IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

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

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Dated: January 14, 2014

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STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff Delaware Strong Families ("DSF") has filed a Verified Complaint seeking a judgment preventing enforcement of unconstitutional provisions of the Delaware Election Disclosures Act (the "Act") and other declaratory and injunctive relief. Both defendants answered the complaint on December 23, 2013. A copy of the Verified Complaint is attached as Exhibit A. DSF has filed herewith a motion for preliminary injunction against enforcement of the Act in the upcoming election cycle. This is DSF's opening brief in support of that motion.

SUMMARY OF ARGUMENT

1. DSF has a reasonable probability of success in its claim that the Act violates DSF's First Amendment rights in that it is unconstitutionally vague and overbroad, both facially and as applied to DSF.

2. Enforcement of the Act would cause DSF irreparable harm.

3. The injunctive relief that DSF seeks would cause no harm to the State or to third parties. Instead, that relief would benefit the public as it would encourage free speech, voter education, and free association among Delaware citizens.

STATEMENT OF FACTS

DSF is a Delaware nonprofit corporation. Exh. A at ¶10. DSF is also a registered tax-exempt organization pursuant to Section 501(c)(3) of the Internal Revenue Code. *Id.* Consistent with its tax-exempt status, DSF does not advocate for or against any candidate for public office. It is under the control of no party or political committee in the State of Delaware or elsewhere. *Id.* at ¶16.

In 2012, DSF distributed an educational voter guide through public distribution and over the Internet within 60 days of Delaware's general election. *Id.* at ¶19. A copy of the 2012 voter

guide is attached to the Verified Complaint as Exhibit A. DSF plans to engage in similar activity before the 2014 general election. *Id.* That voter guide will be distributed within 60 days of the general election to Delaware registered voters via U.S. mail and public distribution. *Id.* It will also be placed on the organization's website and will be available for download. *Id.* In all respects, the 2014 voter guide will be substantially similar to the 2012 DSF voter guide. *Id.*

The 2012 voter guide contained no words of express advocacy and was not the functional equivalent of express advocacy. *Id.* at ¶20, Ex. A. It made no positive or pejorative statements about any candidate for state or federal office. *Id.* The guide listed all candidates running for statewide and federal office in Delaware and listed candidates' own responses to a series of questions covering a broad range of issues. *Id.* Those questions were presented to the candidates in a "candidate questionnaire," soliciting "support" or "oppose" responses and inviting the candidates to explain their answers or offer other comments of 75 words or less per question.[1] *Id.* at ¶¶ 21, 28. DSF then used those responses to create its voter guide. *Id.* at ¶21.

The print version of the voter guide, due to size limitations, contained only the "support" or "oppose" responses, while the explanations and comments were placed on the DSF website. *Id.* at ¶28. The printed guide directed those seeking to read the expanded answers to visit the website. *Id.* If a candidate did not respond to the questionnaire, DSF used publicly-available information to determine that candidate's position on the surveyed issues. *Id.* at ¶26. Each candidate was informed that DSF would use this procedure in the absence of candidate responses and the guide indicated which information had been obtained from public sources, as opposed to a direct response from a candidate. *Id.*

[1] The questionnaires were distributed by DSF's sister organization, Delaware Family Policy Council. Responses were then shared with DSF. *Id.* at ¶21.

DSF's voter guide did not grade or rank candidates based upon their answers or any other criteria. No candidate was given preferential treatment because of his or her answers. No candidate was promoted at the expense of any other candidate. The first page of the guide contained a message from DSF's president, Nicole Theis, informing the reader that "this Voter Guide does not address a candidate's character, only their position on the issues. It should not take the place of your effort to personally evaluate a candidate." *Id.* at ¶29.

