APPENDIX

APPENDIX:

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION FOR GUN RIGHTS, INC., *Plaintiff-Appellant,* v. JEFF MANGAN, in his official capacity as the Commissioner of Political Practices for the State of Montana; Timothy G. Fox, in his official capacity as Attorney General for the State of Montana; LEO J. GALLAGHER, in his official capacity as County Attorney for the County of Lewis and Clark, *Defendants-Appellees*.	No. 18-35010 D.C.No.6:16-cv-00023-DLC OPINION

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, Chief District Judge, Presiding

Argued and Submitted March 5, 2019
Portland, Oregon
Filed August 12, 2019

Before: Susan P. Graber and Marsha S. Berzon, Circuit Judges, and John R. Tunheim,* District Judge

Opinion by Judge Berzon

SUMMARY**

Civil Rights

The panel affirmed in part and reversed in part the district court's summary judgment in favor of Montana defendants in an action brought by the National Association of Gun Rights, a non-profit advocacy group, challenging Montana's electioneering disclosure laws on First Amendment grounds.

Under Montana law, an organization that makes an expenditure of more than $250 on a single electioneering communication must register as a political committee, subject to certain organizational and disclosure requirements. An electioneering

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* The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

communication is, in part, a paid communication made within 60 days of the initiation of voting in an election, that can be received by more than 100 recipients in a voting district and that refers to candidates, political parties or ballot issues. Mont. Code Ann. § 13-1-101(16). Plaintiff filed suit asserting that the State's definition of electioneering communication was both facially overbroad in violation of the First Amendment and unconstitutional as applied to plaintiff. Plaintiff alleged that the First Amendment permits states to require disclosure only of express advocacy and its functional equivalent. Plaintiff asserted that because its proposed mailers did not specifically advocate for or against a specific candidate, but just provided information about a candidate's position on Second Amendment issues, plaintiff could not constitutionally be required to comply with Montana's disclosure requirements.

The panel held that the First Amendment does not limit states' election disclosure requirements solely to regulating express advocacy. The panel reasoned that requiring disclosure of information related to subtle and indirect communications likely to influence voters' votes was critical to the State's interest in promoting transparency and discouraging circumvention of its electioneering laws. Applying exacting scrutiny, the panel held that like the disclosure provisions that were approved in *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) and *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015), most of Montana's disclosure and related requirements were substantially related

to important governmental interests connected with informing the electorate.

The panel held that only Montana's requirement pursuant to §§ 13-37-203, that organizations designate a treasurer registered to vote in Montana, was constitutionally infirm. The panel held that the registered-Montana-voter requirement was not substantially related to any important governmental interest. The panel also held, however, that the registered-voter provision was severable from the rest of the Montana disclosure regime, which could remain in force. The panel therefore affirmed the district court's summary judgment in favor of Montana except with respect to the treasurer provision.

COUNSEL

David Warrington (argued), Kutak Rock LLP, Washington, D.C.; Matthew G. Monforton, Monforton Law Offices PLLC, Bozeman, Montana; for Plaintiff-Appellant.

Jere Stuart Segrest (argued) and Matthew T. Cochenour, Assistant Attorneys General; Timothy Fox, Attorney General; Office of the Attorney General, Helena, Montana; for Defendants-Appellees.

Randy Elf, Lakewood, New York, as Amicus Curiae.

OPINION

BERZON, Circuit Judge:

The National Association of Gun Rights ("NAGR" or "the Association"), a non-profit advocacy group, challenges Montana's electioneering disclosure laws on First Amendment grounds. This appeal treads on familiar territory. In *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) ("*HLW*"), we upheld the State of Washington's disclosure regime, and in *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015), we rejected challenges to a similar regime in Hawaii. Montana's disclosure regulations closely resemble those of these other states.

Like the disclosure provisions we approved in *HLW* and *Yamada*, most of Montana's disclosure and related requirements are substantially related to important governmental interests connected with informing the electorate. Only Montana's requirement that organizations designate a treasurer registered to vote in Montana is constitutionally infirm. We therefore affirm the district court's summary judgment in favor of Montana except with respect to that provision.

I

A

NAGR is a tax-exempt non-profit organization under 26 U.S.C. § 501(c)(4); its principal place of business is in Colorado. NAGR's articulated mission

is to "defend the right to keep and bear arms, and advance that God-given Constitutional right by educating the American people and urging them to action in the public policy process." NAGR reports that it has approximately 36,000 members and supporters in Montana and 4.5 million members nationwide. To retain its federal tax status, NAGR cannot engage in "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." 26 C.F.R. § 1.501(c)(4)–1(a)(2)(ii).

As part of its mission, NAGR seeks to "let[] the public know where legislators and governmental officials stand on issues related to the Second Amendment." "[D]uring [the 2020] election cycle," NAGR intends "to mail educational literature to Montanans . . . describing which public officials have supported the rights of citizens to keep and bear arms and engage in lawful self-defense, as well as those who have not done so."[1] NAGR represents that its proposed future mailer would cost more than $250 to

[1] The proposed literature would be similar in content to the material NAGR mailed during a previous election cycle. In 2012, NAGR sent several mailers to residents in Flathead County, Montana, that discussed state Senator Bruce Tutvedt's alleged attempts to "kill" a state bill encouraging gun ammunition manufacturing. The mailer read: "Bruce Tutvedt: Working Against the Flathead's Burgeoning Small-Arms Industry." It further stated, "FACT: Flathead County was poised to get a new smokeless powder plant until Bruce Tutvedt took to the Senate Floor and demanded it be killed. (S.B. 371, 04/13/11 Audio) Now, thanks to Bruce Tutvedt, unemployment in the Flathead is nearly 11% percent." The mailer called on residents to "[c]ontact Bruce Tutvedt right away and **DEMAND** he apologize for killing new manufacturing for Flathead County."

distribute. The Association does not intend to distribute the literature, however, if the literature would be deemed an "electioneering communication," subjecting the organization to disclosure requirements under Montana law.

