UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELAWARE STRONG FAMILIES,

Plaintiff,

vs.

JOSEPH R. BIDEN III, in his official capacity as Attorney General of the State of Delaware; and

ELAINE MANLOVE, in her official capacity as Commissioner of Elections for the State of Delaware,

Defendants.

Civil Action No. 1:13-cv-1746-SLR

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Randolph D. Moss
Jonathan G. Cedarbaum
Weili J. Shaw
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20005
(202) 663-6000

J. Gerald Hebert
Paul S. Ryan
Megan McAllen
THE CAMPAIGN LEGAL CENTER
215 E Street NE
Washington, DC 20002
(202) 736-2200

A. Ann Woolfolk (No. 2642)
Joseph C. Handlon (No. 3952)
DELAWARE DEPARTMENT OF JUSTICE
Carvel State Building, 6th Floor
820 North French Street
Wilmington, Delaware 19801
(302) 577-8400
ann.woolfolk@state.de.us
joseph.handlon@state.de.us

Counsel for Defendants Joseph R. Biden III and Elaine Manlove

March 7, 2014

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

NATURE AND STAGE OF PROCEEDINGS

Plaintiff Delaware Strong Families (DSF) seeks a declaratory judgment that the Delaware Elections Disclosure Act is unconstitutional on its face and as applied. DSF moved for a preliminary injunction on January 14, 2014. This Court held a combined discovery and Rule 16 scheduling conference on January 24, 2014. On February 6, 2014, the Court ordered DSF to resubmit its brief in support of its motion for a preliminary injunction, limited to one question—"if the scope of the Act is broad enough to include plaintiff's proposed voter guide, is it unconstitutional under such Supreme Court precedent as *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007) [(*WRTL II*)], and *Citizens United v. FEC*, 558 U.S. 310 (2010)"—and ordered Defendants to file a responsive brief by March 7, 2014. D.I. 27.

SUMMARY OF ARGUMENT

Just four years ago, in *Citizens United*, the Supreme Court upheld a federal disclosure law similar to Delaware's. Since then, multiple courts of appeals have relied on *Citizens United* to reject facial challenges to other similar laws.[1] The portion of *Citizens United* that addressed disclosure requirements, which was joined by eight Justices, expressly rejected the principal arguments DSF now makes:

1. *Citizens United* was clear that disclosure requirements are subject not to strict scrutiny—as DSF incorrectly argues—but to the less stringent "exacting scrutiny," which

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[1] *Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 292 (4th Cir. 2013) (West Virginia); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 477-78 (7th Cir. 2012) (Illinois); *Family PAC v. McKenna*, 685 F.3d 800, 806-07 (9th Cir. 2012) (Washington); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 57 (1st Cir. 2011) ("*NOM*") (Maine); *see also, e.g.*, *Free Speech v. FEC*, 720 F.3d 788, 795 (10th Cir. 2013); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1242 (11th Cir. 2013) (Florida); *The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 546 (4th Cir. 2012) ("*Real Truth*"); *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115, 116 (1st Cir. 2011) (Rhode Island; affirming denial of preliminary injunction); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) (Washington).

requires only a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010).

2. *Citizens United* also addressed head-on DSF's argument that "disclosure requirements . . . must be confined to speech that is the functional equivalent of express advocacy." 558 U.S. at 368; *cf.* DSF Br. (D.I. 28) at 9. The Court's response was clear: "We reject this contention." 558 U.S. at 369. As the Court explained, "disclosure is a less restrictive alternative to more comprehensive regulations of speech" and thus is not subject to the same constitutional restrictions that the Court applied in *Wisconsin Right to Life* and *Massachusetts Citizens For Life* (*MCFL*)—two of the principal decisions upon which DSF mistakenly relies. 558 U.S. at 369.

3. *Citizens United* further held that "the public has an interest in knowing who is speaking about a candidate shortly before an election." 558 U.S. at 369. Here, the Legislature found that the Disclosure Act "provid[es] voters with relevant information about where political campaign money comes from and how it is spent, so that voters can make informed choices in elections." H.B. 300, Preamble. That informational interest is "alone . . . sufficient to justify" campaign-finance disclosure laws such as the Disclosure Act. *Citizens United*, 558 U.S. at 369.

4. As *Citizens United* explained, the Supreme Court has found alleged "chilling" effects to outweigh the public interest in disclosure when the challenger shows "a reasonable probability that [its] members would face threats, harassment, or reprisals if their names were disclosed." 558 U.S. at 370. DSF has expressly disclaimed any such contention here.

5. Accordingly, DSF has failed to demonstrate a likelihood of success on the merits.

6. Finally, DSF's contentions that it will suffer an irreparable harm and that the public interest tips in favor of granting injunctive relief fail on both the facts and law.

For each of these reasons, the motion should be denied.

STATEMENT OF FACTS

A. The Delaware Elections Disclosure Act

Until 2013, Delaware law required political advertisers to disclose their funding sources only if their ads "expressly advocate[d] the election or defeat of a clearly identified candidate." 15 Del. C. §§ 8002(10), 8030, 8031 (2012). Advertisers seeking to influence Delaware elections could skirt this disclosure requirement by crafting their messages to avoid the "magic words" of express advocacy. The Legislature concluded that this led to "a proliferation of advertisements that [we]re distributed during the campaign season and intended to influence elections, but [we]re not required to be reported under existing law." Delaware Elections Disclosure Act, 78 Del. Laws c. 400 (2012) (H.B. 300), Preamble.

