No. 26A349

In the Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION, *ET AL.*,

Applicants,

v.

ANTHONY ALBENCE, *ET AL.*,

Respondents.

To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court and Circuit Justice for the Third Circuit

RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION PENDING CERTIORARI

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INTRODUCTION

In 2015, the "electioneering communications" disclosure provisions of the Delaware Elections Disclosure Act (the "Act") challenged here were upheld in *Delaware Strong Families v. Attorney General of Delaware*, 793 F.3d 304 (3d Cir. 2015) ("*DSF*"). There, the Third Circuit reviewed the Act under exacting scrutiny and looked carefully at the tailoring of its reporting requirements, including its monetary thresholds, the media it covers, and the scope of donor disclosure it requires. *Id*. at 310-12. The Court of Appeals ultimately found that the Act was "narrowly tailored and not impermissibly broad." *Id*. at 306.

Applicants Americans for Prosperity Foundation ("AFPF") and Americans for Prosperity ("AFP") have devoted much of their lawsuit below to arguing that courts should ignore basic principles of *stare decisis* to abandon this governing precedent. Their chief argument is that *DSF* had been "superseded" by *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021), because *Bonta* supposedly altered the applicable standard of review. *See* Appellants' Br. at 3-4, *AFPF v. Albence*, No. 26-2469 (3d Cir. Jul. 15, 2026), Dkt. 15 ("Appellants' C.A. Br."). But *DSF* is entirely consistent with *Bonta*. *DSF* applied exacting scrutiny and narrow tailoring when it reviewed the Act, just as *Bonta* later did when examining a different disclosure law.

Accordingly, the district court below found that *DSF* was not "obviously in conflict" with *Bonta*, Opp'n App.22a,[1] remained binding precedent, and compelled the conclusion that applicants had "failed to demonstrate any likelihood of success in

[1] Filed with this Opposition is a supplemental appendix ("Opp'n App.").

winning a facial challenge to the constitutionality of the Act," Opp'n App.23a. Chiefly on this ground, the lower court denied applicants' motion for preliminary injunction. The Third Circuit affirmed, noting that any reconsideration of *DSF* would likely require "our entire Court sitting en banc." Opp'n App.9a.

Applicants now seek the extraordinary remedy of an emergency injunction barring enforcement of the Act pending their petition for certiorari—just weeks before the 2026 general election. At no point in this litigation, however, have applicants requested en banc review of their case by the Third Circuit—the necessary step under appellate rules if they indeed wish the Court of Appeals to reconsider its holding in *DSF*. *See* Policy of Avoiding Intra-circuit Conflict of Precedent, Internal Operating Procedures ("IOP") of the U.S. Court of Appeals for the Third Circuit § 9.1 (Jan. 6, 2023) ("[T]he holding of a panel in a precedential opinion is binding on subsequent panels"). *See also* IOP § 9.2 (allowing initial hearings en banc).

Applicants instead attempt to leapfrog this step and brief the constitutionality of the Act here—in the nation's highest court—in the first instance. And this extraordinary request follows their failure to create a sufficient "factual record to flesh out their likelihood of success and the injuries they fear," Opp'n App.3a, which has prevented the lower courts from even attempting to assess the constitutionality of the law *de novo*, assuming arguendo that *DSF* does not control.

Applicants cannot satisfy the rigorous standard governing a request for an emergency injunction from this Court, which "'demands a significantly higher justification' than a request for a stay.'" *Respect Me. PAC v. McKee*, 562 U.S. 996

(2010) (mem.). Certainly, they offer no excuse for their resort to emergency relief except to complain that they are now in the 60-day pre-election window in which the Act requires spenders to disclose information about the financing of their electioneering communications. But applicants brought their case a scant five months before the disclosure window for the general election commenced—despite relying on *Bonta*, decided *five years* ago. Moreover, applicants seek a preliminary injunction that requires overturning Circuit precedent. It was not only predictable, but nearly inevitable, that an attempt to overturn that precedent would require more than five months. Any purported "emergency" here is entirely of applicants' own making.

Finally, even if this Court were inclined to consider the constitutionality of the Act in the first instance here, applicants' arguments fail for the simple reason that they misunderstand the Act itself. Their principal objection to the Act's tailoring is their belief that the Act requires covered spenders "to disclose *all* donors who gave up to four years before that election," but this is wrong. AFPF Emergency Appl. for Writ of Inj. ("Appl.") 5. Delaware allows groups to form either an unincorporated association to finance one-time electioneering communications or a political action committee ("PAC") to carry out ongoing activity in Delaware. *See* 15 Del. C. § 8002(18). In either case, the spender need disclose only the donors to the association or PAC. This is not a difficult or impracticable option: it is the type of report that many nationwide groups with Delaware-specific political ads currently file in Delaware. Opp'n App.55a.

Applicants have virtually ignored this feature of the Act. Rather than acknowledge that these streamlined reporting options would tailor the donors reported to the communication, applicants attempt to shore up their constitutional claims by training their attention on different elements of the Act—for instance, its monetary thresholds—that have little relevance to their circumstances. AFP and AFPF are sophisticated groups with hundred-million-dollar budgets: they can easily tailor disclosure under the Act by forming an association to fund communications in Delaware. At the same time, the specific level of Delaware's disclosure threshold has little relevance to them given that their spending budget greatly exceeds this level. In short, applicants attempt to redirect attention from provisions of the Act that limit the reporting requirements to elements that have no bearing on their disclosure obligations. This selective blindness does not cast doubt on the Act's tailoring. It only underscores that the very premise of applicants' challenge—*i.e.*, that Delaware requires plenary donor disclosure from groups funding electioneering communication—is faulty.

Because applicants fail to identify any error warranting this Court's review—and the equitable considerations overwhelmingly favor leaving Delaware's disclosure law in place for an election that is imminent—the application should be denied.

STATEMENT OF THE CASE

I. Delaware Elections Disclosure Act

A. Legislative History

In designing the Act, the Delaware Legislature looked to the enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat.

81 (2002), for guidance. Prior to BCRA, federal campaign finance law, 52 U.S.C. § 30101, *et seq.*, had been narrowed by a series of court decisions to require disclosure of only those ads that "expressly advocate[d]" for or against candidates, an easily evaded standard that allowed the funders of most federal election-related advertising to remain secret. *See Buckley v. Valeo*, 424 U.S. 1, 41-43 (1976) (per curiam). *See also McConnell v. FEC*, 540 U.S. 93, 126 (2003) (noting that by avoiding express advocacy, organizations could spend hundreds of millions of dollars on "so-called issue ads . . . without disclosing the identity of, or any other information about, their sponsors").

To address this lack of transparency, Congress "coin[ed] a new term, 'electioneering communications,' to replace the narrowing [express advocacy] construction of [federal] disclosure provisions." *id.* at 189. BCRA then extended federal reporting and disclaimer requirements to cover this new category of spending. This Court upheld BCRA's disclosure provisions on their face in *McConnell*, 540 U.S. at 196-97, and as applied in *Citizens United v. FEC*, 558 U.S. 310, 369 (2010). *See also Indep. Inst. v. FEC*, 216 F. Supp. 3d 176 (D.D.C. 2016) (three-judge court), *summarily aff'd*, 580 U.S. 1157 (2017) (mem.). In upholding BCRA, the Court necessarily approved its requirement that covered groups that use their general treasuries to fund electioneering communications disclose "the names and addresses of *all* contributors" over the monetary threshold. 52 U.S.C. § 30104(f)(2)(F) (emphasis added).[2] However, if a group creates a segregated bank account to pay for these

[2] Four years after *McConnell*, the Federal Election Commission ("FEC") adopted a regulation permitting corporations and unions funding electioneering communications to disclose only those donors who contributed "for the purpose of

communications and spends only funds contributed "directly to this account," BCRA allows the group to report only contributors to that account. *Id.* § 30104(f)(2)(E).

