IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELAWARE STRONG FAMILIES, a Delaware nonprofit corporation, Plaintiff, v. JOSEPH R. BIDEN, III, and EILEEN MANLOVE, Defendants.	)	No.1:13-cv-01746-SLR

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF ITS
MOTION FOR PROTECTIVE ORDER

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THE NATURE OF THE PROCEEDINGS

On January 7, 2014, pursuant to the Joint Stipulation filed with this Court, Attorney General Joseph R. Biden, III and State Commissioner of Elections Elaine Manlove ("Defendants") served Plaintiff with seven Requests for Production of Documents, eight Interrogatories and three Requests for Admission (collectively, the "Requests"). Consistent with Local Rule 37.1, the Requests and Plaintiff's objections thereto are attached as Exhibit A.

The Requests seek information about the internal workings of Delaware Strong Families ("DSF") that are not germane to this litigation, will be burdensome to produce, are likely to chill future First Amendment challenges to Delaware laws and threaten to delay the resolution of this case. After meeting and conferring with the State's counsel pursuant to Local Rule 7.1.1 and Fed R. Civ. P. 26(c)(1) on December 9, 12, and 21, 2013, and January 14, 2014, the parties have been unable to agree on the scope of proposed discovery. Accordingly, DSF respectfully moves this Court for a protective order pursuant to Fed. R. Civ. P. 26(c). Concurrently with this motion, DSF has also filed a motion for preliminary injunction in recognition of DSF's strong probability of prevailing in this litigation once the parties' discovery dispute is resolved.

SUMMARY OF THE ARGUMENT

1. The district courts have the authority to limit discovery to only those requests which are non-burdensome and reasonably calculated to lead to the discovery of admissible evidence. Further, pursuant to *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007), courts must tread carefully in granting expansive discovery in First Amendment political speech and association cases, lest broad or invasive discovery deter future plaintiffs' efforts to vindicate their constitutional rights.

2. DSF's Verified Complaint contains all information necessary to the resolution of this case. Nevertheless, Plaintiff will comply with a limited number of the Defendants' requests.

3. Defendants' remaining requests are irrelevant and/or burdensome as they seek information with an expansive temporal scope, seek certain information regarding DSF's contributors and request communications regarding DSF's solicitations.

STATEMENT OF FACTS

All relevant facts can be found in Plaintiff's Opening Brief in Support of its Motion for Preliminary Injunction, filed contemporaneously with this Motion.

ARGUMENT

I. The Court has broad authority to grant a protective order when a party shows good cause that proposed discovery is irrelevant to resolving a First Amendment challenge to a statute.

It is axiomatic that a party is only permitted to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." and then only where "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Pacitti by Pacitti v. Macy's*, 193 F.3d 766, 777 (3d Cir. 1999) (quoting Fed. R. Civ. P. 26(b)(1)). Thus, "Rule 26 confers broad discretion" upon the district courts "to control the combination of interrogatories, requests for admissions, [and] production requests...permitted in a given case." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 595 n. 13 (2007).

"Rule 26(c) grants federal judges the discretion to issue protective orders that impose restrictions on the extent and manner of discovery where necessary 'to protect a party or person from...undue burden or expense.'" *Pearson v. Miller*, 211 F.3d 57, 65 (3d Cir. 2000) (quoting Fed. R. Civ. P. 26(c)). "Such an order is...appropriate, however, where the party seeking the