Without disclosure, voters lacked an important way to assess the credibility of such ads. To take one example, "Citizens for a Secure Community" issued ads attacking the mayor of Wilmington during the 2012 election. Journalists uncovered that the "Citizens" were actually political operatives based in Texas, Nevada, and Ohio—but their funding sources were never discovered.[2] Meanwhile, the Legislature heard evidence from other states confirming the value of disclosing funding sources for "issue ads," which are often produced by groups with anodyne names. A witness at the House hearing on the Disclosure Act, for example, described a group called "Littleton Neighbors Voting No" that spent $170,000 to oppose a ballot initiative that would have blocked Wal-Mart from operating in Littleton, Colorado. *See* Marziani Decl., Ex. A at 4 (witness statement at House Administration Committee hearing on H.B. 300). Disclosure

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[2] *See* Shaw Decl., Ex. E (Staub, *Mailers Promote Mayoral Hopeful Through Loophole*, Wilmington News Journal, Aug. 31, 2012). The Court's February 6, 2014 Order notes that the State bears the burden of proof on certain issues, but does not address whether the Court contemplated the submission of evidence at this time. Defendants respectfully request that the Court consider the declarations accompanying this brief and the exhibits attached to them to the extent it deems helpful and appropriate.

reports later revealed that Wal-Mart was the group's only funder. *Id.*

Congress and the Supreme Court had also taken note of the practice of running issue ads "while hiding behind dubious and misleading names." *McConnell v. FEC*, 540 U.S. 93, 197 (2003). Congress addressed these problems in enacting the Bipartisan Campaign Reform Act of 2002 (BCRA). Like the Disclosure Act, BCRA requires those engaging in "electioneering communications" to disclose all contributors over a certain threshold. 2 U.S.C. § 434(f). "[E]lectioneering communications" refer to a candidate, are made through specified media within 30 days of a primary or 60 days of a general election, and are targeted to the relevant electorate. *Id.* § 434(f)(3). The Supreme Court upheld these disclosure rules in *McConnell*, *see* 540 U.S. at 194-96, and again in *Citizens United*, *see* 558 U.S. at 368-71.

Following *Citizens United*'s guidance, Delaware adopted a similar approach in the Disclosure Act.[3] 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 voters can make informed choices in elections." H.B. 300, Preamble.[4] Like BCRA, the Disclosure Act requires certain disclosures from organizations that expend more than a specified amount on "electioneering communications," defined as communications that refer to a clearly identified candidate, are publicly distributed by certain media within 30 days of a primary or 60 days of a general election, and are targeted to the relevant electorate. § 8002(11).[5] Once an

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[3] *Citizens United*'s approval of similar requirements was discussed at the House Administration Committee hearing. *See* Shaw Decl., Ex. A at 7 (minutes of Committee hearing); Marziani Decl., Ex. A at 3-6 (witness statement). The vote was 21-0 in the Senate and 24-13 in the House. *See* http://legis.delaware.gov/lis/lis146.nsf/vwLegislation/HB+300.

[4] *See also* Sorenson Decl. ¶¶ 13-34; Raser-Schramm Decl. ¶¶ 23-34.

[5] While federal law covers only broadcast, cable, and satellite communications, the Disclosure Act also includes print, direct mail, and large signage. *See* § 8002(7), (25). That broader coverage reflects Delaware's media market: As the Legislature found, "Delaware has no major network television stations, and Delaware campaigns traditionally rely on door-to-door

organization expends more than $500 on electioneering communications, it must file a "third-party advertisement report" with the Commissioner of Elections. § 8031(a).

The information in those reports promotes transparency and enables the public to evaluate advertisements in light of the identity, credibility, and motives of those funding them. Reports must list the names and addresses of those to whom the organization has paid more than $100 for third-party advertisements; those contributing more than $100 to the organization during the election period; and, if a contributor is an organization, any person owning more than a 50% interest in the contributor. § 8031(a).

Timely public disclosure is the cornerstone of the Act. Third-party advertisement reports must be filed shortly after the expenditure, and the Commissioner of Elections must then make the reports available to the public "immediately upon their filing." § 8032. These measures enable Delaware voters to "evaluate and measure the statements made by and interests of those third parties in a manner that is prompt and informative." H.B. 300, Preamble.

B. DSF and DFPC

Plaintiff Delaware Strong Families Inc. (DSF) is a nonprofit 501(c)(3) corporation. Compl. (D.I. 1) ¶ 10. 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.* ¶ 18. In 2011, DSF reported just short of $60,000 in expenditures. Shaw Decl., Ex. B (DSF Return) at 2. More than 99%—all but about $400—of DSF's expenditures consisted of payments to a 501(c)(4) organization, Delaware Family Policy Council Inc. (DFPC), to reimburse DFPC for work performed on behalf of DSF. *Id.* at 2, 12; Shaw Decl., Ex. C (DFPC

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campaign efforts, local advertising and direct mail efforts." H.B. 300, Preamble; *see also* Sorenson Decl. ¶¶ 39-47; Raser-Schramm Decl. ¶¶ 14-20, 35-37. The Act excludes communications "distributed by a means other than by any communications media," membership communications, and news articles or commentaries, among others. § 8002(10)(b).

