

**BRINGING DARK MONEY TO LIGHT:
POLITICAL NONPROFIT DISCLOSURE STATUTES IN
DELAWARE AND NEW JERSEY**

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I. INTRODUCTION

Since the Supreme Court's landmark *Citizens United*¹ decision in 2010, politically active 501(c)(4) organizations have increasingly become fundraising machines through which private citizens, public and private corporations, and other groups can engage in virtually untraceable, so-called "dark money" political spending.² In the 2012 election cycle alone, 501(c) organizations—whose donors, whether individuals or corporations, are not typically disclosed to the Federal Election Commission ("FEC")—raised about \$308 million.³ In the 2016 presidential primary cycle, dark money circulated at a rate ten times higher than at the same point in the 2012 primary cycle.⁴ State-level elections have likewise seen an increase in nonprofit political fundraising since 2010. In New Jersey, "independent special interest

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1. *Citizens United v. FEC*, 558 U.S. 310 (2010).

2. *Political Nonprofits (Dark Money)*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/outsidespending/nonprof_summ.php (last visited Nov. 5, 2017).

3. Soo Rin Kim, *Super PAC Spending Hits \$500 Million, While 501(c)s Hit the Brakes*, HUFFINGTON POST: OPENSECRETS BLOG (Sep. 1, 2016, 2:52 PM), http://www.huffingtonpost.com/opensecrets-blog/super-pac-spending-hits-5_b_11820874.html.

4. Tom Kertscher, *Ten Times More 'Dark Money' Has Been Spent for 2016 Elections, U.S. Sen. Tammy Baldwin Says*, POLITIFACT WIS. (Nov. 5, 2015, 6:00 AM), <http://www.politifact.com/wisconsin/statements/2015/nov/05/tammy-baldwin/ten-times-more-dark-money-has-been-spent-2016-elecl/>. Interestingly, this record-breaking primary spending was followed by a decrease in dark money spending in the general election after the candidates were selected; total 501(c) fundraising for the general election totaled only \$188 million, \$120 million less than the 2012 general election. See *Political Nonprofits (Dark Money)*, *supra* note 2.

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groups spent \$67 million on gubernatorial and legislative elections” between 2009 and 2015.⁵

The difference between traditional political spending (e.g., direct donations to candidates’ campaigns or their political action committees (“PACs”)) and the type of spending engaged in by political nonprofits is in reporting requirements. The FEC requires that candidates, PACs, and parties “report the names of their donors . . . on a regular basis.”⁶ However, both at the federal level and in most states, politically active 501(c)(4) nonprofit organizations engage in “political spending . . . where the donor is not disclosed and the source of the money is unknown,” a practice commonly referred to as “dark money” spending.⁷

While little action has been taken at the federal level to tighten campaign finance loopholes and reduce dark money spending, since the 2012 elections, some states have passed legislation aimed at increasing financial transparency in state and local elections. New York and California, for example, have enacted laws requiring disclosure of contributions to political nonprofits for certain purposes or over certain levels,⁸ and actively prosecute violations of those statutes.⁹

5. Press Release, N.J. Assembly Republicans, Bramnick Proposes ELEC Supported Reforms (April 8, 2016), <http://www.njassemblyrepublicans.com/bramnick-proposes-elec-supported-reforms/>.

6. Michael Beckel, *What is Political ‘Dark Money’ — and is it Bad?*, CTR. FOR PUB. INTEGRITY (Jan. 20, 2016, 3:00 AM), <https://www.publicintegrity.org/2016/01/20/19156/what-political-dark-money-and-it-bad>.

7. *Dark Money Basics*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/dark-money/basics> (last visited Nov. 5, 2017).

8. See Ron Jacobs, *California Settles Case Involving Contributions to a Ballot Committee*, VENABLE LLP: POL. L. BRIEFING (Nov. 4, 2013), <http://www.politicallawbriefing.com/2013/11/california-settles-case-involving-contributions-to-a-ballot-committee/> [hereinafter *California Settles*]; Ron Jacobs, Larry Norton & Margaret Rohlring, *New York Imposes New Rules on Super PACs, Advocacy Groups, and Political Consultants*, VENABLE LLP: POL. L. BRIEFING (July 6, 2016), <http://www.politicallawbriefing.com/2016/07/new-york-imposes-new-rules-on-super-pacs-advocacy-groups-and-political-consultants/> [hereinafter *New York Imposes New Rules*]. California’s Fair Political Practice Commission recovered \$1 million in fines from two political nonprofits for their failure to disclose donors whose contributions passed through multiple nonprofits and eventually were used for ads requiring disclosure. *California Settles, supra*. The New York Legislature passed a bill requiring 501(c)(4) organizations spending more than \$10,000 on issue advocacy communications in a financial year to disclose any donors contributing \$1,000 or more, with the caveat that if a nonprofit holds a separate bank account for “issue communication” expenditures, it is only required to report contributors to that specific account. *New York Imposes New Rules, supra*.

9. Larry Norton, Ron Jacobs & Cristina I. Vessels, *The FEC Levels Fines on Nonprofits over Donor Disclosure*, VENABLE LLP: POL. L. BRIEFING (July 19, 2016), <http://www.politicallawbriefing.com/2016/07/new-york-imposes-new-rules-on-super-pacs-advocacy-groups-and-political-consultants/>.