B

In 2015, the Montana State Legislature enacted S.B. 289 ("the Statute"), covering a category of speech, denominated "electioneering communications," with the purpose of "increasing transparency, informing Montanans about who is behind the messages vying for their attention, and decreasing circumvention" of campaign finance laws. The Statute defines "electioneering communication" as follows:

> (a) "Electioneering communication" means a paid communication that is publicly distributed by radio, television, cable, satellite, internet website, newspaper, periodical, billboard, mail, or any other distribution of printed materials, that is made within 60 days of the initiation of voting in an election, that does not support or oppose a candidate or ballot issue, that can be received by more than 100 recipients in the district voting on the candidate or ballot issue, and that:
>
> > (i) refers to one or more clearly identified candidates in that election;
> >
> > (ii) depicts the name, image, likeness, or voice of one or more clearly identified candidates in that election; or

(iii) refers to a political party, ballot issue, or other question submitted to the voters in that election.

(b) The term does not mean:

(i) a bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, internet website, or other periodical publication of general circulation unless the facilities are owned or controlled by a candidate or political committee;

(ii) a communication by any membership organization or corporation to its members, stockholders, or employees;

(iii) a commercial communication that depicts a candidate's name, image, likeness, or voice only in the candidate's capacity as owner, operator, or employee of a business that existed prior to the candidacy;

(iv) a communication that constitutes a candidate debate or forum or that solely promotes a candidate debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

> (v) a communication that the commissioner determines by rule is not an electioneering communication.

Mont. Code Ann. § 13-1-101(16).[2]

An organization that makes an expenditure of more than $250 on a single electioneering communication must register as a "political committee."[3] Section 13-1-101(31)(a) defines "political committee" as:

> [A] combination of two or more individuals or a person other than an individual who receives a contribution or makes an expenditure:

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[2] Montana Administrative Rule 44.11605(2)(b) defines "the initiation of voting" for purposes of electioneering communications to occur "when absentee ballot packets are mailed." The Commissioner of Political Practices has interpreted "the initiation of voting" date to be 25 days before an election, the date when general absentee ballots are mailed. Mont. Code Ann. § 13-13-205(1)(a)(ii). NAGR contends that the earliest date absentee ballots are mailed is 45 days before an election, when absentee ballots for overseas service members are sent. § 13-13-205(2). For our purposes, we need not determine whether electioneering communications are those made within 85 days of an election or within 105 days.

[3] For clarity, we refer to any money an organization spends, whether on advertisements or donations to a candidate, ballot issue, or another organization, as an "expenditure." We refer to funds an organization receives from any source as a "contribution."

> (i) to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination;
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> (ii) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or
>
> (iii) to prepare or disseminate an election communication, an electioneering communication, or an independent expenditure.

Political committees ordinarily must abide by certain organizational requirements.[4] All such organizations must file a registration form with the Commissioner of Political Practices containing an organizational statement and the names and addresses of all officers, § 13-37-201(2)(b); appoint a treasurer registered to vote in Montana, §§ 13-37-201(1), -203; deposit all contributions received and expenditures to be disbursed into a bank authorized to transact business in Montana, § 13-37-205; abide by certain depository requirements, § 13-37-207; and keep up-to-date records of contributions and expenditures, § 13-37-208.

In addition to meeting these organizational requirements, political committees are subject to

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[4] These political committee requirements do not apply, with certain exceptions, to political committees organized to support an issue or campaign in a school district or other special districts comprising "a unit of local government authorized by law to perform a single function or a limited number of functions." Mont. Code Ann. § 13-37-206.

disclosure requirements depending on their level of political activity. Montana law distinguishes among several types of political committees, § 13-1-101(31)(b), two of which are relevant to this case: "incidental" committees and "independent" committees.[5]

An "incidental committee" is a political committee "not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure." §13-1- 101(23)(a). A prototypical incidental committee is a business that operates continuously. If such a committee makes an expenditure of more than $250, it is considered an incidental political committee under S.B. 289, but only for the election cycle in which it makes a qualifying expenditure. An incidental committee must report to whom it is making expenditures, but it is not required to report from whom it is receiving contributions unless those contributions were solicited or earmarked for a particular candidate, ballot issue, or petition for nomination. § 13-37-232.

An incidental committee must file periodic reports of expenditures and, if applicable, contributions during an election cycle in which it makes an expenditure, so long as it continues to accept qualifying contributions or make qualifying

[5] Political committees also include "ballot issue committees" and political party committees

expenditures.[6] If, however, an incidental committee has terminated all qualifying contribution and expenditure activity for an election cycle, it may file a closing report at any time. § 13-37-226(9). If it does so, the committee need not file any subsequent reports. In practice, if an incidental committee makes only a single expenditure in an election cycle, it can fulfill all registration, reporting, and closing requirements in a single filing of two forms. If an incidental committee makes multiple expenditures, it is required to file reports at the intervals required by law.

An "independent committee" differs from an incidental committee in purpose. It is a political committee "organized for the primary purpose of receiving contributions and making expenditures that is not controlled either directly or indirectly by a candidate and that does not coordinate with a candidate in conjunction with the making of expenditures" except pursuant to certain provisions not relevant here. § 13- 1-101(24). An independent committee is subject to more detailed disclosure and reporting requirements than an incidental

[6] Specifically, an incidental committee making multiple expenditures must file a report on the 90th, 35th, and 12th day preceding the date of an election during an election cycle in which it makes expenditures. § 13-37-226(5)(a). If an incidental committee receives a qualifying contribution or makes an electioneering communication greater than or equal to $500 within 17 days of an election, the incidental committee must file a report within 2 business days of receiving the contribution or making the electioneering communication. § 13-37- 226(5)(b), (c). An incidental committee also must file reports within 20 days after an election and at the close of the calendar year. § 13-37-226(5)(d), (e).

committee. It must report the source and amount of its contributions, as well as the target and amount of its expenditures. § 13-37-229.

An independent committee must make the required disclosures in the same periodic intervals as an incidental committee. § 13-37-226(4).[7] Like an incidental committee an independent committee may file closing reports at any time. However, because its primary purpose is to advocate during elections, an independent committee often does not close after an election cycle but instead carries over from one election cycle to the next.

C

In 2016, NAGR filed suit against several Montana officials and agencies alleging, among other challenges, that the State's definition of "electioneering communication," § 13-1-101(16), is both facially overbroad in violation of the First Amendment and unconstitutional as applied to NAGR.[8] NAGR's primary contention in district court

[7] Both incidental and independent committees must file more frequent reports if they receive a contribution or make an expenditure "supporting or opposing a candidate . . . or a statewide ballot issue." § 13-37-226(1)–(3). The timing of such reports depends on whether the candidate or ballot issue in question is statewide, district, or local. *Id*.