Return) at 9.[6] DSF and DFPC had the same officers and directors, including the same president, whose salary is paid by DFPC. DSF Return at 3; DFPC Return at 10.

In 2011, DFPC reported to the IRS that it "engages … 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." DFPC Return at 5, 6, 9.

C. The 2012 DSF and DFPC Voter Guides

DSF alleges that, "[i]n 2014, DSF plans to produce and disseminate voter guides in a manner substantively similar to the process [it] used in 2012." Compl. (D.I. 1) ¶ 31. In 2012, the process began when DFPC, not DSF, sent out questions "to all state and federal candidates on the ballot" and used their answers to produce a candidate scorecard. *Id.* ¶ 21. The scorecard framed questions such that a "yes" response was the "Pro-Family Position" and a "no" response was the "Anti-Family Position." Shaw Decl., Ex. D (Scorecard) at 1.[7] DFPC's scorecard then tallied up each candidate's responses to assign letter grades, with "[t]hose who earned an A+ grade . . . considered Outstanding Family Advocates." Color coding indicated whether a candidate was a "Family Advocate," "Needs Improvement," or "Hostile." *Id.* DFPC cautioned, however, that the "Values Scorecard is for personal distribution. For a 501c3 or church-friendly Voter Guide, please go to www.delawarestrong.org." *Id.* That is the address for DSF's website.

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[6] These figures are from 2011, the last year for which returns are publicly available for both DSF and DFPC. DSF's 2012 return, produced in discovery, does not indicate the amount of reimbursements to DFPC.

[7] The 2012 DFPC scorecard is not currently accessible to the public on DSF's or DFPC's website, but is available on the Internet through a third-party web archive. *See* DFPC, *2012 General Election Values Scorecard* (2012), *available at* https://web.archive.org/web/20130301152700/http://www.delawarefamilies.org/pdfs/2012_C4_General_Election_Voter_Scorecard_Final2.pdf; *see United States v. Bansal*, 663 F.3d 634, 667 (3d Cir. 2011) (affirming admissibility of webpage stored on same web archive).

DSF's version of the voter guide was based on DFPC's. Compl. (D.I. 1) ¶ 21. The design and layout of and issues addressed in DSF's "Voter Guide" were virtually identical to those from DFPC's "Scorecard," but with the column for color-coded letter grades and the express Pro- or Anti-Family characterizations removed. *Compare* Compl., Ex. A *with* Scorecard.

ARGUMENT

To obtain a preliminary injunction, DSF must, "by a clear showing, carr[y] the burden of persuasion" on each of four factors. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). These are: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Minard Run Oil Co. v. U.S. Forest Service*, 670 F.3d 236, 249-50 (3d Cir. 2011) (internal quotation marks omitted).[8] DSF has not carried its burden on any of these prongs.

I. DSF IS NOT LIKELY TO SUCCEED ON THE MERITS

A. Disclosure Requirements Are Not Subject To Strict Scrutiny

Disclosure has been a feature of American campaign-finance law for more than a century. The first federal disclosure law, enacted in 1910, required organizations that "spent more than $50 annually for the purpose of influencing congressional elections in more than one State" to disclose each contributor giving over $100 and each expenditure over $10. *See United States v. Automobile Workers*, 352 U.S. 567, 575-76 (1957). Congress has since broadened these disclosure laws several times, and the Supreme Court has repeatedly upheld them against

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[8] DSF cites *Swartzwelder v. McNeilly*, 297 F.3d 228, 234 (3d Cir. 2002), for its claim that a "*reasonable probability* of success on the merits" suffices. D.I. 28, at 2 (emphasis added). That is not the law today. The Supreme Court has held that "[a] plaintiff seeking a preliminary injunction must establish that he is *likely* to succeed on the merits," *Winter*, 555 U.S. at 20 (emphasis added), and recent Third Circuit decisions follow *Winter* in requiring a likelihood of success, *see, e.g., Conestoga Wood Specialties Corp. v. HHS*, 724 F.3d 377, 382 (2013).

constitutional challenge.[9] Most recently, *Citizens United* upheld the disclosure requirements of the federal Bipartisan Campaign Reform Act (BCRA). BCRA, like the Disclosure Act, requires groups expending a defined amount on "electioneering communications" to disclose "the names and addresses of all contributors" over a monetary threshold. *See* 2 U.S.C. § 434(f)(2)(F).

As the Supreme Court has frequently explained, it has treated disclosure requirements favorably because they are "a less restrictive alternative to more comprehensive regulations of speech," such as limits on expenditures or contributions. *Citizens United*, 558 U.S. at 369; *see FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) (*MCFL*); *Buckley v. Valeo*, 424 U.S. 1, 68 (1976); *Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000). Disclosure requirements "'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366 (citations omitted).

