No. 14-1887

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DELAWARE STRONG FAMILIES,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

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

BRIEF OF *AMICI CURIAE* THE LEAGUE OF WOMEN VOTERS OF DELAWARE AND COMMON CAUSE IN SUPPORT OF DEFENDANTS-APPELLANTS

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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 Commissioner of Elections f

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. 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, Common Cause 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/ David B. Hird
(Signature of Counsel or Party)

Dated: June 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, League of Women Voters of Delaware 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/ David B. Hird
(Signature of Counsel or Party)

Dated: June 9, 2014

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INTEREST OF AMICI

Amici, the League of Women Voters of Delaware and Common Cause, are nonpartisan, nonprofit organizations devoted to improving our government through education and advocacy. In its order enjoining enforcement of the Delaware Elections Disclosure Act ("the Disclosure Act" or "the Act"), the District Court mentioned both Amici by name and suggested they need protection from the Act's provisions. Both organizations supported passage of the Act, however, and both support the Act now. Amici recognize the substantial influence of political contributions and spending on Delaware public policy and the need for transparency to ensure an informed electorate.

The League of Women Voters of Delaware (the "League") is a nonpartisan organization that encourages informed and active participation in government. It influences public policy through education and advocacy. The League is committed to improving our campaign finance system, among many other goals. The League is one of the more than 800 state and local leagues across the country.

Common Cause, one of the nation's oldest and largest citizen advocacy organizations, has approximately 400,000 members nationwide. Common Cause promotes open, ethical, and accountable government throughout the United States, including in Delaware through its Delaware chapter. Common Cause has long supported efforts to reform campaign finance laws.

All parties to the appeal have consented to the filing of this brief by Amici. No party's counsel authored this brief in whole or in part. No party, no party's counsel, nor any other person, other than Amici, their members, or their counsel, contributed money for the preparation or submission of this brief.

INTRODUCTION

This case concerns the constitutionality of an important Delaware statute requiring disclosure of the sources of funding for election-related third-party communications made shortly before an election. Such disclosure advances vital First Amendment interests by allowing voters "to make informed decisions and give proper weight to different speakers and messages." *Citizens United v. FEC*, 558 U.S. 310, 371 (2010). In the wake of recent Supreme Court decisions restricting other types of campaign finance regulation, the State's ability to ensure robust disclosure is essential to protect the integrity of the democratic process—as the Court itself has repeatedly recognized. As more money flows into our elections, often from vaguely-named organizations whose backers are unknown, disclosure helps citizens to evaluate the true interests underlying competing political messages. A more informed citizenry can in turn better evaluate the substance of different policy alternatives. Fostering such mature governance is a core mission of both Amici—which is why both supported and continue to support the challenged law.

The provisions of the Disclosure Act at issue here track corresponding provisions of the federal Bipartisan Campaign Reform Act ("BCRA"). Brief of Defendants-Appellants ("State Br.") at 14. Like BCRA (and many other state laws), the Disclosure Act requires certain information to be disclosed in relation to political spending during the run-up to an election. Any person who expends more than $500 on "electioneering communications"—a type of "third party advertisement"—must file a report disclosing, *inter alia*, the advertiser's name and address, the amount spent, and the name and address of any person who contributed more than $100 to the advertiser within the filing period. Del. Code Ann. tit. 15, §§ 8002(10), 8002(27), 8031. The Act's definition of "electioneering communication" is modeled after its federal counterpart: the term means a communication that "refers to a clearly identified candidate," targets that candidate's electorate, and is "publicly distributed" within thirty days preceding a primary election or sixty days preceding a general election. *Id.* § 8002(10)(a).[1] An electioneering communication with a fair market value greater than $500 must also contain a disclaimer stating who paid for it and certain other information, except in certain impracticable circumstances. *Id.* § 8020.

[1] *See* 2 U.S.C. § 434(f). The main distinction between the federal definition of "electioneering communication" and that of Delaware is that the Delaware disclosure requirement is not limited to "broadcast, cable or satellite communications"—understandably, given that such communications play an extremely limited role in Delaware politics. *See* State Br. at 16.

Appellee Delaware Strong Families ("DSF") is a tax-exempt corporation registered under section 501(c)(3) of the Internal Revenue Code. Its mission focuses on the promotion of "Biblical worldview values, resources, and programs." State Br. at 17. In 2011, DSF partnered with an affiliated "social welfare" organization registered under section 501(c)(4),[2] Delaware Family Policy Council ("DFPC"), to produce voter guides publicizing state candidates' positions on social issues important to DSF and DFPC, including same-sex marriage, civil unions, abortion, stem-cell research, and sex education. JA61-64; State Br. at 17-19. DSF plans to produce similar voter guides with DFPC in the future. State Br. at 17.

