No. 14-1887

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DELAWARE STRONG FAMILIES,

Plaintiff-Appellee

v.

ATTORNEY GENERAL OF THE STATE OF DELAWARE AND COMMISSIONER OF ELECTIONS FOR THE STATE OF DELAWARE,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Delaware, No. 1:13-01746 (Robinson, J.)

BRIEF FOR PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Delaware Strong Families makes the following disclosures:

It has no parent corporations, no publicly held companies own 10% or more of its sock, and there is no publicly held corporation which is not a party to the proceeding before this Court, yet has a financial interest in the outcome of the proceeding.

COUNTERSTATEMENT OF ISSUES FOR REVIEW

1. Whether the district court erred in holding that the Delaware Elections Disclosure Act was likely unconstitutional as applied to Plaintiff-Appellee's General Election Values Voter Guide because the Act's broad disclosure demands were insufficiently tailored to the State's interest in regulating "anonymous political advocacy." JA 32, n. 23.

2. Whether the district court erred in finding that preventing irreparable First Amendment harm to the Appellee was in the public interest.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this court. Plaintiff-Appellee is aware of no other case or proceeding related to this case.

INTRODUCTION

This case concerns a statute without modern parallel. As the district court noted, "there is no case that purports to address disclosure requirements with the breadth attributed to the Act." JA 27. The State suggests otherwise, claiming that the Delaware law was "carefully modeled" after the federal Bipartisan Campaign Reform Act of 2002 ("BCRA"), and that because the Supreme Court has upheld BCRA as applied to certain facts, the Act must be upheld as well.

But the Delaware law differs sharply from BCRA in important respects. Both the scope of donor disclosure required by the Act and the scope of communications

triggering that disclosure are considerably broader than their federal analogues. Because the Supreme Court has required "a 'substantial relation' between [a] disclosure requirement and a 'sufficiently important' governmental interest," these differences are of the first importance. *Citizens United v. FEC,* 558 U.S. 310, 366-67 (2010) (quoting *Buckley v. Valeo,* 424 U.S. 1, 64, 66 (1974)). "In the First Amendment context, fit matters." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456 (2014).

The State has glossed over these differences, instead claiming that "the public's interest in knowing who is funding election-related speech suffices by itself to support contributor disclosure laws." App. Br. at 2-3. But the Supreme Court has never approved general regulation of any "election-related" speech, a phrase Appellants use no fewer than 30 times. A nonpartisan voter guide that lists all candidates for office is not the sort of "election-related speech" that courts have previously considered (which is perhaps why the State can point to no case upholding a regulation of the Act's scope and breadth). Moreover, even if regulation of "election-related speech" were a proper articulation of the governmental interest at issue here, it is no answer to DSF's objection: that the donor disclosure required by the State—the name and address of any contributor who has given as little as $100, in aggregate, over a period as long as four years—is insufficiently tailored to that interest.

The district court properly weighed the government's interest against the breadth of its demand, and found "'the relation of the information sought to the purposes of the Act… too remote.'" JA 29 (quoting *Buckley*, 424 U.S. at 79-80). That decision should be affirmed.

COUNTERSTATEMENT OF THE CASE

A. The Delaware Elections Disclosure Act

The Delaware Elections Disclosure Act ("the Act") went into effect on January 1, 2013. JA 9. The State claims that the Delaware General Assembly modeled the Act on the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which may in fact have been the Legislature's intent. App. Br. at 12. Nevertheless, the Act regulates a broader range of communications, and requires more invasive disclosure, than does its federal counterpart or any statute previously upheld by a federal appellate court.

i. BCRA and Electioneering Communications

BCRA sought to regulate a previously undefined form of speech, which it called an "electioneering communication." Congress "defined [the term] to encompass any 'broadcast, cable, or satellite communication' that…refers to a clearly identified candidate for Federal office" within 60 days of a general election, and which was "targeted to the relevant electorate." *McConnell*, 540 U.S. 93, 189-190 (2003) (quoting 2 U.S.C. § 434(f)(3)(A)(i)). BCRA imposed new reporting

requirements on speakers who made electioneering communications "aggregating in excess of $10,000 during any calendar year." 11 C.F.R. 104.20(b) (2014). In particular, corporate speakers must disclose "the name and address of each person who made a donation aggregating $1,000 or more to the corporation…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) (emphasis supplied). Thus, BCRA's disclosure regime only affects speakers who fund $10,000 in a narrowly defined category of broadcast ads, and only requires those speakers to report the names and addresses of those persons who give, proximate to an election,[1] over $1,000 expressly dedicated to financing these "electioneering communications," as that term of art is defined by BCRA.

ii. BCRA was designed to regulate sham issue advocacy

The federal courts' consideration of constitutional challenges to BCRA was "facilitated by the extensive record, which was over 100,000 pages long." *Citizens United*, 558 U.S. at 332 (citations and quotations omitted). That record proved that "hundreds of millions of dollars" were spent to fund "candidate advertisements masquerading as issue ads." App. Br. at 6; *McConnell*, 540 U.S. at 132. The record

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[1] In theory, the covered period could be as long as 23 months (assuming a contribution made January 1 of the previous year, and a communication made just before election day). In practice this is unlikely. Regardless, the scope of disclosure is narrower than the Act's, especially as federal senators serve a six-year term.

also demonstrated that these sham issue speakers "often had anodyne names that further disguised their sources of support." App. Br. at 7. The Supreme Court, upon reviewing that record, determined that "although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." *McConnell*, 540 U.S. at 193.

One "striking example" of the ill Congress sought to address is taken from a 1998 Senate investigation into campaign finance practices during the 1996 federal elections. *Id.* at 194. A group calling itself "Citizens for Reform" sponsored an ad that stated:

> Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order…but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

Id. (citations and quotations omitted).

"The notion that this advertisement was designed purely to discuss the issue of family values strains credulity." *Id.* The Yellowtail ad is the best example of the type of broadcast advertisements that Congress intended BRCA to regulate. Tr. of Or. Arg, Mot. for Prelim. Injunction at 50 (State's Counsel noting that the Yellowtail ad "was characterized…[as] an issue ad"). In fact, the same Senate Report which highlighted the Yellowtail ad also "discussed restrictions on [such] sham issue

advocacy by nonparty groups"—which Congress addressed "[a]fter an extensive investigation into these and other gaps in law" by passing BCRA's limited regulation of "sham" issue advocacy carried over the airwaves. *McConnell*, 540 U.S. at 131-132; App. Br. at 7.

iii. Electioneering Communications and the Delaware Elections Disclosure Act

The 2013 Delaware Elections Disclosure Act defines an electioneering communication for purposes of elections within the State. Under Delaware law, "'[e]lectioneering communication' means a communication by any individual or other person (other than a candidate committee or a political party) that [r]efers to a clearly identified candidate; and [i]s 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). Further, "'[e]lectioneering communication' does not include a communication distributed by a means other than by any communications media," which includes "television, radio, newspaper or other periodical, sign, Internet, mail or telephone." 15 *Del. C.* § 8002(10)(b)(1) and § 8002(7).

If a speaker spends $500 on such "electioneering communications" during an "election period," that speaker must file a third-party advertisement report with the State Commissioner of Elections. 15 *Del. C.* § 8031(a). This report must contain the

names and addresses of all individual contributors who gave $100 or more during the "election period." *Id.* For contributors who are not individuals, the report also must contain the name and address of "[a]ny person who, directly or otherwise, owns a legal or equitable interest of 50 percent or greater" in the contributor, and, if the non-individual contributor gives more than $1,200 during the "election period," the name and address of one "responsible party." 15 *Del. C.* § 8031(a)(4).

All such reports must be filed "within 24 hours after" an "expenditure is made," which "causes the aggregate amount for third-party advertisements made by such person to exceed $500 during an election period."[2] 15 *Del. C.* § 8031. Third-party advertisement reports are made public "immediately upon…filing." 15 *Del. C.* § 8032. The State Commissioner of Elections maintains a website where any user may access these reports.[3]

Delaware does not have a single "election period." 15 *Del. C.* § 8002(11). Different time periods apply to different candidates. But "[f]or a person who makes an expenditure" for an electioneering communication, "the election period shall begin and end at the same time as that candidate identified in such advertisement." 15 *Del C.* § 8002(11)(d). "For a candidate for reelection to an office to which the candidate was elected in the most recent election held therefor," the election period

[2] There is no regulatory guidance on when an expenditure for a static website—which is constantly available in the 60 days before a general election—"is made."
[3] *Available at*: https://cfrs.elections.delaware.gov/Public/ViewFiledReports.

begins "on January 1 immediately after the most recent such election, and end[s] on the December 31 immediately after the general election at which the candidate seeks reelection to the office." 15 *Del C.* § 8002(11)(a)(1). The term for a Delaware state senator is four years. DEL. CONST. art. II, § 2.

iv. Legislative Record of the Delaware Elections Disclosure Act

The State has provided a record of the Act's passage, as well as the types of communications that the Act sought to regulate. This record amply demonstrates that the Legislature, like Congress with regard to BCRA, intended to regulate "sham" issue advertisements.

