No. 15-1234

IN THE

Supreme Court of the United States

DELAWARE STRONG FAMILIES,
Petitioner,

v.

MATTHEW DENN, ATTORNEY GENERAL OF DELAWARE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that Delaware's electioneering communications disclosure law, which was modeled on a federal law twice upheld against First Amendment challenge by this Court, is constitutional as applied to Petitioner's proposed voter guide, which seeks, by its own terms, to "help [voters] choose candidates" at the polls.

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INTRODUCTION

The Delaware General Assembly, following the lead of Congress and this Court, carefully modeled the campaign finance disclosure law Petitioner challenges on a federal statute that this Court has twice upheld against First Amendment challenges—on its face in *McConnell* v. *FEC*, 540 U.S. 93 (2003), and as applied in *Citizens United* v. *FEC*, 558 U.S. 310 (2010). A unanimous Third Circuit panel, applying the standards established by this Court in *McConnell* and *Citizens United*, correctly concluded that the Delaware Elections Disclosure Act (the "Act" or "Disclosure Act") is "sufficiently tailored" to advance "Delaware's interest in an informed electorate" and so "pass[es] constitutional muster." Pet. App. 13, 15. Every other court of appeals to consider a comparable disclosure law since *Citizens United* has reached the same conclusion.

Petitioner alleges conflict between the Third Circuit and the D.C. Circuit. But it has to reach back more than 40 years to do so—itself a powerful indicator that the purported conflict is illusory. The D.C. Circuit's 1975 decision in *Buckley* v. *Valeo*, 519 F.2d 821 (D.C. Cir. 1975), addressed a disclosure provision fundamentally different from Delaware's, and it questioned that provision (no longer a part of the U.S. Code) on vagueness grounds that this Court in *McConnell* and *Citizens United* held had been cured by the "easily understood and objectively determinable" definition of "electioneering communication" used as the basis for Delaware's Act. *McConnell*, 540 U.S. at 194.

Petitioner also asserts that the Third Circuit's decision conflicts with decisions by the Tenth and Seventh Circuits. But those decisions are perfectly consistent with the ruling challenged here. The Tenth Circuit's

decision in *Coalition for Secular Government* v. *Williams*, 815 F.3d 1267 (10th Cir. 2016), concerned the much more onerous, ongoing reporting obligations Colorado imposes on ballot measure committees, not the less extensive, event-driven reporting requirements for electioneering communications established by laws such as Delaware's Disclosure Act. Not surprisingly, when the Tenth Circuit addressed Colorado's electioneering communications law only weeks before the *Coalition* decision, it, like the Third Circuit, upheld the law as consistent with the principles established in *Citizens United* and *McConnell*. The supposed conflict with the Seventh Circuit that Petitioner concocts is equally imaginary. The Seventh Circuit's decision in *Wisconsin Right to Life, Inc.* v. *Barland*, 751 F.3d 804 (7th Cir. 2014), disapproved a state regulation that imposed the "comprehensive, continuous reporting regime" of "the state PAC system—with all its restrictions and registration and reporting requirements," not a "far more modest" "event-driven disclosure rule" like that established by the Disclosure Act. *Id.* at 836-837.

Before this Court, Petitioner makes the potential length of an "election period" under the Disclosure Act the centerpiece of its attack, even mentioning that aspect of the Act in its question presented. But before the district court Petitioner raised no question about that aspect of the Act, and so the court of appeals held that Petitioner had forfeited its ability to challenge the Act on that ground. Pet. App. 15 n.5 ("For the first time on appeal, [Petitioner] argued that the Act's 'election period' is impermissibly long. … In keeping with the 'general rule,' we will 'not consider an issue not passed upon below.'" (quoting *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976))). That basic failing provides a further reason this Court's review is unwarranted.

STATEMENT

A. The Delaware Elections Disclosure Act

1. Federal developments that informed the Disclosure Act

In drafting the Disclosure Act, the Delaware General Assembly relied on both the extensive federal experience with campaign finance disclosure requirements and this Court's guidance about the constitutionality of such requirements.

Federal laws requiring organizations that engage in election-related communications to disclose their contributors have existed for over a century. *See Buckley* v. *Valeo*, 424 U.S. 1, 61-62 (1976). Congress laid the foundations for the current federal disclosure regime in the Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3, and the FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, which "replaced all prior disclosure laws," *Buckley*, 424 U.S. at 62.

This Court has repeatedly upheld these legislative efforts to regulate disclosure. *Buckley*, 424 U.S. at 84; *see Citizens United*, 558 U.S. at 367; *McConnell*, 540 U.S. at 194-202; *United States* v. *Harriss*, 347 U.S. 612, 625 (1954). As the Court explained in *Buckley*, "disclosure requirements, as a general matter, directly serve substantial governmental interests." 424 U.S. at 68. They "further[] First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82. In addition to "provid[ing] the electorate with information," they deter corruption and help the government enforce other campaign finance laws. *Id.* at 66-68. And, unlike contribution and expenditure caps, they "impose no ceiling on campaign-related activities." *Id.* at 64. Thus, the Court has

praised disclosure requirements as "in most applications … the least restrictive means of curbing the evils of campaign ignorance and corruption." *Id.* at 68.

In *Buckley*, the Court identified vagueness concerns with specific language used in FECA's disclosure and reporting requirements. FECA defined "political committees"—which are required to file comprehensive reports with the FEC on an ongoing basis—as groups that received contributions or made "expenditures" over $1,000 "'for the purpose of … influencing' the nomination or election of any person to federal office." 424 U.S. at 63. For persons who are not political committees, FECA required event-driven disclosure of "expenditures" over $100 made "'for the purpose of … influencing'" a covered election. *Id.* at 74-75, 77. To avoid the potential for unconstitutional vagueness in the statutory phrase "for the purpose of … influencing," the *Buckley* Court adopted a limiting construction. The Court interpreted "political committees" to encompass only organizations whose "major purpose … is the nomination or election of a candidate," and, with respect to non-major-purpose groups, interpreted "expenditures" made "for the purpose of … influencing" a covered election to mean "communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 78-80. So limited, the Court held, FECA's disclosure and reporting requirements were constitutional.