To the extent these future voter guides would be "electioneering communications," DSF seeks a declaration invalidating certain provisions of the Disclosure Act as applied to itself. State Br. at 19-20. The District Court found that DSF was likely to succeed on the merits and issued a preliminary injunction (the "PI Ruling"). *See Del. Strong Families v. Biden*, No. 13 1746 SLR, 2014 WL 1292325 (D. Del. Mar. 31, 2014); State Br. at 20-23 (summarizing ruling).[3]

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[2] Unlike 501(c)(3) organizations, organizations registered under section 501(c)(4) can engage in express electoral advocacy, so long as such advocacy is not their primary purpose. *See* 26 U.S.C. § 501(c)(4); 26 C.F.R. § 1.501(c)(4)-1. DFPC reported spending $20,000 on express electoral advocacy in 2011. State Br. at 17.

[3] The District Court and the parties have framed the challenge under review to be an "as-applied" challenge. *See* State Br. at 23 n.7. It should be noted, however, that, unlike a typical as-applied ruling, the District Court's suggestion that certain types of speakers or communications may be entitled to a broad exception from generally applicable disclosure requirements plainly has consequences beyond this

Surprisingly, the PI Ruling mentions Amici by name—reasoning that they and their contributors also need protection from the Disclosure Act. *See Del. Strong Families*, 2014 WL 1292325, at *12 n.21. This reference is puzzling, given that Amici *supported* the Act's passage before the Delaware General Assembly. And although Amici typically do not engage in activities that are covered by the Act, they are willing to comply with the Act's reporting requirements for electioneering communications, to the extent applicable.

SUMMARY OF ARGUMENT

Amici urge this Court to reverse the District Court's PI Ruling, and concur fully with the arguments put forward by the State. Amici write separately to elaborate on two key points.

First, the Disclosure Act represents a reasonable effort by Delaware to adapt to a changing campaign finance landscape while preserving the State's open political culture, and therefore passes constitutional muster under the First Amendment and exacting scrutiny (the less onerous standard of review applied to disclosure laws). As a result of recent changes in campaign finance law, third-

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specific litigation. *See Doe v. Reed*, 561 U.S. 186, 194 (2010) (stating that because "plaintiffs' claim and the relief that would follow" would "reach beyond the particular circumstances of these plaintiffs," "[t]hey must therefore satisfy our standards for a facial challenge to the extent of that reach"). Regardless of whether DSF's challenge is labeled "facial" or "as-applied," the District Court's injunction is "strong medicine" that should be administered with care. *Cf. New York v. Ferber*, 458 U.S. 747, 769 (1982).

party spending in elections has increased exponentially, with a significant amount of these funds consisting of "dark money"— i.e., money coming from groups that do not disclose their contributors. The Delaware General Assembly enacted the Disclosure Act in response to concerns about the increasing influence of dark money on voters in the State. The provisions of the Act bear a substantial relation to the legislature's legitimate objective of improving transparency—vital to our democracy—in the context of Delaware's political culture.

Second, contrary to the District Court's novel reasoning, Delaware was not required to insert special exemptions into the Disclosure Act for supposedly "non-political" speakers and communications, like 501(c)(3) organizations and voter guides. The State's broad interest in transparency justifies requiring disclosure with respect to many types of election-related communications. Nothing about the character of either 501(c)(3) entities or voter guides compels exceptions to be created for them. The appropriateness of such exceptions should be determined by the legislature.

ARGUMENT

I. THE DISCLOSURE ACT BEARS A SUBSTANTIAL RELATION TO THE STATE'S INTEREST IN AN INFORMED ELECTORATE

Properly analyzed in the context of a campaign finance landscape in which transparency is increasingly important, the Disclosure Act bears a substantial relationship to vital government objectives.

A. The Act Is Subject to "Exacting Scrutiny," An Intermediate Standard of Review

As the Supreme Court has repeatedly noted, disclosure laws advance important First Amendment interests. *See infra* Parts I(B)(1), II(A). They do so without imposing any "ceiling on campaign-related activities" or "prevent[ing] anyone from speaking." *Citizens United*, 558 U.S. at 366 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)). Disclosure is thus a "less restrictive alternative to more comprehensive regulations of speech." *Id.* at 369.

