UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELAWARE STRONG FAMILIES, Plaintiff, vs. JOSEPH R. BIDEN III, in his official capacity as Attorney General of the State of Delaware; and ELAINE MANLOVE, in her official capacity as Commissioner of Elections for the State of Delaware, Defendants.	Civil Action No. 1:13-cv-1746-SLR

DECLARATION OF MIMI MURRAY DIGBY MARZIANI

I, Mimi Murray Digby Marziani, declare under penalty of perjury that the following is true and correct:

1. I submit this declaration to accompany Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction.
2. I am currently an associate at Sullivan & Cromwell LLP in New York.
3. From September 2009 until December 2012, I was a counsel at the Brennan Center for Justice at New York University School of Law.
4. In that capacity, I testified before the Delaware House Administration Committee on May 2, 2012, in support of the Delaware Elections Disclosure Act.

5. Attached to this declaration as Exhibit A is a true and correct copy of the written statement I submitted to the Committee for that hearing.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: March 5, 2014

/s/ Mimi Murray Digby Marziani
Mimi Murray Digby Marziani

EXHIBIT A

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Testimony of
MIMI MURRAY DIGBY MARZIANI[1]

Submitted to the
HOUSE ADMINISTRATION COMMITTEE

For the hearing on
HB 300: DELAWARE ELECTIONS DISCLOSURE ACT
May 2, 2012

I appreciate the opportunity to testify today and express my strong support for the Delaware Elections Disclosure Act, which would enhance transparency in Delaware's elections.

Robust disclosure of money in politics is an essential component of a healthy democracy. Voters have a right to know the identities of those seeking to influence their vote. Moreover, disclosure deters corrupt, back-room dealings and enables regulators to detect violations of other campaign finance laws, like contribution limits.

Delaware's current campaign finance disclosure regime has not been updated to meet the challenges of modern elections, and it lags behind the laws of many other states. The Delaware Elections Disclosure Act (the "Act") is necessary to bring Delaware elections into the twenty-first century.

The Act Would Modernize Delaware Elections

Since *Citizens United v. FEC*[2] lifted restrictions on independent spending in US elections, outside parties, including business corporations, unions, and Super PACs, have spent astronomical sums on campaign advertisements in both federal and state elections. In the 2010 federal elections, for example, outside groups spent a total of $294 million on political advertising—an increase of more than 400 percent compared with the previous midterm cycle.[3] Similarly, an analysis of just 20 states showed that at least $193 million was spent independent of campaigns during their 2009 and 2010

[1] Mimi Marziani serves as counsel for the Brennan Center's Democracy Program where her work focuses on money in politics and voting rights.
[2] 130 S. Ct. 876 (2010).
[3] *See* PUBLIC CITIZEN, 12 MONTHS AFTER: THE EFFECTS OF *CITIZENS UNITED* ON ELECTIONS AND THE INTEGRITY OF THE LEGISLATIVE PROCESS 9 (2011).

state elections—a 14% increase from the comparable 2005-2006 cycle.[4] Delaware has not been immune to this influx of new money. In 2010, for instance, outside groups—many funded by out-of-state interests—spent over $1.7 million dollars to influence the results of the state's US Senate race.[5]

As third parties play an increasingly central role in American elections, it becomes even more important that strong disclosure laws promote accountability and deter corruption. To be effective, such laws must be broad enough to capture a significant amount of political spending and rigorous enough to provide useful information to the public. The Act would further these goals in three main ways.

Regulating Electioneering Communications

First, the Act would mend a gaping hole in existing state law by regulating "electioneering communications"—campaign advertisements that target candidates right before an election, but escape disclosure by avoiding the "magic words" of express advocacy like "vote for" or "vote against" that have traditionally triggered disclosure requirements. Over the years, sophisticated players have had little trouble avoiding these magic words and thereby shielding their campaign spending from public scrutiny. Recognizing the problem of so-called sham issues ads in federal elections, the Supreme Court wryly noted that one cannot "satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public."[6]

State elections nationwide have experienced similar issues, and Delaware is no exception. In 2010, for instance, many Delawareans received colorful mailings about several state legislative candidates, largely attacking them for their stance on taxes. The mailings listed a P.O. Box in Newark, but no other identifying information. And, because the cards carefully never told recipients to "vote against" any candidate, state law did not require those responsible for funding this effort to publically report their spending.[7]

Accordingly, over the last decade, federal law and the laws of twenty-one states have been extended to regulate electioneering communications. Delaware should follow suit, and likewise expand the scope of its disclosure regime to capture these ubiquitous campaign ads.