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In January 2013, Delaware passed the Delaware Elections Disclosure Act (“DEDA”), which requires any individual or entity—other than candidates or political parties—spending more than \$500 on ads during an election cycle to report the identities of all donors who contribute an aggregate of \$100 or more in that election cycle.¹⁰ DEDA was challenged on First Amendment grounds, but the Third Circuit upheld it as constitutional in *Delaware Strong Families v. Attorney General of Delaware*.¹¹ In a six-to-two decision, the United States Supreme Court denied certiorari in June 2016.¹²

As Delaware, New York, California, and other major metropolitan states have modernized their political nonprofit disclosure requirements, New Jersey has failed to follow suit. However, legislation calling for increased disclosure was introduced in the New Jersey Assembly in April 2016 as Bill No. A3639, and has been referred to the Assembly Judiciary Committee for consideration during the current term.¹³ New Jersey’s “Pay-to-Play” regulations are famously “far-reaching and complex”¹⁴ Businesses with profitable government contracts, as well as those seeking government contracts, are limited to certain contribution caps and are required to disclose their political contributions to the New Jersey Election Law Enforcement Commission (“ELEC”).¹⁵ Nonprofit corporations, however, are currently exempt from donor disclosure requirements, which allows for the proliferation of dark money in New Jersey state politics.¹⁶

www.politicallawbriefing.com/2016/07/the-fec-levels-fines-on-nonprofits-over-donor-disclosure/ [hereinafter *The FEC Levels Fines on Nonprofits*].

10. DEL. CODE ANN. tit. 15, § 8031(a)(2)–(3) (2013).

11. 793 F.3d 304, 306 (3d Cir. 2015).

12. *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304 (3d Cir. 2015), *cert. denied sub nom.*, *Del. Strong Families v. Denn*, 136 S. Ct. 2376 (2016). Justice Thomas dissents; Justice Alito would grant. *Id.* at 2376.

13. See Press Release, *supra* note 5. For a discussion with the bill’s primary sponsor, Assembly Minority Leader Jon Bramnick, see *infra* notes 112–114 & accompanying text.

14. Michael T.G. Long, *NJ ‘Pay to Play’ Compliance is More Important than Ever*, LAW360 (May 17, 2017, 12:28 PM), <https://www.law360.com/articles/924895/nj-pay-to-play-compliance-is-more-important-than-ever>.

15. N.J. STAT. ANN. § 19:44A-20.26–27 (2008).

16. See N.J.P.L. 2007, c. 304 (2008); N.J. STAT. ANN. § 19:44A-20.6–7 (2008). For further explanation, see *N.J. Local Unit “Political Contribution Disclosure Compliance” Law*, ST. OF N.J.: DEP’T OF COMMUNITY. AFF., http://www.state.nj.us/dca/divisions/dlgs/programs/pay_2_play.html (last visited Nov. 5, 2017).

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This Commentary examines the implications of Delaware's DEDA and advocates for the revision of New Jersey's Pay-to-Play law to include nonprofit corporations and organizations in its disclosure requirements.

II. REGULATION OF 501(C)(4) POLITICAL NONPROFITS

According to IRS regulations, 501(c)(4)s, generally referred to as "social welfare" groups, "must be operated exclusively to promote social welfare" in order to maintain tax-exempt status.¹⁷ However, unlike 501(c)(3) charitable organizations, which are barred from engaging at all "in activity aimed at influencing elections,"¹⁸ a 501(c)(4) "may engage in some partisan political campaign activities . . . provided that its political activities do not become its primary activity."¹⁹ The general, unwritten rule is that so long as a 501(c)(4) spends less than half its resources on "political activities," it can maintain tax-exempt social welfare status.²⁰ To put that designation in perspective, the top 501(c)(4) "social welfare" political nonprofit donor in the 2016 election cycle was the National Rifle Association's NRA Institute for Legislative Action, which spent \$35,157,585 leading up to the election.²¹

Political spending through 501(c)(4)s appeals both to donors wary of disclosing their political affiliations or quickly reaching statutory maximum donations and to candidates wary of accepting large

17. *Social Welfare Organizations*, IRS (last updated Aug. 27, 2016), <https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations> [hereinafter *Social Welfare Organizations*]; see also Sean Sullivan, *What is a 501(c)(4), Anyway?*, WASH. POST (May 13, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/05/13/what-is-a-501c4-anyway/>.

18. Carrie Levine, *Get Ready: The Next Citizens United is Coming*, POLITICO (June 22, 2016), <http://www.politico.com/magazine/story/2016/06/supreme-court-scotus-citizens-united-money-campaigns-political-new-fec-next-law-suit-213980>.

19. B. HOLLY SCHADLER, ALLIANCE FOR JUSTICE, THE CONNECTION: STRATEGIES FOR CREATING AND OPERATING 501(C)(3)S, 501(C)(4)S, AND POLITICAL ORGANIZATIONS 11 (3d ed. 2012), https://www.bolderadvocacy.org/wp-content/uploads/2012/01/The_Connection.pdf.

20. *Outside Spending: Frequently Asked Questions About 501(c)(4) Groups*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/outsidespending/faq.php> (last visited Nov. 5, 2017).

21. *Political Nonprofits: Top Election Spenders*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/outsidespending/nonprof_elec.php (last visited Nov. 5, 2017).