For these reasons, courts apply only intermediate—or "exacting"—First Amendment scrutiny to disclosure laws. Under this standard, a court must uphold a disclosure requirement if it bears a "substantial relation" to "a sufficiently important governmental interest." *Id.* at 366-67; *see also* State Br. at 28-29 (comparing exacting to strict scrutiny). Specific dollar thresholds triggering disclosure receive even greater deference; most courts will uphold an otherwise

constitutional law if its applicable dollar thresholds are "not wholly without rationality."[4]

While this framework is not a rubber stamp, its application has usually resulted in disclosure laws being upheld against both facial and as-applied First Amendment challenges—including recently by the Supreme Court in 8-1 majority rulings. *See*, *e.g.*, *Doe*, 561 U.S. at 196; *Citizens United*, 558 U.S. at 367-72; *McConnell v. FEC*, 540 U.S. 93, 194-202 (2003); *id.* at 321-22 (Kennedy, J., concurring in part and dissenting in part). Proper application of exacting scrutiny yields the same result here.

B. The Disclosure Act Is a Reasonable Effort to Adapt to a Changing Campaign Finance Landscape and Preserve Delaware's Open Political Culture

In evaluating the constitutionality of the Disclosure Act, it is important to consider how campaign finance law has developed recently and how those developments impacted the Delaware General Assembly's decision to adopt the Act.

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[4] *See*, *e.g.*, *Family PAC v. McKenna*, 685 F.3d 800, 811 (9th Cir. 2012); *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115, 119 (1st Cir. 2011); *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 400 (D. Vt. 2012); *Jackson v. Leake*, 476 F. Supp. 2d 515, 526 (E.D.N.C. 2006). *But see Justice v. Hosemann*, No. 11 CV 138 SA, 2013 WL 5462572, at *13 (N.D. Miss. Sept. 30, 2013) (applying exacting scrutiny to thresholds). The "not wholly without rationality" standard derives from *Buckley v. Valeo*, where the Supreme Court upheld the original federal reporting thresholds—including the $10 threshold for reporting contributors' names—because they were not "wholly without rationality." 424 U.S. at 82-83.

1. The Changing Campaign Finance Landscape

In recent years, in a series of 5-4 decisions, the Supreme Court has set aside a number of federal and state campaign finance laws—including almost all restrictions on independent political spending by corporations, labor unions, and other entities, *Citizens United*, 558 U.S. at 357, 365-66; aggregate contribution limits for individuals, *McCutcheon v. FEC*, ---U.S.---, 134 S. Ct. 1434, 1461-62 (2014) (plurality opinion); and even some types of public financing, *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, ---U.S.---, 131 S. Ct. 2806, 2828-29 (2011). In these and other cases, the Court has invoked "effective disclosure" as an essential remaining safeguard for our democracy. *Citizens United*, 558 U.S. at 370; *accord McCutcheon*, 134 S. Ct. 1434 at 1460 (plurality opinion) (noting that "disclosure "arm[s] the voting public with information" and prevents "abuse of the campaign finance system"); *Bennett*, 131 S. Ct. at 2827 (recognizing that "strict disclosure requirements" deter corruption); *Doe*, 561 U.S. at 228 (Scalia, J., concurring) (arguing that by "requiring people to stand up in public for their political acts," disclosure "fosters civic courage, without which democracy is doomed").[5]

[5] In earlier cases, the Court did recognize that the First Amendment protects anonymous political activity in some circumstances. Where elections are concerned, however, absent a reasonable probability of threats, harassment, or reprisals, the right to remain unidentified has never extended beyond individuals

Of the Court's recent decisions, *Citizens United* is the most relevant here. In that case, the majority held that unlimited corporate independent spending did not raise corruption concerns, because disclosure would allow the people to judge for themselves how much weight to give competing speakers and messages. *See* 558 U.S. at 370-71. As a result of *Citizens United* and related cases, independent spending in U.S. elections has skyrocketed. At the federal level, such spending tripled between the 2008 and 2012 presidential elections and quadrupled between the 2006 and 2010 midterm elections.[6]

Even as this trend has gained force, however, the "effective disclosure" that was key to the Court's reasoning has remained far from a reality in many jurisdictions, because disclosure laws around the country continue to be riddled with loopholes. Thus, with the exponential increase in independent third-party spending has come an exponential increase in "dark money"—i.e., funds spent by organizations who keep their contributors secret.[7] In the 2012 election, dark

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engaging in certain in-person "one-on-one communications." *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199 (1999) ("*Buckley II*") (individuals collecting petition signatures); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349 (1995) (individual distributing leaflets); *infra* note 18.

[6] *See* JA114-15; Center for Responsive Politics, Total Outside Spending by Election Cycle, Excluding Party Committees, *at* http://www.opensecrets.org/outsidespending/cycle_tots.php.

