

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

AMERICANS FOR PROSPERITY
FOUNDATION; AMERICANS FOR
PROSPERITY

Plaintiffs,

v.

ANTHONY ALBENCE, in his official
capacity as State Election Commissioner
for the State of Delaware,

KATHY JENNINGS, in her official
capacity as Attorney General of
the State of Delaware,

Defendants.

Case No.

COMPLAINT

NATURE OF THE CASE

1. The First Amendment prohibits the government from “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

2. Included in the First Amendment’s protection is the right of individuals to freely associate with others. The Supreme Court of the United States has long held that compelled disclosure of an advocacy organization’s members violates that right. *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

3. In 2021, the Supreme Court confirmed that state laws requiring the disclosure of an organization’s donors are subject to “exacting scrutiny” under the First Amendment. *See Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021).

4. Plaintiff Americans for Prosperity Foundation (“AFPF”) is a nonprofit organization with donors across the country, including in Delaware. AFPF regularly engages in advocacy and education concerning issues of public policy, including communications in various forms that may refer to incumbent officials who may also be candidates for office.

5. Plaintiff Americans for Prosperity (“AFP”) is a nonprofit organization with donors across the country, including in Delaware. Although AFP sometimes engages in express advocacy, it most regularly engages in issue advocacy, including communications in various forms that may refer to incumbent officials who may also be candidates for office.

6. Plaintiffs intend to publish non-express advocacy, issue-based communications that will refer to specific officeholders who are also candidates for election in Delaware in advance of the 2026 and subsequent primary and general elections. Upon information and belief, however, if Plaintiffs published such communications, the Delaware Elections Disclosure Act, codified at 15 Del. C. § 8001, et seq., and specifically, 15 Del. C. § 8031(a)(3) (“Delaware’s disclosure requirements”), would require them to file reports disclosing the names and addresses of their donors who have donated more than \$100 dating back several years.

7. Plaintiffs reasonably fear that if they fail to file these reports disclosing the names and addresses of their donors, they will be subject to enforcement actions, investigations, and penalties initiated or imposed by Defendants and their agents.

8. Delaware’s disclosure requirements violate the right to private association, chill free speech and association, and overstep the government’s legitimate disclosure interests, all in violation of the First Amendment.

9. Plaintiffs therefore bring this action to obtain a declaration that Delaware's disclosure requirements are unlawful on their face and as applied to Plaintiffs, and to enjoin enforcement of those requirements.

PARTIES

10. Plaintiff Americans for Prosperity Foundation is a Delaware nonprofit corporation headquartered in Virginia. It is exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code. AFPF funds its activities by raising charitable contributions from donors across the country, including in Delaware.

11. Plaintiff Americans for Prosperity is a Washington, D.C. nonprofit corporation headquartered in Virginia. It is exempt from taxation pursuant to Section 501(c)(4) of the Internal Revenue Code. AFP funds its activities by raising contributions from donors across the country, including in Delaware.

12. Defendant Anthony Albence is the State Election Commissioner ("Commissioner") for the State of Delaware and is empowered to issue regulations with the force of law regarding Delaware election laws pursuant to 15 Del. C. § 302. As Commissioner, Defendant Albence also has the power to levy fines when "a report [] is not filed, not filed on time, or is filed on time but incomplete." 15 Del. C. § 8044(a).

13. Defendant Kathy Jennings is the Attorney General of Delaware and is empowered to "investigate matters involving the public peace, safety and justice" in the State of Delaware. 29 Del. C. § 2504(4). Under 15 Del. C. § 8044(g), "the [Reports Appeals Subcommittee of the State Board of Elections] shall notify the Office of the Attorney General" of parties which fail to file required reports. Failure to file such reports constitutes a class A misdemeanor. 15 Del. C. § 8043(c).

JURISDICTION AND VENUE

14. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343.
15. Venue in this Court is proper under 28 U.S.C. § 1391(b)(1) and (b)(2).

FACTS

Delaware's Regulation of Electioneering Communications and Third-Party Advertisements

16. The Delaware Elections Disclosure Act states that “[a]ny person . . . who makes an expenditure for any third-party advertisement that causes the aggregate amount of expenditures for third-party advertisements made by such person to exceed \$500 during an election period shall file a third-party advertisement report with the Commissioner.” 15 Del. C. § 8031(a). A “person” includes “any individual, corporation, company, incorporated or unincorporated association, general or limited partnership, society, joint stock company, and any other organization or institution of any nature.” 15 Del. C. § 8002(17).

17. A “third-party advertisement” includes “an electioneering communication,” 15 Del. C. § 8002(27), which is defined as any communication “by any individual or other person (other than a candidate committee or a political party) that: 1. [r]efers to a clearly identified candidate; and 2. [i]s publicly distributed within 30 days before a primary election or special election, or 60 days before a general election to an audience that includes members of the electorate for the office sought by such candidate.” 15 Del. C. § 8002(10)(a).

18. The “third-party advertisement report” must be “filed under penalty of perjury” and include “[t]he full name and mailing address of each person who has made contributions to such person during the election period in an aggregate amount or value in excess of \$100; the total of all contributions from such person during the election period, and the amount and date of all contributions from such person during the reporting period.” 15 Del. C. § 8031(a)(3). If the

contributor is not an individual, the report must include “the full name and mailing address of . . . [a]ny person who, directly or otherwise, owns a legal or equitable interest of 50 percent or greater in such entity; and . . . [o]ne responsible party, if the aggregate amount of contributions made by such entity during the election period exceeds \$1,200.” 15 Del. C. § 8031(a)(4).

19. “Election period” has various definitions under Delaware law. 15 Del. C. § 8002(11).

20. “For a person who makes an expenditure for a third-party advertisement, the election period shall begin and end at the same time as that of the candidate identified in such advertisement.” 15 Del. C. § 8002(11)(d). For candidates running for reelection for the office to which they were elected in the most recent election, the election period is “the period beginning on January 1 immediately after the most recent such election, and ending on the December 31 immediately after the general election at which the candidate seeks reelection to the office.” 15 Del. C. § 8002(11)(a)(1). And for candidates running for an office which they do not hold, the election period is “the period beginning on the day on which the candidate first receives any contribution from any person (other than from the candidate or from the candidate’s spouse) in support of that candidate’s candidacy for the office, and ending on the December 31 immediately after the general election at which the candidate seeks election to the office.” 15 Del. C. § 8002(11)(a)(3).