As this Court has explained, in the decades after *Buckley*, Congress determined that FECA's reporting requirements for independent expenditures remained vulnerable to evasion. As construed, those requirements applied only to communications that used "magic words" of express advocacy—such as "Elect John Smith" or "Vote against Jane Doe." *McConnell*, 540 U.S. at 126. Groups engaging in election-related speech

thus could evade disclosure simply by forgoing express advocacy and by speaking through organizations without the requisite major purpose of electing a candidate. Corporations, labor unions, and other organizations spent hundreds of millions of dollars to fund so-called "issue" communications that contained no magic words but were nevertheless "specifically intended to affect election results"—an intention "confirmed by the fact that almost all of [these communications] aired in the 60 days immediately preceding a federal election." *Id.* at 127. Groups not only exploited FECA's loopholes to conceal "the identity of, or any other information about, their sponsors"; they also frequently assumed deceptively bland names to further mislead voters about the sponsors of this election-related speech. *Id.* at 126, 128.

Following an extensive investigation into these and other flaws in the federal campaign finance system, Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. BCRA "coin[ed] a new term, 'electioneering communications,' to replace the narrowing construction of FECA's disclosure provisions adopted by this Court in *Buckley*." *McConnell*, 540 U.S. at 189. To avoid the vagueness concerns that had prompted *Buckley*'s narrowing construction, Congress defined "electioneering communication[s]" by reference to "easily understood and objectively determinable" criteria. *Id.* at 194. Under BCRA, an "electioneering communication" is any communication that (1) "refers to a clearly identified candidate for Federal office," (2) is made through specified media within 60 days of a general election or 30 days of a primary, and (3) "is targeted to the relevant

electorate." 52 U.S.C. § 30104(f)(3)(A).[1] BCRA exempts from this definition certain categories of communications, such as news stories and candidate debates. *Id.* § 30104(f)(3)(B). Groups spending more than $10,000 on qualifying electioneering communications must disclose the identity of contributors who gave $1,000 or more. *Id.* § 30104(f)(1)-(2).

In *McConnell* and again in *Citizens United*, the petitioners challenging BCRA's disclosure requirements sought to resurrect *Buckley*'s limiting construction of FECA as a constitutionally mandated line between express advocacy and "issue" speech. This Court explicitly rejected those efforts. *See Citizens United*, 558 U.S. at 369 ("[W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy."); *McConnell*, 540 U.S. at 190 ("[*Buckley*'s] express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law."). In both cases, the Court reaffirmed the vital government interests served by disclosure, and rejected the contention that such laws may constitutionally reach only the functional equivalent of express advocacy. *See Citizens United*, 558 U.S. at 369; *McConnell*, 540 U.S. at 194-196.

2. The Disclosure Act

The Delaware General Assembly passed the Disclosure Act to address problems like those *McConnell* described as motivating Congress to enact BCRA. In

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[1] *See* BCRA § 201, 116 Stat. at 88-90 (amending FECA § 434, originally codified at 2 U.S.C. § 434). Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the U.S. Code were reclassified in Title 52.

doing so, the General Assembly explicitly drew on BCRA and this Court's teachings regarding disclosure. CAJA 72-74, 116-118 & nn.17-20. Until 2013, Delaware law required disclosure of contributors to election-related speech only if the speech "expressly advocat[ed] the election or defeat of a clearly identified candidate." 15 Del. C. § 8002(10) (2012); *see id.* §§ 8030, 8031 (2012). As in the federal system before BCRA, groups could hide the funding sources that made their messaging possible by simply avoiding the "magic words" of express advocacy.

This led, the General Assembly concluded, to "a proliferation of advertisements … that [were] distributed during the campaign season and [were] intended to influence elections, but [were] not required to be reported under existing law." Delaware Elections Disclosure Act, 78 Del. Laws ch. 400 (2012) (H.B. 300), Preamble. One witness at a legislative hearing observed that, under existing law, it was "almost impossible for voters to understand[] where [the] money comes from and who's trying to influence [the public's] votes." CAJA 75.

The General Assembly, furthermore, heard evidence from other states confirming the value of disclosing the sources of funding for campaign-related speech. As recounted by a witness at the House hearing on the Disclosure Act, a group called "Littleton Neighbors Voting No" spent $170,000 to oppose a ballot initiative that would have blocked Wal-Mart from operating in Littleton, Colorado. Disclosure reports revealed Wal-Mart to be the group's sole funder. CAJA 117.

Delaware sought to combat these problems by adopting disclosure requirements modeled on BCRA's. The Disclosure Act does not ban any speech; instead, it

"provid[es] voters with relevant information about where political campaign money comes from and how it is spent, so that [they] can make informed choices in elections." H.B. 300, Preamble. Heeding *Buckley*'s admonition about vagueness, the General Assembly used essentially the same "easily understood and objectively determinable" criteria to define an "electioneering communication" that Congress had devised in BCRA and that this Court had twice upheld. *McConnell*, 540 U.S. at 194. Under Delaware law, an "electioneering communication" likewise (1) refers to a clearly identified candidate, (2) is publicly distributed by certain media within 30 days of a primary or 60 days of a general election, and (3) is targeted to the relevant electorate. 15 Del. C. § 8002(7), (10)(a). The Disclosure Act, like BCRA, exempts several categories of speech, including handbills, news articles, membership communications, and candidate debates. *Id.* § 8002(7), (10)(b). Like BCRA, the Disclosure Act imposes disclosure obligations only above certain monetary thresholds.

The Disclosure Act requires organizations expending more than $500 on "third-party advertising"—which includes spending on "electioneering communications"—to file a "third-party advertisement report" with the Commissioner of Elections. 15 Del. C. §§ 8002(27), 8031(a). The report must include the names and addresses of persons to whom the organization paid more than $100 for third-party advertisements; persons contributing more than $100 to the organization during the election period; and persons owning over 50% of a contributor that is an entity. *Id.* § 8031(a). The "election period" for contributions—essentially a "look-back" period—mirrors the length of the relevant candidacy. *Id.* §§ 8002(11), 8031(a). Such reports must be filed shortly after the expenditure, *id.* § 8031(d), and the

Commissioner of Elections must make the reports publicly available "immediately," *id.* § 8032. These measures, the General Assembly concluded, would enable voters to properly assess "the statements made by and interests of … third parties in a manner that is prompt and informative." H.B. 300, Preamble.

