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 Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE THIRD CIRCUIT HAS UPENDED LONGSTANDING LAW GOVERNING THE FREEDOM OF ASSOCIATION, AND HAS CREATED CIRCUIT SPLITS THAT THIS COURT MUST NOW RESOLVE.

1. The Third Circuit has ruled that if a donor gives a trivial amount of money to a charity, and that group, years later, spends a few hundred dollars on informational speech in temporal proximity to an election, the donor forfeits her constitutional right to privacy of association. Respondents ("the State") contend that this outcome accords with this Court's decisions in *McConnell v. FEC*, 540 U.S. 93 (2003) and *Citizens United v. FEC*, 558 U.S. 310 (2010). It does not.

The State notes that this Court has previously upheld many disclosure laws. We agree, as did the district court below. Pet. 14-27 (reviewing this Court's campaign finance precedents), App. 29-47 (same). Merely because this Court has upheld *some* government regulation of speech and association, however, does not mean it has preemptively upheld *all* such rules. *FEC v. Wis. Right to Life, Inc.*, 546 U.S. 410, 411-412 (2006) (*per curiam*) ("In upholding [the Bipartisan Campaign Reform Act] against a facial challenge, we did not purport to resolve future as-applied challenges").

McConnell and *Citizens United* make clear that laws compelling donor disclosure are subject to heightened scrutiny and must be tailored to meet

an important governmental interest. *Citizens United*, 558 U.S. 310, 366-367 (2010); *McConnell*, 540 U.S. 93, 196-197 (2003); *NAACP v. Ala.*, 357 U.S. 449, 464-466 (1958); Pet. 12-13. The Third Circuit applied this "heightened scrutiny" in name only. The court defined the government's interest in a virtually unlimited fashion and, compounding this mistake, failed to conduct a proper tailoring analysis of the cumulative burden the Delaware Elections Disclosure Act ("Act") imposes upon Delaware Strong Families ("DSF"). Pet. 21-23.

2. The State's repeated reassurances that the Act was "modeled" on the Bipartisan Campaign Reform Act ("BCRA"), and "relied on . . . federal experience" add nothing to the argument. Opp. i, 1, 3, 7, 9, 16, 23. Constitutional intentions are not enough: a law must actually *be* constitutional.

The Act is not BCRA and the State's efforts to conflate the two does little justice to Congress's more careful tailoring. The Act forces any group, even § 501(c)(3) charities conducting traditional § 501(c)(3) activity, to disgorge the personal information of all but the most *de minimis* donors to the association, going back four years, if the non-profit mentions the name of a candidate on the Internet.[1] *Buckley v. Valeo*, 424 U.S.

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[1] No fewer than three times in its brief in opposition, the State argues that DSF "forfeited its ability" to challenge the Act's overbreadth in imposing a so-called "look-back" period of four years. Opp. 2, 13, n.2, 32-33. The State's repetitions do not make its statements true. DSF repeatedly challenged the breadth of the

1, 25 (1976) (*per curiam*) ("[T]he invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for financial transactions can reveal much about a person's activities, associations, and beliefs") (punctuation altered, citation omitted).

Although it also regulates a category of speech it calls "electioneering communications," BCRA does *none* of those things. The Act may ape the language of BCRA, but in no way is "comparable" to or "essentially the same" as that law.[2] Opp. 1, 8.

The State's claim that its disclosure regime is a narrow one, because it imposes "one-time, event-driven disclosure," rings hollow. *E.g.*, Opp. 31. Certainly, in some applications, requiring a single report as a condition of speaking might serve to limit the infringement of associational liberty at issue. Perhaps if Delaware

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election period in district court as part of its challenge to the totality of the burdens imposed against Petitioner by the law. *E.g.*, D. Ct. Dkt. 1 (Verified Complaint) at 7-9, ¶¶ 42-45, 49; D. Ct. Dkt. 23 (1st Br. in Supp. of Mot. for Prelim. Inj.) at 15; *see also infra* at 12-13.

[2] The State's suggestion that it must regulate the Internet or compel four years' of donors from small entities because it must "fit the circumstances of state and local elections in a very small State" would be laughable if it were not so risible. Opp. 29.

