSF is a Delaware nonprofit corporation organized under 26 U.S.C. § 501(c)(3). DSF is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with any ownership stake in DSF.

Respondents, Defendants-Appellants below, are the Attorney General and State Commissioner of Elections of the State of Delaware, in their official capacities.

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OTHER AUTHORITIES

Delaware Strong Families ("DSF") respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's opinion and order reversing the district court is reproduced in the appendix hereto ("App.") at 1-2, 5-22. The district court's order and opinion granting DSF's motion for a preliminary injunction is reproduced in the appendix at App. 23-59.

JURISDICTION

The United States District Court for the District of Delaware had jurisdiction over DSF's complaint pursuant to 28 U.S.C. §§ 1331 and 1343. The district court granted a preliminary injunction on April 8, 2014.

The Third Circuit had jurisdiction over the State's appeal pursuant to 28 U.S.C. § 1292(a). The Third Circuit reversed the district court on July 16, 2015, and ordered entry of judgment for the State. The district court entered judgment on October 1, 2015. The Third Circuit had jurisdiction over DSF's appeal under 28 U.S.C. § 1291. On December 31, 2015, the Third Circuit granted the State's motion for summary affirmance based on the court's July 16, 2015 opinion.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS, AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble.

U.S. Const. amend. I. Other pertinent statutes, regulations, and constitutional provisions are reproduced in the Appendix at App. 60-68.

INTRODUCTION

"Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association." *NAACP v. Ala.*, 357 U.S. 449, 462 (1958). Because they threaten to "flush[ ] small groups, political clubs, or solitary speakers into the limelight" – where these speakers may be persecuted, lose their livelihoods, or otherwise be intimidated into silence – "[b]road and sweeping state inquiries into . . . protected areas [may] discourage citizens from exercising [their protected] rights." *Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016)

(internal quotation marks omitted); *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971).

Thus, this Court has held that the freedom of all Americans "to pursue their lawful private interests privately and to associate freely with others in so doing," *NAACP*, 357 U.S. at 466, is "a basic constitutional freedom that . . . lies at the foundation of a free society." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (*per curiam*) (citations omitted) (internal quotation marks omitted). *See also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91, 96-98 (1982) ("The Constitution protects against the compelled disclosure of political associations and beliefs."). Accordingly, this Court "ha[s] repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64.

This "Court's campaign finance jurisprudence" has attempted to balance this associational liberty, "a constitutional right, and transparency, an extra-constitutional value, as equivalents." *Van Hollen*, 811 F.3d at 501. But, "these two values exist in unmistakable tension . . . [and] on an ineluctable collision course," *id*. at 488, and "important constitutional questions" posed by overbroad disclosure demands remain to be answered. *Id*. at 501.

This case presents those questions.

Here, Respondents ("the State") demand the right to review and publish four years of donor records from a § 501(c)(3) charitable nonprofit – private

information protected from disclosure by federal tax law. The State does so even though DSF makes no endorsements and conducts only traditional charitable activity, including the publication of an educational, non-advocacy voter guide listing all major party candidates for federal and state office and their statements on fifteen different issues. The Third Circuit's opinion permitted this overreach because it failed to account for important precedent, selecting favorable-sounding passages rather than giving effect to this Court's rulings as a whole.

Fundamentally, the State's demand contravenes this Court's cornerstone campaign finance opinions in *Buckley*, *McConnell v. FEC*, 540 U.S. 93 (2003), and *Citizens United v. FEC*, 558 U.S. 310 (2010). While those cases did uphold limited disclosure against constitutional challenges, they did not grant the government carte blanche. To the contrary, they emphasized that compulsory disclosure is constitutional only in narrow circumstances where the state can demonstrate both that the information demanded will inform the electorate about candidate constituencies, and that there is a genuine and vital need for that particular information. The State has failed to proffer such a record, and the information it demands is as likely to mislead the voters as to educate them. Granting the writ is necessary to preserve this Court's landmark decisions.

Additionally, the Third Circuit's decision created a circuit split, and deepened a disparity in First Amendment protection that only this Court may

remedy. The D.C. Circuit has policed the federal system in accordance with *Buckley*, preventing federal campaign finance statutes from capturing traditional charitable activities and prohibiting government demands for generalized donor disclosure from independent groups incidentally discussing candidates and officeholders. The Third Circuit's decision risks the creation of a two-track system where the First Amendment fails to protect those same associational liberties at the state level.

Finally, the Third Circuit reads *Citizens United* in a manner fundamentally different from the Seventh and Tenth Circuits. This case provides a good vehicle for the Court to clarify the scope of *Citizens United* before such misunderstandings further destabilize circuit law.

STATEMENT OF THE CASE

A. DSF's Educational Voter Guide and Delaware's Campaign Finance Laws.

DSF is a § 501(c)(3) educational nonprofit organization, prohibited by federal law from intervening in any election contest. 26 U.S.C. § 501(c)(3) (limiting exempt corporations to those that do "not participate in . . . any political campaign on behalf of (or in opposition to) any candidate for public office").

But DSF may distribute educational voter guides while protecting its general donors' privacy. *See* 26

U.S.C. § 6104(d)(3)(A). The Internal Revenue Service (IRS) includes such educational activities among the nonprofit activities that should be encouraged, and even "subsidize[d] . . . to promote the public welfare." *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983); I.R.S. Rev. Ruls. 78-248, 80-282.

In 2012, DSF made and distributed an educational voter information guide conforming to IRS guidelines. DSF's sister organization delivered a questionnaire to all major-party candidates for federal and state office in Delaware. DSF then compiled a voter guide from the answers,[1] reporting candidates' positions on 15 diverse issues. It also referred readers to DSF's website for expanded candidate statements.

The voter guide supported no candidate for office, listed all candidates equally, and was reviewed by DSF's tax counsel for compliance. Far from electioneering literature, DSF's voter guide merely reported candidates' self-identified policy positions and voting records. Thus, in 2012, DSF's educational voter guide was unregulated.

On January 1, 2013, the Delaware Elections Disclosure Act ("Act") went into effect. The Act conceals the breadth and burdens of its regulations by repeating many of the standard terms of modern campaign finance law and jurisprudence: "electioneering communications," "disclosure," and "reporting." Delaware

[1] It used publicly available sources to determine the positions of candidates who did not respond.

nominally borrows these terms from the federal Bipartisan Campaign Reform Act ("BCRA"), the statute at issue in *McConnell* and *Citizens United*. But despite these cosmetic similarities, the Act differs significantly from the campaign finance laws upheld by this and other courts.

Under Federal law, for example: "The term 'electioneering communication' applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period [60 days of a general election, 30 days of a primary], and (4) targeted to an identified audience of at least 50,000 viewers or listeners." *McConnell*, 540 U.S. at 194.

Moreover, nonprofits need only meet disclosure obligations under BCRA when they spend more than $10,000 for electioneering communications. Even then, BCRA's reporting requirements are much less burdensome than Delaware's: organizations need only report the names and addresses of donors who have explicitly earmarked at least $1,000 for the creation of that specific communication during the preceding calendar year, and they only have to report the names of those to whom they have paid more than $200. 11 C.F.R. § 104.20(c)(4) and (9).

Delaware's law engulfs a much wider range of protected speech – reaching a nonpartisan guide unregulated by federal law – through a much broader definition of electioneering communications. In addition to broadcast ads, Delaware's definition covers

any communication placed on the Internet or delivered through the mail and available to any members, *no matter how few*, of "the electorate for the office sought." Del. Code Ann. tit. 15, § 8002(10); *cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 337 (1995) (invalidating state statute compelling disclosure of speakers "plac[ing] . . . leaflets on car windshields").

The law further burdens speech by reducing the triggering expenditure from the $10,000 required by federal law to a mere $500. Delaware's law then swallows more information about each of the many communications it regulates: unlike federal law, Delaware's Act does not include an earmarking requirement limiting disclosure to donors giving for the purpose of the regulated communication.

Instead, for each report, Delaware demands the full name and mailing address of *all* donors giving over $100, in total, over the previous *four* calendar years. Del. Code Ann. tit. 15 §§ 8002(11)(d); 8031(a)(3); Del. Const. art. II, § 2 (four-year term for state senators). Delaware also demands the full name and mailing address of anyone receiving an expenditure over $100 in the previous *four* calendar years, as well as the purpose of the expenditure. Del. Code Ann. tit. 15 § 8031(a)(2); Del. Const. art. II, § 2.

Consequently, the State's disclosure demands far exceed the federal analogue upheld in *McConnell* and *Citizens United*. Indeed, the disclosure burdens under the Act, for communications that merely mention a

candidate's name, exceed the expanded burdens allowed under federal law for independent expenditures. *McConnell*, 540 U.S. at 197 n.81. Delaware's electioneering communications statute thus treads much closer to the edge of political committee ("PAC") regulation and, with a four-year donor look-back, actually exceeds the burdens of PAC status, which the government may not impose even on groups distributing express advocacy "voter guides" that encourage the election of specific candidates. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("*MCFL*").

Thus, Delaware enacted the most wide-ranging and expansive curtailment in two generations of Americans' right "to pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP*, 357 U.S. at 466. In fact, the Act regulates educational speech more thoroughly, pervasively, and burdensomely than *any* legislation reviewed by this Court, or any other federal court, since *Buckley*. And it does so in the context of an organization that does not endorse candidates and whose donations consequently provide no information about the financial sources of any candidate's support.

B. District Court Proceedings.

On October 23, 2013, DSF filed a verified complaint asking that the district court enjoin enforcement of the Act as applied to the state candidates in DSF's voter guide.

In opposing DSF's preliminary injunction motion, the State tried to support the Act's broad regulation with inapposite exhibits. None of these examples of express advocacy (or its equivalent) or of anonymously-mailed communications (with only a Post Office Box number) were remotely similar to DSF's guide.

In granting DSF's preliminary injunction motion, the district court reviewed this Court's campaign finance jurisprudence, from *Buckley*'s and *McConnell*'s facial rulings, to the as-applied challenges in *Citizens United* and *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"). The court also reviewed those cases that the parties considered "most analogous to the facts at bar," including the D.C. Circuit's *en banc* decision in *Buckley v. Valeo*, 519 F.2d 817 (D.C. Cir. 1975) (*en banc*). (App. 47).

The district court concluded that "there is no case that purports to address disclosure requirements with the breadth attributed to the Act." App. 52. Rather, it noted other states that had followed this Court's guidance by deliberately "exempting . . . non-political [communicators]" like § 501(c)(3)s and "non-political [communications]" like voter guides, because the informational interest diminishes "the less a communicator or communication advocates an election result." App. 55.

The district court further noted that the legislative history of the Act focused on problems related to express advocacy or its equivalent, and not nonpartisan

issue speech. App. 56. Nevertheless, the Act contained none of the "exemptions" for discussions of public policy found in other states' regimes regulating electoral advocacy. *Id*.

Accordingly, the court held "that the relation between the personal information collected" and "the primary purpose of the Act" – "[r]egulating anonymous political advocacy" – was "too tenuous to pass constitutional muster." App. 57 and 57 n.23.

The State appealed the injunction.

C. Third Circuit Decision.

The Third Circuit heard the State's appeal on October 28, 2014. On July 16, 2015, that court reversed and ordered entry of judgment for the State. App. 22.

The Third Circuit professed to review the Act under "exacting scrutiny." App. 14. Exacting scrutiny requires a sufficiently important governmental interest and a substantial relationship between that interest and the disclosure requirement. In a single paragraph, however, the court found "that Delaware's interest in an informed electorate is a sufficiently important governmental interest." App. 14.

The Third Circuit also misapplied this Court's precedents in determining whether there exists a "'substantial relation' between the [informational] interest and the" disclosure requirement. *Buckley*, 424 U.S. at 64.

The Third Circuit failed to even consider whether the disclosure demanded by the State – the publication of general charitable donations to a group publishing a voter guide that endorses neither candidates nor issues – actually increased "the fund of information concerning those who *support* the candidates." *Buckley*, 424 U.S. at 81 (emphasis added). The court simply concluded that the informational interest, the burdens of disclosure, and the tailoring analysis weighing the two is the same in all disclosure cases, despite differences in the nature of the communications, the information demanded, and the organizations involved. *But see Coal. for Secular Gov't v. Williams*, No. 14-1469, 2016 U.S. App. LEXIS 3949, at *27 (10th Cir. Mar. 2, 2016) ("*Coalition*") (noting sliding scale). Consequently, the court upheld the Act based upon the sweeping and incorrect principle that "[p]roviding information to the electorate" is always sufficiently "vital to the efficient functioning of the marketplace of ideas" and to the "objectives underlying the First Amendment" as to override all other First Amendment interests. App. 15 (citation omitted) (internal quotation marks omitted).

Constitutional tailoring, however, requires that the informational interest be more than an amorphous lump of clay that the government may mold to justify whatever disclosure it desires. The informational interest is not sufficiently important just because it demands "information"; the information *itself* must be sufficiently important and material. The Third Circuit failed to examine whether there is

any interest in the information demanded here, much less a "legitimate governmental interest." *Buckley*, 424 U.S. at 64.

The Third Circuit also, *ex nihilo* and without citation, created a new definition of "issue advocacy," one that subsumed all "communications that seek to impact voter choice by focusing on specific issues," and then allowed broad State regulation of such communications. App. 12. This is much more akin to the standard struck down in *Buckley* ("'for the purpose of . . . influencing' an election," 424 U.S. at 79) than to the standard upheld in *McConnell* and *Citizens United*.

Finally, after establishing an unlimited informational interest in any disclosure, the Third Circuit failed to consider the burdens of the Act as a whole on DSF. Instead, the court divided the Act into separate pieces – the disclosure period, the monetary threshold, the media covered, and the generalized nature of disclosure demanded by the Act – and held that none, individually, imposed an unconstitutional burden on DSF.

