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.)

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered a preliminary injunction against Appellants on April 8, 2014. JA4. Appellants timely filed a notice of appeal on April 10, 2014. JA1. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT 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 Delaware Strong Families' General Election Values Voter Guide because the Voter Guide is a "presumably neutral" communication published by a "presumably neutral" organization "by reason of [Delaware Strong Families'] 501(c)(3) status." JA31-32.

2. Whether the district court erred in holding that Appellee Delaware Strong Families established the non-merits factors required for issuance of a preliminary injunction. JA32.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this court. Defendants-Appellants are aware of no other case or proceeding related to this case.

INTRODUCTION

The Delaware General Assembly, following the lead of Congress and the Supreme Court, carefully modeled the campaign finance disclosure law challenged in this case on a federal statute that has twice been upheld by the Supreme Court against First Amendment challenges—on its face in *McConnell v. FEC*, 540 U.S. 93 (2003), and as applied in *Citizens United v. FEC*, 558 U.S. 310 (2010). In nonetheless holding that the Delaware statute was likely unconstitutional—and granting a preliminary injunction barring its enforcement as applied to Plaintiff-Appellee Delaware Strong Families' proposed election-related communication—the district court ignored both the holdings and the reasoning of those Supreme Court precedents; failed to address the federal statute that supplied the pattern for Delaware's; effectively required "narrow tailoring" of the Delaware law, even though the Supreme Court has said no such tailoring is necessary; and invented a novel constitutional requirement that campaign finance disclosure laws may not reach "presumably neutral communications" by "presumably neutral communicators," even though the Supreme Court has rejected efforts to erect similar limitations. These manifold legal errors warrant reversal.

The Delaware Elections Disclosure Act is constitutional as applied to Delaware Strong Families' proposed "General Election Values Voter Guide." The Supreme Court has repeatedly held that the public's interest in knowing who is

funding election-related speech suffices by itself to support contributor disclosure laws. *Citizens United* and *McConnell* upheld application of a federal disclosure law to "the entire range" of covered communications, even though the statute requires disclosure with respect to communications that mention a candidate close to an election without regard to whether they clearly take sides or purport to remain neutral. *McConnell*, 540 U.S. at 196. Indeed, the Court held that, under the "easily understood and objectively determinable" criteria used by that statute (which are similar to those in Delaware's statute), the statute may encompass even communications that "only pertain to a commercial transaction." *Id*. at 194; *Citizens United*, 558 U.S. at 369. The district court's insistence that the First Amendment mandates an exemption from disclosure for purportedly "neutral" election-related communications by "presumptively neutral communicators" flies in the face of these Supreme Court holdings. They make plain that the strength of the public's interest in knowing who funds election-related communications turns not on how starkly or subtly the communication's point of view is expressed, but rather on whether the communication is election-related. The General Election Values Voter guide at issue in this as-applied challenge by definition lies at the core of election-related speech. The district court's order should be reversed.

STATEMENT OF THE CASE

A. The Delaware Elections Disclosure Act

1. Federal developments that influenced the Delaware Act

In drafting the Delaware Elections Disclosure Act ("Disclosure Act"), the Delaware General Assembly relied both on the extensive federal experience with campaign finance disclosure requirements and on recent Supreme Court guidance about the constitutionality of such requirements. The lessons learned from these sources are important to understanding the provisions of the Disclosure Act at issue in this case.

Federal laws requiring organizations making election-related communications to disclose their contributors have existed for over a century.[1] Congress laid the foundations for the current federal disclosure regime in the Federal Election Campaign Act of 1971 ("FECA"), Pub. L. No. 92-225, 86 Stat. 3, and the 1974 amendments to FECA, Pub. L. No. 93-443, 88 Stat. 1263, which "replaced all prior disclosure laws." *Buckley v. Valeo,* 424 U.S. 1, 62 (1976). With respect to independent spending, FECA required "political committees"—

[1] The first federal disclosure law, enacted in 1910, required organizations seeking "to influence the results of congressional elections in two or more States to report all contributions … and to identify contributors" giving $100 or more. *United States v. Automobile Workers,* 352 U.S. 567, 575-576 (1957). In the following decades, Congress broadened this requirement several times, and the Supreme Court upheld it against constitutional challenge. *See Burroughs v. United States,* 290 U.S. 534 (1934) (upholding successor statute); *Buckley v. Valeo,* 424 U.S. 1, 61 (1976) (describing history).

defined as groups that received contributions or made expenditures of over $1,000 "'for the purpose of … influencing' the nomination or election of any person to federal office"—to file regular reports disclosing information about their receipts and disbursements, including the identities of contributors giving $100 or more. *Id.* at 63. It also required every person not a political committee making "expenditures" of over $100 "'for the purpose of … influencing'" a covered election to disclose those expenditures. *Id.* at 74-75.

The Supreme Court upheld both provisions in *Buckley v. Valeo*, concluding that the "disclosure requirements … directly serve[d] substantial governmental interests." *Id*. at 68. Noting the long history of federal disclosure laws, the Court explained that disclosure requirements "provide[] the electorate with information" about election-related spending, deter corruption, and help the government enforce other campaign finance laws. *Id.* at 66-68. "Unlike … overall limitations on contributions and expenditures, … disclosure requirements impose no ceiling on campaign-related activities." *Id.* at 64. Thus, the Court characterized disclosure requirements as "in most applications … the least restrictive means of curbing the evils of campaign ignorance and corruption." *Id.* at 68.

Concerned that the vagueness of the statutory phrase "for the purpose of … influencing" raised constitutional concerns, the Court adopted limiting constructions of the disclosure provisions in FECA that used that phrase. First, it interpreted

"political committee"—defined as organizations expending a certain amount "for the purpose of … influencing" an election— to encompass only organizations "the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. Second, with respect to non-major-purpose groups, it interpreted the term "expenditure"—defined as expenditures made "for the purpose of … influencing" an election—"to reach only … communications that expressly advocate the election or defeat of a clearly identified candidate." *Id*. at 80 (footnote omitted). Express advocacy, the Court explained, entailed words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. On that basis, the Court upheld both provisions.

The decades after *Buckley* revealed that FECA's disclosure requirements were insufficient to achieve the important governmental purposes described and approved by the Court. As construed, FECA required disclosure only when communications used the "magic words" of express advocacy or were made by groups with the "major purpose" of electing a candidate. Those engaging in election-related speech could therefore evade disclosure obligations merely by avoiding those "magic words" and by speaking through groups without the requisite "major purpose." Corporations, labor unions, and other organizations accordingly spent hundreds of millions of dollars to fund "issue speech" "without disclosing the identity of, or any other information about, their sponsors." *McConnell v. FEC*, 540 U.S. 93, 126

(2003). Although these "issue" communications contained no express advocacy, the Court found the conclusion that they "were specifically intended to affect election results … confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id*. at 127.

Groups putting out such "issue" communications, the Court determined, exploited FECA's loopholes to "conceal [the] identity" of their funders. *McConnell*, 540 U.S. at 128. These groups often had anodyne names that further disguised their sources of support. "'Citizens for Better Medicare,' for instance, was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers." *Id*. As the Supreme Court explained, "[s]ome of the actors behind these groups frankly acknowledged that 'in some places it's much more effective to run an ad by the "Coalition to Make Our Voices Heard" than it is to say paid for by "the men and women of the AFL–CIO."'" *Id.* at 128 n.23

After an extensive investigation into these and other gaps in the law, Congress sought to "correct the flaws" in FECA, *McConnell*, 540 U.S. at 194, by enacting the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, also known as the McCain-Feingold law. BCRA "coin[ed] a new term, 'electioneering communications,' to replace the narrowing construction of FECA's disclosure provisions adopted by [the Supreme] Court in

Buckley." *McConnell*, 540 U.S. at 189. To avoid the vagueness concerns that prompted *Buckley*'s narrowing construction, Congress defined "electioneering communication" by reference to clear, objective criteria. An "electioneering communication" is one that (1) "refers to a clearly identified candidate for Federal office," (2) is made within 60 days of a general election or 30 days of a primary, (3) is made through specified media, and (4) is "targeted to the relevant electorate." *Id.* at 189-190. BCRA requires groups that spend more than $10,000 on such electioneering communications to disclose the identity of any contributors giving $1,000 or more. *Id.*

The Supreme Court has twice upheld BCRA's contributor disclosure provisions against First Amendment challenges, facially in *McConnell*, 540 U.S. at 126, and as-applied in *Citizens United v. FEC*, 558 U.S. 310 (2010). These decisions would later significantly inform the Delaware General Assembly's decision to enact the Disclosure Act. JA72-74, 116, 117-119 & nn.17, 21.

The "major premise" of the facial challenge in *McConnell*—and a principal argument raised by Delaware Strong Families in this case—was "that *Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy," confining disclosure requirements to speech that expressly advocated the "'election or defeat of a candidate.'" *McConnell*, 540 U.S. at 190. BCRA crossed this line, the *McConnell* plaintiffs argued, because it reaches

communications that merely "'refer[]'" to a candidate. Br. for Appellants McConnell et al. 44-45, *McConnell*, 540 U.S. 93 (No. 02-1674). But the Supreme Court flatly "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy" in the disclosure context. *McConnell*, 540 U.S. at 194. It explained that *Buckley*'s "express advocacy limitation … was the product of statutory interpretation rather than a constitutional command." *Id.* at 191-192. Moreover, because BCRA's definition of "electioneering communication" was "both easily understood and objectively determinable," the *McConnell* Court concluded that the vagueness concern "that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy" was "simply inapposite" in the context of BCRA. *Id.* at 194.

The Court ultimately concluded that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements … apply in full to BCRA." *McConnell*, 540 U.S. at 196. BCRA serves these interests, the Court held, because it requires speakers engaging in election-related speech "to reveal their identities so that the public is able to identify the source of the funding behind" their speech. *Id.* (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003) (per curiam)). The Court explained:

> Plaintiffs never satisfactorily answer the question of how "uninhibited, robust, and wide-open" speech can occur when organizations hide themselves from the scrutiny of the voting public. … Plaintiffs' argument for striking down BCRA's disclosure

> provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.

Id. at 197 (quoting *McConnell*, 251 F. Supp. 2d at 237). The Court accordingly concluded that "*Buckley* amply supports application of [BCRA's] disclosure requirements to the entire range of 'electioneering communications.'" *Id.* at 196.

Just four years ago, the Supreme Court upheld BCRA's contributor disclosure provisions again, this time against an as-applied challenge, in *Citizens United v. FEC*, 558 U.S. 310 (2010). Citizens United's challenge relied principally on *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), which addressed BCRA's limits on *expenditures*, not its *disclosure* requirements. *Id.* at 457. In *WRTL*, the Court noted *McConnell*'s dictum that, with respect to BCRA's *expenditure restrictions*, "the interests [the Court] had found to 'justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.'" *Id.* at 456. It accordingly concluded that BCRA's prohibition on corporations' using money from their general treasuries to fund electioneering communications could constitutionally apply only to speech that was "express advocacy or its functional equivalent," and not to "'issue advocacy[]' that mentions a candidate for federal office." *Id*. at 456, 481.

Citizens United, citing *WRTL*'s holding that BCRA's *expenditure* restrictions could only reach "express advocacy and its functional equivalent,"

sought "to import a similar distinction into BCRA's *disclosure* requirements." *Citizens United*, 558 U.S. at 368-369 (emphasis added).[2] The Supreme Court's response was clear: "We reject this contention." *Id.* at 369. The Court explained that the constitutional limitations it had established with respect to expenditure limits did not apply to disclosure requirements:

> In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three Justices who would have found § 441b [BCRA's ban on paying for electioneering communications with corporate general treasury funds] to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself.

Id. at 369 (citations omitted). The Court thus "reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Id.*

Citizens United contended specifically that BCRA was unconstitutional as applied to its advertisements promoting a documentary about then-candidate Hillary Clinton. Br. for Appellant 51, *Citizens United*, 558 U.S. 310 (No. 08-205). The group argued that, because the ads took no position on any candidates' suitability for office, they were not the equivalent of express advocacy and

[2] Citizens United's proposed standard differed from that rejected in *McConnell* in that it extended not just to "express advocacy" but also to "its functional equivalent." *Id.*

disclosing the group's funders "would not provide [the public] with information relevant to the electoral process." *Id.* at 15, 51. The Supreme Court expressly rejected that argument, holding that "the public has an interest in knowing who is speaking about a candidate shortly before an election," "[e]ven if the ads only pertain to a commercial transaction." *Citizens United*, 558 U.S. at 369. "The First Amendment protects political speech," the Court concluded, "and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 371.

