No. 14-1887

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DELAWARE STRONG FAMILIES,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

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

BRIEF OF *AMICI CURIAE* THE UNITED STATES CONSTITUTIONAL RIGHTS LEGAL DEFENSE FUND AND THE NATIONAL RIGHT TO WORK COMMITTEE IN SUPPORT OF AFFIRMANCE OF THE PRELIMINARY INJUNCTION AND IN SUPPORT OF PLAINTIFF-APPELLEE DELAWARE STRONG FAMILIES

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July 9, 2014

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 14-1887

Delaware Strong Families, Plaintiff-Appellee

v.

Attorney General of the State of Delaware and Commission of Elections for the State of Delaware, Defendants-Appellants

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. An original and three copies must be filed. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, The National Right to Work Committee makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations: Nothing to disclose.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

Nothing to disclose.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

Nothing to disclose.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A.

/s/ Heidi K. Abegg
(Signature of Counsel or Party)

Dated: July 9, 2014

United States Court of Appeals for the Third Circuit

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If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, United States Constitutional Rights Legal Defense Fund makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: Nothing to disclose.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

Nothing to disclose.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

Nothing to disclose.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

/s/ Heidi K. Abegg
(Signature of Counsel or Party)

Dated: July 9, 2014

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The parties consent to this brief. No party's counsel authored any of this brief, and no one other than *Amici* or its counsel, including any party or party's counsel, contributed money for preparing or submitting this brief.

INTEREST OF AMICI

The National Right to Work Committee is a § 501(c)(4) educational-lobbying organization dedicated to advocating for the Right to Work cause, i.e., opposing compulsory unionism, through various activities (e.g., newsletters, mailings, telephone calls, and advertisements) through various media in any state (including Delaware) where it deems it appropriate at the time. The Committee participated as an *amicus curiae* in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), which struck down restrictions on independent corporate communications related to Federal candidates and elections as a First Amendment violation, and it was a party in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), challenging parts of the Bipartisan Campaign Reform Act of 2002.

The United States Constitutional Rights Legal Defense Fund, Inc. is a § 501(c)(3) charitable organization dedicated, *inter alia*, to defending the freedoms of expression and association protected by the First Amendment to the Constitution of the United States. It has participated as *amicus curiae* in a number of other campaign finance cases, most notably *Citizens United v. Federal Election Commission*,

558 U.S. 310 (2010), which struck down restrictions on independent corporate communications related to Federal candidates and elections as a First Amendment violation, and *Center for Individual Freedom v. Van Hollen and Federal Election Commission*, 694 F.3d 108 (D.C. Cir. 2012), which reversed a district court decision that threatened to compel public disclosure to the FEC of lists of donors who contributed, during certain time periods, more than $1,000 to nonprofit corporations and other entities that made "electioneering communications" without regard to whether the contributions were earmarked for such communications.

Amici have defended First Amendment rights in the courts, and have a strong interest in whether citizens may associate and speak freely. They believe this case is an important opportunity for the Court to protect the First Amendment rights of all Americans. Further, these *amici* believe that their perspective on such issues may bring to the attention of the Court relevant matters not already brought to its attention by the parties, and that this brief may be of help to the Court.

INTRODUCTION

This case involves a state statute which requires organizations of all stripes, who merely mention a candidate within 30 days of a primary election and 60 days of a general election, whether or not the mention is related to the election, to disclose all $100+ donors (using a time consuming and confusing method) and assume other PAC-like burdens if they spend $500 in the aggregate. Organizations are forced to reveal the names and addresses of donors (most of whom will know little to nothing about Delaware-specific communications) as a result of making communications that mention a candidate in a non-candidate capacity and are not election-related, *e.g.*, grassroots lobbying, education, litigation, and from making communications which are not express advocacy or the functional equivalent, *e.g.,* issue advocacy. The State alleges that its sweeping disclosure law is supported by Supreme Court cases holding that the "public's interest in knowing who is funding *election-related speech* suffices by itself to support contributor disclosure laws." App. Br. at 2-3 (emphasis added). The State fails to, and indeed cannot, cite precedent for its informational interest in contributors to organizations engaged in non-electoral speech.