As was the case at the federal level, Delaware initially required disclosure only with respect to ads that "expressly advocate[d]" a candidate's nomination or election. 15 Del. C. §§ 8002(10), 8030, 8031 (2012). Groups active in Delaware elections also avoided disclosure by simply crafting messages that avoided the "magic words" of express advocacy. *See* H.B. 300, 146th Gen. Assemb., pmbl. (Del. 2012) (noting concerns about "a proliferation of advertisements that [we]re . . . intended to influence elections, but [we]re not required to be reported under existing law").

In 2013, Delaware's Legislature decided to follow the federal model and extend existing Delaware disclosure requirements to cover "electioneering communications." *See* 15 Del. C. §§ 8002(10), (27), 8031(a)(3). Guided by the analysis in *McConnell* and *Citizens United*, the Act defines covered "electioneering communications" by the same "easily understood and objectively determinable" criteria employed by BCRA, *McConnell*, 540 U.S. at 103. 15 Del. C. § 8002(10).

B. *Delaware Strong Families*

The Act was soon challenged by Delaware Strong Families ("DSF") as overbroad and contrary to the First Amendment. The district court granted DSF's motion for preliminary injunction, principally on grounds that the Act was insufficiently tailored because it reached "neutral communication[s]" and "neutral

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furthering electioneering communications." Electioneering Communications, 72 Fed. Reg. 72899 (Dec. 26, 2007). This limitation does not appear in the statute and was not considered in *McConnell*.

communicator[s].” *DSF v. Biden*, 34 F. Supp. 3d 381, 395 (D. Del. 2014). The court did not address the option to register an association to tailor donor disclosure, largely because DSF sought not to *limit* the scope of donor disclosure, but to invalidate any disclosure with respect to ads that were not the functional equivalent of express advocacy. *Id.* at 393-94.

Delaware appealed, and the Third Circuit reversed and upheld the Act. The Court of Appeals determined that exacting scrutiny applied and held that the governmental interest in “provid[ing] the electorate with information as to where political campaign money comes from” was “sufficiently important” to sustain a disclosure law. *DSF*, 793 F.3d at 309 (citation modified). It then analyzed whether the Act was both substantially related and “sufficiently tailored” to that interest. Recognizing that BCRA was a “federal statute comparable to the Act” that had been affirmed by the Supreme Court, *id.* at 308, the Court of Appeals carefully “compare[d] the respective disclosure requirements of BCRA and the Act to determine whether the Act survive[d] constitutional scrutiny,” *id.* Ultimately, *DSF* concluded that the Act was “narrowly tailored and not impermissibly broad.” *Id.* at 306.[3]

C. The Current Act

The Act has not changed materially since enactment. It requires specific disclosures from entities that spend more than $500 on “third-party advertisement[s],” which could be either express advocacy or electioneering communications. 15 Del. C. § 8002(27). The Act’s definition of “electioneering

[3] *DSF* filed a petition for certiorari in 2016, which this Court denied. *DSF v. Denn*, 136 S. Ct. 2376 (2016) (mem.).

communications" is modeled after BCRA's definition of the same term, covering ads that: (1) "[r]efer[] to a clearly identified candidate;" (2) are "publicly distributed" within 30 days of a primary election or 60 days of a general election; and (3) are targeted "to an audience that includes members of the electorate for the office sought by such candidate." *Id.* § 8002(10). The Act exempts several categories of speech from these disclosure requirements, including "membership communication[s]," communications relating to candidate debates or forums, and communications distributed by hand. *Id.* § 8002(7), (10)(b).

The Act provides that once an entity spends more than $500 on covered communications, it must file a "third-party advertisement report" with the Commissioner of Elections. *Id.* § 8031(a). The report must list the names and addresses of those contributing more than $100 to the entity that funded the third-party advertisement during the election period. *Id.* The report must also disclose any person owning more than a 50% interest in a disclosed contributor. *Id.*

The Act's donor disclosure requirements respect donors' and organizations' choices of corporate form. The Act requires the entity that pays for electioneering communications to disclose only the donors to the entity; the Act does not require this entity to disclose donors of its affiliates or sponsoring entities. Opp'n App.55a-56a.[4] Nor does the Act require advertisers to "trace back" donations to previous donors

[4] Concerned that this option may reduce donor disclosure in some instances, Delaware's General Assembly considered legislation this year to address the use of PACs and associations to finance electioneering communications, but ultimately did not pass this legislation in its 2026 session. Opp'n App.56a-57a.

"upstream" from the direct contributor to the advertiser. Thus, an organization may form a dedicated unincorporated association or a Delaware PAC for the limited purpose of funding one or more third-party advertisements in Delaware, 15 Del. C. § 8002(19). Opp'n App.54a-56a. Using this option permits the broader organization to disclose only the funds contributed to the dedicated association or PAC. When an organization uses this approach, general purpose donors to the larger parent organization generally do not need to be disclosed. This mechanism resembles the "segregated bank account" option of federal law, which permits groups that finance their federal electioneering communications exclusively through such an account to report only those donors who contribute to the account. 52 U.S.C. § 30104(f)(2)(E). Delaware simply uses alternative entities, rather than bank accounts, as the mechanism to tailor disclosure.

Most third-party advertisers in recent elections in Delaware were unincorporated associations or PACs financing electioneering communications for broader organizations. Opp'n App.55a. For example, when the ACLU, a nationwide organization, finances electioneering communications in Delaware, it does so through the American Civil Liberties Union of Delaware Action Fund. Disclosures related to the electioneering communications identify the donors to the dedicated action fund, rather than to the ACLU's nationwide organization. Opp'n App.248a-261a.

The process for creating an association for third-party advertising consists of the online submission of a six-page form. Even if a group elects to form a PAC, this structure bears little resemblance to a federal "political committee," 52 U.S.C. §

30101(4). A Delaware PAC is required to register with the Department of Elections and file regular disclosure reports, 15 Del. C. §§ 8005, 8030, but a PAC need not incorporate or register with Delaware's Secretary of State. Unlike federal political committees, Delaware PACs are not required to operate formally; for instance, they need not maintain a separate bank account and may "terminate" at any time. *See* 52 U.S.C. §§ 30102, 30103. Unlike most federal political committees, Delaware PACs are not subject to limits on the contributions they receive. Opp'n App.56a. *See* 52 U.S.C. § 30116(a)(1)(C)-(D). Indeed, many Delaware PACs are formed and operated by individual Delawareans.

II. Procedural History

AFP and AFPF initiated their action on April 17, 2026. They filed a motion for preliminary injunction on the same day, asking the district court to enjoin enforcement of the Act on its face, and as applied to AFP and AFPF on grounds that their donors would likely face harassment if their identities were reported. The district court heard the motion on June 8, 2026, and denied applicants' motion that day. The court held that applicants' facial claim had been "previously addressed" and decided in *DSF*, Opp'n App.22a. The district court found that applicants' as-applied claim was also unlikely to succeed because they had failed to "show[] a reasonable probability that disclosure of [their] donors' names pursuant to the Delaware law will subject them to threats, harassments, or reprisals." Opp'n App.24a-25a.