2. The Disclosure Act's text and legislative history

The Delaware General Assembly enacted the Disclosure Act to address problems like those *McConnell* described as motivating adoption of BCRA's disclosure requirements. Until 2013, Delaware law required those engaging in election-related speech to disclose their contributors only if their ads "expressly advocate[d] the election or defeat of a clearly identified candidate." 15 Del. C. §§ 8002(10), 8030, 8031 (2012). As in the federal system before BCRA, groups could avoid disclosure by simply crafting their messages to avoid the "magic words" of express advocacy.

The General Assembly concluded that this led to "a proliferation of advertisements that [we]re distributed during the campaign season … and intended to influence elections, but [we]re not required to be reported under existing law." Delaware Elections Disclosure Act, 78 Del. Laws c. 400 (2012) (H.B. 300), Preamble.[3] 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. JA115. The General Assembly also heard complaints about problems with similar mailings in school board elections. JA73, 75. One witness observed that, under the existing law, it was "almost impossible for voters to understand[] where [the] money comes from and who's trying to influence [the public's] votes." JA75.[4]

The General Assembly also heard evidence from other states confirming the value of disclosing funding sources for "issue" speech. A witness at the House hearing on the Disclosure Act, for example, described a group called "Littleton

[3] This concern was borne out during the 2012 mayoral election in Wilmington, when "Citizens for a Secure Community" issued ads promoting one candidate's policy proposals and attacking another's. Journalists uncovered that the "Citizens" were actually political operatives based in Texas, Nevada, and Ohio—but their funding sources were never discovered. *See* JA108-109.

[4] Disclosure of funding from out-of-state sources was a particular concern. One witness testified that in 2010, "outside groups—many funded by out-of-state interests—spent over $1.7 million dollars to influence the results of the state's US Senate race." JA115. A representative of the governor noted that "the influx of anonymous outside spending could violate Delaware's tradition of direct and honest political dialogue." JA73.

Neighbors Voting No" that spent $170,000 to oppose a ballot initiative that would have blocked Wal-Mart from operating in Littleton, Colorado. JA117. Disclosure reports later revealed that Wal-Mart was the group's only funder. *Id.*

The Delaware General Assembly sought to combat these problems by adopting disclosure requirements modeled closely on BCRA's. In doing so, the General Assembly relied explicitly on the Supreme Court's guidance in *McConnell* and *Citizens United*. *See* JA72-74, 116, 117-119 & nn.17, 21. The Disclosure Act does not ban any speech; instead, it "provid[es] 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." H.B. 300, Preamble. Like BCRA, the Disclosure Act requires disclosure when an organization expends more than a specified amount on "electioneering communications." Heeding the *Buckley* Court's admonition about vagueness, the Disclosure Act defines "electioneering communication" by reference to criteria that are "easily understood and objectively determinable." *McConnell*, 540 U.S. at 103. Again like BCRA, the Disclosure Act defines the term to encompass communications that (i) refer to a clearly identified candidate, (ii) are publicly distributed by certain media within 30 days of a primary or 60 days of a general election, and (iii) are targeted to the relevant electorate. 15 Del. C. § 8002(11).

The Disclosure Act requires organizations expending more than $500 on "third-party advertising"—a term that encompasses electioneering communications as well as "independent expenditures" that "expressly advocate[] the election or defeat of a clearly identified candidate"—to file a "third-party advertisement report" with the Commissioner of Elections. *Id.* §§ 8002(13), (27), 8031(a).[5] The report must include the names and addresses of those to whom the organization has paid more than $100 for third-party advertisements; those contributing more than $100 to the organization during the election period; and, if a contributor is a corporation, any person owning more than a 50% interest in the contributor. *Id.* § 8031(a). Such reports must be filed shortly after the expenditure, and the Commissioner of Elections must then make the reports available to the public "immediately upon their filing." *Id.* § 8032. These measures, the Delaware General Assembly concluded, would enable Delaware "voters to evaluate and measure the statements made by and interests of … third parties in a manner that is prompt and informative." H.B. 300, Preamble.

The Act includes a number of provisions designed to ensure that it reaches no more broadly than necessary to protect the public's interest in knowing who funds election-related speech. The Act limits disclosure to speech made 60 days

[5] The Disclosure Act's application to "independent expenditures" is not at issue in this case. *See* JA55-58. The following discussion is accordingly confined to electioneering communications.

before a general election or 30 days before a primary, a time period the Supreme Court found to suggest that communications are "specifically intended to affect election results." *McConnell*, 540 U.S. at 127. The Act further exempts several categories of speech, including "membership communication[s]," "communication[s] appearing in a news article, editorial, opinion, or commentary," communications relating to candidate debates or forums, and communications distributed by hand. 15 Del. C. §§ 8002(7), (10)(b).

The Act's disclosure thresholds are tailored to account for the particular circumstances of Delaware politics, as ample evidence in the record before the district court reflected. Because Delaware lacks its own major-network television market, and because neighboring television markets are prohibitively expensive, television advertising is rare in Delaware races, as is radio advertising. Instead, direct mail is the predominant form of political advertising, accounting for about 80 percent of spending. JA120, ¶39-42; JA134-135, ¶¶15-20. Candidates therefore need not expend large sums to reach large numbers of Delaware voters. For example, less than $500—indeed, even as little as $150—can purchase enough "robo-calls" to reach every household in a Delaware House district. JA120, ¶43-47; JA137, ¶37. The Disclosure Act accounts for these differences in setting the threshold levels for disclosure and in defining covered media.

B. Delaware Strong Families, The Delaware Family Policy Council, And Their Voter Guides

Plaintiff-Appellee Delaware Strong Families Inc. ("DSF") is a nonprofit 501(c)(3) corporation. JA42, ¶10. Its mission is to "promote Biblical worldview values, resources and programs, and educate and empower citizens to stand strong for those values in all arenas." JA43, ¶18.

In 2011, DSF reported just short of $60,000 in expenditures. JA79. More than 99%—all but about $400—of DSF's expenditures consisted of payments to a 501(c)(4) organization, Delaware Family Policy Council Inc. ("DFPC"), to reimburse DFPC for work performed on behalf of DSF. *See* JA79, 89, 93, 100. DSF and DFPC are close affiliates. They have the same officers and directors, including the same president, whose salary is paid by DFPC. *Compare* JA80 *with* JA101.

DFPC engages extensively in electoral politics. In 2011, DFPC reported to the IRS that it "engage[s] … in political campaign activities on behalf of or in opposition to candidates for public office," JA96, and spent almost $20,000 on "[p]olitical expenditures," JA97, including "polling and encourag[ing] people to act on specific political issues," JA100.

DSF alleges that, "[i]n 2014, DSF plans to produce and disseminate voter guides in a manner substantively similar to the process [it] used in 2012." JA45, ¶31. In 2012, the process of creating DSF's "General Election Values Voter

Guide" began when DFPC (the 501(c)(4))—not DSF (the 501(c)(3))—sent out questionnaires to state and federal candidates and used their answers to produce a candidate scorecard. JA44, ¶21. If a candidate failed to respond to the questionnaire, DFPC, not DSF, "used publicly-available information to determine that candidate's position on the surveyed issues." Pl.'s Reply Br. (D. Ct. Dkt. No. 32) at 4 n.4. The scorecard framed questions such that a "Yes" response was the "Pro-Family Position" and a "No" response was the "Anti-Family Position." JA103. DFPC's scorecard then tallied up each candidate's responses to assign letter grades, with "[t]hose who earned an A+ grade … considered Outstanding Family Advocates." *Id.* Color coding indicated whether a candidate was a "Family Advocate," "Needs Improvement," or "Hostile." *Id.* DFPC cautioned, however, that the "Values Scorecard is for personal distribution. For a 501c3 or church-friendly Voter Guide, please go to www.delawarestrong.org." *Id.* That is the address for DSF's website.

DSF's version of the voter guide was based on DFPC's. JA44, ¶21. The design and layout of and issues addressed in DSF's "General Election Values Voter Guide" were virtually identical to those from DFPC's "Values Scorecard," but with the column for color-coded letter grades and the express Pro- or Anti-Family characterizations removed. *Compare* JA61-64 *with* JA103-106. Like the Values Scorecard, the Values Voter Guide does not include all candidates for the

covered races. Like the Values Scorecard, the Values Voter Guide purports to report whether each candidates supports or opposes:

> Protection for institutions, organizations, and individuals from having the government force them to violate their moral or religious beliefs. …
>
> [S]tate constitutional amendments preserving natural marriage. …
>
> Tax incentives to encourage natural marriage and incent married couples to stay together as a solution to reducing poverty and dependency on government services. …
>
> Strengthening and maintaining marriage as the union of one man and one woman, and not redefining or adding to man/woman marriage.

JA61-62; JA129-130. For candidates that did not respond to the survey, DSF relied on DFPC's characterizations of the candidates' positions and did not assess them independently. *See* Pl.'s Reply Br. (D. Ct. Dkt. No. 32) at 4 n.4.

The self-proclaimed aim of DSF's General Election Values Voter Guide is to influence citizens in casting their votes. "The stakes couldn't be higher this election," it asserts. "Our hope is that on [Election Day], this Voter Guide will help you choose candidates who best represent your values." JA61.

C. District Court Proceedings

DSF filed suit against Defendants-Appellants, Delaware's Attorney General and Commissioner of Elections (collectively, "Delaware") in the fall of 2013, seeking a declaratory judgment that the Disclosure Act is unconstitutional, both facially and as applied to DSF's proposed General Election Values Voter Guide.

JA43-46, 55-58. Delaware sought limited discovery as to the preparation and distribution of DSF's proposed Voter Guide and the alleged impact complying with the Disclosure Act's requirements would have on DSF and its contributors. *See* Pl.'s Responses and Objections to Defs.' Discovery Requests (D. Ct. Dkt. No. 21-1). In response, DSF sought a protective order and filed a motion for a preliminary injunction. JA36 (docket entries 20, 22). After a hearing, the district court barred discovery until further order of the Court, JA6-7, and ordered DSF to resubmit its brief in support of its motion for a preliminary injunction, limited to one question—"if the scope of the Act is broad enough to include plaintiff's proposed voter guide, is it unconstitutional under such Supreme Court precedent as *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007), and *Citizens United v. FEC*, 558 U.S. 310 (2010)," JA5-6.

In March 2014, the district court issued an opinion holding that DSF was entitled to a preliminary injunction, concluding that DSF had established a likelihood of success on the merits of its as-applied challenge. JA32.

The court asserted that "there is no case that purports to address disclosure requirements with the breadth attributed to" the Disclosure Act, JA27, even though both *McConnell* and *Citizens United* upheld the BCRA disclosure provisions upon which the Disclosure Act was modeled. The court devoted only a single paragraph to *Citizens United* in its discussion of DSF's likelihood of success on the merits,

finding the Supreme Court's ruling of limited guidance because its discussion of BCRA's contributor disclosure provisions was "relatively terse," JA29—though that portion of the *Citizens United* decision, joined by eight Justices, spanned six pages, 558 U.S. at 366-371—and because *Buckley* and *McConnell*, upon which *Citizens United* relied, did not involve as-applied challenges, JA29—though *Citizens United* itself did, 558 U.S. at 366.