21. Delaware’s state senators and statewide executive officeholders are elected every four years. *See* DEL. CONST. art. II, § 2; *id.* art. III, §§ 5, 19(a), 21. Therefore, under Delaware law, the applicable “election period” for incumbent candidates for these offices may be up to four years.

22. Delaware regulations require third-party advertisement reports to be filed within “48 hours” after a qualifying expenditure is made if the expenditure is made “more than 30 days

before a primary or special election or 60 days before a general election,” and within “24 hours” after the expenditure is made if the expenditure is made “30 days or less before a primary or special election or 60 days or less before an election.” 15 Del. Admin. Code 100-9.1.5.

23. Failure to file the required reports results in assessment of “a fine by the Commissioner of \$50 for each day that such report is tardy.” 15 Del. Admin. Code 100-10.1. If a tardy report is not filed or corrected within 30 days following either a determination by the Commissioner that the tardiness is not due to reasonable cause or the expiration of the appeal period, “then the Commissioner shall notify the Office of the Attorney General that the reporting party has failed to file such report.” 15 Del. Admin. Code 100-10.3.

Plaintiffs’ Past and Future Activities

24. AFPP is a 501(c)(3) nonprofit organization committed to educating and training Americans to be advocates for the ideas, principles, and policies of a free and open society.

25. AFPP engages in educational and advocacy work in many states across the country in pursuit of this mission. This education and advocacy includes communications through mechanisms that Delaware defines as “communications media.” For example, a true and correct audio copy of a recent radio advertisement from Arizona is available on AFPP’s website.¹ The production and distribution of this communication cost AFPP more than \$500.

26. AFPP intends to engage in similar work in Delaware on an ongoing basis, including within 30 days before the upcoming 2026 primary election and within 60 days of the upcoming 2026 general election. Specifically, AFPP intends to produce and distribute communications through mechanisms that Delaware defines as “communications media.” Upon information and

¹ *AZ Proposition 211 Radio Advertisement*, AMS. FOR PROSPERITY FOUND. (Feb. 2026), https://americansforprosperityfoundation.org/wp-content/uploads/2026/02/AZProp211_60_Radio.mp3.

belief, the production and distribution of these communications will cost AFPP more than \$500. Consistent with its federal tax status, AFPP's communications will discuss specific officeholders, including officeholders who are themselves candidates for election or reelection, in the context of governmental action and issues of public policy but will not advocate their election or defeat.

27. AFP is a 501(c)(4) is a nonprofit organization that engages in broad-based grassroots outreach to advocate for long-term solutions to the country's biggest problems that prevent people from realizing their incredible potential. Its areas of focus include unsustainable government spending and debt, reforms to immigration and economic policy, and a host of other issues.

28. AFP engages in issue advocacy work in many states across the country in pursuit of this mission. This advocacy includes communications through mechanisms that Delaware defines as "communications media." A true and correct copy of a recent example from Maine is attached hereto as Exhibit A. The production and distribution of this communication cost AFP more than \$500.

29. AFP intends to engage in similar work in Delaware on an ongoing basis, including within 30 days before the upcoming 2026 primary election and within 60 days of the upcoming 2026 general election, and subsequent elections. Specifically, AFP intends to produce and distribute communications through mechanisms that Delaware defines as "communications media." Upon information and belief, the production and distribution of these communications will cost AFP more than \$500. Consistent with its federal tax status, these communications will discuss specific officeholders, including officeholders who are themselves candidates for election or reelection, in the context of governmental action and issues of public policy.

30. Plaintiffs' communications are protected speech under the First and Fourteenth Amendments.

31. However, upon information and belief, Plaintiffs' communications would fall within Delaware's definition of "electioneering communications," and therefore would be "third-party advertisements" subject to Delaware's disclosure requirements.

32. Therefore, Plaintiffs would be required to file third-party advertisement reports, under penalty of perjury, that disclose the names and addresses of their donors who have contributed more than \$100 in the aggregate during the applicable "election period."

33. Between 2022 and 2025, thousands of donors contributed more than \$100 to AFP and/or AFPF. The vast majority of these donors reside outside of Delaware, and none gave for the purpose of regulated communications in Delaware or in response to solicitations concerning AFP and AFPF's anticipated activity in Delaware. Yet, under Delaware law, Plaintiffs would be required to disclose the names and addresses of these donors in a third-party advertisement report.

34. This compelled disclosure violates the First Amendment freedom of association and belief enjoyed by Plaintiffs and their supporters.

35. Furthermore, Delaware's disclosure requirements will chill, or at the very least, create an unnecessary risk of chilling, the First Amendment activity of Plaintiffs and their donors.

36. Plaintiffs and their donors have a reasonable fear that they will be the target of threats, harassment, or other retaliation if Plaintiffs are forced to disclose the names and addresses of their donors.

37. Plaintiffs and their supporters have been subject to threats and harassment in the past, as the Supreme Court has recognized. *Bonta*, 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 604.

38. For example, at AFP’s 2011 summit in Washington, D.C., hundreds of protesters gathered outside the event space and attempted to storm the building. The protest became violent, with some attendees physically accosted and injured. *See* Clare O’Connor, *Occupy the Koch Brothers: Violence, Injuries, and Arrests at DC Protest*, FORBES (Dec. 10, 2011 at 6:25 EST), <http://www.forbes.com/sites/clareoconnor/2011/11/05/occupy-the-kochs-violent-clashes-injuries-and-arrests-at-protest-against-corporate-greed/>. Additionally, in 2019, an AFP office in Fargo, North Dakota was vandalized because of AFP’s support for free speech. *See* Rob Port, *This conservative group’s Fargo office has been vandalized repeatedly since it was opened*, INFORUM (Nov. 29, 2019 at 3:15 CT), <https://www.inforum.com/opinion/columns/port-this-conservative-groups-fargo-office-has-been-vandalized-repeatedly-since-it-was-opened>.