In any event, many of the State's references to the record below, *e.g.*, Opp. 9 (asserting percentage of spending in Delaware elections consisting of direct mail), come from papers appended to the State's opposition brief in district court, and do not constitute a fully considered record such as that relied upon by this Court in *McConnell v. FEC*.

merely required, as federal law does, the reporting of earmarked contributions, this would be true. By requiring such wide-ranging disclosure, Delaware has vitiated any constitutional savings that "event-driven" reporting might offer.

To ensure compliance with the Act at some nebulous point in the future, any entity, even the most informally structured groups, must adhere to strict recordkeeping requirements – even tracking the source and amount of cash contributions received from "garage sales, bake sales . . . raffles" and the like – to ensure compliance. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986). Moreover, once a group is forced to file its disclosures with the State – signed by some officer of the group under penalty of perjury[3] – the association must keep these "complete records" of expenditures and contributions on hand for possible inspection for the next three years – a burden also shared by Delaware PACs. 15 Del. Code Ann., tit. 15 §§ 8031(a), (f), 8005(3).

At the end of the day, making an "electioneering communication" opens up a charitable or educational group's comprehensive donor and membership lists to state and public scrutiny. This may be "event-driven," but it is decidedly not "far more modest" than approaches taken by other states to regulate campaign finance. Opp. 2 (citation and quotation

[3] The State's belief that its law does not require groups to, as PACs must, appoint a treasurer, is only true in a very technical sense. Opp. 14, n.4.

marks omitted), Pet. 17, n.2 (collecting state electioneering communications statutes which impose earmarking requirements, and exempt § 501(c)(3) organizations or voter guides).

Cracking Petitioner open and publicizing this information will do little or nothing to advance the informational interest in "help[ing] voters to define more of the candidates' constituencies," particularly given that DSF's IRS-compliant voter guide lists all candidates equally and reports candidates' own characterizations of their views on fifteen different issues. *Buckley*, 424 U.S. at 81.[4]

If a government may do so, however, then the State's ability to squeeze information about *any* organization engaged in speaking about government, partisan or nonpartisan, is functionally limitless, and the freedom of association recognized by this Court in *NAACP v. Alabama* will become merely vestigial.

That outcome has never been blessed by any other court in the Nation, and has been affirmatively blocked in other circuits.

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[4] The State spends considerable time alerting the Court to the fact that DSF's sister organization, a § 501(c)(4), produces scorecards that electioneer, but that DSF's voter guide removes all indicia of electioneering. Opp. 10-11. That is actually Petitioner's point. In any event, Petitioner's counsel are not counsel for the § 501(c)(4), and the § 501(c)(4) is not challenging the application of the Act to any voter scorecard it may produce in the future.

3. The State counsels against granting the writ, claiming that the divisions Petitioner identified among the circuit courts of appeals are "manufacture[d] disagreement." Opp. 18. These disagreements, however, were "manufactured" by the Third Circuit, not Petitioner.

Forty years ago, the *en banc* D.C. Circuit unanimously struck a law that compelled organizations to publicize their donor lists if they "set[ ] forth [a] candidate's position on any public issue." *Buckley v. Valeo*, 519 F.2d 821, 869 (D.C. Cir. 1975) (quoting Federal Election Campaign Act ("FECA"), § 437a). Section 437a, like the Act, intended to "apply indiscriminately and . . . bring under the disclosure provisions many groups, including liberal, labor, environmental, business[,] and conservative organizations." *Buckley*, 519 F.2d at 877 (internal citation and quotation marks omitted).

Undaunted, the State argues there is no circuit split, because the *Buckley* decision is old. Opp. 15. The age of that opinion counsels in favor of granting *certiorari*, not against it. The Third Circuit's dissent from four decades of respected precedent indicates how radically its holding departs from the settled understanding of associational privacy. Neither this Court, nor any federal appellate court, has ever suggested, as the State does now, that *Citizens United*, *McConnell*, or any other decision has vitiated that portion of *Buckley*.

The State claims that the D.C. Circuit struck § 437a because "the provision was unconstitutionally *vague*, not unconstitutionally *burdensome*." Opp. 15

(emphasis in original). This is false. *Buckley*, 424 U.S. at 11, n.7 ("The [circuit] court held one provision, § 437a, unconstitutionally vague *and overbroad* on the ground that the provision is 'susceptible to a reading necessitating reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance'") (quoting *Buckley*, 519 F.2d at 832) (emphasis supplied).