Applicants appealed and the Third Circuit affirmed the district court's denial of preliminary injunction. It accepted the district court's view that *DSF* controlled applicants' facial challenge and also affirmed the lower court's finding that applicants had failed to offer sufficient—or any—evidence of potential donor harassment to support their as-applied challenge. Consequently, the panel expressed "little confidence" that applicants would succeed on the merits of their claims. Opp'n App.9a-10a. The Third Circuit held that applicants had also failed to establish the non-merits factors for preliminary relief, noting that applicants' delay in initiating their action was the reason they had been unable to fully litigate their claims. Opp'n App.10a-13a. Even assuming *arguendo*, or "spotting," applicants some chance of success on the merits, Opp'n App.12a, the Court affirmed that the balance of equities favored the state respondents.

STANDARD OF REVIEW

A stay pending disposition of a petition for writ of certiorari is an "extraordinary" remedy. *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers). An affirmative injunction is a yet more exceptional form of relief and "demands a significantly higher justification than a request for a stay." *Respect Me. PAC*, 562 U.S. at 996. An injunction, "unlike a stay, . . . 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Id.* (citation omitted).

To obtain an emergency injunction in a First Amendment case, an applicant must show that "their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020). Further, a stay applicant must show that its claims are certworthy. *See Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief) (mem.); *Labrador v. Poe*, 144 S. Ct. 921, 931 (2024) (Kavanaugh, J., concurring in the grant of stay) (mem.) ("[T]he Court can and should take care to focus on certworthiness when considering emergency applications.").

ARGUMENT

I. The Claims Asserted by this Application Are Not Properly Before This Court.

Although applicants purport to seek review of the denial of their motion for preliminary injunction, they ask this Court to consider merits issues that were not reached by the district court or Third Circuit in the preliminary proceedings below.

The district court, affirmed by the Third Circuit, ruled that applicants were unlikely to succeed on the merits of their facial challenge because binding precedent had upheld the Act. Opp'n App.22a-23a. Given the *DSF* precedent, the district court had no authority to review the constitutionality of Act *de novo*, and in any event, applicants failed to compile the evidentiary record below necessary for such review, as noted by the Third Circuit. Opp'n App.3a-4a. Thus, after affirming that *DSF* remained controlling after *Bonta*, both lower courts correctly declined to rule on applicants' underlying First Amendment arguments, refusing to issue what would effectively be an impermissible advisory opinion on an "underdeveloped" record. Opp'n App.9a.

Nonetheless, applicants argue at length that "[t]he Act [v]iolates the First Amendment" in their application and request an emergency injunction on that basis. Appl. 13-19. Applicants thus do not ask this Court to review an error committed by the lower courts, but rather, improperly ask that this Court act as a court of first impression on the merits of a constitutional claim upon which the lower courts never ruled. This, however, is a Court "of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *see also Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No.* 174, 598 U.S. 771, 784 n.3 (2023). The dispositive merits rulings below rested solely on the application of binding precedent, so the only operative question of law properly before this Court is whether the lower courts abused their discretion in denying the motion for preliminary injunction on that basis.

And even with respect to the question of whether *DSF* remained binding, the proper course would have been for applicants to petition the Third Circuit for en banc rehearing of *DSF*, as the panel all but recommended they do. Opp'n App.9a. Applicants did not heed this advice. Instead, they ask this Court to reconsider Third Circuit precedent before the full Court of Appeals itself has an opportunity to do so.

Indeed, so rushed is this application that applicants have disobeyed this Court's rules by failing to first request an injunction from the Third Circuit with respect to the challenged ruling. Sup. Ct. R. 23(3) ("Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof."). Nor do applicants attempt to explain any "extraordinary circumstances" that prevented them from doing so—because there are none. This Court should neither endorse this shortcut, nor entertain applicants' request to rule as a court of "first view" on their First Amendment claims, prior to the district court and full Court of Appeals below, and on a record that wholly lacks the evidence and findings of fact necessary for this review. *See Cutter*, 544 U.S. at 719 n.7.

II. Applicants Have Not Shown Any Grounds for a Grant of Certiorari or a Reversal of the Decisions Below.

An applicant for an emergency injunction bears the burden of satisfying each stay factor, *Nken v. Holder*, 556 U.S. 418, 433-34 (2009), in an "indisputably clear" showing, *S. Bay United Pentecostal Church v. Newsom*, 590 U.S. 965, 966 (2020) (Roberts, J., concurring) (mem.). Here, applicants fail to establish a single factor.

In most respects, the Third Circuit's analysis of these factors in connection with applicants' motion for preliminary injunction holds true with respect to the analysis of their instant application for an emergency injunction. As the Third Circuit ruled, applicants failed to show a likelihood of success on the merits of their facial or as-applied claims; failed to show irreparable injury; and failed to show that the balance of equities resolved in their favor. So too do applicants fail to show any of these factors here. Indeed, if there is any change in this analysis now, it further cuts against their application: the general election draws ever closer and the 60-day pre-election window for disclosure commenced three weeks ago.

A. Applicants Are Unlikely to Succeed on the Merits of Their Claims.

1. The lower courts correctly found that *Delaware Strong Families* controls the merits of applicants' facial challenge.

As applicants acknowledge, the district court "deemed itself unable to rule that [*DSF* was] superseded" by *Bonta*, Appl. 10, and consequently ruled that *DSF* precluded applicants from showing "any likelihood of success in winning a facial challenge" to the Act. Opp'n App.23a. The Third Circuit affirmed. Opp'n App.8a-9a.

Applicants do not so much contend that the Third Circuit was wrong to affirm this holding as complain that the Third Circuit did not address the "ongoing vitality of *DSF*." Appl. 10. Applicants go so far as to claim that the Third Circuit in fact affirmatively "held that it need not determine likelihood of success on the First Amendment question." *Id.* at 2. But this characterization of the Third Circuit's ruling cannot be reconciled with the plain text of the opinion. The panel assessed whether the Supreme Court in *Bonta* had overruled *DSF*, and, after noting that *Bonta* was not "an election case," Opp'n App.8a, and thus did not consider the governmental interest in an informed electorate, it declined to find any clear conflict between the two decisions, *id.* at 7a-8a. The panel was thus bound by *DSF*, and noted that "the entire Court sitting en banc" instead may have to "grapple with whether to revisit *Delaware Strong Families*." Opp'n App.9a. This *was* the panel's merits ruling.[5]

And the affirmation that *DSF* remained binding was clearly the correct decision for the panel to reach. Under principles of *stare decisis* and appellate rules, *see* IOP § 9.1, *DSF* remains controlling on a Third Circuit panel unless it is "obviously in conflict with Supreme Court precedent." *Rubin v. Buckman*, 727 F.2d 71, 74 (3d Cir. 1984) (Garth, J., concurring). *See also United States v. Wolfe*, 767 F. App'x 390, 391 (3d Cir. 2019) (noting that where a Circuit precedent "has not been overruled by

[5] As the Court of Appeals noted, even if it attempted to consider the case, in the alternative, as if *DSF* did not control, the merits of applicants' First Amendment claims remained "hazy." Opp'n App.8a. The only plausible way to read this statement is as a ruling that applicants did not meet their burden to show a likelihood of success.

this Court en banc, or overruled or rejected by the Supreme Court, it binds [the] panel"). Only en banc can the Third Circuit reconsider past decisions in the absence of explicit conflict with intervening Supreme Court precedent.

a. *Delaware Strong Families* is consistent with *Bonta*.