While the Delaware General Assembly modeled the Disclosure Act on BCRA, the legislature tailored the Act's monetary thresholds and covered media to fit the distinct circumstances of Delaware politics, as ample evidence in the record below demonstrated. Delaware lacks its own major-network television market, and neighboring television markets are prohibitively expensive. Consequently, television advertising is rare in Delaware races, as is radio advertising. The predominant form of political advertising is direct mail, which accounts for approximately 80 percent of spending. CAJA 125, 134-135. Groups therefore need not spend large sums to reach large numbers of Delaware voters. Less than $500—even as little as $150—can purchase enough pre-recorded "robo-calls" for an entire Delaware House district. *Id.* 137. In establishing the thresholds and the types of media covered, the General Assembly made reasonable judgments informed by the practical realities of the state and local elections covered by the Act.

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

Petitioner, Delaware Strong Families Inc. (DSF), is a nonprofit 501(c)(3) corporation. CAJA 42. Its mission is to "promote Biblical worldview values, resources and programs, and educate and empower citizens to stand strong for those values in all arenas." *Id.* 43. In 2011, DSF reported almost $60,000 in expenditures. *Id.* 79.

Over 99% of DSF's expenditures (all but about $400) consisted of payments to a 501(c)(4) organization, the Delaware Family Policy Council Inc. (DFPC), as reimbursement for work DFPC performed on DSF's behalf. *Id.* 79, 89, 93, 100. DSF and DFPC are close affiliates. They have the same officers and directors, including the same president, whose salary is paid by DFPC. *Id.* 80, 101. DFPC engages extensively in electoral politics. In 2011, DFPC reported to the Internal Revenue Service that it "engage[d] … in political campaign activities on behalf of or in opposition to candidates for public office" and spent almost $20,000 on "[p]olitical expenditures" including "polling and encourag[ing] people to act on specific political issues." *Id.* 96, 97, 100.

In its complaint, DSF alleged plans "to produce and disseminate voter guides" in 2014 "in a manner substantively similar to the process used in 2012." CAJA 45. In 2012, the process of creating DSF's "General Election Values Voter Guide" began when DFPC (the 501(c)(4))—not DSF (the 501(c)(3))—sent out questionnaires to state and federal candidates and used their answers to produce a candidate scorecard. *Id.* 44. The "Values Scorecard" framed questions so that "Yes" represented the "Pro-Family Position" and "No" the "Anti-Family Position," and tallied up each candidate's responses to assign letter grades, with "[t]hose who earned an A+ grade considered Outstanding Family Advocates." Grades were color-coded green for "Family Advocate," yellow for "Needs Improvement," and red for "Hostile." *Id.* 103. DFPC cautioned that this was "for personal distribution" and directed recipients to DSF's website for "a 501c3 or church-friendly Voter Guide." *Id.*

DSF's Values Voter Guide was based on DFPC's Values Scorecard. CAJA 44. The design and content

were virtually identical, except that the color-coded letter grades and express pro-/anti-family labels were removed. *Compare id.* 61-64 *with id.* 103-106. Both versions claimed to report candidates' support or opposition on issues such as "the state constitutional amendments preserving natural marriage." *Id.* 61-62, 129-130. For candidates who did not respond to DFPC's survey, DSF simply relied on DFPC's characterizations of their positions. D. Ct. Dkt. 32 at 4 n.4.

Regardless of its 501(c)(3) status, DSF's self-proclaimed aim is to influence citizens' votes. DSF's 2012 Values Voter Guide states, "The stakes couldn't be higher this election. Our hope is that on [Election Day], this Voter Guide will help you choose candidates who best represent your values." CAJA 61.

C. Proceedings Below

1. In October 2013, DSF filed suit against Respondents, Delaware's Attorney General and Commissioner of Elections, seeking a declaration that the Disclosure Act is unconstitutional both facially and as applied to DSF's proposed 2014 voter guide. CAJA 43-46, 55-58. In March 2014, the district court held that DSF had established a likelihood of success on the merits of its as-applied challenge and was therefore entitled to a preliminary injunction. Pet. App. 52-58. The district court recognized that "'[v]oter guides are typically intended to influence voter behavior,' despite 'lacking words of express advocacy.'" *Id.* 56 n.19. But it nevertheless held that because the Disclosure Act would cover "DSF's proposed voter guide (as a presumably neutral communication) published by DSF (a presumably neutral communicator by reason of its 501(c)(3) status)," the relation between the "personal information collected"—which the court likened to "the metadata

collected by the National Security Administration [sic]"—and the statute's "primary purpose"—which the court characterized as "[r]egulating anonymous political advocacy"—was "too tenuous" to justify application of the law to DSF's voter guide. *Id.* 57 & nn.22, 23.

2. The Third Circuit reversed. A unanimous panel rejected the district court's "'neutral communication' by a 'neutral communicator'" formulation, finding no support for it in this Court's precedents. Pet. App. 12. A voter guide that selects specific issues to focus on, mentions candidates by name, and is distributed close to an election, the court explained, falls under the statutory definition of "electioneering communication" to which the Disclosure Act "can properly apply." *Id.* 13.

The Third Circuit then carefully analyzed the remainder of DSF's as-applied challenge under the "exacting scrutiny" standard. Comparing the Disclosure Act to BCRA's disclosure requirements, the court rejected DSF's arguments that Delaware's lower monetary thresholds and broader range of covered media imposed unconstitutional burdens, and that the State had no interest in the source of contributions that were not expressly earmarked for electioneering communications. The panel concluded that: (1) the Act's monetary thresholds "are rationally related to Delaware's unique election landscape" (Pet. App. 17); (2) the coverage of direct mail and other non-broadcast media "actually utilized in Delaware elections" "is sufficiently tailored to Delaware's interest" in an informed electorate (*id.* 19); and (3) earmarking is not required to withstand exacting scrutiny (*id.* 21). The court noted the fact that other States have similar disclosure laws (*id.* 18-19 n.7), and that Delaware's event-driven disclosure requirements for groups engaged in electioneering communications impose much less onerous reporting require-

ments than are borne by political committees (*id.* 21-22 n.10). Having determined that the features about which DSF complained were substantially related to the government's important interest in promoting an informed electorate, the Third Circuit held that the Disclosure Act was constitutional as applied to DSF and its proposed voter guide. *Id.* 22.[2]

3. After the Third Circuit denied DSF's petition for rehearing en banc, the parties returned to the district court, which entered judgment "for the reasons given" by the Third Circuit. Pet. App. 3. The Third Circuit summarily affirmed that judgment. *Id.* 1.