The State's insistence that the Act has solved any vagueness concerns by expressly drawing an overbroad statute only trades the frying pan for the fire. *Buckley*, 519 F.2d at 874 ("[I]n the First Amendment area . . . statutory vagueness and statutory overbreadth are constitutional vices often related and sometimes functionally inseparable"). In an attempt to solve the vagueness problem, the state has exacerbated the overbreadth problem recognized by *Buckley*.

The State's other remaining "distinctions" between § 437a and the Act are remarkably superficial, and are already addressed at some length in the Petition. Pet. 30-33 ("The differences between the Act and FECA § 437a cut against the constitutionality of Delaware's law . . . had it been upheld [FECA's § 437a] would have demanded *far less* donor disclosure than the Act") (emphasis supplied), *id*. at 31-32, nn.9-10. The mere recitation of these differences is unavailing.

The D.C. Circuit grounded its opinion in *Buckley* on a condition that the Third Circuit ignored, namely that "[t]he Supreme Court has indicated quite plainly

that groups seeking only to advance discussion of public issues or to influence public opinion cannot be equated to groups whose relation to the political process is direct and intimate." *Buckley*, 519 F.2d at 873. Pursuant to that reasoning, the *Buckley* court considered the burdens § 437a imposed on civil society groups.

From legislative history, the court determined that Congress knew the law would work to reveal "the source of . . . income" of Common Cause, a group that often reported the voting records of members. *Id*. at 877, n.140 (citation omitted). Likewise, the New York Civil Liberties Union would find itself exposed for distributing "the civil liberties voting records, positions and actions of . . . candidates for federal office." *Id*. at 871. Judge Tamm, concurring, feared that the burdens of disclosure "would be placed on a Right-to-Life group who places a newspaper advertisement calling for the election of all candidates who support an anti-abortion constitutional amendment." *Id*. at 914 (Tamm, J., concurring); *cf. Mass. Citizens for Life*, 479 U.S. at 265.

Nowhere did the D.C. Circuit indicate that it believed the First Amendment's application would change if, as a condition of its speech, the New York Civil Liberties Union were required to file a single report containing four years' of its donors' home addresses rather than periodic reporting over that same time period. The act of disclosure – not the frequency at which information was disclosed – was the D.C. Circuit's chief concern.

With that concern paramount, the D.C. Circuit conclusively blocked "reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance." *Buckley*, 519 F.2d at 832. This holding would have applied had Petitioner challenged, in the D.C. Circuit, a federal law as overbroad as the Act. *See* Pet. 18 (at time of review in *McConnell v. FEC*, BCRA did not regulate § 501(c)(3) communications).

Nonetheless, the State suggests that this Court's subsequent opinions in *McConnell* and *Citizens United* supersede *Buckley*.[5] The State does so merely through a talismanic assertion of the informational interest. But the informational interest only extends to information which provides information about a candidate's financial constituencies. Pet. 15-16.

Moreover, the D.C. Circuit's recent opinion in *Van Hollen* demonstrates that court's ongoing defense of associational privacy. *Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016).

The writ ought to issue to resolve the split between the District of Columbia and Third Circuits, which augurs a dangerous discrepancy in the First Amendment's application to campaign finance regimes at the federal level and in the states. Pet. 27-36.

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[5] The State can point to no intervening case from the D.C. Circuit shrinking the application of *Buckley*'s holding because there is none.

4. The State's protestations against the Third Circuit's conflicts with the Seventh and Tenth Circuits are similarly unavailing.

The State argues that Petitioner misrepresented the Tenth Circuit's opinion in *Independence Institute v. Williams*, 812 F.3d 787 (10th Cir. 2016). The Tenth Circuit upheld an electioneering communications statute, as applied to a broadcast communication, which only necessitated the disclosure of contributions earmarked for that speech. In doing so, the Tenth Circuit stated that "it is *important* to remember that the [organization] need only disclose those donors who have *specifically earmarked* their contributions for electioneering purposes." *Indep. Inst.*, 812 F.3d at 797 (emphasis supplied).