Disclosure rules therefore face less demanding First Amendment scrutiny than other types of campaign-finance regulation. While restrictions on election-related expenditures are subject to "strict scrutiny," *id.* at 339, disclosure laws receive only "exacting scrutiny," *id.* at 366.[10] Under this "'lower level of scrutiny,'" *Worley*, 717 F.3d at 1242, a disclosure statute is constitutional so long as there is a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest," *Citizens United*, 558 U.S. at 366-67. DSF's contrary claim that the Act "may demand strict constitutional scrutiny," D.I. 28, at 4, is at odds with this Supreme Court precedent and "every one of [the] Circuits who have considered the question, all of whom have applied exacting scrutiny to disclosure schemes." *Worley*, 717 F.3d at 1242 (collecting cases).

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9 *See Buckley v. Valeo*, 424 U.S. 1, 61 (1976) (relating history); *McConnell*, 540 U.S. 93.

10 *See also Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) (describing "a series of precedents" applying "exacting scrutiny" to "First Amendment challenges to disclosure requirements").

The Supreme Court has held that disclosure serves several "important state interests": "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196.[11] The first of these, the public's informational interest, is "alone . . . sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369. "[T]he public," the Court has explained, "has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* Knowing the identity of a speaker is critical because "a speaker's credibility often depends crucially on who he is." *Majors v. Abell*, 361 F.3d 349, 352 (7th Cir. 2004); *see also NOM*, 649 F.3d at 57 ("Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin.").

The campaign-finance case law provides rich evidence of organizations with "misleading," or "mysterious" names that participate in elections while disguising funding sources. *McConnell*, 540 U.S. at 128 & n.23.[12] "[O]nly disclosure of the sources of the[se groups'] funding may enable the electorate to ascertain the identities of the real speakers." *Madigan*, 697 F.3d at 481. Disclosure laws ensure that voters are "'fully informed' about the person or group who is speaking" and "able to evaluate the arguments to which they are being subjected." *Citizens United*, 558 U.S. at 368. The Supreme Court and lower courts have repeatedly found this informational interest alone sufficient to justify disclosure requirements.[13]

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[11] Indeed, the Legislature concluded that Delaware has a "compelling interest" in achieving each of these three goals. H.B. 300, Preamble.

[12] *See McConnell*, 540 U.S. at 128 ("'Citizens for Better Medicare,' … was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers."); *see also* Raser-Schramm Decl., ¶¶ 39-45 (describing "Polly's Plan" ads later shown to be funded by businesses with economic interests in plan).

[13] *See, e.g., Citizens United*, 558 U.S. at 369; *Madigan*, 697 F.3d at 477-78; *Human Life*, 624 F.3d at 1016.

B. The Supreme Court And The Courts Of Appeals Have Consistently Upheld Similar Disclosure Requirements

It is therefore unsurprising that the Supreme Court has repeatedly upheld disclosure requirements like those at issue here, even while striking down restrictions on contributions and expenditures.[14] *Citizens United* upheld disclosure requirements for electioneering communications even as it invalidated a ban on corporate expenditures for the same speech. 558 U.S. at 368-70. The courts of appeals have likewise recognized the constitutionality of disclosure requirements. The Seventh Circuit observed that every court of appeals to entertain a post-*Citizens United* challenge to federal or state disclosure regulations has "upheld the disclosure regulations against the facial attacks." *Madigan*, 697 F.3d at 470 (citing cases).[15]

These courts have not ignored plaintiffs' claims about the potential effects of disclosing their contributors. *Buckley*, for example, observed that "[i]t is undoubtedly true that public

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[14] *See Citizens United*, 558 U.S. at 369 (describing *Buckley* and *McConnell* and noting that, in *United States v. Harriss*, 347 U.S. 612 (1954), the Court "upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself"); *see also Doe*, 130 S. Ct. at 2819-22 (upholding disclosure requirement for petition signatories); *MCFL*, 479 U.S. at 262 (ban on election-related expenditures from corporate treasury funds unconstitutional as applied; disclosure requirements "provide precisely the information necessary to monitor [plaintiff's] independent spending activity and its receipt of contributions"); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) (striking down contribution limit because "the integrity of the political system will be adequately protected" by "publication of a list of all contributors of more than $50"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 & n.32 (1978) (striking down ban on corporate expenditures in part because disclosure sufficed to enable "the people . . . to evaluate the arguments to which they are being subjected").

[15] The court noted that the Tenth Circuit has twice struck down such requirements *as applied* to specific organizations. *See Sampson v. Buescher*, 625 F.3d 1247, 1249 (10th Cir. 2010); *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 671 (10th Cir. 2010). These decisions have been criticized or distinguished by other circuits. *See, e.g.*, *Worley*, 717 F.3d at 1248-49; *Madigan*, 697 F.3d at 484 n.17. In any event, neither is on point: *Sampson* concerned speech on ballot initiatives, and expressly distinguished candidate elections. *See* 629 F.3d at 1249, 1255. The *Herrera* statute, unlike the Disclosure Act, required issue groups to register as political committees and file reports until "the committee has been dissolved or no longer exists." 611 F.3d at 673, 677. *Herrera*, moreover, was briefed before *Citizens United* was decided, and that court only briefly referred to *Citizens United* in a footnote. *See Madigan*, 697 F.3d 484 n.17.