order 'show[s] good cause by demonstrating a particular need for protection.'" *Pearson*, 211 F.3d at 72 (quoting *Cippollone v. Liggett Group, Inc.*, 785 F.2d 1101, 1121 (3d Cir. 1986)). In conducting such an analysis, the Court may determine, *inter alia*, "whether sharing of the information among litigants would promote fairness and efficiency," "whether the information is being sought for a legitimate purpose," and "the interest in privacy of the party seeking protection." *Crum & Crum Enters. v. NDC of Cal., LP*, 2011 U.S. Dist. LEXIS 24690, 5-6 (D. Del. 2011); *Pansy v. Borough of Stroundsburg*, 23 F. 3d 772, 786-788 (3d Cir. 1994). However, such factors are "neither mandatory nor exclusive." *Glenmede Trust v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995); *Pansy*, 23 F.3d at 786-788. Indeed, "'[t]he frequency or extent of use of discovery methods otherwise permitted...shall be limited by the court if it determines that... the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.'" *Crawford-El v. Britton*, 523 U.S. 574, 599 (1998) (quoting Fed. R. Civ. P. 26(b)(2)).

In particular, courts must tread carefully in allowing discovery in cases "at the heart of the First Amendment...[which] 'has its fullest and most urgent application to speech uttered during a campaign for political office.'" *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2353 (2011) (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989)). In order "[t]o safeguard this liberty," the U.S. Supreme Court has stated that a First Amendment challenge to a statute regulating political speech and association "must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." *FEC v. Wisc. Right to Life*, 551 U.S. 449, 469 (2007) ("*WRTL II*") (controlling opinion of Roberts, C.J.). Consequently, discovery must be

limited not only to such information as would fall within the federal rules in their routine application, but also must reflect the judiciary's sensitivity to the deterrent effect broad or invasive discovery may have on future constitutional litigation.

II. Given the breadth of the statute in controversy, DSF has already demonstrated that its proposed activities will trigger Delaware's broad new regulation of public issue speech.

The challenged provisions of the Delaware Elections Disclosure Act (the "Act") are expansively written and, by design, cover speech which does not advocate for or against a candidate. Andrew Lippstone, Counsel for the Governor, has publicly stated that DSF's voter guide, as attached as Exhibit A to the Verified Complaint, is precisely the sort of communication that the statute was intended to regulate. O'Sullivan, Sean and Starkey, John, Conservative Group Files Suit Over Delaware Donor Disclosure Law, THE NEWS-JOURNAL (Oct. 24, 2013), *available at*: http://www.delawareonline.com/article/20131025/NEWS/310250029/Conservative-group-files-suit-over-Delaware-donor-disclosure-law?nclick_check=1. Mr. Lippstone was able to reach this position without knowing the intimacies of DSF's internal organization or practices—and for good reason: the statute renders such information irrelevant.

Delaware pointedly did not choose to enact a law with safe harbors for certain entities, nor has the Commissioner promulgated such safe harbors via regulation. Delaware's law does not discriminate among organizations on the basis of tax status, fundraising practices, relationships with affiliates, the percentage of funds spent on electioneering communications or activities conducted four years ago. Thus, discovery requests keyed to those issues are not relevant to analyzing the Act's constitutionality.

Triggering regulation under the Act is straightforward. If an entity is not a candidate committee or a political party, it runs afoul of the electioneering communication statute when, 60

days before a general election, it 1) spends more than $500 on a communication, 2) which is distributed through certain channels, such as the Internet or the U.S. mails, and 3) names any candidate running for office. 15 *Del. C.* §§ 8002(7), 8002(10); §8002(27); 8031 (2013).

The first trigger, that DSF plans to spend more than $500 on the voter guide in 2014, cannot be seriously disputed, although DSF will provide Defendants with information verifying that the cost of producing the 2012 guide was greatly in excess of $500. The second trigger, the future method of distribution, has been affirmed by the organization's president under penalty of perjury by verifying the Verified Complaint. The third trigger, that the communication name a candidate for office, is clear from the face of the Verified Complaint itself, which incorporates the 2012 voter guide as Exhibit A and asserts the precise process DSF plans to use in developing its 2014 guide.

Once it has been established that DSF's voter guide will trigger the statute, this case presents pure questions of law, as explained in Plaintiff's accompanying Motion for a Preliminary Injunction. Nevertheless, DSF will provide Defendants with certain information as reflected in its attached response.