[8] NAGR brought two other claims: Claim 1—Declaratory and injunctive relief preventing the Commissioner from prosecuting NAGR for educational mailings it made in 2012; and Claim 3—Declaratory and injunctive relief preventing the Commissioner from enforcing the compelled-vote-reporting provision of Montana Code Annotated section 13-35-225(3)(a). On cross-

was that the First Amendment, as a categorical matter, permits states to require disclosure only of express advocacy and its functional equivalent, defined as speech "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 470 (2007) ("*WRTL*"). NAGR asserted that because its proposed mailers did not specifically advocate for or against a specific candidate, but just provided information about a candidate's position on Second Amendment issues, the Association could not constitutionally be required to comply with Montana's disclosure requirements.

The district court rejected this contention. It granted summary judgment to Montana on NAGR's electioneering communication claim, holding that the "electioneering communication" definition was not constitutionally overbroad. The court reasoned that NAGR's argument was foreclosed by *HLW*, 642 F.3d at 1016, which, said the district court, "reject[ed] [the] contention that . . . disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." Applying exacting scrutiny, the district court held that Montana's interests in "increasing transparency, informing Montanans about who is behind the messages vying for their attention, and decreasing circumvention" are important governmental interests, and that

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motions for summary judgment, the district court denied NAGR's first claim as time barred and granted NAGR summary judgment on the third claim, holding § 13-35-225(3)(a) unconstitutional. Neither claim is at issue in this appeal.

Montana's disclosure requirements are substantially related to those interests because "they are tailored to the degree of an organization's political activity." In support of its determination, the court noted that NAGR would likely need only to register as an incidental committee, a minimal burden, and that the Montana law's disclosure requirements are further tailored because the requirements are limited to a communication that costs more than $250 and is made within a few months before an election.

This appeal followed. We review de novo the district court's grant of summary judgment. *See Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015).

II

A

The First Amendment, made applicable to the states through the Fourteenth Amendment, forbids the enactment of any law "abridging the freedom of speech." U.S. Const. amend. I. Political speech lies at the core of speech protected by the First Amendment, as it is the means by which citizens disseminate information, debate issues of public importance, and hold officials to account for their decisions in our democracy. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). Thus, "[t]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for

political office." *Id.* (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)).

Generally, "[l]aws that burden political speech are 'subject to strict scrutiny'"—that is, they must be narrowly tailored to further a compelling government interest. *Citizens United*, 558 U.S. at 340 (quoting *WRTL*, 551 U.S. at 464). But regulations directed only at *disclosure* of political speech are subject to somewhat less rigorous judicial review—"exacting scrutiny," which requires the government to show that the challenged laws are "substantially related to a sufficiently important governmental interest." *HLW*, 624 F.3d at 1005.

This difference derives from the principle that "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis v. FEC*, 554 U.S. 724, 744 (2008). The two types of regulation—expenditure and contribution limitations on the one hand and disclosure requirements on the other—have different effects. Expenditure and contribution limitations "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam). By contrast, "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64; *McConnell v. FEC*, 540 U.S. 93, 201 (2003)). Far from restricting speech, electioneering disclosure

requirements reinforce democratic decisionmaking by ensuring that voters have access to information about the speakers competing for their attention and attempting to win their support. "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791–92 (1978) (footnote omitted). Recognizing the important information-enhancing role that disclosure laws play, the Supreme Court and our court have subjected laws requiring speakers to disclose information in the electoral context to a somewhat less demanding standard than strict scrutiny, described as "exacting scrutiny." *See Doe v. Reed*, 561 U.S. 186, 196 (2010) (collecting cases).

B

NAGR's primary argument—that the First Amendment, as a categorical matter, permits states to require disclosure only with respect to express advocacy—has been rejected by both the Supreme Court and this court.[9] In *Wisconsin Right To Life*, the

[9] Neither party contests that NAGR's intended electioneering materials are likely electioneering communications covered by Montana law, subjecting NAGR to prosecution if it does not comply with Montana's requirements. NAGR's decision—not to distribute for fear of prosecution, election material it would have distributed if the challenged laws had not been enacted—is sufficient to establish standing. In the First Amendment context, "self-censorship" is "a harm that can be realized even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). So long as the "intended speech arguably falls

Supreme Court limited federal *restrictions* on independent campaign expenditures to express advocacy and its functional equivalent. *WRTL*, 551 U.S. at 469–70. But *Citizens United* declined to impose the same categorical limitation on *disclosure* requirements. 558 U.S. at 369. There, the Court upheld a federal law requiring certain electioneering communications to include a disclaimer by the organization that funded the communication.

The electioneering communications at issue in *Citizens United* were television advertisements promoting a movie about then-presidential candidate Hillary Clinton. The advertisements were not the functional equivalent of express advocacy. "They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy," but they did not expressly advocate support or opposition for her candidacy. *Id.* at 368.[10] Nonetheless, the Court upheld the disclaimer requirements. Rather than rely on a rigid distinction between express advocacy and issue advocacy, the Court reasoned that the "[t]he disclaimers . . . provide the electorate with information and insure that the voters are fully informed about the person or group

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within the [challenged] statute's reach," refraining from that speech to avoid disclosure requirements, where speaking without disclosure could lead to prosecution, is a constitutionally sufficient injury. *HLW*, 624 F.3d at 1000–01 (quoting *Cal. Pro-Life Council Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003)).

[10] The Court held that the film itself constituted express advocacy, 558 U.S. at 325, but did not so determine with respect to the advertisements for the film.

who is speaking" *Id.* (citations and alterations omitted).

We relied on this holding in *HLW*. 624 F.3d at 1016. Citing *Citizens United*, we declined to recognize "a bright- line rule distinguishing express and issue advocacy" and "reject[ed] [the] contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Id.* (quoting *Citizens United*, 558 U.S. at 369).

NAGR cites the Seventh Circuit's decision in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014) ("*Barland*"), to support its contention that electioneering disclosure laws may constitutionally apply only to express advocacy. We necessarily rejected that proposition in *HLW*. Other circuits agree with *HLW* on this point. "*Citizens United* made clear that the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context." *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012); accord *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132 (2d Cir. 2014); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54 (1st Cir. 2011).

