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.)

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

A. ANN WOOLFOLK
JOSEPH C. HANDLON
DELAWARE DEPARTMENT OF JUSTICE
Carvel State Building, 6th Floor
820 North French Street
Wilmington, DE 19801

SETH P. WAXMAN
JONATHAN G. CEDARBAUM
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

J. GERALD HEBERT
PAUL S. RYAN
TARA MALLOY
MEGAN MCALLEN
THE CAMPAIGN LEGAL CENTER
215 E Street NE
Washington, DC 20002

July 21, 2014

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I. APPLICATION OF THE DISCLOSURE ACT TO DSF'S VOTER GUIDE IS CONSTITUTIONAL

Under the carefully reasoned and clearly stated standards the Supreme Court has established for judging the constitutionality of campaign finance disclosure laws, the Delaware Elections Disclosure Act clearly passes muster. The Supreme Court has held that the government's "interest in 'provid[ing] the electorate with information' about the sources of election-related spending" and thus about "who is speaking about a candidate shortly before an election" is "sufficiently important," standing alone, to justify disclosure requirements. *Citizens United v. FEC*, 558 U.S. 310, 366-367, 369 (2010); *see McConnell v. FEC*, 540 U.S. 93, 194 (2003). The Court has twice relied on this interest in upholding the disclosure provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. BCRA's disclosure provisions, like the Disclosure Act provisions that were modeled on them, require contributor disclosure for communications that mention a candidate in close proximity to an election, are made through certain media, and are targeted to the relevant electorate. *See* 2 U.S.C. § 434(f). The Disclosure Act, like BCRA, thus directly serves the public's interest in knowing "the sources of election-related spending." *Citizens United*, 558 U.S. at 367, 369; *see McConnell*, 540 U.S. at 194; Delaware Br. 31-35. Under *Citizens United* and *McConnell*, the Disclosure Act's constitutionality is plain.

The proposed General Election Values Voter Guide at issue in this as-applied challenge lies at the heart of the public's interest in disclosure. The Voter Guide communicates about candidates shortly before an election, concerning their positions on issues important to their political contests, and it candidly proclaims that its purpose is "help[ing voters] choose candidates" at the polls. JA61. Knowing the sources of support behind the Voter Guide would allow voters to assess, for example, potential bias in the Voter Guide's framing of the issues or its presentation of candidates' views. For instance, voters may view the Voter Guide's presentation of candidates' positions—and its claim of being "non-partisan"—very differently depending on whether the group producing it is funded by local citizens or instead by major business or union interests. The Disclosure Act and its application to DSF's Voter Guide will thus "help [voters] make informed choices in the political marketplace." *Citizens United*, 558 U.S. at 369. By doing so, the Act will serve the important public interest the Supreme Court has held suffices to establish its constitutionality. Delaware Br. 17-19, 35-36.

A. DSF's Effort To Restrict Disclosure Laws To Express Advocacy Is Foreclosed By Supreme Court Precedent

DSF's brief confirms that its attack on the Disclosure Act rests on precisely the argument rejected by the Supreme Court in *McConnell* and *Citizens United*. DSF's principal argument (at 21-22, 26, 29-30, 42, 48, 51) is that its Voter Guide is constitutionally exempt from disclosure because it is "issue speech," a category

DSF defines (at 30, 42, 55 & n.22) only negatively, as any speech that is not "express advocacy or its functional equivalent." DSF's core contention is thus that disclosure laws, like expenditure restrictions, must be limited to express advocacy or its functional equivalent. The Supreme Court's response to that argument in *Citizens United* merits quotation at length:

> As a final point, Citizens United claims that, in any event, the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in *WRTL* limited 2 U.S.C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent. 551 U.S., at 469-476. Citizens United seeks to import a similar distinction into BCRA's disclosure requirements. We reject this contention.
>
> The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. *See, e.g., MCFL*, 479 U.S., at 262. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. 424 U.S., at 75-76. In *McConnell*, three Justices who would have found § 441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. 540 U.S., at 321 (opinion of KENNEDY, J., joined by Rehnquist, C.J., and SCALIA, J.). And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States v. Harriss*, 347 U.S. 612, 625 (1954) (Congress "has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose"). 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.

558 U.S. at 368-369.

Congress enacted BCRA's disclosure regime in large part to remedy the problems created by limiting disclosure requirements in much the way DSF now

proposes. *Buckley v. Valeo* upheld the disclosure requirements in BCRA's predecessor statute but, to avoid vagueness concerns with the phrase "'for the purpose of … influencing' an election," construed them to apply only to express advocacy. 424 U.S. 1, 79-80 (1976). Post-*Buckley* experience demonstrated, however, that the express advocacy standard failed to adequately protect the public's interest in disclosure. BCRA was Congress's solution to these shortcomings. Delaware Br. 5-8.