III. The State's remaining discovery requests are irrelevant and impose burdens upon DSF.

DSF objects to the remaining requests and interrogatories, insofar as they are irrelevant and complying with them will impose a "burden or expense...[which will] outweigh[their] likely benefit." Fed. R. Civ. P. 26(b)(C)(iii). None of the remaining information Defendants request has any probative value and it is unlikely to lead to any further evidence that could assist in marshalling a defense. Rather, "taking into account the needs of the case," including the mandate that First Amendment political speech challenges must involve minimal discovery, the

Requests impose an "undue burden" upon Delaware Strong, necessitating this "mo[tion] for a protective order." Fed. R. Civ. P. 26.

While doubtless advanced in good faith, the Requests in many ways reflect Defendants' fundamental misunderstanding of this case. The information they seek—data on contributors, solicitations, other activities, and the like—would be relevant if Plaintiff were challenging Delaware's laws governing political committee status. But Plaintiff is not a political committee; indeed, as a 501(c)(3) organization, it is prohibited by federal law from advocating for or against candidates. 26 U.S.C. § 501(c) (2013).

The acme of Plaintiff's challenge is this: Delaware has imposed the *burdens* of PAC status (registration, reporting, and the disclosure of all donors) without providing the constitutionally-required *protections* of PAC status (including the limitation of that status to organizations having the major purpose of expressly advocating the election or defeat of clearly-defined candidates). Discovery requests that mirror PAC burdens merely compound both Defendants' misunderstanding and Plaintiff's injury.

Interrogatory 1 underscores Defendants' error. *Buckley v. Valeo,* which articulated the limits on *non-PAC* disclosure Plaintiff relies upon in this case, also included a minor exception from generalized *PAC* disclosure for minor political parties. Such parties need not disclose their donors if they can show a "'reasonable probability' that [] compelled disclosure will subject those identified to 'threats, harassment, or reprisals.'" *Brown v. Socialist Workers '74 Campaign Comm.,* 459 U.S. 87, 88 (1982) (quoting *Buckley v. Valeo,* 424 U.S. 1, 74 (1976)). This "threats, harassment, or reprisals" standard is the same one under which Defendants request discovery. But the *Socialist Workers* exemption applies to minor political parties—that is, PACs of a

particular kind—which Plaintiff plainly is not. Plaintiff relies upon *Buckley's* central holdings, not a seldom-used and irrelevant exception.

With the foregoing in mind, DSF's objections to the State's requests can be categorized into three classes: an irrelevant and burdensome expansion of the temporal scope of discovery, irrelevant information about DSF's contributors, and an irrelevant, burdensome, and an invasive request that DSF examine, redact, and provide its electronic communications.

A. Expansive temporal scope of discovery.

Document Requests 2, 3, and 7 as well as Interrogatories 2, 3, 5, 7, and 8 seek to obtain information related to DSF's activities from 2010 to the present. But DSF's past activities, and certainly its activities prior to 2012, are not at issue here. DSF has presented Defendants and this Court with a communication that was unregulated in 2012, and would remain unregulated but for the passage of the Act.

For example, Document Request 2 seeks "[a]ll publicly distributed versions of any voter guides or similar materials prepared, funded, or distributed in whole or in part by DSF or its predecessor organizations on or after January 1, 2010." Document Request 3 similarly seeks "all documents and communications on or after January 1, 2010 that solicit contributions to DSF."

It is unclear how any of this is relevant. DSF has offered its 2012 communication as a demonstration of what it plans to do in 2014, and has precisely stated how it plans to assemble and distribute a nearly identical document. This is a case about DSF's proposed activities in the future, during this year's election season. DSF's past activities are not at issue, nor are they helpful in determining whether DSF's future activities will run afoul of the Act. Indeed, past events are especially irrelevant as DSF may very well have acted differently in the past had the Act been in place, just as it will not distribute its voter guide now absent this Court's

intervention. Furthermore, for an organization of DSF's size and manpower, digging through four years of communications and documents—all to provide information that has no bearing on the case at hand—is unduly burdensome.

