No. 26A_____

In the Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION, ET AL.
Applicants,

v.

ANTHONY ALBENCE, ET AL.
Respondents.

To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court and Circuit Justice for the Third Circuit

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION PENDING CERTIORARI

ERIKA D. PROUTY
ROBERT J. TUCKER
ANNA E. CROYTS
BAKER & HOSTETLER LLP
200 Civil Center Dr., Ste. 1200
Columbus, OH 43215

ALLEN J. DICKERSON
Counsel of Record
RICHARD B. RAILE
BAKER & HOSTETLER LLP
Washington Square, Ste. 1100
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 861-1711
adickerson@bakerlaw.com

Counsel for Applicants

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PARTIES AND RULE 29.6 STATEMENT

Applicants are Americans for Prosperity Foundation and Americans for Prosperity. Applicants are the Plaintiffs in the United States District Court for the District of Delaware and the Appellants in the United States Court of Appeals for the Third Circuit. Applicant Americans for Prosperity Foundation has no parent corporation, subsidiary, or affiliate that has issued shares or debt securities to the public and no publicly held company owns 10% or more of its stock. Applicant Americans for Prosperity likewise has no parent corporation, subsidiary, or affiliate that has issued shares or debt securities to the public and no publicly held company owns 10% or more of its stock.

Respondents are Anthony Albence, in his official capacity as the State Election Commissioner for the State of Delaware, and Kathy Jennings, in her official capacity as Attorney General of the State of Delaware. Respondents are the Defendants in the United States District Court for the District of Delaware and the Appellees in the United States Court of Appeals for the Third Circuit.

TO THE HONORABLE SAMUEL A. ALITO, JR.,
ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Pursuant to Rules 20, 22, and 23 of the Rules of this Court, and 28 U.S.C. § 1651, Applicants Americans for Prosperity Foundation and Americans for Prosperity respectfully request a writ of injunction precluding enforcement of disclosure requirements under Delaware Elections Disclosure Act (the Act) pending a petition for certiorari. The Act imposes startlingly expansive donor-disclosure obligations for organizations speaking in proximity to elections, in stark contravention of this Court's requirement that such obligations be narrowly tailored to an important governmental interest. Without this Court's immediate intervention, the Act will foreclose Applicants from speaking until after the 2026 general election, and issues presented in this case may become impossible to review.

In *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021) (*AFPF*), this Court held that exacting scrutiny applies to all compelled disclosure of donor identities, regardless of the severity of burdens imposed. *Id.* at 608–611. It also held that exacting scrutiny "requires narrow tailoring," which in turn requires a state to prove that "alternatives to indiscriminate up-front disclosure" will not serve its asserted interests. *Id.* at 611, 618. The Act plainly fails this test. It provides that, once an entity spends $500 on covered electioneering communications—issue speech that merely mentions a candidate for office—the identify and home address of *everyone* who gave that entity more than $100 up to four years in the past must be publicly disclosed on the internet. The Act makes the California disclosure regime struck down in *AFPF* seem mild by comparison. Indeed, the Tenth Circuit, in striking down a considerably more-tailored Wyoming law, dismissed Delaware's Act out of hand as plainly untailored. *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1248–50 (10th Cir. 2023) (Tymkovich, J.).

The Third Circuit previously upheld the Act under an obsolete, pre-*AFPF* standard. Even then, two justices of this Court would have granted certiorari, and one suggested that, if the Act passes muster, then "exacting scrutiny means no scrutiny at all." *See Del. Strong Fams. v. Denn*, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting from denial of certiorari). When Applicants presented this regime to the Third Circuit in a preliminary injunction appeal, *see* 28 U.S.C. § 1292(a), it had a clear choice. It could apply *AFPF*, reverse its own precedent as obsolete, and enjoin the Act. Or it could adhere to its own precedent and leave a clear First Amendment holding for this Court to evaluate.

It did neither. Splitting from every court of appeals to have considered the issue—and this Court's clear directives—the Third Circuit held that it need not determine likelihood of success on the First Amendment question. Instead, it held that the Act's "status quo" triumphs over likely First Amendment injury and requires a First Amendment challenger to await final judgment after trial, and comply with a likely unconstitutional law in the interim. Minimizing the First Amendment presumption of irreparable harm, the Third Circuit privileged a presumption that enjoining the Act irreparably harms Delaware.

That decision flouts everything this Court has said about First Amendment injury from *Elrod v. Burns*, 427 U.S. 347 (1976), through *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004), to *Chiles v. Salazar*, 607 U.S. 627 (2026). This unbroken string of decisions, and others, treat the preliminary injunction inquiry in First Amendment cases as largely—if not entirely—controlled by the likely merits outcome. And they hold that, where the government bears the burden to overcome First Amendment scrutiny, the challengers "*must* be deemed likely to prevail *unless* the Government has shown" itself likely to satisfy the governing standard. *Am. Civ. Liberties Union*, 542 U.S. at 666 (emphasis added). The decision below flouts that precedent and creates a circuit split—one circuit against the rest. In conflict with the decision below, the national consensus of cases treats "the likelihood of success on the merits [a]s the linchpin of the preliminary injunction analysis," *Sindicato Puertorriqueño de Trabajadores v. Fortuno*, 699 F.3d 1, 10 (1st Cir. 2012) (per curiam), "usually making it unnecessary to dwell on the remaining three factors," *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020). Under this standard, the Third Circuit should have squarely decided whether Delaware is likely to shoulder its burden in defense of the Act and then assessed whether some extraordinary circumstance cut against provisional relief despite that showing. In that process, the Third Circuit should have required *Delaware* to prove its law tailored and applied any uncertainty against *Delaware* in the inquiry. The contrary ruling sets the Third Circuit as a national outlier and calls for this Court's prompt correction.

This is the exceptional case where an injunction pending review in this Court is warranted. The circuits are split on whether the Act is narrowly tailored, and *AFPF* plainly favors the Tenth Circuit's view on that question. More importantly, the Third Circuit has devalued First Amendment rights by requiring Applicants and other First Amendment plaintiffs to forego those rights until trial, where every other circuit gives them the strong benefit of the doubt if they show a likelihood of success at the outset of the case. The Court should intervene to address that rift in precedent. If it declines to act now, it may not have the opportunity because the Act's disclosure restrictions apply only in the period leading to an election (until November 3, 2026). If the Court does not issue an injunction, it may be too late to correct the Third Circuit's wayward equitable doctrine or otherwise ensure national uniformity on this issue of profound constitutional importance.

The time to act is now. The Court should enjoin the Act's application to Applicants for the 2026 election. Alternatively, it may deem this application a petition for certiorari and summarily reverse the ruling of the Third Circuit.

OPINIONS BELOW

The district court's order was issued on the trial court's record and is not published or available in a commercial database. The transcript of the ruling is reproduced at App.18a–33a. The Third Circuit's opinion is designated for publication but has yet to be assigned pagination in the Federal Reporter, Fourth Series. It is available at 2026 WL 2563151 and is reproduced at App.2a–14a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 1651 and Supreme Court Rule 23.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are reproduced at App.85a–99a.