39. Two of Plaintiffs’ founders are brothers Charles Koch and the late David Koch. Charles has faced extensive threats and attacks for his advocacy work, including his work and ties to AFPP. *See Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1056 (C.D. Cal. 2016) (recounting threats to Charles and David) (post-decision procedural history omitted).

40. Donors whose associations with Plaintiffs are known to the public have received threats of physical harm and/or public harassment. For example, reporters have published a list of potential donors to Plaintiffs, resulting in individuals on the list being immediately harassed and their businesses boycotted.

41. Other donors, supporters, and employees of AFP and AFPP have repeatedly faced public threats, harassment, and intimidation based on their support and affiliation for the organizations. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1055-56 (cataloging threats);

see also Ams. for Prosperity v. Grewal, 2019 WL 4855853, at *6 (D.N.J. Oct. 2, 2019) (describing Plaintiffs' evidence where "AFP itself and its donors have been subjected to harassment ranging from death threats to cyberattacks to violent protests at AFP events.").

42. These threats and harassment have continued in recent years. For example, Plaintiffs and their employees have experienced consistent harassment and threats in Vermont from groups that disagree with Plaintiffs on economic policy initiatives, requiring Plaintiffs to hire security for their events. Legislators and their supporters have attempted many ways to stop Plaintiffs' operations in Northeastern states by introducing legislation targeting AFP. Both Vermont and Maine legislators singled out AFP as the reason they attempted to stop non-profits from advocating in their states.

43. Plaintiffs therefore believe that both current and potential donors are fearful of having their names and addresses disclosed as supporters or donors to Plaintiffs.

44. Accordingly, Plaintiffs vigorously protect the confidentiality of their donors. For example, Plaintiffs maintain donor information in a highly secure database, and access is restricted to individuals who have a need to know that information. The vast majority of donors require confidentiality as a condition of their giving to Plaintiffs.

45. If, however, Plaintiffs are required to disclose the names and addresses of their donors, it is likely that potential donors will refuse to contribute, and current donors will cease to contribute, because they are too fearful of the reprisal they will face if their names and addresses are disclosed.

46. Consequently, Delaware's disclosure requirements will chill, or at the very least create an unnecessary risk of chilling, Plaintiffs' and their donors' associational activity by discouraging individuals from associating with Plaintiffs, who are themselves engaged in protected

First Amendment activity. The disclosure requirements will also chill, or at the very least create an unnecessary risk of chilling, the protected speech of donors who forgo making contributions out of fear of reprisal.

47. If, however, Plaintiffs do not file the required reports disclosing their donors, they will be subject to daily fines. Additionally, the Election Commissioner is required to notify the Attorney General of any failure to file required reports, which is a class A misdemeanor. *See* 15 Del. C. § 8043(c).

48. Upon information and belief, Plaintiffs and other organizations face a credible threat that Delaware will enforce the disclosure requirements against them. For example, the state Election Commissioner has previously concluded that a political action committee was required to file a third-party advertisement report for an advertisement that referred to a candidate for State Treasurer aired during the 2018 election, but had failed to do so by the applicable deadline. *See* Exhibit B, “*Re: Request for Ruling on Simpler and Lavelle Campaign Finance Issues*,” STATE OF DEL. DEP’T OF ELECTIONS, (Oct. 26, 2018), https://elections.delaware.gov/public/com_opinions/pdfs/AO2018-01%20LavelleSimpler.pdf.

While the State Election Commissioner agreed “on a one-time basis . . . to waive the fines associated with the Foundation’s tardy third-party reports” so long as they were accurate and complete, the Commissioner also warned that she would “not waive any fines for the Foundation for third-party advertisement reports that must be filed in the future.” *Id.* at 4.

49. Upon information and belief, Delaware has never disavowed enforcement of Delaware’s disclosure requirements for Plaintiffs’ planned conduct. To the contrary, Delaware has previously enforced the requirements, *see* Exhibit B, and rigorously defended the constitutionality of the statute, *see generally Del. Strong Fams. v. Att’y Gen. of Del.*, 793 F.3d 304 (3d Cir. 2015).

50. Absent a court order enjoining enforcement of the law and declaring it unconstitutional, Plaintiffs will not publish communications in Delaware in the regulated periods predating the 2026 or subsequent elections for fear that Delaware will enforce its unconstitutional disclosure requirements.

51. Consequently, Plaintiffs' speech is chilled because they fear a future enforcement action and punishment by Defendants for publishing covered communications without filing the required reports that disclose the names and addresses of their donors.

COUNT I – FIRST AMENDMENT

52. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1 to 51 as if set forth fully herein.

53. The First Amendment to the United States Constitution applies to Delaware by virtue of the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652 (1925).

54. The First Amendment prohibits the government from “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *Bonta*, 594 U.S. at 605-606. The Supreme Court has recognized that “the right to engage in activities protected by the First Amendment” includes “a corresponding right to associate with others.” *Id.* at 606 (citation omitted).

55. The Supreme Court has “held laws unconstitutional that require disclosure of membership lists for groups seeking anonymity” because “they ma[k]e group membership less attractive, raising the same First Amendment concerns about affecting the group’s ability to express its message.” *Rumsfeld v. FAIR*, 547 U.S. 47, 69 (2006). This protection applies with equal force to an organization’s financial supporters. *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976).

56. “[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of government action.” *Patterson*, 357 U.S. at 462.

57. The Supreme Court has thus held that compelled disclosure requirements are subject to “exacting scrutiny.” *Buckley*, 424 U.S. at 93-94; *Bonta*, 594 U.S. at 608.