[7] *See generally* Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections and How 2012 Became the "Dark Money" Election*, 27

money accounted for almost sixty percent of all independent spending at the federal level.[8] And the trend appears to be accelerating, with the current cycle's dark money total on pace to exceed 2012 three-fold, notwithstanding the absence of a presidential race.[9]

Under these circumstances, as other courts of appeals have recognized, the need for "an effective and comprehensive disclosure system" is more pressing than ever. *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 490 (7th Cir. 2012); *accord Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1007-08 (9th Cir. 2010) (disclosure's importance "only likely to increase" in the wake of *Citizens United*). This is especially true in a small jurisdiction like Delaware, which can be

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NOTRE DAME J. L. ETHICS & PUB. POL'Y 383 (2013); Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J. L. & POL'Y 683 (2012).

[8] Potter & Morgan, *supra* note 7, at 384. Much of the increase in federal dark money can be attributed to Federal Election Commission (FEC) rules that have been interpreted to limit disclosure of contributors only to those who specifically earmark their contributions to fund particular third-party communications. *See id.* at 423-28, 446-55, 474-75. DSF tried to argue below that the holding in *Citizens United* was conditioned on such a limitation. *See* Plaintiffs' Reply, Dkt. No. 32, at 5. No such limitation exists in the relevant provisions of BCRA, however, and the Court did not mention, let alone rely upon, the FEC's rule. *See* 2 U.S.C. § 434(f)(2)(F); *Citizens United*, 558 U.S. at 366-70. At least one circuit has since declined to require such an earmarking limitation. *See Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 291-92 (4th Cir. 2013).

[9] *See* Robert Maguire, Center for Responsive Politics, *How 2014 Is Shaping Up To Be the Darkest Money Election To-Date*, OPENSECRETS.ORG, Apr. 30, 2014, *at* http://www.opensecrets.org/news/2014/04/how-2014-is-shaping-up-to-be-the-darkest-money-election-to-date/.

easily overwhelmed by election-related communications supported by undisclosed contributors. The Disclosure Act was passed to meet this challenge.

2. Passage of The Disclosure Act

At the time *Citizens United* was decided, Delaware, like many other jurisdictions, lacked an effective and comprehensive disclosure system for independent third-party spending. When HB 300 (as the Act was known before passage) was introduced, Delaware's existing disclosure law contained a "major loophole." H.B. 300, 146th Gen. Assem. Synopsis (Del. 2012). The existing law required disclosure of independent political spending only for communications "expressly advocat[ing] for the election or defeat of a clearly identified candidate." *Id.* In other words, only communications containing "magic words" denoting a clear electoral message, such as "vote for," "support," "defeat," or "reject" (and perhaps their functional equivalents) were subject to disclosure. *See* State Br. at 5-7 (discussing origins and limitations of "express advocacy" concept). The result was a gaping loophole: communications that indirectly advocated for a candidate but avoided express advocacy were not subject to the disclosure requirements. *See* H.B. 300, 146th Gen. Assem. Synopsis ("[P]ersons who advocate[d] indirectly for a candidate … [were] not required to file reports.").

This loophole became a critical problem with the exponential increase in outside spending discussed above. *See supra* Part I(B)(1). In weighing whether to pass HB 300, the General Assembly heard testimony about the increase in

independent third-party spending nationwide—including more than $1.7 million spent to influence Delaware's 2010 U.S. Senate race. JA114-15. At a hearing before the House Administration Committee on HB 300, a lawyer for Governor Jack Markell, Andrew Lippstone, also remarked on the "rapid increase in spending" in Delaware state elections. JA72; *see also, e.g.*, JA108 (reporting out-of-state spending by "mystery . . . political operatives" on the Wilmington, Delaware mayoral race).

Although Delaware has a long tradition of intimate, face-to-face politics, much of this new spending went to produce ads and other publications whose contributors could remain unknown because the communications indirectly advocated for candidates and thus were not covered by existing disclosure laws. In the preamble to HB 300, the General Assembly noted that there had been "a proliferation of advertisements featuring candidates that are distributed during the campaign season and are intended to influence elections, but are not required to be reported under existing law." 78 Del. Laws c. 400 (2012).[10] Because there are no major media outlets in Delaware, moreover, deploying such communications in a manner sufficient to affect an election is not very expensive. A robo-call to every

[10] Examples presented to the District Court included, *inter alia*: mailings promoting the policy proposals of candidates for mayor of Wilmington and Newark, JA108-10, 137, 155-57; mailings attacking various candidates for the General Assembly, JA137, 139-53; and complaints of "undisclosed electioneering communications" in various school board races, JA73, 75.

household in a state House district, for example, would cost only about $500. *See* State Br. at 16.

The voter guide produced by DSF in 2011 is precisely the type of indirect advocacy that the General Assembly had in mind when it enacted HB 300. Such materials influence voter opinions and behavior by portraying candidates' positions on a select range of issues, which are described in a positive or negative light depending on whether the candidate agrees with DSF's views. *See* JA123-24; *infra* Part II(B)(2) (discussing the DSF voter guide). Without question, such tactics often have a significant impact, as reflected in the testimony before the General Assembly and the record below. *See* State Br. at 13-14; JA137-38. Delaware citizens have the right to know who is making such communications about candidates shortly before an election.