STATEMENT

A. Factual Background

1. Delaware regulates speech about its elections through contribution limits and expenditure restrictions. 15 Del. C. §§ 8010–8012a, 8020. In 2012, the Delaware General Assembly expanded this regime through the Elections Disclosure Act (the Act), which instituted regulation of "third-party advertisement[s]," including "electioneering communication[s]." *Id.* § 8002(27); *see id.* § 8031(a). An electioneering communication includes speech by any communications media that "[r]efers to a clearly identified candidate" and is published within 30 days of a primary or special election or 60 days of a general election. *Id.* §§ 8002(10)(a) and (b)(1). These communications amount to what this Court has called "[i]ssue advocacy," which "conveys information and educates." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (principal opinion).

The Act requires a person who funds an electioneering communication to file a statement of organization with the State Election Commissioner (the

Commissioner)—just as a political action committee must file—identifying itself as the sponsor of the communications along with other information. 15 Del. C. §§ 8031(a)(1), 8005(1). That requirement is not challenged in this case.

The Act also requires that any person making aggregate expenditures on electioneering communications in Delaware in excess of $500 file "a third-party advertisement report." *Id.* § 8031(a). That report must include the full name and address of every person who donated to the person an aggregate amount above $100 during a defined "reporting period." *Id.* § 8031(a)(2). This disclosure requirement is not limited to donors who earmarked donations for Delaware-related communications or whose funds were actually used to fund such communications. App.3a. Nor may disclosure be avoided if donors direct that their gifts not be used for political advertising. *Id*. Moreover, the Act defines the "election period" by reference to an incumbent's term of office. *See* 15 Del. C. § 8002(11)(a)(1). Accordingly, persons who sponsor electioneering communications for a given election may have to disclose all donors who gave up to four years before that election. App.3a.

Failure to file a third-party advertisement report is a crime. 15 Del. C. § 8043(c). Reports must be made under penalty of perjury. *Id.* § 8031(a). Failure to file a required report is punished by "a fine by the Commissioner of $50 for each day that such report is tardy." 15 Del. Admin. C. 100-10.1. The names and addresses of donors disclosed in reports are placed in an online database available worldwide. *See Online Campaign Finance System*, DEL. DEP'T OF ELECTIONS, https://elections.delaware.gov/candidates/campaignfinance/campaignfinancesys.html (last visited Sep. 9, 2026).

2. The Delaware General Assembly apparently believed the Act mimics requirements of the Bipartisan Campaign Reform Act (BCRA) of 2002, which withstood a facial First Amendment challenge in *McConnell v. FEC*, 540 U.S. 93, 224 (2003) (emphasis added), *overruled in part by Citizens United v. FEC*, 558 U.S. 310

(2010). That view was mistaken. BCRA's disclosure regime has never compelled disclosure of all donors to a corporate entity that sponsors electioneering communications covered by BCRA. BCRA itself *bans* corporate sponsorship of electioneering communications. *See id.* at 204. After this Court rejected that ban on First Amendment grounds in *Wis. Right to Life*, *see* 551 U.S. at 481–82, the Federal Election Commission (FEC) implemented the ruling by requiring disclosure only of donors whose funds were actually used "to pay" for covered electioneering communications. Electioneering Communications, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007); *see* 11 C.F.R. § 104.20(c)(10). Furthermore, the Delaware and BCRA definitions of electioneering communications are not coterminous, with the state sweeping in far more issue advocacy.

The FEC rejected a regime that would impose "the significant burden of disclosing the identities of the vast numbers of customers, investors, or members, who have provided funds for purposes entirely unrelated to the making of ECs." *Id.* In upholding the FEC's rule, the D.C. Circuit explained that the FEC properly "exercised its unique prerogative to safeguard the First Amendment." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016).

3. In 2015, the Third Circuit upheld the Act's disclosure requirements under the exacting scrutiny standard it deemed applicable. *See Del. Strong Fams. v. Att'y Gen. of Del.*, 793 F.3d 304, 309–13 (3d Cir. 2015) (*DSF*). The *DSF* court applied a "heightened level of scrutiny" that required only "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* at 309 (quotation marks omitted). Noting that *McConnell* had upheld BCRA's disclosure regime, the Third Circuit oriented its analysis around "similar aspects of BCRA" that were upheld, and it merely "consider[ed] whether the Act's deviations from BCRA change the exacting scrutiny analysis." *Id.* at 310. The Third Circuit did not address

the FEC's post-*Wis. Right to Life* rule tailoring disclosure under BCRA to the funding of covered electioneering communications.

Observing that BCRA sets a $1,000 threshold for donation disclosures, the Third Circuit nonetheless upheld Delaware's threshold of $100—ten times less—because that threshold was (it believed) "*rationally related* to the State's interest." *Id.* at 310–11 (emphasis added) (quotation marks omitted). It also found support for Delaware's "broader" scope of media embraced by the Act and its rejection of earmarking. *Id.* at 311–12. It did not compare the Act to reasonable alternatives, such as the FEC's implementation of BCRA by limiting disclosure to donors who gave "for the purpose of furthering" covered communications. 11 C.F.R. § 104.20(c)(10). And it expressly admitted that "a more narrowly tailored statute" was possible, but found that—under exacting scrutiny—"[o]ur analysis does not change" on that basis. *DSF*, 793 F.3d at 312. The *DSF* court then reversed the district court's grant of a preliminary injunction—without addressing any equitable factors.

Justices Alito and Thomas dissented from this Court's subsequent denial of certiorari. *See Del. Strong Fams. v. Denn*, 136 S. Ct. 2376 (2016). Justice Thomas explained that "the Delaware scheme sweeps far broader than those the Court has previously considered." *Id.* at 2378 (Thomas, J., dissenting).

4. Applicants Americans for Prosperity ("AFP") and Americans for Prosperity Foundation ("AFPF") are nonprofit corporations engaged in public advocacy throughout the United States. AFP is organized under Internal Revenue Code (IRC) section 501(c)(4), and AFPF is organized under section 501(c)(3). The groups raise funds from thousands of individual donors across the country and spend those funds to engage the public on a wide range of policy topics.

Applicants intend to begin producing and distributing communications by television, radio, mail, and internet that would, when run during applicable electioneering windows, be regulated by the Act. App.71a. Applicants' communications discuss officeholders who are candidates for election or reelection in the context of specific public policies. App.71a, 79a–84a. It will cost more than $500 to fund these communications and their publication. *Id.* Because Applicants intend to make the communications within 60 days of the general election, the Act would treat them as third-party advertisements. Accordingly, Applicants will—if they speak as intended—be required to disclose all their donors nationwide going back to January 2023. *See* 15 Del. C. § 8002(11)(a)(1), (d). *Not one* of those donors funded Delaware-related electioneering communications—since Applicants have not engaged in such communications.

Even once Applicants furnish the funds for such communications, the number of donors who have funded them will be very small compared to Applicants' total donor base. From 2022 to 2025, 590 persons contributed between $100.01 and $199.99 to one or both Applicants. App.71a. Over 1,000 more gave between $200.00 and $999.99 during the same period. App.72a. Only a few donors reside in Delaware; the vast majority reside elsewhere. *Id.* None gave for the purpose of making communications in Delaware or in response to solicitations concerning AFP and AFPF's anticipated activity in Delaware. *Id.* If triggered, the Act would require Applicants to disclose, for example, an Ohio resident who donated $30 a year ($120 in the aggregate) since 2023.