The Act was introduced during a House Administration Committee hearing on May 2, 2012. Mr. Jack Polidori of the Delaware School Board Association distributed copies of anonymous campaign literature that had "been sent out in certain school districts from a PAC." JA 75. Ms. Nancy Willing, "representing the Civic [L]eague, noted her concern about anonymous spending in school board elections both in Red Clay and Christiana school districts." *Id.* Ms. Kathleen MacRae "stated [that *amicus*] Common Cause's support for this legislation" was due to its ability to "to disclose 'sham issue ads,' which mention candidates by name." *Id.*

Ms. Mimi Marziani, then of the Brennan Center for Justice, testified regarding the need to modernize Delaware's laws. As an example, she pointed to "colorful

mailings about several state legislative candidates" which "many Delawareans" received during the 2010 election. These mailing discussed "several state legislative candidates, largely attacking them for their stance on taxes." JA 115. Ms. Marziani praised the law's requirement that communications direct recipients to "a link where they can quickly and easily access the…spender's campaign finance report, with full information about a spender's identity, their spending decisions, and the source of their funds." JA 117. She also noted out-of-state examples, including "an advertising blitz" against a Wisconsin Supreme Court candidate and a Colorado election where Wal-Mart spent $170,000 "to defeat a restriction that would have prevented Wal-Mart from coming to town," but did so through the name of another. JA 117.

A few legislators asked questions, primarily to ensure that out-of-state spenders and those funding communications in local school board races would be covered by the law. JA 73-75. As far as the minutes demonstrate, no House member or witness raised concerns about the need to regulate nonpartisan voter guides.

In this litigation, the State introduced a declaration and exhibits from Mr. Erik Raser-Schramm, a long-time Democratic campaign operative and a current principal at Twelve Seven Group, a Delaware "organizing, strategy, and consulting firm." JA 133. Based upon his campaign experience, Mr. Raser-Schramm estimated that "[a]pproximately 80% of the spending in Delaware campaigns goes toward direct mail." JA 135, ¶ 19. He claimed that by 2008, "advertisements mentioning one or

more candidates but without an express appeal to vote for or against a candidate—had become a major phenomenon in Delaware elections." JA 135, ¶ 21.

Appended to this declaration were several anonymous direct mail ads that listed a P.O. Box in Newark, Delaware as their source. JA 140-153. Each ad criticized or praised a single candidate for office on the basis of legislative votes or proposals. *Id.* After criticizing or praising the candidate, each ad closed with a phrase like "Call Terry Schooley at [phone number] and tell her our working families can't afford more taxes," or "Call Bill Stritzinger at [phone number] and tell him you support his plan to get Delaware working again." JA 140, 143.

Mr. Raser-Schramm's declaration also appended a *Newark Post* story discussing a close local election where an out-of-state PAC spent $45,000 on "a series of direct mail pieces expressing support for Polly Sierer's plan to approve construction of a data center and power plant at the University of Delaware." JA 137 ¶ 39-40, JA 145. The PAC was called "I Like Polly's Plan PAC." JA 137 ¶ 39.

Neither Mr. Raser-Schramm's declaration nor the attached exhibits mention nonpartisan voter guides or a need to regulate issue speech conducted over the Internet.

The district court noted this record, pointing out "the difference between educating—providing information to the public—and 'influencing'—affecting the

conduct, thought or character of the public," and noting that "the Act was intended to control the latter form of communication, not the former." JA 31.

B. Delaware Strong Families and its proposed 2014 voter guide

Appellee Delaware Strong Families ("DSF") is a § 501(c)(3) nonprofit corporation. JA 41. As one part—but only one part—of its educational mission DSF produces nonpartisan voter guides. These guides do not promote or oppose any candidate at the expense of any other, and include all major party candidates.[4] JA 60. In 2014, DSF again wishes to produce such a guide, and plans to distribute it within 60 days of the 2014 general election. JA 43, ¶ 19. DSF will place the completed guide on its website, and will also distribute paper copies to Delawareans via the U.S. Postal Service. *Id*. Although the guide will include candidates for federal office, federal election law will not impose any reporting or disclosure obligations upon DSF.

Like many § 501(c)(3) organizations, DSF is affiliated with a § 501(c)(4) organization, the Delaware Family Policy Council ("DFPC"). This is not uncommon. Rosemary Fei, *A Unique and Useful Purpose*, NEW YORK TIMES, May 15, 2013 ("But Section 501(c)(4) has been around for more than 50 years…Charities

[4] The State claims that the 2012 voter guide "does not include all candidates for the covered races." JA 18-19. It appears that certain minor-party candidates, such as members of the Green and Independent Parties, were indeed not represented in the guide. To DSF's knowledge, however, all major-party candidates were included.

who find Section 501(c)(3)'s restrictions hamper their advocacy, often create a (c)(4) affiliate to pursue their lobbying agenda").[5] *See also, e.g., Donating to the American Civil Liberties Union and the ACLU Foundation: What is the Difference?*, ACLU Website.[6]

DSF and DFPC "maintain separate bank accounts and websites." JA 43, ¶ 17; *see* STATEMENT OF REASONS OF CHAIRMAN LEE E. GOODMAN AND COMMISSIONERS CAROLINE C. HUNTER AND MATTHEW S. PETERSON, IN THE MATTER OF CROSSROADS GRASSROOTS POLICY STRATEGIES (MUR 6396) at 12, n. 51 ("[t]he IRS countenances colocation and office sharing, employee sharing, and coordination between affiliated organizations so long as each organization maintains separate finances, funds permissible activities, and pays its fair share of overhead"). In order "to ensure that the § 501(c)(3)organization never subsidizes the § 501(c)(4) organization" DFPC pays for shared expenses, and DSF subsequently reimburses the (c)(4) affiliate for its share.[7] *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983).

DFPC, however, is not a party to this case, and DSF is mystified by the State's extensive focus upon its sister organization. DSF has not argued that DFPC's

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[5] *Available at*: http://www.nytimes.com/roomfordebate/2013/05/15/does-the-irs-scandal-prove-that-501c4s-should-be-eliminated/501c4s-serve-a-unique-and-useful-purpose-18.

[6] *Available at*: https://www.aclu.org/donating-american-civil-liberties-union-and-aclu-foundation-what-difference.

[7] This "chargeback" system was discussed at length below. Dkt. 32 at 3-4, n. 4.

scorecard, discussed *infra,* cannot be constitutionally regulated under the Act. Nor could it: counsel for DSF do not represent DFPC.

In 2012, DFPC sent a neutrally worded questionnaire to state and federal candidates, and used the responses to produce a legislative scorecard. JA 44, ¶ 21. Candidates had approximately four weeks to respond to the questionnaire, and at their option, could add up to 75 words explaining each answer. JA 44-45, ¶¶ 26, 28. If a candidate did not respond, public sources were used to determine his or her positions, where possible. DFPC gifted this information to DSF, which used it to produce a nonpartisan, non-advocacy voter guide. The guide noted that candidates' additional 75 word explanations—if any—were reproduced verbatim on DSF's website. JA 42, ¶ 26. Outside counsel vetted both this process and the content of the guide itself for compliance with the Internal Revenue Code. JA 45, ¶ 33.

DSF's guide listed state candidates' positions on a number of issues, including whether Delaware should enact a single-payer health care system, legalize gambling, reduce corporate taxes, make gender identity a protected class for purposes of Delaware antidiscrimination laws, and amend the State constitution to recognize only opposite-sex marriage.[8] JA 62. DSF's guide did not encourage readers to vote

[8] The State appears to take issue with the questionnaire's wording. App. Br. at 19; JA 124, ¶ 36-37. But it is difficult to believe that the State would permit DSF to publish its voter guide if it used alternative language. App. Br. at 19. The statute is not triggered by *how* organizations speak about candidates' positions on issues,

for or against any particular candidate, nor did it rate any particular candidate for their position on any issue. Indeed, the guide contained a message from DSF's president, Nicole Theis, expressing the institution's aim that the "Voter Guide will help you choose candidates who best represent *your* values," not the values of the organization. JA 61 (emphasis supplied). Mrs. Theis further emphasized that "this Voter Guide does not address a candidate's character, only their position on issues. It should not take the place of your effort to personally evaluate a candidate." *Id.*

In 2014, DSF will spend more than $500 to distribute this same voter guide, updated to apply to the upcoming election. JA 45, ¶ 30. Doing so will not constitute DSF's major purpose. As a result of producing and distributing the guide, DSF will be required to provide the State with the names and addresses of all of its contributors of $100 or more, in the aggregate, in the past four years. 15 *Del. C.* §§ 8031(a)(3), 8002(11). This information will be made public "immediately upon…filing," and will be posted on the State Commissioner of Elections' website. 15 *Del. C.* § 8032.

C. Proceedings below

DSF filed its complaint in the United States District Court for the District of Delaware on October 23, 2013. The State answered on December 23, 2013.

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simply that they *do so*. In any event, the language used on the face of DSF's voter guide in no way constitutes advocacy for or against candidates.