The ability of groups backed by undisclosed contributors to blanket a Delaware race with dark money-funded indirect advocacy communications posed a direct threat to the State's "tradition of direct and honest political dialogue." JA73; State Br. at 13 n.3. While transparency is important everywhere, in Delaware, a small state, it is at the core of the political culture. "Delaware political campaigns have long relied on direct contact and communication between candidates and Delawareans at community events, churches, schools, business and neighborhood meetings . . . ." 78 Del. Laws c. 400, Preamble (2012). Through the Disclosure Act, the General Assembly sought "to preserve that tradition of open and direct

communication" by requiring "those who are attempting to influence Delaware elections [to] disclose their identity and efforts in a manner that allows voters to evaluate and measure the statements made by and interests of those third parties." *Id.*

To accomplish this objective without unduly burdening political speech, the Disclosure Act was carefully crafted not to overstep applicable constitutional bounds. Its definition of "electioneering communication" and other relevant provisions were modeled on the "easily understood and objectively determinable" criteria used in the Act's federal counterpart, which the Supreme Court upheld in both *Citizens United* and *McConnell*. State Br. at 15-16. The Act's thirty- and sixty-day pre-election windows for disclosure correspond to the time periods during which the Court has found it likely that a communication was "specifically intended to affect election results." *Id.* Moreover, the Disclosure Act contains a number of common-sense exceptions, which reflect concerns that have arisen in the Supreme Court's past First Amendment jurisprudence. *Id.* Finally, the Act's reporting thresholds, while lower than those under federal law, are appropriately tailored to the realities of Delaware politics. *See supra*; State Br. at 16.

Unsurprisingly, the Disclosure Act easily won approval. It was co-sponsored by almost half the General Assembly (30 of 62 members); Amici and a number of other local organizations backed passage. *See* H.B. 300, 146th Gen. Assem. Synopsis. The Act ultimately passed the House by a comfortable margin,

and secured *unanimous* approval in the Senate. Del. Gen. Assem. HB 300 H.R. Voting Report, May 8, 2012; Del. Gen. Assem. HB 300 Sen. Voting Report, June 6, 2012.[11]

C. Other State Laws

Although the Disclosure Act is particularly attuned to Delaware's retail political culture, it is not unique, contrary to the District Court's suggestion, *see Del. Strong Families*, 2014 WL 1292325, at *11. Many states require disclosure of election-related communications beyond those containing express advocacy or its functional equivalent. *See, e.g.*, Alaska Stat. § 15.13.400(5); Cal. Gov't Code § 85310; Colo. Const. art. XXVIII, §§ 2(7), 6(1); Idaho Code Ann. § 67-6602(f); Mass. Gen. Laws ch. 55, §§ 1, 18F; N.C. Gen. Stat. § 163-278.6(8j); Ohio Rev. Code Ann. § 3517.1011(A)(7); Okla. Stat. tit. 74, ch. 62, appendix 257 § 1-1-2; S.D. Codified Laws § 12-27-17; Vt. Stat. Ann. tit. 17, §§ 2901(6), 2971. Many of these laws do not contain special exceptions for voter guides or for communications by 501(c)(3) organizations. Moreover, several of these states have similarly low or even lower (or non-existent) dollar thresholds for disclosure of contributors, without any earmarking or similar limitations. *See, e.g.*, Alaska Stat. §§ 15.13.040(d)-(e), 15.13.400(5), (6), (10); Idaho Code Ann. §§ 67-6602,

[11]The House voting report is available at http://legis.delaware.gov/LIS/lis146.nsf/7712cf7cc0e9227a852568470077336f/de36c5dd127d817a852579f80074d4fe?OpenDocument; the Senate voting report is available at http://legis.delaware.gov/LIS/lis146.nsf/7712cf7cc0e9227a852568470077336f/ac34097f7e7ff2c285257a150075d8ee?OpenDocument.

67-6630. *Cf. also supra* note 8 (describing problems with earmarking limitations at the federal level).

Particularly for a small state with no major broadcast media market, the relevant provisions of the Disclosure Act are hardly exceptional—and more than justified.