BCRA requires disclosure without regard to whether a communication is "express advocacy" or to whether the speech takes a position on a particular candidate or "advocates an election result." DSF Br. 50 n.18 (quoting JA30). Instead, Congress relied on the "easily understood and objectively determinable" criteria, *McConnell,* 540 U.S. at 189-190, 194, that would later serve as the model for the Disclosure Act. BCRA, like the Disclosure Act, requires disclosure of speech that mentions candidates within 30 or 60 days of an election, is made through certain media, and is targeted to the relevant electorate. 2 U.S.C. § 434(f).

When the Supreme Court upheld BCRA's disclosure requirements in *McConnell* and *Citizens United,* it was well aware that those requirements would apply not only to express advocacy and its functional equivalent. The *McConnell* plaintiffs, like DSF, argued principally "that *Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy." 540 U.S.

at 190. Like DSF, they contended that BCRA was unconstitutional because it required disclosure of communications that merely "'refer[]'" to a candidate. Br. for Appellants McConnell et al. 44-45, *McConnell*, 540 U.S. 93 (No. 02-1674). The Supreme Court disagreed. The Court explained that *Buckley*'s "express advocacy limitation … was the product of statutory interpretation rather than a constitutional command." *McConnell*, 540 U.S. at 191-192. Because BCRA's definition of "electioneering communication" was "both easily understood and objectively determinable," the vagueness concern "that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy" was "simply inapposite" with respect to BCRA. *Id.* at 194. The Court therefore "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy" in the disclosure context and upheld "application of [BCRA's] disclosure requirements to the entire range of 'electioneering communications.'" *Id.* at 194, 196.

Despite this clear holding, DSF argues (at 30) that *McConnell* constitutionally exempts "genuine issue speakers" from disclosure, citing *McConnell*'s dictum that "we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." 540 U.S. at 206 n.88. But the Court made that observation in discussing BCRA's expenditure *limits*, not its *disclosure* requirements, and *McConnell* expressly

applied different constitutional standards to the two types of laws and found them justified by different interests. *Id.* at 205, 231.

Later decisions confirm that distinction. In *FEC v. Wisconsin Right to Life* (*WRTL*), the Court cited *McConnell*'s discussion of "genuine issue ads" in holding that BCRA's ban on funding electioneering communications with corporate general treasury funds was unconstitutional as applied to "'issue advocacy[]' that mentions a candidate for federal office." 551 U.S. 449, 456 (2007). The Court explained that, in resolving the constitutionality of an expenditure *limit*, courts must "determine whether the speech at issue is the 'functional equivalent'" of express advocacy "or instead a 'genuine issue a[d].'" *Id*. at 456, 481. But in *Citizens United*, the Supreme Court rejected the plaintiff's effort "to import a similar distinction into BCRA's *disclosure* requirements," explaining that the constitutional limitations it established for expenditure limits did not apply in the disclosure context. 558 U.S. at 368-369 (emphasis added) (citing decisions striking down expenditure limits but upholding disclosure requirements for the same speech). *See supra* p. 3. *Citizens United* confirms that *McConnell*'s and *WRTL*'s discussions of "genuine issue ads" do not apply to disclosure laws.

Citizens United's holding is therefore fatal to DSF's effort to erect a constitutional barrier restricting disclosure laws to express advocacy or its functional equivalent. Like DSF, Citizens United argued that the public's interest

in disclosure does not apply to speech that "do[es] not expressly or impliedly advocate a candidate's election or defeat" and that disclosure must be limited to "express advocacy or [its] functional equivalent." Br. for Appellant 51, *Citizens United*, 558 U.S. 310 (No. 08-205). The Court "reject[ed] Citizens United's contention." 558 U.S. at 369.

DSF nonetheless argues (at 47-48) that, when *Citizens United* held that BCRA was justified by the "governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending," 558 U.S. at 367, the Court meant the phrase "election-related" to mean "express advocacy of the election or defeat of a candidate, or its functional equivalent." That is utterly implausible. Only two pages later, *Citizens United* flatly rejected the argument that "disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Id.* at 369.

DSF remarkably contends that *Citizens United*'s discussion of the distinction between issue speech and express advocacy was dicta. It claims that "[t]he Court had already concluded that *Hillary and the ads promoting it* were the equivalent of express advocacy," which, if true, would have meant the Court did not need to consider whether disclosure must be limited to express advocacy. DSF Br. 34 (quoting *Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 836 (7th Cir. 2014)) (emphasis added). One need only read *Citizens United* to see that DSF's

statement is untrue. The vast majority of the Court's disclosure analysis addressed the application of BCRA's disclosure requirements to the advertisements at issue in the case. 558 U.S. at 367-371. Although the Court determined that Citizens United's *movie* was the functional equivalent of express advocacy, it made no similar finding with respect to *the advertisements* for the movie. *Id.* at 324-325. Indeed, the parties agreed that the advertisements were not express advocacy, *see* Delaware Br. 48 n.22, and the district court likewise found that the ads "did not advocate Senator Clinton's election or defeat." *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008) (per curiam). This was not a difficult question. Express advocacy requires the use of certain "magic words," *McConnell*, 540 U.S. at 126, and "the functional equivalent of express advocacy" requires that a communication be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *WRTL*, 551 U.S. at 469-470. Neither even arguably applies to a ten-second ad that states, in its entirety, "[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. *Citizens United*, 530 F. Supp. 2d at 276 n.2.