The State issued a number of discovery requests, including demands for DSF's 2010 voter guide, all solicitations DSF made for any contributions, and the dates, target audiences, and "number of people reached" in all voter guide distributions since 2010. *See* Pl.'s Responses and Objections to Defs.' Discovery Requests (Dkt. No. 21-1). DSF's counsel repeatedly met with counsel for the State, both telephonically and in person, in an effort reach agreement on the scope of discovery. Tr. of Oral Argument, Mot. for Protective Order at 35. After these attempts failed, DSF moved for a protective order and preliminary injunction on January 14, 2014. Shortly before the hearing on those motions, the State informed DSF that it intended to seek five depositions, but never specified whom it sought to depose. *Id.*

A scheduling conference took place on January 24, after which the court denied DSF's motion for a protective order "[g]iven the court's general practice to resolve discovery disputes informally, rather than through a motion practice." Dkt. 27 at 1, n. 1. The court simultaneously ordered briefing on a single question: "if the scope of the Act is broad enough to include plaintiff's proposed voter guide, is it unconstitutional[?]" Dkt. 27 at 2. The court scheduled oral argument for March 18, 2014, with a discovery conference immediately to follow. *Id*.

At the hearing, DSF argued that "[w]hat matters is whether you do or do not mention a candidate in any way and spend $500 and put it on the Internet…that has

never been upheld by any Court in the United States and that is our as applied challenge." Tr. of Oral Argument on Mot. for Prelim. Injunction at 62. Counsel for the State disagreed, and promised to supply contrary citations. *Id*. at 62-63.

On March 24, 2014, the State filed supplemental briefing, largely relying upon *Center for Individual Freedom v. Tennant*, 706 F.3d 270 (4th Cir. 2013). Dkt. 33. In response, DSF noted that *Tennant* was a facial ruling in which the plaintiffs did not intend to make a voter guide, but instead intended to produce ads that were the functional equivalent of express advocacy. Pl. Rsp. To Def. Supp. Filing, Dkt. 34 at 2. DSF also pointed out that the law at issue in *Tennant* had a much higher disclosure threshold than Delaware's, and did not regulate Internet communications. *Id.* at 3. The district court agreed, further noting that *Tennant* invalidated a provision of the statute regulating electioneering communications in periodicals because the state "had failed to demonstrate a substantial relation between its interest in informing the electorate" and the statute's breadth. JA 27.

On March 31, 2014, the district court issued its opinion, which contains a thorough discussion of *Buckley*, *McConnell*, and *Citizens United*, as well as relevant opinions from the Courts of Appeals. The district court concluded that "there is no case that purports to address disclosure requirements with the breadth attributed to the Act." JA 27. Applying exacting scrutiny, it found that Delaware had improperly tailored its law, as it captured genuine issue speech without providing a

constitutional justification for doing so. While recognizing that "the First Amendment does not erect a rigid barrier between express advocacy and so-called issue advocacy," the court ruled that "the less a communicator advocates an election result, the less interest the government should have in disclosure when weighed against the important First Amendment rights at stake." JA 30. It recognized that while "it is never an easy task for the legislature to draw lines when it comes to restricting constitutional rights…the Act is so 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." JA 33. Thus, plainly, "the relation between the personal information collected to the primary purpose of the Act is too tenuous to pass constitutional muster." *Id*.

The court did not immediately enter the injunction—noting that DSF and the State had yet to agree on discovery—and scheduled a telephonic discovery conference for the next day, April 1. JA 32-33. During that conference, the State's counsel promised to "articulate what additional discovery we think would be helpful in the case and try and do so in a way that's targeted at the issues that we've discussed." JA 230-31. Counsel then sought expansive discovery related to voter guide distribution, including "the criteria by which" DSF selected voter guide recipients, DFPC Facebook and Twitter posts, DFPC voter scorecards for 2010 and

2012, DSF's 2010 voter guide (which DSF had stated it would not replicate), and "[a]ll documents publicly distributed by DSF since January 1, 2012, that refer to a candidate for elective office." Def. [Proposed] Second Set of Discovery Req's. to Pl. (Dkt. 37-1) at 1-4. In arguing for this expansive discovery, the State's counsel argued that "who [] these voter guides [are] distributed to and how are they distributed…in a very objective way goes to the question of whether it is neutral speech or not." He proceeded to analogize this to a voter guide focused on candidates' views on gun control: "[i]f it is only distributed at the NRA meeting or to members of the NRA, that is a pretty good objective indication that is not neutral speech and is not a neutral voter guide." JA at 208-209.

Thus, these discovery requests were premised—at least in part—upon the clearly problematic notion that a communication's neutrality depends upon the audience to which it is spoken. On April 8, having reviewed the State's new discovery requests and arguments in support, the court reiterated that "overbroad statutes lead to overbroad discovery." JA 237, *see FEC v. Wisc. Right to Life,* 551 U.S. 449, 465 (2007) ("*WRTL II*") (controlling opinion) (First Amendment challenges to campaign finance statutes ought to "entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation"). That same day, the court entered its injunction.

SUMMARY OF THE ARGUMENT

Because compelled disclosure of an organization's financial supporters is a "significant encroachment" on freedom of association, the Supreme Court has stated that such demands "must survive exacting scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). This "rigorous standard" requires that the State demonstrate a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Wisc. Right to Life v. Barland*, Nos. 12-2915, 12-3046, 12-3158, 2014 U.S. App. LEXIS 9015 at 101 (7th Cir. May 14, 2014) (citing *McCutcheon*, 134 S. Ct. at 1456-57); *Citizens United v. FEC*, 558 U.S. at 366-367 (citing *Buckley*, 424 U.S. at 64) (quotations omitted in original).

The State argues that the Delaware Elections Disclosure Act ("the Act") was designed to serve the same interests as a 2002 federal law, the Bipartisan Campaign Reform Act ("BCRA"). BCRA, like the Act, was intended to regulate anonymous sources of funding for "candidate advertisements masquerading as issue ads." *McConnell*, 540 U.S. 93, 132 (2003) (quotation marks and citation omitted). The federal response to these "sham" issue ads was a tailored regime that limited itself to broadcast communications and compelled the disclosure of only those donors giving directly for the purpose of airing these "electioneering communications."

But Delaware's Act is not BCRA. Delaware regulates anything mailed through the U.S. post or placed on the Internet. Delaware requires speakers to disclose *all* donors who gave as little as $100, in aggregate, over a four-year period.

After a thorough review of federal jurisprudence on campaign finance, the district court appropriately looked to the D.C. Circuit and Supreme Court rulings in *Buckley v. Valeo*. JA 28-30. The *Buckley* Supreme Court opinion carefully construed a federal statute to reach only donors who either (1) gave to organizations whose major purpose was advocating directly for or against candidates or (2) gave directly to fund a communication advocating for or against a candidate. *Buckley*, 424 U.S. at 79-80. Similarly, the *Buckley* D.C. Circuit struck down a provision which predicated disclosure of general donors to organizations that merely discussed the voting records of candidates for office. *Buckley v. Valeo*, 519 U.S. 821, 878 (D.C. Cir. 1975) (*en banc*). This ruling was never appealed to the Supreme Court. *Buckley*, 424 U.S. at 11, n. 7.

On appeal, the Attorney General and State Commissioner of Elections ("the State") have asserted a right to require disclosure for any "election-related" speech. But this contention stretches the case law to the breaking point, and would require *Buckley* to be overruled. The cases upon which the State relies, including *McConnell v. FEC*, 540 U.S. 93 (2003) and *Citizens United v. FEC*, 558 U.S. 310 (2010), have only required donor disclosure for candidate advocacy—not educational speech

about candidates and issues. As the district court observed, "there is no case that purports to address disclosure requirements with the breadth attributed to the Act." JA 27.

Applying exacting scrutiny, the district court found that the Act was improperly tailored because it "is so broadly worded as to include within the scope of its disclosure requirements virtually every communication…no matter how indirect and unrelated it is to the electoral process…includ[ing] DSF's proposed voter guide." JA 31. Accordingly, "the relation between the personal information collected to the primary purpose of the Act is too tenuous to pass constitutional muster." JA 32.

This ruling was correct. It ought to be upheld, and the State's novel and unbounded theory of its regulatory authority rebuffed.

ARGUMENT

I. Standard of Review

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Def. Council*, 555 U.S. 7, 20 (2008) (citations omitted). The Third Circuit "review[s] an order granting a preliminary injunction for abuse of discretion, the factual finding for clear error, and

the determinations of questions of law *de novo*." *Bennington Foods LLC v. St. Croix Renaissance Group, LLP*, 528 F.3d 176, 178 (3d Cir. 2008). This Court "review[s] a district court's rulings regarding the scope and conduct of discovery for abuse of discretion." *Mirarachi v. Seneca Specialty Ins. Co.*, No. 13-2347, 2014 U.S. App. LEXIS 8016 at 5 (3d Cir. Apr. 29, 2014) (citing *Petrucelli v. Bohringer & Ratzinger, GMBH*, 46 F.3d 1298, 1310 (3d Cir. 1995)).

II. The district court correctly found that DSF has established a likelihood of success on the merits.

A. Because compelled disclosure infringes upon the freedom of association, disclosure laws are subject to exacting scrutiny.