Enhancing Reporting Requirements

Second, the Act would require prompt disclosure from third parties spending significant amounts on independent expenditures and/or electioneering communications. Specifically, within twenty-four

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[4] *See* National Institute of Money in State Politics, *Independent Spending's Role in State Elections: 2005-2010*, FOLLOWTHEMONEY.ORG (March 15, 2012), http://www.followthemoney.org/press/PrintReportView.phtml?r=481.

[5] Center for Responsive Politics, *2010 Race: Delaware Senate, Outside Spending*, OPENSECRETS.ORG (last visited April 30, 2012), http://www.opensecrets.org/races/indexp.php?cycle=2010&id=DES2.

[6] *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (citation omitted).

[7] *See* Celia Cohen, *None of Your Business Who Paid for This Ad*, DELAWAREGRAPEVINE.COM (Oct. 27, 2010), http://www.delawaregrapevine.com/10-10PObox.asp.

hours of spending $500 or more on campaign advertisements right before an election,[8] outside spenders would have to file a report with information about their political spending and a list of everyone who has recently donated more than $100 to them. If more than $1,200 of the underlying funds came from a non-human entity, a representative from that entity must also be identified. Thereafter, the Elections Commission will post the spending report online.

Disclosing information about the spender, the target of their spending, and the people or entities providing the underlying funding is necessary to paint a full and accurate picture of election spending in Delaware. Otherwise, corporate or other political actors seeking to veil their involvement in partisan politics may seek to funnel their funds through another organization, evading meaningful disclosure and thus any public accountability. This, too, has been a substantial problem nationwide.[9]

Delaware thus has a strong interest in joining with the numerous other states that require robust disclosure of outside spending, including information about underlying donors.[10]

Requiring Spenders to Stand by their Advertisements

Finally, the Act would require outside spenders to stand by their advertisements, just like candidates must do. As the *Citizens United* Court explained, stand-by-your-ad requirements are necessary to "insure that . . . voters are fully informed about the person or group who is speaking," and "avoid confusion by making clear that the ads are not funded by a candidate or political party."[11] And so, federal law and the laws of thirty-eight states include disclaimer requirements as part of their campaign finance regimes.

In addition to mandating that groups include their name on the face of campaign ads, the Act would require a link to the Election Commission's website, where a voter can easily learn more about the spender and its funders. This is of vital importance; too often the name on the face of an ad is that of a benign-sounding group that obscures who is running, the organization and how it obtains its funding. Examples of this problem abound in state elections nationwide:

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[8] If the $500 threshold is reached more than 30 days before a primary or special election, or 60 days before a general election, spenders have forty-eight hours to file their report.

[9] Indeed, in the 2010 federal elections, an estimated $135 million was spent by groups that did not provide any information about their sources of money. 12 MONTHS AFTER, *supra* note 3, at 10. And, of the ten highest spending outside groups that year, seven disclosed nothing about their contributors—even though they collectively accounted for nearly half of all outside spending. *Id.*

[10] Many states that are close to Delaware in population and geographic distance have similar requirements. For states with similar total population, *see, e.g.*, Haw. Rev. Stat. § 11-341(c) (requiring disclosure of *all* underlying donors funding electioneering communications); Alaska Stat. § 15.13.040(d)-(e) (requiring requiring disclosure of *all* underlying donors funding campaign advertisements). For states that are geographically close to Delaware, *see, e.g.*, MD Code Ann., Elec. Law §§ 13-306(e)(5); 13-307(e)(5) (requiring disclosure of underlying donors contributing over $51 to fund campaign advertisements); Mass. Gen. Laws ch. 55, § 18F (requiring disclosure of underlying donors contributing over $250 for electioneering communications). *See also* 2 U.S.C. § 434(f)(2) (mandating disclosure of underlying donors contributing over $1,000 to fund electioneering communications); *Van Hollen v. FEC*, ___ F.Supp.2d ___ , 2012 WL 1066717 (March 30, 2012) (striking down FEC interpretations narrowing scope of underlying disclosure required by § 434(f)(2)).