The notion that the Supreme Court would devote an entire Part of its opinion (joined by eight Justices) to an unnecessary frolic is preposterous. Even Justice Thomas, the lone dissenter from Part IV, viewed its treatment of disclosure as a

holding. *See* 558 U.S. at 485 ("I respectfully dissent from the Court's judgment upholding BCRA §§ 201 and 311.").

Decisions by several courts of appeals confirm what is apparent from the face of the opinions: *McConnell* and *Citizens United held* that "the distinction between issue discussion and express advocacy has no place in First Amendment review" of "disclosure-oriented laws." *National Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011) (*NOM*); *see also Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) ("[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).[1]

B. DSF's Attempts To Evade *McConnell* and *Citizens United* Rest On Mischaracterizations

DSF offers several reasons why the Supreme Court did not mean what it said in *McConnell* and *Citizens United*. None has merit.

First, DSF suggests (at 4-5, 20, 33, 36, 56 n.24) that *Citizens United* and *McConnell* upheld the constitutionality of disclosure only for contributions

[1] Indeed, the Seventh Circuit reached the same conclusion just two years ago. *See Center for Individual Freedom v. Madigan*, 697 F.3d 464, 470 (7th Cir. 2012) ("holding"). *Barland* offers no explanation for its departure from circuit precedent. The Second Circuit has expressly rejected *Barland*. *See Vermont Right to Life Comm., Inc. v. Sorrell*, No. 12-2904, 2014 WL 2958565, at *10 n.12 (2d Cir. July 2, 2014).

"earmarked" for electioneering communications because BCRA requires disclosure only of contributors who make donations "for the purpose of furthering electioneering communications." That is untrue. The "earmarking" limitation appears not in BCRA itself, but in a regulation adopted by the Federal Election Commission years after *McConnell* upheld BCRA against facial challenge. *See* 11 C.F.R. § 104.20(c)(9); 72 Fed. Reg. 72,899 (Dec. 26, 2007); *McConnell*, 540 U.S. at 194-202. Though the regulation had been adopted by the time of *Citizens United*, it had already been challenged in court, and neither the parties nor the Supreme Court relied on it. The D.C. Circuit has accordingly rejected the contention that "the Supreme Court's holding was limited by" the earmarking regulation. *Van Hollen v. FEC*, No. 12-5117, 2012 WL 1758569, at *3 (D.C. Cir. May 14, 2012) (unpublished).

Other courts of appeals have understood *McConnell* and *Citizens United* as confirming the constitutionality of statutes requiring organizations to disclose all contributors, regardless of whether the contributions are earmarked. *See, e.g.*, *Center for Individual Freedom v. Tennant*, 706 F.3d 270, 292 (4th Cir. 2013) (upholding disclosure requirement without earmarking limitation because "*McConnell* compels us to find that [it] is constitutional"); *Family PAC v. McKenna*, 685 F.3d 800, 803 (9th Cir. 2012); *Madigan*, 697 F.3d at 472. Indeed, the Fourth Circuit recently reversed a district court precisely for imposing an

"earmarking" limitation to "cure" the alleged unconstitutionality of a disclosure requirement. *Tennant*, 706 F.3d at 292.

Second, DSF quotes (at 31, 32, 39) *Citizens United*'s offhand description of the advertisements as containing "pejorative references" to Senator Clinton's candidacy. The Court offered that description in discussing whether the ads satisfied BCRA's definition of "electioneering communication," not as an element of its constitutional analysis. 558 U.S. at 368. *Citizens United* never suggested that a "pejorative reference" is necessary to satisfy BCRA's statutory definition of electioneering communication, let alone that such a limitation is constitutionally required. Indeed, the Court had previously upheld "application of [BCRA's] disclosure requirements to the *entire range* of 'electioneering communications,'" without regard to their "pejorative" nature. *McConnell*, 540 U.S. at 196 (emphasis added). Had the Court intended to overrule that holding and limit disclosure to "pejorative" references, it would have done so explicitly.

Third, DSF contends (at 32 n.11, 51) that *Citizens United* is inapposite because it addressed disclosure as to "mere commercial speech, which is not entitled to the same level of First Amendment protection as political issue speech." That argument again misreads the opinion. Citizens United contended that the public's interest in disclosure did not extend to its ads because disclosing the funding sources for commercial advertisements "would not help viewers make

informed choices in the political marketplace." 558 U.S. at 369. The Court agreed that the ads "only attempt to persuade viewers to see the film." *Id.* It nonetheless rejected Citizens United's argument: "Even 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." *Id.* (emphasis added). The clear implication is that the public interest in disclosure would be *even stronger* if a communication more directly pertained to "the political marketplace."

Fourth, DSF suggests (at 46) that the governmental interest in "providing the electorate with information about the sources of election-related spending" may be satisfied by disclaimers identifying the immediate sponsor of an electioneering advertisement, without disclosing its contributors. That argument is again inconsistent with Supreme Court precedent.