II. DELAWARE WAS NOT REQUIRED TO CARVE OUT SPECIAL EXEMPTIONS FROM THE DISCLOSURE ACT FOR 501(C)(3) ORGANIZATIONS OR VOTER GUIDES

The District Court did not strike the appropriate balance when determining whether the Disclosure Act, carefully crafted to hew to constitutional requirements in the context of Delaware's political landscape, satisfied exacting scrutiny. Instead, the District Court issued a PI Ruling based on sweeping generalizations and an unsupported "neutrality" theory, which apparently requires that special, more limited disclosure rules be applied to, *inter alia*, 501(c)(3) organizations and voter guides. *See Del. Strong Families*, 2014 WL 1292325, at *11-*12. The Court's reasoning is at odds with applicable Supreme Court and lower court precedents, and turns a blind eye to a variety of basic facts about 501(c)(3) groups, voter guides, and DSF's specific activities. *See* State Br. at 38-42.

A. The State's Informational Interest in Disclosure Is Broad

The baseline against which the District Court's proposed exceptions must be judged is the broad public interest in disclosure that many courts have acknowledged. This interest plainly extends far beyond communications

containing express advocacy. *See* State Br. at 4-12, 29-31.[12] It extends to many types of advocacy that have nothing to do with candidates, such as campaigns for or against ballot initiatives. *E.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978). It even extends beyond elections altogether—notably to lobbying activities, including indirect "letter campaign[s]" and other efforts to induce ordinary citizens to influence their legislators (sometimes called "grassroots lobbying"). *See United States v. Harriss*, 347 U.S. 612, 621 n.10, 625 (1954).[13]

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[12] *See e.g.*, *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011) (express/issue advocacy distinction appears to have "no place in First Amendment review of . . . disclosure-oriented laws"); *Human Life*, 624 F.3d at 1016 (distinction "[does] not translate into the disclosure context"); *Madigan*, 697 F.3d at 484 ("[w]hatever the . . . express advocacy/issue [advocacy] distinction may be in other areas of campaign finance law . . . disclosure requirements need not hew to it to survive First Amendment scrutiny"); *Tennant*, 706 F.3d at 270 (same); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 591 n.1 (8th Cir. 2013) (same); *Free Speech v. FEC*, 720 F.3d 788, 795 (10th Cir. 2013) (same). One panel of the Seventh Circuit recently departed from the prevailing consensus, suggesting that the express/issue advocacy distinction would be dispositive in some circumstances. *See Wisc. Right to Life, Inc. v. Barland*, --- F.3d ---, 2014 WL 1929619, at *30-*31 (7th Cir. May 14, 2014). The panel's holding is difficult to square with the Seventh Circuit's own prior decision in *Madigan*, let alone the relevant portions of *Citizens United*—which the court downplayed as "*dicta.*" *Id.* at *29. In any event, the facts in *Barland*—where the court found the requirements at issue to be tantamount to PAC status—are very different from those here. *See id.* at *33-*34; *infra* note 14.

[13] Following *Harriss*, courts have consistently upheld state disclosure laws applicable to both direct and grassroots lobbying. *See Fla. League of Prof. Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460-61 (11th Cir. 1996); *Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am.*, 761 F.2d 509, 512 (8th Cir. 1985); *Comm'n on Indep. Colls. and Univs. v. N.Y. Temp. State Comm'n*, 534 F. Supp. 489, 494 (N.D.N.Y. 1982).

Although the value of disclosure is not limited to the electoral context, the public interest in transparency remains strongest in the run-up to elections. "For the same reason" that an organization has a heightened interest in speaking during this time, citizens have "a heightened interest in knowing who [is] trying to sway their views . . . and how much they [are] willing to spend to achieve that goal." *Human Life*, 624 F.3d at 1019; *see also McConnell*, 540 U.S. at 238-39 (Breyer, J.) (upholding requirement that broadcasters disclose identities of those seeking to air election-related messages, including supposedly "neutral" messages containing no reference to a specific candidate, based in part on the public's informational interest).

Importantly, disclosure of even relatively small contributors can further this heightened interest, by "ensur[ing] that the electorate will have access to information regarding the driving forces backing and opposing" each candidate or ballot question. *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 41 (1st Cir. 2012) ("*McKee II*"); *Family PAC v. McKenna*, 685 F.3d 800, 810 (9th Cir. 2012); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1251 (11th Cir. 2013). To take just one example, "the public could very well be swayed by the fact that numerous donations" to an organization trying to sway an election "came from out of state." *Protectmarriage.com v. Bowen*, 830 F. Supp. 2d 914, 948 n.16 (E.D. Cal. 2011), *dismissed in part on other grounds*, ---F.3d---, 2014 WL 2085305 (9th Cir. May 20, 2014).

The Act's bright-line provisions requiring disclosure by those making electioneering communications were intended to further this broad public interest in transparency for election-related materials distributed to voters during the run-up to elections. That interest is sufficient to justify even-handed application of the Act's "easily understood and objectively determinable" criteria for disclosure. *See* State Br. at 25.[14]

B. The Act Is Constitutional As Applied to DSF and Its Voter Guides

Notwithstanding the State's broad interest in disclosure, the District Court substituted its judgment for that of the General Assembly, inventing two novel exceptions—for 501(c)(3) entities and voter guides—that the Court deemed constitutionally compelled. The First Amendment requires neither of these exceptions.