Producing and distributing the voter guide is an extensive process, costing well over $500. *Id.* at ¶30. Candidates must be researched, services for printing and mailing must be contracted for, and legal counsel must be consulted to ensure that the guide is educational and non-partisan so that DSF does not jeopardize its tax status as a 501(c)(3) organization. *Id.* at ¶33. In 2012, DSF expended over 250 hours of staff time on the creation of the voter guide. *Id.* at ¶32. If that process does not begin by July 1, 2014, the guide cannot be made available before the election—which would obviously destroy its very purpose and educational value. *Id.* at ¶34. Moreover, it is critical that DSF be able to assure its donors and prospective donors, as it has always done, that their donations will not be publicly disclosed.

The Act became law in Delaware on January 1, 2013. Prior to its enactment, DSF was not regulated under the state's election laws. Under the Act's provisions, however, DSF's activities, including the publication of its voter guide, will be within the regulatory purview of the State Commissioner of Elections and the Attorney General. For the first time, DSF will be required to register in advance with the state, submit to burdensome regulations, and reveal the names and addresses of its financial supporters. *Id.* at ¶36.

The Act has, in fact, created a new category of speech that the state government will regulate: the "third-party advertisement," which the Act defines as an "independent expenditure

or an electioneering communication." 15 *Del. C.* § 8002(27). That provision redefines "electioneering communication" as any communication distributed by "television, radio, newspaper or other periodical, sign, Internet, mail, or telephone" which "refers to a clearly identified candidate" and 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(7), (10).

The Act also creates a new disclosure regime for "third-party advertisements." Under this system, any person (including any corporation, 15 *Del. C.* § 8002(17)) which spends more than $500 on third-party advertisements must "file[] under penalty of perjury" a "third-party advertisement report with the Commissioner." The third-party advertisement report must contain, *inter alia*,

> [t]he full name and mailing address of each person who has made contributions to [an organization] 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.

15 *Del. C.* § 8031(3). Other mandates require filing the report within 24 hours of the communication's release and, if a contributor is not an individual, listing "the full name and mailing address of...[a]ny person who, directly or otherwise, owns a legal or equitable interest of 50 percent or greater...and [o]ne responsible party, if the aggregate amount of contributions made by such entity during the election period exceeds $1,200." 15 *Del. C.* §§ 8031(d); 8031(4). These requirements are extraordinarily similar to those that the State imposes upon political committees ("PACs"). Exh. A at ¶49. Consequently, the Act converts any organization making "third-party advertisements" into a PAC in all but name.

Under this new regime, DSF's voter guide in 2014 would be unconstitutionally regulated as an "electioneering communication" and the functional equivalent of PAC status would be imposed upon DSF through the State's disclosure regime for third-party advertisements. DSF will not publish its voter guide absent injunctive or declaratory relief by this Court, as it will be forced to consider the guide an "electioneering communication," comply with the State's expansive regulatory regime, and reveal its financial contributors. *Id.* at ¶37.

ARGUMENT

The Act contains three provisions that are unconstitutionally vague and overbroad, both facially and as applied to DSF. The first two provisions are the definitions of "third-party advertisement" and "electioneering communication," codified at 15 *Del C.* § 8002(10) and § 8002(27), respectively. The third unconstitutional provision is the third-party advertisement disclosure regime codified at 15 *Del C.* § 8031. These provisions, taken together, function to impose the burdens of PAC status upon any organization that spends as little as $500 on a communication that mentions a candidate for office—even if the communication itself is neutral, nonpartisan and fails to advocate for or against any candidate. Consequently, and for the reasons set forth below, the Act violates the First Amendment as interpreted by forty years of United States Supreme Court precedent.

I. THE STANDARD FOR ENTRY OF A PRELIMINARY INJUNCTION.

In this Circuit, to "determin[e] whether a preliminary injunction should be issued, a court must consider (1) whether the movant has a reasonable probability of success on the merits; (2) whether irreparable harm would result if the relief sought is not granted; (3) whether the relief would result in greater harm to the non-moving party; and (4) whether the relief is in the public

interest." *Swartzwelder v. McNeilly*, 297 F.3d 228, 234 (3d Cir. 2002). Plaintiff's case satisfies all four prongs required for the entry of a preliminary injunction.