Relatedly, Interrogatory 5, which seeks information on how all past guides were "publicly distributed" within the meaning of 15 *Del. C.* § 8002(21), poses an excessive burden on Plaintiff, even if limited to the 2012 guide. DSF will provide information as to how the 2012 guide was publicly distributed through "communications media"—the standard by which a communication becomes a regulable "electioneering communication" under the Act. 15 *Del. C.* § 8002(10). The extent to which the 2012 guide was distributed through other means to persons or places is obviously irrelevant to this case—such activity falls beyond the ambit of the statute. Furthermore, forcing DSF to look backward and account for every such distribution—and the approximate size of the group affected by such distribution—would impose a plainly excessive burden on the organization since, even today, such distributions are entirely unregulated.

B. Internal information on contributors.

Interrogatories 2, 3, 4, and 7 and Document Request 7 request information regarding the particularities of DSF's contributors and funding. These can plainly have no bearing on DSF's facial challenge. As for DSF's as-applied challenge, this litigation is premised upon the belief that the State may not compel any donor disclosure given the specific communication DSF intends to make in 2014. The number of persons funding DSF, for example, has no bearing on whether or not DSF must reveal the names and addresses of those contributors because it publishes and distributes a voter guide.

Document Request 7, which seeks "[a]ny documents or communications...that contain, describe, or reflect any request by a contributor to DSF that the contributor's identity, contact

information, and/or other information about their contribution be kept confidential" is particularly troublesome. Until passage of the Act, the state of the law was simple—contributions to 501(c)(3) organizations were not publicly disclosed. Now, because of the Act, contributors giving over $100 to a 501(c)(3) that produces a nonpartisan, neutral voter guide will be publicly disclosed. Whether contributors have expressed a desire to remain undisclosed is irrelevant to whether or not the State may constitutionally compel such disclosure. Moreover, the absence of any such evidence, even if relevant, would not be evidence of the absence of such concerns, given that federal law keeps the contributors to 501(c)(3) organizations confidential. DSF's contributors thus had a well-founded reason to believe they would remain anonymous. The State, not DSF, has upset the status quo. Defendants should not now be permitted to invade DSF's privacy, especially where doing so will have no bearing on the outcome of this litigation.

C. Communications regarding DSF's solicitations.

Document Request 3 deals with DSF's fundraising practices, which are not at issue in this case. The State has asked for communications regarding DSF's solicitations. But the meaning of the challenged statute—which merely requires that a communication mention a candidate and cost over $500, and which further requires the disclosure of all donors however solicited—does not turn on such information. Either Delaware may require the disclosure required by the Act for the activities covered by the Act, or it may not. DSF's fundraising methods and communications with its donors have no bearing on the question and will not assist Defendants in preparing a defense. Moreover, requesting the communications of an organization challenging the government is inherently invasive. This is particularly the case here, where it is unlikely to produce any admissible evidence.

CONCLUSION

DSF will comply with Defendants' legitimate and non-burdensome discovery requests. Further discovery threatens to delay the resolution of this case past July 1, 2014—the date by which DSF must begin creating its voter guide. Complaint at ¶34. Having demonstrated that it will comply with the "minimal...discovery" necessary to demonstrate that it has standing to challenge the statute, DSF now asks this Court to "take into account the needs of this case," eliminate "the threat of burdensome litigation" imposed by Defendants' remaining requests, and grant the motion for a protective order. *WRTL II*, 551 U.S. at 469. Thus, Plaintiff respectfully requests that this Court provide relief in a matter consistent with its objections to Defendants' discovery requests as listed in Exhibit A.

Respectfully submitted this 14th day of January, 2013.

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