58. That standard requires “that there be ‘a substantial relation between the disclosure requirement and a sufficiently important governmental interest,’” *Bonta*, 594 U.S. at 611 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)), “and that the disclosure requirement be narrowly tailored to the interest it promotes,” *id.* (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). The narrow tailoring inquiry requires analysis of “the extent to which the burdens are unnecessary.” *Id.*

59. “Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—‘[b]ecause First Amendment freedoms need breathing space to survive.’” *Id.* at 609 (alternation in original) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

60. “A critical feature of [the narrow tailoring] inquiry turns on whether the [government] ‘seriously undertook to address’ the problems it faces ‘with less intrusive tools readily available to it.’” *Sisters for Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400, 404 (6th Cir. 2022) (Sutton, C.J.) (quoting *McCullen v. Coakley*, 573 U.S. 464, 494 (2014)). “This means that, beyond proving a balanced relationship between the disclosure scheme’s burdens and the government’s interests, the government must ‘demonstrate its need’ for the disclosure regime ‘in light of any less intrusive alternatives.’” *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1247 (10th Cir. 2023) (quoting *Bonta*, 594 U.S. at 613).

61. Delaware’s disclosure requirements require Plaintiffs to disclose the names and addresses of their donors who have contributed more than \$100 in the aggregate during the

applicable “election period.” The compelled disclosure of Plaintiffs’ donors, as required by Delaware’s disclosure requirements, burdens Plaintiffs’ First Amendment right to association, triggering exacting scrutiny.

62. Delaware’s disclosure requirements set forth in 15 Del. C. § 8031 are not substantially related to a sufficiently important government interest, nor are they narrowly tailored to any interest they allegedly promote.

63. The Supreme Court has identified the governmental interests that could survive exacting scrutiny as: “provid[ing] the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek . . . office,” “deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity,” and “detect[ing] violations of the contribution limitations.” *Buckley*, 424 U.S. at 66-68 (citations omitted).

64. Delaware’s disclosure requirements lack a substantial relation to any of these interests, and are not narrowly tailored to any of these interests.

65. The only interest that could even potentially justify the disclosure requirements here is the informational interest, but that “simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348 (1995).

66. Delaware cannot demonstrate that disclosing the names and addresses of Plaintiffs’ donors across the country for an extended period of time actually provides voters with information that is relevant to their evaluation of candidates or “help[s] citizens make informed choices in the

political marketplace,” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 367 (2010) (citations omitted), or that it is narrowly tailored to that interest.²

67. Under Delaware’s disclosure requirements, Plaintiffs must disclose the names and addresses of all of their donors who have contributed more than \$100 within the applicable “election period,” regardless of whether these donors earmarked their donations for a specific candidate or purpose. Circuit courts around the country have identified a state’s institution of “earmarking systems” and “opt out” provisions as methods of tailoring disclosure requirements to a state’s informational interest. *See Wyo. Gun Owners*, 83 F.4th at 1248-49; *Gaspee Project v. Mederos*, 13 F.4th 79, 89 (1st Cir. 2021). Delaware lacks either option and cannot “demonstrate its need” for the burden of disclosing all of Plaintiffs’ donors above \$100 in light of these other “less intrusive alternatives.” *Bonta*, 594 U.S. at 613.

68. Delaware also cannot demonstrate that the applicable “election period[s]” are narrowly tailored to any informational interest. Those periods are defined by the election periods for “the candidate identified in such [third-party] advertisement[s],” 15 Del. C. § 8002(11)(d), which equates to a four-year election period for incumbent statewide executive officeholders and state senators, *see* 15 Del. C. § 8002(11)(a)(1). Compelling the disclosure of Plaintiffs’ donors as far back as four years prior to an election provides little information of value to voters, as those donors may no longer support Plaintiffs or their mission, and are unlikely to have given for the

² The bill synopsis for the legislation enacting Delaware’s disclosure requirements claimed that it was intended to “close a major loophole under existing law” “by requiring reports for electioneering communications—i.e., third party advertisements that refer to a clearly identified candidate and are publicly distributed within 30 days before a primary or special election, or 60 days before a general election,” and that “[t]his requirement will provide crucial information to voters in the days before an election and ‘help citizens make informed choices in the political marketplace.’ *Citizens United v. FEC*, 130 S. Ct. 876 (2010).” H.B. 300, 146th Gen. Assemb. (Del. 2012), available at <https://legis.delaware.gov/BillDetail/21575> (last visited Apr. 7, 2026).

purpose of any specific public communication or advocacy concerning any specific candidate, in Delaware or elsewhere.

69. Delaware’s interest here, whatever it may be, is weak, and it is apparent “[t]here is a dramatic mismatch” between those interests “and the disclosure regime . . . implemented in service of that end.” *Id.* at 612. Delaware’s disclosure requirement is therefore not narrowly tailored to any government interest.

70. The government’s interests also do not “reflect the seriousness of the actual burden” that Delaware’s disclosure requirements impose on the First Amendment rights of Plaintiffs and their supporters. *Bonta*, 594 U.S. at 615 (quoting *Reed*, 561 U.S. at 196). Plaintiffs and their supporters have suffered from threats and harassment in the past, and donors will likely face similar retaliation in the future if their affiliation with Plaintiffs is disclosed. Delaware’s disclosure requirements therefore will also chill, or at the very least create an unnecessary risk of chilling, the protected associational and speech activity of Plaintiffs’ and their supporters.

71. Delaware’s disclosure requirements are overbroad and facially unconstitutional because they “fail[] exacting scrutiny in ‘a substantial number of [their] applications . . . judged in relation to [their] plainly legitimate sweep.’” *Id.* at 618 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

72. The “lack of tailoring to” Delaware’s goals is “categorical—present in every case—as is the weakness of the State’s interest . . .” *Id.* at 615. It is true in “every case” that Delaware’s interests in the disclosure requirement is weak, that Delaware has not imposed “less intrusive alternatives,” and that the disclosure requirements are not narrowly tailored to the state’s interests. *See id.* at 613, 615.

73. Delaware’s disclosure requirements are triggered by relatively low expenditures on third-party advertisements (\$500), and require the disclosure of donors who gave even less (more than \$100 in the aggregate) as far back as four years and regardless of whether they were earmarked or specified for a specific candidate, communication, or any other purpose. Delaware’s disclosure requirements do not create a mechanism for donors to “opt-out” of having their donations used for third-party advertisements and thereby avoid disclosure.