5. Applicants will not disclose their donors in this expansive manner. Applicants prioritize donor privacy and have erected safeguards to protect their confidentiality. App.73a–74a. Applicants maintain donor information in a highly secure database and restrict access to employees who need to know it. App.73a. If Applicants disclose their donors, at least some will refuse to contribute, and current donors will cease contributing. Some will be fearful of reprisal if their names and addresses are publicized. App.72a–74a, 80a. Others will feel betrayed by the violation of agreements they made with Applicants to maintain the confidentiality of

donations. *See* App.73a–74a. And others will not wish for their names to be misleadingly associated with activities over which they had no control and in which they were not involved. *See* App.71a–72a. This is why Applicants object to disclosure.

Applicants' concerns of harassment and reprisal are justified. Applicants and their employees and supporters have been subject to threats and harassment, App.72a, as this Court and others have recognized, *see AFPF*, 594 U.S. at 617 (explaining that AFPF had shown "that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence"); *see also id.* at 636–37 (Sotomayor, J., dissenting) ("Petitioners have unquestionably provided evidence that their donors face a reasonable probability of threats, harassment, and reprisals if their affiliations are made public."); *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1056 (C.D. Cal. 2016) (cataloging threats); *see also Ams. for Prosperity v. Grewal*, No. 3:19-cv-14228-BRM-LHG, 2019 WL 4855853, at *6 (D.N.J. Oct. 2, 2019) (describing evidence where "AFP itself and its donors have been subjected to harassment ranging from death threats to cyberattacks to violent protests at AFP events").

Threats and harassment have continued in recent years, including in Vermont, where Applicants were compelled to hire security for their events due to consistent harassment and threats from groups who disagree with Applicants' economic policy views. App.72a. Legislators have attempted to stop Applicants' operations in northeastern states by introducing legislation targeting AFP, including in Vermont and Maine, where legislators singled out AFP as the basis for preventing non-profits from advocating in their states. App.72a–73a. Applicants and their donors therefore have a reasonable fear that they will be the target of threats, harassment, or other retaliation if such information is disclosed.

B. The Present Controversy

Rather than subject their nationwide donor base to worldwide exposure, Applicants brought this action immediately seeking an injunction from the district court on April 17, 2026—six-and-a-half months before election day 2026. Applicants acknowledged the adverse *DSF* decision in the Third Circuit, but explained that this Court's intervening *AFPF* decision required a more restrictive heightened-scrutiny standard, requiring "narrow tailoring" by comparison to "any less intrusive alternatives." *AFPF*, 594 U.S. at 612–13. Applicants sought a preliminary injunction permitting them to make electioneering communications within 60 days of the 2026 general election without worldwide disclosure of all their donors. *See* App.51a.

The district court expedited its consideration of the request but denied an injunction. That court addressed only the first factor governing requests for interim injunctions, likelihood of success on the merits. *See* App.19a–29a; *see Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). The court followed the Third Circuit's *DSF* opinion and deemed itself unable to rule that opinion superseded by *AFPF*. App.23a–24a. The district court, however, did not rule against Applicants on equitable factor. And it never suggested that the suit was untimely.

Applicants appealed to the Third Circuit, which also expedited the matter. App.16a. That court affirmed the district court's order but on different grounds. *See* App.8a–13a. The court acknowledged that Applicants "argue forcefully that they are likely to succeed," notwithstanding *DSF*, because *AFPF* "tightened up the narrow-tailoring requirement." App.8a. But the court declined to decide the ongoing vitality of *DSF*. The court found ambiguity from the fact that *AFPF* "was not an election case" and, in such cases, "the government has an interest in informing voters where election-related spending is coming from." App.8a–9a. After describing possible competing arguments, the Third Circuit was satisfied to call the outcome "hard to say" and merely to "spot the challengers some likelihood of success." App.10a, 12a.

The Third Circuit instead resolved the case on equitable grounds. It held that, in First Amendment cases, a presumption of irreparable harm does not establish "its probability or degree." App.11a. It acknowledged that Applicants' decision not to speak during the 60 days before an election "may" be irreparable harm but explained "we do not know how much." *Id.* Thus, on this factor too, the Third Circuit held "we do not yet know." App.12a.

The Third Circuit ultimately resolved the appeal by balancing of equities itself, even though the district court conducted no such balancing. *See* App.12a–13a, 27a–28a. It explained that "there is no risk of this case dying" because Applicants can obtain relief after trial. App.12a. It also determined that, despite the intervening assertion of First Amendment injuries, "[i]t makes no difference that challengers invoke the First Amendment." App.10a. Any presumption of harm runs into a separate presumption "that enjoining enforcement of the law would irreparably harm Delaware." App.11a. And the Third Circuit rejected Applicants' argument that "Delaware has no interest in enforcing an unconstitutional law." App.10a (quotation marks omitted). Faced with these perceived competing interests, the court privileged "the status quo." App.13a. Because Applicants "decided only recently to speak in Delaware," and did not "bring this suit earlier," the Act's requirements should (in the court's view) stand for the 2026 elections. App.12a. The court affirmed the judgment and returned the mandate immediately. App.1a.

ARGUMENT

The Court should grant an injunction to permit Applicants to speak free from the Act's unconstitutional disclosure rules that chill its expression during the 2026 election. The All Writs Act authorizes an individual Justice or the full Court to issue an injunction pending a writ of certiorari. 28 U.S.C. § 1651; *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). To obtain such an injunction, it is "well settled" that an applicant must show that four Justices "will consider the issue sufficiently meritorious to grant certiorari," "that there is a fair prospect that five Justices will conclude that the case was erroneously decided below," and "that irreparable harm will likely result from the denial of equitable relief." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). The Court has exercised this power to vindicate individual constitutional rights, or their equivalent, pending certiorari proceedings. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020) (per curiam) (granting injunction where applicants established "that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest"); *Wheaton Coll. v. Burwell*, 573 U.S. 958, 958 (2014) (similar ruling under the Religious Freedom Restoration Act); *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171, 1171 (2014) (same); *Akina v. Hawaii*, 577 U.S. 1024, 1024 (2015) (similar ruling under the Fourteenth and Fifteenth Amendments). "In appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public." *Lucas*, 486 U.S. at 1304. Those factors readily support the injunction requested in this case.

I. There Is a Reasonable Probability of Review and a Fair Prospect of Reversal

The Act imposes a disclosure mandate that triggers exacting scrutiny and fails that test. The Act is alleged to advance the State's interest in smoking out who funds speech related to Delaware elections. But it demands disclosure of nearly all an entity's donors going back up to four years once the entity spends above $500 in Delaware. This dragnet exhibits no remote attempt at tailoring. Applicants therefore demonstrated a likelihood of success on the merits that warranted provisional relief. This case merits this Court's review both because of the profound importance of First Amendment rights at stake and because Third Circuit precedent directly conflicts with the Tenth Circuit, which has specifically spoken to the Act and deemed it unconstitutional after *AFPF*.