II. DSF HAS A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS OF ITS CLAIM THAT THE ACT IS UNCONSTITUTIONAL.

The Verified Complaint amply establishes that the Act is in derogation of the First Amendment and Supreme Court authority. Accordingly, DSF has a reasonable probability – indeed a strong likelihood – of success on the merits of its claims and a preliminary injunction is appropriate.

A. There is a constitutional presumption that forced disclosure abridges the freedom of association.

As a first principle, the disclosure of an organization's contributors is disfavored. *See Buckley v. Valeo*, 424 U.S.1, 65 (1976) (citing *NAACP v. Alabama*, 357 U.S. 449, 461 (1958)). It has "long [been]...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." *Buckley*, 424 U.S. at 64. It is not enough that the state have some interest; its interest must be substantial enough to pass "exacting scrutiny." *Id.* The Supreme Court has permitted the state to mandate disclosure (though not the disclosure of all donors and members as the Act does) only when a group makes expenditures that expressly advocate a particular election result. *Id.* at 80-81. The more extensive, PAC-type requirements the Act imposes here are permissible only when the organization is under the control of a candidate or party or has the primary purpose of nominating or electing a candidate. *Id.* at 79. Defendants' effort to force organizations to disclose their contributors merely for engaging in nonpartisan issue speech constitutes a level of intrusion never blessed by the Third Circuit or the Supreme Court.

In the seminal decision of *Buckley v. Valeo*, the Supreme Court examined the interplay between a state's desire for disclosure and the First Amendment's robust protection of the freedoms of speech and association. The Court determined that "[t]he constitutional right of association...stem[s] from the...recognition that '[e]ffective advocacy of both public and private points of view...is undeniably enhanced by group association.'" *Id.* at 15 (quoting *NAACP v. Alabama*, 357 U.S. at 460 (1958)). Acting to safeguard this associational liberty, the Court noted explicitly that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Id.* at 66. The Court was further concerned about "the invasion of privacy of belief" generated by disclosure, given that "'[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'" *Id.* at 66 (*quoting California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring)).

Consequently, the Court placed the burden of defending a disclosure regime's constitutionality on the State. *Id.* at 65. And *Buckley* was no outlier; the Court has long mandated that disclosure survive "exacting scrutiny." *Id.* at 64-65 (citing *NAACP v. Alabama*, 357 U.S. at 463). Therefore, the State must show a "relevant correlation" or "substantial relation" between the disclosure required and the governmental interest. *Id.* (internal citation omitted).

The Federal Election Campaign Act ("FECA"), the law challenged by the *Buckley* plaintiffs, required disclosure from "political committees," a term defined only as organizations making "contributions" or "expenditures" over a certain threshold amount. *Id.* at 79. Since such a vague definition "could be interpreted to reach groups engaged purely in issue discussion" the Court, performing its duty to save, if possible, legislative intent, promulgated the so-called "major purpose" test. *Id.* The "major purpose" test is straightforward: the State may compel contributor information from "organizations that are under the control of a candidate or the major

purpose of which is the nomination or election of a candidate." *Id.* Ultimately, such an organization's expenditures "are, by definition, campaign related." *Id.*

In the context of an organization *without* "the major purpose" of supporting or opposing a candidate, the Court deemed disclosure constitutionally appropriate *only:*

> (1) when [organizations] make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when [organizations] make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.

Id. at 80. The Court narrowly defined the term "expressly advocate" to encompass only "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Id.* at 80 n. 108, incorporating by reference *id.* at 44 n. 52. The Court declared these instances to have a "substantial connection with the governmental interests" in disclosure. *Id* at 81.

In short, the Supreme Court has long noted that compelled disclosure of contributors is constitutionally disfavored. Thus, it can only be required of groups that exist to actively advocate for a particular electoral result and such disclosure regimes must withstand "exacting scrutiny," under which the burden of persuasion falls upon the state.

B. The Supreme Court has protected organizations from the imposition of PAC status, even when an organization, unlike DSF, engages in express advocacy.