REASONS FOR DENYING THE PETITION

I. THERE ARE NO CIRCUIT SPLITS FOR THIS COURT TO RESOLVE

The petition does not point to a single court of appeals decision holding that an electioneering communications law that requires event-driven disclosures violates the First Amendment. That is hardly surprising since every court of appeals to consider a First Amendment challenge to disclosure laws of this sort since *Citizens United* has upheld the law's constitutionality.[3] The purportedly contrary Circuit decisions Peti-

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[2] As noted above, DSF also argued, for the first time on appeal, that the possibility of an "election period" reaching back four years was impermissibly long. The Third Circuit held that argument forfeited by DSF's failure to raise it before the district court. Pet. App. 15 n.5.

[3] *See Independence Inst.* v. *Williams*, 812 F.3d 787, 797-799 (10th Cir. 2016) (Colorado); *Vermont Right to Life Comm., Inc.* v. *Sorrell*, 758 F.3d 118, 133-134 (2d Cir. 2014) (Vermont), *cert. denied*, 135 S. Ct. 949 (2015); *Center for Individual Freedom, Inc.* v. *Tennant*, 706 F.3d 270, 290-292 (4th Cir. 2013) (West Virginia); *Human Life of Wash. Inc.* v. *Brumsickle*, 624 F.3d 990, 1018-1019

tioner cites addressed fundamentally different laws—ones that impose extensive ongoing registration and disclosure obligations on organizations that qualified as political committees. As many courts, including those whose decisions Petitioner highlights, have recognized, political-committee status gives rise to substantial burdens that differ in kind from the event-driven disclosure requirements at issue here.[4]

A. There Is No Danger Of A Federal-State Split

Petitioner broadly contends (Pet. 27-36) that a conflict exists between the D.C. Circuit, which generally reviews the constitutionality of federal campaign finance laws, and the regional Circuit Courts, which review the constitutionality of their state counterparts. The D.C. Circuit, in Petitioner's view, has "policed" the federal system (*id.* 5), while the regional Circuits have allowed First Amendment rights to "wilt away in the states" (*id.* 28). Despite this sweeping claim, Petitioner fails to identify a specific legal issue on which the Cir-

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(9th Cir. 2010) (Washington); *cf. Iowa Right to Life Comm., Inc.* v. *Tooker*, 717 F.3d 576, 593-594 (8th Cir. 2013) (Iowa) (upholding Iowa provision requiring organizations making independent expenditures to file initial report because requirement was "similar to a one-time, event-driven report").

[4] Unlike the Disclosure Act, laws that impose political-committee status typically require an organization to register as a committee, appoint a treasurer, maintain separate bank accounts, and file extensive, ongoing reports—none of which are at issue here. Notably, the courts of appeals have upheld several laws of this sort since *Citizens United*, *see, e.g.*, *Worley* v. *Florida Sec'y of State*, 717 F.3d 1238, 1240-1241, 1253-1255 (11th Cir. 2013); *National Org. for Marriage* v. *McKee*, 649 F.3d 34, 42, 56-58 (1st Cir. 2011), and the Court denied a petition for certiorari challenging the constitutionality of such a law this very Term, *see Justice* v. *Hosemann*, 771 F.3d 285 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 1514 (2016).

cuits are divided along federal-state lines. Instead, Petitioner relies on a D.C. Circuit decision from more than 40 years ago. But that decision invalidated a disclosure provision very different from the Disclosure Act, and it did so on the ground that the provision was unconstitutionally *vague*, not unconstitutionally *burdensome*. This supposed conflict, which, according to Petitioner, has lain dormant for more than four decades, is no conflict at all.

Petitioner relies on the unappealed aspect of the D.C. Circuit's decision in *Buckley*, 519 F.2d at 869-878.[5] At issue was FECA § 308, which required an organization to "file reports … as if [it] were a political committee" upon the occurrence of any of the following circumstances:

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

[5] *See Buckley*, 424 U.S. at 10 n.7, 61 n.70.

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

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

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

Third, § 308 required a group that engaged in covered activity to "'file reports with the [FEC] as if such person were a political committee.'" *Buckley*, 519 F.2d at 870. Then, as today, political-committee status meant ongoing quarterly reporting, regardless of whether the organization engaged in any election-related activity, as well as additional, detailed requirements about the organization's recordkeeping, man-

agement of funds, and dissolution. *See, e.g.*, FECA §§ 302-304, 86 Stat. at 12-15; 52 U.S.C. §§ 30102-30104. Under the Disclosure Act, by contrast, electioneering communications do not transform an organization into a "political committee." *See* 15 Del. C. § 8002(19) Nor are the Disclosure Act's requirements comparable to those imposed on political committees under Delaware law. The Disclosure Act requires a covered group to file a report only when it expends a certain amount on covered communications. *Id.* § 8031(a). Political committees, by contrast, are subject to an array of additional obligations: They (a) must file ongoing reports as long as they are in existence, without regard to whether they engage in election-related activity, *id.* § 8030(a); (b) must report a host of detailed information that need not be disclosed by groups only making electioneering communications;[6] (c) cannot receive contributions of over $50 in cash, *id.* § 8012(a); (d) can make expenditures only for certain enumerated purposes, *id.* § 8020; and (e) can be dissolved only in accordance with statutory requirements, *id.* § 8022.

Finally, the D.C. Circuit's *Buckley* decision must be read in light of later decisions of this Court. Petitioner invokes (at 38) the D.C. Circuit's suggestion that "the governmental interest in disclosure correspondingly diminishes" when the organization is "discuss[ing] issues of public interest on a wholly nonpartisan basis." 519 F.2d at 872-873. But the only asserted governmental interest the D.C. Circuit considered was the interest in maintaining the purity and integrity of elections. *Id.*

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[6] That information includes the committee's "cash and other intangible and tangible assets on hand"; "[t]he amount of," and detailed information about, "each debt in excess of $50"; and "any transfer of funds" to or from other political committees. 15 Del. C. § 8030(d).