The First Amendment dictates that restrictions on speech be no more than is necessary to combat the problem being addressed or the interest being advanced. The State's informational interest is not absolute and cannot trump the important rights of association and privacy at stake here. Rather than striking a constitutional balance of competing First Amendment interests, the State has completely ignored the associational and privacy rights of organizations and their donors. Requiring organizations engaged in non-electoral speech to disclose donor information does not deter corruption and does not provide the electorate with information "'about the sources of election-related spending.'" App. Br. at 35 (*quoting Citizens United v. FEC*, 558 U.S. 310, 367 (2010)). It does, however, make private associations public, thus permitting harassment and reprisal. It removes the donor's ability to control information concerning their person. It prohibits anonymous publication. The overbroad disclosure regime therefore is not tailored to meet the State's informational interest.

Imposing PAC-like burdens on organizations engaged in non-electoral speech is not only unconstitutional, but it chills speech and deters non-profit activity. Such speech and associational activity must

be protected. Not only do non-profit organizations perform acts of charity; educate; shape and define values, policies, and culture; and lessen the burden of government, they serve to amplify the voices of associated individuals. Within this role, they are concentrations of power which can buffer, or stand up to, the power of the majority, other interest groups, and the state. In short, they are an important part of our democratic structure.[1]

ARGUMENT

I. DELAWARE'S STATUTE SWEEPS IN ALL SPEECH WITHIN THE 30/60 DAY TIME PERIODS, THUS REQUIRING REPORTING OF NON-CAMPAIGN RELATED SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

As the District Court correctly noted, Delaware's statute is broad enough to capture neutral communications, and virtually every communication made during the critical time period, no matter how indirect and unrelated it is to the electoral process. *Del. Strong Families v. Biden*, No. 13 1746 SLR, 2014 WL1292325 (D. Del. March 31, 2014). Delaware has chosen to regulate "a relatively large amount of constitutionally protected speech unrelated to elections merely to

[1] For this reason, non-profit associations are often referred to as the "Independent Sector," the "Third Sector," or the Non-Profit Sector."

regulate a relatively small amount of election-related speech." *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008).

The Supreme Court has rejected sweeping attempts to regulate speech that is not express advocacy or its functional equivalent.[2] *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) (*WRTL II*) (a communication may be regulated as the functional equivalent of express advocacy only if, objectively focusing on its substance, it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."); *McConnell v. FEC*, 540 U.S. 93, 206 n. 88 (2003) ("the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads."). The analysis of the statute in question must begin with a determination of whether the communication being regulated is unambiguously campaign related, *Buckley v. Valeo*, 424 U.S. 1, 80 (1976), because "this requirement ensures that the constitutional regulation of elections . . . does not sweep so broadly as to become an

[2] While *WRTL II* involved a ban on speech during the 30/60 day time period, the same protection of issue speech is also required in a reporting/disclosure scheme.

unconstitutional infringement on protected political expression." *North Carolina Right to Life, Inc.*, 525 F.3d at 287.

Rather than carefully articulating what election-related communications are the functional equivalent of express advocacy, and thus regulable, the Delaware statute reaches many communications by exempt organizations that no reasonable person could conclude have anything to do with a subsequent election. For example, assume that a § 501(c)(3) organization whose purpose is to improve the quality of life in a Delaware city schedules its annual fundraising banquet for mid-November, two weeks after the election. It invites the mayor, who is running for statewide office that year, to speak at the banquet, and he accepts. Beginning in July and continuing through the week before the banquet, the organization regularly publishes advertisements in the local newspaper, and sends weekly emails and other mailings to all the residents of the city. All of these communications state that the mayor will be the featured speaker at the banquet. None of the communications mention the election or that the mayor is a candidate. No reasonable person would conclude that these communications are

appeals to vote for or against the mayor, but the organization would be required to file reports and disclose donors if it spent more than $500.

Assume that X is running for re-election as Governor. During his first term, the Delaware Department of Education was sued for allegedly misallocating state grants to local education agencies. A secondary issue in the case was whether Z was duly appointed to head the Department of Education and thus authorized to take the action in question. The opinion of the Delaware Supreme Court, issued shortly before the election, mentions X because, as Governor, he appointed Z to head the Department. Exempt organizations filed amici briefs in the case, spending more than $500, and want to put their briefs and the opinion on their websites.[3] No reasonable person would conclude that these communications were intended to influence the election, but the organizations would be required to file reports and disclose donors.