In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), a pro-life organization challenged a portion of FECA that forced the entity to choose between becoming a PAC under federal law or self-silencing. The Court determined that this choice was unconstitutional.

Massachusetts Citizens for Life (MCFL) produced a voter guide. *MCFL*, 479 U.S. at 243. Unlike the voter guide at issue here, MCFL's guide explicitly favored certain candidates over others and headlined itself as being "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE." *Id.* at 243-244. Although MCFL claimed the guide did not endorse specific candidates, the Court found this assertion sophistic. By emphasizing certain candidates over others (by, for example, prominently identifying certain candidates as "100-percent pro-life"), the guide constituted express advocacy. *Id.* at 249 (citing *Buckley*, 424 U.S. at 44 n. 52), *see also FEC v. Christian Coalition*, 52 F.Supp.2d 45, 55 (D.D.C. 1999) (finding express advocacy when only one candidate was described by a voter guide as a "100 percenter" and the guide described itself as helping voters cast ballots for "100 percenters"). But in making this finding, the Court reiterated that *Buckley's* "express advocacy" requirement was intended "to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *Id.* at 249 (quoting *Buckley*, 424 U.S. at 42). Despite finding that the voter guide was such a "pointed exhortation," the Court refused to apply the federal PAC registration and reporting requirements to the group based on this single communication.

Justice Brennan, writing for four members of the Court, expressed concern with the requirements attendant to PAC disclosure. In particular, the plurality highlighted the requirements to appoint a treasurer; ensure that contributions were forwarded to the treasurer; keep detailed books documenting expenditures; record the name, address, and employer of contributors; and the need to comply with burdensome reporting schedules. *Id.* at 253 (Brennan, J., for the plurality). Similarly, Justice O'Connor was concerned with the "organizational restraints" imposed by committee status, including "a more formalized organizational form" and a significant loss of funding availability. *Id.* at 266 (O'Connor, J., concurring).

Consequently, because its "practical effect may [have been] to discourage protected speech," forcing MCFL to register as a political committee was unconstitutional. *Id.* at 255 (Brennan, J., for the plurality). Justice O'Connor agreed, noting that "the Government ha[d] failed to show that groups such as MCFL pose[d] any danger that would justify infringement of its core political expression." *Id.* at 266. MCFL, therefore, was free from PAC registration and disclosure, *despite having engaged in express advocacy. Id.* at 264-65. Accordingly, imposition of the burdens of PAC status upon organizations like DSF that do not engage in express advocacy is unconstitutional.

C. The Supreme Court's decisions in *McConnell* and *Citizens United* do not predicate disclosure upon neutral, nonpartisan informational speech.

More recent Supreme Court decisions on campaign finance support DSF's application for injunctive relief.

1. *McConnell v. FEC* and its progeny limited state regulation to the "functional equivalent" of *Buckley's* "express advocacy" both facially and on an as-applied basis.

In 2002, Congress dramatically revised the federal election laws by passing the Bipartisan Campaign Reform Act (BCRA). BCRA's principal addition was the "electioneering communication," defined as "any 'broadcast, cable, or satellite communication' that...'refers to a clearly identified candidate for Federal office'" and "'is targeted to the relevant electorate'" within 60 days of a general election or 30 days of a primary election. *McConnell v. FEC*, 540 U.S. 93,189-190 (2003) (quoting BCRA at 2 U.S.C. § 434(f)(3)(A)(i) (2003)). That new term was a Congressional response to the rise of "sham issue advocacy...candidate advertisements masquerading as issue ads." *McConnell*, 540 U.S. at 132. (internal quotations omitted). The law was not designed to capture a nonpartisan, informational voter guide.