That interest, the court said, was not threatened by "issue discussions unwedded to the cause of a particular candidate." *Id.* at 873. But this Court's campaign finance jurisprudence in the intervening decades has recognized the public's informational interest "in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369. That interest *is* implicated by electioneering communications, *i.e.*, statements directed to voters about particular candidates shortly before an election. The Third Circuit's decision here therefore does not conflict with *Buckley*.

Petitioner's reliance on *Van Hollen* v. *FEC*, 811 F.3d 486 (D.C. Cir. 2016), is equally misplaced. *Van Hollen* involved an Administrative Procedure Act challenge, not a constitutional one, to a rule promulgated by the FEC that required corporations and labor unions to disclose only those donations that were made for the purpose of funding electioneering communications. *Id.* at 488. The court upheld the rule as a permissible construction of BCRA's disclosure provision, *id.* at 493, and a non-arbitrary exercise of the FEC's policy judgment, *id.* at 501. The D.C. Circuit did not say that the First Amendment *requires* this type of earmarking limitation, and in fact expressly "forestall[ed]" any constitutional questions "to some other time." *Id.* *Van Hollen* therefore does not speak to the question presented in the petition.

B. There Is No Split Over Proper Application Of *Citizens United* To Disclosure Laws

In a last-ditch effort to manufacture disagreement among lower courts where there is none, Petitioner contends that the Third Circuit applied *Citizens United* to the Disclosure Act in a manner "fundamentally different" (Pet. 5) from that adopted in two decisions by

the Tenth Circuit and one by the Seventh. That is not the case. Those Circuits concluded that certain laws triggering political-committee status and extensive, ongoing reporting obligations were unconstitutionally burdensome. But the law most closely resembling the Disclosure Act—the Colorado disclosure law for electioneering communications—was easily upheld by the Tenth Circuit. *See Independence Inst.* v. *Williams*, 812 F.3d 787 (10th Cir. 2016). There is no Circuit split for the Court to resolve.

1. Tenth Circuit

Petitioner relies principally on the Tenth Circuit's recent decision in *Coalition for Secular Government* v. *Williams*. But that case addressed an entirely different aspect of Colorado's campaign finance system—the requirement that all organizations and groups spending a certain amount "to support or oppose any ballot issue or ballot question" register as "issue committees" and comply with a "substantial set" of corresponding obligations. 815 F.3d at 1269-1270. Many of those obligations parallel the extensive requirements that apply to political committees under federal law. Issue committees in Colorado, for example, must maintain separate bank accounts and must adhere to strict recordkeeping requirements. *Id.* at 1270. They must file ongoing reports disclosing the name and address of each contributor, with additional employment information for any person whose contribution totaled $100 or more. *Id.* at 1271. These periodic reports, the court noted, must be filed "regardless of whether an issue committee has received or spent any money." *Id.* at 1280. Some of the reports require details about an organization's "most mundane, obvious, and unimportant expenditures (*e.g.*, the address of the post office at which [it] purchased

stamps)." *Id.* at 1279. All told, the court calculated that an issue committee supporting or opposing a ballot initiative in Colorado's 2014 election would have had to file no fewer than 12 reports in seven months. *Id.* at 1271, 1279.

The Tenth Circuit held that this extensive regulatory scheme could not constitutionally be applied to the Coalition for Secular Government, a nonprofit corporation operated by a single individual. *Coalition*, 815 F.3d at 1269, 1280-1281. In reaching this conclusion, the Tenth Circuit did not employ an analysis different from the Third Circuit's approach. On the contrary, the Tenth Circuit applied the "exacting scrutiny" standard required by this Court's precedents, demanding "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 1275-1276 (quoting *Citizens United*, 558 U.S. at 366-367).[7]

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[7] Contrary to the assertion by one of Petitioner's amici (Buckeye Inst. Br. 6-8), there is no conflict over the "meaning" of "exacting scrutiny" as applied to disclosure requirements. It is well settled in this context that "exacting scrutiny" demands "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-367; *see also John Doe No. 1* v. *Reed*, 561 U.S. 186, 196 (2010) (citing "series of precedents" applying this standard to "First Amendment challenges to disclosure requirements"). The courts of appeals "have uniformly adopted th[is] same standard." *Hosemann*, 771 F.3d at 296; *see also Worley*, 717 F.3d at 1244 (collecting decisions in the First, Fourth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits). Petitioner itself does not challenge this standard, *see* Pet. 11, though it sometimes misstates its meaning, *id.* 4 (suggesting disclosure laws are constitutional only "in narrow circumstances where the state can demonstrate both that the information demanded will inform the electorate about candidate constituencies, and that there is a genuine and vital need for that particular information").

The Tenth Circuit's holding also is perfectly consistent with the Third Circuit's application of the principles of *Citizens United* and *McConnell* to Delaware's Disclosure Act. The Tenth Circuit recognized that "[v]oters certainly have an interest in knowing who finances support or opposition to a given ballot initiative," but concluded that the "onerous" reporting and other requirements borne by issue committees outweighed that interest in the context of a tiny issue committee. *Coalition*, 815 F.3d at 1280. The Colorado requirements, which mandated reporting of "mundane, obvious, and unimportant" information about issue committees, "*regardless* of whether [the] issue committee … received or spent any money," *id.* at 1279 (emphasis added), bear no resemblance to the Disclosure Act's much more limited, event-driven disclosure obligations. The Tenth Circuit's disapproval of a single application of Colorado's issue committee law thus in no way conflicts with the Third Circuit's approval of the Disclosure Act.