74. Delaware’s disclosure requirements create an “unnecessary risk of chilling” by “indiscriminately sweeping up the information of *every* major donor with reason to remain anonymous.” *Bonta*, 594 U.S. at 616-17. This risk of chilling is even more serious here where the requirement does not just apply to “major” donors but “sweep[s] up” donors who have given more than \$100 in the aggregate over a four-year period, and when ever-evolving technology permits ““anyone with access to a computer”” to ““compile a wealth of information about’ anyone else” using their name and home address. *Id.*

75. Moreover, Delaware’s disclosure requirements are not narrowly tailored as applied to Plaintiffs, and therefore violate the First Amendment rights of Plaintiffs and their supporters.

76. Plaintiffs intend to publish and distribute communications that will be considered “electioneering communications” in the regulated periods predating the 2026 and subsequent elections, communication that would require Plaintiffs to file “third-party advertisement reports” disclosing the names and addresses of their donors.

77. However, unless and until a court enjoins the enforcement of the Delaware disclosure requirements, or they are otherwise repealed, Plaintiffs will not publish such communications in Delaware. Plaintiffs’ speech will be chilled, as well as the activity of their donors, who fear they will face harassment and reprisals if their names and addresses are disclosed.

78. Delaware's disclosure requirements infringe the First and Fourteenth Amendment rights to freedom of speech and freedom of association of Plaintiffs and their supporters, and are unconstitutional on their face and as applied to Plaintiffs.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully requests that judgment be entered in their favor and against the Defendants as follows:

A. An order preliminarily enjoining the enforcement of the disclosure requirements for third-party advertisements at 15 Del. C. § 8031;

B. An order permanently enjoining the enforcement of the disclosure requirements for third-party advertisements at 15 Del. C. § 8031;

C. A declaration that the disclosure requirements for third-party advertisements at 15 Del. C. § 8031 violate the First and Fourteenth Amendments both on their face and as applied to Plaintiffs, and are therefore null and void in their entirety;

D. An award to Plaintiffs of their reasonable attorneys' fees and costs;

E. A grant to Plaintiffs of such additional or different relief as the Court deems just and proper.

DATED: April 17, 2026

BAKER & HOSTETLER LLP

Allen J. Dickerson*
1050 Connecticut Ave., N.W., Suite 1110
Washington, DC 20036-5403
(202) 861-1507
adickerson@bakerlaw.com

/s/ Jeremy D. Anderson
Jeremy D. Anderson (No. 4515)
1201 North Market St., Suite 1407
Wilmington, DE 19801-1147
(302) 407-4224
janderson@bakerlaw.com

Erika D. Prouty*
Robert J. Tucker*
Anna E. Croyts*
200 Civil Center Dr., Suite 1200
Columbus, OH 43215-4138
(614) 228-1541
eprouty@bakerlaw.com

Attorneys for Plaintiffs

rtucker@bakerlaw.com
acroyts@bakerlaw.com

**Pro hac vice motions forthcoming*

EXHIBIT A



FREE SPEECH IS UNDER ATTACK IN MAINE

THANKS TO SENATOR RICK BENNETT

1st Amendment

SENATOR RICK BENNETT IS **ATTACKING FREE SPEECH** IN MAINE

Protect Privacy Rights.

Stop them from **taking your rights.**

Censorship is **never the answer.**



Tell your legislator to

Protect the First Amendment


Address
City, State, Zip

Non-Profit Org.
US Postage
PAID
AMERICANS FOR
PROSPERITY

EXHIBIT B



State of Delaware
Department of Elections



October 26, 2018

Re: Request for Ruling on Simpler and Lavelle Campaign Finance Issues

Dear

By letter dated October 15, 2018, the Delaware Democratic Party requests a ruling on certain conduct in connection with the campaigns of Ken Simpler (for State Treasurer) and Greg Lavelle (for State Senator, 4th District). Specifically, your letter alleges and complains that each of these campaigns has violated campaign finance laws under Chapter 80 of Title 15 of the Delaware Code.

My jurisdiction under 15 *Del. C.* Ch. 80 does not extend to rulings on individual complaints; my jurisdiction to act upon the Democratic Party’s complaint is limited to the issuance of rulings based on a specified set of facts pursuant to 15 *Del. C.* § 8041(2). Accordingly, I respond to the Democratic Party’s request for a ruling using the allegations in its letter as a specified set of facts. Those allegations are set out below.

The Foundation for Delaware’s Future, LLC

As of the date of the Democratic Party complaint, the Foundation for Delaware’s Future, LLC (the “Foundation”), which is a duly registered political action committee, had not filed any third-party advertising reports the Democratic Party alleges are required by 15 *Del. C.* § 8031. The Democratic Party requests an opinion from me on whether the Foundation must file such report(s) to disclose the costs of its digital advertisement currently running on digital and cable platforms. The Democratic Party provided a copy of a screenshot of that advertisement (see Exhibit 1). Thus, the first issue on which the Democratic Party seeks a ruling is whether the advertisement constitutes a third-party advertisement.

“Third-party advertisement” is defined as an independent expenditure or an electioneering communication. 15 *Del. C.* § 8002(27). If the advertisement constitutes either an

<https://ivote.de.gov>

State Election Commissioner
905 S Governors Ave Ste 170
Dover DE 19904
Phone: (302) 739-4277

New Castle County Office
Carvel State Office Bldg
820 N French St STE 400
Wilmington DE 19801
Phone: (302) 577-3464

Kent County Office
100 Enterprise Pl Ste 5
Dover DE 19904
Phone: (302) 739-4498

Sussex County Office
119 N Race St
PO Box 457
Georgetown DE 19947
Phone: (302) 856-5367
STGP001 v1.17/7/2015

October 26, 2018

Page 2 of 7

independent expenditure or an electioneering communication, both of which are defined terms under Chapter 80, the person who makes the expenditure for the advertisement must file a “special” report of a third-party advertisement under 15 *Del. C.* § 8031.