Considered as a whole, *Barland*'s reading of *Citizens United* is not to the contrary. That decision asserted that the Court's holding in *Citizens United* regarding disclosure requirements did not "suggest[] that the Court was tossing out the express-advocacy limitation for *all* disclosure systems" and cautioned that "it's a mistake to read *Citizens United* as giving the government a green light to impose political-committee status on every person or group that

makes a communication about a political issue that also refers to a candidate." *Barland*, 751 F.3d at 836–37. In context, when *Barland* stated that *Citizens United* "applies only to the specifics of the disclosure requirement at issue there," *id.* at 836, it was offering a contrast between narrowly tailored and sweeping disclosure requirements, *id.* at 837, not determining that even appropriately tailored disclosure laws, such as the one considered in *Citizens United*, may apply only to express advocacy.

Montana's disclosure requirements for political speech that mentions a candidate or ballot initiative in the days leading up to an election reflect the unremarkable reality that such speech—express advocacy or not—is often intended to influence the electorate regarding the upcoming election. That NAGR intends specifically to send out its mailers "during this election cycle" reveals its own belief that such communications are more relevant to voters in the days before an election. To paraphrase *HLW*, "[f]or the same reasons that [NAGR] had a heightened interest in speaking about [Second Amendment rights] during the run-up to the . . . vote, [Montanans] had a heightened interest in knowing who was trying to sway their views on the topic and how much they were willing to spend to achieve that goal." 624 F.3d at 1019. Requiring disclosure of information related to subtle and indirect communications likely to influence voters' votes is critical to the State's interest in promoting transparency and discouraging circumvention of its electioneering laws.

In sum, the First Amendment does not limit states' election disclosure requirements solely to regulating express advocacy. Rather, we apply exacting scrutiny in determining the validity of election disclosure requirements covering electioneering communications.

C

NAGR also submits that, even if exacting scrutiny applies,[11] Montana's disclosure regime for electioneering communications cannot stand.[12] Not so.

This is not the first time we have addressed the constitutionality of electioneering communication disclosure requirements under exacting scrutiny. Both *HLW* and *Yamada* upheld disclosure regimes similar to the one at issue in this case. With one exception, Montana's requirements are sufficiently

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[11] NAGR acknowledges that, if electioneering communication disclosure requirements for issue advocacy are permitted at all, exacting scrutiny—not strict scrutiny—applies. Before *HLW*, there was some confusion in this circuit as to whether electioneering disclosure laws are subject to exacting scrutiny or strict scrutiny. *See HLW*, 624 F.3d at 1003–05. *HLW* clarified that exacting scrutiny is the correct standard. *Id.*

[12] NAGR maintains that it is challenging only the overbreadth of the term "electioneering communications" and not the accompanying disclosure requirements. This attempt at delicately parsing NAGR's claim is of no help. The constitutionally permissible scope of the term "electioneering communications" depends on the disclosure burdens that attach when a speaker makes such a communication.

parallel to those in *HLW* and *Yamada* that those precedents control here.

HLW addressed a challenge to the State of Washington's laws requiring public disclosures for organizations engaging in various types of political speech. Under Washington law, an organization engaged in limited political advocacy is required to disclose only its "independent expenditures" and "political advertising." *Id.* at 998. Such an organization must identify the target of its expenditures on a monthly basis so long as it continues to make expenditures, but generally need not disclose the source of its contributions. *Id.* at 998–99.

On the other hand, the Washington disclosure statute requires an organization that has as its "'primary or one of the primary purposes' to 'affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions'" to fulfill more significant requirements by registering as a "political committee." *Id.* at 997 (quoting *Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 49 P.3d 894, 903 (Wash. Ct. App. 2002)). A political committee must file ongoing reports disclosing the sources of its expenditures and contributions. *Id.* at 998. The frequency of reporting for both types of organizations in Washington is pegged to fixed intervals before an election. *Id.* at 998–99.

In *HLW*, a non-profit organization, Human Life of Washington Inc., sought to distribute material opposing physician-assisted suicide shortly before a

state ballot initiative vote to legalize such conduct in Washington. *Id.* at 995, 1014. Applying exacting scrutiny, we determined that Washington's interest in "[p]roviding information to the electorate" is a sufficiently important interest to justify Washington's disclosure requirements, because the requirements "help[ed] ensure that voters have the facts they need to evaluate the various messages competing for their attention" and make informed electoral choices. *Id.* at 1005.

HLW went on to hold that the State's disclosure requirements are substantially related to that important interest. *Id.* at 1012, 1018. With respect to the political committee requirements, we reasoned that Washington's disclosure requirements are appropriately scaled to the level of political advocacy in which an organization engages. The scaling "ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy." *Id.* at 1011. *HLW* also determined that Washington's political committee disclosure requirements are not overly burdensome relative to the government's interests. *Id.* at 1013. Such requirements are triggered only if a committee spends above a certain annual threshold and involve only a two-page registration form, along with three additional reports pegged to the election in which the organization is engaging. *Id.* And, with respect to the independent expenditures and political advertising requirements, *HLW* concluded that those requirements are substantially related to the interest in informing the electorate, because they (1) "target

only those expenditures and advertisements made in conjunction with an ongoing election or vote," and (2) "once the initial two-page registration form is filed, the filing of additional special reports is pegged to the dates of the upcoming election." *Id.* at 1018.

Yamada addressed issues closely similar to those in *HLW*, this time rejecting an as-applied challenge to election disclosure laws in Hawaii. While doing so, *Yamada* reaffirmed the First Amendment principles established in *HLW*. 786 F.3d 1182.

Under Hawaii law, an organization with "'the purpose' of making or receiving contributions, or making expenditures, for communications or activities that constitute express advocacy or its functional equivalent" that receives contributions or makes certain expenditures in excess of $1000 over a two-year election period must register as a "noncandidate committee." *Id.* at 1194–95. A noncandidate committee must provide identifying information about its organization, maintain records for five years, and keep a segregated bank account for the committee's contributions. *Id.* at 1195. In addition, a noncandidate committee is required to disclose its contributions and expenditures at intervals tied to each election cycle and to file annual reports. *Id.* Organizations that do not qualify as noncandidate committees in Hawaii need only include disclosures in certain "electioneering communications," such as advertising that identifies a candidate and advocates or opposes the election of that candidate. *Id.* at 1202.

Yamada upheld both Hawaii's noncandidate committee disclosure requirements and its electioneering communication disclosure requirements. With respect to the noncandidate committee requirements, *Yamada* held that the requirements are "materially indistinguishable" from the disclosure requirements at issue in *HLW*. In so holding, *Yamada* reasoned that, because the requirements do not apply to organizations engaged in incidental advocacy and trigger reporting requirements only at a $1,000 threshold, they are adequately tailored to the governmental interests underlying them. *Id.* at 1195, 1198–99. With respect to electioneering communications, *Yamada* noted that Hawaii's disclaimer requirements track the federal disclaimer requirements upheld in *Citizens United*. *Id*. at 1201–03.