Applicants declare *DSF* "obsolete," after *Bonta*, Appl. 2, but they identify no conflict between the two decisions. Indeed, applicants below were forced to concede that there was no *explicit* disagreement between the decisions because *DSF* expressly considered whether the Act is "narrowly tailored" as *Bonta* instructs. *See* Appellants' C.A. Br. 33 n.4 (quoting *DSF*, 793 F.3d at 306). Applicants' argument instead rested on the claim that *DSF*'s explicit holding notwithstanding, the Third Circuit's analysis there "in *function*" did not include "the features [*Bonta*] demands of the narrow tailoring inquiry." *Id.* (emphasis added). But supposition about *implicit* tension between a Supreme Court holding and Circuit precedent cannot vitiate the binding effect of the latter without rendering *stare decisis* a nullity.

Further, there is not even any implicit tension between *Bonta* and *DSF* because *Bonta* reaffirmed that exacting scrutiny is the correct standard of review.

In *Bonta*, this Court considered a California reporting law that required charities active in the state to submit tax documents and donor information to the state attorney general, on a confidential basis, to aid the state's oversight of nonprofit entities. 594 U.S. at 601-02. The California law thus did not involve elections, nor the public disclosure of campaign-finance information—and thus implicated no First Amendment interest in an informed electorate.

In challenging California's reporting law, the plaintiffs in *Bonta* had urged this

Court to apply strict scrutiny, distinguishing, for the purpose of their argument, campaign-finance laws like Delaware's that received exacting scrutiny. This Court declined to create the two-tier system of review that the plaintiffs requested. Instead, drawing upon precedents like *Buckley* and *Citizens United*, it reaffirmed that the exacting scrutiny it applied in those campaign-finance cases was the appropriate standard for *all* types of donor-disclosure laws. *Id.* at 608 (citing *Buckley*, 424 U.S. at 64-68; *Citizens United*, 558 U.S. at 366-367; *Davis v. FEC*, 554 U.S. 724, 744 (2008)). In the alternative, the *Bonta* plaintiffs had urged this Court to incorporate a "least restrictive means test" into exacting scrutiny. *Id.* at 608. The Court rejected this request as well, explaining that that exacting scrutiny requires "disclosure regimes" to be "narrowly tailored to the government's asserted interest," but not "the least restrictive means of achieving their ends." *Id.*

Despite *Bonta*'s reaffirmation of exacting scrutiny, applicants claim that the decision superseded *DSF* because *Bonta* implicitly heightened exacting scrutiny by stating that it requires an analysis of narrow tailoring. Appl. 16-18. But *Bonta* never suggested that it was *changing* exacting scrutiny. To the contrary, the plurality opinion made clear that the "need for narrow tailoring" in exacting scrutiny review was present throughout its precedents, both "early in [its] compelled disclosure cases" and in "more recent decisions." 594 U.S. at 608-09. And the plurality expressly rejected the dissent's position that earlier political disclosure cases like *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), had employed a standard that required only a "modest level of tailoring." 594 U.S. at 611 (citation omitted). Instead, the Court explained that cases like *Reed* had in fact narrowly reviewed tailoring, and had upheld disclosure "only after [it] concluded that various narrower alternatives proposed by the plaintiffs were inadequate." *Id.*

Consistent with the later *Bonta* decision, *DSF* had expressly considered whether the Act was "narrowly tailored and not impermissibly broad," 793 F.3d at 306, citing *Buckley and Citizens United* as the basis for the standard it applied, *id*. at 309. As the district court here highlighted, *DSF* specifically reviewed "the Act's monetary thresholds, the types of media covered, the length of the statutory 'election period,' and the lack of so-called earmarking provisions," Opp'n App.22a-23a, assessing the degree to which each of these features was necessary to achieve the government's informational interest, *DSF*, 793 F.3d at 310-12.

DSF also considered the Act's requirements in light of any less intrusive alternatives, which applicants below designated as the hallmark of narrow tailoring review. Appellants' C.A. Br. 20. The Third Circuit made a point-by-point comparison of Delaware's disclosure requirements to the sometimes "less restrictive" federal model. The Court noted each feature of the Act that departed from BCRA, *DSF*, 793 F.3d at 310-11, and considered at length whether the record justified Delaware's choice of different criteria for disclosure, *id.* For instance, the Third Circuit reasoned that Delaware's lower thresholds for reporting were justified in light of the lower costs of state campaigns, which tended to rely on inexpensive media, such as direct mail, *id*. at 310-11, not television, given that there was no major-network television market serving Delaware, *id*. at 311.

With little to critique in the *DSF* opinion itself, applicants instead turn to dicta in a Tenth Circuit decision, *Wyo. Gun Owners v. Gray*, 83 F.4th 1224 (10th Cir. 2023), to attack *DSF*'s tailoring analysis. *See* Appl. 16 (claiming that *DSF* was a "a relic of pre-[*Bonta*] exacting scrutiny") (quoting *Gray*, 83 F.4th at 1249)). The Tenth Circuit's criticism rests on a faulty understanding of both *DSF*, which in fact analyzed the Act for narrow tailoring, and the Act, which provides a streamlined reporting option in lieu of full donor disclosure, *see supra* at 9-10.

Applicants proclaim nonetheless that this passage in *Gray* creates "as stark a circuit split as there could be." Appl. 17. But a few lines of criticism in dicta does not a circuit split make. Even if the Tenth Circuit's mention of *DSF* were integral to its holding in *Gray*, there is no divergence between the circuits on any significant legal issue: both Circuits applied exacting scrutiny to the disclosure laws in question and both conducted a narrow tailoring review. Even assuming these two courts differed slightly in how they applied the same standard of scrutiny, minor variations in the "[]application of a properly stated rule of law" does not constitute a legal conflict, nor is it adequate grounds for a grant of certiorari. Sup. Ct. R. 10.

And there are not even minor variations across the circuits in the application of exacting scrutiny. Two years after *Gray*, the Tenth Circuit upheld a New Mexico disclosure law that required groups financing electioneering communications through their general treasury to provide near plenary donor disclosure. *Rio Grande Found. v. Oliver*, 154 F.4th 1213 (10th Cir. 2025); *see also* N.M. Stat. §§ 1-19-26(Q), 1-19-27.3(D). The majority opinion rejected the dissent's argument that the law was not sufficiently tailored because it lacked an earmarking requirement and other narrowing features, *Oliver*, 154 F.4th at 35, noting that under *Bonta* the donor reporting requirement need not be "the least restrictive means of achieving [New Mexico's] ends," 154 F.4th at 1228.

In short, *DSF* conducted the narrow tailoring review prescribed by *Bonta* and established in this Court's earlier campaign-finance precedents. Applicants identify no reason why this Court should reverse the lower courts' judgment that *DSF* controls the merits of applicants' facial claim.

b. The lower courts' analysis of the merits appropriately stopped at *Delaware Strong Families*.

At base, it appears that applicants' real grievance is not that the Third Circuit *refused* to decide likelihood of success on the merits, but that the merits decisions of both courts below focused on the question of whether *DSF* was binding—without a *de novo* consideration of whether the Act satisfies exacting scrutiny. Applicants insist that the "Third Circuit should have required Delaware to prove its law tailored," Appl. 3, but this would not be the proper course of appellate review. A district court has no authority to consider a settled issue of law *de novo* where controlling precedent directly applies; so too is the Third Circuit bound by an earlier panel decision unless it has been overruled by an intervening Supreme Court ruling.