In upholding BCRA's electioneering communication provision, the *McConnell* majority noted that "the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." *McConnell*, 540 U.S. at 193. Thus, "Congress enacted the new electioneering communications provisions because it recognized that the express advocacy test was woefully inadequate at capturing communications designed to influence candidate elections." *Id.* at 217 (internal quotations omitted). Further, the Court noted that "the vast majority of ads" which would be regulated as electioneering communications "clearly had" an "electioneering purpose." *Id.* at 206. The Court then determined that the state could regulate "issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections [that] are the functional equivalent of express advocacy." *Id.*, *see also Citizens United v. FEC*, 558 U.S. 310, 324 (2010) ("*McConnell* decided that §441b(b)(2)'s definition of an 'electioneering communication' was facially constitutional insofar as it restricted speech that was 'the functional equivalent of express advocacy' for or against a specific candidate."). As the *McConnell* majority noted, "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *Id.* at 206, n. 88.

Four years later, the *McConnell* Court's explicit presumption that ads aired shortly before an election are generally the functional equivalent of express advocacy was challenged by Wisconsin Right to Life (WRTL), a nonprofit corporation. *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007) (*WRTL II*).[2]

The *WRTL II* Court's opinion authoritatively delineated the difference between the functional equivalent of express advocacy—a "sham issue" ad—and speech that was not clearly

[2]*Wisc. Right to Life v. FEC*, 546 U.S. 410 (2006), or "*WRTL I*", focused on whether *McConnell* had foreclosed as-applied challenges to the corporate electioneering communications ban. A unanimous Supreme Court determined that it had not. 546 U.S. at 412.

such a sham. *WRTL II*, 551 U.S. at 470. In doing so, the *WRTL II* Court "decline[d] to adopt a test...turning on the speaker's intent to affect an election," determining instead that such an "inquiry [must be limited]...to 'language within the four corners' of the ads." *Id.*, 551 U.S. at 467, 551 U.S. at 461 (quoting *WRTL II*, 466 F. Supp. 2d 195, 207 (D.D.C. 2006)). The Court rejected the intent and purpose analysis conducted by the *McConnell* Court to regulate issue ads and determined that a communication may only be regulated as the functional equivalent of express advocacy when, "objective[ly]...focusing on the substance of the communication...[it is] susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 551 U.S. at 469-470. The Court determined that under this analysis, WRTL's proposed ads exhorting a telephone call to a member of the Senate about filibuster reform could not be regulated as an electioneering communication. *Id.* at 481.

WRTL II arose in the context of a ban on speech, not a forced disclosure regime. But it nonetheless serves as strong authority for the continued vitality of *Buckley*'s separation of issue speech and express advocacy and, while acknowledging that some issue speech may indeed be a "sham," provides an authoritative roadmap for courts seeking to make that determination. A communication is the "functional equivalent of express advocacy" only if, on its own terms, no reasonable person can read it as anything other than as an appeal to vote one way or another.

2. The disclosure upheld in *Citizens United*—donors who explicitly contribute for a communication that is the functional equivalent of express advocacy—is substantially less burdensome than that imposed by the Act.

BCRA "requir[es]... any corporation spending more than $10,000 in a calendar year to produce or air electioneering communications [to] file a report with the FEC that includes—among other things—the names and addresses of anyone who contributed $1,000 or more in aggregate to the corporation *for the purpose of* furthering electioneering communications."

Citizens United v. FEC, 530 F. Supp. 2d 274, 280 (D.D.C. 2008) (emphasis supplied), *see also* 72 Fed. Reg. 72899, Federal Election Commission (Dec. 26, 2007). The "other things" that must be filed with the FEC include "the person making the expenditure, the amount of the expenditure, [and] the election to which the communication was directed." *Citizens United*, 558 U.S. at 366. In contrast, Delaware's new regime demands information about contributors who did not contribute for the purpose of furthering an electioneering communication and also imposes burdens rising to the level of PAC status. In fact, Delaware's scheme is clearly analogous to that invalidated by *Buckley*, which held that unless an entity is controlled by a candidate or has the major purpose of express advocacy, the State may only compel the disclosure of those who "make contributions earmarked for political purposes." 424 U.S. at 80.