Taken together, *HLW* and *Yamada* indicate that electioneering disclosure laws that survive exacting scrutiny under the First Amendment exhibit certain broad features. These features are apparent in all but one component of Montana's disclosure requirements.

First, such laws further the "important" interests of "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *Yamada*, 786 F.3d at 1197 (quoting *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031 (9th Cir. 2009)); *see also Citizens United*, 558 U.S. at 369; *McConnell*, 540 U.S. at 196; *HLW*, 624 F.3d at 1008. Knowing shortly

before an election who is speaking and how much they are spending "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371.

Montana's disclosure regime furthers identical interests. Montana's interests in "increasing transparency, informing Montanans about who is behind the messages vying for their attention, and decreasing circumvention" of campaign finance laws are sufficiently important to justify election disclosure requirements. *See Citizens United*, 558 U.S. at 369; *McConnell*, 540 U.S. at 196; *Yamada*, 786 F.3d at 1197; *HLW*, 624 F.3d at 1008.

Second, the substantive information organizations must disclose under valid electioneering laws usually varies with the type and level of an organization's political advocacy.

Organizations that frequently engage in political speech can be required to disclose more information than organizations that do so only occasionally. When measuring an organization's level of political advocacy, these statutes often use purpose as a proxy. For example, the Washington disclosure laws upheld in *HLW* require organizations with "a primary purpose of political advocacy" to disclose the source and amount of both contributions and expenditures; organizations without such a purpose must disclose only the source and amount of expenditures. 624 F.3d at 998–99. Similarly, the Hawaii laws upheld in *Yamada* require organizations with "'the purpose' of ... [engaging in] express advocacy or its functional

equivalent" to disclose information about both contributions and expenditures, 786 F.3d at 1194–95; organizations having no such purpose but engaging in occasional political advertising are required to include only a disclaimer within the advertisement itself, concerning whether a candidate endorsed the particular advertisement, *id.* at 1202. Variance in substantive reporting requirements for different levels of political advocacy activity "ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy." *HLW*, 624 F.3d at 1011.

Montana's disclosure regime similarly imposes reporting burdens commensurate with an organization's level of political advocacy. Montana has a two-tiered reporting structure, like the Washington regime affirmed in *HLW*. *Id.* Independent committees, which have the "primary purpose of receiving contributions and making expenditures" to support a candidate or ballot initiative, or make electioneering communications, Mont. Code Ann. § 13-1-101(24), are subject to more substantial requirements than incidental committees, which do not have such a primary purpose, § 13-1-101(23)(a). Independent committees must report both contributions received and expenditures made, § 13-37-229; incidental committees need only report expenditures, unless their contributions were solicited or earmarked for a

particular candidate, ballot issue, or petition for nomination.[13]

Third, in valid electioneering disclosure laws, the frequency of required reporting does not extend indefinitely to all advocacy conducted at any time but is tied to election periods or to continued political spending. During an election period, reporting is for the most part limited to reasonable intervals in the days leading up to an election and shortly thereafter. *Yamada* upheld a requirement to file reports ten days before any election, twenty days after a primary election, and thirty days after a general election. 786 F.3d at 1195. Similarly, *HLW* upheld a requirement to file reports on the twenty-first day before an election, the seventh day before an election, and the tenth day of the first month after an election. 624 F.3d at 998, 1013. Less extensive reporting requirements are imposed on organizations that receive contributions or make expenditures outside an election period, *see Yamada*, 786F.4d at 1195; *HLW*, 624 F.3d at 1013, or on organizations that stop making expenditures in the middle of an election period, *see Yamada*, 786 F.3d at 1195; *HLW*, 624 F.3d

[13] In this respect, Montana's disclosure regime is distinguishable from the Wisconsin regime invalidated in *Barland*, the Seventh Circuit case that NAGR cites to support its position. 751 F.3d 804. The disclosure requirements there did not vary with an organization's level of political advocacy. Groups engaged in express advocacy and those engaged in issue advocacy were subject to the same reporting requirements. *Id*. at 837. So were organizations with a major purpose of political advocacy and those that incidentally engaged in such advocacy. *Id*. at 841–42.

at 1018-19.[14] These requirements reflect "the unique importance of the temporal window immediately preceding a vote," when speech is more likely to be perceived as related to an election and the public is more likely to pay attention to and be affected by such speech. *HLW*, 624 F.3d at 1019.

Montana's reporting requirements are similarly tied with precision to specific election periods. For organizations that make electioneering communications, such as NAGR, only a communication made "within 60 days of the initiation of voting in an election" triggers the requirement to register as a political committee. § 13-1-101(16). Once an organization registers as a political committee, it usually must file disclosure reports at intervals preceding and shortly after an election, as well as at the end of the calendar year. § 13-37- 226(4), (5). Committees that receive contributions or make expenditures "supporting or opposing a candidate . . . or ballot issue" must file more frequent reports. § 13-37- 226(1)-(3). If a committee terminates qualifying contributions and expenditure activity for an election cycle, it may file a "closing report" at any time,

[14] Other circuits have struck down reporting requirements that mandate reporting after an organization stops making expenditures in the middle of an election period. *See Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 873–74 (8th Cir. 2012) (en banc) (enjoining Minnesota's reporting requirements, which continued to apply after an organization ceased further expenditures); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 596–98 (8th Cir. 2013) (striking down Iowa's ongoing reporting requirements, which were not tethered to any future political spending).

relieving it of subsequent reporting obligations. § 13-37-226(9). A committee making a single expenditure in an election cycle can thus fulfill all registration, reporting, and closing requirements in one filing of two forms. Montana's reporting requirements are therefore carefully tailored to pertinent circumstances, distinguishing them from one-size-fits-all disclosure regimes that other circuits have invalidated. *See Swanson*, 692 F.3d at 873–74; *Tooker*, 717 F.3d at 596–98.

Fourth, disclosure laws specifying a monetary threshold at which contributions or expenditures trigger reporting requirements ensure that the government does not burden minimal political advocacy. The acceptable threshold for triggering reporting requirements need not be high. In Hawaii, the threshold was raising or spending more than $1,000 during a two-year election cycle. *Yamada*, 786 F.3d at 1195. In Washington, the threshold was raising or spending more than $5,000, or raising more than $500 from a single donor. *HLW*, 624 F.3d at 1013.

