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 U.S. Court of Appeals for the Third Circuit

BRIEF OF THE CATO INSTITUTE AND INSTITUTE FOR JUSTICE AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

If someone gives $25 each year for four years to a small educational nonprofit that publishes a voter guide that lists all candidates' positions on particular issues, does "the public" need to know the name and address of that donor in order to cast an informed vote, form qualified opinions, or do anything useful such that this "informational interest" overrides the donor's right to speak and donate anonymously?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute ("Cato") is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case concerns Cato because private association is an essential right that must be protected against governmental intrusion. Indeed, the Cato Institute is named for the anonymously written *Cato's Letters*.

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and restoring constitutional limits on government power. As part of that mission, IJ litigates free-speech cases to defend the free exchange of a wide array of ideas, including speech about political issues. IJ exists due to the generosity of its donors, some of whom expect it to protect their privacy from unnecessary disclosure.

Amici file this brief because the case offers an important opportunity for the Court to clarify that all government burdens on peaceful speech and association—including those imposed by campaign-finance laws—must be subject to meaningful judicial review.

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[1] Rule 37 statement: All parties were given timely notice of intent to file this brief; letters from all parties' counsel consenting to its filing have been submitted to the Clerk. Further, no part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

This case is about a small, young nonprofit's suffering collateral damage from the frenetic attack on "dark money." Whatever that ominous term means, it should not include Delaware Strong Families (DSF), which spends no money on political advocacy but instead educates to "rebuild a culture of marriage, family, and freedom." DSF, www.delawarestrong.org. In trying to make "dark" money less opaque, Delaware does not have to legislate with absolute precision. But neither can it take a sledgehammer to political speech—or perhaps as a better metaphor, due to a blast zone encompassing innocuous activities and fallout affecting the First Amendment, an atomic bomb—in the name of "voter information."

DSF sought to vindicate its donors' constitutional rights to speak and associate anonymously. Instead, the Third Circuit rubber-stamped Delaware's disclosure law without meaningful scrutiny. Similar things are happening all over the country and, if laws like this one are allowed to glide through the courts, many more nonprofits will find themselves not only threatened, but chilled to the point of dissolution.

When the search for "dark money" includes the mandated disclosure of names and addresses of people who donate $25 for each of four years—this bears repeating: **twenty-five dollars a year**—then that search has jumped the constitutional shark. Delaware's law will certainly not be the furthest point in the frenzy to expose "dark money," so one wonders how low the contribution limit must go and how much non-electoral speech will be regulated before this Court steps in to clarify that the right to anonymous speech and association is judicially enforceable.

REASONS FOR GRANTING THE WRIT

I. AS THE RIGHT TO SPEAK AND DONATE ANONYMOUSLY COMES UNDER GREATER ATTACK, FEDERAL COURTS RUBBER-STAMP DISCLOSURE LAWS

Campaign-finance regulations are growing in number and beginning to encroach into non-election related speech. In addition to the heated rhetoric around this policy area, there is evidence that at least some of these laws are intended to chill constitutionally protected speech. Certiorari is warranted based on these facts alone, not to mention the Court's precedents for meaningfully scrutinizing suspicious and pretextual government activities.

A. As Campaign-Finance Restrictions Grow, Courts Too Often Let These Laws Escape Meaningful Scrutiny

This Court has held that disclosure can "be justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." *Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)). The Court has not held, however, that *all* disclosure laws are thus constitutional. Yet in many circuits, that has become the *de facto* law. Pet. at 35.

Over the past few years, many states have enacted campaign-finance laws—which usually also include, *inter alia*, committee-registration requirements, reporting mandates, and organizational-structure rules—that go far beyond federal requirements. States need not mirror the federal government's election laws, of course, but neither can they

brazenly regulate the paltriest political activities as if they were SuperPAC attack ads. Yet such broad laws are being upheld by the lower courts without any real scrutiny into whether the law reasonably advances the "government's informational interest" rather than unnecessarily burdening constitutionally protected speech. Delaware's law is the most expansive, but other states have come close. Pet. at 35.

In 2013, for example, Nevada expanded the definition of a "committee for political action":

> **Any business or social organization**, corporation, partnership, association, trust, unincorporated organization or labor union . . . Which **does not have as its primary purpose affecting the outcome of any primary election**, general election, special election or any question on the ballot, but for the purpose of **affecting the outcome of any election** or question on the ballot receives contributions in excess of $5,000 in a calendar year or makes expenditures in excess of $5,000 in a calendar year.