disclosure of contributions" may "deter some individuals who otherwise might contribute." 424 U.S. at 68. Nonetheless, the Supreme Court concluded that "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.*; *see also Family PAC*, 685 F.3d at 806-07 (finding this burden to be "modest"); *Madigan*, 697 F.3d at 482 (same). Courts have likewise sustained disclosure requirements despite organizations' claims that they will be forced to refrain from speech if required to disclose their contributors:

> We . . . take the [plaintiff] at its word that its donors are so adamant about remaining anonymous that subjecting it to the Illinois reporting requirements will deter it from engaging in its preferred form of public advocacy. That is regrettable, but it is the [plaintiff's] and its donors' choice to make. . . . While there is also a respected tradition of anonymity in the advocacy of political causes in this country, that tradition does not mean voters must remain in the dark about who is speaking about a candidate shortly before an election.

Madigan, 697 F.3d at 498-99 (internal quotation marks and citations omitted).

The one circumstance in which the Supreme Court has found alleged "chilling" effects to outweigh the public interest in election-related disclosure is when there is "a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed"—an argument expressly disclaimed by DSF. *Citizens United*, 558 U.S. at 370; *see* DSF Mot. for Protective Order, Ex. A (D.I. 21-1) at 4. In short, disclosure requirements are "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our . . . election system to public view." *Buckley*, 424 U.S. at 82.

C. The Disclosure Act Is Constitutional On Its Face

1. DSF Bears a Heavy Burden in Proving Facial Unconstitutionality

To prevail on its overbreadth challenge, DSF "must demonstrate from the text of [the Act] and *from actual fact* that a substantial number of instances exist in which the [Act] cannot be applied constitutionally." *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988)

(emphasis added).[16] Invalidation on overbreadth grounds is "'strong medicine'" that should be employed "with hesitation, and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769 (1982); *see Conchatta Inc. v. Miller*, 458 F.3d 258, 262-63 (3d Cir. 2006). The Supreme Court has thus "vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292-93 (2008). DSF cannot show *any* unconstitutional reach, much less a "substantial" one. Therefore, DSF's facial challenge must fail.

2. DSF's Arguments Are Contrary to Clear Supreme Court Precedent

DSF's arguments against the Act are foreclosed by the Supreme Court's decisions twice upholding BCRA's disclosure provisions. Like the Act, BCRA requires any organization that passes a monetary threshold in spending on "electioneering communications" to disclose the names and addresses of contributors who gave more than a certain amount. 2 U.S.C. § 434(f)(1), (2); 15 Del. C. §§ 8031(a), 8002(27). Like the Act, BCRA defines "electioneering communication" to include all communications through specified media that refer to a clearly identified candidate for office and are made within 60 days of a general election or 30 days of a primary. 2 U.S.C. § 434(f)(3)(A)(i); 15 Del. C. § 8002(10)(a). And like the Act, BCRA does not limit disclosure to political committees or groups that have the "major purpose" of influencing

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[16] Although DSF asserts a vagueness challenge, Compl. (D.I. 1) ¶¶ 80-81, 85-86, 91, 93, its brief does not explain why any provision of the Act is unconstitutionally vague. Moreover, "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim" and "certainly cannot do so based on the speech of others." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010). DSF claims no ambiguity as to whether its conduct will be covered—rather, it asserts that its conduct *will* trigger the Act. *See, e.g.*, Compl. (D.I. 1) ¶ 3. In any event, even if DSF had identified some ambiguity in the Act, that ambiguity would properly be resolved through the Election Commissioner's advisory opinion process, under which "any person" can request "a ruling that applies" the Act "to a set of facts specified by the person." 15 Del. C. § 8041(2). The Supreme Court has found the availability of such a process "important in rejecting . . . vagueness contentions." *Arnett v. Kennedy*, 416 U.S. 134, 160 (1974).

elections, or to contributions earmarked for electioneering communications.[17] The Supreme Court upheld these provisions of BCRA against facial challenge in *McConnell* and against as-applied challenge in *Citizens United*.[18]

a. The First Amendment does not limit disclosure requirements to express advocacy

The Supreme Court and the courts of appeals have resoundingly rejected DSF's primary argument: that the First Amendment permits disclosure requirements "only when a group makes expenditures that expressly advocate a particular election result" or are the "functional equivalent" of express advocacy. D.I. 28, at 6, 11; Compl. (D.I. 1) ¶ 79. The Supreme Court could not have been more explicit in *Citizens United*: "[W]e reject Citizens United's contention that [BCRA's] disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." 558 U.S. at 369; *see also McConnell*, 540 U.S. at 194.[19] Since *Citizens United* numerous courts of appeals have reached the same conclusion.[20]

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[17] The FEC has since attempted to impose the latter limitation by regulation. The validity of that rule is currently subject to litigation. *See Center for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) (per curiam) (rejecting *Chevron* step one challenge but remanding for further consideration, including under *Chevron* step two).

[18] While *Citizens United* overruled the portions of *McConnell* addressing BCRA's ban on corporate independent expenditures, *Citizens United*, 558 U.S. at 365-66, it expressly "adhere[d] to [*McConnell*] as it pertains to . . . disclosure," *id.* at 368.