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donations from identifiable donors.²² 501(c)(4)s often serve as vehicles for untraceable donations because under “the prevailing FEC interpretation, 501(c)(4) organizations must disclose their donors on campaign finance reports only when they contribute specifically to support particular ads that are the subject of an FEC report” the organization is already required to file; that is, ads expressly advocating for or against particular candidates.²³ “Since the vast majority of donors do not earmark their contributions for these purposes, donors’ identities typically remain unknown to the FEC and the public at large.”²⁴ As a result, none of the donors whose contributions added to the NRA’s 2016 figures, for example, are required to be disclosed to the FEC, unless their contributions were specifically designated—by the donor—for ads expressly advocating election or defeat of a specific candidate (even if the NRA actually *used* the funds for that purpose).²⁵

Even where donors should be disclosed according to federal requirements, they often manage to slip through bureaucratic cracks. The FEC’s panel of commissioners (made up of three Republicans and three Democrats) often deadlocks along party lines when it comes to prosecuting nondisclosure, and the FEC is frequently embroiled in litigation with watchdog groups alleging failure to actually effectuate such disclosures.²⁶ As a result, particularly because dark money spending has continually “risen in amount and impact” since *Citizens United*,²⁷ it has become critical for states to independently modernize their disclosure statutes, rather than wait for guidance or enforcement from the FEC.

22. See Alan Greenblatt, *How Unregulated Dark Money is Reshaping State Politics*, GOVERNING (Sep. 29, 2016), <http://www.governing.com/topics/elections/gov-dark-money-campaign-finance-state-politics.html>.

23. *The FEC Levels Fines on Nonprofits*, *supra* note 9.

24. *Id.*

25. See *id.*

26. See Kenneth P. Doyle, *FEC Deadlocks on New Rules Against Foreign Campaign Money*, BLOOMBERG BNA (Jan. 13, 2017), <https://www.bloomberglaw.com/document/XB471VK0000000;Lawsuits>, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON [hereinafter CREW], <http://www.citizensforethics.org/legal/lawsuits/> (last visited Nov. 5, 2017).

27. Kenneth P. Doyle, *FEC Faulted for Failure to Enforce Disclosure on Nonprofits*, BLOOMBERG BNA (Sep. 20, 2016), <http://www.bna.com/fec-faulted-failure-n57982077289/>.

*RUTGERS UNIVERSITY LAW REVIEW*III. *CITIZENS UNITED* AND CAMPAIGN FINANCE JURISPRUDENCE

The effectiveness of campaign contribution disclosure requirements is not only dependent on the will (or lack thereof) of the FEC to enforce them, but also on their survival under constitutional challenges by affected groups. *Citizens United* is the most recent in a line of decisions by the Supreme Court considering what, if any, limitations the government can apply to campaign contributions by individuals and corporations in the context of political speech.²⁸

The Court addressed such a challenge for the first time in 1976 in *Buckley v. Valeo*,²⁹ arising from a constitutional challenge to the Federal Election Campaign Act of 1971, as amended in 1974 (“FECA”).³⁰ FECA created the FEC and instituted a number of regulations dealing with campaign finance.³¹ The Court upheld FECA’s disclosure requirements and campaign contribution limits, but found unconstitutional FECA’s provision limiting how much congressional candidates could spend on their own campaigns.³² *Buckley* also introduced a concept that would remain a major focus of campaign finance jurisprudence: that “[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”³³

The Court’s “concern” over the “appearance of corruption”³⁴ was still clear when it considered a challenge to the Bipartisan Campaign Reform Act of 2002 (“BCRA”) ³⁵ in *McConnell v. FEC*.³⁶ BCRA placed new restrictions on both coordinated campaign expenditures (those

28. See generally *Citizens United v. FEC*, 558 U.S. 310 (2010).

29. 424 U.S. 1 (1976).

30. See Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3 (codified as amended at 52 U.S.C.A. § 30101 (1974)).

31. See 52 U.S.C.A. § 30101–26.

32. *Buckley*, 424 U.S. at 143 (“[W]e sustain the individual contribution limits, the disclosure and reporting provisions, and the public financing scheme. We conclude, however, that the limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm.”).

33. *Id.* at 27.

34. *Id.*

35. Pub. L. No. 107-155, 116 Stat. 81.

36. 540 U.S. 93, 143 (2003) (“Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits.”).

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agreed upon by a candidate or party and the person or entity paying for the communication) and independent expenditures (made without coordination between the donor and recipient).³⁷ BCRA also required that any organizations—including nonprofits—which spent \$10,000 or more in a calendar year on ads that clearly identified federal candidates disclose the identities and addresses of all donors who contributed an aggregate of \$1,000 or more to the organization in their mandated annual report to the FEC.³⁸ The Court upheld BCRA and found it constitutionally narrow because it focused on “regulating contributions that directly benefit federal candidates and thus pose the greatest risk of corruption or its appearance.”³⁹ Seven years later, however, *McConnell v. FEC* and corresponding portions of BCRA were invalidated in *Citizens United v. FEC*.⁴⁰

Citizens United, a conservative nonprofit, challenged BCRA’s constitutionality based on a provision in the law which barred corporations from using “general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate”⁴¹ Citizens United planned to use general treasury funds to pay for a film criticizing then-Senator Hillary Clinton, and it prospectively challenged the law to avoid potential FEC penalties for its use of those specific funds.⁴² The Court’s decision in *Citizens United* is critical to campaign finance regulation because it opened the door to unlimited dark money spending by businesses and nonprofits, and helped establish the idea that “corporations are people.”⁴³

The Court found that BCRA placed a prior restraint on free speech because under its restrictions, “a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC

37. See *id.* at 221 (comparing “expenditures that truly are independent” with coordinated “expenditures made after a ‘wink or nod’ . . . ‘at the request or suggestion of a candidate’”) (internal citations omitted).

38. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 § 201(a). See also *McConnell*, 540 U.S. at 102, 162.

39. *McConnell*, 540 U.S. at 167.

40. 558 U.S. 310 (2010).

41. *Id.* at 320.

42. *Id.* at 321.

43. See Philip Rucker, *Mitt Romney Says ‘Corporations are People’*, WASH. POST (Aug. 11, 2011), https://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html.

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enforcement must ask a governmental agency for prior permission to speak” and that such “onerous restrictions” were unconstitutional.⁴⁴ Additionally, in a reversal of decades-long jurisprudence contemplating the opposite, the Court stated in dicta that the “appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.”⁴⁵

Importantly, however, the Court upheld BCRA’s donor disclosure requirements; it held that while donor “disclosure requirements may *burden* the ability to speak,”⁴⁶ they “do not *prevent* anyone from speaking.”⁴⁷ In February 2017, the Court again upheld the constitutionality of donor disclosure laws when it affirmed the District Court for the District of Columbia’s ruling in *Independence Institute v. FEC*.⁴⁸ The District Court found that “disclosure [of donor identities] will assist the public, the Federal Election Commission, and Congress in monitoring those who seek to influence the issues debated during peak election season”⁴⁹

IV. DELAWARE ELECTIONS DISCLOSURE ACT

A. *The Law*

Donor disclosure requirements were one of few BCRA provisions spared by the Court in *Citizens United*, making their critical nature all the more apparent. After the decision, Delaware, where 66 percent of Fortune 500 companies are incorporated,⁵⁰ passed progressive legislation with exacting disclosure standards which apply both to for-profit and nonprofit entities. DEDA⁵¹ requires politically active nonprofits to disclose their donors, and has been hailed as a “victory” for

44. *Citizens United*, 558 U.S. at 335.

45. *Id.* at 360.

46. *Id.* at 366 (emphasis added).

47. *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 201 (2003)) (emphasis added).

48. For summary disposition, see United States Supreme Court Order No. 16-743 (Feb. 27, 2017), https://www.supremecourt.gov/orders/courtorders/022717zor_k5fm.pdf, *aff'g* *Indep. Inst. v. FEC*, No. 14-CV-1500, 2016 WL 6560396 (D.D.C. 2016).

49. *Indep. Inst.*, 2016 WL 6560396, at *11.

50. JEFFREY W. BULLOCK, DELAWARE DIVISION OF CORPORATIONS 2015 ANNUAL REPORT 1–3 (2015), https://corp.delaware.gov/Corporations_2015%20Annual%20Report.pdf.

51. DEL. CODE ANN. tit. 15, §§ 8001–8046 (2013).

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election transparency and for “voters, who deserve to know the identities of those spending money to influence their votes”⁵²

DEDA was enacted to “correct[] a loophole” in Delaware’s disclosure requirements which allowed special-interest groups, including nonprofits, to “evade disclosure . . . by refraining from expressly advocating the election or defeat of a [specific] candidate (‘Vote for Jones’ or ‘Defeat Smith’).”⁵³ DEDA requires any nonprofit which donates \$500 or more to fund third-party advertisements⁵⁴ during the period leading up to an election to publicly disclose the identity of anyone who contributes \$100 or more to, or who receives \$100 or more from, that nonprofit.⁵⁵ The statute provides that covered nonprofits must “file a third-party advertisement report” with the State Election Commissioner, and that the reports become publicly accessible “immediately upon their filing[.]”⁵⁶

DEDA’s disclosure requirements allow voters to easily ascertain “who is responsible for advertisements and other materials asking for them to support or oppose candidates,” hold “elected officials accountable[,] and make informed choices at the ballot box.”⁵⁷ DEDA’s requirements differ from the FEC’s federal requirements in that they apply regardless of whether advertisements “explicitly urge people to vote for or against a specific candidate,”⁵⁸ and whether or not donations

52. CLC Staff, *Third Circuit Court Upholds Delaware Dark Money Disclosure Law*, THE CAMPAIGN LEGAL CTR. (July 17, 2015), <http://www.campaignlegalcenter.org/news/press-releases/third-circuit-court-upholds-delaware-dark-money-disclosure-law> (quoting Tara Malloy, Senior Counsel for the Campaign Legal Center).

53. See *Delaware Elections Disclosure Act*, BRENNAN CTR. FOR JUSTICE (Aug. 15, 2012), <https://www.brennancenter.org/legislation/delaware-elections-disclosure-act>.

54. Third-party advertisements include “electioneering communications,” defined in DEDA as any communication that “[r]efers to a clearly identifiable candidate” and “is publicly distributed within [thirty] days before a primary election or special election, or [sixty] days before a general election” to the general electorate. DEL. CODE ANN. tit. 15, § 8002(10)(a)(1)–(2).

55. See DEL. CODE ANN. tit. 15, § 8031(a)(1)–(5), (b).

56. §§ 8031(a), 8032.

57. Jon Offredo, *Federal Judges Uphold Delaware Campaign Disclosure Law*, DELAWAREONLINE: NEWS J. (July 16, 2015, 3:26 PM), <http://www.delawareonline.com/story/news/politics/firststatepolitics/2015/07/16/federal-judges-uphold-delaware-campaign-disclosure-law/30249945/>.