Delaware's statute reaches far beyond candidate-related activity to education, government accountability efforts, and grassroots lobbying. The inclusion of any communication which mentions a clearly

[3] The amici briefs would need to contain a campaign finance disclaimer, stating who paid for it and certain other information. Del. Code Ann. tit. 15, § 8020.

identified candidate within 30/60 days of an election will effectively prohibit many exempt organizations from engaging in any grassroots lobbying of the executive branch between August (30 days before the September primary) and the date of the election in November.

The overbroad reach of Delaware's law creates a practical problem for exempt organizations. The Act requires that any 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" file a third-party advertisement report. Del. Code Ann. tit. 15, § 8031(a). Exempt organizations will need to keep a running total of the amount of all third-party advertisements made 30/60 days before an election. While it may be simple to keep track of the cost of electioneering communications distributed via TV, radio, newspaper, or telephone, how are exempt organizations to value electioneering communications placed on their websites? What about communications that are already present on their websites? For example, what about Articles of Incorporation which contain the name and signature of the secretary of state running for reelection, litigation documents mentioning an

officeholder who is now a candidate, written testimony before government officials who are also candidates, and factual news reports or commentary? Are exempt organizations required to search their website archives to find any communication which mentions the name of someone who is now a candidate even if it has no nexus to the election? Presumably, the organization will need to know the name of every person who has declared him- or herself as a candidate. This is an intolerable burden on the First Amendment right of an exempt organization to speak about public policy issues in a manner that has no real connection to any election.

II. DISCLOSURE OF DONORS CANNOT BE CONSTITUTIONALLY REQUIRED OF ORGANIZATIONS NOT ENGAGED IN EXPRESS ADVOCACY OR ITS FUNCTIONAL EQUIVALENT IN THE NAME OF TRANSPARENCY.

Delaware's law requires exempt organizations making $500 of electioneering communications to disclose *all* donors of $100 or more during the election period. *Amici Curiae* League of Women Voters of Delaware and Common Cause allege that the State's concern about "dark money" is sufficient to justify disclosure. *See Amici Curiae* Br. at 20. However, "the imposition of disclosure requirements is not without

limitations." *National Right to Work Legal Defense and Education Foundation, Inc., v. Herbert*, 581 F. Supp. 2d 1132, 1148 (D. Utah 2008). The Government has no interest in compelling disclosure of donors to organizations engaged in non-electoral speech. *See id.* (disclosure requirements may constitutionally be imposed only when they regulate activities that are unambiguously campaign related.) (citing *Buckley*, 424 U.S. at 80).

"Sunlight," that powerful disinfectant touted by Justice Brandeis, has become a panacea for any ill said to plague our democracy. Too much corruption in government? Enact stricter reporting requirements. Too many back-room deals? Enact earmark reform and lobbyist registration. Too many individuals and groups "hiding" behind misleading names on issue ads? Enact disclosure requirements.

This case demonstrates what happens when sunlight or transparency is taken too far – when privacy rights are ignored – and disclosure of protected association is compelled for no other purpose than to silence those on the other side. But openness, transparency, and more information are not the only requirements to sustain a functioning, vibrant democracy. The enjoyment of privacy of association

is also fundamental to our democracy. Technological advances continue to make our lives easier, but they also chip away at our privacy. We are subjected to scans and searches when we travel, we have to present identification to buy certain kinds of medicine, our vehicles are videotaped going through intersections, and our homes can be seen on the Internet at street view and from above.

Despite this, citizens still value privacy and search for ways to maintain privacy and anonymity – for example, using cash; arranging transactions so that they remain under various reporting thresholds (e.g., campaign contributions, bank transactions); and using pre-paid cell phones. However, the only choice present in this case to maintain privacy lies in not contributing more than $100 to any non-profit organization.

The State has conditioned the exercise of a fundamental right – the right of association – on the relinquishment of privacy for information's sake. This information interest does not promote openness or transparency of *government*. It does, however, focus the glare of sunlight on ordinary citizens exercising their right to associate with non-profit organizations. This compelled disclosure, coupled with

technological advances, permits opponents to harass, intimidate, and sanction these citizens. Consequently, the important associational privacy rights of these citizens should not be given short shrift in the name of "transparency."