The Disclosure Act differs from BCRA in minor ways—for example, in its precise dollar thresholds, covered media, and definition of the relevant electorate. These reflect the fact that the Act applies to state and local elections in a small state. *See* Raser-Schramm Decl. ¶¶ 14-20, 35-37; Sorenson Decl. ¶¶ 39-47.

[19] DSF's contention that *Citizens United*'s approval of disclosure was limited to "pejorative" depictions of candidates, *see* D.I. 28, at 12, is untenable. That argument flies in the face of the Court's unqualified holding that disclosure is not limited to express advocacy or its functional equivalent. 558 U.S. at 368-69. Indeed, the Court noted that application of the disclosure requirements would be permissible even to "ads [that] only pertain to a commercial transaction." *Id.* at 369. The dispositive point is simply that "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.*

[20] *See NOM*, 649 F.3d at 54-55 ("the distinction between issue discussion and express

DSF's effort to revive this distinction relies principally on *Buckley* and *WRTL II*. But the Supreme Court has held that neither case imposes a constitutional "express advocacy" limitation on disclosure laws. *Buckley*'s "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *McConnell*, 540 U.S. at 191-92; *see also Citizens United*, 558 U.S. at 369; *WRTL II*, 551 U.S. at 474 n.7 (opinion of Roberts, C.J.). *WRTL II* did not even involve disclosure; it held that a *ban* on financing certain electioneering speech with corporate and labor union funds could apply only to the "functional equivalent of express advocacy." *Id.* at 469. DSF admits *WRTL II* involved "a ban on speech," not disclosure, yet still claims *WRTL II* is "strong authority" for the distinction between "issue speech and express advocacy." D.I. 28, at 10; *see also* Compl. (D.I. 1) ¶¶ 68-69.[21] But in *Citizens United*, eight Justices expressly rejected the contention that *WRTL II* applies to disclosure laws:

> Citizens United claims ...[BCRA's] disclosure requirements ... must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in *WRTL* limited 2 U.S.C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent. Citizens United seeks to import a similar distinction into BCRA's disclosure requirements. We reject this contention.

Citizens United, 558 U.S. at 368-69 (citations omitted).

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advocacy has no place in First Amendment review" of "disclosure-oriented laws"); *Free Speech*, 720 F.3d at 795; *Real Truth*, 681 F.3d at 551-52; *Madigan*, 697 F.3d at 484 ("*Citizens United* made clear that the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context."); *Human Life*, 624 F.3d at 1016 ("[T]he position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable.").

[21] Similarly, DSF quotes the Chief Justice's opinion in *WRTL II* to support its claim that "electioneering communication" may only include speech "'susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.'" D.I. 28, at 14. *WRTL II* involved a section of BCRA that *prohibited* "WRTL from running" certain ads. 551 U.S. at 464. As *Citizens United* recognized, *WRTL II*'s constitutional test is inapposite for the "less restrictive alternative" of disclosure requirements, where "electioneering communications" are not limited to "the functional equivalent of express advocacy." 558 U.S. at 369.

b. The First Amendment does not limit disclosure requirements to "earmarked" contributions

DSF next contends that unless an entity has "the major purpose" of express advocacy, the State may only compel the disclosure of those contributions "earmarked" for political purposes. D.I. 28, at 6. This purported "earmarking" rule has no basis in the decisions of the Supreme Court or the courts of appeals. *McConnell* and *Citizens United* both upheld BCRA's disclosure requirements even though they require disclosure of "the names and addresses of *all* contributors" over a specified threshold. 2 U.S.C. § 434(f)(2)(F) (emphasis added). The courts of appeals have likewise upheld statutes that require organizations to disclose all of their donors, even though a given contribution may not have "the major purpose of express advocacy." *See, e.g.*, *Madigan*, 697 F.3d at 472; *Family PAC*, 685 F.3d at 803. Indeed, the Fourth Circuit recently reversed a district court precisely for imposing an "earmarking" limitation to "cure" the alleged unconstitutionality of a disclosure requirement. *Tennant*, 706 F.3d at 292.[22]

DSF implies that *Citizens United* relied on the FEC's implementing regulations, which require disclosure only of those contributors who contributed "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9).[23] But this "earmarking" requirement played no role in *Citizens United*'s constitutional analysis and was never mentioned in the Court's opinion. The D.C. Circuit has accordingly rejected the contention that "the Supreme Court's holding was limited by" the earmarking regulation. *Van Hollen v. FEC*, No. 12-5117,

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[22] The same court struck down limited portions of the disclosure statute because they were insufficiently comprehensive and "deprived the electorate of information about … election-related activities." *Id.* at 285, 289-90 (striking down portion of statute because it *failed* to cover "direct mailings, telephone banks, and billboard advertising" as well as speech by 501(c)(3) organizations—all of which are covered by the Disclosure Act).

[23] DSF's brief implies that the statute itself contains this purpose limitation. *See* D.I. 28, at 11. It does not. *See* 2 U.S.C. § 434(f)(2)(F) (requiring disclosure of "the names and addresses of *all* contributors who contributed an aggregate amount of $1,000 or more" (emphasis added)).