Petitioner seizes (at 37) on the Tenth Circuit's application of a "sliding scale" in assessing the strength of the public's interest in disclosure as a supposed point of conflict with the Third Circuit. *Coalition*, 815 F.3d at 1278. But the Third Circuit said nothing to the contrary. And in any event, the Tenth Circuit has not applied the "sliding scale" approach outside the issue-committee context. Earlier this year, the Tenth Circuit held that Colorado's disclosure law for "electioneering communications" could constitutionally be applied to a single advertisement sponsored by a nonprofit organization. *See Independence Inst.*, 812 F.3d at 789. In doing so, the court relied generally on "the public's 'interest in knowing who is speaking about a candidate shortly before an election,'" *id.* at 798 (quoting *Citizens*

United, 558 U.S. at 369); it did not treat the informational interest as weaker because of the small-scale nature of the intended advertisement.[8]

The second decision to which Petitioner points, *Independence Institute* v. *Williams*, only confirms that no conflict exists between the Third and Tenth Circuits. *Independence Institute* upheld the constitutionality of Colorado disclosure requirements that are substantially similar to Delaware's Disclosure Act. The Colorado provisions require any person or organization spending a certain amount on "electioneering communications" in a given year to disclose the name, address, and occupation of any person who donated $250 or more to fund those communications. 812 F.3d at 789. The Tenth Circuit affirmed the constitutionality of applying these provisions to a television advertisement without hesitation. Invoking *Citizens United*, the court held that the disclosure provisions "serve[] the legitimate interest of informing the public about the financing of ads that mention political candidates in the final weeks of a campaign." *Id.*

Although Petitioner contends (at 38) that *Independence Institute* supports the argument that an earmarking limitation is constitutionally required, that

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[8] Petitioner also contends (at 38) that the Tenth Circuit, unlike the Third, considers the burdens on small-time donors "constitutionally relevant." On the contrary, the Third Circuit acknowledged the importance of associational privacy as a key consideration driving the need for exacting scrutiny of disclosure laws. Pet. App. 14.

In any event, the Tenth Circuit considered the possibility of lost donations as a factor to weigh in the balancing because of concrete evidence in the record that the Coalition had lost donors as a result of the disclosure requirements. *See Coalition*, 815 F.3d at 1279. Petitioner presented no such evidence in this case.

contention is patently false. As the Tenth Circuit explained, the Colorado earmarking limitation arose from the manner in which the Colorado Secretary of State interpreted the regulations at issue, not from their text. *See* 812 F.3d at 789 n.1. In fact, the regulations had recently been amended to *remove* any explicit reference to earmarking. *See id.* at 797 n.12. It is implausible to suggest that the Tenth Circuit considered earmarking to be required by the First Amendment when it was not even required by the governing regulations.

2. Seventh Circuit

Petitioner next contends (at 39-40) that the Third Circuit's decision contradicts the Seventh Circuit's decision in *Wisconsin Right to Life, Inc.* v. *Barland.* Not so. *Barland* called it a "mistake to read *Citizens United* as giving the government a green light to *impose political-committee status* on every person or group that makes a communication about a political issue that also refers to a candidate." 751 F.3d at 836-837 (emphasis added). Whatever the merits of that view, it answers an entirely different question from the one presented here. The Disclosure Act does not impose political-committee status or similarly extensive requirements on any organization. Instead, the Act follows BCRA's model and requires a "one-time, event-driven disclosure." *Id.* at 824. *Barland* acknowledged that such disclosures are "far less burdensome than the comprehensive registration and reporting system imposed on political committees." *Id.*; *see also id.* at 836; *Independence Inst.*, 812 F.3d at 795 n.9; *Iowa Right to Life Committee, Inc.* v. *Tooker*, 717 F.3d 576, 592 (8th Cir. 2013). The Seventh Circuit's decision thus has no bearing on the proper resolution of this case.

Barland mistakenly treated as dictum in *Citizens United* what the Third Circuit correctly treated as a holding, namely, this Court's emphatic "reject[ion]" of the "contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." 558 U.S. at 369.[9] But, as *Barland*

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[9] *See Citizens United*, 558 U.S. at 368-369 ("As a final point, Citizens United claims that, in any event, the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in [*FEC* v. *Wisconsin Right to Life*, 551 U.S. 449, 469-476 (2007)] limited 2 U.S.C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent. Citizens United seeks to import a similar distinction into BCRA's disclosure requirements. We reject this contention." (citation omitted)).

Barland ignored not only the text of *Citizens United*, but also binding Seventh Circuit precedent. Just two years earlier, another Seventh Circuit panel had held that, after *Citizens United*, "the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context." *Center for Individual Freedom* v. *Madigan*, 697 F.3d 464, 484 (7th Cir. 2012). *Barland* did not even purport to reconcile the two holdings. A Seventh Circuit panel "cannot overrule another implicitly." *Brooks* v. *Walls*, 279 F.3d 518, 522 (7th Cir. 2002). When a later decision conflicts with an earlier decision but was not reviewed by the full court, the earlier decision "remain[s] the law of the circuit." *Id.* at 522-523. Any future Seventh Circuit panel is therefore bound to follow *Madigan*. Because that opinion is consistent with the Third Circuit's—and that of every other court of appeals to address the issue—even on this ancillary point there is no Circuit split to resolve. *See Independence Inst.*, 812 F.3d at 794-796 ("[*Citizens United*] confirmed that there is no constitutionally mandated distinction between express advocacy and some issue speech in the context of disclosure."); *Sorrell*, 758 F.3d at 132 n.12 (disagreeing with *Barland* because there is "no indication that the *Citizens United* ruling depended on the type of disclosure requirements it upheld"); *Real Truth About Abortion, Inc.* v. *FEC*, 681 F.3d 544, 551-552 (4th Cir. 2012) (recognizing *Citizens United* upheld disclosure requirements "for all electioneering communications—including those that are *not* the functional equivalent of express

noted, "[s]till, the Supreme Court's dicta must be respected." 751 F.3d at 836. Thus, that disagreement in characterization made no difference to the result, and certainly affords no reason for this Court's intervention.

II. THE THIRD CIRCUIT PROPERLY APPLIED THIS COURT'S PRECEDENTS AND REACHED THE RIGHT RESULT

This Court's teachings on disclosure dictated the outcome here, and the Third Circuit faithfully applied those teachings in approving the Disclosure Act's constitutionality. Misreading precedent, Petitioner raises a series of unavailing objections to the Third Circuit's ultimately fact-bound—and correct—application of settled law. Further review is unwarranted.