Although *Citizens United* was primarily decided as a case about a corporation's right to spend money from its general treasury to fund electioneering communications, the Court's holding also touched upon the BCRA disclosure regime. Citizens United "produced two 10-second and one 30-second ad [promoting] *Hillary*," a feature length film critical "of [then-] Senator Clinton's character and her fitness for the Presidency." *Citizens United*, 558 U.S. at 320, 325. Conducting an overbreadth analysis, eight justices of the Court upheld BCRA's electioneering communication disclosure regime "as applied to the ads for the movie and to the movie itself." *Citizens United*, 558 U.S. at 367.

Citizens United argued that *Hillary: The Movie* could not be regulated as an electioneering communication because it made no explicit appeal for the viewer to vote against Senator Clinton. *Id.* at 325. The Court disagreed and determined that the movie was nothing less than "a feature-length negative advertisement that urge[d] viewers to vote against Senator Clinton for President." *Id.* That is, *Hillary* was express advocacy, like *MCFL*'s guide.

The ads promoting *Hillary,* however, "did not advocate Senator Clinton's election or defeat; instead, they proposed a commercial transaction—buy the DVD of *The Movie*." *Citizens United*, 530 F. Supp. 2d at 280 (D.D.C. 2008). Nonetheless, the Supreme Court determined that they fell within BCRA's definition of an "electioneering communication" because they "referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy." *Citizens United*, 558 U.S. at 368. Thus, while the Court held that the ads were subject to the law's disclosure provisions, it did so only as applied to communications that the Court found "pejorative." *Id.*[3]

Indeed, the Court noted that "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Citizens United*, 551 U.S. at 369 (citing *MCFL*, 479 U.S. at 262). By citing directly to *MCFL*, the *Citizens United* Court made its point clear: disclosure is a less restrictive alternative to requiring *PAC status* or its equivalent. That is: the disclosure at issue in *Citizens United*, a single form listing only those donors who earmarked their contributions to support a particular "pejorative" advertisement, was not the same as PAC status, and could be allowed. The *Citizens United* Court did not grant a permission slip to every government to pry open the books of every group based upon the mere mention of a candidate running for an office (or of *all* candidates, running for *all* offices).

D. The Act's third-party advertisement reports unconstitutionally impose the burdens of PAC status on non-advocacy organizations.

Under the Act, entities that spend more than $500 on electioneering communications are forced to file "third-party advertisement reports" with the State. But these reports are not simply

[3] In fact, *Citizens United* explicitly endorsed *WRTL II*'s characterization of an "electioneering communication" and applied the functional equivalent test to *Hillary: The Movie* itself, an analysis that places the portions of Justice Kennedy's opinion dealing with *Hillary* in some tension with its discussion of the accompanying ads. *Citizens United*, 558 U.S. at 324.

"reports"—they impose the functional equivalent of the full panoply of PAC status upon groups that do not engage in *any* express advocacy, as well as groups that do not meet the major purpose test. *See MCFL*, 479 U.S. at 262, *Citizens United*, 558 U.S. at 325.

The following chart amply demonstrates the point:

Delaware Third-Party Advertisement Report *After spending more than $500 on any combination of independent expenditures or electioneering communications, a Delaware group must...*	**Delaware Political Committee Report** *After spending more than $500 or receiving more than $500 in contributions, a Delaware PAC must...*	**PAC Report Disallowed in *MCFL*.** *At the time of* MCFL, *after spending more than $1,000 or receiving more than $1,000, a federal PAC must...*
Disclose all contributions to the organization during the election period of over $100, including names and addresses of contributors. §8031(a)(3).	Disclose all contributions to the organization during the election period of over $100, including names and addresses of contributors. §8030(d)(2).	Disclose the contributions of all persons giving "in excess of $200 within the calendar year." FECA, §304(b)(3)(A) (1980).
If aggregate contributions from a non-individual exceed $1,200, disclose the full name and address of anyone with a 50 percent stake in the entity and "one responsible party." §8031(a)(4)(a)-(b).	If aggregate contributions from a non-individual exceed $1,200, given the name and address of "one responsible party." §8030(d)(2).	No such requirement.
At minimum, file reports during the same reporting period used by PACs. §8031(b).	Abide by mandatory reporting period. §8030(b).	Abide by mandatory reporting period. FECA, §304(a)(4).
48 hour reporting if expenditure is made more than 60 days before a general election or 30 days before of a primary/special election. §8031(d).	48 hour reporting if independent expenditure or electioneering communication is made more than 60 days before a general election or 30 days before of a primary/special election. §8031(d).	No such requirement.
24 hour reporting if expenditure is made 60 days or less before a general election or 30 days or less	If an independent expenditure or electioneering communication is made, must abide by same rule.	"Any independent expenditure...aggregating $1,000 or more made after the 20th day, but more than 24