Nev. Rev. Stat. Ann. § 294A.0055 (emphases added). This definition sweeps in 501(c)(3)s. Any nonprofit that supports a ballot measure would be subject to regulation, as would any (c)(3) that, like DSF, publishes a voting guide to "affect[] the outcome of any election." The definition also does away with the "major purpose test." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). Laws like Nevada's go beyond any regulation of "political activity" that this Court has upheld and seriously endanger the thriving system of charitable giving that is quintessentially American. See *infra* Part II.

Hawaii has imposed PAC status on organizations engaging in limited political speech that does not advocate for or against any candidate. Haw. Rev. Stat. 11-302. The state recently required PAC registration for a for-profit company that wanted to run three newspaper advertisements describing how "we have representatives who do not listen to the people" and arguing that some named representatives were "intent on the destruction of the family." *Yamada v. Snipes*, 786 F.3d 1182, 1185-86 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 569 (2015). The company was required to appoint PAC officers, register with the state within 10 days of speaking, and abide by a number of regulatory requirements—including providing identifying information of anyone who contributed more than $100 to the group since the last election, whether or not those contributions funded any involvement in electoral politics. Haw. Rev. Stat. 11-323(a)(12).

The Ninth Circuit upheld Hawaii's law in an opinion that erroneously combined certain parts of *Buckley* (upholding PAC status for groups predominantly engaged in express advocacy) and *Citizens United* (allowing limited reporting requirements for speech about a candidate and close to an election). As the *Buckley* Court was aware, not all disclosure and registration rules are created equal; any requirement must be tailored to leave a substantial amount of non-electoral political speech unregulated. *Buckley*, 424 U.S. at 79 ("The general requirement that 'political committees' and candidates disclose their expenditures could raise similar vagueness problems, for 'political committee' . . . could be interpreted to reach groups engaged *purely in issue discussion*. . . . To fulfill the purposes of the Act *they need only encompass organizations that are under the control of a candi-*

date or the major purpose of which is the nomination or election of a candidate.") (emphasis added).

When it comes to independent speech, this Court has approved only limited disclosures that are directly related to that speech, *Citizens United*, 558 U.S. at 366. The Ninth Circuit ignored this rule in favor of requirements that do not have "a substantial relation between the disclosure requirement and a sufficiently important government interest." *Id.* at 366-67 (quotations omitted). In so doing, the court joined other circuit courts that have found *Buckley*'s admonition for narrowly tailored rules, *Buckley*, 424 U.S. at 41 n.48 ("First Amendment freedoms need breathing space to survive, [and so] government may regulate in the area only with narrow specificity"), to be somehow superseded by *Citizens United*'s endorsement of disclosure requirements in limited contexts.

The Third Circuit has now joined that trend. DSF is not under the control of a candidate, nor is its major purpose the nomination or election of a candidate. Nevertheless, it faces invasive disclosure mandates under a thoroughly novel definition of "issue advocacy"—"communications that seek to impact voter choice by focusing on specific issues," *Del. Strong Families v. AG of Del.*, 793 F.3d 304, 308 (3d Cir. 2015). Such a formulation resembles the standard that *Buckley* overturned—"'for the purpose of . . . influencing' an election," 424 U.S. at 79. The Third Circuit also used a generalized, overarching definition of the government's "informational interest" that looks at "information" as a whole rather than specifically—namely, the identities of $25-per-year donors and the like. If the government's interest in "information" equally encompasses both billion-dollar checks and

$25 checks then the "end" of the "means-end" test has become a bulldozer that will plough through any attempt at the tailoring that *Buckley* and its progeny demand. *See, e.g., Citizens United*, 558 U.S. at 367 ("[disclosure is] justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending.").

Moreover, some state attorneys general have entered into the business of forcing disclosure from nonprofits that do not engage in *any* political advocacy or electoral speech. California's Kamala Harris demanded unredacted 990 Schedule B forms from 501(c)(3)s operating in her state, thus gaining access to the names of all donors who gave more than $5,000 in the previous year. *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1310-11 (9th Cir. 2015). *But cf. Americans for Prosperity Found. v. Harris*, 2016 U.S. Dist. LEXIS 53679, *19 (C.D. Cal. Apr. 21, 2016) ("AFP has suffered irreparable harm. The Attorney General's requirement that AFP submit its Schedule B chills the exercise of its donors' First Amendment freedoms to speak anonymously and to engage in expressive association."). New York's Eric Schneiderman has demanded similar disclosures, yet—unlike in California—those disclosures are purportedly related to actual electioneering. Press Release, A.G. Schneiderman Adopts New Disclosure Requirements for Nonprofits that Engage in Electioneering, (June 5, 2013), http://goo.gl/0f6XQM.