The district court acknowledged the Supreme Court's holdings that disclosure requirements need not be limited to communications that are the functional equivalent of express advocacy, JA30, and it recognized that "'[v]oter guides are typically intended to influence voter behavior,' despite 'lacking words of express advocacy,'" JA31 n.19. The court nonetheless insisted that "the less a communicator or communication advocates an election result, the less interest the government should have in disclosure." JA30. The court compared the Disclosure Act unfavorably to other state disclosure laws that had been upheld against First Amendment challenges, suggesting that it might have survived scrutiny if, like those other laws, it was "more narrowly tailor[ed]." *Id.* The court concluded that because the Disclosure Act would cover "DSF's proposed voter guide (as a presumably neutral communication) published by DSF (a presumably neutral communication by reason of its 501(c)(3) status)," "the relation" between the Act's "primary purpose," which it asserted was "regulating anonymous political

advocacy," and the disclosure required was "too tenuous" to justify its application to DSF. JA31-32 & n.23.[6]

Although the district court's opinion announced a new rule of constitutional law—that campaign finance disclosure requirements may not be applied to "neutral communications" or "neutral communicators"—it did not actually find that DSF and its proposed Values Voter Guide were "neutral." The court described DSF and the Values Voter Guide as "*presumably* neutral," JA31, 32 (emphasis added), and noted that "[b]ecause the characterization of DSF's proposed 'voter guide' has not been the subject of this motion practice, the court will *assume* for purposes of its analysis that it would pass muster as a nonpartisan voter guide," JA28 n.15 (emphasis added). The court stated that, because "the factual underpinnings for its decision have not been specifically challenged or vetted through discovery," "no order shall be executed" until after the court conferred with the parties. JA32-33.

In a subsequent status conference, both DSF and Delaware argued to the district court that its "neutral communication, neutral communicator" rule was incorrect under Supreme Court precedent. JA205-206, 222-224. Following the conference, Delaware drafted proposed discovery requests aimed at developing the

[6] The district court suggested that the "personal information" collected under the Act was "[l]ike the metadata collected by the National Security Administration [sic]." JA32 & n.22.

factual record as to whether DSF and its Values Voter Guide were in fact "neutral" under the district court's newly minted test. *See* Joint Status Report (D. Ct. Dkt. No. 37) at 2. On April 8, 2014, the district court denied further discovery and entered an order granting DSF's motion for a preliminary injunction. JA4, 237. The court made no findings as to the "neutrality" of DSF or its Values Voter Guide. This appeal followed. JA1.[7]

SUMMARY OF ARGUMENT

The Disclosure Act is constitutional as applied to DSF's proposed General Election Values Voter Guide, as the Supreme Court's decisions in *McConnell* and *Citizens United* make clear.

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[7] DSF's complaint also included a facial overbreadth challenge. The district court did not rule on that challenge and it is not at issue here. The overbreadth doctrine is an exception to the normal rule that a facial challenge can prevail only if "'no set of circumstances exists under which the [law] would be valid.'" *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010). Invalidation on overbreadth grounds is "'strong medicine'" that should be employed "with hesitation, and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769 (1982); *see Conchatta Inc. v. Miller*, 458 F.3d 258, 262-263 (3d Cir. 2006). The Supreme Court has thus "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292-293 (2008). The plaintiff in such a challenge must "demonstrate from the text of [the Act] and *from actual fact* that a substantial number of instances exist in which the [Act] cannot be applied constitutionally." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988) (emphasis added). DSF offered no evidence below to satisfy this burden, and the district court accordingly did not rule on this claim. DSF's facial challenge therefore is not before this court.

Because contributor disclosure laws promote transparency rather than restricting campaign contributions or expenditures, they are not subject to "strict scrutiny," with its "narrow tailoring" requirement. Rather, disclosure laws are constitutionally permissible so long as they satisfy the more lenient "exacting scrutiny" standard, which requires only a substantial relation between an important governmental interest and the disclosure obligations. The public's interest in knowing who makes and funds election-related speech, the Supreme Court has repeatedly held, by itself is sufficiently important under this test. Finding disclosure to directly serve this interest, the Supreme Court rejected both facial and as-applied First Amendment challenges to BCRA, the federal statute that provided the model for the Disclosure Act. Those decisions should have compelled the district court to uphold the Disclosure Act.

The Voter Guide at issue here—which expressly addresses voters about an election—lies at the heart of the public's interest in knowing who funds election-related speech. The district court's new constitutional rule that "presumably neutral" communications by 501(c)(3) organizations must be exempt from contributor disclosure laws is contrary to established First Amendment doctrine. It contradicts the Supreme Court's decisions upholding BCRA, which covers speech that mentions a candidate in close proximity to an election and is aimed at the relevant electorate, but contains no exemption for "neutral" communications or

communicators. *Citizens United* and *McConnell* held that disclosure requirements need not be limited to organizations engaging in express advocacy for or against candidates or the functional equivalent of such advocacy. On the contrary, the Court upheld BCRA's application to the "entire range" of speech covered under the statute, including speech that "only pertain[s] to a commercial transaction." *Citizens United*, 558 U.S. at 369.

The Disclosure Act relies on "easily understood and objectively determinable" criteria like those upheld in BCRA. *Citizens United*, 558 U.S. at 369. The district court's test, by contrast, introduces the very vagueness and uncertainty that the Supreme Court has warned pose the real threat to First Amendment values in this area. The district court's newly-minted test is also unworkable—as the court's own failure to define neutrality or to make any finding about the neutrality of the particular communications at issue vividly demonstrates.

Finally, the district court's two-sentence analysis of the non-merits factors necessary for preliminary injunctive relief, like its discussion of the merits, ignored governing precedents and failed to address basic points of law and fact placed before it.

The district court's order should be reversed.

ARGUMENT

To obtain a preliminary injunction, a plaintiff must, "by a clear showing, carr[y] the burden of persuasion" on each of four factors. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). These are "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Minard Run Oil Co. v. United States Forest Serv.*, 670 F.3d 236, 249-250 (3d Cir. 2011) (internal quotation marks omitted). DSF established none of these factors, and accordingly was not entitled the "extraordinary remedy" of a preliminary injunction. *Winter v. NRDC*, 555 U.S. 7, 24 (2008).

I. STANDARD OF REVIEW

This Court "review[s] an order granting a preliminary injunction for abuse of discretion, the factual findings for clear error, and the determinations of questions of law *de novo*." *Bennington Foods LLC v. St. Croix Renaissance, Grp., LLP*, 528 F.3d 176, 178 (3d Cir. 2008). The Court "exercise[s] plenary review over [a] district court's determination as to the constitutionality of [a] challenged statute." *Government of Virgin Islands v. Steven*, 134 F.3d 526, 527 (3d Cir. 1998).

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT DSF ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS

The district court's analysis of the constitutionality of the Disclosure Act directly conflicts with the Supreme Court's most recent decisions addressing contributor disclosure laws. In *McConnell* and *Citizens United*, the Court rejected First Amendment challenges to the federal disclosure law upon which Delaware's Disclosure Act was closely modeled. The district court's opinion cannot be squared with either the reasoning or the holdings of those decisions and should be reversed.

A. Disclosure Laws Applicable To Election-Related Communications Are Subject To A "Lower Level Of Scrutiny"

For purposes of constitutional analysis, the Supreme Court has divided campaign-finance requirements applicable to election-related communications into two categories: direct restrictions on expenditures and laws requiring disclosure. Under the Court's precedent, disclosure laws are constitutionally preferred to expenditure limits because they are "a less restrictive alternative to more comprehensive regulations of speech," like expenditure limits, and directly serve First Amendment values. *Citizens United*, 558 U.S. at 369. Disclosure requirements "'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366 (citations omitted); *Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000) (disclosure

requirements "impose 'only a marginal restriction upon the contributor's ability to engage in free communication.'"). Instead, they provide the public with more information, which voters can use to "make informed choices in the political marketplace." *McConnell*, 540 U.S. at 197. In short, disclosure requirements are "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our … election system to public view." *Buckley*, 424 U.S. at 82.

Because disclosure laws, unlike restrictions on speech, further First Amendment values, they are subject to a more lenient constitutional standard. Limits on *expenditures* are "'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 558 U.S. at 340 (2010). *Disclosure* laws, by contrast, are subject to a less demanding standard known as "exacting scrutiny." *Id.* at 366-367. That standard demands neither a "compelling" governmental interest nor "narrow tailoring." Instead, disclosure laws are constitutional so long as there is a "'relevant correlation' or 'substantial relation'" between the requirement and a "sufficiently important" government interest. *Buckley*, 424 U.S. at 64, 66 (footnote omitted); *Citizens United*, 558 U.S.

at 366-367; *Doe v. Reed*, 561 U.S. 186, 196 (2010).[8] As the Supreme Court has explained, and other Courts of Appeals have recognized, this is a distinctly "lower level of scrutiny" than is applicable to restrictions on political expenditures. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011); *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1242 (11th Cir. 2013).

B. Disclosure Of Those Who Fund Election-Related Speech Satisfies Exacting Scrutiny

The Supreme Court has repeatedly concluded that laws requiring disclosure of those who produce or fund election-related communications satisfy exacting scrutiny. The Court has held several "important state interests" sufficient to support disclosure laws: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196; *see also Buckley*, 424 U.S. at 66-68.[9] All three of these interests

[8] "Every one of [the] Circuits [t]o have considered the question" has "applied exacting scrutiny to disclosure schemes." *Worley*, 717 F.3d at 1242 (collecting decisions from First, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits); *see also Doe*, 561 U.S. at 196 (describing "series of precedents" applying "exacting scrutiny" to "First Amendment challenges to disclosure requirements").

[9] "Important" is an understatement: As this Court explained in *Mariani*, the Supreme Court accepted each of these interests as "compelling" in *Buckley*. 212 F.3d at 775. These interests *a fortiori* satisfy the less-demanding "sufficiently important" threshold applicable here.

support the Disclosure Act,[10] but the first—the public's informational interest—is "alone … sufficient to justify" a disclosure law. *Citizens United*, 558 U.S. at 369; *see also, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) (disclosure requirements "justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending") (quoting *Citizens United*, 558 U.S. at 367); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 477-478 (7th Cir. 2012) (same); *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1017 (9th Cir. 2010) (same).

The Supreme Court has also held that disclosure of those who fund election-related speech directly serves this informational interest. Knowing the identity of a speaker is critical because "a speaker's credibility often depends crucially on who he is." *Majors v. Abell*, 361 F.3d 349, 352 (7th Cir. 2004); *see also National Org. for Marriage v. McKee*, 649 F.3d 34, 57 (1st Cir. 2011) ("*NOM*") ("Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin."). But election-related speech is often made through organizations that "conceal the true identity of the source" of their funding. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981); *see also Madigan*, 697 F.3d at 481 ("[O]nly disclosure of the sources of [such organizations'] funding may enable the electorate to ascertain the identities of the real speakers.").

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[10] *See* H.B. 300, Preamble (relying on all three interests); *see also* JA123, ¶¶26-27.

Disclosure laws ensure that voters are "'fully informed' about the person or group who is speaking" and "able to evaluate the arguments to which they are being subjected." *Citizens United*, 558 U.S. at 368; *see also NOM*, 649 F.3d at 40 ("[P]romot[ing] the dissemination of information about those who deliver and finance political speech … encourag[es] efficient operation of the marketplace of ideas"); *Madigan*, 697 F.3d at 498 (disclosure "advance[s] the democratic virtues in informed and transparent public discourse without impairing other First Amendment values"). Laws like the Disclosure Act improve the democratic process by "help[ing] citizens make informed choices in the political marketplace." *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. at 197 (internal quotation marks omitted)).

C. The Disclosure Act Is Constitutional

Relying on this reasoning, the Supreme Court held in *McConnell* and *Citizens United* that BCRA's disclosure requirements were substantially related to the public's interest "in knowing who is speaking about a candidate shortly before an election," *Citizens United*, 558 U.S. at 369, and thus were constitutional. Those precedents require the same conclusion with respect to the Disclosure Act, which was modeled after BCRA.

Like the Disclosure Act, BCRA requires any organization that spends more than a threshold amount on "electioneering communications" to disclose the names

and addresses of contributors who gave more than a certain amount. 2 U.S.C. § 434(f)(1), (2); 15 Del. C. §§ 8031(a), 8002(27). Like the Disclosure Act, BCRA defines "electioneering communication" to include all communications by specified media that refer to a clearly identified candidate for office and are made within 60 days of a general election or 30 days of a primary. 2 U.S.C. § 434(f)(3)(A)(i); 15 Del. C. § 8002(10)(a). And, like the Disclosure Act, BCRA is tailored in various ways to ensure that it reaches no more broadly than necessary to achieve its purpose. *E.g.*, 15 Del. C. § 8002(10)(b) (excluding membership communications, news articles or editorials, and communications promoting candidate forums); *id*. § 8002(10)(a) (excluding communications that are not proximate to an election); *id*. § 8002(25) (excluding signs smaller than 3 square feet); 2 U.S.C. § 434(f)(3)(A)(i), (B).