The Supreme Court has long held that "'[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association…." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). It is equally true that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association..." *Id.* at 462 (citation omitted).

When government power is used to compel an organization to reveal its financial supporters, it is not an incidental violation of these freedoms. Rather, as seventy years of jurisprudence teaches, compelled disclosure imposes "a significant encroachment upon personal liberty." *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (collecting cases); *Buckley,* 424 U.S. at 66 ("compelled disclosure has the

potential for substantially infringing the exercise of First Amendment rights”). There is a “vital relationship between freedom to associate and privacy in one’s associations.” *NAACP*, 357 U.S. at 462.

To protect against unconstitutional infringement of associational freedom, the Supreme Court has required that government efforts to compel disclosure survive exacting scrutiny. Under exacting scrutiny, it is not enough that the government make a “mere showing of some legitimate governmental interest.” *Buckley*, 424 U.S. at 64. When “‘protected rights of political association’” are involved, a state’s disclosure laws may only “‘be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.’” *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 25) (additional citations omitted). The State asserts that exacting scrutiny is “a more lenient constitutional standard.” App. Br. at 28. But exacting scrutiny is “not a loose form of judicial review,” but rather a “rigorous standard” which disclosure laws may not easily survive. *Wisc. Right to Life v. Barland*, 2014 U.S. App. LEXIS 9015 at 101 (citing *McCutcheon*, 134 S. Ct. at 1456-57); *see also Buckley*, 424 U.S. at 29.

i. The Supreme Court has required governments to demonstrate that their disclosure statutes are closely drawn to a sufficiently important interest.

In the 1950s and 1960s, the Supreme Court heard a series of donor disclosure cases when various states sought the membership lists of the NAACP and its chapter organizations. The Court repeatedly found that the First Amendment prevented the states from obtaining this information. These cases laid the foundation for the modern understanding of exacting scrutiny and the constitutional mandate that governments closely tailor disclosure statutes to a properly pled government interest.

Freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference" such as disclosure requirements (and attendant sanctions for failure to disclose). *Bates*, 361 U.S. at 523. Accordingly, the civil rights era Court prohibited states from obtaining personal data on donors where those governments failed to "demonstrate the compelling and subordinating governmental interest essential to support direct inquiry" into those records. *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963); *see also Bates*, 361 U.S. at 525 (finding "no relevant correlation between" the government interest asserted "and the compulsory disclosure and publication of the membership lists").

ii. In the seminal *Buckley v. Valeo* case, the Supreme Court applied exacting scrutiny to protect organizations engaged in issue speech from burdensome disclosure.

Buckley v. Valeo is the starting point for all campaign finance jurisprudence in the modern era. JA 11 ("The court starts its review of [campaign finance precedent]…with the decision in *Buckley*"); *McCutcheon*, 134 S. Ct. at 1444 (applying *Buckley* to challenge to aggregate contribution limits). In *Buckley*, the Court examined the interplay between government efforts to compel disclosure of campaign contributor data and the First Amendment's robust protections of speech and association. *Buckley* concerned provisions of the Federal Election Campaign Act ("FECA") which required "political committees" to disclose contributor data to the federal government for publication—but a "political committee" was defined merely as an association making contributions or expenditures above a threshold amount.[9] *Id.* at 79.

The *Buckley* Court began its disclosure analysis by noting that "[s]ince *NAACP v. Alabama* we have required that the subordinating interests of the State *must* survive exacting scrutiny." *Id.* at 64 (emphasis supplied), JA 12 (citing same). *Buckley* "insist[ed] that there be a relevant correlation or substantial relation between the governmental interest and the information to be disclosed." *Id.*

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[9] That threshold was $1000 when *Buckley* was heard in 1975, 424 U.S. at 62, or over $4400 today after adjustment for inflation—a figure nearly nine times that set by Delaware.

Under exacting scrutiny, the Court determined that the definition of "political committee" was vague because it "could be interpreted to reach groups engaged purely in issue discussion." *Id.* at 79. Accordingly, in order to make a "proper fit" between the statute as written and the governmental interests FECA implicated, the Court promulgated the so-called "major purpose" test. *Id*. The "major purpose" test is straightforward: the government 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*. In this context, as the district court correctly noted, such an organization's expenditures "are, by definition, campaign related." *Id*., *see also* JA 14-15 (quoting *Buckley*, 424 U.S. at 79-80) ("'This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate'").

In the context of an organization *without* "the major purpose" of supporting or opposing a candidate, which is the case here, the *Buckley* 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.

Buckley, 424 U.S. 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*., n. 108, incorporating by reference *id*. at 44, n. 52. The Court declared that these instances have a "substantial connection with the governmental interests" in disclosure. *Id*. at 81.

iii. *McConnell v. FEC* did not diminish the First Amendment's robust protection of genuine issue speech.

In 2002, Congress passed BCRA, the first major expansion of federal political speech regulation since the 1974 FECA amendments. Like FECA, BCRA immediately faced constitutional challenges. *McConnell*, 540 U.S. at 132 (noting eleven such challenges to BCRA's enactment).

While BCRA provided for many regulatory changes, the "relevant analysis to the issues at bar includes the Court's review of" BCRA's definition of an "electioneering communication." JA 16. The law defined such a communication as "any 'broadcast, cable, or satellite communication' that…'refers to a clearly identified candidate for Federal office'" which is made within 60 days of a general election or 30 days of a primary election and "'is targeted to the relevant electorate.'" *McConnell*, 540 U.S. at 189-190 (quoting 2 U.S.C. § 434(f)(3)(A)(i)); JA 16 (citing same). Under BCRA, "targeted to the relevant electorate" means that "the communication can be received by 50,000 or more persons" in the relevant jurisdiction. 2 U.S.C. § 434(f)(3)(C).

This new statutory creature was a response to the rise of "sham issue advocacy," or "candidate advertisements masquerading as issue ads." *McConnell*, 540 U.S. at 132 (quotations and citations omitted). Explicit in the *McConnell* opinion is a belief that "the vast majority of ads" which would be regulated as electioneering communications "clearly had" an "electioneering purpose." *Id.* at 206. This is likely because, before the passage of BCRA, campaigns began running broadcast advertisements which, rather than "urg[ing] viewers to 'vote against Jane Doe,'" simply "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.* at 127. "Moreover, the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* The Court, appropriately enough, referred to such ads as "so-called" or "sham issue advocacy," as these "issue" ads' true purpose was to advocate for the election of some candidates at the expense of others. *Id.* at 126, 132, 185.

This electioneering communication definition survived a facial challenge. *Id.* at 194; *see also McConnell v. FEC*, 251 F. Supp. 2d 176, 573 (D.D.C. 2003) (Kollar-Kotelly, J.) *aff'd in part, rev'd in part*, 540 U.S. 93 ("the definition of electioneering communication [was]…narrowly tailored to *only* the communication media that was problematic") (emphasis supplied). But *McConnell* did not provide a blank check to would-be regulators to force disclosure of all financial supporters of *any* issue

communication—to do so would have been to overrule *Buckley*. Instead, the Court took care to make certain that genuine issue speakers could still raise as-applied challenges to BCRA's electioneering communications regime. *McConnell*, 540 U.S. at 206, n. 88 ("We assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads"); *id.* at 207 (noting the "heavy burden" involved in bringing a successful facial challenge); *see also* JA 18 (discussing same).

iv. *FEC v. Wisconsin Right to Life* further protects genuine issue speakers discussing candidates shortly before an election.

Four years after *McConnell*, a nonprofit corporation, Wisconsin Right to Life ("WRTL"), challenged the presumption that ads aired shortly before an election are generally the functional equivalent of express advocacy. *WRTL II*, 551 U.S. at 458.[10] WRTL successfully challenged BCRA's ban on corporate-sponsored electioneering communications as applied to broadcast communications that were genuine issue speech, yet still mentioned a candidate for office. *Id*. at 482; JA 19.

WRTL II authoritatively set out the difference between issue advocacy and "the functional equivalent" of express advocacy. *Id*. at 461. In so doing, the Court refused to "adopt a test…turning on the speaker's intent to affect an election," as

[10]*Wisc. Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), turned on whether *McConnell* foreclosed as-applied challenges to BCRA's corporate electioneering communication ban. A unanimous Court determined that it had not. *Id.* at 411-12.

"analyzing the question in terms 'of intent and effect'…would afford 'no security for free discussion.'" *Id.* at 467-68 (Roberts, C.J., controlling op.) (quoting *Buckley*, 424 U.S at 43); JA 20 (discussing same). Therefore, the Court concluded that the proper analysis must "objective[ly] focus[] on the substance of the communication." *Id*. at 469 (citing *Buckley*, 424 U.S. at 43-44). To be the functional equivalent of express advocacy, a communication—within its four corners—must be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id*. at 470.

v. Applying exacting scrutiny, *Citizens United* upheld a limited disclosure provision as applied to a specific film and "pejorative" advertisements for that film.

Eventually, in *Citizens United*, the Court struck down the ban on corporate and union independent expenditures. 558 U.S. at 372. In so doing, it upheld BCRA's electioneering communication disclosure and disclaimer requirements. *Id.* The particular facts and analysis of that case, however, matter.