Once reporting requirements are triggered, states may constitutionally mandate disclosure of even small contributions. *Family PAC v. McKenna*, 685 F.3d 800, 809 (9th Cir. 2012), for example, upheld requirements that organizations disclose the names and addresses of contributors donating more than $25 and reveal the employer and occupation of contributors giving more than $100. "[K]nowing the source of even small donations is informative in the aggregate and prevents evasion of disclosure." *Worley*

v. Fla. Sec'y of State, 717 F.3d 1238, 1251 (11th Cir. 2013); *see also Buckley*, 424 U.S. at 82–84 (upholding a requirement that organizations keep records of all contributions in excess of $10 and report contributions in excess of $100).

Montana's disclosure regime imposes requirements only on organizations that make an expenditure of more than $250 to disseminate a single electioneering communication, § 13-1-101(31)(d), ensuring that disclosure requirements do not burden minimal political activity. This threshold is within the range of constitutionally acceptable reporting thresholds. *See. e.g.*, *McKee*, 649 F.3d at 59–60 (upholding a $100 contribution threshold); *Yamada*, 786 F.3d at 1195 (upholding a threshold of $1,000 during a two-year election cycle); *HLW*, 624 F.3d at 1013 (upholding a threshold of $5,000 during an election cycle or $500 from a single donor).

Finally, disclosure laws may impose certain adjunct requirements on political speakers, to enable "gathering the data necessary to enforce more substantive electioneering restrictions." *Yamada*, 786 F.3d at 1197 (quoting *Canyon*, 556 F.3d at 1031). An organization may be required to "designate officers, disclose its bank account information, and designate a treasurer responsible for recording contributions and expenditures and maintaining records for five years," *id.* at 1195, as well as to file a short registration form containing "the organization's name, relationship with other organizations, and persons with authority over the organization's finances," *HLW*, 624 F.3d at 1013.

Most of Montana's disclosure-related registration requirements are similar to, and no more onerous than, those we upheld in *HLW*, 624 F.3d at 1013, and in *Yamada*, 786 F.3d at 1195. Qualifying political committees need to file a two-page registration form with the State containing basic identification information, § 13-37-201(3), appoint a treasurer, § 13-37-201(1), abide by certain bank depository requirements, §§ 13-37-205, -207, and keep current records of contributions and expenditures, § 13-37-208. *See, e.g.*, *HLW*, 624 F.3d at 997 (noting bank and treasurer requirements). Like the obligations in *HLW* and *Yamada*, these obligations "require little more if anything than a prudent person or group would do in these circumstances anyway." *Worley*, 717 F.3d at 1250; *see also SpeechNow.org v. FEC*, 599 F.3d 686, 697 (D.C. Cir. 2010) (en banc) (upholding "organizational requirements . . . such as designating a treasurer and retaining records").

In short, almost all of Montana's disclosure requirements share the features that *HLW* and *Yamada* have highlighted as markers of valid disclosure laws and so withstand exacting scrutiny. *Yamada*, 786 F.3d at 1195.[15]

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[15] We do not suggest that disclosure laws with different features than those described above would not survive exacting scrutiny. Rather, these are features of statutes that do survive such scrutiny. Election disclosure schemes are often varied and complex, imposing different requirements on different categories of speakers.

For example, an election disclosure regime could embody these broad principles but, in its details, impose overly onerous

D

NAGR suggests that, even if *HLW* and *Yamada* otherwise support upholding Montana's electioneering disclosure requirements, Montana's requirements governing the disclosure of issue advocacy during candidate elections are inconsistent with *HLW*.

HLW did note that "there is less of a danger of a regulation sweeping too broadly in the context of a ballot measure than in a candidate election," because "the only issue advocacy that could potentially be regulated is advocacy regarding the single issue put before the public." *HLW*, 624 F.3d at 1018 (emphasis omitted) (internal quotation marks omitted). In making that distinction, *HLW* reasoned that, "[i]n the ballot initiative context, . . . where express and issue advocacy are arguably 'one and the same,' any incidental regulation of issue advocacy imposes more limited burdens that are more likely to be substantially related to the government's interests." *Id*.

HLW's discussion was of relevant differences between ballot initiatives and candidate elections that *could* matter in some—but not all—circumstances. In the end, though, *HLW* rejected both

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requirements. Conversely, legislatures have some discretion to define the precise details of each scheme—for example the specific dollar threshold that triggers disclosure requirements. "[D]isclosure thresholds . . . are inherently inexact; courts therefore owe substantial deference to legislative judgments fixing these amounts." *Family PAC*, 685 F.3d at 811.

a facial and an as-applied challenge to Washington's disclosure requirements generally. *Id.* at 994– 95. Those requirements covered both candidate and ballot initiative elections. *Id.* at 997–99. We observed in *HLW* that the "disclosure obligations do not apply absent a pending *election or ballot initiative campaign*," *id.* at 1018 (emphasis added), and thus concluded that Washington's tailored disclosure regulations were not overbroad as applied to candidate elections.

Yamada, decided after *HLW*, upheld Hawaii's election disclosure regime as applied to a corporation that contributed money to candidate campaigns and bought advertisements criticizing a candidate. Examining Hawaii's carefully tailored disclosure requirements for electioneering communications, *Yamada* suggested no distinction between candidate and ballot initiative elections for First Amendment purposes. *See* 786 F.3d at 1185–86.

Similarly, Montana's tailored disclosure regime for electioneering communications does not violate the First Amendment simply because it covers candidate elections. As explained, the components of Montana's disclosure regime are—with the exception we next discuss—closely parallel to those upheld in *HLW* and *Yamada*. And, like the disclosure regulations in those cases, Montana's requirements are substantially related to important governmental interests as applied both to candidate and to ballot initiative elections.

III

One of Montana's registration requirements does raise serious First Amendment concerns. In addition to imposing the registration requirements already mentioned, Montana mandates that a political committee's designated treasurer be a registered Montana voter. § 13-37-203. To register as a Montana voter, an individual must be at least 18 years of age, a resident of Montana for at least 30 days, a United States citizen, not currently incarcerated for a felony, and of sound mind. § 13-1-111. This registered-Montana-voter requirement is not, we hold, substantially related to any important governmental interest.