The Supreme Court upheld these provisions of BCRA against facial challenge in *McConnell* and against as-applied challenge in *Citizens United*.[11] The reasoning of *McConnell* and *Citizens United* accordingly apply in full to the Disclosure Act. 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

[11] *Citizens United* overruled the portions of *McConnell* addressing BCRA's ban on corporate independent expenditures, but expressly "adhere[d] to [*McConnell*] as it pertains to … disclosure." *Citizens United*, 558 U.S. at 365-366, 368.

elections." H.B. 300, Preamble. As eight Justices held in *Citizens United*, that informational interest is "alone … sufficient to justify" campaign-finance disclosure laws such as the Disclosure Act. 558 U.S. at 369. The Disclosure Act serves that interest in the same manner as BCRA. The Act informs the public by requiring those "attempting to influence … elections to 'disclose their identity and efforts in a manner that allows voters to evaluate and measure the statements made by and interests of those third parties[.]'" *Cf. McConnell*, 540 U.S. at 198 ("BCRA's disclosure provisions require these organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections." (quoting *McConnell*, 251 F. Supp. 2d at 237)).

Because the informational interest and the relationship between disclosure and that interest are so well-established, the State's burden to provide additional evidence on these points is light. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."); *National Ass'n of Mfrs. v.*

Taylor, 582 F.3d 1, 15 (D.C. Cir. 2009) (Garland, J.); *Canyon Ferry Rd. Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1032 (9th Cir. 2009).[12]

In any event, uncontroverted evidence in the record supports the Delaware General Assembly's determination that the Disclosure Act would help Delaware voters "make informed choices in elections." H.B. 300, Preamble. The General Assembly heard how the prior law's failure to require disclosure for election-related communications that avoid express advocacy led to a barrage of such communications by groups that did not disclose their donors. *See supra* pp. 12-14.[13] The General Assembly concluded that contributor disclosure was needed for such communications so that voters could give them proper weight. As former Delaware Republican State Senator Liane Sorenson explained in a declaration below, "communications that mention candidates during the run-up to an election

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[12] The D.C. Circuit recognized in a case involving another disclosure statute that extended beyond express advocacy communications—to cover lobbying communications—that the "justification for" the statute was not one "susceptible to empirical evidence," but rather "a claim that good government requires greater transparency." *Taylor*, 582 F.3d at 15-16. "That is a value judgment based on the common sense of the people's representatives, and repeatedly endorsed by the Supreme Court as sufficient to justify disclosure statutes." *Id*. (citing *United States v. Harriss*, 347 U.S. 612, 625 (1954), *Buckley*, and *McConnell*). In such cases, even a legislature's "'unprovable assumptions'" may be "'sufficient to support the constitutionality of state and federal laws.'" *Id*. at 16.

[13] *See also* JA135-136, ¶¶21-28. The volume of election-related communications by outside groups in Delaware is substantial: Veteran Delaware political advisor Erik Raser-Schramm explained in a declaration below that in "a typical legislative race" in Delaware, "outside issue advertising can double the number of direct mail pieces … influencing voters." JA135, ¶22.

affect voting behavior," and "if voters know who is funding political advertisements, that information affects their evaluation of the message." JA121-122, ¶¶14, 18.[14] The Disclosure Act's provisions are therefore directly related to the public's interest in knowing who is funding election-related communications.

D. The Disclosure Act Is Constitutional As Applied To DSF's Proposed "General Election Values Voter Guide"

1. The proposed communications at issue here lie at the heart of the public's interest in disclosure

Communications such as DSF's General Election Values Voter Guide lie at the core of the "governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." *Citizens United*, 558 U.S. at 367 (alteration in original). 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. *See* JA123, ¶31 ("Voter guides are typically intended to influence voter behavior, and they, in fact, generally do so. Otherwise, organizations would not go to the expense of producing them."). DSF's General Election Values Voter Guide displays this clearly. "The stakes couldn't be higher this election," it asserts. "Our hope is that on [Election Day], this Voter Guide will

[14] Raser-Schramm's declaration explained how a group that did not disclose its donors funded ads supporting a candidate's data center project, but without using express advocacy. Only after the candidate won—by 115 votes—did the public learn that the group was "funded by interests that would benefit economically from" the project. JA137-138, ¶¶39-45.

help you choose candidates who best represent your values." JA61; *see also* JA123-124, ¶33-38 ("Many voter guides portray candidates' positions in a positive or negative light depending on whether a candidate agrees with the organization's views. Moreover, as the term "voter guide" conveys, they all provide information to inform the decisions that voters make when they cast their ballots."). "The public has the same interest in knowing who is funding voter guides" as it does other communications, because "[d]isclosure enables voters to evaluate a voter guide's portrayal of a candidate's positions in light of the reputations and motives of those funding the guide," JA123-124 ¶¶32-34.

By contrast, the advertisements in *Citizens United* promoted a "commercial transaction," and the "issue ads" in *WRTL* urged listeners to call their U.S. Senators about a policy issue. Yet the Court held that disclosure laws could apply to both. *See Citizens United*, 558 U.S. at 368-369. This case lies at the core of the important governmental interests underlying disclosure laws. The public's "interest in knowing who is speaking about a candidate shortly before an election," *id.*, is at its strongest when the "election-related" speech at issue is intended to inspire not a commercial transaction or phone call, but a *vote*.

2. DSF has not shown a reasonable probability of threats, harassment, or reprisals against its members

The Supreme Court has acknowledged "that public disclosure of contributions" may "deter some individuals who otherwise might contribute,"

Buckley, 424 U.S. at 68, but it has found that burden insufficient to justify invalidating a disclosure law, *id.* at 68-74; *see also Family PAC v. McKenna*, 685 F.3d 800, 806-807 (9th Cir. 2012); *Madigan*, 697 F.3d at 482. Indeed, courts have sustained disclosure requirements despite claims that plaintiffs will refrain altogether from speech if required to disclose their contributors:

> We … take the [plaintiff] at its word that its donors are so adamant about remaining anonymous that subjecting it to the Illinois reporting requirements will deter it from engaging in its preferred form of public advocacy. That is regrettable, but it is the [plaintiff's] and its donors' choice to make. … While there is also a respected tradition of anonymity in the advocacy of political causes in this country, that tradition does not mean voters must remain in the dark about who is speaking about a candidate shortly before an election.

Madigan, 697 F.3d at 498-499 (internal quotation marks and citations omitted).

Instead, the Supreme Court has required plaintiffs claiming that disclosure will deter their speech to clear a much more demanding bar. The only circumstance in which the Supreme Court has found alleged "chilling" effects to outweigh the public interest in election-related disclosure is when the plaintiff can demonstrate, in an as-applied challenge, that there is "a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370; *see also Doe*, 130 S. Ct. at 2821; *Buckley*, 424 U.S. at 74. Here, DSF expressly disclaimed that argument. *See* Pl.'s Responses and Objections to Defs.' Discovery Requests (D. Ct. Dkt. No. 21-1) at 4.

E. The District Court's "Neutrality" Test Is Contrary To Supreme Court Precedent and Unworkable

As discussed above, the Supreme Court in *McConnell* and *Citizens United* upheld against both facial and as-applied constitutional challenges the very federal disclosure law upon which Delaware's Disclosure Act was modeled. Those decisions control this case. The district court, however, declined to follow either precedent. Instead, the district court announced a requirement never before seen in the Federal Reporter or U.S. Reports: a constitutional exemption from disclosure for "presumably neutral" communications by "presumably neutral" groups. That vague standard directly conflicts with *McConnell* and *Citizens United* and would inject uncertainty into an area where the Supreme Court has demanded clear rules.

1. *McConnell* and *Citizens United* establish the constitutionality of disclosure requirements for the "entire range of electioneering communications"

The Supreme Court has recognized only one constitutionally mandated exemption from contributor disclosure requirements like those at issue here: disclosure is not required when there is "a reasonable probability that a group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370; *see also Doe*, 561 U.S. at 200; *Buckley*, 424 U.S. at 74. The district court invented another: Disclosure requirements may not apply to "communicators" (such as 501(c)(3) groups) and "communications" (such as voter guides) that are "generally considered to be non-

political" or "presumably neutral." JA30-32. The court cited not one precedent for the proposition that such a "presumptive neutrality" exemption is constitutionally required. *See id.*

That lack of authority is unsurprising. The Supreme Court has already considered and rejected distinctions like the one drawn by the district court. In *McConnell*, the plaintiffs argued that *Buckley* confined the application of disclosure requirements to communications that constitute express advocacy. Br. for Appellants McConnell et al. 40-45, *McConnell*, 540 U.S. 93 (No. 02-1674). BCRA's disclosure provisions were unconstitutional, the plaintiffs argued, because they extended beyond express advocacy to communications that merely "'refer[]'" to a candidate. *Id.* at 44. The Court rejected that argument, holding that disclosure was constitutional for "the entire range of 'electioneering communications.'" *McConnell*, 540 U.S. at 196.

In so holding, the Court "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy." *McConnell*, 540 U.S. at 194. *Buckley*'s "express advocacy limitation," the Court explained, "was the product of statutory interpretation rather than a constitutional command." *Id.* at 191-192; *see also Citizens United*, 558 U.S. at 369; *WRTL*, 551 U.S. at 474 n.7 (opinion of Roberts, C.J.); *McConnell*, 540 U.S. at

190 ("the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law").

The plaintiffs in *Citizens United* sought to revive a similar distinction, this time relying on *WRTL*. As discussed above, *WRTL* limited the federal-law *ban* on independent expenditures using corporate general treasury funds to "express advocacy or its functional equivalent"—that is, messages that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 469-470. In *Citizens United*, however, eight Justices rejected an attempt to extend *WRTL*'s "express advocacy" limitation to disclosure laws covering the same corporate expenditures. 558 U.S. at 368-369 ("Citizens United seeks to import a similar distinction into BCRA's disclosure requirements. We reject this contention."). The Court explained that disclosure laws can constitutionally reach a much broader range of communications than the expenditure limits at issue in *WRTL* because they are "a less restrictive alternative to more comprehensive regulations of speech." *Id.* at 369.[15]

Citizens United's unsuccessful as-applied challenge relied on much the same reasoning as the district court offered below. Some of the communications at issue

[15] In rejecting the argument that disclosure must be confined to express advocacy, the Court pointed to its longstanding approval of disclosure in the different, though related, context of lobbying disclosure laws because lobbying too involves speech other than express advocacy. *Citizens United*, 558 U.S. at 369 (recognizing that the "Court has upheld registration and disclosure requirements on lobbyists" (citing *Harriss*, 347 U.S. at 625)).

were advertisements for a documentary about then-presidential candidate Hillary Clinton. Citizens United claimed that the public's "informational interest is inapplicable to Citizens United's advertisements because they do not expressly or impliedly advocate a candidate's election or defeat." Br. for Appellant 51, *Citizens United*, 558 U.S. 310 (No. 08–205). Instead, the ads were intended simply to "promote a documentary movie … encouraging viewers to see [it] in the theater, purchase it on DVD, or download it through Video On Demand." *Id.* at 15. For example, one of the ads—a mere ten seconds long—stated only that "[i]f you thought you knew everything about Hillary Clinton … wait 'til you see the movie," followed by a link to the movie's website. *Id.* at 8 n.1. Citizens United contended that, because the ads "only attempt to persuade viewers to see the film," disclosure would not "help viewers make informed choices in the political marketplace." *Citizens United*, 558 U.S. at 369.

The Supreme Court squarely rejected this attempt to narrow the public's informational interest. The Court held that "[e]ven if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369.[16]

[16] In this case, the public's informational interest is much stronger. DSF's General Election Values Voter Guide has the self-proclaimed goal of influencing Delaware citizens not in choosing a film, but in casting a vote. The Supreme Court's holding validating BCRA's disclosure requirement as applied to Citizen United's ads therefore applies *a fortiori* to DSF's Values Voter Guide.