This broad understanding of the informational interest and of electoral advocacy – labeling essentially all discussions of public policy as attempts to manipulate the electorate, and then allowing the State to extend its informational interest to reach any possible governmental curiosity – led the court to ignore the limits of *Buckley* and reverse the district court's ruling.

D. Subsequent Proceedings.

On August 12, 2015, the Third Circuit denied DSF's July 30, 2015 petition for rehearing *en banc*, with Judges Jordan and Vanaskie supporting reconsideration. The court then denied DSF's motion to stay the mandate pending a petition for writ of *certiorari*.

The Third Circuit's mandate specifically ordered entry of judgment for the State. On October 1, 2015, the district court entered judgment "for the reasons given" in the Third Circuit's "opinion and judgment of July 16, 2015." App. 3.

On October 1, 2015, DSF timely appealed. On December 31, 2015, the Third Circuit granted the State's motion for summary affirmance and issued a final order and opinion incorporating the July 16, 2015 opinion.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S PRECEDENTS.

This Court has repeatedly demanded that donor disclosure laws demonstrate a "substantial relation" between the disclosure involved and a "'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66). Mere invocation of a disclosure interest is insufficient. Simply because this Court has upheld some

mandatory disclosure laws does not mean that all mandatory disclosure passes First Amendment review: "In for a calf is not always in for a cow." *McIntyre*, 514 U.S. at 358 (Ginsburg, J., concurring). Accordingly, in *McConnell* and *Citizens United*, this Court upheld disclosure laws only because they provided information about those who actually supported or opposed candidates.

The Third Circuit mistakenly held that *McConnell* and *Citizens United* resolved the challenge here. App. 12. But "[t]he nature of our system of legal precedent is that later cases often distinguish prior cases based on sometimes slight differences." *Independence Institute v. FEC*, No. 14-5249, 2016 U.S. App. LEXIS 3731, at *8 (D.C. Cir. Mar. 1, 2016). The differences here are not slight, and this case exists well outside of *McConnell*'s and *Citizens United*'s holdings.

Because the Third Circuit decision conflicts with this Court's foundational precedent, this Petition should be granted.

1. *Buckley* controlled the outcomes in *McConnell* and *Citizens United*, and it should have controlled here.

In *Buckley*, the Court substantially narrowed the wide-ranging disclosure regime introduced by the Federal Election Campaign Act (FECA) to ensure that it did "not reach all *partisan* discussion," *Buckley*, 424 U.S. at 80 (emphasis supplied), much less nonpartisan educational speech like DSF's. Thus, the *Buckley* Court upheld disclosure only "concerning

those who support the candidates." 424 U.S. at 81. Accordingly, the Court limited disclosure to groups whose major purpose was expressly advocating specific electoral outcomes, or to those individuals who earmarked funds for speech supporting or opposing candidates. 424 U.S. at 79-81. Such "campaign related" disclosure bore "a sufficient relationship to a substantial governmental interest." *Id*. at 79, 80.

In contrast, DSF's nonpartisan reporting of all major candidates' self-reported statements on public issues does not "support the candidates," and donor disclosure will not reveal anything "concerning those who support the candidates." *Id*. at 81. Instead, erroneously reporting DSF's general donors, who may be unaware of the guide and have given for other reasons, as supporting *all* of the candidates (for all are listed in its guide) will mislead the electorate as to candidates' financial "constituencies." *Id*. And disclosing donations made years before many candidates in the guide even considered running for office will only amplify these misperceptions.

2. *McConnell* and *Citizens United* did not overturn *Buckley* and do not address the instant matter. Those cases concerned broadcast advertising about a candidate; this case involves a nonpartisan voter guide. Those decisions were based upon *McConnell*'s lengthy record – over 100,000 pages – which demonstrated that certain broadcast communications lacking express advocacy were being used to evade constitutional disclosure requirements. *Citizens United*, 558 U.S. at 332 (noting *McConnell*'s record); *McConnell*, 540 U.S. at 196 (noting that

BCRA addressed "the source of the funding behind broadcast advertisements") (internal quotation marks omitted).

No such record exists here. The State had the burden of providing such a record to "show[ ] that the [Act] does not burden substantially more speech than is necessary." *Turner Broad. Sys. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 665 (1994) (internal quotation marks omitted). The record here, such as it is, fails to address – much less demonstrate any baneful effects from – Internet communications, educational voter guides, or speech that does not function as advocacy.

The Third Circuit noted that a number of other states also regulate non-broadcast communications. But "an indiscriminate survey of the laws of other jurisdictions" is insufficient if it fails to "marshal[ ] any evidence about *why* those laws were enacted and *how* the regulations are enforced." *Edwards v. D.C.*, 755 F.3d 996, 1004 (D.C. Cir. 2014) (emphasis in original).[2]

Furthermore, this Court has afforded greater privacy protections to non-broadcast speakers, as opposed to those who spend millions of dollars to

[2] Many of these state statutes regulate much more narrowly than Delaware's. Colorado, Massachusetts, and North Carolina have an earmarking requirement. Colo. Const. art. XXVIII, § 6(1); Mass. Gen. Laws ch. 55, § 18F; N.C. Gen. Stat. § 163-278.12C(a)(5). Connecticut exempts § 501(c)(3) organizations. Conn. Gen. Stat. § 9-601b(13). West Virginia exempts voter guides. W. Va. Code § 3-8-1a(12)(B)(viii).

purchase airtime from broadcasters. *Compare McIntyre*, 514 U.S. at 337 (describing leaflets), *with McConnell*, 540 U.S. at 194 ("applies only . . . to a broadcast").

3. Even ignoring Delaware's overreach into non-broadcast communications possibly seen by only a single voter, no case of this Court has "addressed a statutory regime as broadly constructed (and apparently construed) as the one at bar." App. at 35a. The closest analogue, *Buckley*, required a statute of similar breadth to be substantially narrowed to survive constitutional scrutiny.

The Third Circuit relied upon *McConnell*, but the version of BCRA that this Court reviewed facially in that case had been construed by the FEC to exempt all § 501(c)(3) activity. 67 Fed. Reg. 65190, 65200 (Oct. 23, 2002) (finding "compelling" concerns that failing to exempt § 501(c)(3) charities would "discourag[e] . . . highly desirable and beneficial activity, simply to foreclose a theoretical threat . . . [from activity that] *such organizations, by their very nature, do not do*" (emphasis added)).[3]

Thus, *McConnell* did not address whether a campaign finance statute could broadly capture traditional § 501(c)(3) communications. *See Independence*

[3] This exemption was later struck for technical reasons, *Shays v. FEC*, 337 F. Supp. 2d 28, 127 (D.D.C. 2004), but it was in full force when this Court reviewed *McConnell*. 67 Fed. Reg. 65190 ("The final rules will take effect on November 6, 2002").

Institute v. FEC, 2016 U.S. App. LEXIS 3731, at *7 (noting that this Court has not addressed whether "tax status or the nature of a nonprofit organization affects the constitutional analysis of [a] disclosure requirement").

Likewise, the version of BCRA reviewed in *Citizens United* covered only donations earmarked for electioneering communications. After this Court permitted spending for issue ads from corporations' and unions' general treasury funds in *WRTL II*, 551 U.S. 449, the FEC exempted non-earmarked donations from disclosure requirements for the new issue ad spending because such donations "do not necessarily" indicate support for "the corporation's electioneering communications."[4] *See* 11 C.F.R. § 104.20(c)(9); 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007). In doing so, the FEC observed the requirements of this Court's *Buckley* decision, which also limited disclosure to earmarked donations. *Buckley*, 424 U.S. at 80.

But Delaware – and the Third Circuit in upholding Delaware's law – showed no concern that the Act compels disclosure of charitable contributions that give no information about who is supporting candidates.

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[4] "After *Wisconsin Right to Life*, corporations and unions suddenly could expend general treasury funds for issue ads, a result Congress had explicitly prohibited under BCRA." *Van Hollen*, 811 F.3d at 496.

Therefore, neither *McConnell* nor *Citizens United* resolves this case. Those opinions did not consider generalized donor disclosure[5] – much less disclosure for charitable donations going back four years, or triggered by a single act of traditional nonprofit activity.[6] The Third Circuit failed to acknowledge that neither *Citizens United* nor *McConnell* overruled *Buckley*, and it consequently failed to analyze how those cases combine with *Buckley* to limit the grasp of state disclosure laws.

4. Furthermore, citing to *Citizen United*'s progeny, the Third Circuit mistakenly held that there is a substantial relationship between Delaware's disclosure regime and its informational interest because the regime requires "event-driven disclosures."

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[5] The Third Circuit glossed over this distinction, stating: "Nothing in *Citizens United* implies that the Court relied upon the FEC earmarking regulation when approving of BCRA's disclosure regime." App. 21. This is an odd statement; obviously this Court was considering the actual rule before it. In any event, this Court was briefed about the earmarking regulation's effect, which was directly cited by the three-judge court first hearing *Citizens United*. Brief for Appellee, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205) at 5; *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008).

[6] Producing "a feature-length negative advertisement that urges viewers to vote against [a candidate] for President" and issuing commercials for that film that are "pejorative" of that candidacy, are permitted for § 501(c)(4) organizations like Citizens United, but banned for charitable § 501(c)(3) groups like DSF. *Citizens United*, 558 U.S. at 325, 368; IRS Pub. No. 4221-NC, Compliance Guide for Tax Exempt Organizations (2014) at 6.

App. 21 and 21 n.10. While the disclosure obligations under Delaware law are triggered by an event, the disclosure of unrelated donor information four years before that event is hardly "event-driven." Rather, as the Seventh Circuit recognized in interpreting *Citizens United*, a "one-time, event-driven disclosure rule" involves "donors who contributed . . . to the expenditure." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 824 (7th Cir. 2014).

Delaware's disclosure regime falls short of a one-time, event-driven disclosure in two ways. First, it pulls in donations not made for the event itself. Second, it collects four years of donor information even though DSF publishes its voter guide every two years. Thus, Delaware's disclosure regime goes outside the event by compelling disclosure entirely unrelated to DSF's voter guide production.

5. Unlike the Third Circuit decision here, *McConnell* and *Citizens United* applied *Buckley*'s informational interest with care, preventing unbridled discretion by the government in defining the scope of, and tailoring to, the informational interest. *McConnell* determined that the lengthy record below counseled in favor of regulating electioneering communications generally, since that record demonstrated that almost all broadcast ads mentioning candidates were being "used to advocate the election or defeat of clearly identified federal candidates." 540 U.S. at 126; *Buckley*, 424 U.S. at 44 n.52.

Likewise, *Citizens United* upheld BCRA as applied but – consistent with *Buckley* – in a situation where an earmarking limitation ensured that a nonprofit's entire donor list would not be made public for engaging in First Amendment activity. 558 U.S. at 369 (comparing BCRA disclosure to more onerous regulation, such as PAC status, which includes general donor disclosure).

The Third Circuit, however, turned *Buckley*'s informational interest on its head. Rather than limiting disclosure to "help[ ] voters to define more of the candidates' constituencies," the panel simply asserted that the informational interest reached all information that may be mildly interesting. *Buckley*, 424 U.S. at 81.

6. The Third Circuit has additionally damaged the *Buckley* precedent by redefining "issue advocacy" to encompass all "communications that seek to impact voter choice," including those that "focus[ ] on specific issues." App. at 11-12. Such a construction knows no bounds. It essentially eliminates any distinction between genuine issue speech and electoral advocacy.

Thus, under the pretense of revealing candidate constituencies, the State may permissibly regulate *all* speech about politics and candidates – or even about issues that might form the basis of political discussion – and effectively silence much of that speech.[7]

[7] The Ninth Circuit has, in fact, upheld imposing PAC status on a corporation that engaged in issue speech about the

(Continued on following page)

See Buckley, 424 U.S. at 43 ("Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions . . . campaigns themselves generate issues of public interest.").

Those in government may chafe at scrutiny by those outside the halls of power, but this is no reason to countenance burdening nonpartisan issue speech. Doing so works against the explicit aim of *Buckley*, which sought to prevent compulsory disclosure from reaching "all partisan discussion," a principle this Court has repeatedly affirmed. *See*, *e.g.*, *WRTL II*, 551 U.S. at 471-72 (Roberts, C.J., controlling opinion) ("Under appellants' view, there can be no such thing as a genuine issue ad during the blackout period").

7. Thus, the Third Circuit's misapplication of *Buckley* rests on the mistaken premise that *Citizens United sub silencio* overturned *Buckley*. As indicated *supra*, this is an odd proposition. App. at 54 ("the Supreme Court's relatively terse discussion about disclosure in *Citizens United* is based in large measure on citations to its precedential opinions in *Buckley* and *McConnell*").

Citizens United did not expand the scope of the informational interest beyond defining candidates'

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alleged misuse of parliamentary procedure by a named Hawaii legislator. *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 569 (2015).

financial supporters and constituencies. 558 U.S. at 366-67 (citing to *Buckley*, 424 U.S. at 64, 66). Rather, the informational interest in *Citizens United* was of a piece with the interest in exposing candidates' financial constituencies, as identified in *Buckley*.

As a § 501(c)(4) speaker, Citizens United was allowed by federal tax law to advocate the election or defeat of candidates. Citizens United's commercial broadcasts did so, encouraging Americans to purchase a propaganda film reflecting that group's opposition to then-Senator Clinton's candidacy. *Citizens United*, 530 F. Supp. 2d 274, 276 n.4 (D.D.C. 2008) ("Hillary's got an agenda . . . Hillary is the closest thing we have in America to a European socialist . . . If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie") (internal quotation marks omitted).

Citizens United was not an educational nonprofit distributing, via the Internet, a nonpartisan voter guide helping voters understand candidate stances on more than a dozen issues. Rather, Citizens United focused on one candidate to argue – via a feature film and advertisements for that film – "that she [was] unfit for the Presidency." *Citizens United*, 558 U.S. at 325.