McConnell recognized that when groups are not required to disclose their contributors, they often conceal the true nature of their support by hiding behind "mysterious" and anodyne names like "'American Family Voices.'" 540 U.S. at 128 & n.23; Delaware Br. 6-7. Such names disguise the sources of an organization's funding and make it impossible for voters to weigh the "source and credibility" of an organization's arguments. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-792 (1978); Delaware Br. 30-31. The Supreme Court noted, for example, 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.'" *McConnell*, 540 U.S. at 128 n.23 (internal quotation marks omitted). Similarly, in Delaware, a group called "Citizens for a Secure Community" ran ads attacking the mayor of Wilmington during the 2012 election. The identity of the group was known, but its funders were not. Journalists ultimately discovered that the group was run by out-of-state political operatives, but Delaware voters may never know if the group's funders also came from out of State or why they tried to influence the election. Delaware Br. 13 n.3; JA108-109.

As *McConnell* explained, contributor disclosure allows the public to "identify the source of the funding behind" these communications and thereby serves the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." 540 U.S. at 197 (quoting *McConnell*, 251 F. Supp. 2d at 237). Without contributor disclosure, "it is difficult, if not impossible, for the voting public to know who is" paying for political communications. *McConnell*, 251 F. Supp. 2d at 243-244. Contributor disclosure therefore protects the public's informational interest even when an ad's direct sponsor is known.

Recognizing the value of both contributor-disclosure provisions and disclaimer requirements, the Supreme Court upheld both in BCRA. *See McConnell*, 540 U.S. at 196, 230; *Citizens United*, 558 U.S. at 366-371. Indeed,

many—if not most—federal and state disclosure laws contain both reporting and disclaimer components, and many decisions have upheld both types of provisions. *See, e.g.*, *Sorrell*, 2014 WL 2958565, at *2-3, *7; *Worley v. Florida Sec'y of State*, 717 F.3d 1238, 1253-1255 (11th Cir. 2013); *Tennant*, 706 F.3d at 277, 279; *NOM*, 649 F.3d at 59-61; *Human Life*, 624 F.3d at 999.

Fifth, DSF contends that the record evidence documenting the public interest behind BCRA extended only to "sham issue ads," and that therefore the Disclosure Act is unconstitutional insofar as it subjects other types of communications to disclosure. DSF does not attempt to specify what types of communications the term "sham issue ads" covers, and, however it is defined, Supreme Court precedent makes clear that a disclosure law need not be so limited. *Citizens United* upheld BCRA as applied to three promotional ads for a political movie, none of which could conceivably be deemed a "sham issue ad." 558 U.S. at 367-368.

Similarly, the Supreme Court in *McConnell* did not uphold BCRA's disclosure requirements only as applied to "sham issue ads." To the contrary, it sustained the requirements for the "entire range" of electioneering communications even though it recognized that some "percentage" of electioneering communications had no "electioneering purpose." 540 U.S. at 196, 206. Furthermore, as the *McConnell* district court recognized, BCRA's purpose was expansive: to ensure that the "public is able to identify the source of the funding

behind broadcast advertisements influencing certain elections," not merely to target some subset of "sham" ads. 251 F. Supp. 2d at 237. BCRA's scope reflected the public's strong interest in and need for comprehensive information about the sources of money funding election-related communications. *Id*. at 231. Nor is it necessary for the Delaware General Assembly to have considered specific evidence about the need to regulate voter guides, as opposed to other forms of election-related speech. In drafting legislation of general applicability, a legislature need not provide evidence as to every possible form of conduct that falls within the law's scope. *See, e.g.*, *Phillips v. Borough of Keyport*, 107 F.3d 164, 178 (3d Cir. 1997). In enacting BCRA, Congress did not specifically consider the need for disclosure of ads promoting documentaries. Yet *Citizens United* upheld BCRA as applied to three such ads. 558 U.S. at 369.

C. The District Court's And DSF's Alternative Standards Are Inconsistent With Supreme Court Precedent And Impermissibly Vague

Perhaps recognizing that the Supreme Court has rejected DSF's proposed constitutional line between issue speech and express advocacy when it comes to disclosure laws, DSF and the district court recast that distinction in slightly different terms. The court crafted its own exemption for "communicators" and "communications" that are "generally considered to be non-political" or "presumably neutral." JA30-32. DSF suggests (at 29, 48-49, 54) that the First

Amendment limits disclosure laws to "sham issue ads" or communications that are "pejorative" in tone.

Both these proposed tests would condemn as unconstitutional laws the Supreme Court has already upheld. BCRA required disclosure for "electioneering communications," a term defined without regard to whether a communication is "neutral," "pejorative," or a "sham issue ad." Congress deliberately omitted such distinctions to avoid the vagueness concerns raised in *Buckley*, and the Supreme Court specifically relied on the brevity and objective character of BCRA's definition of "electioneering communications" in finding it constitutional. *McConnell*, 540 U.S. at 194. Were the alternative tests proposed by DSF and the district court correct, BCRA would be unconstitutional because it reaches "neutral" speech that is not "pejorative" or a "sham issue ad." *Citizens United* and *McConnell* say otherwise.