It is therefore settled law that disclosure can constitutionally reach beyond express advocacy or its functional equivalent. *Citizens United*, 558 U.S. at 369. Indeed, since *Citizens United*, every court of appeals to have considered the issue has rejected attempts to create a constitutional distinction between "issue discussion" and "express advocacy."[17] 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. To the contrary, this informational interest extends, and disclosure laws may therefore apply, to the "the entire range of 'electioneering communications,'" *McConnell*, 540 U.S. at 194, including those that "merely mention a federal candidate," *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 551-552 (4th Cir. 2012); *see also McConnell*, 540 U.S. at 194-196.

2. The Constitution does not require an exception for 501(c)(3) groups

The district court's attempt to carve out an exemption for "presumably neutral" communicators likewise finds no support in precedent or constitutional

[17] *See, e.g.*, *NOM*, 649 F.3d at 54-55 ("the distinction between issue discussion and express advocacy has no place in First Amendment review" of "disclosure-oriented laws"); *Madigan*, 697 F.3d at 484 ("*Citizens United* made clear that the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context."); *Human Life*, 624 F.3d at 1016 ("[T]he position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."); *Free Speech v. FEC*, 720 F.3d 788, 795 (10th Cir. 2013); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 551-552 (4th Cir. 2012).

principle. Whether or not a 501(c)(3) exemption would be *permissible*,[18] there is no basis in precedent for concluding that one is constitutionally *required*. In *McConnell*, the Supreme Court upheld BCRA's disclosure provisions against a facial challenge even though that statute contains no exemption for 501(c)(3) groups. 540 U.S. at 194-196. After *McConnell*, when the Federal Election Commission tried to exempt 501(c)(3) groups by regulation, a federal district court invalidated the exemption. *Shays v. FEC*, 337 F. Supp. 2d 28, 125-128 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). Although BCRA authorized the FEC to exempt communications from the definition of "electioneering communication," it prohibited the FEC from exempting communications that "'promote[],'" "'support[],'" "'attack[], or oppose[] a candidate,'" "'regardless of whether the communication'" contains express advocacy. *Id.* at 125. The court found the FEC's 501(c)(3) exemption arbitrary and capricious because "the [FEC] did not fully address whether the tax code … preclude[s] Section 501(c)(3) organizations from making" communications BCRA "requires be regulated." *Id.* at 128.[19] No court has imposed such an exemption as a matter of constitutional law.

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[18] *Cf. Center for Individual Freedom v. Tennant*, 706 F.3d 270, 289 (4th Cir. 2013) (holding 501(c)(3) exemption unconstitutional).

[19] Contrary to the district court's assumption, 501(c)(3) organizations can and do engage in election-related speech. For example, DSF relied below on an IRS ruling that 501(c)(3) organizations can distribute voter guides under certain circumstances. Pl.'s Br. in Support of Mot. for Prelim. Injunction (D. Ct. Dkt. No.

3. The district court's neutrality standard is impermissibly vague and unworkable

The district court's "neutrality" standard itself suffers from a grave constitutional flaw. It would require state officials (and ultimately a reviewing judge) to probe the "neutrality" of both the speaker and its proposed communication. That is precisely the kind of vague, open-ended inquiry that the Supreme Court has rejected in the campaign-finance realm. *See, e.g.*, *Buckley*, 424 U.S. at 79 (finding phrase "'for the purpose of … influencing' an election or nomination" to raise constitutional vagueness concerns). *Buckley* noted that a constitutional standard that requires an inquiry into distinctions like those between "discussion, laudation, general advocacy, and solicitation" would leave the speaker "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). In *WRTL*, the Chief

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28) at 17 (citing Rev. Rul. 78-248). As discussed above, the point of voter guides is to influence voters' choices. They therefore lie at the core of the public's interest in disclosure of election-related speech. *See supra* pp. 35-36.

The same IRS ruling also recognizes that 501(c)(3) organizations may not distribute voter guides if they "evidence[] a bias or preference with respect to the views of any candidate or group of candidates.'" Rev. Rul. 78-248, at *1. A voter guide is not "non-partisan" if "[s]ome questions evidence a bias on certain issues." *Id.* at *2. A voter guide also is not "non-partisan" if "it focuses only on 'issues of importance to the organization' and is 'widely distributed' among the electorate." *Id.* That is true even if the guide is "factual in nature" and "contains no express statements in support of or in opposition to any candidate." *Id.* Despite relying on DSF's 501(c)(3) status to justify its ruling, the district court made no findings on whether DSF actually complied with these requirements.

Justice similarly "decline[d] to adopt a test for as-applied challenges turning on the speaker's intent to affect an election" or "the actual effect speech will have on an election or on a particular segment of the target audience." 551 U.S. at 469 (controlling opinion of Roberts, C.J.). Vague tests produce inconsistent results, encourage litigation, and "typically lead to a burdensome, expert-driven inquiry," which "may or may not accurately predict electoral effects." *Id.* at 468-469.

The Disclosure Act's definition of "electioneering communication," by contrast, relies on concrete and objective criteria. The message must (1) be distributed by certain specified media (2) within a certain time period, (3) "[r]efer[] to a clearly identified candidate" for office, and (4) be publicly distributed to members of the electorate for that office. 15 Del. C. § 8002(10)(a). As the Supreme Court explained in describing the similar features of BCRA, "[t]hese components are both easily understood and objectively determinable." *McConnell*, 540 U.S. at 194 (citing 2 U.S.C. § 434(f)).

Tellingly, even DSF, which *prevailed* under the "neutrality" standard announced in the district court's March 31 opinion, rejected it in a subsequent status conference with the Judge. *See* JA205-206 ("This idea that we have to have some sort of neutral communication before the First Amendment attaches I think is very wrong. I don't think the word 'neutral' is really what's driving the Supreme Court's concerns in this area."); *see also* JA207 (district court stating "I understand

that plaintiff's counsel doesn't think neutrality is really what we're supposed to be looking at[.]"). Instead, DSF claimed, "[t]he distinction in the case law is between advocating for candidates and advocating for issues." JA205.

That distinction does exist "in the case law," but only in the case law addressing limits on expenditures. *See WRTL*, 551 U.S. at 469-470. As noted above, the Supreme Court has repeatedly rejected that distinction in the *disclosure* context. *See Citizens United*, 558 U.S. at 369 ("[W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy."); *McConnell*, 540 U.S. at 194 (rejecting "the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy"). Decisions of other courts of appeals confirm this reading: "*Citizens United* made clear that the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context." *Madigan*, 697 F.3d at 484. After *Citizens United*, "the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable." *Human Life*, 624 F.3d at 1016.[20]

4. The district court's bases for dismissing *Citizens United* were erroneous

McConnell and *Citizens United* could not be clearer: Contributor disclosure laws like Delaware's pass constitutional muster. Yet the District Court struggled

[20] *See also supra* pp. 39-42.

with the "question … how to apply the guidance of *Citizens United* to the Act," ultimately deciding to create a "neutrality" exemption out of whole cloth. JA29. The district court offered four perplexing bases for discounting *Citizens United*: "The court notes at this juncture that the Supreme Court's [i] relatively terse discussion about disclosure in *Citizens United* [ii] is based in large measure on citations to its precedential opinions in *Buckley* and *McConnell*, [iii] neither of which were as-applied challenges and [iv] neither of which addressed a statutory regime as broadly constructed (and apparently construed) as the one at bar." JA29. The first three observations are irrelevant; the last is simply incorrect.

First, whether or not Part IV of *Citizens United* is accurately described as "relatively terse"—it contains more than 1,600 words and occupies six pages in the U.S. Reports, 558 U.S. at 366-371—its length has no bearing on its precedential force. That Part describes the Court's reasons for upholding BCRA's disclosure requirements against Citizens United's as-applied challenge and commanded the votes of eight Justices, as other courts of appeals have recognized. *See, e.g.*, *Free Speech v. FEC*, 720 F.3d 788, 795 (10th Cir. 2013) (D.C. Circuit); *NOM*, 649 F.3d at 54-55 (First Circuit); *Real Truth*, 681 F.3d at 551-552 (Fourth Circuit); *Madigan*, 697 F.3d at 484 (Seventh Circuit); *Human Life*, 624 F.3d at 1016 (Ninth Circuit).

Second, that *Citizens United*'s reasoning was "based in large measure on citations to its precedential opinions in" other cases does not detract from the

precedential force of *Citizens United*'s holding. The precedential effect of a Supreme Court holding does not depend on the nature of the decisions cited in the opinion.[21] To the extent the district court's pointed reference to the Supreme Court's "*precedential* opinions in *Buckley* and *McConnell*," *id.* (emphasis added), suggests that it viewed Part IV of *Citizens United* as *non*-precedential, that was plain error. Part IV was necessary to the judgment in *Citizens United* and is therefore a binding holding of the Court.[22]

Third, the District Court apparently thought it pertinent that neither *Buckley* nor *McConnell* was an as-applied challenge. JA29. It is unclear why that would be relevant; their holdings are nonetheless binding in later cases involving as-applied challenges, as the Supreme Court's reliance upon them in *Citizens United*,

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[21] Indeed, Chief Justice Marshall's opinion for the Court in *Marbury v. Madison* cites one precedent —a 1762 decision from England. *See* 5 U.S. (1 Cranch) 137, 168 (1803) (citing *King v. Ba[r]ker*, 3 Burrows 1266).

[22] The Seventh Circuit's contrary suggestion in its recent *Barland* decision is similarly inaccurate. *See Wisconsin Right to Life, Inc. v. Barland*, Nos. 12-2915, 12-3046, 12-3158, 2014 WL 1929619, at *18 (7th Cir. May 14, 2014). The portion of the *Citizens United* opinion the *Barland* court cites discusses Citizen United's movie, not the advertisements for the movie. *See id.* (citing *Citizens United*, 558 U.S. at 324-325). The Court determined that the movie was the functional equivalent of express advocacy, but it made no similar finding with respect to the advertisements for the movie. *Citizens United*, 558 U.S. at 324-325. That is because both Citizens United and the government agreed that the advertisements were not the functional equivalent of express advocacy. *See* Br. for Appellant at 51, *Citizens United*, 558 U.S. 310 (No. 08-205) (public's "informational interest is inapplicable to Citizens United's advertisements because they do not expressly or impliedly advocate a candidate's election or defeat"); Br. for Appellee 36 ("the advertisements are not the functional equivalent of express advocacy").

a decision addressing as-applied challenges, illustrates. *See also, e.g.*, *WRTL*, 551 U.S. at 456-457. In any event, *Citizens United itself* was an as-applied challenge.

Fourth, contrary to the district court's assertion, both *McConnell* and *Citizens United did* address "a statutory regime as broadly constructed," JA29, as the Disclosure Act—namely BCRA, on which the Disclosure Act was modeled. It is not a coincidence that the Disclosure Act and BCRA use the same substantive criteria. The Delaware General Assembly was aware that *Citizens United* and *McConnell* had upheld BCRA's disclosure provisions, *see* JA72-74, 116, 117-119 & nn.17, 21, and it heeded that guidance by enacting provisions very similar to the BCRA provisions at issue in those cases, *see supra* Part I.C.1.

The Disclosure Act provisions challenged here differ from BCRA in minor ways—for example, in their precise dollar thresholds, covered media, and definition of the relevant electorate. These reflect the Delaware General Assembly's efforts to tailor the Act to the realities of state and local elections in a small state. S*ee* JA134-135, 137 ¶¶14-20, 35-37; JA125 ¶¶39-47; JA116 n.10 (testimony comparing thresholds to those of other similar states). None of these minor differences figured in the district court's analysis. JA27-32.

Thus, the district court's objections to the scope of the Disclosure Act would apply equally to BCRA. BCRA does not exempt "those communicators" or "communications" "generally considered to be non-political." JA30. Rather,

BCRA covers any communication that "refers to a clearly identified candidate for federal office" and is broadcast within 60 days of a general election or 30 days of a primary, 2 U.S.C. § 434(f)(3)(A)—the same criteria used in the Disclosure Act, *see* 15 Del C. § 8002(10)(a) ("electioneering communication" "refers to a clearly identified candidate" and is publicly distributed within the same 60- and 30-day windows). Nor is BCRA confined to advertisements run by groups "'hiding behind dubious and misleading names.'" JA30. Under the district court's reasoning, then, these characteristics would make BCRA unconstitutional. That conclusion cannot be squared with Supreme Court precedent: *Citizens United* rejected by an 8-1 vote the claim that these criteria were too broadly drawn. 558 U.S. at 368-369.