Too many circuits have treated *Citizens United*'s basic validation of disclosure as a sweeping affirmation of any disclosure regime. *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132 n.12 (2d Cir. 2014); *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1251-

52 (11th Cir. 2013); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 591 n.1 (8th Cir. 2013); *Ctr. for Individual Freedom v. Tennant*, 706 F.3d 270, 290 (4th Cir. 2013); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 57-58 (1st Cir. 2013); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1008-10 (9th Cir. 2010). While some courts have applied meaningful scrutiny to disclosure and registration requirements, most have not. Pet. at 36-41.

The Court in *Citizens United*, while upholding some disclosure and registration requirements, was fully aware of the dangers of such rules:

> The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application."

558 U.S. at 328 (2010) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

The trend is clear and growing: whether through novel laws that sweep in more "political" activity than contemplated by any of this Court's precedents or state officials' deciding to take it upon themselves to "clean up politics," there are more and more disclosure and registration requirements that burden core First Amendment speech.

B. Pretextual Motivations Spur Many Campaign-Finance Laws

There is a movement against "money in politics," however idiosyncratically defined. For many, the fact that an organization spends money to advocate certain political reforms is *per se* suspect, regardless whether the organization is a 501(c)(3), (c)(4), or something else. Thus, in the face of fire-brand rhetoric and real-world instances of intentional and deliberate speech-suppression, *see* Trevor Burrus, *Terrifying Senate Democrats Vote to Give Political Speech Less Protection than Pornography*, Forbes.com, Sept. 11, 2014, http://goo.gl/EQ4Blz, it is not unreasonable to question the motives behind many disclosure laws.

Some politicians have sought to work around *Citizens United* through onerous disclosure and registration requirements. Sometimes the purpose is simply to provide more transparency for the electorate. But often, the goal is far more suspect, namely to dissuade political speech and participation.

Debate on the Bipartisan Campaign Reform Act revealed just this censorious motive. "If you demand full disclosure for those that pay for those ads, you're going to see lots less of [such advertising]," said Senator John McCain. 147 Cong. Rec. S3116 (Mar. 29, 2001). A similar statement came during an earlier proposal by Senator Olympia Snowe: "Under my bill, the law would be changed in such a way to include these types of ads under hard money limits and disclosure requirements. This would help limit the attack ads." 143 Cong. Rec. S8581 (July 31, 1997).[2]

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[2] Note that both McCain and Snowe are Republicans; the desire to control and restrict political speech is, sadly, bipartisan.

Shortly after the Court's decision in *Citizens United*, the Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act was introduced in Congress. Evan Mackinder, *Disclose, Disclaim, Report: Democrats Reveal New Campaign Finance Legislation*, Opensecrets.org, (Apr. 29, 2010), http://www.opensecrets.org/news/2010/04/disclose-disclaim-report. According to the ACLU, the bill contained disclosure requirements that were "overly broad and inconsistent and will likely infringe upon the free speech and privacy rights of Americans." Press Release, Bill Will Compromise Free Speech, ACLU (July 26, 2010), https://goo.gl/EtjLaj.

In a letter to the Senate, the ACLU expressed concern that the bill would "compel disclosure even when a donor had no intention that a gift be used for political purposes." Letter, ACLU Opposes S. 3628 – The Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act (July 23, 2010), https://goo.gl/mnpHhi. The ACLU was particularly concerned that "by compelling politically active organizations to disclose the names of donors giving as little as $600, S. 3628 both violates individual privacy and chills free speech on important issues." *Id.* Under such broad requirements, an organization "might refrain from engaging in public communications that would subject its donors to disclosure," which would curtail free speech, or "donors sensitive to public disclosure might refrain from giving to the organization, in which case the organization's ability to engage in speech will have been curtailed." *Id.*

For at least some of the Disclose Act's supporters, however, chilling speech was precisely the point. Upon unveiling the bill, Senator Charles Schumer said

that "the deterrent effect should not be underestimated." T.W. Farnam, *The Influence Industry: Disclose Act Could Deter Involvement in Elections*, Wash. Post, May 13, 2010, http://goo.gl/XO44lL. Later, during a committee hearing, Sen. Schumer doubled down on his deterrence claim: "I think it's good when somebody is trying to influence government for their purposes, directly with ads and everything else, it's good to have a deterrent effect." Ctr. for Comp. Pol., *Senator Schumer Doubles Down on Lauding "Deterrent Effect" of Bill on Speech*, YouTube (July 24, 2014), https://www.youtube.com/watch?v=NHX_EGH0qbM.