Moreover, the Supreme Court has consistently emphasized the need for disclosure laws to provide "easily understood and objectively determinable" criteria. *McConnell*, 540 U.S. at 194. In *Buckley*, the Court found that FECA's "for the purpose … of influencing" test raised constitutional vagueness concerns. 424 U.S. at 44, 79-80.[2] In *McConnell*, by contrast, the Court approved BCRA's

[2] In discussing FECA's expenditure limits, the Court found impermissibly vague a standard much like the one DSF advances. *Buckley*, 424 U.S. at 42

standard for "electioneering communications" because it was "both easily understood and objectively determinable." 540 U.S. at 194.

The tests DSF and the district court propose would require just the type of subjective, open-ended inquiry that the Court rejected in *Buckley*. *Buckley* objected to statutory language that was so vague as to 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." 424 U.S. at 43. Reviewing a communication for "neutrality" or "pejorative" tenor would raise the same concerns. Delaware Br. 44-46.

Indeed, it is not even clear that DSF and the district court can apply their own tests to the General Election Values Voter Guide at issue here. The court ultimately had to base its ruling on the "presumed" neutrality of DSF and its Voter Guide. Although the court suggested that the guide's neutrality should be "vetted through discovery," JA32, it later stopped all discovery because of uncertainty over what evidence would be relevant to determining neutrality. The record still contains no finding on the Voter Guide's actual neutrality. Delaware Br. 21-23, 54. It thus appears that the district court had no methodology for assessing a communication's purported neutrality, nor did it even identify the types of evidence that would be determinative.

(whether communication "'advocate[d] the election or defeat of'" a candidate impermissibly vague standard).

Similarly, DSF offers no criteria for determining whether a communication is "pejorative" or rather "genuine issue speech." Some might reasonably conclude, for example, that it is "pejorative" to state (as DSF's Voter Guide does) that a particular candidate does not wish to protect individuals "from having the government force them to violate their moral or religious beliefs." JA61. DSF presumably would disagree. That different speakers and different members of the intended audience may understand statements like this one to be more or less negative simply underscores the subjective nature of DSF's test.

D. DSF Misstates Governing Law In Two Other Respects

Two other mischaracterizations of established law warrant brief rebuttal.

First, DSF overstates the "exacting scrutiny" standard of review for campaign finance disclosure laws. DSF cites (at 24) *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444, 1459 (2014), to suggest that disclosure laws must be "closely drawn" to a governmental interest, but the quoted passage discusses *Buckley*'s analysis of BCRA's contribution *limits*, not its *disclosure* requirements. Although *Buckley* required contribution limits to be "closely drawn," it held that disclosure requirements need bear only a "'relevant correlation' or 'substantial relation'" to the governmental interest justifying them. *Buckley*, 424 U.S. at 64 (footnote omitted); *see also, e.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000) (contribution limits must be "closely drawn"). The Supreme Court has never

applied the "closely drawn" requirement to campaign finance disclosure requirements. *See, e.g.*, *Citizens United*, 558 U.S. at 366-367; *Doe v. Reed*, 561 U.S. 186, 196 (2010); *McConnell*, 540 U.S. at 194-202; *Buckley*, 424 U.S. at 64, 66.[3]

Second, DSF attempts to enlist civil-rights-era cases rebuffing attempts by segregationist officials to seize NAACP membership records. DSF Br. 25 (citing *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963), and *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960)). These cases do not support the "closely drawn" tailoring requirement DSF ascribes to them. The Supreme Court has explained that, in the context of campaign finance disclosure, the NAACP decisions stand only for the proposition that a group may obtain an as-applied exemption from disclosure if it shows a "reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74 (rejecting blanket disclosure exemption for minor parties); *see also Citizens United*, 558 U.S. at 370 (citing *McConnell*, 540 U.S. at 198); *Doe*, 561 U.S. at 200. Indeed, that is the *only* form of as-applied challenge the

[3] DSF misleadingly cites (at 50) *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), for a narrow tailoring requirement. But *McCullen* involved a ban on speech in "traditional public fora," a category of regulation the Court has held must be "narrowly tailored" to the justifying governmental interest. *Id.* at 2529. The Court has never required narrow tailoring for campaign finance disclosure requirements.

Supreme Court has recognized in the context of disclosure laws. *See Doe*, 561 U.S. at 200. DSF has disavowed such a claim in this case. *See* Delaware Br. 37.