8. Moreover, unlike the Third Circuit's decision, *Citizens United* properly applied exacting scrutiny's tailoring requirement. *Buckley*, 424 U.S. at 64 (stating that "compelled disclosure . . . cannot be justified by a mere showing of some legitimate governmental

interest"). "In the First Amendment context, fit matters." *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1456 (2014).

BCRA's disclosure requirements implicated an actual informational interest, and the requirements were tailored to that interest. The law demanded only the disclosure of those who expressly gave to fund broadcast ads for a 90-minute "feature-length negative advertisement . . . against" Hillary Clinton. 558 U.S. at 325; 11 C.F.R. § 104.20(c)(9); *see Buckley*, 424 U.S. at 80. Donors who gave generally to Citizens United, or who contributed to fund other movies, were not disclosed and publicized.

9. Nevertheless, the Third Circuit considered DSF's case foreclosed by *Citizens United*. In reaching this conclusion, the court disregarded the facts of both the case and the law before the *Citizens United* Court. The Third Circuit's failure to substantively engage with these distinctions triggered its misreading of *Citizens United*.

For example, the four-year length of Delaware's disclosure period, which the court of appeals addressed only in a footnote, goes directly to the tailoring requirement that laws be "closely drawn" to protect "associational freedoms." *Buckley*, 424 U.S. at 25. Linking a donation for general purposes to a specific communication made nearly four years later violates donor privacy while providing no material information to the electorate.

Indeed, such disclosure is misleading: the regulation would identify a donor in January 2013 as sponsoring a communication distributed in October 2016, even if that donor had grown disenchanted, ceased contributing, and disagreed with the regulated communication. And the Act exacerbates the potential to mislead the electorate by extending its reach to non-electoral groups, such as those "advocating such causes as a cure for cancer or support for wounded war veterans," or those – like DSF – encouraging civic engagement. App. 57 n.21. As the FEC recognized by including an earmarking requirement in BCRA's implementation, generalized donor disclosure for nonprofit groups threatens to attach people to speech that they may not support. 72 Fed. Reg. at 72911; *Van Hollen*, 811 F.3d at 497 (citing same).

As this Court has recognized, we live in a world of nearly instant Internet disclosure of "massive quantities" of public spending information. *McCutcheon*, 134 S. Ct. at 1460 (Roberts, C.J., controlling op.). Such information may be useful when it indeed informs voters about a candidate's constituencies, *Buckley*, 424 U.S. at 81, but disclosure lacks any value when it attaches people to speech they do not support. And online disclosure never sunsets; there is no right to be forgotten. *ProtectMarriage.com – Yes on 8 v. Bowen*, 752 F.3d 827, 835 (9th Cir. 2015).

It is undoubtedly proper – and supported by this Court's precedents – to ask Americans to stand with civic courage behind their public, political acts. *See Doe v. Reed*, 561 U.S. 186, 214 (2010) (Sotomayor, J.,

concurring). It is wholly improper – and contravenes this Court's precedents – to demand such courage from persons in Delaware making general charitable donations of $25 a year, especially when the State splashes a donor's identity across the Internet because of her donation's loose connection to a communication made four years later.

The *Buckley* precedent forecloses Delaware's overreach. Preservation of that precedent counsels in favor of granting the writ.

II. THE THIRD CIRCUIT'S RULING SUPPORTS A SYSTEM WHERE THE FIRST AMENDMENT PROTECTS ASSOCIATIONAL PRIVACY AT THE FEDERAL LEVEL BUT NOT THE STATE LEVEL.

The Third Circuit's decision conflicts with sister circuit precedent, including a substantial split with the D.C. Circuit. That particular split is emblematic of a system where First Amendment rights wither in the context of state campaign finance regulation while remaining protected at the federal level.

The D.C. Circuit, by law and location, handles much of the federal campaign finance litigation. Parties must bring constitutional challenges to BCRA before a three-judge court comprised of two D.C. District Court judges and one D.C. Circuit judge. *See* 52 U.S.C. § 30110 note. Accordingly, BCRA challenges are directly governed by the precedents of this Court and the D.C. Circuit. And, as discussed *infra*, the

D.C. Circuit has protected the rights of contributors against overbroad disclosure regimes such as the Act's.

The regional circuit courts, however, review the state regimes. Division between the federal regime and the state regimes creates a two-track system of campaign finance law, where the First Amendment protects associational liberty at the federal level but allows it to wilt away in the states. Only this Court may resolve this conflict. Accordingly, *certiorari* ought to be granted.

1. As a matter of law in the D.C. Circuit, broad, sweeping disclosure statutes triggered by the mere mention of a candidate's voting record are unconstitutional under the First Amendment.

In the *Buckley* case, the *en banc* D.C. Circuit unanimously "held . . . [FECA] § 437a, unconstitutionally vague and overbroad" because it could have required reporting even when a group's "only connection with the elective process ar[ose] from completely nonpartisan public discussion of issues of public importance." *Buckley*, 424 U.S. at 11 n.7 (quoting *Buckley*, 519 F.2d at 832).[8]

Much like the Act, § 437a unconstitutionally attempted to impose disclosure requirements on

[8] The D.C. Circuit's holding against § 437a remains good law because "[n]o appeal" was "taken from that holding" to the Supreme Court. *Buckley*, 424 U.S. at 11 n.7.

speech that stated candidates' positions and voting records. Section 437a required that "[a]ny person" who spent money "setting forth the candidate's position on any public issue, his voting record, or other official acts" would have to report "the source of the funds used in carrying out" that activity. *Buckley*, 519 F.2d at 869-870 (quoting FEC § 437a).

DSF's voter guide also includes candidates for federal office. The D.C. Circuit's holdings on § 437a are relevant because they are the controlling precedent over the federal candidates in the same voter guide the Third Circuit reviewed. FECA § 437a sought to regulate any speech, no matter how incidental to advocacy, if it merely mentioned where a candidate stood on "any public issue." *Buckley*, 519 F.2d at 869 (quoting FECA § 437a). Like Delaware's law, § 437a was "intended to apply indiscriminately and . . . bring under the disclosure provisions . . . liberal, labor, environmental, business, and conservative organizations . . . [It] d[id] not make any exceptions." *Id*. at 877 n.140 (quoting statement of Rep. Frenzel).

The D.C. Circuit determined that, like the Act, "section 437a may also demand disclosure by" organizations that did not "endors[e] or oppos[e] any candidate for public office." *Id*. at 871. That is, like DSF here, the New York Civil Liberties Union likely fell within the ambit of section 437a because it "publicize[d] . . . the civil liberties voting records, positions and actions of elected public officials, some of whom are candidates for federal office." *Id*.

Because it reached all such communications, the D.C. Circuit applied the *NAACP* line of cases and struck down § 437a. *Id*. at 872 (citing to *NAACP*, 357 U.S. at 462; *Bates v. Little Rock*, 361 U.S. 516, 522-24 (1960)). The court determined that "issue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections." *Buckley*, 519 F.2d at 873. Rather, because "such discussions are vital and indispensable to a free society and an informed electorate . . . the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes." *Id*.; *cf.* App. 55 ("[T]he less a communicator or communication advocates an election result, the less interest the government" has "when weighed against the important First Amendment rights at stake.").

In reversing the district court, the Third Circuit is in direct conflict with the D.C. Circuit. It is undisputed that both statutes, FECA's § 437a and the Act here, forced disclosure and publication of the constitutionally protected information of a group's donors, even when that group merely presents candidates' voting records and positions. In 1975, the victim of that overbroad statute was the New York Civil Liberties Union. In 2016, it is Delaware Strong Families. While the plaintiffs have changed, their donors' associational rights have not.

2. The differences between the Act and FECA § 437a cut against the constitutionality of Delaware's law. FECA's disclosure regime would have been

periodic, unlike Delaware's electioneering communications regime. But the Act actually requires far more private information to be made public than did § 437a.[9] The Act may require that an entity submit only one form to the State, but it asks for four years' of the personal, protected information of DSF's general donors. FECA asked for nothing of that scope, despite possibly requiring multiple filings.

FECA's § 437a, had it been upheld, would have demanded far less donor disclosure than the Act. Section 437a merely required that disclosure reports "set forth the source of funds used *in carrying out* any" activity discussing a candidate for office. 2 U.S.C. § 437a (emphasis added). Thus, § 437a is consistent with a construction limiting disclosure to earmarked funds, a construction anticipating both BCRA and *Buckley*'s requirement that disclosure by non-PACs be limited to those giving directly for a specified

[9] The Act ingeniously requires PAC-level reporting while trying to avoid challenges for unconstitutionally imposing PAC status. That is, Delaware could only require annual reporting each year for four years if it imposes PAC status on DSF, but a regulation imposing PAC status for the nonpartisan speech and minimal expenditures at issue here would be unconstitutional. *Cf. N.M. Youth Organized v. Herrera*, 611 F.3d 669, 679 (10th Cir. 2010) (striking down reporting and other PAC requirements as imposed on § 501(c)(3) groups spending small sums on direct mail campaigns). Delaware demands the same level of reporting by requiring four years of reporting all at once.

communication. *Buckley*, 424 U.S. at 80; 11 C.F.R. § 104.20(c)(9).[10]

Finally, it is irrelevant to the constitutional rights at issue that vagueness concerns precipitated the examination of § 437a. As Professor Chemerinsky has written, "vague laws restricting speech" are unconstitutional "out of concern that they will chill constitutionally protected speech." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 942 (3d ed., Aspen 2006). That is, vague laws are unconstitutional because they may extend to and thus silence protected speech. Explicitly reaching that speech does not cure the constitutional violation precipitating the vagueness ruling. It only makes the unconstitutionality explicit.

Thus, there is a substantial circuit split here. The D.C. Circuit invalidated § 437a because it would have required disclosure from groups engaged in nonpartisan, educational activities. Delaware eliminated any

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[10] FECA also imposed a *de minimis* spending trigger, as opposed to Delaware's $500 trigger. But there is no evidence that Delaware's $500 spending trigger will, in practice, mitigate the privacy invasions and First Amendment burdens that motivated the *Buckley* ruling.

FECA § 437a also regulated generally, and not only within the 60-day electioneering communications window. But regardless of proximity to an election, states must still demonstrate that their disclosure laws provide information about candidates' financial constituencies. If *Citizens United* had overturned *Buckley* on this point, it would have said so.

vagueness concerns by *explicitly* reaching such communications, and the Third Circuit upheld Delaware's law nonetheless. *See Buckley*, 519 F.2d at 914 (Tamm, J., concurring in relevant part) ("I can hardly imagine a more sweeping abridgement of first amendment associational rights.").

The First Amendment needs "breathing space to survive, [and so] government may regulate in the area only with narrow specificity." *Buckley*, 424 U.S. at 41 n.48 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). That Delaware has eschewed vagueness in favor of a clear regulation does not mean that groups are any freer to speak. It means only that we can now see the hands around their necks.

3. In January of this year, almost 40 years to the day from this Court's *Buckley* decision, the D.C. Circuit again prevented the federal campaign finance system from transmogrifying into an overbroad and invasive regime like Delaware's. In particular, that court upheld a Federal Election Commission regulation protecting the privacy of general-fund donors to organizations making federal electioneering communications.

The FEC's earmarking requirement for BCRA, 11 C.F.R. § 104.20(c)(9), was challenged by a member of Congress, Christopher Van Hollen, Jr., as being improperly promulgated as a matter of administrative law. In *Van Hollen*, the D.C. Circuit appropriately placed "Van Hollen's challenge to the FEC disclosure rules . . . in its broader context, the century-long

conflict over campaign finance reform." 811 F.3d at 489. Ultimately, the D.C. Circuit upheld the earmarking requirement, observing that "[b]y tailoring the disclosure requirements to satisfy constitutional interests in privacy, the FEC fulfilled its unique mandate" to cautiously regulate First Amendment activity. *Id*. at 499.

The D.C. Circuit completed its analysis by noting several constitutional harms that would arise without an earmarking requirement. First, BCRA would have infringed on nonpolitical associational rights and transformed even nonpolitical issues into regulable political ones. "For instance, an American Cancer Society donor who supports cancer research but not ACS's political communications must decide whether a cancer cure or her associational rights are more important to her. . . . Cancer research isn't a political issue, but disclosure rules of this sort would undeniably transform it into one." *Id*. at 500-01.

Second, failure to include an earmarking requirement would erase an individual's privacy rights in non-political charitable donations:

> [M]odest individuals who'd prefer the amount of their charitable donations remain private lose that privilege the minute their nonprofit of choice decides to run an issue ad. The Supreme Court routinely invalidates laws that chill speech [for] far less . . .

Id. at 501.

Furthermore, regulations lacking disclosure requirements are most harmful to small groups like DSF. That is, they "have their real bite when flushing small groups, political clubs, or solitary speakers into the limelight, or reducing them to silence." *Id*. at 501 (quoting *Majors v. Abell*, 361 F.3d 349, 358 (7th Cir. 2004) (Easterbrook, J., dubitante)).

The D.C. Circuit's analysis accords with the district court's understanding of the Act in this case, and it further demonstrates the sharp division between the D.C. Circuit and Third Circuit. App. 57 n.21 ("the Act, however, is broad enough to cover the contributors to any charitable organization, e.g., those advocating such causes as a cure for cancer").

4. This division matters, as we have entered a bifurcated world where respect for the Constitution protects First Amendment rights to donor privacy at the federal level, but where many states are free to ignore these liberties and expose unpopular groups to "public opprobrium, reprisals, and threats of reprisals." *Familias Unidas v. Briscoe*, 619 F.2d 391, 399 (5th Cir. 1980). While the Third Circuit's opinion below is more expansive than any decision in the Nation, and in conflict with decisions from the Seventh and Tenth Circuits (see below), it expands upon reasoning from the First, Second, Fourth, Eighth, Ninth, and Eleventh Circuits, all of which have denied the existence of a constitutional safe haven for issue speakers after *Citizens United*.

See Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 132 n.12 (2d Cir. 2014); *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1251-52 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 529 (2013); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 591 n.1 (8th Cir. 2013); *Ctr. for Individual Freedom v. Tennant*, 706 F.3d 270, 290 (4th Cir. 2013); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 60 (1st Cir. 2013); and *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010).

The disclosure upheld in those cases was less invasive than what Delaware demands, with plaintiffs engaging in markedly different speech. *See*, *e.g.*, *Tennant*, 706 F.3d 270 (upholding electioneering communications regime with a voter guide exemption, W. Va. Code § 3-8-1a(11)(B)(viii)). Nevertheless, these cases indicate that this Court's window to prevent a two-track system of associational liberty is rapidly closing.

III. THE THIRD CIRCUIT SPLITS WITH THE TENTH AND SEVENTH CIRCUITS OVER *CITIZENS UNITED*'S PROPER SCOPE.

A. Split with the Tenth Circuit

The Third Circuit's decision conflicts with two recent Tenth Circuit decisions, both of which emphasize that exacting scrutiny is not one-size-fits-all at any step of the exacting scrutiny analysis.

1. In striking down reporting requirements in *Coalition for Secular Government v. Williams*, the

Tenth Circuit held that the informational interest does not have the same weight for all organizations. 2016 U.S. App. LEXIS 3949, at *27. In particular, unlike the Third Circuit, the Tenth Circuit "recognized that the strength of the informational interest in financial disclosure varies depending on whether an [organization] has raised and spent $10 million" or something less. *Id*. As in the present case, the disclosure interest was not substantial because the organization was not one of those raising and spending large sums of money.

2. The Tenth Circuit also recognized that, in as-applied cases, a court must look at the specific burdens under the specific provisions at issue. In *Coalition*, as is the case here, Colorado's law would have required "detailed information about . . . mundane, obvious, and unimportant expenditures," like the "address of the post office" for purchasing stamps.

In addition, the Tenth Circuit noted the added impact of disclosure burdens on small-scale organizations like DSF when the law exposes information like where donors to unpopular causes and their families live. As the Tenth Circuit stated, one "would expect some prospective contributors to balk at producing" such address and employment information. *Coalition*, 2016 U.S. App. LEXIS 3949, at *30. And, for "small-scale" organizations like the Coalition and DSF, any such "lost contributions might affect their ability to advocate." *Id*.

Delaware's law equals or exceeds the burdens of Colorado's law: no termination report can limit reporting to a single year or less, and a $100-over-four-years reporting threshold – that is $25 per year – is extraordinarily similar to the $20 donation-reporting threshold in Colorado. *See id.* at *10-11, 12-13, 31-32. In short, not only general donors, but general donors giving extraordinarily small contributions, would be captured in both systems. But the Tenth Circuit considers the burdens of capturing such de minimis activity constitutionally relevant, and the Third Circuit does not.

3. Furthermore, the Tenth Circuit recognizes the importance of tailoring under *Citizens United*, so that the government regulates only speech that is substantially related to the government's interest, including donations that inform rather than mislead as to candidate constituencies. In particular, in upholding Colorado's electioneering communications law in *Independence Institute v. Williams*, No. 14-1463, 2016 U.S. App. LEXIS 1865 (10th Cir. Feb. 4, 2016), the court stated that it is "important to remember" that Colorado's law required only contributions that had been "specifically earmarked . . . for electioneering purposes." *Id*. at *24; *see also id*. at *26 (upholding requirements only as "sufficiently drawn" and noting "less restrictive" than alternatives); *McKee*, 649 F.3d at 58 (requiring "identifying information [only of] contributors [giving donations] to support or oppose").

4. Thus, while the Third Circuit has shown marked indifference to the need for tailoring in its

interpretation and application of *Citizens United*, the Tenth Circuit has recognized that the analysis must adjust to the circumstances at each step. That is, the Tenth Circuit recognized that there is not a single, overwhelmingly weighted disclosure interest in all cases; that disclosure burdens can impact small organizations like DSF far more heavily than others; and that earmarking and other forms of tailoring are important even under exacting scrutiny. *Compare* App. 21 (declining to revisit analysis even where "an earmarking limitation would [have] result[ed] in a more narrowly tailored statute"). And the Tenth Circuit did so in the context of a communication found to be express advocacy, unlike the nonpartisan issue speech at issue here.

Consequently, DSF's voter guide, and the privacy of its general donors, would have been protected in the Tenth Circuit.

B. Split with the Seventh Circuit

5. In *Barland*, the Seventh Circuit noted that *Citizens United* dealt with advertisements that were "the equivalent of express advocacy." 751 F.3d at 825; *see Citizens United*, 558 U.S. at 325. Accordingly, this Court was not addressing issue advocacy, much less pure educational speech such as DSF's, when it upheld the disclosure requirements as applied to Citizens United. *Citizens United*, 558 U.S. at 369. The Third Circuit here expressly rejected any contextual significance or limitations to the *Citizens United*

decision, holding without further explanation that the *Citizens United* decision was broad and general rather than addressed to the circumstances of that case. App. 12.

Whether or not this Court did, in fact, fully lift the express advocacy (or its equivalent) limitation is a conflict that only this Court may resolve. While lower courts must respect this Court's dicta, *see*, *e.g.*, *IFC Interconsult, AG v. Safeguard Int'l Partners*, 438 F.3d 298, 311 (3d Cir. 2006), dicta should not be applied where it has negative, unintended consequences in situations the Court did not consider.

DSF's voter guide plainly does not function as express advocacy or its functional equivalent, and it is qualitatively distinct from the candidate attack ads before this Court in *Citizens United*. *Cf. Barland*, 751 F.3d at 836 ("The Court had already concluded that *Hillary* and the ads promoting it were the equivalent of express advocacy."). And while DSF's case does not turn on whether or not *Citizens United* contains dicta,[11] if, in some circumstances, "the Constitution limits the reach of disclosure to express advocacy or its functional equivalent," this only strengthens DSF's First Amendment arguments on the merits. App. 12.

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[11] The district court opinion, which preceded the Seventh Circuit's opinion in *Barland*, treats the *Citizens United*'s relaxation of the express advocacy/issue speech division as a holding. App. 46.

6. These circuit splits are substantial. They are at the heart of the interests at issue here: What speech may trigger disclosure, and how far may the government delve into an organization's books when that prospecting ceases to produce any information relevant to candidates' financial constituencies? Only this Court may resolve these questions, and this case is the vehicle to do so. Accordingly, it ought to grant the writ.

7. Nevertheless, to the extent that this Court believes that it is impossible to reconcile these other circuit court opinions, including the D.C. Circuit's opinions in *Buckley* and *Van Hollen*, with *McConnell* and *Citizens United* – that is, to the extent it believes the Third Circuit correctly applied those cases – then the interests of justice still counsel in favor of *certiorari*.

For if the Third Circuit correctly applied *McConnell* and *Citizens United* – if it is correct that *McConnell* and *Citizens United* permitted broadly-defined disclosure requirements to reach any speech that merely mentions a candidate – then those cases "threaten[ ] to subvert the principled and intelligible development of our First Amendment jurisprudence" and they ought to be overruled. *Citizens United*, 558 U.S. at 385 (Roberts, C.J., concurring) (citation omitted) (internal quotation marks omitted).

CONCLUSION

This Court has never, applying exacting scrutiny, blessed generalized disclosure for non-advocacy speech, and the only disclosure regimes it has upheld are those where disclosure in fact provides information about candidates' financial constituencies. To preserve *Buckley v. Valeo*, protect First Amendment freedoms against overzealous state legislatures, and resolve a number of circuit splits, this Court ought to grant the writ.

Dated: March 30, 2016

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

October 27, 2015
DCO-008

No. 15-3402

DELAWARE STRONG FAMILIES,
A DELAWARE STRONG FAMILIES,
Appellant

v.

COMMISSIONER OF ELECTIONS, IN HER OFFICIAL CAPACITY AS STATE COMMISSIONER OF ELECTIONS; ATTORNEY GENERAL DELAWARE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF DELAWARE

(D. Del. No. 1-13-cv-01716)

Present: CHAGARES, GREENAWAY, JR. and SLOVITER, *Circuit Judges*

1. Motion by Appellees to Summarily Affirm.

2. Response by Appellant to Motion to Summarily Affirm.

Respectfully,
Clerk/mlr

_____ORDER_____

The foregoing motion is granted.

By the Court,

/s/ Joseph A. Greenaway, Jr.
Circuit Judge

Dated: December 31, 2015

cc: David E. Wilks, Esq.
Jonathan G. Cedarbaum, Esq.
Allen Disckerson [sic], Esq.
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELAWARE STRONG FAMILIES, Plaintiff, vs. MATTHEW DENN, in his official capacity as Attorney General of the State of Delaware; and ELAINE MANLOVE, in her official capacity as Commissioner of Elections for the State of Delaware, Defendants.	Civil Action No. 1:13-cv-1746-SLR

JUDGMENT IN A CIVIL CASE

In accordance with the mandate of the United States Court of Appeals for the Third Circuit, for the reasons given in that Court's opinion and judgment of July 16, 2015, and to permit the Plaintiff to expeditiously seek a writ of *certiorari* from the judgment of the Court of Appeals,

IT IS ORDERED AND ADJUDGED that judgment be and is hereby entered on all claims in favor of Defendants and against Plaintiff.

/s/ Sue L. Robinson
Sue L. Robinson
United States District Judge

Dated: 10/1/2015

/s/ Nicole Nolt
[(By) Deputy] Clerk

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-1887

DELAWARE STRONG FAMILIES,
a Delaware nonprofit corporation

v.

ATTORNEY GENERAL OF THE STATE OF DELAWARE, in his official capacity as Attorney General of the State of Delaware; COMMISSIONER OF ELECTIONS, in her official capacity as State Commissioner of Elections
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
(D.C. Civ. No. 1-13-cv-01746)
District Judge: Honorable Sue L. Robinson

Argued October 28, 2014

Before: MCKEE, *Chief Judge*, GREENAWAY, JR., and KRAUSE, *Circuit Judges*

(Opinion Filed: July 16, 2015)

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OPINION

GREENAWAY, JR., *Circuit Judge*.

This case requires us to decide whether the Delaware Elections Disclosure Act (the "Act") is constitutional as applied[1] to a 2014 Voter Guide ("Voter Guide") that Appellee Delaware Strong Families ("DSF") intended to produce and distribute. DSF's Complaint seeks a declaratory judgment that the Act's disclosure provisions are unconstitutional and a preliminary injunction preventing enforcement of the

[1] DSF initially brought the instant action arguing overbreadth and vagueness. The District Court concluded that the Act was unconstitutional as applied to DSF; therefore, it did not reach the facial challenge. *Del. Strong Families v. Biden,* 34 F. Supp. 3d 381, 394 (D. Del. 2014).

Act. The United States District Court for the District of Delaware ("District Court") granted the preliminary injunction declaring that the Act's disclosure requirements are unconstitutional. Because the Act is narrowly tailored and not impermissibly broad we will reverse the District Court and remand for entry of judgment in favor of Appellants.

I. BACKGROUND

On October 23, 2013, DSF filed a Complaint alleging both facial and as-applied challenges to the Act.[2] DSF planned to distribute the 2014 Voter Guide over the internet within sixty days of Delaware's general election and planned to spend more than $500 on its creation and distribution.[3] The State of

[2] The lawyers representing DSF in this appeal filed similar complaints in Colorado and Washington D.C.

[3] The proposed 2014 Voter Guide is not part of the record. However, in its Complaint DSF alleges that "[i]n 2014, DSF plans to produce and disseminate voter guides in a manner substantively similar to the process used in 2012." J.A. 45. The 2012 Voter Guide lists a series of statements concerning, inter alia, "[a] Single Payer Healthcare System"; adding gender identity to the protected classes in Delaware law; "[s]trengthening and maintaining marriage as the union of one man and one woman"; and "[p]rohibit[ing] coverage for abortion in the state insurance exchanges mandated by the new federal health care law." J.A. 61-64. It also lists all Delaware federal and state candidates and their respective stances in support of or opposition to each statement. The answers were provided by the candidates themselves or, if no response was submitted, were gleaned from the candidates' "voting records, public statements, and/or campaign literature." J.A. 61. In its Brief, DSF states

(Continued on following page)

Delaware ("State") filed an answer and issued various discovery requests. DSF moved for a protective order and preliminary injunction. The District Court denied DSF's motion for a protective order and instructed the parties to submit briefs addressing whether the Act is constitutional. J.A. 5-6. On March 31, 2014, Judge Robinson issued an opinion granting a preliminary injunction against Appellants and, on April 8, 2014, entered an order granting DSF's motion for a preliminary injunction. *Id.* at 4. This appeal followed.

In 2012, DSF disseminated its 2012 Voter Guide without having to disclose its donors. However, enactment of the Act on January 1, 2013, changed the relevant disclosure requirements. The Act requires "[a]ny person . . . who makes an expenditure for any third-party advertisement that causes the aggregate amount of expenditures for third-party advertisements made by such person to exceed $500 during an election period [to] file a third-party advertisement report with the Commissioner." 15 Del. C. § 8031(a).

The Act defines a "third-party advertisement" in part as "an electioneering communication." *Id.* § 8002(27). An electioneering communication is:

> a communication by any individual or other person (other than a candidate committee or a political party) that: 1. Refers to a clearly identified candidate; and 2. Is publicly distributed within 30 days before a primary

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that: "In 2014, DSF will . . . distribute this same voter guide, updated to apply to the upcoming election." Appellee Br. at 15.

> election . . . or 60 days before a general election to an audience that includes members of the electorate for the office sought by such candidate.