Rather than rely on this basic language, the State suggests that the Tenth Circuit immediately retracted this statement in a footnote on the same page of the opinion. That footnote says that the Secretary of State believed that the earmarking limitation was demanded by "language in the Colorado Constitution itself." *Id*. at n.12. Regardless of the *source* of that limitation, it was considered "important" by the Tenth Circuit in determining whether Colorado's electioneering communications regime was overly burdensome – the precise question presented here. *Id*. at 797. By contrast, in the Third Circuit, whether donor disclosure is limited to contributions for regulated speech is irrelevant. App. 21 ("Our analysis does not change simply because an earmarking limitation would result in a

more narrowly tailored statute"). *Certiorari* should issue to resolve this split.

In *Coalition for Secular Government v. Williams*, 815 F.3d 1267 (10th Cir. 2016), the Tenth Circuit applied exacting scrutiny to compare the state's interest against the cumulative burdens of reporting. 815 F.3d at 1278-1279. This contrasts fundamentally with the Third Circuit's "weigh the spokes, but not the wheel" approach. Under its analysis, the Tenth Circuit ruled that Colorado's issue committee law unconstitutionally burdened a pro-choice group raising and spending less than $3,500. *Id*. at 1278. Colorado's reporting requirements are substantively similar to the Act's, mandating tracking of contributions as small as $25 (Delaware) and $20 (Colorado) and demanding donors' names and addresses. Pet. 37-38. Contrary to Delaware's assertion, the Tenth Circuit's holistic tailoring analysis in *Coalition for Secular Government* offers similarly-situated speakers more robust First Amendment protection than the Third Circuit's approach.

The State also errs in its reading of *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). The State relies on *Barland* in its own brief in opposition to support its position that "one-time, event-driven" disclosure regimes are instantly constitutional. Opp. 2. The State willfully ignores *Barland*'s refusal to extend *Citizens United* beyond "the specifics of the disclosure requirement at issue there." *Barland*, 751 F.3d at 836. Furthermore, the *Barland* Court believed that *Citizens United*'s "relaxing [of] the express-advocacy

limitation" was dicta, which, if true, obviously counsels in favor of granting the writ. *Id.*; Pet. 39-40.

5. In a last-ditch effort to avoid the plain injustice of the Third Circuit's ruling, the State suggests that Petitioner has waived any review of the Act's patently-excessive four-year look-back provision. This assertion has always been false.

Not only did Petitioner reference that portion of the Act in paragraphs 42-45 and 49 of the Verified Complaint, in its first brief in support of a preliminary injunction it contrasted the Delaware reporting period with the calendar year approach taken in a federal law struck, as applied to a group distributing voter guides, by this Court. D. Ct. Dkt. 1 (Verified Complaint) at 7-9, ¶¶ 42-45, 49; D. Ct. Dkt. 23 at 15. Again, in its second brief in support of a preliminary injunction, Petitioner referenced the relevant statutory provision and noted the minimum sum to be reported over the election period. D. Ct. Dkt. 28 (2d Br. in Supp. of Mot. for Prelim. Inj.) at 13. And in granting that injunction, the district court specifically referenced the "election period" as among the burdens imposed by the Act. App. 27, 57-58, n.24.

The Third Circuit's error was to treat the length of the look-back period as a separate constitutional harm, whereas Petitioner – and the district court below – has always argued that the *totality* of the law imposed unconstitutional burdens, of which the "election period" provision is but one. App. 57 ("[T]he relation between

the personal information collected to the primary purpose of the Act is too tenuous to pass constitutional muster").

In any event, when a party properly claims that a statute will "violate its First Amendment right[s] . . . 'a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Citizens United*, 558 U.S. at 331 (quoting *Lebron v. Nat'l R.R. Passenger Co.*, 513 U.S. 374, 379 (1995)).

CONCLUSION

As the D.C. Circuit observed just this year, "the Supreme Court's campaign finance jurisprudence subsists, for now, on a fragile arrangement that treats speech, a constitutional right, and transparency, an extra-constitutional value, as equivalents." *Van Hollen*, 811 F.3d at 501. The State is correct that – because *Van Hollen* was an administrative law case – the D.C. Circuit "forestall[ed]" the answer to that question to some

other time. *Id*. Now, however, is that time, and the writ ought to issue.

Dated: May 27, 2016

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