There, a nonprofit corporation produced a film called *Hillary: The Movie* ("*Hillary*") and several advertisements to promote the film. *Id*. at 319-20. Key to the Court's resolution of the case was whether *Hillary* and its supporting advertisements were express advocacy or its functional equivalent. *Id*. at 324-25. "Applying an objective test to determine whether *Hillary* was the functional equivalent of express advocacy, the Court found [applying *WRTL II*] that there was 'no reasonable

interpretation of *Hillary* other than as an appeal to vote against Senator Clinton.'"[11] JA 22 (citing *Citizens United*, 558 U.S. at 326). Turning to the advertisements, it held that "[t]he ads fall within BCRA's definition of an 'electioneering communication'" because "[t]hey referred to then-Senator Clinton by name shortly before a primary and contained *pejorative references* to her candidacy." *Id*. at 368 (emphasis supplied).

One ad began with a "kind word about Hillary Clinton," and after complimenting Mrs. Clinton's fashion sense, announced that *Hillary: The Movie* was "a movie about everything else." *Citizens United v. FEC*, 530 F. Supp. 2d 274, 276, n. 3 (D.D.C. 2008). Another ad claimed Senator Clinton was "the closest thing we have in America to [a] European socialist." *Id.*, n. 4. These "pejorative"

[11] *Hillary* was expressly held to be express advocacy. But there is some dispute as to whether the *ads* for *Hillary* were found to be express advocacy or its functional equivalent. The Seventh Circuit believes they were. *See Wisc. Right to Life v. Barland*, 2014 U.S. App. LEXIS at 49 ("[t]he Court began by holding that Hillary and the ads promoting it were the functional equivalent of express advocacy under *Wisconsin Right to Life II* and thus fell within BCRA's ban on corporate electioneering communications." (citing *Citizens United* at 324-25)). The State argues that this is not so, as both parties agreed the ads were not express advocacy. App. Br. at 48. Of course, *Citizens United* also did not believe *Hillary* to be express advocacy, so the State is likely reading far too much into its briefing. All this does little to undermine the main point in *Barland*, which is that the Supreme Court does not seem to have given the question much thought. In any event, the ads promoting *Hillary* were mere commercial speech, which is not entitled to the same level of First Amendment protection as political issue speech.

advertisements were electioneering communications. *Citizens United*, 558 U.S. at 368.

But *Citizens United* had virtually no discussion of BCRA's disclosure provisions, except for a "relatively terse" section at the end of Justice Kennedy's majority opinion. JA 29; *See Citizens United*, 558 U.S. at 368-71; *Barland*, 2014 U.S. App. LEXIS at 52 (observing that "this part of the [*Citizens United*] opinion is quite brief").

As discussed *supra*, unlike the Act, BCRA is not a system of generalized donor disclosure. Rather, "any corporation spending more than $10,000 in a calendar year to produce or air electioneering communications must file a report with the FEC that includes—among other things—the names and addresses of anyone who contributed $1,000 or more in aggregate to the corporation *for the purpose of furthering electioneering communications*" made "since the first day of the preceding calendar year." *Citizens United*, 530 F. Supp. 2d at 280 (emphasis supplied) (citations omitted); 11 C.F.R. § 104.20(c)(9).

Pursuant to *NAACP* and *Buckley*, the Court "subjected these [disclosure] requirements to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-367. "[W]ithout much comment," the Court determined that "the informational interest justifie[d]" application of BCRA's disclosure mandate to

Hillary and its ads. *Barland*, 2014 U.S. App. LEXIS at 54; *Citizens United* at 368-369, 370. While "the Court declined to apply the express-advocacy limitation to the federal disclosure…requirements for electioneering communications…[t]his was dicta. The Court had already concluded that *Hillary* and the ads promoting it were the equivalent of express advocacy." *Barland*, 2014 U.S. App. LEXIS at 87 (citations omitted). Indeed,

> [l]ifting the express-advocacy limitation more broadly would have been a major departure from *Buckley* and is not likely to have been left implicit. *Citizens United* approved event-driven disclosure for federal electioneering communications—large broadcast ad buys close to an election. In that specific and narrow context, the Court declined to enforce *Buckley*'s express-advocacy limitation, but it went no further than that.

Id. at 89.

While "we pay due homage to the Supreme Court's well-considered dicta as pharoi [Roman lighthouses] that guide our rulings," it is far from clear that this dictum is so well-considered.[12] *IFC Interconsult, AG v. Safeguard Int'l Partners*, 438 F.3d 298, 311 (3d Cir. 2006); JA 29 (noting the "relative[] terse[ness]" of *Citizens United*'s disclosure discussion); *see also McCutcheon*, 134 S. Ct. at 1445

[12] Indeed, the disclosure regime was only briefly raised at oral argument, when Chief Justice Roberts pushed back against the FEC's contention that disclosure only applied to organizations which could demonstrate they were victims of reprisals. Tr. of Or. Argument at 50-52, *Citizens United v. FEC*, No. 08-205 (March 24, 2009).

(declining to be bound by "one paragraph" in the *Buckley* Court's "139-page opinion").

In any event, even taking the Court's dicta as law, the Act goes much farther than BCRA. As noted previously, BCRA's sponsors marshaled a lengthy legislative record to demonstrate the harm posed by sham issue ads. The Act's sponsors failed to do anything of the kind regarding nonpartisan voter guides, especially those distributed via the Internet or U.S. Postal Service, and especially when the guides include an appropriate disclaimer to inform readers of their authorship.

Moreover, the Act captures far more speech than BCRA—evidenced alone by the fact that, despite mentioning federal candidates, DSF's voter guide could not be regulated as an electioneering communication under federal law. Finally, the Act requires DSF to turn over the names and addresses of contributors going back as far as four years—not the single calendar year BCRA contemplates. The chart below illustrates these differences.

	BCRA	**The Act**
Covered Media	Limited to "broadcast, cable, or satellite communication."2 U.S.C. § 434(f)(3)(A)(i).	Covers non-broadcast media such as signs, mail, and telephone calls. 15 *Del. C.* § 8002(10)(b)(1) (exempting anything that is *not* "communications media," which is defined as "television, radio, newspaper or other periodical, sign,

		Internet, mail or telephone" by 15 *Del. C.* § 8002(7)).
Targeting limitation	Only advertisements that "can be received by 50,000 or more persons" in the relevant jurisdiction. 2 U.S.C. § 434(f)(3)(C).	No such limitation. If the "audience…includes [any] members of the electorate for the office sought," then it is a covered communication. 15 *Del. C.* § 8002(1)(a)(2).
Triggering Threshold	$10,000 in the aggregate (over one year). 2 U.S.C. § 434(f)(1).	Only $500. 15 *Del. C.* § 8031(a).
Disclosure Period	Preceding calendar year. 11 C.F.R. 104.20(c)(9).	Up to four years. 15 *Del. C.* §§ 8031(a)(3) (report disclosure per election period), 8002(11)(d) (defining election period for third party advertisements).
Donor Disclosure Threshold for Corporate Speakers	Names and addresses of contributors who give $1,000 or more, in the aggregate, where such contributions are "made for the purpose of furthering electioneering communications." 2 U.S.C. §§ 434(f)(2)(E) and (F); 11 C.F.R. § 104.20(c)(9).	Names and addresses of all contributors to the organization giving, in aggregate, $100 during the relevant disclosure period. 15 *Del. C.* § 8031(a)(2).
Legislative Record	Documented history of abuse via "sham issue ads;" legislative response	No record documenting intention to cover nonpartisan voter guides; some history of attempting to

	tailored to address that abuse. *See McConnell*, 540 U.S at 126-29 (describing "sham issue ads" and avoidance of using express advocacy); *id*. at 130 (citing Senate reports detailing problem).	resolve "sham issue ads," but no tailoring analysis for voter guides and other issue advocacy. No record analysis justifying regulation of Internet communications. *See* Delaware Elections Disclosure Act, 78 Del. Laws c. 400 Preamble (2012) (H.B. 300); App. Br. at 13 (citing same).

At most, *Citizens United* stands for the proposition that states may demand disclosure of the direct funders of communications that are not the functional equivalent of express advocacy. *See* 558 U.S. at 366-370. But it does *not* automatically follow that the State may then regulate all speech about candidates near election time merely by asserting some governmental interest, nor that it may demand all donors to an organization regardless of their connection to the communication in question. This would excise the word "exacting" from "exacting scrutiny."

vi. Exacting scrutiny requires the government to justify its regulation. A Plaintiff need not demonstrate threats, harassment or reprisal to avoid compulsory, generalized donor disclosure as a condition of engaging in issue speech.

Under exacting scrutiny, the burden is on "the State [to] demonstrate[] a sufficiently important interest and employ[ment of a] means closely drawn to avoid

unnecessary abridgement of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444 (citing *Buckley*, 424 U.S. at 25).