Id. § 8002(10)(a). The "third-party advertisement report" must include "[t]he full name and mailing address of each person who has made contributions to [DSF] during the election period in an aggregate amount or value in excess of $100." *Id.* § 8031(a)(3). Disclosure is not limited to individuals who earmarked their donations to fund an electioneering communication.

The Act's application here is undisputed since the Voter Guide: 1) meets the definition of "electioneering communication," 2) would be distributed on the internet within the sixty days prior to Delaware's general election, and 3) would cost DSF more than $500 to produce.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. § 1331 and this Court has jurisdiction under 28 U.S.C. § 1292(a)(1). We exercise plenary review over a challenge to the constitutionality of a statute. *United States v. Pendleton*, 636 F.3d 78, 82 (3d Cir. 2011). In reviewing the grant or denial of a preliminary injunction, we employ a "tripartite standard of review": findings of fact are reviewed for clear error, legal conclusions are reviewed de novo, and the decision to grant or deny an injunction is reviewed for

abuse of discretion. *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013). "The decision to issue a preliminary injunction is governed by a four-factor test." *Id.* The plaintiff must show: 1) likelihood of success on the merits; 2) that he is likely to suffer irreparable harm; 3) that denying relief would injure the plaintiff more than an injunction would harm the defendant; and 4) that granting relief would serve the public interest. *Id.*

III. ANALYSIS

We first address the District Court's erroneous conclusion that the Act's disclosure requirements are unconstitutionally broad by virtue of reaching "neutral communication[s]" by "neutral communicator[s]." *Del. Strong Families*, 34 F. Supp. 3d at 395. We then turn to the relevant Supreme Court precedent, which analyzed the federal statute comparable to the Act – the Bi-Partisan Campaign Reform Act ("BCRA") – and compare the respective disclosure requirements of BCRA and the Act to determine whether the Act survives constitutional scrutiny.

A. Advocacy and the Voter Guide

Campaign finance jurisprudence uses the terms "express advocacy" and "issue advocacy" to describe different types of election-related speech. The former encompasses "communications that expressly advocate the election or defeat of a clearly identified candidate," *Buckley v. Valeo*, 424 U.S. 1, 80 (1976),

while the latter are communications that seek to impact voter choice by focusing on specific issues. The Supreme Court has consistently held that disclosure requirements are not limited to "express advocacy" and that there is not a "rigid barrier between express advocacy and so-called issue advocacy." *McConnell v. FEC,* 540 U.S. 93, 193 (2003). Any possibility that the Constitution limits the reach of disclosure to express advocacy or its functional equivalent is surely repudiated by *Citizens United v. FEC*, which stated: "The principal opinion in [*FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-76 (2007)] limited . . . restrictions on independent expenditures to express advocacy and its functional equivalent. Citizens United seeks to import a similar distinction into BCRA's disclosure requirements. We reject this contention." 558 U.S. 310, 368 (2010).

The District Court concluded that the Act's disclosure requirements could not constitutionally reach DSF's Voter Guide because it was a "neutral communication" by a "neutral communicator." *Del. Strong Families*, 34 F. Supp. 3d at 395. This formulation finds no support in the case law and is not one that we choose to adopt. The District Court found that DSF was a presumed neutral communicator by virtue of its status as a § 501(c)(3) organization. *Id.* Similarly, DSF argues in its reply brief that, by virtue of this status, it is not permitted to engage in "any political campaign on behalf of or in opposition to any candidate for public office." 26 C.F.R. § 1.501(c)(3)-1(b)(3)(ii). The Act and § 501(c)(3), however, are separate

and unrelated, and DSF has offered no compelling reason to defer to the § 501(c)(3) scheme in determining which communications require disclosure under the Act. Accordingly, we conclude that it is the conduct of an organization, rather than an organization's status with the Internal Revenue Service, that determines whether it makes communications subject to the Act.

The District Court noted that voter guides are typically intended to influence voters even though they may "lack[ ] words of express advocacy." *Del. Strong Families*, 34 F. Supp. 3d at 394 n.19. By selecting issues on which to focus, a voter guide that mentions candidates by name and is distributed close to an election is, at a minimum, issue advocacy. Thus, the disclosure requirements can properly apply to DSF's Voter Guide, which falls under the Act's definition of "electioneering communication" by, among other things, mentioning candidates by name close to an election. *See* 15 Del. C. § 8002(10)(a); *see also McConnell*, 540 U.S. at 196 (endorsing the application of disclosure requirements to the "entire range" of similarly-defined "electioneering communications"). As long as the Act survives exacting scrutiny, disclosure of DSF's donors is constitutionally permissible.

Because it concluded that the Act impermissibly reached DSF's Voter Guide as a general matter, the District Court did not analyze the Act's specific requirements to determine whether it is sufficiently tailored to pass constitutional muster. It is this analysis that we engage in next.

B. Exacting Scrutiny

Acknowledging the interest in one's privacy of association, the Supreme Court in *Buckley* announced that campaign finance disclosure requirements are reviewed under "exacting scrutiny." 424 U.S. at 64-68. This is a heightened level of scrutiny, which accounts for the general interest in associational privacy by requiring a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66).[4]

DSF acknowledges that Delaware's interest in an informed electorate is a sufficiently important governmental interest. Appellee Br. at 50. "[D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek [ ] office." *Buckley*, 424 U.S. at 66-67. The Supreme Court endorsed this interest in *Buckley*, 424 U.S. at 81 (stating "disclosure helps voters to define more of the candidates' constituencies"), and has reiterated its importance, *see McConnell v. FEC*, 540 U.S. 93, 196 (2003) (countenancing the

[4] Exacting scrutiny differs from "strict scrutiny" – the most demanding level of scrutiny applied in the First Amendment context – in that it does not engage in a "least-restrictive-alternative analysis." *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989). Strict scrutiny is reserved for restrictions on speech that are content or viewpoint based. *McCullen v. Coakley,* 134 S.Ct. 2518, 2534 (2014).

government's informational interest and rejecting a challenge to BCRA's disclosure provisions); *Citizens United*, 558 U.S. at 371 (stating that "disclosure permits citizens. . . . to make informed decisions and give proper weight to different speakers and messages"); *see also Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1005 (9th Cir. 2010) ("Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment."). Therefore, we find that Delaware's interest in an informed electorate is sufficiently important.

We now turn to the specific sections of the Act that DSF alleged in its Complaint were impermissibly broad[5] and therefore did not bear a substantial relation to the Act's disclosure requirements, to wit:

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[5] For the first time on appeal, DSF argued that the Act's "election period" is impermissibly long. The election period is essentially a "look back" period, requiring disclosure of donors who made donations during this defined time. In keeping with the "general rule," we will "not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Even were we to reach this argument, it would not alter our conclusion. It is true that the Act's election period will generally be longer than BCRA's. *Compare* 52 U.S.C. § 30104(f)(2)(F) (defining the election period as "beginning on the first day of the preceding calendar year and ending on the disclosure date"), *with* 15 Del. C. § 8002(11)(3) (stating that "the election period shall begin and end at the same time as that of the candidate identified in such advertisement"). We do not, however, find material to our analysis the difference between the Act's potential four year look-back and BCRA's potential two year look-back period.

the monetary threshold and the type of media covered. As noted above, the Supreme Court's guidance in upholding BCRA's disclosure provision under exacting scrutiny is particularly applicable to this case. The Act's disclosure requirements are similar in structure and language to those of the analogous federal law. Thus, in applying exacting scrutiny to the Act's disclosure requirements, we will examine similar aspects of BCRA that the Court has upheld and consider whether the Act's deviations from BCRA change the exacting scrutiny analysis.

1. Monetary Threshold

In *Buckley*, the Supreme Court stated that deciding where to locate a monetary threshold "is necessarily a judgmental decision, best left . . . to congressional discretion" and determined that the thresholds presented were not "wholly without rationality." 424 U.S. at 83 (discussing thresholds for direct contributor disclosure). Thus, even though election disclosure laws are analyzed under exacting scrutiny, we apply less searching review to monetary thresholds – asking whether they are "rationally related" to the State's interest. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 60 (1st Cir. 2011) (citing *Buckely* [sic] and stating that "judicial deference [is granted] to plausible legislative judgments as to the appropriate location of a reporting threshold . . . unless they are wholly without rationality") (quotation marks and internal citation omitted); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1251-52 (9th Cir. 2013)

(same analysis of monetary thresholds in the political action committee context); *Family PAC v. McKenna*, 685 F.3d 800, 811 (4th Cir. 2012) (same).

Under BCRA,[6] groups that spend in excess of $10,000 annually must report individual contributors of $1,000 or more. 52 U.S.C. § 30104(f)(1), (2)(F). Under the Act, groups that spend more than $500 annually must report individual contributors of $100 or more. 15 Del. C. § 8031(a)(3). It is unsurprising that Delaware's thresholds are lower than those for national elections. Delaware is a small state where direct mail makes up 80% of campaign expenditures. J.A. 135. "[F]or less than $500 a campaign can place enough pre-recorded 'robo-calls' to reach every household in a Delaware House district. If a hyper-targeted recipient list is used, as is common in campaigns, $150 would suffice." J.A. 137. The expenditure thresholds are supported by the record and are rationally related to Delaware's unique election landscape.

2. Type of Media Covered

BCRA defines "electioneering communication" as "any broadcast, cable, or satellite communication," 52

[6] As of September 1, 2014, the relevant provisions of BCRA were transferred from 2 U.S.C. § 437 to 52 U.S.C. § 30104. We use the updated citations, but note, in the interest of clarity, that the District Court opinion and other disclosure-related opinions employ the old citations.

U.S.C. § 30104(f)(3)(A)(i), except the following: "a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate"; "a communication which constitutes an expenditure or an independent expenditure under this Act"; and "a communication which constitutes a candidate debate or forum." *Id.* § 30104(f)(3)(B)(i-iii).

The Act is broader, defining "communications media" as "television, radio, newspaper or other periodical, sign, Internet, mail or telephone." 15 Del. C. § 8002(7). Excluded from the Act's definition of "electioneering communication" are the following: "membership communication"; "communication appearing in a news article, editorial, opinion, or commentary, provided that such communication is not distributed via any communications media owned or controlled by any candidate, political committee or the person purchasing such communication"; and "communication made in any candidate debate or forum." *Id.* § 8002(10)(b)(2-4).

Though the Act reaches non-broadcast media (by including direct mail and the internet), it is not unique in this regard. Many other state statutes also include non-broadcast media.[7] Furthermore, the

[7] Nine other state statutes include direct mail. *See* Col. Const. art. XXVIII, § 2(7)(a); AS § 15.13.400(3); Conn. Gen. Stat.

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media covered by the Act reflects the media actually used by candidates for office in Delaware, and thus it bears a substantial relation to Delaware's interest in an informed electorate. Delaware does not have its own major-network television station and campaign television advertisements on nearby Pennsylvania and Maryland stations are both expensive and "generally a poor investment, given that they reach primarily non-Delaware voters." J.A. 134. Statewide campaigns use radio advertising, but this "is typically too expensive for most legislative or local races." J.A. 135.

Had the legislature limited "electioneering communication" to media not actually utilized in Delaware elections, the disclosure requirements would fail to serve the State's interest in a well-informed electorate thereby resulting in a weaker fit between the two. Accordingly, we find that the media covered by the Act is sufficiently tailored to Delaware's interest.

C. Earmarking

Throughout its brief, DSF represents that BCRA limits disclosure to those donors who earmarked their donations to fund electioneering communications (Appellee Brief at 5, 20, 33, 36) and implies that, to

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§ 9-601b(a)(2)(B); Idaho Code Ann. § 67-6602(f)(1); Mass. Gen. Laws ch. 55, § 1; N.C. Gen. Stat. § 163-278.6(8j); 17 V.S.A. § 2901(11); RCW § 42.17A.005(19)(a); W. Va. Code § 3-8-1a(12)(A). Three state statutes include internet communications. *See* AS § 15.13.400(3); Conn. Gen. Stat. § 9-601b(a)(2)(B); 17 V.S.A. § 2901(11).

survive constitutional scrutiny, the Act must be similarly limited. However, BCRA itself does not contain an earmarking requirement. Rather, after the Court decided *McConnell*, the Federal Elections Commission ("FEC") passed 11 C.F.R. § 104.20(c)(9), which contained an earmarking limitation.[8] The FEC regulation was in effect when *Citizens United* was decided, but it was thereafter vacated as "an unreasonable interpretation of [ ] BCRA." *Van Hollen v. FEC*, No. 11-0766, 2014 WL 6657240, at *1 (D.D.C. Nov. 25, 2014).[9]

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[8] "Statements of electioneering communications filed under paragraph (b) of this section shall disclose the following information. . . . If the disbursements were made by a corporation or labor organization pursuant to 11 CFR § 114.15, the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made *for the purpose of furthering electioneering communications.*" 11 C.F.R. § 104.20(c)(9) (2014) (emphasis added).

[9] In 2012, the D.C. District Court first invalidated the FEC regulation for impermissibly altering the meaning of BCRA. *Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. 2012). The FEC did not appeal this ruling, but the Center for Individual Freedom intervened. The D.C. Circuit reversed, holding that the District Court erred in disposing of the case under *Chevron* step one, but remanded with instructions for the District Court to refer the matter to the FEC to explain the meaning and scope of the regulation or to engage in further rulemaking to clarify. *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012). The FEC decided not to undertake further rulemaking. *Van Hollen,* 2014 WL 6657240, at *4. In its 2014 decision, the D.C. District Court once again invalidated the FEC regulation, this time holding under *Chevron* step two that the regulation

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Nothing in *Citizens United* implies that the Court relied upon the FEC earmarking regulation when approving of BCRA's disclosure regime. The opinion does not mention earmarking and 11 C.F.R. § 104.20(c)(9) is not cited. As such, DSF's representation that the Act must limit disclosure to those donors who earmarked their donations to fund electioneering communications is unavailing.