58. Levine, *supra* note 18.

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are specifically earmarked for electioneering use.⁵⁹ In practice, DEDA, which has been called “radical” compared to typical disclosure laws, requires almost total disclosure of the identities of major political contributors.⁶⁰

B. *The Challenge*

Delaware Strong Families (“DSF”), a conservative 501(c)(3) organization⁶¹ was an early objector to DEDA’s disclosure requirements as they applied to the Voter Guide it distributed before each election.⁶² The Voter Guide included state and federal candidates’ positions on same-sex marriage, insurance coverage for abortion, expansion of protected classes, and similar issues presented in a clearly and purposefully conservative light.⁶³ In an effort to avoid being subject to disclosure requirements leading up to the 2014 elections, DSF filed a complaint in October 2013 alleging that DEDA was unconstitutionally broad.⁶⁴ The District Court denied DSF’s motion for a protective order, but granted a preliminary injunction; it found that DSF was likely to

59. *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 307 (3d Cir. 2015) (“Disclosure is not limited to individuals who earmarked their donations to fund an electioneering communication.”).

60. Levine, *supra* note 18.

61. DSF’s designation as a 501(c)(3) is, at best, inappropriate; IRS rules “absolutely” prohibit 501(c)(3)s (as compared to 501(c)(4)s) “from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office.” *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501-c-3-tax-exempt-organizations> (last modified Sep. 13, 2017). Certain “voter education activities,” including voting guides and drives, “would not be prohibited political campaign activity if conducted in a non-partisan manner.” *Id.* “On the other hand, voter education or registration activities with evidence of bias . . . will constitute prohibited participation or intervention.” *Id.*

DSF’s website includes a “Voting Center” page, which provides sample “Questions to Ask Candidates.” Such questions include whether a candidate supports or opposes “[p]arental consent for abortion for minors under the age of 18,” “[r]edefining marriage in Delaware, resulting in any two adults being permitted to marry,” and “[u]sing tax payer money to fund Planned Parenthood and other organizations that provide abortion services.” *Questions to Ask Candidates*, DEL. STRONG FAMILIES, <http://files.ctctcdn.com/612c5f6b001/364e45d0-9301-478e-895e-ece917ef0cfb.pdf> (last visited Nov. 5, 2017). The questions do not suggest a non-partisan perspective.

62. *Del. Strong Families*, 793 F.3d at 307.

63. *Id.* at 307 n.3 (quoting the record, Joint App’x. 61–64).

64. *Id.* at 306–07.

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succeed on the merits of its constitutional claim and “that the balance of harms” in question “weigh[ed] in favor of DSF.”⁶⁵

In an opinion authored by Judge Joseph Greenaway, the Third Circuit Court of Appeals reversed the District Court’s injunction and found DEDA constitutionally narrow.⁶⁶ The District Court originally held that as a 501(c)(3), DSF was automatically a “neutral communicator” and its guide was a “neutral communication”—as opposed to a political nonprofit and an electioneering communication, respectively—and that DEDA’s disclosure requirements therefore “could not constitutionally reach it.”⁶⁷ The Third Circuit found, however, that “it is the conduct of an organization, rather than the organization’s status with the [IRS], that determines whether it makes communications subject to [DEDA].”⁶⁸ The court found that the Voter Guide met the definition of an “electioneering communication” by . . . mentioning candidates by name close to an election” and “selecting issues on which to focus[.]”⁶⁹ As a result, through its publication of the Voter Guide, DSF was properly subject to DEDA.

Addressing DSF’s claim that DEDA was unconstitutionally broad due to expenditure limits and range of application, the court relied on the “exacting scrutiny” standard utilized by the Supreme Court in *Buckley*.⁷⁰ Exacting scrutiny requires a “substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest,”⁷¹ so the remaining question for the Third Circuit was whether the State’s interest in an “informed electorate” was substantially served by DEDA’s disclosure requirements.⁷² The court first considered DEDA’s expenditure threshold, which required groups spending \$500 or more on electioneering in a single election period to disclose the identities of donors who contributed \$100 or more (significantly lower

65. Del. *Strong Families v. Biden*, 34 F. Supp. 3d 381, 395 (2014), *rev’d sub nom*, Del. *Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304 (3d Cir. 2015).

66. Del. *Strong Families*, 793 F.3d at 306 (“Because the Act is narrowly tailored and not impermissibly broad we will reverse the District Court and remand for entry of judgment in favor of Appellants.”).

67. *Id.* at 308 (citing Del. *Strong Families*, 34 F. Supp. 3d at 395).

68. Del. *Strong Families*, 793 F.3d at 308–09.

69. *Id.*

70. *Id.*

71. *Id.* (citing *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976))).