This case illustrates the tension that exists between transparency and associational privacy, both of which are required for a functioning democracy. *Cf. Buckley*, 424 U.S. at 237 (Burger, C.J., concurring in part and dissenting in part) ("The public right to know ought not to be absolute when its exercise reveals private political convictions."). Justice Brandeis advocated "sunlight as a disinfectant" because it illuminates and is the "best of disinfectants." Louis Brandeis, Other People's Money, Harper's Weekly, Dec. 20, 1913, http://www.law.louisville.edu/library/collections/brandeis/node/196 (last visited July 7, 2014). In the marketplace of ideas, more information is usually better. But when associational rights are involved, privacy trumps a mere informational interest.

The "freedom to engage in association for the advancement of beliefs and ideas" encompasses the "protection of privacy of association." *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544

(1963); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association . . . . Exercise of these basic freedoms in America has traditionally been through the media of political associations.").

Alexis de Tocqueville noted the importance of associations in our country. *See* Alexis de Tocqueville, 2 Democracy in America 512-13 (J.P. Mayer ed. & George Lawrence trans., Harper Perennial 1966) (1840). "We constitute our selves in our associations with others, and our group affiliations are a crucial part of our identities." Lee Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Or. L. Rev. 117, 178 (1996). When these associations "are exposed to the glare of unwanted publicity, great psychic, social, and economic harm may occur." Christopher Hunter, *Political Privacy and Online Politics: How E-Campaigning Threatens Voter Privacy*, http://journals.uic.edu/ojs/index.php/fm/article/view/930/852 (last visited July 7, 2014).

To protect these associational rights, the "law is also concerned with protecting sanctuaries of private liberty from state intervention."

Seth F. Kreimer, *Article: Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. Pa. L. Rev. 1, 7 (1991). The privacy afforded by these shadows is as necessary as the sunlight. *Id.* "The importance of that right to choose, both to the individual's self-development and to the exercise of responsible citizenship, makes the claim to privacy a fundamental part of civil liberty in democratic society." Alan F. Westin, *Social and Political Dimensions of Privacy*, 59 Journal of Social Issues 431, 434 (2003). Without privacy, citizens cannot exercise basic freedoms. "If we are 'switched on' without our knowledge or consent, we have lost our fundamental constitutional rights to decide when and with whom we speak, publish, worship and associate." *Id.*

Delaware's law requires exempt organizations making $500 of electioneering communications to disclose *all* donors of $100 or more during the election period. Depending upon the candidate mentioned in the communication, and the election period involved, that can start anywhere from the period beginning on January 1 immediately after the most recent such election (candidate for reelection to an office to which the candidate was elected), to the period beginning on the day on

which the candidate first receives any contribution from any person (candidate for election to an office which the candidate does not hold). Del. Code Ann. tit. 15, § 8002(11)(a)(1) and (3).

In this case, organizations may be required to disclose the names of donors who have no knowledge of Delaware activities, and have not given any type of consent to disclosure. A donor who gives to an organization the year prior to an election (e.g., when the candidate for election first receives a contribution) may have no reason to know (the organization itself may have no plans to make electioneering communications) that the organization may engage in speech the following year that qualifies as an electioneering communication under the broad definition. A donor living in Illinois and giving to an organization located in Virginia may have no expectation that his/her name may be disclosed in Delaware for a communication having nothing to do with an election.

III. COMPELLED DISCLOSURE OF THE NAMES OF $100 DONORS IMPLICATES IMPORTANT ASSOCIATIONAL PRIVACY INTERESTS THAT THE GOVERNMENT HAS AN OBLIGATION TO PROTECT.

The Supreme Court has long recognized the importance of political and associational privacy. *See e.g., Talley v. California,* 362

U.S. 60 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Sweezy*, 354 U.S. 234; *NAACP v. Alabama*, 357 U.S. 449 (1958); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). "[T]he inviolability of privacy belonging to a citizen's political loyalties has [an] overwhelming importance to the well-being of our kind of society." *Sweezy*, 354 U.S. at 265 (Frankfurter, J., concurring in the result); *cf. Buckley*, 424 U.S. at 237 (Burger, J., dissenting) ("[S]ecrecy and privacy as to political preferences and convictions are fundamental in a free society."). Associations facilitate individual expression and serve as a bulwark against an ambitious majority. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 and 622 (1984) (Associations are the "critical buffers between the individual and the power of the State" and are "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.").