Our analysis does not change simply because an earmarking limitation would result in a more narrowly tailored statute. As discussed above, a disclosure requirement is subject to "exacting scrutiny," which necessitates a "substantial relationship" between the State's interest and the disclosure required. The Act marries one-time, event-driven disclosures to the applicable "election period," which is itself controlled by the relevant candidate's term. This provides the necessary "substantial relationship" between the disclosure required and Delaware's informational interest.[10]

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was arbitrary and capricious. *Id.* at *1. The Center for Individual Freedom filed its notice of appeal in January 2015; resolution of this matter is still pending.

[10] Disclosure that is singular and event-driven is "far less burdensome than the comprehensive registration and reporting system [oftentimes] imposed on political committees." *Barland,* 751 F.3d at 824 (discussing *Citizens United* and BCRA). *But see Worley*, 717 F.3d at 1250 (rejecting facial challenge to ongoing [political action committee] reporting regime by four individuals who wanted to spend $600 because such regime was not overly burdensome and "require[s] little more if anything than a

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IV. CONCLUSION

As demonstrated above, the Act is constitutional as applied to DSF's Voter Guide, therefore DSF has not established likelihood of success on the merits. We need not analyze the other factors implicating a preliminary injunction analysis. Accordingly, the District Court abused its discretion in granting the preliminary injunction in favor of DSF. For the foregoing reasons we will reverse the judgment of the District Court granting DSF's motion for preliminary injunction and remand for entry of judgment in favor of Appellants.

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prudent person or group would do in these circumstances anyway"). A comparison of the Act's political action committee ("PAC") disclosure requirements to the disclosure required of DSF shows that the former is much more extensive. Under § 8030, a PAC is required to file ongoing reports that disclose, inter alia: assets on hand; the name and address of each person making contributions in excess of $100; the name and address of each political committee from or to which it made any transfer of funds; the amount of each debt in excess of $50; proceeds from ticket sales, collections, and sales of items; total expenditures; and all goods and services contributed in kind. 15 Del. C. § 8030(d)(1-2), (4-5), (6a-c), (10-11). Whereas DSF – and other organizations making "electioneering communications" – are required to make much more limited disclosures, and then only when a triggering communication is made. *Id.* § 8005. Whether the Act's disclosure requirements for PACs would be overly burdensome as applied to DSF is not an issue that is before us and thus is not one we reach today.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

DELAWARE STRONG FAMILIES, Plaintiff, v. JOSEPH R. BIDEN III, in his official capacity as Attorney General of the State of Delaware; and ELAINE MANLOVE, in her official capacity as Commissioner of Elections for the State of Delaware, Defendants.	)	Civ. No. 13-1746-SLR

ORDER

At Wilmington this 8th of April, 2014, for the reasons stated in the court's memorandum opinion issued on March 31, 2014;

IT IS ORDERED that, pending resolution of this case or until otherwise ordered by the court, defendants are preliminarily enjoined from enforcing 15 Del. C. §§ 8002(10), 8002(27) and 8031 against plaintiff with respect to plaintiffs creation and distribution of a 2014 voter guide similar to its 2012 voter guide.

IT IS FURTHER ORDERED that, by consent of the parties, no security shall be required of plaintiff.

/s/ Sue L. Robinson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELAWARE STRONG FAMILIES, Plaintiff, v. JOSEPH R. BIDEN III, in his official capacity as Attorney General of the State of Delaware; and ELAINE MANLOVE, in her official capacity as Commissioner of Elections for the State of Delaware, Defendants.	)	Civ. No. 13-1746-SLR

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Joseph C. Handlon, Deputy Attorney General, Delaware Department of Justice, Wilmington, Delaware. Counsel for Defendants. Of Counsel: Randolph D. Moss, Esquire, Jonathan G. Cedarbaum, Esquire and Weili J. Shaw, Esquire of Wilmer Cutler Pickering Hale and Dorr LLP and J. Gerald Hebert, Esquire,

Paul S. Ryan, Esquire and Megan McAllen, Esquire of The Campaign Legal Center.

MEMORANDUM OPINION

Dated: March 31, 2014
Wilmington, Delaware

/s/ Sue L. Robinson
ROBINSON, District Judge

I. INTRODUCTION

Plaintiff Delaware Strong Families ("DSF") has filed a verified complaint seeking a judgment to prevent enforcement of certain provisions of the Delaware Election Disclosures Act ("the Act"), 15 Del. C. § 8001, *et seq.*, which became law on January 1, 2013. Prior to its enactment, Delaware's election laws did not regulate nonprofit corporations like DSF. In 2012, DSF distributed a voter guide[1] over the Internet within 60 days of Delaware's general election. DSF plans to engage in similar activity before the 2014 general election, and expects to incur costs over $500 in doing so. Under the Act, DSF's activities, including the publication of its voter guide, will be within the regulatory purview of the State Commissioner of Elections ("the Commissioner") and the Attorney General of the State of Delaware, defendants at bar.

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[1] Attached to the complaint (D.I. 1) as exhibit A.

More specifically, § 8031(a) of the Act requires that "[a]ny person . . . who makes an expenditure for any third-party advertisement that causes the aggregate amount of expenditures for third-party advertisements made by such person to exceed $500 during an election period shall file a third-party advertisement report with the Commissioner." 15 Del. C. § 8031(a). The report includes, *inter alia*, the names and addresses of each person who has made contributions to the "person" in excess of $100 during the election period. "Person" includes "any individual, corporation, company, incorporated or unincorporated association, general or limited partnership, society, joint stock company, and any other organization or institution of any nature." 15 Del. C. § 8002(17). "Third-party advertisement" means "an independent expenditure or an electioneering communication." 15 Del. C. § 8002(27). "Electioneering communication" means "a communication by any individual or other person (other than a candidate committee or a political party) that: (1) Refers to a clearly identified candidate; and (2) Is publicly distributed within 30 days before a primary election or special election, or 60 days before a general election to an audience that includes members of the electorate for the office sought by such candidate." 15 Del. C. § 8002(10)a.

According to the legislative history of the Act, its focus was on "clos[ing] loopholes about the transparency of third-party ads" by "better regulat[ing] electioneering communications by third-parties," particularly as to "how the third party receives funding

and where that money goes." (D.I. 30, ex. 1, Del. House Admin. Comm. Minutes, House Bill No. 300 (May 2, 2012)) Also apparent from the legislative history is a concern about the power vested in the Commissioner "to make an exemption without any stipulations or guidelines as to how [she] can make exemptions. As a result, the state is delegating broad authority to a single person, and this could result in potential long-term problems." (*Id.*) In this regard, 15 Del. C. § 8041(1)c gives the Commissioner the power to "adopt[ ] any amendments or modifications to the statements required under § 8021 of this title, or exemptions from the requirements thereunder." 15 Del. C. § 8041(1)c.

The court has jurisdiction over the matter pursuant to 28 U.S.C. § 1331, as the action arises under the First and Fourteenth Amendments to the United States Constitution. Venue in this court is proper under 28 U.S.C. § 1391(b)(1) and (b)(2).

II. STANDARD OF REVIEW

In the Third 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); *Hes v. de Jongh*, 638 F.3d 169, 172 (3d Cir. 2011). A preliminary injunction is "an extraordinary remedy," which "should be granted only in limited circumstances." *Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d 2004) (citation omitted).

III. DISCUSSION

A. Analytical Framework

The regulation of campaign finances has a long history. The dispute at issue, therefore, cannot be adequately addressed without an understanding of the analytical framework established by Supreme Court precedent on campaign finance regulation.

1. *Buckley v. Valeo* ("*Buckley*")

The court starts its review of such with the decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), where the United States Supreme Court addressed various challenges to the Federal Election Campaign Act of 1971 ("FECA"), as amended in 1974. Appellants in *Buckley* did not challenge the disclosure requirements of FECA, 2 U.S.C. §§ 431, *et seq.*, as per se unconstitutional; they instead argued that several provisions were overbroad as applied to contributions: (a) to minor parties and independent candidates; and (b) by individuals or groups other than a political committee

or candidate. Of import to the disclosure requirements at bar, the Court explored the general principles related to the challenged reporting and disclosure requirements, to wit: The Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. The Court has

> long . . . recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny. We also have insisted that there be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed.

Id. (citations omitted). The Court reiterated the fact that

> [t]he right to join together "for the advancement of beliefs and ideas" . . . is diluted if it does not include the right to pool money through contributions, for funds are often essential if "advocacy" is to be truly or optimally "effective." Moreover, the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for "[f]inancial

> transactions can reveal much about a person's activities, associations, and beliefs."

Id. at 65-66 (citations omitted). In addressing the other side of the scale, the Court identified the governmental interests sought to be vindicated by the disclosure requirements: (1) providing the electorate with information "'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office;" (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity;" and (3) serving as "an essential means of gathering the data necessary to detect violations of the contribution limitations" described elsewhere in the statute. *Id.* at 66-68. The Court went on to conclude that disclosure requirements, "as a general matter, directly serve substantial governmental interests" and appear, "in most applications," "to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68.

With respect to FECA's reporting and disclosure requirements as applied to minor parties and independents, the Court concluded that, absent evidence of a "reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties," *id.* at 74, "the substantial public interest in disclosure identified by

the legislative history of [FECA] outweighs the harm generally alleged." *Id.* at 72.

In considering the disclosure provision applicable to individual contributions,[2] attacked by appellants as "a direct intrusion on privacy of belief," the Court noted that it "must apply the same strict standard of scrutiny, for the right of associational privacy . . . derives from the right of the organization's members to advocate their personal points of view in the most effective way." *Id.* at 75 (citations omitted). According to the Court, § 434(e) was

> part of Congress' effort to achieve "total disclosure" by reaching "every kind of political activity" in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible. . . .
>
> In its efforts to be all-inclusive, however, the provision raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights.

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[2] Section 434(e) required "[e]very person (other than a political committee or candidate) who makes contributions or expenditures" aggregating over $100 in a calendar year, "other than by contribution to a political committee or candidate," to file a statement with the Commission requiring direct disclosure of what such individual or group contributes or spends. *See Buckley*, 424 U.S. at 74-75.

Id. at 76-77. More specifically, § 434(e) applied to "[e]very person . . . who makes contributions or expenditures." "Contributions" and "expenditures" were defined under FECA "in terms of the use of money or other valuable assets '**for the purpose of . . . influencing**' the nomination or election of candidates for federal office. It [was] the ambiguity of this phrase that pose[d] constitutional problems" for the Court. *Id.* at 77 (emphasis added).

With the constitutional requirement of definiteness at stake in the context of First Amendment rights, the Court recognized that, "to avoid the shoals of vagueness," it had the obligation to construe the statute with a heightened degree of specificity. *Id.* at 77-78 ("Where First Amendment rights are involved, an even 'greater degree of specificity' is required."). Harking back to Congress' intent to ferret out and prevent election-related corruption, the Court explained that, when the maker of a contribution or of an expenditure is not a political committee or a candidate presumably focused on the nomination or election of a candidate for political office, "the relation of the information sought to the purposes of [FECA] may be too remote. To insure that the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 79-80.

The Court concluded that "§ 434(e), **as construed**, bears a sufficient relationship to a substantial governmental interest. **As narrowed**, § 434(e) . . . does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result." *Id.* at 80 (emphasis added).

2. *McConnell v. FEC* ("*McConnell*")

The Supreme Court in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), addressed the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which amended FECA and other portions of the United States Code. "In enacting BCRA, Congress sought to address three important developments in the years since th[e] Court's landmark decision in *Buckely* [sic] *v. Valeo* . . . : the increased importance of 'soft money' [and] the proliferation of 'issue ads,' [as detailed in] findings of a Senate investigation into campaign practices related to the 1996 federal elections." *Id.* at 93.

> With regard to the first development, prior to BCRA, FECA's disclosure requirements and source and amount limitations extended only to so-called "hard-money" contributions made for the purpose of influencing an election for federal office. Political parties and candidates were able to circumvent FECA's limitations by contributing "soft money" – money as yet unregulated under FECA – to be used for activities intended to influence state or

> local elections; for mixed-purpose activities such as get-out-the-vote (GOTV) drives and generic party advertising; and for legislative advocacy advertisements, even if they mentioned a federal candidate's name, so long as the ads did not expressly advocate the candidate's election or defeat. With regard to the second development, parties and candidates circumvented FECA by using "issue ads" that were specifically intended to affect election results, but did not contain "magic words," such as "Vote Against Jane Doe," which would have subjected the ads to FECA's restrictions.

Id. at 93-94.

The relevant analysis to the issues at bar includes the Court's review of BCRA § 201's definition of "electioneering communications," a new term coined

> to replace the narrowing construction of FECA's disclosure provisions adopted by this Court in *Buckley.* As discussed further below, that construction limited the coverage of FECA's disclosure requirement to communications expressly advocating the election or defeat of particular candidates. By contrast, the term "electioneering communication" is not so limited, but is defined to encompass any "broadcast, cable, or satellite communication" that
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> > "(I) refers to a clearly identified candidate for Federal office;

> (II) is made within –
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> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate."

Id. at 189-190.

Consistent with the above definition, BCRA provided "significant disclosure requirements for persons who fund electioneering communications." *Id.* at 190. "The major premise of plaintiffs' challenge to BCRA's use of the term 'electioneering communication' [was] that *Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech." *Id.* The Court disagreed, clarifying that *Buckley's* "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a

constitutional command."[3] *Id.* at 191-192. Nor was the Court persuaded, "independent of [its] precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy." *Id.* at 193.