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[14] Since *Citizens United*, the broad public interest in transparency has been held to justify most event-driven, election-related disclosure requirements. There is more disagreement with respect to laws imposing the full burdens of political committee (or "PAC") status—the highest form of regulation—on entities engaged in comparatively little electoral activity. *See*, *e.g.*, *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 , 873 (8th Cir. 2012) (en banc) (invalidating laws that imposed PAC-like continuous reporting on all groups making independent expenditures). *But see id.* at 881-83 (Melloy, J., concurring in part and dissenting in part) (joined by three colleagues); *id.* at 887-88 (Colloton, J., concurring in part and dissenting in part). Amici believe such laws are constitutional, but this Court need not decide the question. The Disclosure Act's registration and reporting requirements for PACs and its third-party advertising disclosure requirements overlap but are plainly not equivalent, *compare* Del. Code Ann. tit. 15, § 8030, *with id.* § 8031, and "simply because a requirement applies to a PAC does not mean applying it to a non-PAC is prohibited." *Tooker*, 717 F.3d at 593.

1. 501(c)(3) Organizations

The District Court incorrectly held that the First Amendment *requires* special carve-outs from disclosure laws for 501(c)(3) entities. *See Del. Strong Families*, 2014 WL 1292325, at *12.

It is true that, under federal tax law, entities registered under section 501(c)(3) are not supposed to "participate," "intervene," or otherwise attempt to influence any "political campaign" for or against a candidate for public office. 26 U.S.C. § 501(c)(3). It does not follow, however, that the IRS's definition of "political" activity for tax purposes must be imported into other legal regimes. In fact, elsewhere courts have cautioned against doing so. *See, e.g.*, *Shays v. FEC*, 337 F. Supp. 2d 28, 124-28 (D.D.C. 2004) (criticizing the Federal Election Commission for deferring to the IRS standard because "the IRS in the past has not viewed Section 501(c)(3)'s ban on political activities to encompass activities that are . . . considered [to be political activities]" under federal campaign finance law).

Moreover, the mere existence of the federal prohibition on 501(c)(3) political activity does not mean that 501(c)(3) organizations comply with the prohibition. The agency's almost complete failure to enforce its rules with respect to 501(c)(3) organizations engaging in politics has been well-documented.[15]

[15] *See, e.g.*, Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1315 (2007) ("Many 501(c)(3) organizations . . . are either ignoring the political campaign ban or are using 'issue discussion' or 'lobbying' as a means of

Indeed, DSF's voter guides may not satisfy the IRS guidance on this issue, as explained in Part II(B)(2), *infra*. The State cannot have been constitutionally obligated to turn a blind eye to this reality by excepting 501(c)(3) organizations from the Act's generally applicable requirements.

The Fourth Circuit's recent decision in *Center for Individual Freedom v. Tennant* is instructive on this point. The West Virginia disclosure statute at issue in *Tennant* defined "electioneering communication" similarly to Delaware's Disclosure Act. 706 F.3d 270, 281-82 (4th Cir. 2013). The statute contained an exception for 501(c)(3) organizations, which the Fourth Circuit ruled *unconstitutional*, reasoning that 501(c)(3) status does not necessarily preclude all electoral participation. *Id.* at 289-90. Excluding such organizations, the court concluded, "likely deprived the electorate of information about [their] election-related activities." *Id.* at 289.[16] *Cf. Shays*, 337 F. Supp. at 124-28 (invalidating

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promoting candidates and testing the limits of the prohibition."); Nanette Byrnes, *As Churches Get Political, IRS Stays Quiet*, REUTERS, June 21, 2012, *at* http://www.reuters.com/article/2012/06/21/us-usa-tax-churches-irs-idUSBRE85K1EP20120621 (reporting the increasing political activity of faith-based organizations with 501(c)(3) status and IRS's reluctance to engage in enforcement activity with respect to such organizations).

[16] The District Court posited that this portion of *Tennant* was meant to apply only to groups engaging in express advocacy or its functional equivalent, *Del. Strong Families*, 2014 WL 1292325, at *11, but the Fourth Circuit's opinion says nothing of the sort. Indeed, earlier in the opinion the court emphasizes that disclosure requirements can extend beyond the functional equivalent of express advocacy. *Tennant*, 706 F.3d at 281. Having made this point, it is implausible that the court

FEC exception for 501(c)(3) organizations as unreasonable and contrary to statutory intent in BCRA).