Compelled disclosure in this case involves revealing an association, a fundamental liberty interest. *Cf. Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998) (noting that the Supreme Court has recognized the right to informational privacy only when a fundamental liberty interest is implicated). Compelling disclosure of $100 donors implicates

the donor's interest in protecting against the disclosure of personal matters; interest in controlling his or her person and what information is shared; as well as a general right to be left alone. As opined by Warren and Brandeis:

> The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever . . . their position or station, from having matters which they may properly prefer to keep private, made public against their will.

Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 214-15 (1890). The State has a duty to prevent compelled disclosure of associations unrelated to electoral speech. The Supreme Court has recognized that "the right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosure. . . . In some circumstances that duty . . . has roots in the Constitution. . . ." *Whalen v. Roe*, 429 U.S. 589, 605 (1977).

The State cannot demonstrate an important governmental interest in requiring disclosure of donors to organizations engaged in non-electoral speech. The State's interest in transparency is not sufficient. Requiring disclosure of donors to organizations engaged in

non-electoral speech does nothing to deter corruption or prevent "abuse of the campaign finance system." *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, __ U.S. __, 131 S. Ct. 2806, 2827 (2011). This compelled disclosure, however, does permit harassment.

One danger of the "transparency" is the accessibility it now provides. Developments in technology have greatly impacted the privacy of association. Virtually unlimited amounts of information may be recorded, stored, aggregated, and shared permanently. The Internet can be used as the "spotlight of public opinion" to discourage unpopular associations. *Cf.* Kreimer, *Article: Sunlight, Secrets, and Scarlet Letters*, 140 U. Pa. L. Rev. at 11.

Prior to the advent of the Internet, our associations remained private because searching for them was akin to a needle in a haystack search and rarely would anyone take the time to search. *See* Daniel J. Solove, *Modern Studies in Privacy Law: Notice, Autonomy and Enforcement of Data Privacy Legislation: Access and Aggregation: Public Records, Privacy and the Constitution*, 86 Minn. L. Rev. 1137, 1178 (2002). Technology removed the deterrent imposed by the time and resources necessary to locate practically obscure associations and

increases the potential for social stigma and sanctions. *See Whalen*, 429 U.S. at 607 (Brennan, J., concurring) ("The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information . . . .").

Not only does technology enable an individual intent on harassment and intimidation to locate associations quickly, without much effort, but the search, sharing of results and spotlighting can be done anonymously. For example, a website that now appears to be defunct, www.eightmaps.com, provided an interactive Google map showing locations, names, addresses, donation amounts and, where provided, the names of employers of supporters of California's Proposition 8, which related to same-sex marriage. As a result, some supporters of Proposition 8 received death threats and/or had their businesses boycotted. Brad Stone, *Death Threats Follow Web Map of Donors*, Int'l Herald Trib., Feb. 9, 2009 at 12.

Technological advances are rapidly being used in new ways to aggregate information and make new uses of it. Technology is capable of accumulating and storing information that may otherwise have been forgotten. The permanence of our associations, and their effects, cannot

yet be measured. "We do not understand the scope of a disclosure into an electronic environment." Kreimer, *supra* at 115. There has yet to be a generation for which there has been the ability to record and store all aspects of their lives online from birth until death. Consequently, donors today have not lived long enough with technology to be able to fully grasp the consequences of their documented associations. *Cf.* Kreimer, *supra* at 115 ("Although today I may not care who knows about my ACLU membership, I may dearly wish in twenty years that it be confidential.").

Another danger of "transparency" is its permanence, which removes any time limit on social stigma and harassment. *Cf.* Andrew Jay McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C.L.Rev. 989, 1042 (1995). The disclosed associations of donors today will be part of their identities today as well as twenty years from now because the permanence permitted by technology "allows the scrutiny to be extended indefinitely." *Id.* Compelled disclosure of associations, coupled with the technology of the Internet, removes any ability of the donors to remove, or make secret, associations from their past. "Once one has been

identified as a member of the NAACP, she may be able to become a non-member, but she will always be an ex-member." Tien, *supra* at 178.