5. The district court erroneously relied on a 40-year-old court of appeals decision

The district court also discounted *Citizens United* and *McConnell* based on a perceived conflict with *Buckley v. Valeo*—not the Supreme Court's opinion in that case, but rather an unappealed portion of the *D.C. Circuit's* 1975 opinion. *See* JA28-29 (citing *Buckley v. Valeo*, 519 F.2d 821 (1975)); *see Buckley*, 424 U.S. at 10 n.7. In the relevant portion of that opinion, the court of appeals, which upheld most of FECA's disclosure provisions, invalidated one section as "unconstitutionally vague." *Buckley*, 519 F.2d at 832. That provision, § 308, required an organization to "file reports … as if [it] were a political committee" upon the occurrence of any of the following circumstances:

> [The requirement] is activated—without any "expend[ing] [of] any funds" whatever—(1) by "any act directed to the public for the purpose of influencing the outcome of an election"; or (2) by "any material" "publishe[d] or broadcast[] to the public" which "refer[s] to a candidate (by name, description, or other reference)" and which (a) "advocate[es] the election or defeat of such candidate," or (b) "set(s) forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office)," or (c) is "otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate."

Id. at 870 (all but first alteration in original). This expansive requirement differs from the challenged provisions of the Disclosure Act in fundamental ways.

First, § 308 suffered from the same sort of unclear drafting that Supreme Court's *Buckley* opinion identified. Section 308 applied to "any act directed to the public for the purpose of influencing the outcome of an election," *id.* at 869, using language almost identical to the "for the purpose of … influencing" formulation the Supreme Court later found to raise constitutional vagueness concerns. *Buckley*, 424 U.S. at 79, 80. The court of appeals understandably found that this "purpose" clause lacked the "precision essential to constitutionality." *Buckley*, 519 F.2d at 877-878. By contrast, the Supreme Court has described the definition of "electioneering communication" in BCRA, on which the Disclosure Act was modeled, as "both easily understood and objectively determinable." *McConnell*, 540 U.S. at 194 (citing 2 U.S.C. § 434(f)).

Second, § 308 was not limited to expenditures proximate to an election. The Supreme Court's later holding that the public has an interest "in knowing who is speaking about a candidate shortly before an election" therefore would not have applied to § 308. *Citizens United*, 558 U.S. at 369. By contrast, the Disclosure Act (like BCRA, which Supreme Court upheld) is limited to communications made within 30 days of a primary or 60 days of a general election.

Third, § 308 required a group that engaged in covered activity to "file reports with the [Federal Election] Commission *as if such person were a political committee*." *Buckley*, 519 F.2d at 870 (quoting 88 Stat. 1279) (emphasis added). Then, as today, political-committee status meant *ongoing* quarterly reporting, regardless of whether the organization engaged in any election-related activity, as well as an array of additional, detailed requirements. *See*, *e.g.*, 88 Stat. 1276; 2 U.S.C. § 434(a)-(b) (quarterly and other ongoing reports, including reporting of cash on hand and debts); *id.* § 432(h) (governing use of bank accounts); *id.* § 433 (statements of organization and termination requirements). Under the Disclosure Act, by contrast, electioneering communications do not transform an organization into a "[p]olitical committee."[23] Nor are the Disclosure Act's requirements

[23] *See* 15 Del. C. § 8002(19) ("'Political committee'" includes "[a]ny organization … which accepts contributions from or makes expenditures to any candidate, candidate committee or political party in an aggregate amount in excess of $500 during an election period, not including independent expenditures.").

comparable to those imposed upon political committees under Delaware law. The Disclosure Act requires a covered group to file a report only when it expends a certain amount on covered communications. *See* 15 Del. C. § 8031(a). Political committees, by contrast, are subject to an array of additional obligations: They (a) must file ongoing reports as long as they are in existence, without regard to whether they engage in election-related activity, 15 Del. C. § 8030(a); (b) must report a host of detailed information that need not be disclosed by groups only making electioneering communications;[24] (c) cannot receive contributions of over $50 in cash, *id.* § 8012(a); (d) can make expenditures only for certain enumerated purposes, *id.* § 8020; and (e) can be dissolved only in accordance with statutory requirements, *id.* § 8022.[25]

The challenged Disclosure Act provisions bear little resemblance to FECA § 308, a vaguely drafted, far-more-burdensome provision invalidated by the D.C. Circuit in 1975. Forced to choose between *Citizens United*, a recent Supreme Court decision upholding a similar federal law, and *Buckley*, a forty-year-old, out-

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[24] That information includes the committee's "cash and other intangible and tangible assets on hand"; "[t]he amount of," and detailed information about, "each debt in excess of $50"; and "any transfer of funds" to or from other political committees. *Id.* § 8030(d).

[25] A number of courts have contrasted the requirements of PAC status with those of "one-time, event-driven disclosure rule[s]." *Barland*, 2014 WL 1929619, at *30, 37; *Iowa Right To Life Comm., Inc. v. Tooker*, 717 F.3d 576, 597 (8th Cir. 2013). The Disclosure Act clearly falls in the latter group.

of-circuit court of appeals decision invalidating a dissimilar law, the district court chose incorrectly.

F. The District Court Erred by Finding a Likelihood of Success Based on "Presumed" Facts

The district court asserted that the constitutionality of disclosure turns on the "neutrality" of the communicator and the communication. *See* JA30-32. But the court did not actually find that DSF and its proposed voter guide were neutral, or even that DSF was likely to prevail on those questions. Instead, the district court stated merely that the voter guide was a "presumably neutral" communication and that DSF was a "presumably neutral" communicator, while conceding that those "factual underpinnings for its decision ha[d] not been specifically challenged or vetted through discovery." JA31-32. Appellants promptly sought, but were denied, discovery to test the truth of these "presumed" facts.[26]

Even if its unprecedented "neutrality" rule were correct, the district court erred in granting a preliminary injunction based on presumed facts. "As a prerequisite to the issuance of an interlocutory injunction, the moving party must show a clear right to relief." *Charles Simkin & Sons, Inc. v. Massiah*, 289 F.2d 26,

[26] The district court initially delayed issuing an order giving effect to its March 31 opinion in order to consider whether to permit discovery on these "factual underpinnings." *See* JA32-33. Appellants requested, but were denied, such discovery. *See* JA200-202, 237. DSF also refused to respond to prior discovery requests that likely would have brought to light evidence relevant to neutrality. *See* Joint Status Report (D. Ct. Dkt. No. 37) at 2-3.

29 (3d Cir. 1961) (emphasis added). Here, Defendants disputed the purported neutrality of both DSF and its voter guide, *see* Transcript of Oral Arg. (D. Ct. Dkt. No. 42) at 64 ll.14-18; JA201-202, 209-211, facts that were dispositive to the decision. The district court failed to resolve the factual issues that it identified as the premise of its newly announced rule.

Moreover, even if these "presumed" facts could be construed as factual findings, the district court erred in discerning "neutrality" based on intuition, not evidence. As this Court has explained, "[t]he law does not take judicial notice of matters of 'common sense,' and common sense is no substitute for evidence. A preliminary injunction may not be based on facts not presented at a hearing, or not presented through affidavits, deposition testimony, or other documents, about the particular situations of the moving parties." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000). The district court cited no record evidence to bolster its impression that the Voter Guide was neutral. In fact, the record contained evidence tending to show that the Guide was *not* neutral. A declaration submitted by the former Minority Leader of the Delaware Senate, Senator Liane Sorenson, pointed out several features of DSF's Voter Guide that could be perceived as

taking sides. *See* JA124, ¶¶35-37.[27] *See also supra* pp. 18-19. On this record, the granting of a preliminary injunction was an abuse of discretion.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT DSF HAD ESTABLISHED THE REQUIRED NON-MERITS FACTORS

The district court addressed the remaining non-merits factors in all of two sentences. *See* JA32. Its cursory analysis contained several independent grounds for reversal.

A. DSF Did Not Establish A Likelihood of Irreparable Injury

In the First Amendment context, as elsewhere, a movant must satisfy "the traditional prerequisites for injunctive relief," including irreparable injury. *Anderson v. Davila,* 125 F.3d 148, 164 (3d Cir. 1997). The district court offered one sentence of analysis on the irreparable-injury prong, JA32, "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction." 11A Wright et al., *Federal Practice & Procedure* § 2948.1 (3d ed. 2013). Its opinion quoted this Court's decision in *Hohe v. Casey*, 868 F.2d 69 (3d Cir. 1989), for the "well established" proposition "that 'the loss of First Amendment freedoms,

[27] These included "(i) the selection and phrasing of the issues or questions,"– for example, "Strengthening and maintaining marriage as the union of one man and one woman, and not redefining or adding to man/woman marriage" – "(ii) the document's self-description as a 'Values Voter Guide,' [and] (iii) its statement near the top of the first page that 'The stakes couldn't be higher this election. Our hope is that on November 6th, this Voter Guide will help you choose candidates who represent your values.'" JA124, ¶37.

for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* at 72 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see* JA32.

The district court did not quote *Hohe*'s further clarification that the mere "*assertion* of First Amendment rights does not automatically require a finding of irreparable injury. … Rather the plaintiffs must show 'a chilling effect on free expression.'" *Hohe*, 868 F.2d at 72-73 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (emphasis added) (citation omitted)). This is not a case where denying a preliminary injunction would require DSF to run the risk of criminal prosecution in order to speak. *Cf. Dombrowski*, 380 U.S. at 486-487. The requisite "chilling effect," therefore, does not necessarily follow from application of the law during the litigation. As the Supreme Court has repeatedly explained, disclosure requirements, unlike expenditure limits, "do not prevent anyone from speaking." *Citizens United*, 558 U.S. at 366; *McConnell*, 540 U.S. at 201 (same).

DSF made no attempt to explain to the district court *why* it could not speak while complying with the Act during this litigation. DSF offered only the unexplained claim that it will be that it would be "forced into self-silence" if the Act were not enjoined. Pl.'s Br. in Support of Mot. for Prelim. Injunction (D. Ct. Dkt. No. 28) at 16. DSF did not explain why that "self-silence" would be "forced," rather than the product of its own choice. "Not surprisingly, a party may not satisfy the irreparable harm requirement if the harm complained of is self-

inflicted." Wright et al., *Federal Practice & Procedure* § 2948.1. That principle makes sense: If a threat to "self-silence" sufficed, every First Amendment plaintiff could obtain a preliminary injunction without making a concrete showing of likely irreparable injury. That contravenes this Court's statement that a First Amendment plaintiff must establish "the traditional prerequisites for injunctive relief." *Anderson*, 125 F.3d at 164.

DSF offered no evidence that it would be harmed in any way by donor disclosure, and objected "to the relevance of" Appellants' discovery requests seeking such evidence.[28] The Disclosure Act imposes modest filing and record-keeping obligations, but those incidental burdens do not suffice: "[I]t is the *direct penalization, as opposed to incidental inhibition*, of First Amendment rights which constitutes irreparable injury." *Hohe*, 868 F.2d at 73 (emphasis added) (internal quotation marks and brackets omitted). Nothing in the record tended to show that DSF could not engage in its desired speech while complying with the Act.

B. DSF Did Not Establish The Balance-Of-Harms Or Public-Interest Factors

The last two factors of the preliminary-injunction standard call for a court to verify "that granting preliminary relief will not result in even greater harm to the nonmoving party" and "that the public interest favors such relief." *Minard Run*

[28] *See* Pl.'s Responses and Objections to Defs.' Discovery Requests (D. Ct. Dkt. No. 21-1) at 3-4.

Oil Co., 670 F.3d at 249-250. These two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

The district court, in its one-sentence of analysis on this prong, found that "*defendants'* interest in public disclosure [could not] withstand *the public's* interest in protecting their privacy of association and belief." JA32 (emphasis added). That misstates the applicable legal standard. Because the defendants are public officers sued in their official capacities, "defendants' interest in public disclosure" *is* "the public's interest." *See Nken*, 556 U.S. at 435. It is the public's interest in the enforcement of state law that must be weighed against DSF's private interest in avoiding the required disclosures. This misstatement of law was plain error.