Analysis of whether the advertisement is an independent expenditure is straightforward. An independent expenditure is defined as “any expenditure made by any individual or other person (other than a candidate committee or a political party) *expressly advocating the election or defeat of a clearly identified candidate*, which is made without cooperation or consultation with any candidate, or any committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate or any committee or agent of such candidate.” 15 *Del. C.* § 8002(13) (emphasis added).¹

I conclude that the advertisement at issue does not constitute an independent expenditure because nowhere does it advocate for the election of Ken Simpler. It simply asks the reader to call Ken Simpler. Thus, I need not address the coordination issue and advise that the Foundation is not required to file a report of a third-party advertisement on the ground that the advertisement the Democratic Party describes is an independent expenditure. That finding, however, does not end the analysis.

The next issue is whether the advertisement constitutes an electioneering communication. An electioneering communication is defined in relevant part as a communication that refers to a clearly identified candidate that is publicly distributed within 60 days of a general election. 15 *Del. C.* § 8002(10)a. Unlike an independent expenditure, an electioneering communication need not expressly advocate for the election or defeat of a candidate to be reportable, and coordination is not part of the analysis; the timing of the communication is the central inquiry. The Democratic Party alleges that the Foundation is publicly airing the advertisement within 60 days of the general election and I accept this as a fact for the purposes of this ruling. Thus, the sole issue raised under the facts that the Democratic Party alleges is whether the advertisement refers to Ken Simpler as a clearly identified candidate.

“Clearly identified candidate” is defined to mean “that the name, a photograph or a drawing of the candidate appears or the identity of the candidate is otherwise apparent by unambiguous reference.” 15 *Del. C.* § 8002(5). The advertisement indeed contains the name and photograph of Ken Simpler and the identity of Ken Simpler is also apparent by unambiguous

¹ The United States Supreme Court has ruled that the First Amendment would allow the regulation of express advocacy defined to include not only the *Buckley v. Valeo* “magic words” but also their functional equivalent. *McConnell v. FEC*, 540 U.S. 193, 206 (2003); *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 474 n.7 (2007). See 11 C.F.R. § 100.22(b). Delaware’s statute and regulations are not written to reach the functional equivalent of express advocacy. 15 *Del. C.* § 8002 (13); 15 DE Admin Code 100 Campaign Finance Regulations, Section 2.

October 26, 2018

Page 3 of 7

reference.² Moreover, settled case law from the United States Supreme Court establishes that states may regulate **disclosure** of speech that is not express advocacy without violation of the First Amendment of the United States Constitution.³

Under the facts the Democratic Party alleges, the Foundation's advertisement was publicly aired within 60 days of the November 6, 2018 general election and so it constitutes an electioneering communication under 15 *Del. C.* § 8002(10)a. Additionally, under the facts the Democratic Party alleges, the cost of the advertisement exceeded \$500.00 and therefore the Foundation was required to file a special report within 24 hours after the expenditure was made.⁴ 15 *Del. C.* § 8031.

The Delaware Campaign Finance Reporting System reflects that the Foundation filed two third-party advertisement reports on October 19, 2018 and one third-party advertisement report on October 22, 2018. The remaining issues, therefore, are whether the Foundation reports were timely and accurate.

The Foundation has responded to both of these allegations.⁵ As to timeliness, while denying that the Foundation was legally required to file third-party advertisement reports at all, the Foundation concedes that it did file the reports well after the 24-hour filing deadline imposed by 15 *Del. C.* § 8031(d). The Foundation contends, however, that it supplied the information required by Section 8031 when it filed its 30-day report under 15 *Del. C.* § 8030 on October 8 and that, therefore, the October 8 report is the functional equivalent of a 30-day report. Moreover, the Foundation requests that I waive the fines imposed under 15 *Del. C.* § 8044. I respond to the Foundation's request and contention separately.

² Case law from other jurisdictions applying language that is identical to the language of Section 8002(5) have concluded that an advertisement clearly identifies a candidate if the subject of the advertisement is publicly identified as a candidate by the target audience for the advertisement. *Comm. for Justice & Fairness v. Arizona Sec'y of State's Office*, 332 P.3d 94 (Ct. App. 2014); *Hispanic Leadership Fund, Inc. v. Fed. Election Comm'n*, 897 F. Supp. 2d 407 (E.D. Va. 2012)

³ *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Citizens United v. FEC*, 558 U.S. 310 (2010); *See also Delaware Strong Families v. Attorney General of Delaware*, 793 F.3d 304, 308 (3rd Cir. 2015)(*cert. denied* 136 S. Ct. 2376 (2016)) ("Any possibility that the Constitution limits the reach of disclosure to express advocacy or its functional equivalent is surely repudiated by *Citizens United v. FEC*...")

⁴ 15 *Del. C.* § 8031(d) and 15 Del. Admin. Code § 100.9.1.5 read in pertinent part: "For purposes of this section, an expenditure shall be deemed to be made on the date it is paid or obligated, whichever is earlier." 16 DE Reg. 771 (01/01/13).

⁵ The Foundation and First State First requested, and I granted, permission to respond to the Democratic Party's complaint. These entities responded on October 23, 2018.

October 26, 2018

Page 4 of 7

By not legislating a “grace” period that excuses the filing of special reports under Section 8031 within a certain timeframe (e.g. five days) of the filing deadlines for the 8 and 30 day reports under Section 8030, the General Assembly has clearly spoken with respect to the 24-hour filing deadline for special reports. Therefore, I do not agree that a 30-day report serves as the functional equivalent of a third-party advertisement report. I do agree, however, on a one-time basis, to waive the fines associated with the Foundation’s tardy third-party reports, provided that the filed reports are accurate and complete. Please be advised that I will not waive any fines for the Foundation for third-party advertisement reports that must be filed in the future.

Since the Foundation did not file the reports until after the Democratic Party made its October 15, 2018 complaint, I have no set of facts on which to opine whether the reports were accurate. The Foundation alleges in response to the complaint by the Democratic Party that its 30-day report accurately reported the costs of its advertisement incurred to date. I am authorized to issue a ruling only upon a specified set of facts; I cannot resolve factual differences in this procedural posture. I direct the attention of the Democratic Party to 15 *Del. C.* § 8031(d) (“For purposes of this section, an expenditure shall be deemed to be made on the date it is paid or obligated, whichever is earlier.”) to confirm that the three filed reports are filed in response to the Simpler ads at issue.