II. THE DELAWARE GENERAL ASSEMBLY PROPERLY TAILORED THE DISCLOSURE ACT TO ELECTIONS IN DELAWARE

In the district court, DSF objected to the Disclosure Act because it does not categorically exempt what DSF terms "genuine issue speech." DSF now takes issue with several ancillary features of the Disclosure Act that do not exactly track their BCRA counterparts: its monetary thresholds, the "look-back period" for disclosure, and the types of covered media. These aspects of the Disclosure Act reflect the Delaware General Assembly's sensible efforts to draw the Act to fit the circumstances of state and local elections in a very small State, and they fall well within the range of permissible legislative discretion.[4]

[4] Delaware's opening brief describes (at 15-16, 32) the many provisions of the Disclosure Act that tailor it to protecting the public's "interest in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369. The Act, like BCRA, does not cover communications made more than 60 days before a general election or 30 days before a primary, a time period the Supreme Court has found an acceptable proxy for whether communications mentioning a candidate are "specifically intended to affect election results." *McConnell*, 540 U.S. at 127. The Act also does not cover communications between organizations and their members, 15 Del. C. § 8002(10)(b)(2); news articles and commentaries, *id.* § 8002(10)(b)(3); handbills or other hand-delivered messages, *id.* §§ 8002(10)(b)(1), 8002(7). Finally, the Act categorically exempts communications that do not "refer[] to a clearly identified candidate."

A. Supreme Court Precedent Affords Legislatures Substantial Discretion In Shaping Disclosure Requirements

Although disclosure requirements generally are subject to exacting scrutiny, the Supreme Court has given legislatures substantial deference in determining the triggers for required disclosure. In setting monetary thresholds, "[t]he line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion." *Buckley*, 424 U.S. at 83. The legislature's chosen limits are therefore valid unless they are "wholly without rationality," and "distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* ("'[A] court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.'"). Thus, for example, *Buckley* upheld Congress's chosen thresholds even though "there is little in the legislative history to indicate that Congress focused carefully on the appropriate level at which to require recording and disclosure." *Id.* The courts of appeals have therefore explained that courts "do not review reporting thresholds under the 'exacting scrutiny' framework." *NOM*, 649 F.3d at 60. Rather, following "*Buckley*, we have … upheld such legislative determinations unless they are 'wholly without rationality.'" *Id.*; *see also, e.g.*, *Family PAC*, 685 F.3d at 811; *Worley*, 717 F.3d at 1251.

Similarly, the Supreme Court has warned that courts "must decline to draw, and then redraw, constitutional lines based on the particular media or technology

used to disseminate political speech from a particular speaker." *Citizens United*, 558 U.S. at 326. Although various media may differ in their "risk of distorting the political process," "any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise" its own First Amendment concerns. *Id.* Moreover, any distinctions "might soon prove to be irrelevant or outdated by technologies that are in rapid flux." *Id.*

This deference rests on the recognition that such decisions are best left to legislative discretion. *NOM*, 649 F.3d at 60. The Delaware General Assembly's determinations about the scope of the Disclosure Act satisfy even exacting scrutiny, and they certainly satisfy this more relaxed standard.

B. Monetary Thresholds

Under the Disclosure Act, a group must file a third-party advertisement report when it spends more than $500 on electioneering communications, and must disclose contributors giving more than $100. These thresholds are lower than BCRA's, 2 U.S.C. § 434(f)(1), (2)(F), because the two statutes are designed for very different settings. BCRA applies to federal elections, including nationwide presidential elections and senatorial elections in States with populations up to 40 times as great as Delaware's, which is less than 900,000. The Disclosure Act, by

contrast, applies to state and local elections—down to the school-board level—in one of the smallest States in the Union.

The amounts of money spent in these two contexts are radically different. During the 2012 federal elections, the two major-party presidential candidates each raised over $1 billion, while winning Senate candidates spent an average of $10.3 million and winning House candidates averaged $1.6 million.[5] By contrast, as record evidence reflected, in a Delaware election, even a $500 expenditure can purchase a significant amount of political messaging. JA125, JA137. For example, as little as $150 can purchase enough automated telephone calls to reach every household in a Delaware House district. JA137. Approximately 80% of the spending in Delaware campaigns goes toward direct mail, which is far less expensive than broadcast advertising. JA135. Even State Senate districts are quite small—containing roughly 50,000 constituents, compared to around 700,000 for the average U.S. House district (the smallest-scale race regulated by BCRA)—and the Act also applies to far smaller political units. JA125.

Delaware's $500 threshold is well within the mainstream of States that have adopted analogous electioneering-communications laws. Alaska and Vermont also

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[5] Vogel et al., *Barack Obama, Mitt Romney both topped $1 billion in 2012*, Politico (Dec. 7, 2012), *available at* http://www.politico.com/story/2012/12/barack-obama-mitt-romney-both-topped-1-billion-in-2012-84737.html; Steinhauser & Yoon, *Cost to win congressional election skyrockets*, CNN (July 11, 2013), *available at* http://www.cnn.com/2013/07/11/politics/congress-election-costs/.

use $500 to trigger disclosure for third-party communications, *see* Alaska Stat. § 15.13.040; Vt. Stat. Ann. tit. 17, § 2971, and both statutes have been upheld by courts of appeals, *see Sorrell*, 2014 WL 2958565, at *11; *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 776 (9th Cir. 2006). Several other States—including some much more populous than Delaware—use thresholds well below $500. *See* Mass. Gen. Laws ch. 55, § 18F ($250); Wash. Rev. Code § 42.17A.305(1)(b)(ii) ($250); Me. Rev. Stat. tit. 21-A, § 1019-B ($100); S.D. Codified Laws § 12-27-17 ($100). The First Circuit has upheld Maine's $100 threshold. *NOM*, 649 F.3d at 60-61. Delaware's $100 contributor-disclosure threshold is similarly well within the range of other States' disclosure provisions. *See* Idaho Code Ann. § 67-6630 ($50 contributor-disclosure threshold); Md. Code Ann., Elec. Law § 13-307 ($51 contributor-disclosure threshold).