The district court also misperceived the concrete interests at stake. The preliminary injunction threatens to create uncertainty about the scope and enforceability of the Disclosure Act and deprive the public of the information the Act provides—information the Supreme Court has found "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371. On the other side of the ledger is only DSF's conclusory threat to "self-silence"; DSF has not provided evidence of any concrete harm that would actually result if it complied with the law while publishing its General Election Voter Guide.

CONCLUSION

The district court's order should be reversed.

Respectfully submitted,

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June 2, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 13,995 words.

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/s/ Jonathan G. Cedarbaum
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June 2, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Jonathan G. Cedarbaum
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ADDENDUM

15 Del. C. § 8002. Definitions

As used in this chapter:

* * *

(5) "Clearly identified candidate" means that the name, a photograph or a drawing of the candidate appears or the identity of the candidate is otherwise apparent by unambiguous reference.

* * *

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

* * *

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

1. Refers to a clearly identified candidate; and

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

b. "Electioneering communication" does not include:

1. A communication distributed by a means other than by any communications media;

2. Any membership communication;

3. A communication appearing in a news article, editorial, opinion, or commentary, provided that such communication is not distributed via any communications media owned or controlled by any candidate, political committee or the person purchasing such communication;

4. A communication made in any candidate debate or forum, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum.

* * *

(13) “Independent expenditure” means any expenditure made by any individual or other person (other than a candidate committee or a political party) expressly advocating the election or defeat of a clearly identified candidate, which is made without cooperation or consultation with any candidate, or any committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate or any committee or agent of such candidate.

* * *

(15) “Membership communication” means a newsletter or periodical, telephone call, or any other communication distributed solely to the members, shareholders, or employees of an organization or institution.

* * *

(21) “Publicly distributed” means aired, broadcast, delivered or otherwise disseminated to members of the public.

* * *

(23) “Responsible party” means any natural person who shares or exercises discretion or control over the activities of any entity required to file reports in accordance with this chapter, and shall include any officer, director, partner, proprietor or other natural person who exercises discretion or control over the activities of such entity.

* * *

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

15 Del. C. § 8031. Special reports—Third-party advertisements

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

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

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

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

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

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

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

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

(b) For purposes of this section, a reporting period shall begin on the day after the previous reporting period under § 8030 of this title or this section, whichever is later. However, if the person making the expenditure hereunder was not previously required to file any reports during the election period under § 8030 of this title or this section, then the reporting period shall begin on the date the first contribution is received or expenditure made by or on behalf of such person in the current election period. A reporting period shall end on the date of the expenditure set forth in subsection (a) of this section.

(c) Any person other than an individual that makes a contribution for which disclosure is required under paragraph (a)(3) of this section shall provide written notification in accordance with § 8012(e) of this title to the person filing the report hereunder. The person filing the report may rely on such notification, and should

the notification provided by the representative of the entity be inaccurate or misleading, the person or persons responsible for the notification, and not the person filing the report, shall be liable therefor.

(d) If the expenditure is made more than 30 days before a primary or special election or 60 days before a general election, the report required under this section shall be filed within 48 hours after such expenditure is made. If the expenditure is made 30 days or less before a primary or special election or 60 days or less before an election, such report shall be filed with the Commissioner within 24 hours after such expenditure is made. For purposes of this section, an expenditure shall be deemed to be made on the date it is paid or obligated, whichever is earlier.

(e) The Commissioner shall adopt regulations exempting, to the extent possible, persons from reporting duplicative information under this chapter.

(f) Persons required to file reports under this section shall retain complete records of all expenditures made and contributions received in connection herewith for 3 years following the election for which such report was filed.

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.)

JOINT APPENDIX VOLUME I (JA1-JA33)

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VOLUME I (BOUND WITH BRIEF)

VOLUME II

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELAWARE STRONG FAMILIES,

Plaintiff,

vs.

JOSEPH R. BIDEN III, in his official capacity as Attorney General of the State of Delaware; and

ELAINE MANLOVE, in her official capacity as Commissioner of Elections for the State of Delaware,

Defendants.

Circuit Court Docket No. _____

District Court Docket No. 1:13-cv-1746-SLR

District Court Judge: The Honorable Sue L. Robinson

NOTICE OF APPEAL TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Notice is hereby given that Defendants Joseph R. Biden III and Elaine Manlove appeal to the United States Court of Appeals for the Third Circuit from the Order issued in this action on April 8, 2014 (D.I. 38), and from all other orders, rulings, findings, and conclusions underlying and related to that Order, including but not limited to the Memorandum Opinion issued on March 31, 2014 (D.I. 35).

Dated: April 10, 2014

Respectfully submitted,

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I hereby certify that I caused the foregoing to be delivered through the ECF electronic filing system on the 10th day of April, 2014, to:

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April 10, 2014

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

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

ORDER

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

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

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

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

DELAWARE STRONG FAMILIES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 13-1746-SLR
	)	
JOSEPH R. BIDEN, III and EILEEN MANLOVE,	)	
	)	
	)	
Defendants.	)	

ORDER

At Wilmington this 6th day of February, 2014, having reviewed the record and conferred with counsel regarding the pending discovery dispute;[1] and having further considered the context of the dispute, that is, whether defendants' burdensome discovery requests are appropriate when plaintiff is challenging the constitutionality of the Delaware Election Disclosures Act ("the Act") and its definitions of "third-party advertisements," 15 Del. C. §§ 8002 (2), (10) and (27), as applied to plaintiff's proposed materials (2012 voter guide, D.I. 1, ex. A);

IT IS ORDERED that:

1. On or before **February 21, 2014,** plaintiff shall resubmit its opening brief in support of its motion for a preliminary injunction, addressing the sole issue identified above: if the scope of the Act is broad enough to include plaintiff's proposed voter

[1]Given the court's general practice to resolve discovery disputes informally, rather than through a motion practice, plaintiff's motion for protective order (D.I. 20) is denied.

guide, is it unconstitutional under such Supreme Court precedent as *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007), and *Citizens United v. FEC*, 558 U.S. 310 (2010).

2. Defendants shall file their responsive brief on or before **March 7, 2014**, again limiting their argument to the one issue.

3. Plaintiff may file a reply brief on or before **March 14, 2014.**

4. Briefing shall conform to D. Del. LR 7.1.3.

5. Oral argument shall be conducted on **March 18, 2014** at **3:30 p.m.** in courtroom 4B, fourth floor, U.S. Courthouse, 844 King Street, Wilmington, Delaware.

6. A decision shall be forthcoming on this issue on or before **March 31, 2014.**

IT IS FURTHER ORDERED that, in order to be prepared to move the case forward assuming the constitutionality of the Act, some efforts shall be undertaken in connection with defendants' discovery requests, to wit:

7. On or before **February 21, 2014**, plaintiff shall produce those materials upon which it would rely at trial to prove that the Act's reporting requirements will result in injury to plaintiff.

8. Given that the Act burdens political speech and, therefore, "'the burden is on the government to show the existence of [a compelling] interest'" in prohibiting such speech, on or before **March 7, 2014,** defendants shall produce those materials upon which it would rely at trial to carry its burden of proof under the strict scrutiny standard.

9. A discovery conference shall be conducted on **March 18, 2014** at the conclusion of oral argument to resolve what further discovery each of the parties requires to try these matters. Absent agreement of the parties, however, no further

discovery may be pursued until further order of the court.

10. If needed, the court shall conduct a telephonic status conference on **April 1, 2014** at **10:00 a.m.**, in order to coordinate the completion of the discovery process, with discovery ending on or before **April 30, 2014**. The telephone call shall be coordinated by plaintiff's counsel.

11. The court shall conduct an in-person status conference on **May 6, 2014** at **4:30 p.m.** in courtroom 4B, in order to resolve any remaining discovery disputes and to discuss whether the case should be resolved through a motion practice or by trial. The court has reserved the week of **June 2, 2014** for this matter, if needed.

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

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

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MEMORANDUM OPINION

Dated: March 31, 2014
Wilmington, Delaware

ROBINSON, District Judge

I. INTRODUCTION

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

More specifically, § 8031(a) of the Act requires that "[a]ny person . . . who makes an expenditure for any third-party advertisement that causes the aggregate amount of expenditures for third-party advertisements made by such person to exceed $500 during an election period shall file a third-party advertisement report with the Commissioner." 15 Del. C. § 8031(a). The report includes, *inter alia*, the names and addresses of each person who has made contributions to the "person" in excess of $100 during the election period. "Person" includes "any individual, corporation, company, incorporated or unincorporated association, general or limited partnership, society, joint stock company, and any other organization or institution of any nature." 15 Del. C. § 8002(17). "Third-party advertisement" means "an independent expenditure

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

or an electioneering communication." 15 Del. C. § 8002(27). "Electioneering communication" means "a communication by any individual or other person (other than a candidate committee or a political party) that: (1) Refers to a clearly identified candidate; and (2) Is publicly distributed within 30 days before a primary election or special election, or 60 days before a general election to an audience that includes members of the electorate for the office sought by such candidate." 15 Del. C. § 8002(10)a.

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

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

II. STANDARD OF REVIEW

In the Third Circuit, "[f]our factors determine whether a preliminary injunction is appropriate: (1) whether the movant has a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3) whether there will be greater harm to the nonmoving party if the injunction is granted; and (4) whether granting the injunction is in the public interest." *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 302 (3d Cir. 2013) (internal citation and quotation marks omitted); *see also N.J. Retail Merchs. Ass'n. v. Sidamon Eristoff*, 669 F.3d 374, 385-386 (3d Cir. 2012); *Hes v. de Jongh*, 638 F.3d 169, 172 (3d Cir. 2011). A preliminary injunction is "an extraordinary remedy," which "should be granted only in limited circumstances." *Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d 2004) (citation omitted).

III. DISCUSSION

A. Analytical Framework

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

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

The court starts its review of such with the decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), where the United States Supreme Court addressed various challenges to the Federal Election Campaign Act of 1971 ("FECA"), as amended in 1974. Appellants in *Buckley* did not challenge the disclosure requirements of FECA, 2 U.S.C. §§ 431, *et seq.*, as per se unconstitutional; they instead argued that several provisions were over-

broad as applied to contributions: (a) to minor parties and independent candidates; and (b) by individuals or groups other than a political committee or candidate. Of import to the disclosure requirements at bar, the Court explored the general principles related to the challenged reporting and disclosure requirements, to wit: The Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. The Court has

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

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

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

Id. at 65-66 (citations omitted). In addressing the other side of the scale, the Court identified the governmental interests sought to be vindicated by the disclosure requirements: (1) providing the electorate with information "'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office;" (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity;" and (3) serving as "an essential means of

gathering the data necessary to detect violations of the contribution limitations" described elsewhere in the statute. *Id.* at 66-68. The Court went on to conclude that disclosure requirements, "as a general matter, directly serve substantial governmental interests" and appear, "in most applications," "to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68.

With respect to FECA's reporting and disclosure requirements as applied to minor parties and independents, the Court concluded that, absent evidence of a "reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties," *id.* at 74, "the substantial public interest in disclosure identified by the legislative history of [FECA] outweighs the harm generally alleged." *Id.* at 72.

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

> part of Congress' effort to achieve "total disclosure" by reaching "every kind of political activity" in order to insure that the voters are fully informed and

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

> to achieve through publicity the maximum deterrence to corruption and undue influence possible. . . .
>
> In its efforts to be all-inclusive, however, the provision raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights.

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

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

that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 79-80. The Court concluded that "§ 434(e), **as construed**, bears a sufficient relationship to a substantial governmental interest. **As narrowed**, § 434(e) . . . does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result." *Id.* at 80 (emphasis added).