Schumer also commented that he wanted to ensure that "the final bill addresses the tilted advantage that big business has enjoyed for far too long," John Bresnahan, *Schumer to Push New Campaign Law*, Politico, July 22, 2010, http://goo.gl/rOJrpY, implying that he disagrees with—and will work against—the longstanding constitutional principle that the First Amendment doesn't allow government to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections." *Buckley*, 424 U.S. at 48.

More recently, some representatives have pushed for the SEC to get into election law by requiring companies to disclose campaign spending. Joseph Lawler, *How Democrats Are Using SEC to Beat Campaign Finance Laws*, Wash. Examiner, Apr. 18, 2016, http://goo.gl/qqYu4m. Such a move would place formidable compliance costs on companies that have a right to spend money on political speech. *Id.* But, again, maybe that's the point. As Senator Jeff Merkley said, "It's time to stop this wave of dark money that is drowning out the voice of the people." *Id.*

As this Court has noted, there are great reasons to be skeptical of government actors deciding the methods and rules by which citizens are allowed to speak about the government. In the words of Chief Justice Roberts, "Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government 'into the debate over who should govern.' And those who govern should be the *last* people to help decide who should govern." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441-42 (2014).

C. Courts Must Apply Meaningful Scrutiny to Prevent Unconstitutional Goals from Being Realized

1. Unlike equal-protection violations, which require proof of discriminatory purpose, *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."), laws that burden protected speech can be unconstitutional regardless of the motives of lawmakers. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Nevertheless, the growing possibility that some campaign-finance laws may be passed to muzzle protected speech should give this Court pause as to whether to continue allowing lower courts to rubber-stamp disclosure rules. Meaningful scrutiny is warranted when there is a high possibility of illicit motives behind the laws.

In other contexts, this Court has used a deep suspicion of government motives as a reason to impose higher scrutiny. In *United States v. Carolene Products Co.*, this Court said that "prejudice against discrete and insular minorities may be a special condi-

tion" that "may call for a correspondingly more searching judicial inquiry." 304 U.S. 144, 153 n.4 (1938). Because prejudice against "discrete and insular minorities" is common, and because seemingly neutral laws may in fact be attempts to harm a disfavored group, courts meaningfully scrutinize such laws and their consequences. For example, in *Hunter v. Underwood*, 471 U.S. 222, 229 (1985), the Court undertook a searching inquiry to determine whether a facially neutral provision of the 1901 Alabama Constitution was passed "with the intent of disenfranchising blacks." And in *Romer v. Evans*, 517 U.S. 620 (1996), a Court suspicious of the government—more specifically, the voters—of Colorado, overturned the state's Amendment 2, which denied protected status to homosexuals. "The bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* at 634 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *see also City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 473 (1985) ("Cleburne's ordinance sweeps too broadly to dispel the suspicion that it rests on a bare desire to treat the retarded as outsiders, pariahs who do not belong in the community.").

As Professor Chemerinsky has written, when there is "great suspicion of the government, or a fundamental right is at stake, the government will be required, by the level of scrutiny, to meet a heavy burden." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 539 (3d ed., Aspen 2006). Here, there is both a great suspicion of the government and a fundamental right at stake.

2. Suspicion of government activity also warrants higher scrutiny in First Amendment cases. *See gen-*

erally, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev 413 (1996). In *R.A.V. v. City of St. Paul*, for example, the Court invalidated a hate-speech ordinance that proscribed hate speech based on some, but not all, characteristics. 505 U.S. 377 (1992). The Court implied that suspicion of the government's motives was a factor in the holding: "The First Amendment generally prevents government from proscribing speech. . . because of disapproval of the ideas expressed." *Id.* at 382. "The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed." *Id.* at 386. "[T]he nature of the content discrimination is such that there is no realistic possibility that *official suppression of ideas is afoot*." *Id.* at 390 (emphasis added). When the Court examined why the law selectively chose certain characteristics, there was evidence that the city was trying to "handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty." *Id.* at 394.