before a primary/special election. §8031(d).		hours, before any election shall be reported within 24 hours after such independent expenditure is made." FECA, §304(c)(2).
Mandatory retention of "complete records" of all expenditures and contributions for three years following the election. §8031(f).	Mandatory retention of "complete records" of all expenditures and contributions for three years following the election. §8005(3).	"[P]reserve receipts for all disbursements over $200 and all records for three years after the report is filed." FECA, §302(d).
File report under penalty of perjury. §8031(a).	Candidate or PAC treasurer must file a sworn affidavit supporting the report. §8030(f).	"Each treasurer of a political committee shall file reports of receipts and disbursements…[t]he treasurer shall sign each such report." FECA, §304(a)(1).

As mentioned above, the *Buckley* Court adamantly opposed efforts to impose these burdens on "groups engaged purely in issue discussion." *Buckley*, 424 U.S. at 79. "The practical effect" of PAC status "make[s] engaging in protected speech a severely demanding task…result[ing] in a deterrence of speech which the Constitution makes free." *MCFL*, 479 U.S. at 256.

Delaware's law, of course, actually goes much farther than any of these cases. It imposes PAC status on groups whose communications are *not* express advocacy or its functional equivalent, even where those communications are *not* the organizations' major purpose. This approach is a stark departure from *Buckley* and has never been upheld by the Supreme Court.

E. The Act's definitions of "third-party advertisement" and "electioneering communication" unconstitutionally chill protected speech.

Even if this Court finds that the Act has not imposed the full panoply of the State's PAC laws upon DSF, the State's definitions of "electioneering communication" and "third-party advertisement" are nevertheless unconstitutional. By branding a mechanism by which the State

seeks to regulate nonpartisan, neutral speech as an "electioneering communication," Delaware likely wishes to wrap its new law in the comforting cloak of *McConnell*. But as discussed above, *McConnell* and its progeny do not permit the government to cast so wide a net—an electioneering communication is speech which is "susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate." *WRTL II*, 551 U.S. at 469-470. The State here attempts to regulate speech that is clearly susceptible of several reasonable interpretations. Regardless of content, as long as a candidate's name is on the communication, the Act treats the publishing organization as a PAC, reports must be filed and its donors disclosed.

At a minimum, the Act's definitions cannot constitutionally be applied to DSF. The guide contains no words of express advocacy, takes no position on any candidate and does not even "indirectly" advocate for a candidate. It certainly does not objectively appeal for a vote for any candidate. It is not clear how it could be interpreted as doing so, as every candidate for office is listed equally. The State, therefore, cannot offer a sufficient justification for regulating this non-partisan, neutral, informational speech as an electioneering communication.

F. The Act's third-party advertisement disclosure regime goes beyond what the Constitution tolerates.

Even if this Court determines that the Act's definitions of "electioneering communication" and "third-party advertisement" and the administrative demands imposed upon groups like DSF are constitutional, the Act's disclosure regime nonetheless withers under the constitutional presumption against disclosure. As the discussion above demonstrates, the disclosure regime upheld in *Citizens United* is simply not analogous to the Act's regime. Delaware's law not only demands the disclosure of funders who earmark contributions for

electioneering communications, as BCRA did, but *all* funders, including those who may disagree with a communication or be unaware of its existence.