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

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

> With regard to the first development, prior to BCRA, FECA's disclosure requirements and source and amount limitations extended only to so-called "hard-money" contributions made for the purpose of influencing an election for federal office. Political parties and candidates were able to circumvent FECA's limitations by contributing "soft money" - money as yet unregulated under FECA - to be used for activities intended to influence state or local elections; for mixed-purpose activities such as get-out-the-vote (GOTV) drives and generic party advertising; and for legislative advocacy advertisements, even if they mentioned a federal candidate's name, so long as the ads did not expressly advocate the candidate's election or defeat. With regard to the second development, parties and candidates circumvented FECA by using "issue ads" that were specifically intended to affect election results, but did not contain "magic words," such as "Vote Against Jane Doe," which would have subjected the ads to FECA's restrictions.

Id. at 93-94.

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

> to replace the narrowing construction of FECA's disclosure provisions adopted by this Court in *Buckley*. As discussed further below, that construction limited the coverage of FECA's disclosure requirement to communications expressly advocating the election or defeat of particular candidates. By contrast, the term "electioneering communication" is not so limited, but is defined to encompass any "broadcast, cable, or satellite communication" that
>
> "(I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within -
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate."

Id. at 189-190.

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

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

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

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

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

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

[4]BCRA § 201 amended the disclosure requirements to FECA § 304, providing that "[e]very person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall . . . file with the [Federal Election] Commission a statement" containing certain required information. BRCA, Pub. L. No. 107-155, § 201 (codified as amended at 2 U.S.C. § 434 (f)(1)).

economic reprisals or physical threats as a result of the compelled disclosures." *Id.*

The Court then turned its attention to BCRA § 203's prohibition of corporate and labor disbursements for electioneering communications. "Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *Id.* at 203. Section 203 of BCRA extended this rule to all "electioneering communications," as defined in BCRA §201(f)(3)(A). In response to plaintiffs' argument that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications," *id.* at 206, the Court explained that

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

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

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

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

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

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

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

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

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

> the other hand, WRTL's ads are **not** express advocacy or its equivalent, the Government's task is more formidable. It must then demonstrate that banning such ads during the blackout periods is narrowly tailored to serve a compelling interest.

Id. at 465 (emphasis in original).

During the course of its analysis, the Court "decline[d] to adopt a test for as-applied challenges turning on the speaker's intent to affect an election," as "opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue." *Id.* at 467-468. The Court instead embraced an objective standard: "[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-470. "[C]ontextual factors[6] . . . should seldom play a significant role in the inquiry." *Id.* at 473-474.

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

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

> Yet, as is often the case in this Court's First Amendment opinions, we have gotten this far in the analysis without quoting the Amendment itself: "Congress shall make no law . . . abridging the freedom of speech." The Framers' actual words put these cases in proper perspective. Our jurisprudence over the past 216 years has rejected an absolutist interpretation of those words, but when it comes to drawing difficult lines in the area of pure political speech - between what is protected and what the Government may ban - it is worth recalling the language we are applying. *McConnell* held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. We have no occasion to revisit that determination today. But when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban - the issue we **do** have to decide - we give the benefit of the doubt to speech, not censorship. The First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech" demands at least that.

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

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

The last of the significant First Amendment cases is the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), another as-applied challenge to FECA, 2 U.S.C. § 441b, as amended by BCRA § 203. In January 2008, appellant Citizens United, a nonprofit corporation, released a documentary (hereafter "*Hillary*") critical of then-Senator Hillary Clinton, a candidate for her party's Presidential nomination. Concerned about possible civil and criminal penalties for violating § 441b, it sought declaratory and injunctive relief, arguing that (1) § 441b was unconstitutional as applied to *Hillary,* and (2) BCRA's disclaimer, disclosure, and reporting requirements, BCRA §§ 201 and 311, were unconstitutional as applied to *Hillary* and the television ads Citizens United produced to announce the availability of *Hillary* on cable television through video-on-demand. Applying an

objective test to determine whether *Hillary* was the functional equivalent of express advocacy, the Court found that there was "no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL,* the film qualifies as the functional equivalent of express advocacy." *Id.* at 326.

The Court then proceeded to "exercise . . . its judicial responsibility" to consider the facial validity of § 441b, explaining that "[a]ny other course of decision would prolong the substantial, nationwide chilling effect caused by § 441b's prohibitions on corporate expenditures." *Id.* at 333. The Court once again traced the history of campaign finance regulation, and characterized the dilemma at hand in terms of "confront[ing] . . . conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity[7] and a post-*Austin* line that permits them." *Id.* at 348. The Court reconfirmed that "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'" *Id.* at 349. The Court rejected the reasoning of *Austin*, finding it "irrelevant for purposes of the First Amendment that corporate funds may 'have little or no correlation to the public's support for the corporation's political ideas,' . . . [because a]ll speakers, including

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[7]In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Supreme Court held that political speech may be banned based on the speaker's corporate identity, having found "a compelling governmental interest in preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *Citizens United*, 558 U.S. at 348 (citing *Austin*, 494 U.S. at 660).

individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas." *Id.* at 351 (quoting *Austin*, 494 U.S. at 660). The Court then overruled *Austin*, based on the "principle established in *Buckley* . . . that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Id.* at 365.

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

> The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. . . . In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. . . .

> In *McConnell*, three Justices who would have found § 441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. . . . And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. . . . For these reasons, we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.

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

B. Circuit Court Precedent

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

> Any person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candiate (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. The reports filed by such person shall set forth the source of the funds used in carrying out any activity described in the preceding sentence in the same detail as if the funds were contributions within the meaning of section 431(3) of this

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

> title, and payments of such funds in the same detail as if they were expenditures within the meaning of section 431(f) of this title.

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

> recognition that the government has demonstrated a substantial and legitimate interest in protecting the integrity of its elections, an interest closely connected to and plainly advanced by those provisions.
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> Section 437a, however, seeks to impose the same demands where the nexus may be far more tenuous. As we have said, it may undertake to compel disclosure by groups that do no more than discuss issues of public interest on a wholly nonpartisan basis. To be sure, any discussion of important public questions can possibly exert some influence on the outcome of an election . . . . But unlike contributions and expenditures made solely with a view to influencing the nomination or election of a

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[9]Human Events, Inc., "the publisher of a weekly newspaper devoted primarily to events of political importance and interest," and the New York Civil Liberties Union, an organization that "engage[s] publicly in nonpartisan activities which 'frequently and necessarily refer to, praise, criticize, set forth, describe or rate the conduct or actions of clearly identified public officials who may also happen to be candidates for federal office.'" 590 F.2d at 870-71. With respect to the latter, it sufficiently demonstrated a "'threat of specific future harm,' . . .([to wit] disclosure would cause loss of contributions from those who currently insist that their gifts remain confidential)." *Buckley v. Valeo*, 519 F.2d at 871 n.130.

> candidate, *see* 2 U.S.C. §§ 431(e), 431(f), issue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections. Moreover, and very importantly, such discussions are vital and indispensable to a free society and an informed electorate. Thus the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes.

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

Defendants, for their part, direct the court's attention to *Center for Individual Freedom, Inc. v. Tennant* ("*CFIF*"), 706 F.3d 270 (4th Cir. 2013), where the Fourth Circuit reviewed West Virginia's campaign finance laws.[11] Defendants find most relevant to the dispute at bar the challenge in *CFIF* to West Virginia's definition of "electioneering communication" found in W. Va. Code § 3-8-1a(12)(A), to wit,

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

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

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

W. Va. Code § 3-8-1a(12)(A). In *CFIF*, plaintiff challenged the definition's inclusion of materials "published in any newspaper, magazine or other periodical." 706 F.3d at 281-282. In this context, and applying "exacting scrutiny" for its evaluation of the campaign finance disclosure provisions, the Fourth Circuit found that West Virginia could rely on its interest of "providing the electorate with election-related information." *Id.* at 283. The Fourth Circuit concluded, however, that West Virginia had "failed to demonstrate a substantial relation between its interest in informing the electorate and its decision to include periodicals - but not other non-broadcast materials - in its 'electioneering communication' definition." *Id.* More specifically, the Court found that, "[a]lthough the affidavits that West Virginia submitted sufficiently support its decision to regulate periodicals and other non-broadcast media, they do not justify the legislature's decision to regulate periodicals to the exclusion of other non-broadcast media, such as direct mailings." *Id.* at 285. "[E]rr[ing] on the side of protecting political speech rather than suppressing it," *id.*, the Fourth Circuit determined that "limiting the campaign finance regime's applicability to only broadcast media causes it to burden fewer election-related communications." *Id.*

C. Likelihood of Success on the Merits

Starting where defendants left off, as far as the court can discern, there is no case that purports to address disclosure requirements with the breadth attributed to the Act.[12] As noted by DSF, many of the cases identified by defendants relate to statutes that only regulate express advocacy or its functional equivalent (not the mere mention

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

of a candidate),[13] while other cases (including *CFIF*) involve statutes that have exemptions from the reporting requirements, such as those exempting § 501(c)(3) activity from disclosure[14] or those exempting such publications as voter guides.[15] Consequently, when the Fourth Circuit in *CFIF* upholds the constitutionality of West Virginia's substantive disclosure requirement, W. Va. Code § 3-8-2b(b)(5), which mandates the disclosure of certain contributors "whose contributions were used to pay for electioneering communications," one cannot ignore the context of the decision, where the West Virginia legislature, by its exemptions to the definition of "electioneering communication"[16] and its preamble to the regulations,[17] made clear that its intended focus was on express advocacy. Indeed, where a legislature (Congress) clearly intended otherwise, i.e., to embrace virtually all political communications and communicators, the D.C. Circuit rejected the resulting statutory language as being over-

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

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

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

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

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

broad. *See Buckley v. Valeo*, 519 F.2d at 877-78 and 877 n.140.

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

The Court had more difficulty applying such requirements to individual contributors and, in that context, found "the relation of the information sought to the purposes of the Act . . . too remote." *Buckley,* 424 U.S. at 79-80. To insure that the reach of 434(e) was not impermissibly broad, the Court construed "expenditure" for purposes of that section "to reach only funds used for communications that expressly advocate[d] the election or defeat of a clearly identified candidate." *Id.* at 80. The Court in *McConnell,* while rejecting the notion that "*Buckley* drew a constitutionally

mandated line between express advocacy and so-called issue advocacy," *McConnell*, 540 U.S. at 190, nevertheless rooted its decision to uphold the disclosure requirements to "evidence in the record that independent groups were running **election-related advertisements** 'while hiding behind dubious and misleading names.'" *Citizens United*, 558 U.S. at 367 (emphasis added) (citing to *McConnell*, 540 U.S. at 197).

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

The Act has no such exemptions, apparently leaving to the Commissioner (and the less transparent administrative regulation process) any efforts to perhaps more narrowly tailor the Act's disclosure requirements to communicators/communications more likely to raise concerns about partisan politics. In this regard, the court notes that the focus of the Act was actually on communications that are the functional equivalent

of advocacy, e.g., on "sham issue ads,"[18] voter guides,[19] and even advertisements that encourage recipients to contact officeholders and candidates, all described in the record in terms of advocacy, i.e., as efforts intended "to affect voters' choices at the ballot box." (D.I. 30, ex. 4 at 4)

The court recognizes that it is never an easy task for the legislature to draw lines when it comes to restricting constitutional rights. A fully informed electorate is a worthy goal recognized by the Supreme Court.[20] Nevertheless, as presented, the Act is so broadly worded as to include within the scope of its disclosure requirements virtually every communication made during the critical time period, no matter how indirect and unrelated it is to the electoral process.[21] On the record presented, this would include DSF's proposed voter guide (as a presumably neutral communication) published by

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

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

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

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

DSF (a presumably neutral communicator by reason of its 501(c)(3) status). The court concludes that the relation between the personal information collected[22] to the primary purpose of the Act[23] is too tenuous to pass constitutional muster.[24] Therefore, DSF is likely to prevail on the merits of its claim that the Act, as applied, is unconstitutional.

D. Balance of Harms

In the Third Circuit, "[i]t is well established that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Having found that DSF has demonstrated a likelihood of success on the merits of their First Amendment claim, and concluding that defendants' interest in public disclosure cannot withstand the public's interest in protecting their privacy of association and belief guaranteed by the First Amendment, the court concludes that the balance of harms weighs in favor of DSF.

IV. CONCLUSION

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

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

[23]Regulating anonymous political advocacy.

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

shall be executed until the court has conferred with the parties at the scheduled April 1, 2014 telephonic status conference.