1. This Court has held that disclosure serves at least three sufficiently important governmental interests: providing information to voters, avoiding corruption, and helping to enforce other substantive election regulations. *McConnell*, 540 U.S. at 196; *see also Buckley*, 424 U.S. at 66-68. All three support the challenged provisions of the Disclosure Act. *See* H.B. 300, Preamble; CAJA 123. But the first—the public's informational interest—"alone is sufficient to justify" such provisions. *Citizens United*, 558 U.S. at 369. Disclosure requirements like these "'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" *Id.* at 366 (citations omitted). Thus, as the Court has several times reiterated, disclosure not only advances First Amendment values by exposing the

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advocacy"); *McKee*, 649 F.3d at 54-55 (holding, "in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review" of "disclosure-oriented laws"); *Brumsickle*, 624 F.3d at 1016 (rejecting view that "disclosure requirements cannot constitutionally reach issue advocacy" as "unsupportable" in light of *Citizens United*).

electoral process to public view, but is generally "a reasonable and minimally restrictive" means of doing so. *Buckley*, 424 U.S. at 68, 82; *see also McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1459-1460 (2014) (plurality opinion); *Citizens United*, 558 U.S. at 369.

On the basis of these foundational principles, the Court has twice upheld BCRA against similar attacks, concluding that analogous federal disclosure requirements are substantially related to the public's "interest in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369; *see McConnell*, 540 U.S. at 196. Those precedents require the same conclusion with respect to the Disclosure Act.

In an effort to avoid this conclusion, Petitioner makes essentially two arguments: (1) *Buckley*, in limiting the pre-BCRA disclosure regime to express advocacy, somehow "controlled the outcomes" in *McConnell* and *Citizens United* (Pet. 15-16); and (2) Delaware law goes beyond the features of the federal regulatory regime that were before the Court in *McConnell* and *Citizens United* (*id.* 16-20). The Third Circuit rightly rejected each of these arguments. The first is contrary to the express holdings of those decisions. And, as to the second, the Disclosure Act's deviations from BCRA in fact support—or, at the very least, do not constitutionally undermine—the substantial relationship between the statute and the State's interest in a well-informed electorate.

a. This Court has made it settled law that disclosure requirements can constitutionally reach beyond express advocacy or its functional equivalent. Petitioner's unsupported assertion that "disclosure of charitable contributions … give[s] no information about who is

supporting candidates" (Pet. 19) does not alter the state of the law on this issue. Not only is Petitioner's statement contradicted by the factual record here—which shows extensive coordination between Petitioner and its more explicitly partisan 501(c)(4) affiliate, DFPC—but the only possible legal relevance of the statement hinges on resurrecting the distinction between express advocacy and issue speech that this Court rejected as "functionally meaningless." *McConnell*, 540 U.S. at 193. No matter how Petitioner repackages the distinction, those decisions foreclose such constitutional challenges.

As *McConnell* made clear, *Buckley*'s "express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law." *McConnell*, 540 U.S. at 190. The "major premise" of the facial challenge there—and of Petitioner's lawsuit here (CAJA 55)—was that express advocacy marks "a constitutional boundary." *McConnell*, 540 U.S. at 190, 192. Rejecting that premise, the Court held that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements … apply *in full* to BCRA," and that *Buckley* thus "amply supports application of [BCRA's] disclosure requirements to the *entire range* of 'electioneering communications.'" *Id.* at 196 (emphasis added).

The Court rejected a similar as-applied challenge in *Citizens United*. Citizens United, like Petitioner, claimed that the public's informational interest does not apply to communications that "do not expressly or impliedly advocate a candidate's election or defeat." Appellant's Br. 51, 558 U.S. 310 (No. 08-205). "Even if the [communications] only pertain to a *commercial* transaction," the Court rejoined, "the public has an interest in knowing who is speaking about a candidate shortly

before an election." 558 U.S. at 369 (emphasis added). Petitioner's argument that this part of *Citizens United* is dictum (Pet. 40) is meritless. *See supra* pp. 23-25 & n.9. Indeed, this clear holding garnered eight Justices' support less than six years ago.

b. Notwithstanding Petitioner's attempt to hide behind its 501(c)(3) status, its proposed voter guide lies at the core of Delaware's interest in informing voters "about the sources of election-related spending." *Citizens United*, 558 U.S. at 367. By definition, a voter guide seeks to influence citizens' votes, and many such guides portray candidates positively or negatively based on the organization's views. CAJA 123-124. In 2012, Petitioner's General Election Values Voter Guide drew attention to the "stakes" of the election, seeking to "help [voters] choose candidates who best represent [those voters'] values." *Id.* 61. As the Third Circuit rightly held, this is election-related speech that falls under the Disclosure Act's objective criteria. Delaware has an important interest in requiring disclosure in this context so that voters can "react to [such] speech … in a proper way" and "give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371.

2. The Disclosure Act's deviations from BCRA do not change the correctness of the Third Circuit's opinion. On the contrary, the features about which Petitioner complains, the Third Circuit rightly concluded, reflect the specific circumstances of Delaware elections and are substantially related to the State's informational interest.

a. Petitioner's suggestion that the record below supporting Delaware's justification is inadequate (Pet. 16-17) is simply false and, in any event, does not merit

this Court's review. In fact, as uncontroverted evidence shows, Delaware's prior law led to a flood of election-related speech that escaped disclosure, thereby supporting the General Assembly's conclusion that defining "electioneering communications" along the broader lines drawn by BCRA would help Delaware voters "make informed choices in elections." H.B. 300, Preamble; *see supra* pp. 7-9. The relationship between disclosure and the government's informational interest is, moreover, well established, and in such cases the State's burden to provide additional evidence is light. *See Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

b. The differences between BCRA and the Disclosure Act concerning monetary thresholds, covered media, and the duration of the reporting period all reflect reasonable adjustments to fit the circumstances of state and local elections in a very small State. While Petitioner tries (Pet. 18) to paint Delaware as an outlier, other States have made similar adjustments,[10] and the courts to consider these analogous features have uniformly upheld them.[11] Delaware's choices on these fronts fall well within the range of permissible legisla-

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[10] *See* National Conference of State Legislators, *States' Independent Expenditure Reporting 2014* (July 2014) (providing 50-state survey), http://www.ncsl.org/Portals/1/documents/legismgt/2014_Independent_Expenditures_Chart.pdf.