72. Del. *Strong Families*, 793 F.3d at 309.

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than BCRA's \$10,000/\$1,000 threshold).⁷³ The court described the threshold difference as "unsurprising" because "Delaware is a small state" and explained that "for less than \$500 a campaign can place enough pre-recorded 'robo-calls' to reach every household in a Delaware House district."⁷⁴ DEDA's expenditure thresholds were therefore "rationally related to Delaware's unique election landscape."⁷⁵

The court also found that DEDA's application to non-broadcast media was constitutional, despite the fact that, as DSF contended, BCRA only covers broadcast media.⁷⁶ It held that because DEDA covers the means of communication "actually utilized in Delaware elections," "the media covered by [DEDA] is sufficiently tailored to Delaware's interest."⁷⁷ Additionally, DSF contended that DEDA's disclosure requirements, which applied equally to earmarked and non-earmarked donations, were not constitutional because BCRA only required donor disclosure for donations earmarked for electioneering.⁷⁸ The court pointed out, however, that BCRA itself actually does not "contain an earmarking requirement. Rather, after the [Supreme] Court decided *McConnell*, the [FEC] passed" a regulation establishing the earmarking provision.⁷⁹ The court also noted that even though an earmarking requirement would make the statute even more narrowly tailored to the State's interest, such a requirement was unnecessary; it found that DEDA's "event-driven disclosures . . . provide[] the necessary 'substantial relationship' between the disclosure requirement and Delaware's informational interest."⁸⁰ The Third Circuit found DEDA "constitutional as applied to DSF's Voter Guide" and reversed the District Court's injunction.⁸¹

DSF appealed the Third Circuit's decision, and in June, 2016, its petition to the Supreme Court for a writ of certiorari was denied in a six-to-two decision.⁸² Justice Thomas authored a dissent, and argued that "the purported government interest in an informed electorate

73. *Id.* at 310.

74. *Id.* at 310–11 (citing to the record, Joint App'x. 135).

75. *Del. Strong Families*, 793 F.3d at 311.

76. *Id.*

77. *Id.*

78. *Id.* at 311–12.

79. *Id.*

80. *Id.*

81. *Id.* at 313.

82. *Del. Strong Families v. Denn*, 136 S. Ct. 2376, 2376 (2016). Justice Alito would grant; Justice Thomas dissents.

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cannot justify the burdens that disclosure requirements impose.”⁸³ He contended that even a slight risk of potential contributions being deterred “justif[ies] eliminating disclosure requirements altogether.”⁸⁴ After analyzing the Third Circuit’s use of the exacting scrutiny standard to determine whether DEDA’s restrictions were sufficiently tailored to the State’s legitimate interest, Justice Thomas concluded that the Court’s denial of certiorari “sends a strong message that ‘exacting scrutiny’ means no scrutiny at all.”⁸⁵

Dissents from denials of certiorari are fairly rare on the Supreme Court, and the denials themselves usually do not provide any details about the decision, so typically the public, as well as the parties to a case, “have almost no way of knowing whether the issue generated any interest at the Court.”⁸⁶ The Court’s denial of DSF’s petition was interpreted by some activists as “a strong statement on behalf of disclosure.”⁸⁷ Nonetheless, the denial could just as easily “signal that the Court is not interested in the issue and sees no problem with” the Third Circuit’s holding.⁸⁸ Given the Supreme Court’s long history of engagement with campaign finance reform, however, and Justice Thomas’ strong dissent, disinterest seems unlikely.

V. NEW JERSEY’S PAY-TO-PLAY LAWS & PROPOSED LEGISLATION

New Jersey’s statewide campaign contribution disclosure regulations, collectively known as the “Pay-to-Play” laws, place certain restrictions and disclosure requirements on—only—for-profit business

83. *Id.* at 2378 (Thomas, J., dissenting).

84. *Id.* at 2377 (Thomas, J., dissenting).

85. *Id.* at 2378 (Thomas, J., dissenting). Justice Thomas argued that “the Third Circuit failed to ask how that interest [, to have an informed electorate,] could justify mandatory disclosure merely because an organization mentions a candidate’s name.” *Id.*

86. Tom Goldstein, *What You Can Learn From Opinions Regarding the Denial of Certiorari*, SCOTUSBLOG (Nov. 18, 2013, 2:10 PM), <http://www.scotusblog.com/2013/11/what-you-can-learn-from-opinions-regarding-the-denial-of-certiorari/>.

87. See Jeff Brindle, *Supreme Court Leaves Intact New Delaware Law That Expands Disclosure*, OBSERVER (Aug. 29, 2016, 11:55 AM), <http://observer.com/2016/08/supreme-court-leaves-intact-new-delaware-law-that-expands-disclosure> (“In New Jersey, independent groups are ever increasing in number and spending. Current law allows many to avoid disclosing their contributions, their expenditures, or both.”).

88. Goldstein, *supra* note 86.

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entities that have or are seeking New Jersey government contracts”⁸⁹ valued “in excess of \$17,500, except for a contract that is required by law to be publicly advertised for bids.”⁹⁰ Nonprofit organizations are not even mentioned in the Pay-to-Play statute, and are therefore typically totally exempt from disclosure of their own donations, or the identities of their donors.⁹¹

In the context of traditional candidate funds, candidate committees, political parties, and the like, New Jersey’s contribution limits and reporting requirements are similar to those of many other states;⁹² campaigns and their committees are required to make regular disclosures about both their donors and their own expenditures,⁹³ and there are limits on how much money can be donated to each of these groups by certain entities per election cycle (e.g., individuals may only donate \$2,600 per election cycle to a candidate committee, and \$25,000 per year to a state political party committee).⁹⁴

The practical effect of requiring political parties and candidates to disclose their funds and contributors, while allowing nonprofits to forego such disclosure, has been a consistent and staggering exodus of money from traditional, somewhat transparent fundraising through political parties “into newly created special interest [groups] designed to get around the law.”⁹⁵ A January 2017 report by New Jersey’s ELEC found that from 2010 to 2017, county political parties received about 50 percent less in annual contributions than they did between 2003 and 2009.⁹⁶ ELEC concluded that the decrease resulted from the combined

89. *Pay-to-Play Information*, ST. OF N.J.: ELECTION L. ENFT COMM’N, https://wwwnet-elec.state.nj.us/elec_ptp/p2p.html (last visited Nov. 5, 2017) (emphasis added).