And the decision below created yet additional splits on preliminary-relief standards by holding that First Amendment rights can stand in suspense indefinitely while litigation occurs. That holding flouts this Court's precedent, which deems the loss of First Amendment freedoms, even temporarily, irreparable harm *per se* and dismisses most any alleged state interest in perpetuating that loss. That is why other circuits treat a First Amendment question as the linchpin of a preliminary injunction analysis; other factors follow where the First Amendment leads. Because the Third Circuit has degraded First Amendment rights in a novel and erroneous doctrine of equity at odds with the national consensus, this Court is likely to grant certiorari and reverse.

A. The Act Violates the First Amendment

The Act imposes a disclosure mandate that triggers exacting scrutiny and fails that standard.

1. "The First Amendment guarantees all Americans the rights to speak, worship, publish, assemble, and petition their government freely." *First Choice Women's Res. Ctrs., Inc. v. Davenport*, 608 U.S. 174, 184 (2026). This Court has "long understood" that each of these rights "necessarily carries with it a corresponding right to associate with others." *Id*. (cleaned up). And "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).

Accordingly, this Court in *AFPF* held that all donor-disclosure requirements are subject to exacting scrutiny, regardless of the severity of their burdens. 594 U.S. at 608–11. The Court also "tightened" the exacting-scrutiny standard. *Wyo. Gun Owners*, 83 F.4th at 1244 ; *see also Gaspee Project v. Mederos*, 13 F.4th 79, 85 (1st Cir.

2021). Before *AFPF*, many courts, including the Third Circuit, understood the exacting-scrutiny test to require only "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *DSF*, 793 F.3d at 309 (citation omitted). But *AFPF* held that a disclosure requirement also must "be narrowly tailored to the interest it promotes." 594 U.S. at 611; *see Wyo. Gun Owners*, 83 F.4th at 1244. That test requires the State to "demonstrate its need for" the information it demands "in light of any less intrusive alternatives." *AFPF*, 594 U.S. at 613; *cf. McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) ("In the First Amendment context, fit matters.").

2. The Act fails this standard because of its "dramatic mismatch" between ends and means. *AFPF*, 594 U.S. at 612. While the State has claimed it serves an informational interest, that interest at most permits a state to compel disclosure of "sources of election-related spending." *Citizens United*, 558 U.S. at 367. But the Act stretches far beyond that supposed goal by demanding disclosure of donors who did not contribute to election-related spending in Delaware. Once an entity, like one of the Applicants, spends $500 on a qualifying communication, it must disclose *all* donors everywhere who funded the entity by more than $100 in the aggregate for all purposes going back years. The Act makes no attempt to tie a donor or donation to a regulated communication or even to Delaware. It sets a low threshold to rope in even small donors. And the mandate's time period ensures that funds donated and spent long ago will be disclosed based on a supposed interest in regulating Delaware spending. If Applicants began speaking about Delaware elections this year, the Act would require disclosure of innumerable donors whose gifts were not (and could not have been) used in Delaware elections as far back as January 2023.

That is "a dragnet for sensitive donor information," *AFPF*, 594 U.S. at 614, that makes the scheme struck down in *AFPF* look mild. In *AFPF*, California set a donation threshold 50 times Delaware's ($5,000) measured by "a particular tax year," and it required that the donor information be maintained in confidence by the Attorney General. *See id.* at 602, 615–16. The Court remarked with disapprobation at "the amount and sensitivity of this information harvested by the State." *Id.* at 613. Here, Delaware set the threshold at a small fraction of California's ($100.01), measured over a period up to four times the length (four years), and publishes the same sensitive donor information—names and addresses—to the entire world. Delaware's burdens exceed those of California's unconstitutional regime. *Cf. id.* at 611 ("[A] reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary[.]").

And Delaware's scheme is even less tailored than California's. In *AFPF*, California claimed that it had a strong interest in "preventing wrongdoing by charitable organizations," *id.* at 612, but no record evidence showed that pre-investigation collection of donor identities furthered that interest, given that California had alternative means of policing charities and rarely used the disclosures to that end. *Id.* at 612–15. Because it "cast[] a dragnet for sensitive donor information" that "will become relevant in only a small number of cases," California fell "far short" of its tailoring burden. *Id.* at 613–614. Delaware falls even further short. Because only a small subset of donors to a national organization will fund recent, Delaware-related speech, only a small subset of disclosed information could relate to Delaware's supposed interest.

Delaware also cannot "demonstrate its need" for expansive disclosure requirements in light of "less intrusive alternatives." *AFPF*, 594 U.S. at 613. Delaware has not explained why a disclosure regime tailored to Delaware itself and current election spending would not satisfy an information interest. States often erect earmarking regimes that reach donations set apart for communications within a given state, as well as "opt out" provisions that allow donors to avoid public exposure by directing an organization not to spend their donation in a given state. *See Wyo.*

Gun Owners, 83 F.4th at 1248–49; *Gaspee Project*, 13 F.4th at 89. In fact, the Tenth Circuit deemed a Wyoming regime insufficiently tailored even though it was much more tailored than Delaware's, reaching only donations "*which relate to* an independent expenditure or electioneering communication." *Wyo. Gun Owners*, 83 F.4th at 1247 (citation omitted). The court found that law insufficiently tailored because "the statute could have outlined an earmarking system." *Id.* at 1248.

Delaware's failure here is even more obvious because it did not even attempt to limit disclosure to donors who funded Delaware-related communications. Whereas Wyoming tried and failed, Delaware did not even try.

3. The Court need not take Applicants' word on the Act's constitutional infirmities. The Tenth Circuit in *Wyoming Gun Owners* directly addressed Delaware law and Third Circuit precedent and explained that neither survives *AFPF*.

The issue arose because, in that case, Wyoming argued that the entity plaintiffs could bypass the burden to distinguish donations that did and did not relate to a covered expenditure by blanket disclosure of "*all* contributions (over $100) received in the election cycle." 83 F.4th at 1247. In support of that argument, Amicus Campaign Legal Center pointed to Delaware's Act and the *DSF* decision upholding it. *Id.* at 1249–50. Writing for the court, Judge Tymkovich dismissed the Delaware Act on the ground that it "surely forced advocacy groups to bear the burden of overdisclosing donors despite a disconnect with an informational interest." *Id.* Delaware's approach erred, the Tenth Circuit held, in that "it would necessarily sweep in speakers who may have been interested in supporting a different candidate or no candidate at all or perhaps wished to preserve their privacy or anonymity." *Id.* at 1248. Turning to the *DSF* decision, Judge Tymkovich explained that it "is a relic of pre-[*AFPF*] exacting scrutiny" and that, "[a]fter [*AFPF*], a court would surely take a closer look at the 'extent to which the burdens are unnecessary.'" *Id.* at 1249 (quoting *AFPF*, 594 U.S. at 611). The split between *Wyoming Gun Owners* and *DSF* is as stark a circuit split as there could be.