[11] *Citizens United*, 130 S. Ct. at 915.

- During the 2011 Wisconsin Supreme Court race, a group named "Citizens for a Strong America" funded an advertising blitz against candidate JoAnne Kloppenburg, but provided no public information about its organization, leadership, or funders. The address listed for the group led to a mailbox at a local UPS store and its phone number led to a full voicemail box. Eventually, the Center for Media and Democracy discovered that "Citizens for a Strong America" was controlled by a leader of Americans for Prosperity, a national organization largely funded by billionaire David Koch.[12]

- In a 2010 Colorado ballot measure election, a group called "Littleton Neighbors Voting No," spent $170,000 to defeat a restriction that would have prevented Wal-Mart from coming to town. When the disclosure reports for these groups were filed, however, it was revealed that "Littleton Neighbors" was exclusively funded by Wal-Mart; it was not a grassroots campaign at all.[13]

The Act would prevent this mischief by giving curious voters a link where they can quickly and easily access the outside spender's campaign finance report, with full information about a spender's identity, their spending decisions, and the source of their funds.

The Act Stands on Firm Constitutional Ground

For more than three decades—from *Buckley v. Valeo*,[14] upholding the post-Watergate regulation of money and politics in 1976, through *McConnell v. FEC*,[15] upholding the Bipartisan Campaign Reform Act's ("BCRA") disclosure requirements in 2003, to *Citizens United* [16]and beyond—the US Supreme Court has consistently and repeatedly held laws requiring the robust disclosure of money in politics. Moreover, the Court has twice upheld the specific reforms that are central to HB 300—mandating robust disclosure of electioneering communications and disclaimers on the face of campaign advertisements.[17] This unbroken chain of precedent leaves no doubt that the Act is constitutional.

In *Buckley v. Valeo*, the Court explained that campaign finance disclosure serves three vital governmental interests:

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[12] Lisa Graves, *Group Called "Citizens for a Strong America" Operates out of a UPS Mail Drop but Runs Expensive Ads in Supreme Court Race?*, PRWATCH.ORG (Apr. 2, 2011, 6:37 PM), http://www.prwatch.org/news/2011/04/10534/group-called-citizens-strong-america-operates-out-ups-mail-drop-runs-expensive-ad.

[13] *See* Def.'s Response Br. to Pls.' Motion for Summary Judgment, Sampson v. Coffman, 06-cv-01858 at 43-44 (D. Co. 2007) (Dkt. #34).

[14] 424 U.S. 1 (1976).

[15] 540 U.S. at 194-96.

[16] 130 S. Ct. at 914-16.

[17] *See Citizens United*, 130 S. Ct. at 914-16; *McConnell*, 540 U.S. at 194-96. Under federal law, an electioneering communication is "any broadcast, cable, or satellite communication that (1) Refers to a clearly identified candidate for Federal office; (2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and (3) Is targeted to the relevant electorate . . . ." Electioneering Communication, 11 C.F.R. § 100.29(a) (2011). *See also* 2 U.S.C. § 434(f)(3).

> (1) "disclosure provides the electorate with information as to where political campaign money comes from and how it is spent;" (2) "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity;" and (3) "disclosure requirements are an essential means of gathering the data necessary to detect violations" of other campaign finance regulations.[18]

The *Buckley* court went on to find these interests important enough to justify any incidental burdens on political speech that disclosure requirements could cause. In 2003, the *McConnell* Court reaffirmed this triumvirate of governmental interests by upholding the reporting and disclaimer requirements for electioneering communications in BCRA.

More recently, in *Citizens United*, eight justices voted to uphold BCRA's disclosure requirements as applied to a politically-active nonprofit, Citizens United. In doing so, the Court explained that even if "[d]isclaimer and disclosure requirements may burden the ability to speak, . . . they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." [19] And, the Court made clear that laws of this nature further important First Amendment values, and are necessary components of our electoral process:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.[20]

Since *Citizens United*, lower federal courts—from Washington to Florida and from Maine to Hawaii—have consistently and repeatedly upheld state campaign finance disclosure laws that target outside spending.[21] Over and over, these courts have stressed the importance of robust

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[18] 424 U.S. at 66-68 (citations and internal quotation marks omitted).