"Having rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy," the Court examined the use of the term "electioneering communication" in the challenged disclosure provisions. The Court concluded

> that the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements – providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions – apply in full to BCRA. Accordingly, *Buckley* amply supports application of FECA § 304's disclosure requirements[4] to

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[3] In this regard, the Court observed that the definition of "electioneering communication" "raise[d] none of the vagueness concerns that drove [its] analysis in *Buckley*. The term 'electioneering communication' applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners." *McConnell.*, 540 U.S. at 194.

[4] BCRA § 201 amended the disclosure requirements to FECA § 304, providing that "[e]very person who makes a disbursement for the direct costs of producing and airing electioneering

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> the entire range of "electioneering communications."

Id. at 196. While acknowledging, as it did in *Buckley*, "that compelled disclosures may impose an unconstitutional burden on the freedom to associate in support of a particular cause," *id.* at 198, nevertheless, the Court recalled that an as-applied challenge could be mounted based on "evidence that any party had been exposed to economic reprisals or physical threats as a result of the compelled disclosures." *Id.*

The Court then turned its attention to BCRA § 203's prohibition of corporate and labor disbursements for electioneering communications. "Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *Id.* at 203. Section 203 of BCRA extended this rule to all "electioneering communications," as defined in BCRA §201(f)(3)(A). In response to plaintiffs' argument that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of

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communications in an aggregate amount in excess of $10,000 during any calendar year shall . . . file with the [Federal Election] Commission a statement" containing certain required information. BRCA [sic], Pub. L. No. 107-155, § 201 (codified as amended at 2 U.S.C. § 434(f)(1)).

electioneering communications," *id.* at 206, the Court explained that

> [t]his argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect. The precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose is a matter of dispute. . . . Nevertheless, the vast majority of ads clearly had such a purpose. . . . Moreover, whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.

Id. The Court thus upheld the constitutionality of the challenged amendments.

3. ***FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*")**

The Supreme Court, in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), had the opportunity to address BCRA § 203

again, this time in the context of an as-applied challenge to its constitutionality. Appellee Wisconsin Right to Life, Inc. ("WRTL") was a nonprofit, nonstock, ideological advocacy corporation recognized by the Internal Revenue Service as tax exempt under § 501(c)(4) of the Internal Revenue Code. WRTL planned on running certain ads financed with funds from its general treasury, which ads would be illegal "electioneering communications" under BCRA § 203. WRTL filed suit against the Federal Election Commission ("FEC"), seeking declaratory and injunctive relief, alleging that BCRA's prohibition on the use of corporate treasury funds for "electioneering communications" as defined in BCRA was unconstitutional as applied to its ads.[5] The Court set the stage for its analysis by reminding the readers that,

> [p]rior to BCRA, corporations were free under federal law to use independent expenditures to engage in political speech so long as that speech did not expressly advocate the election or defeat of a clearly identified federal candidate. . . . BCRA significantly cut back on corporations' ability to engage in political speech. BCRA § 203, at issue in these cases, makes it a crime for any labor union or incorporated entity – whether the United Steelworkers, the American Civil Liberties

[5] The ads, entitled "Wedding," "Waiting," and "Loan," were all similar in substance and format, and similarly suggested to viewers that they contact identified politicians "and tell them to oppose the filibuster." *WRTL*, 551 U.S. at 458-459.

> Union, or General Motors – to use its general treasury funds to pay for any "electioneering communication."

Id. at 457. In establishing the proper burden of proof, the Court recognized that,

> [b]ecause BCRA § 203 burdens political speech, it is subject to strict scrutiny. . . . Under strict scrutiny, the **Government** must prove that applying BCRA to WRTL's ads furthers a compelling interest and is narrowly tailored to achieve that interest. . . . This Court has already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent. . . . So to the extent the ads in these cases fit this description, the FEC's burden is not onerous; all it need do is point to *McConnell* and explain why it applies here. If, on the other hand, WRTL's ads are **not** express advocacy or its equivalent, the Government's task is more formidable. It must then demonstrate that banning such ads during the blackout periods is narrowly tailored to serve a compelling interest.

Id. at 465 (emphasis in original).

During the course of its analysis, the Court "decline[d] to adopt a test for as-applied challenges turning on the speaker's intent to affect an election," as "opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a

pending legislative or policy issue." *Id.* at 467-468. The Court instead embraced an objective standard: "[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-470. "[C]ontextual factors[6] . . . should seldom play a significant role in the inquiry." *Id.* at 473-474.

The Court ultimately held that, "[b]ecause WRTL's ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, . . . they are not the functional equivalent of express advocacy, and therefore fall outside the scope of *McConnell's* holding." *Id.* at 476. Significantly, the Court declared that it had "never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent." *Id.* In the concluding passage of its opinion, the Court observed:

> Yet, as is often the case in this Court's First Amendment opinions, we have gotten this far in the analysis without quoting the Amendment itself: "Congress shall make no law . . . abridging the freedom of speech." The Framers' actual words put these cases in proper perspective. Our jurisprudence over the past 216 years has rejected an absolutist

[6] For instance, that WRTL participates in express advocacy in other aspects of its work. *Id.* at 472-474.

> interpretation of those words, but when it comes to drawing difficult lines in the area of pure political speech – between what is protected and what the Government may ban – it is worth recalling the language we are applying. *McConnell* held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. We have no occasion to revisit that determination today. But when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban – the issue we **do** have to decide – we give the benefit of the doubt to speech, not censorship. The First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech" demands at least that.

Id. at 481-482 (emphasis in original).

4. *Citizens United v. FEC* ("*Citizens United*")

The last of the significant First Amendment cases is the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), another as-applied challenge to FECA, 2 U.S.C. § 441b, as amended by BCRA § 203. In January 2008, appellant Citizens United, a nonprofit corporation, released a documentary (hereafter "*Hillary*") critical of then-Senator Hillary Clinton, a candidate for her

party's Presidential nomination. Concerned about possible civil and criminal penalties for violating § 441b, it sought declaratory and injunctive relief, arguing that (1) § 441b was unconstitutional as applied to *Hillary*, and (2) BCRA's disclaimer, disclosure, and reporting requirements, BCRA §§ 201 and 311, were unconstitutional as applied to *Hillary* and the television ads Citizens United produced to announce the availability of *Hillary* on cable television through video-on-demand. Applying an objective test to determine whether *Hillary* was the functional equivalent of express advocacy, the Court found that there was "no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy." *Id.* at 326.

The Court then proceeded to "exercise . . . its judicial responsibility" to consider the facial validity of § 441b, explaining that "[a]ny other course of decision would prolong the substantial, nationwide chilling effect caused by § 441b's prohibitions on corporate expenditures." *Id.* at 333. The Court once again traced the history of campaign finance regulation, and characterized the dilemma at hand in terms of "confront[ing] . . . conflicting lines of precedent: a *pre-Austin* line that forbids restrictions on political speech based on the speaker's corporate identity[7]

[7] In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Supreme Court held that political speech may be

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and a *post-Austin* line that permits them." *Id.* at 348. The Court reconfirmed that "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'" *Id.* at 349. The Court rejected the reasoning of *Austin*, finding it "irrelevant for purposes of the First Amendment that corporate funds may 'have little or no correlation to the public's support for the corporation's political ideas,' . . . [because a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas." *Id.* at 351 (quoting *Austin*, 494 U.S. at 660). The Court then overruled *Austin*, based on the "principle established in *Buckley* . . . that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Id.* at 365.

The Court next addressed Citizens United's challenge to BCRA's disclaimer and disclosure provisions

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banned based on the speaker's corporate identity, having found "a compelling governmental interest in preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *Citizens United*, 558 U.S. at 348 (citing *Austin*, 494 U.S. at 660).

as applied to *Hillary* and the advertisements for the movie. The Court acknowledged that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' *Buckley*, 424 U.S. at 64 . . . and 'do not prevent anyone from speaking,' *McConnell*, [540 U.S.] at 201. . . ." *Citizens United*, 558 U.S. at 366. Under the "exacting scrutiny" standard that requires a "substantial interest" between the disclosure requirement and a "sufficiently important" governmental interest, the Court found the statute valid as applied to the ads for the movie and to the movie itself. In so concluding, the Court reiterated the governmental interests identified in *Buckley*, 424 U.S. at 66, and rejected the argument that "the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy." *Citizens United*, 558 U.S. at 368.

> The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. . . . In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. . . .
>
> In *McConnell*, three Justices who would have found § 441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. . . . And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. . . .

> For these reasons, we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.

Id. at 369. Finally, because Citizens United offered no evidence that its members may face threats, harassment, or reprisals if their names were disclosed, the Court found no showing that BCRA's disclaimer and disclosure requirements to the movie and ads would impose a chill on speech or expression. The Court found no constitutional impediment to the application of such requirements to the movie and ads at issue. *Id.* at 370-371.

B. Circuit Court Precedent

When asked about cases most analogous to the facts at bar, the parties (not surprisingly) identified different cases. For its part, DSF identified *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975),[8] and the discussion therein related to now repealed FECA § 437a, which provided that:

> Any person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description, or other reference) advocating the

[8] (*See* D.I. 32 at 6)

> election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts . . . , or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate shall file reports with the [FEC] as if such person were a political committee. The reports filed by such person shall set forth the source of the funds used in carrying out any activity described in the preceding sentence in the same detail as if the funds were contributions within the meaning of section 431(3) of this title, and payments of such funds in the same detail as if they were expenditures within the meaning of section 431(f) of this title.

Id. at 869-870 (citing 2 U.S.C. § 437a (repealed by Pub. L. 94-283, § 105, 90 Stat. 475 (May 11, 1976))). The D.C. Circuit observed at the outset of its analysis that "the activity summoning the report is calculated to exert an influence upon an election. But section 437a is susceptible to a reading necessitating reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance," including such groups as plaintiffs.[9] *Id.* at 870. In

[9] Human Events, Inc., "the publisher of a weekly newspaper devoted primarily to events of political importance and interest," and the New York Civil Liberties Union, an organization that "engage[s] publicly in nonpartisan activities which 'frequently and necessarily refer to, praise, criticize, set forth, describe or

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distinguishing between the disclosure requirements of § 437a and the central disclosures requirements of FECA pertaining to "political committees" and to "contributions" and "expenditures," the court grounded its decision to uphold the latter requirements on its

> recognition that the government has demonstrated a substantial and legitimate interest in protecting the integrity of its elections, an interest closely connected to and plainly advanced by those provisions.
>
> Section 437a, however, seeks to impose the same demands where the nexus may be far more tenuous. As we have said, it may undertake to compel disclosure by groups that do no more than discuss issues of public interest on a wholly nonpartisan basis. To be sure, any discussion of important public questions can possibly exert some influence on the outcome of an election. . . . But unlike contributions and expenditures made solely with a view to influencing the nomination or election of a candidate, *see* 2 U.S.C. §§ 431(e), 431(f), issue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections. Moreover, and very

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rate the conduct or actions of clearly identified public officials who may also happen to be candidates for federal office." 590 F.2d at 870-71. With respect to the latter, it sufficiently demonstrated a "'threat of specific future harm,' . . . ([to wit] disclosure would cause loss of contributions from those who currently insist that their gifts remain confidential)." *Buckley v. Valeo*, 519 F.2d at 871 n.130.

> importantly, such discussions are vital and indispensable to a free society and an informed electorate. Thus the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes.

Id. at 872-873. Despite an unmistakable congressional intention to apply the statute broadly,[10] the court concluded that "the crucial terms 'purpose of influencing the outcome of an election' and 'design[ ] to influence' voting at an election stand without any readily available narrowing interpretation" and, thus, were unconstitutionally vague and over-broad. *Id.* at 877-878. This holding was not appealed and, therefore, not subject to the Supreme Court review in *Buckley*, 424 U.S. at 11 n.7.

Defendants, for their part, direct the court's attention to *Center for Individual Freedom, Inc. v. Tennant* ("*CFIF*"), 706 F.3d 270 (4th Cir. 2013), where the Fourth Circuit reviewed West Virginia's campaign finance laws.[11] Defendants find most relevant to the dispute at bar the challenge in *CFIF* to West

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[10] According to the legislative history included in the court's opinion, the provision was intended "to apply indiscriminately," "bring[ing] under the disclosure provisions many groups, including liberal, labor, environmental, business and conservative organizations." *Id.* at 877 & n.140 (citing 120 Cong. Rec. H10333 (daily ed. Oct. 10, 1974) (statement of Rep. Frenzel)).

[11] (*See* D.I. 33 at 1)

Virginia's definition of "electioneering communication" found in W. Va. Code § 3-8-1a(12)(A), to wit,

> any paid communication made by broadcast, cable or satellite signal, or published in any newspaper, magazine or other periodical that:
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> (i) Refers to a clearly identified candidate . . . ;
>
> (ii) Is publicly disseminated within:
>
> (I) Thirty days before a primary election . . . ; or
>
> (II) Sixty days before a general . . . election . . . ; and
>
> (iii) Is targeted to the relevant electorate. . . .

W. Va. Code § 3-8-1a(12)(A). In *CFIF*, plaintiff challenged the definition's inclusion of materials "published in any newspaper, magazine or other periodical." 706 F.3d at 281-282. In this context, and applying "exacting scrutiny" for its evaluation of the campaign finance disclosure provisions, the Fourth Circuit found that West Virginia could rely on its interest of "providing the electorate with election-related information." *Id.* at 283. The Fourth Circuit concluded, however, that West Virginia had "failed to demonstrate a substantial relation between its interest in informing the electorate and its decision to include periodicals – but not other non-broadcast materials – in its 'electioneering communication' definition." *Id.*

More specifically, the Court found that, "[al]though the affidavits that West Virginia submitted sufficiently support its decision to regulate periodicals and other non-broadcast media, they do not justify the legislature's decision to regulate periodicals to the exclusion of other non-broadcast media, such as direct mailings." *Id.* at 285. "[E]rr[ing] on the side of protecting political speech rather than suppressing it," *id.*, the Fourth Circuit determined that "limiting the campaign finance regime's applicability to only broadcast media causes it to burden fewer election-related communications." *Id.*

C. Likelihood of Success on the Merits

Starting where defendants left off, as far as the court can discern, there is no case that purports to address disclosure requirements with the breadth attributed to the Act.[12] As noted by DSF, many of the cases identified by defendants relate to statutes that only regulate express advocacy or its functional equivalent (not the mere mention of a candidate),[13] while other cases (including *CFIF)* involve statutes that have exemptions from the reporting requirements, such as those exempting § 501(c)(3) activity from disclosure[14] or those exempting such publications as

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[12] The Delaware Election Disclosures Act, 15 Del. C. § 8001, *et seq.*, as defined in part I, introduction.