Ken Simpler

The Democratic Party’s complaint against Ken Simpler is twofold. First, the Democratic Party alleges that Ken Simpler acted improperly when he linked the Foundation advertisement to his social media account on Facebook because that linkage necessarily required state employees of the Treasurer’s Office to engage in electioneering on state time. A copy of the Facebook entry with a screenshot of the Foundation advertisement is attached as Exhibit 2. Second, the Democratic Party alleges that Ken Simpler’s use of the advertisement changed the nature of the advertisement to something other than issue advocacy. I do not agree with either contention.

The concern about pressing state employees into the service of the Simpler campaign is speculative, especially given the Foundation’s representation that no one has called the State Treasurer’s office in response to the advertisement. The propriety of the practice of instructing voters to call government employees during their work hours is beyond the scope of this ruling.

The charge that linkage of the Foundation advertisement to the Simpler campaign converts the advertisement into something other than unregulated issue advocacy mischaracterizes the advertisement. The Foundation advertisement is an electioneering communication and must be reported as such. Thereafter, if the candidate clearly identified in

October 26, 2018

Page 5 of 7

the electioneering communication, which has been properly reported, or anyone else for that matter, uses the advertisement, the advertisement remains a disclosed electioneering communication and the purpose of the campaign finance laws – public disclosure – has been furthered.

First State First and Senator Greg Lavelle

The Democratic Party alleges, and I accept as true for the purposes of this ruling, that Greg Lavelle coordinated with First State First, a political action committee of which Senator Lavelle is the treasurer, to produce and publicly distribute mailings about Senator Lavelle. Copies of the mailings are attached as Exhibit 3. The mailings each tout Senator Lavelle's accomplishments as state senator and invite the reader to contact the Senator via his Senate-assigned phone number at his office in Legislative Hall to thank him. The Democratic Party contends that these mailings constitute third-party expenditures subject to 15 *Del. C.* § 8031. I disagree.

The discussion above regarding State Treasurer Ken Simpler is fully applicable here. An expenditure qualifies as an "independent expenditure," and is reportable, if it "expressly advocate[s] the election or defeat of a clearly identified candidate. . ." 15 *Del. C.* § 8002(13). Like the Foundation advertisement, the First State First mailings do not expressly advocate for the election or defeat of any candidate. The Delaware statute does not require disclosure of the speech contained in the First State First mailings on the ground that the speech is an independent expenditure. The remaining analysis regarding the Foundation's advertisement, however, is directly applicable to the First State First mailings as well.

Just as the Foundation's advertisement constitutes an electioneering communication as defined by 15 *Del. C.* § 8002(10)a, so too do the First State First mailings. The mailings refer to a clearly identified candidate because they contain the name, photograph and the identity of a candidate made apparent by unambiguous reference. *Id.* Accordingly, if the mailings otherwise qualify as third-party advertisements, including the cost provisions contained in 15 *Del. C.* § 8031,⁶ the cost of the mailings is an expenditure for a third-party advertisement, and must be reported as such.

⁶ Section 8031 provides that expenditures that cause the aggregate amount of expenditures for third-party advertisements made by the advertiser to exceed \$500 must be reported as third-party advertisement. The Democratic Party makes no factual allegation as to the cost of the mailings.

October 26, 2018

Page 6 of 7

The records of the State Election Commissioner reflect that First State First filed third-party advertisement reports on September 19, 2018, September 25, 2018, and October 4, 2018. The Democratic Party's complaint does not allege that First State First did not timely file accurate third-party advertisement reports. I conclude, therefore, that on the facts that the Democratic Party alleges, First State First did not violate Delaware law.

The Response of the Foundation for Delaware's Future and First State First

Many of the points that the Foundation and First State First raised in their response are addressed above. There are, however, several additional points in the response that warrant comment.

First, the Foundation and First State First rely on a Delaware Attorney General's Opinion from 2000 to support their contention that the advertisement and mailings at issue cannot be regulated because they constitute issue advocacy. While the Attorney General's Opinion they cite largely remains good law, it must be read in conjunction with changes to the Delaware statutes and regulations. As the Foundation and First State First acknowledge, the General Assembly rewrote Delaware's campaign finance laws in 2012. The changes include defining electioneering communications and required that such communications be disclosed in special reports. 15 *Del. C.* §§ 8002(10)a and 8031. The Attorney General's Opinion simply did not opine upon the constitutionality of regulating the disclosure of electioneering communications.⁷

Second, the Foundation and First State First rely upon *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL*"), to support their view that the advertisement and mailings at issue cannot be regulated because they constitute issue advocacy. (Response at Page 1, note 1). That reliance is misplaced. *WRTL* addressed the constitutionality of criminalizing **payment** for electioneering communications and therefore does not apply to the **disclosure** provisions at issue here. The United States Supreme Court has uniformly drawn a clear distinction between **banning** electioneering communications and **requiring disclosure** of communications beginning with *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) and most recently in *Citizens United v. FEC*, 558 U.S. 310, 366-371 (2010). Very recently, the Third Circuit recognized this distinction in *Delaware Strong Families v. Attorney General of Delaware*, 793 F.3d 304, 308 (3rd Cir. 2015)(*cert. denied* 136 S. Ct. 2376 (2016)), writing, "Any possibility that the Constitution limits the reach of disclosure to express advocacy or its functional equivalent is surely repudiated by *Citizens United v. FEC*..."

⁷ In footnote 2 of the Foundation and First State First's response, they write that the Democratic Party's complaint's use of the term "electioneering materials" appeared to mean the Democratic Party was alleging that the advertisement and mailings constituted "express advocacy." I understand the Democratic Party to be complaining that the advertisement and mailings constitute electioneering communications.

October 26, 2018

Page 7 of 7

Conclusion

I trust that the analysis above addresses all issues raised in the complaint of the Democratic Party and the response by the Foundation and First State First, to the extent possible in a ruling pursuant to 15 Del. C. 8041(2). That said, I wish to add a comment on the practices at issue.