Although some circuits have upheld disclosure mandates related to election speech post-*AFPF*, those regimes were more tailored than Delaware's and only confirm the State cannot "demonstrate its need" in light of "less intrusive alternatives." *AFPF*, 594 U.S. at 613. The First Circuit, for example, upheld Rhode Island's disclosure regime for electioneering communications, which has a threshold ten times higher than Delaware's at $1,000 and enables donors to opt out from funding covered communications. *Gaspee Project*, 13 F.4th at 89. The Tenth Circuit upheld New Mexico's regime, which reaches donations above $200 earmarked for covered expenditures and other donations at a threshold fifty times higher than Delaware's ($5,000). *Rio Grande Found. v. Oliver*, 154 F.4th 1213, 1218, 1228 (10th Cir. 2025). Likewise, before *AFPF*, the Fourth Circuit upheld the disclosure of donors of more than $1,000 "whose contributions were used to pay for electioneering communications." *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 290–92 (4th Cir. 2013) (citation omitted). The Court does not need to assume these cases were correctly decided—or that these regimes satisfy exacting scrutiny—to see that Delaware could have made *some* attempt at tailoring that would mark a substantial improvement over the Act.[1] *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730–31 (2014) (finding that accommodation provided to some groups demonstrated lack of tailoring while leaving open possibility that the accommodation itself was insufficiently tailored).

4. Here, the Third Circuit did not decide whether the Act is likely unconstitutional or whether its *DSF* decision withstands *AFPF*. As explained below, this omission was a conflict-creating error independently meriting this Court's

[1] The New Mexico ruling, for example, prompted a vigorous dissent. *See Rio Grand Found.*, 154 F.4th at 1231–35 (Eid, J., dissenting).

immediate intervention. *See infra* § I.B. In all events, the Third Circuit's passing nods to reasons the Act *might* survive exacting scrutiny are without basis in First Amendment law.

The court began by noting that *AFPF* "was not an election case." App.8a. But *AFPF* was clear in setting the standard for "First Amendment challenges to compelled disclosure," including in "campaign finance case[s]," and "other election-related settings." 594 U.S. at 607–08. While *AFPF* also explained that its exacting scrutiny test is "not unique to electoral disclosure regimes," that assertion only reaffirmed that its standard *does* apply to electoral disclosure regimes. *Id.* at 608.

Nor does it matter, as the Third Circuit suggested, that, in election disclosure cases, "the government has an interest in informing voters where election-related spending is coming from." App.9a. Maybe it does. But the Court in *AFPF* understood that California also had "an important interest in preventing wrongdoing by charitable organizations." 594 U.S. at 612. The regime at issue failed not for lack of a state interest but for insufficient tailoring. *Id.* at 612–19. Thus, no reference to Delaware's purported interest, or its strength, can adequately tailor the Act. Besides, the State in this case effectively abandoned any assertion of strength in its disclosure interest by arguing below that Delaware political action committees are easily formed and exempt from the Act's invasive standards. *See* App.11a–12a. A state's supposed "purpose" can be "belied" by other provisions of its own law that "are both underinclusive and overinclusive." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 792–93 (1978); *see also Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011) (loopholes "raise[] serious doubts about whether the government is in fact pursuing the interest it invokes"). This is yet another respect in which the State's defense here is weaker than California's in *AFPF*.

There is also no merit to the Third Circuit's related suggestion that Applicants could avoid the Act's burdens by "creat[ing] and fund[ing] a Delaware political-action committee or unincorporated association," which the court thought might limit "disclosure to donors who fund those Delaware-specific groups." App.11a. Setting aside that this point only shoots the State's purported interest in the proverbial foot, it also ignores that Applicant AFPF is organized under IRC § 501(c)(3) and thus cannot form a political action committee.[2] It also cannot and does not engage in express advocacy, further undermining the State's interest in limiting election speech. The Third Circuit had nothing to say of *Citizens United*, which explained that "[a] PAC is a separate association" and explicitly rejected the assertion that "a PAC could somehow allow a corporation to speak." 558 U.S. at 337. The Third Circuit did not explain how First Amendment burdens on Applicants could be salvaged by the possibility of speech by separate persons. That may be why—as with all its musings—the Third Circuit left the point unresolved, admitting "these extra hoops" may "add an unconstitutional burden to the challengers' speech." App.11a–12a. The Court inexplicably thought it could "not yet know" the answers to such legal questions until after trial.[3] App.12a.

[2] *Frequently asked questions about the ban on political campaign intervention by 501(c)(3) organizations*, IRS, https://www.irs.gov/charities-non-profits/charitable-organizations/frequently-asked-questions-about-the-ban-on-political-campaign-intervention-by-501c3-organizations-contributions-to-political-organizations (last visited Sep. 9, 2026).

[3] Notably, the Third Circuit did not endorse the State's suggestion that the Act is saved by *McConnell*, *see* 540 U.S. at 129, *overruled by Citizens United*, 558 U.S. 310. Although *McConnell* upheld disclosure provisions of the Bipartisan Campaign Reform Act (BCRA) of 2002 from a facial challenge, it did not address tailoring—a point not raised, *id.* at 195—and had no reason to because it was at the time a crime for corporations to fund electioneering communications, *id.* at 204; *see supra* pp. 5–6. Accordingly, the Court addressed only donor disclosure by (1) "a single individual who has collected contributions from others" and (2) a corporation's "segregated account"—its PAC. *Id.* at 194–95 (citation omitted). The Court, unsurprisingly, did not address the interests of general donors funding then-unlawful communications by entities not entitled to make them. After this Court rejected BCRA's ban on corporate electioneering communications in *Wis. Right to Life, Inc.*, 551 U.S. at 481–82, the Federal Election Commission promulgated a rule excluding the federal

B. The Third Circuit Split With the National Consensus, and This Court's Repeated Holdings, in Erroneously Treating the First Amendment as an Optional Afterthought in Preliminary Injunction Cases

Where Judge Tymkovich projected that the Third Circuit "would surely take a closer look at" Delaware's Act after *AFPF*, *Wyo. Gun Owners*, 83 F.4th at 1249, the court below punted that opportunity away. It recognized that Applicants "argue forcefully" against the Act, but balked at its own decision in *DSF*. App.8a–9a. Noting that the Third Circuit "may have to grapple with" that decision's ongoing vitality after *AFPF*, the court avoided that question, finding it sufficient to call it "hard to say" who would likely succeed. App.9a–10a. It was enough, the court held, that "we do not know how much" irreparable harm Applicants would suffer because of purported evidentiary deficiencies (oddly discounting evidence submitted by "affidavit" as "not testimony") that the court believed left no proof of the "probability or degree" of Applicants' harm. App.11a–12a.

According to the Third Circuit, "[i]t makes no difference that challengers invoke the First Amendment." App.10a. It held that First Amendment plaintiffs must show, in addition to likely success, "where they sit on [a] spectrum" of irreparable harm. App.11a. As for the proposition that a state "has no interest in enforcing an unconstitutional law," the Third Circuit rejected it as "misunderstand[ing]." App.10a (quotation marks omitted). It therefore afforded overriding weight to Delaware's interest in enforcing the Act. But it is the Third Circuit that misunderstands and splits with established First Amendment doctrine.