The Supreme Court has consistently denied government efforts to compel disclosure even when "state scrutiny," as opposed to general publication, was at issue. *NAACP*, 357 U.S. at 466. This is contrary to the State's suggestion that challengers of compelled disclosure laws must demonstrate "a reasonable probability" of "threats, harassment, or reprisals," App. Br. at 37 (internal citations omitted). Instead, the civil rights era Court also struck down untailored disclosure laws with no evidence that speakers would suffer threats, harassments, or reprisals if their information were publicized. *See*, *e.g.*, *Talley v. California*, 362 U.S. 60, 69 (Clark, J., dissenting) ("[t]he record is barren of any claim, much less proof, that [Talley] will suffer any injury whatever…") (citations and quotations omitted).

The district court noted that *Buckley* declined to exempt minor parties and independent PACs from disclosure unless those entities faced 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.'" JA 13 (quoting *Buckley*, 424 U.S. at 74). But *Buckley* did not require a showing of threats, harassments, or reprisals as a general matter. Rather, it merely provided that such evidence may be necessary to evade the disclosure laws *as limited* to parties or PACs—entities with a major purpose of express advocacy.

See Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101 (1982). This accorded with case law from the *NAACP* era. The Supreme Court has never made such a demonstration a precondition to successfully demonstrating the unconstitutionality of a disclosure law as applied to an issue speaker. *Talley*, 360 U.S. at 67.

vii. The district court's reliance on the *en banc* D.C. Circuit opinion in *Buckley v. Valeo* was sound.

Forty years ago, the *en banc* D.C. Circuit rejected the federal government's effort, in the name of campaign finance disclosure, "to embrace virtually all political communications and communicators" within its regulatory purview. JA 28. Yet, the State argues that the district court "erroneously relied on a 40-year-old court of appeals decision." App. Br. at 50. Of course, there is no serious understanding of judicial review which vitiates reliance on an opinion merely because of its age. Nor is there any judicial canon which prevents a court from relying on out-of-circuit precedent when such precedent is directly on point.

Only one provision from the *Buckley* plaintiffs' comprehensive challenge to FECA never made its way to the Supreme Court. This is because that provision was facially invalidated and "[n]o appeal [w]as…taken from that holding." *Buckley*, 424 U.S. at 11 n. 7.

The offending provision was 2 U.S.C. § 437a, which provided that:

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

Id. at 869-870 (citing 2 U.S.C. § 437a (repealed by Pub. L. 94-283, § 105 (May 11, 1976)) (emphasis supplied).

"Dissecting the statutory language," it was clear that the law applied to "'any material 'published or broadcast[] to the public'" which named a candidate and discussed the candidate's record or public positions. The D.C. Circuit case in question is *Buckley v. Valeo*, 519 F.2d 821, 870 (D.C. Cir. 1975) (*en banc*). In invalidating the law, the *en banc* Court observed with substantial understatement that such a regulatory scope "is potentially expansive." *Buckley*, 519 F.2d at 870.

The *en banc* Court of Appeals noted that although the New York Civil Liberties Union was "forbidden by the constitution and policies of its parent body from endorsing or opposing any candidate for public office," the "organization also publicizes…the civil liberties voting records, positions[,] and actions of elected public officials, some of whom are candidates for federal office." 519 F.2d at 871. Under FECA, the New York Civil Liberties Union's public discussions of civil

liberties would suddenly trigger disclosure requirements, illustrating the provision's far-reaching effects. Judge Edward Tamm, writing separately, said he could "hardly imagine a more sweeping abridgement of [F]irst [A]mendment associational rights. Section 437a creates a situation whereby a group contributes to the political dialog in this country only at the severest cost to their associational liberties. I can conceive of no governmental interest that requires such sweeping disclosure..." *Buckley*, 519 F.2d at 914 (Tamm, J., concurring in part, dissenting in part).

Thus, FECA § 437a explicitly sought the same scope of government power that the State claims here: namely, the right to regulate any speech, no matter how incidental to advocacy, if it merely mentions where a candidate stands on "any public issue." *Id.* at 869. Yet, the State contests the application of the 1975 *Buckley* decision to this case on three grounds. We will take each in turn.

First, the State objects that § 437a "suffered from the same sort of unclear drafting that [the] Supreme Court's *Buckley* opinion identified," specifically the statute's provision capturing any communication "designed to influence the electorate." App. Br. at 51. (citation and quotation marks omitted).

But, in *Buckley,* the *en banc* Court was concerned that § 437a—were it as "easily understood and objectively determinable" as the Delaware Act—would still cover all speech about candidates "by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of

public importance." App. Br. at 51 (citations and quotations omitted); *Buckley*, 519 F.2d at 870. It is true that the Court invalidated § 437a on vagueness grounds. But this vagueness was fatal precisely *because* it created the potential for a reading of the law whereby virtually any communication discussing a candidate's record would be covered by FECA and subject to invasive reporting requirements. That Delaware has eliminated the vagueness by *explicitly* reaching such communications is no answer to the D.C. Circuit's reasoning.

Second, the State correctly observes that § 437a "was not limited to expenditures proximate to an election." App. Br. at 52. Thus, the State maintains that the *en banc* Court's decision has been vitiated by "[t]he Supreme Court's later holding that the public has an interest 'in knowing who is speaking about a candidate shortly before an election.'" App. Br. at 52 (quoting *Citizens United*, 558 U.S. at 369). But that public interest is necessarily limited to those communications which constitute advocacy for or against a candidate, as the film and ads in *Citizens United* were found to be. 558 U.S. at 325, 368. By contrast, the *en banc* Court noted that imposing disclosure requirements upon communicators for "tak[ing] public stands on public issues" was impermissible under the First Amendment because "the nexus" between such speech and any cognizable governmental interest "may be far more tenuous." *Buckley*, 519 F.2d at 872.

Regardless of the time period, "issue discussions unwedded to the cause of a particular candidate…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." *Buckley*, 519 F.2d at 872. In fact, the *en banc* Court anticipated that much speech covered by § 437a would, in fact, occur close in time to an election, given that "[p]ublic discussion of public issues *which also are campaign issues* readily and often unavoidably draws in candidates and their positions, their voting records[,] and other official conduct." *Id.* at 875-876 (emphasis supplied).

Finally, the State suggests that the burden imposed upon organizations regulated under § 437a was much greater than under the Act. But this is hardly clear. First, although the plain language of § 437a required regulated entities to file reports with the FEC "as if such person were a political committee," those reports simply had to "set forth the source of funds used *in carrying out* any" activity which discussed a candidate for office. § 437a (emphasis supplied) This language is easily consistent with a construction limiting disclosure to persons earmarking funds for such communications—a construction which would anticipate the *Buckley* Court's decision to limit disclosure by non-major purpose entities to only those persons

giving directly for a communication, and a distinction that still exists in federal law.[13]

In any event, the district court did not treat the D.C. Circuit's *Buckley* opinion as controlling precedent that rigidly dictates the outcome of this case. Rather, given the State's failure to identify a single case upholding a statute as broad as the Act, and the similarity of the provisions considered, the district court looked to *Buckley* for guidance after the case identified by the State, *Center for Individual Freedom v. Tennant*, 706 F.3d 270 (4th Cir. 2013), turned out to be unhelpful. The decision below is the result not of unthinking reliance on authority but on the district court's mandate to apply exacting scrutiny to the facts before it: a nonpartisan, non-advocacy communication that would trigger generalized donor disclosure reaching back four years. Given the options, the district court correctly decided that *Buckley* better fit those facts.

B. Exacting scrutiny requires an appropriate fit between the government's asserted interest and the disclosure demanded.

The Act creates a new form of regulated speech under Delaware law, the "electioneering communication." 15 *Del. C.* § 8002(10). But despite borrowing a

[13] Furthermore, DSF has always maintained that the Act did impose the functional equivalent political committee status against organizations which merely mention a candidate. JA 48-49, ¶ 49 (comparing electioneering communication disclosure under the Act to Delaware's PAC requirements). This remains its position.

term of art from BCRA, Delaware's electioneering communications regime is broader and more invasive than its federal counterpart.

With both the Act and BCRA, the relevant concern was "sham issue advocacy" which patently advocated for and against particular candidates without explicitly exhorting the listener (and, under federal law it is always a listener,) to vote in a particular way. The State argues that the "Act serves the same informational interest as BCRA: 'providing voters with relevant information about where political campaign money comes from and how it is spent, so that voters can make informed choices in elections.'" App. Br. at 32-33 (quoting Act's Preamble). But "governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of the ordinance." *Bates*, 361 U.S. at 525.

In district court, the State appended a series of declarations and exhibits to their opposition brief on the preliminary injunction motion. This addendum purported to demonstrate the legislative record justifying Delaware's expansive law. But the State's examples of advertisements prompting the passage of the Act merely suggest that Delaware was interested in regulating the same type of "sham" issue advocacy that confronted Congress in 2002. JA 139-151. The State's examples are all "candidate advertisements masquerading as issue ads." *McConnell*, 540 U.S. at 132 (quotation marks and citation omitted), App. Br. at 13 ("In 2010, for example,

mailings by groups that hid their sources of funding were used to attack various candidates for the state legislature for their positions on taxes.") No member of the legislature stated a belief that the law ought to cover nonpartisan voter guides, and at least one member of the legislature has reported that he would not have voted for it if he believed that it would. Lynn R. Parks, *Group Asks Court to Put Campaign Finance Law on Hold,* SEAFORD MORNING STAR, Mar. 27-Apr. 2, 2014, at 2 (stating that state Sen. Robert Venables "said that if he had the vote to do over again, he would not support [the Act]… [DSF] should have the right to say how [candidates] have voted on issues") (final brackets in original).