90. N.J. STAT. ANN. § 19:44A-20.26(2)(a) (West 2014).

91. *See id.*; *see also* Samantha Marcus, *Fundraising by N.J. Political Parties, Legislative Committees Drops, Report Says*, NJ.COM (Oct. 19, 2015, 1:07 PM), http://www.nj.com/politics/index.ssf/2015/10/fundraising_by_nj_parties_legislative_committees_d.html (ELEC “has suggested the state consider . . . extending the disclosure laws that parties and candidates follow to [cover] independent groups.”); Max Pizarro, *ELEC: NJ Political Party Fundraising Nosedives*, OBSERVER (Jan. 30, 2017, 11:16 AM), <http://observer.com/2017/01/elec-nj-political-party-fundraising-nosedives/>.

92. *See Contribution Limits Chart*, ST. OF N.J.: ELECTION L. ENFT COMM’N, http://www.elec.state.nj.us/forcandidates/elect_limits.htm (last visited Nov. 5, 2017).

93. N.J. STAT. ANN. § 19:25-1.9.

94. *Contribution Limits Chart*, *supra* note 92.

95. News Release, State of N.J.: Election Law Enft Comm’n, Cty. Parties 2016 Totals (Jan. 30, 2017), http://www.elec.state.nj.us/pdf/files/press_releases/pr_2017_pr_01302017.pdf.

96. *Id.*

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effect of the Pay-to-Play laws, which were introduced in 2005 and amended in 2008, and the abolition of spending limits for independent nonprofit groups in *Citizens United* in 2010.⁹⁷ For example, in the 2013 gubernatorial election cycle, “independent political groups” spent a total of \$41 million, and in 2016, independent groups spent \$28 million on ballot questions alone, all with undisclosed sources of funding.⁹⁸

Efforts to fill the gaps in Pay-to-Play, both by ELEC proposals⁹⁹ and through legislative measures,¹⁰⁰ have been largely unsuccessful. However, Assembly Minority Leader Jon Bramnick introduced a bill for consideration (which has been in committee awaiting a vote since April 2016¹⁰¹) that would amend Pay-to-Play to require independent expenditure groups, including 501(c)(4)s, to abide by the same disclosure requirements as all other political groups.¹⁰² New Jersey Assembly Bill No. 3639 introduces new language to define independent groups:

The term “independent expenditure group” means an organization organized under section 527 of the federal Internal Revenue Code, 26 U.S.C. [§]527, or under paragraphs (4), (5), or (6) of subsection c. of section 501 of the federal Internal Revenue Code, 26 U.S.C. [§]501, that does not fall within the definition of any other organization subject to the provisions of P.L.1973, c.83 (C.19:44A-1 et seq.), that engages in influencing or attempting to influence the outcome of any election or the nomination, election, or defeat of any person to any State or local elective public office, or the passage or defeat of any public question, or in providing political information on any candidate or public question, and raises or expends \$5,000

97. *Id.*

98. *Id.*

99. ELEC has made a number of proposals to simplify Pay-to-Play and “offset independent groups,” but none have been adopted. *Id.*

100. In 2010, Governor Christie issued an executive order extending Pay-to-Play restrictions to “labor unions and labor organizations,” but after a legal challenge, the order was struck down. *Comm’n Workers of Am. v. Christie*, 994 A.2d 545, 548, 555–56 (N.J. Super. Ct. App. Div. 2010).

101. *N.J. A3639*, BILLTRACK50, <https://www.billtrack50.com/BillDetail/737846> (last visited Nov. 5, 2017).

102. *Assemb. B. 3639*, 217th Sess. (N.J. 2016).

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or more in the aggregate for any such purpose, but does not coordinate its activities with any candidate or political party.¹⁰³

The bill provides that independent 501(c)(4) groups (and others) which raise or expend an aggregate of \$5,000 or more and “engage[] in influencing or attempting to influence the outcome” of any election or public question¹⁰⁴ will be subject to the same disclosure requirements as those groups already covered by Pay-to-Play (candidates, party committees, etc.).¹⁰⁵ It requires “[e]ach independent expenditure group” to “make a full cumulative report . . . of all contributions received in excess of \$300 . . . and of all expenditures in excess of \$300 made, incurred, or authorized by it in influencing or attempting to influence” the outcome of an election or public question.¹⁰⁶ It further requires the reports to contain “the name and mailing address of each person or group” from whom the group has received a contribution, and the occupation and employer of any individual contributor.¹⁰⁷

The types of expenditures which would require donor disclosure echo BCRA’s requirements for electioneering communications, both in the forms of express and issue advocacy:

The disclosure requirements for an independent expenditure group shall apply to and include any expenditure for a communication that can be interpreted by a reasonable person as advocating: (1) the election or defeat of a candidate for nomination or election to an elective public office, taking into account whether the communication mentions a candidate or takes a position on a candidate’s character, qualifications, or fitness for the public office; or (2) the passage or defeat of a public question. An independent expenditure group shall disclose all expenditures made by it in excess of \$300, including, but not limited to, for voter registration, get-out-the-vote-efforts, polling, and research done for the purpose of supporting or opposing: (1) a candidate for nomination or election to an

103. Assemb. B. 3639(3)(t).

104. *Id.*

105. Assemb. B. 3639(8)(d)(1)–(2).

106. Assemb. B. 3639(d)(1) (emphasis added).

107. *Id.*

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elective public office; or (2) the passage or defeat of a public question.¹⁰⁸

Here, “the election or defeat of a candidate” encompasses express advocacy, and “the passage or defeat of a public question” encompasses issue advocacy.¹⁰⁹ The bill would thereby institute disclosure requirements at the state level analogous to those required by BCRA at the federal level.