C. "Election Period"

The Disclosure Act's monetary thresholds relate to expenditures and contributions that fall within a statutorily defined "election period." *See* 15 Del. C. § 8031(a), (a)(3). The length of this "election period" corresponds to the length of the candidacy of the official to whom an electioneering communication pertains. *Id.* § 8002(11)(d).

DSF's brief brazenly claims (at 50 n.19) that "the State makes no attempt to justify" the Act's definition of an "election period." That is because, until its

response before this Court, DSF never put that definition in issue. DSF's brief in support of its motion for a preliminary injunction did not even mention the four-year upper limit it now bemoans. This Court "generally refuse[s] to consider issues," like this one, "that the parties have not raised below." *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 249 (3d Cir. 2013).

In any event, the Act's definition of "election period" is reasonable. Linking the "election period" to the length of the relevant candidacy makes sense: The point of contributor disclosure, after all, is to identify those who funded speech *about the candidate*, thereby informing the public as to "who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369. In this area as well, Delaware is no outlier. Maryland's disclosure period also encompasses an entire four-year "election cycle." Md. Code Ann., Elec. Law §§ 1-101, 13-307(c)(1). Similarly, Maine's disclosure period for aggregating expenditures varies with the length of each "candidate's election." Me. Rev. Stat. tit. 21-A, § 1019-B; *see also NOM*, 649 F.3d at 60 ("the information that must be reported under this subsection is … 'modest.'" (citation omitted)).

DSF also misstates the degree to which the Act differs from BCRA in this regard. BCRA reporting reaches from the date of the electioneering communication back to "the first day of the *preceding* calendar year"—that is, to the first day of the first year of the two-year federal election cycle, not, as DSF

asserts (at 36), the calendar year during which the communication is made. 2 U.S.C. § 434(f)(2)(F) (emphasis added); 11 C.F.R. § 104.20(c)(8)-(9) (same). Thus, for an electioneering communication made shortly before a November general election, the length of the disclosure period is approximately 22 months.

D. Media

The Disclosure Act's definition of "electioneering communication" covers "television, radio, newspaper or other periodical, sign, Internet, mail or telephone" communications that are targeted to the relevant electorate for an office and mention a candidate within the 30- and 60-day windows. 15 Del. C. § 8002(7), (10)(b). Like the Act's monetary thresholds, the Act's covered media reflect the features of Delaware elections. Direct mail, a secondary advertising medium in most federal elections, "is by far the dominant form of political advertising" in Delaware elections. JA135. Other low-cost media, like telephone robo-calls, are also more important in Delaware than at the federal level. JA137.

DSF's brief does not explain why it would be unconstitutional to apply the Act to DSF's transmission of its Voter Guide through any of the lower-cost media covered by the Act. Its lone objection (at 11) appears to be that none of the declarations the State provided at the preliminary-injunction stage "mention … a need to regulate issue speech conducted over the Internet." Again, however, DSF

did not place that feature of the Act in issue in its Complaint or preliminary-injunction brief, so there was no call for the State to assemble a responsive record.

DSF strains to paint Delaware as an outlier, but every one of the additional, lower-cost media included in the Disclosure Act is covered by multiple other state statutes: direct mail,[6] signage,[7] newspaper or periodical advertising,[8] telephone,[9] and Internet posting.[10] Indeed, many States go further than Delaware, reaching media not covered by the Act. One State includes email,[11] two reach hand-delivered materials,[12] and at least two States include a catch-all category for

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[6] Alaska Stat. § 15.13.400(3); Col. Const. art. XXVIII § 2(7)(a); Conn. Gen. Stat. § 9-601b(a)(2)(B); Idaho Code Ann. § 67-6602(f)(1); Mass. Gen. Laws ch. 55, § 1; N.C. Gen. Stat. § 163-278.6(8j); Vt. Stat. Ann. tit. 17, § 2901(11); Wash. Rev. Code § 42.17A.005(19)(a); W. Va. Code § 3-8-1(a)(12)(A).

[7] Cal. Elec. Code § 304 (outdoor advertising facilities); Col. Const. art. XXVIII § 6 (billboards); Conn. Gen. Stat. § 9-601b(a)(2)(B) (same); Idaho Code Ann. § 67-6602(f)(1) (same); Wash. Rev. Code § 42.17A.005(19)(a) (same).