The passage of time, coupled with practical obscurity, no longer serve as protections against disclosure. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 ("[I]n today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains age 80. . . ."). "Nondisclosure is insurance against the future." Kreimer, *supra* at 115.

The flip side of the State's "transparency interest" is the donors' "informational privacy" or one's right to control the dissemination of personal information. *See* Alan F. Westin, *Privacy and Freedom* 7 (1967) (defining privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."); *Reporters Comm.*, 489 U.S. at 763 (noting that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."). Judge Posner has called

this interest, "the face we present to the world." Richard A. Posner, *Overcoming Law* 531 (1995).

Donors should have control over whether they wish to surrender their privacy. *Cf.* 11 C.F.R. § 104.20(c)(9) (disclosure of contributors is limited to only those who specifically give for the purpose of making the electioneering communication). Compelled disclosure is an intrusion into a sphere of personal liberty. William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. Const. L. 1, 19 (2003). Associations label us, and compelled disclosure displays that label to others without our consent. *Id.* Forcing organizations to publicly disclose associations they are constitutionally entitled to keep private is a violation of their constitutionally protected autonomy – a donor's right to define himself. *Cf.* Kreimer, *supra* at 69-70; *cf. also Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 32-33 (1986) (Rehnquist, J., dissenting) ("an individual's right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in the freedom of conscience."). Otherwise, donors concerned

about disclosure will have no choice but to limit contributions to less than $100 to any organization that *might* be active in Delaware.

IV. THE REGULATORY SCHEME IMPOSES SIGNIFICANT PAC-LIKE BURDENS.

This case is important to non-profit organizations because there are very real and very burdensome consequences if PAC-like status is imposed on the basis of non-electoral speech. Campaign finance regulation has become so complex and confusing that ordinary citizens cannot understand it, and even experts struggle with it. Professionals must be hired before one speaks alone or with others to handle the heavy workload, help maneuver through the complex web of restrictions, and help avoid the imposition of penalties. Some citizen groups are chilled from speaking because they want to avoid the complexity altogether or because they cannot afford a team of specialists. These groups are associations of citizens who pose no threat of corrupting the political process.

V. THE BURDENS OF DELAWARE'S ELECTIONEERING COMMUNICATION REPORTING SCHEME ARE REAL, SIGNIFICANT, AND ONEROUS AND, THEREFORE, DEMAND AN IMPORTANT GOVERNMENT INTEREST TO JUSTIFY THEIR IMPOSITION.

In *Buckley*, the Court was concerned not only with the chilling effect of reporting and disclosure requirements on an organization's contributors, but also with the potential burden of disclosure requirements on an association's own speech. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 265-66 (1986) (O'Connor, J., concurring) (*MCFL*) (*citing Buckley*, 424 U.S. at 66-68, 74-82). Since *Buckley*, the Court has repeatedly recognized the burdens imposed by PAC status. "Detailed recordkeeping and disclosure obligations . . . impose administrative costs that many small entities may be unable to bear." *MCFL*, 479 U.S. at 253.

For some, the sheer amount of time required to prepare reports dictates hiring professionals. Data entry and recordkeeping can be time consuming, especially if the non-profit has a large number of $100+ donors. Non-profits will need to keep track of all TV, radio, newspaper or other periodical, Internet, mail or telephone communications, or signs that mention a clearly identified candidate. Within 30/60 days of

an election, non-profits will need to scour their websites to find archived communications that mention candidates (after first obtaining a list of all candidates running for state and local office).