The Court has also questioned the motivation behind campaign-finance laws. In *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978), the Court found it curious "that a particular kind of ballot question has been singled out for special treatment." That special treatment "suggest[ed] instead that the legislature may have been concerned with silencing corporations on a particular subject." *Id.* As in *R.A.V.*, there was evidence in the record that the prohibition was "'tailor-made' to prohibit corporate campaign contributions to oppose a graduated income tax

amendment." *Id; see also,*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities.").

3. Taken together, these cases represent a particular theory about when and why certain actions deserve meaningful scrutiny. When there is a "great suspicion of government," then courts should engage in more searching review. Due to the prevalence of burdensome restrictions and mandates that, for essentially the first time, threaten 501(c)(3)s—in addition to the strong possibility of unconstitutional goals—there is a "great suspicion of government" surrounding modern campaign-finance regimes.

Government purpose and motive are not determinative considerations under the First Amendment. *See Reed v. Town of Gilbert*, 135 S. Ct. at 2228 ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus' toward the ideas contained in the regulated speech."). Nevertheless, purpose and motive are relevant to whether this Court should grant certiorari in order to ensure that lower courts are properly scrutinizing the various disclosure laws that are consistently being passed—many for the express or implied purpose of deterring political speech. Where there's a will there's a way, and there is certainly a will to shut down protected speech via disclosure and registration rules. Will this Court continue to let them stand?

II. THIS COURT SHOULD CLARIFY THE LIMITS OF DISCLOSURE REQUIREMENTS WHEN APPLIED TO NON-ADVOCACY GROUPS

A famous observer of American civic behavior once presciently observed:

> Americans of all ages, all conditions, all minds constantly unite. Not only do they have commercial and industrial associations in which all take part, but they also have a thousand other kinds: religious, moral, grave, futile, very general and very particular, immense and very small; Americans use associations to give fêtes, to found seminaries, to build inns, to raise churches, to distribute books, to send missionaries to the antipodes; in this manner they create hospitals, prisons, schools.

2 Alexis de Tocqueville, *Democracy in America* 896 (Eduardo Nolla ed., Liberty Fund 2010) (1838).

Tocqueville was correct. Americans are incredibly civic-minded, and we constantly form associations "which have an object that is in no way political." *Id.* In fact, "the political associations that exist in the United States form only a detail in the midst of the immense picture that the sum of associations presents [here]." *Id.*

We're also incredibly generous, giving the most of any nation in the world—two times more than Britons and Canadians and 20 times more than Italians and Germans. Paul Bedard, *Americans Are World's Most Charitable, Top 1% Provide 1/3rd of All Donations*, Wash. Examiner, Jan. 19, 2016, http://goo.gl/OSmLy4. And many of the organization

that receive Americans' largesse—if not most of them—are 501(c)(3)s.

There are almost one million 501(c)(3) nonprofit organizations in the United States, and all are under attack, directly or indirectly, from Delaware's law and others like it. Brice S. McKeever & Sarah L. Pettijohn, *The Nonprofit Sector in Brief 2014*, The Center on Nonprofits and Philanthropy at the Urban Institute, Oct. 2014, at 3; *see also* Jon Riches, *The Victims of "Dark Money" Disclosure: How Government Reporting Requirements Suppress Speech and Limit Charitable Giving*, Goldwater Institute, 6, 8-10 (Aug. 5, 2015), http://goo.gl/ddpJNq. 501(c)(3)s include schools, hospitals, art centers, community groups, churches, public radio stations, and educational groups. Many of these groups hope to educate voters, lawmakers, and the public on questions of particular importance, from the environment to nutrition to gun safety to untold others. But they are prohibited by the tax code from direct advocacy for candidates. 26 U.S.C. § 501(c)(3) (2015) ("[N]o substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in [including the publishing or distributing of statements], any political campaign on behalf of [or in opposition to] any candidate for public office."). Politics may be related to what they do, but what part of life doesn't have a political component? Nevertheless, due to the tax code, 501(c)(3)s are, in Tocqueville's words, "in no way political." Tocqueville, *supra* at 896.

Collectively, 501(c)(3)s reported $1.65 trillion in revenue in 2012. McKeever & Pettijohn, *supra* at 1. Yet most (c)(3)s are still small, with 66.4 percent tak-

ing in less than $500,000. *Id.* For those small groups in particular, complying with laws like Delaware's can be onerous to the point of destruction.

By placing the 501(c)(3) exemption in the tax code, the government and the people of the United States have indicated that they wish to encourage such socially minded behavior. Yet Delaware's law, as well as others that have been passed and proposed, are threatening the continuing viability of 501(c)(3)s.