Because the Disclosure Act contains no exception for 501(c)(3) entities, this Court need not address whether such exceptions are constitutionally permissible. (Amici disagree with the Fourth Circuit, and believe they are).[17] Suffice it to say, there is no reasonable basis to conclude that such exceptions are constitutionally required.

2. Voter Guides

The District Court's suggestion that voter guides must be exempted is even less plausible than its reasoning with respect to 501(c)(3) entities. *See Del. Strong Families*, 2014 WL 1292325, at *12.

In the PI Ruling, the court characterized voter guides as "non-political," but then conceded that they are "typically intended to influence voter behavior, despite lacking words of express advocacy." 2014 WL 1292325, at *11 & n.19; *see also* State Br. at 35-36 (noting that, by definition, "voter guides" are designed to influence voter behavior and often do); *Colo. Right to Life Comm., Inc. v. Davidson*, 395 F. Supp. 2d 1001, 1019 (D. Colo. 2005) (similar voter guides were

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would then cabin its holding regarding 501(c)(3)s to express advocacy or its functional equivalent without saying so.

[17] States are not obligated to extend disclosure laws to the maximum extent permitted under the Constitution; where a state's objectives are plainly legitimate, the determination of how far a disclosure law should extend is best made by legislators, not courts.

"clear attempts to promote the election of those candidates who agree with CRLC's positions" and were appropriately subject to disclosure when distributed shortly before an election to the group's supporters). By their very nature, voter guides are at the core of the State's informational interest in disclosure, as the State explains. *See* State Br. at 36.

Moreover, DSF's last voter guide was not "non-political." While the guide might not have contained as much blatantly political language as the version disseminated by DFPC, it did contain a variety of phrases—such as "Values Voter," "[t]he stakes couldn't be higher," and "natural marriage"—that many would deem political. JA61, 124-25; *see also* State Br. at 19. The guide also identified DSF as an affiliate of DFPC, which expressly advocates on behalf of candidates. JA124. And the narrow selection and framing of issues in the guide are themselves significant. IRS guidance for 501(c)(3) groups suggests that voter guides, like DSF's, that include "[s]ome questions [that] evidence a bias on certain issues" and focus narrowly on "one area of concern" rather than a "wide range of subjects" are not permissible for 501(c)(3) organizations. IRS Rev. Ruling 78-248 (1978). The District Court invoked DSF's 501(c)(3) status as a basis for its ruling without examining whether DSF's voter guide complies with the criteria for 501(c)(3) groups.

Ultimately, whatever DSF claims to have intended or to intend going forward, its communications to voters about the positions and voting records of

candidates close to an election clearly implicate the State's important interest in furthering voters' right to know who is speaking to them. The Disclosure Act permissibly eschews the type of subjective line-drawing the District Court mandated in favor of an objective standard that can be applied in an even-handed fashion—just like the corresponding provisions of BCRA upheld by the Supreme Court in *Citizens United* and *McConnell*. State Br. at 45. The District Court should have adhered to the teaching of those cases, and denied DSF's motion for a preliminary injunction.[18]

CONCLUSION

Amici are non-partisan organizations who do not usually engage in activities that would implicate the Act's disclosure requirements. But it is conceivable that, like DSF, they may be subject to the provisions of the Disclosure Act, depending on the types of communications they determine to make in the future. That is not unconstitutional.

[18] DSF remains free to seek an exemption from the Disclosure Act, to which it would be constitutionally entitled if it could show a probability of "threats, harassments, or reprisals" with respect to either itself or its contributors sufficient to outweigh the public's interest in disclosure. *See* State Br. at 36-37. The General Assembly had no constitutional obligation to codify this or any other explicit exemption criteria, however, as the District Court implied. *See Del. Strong Families*, 2014 WL 1292325, at *11. No such criteria are codified under federal law, for example. While courts have occasionally required exemptions where disclosure would subject contributors to threats, harassment, or reprisals, *see*, *e.g.*, *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416 (2d Cir. 1982), they have not required exemption criteria to be set forth by statute.

At the heart of the First Amendment is the realization that "informed public opinion is the most potent of all restraints against misgovernment." *Buckley v. Valeo*, 424 U.S. at 1, 67 n.79 (1976) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)). Amici support the goal of civic engagement that underlies the publishing of most voter guides. Nonetheless, Delaware citizens deserve to know who is funding DSF's communications about candidates shortly before an election, whether or not DSF is in compliance with its tax-exempt status or concedes that it intends to influence voters. The Disclosure Act appropriately balances these competing First Amendment interests. Accordingly, the District Court's PI Ruling should be reversed.

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Respectfully submitted,

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CERTIFICATIONS

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.

/s/ David B. Hird

David B. Hird

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 9th day of June, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Robyn Cocho
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