[11] *See, e.g.*, *Sorrell*, 758 F.3d at 133-134 (Vermont's $500 threshold); *Madigan*, 697 F.3d at 494 (Illinois' coverage of Internet communications); *McKee*, 649 F.3d at 60-61 (Maine's $100 threshold); *Alaska Right to Life Comm.* v. *Miles*, 441 F.3d 773, 776 (9th Cir. 2006) (Alaska's $500 threshold).

tive discretion. *Cf. Buckley*, 424 U.S. at 82-84; *Citizens United*, 558 U.S. at 326. Indeed, as the Third Circuit determined, and as the record corroborates, the Disclosure Act's lower monetary thresholds and inclusion of non-broadcast media such as direct-mailing result in a closer fit between the informational interest the Act is intended to serve and Delaware's "unique election landscape," in which television and radio ads play no significant role. Pet. App. 17, 19; *see supra* pp. 9-10.

c. Petitioner repeatedly implies—without any basis in this Court's precedents—that because the FEC and some States have chosen to reach only corporate funds specifically earmarked for election-related speech, or have adopted shorter look-back periods, Delaware was required to do the same. Such variation among state laws, however, is tested in the normal process of adjudication by lower courts applying the same standard of exacting scrutiny applied by the Third Circuit here. Such fact-bound determinations do not warrant this Court's supervision.

Furthermore, whether the General Assembly might have chosen otherwise, its choices were reasonable and substantially related to the public's informational interest. "Money is fungible[.]" *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 31 (2010). Individuals and organizations may reasonably be expected to know the causes advanced by the organizations to which they give money. An earmarking limitation, like an express advocacy one, may permit groups to subvert the aims of disclosure. Delaware's look-back period likewise sensibly tracks the relevant candidacy—for incumbents, the term of office; 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 peri-

ods foreseeably may assist organizations in engaging in election-related speech. And for purposes of the First Amendment analysis, what matters is the public's interest in knowing who provided the financial wherewithal that made this speech possible.

3. Finally, the Disclosure Act adequately protects the privacy and associational rights Petitioner stresses throughout its petition. Like BCRA, the Act limits disclosure to speech made in the immediate lead-up to an election—the period during which communications are "specifically intended to affect election results." *McConnell*, 540 U.S. at 127. It captures speech only above certain monetary thresholds. It exempts several categories of speech, including handbills like those at issue in *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334 (1995). And, with respect to groups like Petitioner, its one-time, event-driven disclosure requirements fall far short of the burdens imposed by political-committee status. Pet. App. 21-22 n.10. In recognition of the potential of compelled disclosures to encroach on privacy and associational freedom, the *Buckley* Court required such laws to withstand "exacting scrutiny," 424 U.S. at 64, as the Third Circuit expressly acknowledged, Pet. App. 14.[12] Protection of these constitutional

[12] *Buckley* held that groups may be exempted from disclosure upon showing a "reasonable probability" of "threats, harassment, or reprisals from either Government officials or private parties." 424 U.S. at 74. Petitioner expressly disclaimed any reliance on this argument. *See* D. Ct. Dkt. 21-1 at 4.

The comparison drawn by Petitioner's amicus Americans for Prosperity Foundation (AFPF) to a recent district court decision involving threats to AFPF is thus inapposite. *See* AFPF Br. 6-8 & n.3 (citing *AFPF* v. *Harris*, 2016 WL 1610591 (C.D. Cal. Apr. 21, 2016)). AFPF not only alleged, but, over the course of a six-day trial, offered "ample evidence" of, concrete threats. *AFPF*, 2016 WL 1610591, at *4.

rights is thus built into the heightened standard of review. The Third Circuit properly applied that standard and correctly held that the Disclosure Act satisfies it.

III. Petitioner's Forfeiture Of Any Challenge To The Election Period Also Counsels Against Review

Under the Disclosure Act, a covered organization must disclose the names and addresses of all persons who made contributions exceeding $100 during the relevant "election period." 15 Del. C. § 8031(a). For incumbents, the "election period" corresponds to the term length of the candidate identified in the communication. *Id.* § 8002(11). The term of a state representative is two years and of a state senator four years, *see* Del. Const. art. II, § 2, so the Act, *at most*, requires a covered organization to disclose the persons who made contributions over the previous four years.

The petition repeatedly cites this *maximum* four-year election period (without recognizing it as such) as a central reason the law impermissibly burdens First Amendment rights. *See* Pet. 3, 8-9, 21, 25-27. Indeed, the election period is an integral part of the question on which Petitioner seeks this Court's review. *See id.* i (stating question presented as the constitutionality of an Act that requires disclosure "of individuals making unrelated donations over the previous four years"). But Petitioner failed to raise any objection to the election period in the district court.

Moreover, as the district court in *AFPF* noted, the California law AFPF challenged is unrelated to electoral speech and does not trigger the "unique considerations … that specifically shape and define the application of exacting scrutiny" in "the context of elections and campaign finance disclosure laws." *Id.* at *3.

As Delaware explained to the Third Circuit, Petitioner's submissions to the district court in support of a preliminary injunction "did not even mention the four-year upper limit it now bemoans." Delaware C.A. Br. 24-25. That oversight calls into question the genuineness of Petitioner's objection. Just as significantly, it prevented the Third Circuit from engaging in a meaningful analysis of the impact of the disclosure period on the constitutionality of the Act. The Third Circuit addressed the argument only in a brief footnote, explaining that Petitioner had challenged the disclosure period "[f]or the first time on appeal." Pet. App. 15 n.5. Following this Court's practice, the Third Circuit thus stated that it would "'not consider an issue not passed upon below.'" *Id.* (quoting *Singleton*, 428 U.S. at 120). The court briefly suggested that the length of the period was not "material to [its] analysis," but, consistent with its finding of forfeiture, it did not discuss the issue beyond that. *Id.*

Because Petitioner forfeited its challenge to the election period, no lower court has engaged with the precise question that Petitioner presents here. Thus, even if the petition otherwise presented a question worthy of review—which it does not—the Court should await a more appropriate vehicle to address it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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