Senator Lavelle attempts, through the action of a PAC he controls, to finely parse the legal difference between “issue” advocacy” and “express advocacy”. By carefully never saying “vote for” but substituting his picture, name and title, most voters would never understand the difference.

While I believe that his use of the mailings at issue steps right up to the legal line and the distinction in the statute, I reluctantly conclude his use of electioneering communications to support his own campaign does not step over the line and is technically permitted 15 *Del. C.* Ch. 80. In my view, however, though legal, the practice is not consistent with the spirit of the law intended to promote transparency, fairness and clarity for voters and the election process.

Very truly yours,



Elaine Manlove
State Election Commissioner

Cc Pursuant to 15 *Del. C.* § 8041(2):

Governor John C. Carney

Attorney General Matt Denn

Erik Raser-Schramm, Chairman, Delaware Democratic Party

Michael Harrington, Sr., Chairman, Delaware Republicans Party

David McCorquodale, Green Party

Sean Goward, Libertarian Party

EXHIBIT 1-2



Ken Simpler for Delaware



Sponsored · Paid for by The Simpler Campaign, LLC ·

To learn more about Ken's accomplishments, finance background and vision for his home state visit KenSimpler.com

Support State Treasurer Ken Simpler on November 6th!
[#LetsMakeItSimpler](https://twitter.com/LetsMakeItSimpler)



CALL STATE TREASURER
KEN SIMPLER
302-672-6700

Paid for by Foundation for Delaware's Future, LLC.
Learn more about Foundation for Delaware's Future, LLC
at elections.delaware.gov

EXHIBIT 3

PAID FOR BY FIRSTSTATEFIRST PAC
500 WHITBY DRIVE | WILMINGTON, DE 19803
18-LAV-003

PRECISE
STANDARD
DE POSTAGE
PAID
ASSOCIATES
INTERNATIONAL
INC.

T18 B25 P1 S 5102*****ECRLOT**C 019



State Senator

GREG LAVELLE

IS LEADING THE FIGHT TO PROTECT TAXPAYERS & REFORM DOVER.

STOPPING AN INCOME TAX INCREASE | STANDING UP TO THE CAREER POLITICIANS
OPPOSING LEGISLATIVE PAY RAISES

State Senator

GREG LAVELLE STANDS UP FOR TAXPAYERS

GREG LAVELLE is a businessman with real-world skills he uses every day to make sure taxpayers can keep more of what they earn.

He's also Delaware's leading voice for government reform - to help stop Dover from wasting our money.



Helped stop an income tax increase on working families.



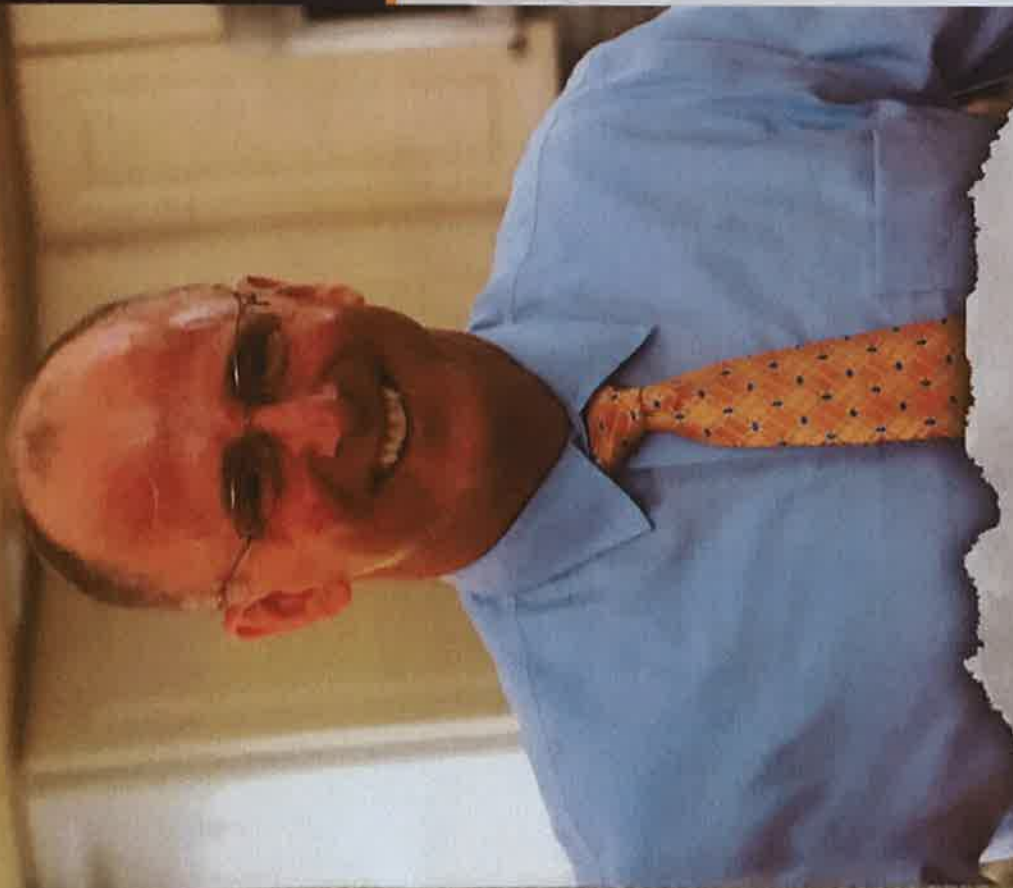
Protected homeowners by preserving tax deductions for mortgage interest.



Led the fight against unethical pay raises for legislators and has returned over \$43,000 in raises to local charities.



Passed a Constitutional Amendment to stop politicians from raiding the Transportation Trust Fund and ensure money is spent on infrastructure, as promised.



HOCKESSIN
CommunityNews

August 2013

DELAWARE SENATOR GREG LAVELLE AGAIN DONATES PAY RAISE TO CHARITY; CALLS FOR REFORM OF LAWMAKERS' SALARY HIKES

Call Greg Lavelle at 302-744-4135 and thank him for protecting your money!