[8] Alaska Stat. § 15.13.400(3) (print); Cal. Elec. Code § 304 (newspapers, magazines); Col. Const. art. XXVIII § 2(7)(a) (newspapers); Conn. Gen. Stat. § 9-601b(a)(2)(B); (newspapers, magazines); Idaho Code Ann. § 67-6602(f)(1) (newspapers); Mass. Gen. Laws ch. 55, § 1 (print); Okla. Stat. tit. 257, § 10-1-7(b)(1) (written media); Vt. Stat. Ann. tit. 17, § 2901(11) (newspapers, periodicals); Wash. Rev. Code § 17A-005(19)(a) (newspapers, periodicals); W. Va. Code § 3-8-1(a)(12)(A) (newspapers, magazines).

[9] Conn. Gen. Stat. § 9-601b(a)(2)(B); Idaho Code Ann. §§ 67-6602(f)(1); N.C. Gen. Stat. § 163-278.6(8j); Vt. Stat. Ann. tit. 17, § 2901(11); W. Va. Code § 3-8-1.

[10] Alaska Stat. § 15.13.400(3); Conn. Gen. Stat. § 9-601b(a)(2)(B); Vt. Stat. Ann. Tit. 17, § 2901(11) (mass digital communication).

[11] Vt. Stat. Ann. tit. 17, § 2901(11) (mass electronic communication)

[12] Col. Const. art. XXVIII § 2(7)(a); Idaho Code Ann. § 67-6602(f)(1).

communications "otherwise distributed."[13] Other courts of appeals have found no constitutional problem with a disclosure law's reaching beyond TV and radio. *See Tennant*, 706 F.3d at 283 ("Despite CFIF's argument that the public's informational interest extends only to broadcast media, there is no reason why the public would not have a similar interest in knowing the source of campaign-related spending when it takes the form of print communication."); *Madigan*, 697 F.3d at 494 (Internet).

The media Congress chose to cover in BCRA are those most relevant to costly federal elections, but those choices do not create a constitutional constraint on States. Indeed, *Citizens United* warned that courts "must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker." 558 U.S. at 326. Because Delaware elections are dominated by media other than TV and radio, the Disclosure Act would be completely ineffective if it reached only the broadcast communications covered by BCRA. *See* JA137. The Act's coverage of lower-cost media, like comparable statutes in many other States, reflects the General Assembly's reasonable drawing of the Act to fit local circumstances.

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[13] Col. Const. art. XXVIII § 2(7)(a); Idaho Code Ann. § 67-6602(f)(1) (same); *see also* Cal. Elec. Code § 304 ("any other type of general, public, political advertising").

III. DSF'S SHOWING OF IRREPARABLE HARM IS INADEQUATE

DSF's claim of irreparable harm rests on its generalized assertion (at 58) that donor disclosure during the pendency of this litigation will harm the organization and burden its speech. But the Supreme Court has rejected the premise that disclosure necessarily burdens speech by creating a risk of harassment. *See, e.g.*, *Doe*, 561 U.S. at 200-201. A party seeking a preliminary injunction must establish the feared harm as a factual matter. *See, e.g.*, *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000). Not only did DSF introduce no evidence on this point, but it affirmatively disclaimed the argument that its contributors would "would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370; Delaware Br. 37. "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*, 204 F.3d at 487. DSF has presented no evidence that complying with the Act will chill or deter its speech, instead offering only its conclusory threat to engage in "self-silenc[ing]." Delaware Br. 57 (quoting Pl.'s Br. In Support of Mot. For Prelim. Injunction (D. Ct. Dkt. No. 28) at 16).

CONCLUSION

DSF's attempt to invalidate Delaware's legitimate effort through the Disclosure Act to promote electoral transparency does "'not reinforce the precious

First Amendment values [DSF] argue[s] are trampled by [the Act], but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.'" *McConnell*, 540 U.S. at 197 (quoting 251 F. Supp. 2d at 237). The district court's order should be reversed.

Respectfully submitted,

/s/ Jonathan G. Cedarbaum

SETH P. WAXMAN
JONATHAN G. CEDARBAUM
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

A. ANN WOOLFOLK
JOSEPH C. HANDLON
DELAWARE DEPARTMENT OF JUSTICE
Carvel State Building, 6th Floor
820 North French Street
Wilmington, DE 19801

J. GERALD HEBERT
PAUL S. RYAN
TARA MALLOY
MEGAN MCALLEN
THE CAMPAIGN LEGAL CENTER
215 E Street NE
Washington, DC 20002

July 21, 2014

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that the Brief for Defendants-Appellants 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 6,938 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Jonathan G. Cedarbaum
JONATHAN G. CEDARBAUM

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 Defendants-Appellants is identical to the text in the paper copies. The undersigned also certifies that the electronic copy of the Brief for Defendants-Appellants was scanned for viruses by Trend Micro OfficeScan Client for Windows version 10.6.1180, and no viruses were detected.

/s/ Jonathan G. Cedarbaum
JONATHAN G. CEDARBAUM

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 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
JONATHAN G. CEDARBAUM

July 21, 2014