[13] (*See* D.I. 32 at 7 n.8)

[14] (*See* D.I. 43 at 7 n.9)

voter guides.[15] Consequently, when the Fourth Circuit in *CFIF* upholds the constitutionality of West Virginia's substantive disclosure requirement, W. Va. Code § 3-8-2b(b)(5), which mandates the disclosure of certain contributors "whose contributions were used to pay for electioneering communications," one cannot ignore the context of the decision, where the West Virginia legislature, by its exemptions to the definition of "electioneering communication"[16] and its preamble to the regulations,[17] made clear that its intended focus was on express advocacy. Indeed, where a legislature (Congress) clearly intended otherwise, i.e., to embrace virtually all political communications and communicators, the D.C. Circuit rejected the resulting statutory language as being overbroad. *See Buckley v. Valeo*, 519 F.2d at 877-78 and 877 n.140.

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[15] (*See* D.I. 32 at 7 n.10) Because the characterization of DSF's proposed "voter guide" has not been the subject of this motion practice, the court will assume for purposes of its analysis that it would pass muster as a nonpartisan voter guide.

[16] Including, e.g., "[a] communication, such as voter's guide, which refers to all of the candidates for one or more offices, which contains no appearance of endorsement for or opposition to the nomination or election of any candidate and which is intended as nonpartisan public education focused on issues and voting history." W. Va. Code § 3-8-1a(12)(B)(viii).

[17] *See* W. Va. Code § 3-8-1(a)(6): "Disclosure by persons and entities that make expenditures for communications that expressly advocate the election or defeat of clearly identified candidates, or perform its functional equivalent, is a reasonable and minimally restrictive method of furthering First Amendment values by public exposure of the state election system."

The question remains how to apply the guidance of *Citizens United* to the Act which, by its language, is broad enough in scope to capture neutral communications similar to those exempted by West Virginia's legislature and deemed over-broad by the court in *Buckley v. Valeo*, 519 F.2d at 877. The court notes at this juncture that the Supreme Court's relatively terse discussion about disclosure in *Citizens United* is based in large measure on citations to its precedential opinions in *Buckley* and *McConnell*, neither of which were as-applied challenges and neither of which addressed a statutory regime as broadly constructed (and apparently construed) as the one at bar. As noted above, the disclosure requirements under examination in *Buckley* were those directed to contributions made by individuals, as well as contributions to minor parties and independent candidates. The Court had no problem finding that the governmental interests in disclosure were substantially related to its interests in election transparency when reviewing the application of the disclosure requirements to contributions to minor parties and independent candidates, obviously participants in the political process.

The Court had more difficulty applying such requirements to individual contributors and, in that context, found "the relation of the information sought to the purposes of the Act . . . too remote." *Buckley*, 424 U.S. at 79-80. To insure that the reach of 434(e) was not impermissibly broad, the Court construed "expenditure" for purposes of that section "to reach only funds used for communications that expressly

advocate[d] the election or defeat of a clearly identified candidate." *Id.* at 80. The Court in *McConnell*, while rejecting the notion that "*Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy," *McConnell*, 540 U.S. at 190, nevertheless rooted its decision to uphold the disclosure requirements to "evidence in the record that independent groups were running **election-related advertisements** 'while hiding behind dubious and misleading names.'" *Citizens United*, 558 U.S. at 367 (emphasis added) (citing to *McConnell*, 540 U.S. at 197).

Although the First Amendment does not "erect[ ] a rigid barrier between express advocacy and so-called issue advocacy," the Supreme Court continues to demand, under an "exacting scrutiny standard," that the government's interest in obtaining information about a communicator must be substantially related to a sufficiently important governmental interest, e.g., election transparency. It would appear as though other legislative efforts have translated this guidance into exempting from disclosure requirements those **communicators** generally considered to be non-political (e.g., § 501(c)(3) groups) and/or those **communications** generally considered to be nonpolitical (e.g., voter guides), the reasoning being that the less a communicator or communication advocates an election result, the less interest the government should have in disclosure when weighed against the important First Amendment rights at stake.

The Act has no such exemptions, apparently leaving to the Commissioner (and the less transparent administrative regulation process) any efforts to perhaps more narrowly tailor the Act's disclosure requirements to communicators/communications more likely to raise concerns about partisan politics. In this regard, the court notes that the focus of the Act was actually on communications that are the functional equivalent of advocacy, e.g., on "sham issue ads,"[18] voter guides,[19] and even advertisements that encourage recipients to contact officeholders and candidates, all described in the record in terms of advocacy, i.e., as efforts intended "to affect voters' choices at the ballot box." (D.I. 30, ex. 4 at 4)

The court recognizes that it is never an easy task for the legislature to draw lines when it comes to restricting constitutional rights. A fully informed electorate is a worthy goal recognized by the Supreme Court.[20] Nevertheless, as presented, the Act is so

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[18] Described as "campaign advertisements that target candidates right before an election, but escape disclosure by avoiding the 'magic words' of express advocacy like 'vote for' or 'vote against' that have traditionally triggered disclosure requirements." (D.I. 30, ex. 2 at 2)

[19] "Voter guides are typically intended to influence voter behavior," despite "lacking words of express advocacy." (*Id.*, ex. 3 at 4-5)

[20] The court notes the difference between educating – providing information to the public – and "influencing" – affecting the conduct, thought or character of the public. As reflected in the legislative history, the Act was intended to control the latter form of communication, not the former.

broadly worded as to include within the scope of its disclosure requirements virtually every communication made during the critical time period, no matter how indirect and unrelated it is to the electoral process.[21] On the record presented, this would include DSF's proposed voter guide (as a presumably neutral communication) published by DSF (a presumably neutral communicator by reason of its 501(c)(3) status). The court concludes that the relation between the personal information collected[22] to the primary purpose of the Act[23] is too tenuous to pass constitutional muster.[24] Therefore, DSF is likely to prevail on the

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[21] Any one who contributes to such civic organizations as the League of Women Voters, the American Civil Liberties Union of Delaware, or Common Cause might well expect to have their names and addresses listed as a matter of public record, because such organizations tend to discuss the actions of clearly identified public officials. The Act, however, is broad enough to cover the contributors to any charitable organization, e.g., those advocating such causes as a cure for cancer or support for wounded war veterans, if the organization publishes a communication within the critical time frame that so much as mentions, even in a non-political context, a public official who happens to be a candidate.

[22] Like the metadata collected by the National Security Administration.

[23] Regulating anonymous political advocacy.

[24] And, indeed, those who want to circumvent the intent of the Act will simply contribute anonymously. It will likely be the First Amendment rights of non-political contributors that will end up being violated by the intrusive collection of personal information – the full name and mailing address of each person who has made contributions in excess of $100 during the

(Continued on following page)

merits of its claim that the Act, as applied, is unconstitutional.

D. Balance of Harms

In the Third 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)). Having found that DSF has demonstrated a likelihood of success on the merits of their First Amendment claim, and concluding that defendants' interest in public disclosure cannot withstand the public's interest in protecting their privacy of association and belief guaranteed by the First Amendment, the court concludes that the balance of harms weighs in favor of DSF.

IV. CONCLUSION

For the reasons states [sic], DSF's motion for a preliminary injunction (D.I. 22) is granted. The court recognizes, however, that the factual underpinnings for its decision have not been specifically challenged or vetted through discovery. Therefore, no order shall be executed until the court has conferred with the

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election period – information that is unrelated to the regulation of abusive political activity.

parties at the scheduled April 1, 2014 telephonic status conference.

1. Del. Const. art. I, § 2 provides, in relevant part:

Composition of House and Senate; terms of office; districts; election

The Senate shall be composed of twenty-one members, who shall be chosen for four years.

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2. 52 U.S.C. § 30104(f)(3) provides:

Electioneering communication

For purposes of this subsection

(A) In general

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which –

(I) refers to a clearly identified candidate for Federal office;

(II) is made within –

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) Exceptions

The term "electioneering communication" does not include –

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 30101(20)(A)(iii) of this title.

(C) Targeting to relevant electorate

For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons –

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

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3. 11 C.F.R. § 104.20(c)(9) provides:

Contents of statement

. . .

If the disbursements were made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each person who made a donation

aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.

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4. Del. Code Ann. tit. 15, § 8002 provides, in relevant part:

Definitions

. . .

(7) "Communications media" means television, radio, newspaper or other periodical, sign, Internet, mail or telephone.

(10) "Electioneering communication" means a communication by any individual or other person (other than a candidate committee or a political party) that:

1. Refers to a clearly identified candidate; and

2. Is publicly distributed within 30 days before a primary election or special election, or 60 days before a general election to an audience that includes members of the electorate for the office sought by such candidate. For purposes of this section, the term "general election" shall include any annual election for 1 or more members of a school board pursuant to § 1072(c) of Title 14.

(11) "Election period" means:

a. For a candidate committee:

1. For a candidate for reelection to an office to which the candidate was elected in the most recent election held therefor, the period beginning on January 1 immediately after the most recent such election, and ending on the December 31 immediately after the general election at which the candidate seeks reelection to the office.

2. For a candidate for reelection to an office which the candidate attained since the last election held therefor (whether the candidate attained the office by succession, appointment or otherwise), the period beginning on the day the candidate succeeded to or was appointed to the office, and ending on the December 31 immediately after the general election at which the candidate seeks reelection to the office.

3. For a candidate for election to an office which the candidate does not hold, the period beginning on the day on which the candidate first receives any contribution from any person (other than from the candidate or from the candidate's spouse) in support of that candidate's candidacy for the office, and ending on the December 31 immediately after the general election at which the candidate seeks election to the office.

4. Notwithstanding the foregoing, for purposes of the limitations under § 8010 of this title on contributions from persons other than political parties and political action committees, for a candidate in a general

election who was nominated for such office in a primary election, the election period shall end on the day of the primary and the next election period shall begin on the day after the primary.

b. For a political party and for a political action committee, the period beginning on the January 1 immediately after a general election, and ending on the December 31 immediately after the next general election.

c. For a candidate committee for a person who does not hold public office and who has not taken action necessary under the law to qualify for nomination or election under the laws of the State, the period beginning on the date the first contribution is received or expenditure is made by the committee and ending on the fourth December 31 following such date; provided, however, that if such person takes action necessary under the law to qualify for nomination or election under the laws of the State, the period shall be determined under paragraph (11)a. of this section.

d. For a person who makes an expenditure for a third-party advertisement, the election period shall begin and end at the same time as that of the candidate identified in such advertisement, without regard to paragraph (11)a.4. of this section.

. . .

(17) "Person" includes any individual, corporation, company, incorporated or unincorporated association, general or limited partnership, society, joint stock

company, and any other organization or institution of any nature.

. . .

(27) "Third-party advertisement" means an independent expenditure or an electioneering communication.

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4. Del. Code Ann. tit. 15, § 8031(a) provides:

Special Reports – Third Party Advertisements

(a) Any person other than a candidate committee or political party who makes an expenditure for any third-party advertisement that causes the aggregate amount of expenditures for third-party advertisements made by such person to exceed $500 during an election period shall file a third-party advertisement report with the Commissioner. The report shall be filed under penalty of perjury and shall include the following:

(1) The information required under § 8005(1) of this title with respect to the person making such expenditure;

(2) The full name and mailing address of each person to whom any expenditure has been made by such person during the reporting period in an aggregate amount in excess of $100; the amount, date and purpose of each such expenditure; and the name of, and office sought by, each candidate on whose behalf such expenditure was made;

(3) The full name and mailing address of each person who has made contributions to such person during the election period in an aggregate amount or value in excess of $100; the total of all contributions from such person during the election period, and the amount and date of all contributions from such person during the reporting period;

(4) If a person who made a contribution under paragraph (a)(3) of this section is not an individual, the full name and mailing address of:

a. Any person who, directly or otherwise, owns a legal or equitable interest of 50 percent or greater in such entity; and

b. One responsible party, if the aggregate amount of contributions made by such entity during the election period exceeds $1,200; and

(5) The aggregate amount of all contributions made to the person who made the expenditure.

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5. Del. Code Ann. tit. 15, § 8032 provides:

Public Disclosure

All reports made to the Commissioner and all rulings made by the Commissioner under this chapter shall be public and shall, immediately upon their filing, be made available by the office of the Commissioner for inspection and copying at reasonable cost by the public, except that the identity of the candidate or

committee which requested a ruling shall not be disclosed without the candidate's or committee's consent. The Office of the Election Commissioner shall remain open beyond the ordinary close of business on the day the reports are due to be received under § 8030(c) of this title, until all persons who are present at said office at the time of the ordinary close of business have had an opportunity to make reasonable inspection and copying of said reports.

Any contributor who is a law-enforcement officer as defined by § 222 or § 2401 of Title 11, a probation and parole officer, or a federal or state judicial officer may request that the Commissioner remove that officer's mailing address from any report to the Commissioner before the report is publicly disclosed. Any other person, upon application to the board of elections for the county in which that person resides, may request that the person's mailing address be removed from any report to the Commissioner before the report is publicly disclosed. After considering the application, if the board of elections determines that good cause exists, it shall approve the removal of the person's mailing address by the Commissioner before the report is publicly disclosed.