2012 WL 1758569, at *3 (D.C. Cir. May 14, 2012) (unpublished). What's more, this earmarking limitation *did not even exist* at the time of *McConnell*, *see* 72 Fed. Reg. 72,899 (Dec. 26, 2007), but *McConnell* nonetheless upheld BCRA's disclosure requirements in full, *see* 540 U.S. at 194-202; *see also Tennant*, 706 F.3d at 292 (upholding disclosure requirement without earmarking limitation because "*McConnell* compels us to find that [it] is constitutional").

An earmarking limitation would mean that groups that make electioneering communications "need not disclose who has contributed to pay for" those communications "'unless the donor is dumb enough specifically to direct the organization to use the money for a particular'" communication. *Madigan*, 697 F.3d at 490 n.27. "The First Amendment does not require a state to build such an escape hatch into reasonable disclosure laws." *Id.* at 489.

3. The Act Does Not Treat Covered Organizations as Political Committees

Finally, DSF claims that the Act unconstitutionally imposes "the burdens of PAC status upon organizations like DSF that do not engage in express advocacy." D.I. 28, at 8; Compl. (D.I. 1) ¶ 60.[24] That is not so.

Organizations that only engage in electioneering communications do not fall within the Act's definition of a "[p]olitical committee."[25] And DSF is incorrect that the Act imposes the "functional equivalent" of political committee status on such organizations. D.I. 28, at 13; Compl. (D.I. 1) ¶ 89. Under Delaware law, political committees face much more extensive

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[24] DSF also seems to suggest that PAC status can only be imposed on an organization with the "major purpose" of supporting or opposing candidates. *See* D.I. 28, at 13. But *Buckley*'s "major purpose" test is "a creature of statutory interpretation, not constitutional command." *Madigan*, 697 F.3d at 487-88. It does not mean "that an entity must have that major purpose to be deemed constitutionally a political committee." *Human Life*, 624 F.3d at 1009-10.

[25] 15 Del. C. § 8002(19) ("Any organization . . . which accepts contributions from or makes expenditures to any candidate, candidate committee or political party in an aggregate amount in excess of $500 during an election period, not including independent expenditures").

obligations than do third-party advertisers. Political committees (a) must file ongoing reports as long as they are in existence, without regard to whether they engage in election-related activity, 15 Del. C. § 8030(a); (b) must report a host of detailed information that need not be disclosed by groups only making electioneering communications;[26] (c) cannot receive contributions of over $50 in cash, *id.* § 8012(a); (d) can make expenditures only for certain purposes, *id.* § 8020; and (e) can be dissolved only in accordance with statutory requirements, *id.* § 8022.[27]

This case bears no resemblance to the circumstances in which the Supreme Court has held that PAC spending is not an adequate substitute for corporate campaign expenditures. *Citizens United* held that requiring corporations to speak through a PAC was a ban on speech by the *corporation* itself: "A PAC is a separate association from the corporation," so the requirement that a corporation use a PAC "does not allow corporations to speak." *Citizens United*, 558 U.S. at 337. *Citizens United* also recognized that cases like *MCFL* involved "more comprehensive regulation of speech" than disclosure requirements and thus have no bearing on the constitutionality of disclosure rules. As in *Citizens United*, the law at issue in *MCFL* required MCFL to speak through a "separate segregated fund" and barred use of general treasury funds for speech—a "substantial" restriction on MCFL's speech. 479 U.S. at 252 (plurality opinion of Brennan, J.). The law also imposed "extensive requirements" and "stringent restrictions" with no parallel here: It regulated MCFL's internal management, imposed strict *ongoing* reporting requirements irrespective of continued activity, and precluded MCFL from

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[26] 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. *Id.* § 8030(d).

[27] The Disclosure Act's requirements are likewise far less burdensome than those imposed on political committees under federal law. *See, e.g.*, 2 U.S.C. § 432(h) (governing use of bank accounts); *id.* § 433 (statements of organization and termination requirements); *id.* § 434(a)-(b) (quarterly and other ongoing reports, including reporting of cash on hand and debts).

dissolving unless certain conditions were met. *Id.* at 253-54. The Disclosure Act imposes none of these restrictions on groups that just engage in electioneering communications.[28] There is no comparison between the restrictions at issue in *MCFL* and the modest, intermittent reports required by the Disclosure Act.[29]

D. The Disclosure Act Is Constitutional As Applied To DSF

The Supreme Court has recognized one basis for an as-applied challenge to an election-related disclosure requirement: such a requirement "would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370. DSF has expressly disclaimed any such contention.[30]

DSF's only argument in support of its as-applied challenge is a single paragraph asserting that the Act "cannot constitutionally be applied to DSF" because DSF's proposed voter guide "contains no words of express advocacy, takes no position on any candidate and does not even 'indirectly' advocate for a candidate." D.I. 28, at 15; *see* Compl. (D.I. 1) ¶ 92. That simply repackages DSF's contention that disclosure requirements must be limited to express advocacy

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[28] One court of appeals has struck down requirements that an organization make "perpetual, ongoing reports" until it satisfies statutory requirements for termination, "regardless of whether it ever makes more than a single independent expenditure." *Iowa Right To Life Comm., Inc. v. Tooker*, 717 F.3d 576, 597 (8th Cir. 2013); *see also Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (same). The court explained that requiring a "one-time report 'whenever money is spent'"—as the Disclosure Act does—would be a constitutional means to achieve the same goals. *Iowa Right to Life Comm.*, 717 F.3d at 597.