[19] 130 S. Ct. at 914 (citations and internal quotation marks omitted).

[20] *Id.* at 916.

[21] *See, e.g.*, *Family PAC v. McKenna*, Nos. 10–35832, 10–35893, 2012 WL 266111, at *6 (9th Cir. Jan. 31, 2012) (upholding Washington's $25 and $100 disclosure thresholds for reporting information about contributors to political committees that support ballot measures); *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115, 118 (1st Cir. 2011) (finding that Rhode Island's "relatively small imposition" for disclosing information about independent expenditures is related to government interest in providing electorate with key information); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 41 (1st Cir. 2011) (upholding Maine's political committee financial disclosure requirements and finding that provisions "neither erect a barrier to political speech nor limit its quantity"), *aff'd* No. 11-1196, 40 (1st Cir. Jan. 31, 2012) (finding that "ballot question committee" law, like PAC laws, are constitutional and that "transparency is a compelling objective"), *cert. denied*, No. 11-559 (U.S. Feb. 27, 2012); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010) (upholding Washington's political committee financial disclosure requirements and noting, "indeed, it is the Supreme Court's decision in *Citizens United* . . . that provides the best guidance regarding the constitutionality of the Disclosure Law's requirements."); *Justice v. Hosemann*, No. 3:11-CV-138-SA-SAA, 2011 WL 5326057, at *14 (N.D. Miss. Nov. 3, 2011) (holding that Mississippi's disclosure forms are not "overly intrusive" and that $200 threshold amount is rational and substantially related to government's important informational interest); *ProtectMarriage.com v. Bowen*, No. 2:09-CV-00058-MCE-DAD, 2011 WL 5507204, at *18 (E.D. Cal. Nov. 4, 2011) (finding that alleged harassment related to financial support of Proposition 8 did not warrant exception from California's general disclosure laws); *Nat'l Org. for Marriage, Inc. v. Roberts*, 753 F.Supp.2d 1217, 1222 (N.D. Fla. 2010)

transparency of money in state politics. For instance, as the Ninth Circuit Court of Appeals explained, upholding Washington state disclosure laws:

> Campaign finance disclosure requirements . . . advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas. An appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another.[22]

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For the reasons set forth above, the reforms contained in HB 300 should be embraced by the House Administration Committee and recommended to the General Assembly for prompt passage.

(finding that Florida disclosure requirements connected to "electioneering communications organizations" "would not prohibit [plaintiff] from engaging in its proposed speech"); *Yamada v. Kuramoto*, No. 10-00497 JMS/LEK, 2010 WL 4603936, at *1 (D. Haw. Oct. 29, 2010) (finding that "*Citizens United* also endorsed disclosure" and upholding Hawaii's disclosure regime); *Iowa Right to Life Comm., Inc. v. Smithson*, 750 F.Supp.2d 1020, 1026 (S.D. Iowa 2010) (finding "under *Citizens United*, '[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements'" and upholding Iowa disclosure regime (alteration in original)); *Wis. Club for Growth, Inc. v. Myse*, No. 10-cv-427-wmc, 2010 WL 4024932, at *5 (W.D. Wis. Oct. 13, 2010) (refusing to enjoin Wisconsin's disclosure regulations; noting "[P]laintiffs' reliance on *FEC v. WRTL* ignores the Supreme Court's later treatment of disclosure and disclaimer regulations in *Citizens United*"); *Ctr. for Individual Freedom v. Madigan*, 735 F. Supp. 2d 994, 1000 (N.D. Ill. 2010) (upholding Illinois' registration, disclosure, and reporting provisions; noting "in *Citizens United*, the Supreme Court expressly rejected the contention that election-law disclosure requirements are limited to express advocacy or its functional equivalent"). *See also SpeechNow.org v. FEC*, 599 F.3d 686, 696–97 (D.C. Cir. 2010) (upholding federal disclosure requirements for organizations making independent expenditures; finding "*Citizens United* upheld disclaimer and disclosure requirements for electioneering communications as applied to Citizens United, again citing the government's interest in providing the electorate with information").

[22] *Brumsickle*, 624 F.3d at 1008.