Indeed, one must return to the 1976 *Buckley* decision to find a challenged law as all-encompassing as the Act. Prior to the *Buckley* case reaching the Supreme Court, it was reviewed by the *en banc* D.C. Circuit, which "held [only] one provision [of the law], § 437(a), unconstitutionally vague and overbroad on the ground that the provision was '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.'" *Buckley*, 424 U.S. at 11 n. 7 (internal citations omitted). The *en banc* panel noted that § 437(a), which called for the disclosure of "the source of funds used in carrying out" any public communication setting forth the candidate's position on any issue, [or setting forth] his voting record" threatened to place the contribution lists of groups such as Common Cause directly into the hands of the federal government. *Buckley v. Valeo*, 519 F.2d 821, 869-871, 877 n. 140 (D.C. Cir. 1975). In fact, the court explicitly recognized that the law would compel the disclosure of the funder of one of the *Buckley* plaintiffs, the New York chapter of the American Civil Liberties Union, because that branch often "publicize[d]...the civil liberties voting records, positions and actions of elected public officials" including candidates seeking federal office. *Buckley*, 519 F.2d at 871. The D.C. Circuit invalidated the provision as regulating speech outside of the government's purview, and "[n]o appeal...[was] taken from that holding." *Buckley*, 424 U.S. at 11 n. 7.

No Supreme Court opinion has disturbed the D.C. Circuit's holding in *Buckley*. What Delaware's law does, facially and as applied to DSF and those similarly situated, is entirely novel as a matter of Third Circuit law and conflicts with four decades of jurisprudence from the United States Supreme Court. The government's interest in the general funders of an

organization, merely because the organization makes a specific communication, diminishes the farther the funders are from control of the communication and the farther the communication gets from express advocacy. The Act's disclosure regime is unconstitutional.

III. DSF WILL BE IRREPARABLY HARMED IN THE ABSENCE OF AN INJUNCTION, WHICH WOULD PLAINLY BE IN THE PUBLIC INTEREST.

If the Court does not grant the relief that DSF seeks here, DSF will be forced into self-silence. Such silence in the face of a statute infringing upon the First Amendment is an unquestionably irreparable harm. "[W]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary...That principle applies with equal force to a violation of...First Amendment freedoms." *Conestoga Wood Specialties Corp.v. Sec'y of the U.S. Dept. of Health and Human Services*, 724 F.3d 377, 416 (3d Cir. 2013) (internal citations and quotations omitted).

A. Denial of a preliminary injunction would cause greater harm to Plaintiff than Defendants.

"One of the goals of the preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable, noncontested status of the parties." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (internal quotations and citations omitted). An injunction would merely permit DSF to engage in issue speech that was unquestionably unregulated by the State before January 1, 2013 – indeed speech that it engaged in, without being subjected to this law, in the autumn of 2012. Thus, "[g]ranting an injunction would restore that state of affairs." *Opticians Ass'n of Am. v. Indep.Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990). Further, denial of the injunction would infringe upon DSF's First Amendment rights, unnecessarily chill its speech and limit its ability to educate the public about candidates for office until well after the 2014 election. "While there will be other elections [after 2014], no future

election will be *this* election." *Emineth v. Jaeger*, 901 F. Supp. 2d 1138, 1142 (D.N.D. 2012) (emphasis in original).

B. The public interest will be vindicated by a preliminary injunction.

Our shared "First Amendment rights are part of the heritage of all persons and groups in this country." *United States v. UAW-CIO*, 352 U.S. 567, 581 (1957). Protecting such rights is decidedly in the public interest, as "'[t]he public as a whole has a significant interest in ensuring...the protection of First Amendment liberties.'" *Conestoga*, 724 F.3d at 417 (quoting *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009)).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests a preliminary injunction against Defendants' enforcement of 15 *Del. C.* § 8002(10), § 8002(27), and § 8031.

Respectfully submitted,

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Dated: January 14, 2014