And it is even more improper for applicants to ask *this* Court to decide the Act's facial constitutionality in the first instance now. *See supra* Part I. Given that the lower courts' focus was the applicability of *DSF*, these questions were neither squarely presented, nor fully briefed below—and, as the Third Circuit found, the record compiled by applicants was so "underdeveloped" that it did not support meaningful review of "whether Delaware demands more disclosure than its interests justify." Opp'n App.9a. To be sure, respondents believe that the Act also clears *de novo* review under *Bonta*, and that applicants' facial claims lack merit and rest on a misunderstanding of the law, as explained in *infra* Part III. But the question decided by both the district court and the Third Circuit was not whether the Act was narrowly tailored to meet a sufficiently important governmental interest, but instead whether *DSF* controlled applicants' facial challenge.

2. The Third Circuit correctly ruled that applicants were unlikely to succeed on the merits of their as-applied claim.

The district court, affirmed by the Third Circuit, was also correct to conclude that applicants were unlikely to succeed on their as-applied claim because the record was "insufficient" to demonstrate a reasonable probability that applicants' "donors will be subjected to threats, harassments, or reprisals due to the Delaware statute." Opp'n App.26a. *See also Citizens United*, 558 U.S. at 370; *Buckley*, 424 U.S. at 74. Applicants raise no grounds to question this ruling.

The "as-applied" exemption for harassment was designed to protect "dissident" viewpoints that would otherwise be removed from "the free circulation of ideas." *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91, 93 (1982). Applicants failed to allege or show that their organizations and donors had suffered the kind of harassment or reprisals that warranted exemptions for the NAACP in the 1950's, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), or the sixty-member Socialist Workers Party, *Brown*, 459 U.S. at 91. Indeed, far from meeting the standard for a preliminary injunction, most of applicants' allegations of harm were so "generic, undated" and general, Opp'n App.9a, that they would not even survive a motion to dismiss. *See AFP v. Meyer*, 724 F. Supp. 3d 858, 879 (D. Ariz. 2024), *appeal docketed,* No. 24-2933 (9th Cir., argued May 15, 2025) (dismissing AFPF and AFP's claim for as-applied exemption from an Arizona disclosure law because it was "based on generic allegations regarding the treatment of their donors in unrelated matters").

And applicants' gravest failure, as the Third Circuit found, was that they did not "offer[] anything from *donors*," Opp'n App.10a (emphasis added)—*i.e.*, they alleged no harassment or adverse effects suffered by their *donors* because their identities were disclosed in a campaign finance report or similar disclosure. To the extent applicants mentioned a handful of specific incidents of harassment, almost all involved the experiences of AFPF or AFP's leadership and public-facing associates—and were occasioned by their public advocacy, not in response to information gleaned from disclosure reports filed with a government agency. Although a plaintiff "need not make voluminous allegations of possible harm, they must make some allegations that can plausibly be tied to [the disclosure law]," including a "factual basis for believing the disclosures required by the [law] will lead to 'threats, harassment, or reprisals.'" *Meyer*, 724 F. Supp. 3d at 879. These applicants wholly failed to do.

This omission is even more glaring because applicants operate an affiliated super PAC, Americans for Prosperity Action ("AFPA"), which took in $180 million in receipts in 2023-24. Defs.' Opp'n to Mot. for Prelim. Inj. at 11, *AFPF v. Albence*, No. 1:26-cv-00445-JLH (D. Del. May 26, 2026), Dkt. 21 ("Defs. Opp'n") (citing AFPA

Financial Summary, https://www.fec.gov/data/committee/C00687103/). In the same period, the super PAC reported the names of more than two thousand donors. *Id*. Applicants made no allegation that any of these contributors has faced harassment from this disclosure.

Applicants insinuate that they "presented unrebutted evidence showing that they 'and their supporters have been subject to bomb threats, protests, stalking, and physical violence'" but this is misleading because applicants are quoting from a *different* case—not referencing admissible evidence they offered below. Appl. 31 (quoting *Bonta*, 594 U.S. at 617). Applicants cannot excuse their failure to submit sufficient—or any—evidence of donor harassment *here*, by merely gesturing at unrelated cases elsewhere. Appl. 9. In any event, no case has granted either AFP or AFPF an as-applied exemption from disclosure based on donor harassment.[6]

Finally, although applicants insist that the Third Circuit panel did not consider the likelihood-of-success prong of the preliminary injunction standard, this assertion is plainly wrong with respect to the court's review of the as-applied claim as well. The panel found that the allegations and evidence offered by applicants were insufficient, and "give us little confidence in the likelihood of success." Opp'n App.10a.

[6] Applicants cite an unpublished New Jersey decision, *AFP v. Grewal*, No. 3:19-cv-14228, 2019 WL 4855853, at *20 (D.N.J. Oct. 2, 2019), but the court there made no findings as to whether AFP merited an as-applied exemption from the law at issue. Appl. 9. And in *Bonta*, the district court's grant of a preliminary injunction barring enforcement of California's law as applied to AFPF was reversed by the Ninth Circuit, which found that AFPF had not shown a reasonable probability of harassment. *AFPF v. Harris*, 809 F.3d 536, 540-41 (9th Cir. 2015).

B. The Third Circuit was correct to hold that applicants failed to show irreparable harm.

The Third Circuit found that applicants "spen[t] little time showing irreparable harm" below, Opp'n App.11a, and they make same error here.

The principal "harm" applicants identify is their choice to refrain from running electioneering communications for fear of the plenary donor disclosure that they believe the Act requires in the 60-day pre-election reporting window. But the law does not require such disclosure. As the Court of Appeals noted, applicants "could create and fund a Delaware political-action committee or unincorporated association, limiting disclosure to donors who fund those Delaware-specific groups." *Id.*

Applicants do not explain why they could not take advantage of this option. They speculate that "Applicant AFPF is organized under IRC § 501(c)(3) and thus cannot form a political action committee," Appl. 19, yet this is not only wrong, but a non-sequitur. AFPF need not form a PAC; it can create an unincorporated association. Many similarly situated third-party spenders take this route in Delaware elections, and this undertaking requires only a single online form. Opp'n App.54a-55a. Applicants misstate tax law as well: a Section 501(c)(3) organization cannot create or fund a Section 527 "political organization," because the latter tax status is reserved for entities that primarily influence the election or appointment of candidates to public office. 26 U.S.C. § 527. But there is no bar to AFPF forming a

"PAC" under Delaware law because such an entity need not be organized under Section 527, nor presumably, would it be devoted to political campaign intervention.[7]

Applicants' ignorance of the streamlined reporting options under the Act—and their unfounded fears of plenary donor disclosure—cannot be the foundation of a claim of irreparable injury. It is possible, as the Third Circuit acknowledged, that applicants could develop a record showing that reporting as an association creates an "unconstitutional burden" on spenders and thereby does not sufficiently tailor the Act on its face. Opp'n App.11a-12a. But applicants have not done so. *Id*. Respondents disagree that this reporting option is burdensome and submitted evidence below demonstrating that the formation of an association or PAC was simple and widespread among third-party advertisers. Opp'n App.53a-56a. But regardless of what a fully developed record might show in the future, this option is undeniably available to applicants *now* if they in fact wish to run electioneering communications. If instead AFPF and AFP choose to embrace comprehensive donor disclosure in connection with their 2026 Delaware advocacy, any resulting "injury" would be entirely voluntary.