1. The equitable starting point is the axiom that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. That rule applies at the preliminary

disclosure requirement those donors "who have provided funds for purposes entirely unrelated to the making of" electioneering communications. Electioneering Communications, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007).

injunction stage in federal district court. *See id.* at 373–74 (affirming appellate court's reversal of denial of preliminary injunction on the strength of First Amendment injury); *Mahmoud v. Taylor*, 606 U.S. 522, 569 (2025) (finding from likely First Amendment injury that "an injunction is both equitable and in the public interest"); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 118, 131 (1989) (affirming preliminary injunction issued on this ground). It also applies to requests for stays and injunctions pending review in this Court. *See Roman Cath. Diocese*, 592 U.S. at 19–21 (granting injunction application because impingement of First Amendment rights established irreparable harm that outweighed alleged state interests in the impingement); *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers) (granting stay because irreparable harm of "indefinite" speech impingement "is intolerable under the First Amendment"). The rule is so established that, just last Term, this Court reversed a lower court order denying a preliminary injunction without mentioning the equitable factors: the likely First Amendment violation did *all* the needed work. *See Chiles*, 607 U.S. at 636–38, 655; *see also First Choice*, 608 U.S. at 199.

Applying this doctrine, the Court in *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004), held that—at least in the First Amendment setting—a court assessing a preliminary injunction request "*must* consider whether the plaintiffs have demonstrated that they are likely to prevail on the merits." *Id.* at 666 (emphasis added). Further, when "the Government bears the burden of proof on the ultimate question" of the challenged law's "constitutionality," the challengers "*must* be deemed likely to prevail *unless* the Government has shown" itself likely to satisfy the governing standard. *Id.* (emphases added). In that case, the Court held that the many uncertainties surrounding the likely outcome after trial supported a preliminary injunction, given that "the potential harms from reversing the injunction outweigh those of leaving it in place by mistake." *Id.* at 670.

Faithfully adhering to this Court's precedents, the federal circuit courts—other than the Third Circuit—have held that "the likelihood of success on the merits is the linchpin of the preliminary injunction analysis." *Sindicato Puertorriqueño*, 699 F.3d at 10. Most courts consider it self-evident that "[p]reliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors." *Roberts*, 958 F.3d at 416. That is because the "equities favor[]" the party "whose First Amendment rights are being chilled." *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014).

The circuits overwhelmingly agree that likely First Amendment violations are "a per se irreparable injury." *Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020); *see also, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 304 (D.C. Cir. 2006) ("per se"); *Retail Energy Advancement League v. Brown*, 175 F.4th 551, 565 (4th Cir. 2026) ("[I]n First Amendment cases . . . no further inquiry is needed"); *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 380 (5th Cir. 2022) ("per se").

The other circuits also agree that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 695 (9th Cir. 2023) (citation omitted); *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) ("always"); *Int'l Ass'n of Fire Fighters, Loc. 365 v. City of E. Chi.*, 56 F.4th 437, 453 (7th Cir. 2022) ("First Amendment harms . . . are serious injuries that money damages cannot remedy."); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("[S]ecuring First Amendment rights is in the public interest."). And, conversely, the circuits agree that "[n]o public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal." *Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (same). The Third Circuit's own precedent once held this. *K.A. ex rel. Ayers v. Pocono Mountain Sch.*

Dist., 710 F.3d 99, 114 (3d Cir. 2013) ("[T]he enforcement of an unconstitutional law vindicates no public interest."); *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003) ("[N]either the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." (citation and internal quotation marks omitted)). *But see* App.10a (writing this off as "misunderstand[ing]").

Taking this doctrine at its word, at least three circuits have held that a court may not do what the Third Circuit did in this case—deny a constitutionally founded preliminary injunction request without deciding which side is likely to prevail on the merits. In *Baird v. Bonta*, 81 F.4th 1036 (2023), the Ninth Circuit reversed a district court order denying a preliminary injunction "without analyzing whether [the plaintiffs] were likely to succeed on the merits" because the district court thought the public interest supported the challenged gun regulation. *Id.* at 1039, 1041. The court explained that, because "a finding that a plaintiff is likely to succeed on the merits of a constitutional claim impacts the other *Winter* factors," a court "necessarily abuses its discretion when it skips analyzing the likelihood of success factor in a case involving such a claim." *Id.* That is because a plaintiff who is "likely to prevail on the merits . . . will almost always demonstrate he is suffering irreparable harm as well," which "tips the merged third and fourth factors decisively in his favor." *Id.* at 1042.

The First Circuit has also deemed it "incumbent upon the district court to engage with the merits before moving on to the remaining prongs of its analysis" and reversed a preliminary-injunction-denial order that found "addressing the merits . . . inappropriate on an 'incomplete record,'" in need of "further factual development." *Sindicato Puertorriqueño*, 699 F.3d at 11. For one thing, "a facial challenge to a statute presents a question of law that the district court could and should have resolved on the present record." *Id.* And, once likelihood of success was shown, "it follows that the irreparable injury component of the preliminary injunction analysis is satisfied as well" and so too "the balance of the equities and the public interest" components. *Id.* at 15–16; *see also N.Y. Progress & Prot. PAC*, 733 F.3d at 488 (Second Circuit holding that district court's failure to analyze likelihood of success was reversible error because "[c]onsideration of the merits is virtually indispensable in the First Amendment context").

2. The decision below makes the Third Circuit an extreme outlier in failing to protect First Amendment liberties. App.8a–10a. Through a set of interlacing, novel concepts, it dismissed the prevailing First Amendment rule that the likelihood of success "is the linchpin of the preliminary injunction analysis," *Sindicato Puertorriqueño*, 699 F.3d at 10, on which cases "often turn," *Roberts*, 958 F.3d at 416.

Rather than treat a likely First Amendment violation as "per se irreparable," *Otto*, 981 F.3d at 870, alleviating need for "further inquiry," *Retail Energy*, 175 F.4th at 565, the Third Circuit proposed "a spectrum" framework that requires First Amendment plaintiffs to show, in addition to irreparable harm, proof of "where they sit on that spectrum." App.11a. Setting aside the settled rule that "[n]o public interest is served by maintaining an unconstitutional policy," *Agudath Isr. of Am.*, 983 F.3d at 637; *Ariz. Dream Act*, 757 F.3d at 1069, the Third Circuit offset a presumption of irreparable harm with a presumption "that enjoining enforcement of the law would irreparably harm Delaware," App.11a. Ignoring that a First Amendment challenge "presents a question of law," *Sindicato Puertorriqueño*, 699 F.3d at 11, the court deemed Applicants' arguments premature because of *the State's* plans for "evidence at trial, including testimony from voters and campaign officials who value donor disclosures, and statistics about how many people visit Delaware's donor-disclosure database."[4] App.9a. The court also criticized Applicants for providing "an affidavit

[4] The Third Circuit did not fault the State for failing to present, or even seek an opportunity to present, such information at a preliminary injunction hearing. This belies the Third Circuit's assertion that it applied some degree of presumption of First Amendment harm. *See* App.11a.

from the organization, not testimony from their donors, that speaks in generalities about possible harms from disclosure." App.11a. From there, the court worked backward to deem it unnecessary to decide the legal question whether the Act is likely unconstitutional; it was satisfied to merely "spot the challengers some likelihood of success." App.12a. It also deferred on irreparable harm, explaining "we do not yet know" its degree. *Id*. And it ultimately yielded to "status quo" as the determining factor. App.13a.