The passage of these reforms—either in their current form in Bill No. 3639 or in later legislation—is essential to leveling the political playing field in New Jersey and allowing the electorate the opportunity to make truly informed choices at the ballot box. In an interview for this Commentary, the bill’s sponsor, Assemblyman Jon Bramnick, said that increased disclosure is in the “best interest of society in New Jersey.”¹¹⁰ He noted that special interest groups are able to avoid disclosure under the current version of Pay-to-Play, “all under the guise of free speech,” and that “special interest money does everything it can to avoid exposure to the sun.”¹¹¹ Previous efforts to increase disclosure have failed, largely because in reality, whatever party is in power in the state legislature is currently “better at raising money,” tends to have benefited significantly from the contribution system in place, “and therefore would prefer less disclosure.”¹¹²

Assemblyman Bramnick’s Bill No. 3639 broadly incorporates BCRA’s disclosure requirements¹¹³ and, if passed, would be the first step in modernizing New Jersey’s campaign finance laws to reflect the post-*Citizens United* political landscape. To curb the further proliferation of dark money in New Jersey’s elections, it is imperative that the state legislature reform the Pay-to-Play laws to include the regulation of 501(c)(4) nonprofits and other independent groups. Post-*Citizens United*, the exemption of nonprofits from disclosure requirements regarding not only their own political contributions but

108. Assemb. B. 3639(d)(2) (emphases added).

109. *Id.*

110. Interview with Jon Bramnick, Minority Leader, N.J. State Assembly, in Scotch Plains, N.J. (Feb. 14, 2017).

111. *Id.*

112. *Id.*

113. See *supra* notes 34–49 & accompanying text.

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also the identity of their donors does not serve New Jersey's "interest in an informed electorate."¹¹⁴

VI. CONCLUSION

Since *McConnell v. FEC*, the Supreme Court has consistently demonstrated its willingness to uphold disclosure requirements at both federal, and, more recently, state levels.¹¹⁵ Its denial of certiorari in the *Delaware Strong Families* case cannot necessarily be interpreted as a statement of the majority's support for DEDA's requirements or the Third Circuit's opinion regarding the law, but taken alongside its recent summary affirmation of the D.C. Circuit's decision in *Independence Institutes*, it seems to indicate that the Court continues to view "preventing the actual or apparent corruption of federal candidates and officeholders" as "a sufficiently important interest to justify contribution limits"¹¹⁶ and disclosure requirements.

New Jersey and other states yet to pass legislation requiring the regulation and full disclosure of nonprofit political activity should follow the lead of the Supreme Court, and of states like Delaware, which have passed comprehensive legislation targeting the use of dark money in politics. For such legislation to be successful, it is also essential that the FEC and its state equivalents, like New Jersey's ELEC, use the full range of their authority to step in when questionable contribution practices come to light; the FEC's current commissioners often fail to effectively pursue enforcement actions¹¹⁷ and New Jersey's ELEC has been somewhat sidelined in recent years because of a persistent

114. *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 309 (3d Cir. 2015).

115. See Kenneth P. Doyle, *Supreme Court Backs FEC Disclosure Rules*, BLOOMBERG BNA (Feb. 28, 2017) [hereinafter Doyle, *FEC Disclosure Rules*], <https://www.bna.com/supreme-court-backs-n57982084528/> ("The federal government defended the disclosure rules in court, and a motion filed last month on behalf of the FEC said the Supreme Court already 'has twice considered and twice upheld' the FEC disclosure requirements at issue in [*Independence Institute*].").

116. *McConnell v. FEC*, 540 U.S. 93, 95 (2003).

117. Doyle, *FEC Disclosure Rules*, *supra* note 115. "Watchdog" groups like Public Citizen and CREW, see *supra* note 26, frequently challenge FEC dismissals of enforcement actions. For example, in September 2016, the U.S. District Court for the District of Columbia found "that the FEC acted 'contrary to law' by dismissing an FEC enforcement case against two conservative nonprofit groups—American Action Network and Americans for Job Security—that refused to disclose their donors." Kenneth P. Doyle, *Judge Won't Order FEC to Pursue Conservative Nonprofit*, BLOOMBERG BNA (Feb. 24, 2017), <https://www.bna.com/judge-wont-order-n57982084370/>.

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vacancy on its board.¹¹⁸ New Jersey legislators should unite to pass comprehensive Pay-to-Play reform in the interest of fairer, more transparent government and elections.

118. Salvador Rizzo, *N.J. Election Watchdog Agency Kept on Sidelines*, NORTHJERSEY.COM (Aug. 14, 2016), <http://www.northjersey.com/story/news/2016/08/14/nj-election-watchdog-agency-kept-on-sidelines/92943398/>. “The vacancies have prevented the ELEC from pursuing its biggest case of alleged political wrongdoing in years—and many others. . . . In other words, there’s no sheriff in town . . .” *Id.*