Montana's registered-voter requirement is subject to exacting scrutiny, not strict scrutiny. True, the requirement does not, on its own, mandate registration or disclosure. Rather than require that a speaker provide particular information about itself or its activities, it imposes a requirement on how an organization engaged in electioneering communication must be structured. The requirement is, however, a predicate to enforcement of a broader disclosure regime.

Our precedents addressing the constitutionality of state electioneering disclosure regimes have subjected to exacting rather than strict scrutiny the *entire* disclosure regime, including provisions that do not themselves require registration or disclosure. *Yamada*, for example, analyzed under exacting scrutiny, and upheld, laws requiring covered entities to maintain records of their contributions and

expenditures. 786 F.3d at 1195. *HLW* approved the requirement that political committees open bank accounts in the state in which they are speaking. 624 F.3d at 997. Our sister circuits have similarly so held. *See Worley*, 717 F.3d at 1249 (upholding under exacting scrutiny "[o]ther requirements, such as requiring a treasurer, segregated funds, and record-keeping" (internal quotation marks omitted)); *Sorrell*, 758 F.3d at 137 (characterizing "registration, recordkeeping necessary for reporting, and reporting requirements" as a single "disclosure regime" subject to exacting scrutiny); *SpeechNow.org*, 599 F.3d at 697–98 (upholding under exacting scrutiny "organizational requirements ... such as designating a treasurer and retaining records"). Montana's registered voter requirement resembles the types of organizational requirements that we and other circuits have analyzed under exacting scrutiny.

Reviewing Montana's registered voting requirement under exacting scrutiny is consistent with precedents in which strict scrutiny was applied. *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008), for example, reviewed an Arizona requirement that circulators of candidate nomination petitions be residents of that state, *id.* at 1036, concluding that strict scrutiny was compelled by the Supreme Court's decision in *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 194–95 (1999). *Buckley* invalidated a Colorado law requiring that circulators of ballot initiative petitions be registered voters. As *Nader* noted, "[t]he Court held in *Buckley* that significantly reducing the number of potential circulators imposed a severe burden on rights of political expression."

Nader, 531 F.3d. at 1036. Inferring from *Buckley* that laws severely burdening speech rights must be subject to strict scrutiny, *Nader* concluded that the Arizona residency requirement was subject to strict scrutiny because it "exclude[d] from eligibility all persons who support the candidate but who . . . live outside the state of Arizona." *Id*.

Montana's registered-voter requirement is significantly less burdensome than the requirements at issue in *Buckley* and *Nader*. The particular First Amendment harm that restrictions on petition circulators pose is that they "limit the number of voices who will convey the initiative proponents' message and, consequently, cut down the size of the audience proponents can reach." *Buckley*, 525 U.S. at 194– 95 (alterations and citations omitted). No similar limitation on the audience reached is here at issue: Montana requires only that a *single* individual be a registered Montana voter— a political committee's treasurer. So long as an organization can find one such treasurer, the size of the audience it can reach will not be limited.

So, given the limited burden on a political committee's speech imposed by Montana's registered-voter requirement, we apply exacting rather than strict scrutiny to determine its validity. But we conclude anyway that the registered voter requirement does not significantly forward the interests it is said to advance and so violates the First Amendment.

Addressing the connection between the registered-voter requirement and the goals of its disclosure

scheme, Montana asserts that the registered voter requirement is "shorthand" for the prerequisites that being a registered Montana voter entails—being at least 18, of sound mind, a Montana resident, and not an incarcerated felon. Such types of prerequisites can be substantially related to Montana's important interest in identifying representatives of political committees who can be held accountable for violations of election laws.[16] For example, the State has a strong interest in assuring that it can subpoena treasurers of political committees, and only individuals within the state can be subpoenaed. Mont. Code. Ann. § 46-15-107.

But an individual can meet all the prerequisites for registering to vote yet not register. Montana could have made appropriate prerequisites for registration the conditions for serving as treasurer without requiring registration itself. Montana identifies no interest served by excluding potential treasurers who are not registered voters but could be if they chose. We cannot identify any such interest either. And none of the disclosure regimes we have upheld have included such a registration requirement. *Yamada*, 786 F.3d at 1195 (citing Haw. Rev. Stat. § 11-324); *HLW*, 624 F.3d at 997 (citing Wash. Rev. Code § 42.17.050(1)).

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[16] We do not address whether the details of Montana's prerequisites for voter registration—such as the 30-day Montana residency requirement—are permissible conditions for being a treasurer of a political committee.

An out-of-state organization like NAGR, which has its principal place of business in Colorado, may not have any members qualified to be designated as a treasurer *and* registered to vote in Montana. By imposing the voter registration qualification that it does, the state burdens the speech rights of such organizations without any justification and so violates the First Amendment.

But that single invalid provision certainly does not mean that the entire disclosure statute falls. The registered-voter provision is definitely severable from the rest of the Montana disclosure regime.

"Severability is a matter of state law." *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1325 (9th Cir. 2015) (en banc) (alterations and quotations omitted). Under Montana law:

> [I]f a statute contains both constitutional and unconstitutional provisions, we examine the legislation to determine if there is a severability clause. The inclusion of a severability clause in a statute is an indication that the drafters desired a policy of judicial severability to apply to the enactment. If a statute does not contain a severability clause, we still may sever an unconstitutional provision. In doing so, we must determine whether the unconstitutional provisions are necessary for the integrity of the law or were an inducement for its enactment. In order to sever an unconstitutional provision, the remainder of the statute must be complete in itself and capable of being executed in accordance with the apparent legislative intent.

> That is, if severing the offending provisions will not frustrate the purpose or disrupt the integrity of the law, we will strike only those provisions of the statute that are unconstitutional.

State v. Theeler, 385 P.3d 551, 553–54 (Mont. 2016) (citations and internal quotation marks omitted).

The statute that first enacted the requirement that committee treasurers must be registered Montana voters contained a severability provision, *see* 1975 Mont. Laws 1250, 1265, but a later amendment did not, *see* 1977 Mont. Laws 108. But "[w]ith or without severability clauses in each amendment since the statute's enactment, we conclude that the unconstitutional provision is unnecessary for the integrity of the law." *Theeler*, 385 Mont. at 474 (quotation marks omitted). Without the registered voter requirement, a political committee would still be required to designate a committee treasurer, fulfill registration requirements, and keep records of its contributions and expenditures. Mont. Code Ann. §§ 13-37-201, -208. Montana would still be able to gather the identifying information necessary to enforce its substantive campaign finance laws, as evidenced by other state electioneering disclosure regimes that do not require treasurers to register in their state. *See Yamada*, 786 F.3d at 1195; *HLW*, 624 F.3d at 997.