Once the $500 aggregate spending level is reached, non-profits will need to compile its list of $100+ donors. To do this, the non-profit will need to figure out the election period for each candidate mentioned in the electioneering communications:

> 1. For a candidate for reelection to an office to which the candidate was elected in the most recent election held therefor, the period beginning on January 1 immediately after the most recent such election, and ending on the December 31 immediately after the general election at which the candidate seeks reelection to the office.
>
> 2. For a candidate for reelection to an office which the candidate attained since the last election held therefor (whether the candidate attained the office by succession, appointment or otherwise), the period beginning on the day the candidate succeeded to or was appointed to the office, and ending on the December 31 immediately after the general election at which the candidate seeks reelection to the office.
>
> 3. For a candidate for election to an office which the candidate does not hold, the period beginning on the day on which the candidate first receives any contribution from any person (other than from the candidate or from the candidate's spouse) in support of that candidate's candidacy for the office, and ending on the December 31 immediately after the general election at which the candidate seeks election to the office.

Del. Code Ann. tit. 15, § 8002(11)(a)(1)-(3). This complex and time-consuming disclosure scheme is a significant burden on the exercise of the right to association.

The barrier to exercising the right to association due to PAC-like burdens is demonstrated in an experiment. In 2007, 255 subjects attempted to comply with disclosure laws from 3 states regulating ballot issue committees. Jeffrey Milyo, Ph.D., *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, at 27, Institute for Justice (Oct. 2007; last visited July 7, 2014) http://www.ij.org/images/pdf_folder/other_pubs/CampaignFinanceRedTape.pdf ("Milyo"). The difficulties of complying with reporting and disclosure laws was evident: not one subject completed all of the tasks correctly. *Id.* at 8. This is problematic because for "even a very small group with just a few contributors and expenditures, missing one filing deadline might generate hundreds of thousands of dollars in fines, or more." *Id.* at 3. Almost 89% of the participants agreed that when the specter of fines and punishment for incorrect compliance was raised, many people would be deterred from engaging in independent political activity altogether. *Id.* at 14-16. Or, their participation in the political

process was delayed for years. *Id.* at 18. A comment from one participant, a woman who served as a campaign treasurer for a political committee, is especially noteworthy:

> Even with [my] limited experience I found this exercise to be complicated and mentally challenging. I took nearly the alloted [sic] amount of time to complete the forms and still made two major errors. The burdensome paper work and fines imposed for errors in reporting proved to be a hurdle that prevented the formation of our PAC . . . for a number of years.

Id.

In another reporting experiment, California's Bipartisan Commission found that even participants with backgrounds in campaigns could not generate a form without making multiple mistakes, even with using a fairly simple set of mock campaign data. Bipartisan Commission on the Political Reform Act of 1974, *Overly Complex and Unduly Burdensome: The Critical Need to Simplify the Political Reform Act* at 69 (last visited July 7, 2014) http://www.fppc.ca.gov/pdf/McPherson.pdf. Those without a campaign background spent up to 3 hours completing the forms; some gave up in frustration. *Id.* Both those with campaign experience and those without it felt uncomfortable and uncertain about some of the responses on their prepared reports. *Id.*

What these two experiments show is that reporting requirements are so complex that even those with accounting and campaign backgrounds have difficulty complying. Complex reporting is a burden in and of itself, but it also creates other burdens – administrative fines and investigations from simple errors, and deterrence of participation in the democratic process. This was reaffirmed in the California study:

> Nothing discourages the citizenry from participating in the political process more quickly or completely than a political system that is permitted to become unduly complex and incomprehensible. If the rules of the game are too difficult or complicated for the average citizen to readily understand them, the citizens are naturally repelled by that complexity. The average citizen may then rationally choose to opt out of the process rather than attempt to maneuver through the difficulties and expense of obtaining the necessary legal or technical assistance. Such complexity then runs counter to the purpose of government to encourage public participation.

Bipartisan Commission at 34.

It is obvious from the foregoing discussion that the State's designation of PAC-like status on nonprofit organizations is extremely burdensome on the exercise of core First Amendment freedoms. *See* Bipartisan Commission at 62 ("Thus the regulations have injured grassroots democracy and have essentially professionalized politics so that you have to have lawyers and accountants on your campaign

staff."). Consequently, the State must demonstrate a compelling interest to justify this burden. *See MCFL*, 479 U.S. at 256 ("When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest.").

Expenditure-specific disclosure is done only if and when an electioneering communication is made. *Cf.* 11 C.F.R. § 104.5(j). Once the electioneering communication is disclosed, no additional reports are required, assuming no additional electioneering communications are made.