The "harm" applicants claim here is also due to their own delay in bringing suit. They were well aware of the *DSF* precedent and thus knew that they were not

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[7] AFPF's tax status prohibits it from intervening in "political campaign[s]," 26 U.S.C. § 501(c)(3), and, as noted below, there is some question whether AFPF can fund its proposed electioneering communications in Delaware and remain compliant with its tax status. Defs. C.A. Opp'n 19-20. But this limit on AFPF's activities arises from federal tax law, not from the Act, and certainly not from the option under the Act for third-party spenders to circumscribe their donor reporting by registering a PAC.

merely seeking to persuade a trial court to deem the Act unconstitutional in the first instance, but rather to convince the en banc Court of Appeals to reconsider standing precedent. Applicants made no attempt "to explain why they chose not to bring this suit earlier." Opp'n App.12a. The Act has been in effect since 2013, and even insofar as the *Bonta* decision prompted applicants' decision to sue, it was issued in 2021. This delay casts doubt on any claim that applicants are subject to an imminent risk of harm.

Finally, as the Third Circuit noted, instead of attempting to demonstrate actual injury, applicants largely "rely on the presumption that First Amendment harm is irreparable." Opp'n App.11a. While this presumption may be correct in theory, the problem with applicants' argument is that they have not shown a likelihood of success on the merits and thus have not established a likely First Amendment harm in the first place. The mere "*assertion* of First Amendment rights does not automatically require a finding of irreparable injury," but rather, a plaintiff "must show 'a chilling effect on free expression.'" *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989) (emphasis added). This appeal does not arise from a motion to dismiss, where plaintiffs' allegations are assumed to be true and all inferences resolved in their favor. If the mere unsupported assertion of First Amendment injury was sufficient to show "irreparable harm," this factor for preliminary relief would be rendered a nullity.

C. The Court of Appeals was correct to find that the balance of equities favored respondents.

After balancing the potential harm to applicants from a denial of preliminary relief against the harm to the state—and Delaware voters—from a grant, the Third Circuit found that the scale tipped in favor of Delaware. Many of the reasons cited by the panel for this conclusion—applicants' delay in initiating suit, the proximity of the election, and the strong public interest in campaign finance disclosure in the last weeks of campaigning—are equally relevant to the consideration of the equities here.

The last two factors considered when reviewing a motion for preliminary injunction are whether granting such relief will "result in even greater harm to the nonmoving party" and whether "the public interest favors such relief," *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 250 (3d Cir. 2011). These factors "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. This is particularly true here—because the state's interest in the orderly and uniform enforcement of its disclosure laws is particularly strong immediately before an election, as is voters' interest in receiving full information about who is financing the campaign advertising they see and must evaluate before heading to the polls.

Delaware' primary election took place on Tuesday, September 15. *See* Del. Dep't of Elections, Primary Election, https://perma.cc/4J85-RHUU (last visited Sep. 22, 2026). Third-party spenders have duly disclosed the sources funding their electioneering communications in the 30-day period prior to the primary as the Act requires. 15 Del. C. § 8031(a). The general election is only five weeks away, and the 60-day pre-election window for electioneering communications disclosure has been running for weeks. Granting the injunction requested by applicants would both upend Delaware's campaign disclosure system in the middle of the election season and deprive voters at this crucial juncture of the information mandated by the Act—information this Court has found "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371. Such a ruling would also apply inconsistently across the primary and general elections, across various races for public office, and among various third-party advertisers. Voters would receive no information about who was really financing AFP and AFPF's ads, and the candidates that applicants criticized would not have the disclosure needed to mount an informed response. But many other third-party spenders would have complied—or would continue to comply—with the Act. This result would be chaotic, confusing to voters, and unfair to candidates and other speakers: instead of advancing First Amendment values of robust debate and informed voting, it would do the opposite.

This case thus well illustrates why the equities counsel against late-breaking changes to election rules. "Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of a stay) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). Although the "courts have split on whether *Purcell* applies in the campaign finance context," "there are strong arguments that it should." *OPAWL v. Yost*, 118 F.4th 770, 774 (6th Cir. 2024). *See also Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir.

2012) (staying injunction that had invalidated Montana's contribution limits five weeks before the general election). And here, the law is a *disclosure* requirement, which primarily provides useful information to voters, *see Citizens United*, 558 U.S. at 370, unlike, for instance, a contribution limit, that has narrower relevance and primarily affects only candidates' fundraising activities. Thus, in contrast to the fundraising restrictions at issue in *Chancey v. Illinois State Board of Elections*, 635 F. Supp. 3d 627 (N.D. Ill. 2022), if the Act is enjoined now, it is not "difficult to imagine" that "voters will be confused." *Id.* at 644. As the Third Circuit recognized, for this reason the "Supreme Court has repeatedly warned lower courts not to alter the election rules on the eve of an election." Opp'n App.13a (citation modified).

On the other side of the scales, applicants' claimed injury is both conjectural and largely self-created. Unlike the plaintiff group in *DSF*, which had a track record of distributing voter guides about Delaware candidates, neither AFP nor AFPF alleged it has ever made disbursements for any type of election or candidate advocacy in Delaware, much less for communications subject to the Act. Indeed, upon filing suit, applicants apparently had not even developed any ads for Delaware elections—and only first produced two flyers for distribution with their reply brief in support of their motion for preliminary injunction. Appl. App. 82a, 84a. Applicants thus have no current disclosure obligations under the Act, and, as argued *supra*, they provide no credible reason why they could not register an association to run these two ads in the next weeks, if indeed this was truly their plan.

Nor will denying the application "moot the case or render final judgment useless," as the Court of Appeals noted. Opp'n App.12. Campaign finance questions almost always take longer to litigate than the five months applicants allotted to this effort. Indeed, cases often take longer than the election cycle from which they arose, and thus fall squarely in the "capable of repetition, yet evading review" exception to mootness. *See, e.g.*, *Davis*, 554 U.S. at 735-36. There is no bar to applicants' pursuit of their facial or as-applied claims in the absence of an emergency injunction.

D. Applicants identify no circuit split on these issues.

Failing to identify any error of law in the lower courts' rulings, applicants instead seek to portray them as out of step with "the national consensus" on First Amendment doctrine in the preliminary injunction context. Appl. 20. But their attempts to manufacture a circuit split are in vain: the lower courts, far from "split[ting] with established First Amendment doctrine," *id.*, applied the right standards and reached the right result.

The crux of applicants' postulated circuit split is their claim that the Third Circuit panel improperly "den[ied] a constitutionally founded preliminary injunction request without deciding which side is likely to prevail on the merits." Appl. 23. But this attack rests on a misreading of the decision. The panel *did* weigh whether applicants had established any likelihood of success sufficient to carry their burden—and answered that question in the negative. As discussed *supra* at 14-15, the panel affirmed the district court's ruling that *DSF* controlled applicants' facial challenge to the Act and that, "[a]ccordingly, [applicants] ha[ve] failed to demonstrate any likelihood of success in winning a facial challenge to the constitutionality of the Act."

Opp'n App.23a. Applicants may have preferred a lengthier assessment of whether *DSF* was in tension with *Bonta*, but the panel did not have the authority to overturn *DSF* absent a finding that it was "obviously in conflict" with *Bonta*. *Rubin*, 727 F.2d at 74. It did not do so because no such conflict exists.