Indeed, most of the State's examples simply demonstrate the State's interest in placing disclaimers on electioneering communications—perhaps the best way for a voter to quickly "'evaluate and measure the statements made by'" a third party. App. Br. at 15 (quoting H.B. 300, Preamble); JA 139-151 (providing copies of sham issue advocacy only signed "P.O. Box 1180"). But DSF does not challenge the State's disclaimer laws. JA 41-59.

i. The State overstates its interest in DSF's contributor information.

The State appears to believe that any speech that is "election-related" may serve as the trigger for public donor disclosure. *See* App. Br. at 3 ("the public's interest in knowing who funds election-related communications turns… on whether the communication is election-related"). Given that Delaware's legislative record

evidences no discussion of issue speech like DSF's voter guide, it may be forced to reply upon this expansive understanding of a governmental interest. But doing so has led the State to stretch the case law beyond what it can reasonably bear.

For example, at oral argument, counsel for the State embraced a remarkable reading of *McConnell* and *Citizens United*, asserting that nonpartisan voter guides are accorded *less* constitutional protection than broadcast political ads. Tr. of Oral Argument on Mot. for Prelim. Injunction at 52. The State reiterates that argument on appeal. App. Br. at 35 ("It is hard to see what could be more directly 'election-related' than a 'Voter Guide'—the point of which, by definition, is to guide citizens in casting their votes").

The State's reliance on an interest in "election-related spending" comes solely from language in the *Citizens United* opinion which—explicitly applying *Buckley*—affirmed that "disclosure could be justified based on a governmental interest" in publicizing "the sources of election-related spending." *Citizens United*, 558 U.S. at 369. This passage explicitly cites to page 66 of the *Buckley* opinion, which anchors the informational interest in the electorate's need to know the identity of a candidate's supporters. *Buckley*, 424 U.S. at 66-67. As *Buckley*[14]*, Mass. Citizens for*

[14] 424 U.S. at 80 ("To insure that the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section in the same way we construed the terms of § 608(e)—to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.")

Life. v. FEC[15], and *WRTL II*[16] make abundantly clear, the Court has consistently limited "election related" speech to express advocacy of the election or defeat of a candidate, or its functional equivalent. *Buckley* specifically rejected the notion that what the State here calls "election-related" speech must be disclosed. Rather, *Buckley* quite clearly limited disclosure to organizations with a primary purpose of electing candidates, and "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80. At most, *McConnell* expands this to include a defined category of speech—"electioneering communications"—that is much narrower than what the State here defines as "electioneering communications" or now terms "election-related" speech.[17]

Nor can the State find solace in *Citizens United.* By referencing "election-related speech" the *Citizens United* Court could only have been discussing the examples of such speech in front of it. That is, speech which favors—or opposes—

[15] 478 U.S. 238, 249 (1986) (Brennan, J., plurality op.) ("*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons.")
[16] 551 U.S. 469-470. ("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.")
[17] As the district court noted, under the State's theory of the case, "[i]t will likely be the First Amendment rights of non-political contributors that will end up being violated by the intrusive collection of personal information…information that is unrelated to the regulation of *abusive* political activity." JA 32, n. 24.

a candidate, as *Hillary: The Movie* or its associated "pejorative" advertisements did. *Citizens United*, 558 U.S. at 325, 369; *see also Barland*, 2014 U.S. App. LEXIS at 49 (characterizing *Citizens United* as "holding that *Hillary* and the ads promoting it were the functional equivalent of express advocacy").

Quite aside from the lack of clear legal provenance, the State's protestations of an expanded informational interest simply collapse upon cursory review. For example, the State claims that "[t]he public's interest in knowing who is behind election-related speech…extends, and disclosure laws may therefore apply, to the 'entire range of 'electioneering communications', including those that 'merely mention a federal candidate.'" App. Br. at 42 (quoting *McConnell*, 540 U.S. at 94 and *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 551-552 (4th Cir. 2012)). But that is sophistry. As used by the Supreme Court, the "entire range of electioneering communications" is quite obviously the entire range of "electioneering communications" *as defined by BCRA*. But BCRA and the Act are two very different statutes. Reliance upon BCRA merely because both Delaware and the United States regulate a class of speech called "electioneering communications" is akin to a captain of the United States Army seeking to take command of a U.S. Navy vessel on the grounds that both services recognize the rank of "captain."

Stuck with a legislative record that makes no mention of communications remotely like DSF's, the State has chosen to create a new rule of its own: the public

interest extends to any communication that mentions a candidate and has *any* connection to an election. App. Br. at 42 ("The public's interest in knowing who is behind election-related speech is not limited to candidate-endorsed messages, attack ads, or some similar subset of election-related communications"). Under the State's reading of the available precedent, if a civic group merely distributed *sample ballots* a week before an election, the State would immediately obtain access to four years of contributor data from that organization and be able to place it on the Internet. That is not the law.[18]

ii. The State has failed to tailor its demands to its interest.

DSF concedes, as it always has, that the informational interest, properly understood, is a sufficiently important governmental interest. *Citizens United*, 558 U.S. at 369; *see also* App. Br. at 33. "But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency." *McCullen v. Coakley.* No. 12-1168, 2014 U.S. LEXIS 4499 at 37 (U.S. June 26, 2014) (citations, quotations, and brackets omitted). The Act fails to demonstrate this tailoring requirement, [19] as it is not "closely drawn

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[18] "[T]he 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." JA 30.

[19] For instance, the State makes no attempt to justify demanding the names and addresses of all donors giving a total over $100 over an "election period" of up to four years.

to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25. Issue speech, such as DSF's voter guide, simply does not "lie[] at the heart of the public's interest in knowing who funds election-related speech." App. Br. at 24. If it were, then government power could be employed to reveal the financiers of virtually any non-partisan get-out-the-vote efforts that make even passing references to candidates. *Compare* DSF's 2012 Voter Guide ("The stakes couldn't be higher this election") *with P. Diddy Announces Campaign to Make Voting "Sexy,"* MTV.COM (July 20, 2004), http://www.mtv.com/chooseorlose/voter101/news.jhtml ?id=1489561.

The State misses this point, and makes much of the *Citizens United* Court's description of the ads for *Hillary*: *The Movie* as being for a "commercial transaction." But this is no rationale supporting forced disclosure for *political issue* speakers. The State's argument is simply backwards. *See Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 223 (1989) ("the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office") (citations and quotation marks omitted). It ought to be undisputed that, during the 2008 Democratic primaries, speech about how Hillary Clinton and Barack Obama voted on funding for the war in Iraq came with more constitutional protection than an appeal to buy a documentary DVD about Hillary Clinton or, for that matter, dishwasher detergent. *United States v. Williams*, 553 U.S. 285, 298

(2008) (describing the "First Amendment status of commercial speech" as "less privileged"); *see also Cent. Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 562-563 (1980) ("[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression").

Having failed to anticipate that some communications might both mention candidates and be genuine issue speech subject to full First Amendment protection, the State is left to argue that any speech that is "election-related" may serve as the trigger for public disclosure of an organization's donors, and that this is sufficient tailoring. But that is overbroad. The relation between the information demanded "is too tenuous to pass constitutional muster." JA 32.

C. The district court did not enact a novel constitutional test; it simply required the State to tailor its statute.

After the district court determined that *McConnell* and *Citizens United* did not control the outcome of this case, it conducted a proper exacting scrutiny analysis and found the State's tailoring deficient. JA 30 (noting that the Act's language was comprehensive, "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").

The State has presented no case where *any* federal court found a comparable disclosure regime constitutional. Even after the supplemental briefing on the subject

discussed *supra*, the district court determined that "there is no case that purports to address disclosure requirements with the breadth attributed to the Act. JA 27. "[M]any of the cases identified by" the State "relate to statutes that only regulate express advocacy or its functional equivalent (not the mere mention of a candidate), while other cases…involve statutes that have exemptions from the reporting requirements, such as those exempting § 501(c)(3) activity from disclosure or those exempting such publications as voter guides….one cannot ignore the context of the decision[s]"). JA 27-28.