By contrast, Delaware requires non-profit organizations to file reports during the same reporting period used by PACs. Del. Code Ann. tit. 15, § 8031(b). This ongoing PAC-like reporting severely burdens speech by restricting spontaneous expression, especially for non-profit organizations that do not intend to continue to speak. The numerous requirements and complex donor disclosure rules will not only dampen non-profit organization activity, but may cause such groups not to speak altogether. *See National Right to Work Legal Defense and Education Foundation*, 581 F.Supp. 2d at 1153 ("Therefore, when the requirements for classification as a political issues committee are

loosely defined, otherwise protected political speech, such as true issue advocacy, may be self-censored . . . ."). Zechariah Chafee, Jr. pointedly observed that "[t]he men who propose suppressions, in Congress and elsewhere, speak much of the dangers against which they are guarding, but they rarely consider the new dangers which they are creating or the great value of what they are taking away." Zechariah Chafee, Jr., Does Freedom of Speech Really Tend to Produce Truth?, *The Principles and Practice of Freedom of Speech* 334 (Haig Bosmajian ed., 1971). The State's overbroad statute will result in taking away a part of the unique role non-profit organizations play in our democracy. *See* Lester M. Salamon, *America's Nonprofit Sector: A Primer* 9 (1992) ("Most of the major reforms in American Society . . . have originated in this nonprofit sector.").

VI. DELAWARE'S DISCLOSURE LAW IS AN ATTACK ON THE FREEDOM TO PUBLISH ANONYMOUSLY.

Delaware's overbroad disclosure and reporting law is an unconstitutional governmental attack on Americans' freedom to publish anonymously. It harkens back to:

> The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers, and distributors would

> lessen the circulation of literature critical of the government. . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

Talley, 362 U.S. at 64-65 (striking down an ordinance that required handbills to disclose, *inter alia*, "the true names and addresses of the owners, managers or agents of the person sponsoring said handbill." *Id.* at 61.) "Every freeman has an undoubted right to lay what sentiments he pleases before the public," IV W. Blackstone, *Commentaries on the Laws of England*, 151 (Univ. Of Chi. Facsimile ed.:1789). This includes the right to publish anonymously. *McIntyre*, 514 U.S. at 342-43. And publishers need not show that they were actually threatened or retaliated against or harassed. "[Q]uite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. . . . [T]he Court's reasoning [in *Talley*] embraced a respected tradition of anonymity in the advocacy of political causes." *Id.*, 514 U.S. at 342-343 & n.6.

The alleged interest in informing the electorate by forcing an organization to provide more information than the organization may desire impermissibly intrudes on the organization's editorial discretion.

"The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *McIntyre*, 514 U.S. at 348. "The best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at n. 11.

In the case of donor information, the words of Justice Thomas ring true:

> [T]he threat of retaliation from *elected officials* [is real]. . . . [A] candidate challenging an incumbent state attorney general reported that some members of the State's business community feared donating to his campaign because they did not want to cross the incumbent; in his words, ... "I can't afford to have my name on your records. He might come after me next."

Citizens United v. FEC, 558 U.S. 310, 383 (2010) (Thomas, J., dissenting).

Delaware's overbroad reporting and disclosure law focuses not just on contributions to candidates, the disclosure of which concerned Justice Thomas, but on independent publishing activities that are obviously not express advocacy or its functional equivalent. The freedom of the press prohibits Delaware from regulating such publishing activities and from attacking the anonymous nature of them.

CONCLUSION

Delaware's law is unconstitutional, both as applied and facially. The State has not met its burden and the Court should affirm the granting of the preliminary injunction.

Respectfully submitted,

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July 9, 2014

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CERTIFICATION

L.A.R. 28.3(d) CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

July 9, 2014

/s/ Heidi K. Abegg
Heidi K. Abegg

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,414 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007, the word processing system used to prepare the brief, in 14 point Century Schoolbook font.

Dated: July 9, 2014

/s/ *Heidi K. Abegg*
Heidi K. Abegg

CERTIFICATE OF COMPLIANCE PURSUANT TO THIRD CIRCUIT RULE 31.1(c)

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

Dated: July 9, 2014

/s/ *Heidi K. Abegg*
Heidi K. Abegg

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2014, I electronically filed the foregoing using the Court's CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 9, 2014

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