[29] Justice O'Connor concurred separately to make clear that "the significant burden on MCFL in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act." 479 U.S. at 266 (O'Connor, J., concurring in part and concurring in the judgment).

[30] *See* DSF Mot. for Protective Order, Ex. A (D.I. 21-1), at 4. Indeed, DSF makes no attempt to establish that it suffers any unique burden under the Act. *See also* Moll Decl. ¶¶ 14-41 (describing recordkeeping obligations and practices of 501(c)(3) organizations).

or its functional equivalent. But the Supreme Court has "reject[ed] [the] contention that . . . disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Citizens United*, 558 U.S. at 369. Disclosure requirements can permissibly apply to "the entire range of 'electioneering communications,'" *McConnell*, 540 U.S. at 194, including those that "merely mention a federal candidate," *Real Truth*, 681 F.3d at 551-52.

II. DSF HAS NOT ESTABLISHED THE NON-MERITS FACTORS REQUIRED

DSF has not shown that it will suffer irreparable harm if a preliminary injunction is denied. The mere "assertion of First Amendment rights does not automatically require a finding of irreparable injury"; rather, DSF "must show 'a chilling effect on free expression.'" *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989). DSF has not made that showing

First, this case can likely be resolved on the merits before DSF takes any action that might trigger the Act. DSF asserts that it must begin preparing its voter guide by July 1. *See* Compl. (D.I. 1) ¶ 34. The Court's February 6 scheduling order should enable this case to be resolved before that date. That alone is sufficient ground to deny DSF's motion.

Second, the Act does not prohibit any speech. Rather, it permits unlimited electioneering communications, subject only to a few basic filing and recordkeeping requirements. DSF does not allege that these clerical tasks would impose a significant burden on its speech, but asserts that it will be "forced into self-silence" if the Act is not enjoined. D.I. 28, at 16.[31] Such a self-imposed silence does not constitute irreparable harm. *See, e.g.*, *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995).

Finally, the Act does not in any way endanger DSF's 501(c)(3) status. DSF is not

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[31] DSF cites the Third Circuit's *Conestoga* decision for the proposition that it need make "no further showing" to establish irreparable harm. D.I. 28, at 16-17 (citing 724 F.3d at 416). The page DSF cites is not from the majority opinion in *Conestoga*, but from the dissent.

required to "list candidates the entity supports or opposes." D.I. 28, at 17. The relevant field on Delaware's third-party-advertiser form is optional, and by its terms is inapplicable to groups that do not "support" or "oppose" candidates. *See* Manlove Decl. ¶¶ 6-12.

The last two factors of the preliminary-injunction standard call for the Court to verify "that granting preliminary relief will not result in even greater harm to the nonmoving party" and "that the public interest favors such relief." *Minard*, 670 F.3d at 250. These factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Granting DSF's motion would create uncertainty about the scope and enforceability of a law designed to promote more speech—not less. A preliminary injunction would create disarray and deprive voters of the information provided by the Disclosure Act—information the Supreme 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.

CONCLUSION

The motion for a preliminary injunction should be denied.

Respectfully submitted,

/s/ Joseph C. Handlon

A. Ann Woolfolk (No. 2642)
Joseph C. Handlon (No. 3952)
DELAWARE DEPARTMENT OF JUSTICE
Carvel State Building, 6th Floor
820 North French Street
Wilmington, Delaware 19801
(302) 577-8400
ann.woolfolk@state.de.us
joseph.handlon@state.de.us

Randolph D. Moss
Jonathan G. Cedarbaum
Weili J. Shaw
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20005
(202) 663-6000

J. Gerald Hebert
Paul S. Ryan
Megan McAllen
THE CAMPAIGN LEGAL CENTER
215 E Street NE
Washington, DC 20002
(202) 736-2200

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be delivered through the ECF electronic filing system on the 7th day of March, 2014, to:

David E. Wilks
WILKS, LUKOFF & BRACEGIRDLE, LLC
1300 North Grant Avenue
Suite 100
Wilmington, Delaware 19806
(302) 225-0850
dwilks@wlblaw.com

Allen Dickerson
Zac Morgan
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, VA 22314
(703) 894-6800
adickerson@campaignfreedom.org
zmorgan@campaignfreedom.org

Counsel for Plaintiff

Randolph D. Moss
Jonathan G. Cedarbaum
Weili J. Shaw
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20005
(202) 663-6000

J. Gerald Hebert
Paul S. Ryan
Megan McAllen
THE CAMPAIGN LEGAL CENTER
215 E Street NE
Washington, DC 20002
(202) 736-2200

/s/ Joseph C. Handlon
A. Ann Woolfolk (No. 2642)
Joseph C. Handlon (No. 3952)
DELAWARE DEPARTMENT OF JUSTICE
Carvel State Building, 6th Floor
820 North French Street
Wilmington, Delaware 19801
(302) 577-8400
ann.woolfolk@state.de.us
joseph.handlon@state.de.us