By doing so, the Third Circuit flouted this Court's clear directive that, where the government bears the burden to overcome First Amendment scrutiny, uncertainty *compels* an injunction. *Am. Civ. Liberties Union*, 542 U.S. at 666 ("*must* be deemed likely to prevail") (emphasis added). This answers the Third Circuit's many concerns about projecting the results in this case. Unsurprisingly, this approach also conflicts with the national consensus. At least the First and Ninth Circuit have explicitly held that courts must *not* decide a constitutionally grounded preliminary-injunction request on equitable grounds without deciding the likelihood-of-success element. *Baird*, 81 F.4th at 1041; *Sindicato Puertorriqueño*, 699 F.3d at 11. And the overriding thrust of First Amendment precedent supports those holdings by treating equitable considerations as downstream and nearly always controlled by the merits.

3. The national consensus is right; the Third Circuit is wrong. This Court's zeal for First Amendment rights "has been more reminiscent of Hannibal than of Hamlet." *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 302 (2004) (plurality opinion); *see Am. Civ. Liberties Union*, 542 U.S. at 666. As shown, like the circuit courts, this Court's precedents have squarely resolved First Amendment-based requests for interim relief by addressing the merits and treating the equitable factors as follow-on queries with little independent force. *Elrod*, 427 U.S. at 373–74; *Mahmoud*, 606 U.S. at 569; *Sable Commc'ns of Cal.*, 492 U.S. at 118, 131; *Roman Cath. Diocese*, 592 U.S. at 19–21. The

Third Circuit cited no case of this Court—or any other circuit—that resolved a First Amendment provisional-relief case without deciding the merits question.

Instead—where it was not extemporizing law from scratch—the Third Circuit mixed in cases that did not involve the First Amendment or any constitutional right at all. Its principal authority, *Winter v. NRDC*, 555 U.S. 7 (2008), rejected a preliminary injunction without addressing the merits because the alleged irreparable harm from naval activity to water mammals was overridden by the public interest in that naval activity. *See id.* at 24–31; App.2a, 8a. But the preliminary injunction was founded on the National Environmental Policy Act of 1969 (NEPA) and the Coastal Zone Management Act of 1972 (CZMA). *Id.* at 15–20. Impingements on NEPA and CZMA rights are neither *per se* irreparable nor confirmative of the public interest. And *Winter* factored in the cross-cutting "deference" afforded "to the professional judgment of military authorities concerning the relative importance of a particular military interest," *id.* at 24 (citation omitted), which has no application here.

Even further afield from this case among the Third Circuit's authorities was a partisan-gerrymandering case surrounded by "legal uncertainty" where a provisional injunction was sought years after filing and violated the *Purcell* principle,[5] *Benisek v. Lamone*, 585 U.S. 155, 159–61 (2018); a case addressing whether the Federal Water Pollution Control Act overrode equitable considerations in injunction motions, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 316–20 (1982); on addressing how equitable factors relate to injunctions authorized by express terms of the National

[5] The Third Circuit obliquely suggested that the *Purcell* principle might apply. App.13a. But no authority applies that doctrine to a campaign-speech restriction. The *Purcell* principle applies to "election laws" and expresses reluctance to impose "chaos and confusion" by interfering with the "enormous advance preparations by state and local officials" in preparing ballots, establishing precincts and voter qualifications, and administering an election. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanagh, J., concurring). A federal permission for Applicants to speak about policy issues is nothing like that.

Labor Relations Act, *Starbucks Corp. v. McKinney*, 602 U.S. 339, 346–51 (2024); a Circuit Justice order staying an injunction against a law that had recently been upheld in this Court and the Ninth Circuit, *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1323 (1984) (Rehnquist, J., in chambers); and a concurring opinion in a Religious Freedom Restoration Act (RFRA) case that this Court implicitly *rejected* in holding that a preliminary injunction was warranted because of a likely RFRA violation, *compare O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1011 (10th Cir. 2004) (McConnell, J., concurring) (urging a "heightened showing" on equitable grounds), *with Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006) (affirming the injunction based on finding of likelihood of success without imposing a heightened standard). *See* App.6a, 7a, 10a. Meanwhile, Alexander Hamilton's *Federalist* opinions about equity were not, and could not have been, informed by the First Amendment because it did not yet exist. *See* App.5a (quoting *The Federalist No. 83*, at 505 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); *see Janus v. AFSME, Council 31*, 585 U.S. 878, 903 (2018) (warning of "halfway originalism" in First Amendment cases). This hodgepodge of off-point authorities does much to prove how little basis there is for the decision below.

The Third Circuit's final authority was its own decision declining to apply First Amendment preliminary-injunctions standards in a Second Amendment case on the apparent basis that the latter set of rights is of lesser constitutional significance. *See* App.11a (citing *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, 108 F.4th 194, 203–04 (3d Cir. 2024), *cert. denied sub nom. Gray v. Jennings*, 145 S. Ct. 1049 (2025)). Whether or not that distinction is sound, even *Del. State Sportsmen's Ass'n* recognized that "[u]nique First Amendment doctrines warrant [an] exception" to the Third Circuit's general reluctance to equate likely success with irreparable harm. 108 F.4th at 204. The Third Circuit chose not to follow its own precedent on this point and instead improperly extended its disfavor for preliminary relief into the First Amendment context.

4. The final plank in the Third Circuit's novel First Amendment doctrine is a heavy-handed preference for the "status quo." App.2a–3a, 6a–8a, 12a–13a. Even outside the First Amendment context, this cramped view "misconceives the central purpose of a preliminary injunction, which is to prevent irreparable harm." *Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975). The status quo discussion in preliminary-injunction precedents is best understood as "loosely stated." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). In First Amendment cases, the circuits have consistently privileged the equitable force of constitutional rights over assertions that the status quo should be maintained. *See, e.g.*, *Hubbard v. City of San Diego*, 139 F.4th 843, 853–54 & n.10 (9th Cir. 2025); *Nat'l Inst. of Fam. & Life Advocs. v. James*, 160 F.4th 360, 373 n.9 (2d Cir. 2025). For example, in *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), the court directed a preliminary injunction against an eavesdropping statute that was in place decades before the challenge, even though the court knew the suit was an "obvious . . . test case." *Id.* at 586, 608. Even in that context, the equities followed the likelihood-of-success ruling because "the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *Id.* at 590. The equities likely compelled a preliminary injunction against an independent expenditure law enacted in the 1980s because of its likely constitutional defects, even though the challenge was not brought until 2021. *Ind. Right to Life Victory Fund v. Morales*, 112 F.4th 466, 468–69, 472 (7th Cir. 2024); *see also Jones v. Jegley*, 947 F.3d 1100, 1107 (8th Cir. 2020) (affirming preliminary injunction against 1990s contribution-limitation law challenged in 2019); *We the People PAC v. Bellows*, 40 F.4th 1, 27 (1st Cir. 2022) (affirming preliminary injunction against residency and voter-registration requirements for petition circulators enacted in 2015 and

challenged in 2020). The Third Circuit cited no case for the proposition that a First Amendment plaintiff must challenge a law immediately after its passage or subsequent change in the controlling standard from this Court, or else waive its right to seek temporary injunctive relief.