Yet, the State believes that the court's opinion creates a new constitutional test "never before seen in the Federal Reporter or U.S Reports"—a constitutional exemption from disclosure for "presumably neutral" communications by "presumably neutral" groups. App. Br. at 38. This argument is a red herring, and represents yet another attempt by the State to shift *its* burden to defend a constitutionally suspect law to a would-be speaker.[20] The district court's discussion

[20] The State makes much of the district court relying upon "presumed" facts. App. Br. at 54. The State goes on to lament that it "promptly sought, but [was] denied, discovery to test the truth of these 'presumed' facts." *Id.* But this initial 'presumption' was merely an invitation for the State to articulate a theory that did *not* depend upon the subjective views of speakers, and to request appropriate discovery premised on such a theory. The State was given two opportunities to do so, in separate telephonic hearings, but instead continued to insist upon a theory of neutrality premised upon invasive and irrelevant discovery. JA 197, JA 235. Having realized that the State's litigation position was—like its statute—overbroad, the district court denied these discovery requests. JA 237. At that point, the

of presumed neutrality was not an articulation of a novel constitutional standard, but merely a reference to the Court's ruling that "the Act is so 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." JA 31; *see also id.* at 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 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").[21]

By noting that DSF and its communication were "presumed neutral," the district court was merely discussing a familiar touchstone of campaign finance law: the need to protect genuine issue speech. *McConnell*, 540 U.S. at 206, n. 88 (holding that BCRA's regime might not apply to genuine issue speakers). In other words, while the State may have an interest in *some* speech, it may not call *all* speech about candidates "electioneering communications" and then demand extensive disclosure

"presumption" in its memorandum opinion was extinguished in favor of a finding that DSF's Guide is, indeed, 'neutral'—that is, issue speech.

[21] *See also* JA 122 (Sen. Sorenson asserting that the Act is permissible because any "[r]efer[ence] to a candidate by name ties the advertisement to the upcoming election and creates a positive or negative association in voters' minds.")

going back multiple years. Looking at the communication and the statute, the district court simply found that the law was, as applied to DSF, a poor fit under exacting scrutiny.

Nor is the district court's ruling unworkable. Genuine issue speech does not present metaphysical questions—as Chief Justice Roberts amply proved in his controlling opinion in *WRTL II*, 551 U.S. at 469-470 (discussing touchstones which would demonstrate if a broadcast communication is "genuine issue" speech in the context of federal electioneering communications).[22] As discussed *supra*, the court afforded the State ample opportunity to test the presumption that DSF's speech was genuine issue speech—but ultimately concluded that the statute's overbreadth would require overbroad discovery. *WRTL II*, 551 U.S. at 469 (challenges to campaign finance statutes "must entail minimal *if any*, discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation") (emphasis supplied).

The district court's decision that no record evidence beyond the guide itself was required to find that the voter guide was neutral—or, more precisely, was genuine issue speech—similarly comports with the Chief Justice's dictate that courts

[22] Indeed, the *WRTL II* decision did manage to devise a test for genuine issue speech, 551 U.S. at 469-470, and the FEC has managed to implement it. See 72 Fed. Reg. 72899 (Dec. 26, 2007) (FEC final rule on electioneering communications, applying the *WRTL II* decision).

ought to review communications purely on their face. *WRTL II*, 551 U.S. at 469-470. DSF's communication speaks for itself, contrary to the State's attempts to require the type of intents-and-effects analysis prohibited by the Supreme Court. *Id.*

The State also errs in presuming that the district court's discussion of § 501(c)(3) requires a mandatory carve-out for such groups.[23] App. Br. at 42-43. This is not the district court's opinion, which was grounded in the fact that the Act simply covered speech, such as voter guides by § 501(c)(3) organizations, which BCRA and other challenged statutes did not. JA 30 ("It would appear as though other legislative efforts have translated this guidance into exempting from disclosure those *communicators* generally considered to be non-political (*e.g.* § 501(c)(3) groups) and/or those *communications* generally considered to be non-political (*e.g.* voter guides)") (emphasis in original).[24]

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[23] The State correctly notes that § 501(c)(3) organizations may legally involve themselves in "election-related speech." App. Br. at 42, n. 19. As discussed *supra*, "election-related speech" is *not* "electoral *advocacy* speech."

[24] A number of states *have* passed properly tailored electioneering communication laws. Some states do exempt § 501(c)(3) groups from electioneering communication laws, *see, e.g.* 10 ILL. COMP. STAT. 5/9-1:14(b)(4), some regimes only obtain information on the direct funders of an electioneering communications, *see* 11 C.F.R. § 104.20(c)(9), and some exempt voter guides entirely, *see* W. VA. CODE § 3-8-1a(12)(B)(viii). These are simply some acceptable methods of tailoring the State's interest in disclosure of funding for candidate advocacy while protecting genuine issue speech.

In other words, and to summarize: no similar statute has been challenged, and consequently the State can point to no similar judicial ruling.

III. The district court correctly concluded that DSF established the non-merits factors for an injunction to issue.

In determining that DSF had established the non-merits factors for a preliminary injunction to issue, the district court appropriately applied Third Circuit precedent.

A. DSF established a likelihood of irreparable First Amendment harm.

"It 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) (citation and quotations omitted). Such "injunctive relief [i]s 'clearly appropriate' where First Amendment interests" are "either threatened or in fact being impaired at the time [injunctive] relief was sought." *Stilp v. Contino*, 613 F.3d 405, 409 n.4 (3d Cir. 2010) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

The State argues that First Amendment interests have neither been threatened nor impaired by the Act: "[t]his is not a case where denying a preliminary injunction would require DSF to run the risk of criminal prosecution in order to speak." App. Br. at 57 (citation omitted). Yet, the Act would force DSF—or presumably one of its officers—to run the risk of criminal prosecution if DSF did not provide the State with four years' worth of personal data on its donors as a *condition* of speaking. 15

Del. C. § 8043(c) ("'[a]ny reporting party who…fails to file" a report "shall be guilty of a class A misdemeanor. For purposes of this subchapter, 'reporting party' means any candidate, *treasurer or other person required to file* reports under this chapter") (emphasis supplied). Under Delaware law, the sentence for a class A misdemeanor "may include up to 1 year incarceration…and such fine up to $2,300, restitution or other conditions as the court deems appropriate." 11 *Del. C.* § 4206(a).

Thus, DSF must either comply with a law which constitutes a "significant encroachment[] on First Amendment rights" of its members, or force its officers to risk incarceration and a substantial monetary penalty. *Buckley*, 424 U.S. at 64; *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) ("[t]he threat of sanctions may deter the[] exercise" of First Amendment freedoms "almost as potently as the actual application of sanctions.") (citations omitted). *That* is why DSF cannot "speak while complying with the Act during this litigation." App. Br. at 57.

Furthermore, as a recent Ninth Circuit case demonstrated, once a state government publicizes an organization's donor information on the Internet, their privacy is irreversibly violated. *ProtectMarriage.com – Yes on 8 v. Bowen*, No. 11-17884, 2014 U.S. App. LEXIS 9312 at 16-18 (9th Cir. October 11, 2013). If DSF complied with the statute, and later prevailed in seeking permanent relief, it could never undo the disclosure of its contributor data. *See id.* (finding that ProtectMarriage.com's donor information had been so "vast[ly] disseminat[ed]" by

third parties that the court could "no longer provide Appellants with effective relief").

B. DSF established that the public interest and the balance of the equities support the entry of an injunction.

"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, 597 (1957) (Black, J., dissenting). And "enforcement of an unconstitutional law vindicates no public interest." *K.A. v. Pocono Mt. Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013).Thus, the district court's injunction, which protects DSF's First Amendment freedoms, unquestionably furthers this interest.

Yet the State contends that because the Attorney General and the State Commissioner of Elections are "public officers sued in their official capacities, defendants' interest in public disclosure," and enforcement of the Act against DSF, *is* the public's interest." App. Br. at 59 (emphasis in original) (quotations and citations omitted). In the context of a motion for preliminary injunction, however, "the Government does not have an interest in the enforcement of an unconstitutional law" and "the public interest [i]s not served by the enforcement of an unconstitutional law." *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) (quotations and citations omitted); *see also id.* at 251, n. 11 (citing *ACLU v. Reno*, 217 F.3d 162, 180-81 (3d Cir. 2000) (observing same)).

The balance of harms also weighs in favor of upholding the issuance of the injunction. Even setting aside the grave First Amendment harms, "[o]ne 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 Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 729 (3d Cir. 2004) (quotation marksand citations omitted). Upholding the preliminary injunction permits DSF to engage in issue speech unquestionably unregulated by Delaware before January 1, 2013; indeed, speech that DSF freely engaged in the autumn of 2012. Reversal would entirely prevent DSF from being able to speak out in this way, at a minimum, for the rest of the year, and through the end of the election.

CONCLUSION

For the foregoing reasons, the district court's entry of a preliminary injunction should be affirmed.

Dated: July 2, 2014

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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Appellee's Opposition Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, the word processing system used to prepare the brief, in 14 point Times New Roman font.

Dated: July 2, 2014 s/ Allen Dickerson
Allen Dickerson

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PURSUANT TO THIRD CIRCUIT RULE 31.1(c)

Pursuant to Third Circuit Rule 31.1(c), the undersigned hereby certifies that the text in the electronic copy of the Brief for Plaintiff-Appellee is identical to the text in the paper copies. The undersigned also certifies that the electronic copy of the Brief for Defendants-Appellants was scanned for viruses by AVG 2014, version 2014.0.4716, and no viruses were detected.

Dated: July 2, 2014

s/ Allen Dickerson
Allen Dickerson

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that all of the attorneys whose names on Appellee's Opposition Brief are members of the bar of this court.

Dated: July 2, 2014 s/ Allen Dickerson
Allen Dickerson

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2014, I electronically filed the foregoing using the Court's CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 2, 2014

s/ Allen Dickerson
Allen Dickerson