Many people will not give to nonprofits if they're forced to disclose their identities. For a law like Delaware's, the situation is even worse. By mandating disclosure over the previous four years, donors will wonder whether their charity's unknown activities in the future will cause their identities to be disclosed.

In his *Citizens United* partial dissent, Justice Thomas warned of "a cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens' exercise of their First Amendment rights." 558 U.S. at 482 (Thomas, J., dissenting in part) (emphasis original). People have been shamed or worse for their donations, *id.* at 482 ("The director of the nonprofit California Musical Theater gave $1,000 to support [an] initiative; he was forced to resign after artists complained to his employer"), and, given the increasing polarization of American politics, people are justifiably afraid that their charitable giving will be somehow punished. According to Pew:

> Republicans and Democrats are further apart ideologically than at any point in recent history. Growing numbers of Republicans and Democrats express highly negative views of the opposing party. And to a considerable degree, polarization is reflected in the personal

> lives and lifestyles of those on both the right and left.

Carroll Doherty, *7 Things to Know About Polarization in the United States*, Pew Research Center, June 7, 2014, http://goo.gl/vvYkJi.

In polarized times, forcing disclosure on 501(c)(3) donors can be akin to a "requirement that adherents of particular religious faiths or political parties wear identifying arm-bands." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950)).

In a recent decision, the U.S. District Court for the Central District of California found "ample evidence establishing that [plaintiffs] AFP, its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known." *Americans for Prosperity Found.*, 2016 U.S. Dist. LEXIS 53679 at *12. Employees have been threatened with having their throats slit, have had people spit in their faces, and been attacked in various other ways. *Id.* at *12-*13.

Delaware seems unconcerned with these effects—or perhaps has not thought them through. Yet in one study of disclosure for ballot initiatives, 56 percent of survey respondents were against disclosure when it included their name, address, and donation amount. Dick Carpenter II, *Disclosure Costs: The Unintended Consequences of Campaign Finance Reform*, Institute for Justice, Mar. 2007, at 7 http://goo.gl/BvJ2yP. That number rose to 71 percent when it included their employer. *Id.* A majority said they would "think twice" before donating to a ballot issue where disclosure is required. *Id.* By contrast, only slightly more than

one-third knew where to access contributor lists obtained through disclosure, demonstrating that perhaps the government's "informational interest" is not as strong as supposed. Figuring that out, however, would require meaningful scrutiny. See *supra* Part I.

The response of forced disclosure on 501(c)(3) donors can reasonably expected to be similar, particularly if the group advocates a relatively provocative viewpoint. "Relatively" here means relative to the intellectual climate of the particular donor. Under Delaware-style disclosure rules, donating to a pro-life group in Massachusetts is more dangerous than donating to one in Mississippi. This gives the Massachusetts group a double-whammy: Championing the pro-life cause in a pro-choice state is already difficult, but it becomes much more so if donors are disclosed due to the publication of something innocuous like an issue brief or voter guide. In a roundabout yet entirely plausible way, therefore, laws like Delaware's, if they continue to evade judicial review, perpetuate a kind of status quo bias in public opinion, preferring majority opinions to minority ones—as well as reinforcing politically correct groupthink.

One of Tocqueville's favorite things about America was our thriving culture of civic associations. "I often admired the infinite art with which the inhabitants of the United States succeeded in setting a common goal for the efforts of a great number of men, and in making them march freely toward it." Tocqueville, *supra* at 897. Laws like Delaware's endanger this unique tendency—and there will certainly be more like it to come if this Court doesn't step in.

CONCLUSION

Freedom of speech is one of our most precious rights. *See*, *e.g.*, Thomas J. Rebbec, *Third Grade Winner of Jefferson Park Elementary's Essay Contest on the "Four Freedoms,"* El Paso, IL, http://goo.gl/wNWFAC ("Here is another freedom. It is called freedom of speech. One thing freedom of speech lets you do is say your own thoughts. Some countrys [sic] do not let you do that. Freedom of speech also lets you say what you want. You can say what you want almost anywhere in the United States."). Nevertheless, campaign-finance regulations are growing in number and complexity, and they are beginning to invade non-election-related speech.

Encroachments like the Third Circuit validated here deserve more than cursory review. This Court should grant certiorari and reaffirm that a meaningful level of scrutiny exists for disclosure rules—particularly when they burden nonprofit educational organizations.

Respectfully submitted,

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