Instead, the Third Circuit proposed that a preliminary injunction would be unneeded because a delay in resolution of Applicants' First Amendment contention "will not moot the case or render final judgment 'useless.'" App.12a (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975)).[6] This again defies the doctrine that First Amendment deprivations are irreparable harm "for even minimal periods of time." *Elrod*, 427 U.S. at 373. Even if Applicants are vindicated after a final judgment invalidating the Act's disclosure rules, that cannot turn back the clock to 2026 to enable them to speak *now*. The very fact that Applicants are forbearing speech for an indefinite period while the State decides what "evidence" it wants to sponsor at trial compounds the error of the order below. App.9a.

C. The First Two Interim Relief Factors Are Satisfied

This application raises *two* questions that merit both certiorari review and reversal. The first two factors therefore support an injunction pending this Court's review. *Lucas*, 486 U.S. at 1304 (Kennedy, J., in chambers).

Because "[t]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office," *Citizens United*, 558 U.S. at 339 (quotation marks omitted), this Court has often reviewed campaign finance speech restrictions and disclosure obligations even in the absence of a split among circuits, *see, e.g.*, *AFPF*, 594 U.S. at, 605 (certiorari granted based on importance); *Bellotti,* 435 U.S. 765 (1978) (certiorari to Massachusetts Supreme Judicial Court);

[6] In *Doran*, this Court *affirmed* a preliminary injunction issued under the First Amendment against an ordinance forbidding topless dancing. 422 U.S. at 932–33. This was yet another odd place to look for justification for the decision below.

cf. Citizens United, 558 U.S. at 322 (re-argument directed based on importance). The case for certiorari is all the stronger here where a stark circuit split now persists between the Tenth and Third Circuits not only as to applicable First Amendment standards but also as to Delaware's Act. *Compare Wyo. Gun Owners*, 83 F.4th at 1247, 1249–50, *with DSF*, 793 F.3d at 309–13. Rarely is a split this pronounced. And rarely are the odds of reversal so clear: *AFPF* requires narrow tailoring in light of reasonable alternatives, but the Act is expansive beyond the regime *AFPF* condemned. *See supra* § I.A.

As important as that question is, the Court's review may be even more significant on the preliminary-injunction standard—a topic of far-reaching importance. Across First Amendment challenges, courts in 47 states will follow the consensus path of focusing on the First Amendment issue, deciding it as a matter of law, and—where likelihood of success is shown—assessing whether extremely unusual circumstances somehow cut against provisional relief. But, in Pennsylvania, Delaware and New Jersey, Applicants and other First Amendment plaintiffs will now ordinarily need to await trial—to address fact inquiries with unclear relevance to First Amendment legal questions—and suffer speech deprivations for indefinite periods of litigation delay. This Court should not condone that atypical state of affairs. Instead, the Court should bring the Third Circuit back to bedrock First Amendment principles, binding precedent, and the national consensus. Certiorari and reversal are both likely and warranted.

II. The Equites Favor an Injunction

The equitable factors warrant an injunction for reasons largely articulated above. The question is whether "irreparable harm will likely result from the denial of equitable relief," *Lucas*, 486 U.S. at 1304 (Kennedy, J., in chambers), and Applicants' likely First Amendment injury "unquestionably constitutes irreparable injury," *Elrod*, 427 U.S. at 373; *see also Mahmoud*, 606 U.S. at 569; *Chiles*, 607 U.S. at 655.

It is undisputed that Delaware and the courts below have forced both Applicants into the unconstitutional position of "self-censor[ing] rather than risk" either "the perils of trial" or the harms of worldwide disclosure of every last donor across the nation since January 2023. *Am. Civ. Liberties Union*, 542 U.S. at 670–71. The 60-day pre-election blackout period has begun, leaving Applicants the choice between silence and vast disclosure of protected associational ties. The First Amendment rejects the State's imposition of that choice.

The irreparable harm is all the more pronounced here where Applicants presented unrebutted evidence showing that they "and their supporters have been subject to bomb threats, protests, stalking, and physical violence." *AFPF*, 594 U.S. at 617; *see also id.* at 636–37 (Sotomayor, J., dissenting); *Harris*, 182 F. Supp. 3d at 1056 (cataloging threats); *see also Grewal*, 2019 WL 4855853, at *6; App.72a–74a. This Court in *AFPF* held that a showing of likely "harassment and reprisals" is "not required" to show First Amendment injury from a disclosure requirement. 594 U.S. at 617. By consequence, it is not needed to establish irreparable harm. *Elrod*, 427 U.S. at 373. But because Applicants *can* show this, their showing of harm is all the stronger. *Contra* App.11a (doubting the "probability or degree" of harm).

The First Amendment showing also establishes that "an injunction is both equitable and in the public interest." *Mahmoud*, 606 U.S. at 569; *see Am. Civ. Liberties Union*, 542 U.S. at 666–69; *Chiles*, 607 U.S. at 655. The State has no interest in enforcing a law that is likely unconstitutional. *Agudath Isr. of Am.*, 983 F.3d at 637; *Ariz. Dream Act Coal.*, 757 F.3d at 1069; *K.A.*, 710 F.3d at 114. To be precise, Delaware has no interest in publicizing names and addresses of individuals across the nation who supported Applicants in 2023, 2024, and 2025 and whose donations did not go to spending on electioneering communications in Delaware. No amount of referencing states' interest in their own laws can override the First Amendment's force against the Act, which has no remote tailoring to a legitimate interest.

An immediate injunction is warranted for the additional reason that this Court's review of the Third Circuit's approach to preliminary injunctions may not be feasible on the ordinary time-table for certiorari petitions. Although this case cannot become moot based on a preliminary-injunction ruling, the preliminary-injunction motion risks becoming moot after the 2026 general election passes. *See Knaust v. City of Kingston*, 157 F.3d 86, 88 (2d Cir. 1998); *Matos ex rel. Matos v. Clinton Sch. Dist.*, 367 F.3d 68, 72 (1st Cir. 2004). Or else an injunction pending final judgment may no longer be justified on equitable grounds, given the length of time before the 60- and 30-day windows of restricted speech begin.[7] *See Robinson v. Ardoin*, 86 F.4th 574, 600 (5th Cir. 2023) (vacating preliminary injunction order after election because "a preliminary injunction is no longer needed to prevent an irreparable injury from occurring before said trial"), *overruled on other grounds in Louisiana v. Callais*, 608 U.S. 85 (2026). Accordingly, without interim relief, or other intervention, the Third Circuit's outlier approach to preliminary injunctions will persist, leaving most First Amendment challengers no recourse but years of litigation and trial before their rights might become vindicated. The Court should not enable that state of affairs.

CONCLUSION

The Court should issue an injunction forbidding Delaware from enforcing the Act's disclosure provisions against Applicants pending resolution of their forthcoming petition for certiorari and any subsequent proceedings in this Court.

[7] Arguably, the possibility of a special election would maintain the option to seek certiorari review, but the point appears to be unsettled.

Respectfully Submitted,

/s/ Allen J. Dickerson

ALLEN J. DICKERSON
Counsel of Record
RICHARD B. RAILE
BAKER & HOSTETLER LLP
Washington Square, Ste. 1100
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 861-1711
adickerson@bakerlaw.com

ERIKA D. PROUTY
ROBERT J. TUCKER
ANNA E. CROYTS
BAKER & HOSTETLER LLP
200 Civil Center Dr., Ste. 1200
Columbus, OH 43215

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