Applicants' excursions into case law deeming the likelihood-of-success factor paramount in the preliminary injunction inquiry are thus beside the point. The panel below declined to find that *DSF* was overruled by *Bonta*, and this *was* its ruling on applicants' likelihood of success on the merits.

In contradictory fashion, applicants also contend that the Third Circuit decision is an outlier because it supposedly failed to "equate likely success with irreparable harm." Appl. 27. Again, the applicants misapprehend the rulings below. Even as they erroneously fault the lower courts for *failing* to rule on plaintiffs' likelihood of success, they nevertheless appear to award themselves the victory on that prong, in service of their argument that the panel improperly failed to "treat a likely First Amendment violation as 'per se irreparable.'" *Id*. at 24. But the Third Circuit did not depart from governing precedent because the panel determined that applicants' claim was *un*likely to succeed, and thus the general presumption that a First Amendment injury is irreparable—*if demonstrated*—became irrelevant. *Cf. Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 11 (1st Cir. 2012) (noting that "irreparable injury is presumed *upon a determination that the movants are likely to prevail* on their First Amendment claim") (emphasis added).

Nor are applicants correct that plaintiffs necessarily establish irreparable harm whenever they allege a likely First Amendment violation; as the D.C. Circuit summarized, "where it is not clear that a particular statute, policy, or practice will have any actual adverse effect on protected First Amendment liberties, the moving party must demonstrate some likelihood of a chilling effect on their rights." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (collecting cases); *see also id.* ("[I]n this court, as in several others, 'there is no *per se* rule that a violation of freedom of expression *automatically* constitutes irreparable harm.'").

Here there was ample reason for the lower courts to probe the applicants' asserted harms in weighing the equities: as the Court of Appeals noted, applicants could not defend their years-long delay in bringing this suit or substantiate the generalized harms they claim on behalf of donors. Opp'n App.10a, 12a-13a. And even accepting applicants' stated advertising plans at face value, the Act does not prohibit or curtail their electioneering communications, but merely ensures that Delawareans can be informed about who is doing the talking. That fact alone distinguishes many of the cases upon which applicants' illusory circuit split is premised. *Cf. Chiles v. Salazar*, 607 U.S. 627, 637 (2026) ("Ms. Chiles had previously spoken in ways the law now forbids, and she would continue speaking the same way but for Colorado's new law."); *Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020) ("This is a case about what speech the First Amendment allows the government to ban, and under what circumstances."). The Third Circuit's approach to the preliminary injunction framework fits comfortably among those of its sister circuits.

The panel—left to weigh, on the one hand, applicants' conclusory demands for facial injunctive relief based on the presumption of irreparable First Amendment injury, against, on the other, controlling Third Circuit precedent and Delaware's vital interest in maintaining its disclosure rules—properly declined to upend the "status quo" on such an unconvincing showing. Even in the First Amendment context, a party seeking the extraordinary relief of a preliminary injunction "must generally show reasonable diligence." *Benisek v. Lamone*, 585 U.S. 155, 159 (2018). Applicants did not make that showing.

III. Applicants' Challenge to the Constitutionality of the Act Has No Merit.

The Third Circuit already held that the Act satisfies exacting scrutiny in *DSF*, and applicants identify no reason to find that the district court or the Court of Appeals erred in following *DSF*. But even if this Court were to question whether *DSF* should have controlled the outcome below, the appropriate ruling would be to remand the case to the district court to consider whether the Act was sufficiently tailored, not to enjoin the Act on an emergency basis weeks before an election, when these issues were not fully briefed nor an adequate record created by applicants below. As a "court of review, not of first view," this Court is not well-positioned to "undertake the needed inquiries" to rule on First Amendment facial claims in the first instance. *Moody v. NetChoice, LLC*, 603 U.S. 707, 725-26 (2024) (declining to rule on First Amendment facial overbreadth claims, especially as "the record was underdeveloped," and remanding cases to lower courts). Applicants' demand that this Court rule on the Act's tailoring here in the first instance defies all principles of appellate review.

A. The Act is narrowly tailored to advance the important governmental interest in an informed electorate.

Nevertheless, *de novo* review would confirm that, as was true a decade ago, the Act remains narrowly tailored to advance the state's vital interest in informing voters "about the sources of election-related spending." *Citizens United*, 558 U.S. at 367.

This Court has long recognized that electoral disclosure laws are "the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley*, 424 U.S. at 68. Delaware's Act, like the federal law upon which it was modeled, serves the well-established state interest in "provid[ing] the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate.'" *Id.* at 66-68. 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 such as "'American Family Voices.'" *McConnell*, 540 U.S. at 128 n.23. Requiring election advertisers to disclose their contributors ensures that voters can discern the people and interests behind the campaign-related messages they see, even when entities "adopt seductive names" that obscure their true purposes and affiliations. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981). *See also Nat'l Republican Senatorial Comm. v. FEC*, 146 S. Ct. 2404, 2421 (2026) (emphasizing that disclosure advances the important governmental interest in "deter[ing] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity").

The Act is narrowly tailored to advance this important informational interest, as the Third Circuit found in *DSF*. Its threshold criteria and numerous narrowing features ensure the Act's disclosure requirements are tightly tied to their informational objectives. The Act uses the exact same criteria as BCRA to define the scope of covered electioneering communications. *See supra* at 6-8. Its voter-targeting threshold, the 30- and 60-day pre-election time periods in which it applies, and its monetary thresholds for disclosure all confirm a close nexus between the Act's transparency objectives and local campaign practices. Like BCRA, it provides a mechanism for groups like applicants to segregate their electioneering funds from general revenues and thereby tailor the reach of donor disclosure. These characteristics sharply distinguish the Act from the law in *Bonta*, which created a "dramatic mismatch" between California's tax disclosure regime and its "weak[]" interest in administrative convenience of such disclosures. 594 U.S. at 614-15.

B. Applicants raise no grounds to revisit the Act's constitutionality.

While applicants invoke *Bonta* in their attempt to relitigate the Act's tailoring, they largely turn to the same flawed arguments that the Third Circuit rightly rejected in *DSF*. *See* 793 F.3d at 310-12.

1. Neither earmarking nor opt-outs are constitutionally required.

Applicants' principal complaint is that required disclosure under the Act is not limited to contributors who give funds specifically to support a particular Delaware candidate or electioneering communication. Appl. 14. But their solution to this perceived problem—mandating an "opt out" or earmarking requirement to limit disclosure—would vitiate the Act's transparency purposes, rather than resolve any constitutional issues.

As this Court has long recognized, an earmarking limitation on donor disclosure is not a compulsory feature without which a disclosure law fails to show narrow tailoring. In *McConnell* and *Citizens United*, the Supreme Court upheld BCRA's electioneering communication disclosure requirements as to "the entire range of 'electioneering communications,'" *McConnell*, 540 U.S. at 196, without regard to any earmarking requirement.[8]

Following *Citizens United* and *McConnell*, appellate courts have understood those decisions as confirming the constitutionality of statutes requiring organizations engaged in electioneering to disclose contributors, regardless of whether the contributions are earmarked. In *DSF*, the Third Circuit rejected the claim "that the Act must limit disclosure to those donors who earmarked their donations," recognizing that "[n]othing in *Citizens United* implies that the Court relied upon the FEC earmarking regulation when approving of BCRA's disclosure regime." 793 F.3d at 311-12. *See also Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 292 (4th Cir. 2013) (upholding disclosure requirement without earmarking limitation

[8] Applicants place undue weight on the FEC's 2007 regulation that permitted corporations funding electioneering communications to disclose only those contributions earmarked for covered communications. Appl. 6. This regulation was adopted four years after *McConnell* upheld the federal statute on its face. *McConnell*, 540 U.S. at 194-202; *see supra* at 5 n.2. And although the FEC regulation had been adopted by the time of *Citizens United*, neither the parties nor this Court relied on it. *See Van Hollen v. FEC*, No. 12-5117, 2012 WL 1758569, at *3 (D.C. Cir. May 14, 2012) (unpublished) (rejecting contention that *Citizens United*'s "holding was limited by" the earmarking regulation).

because "*McConnell* compels us to find that [it] is constitutional"); *accord Fam. PAC v. McKenna*, 685 F.3d 800, 803 (9th Cir. 2012); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 472 (7th Cir. 2012). *Cf. Gray*, 83 F.4th at 1249 n.8.[9]

After *Bonta*, federal circuit courts continue to uphold laws requiring comprehensive donor disclosure rather than limiting disclosure to earmarked funds. Applying *Bonta*'s narrow-tailoring standard, the First Circuit upheld a Rhode Island law requiring groups that spend more than $1,000 on electioneering communications to report *all* donors above a statutory threshold. *Gaspee Project v. Mederos*, 13 F.4th 79, 95 (1st Cir. 2021); *see also* R.I. Gen. Laws § 17-25.3-1(b), (h). Two different courts likewise upheld Arizona's comprehensive "trace back" law, which requires groups funding electioneering communications to report not only their immediate donors, but to track back their donations to the original source. *Ctr. for Ariz. Pol'y Inc. v. Ariz. Sec'y of State*, 592 P.3d 75 (Ariz. 2026); *Meyer*, 724 F. Supp. 3d at 878. The plaintiffs there complained that the law "requires the disclosure of the entire chain of donors," even those donors who did not earmark their funds or even know who the eventual recipient of their contribution was. *Id.* at 877. But the court nevertheless held that the law was narrowly tailored, noting that the "aim" of disclosure laws is "to identify who is funding political advertisements," "even if particular donors might disagree

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[9] As the Ninth Circuit recently found, no court has held that a law "fails narrow tailoring unless it is limited to the disclosure of earmarked contributions." *No on E, San Franciscans Opposing the Affordable Hous. Prod. Act v. Chiu*, 62 F.4th 529, 545 (9th Cir. 2023). *See also Justice v. Hosemann*, 771 F.3d 285, 289 (5th Cir. 2014); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 124 (2d Cir. 2014); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1251 (11th Cir. 2013).

with certain messages they are funding." *Id. See also Smith v. Helzer,* 95 F.4th 1207, 1218-19 (9th Cir. 2024), *cert. denied sub nom. Smith v. Stillie*, 145 S. Ct. 567 (2024).

Applicants attempt to distinguish the many disclosure laws sustained above on the ground that they included "opt-out system[s]" or some other means to streamline donor reporting. Appl. 13. But in so arguing, applicants fail to acknowledge that Delaware provides spenders with an arguably *more* effective mechanism for tailoring donor disclosure. As discussed *supra*, the Act allows groups to register and fund an unincorporated association or PAC to issue desired electioneering communications—accomplished via a simple online form—and then disclose only those donors whose money is transferred to this entity.

Applicants mostly disregard this reporting option under the Act. They suggest that the availability of this option does not serve to tailor the law, invoking *Citizens United* for the purported principle that a "PAC is a separate association" and does not "allow a corporation to speak." Appl. 19 (quoting *Citizens United*, 558 U.S. at 337). But *Citizens United* reviewed the federal *prohibition* on the use of corporate treasury funds for election spending and thus addressed whether a corporate PAC, *see* 11 C.F.R. § 114.5, provided a sufficient alternative route for corporations to engage in electioneering. The Court held that a corporate federal PAC is subject to "extensive regulation" and "onerous restrictions," and consequently was too burdensome to present a viable way for a "corporation to speak" in elections. 558 U.S. at 337-39.

That federal system has no Delaware analogue. There is no spending ban at issue. Delaware PACs are subject to neither the organizational requirements nor the contribution limits imposed on federal PACs. *See supra* at 9-10. And of course, third-party spenders need not even form a PAC, but rather can use an unincorporated association in order to streamline their reporting. The Act provides a simpler process than either Arizona's donor opt-out or federal law's "segregated bank account" for third-party spenders to limit donor disclosure. Applicants cannot prop up their unfounded claim of inadequate tailoring by simply ignoring this option under the Act.

2. The Act's dollar thresholds and temporal periods are appropriately tailored.

Applicants critique multiple aspects of the Act's design, striving to portray the Act as an outlier. Appl. 14-15. But the Act is well within the range of analogous electioneering communication disclosure laws adopted in other states and narrowly tailored to advance Delaware's informational interests.

First, the monetary threshold at which disclosure obligations commence—*i.e.*, $500 in aggregate spending—is tailored for the small state elections it covers. Exacting scrutiny "simply requires that the threshold at which contributions are disclosed be reasonably narrowly tailored to fit the state's interest." *Smith*, 95 F.4th at 1218. This is "'necessarily a judgmental decision, best left' to the discretion of the legislature." *Id.* (quoting *Buckley*, 424 U.S. at 83). Although Delaware's thresholds differ from BCRA's, they are justified in light of the practical realities of state elections, as *DSF* recognized, 793 F.3d at 306. For instance, Delaware lacks its own major-network television market, and neighboring television markets are prohibitively expensive, so television advertising is rare in Delaware races. Opp'n App.51a-52a Because less costly media, such as direct mail, instead accounts for a large share of campaign spending, groups need not spend large sums of money to reach Delaware voters. *Id.* The Act's adjustments to BCRA therefore support the narrow fit between the statute and the state's interest in an informed electorate.[10]

Second, applicants criticize the temporal "look back" period, Appl. 12, but the Act sensibly tracks the relevant candidacy—for incumbents, the term of office; and for challengers, the period beginning from receipt of the first qualifying contribution to a candidate committee. 15 Del. C. §§ 8002(11), 8031(a). Contributions made in those periods foreseeably may assist organizations engaging in relevant election-related speech. In contrast, limiting the look-back period to only a fraction of the candidate's election cycle, as applicants wrongly imply is a constitutional necessity, would obscure important information about early campaign fundraising and could easily be gamed to evade disclosure altogether.

The Delaware General Assembly modeled the Act on BCRA, but crafted its monetary thresholds and other criteria to fit Delaware's unique circumstances. These minor deviations from BCRA ensure the Act advances its transparency goals for local elections in a much smaller jurisdiction. The Act's adaptations of BCRA support the narrow fit between the statute and the State's interest in a well-informed electorate.

CONCLUSION

For all these reasons, the application should be denied.

[10] Delaware's spending threshold is similar to those used in other small states. Alaska and Vermont also employ a $500 threshold. *See* Alaska Stat. §§ 15.13.040, 15.13.110; Vt. Stat. tit. 17, § 2971. Several states require reporting at lower expenditure amounts. Ala. Code § 17-5-8(d)(7) ($100 threshold); Wash. Rev. Code § 42.17A.305 ($100 threshold); 10 Ill. Comp. Stat. 5/9-1.8, 5/9-9.5, 5/9-11 ($150 threshold); 21-A Me. Rev. Stat. §§ 1014, 1019-B ($250 threshold); Or. Rev. Stat. § 260.083 ($250 threshold).

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