In short, the remainder of the electioneering disclosure regime could still be "executed in accordance with the apparent legislative intent" of the law. *Theeler*, 385 P.3d at 554 (internal quotation

marks omitted). We hold that, despite the invalidity of the registered voter provision, the rest of Montana's disclosure scheme remains in force.

IV

In sum, the First Amendment does not limit Montana to regulating only express advocacy. With the exception of its designated-treasurer requirement, all of the other components of Montana's disclosure regime survive exacting scrutiny. Like the disclosure regimes upheld in *HLW* and *Yamada*, Montana's scheme is sufficiently tailored to Montana's interest in informing its electorate of who competes for the electorate's attention and preventing the circumvention of Montana's election laws.

We **AFFIRM** in part and **REVERSE** and **REMAND** in part the district court's summary judgment order. The parties shall bear their own costs on appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

NATIONAL ASSOCIATION FOR GUN RIGHTS, INC., *Plaintiff,*	CV 16-23-H-DLC
vs.	(Consolidated with CV 16-33-H-DLC)
JONATHAN MOTL, in his official capacity as the Commissioner of Political Practices for the State of Montana; Timothy G. Fox, in his official capacity as Attorney General for the State of Montana; LEO J. GALLAGHER, in his official capacity as County Attorney for the County of Lewis and Clark, *Defendants.*	ORDER

Before the Court are cross-motions for summary judgment. Plaintiff National Association for Gun Rights, Inc. ("NAGR") argues that Montana's campaign finance disclosure requirements are unconstitutional. Specifically, NAGR contends that Montana impermissibly regulates "issue advocacy" by imposing reporting requirements for "electioneering communications." *See* Mont. Code Ann. § 13-1-101(15)

(2015) (defining "electioneering communications"). NAGR also contends that Montana's vote disclosure statute, Montana Code Annotated ("MCA")§ 13-35-225(3), is likewise unconstitutional. In response, Defendants Jonathan Motl,[1] Timothy C. Fox, and Leo Gallagher, in their official capacities (collectively "Defendants"), move for summary judgment arguing that Montana's regulation of electioneering communications satisfies constitutional scrutiny. For the reasons discussed below, the Court will grant Defendants' motion as it pertains to MCA § 13-1-101(15). However, because Defendants do not contest Plaintiffs' challenge to MCA § 13-35-225(3), the Court will grant NAGR's motion in part and award summary judgment as to this claim only.

I. Background

A. National Association for Gun Rights, Inc.

NAGR is a tax-exempt organization under Internal Revenue Code § 501(c)(4). See *NAGR v. Murray,* 969 F. Supp. 2d 1262, 1264-1265 (D. Mont. Sept. 17, 2013) ("*NAGR I*"). NAGR asserts that they are "a grassroots organization whose mission is to defend the right to keep and bear arms, and advance that God-given Constitutional right by educating the public and urging them to take action in the public policy process." (Doc. 37 at 3 (internal quotation marks omitted).) In 2012, NAGR sent several mailers

[1] The Court notes that Jonathan Motl is no longer Montana's Commissioner of Political Practices. In May 2017, Jeff Mangan became the new Commissioner of Political Practices. https://politicalpractices.mt.gov/aboutus

("2012 Mailer") to the residents in Flathead County, Montana, which discussed state Senator Bruce Tutvedt's alleged attempts to "kill" Senate Bill 371. This bill, which ultimately failed in the 2011 Montana legislative session, was entitled "[a]n act ensuring the availability of Montana ammunition; encouraging the formation of business in Montana primarily engaged in the manufacture of ammunition components." (Doc. 1 at 20.)

The 2012 Mailer stated that "**FACT**: Flathead County was poised to get a new smokeless powder plant until Bruce Tutvedt took to the Senate Floor and demanded it be killed. (S.B. 371, 4/13/11 Audio) Now, thanks to Bruce Tutvedt, unemployment in the Flathead is nearly 11% percent." (Doc. 1 at 20 (emphasis in original).) The mailer further urged the recipient to "[c]ontact Bruce Tutvedt right away and **DEMAND** he apologize for killing new manufacturing in Flathead County." (*Id.* (emphasis in original).)

As a result of this mailer, NAGR received a letter from Montana's Commissioner of Political Practices ("COPP") Jonathan Motl which found that NAGR, along with six other corporate entities, "failed to meet Montana campaign practice law and standards by failing to register, report and disclose ... illegal corporate contributions for or against a ... primary election candidate." (*Id.* at 33.) The letter also stated that there was sufficient evidence to show that NAGR "violated Montana's campaign practices laws as set out above and that civil adjudication of the violation is warranted." (*Id.* at 50.)

B. Present Litigation

In March of 2016, NAGR filed suit seeking three forms of relief. First, NAGR sought to enjoin Montana's COPP from pursuing civil penalties against the organization based on the 2012 Mailer. Second, as mentioned above, NAGR asserts that MCA § 13-1-101(15), which defines "electioneering communications," a form of speech which triggers Montana's campaign finance disclosure requirements, is unconstitutionally overbroad and must be struck down. This statute states that:

> (a) "electioneering communication" means a paid communication that is publicly distributed by radio, television, cable, satellite, internet website, newspaper, periodical, billboard, mail, or any other distribution of printed materials, that is made within 60 days of the initiation of voting in an election, that does not support or oppose a candidate or ballot issue, that can be received by more than 100 recipients in the district voting on the candidate or ballot issue, and that:
>
> (i) refers to one or more clearly identified candidates in that election;
>
> (ii) depicts the name, image, likeness, or voice of one or more clearly identified candidates in that election; or
>
> (iii) refers to a political party, ballot issue, or other question submitted to the voters in that election.
>
> (b) The term does not mean:
>
> (i) a bona fide news story, commentary, blog, or editorial distributed through the facilities of

> any broadcasting station, newspaper, magazine, internet website, or other periodical publication of general circulation unless the facilities are owned or controlled by a candidate or political committee;
> (ii) a communication by any membership organization or corporation to its members, stockholders, or employees;
> (iii) a commercial communication that depicts a candidate's name, image, likeness, or voice only in the candidate's capacity as owner, operator, or employee of a business that existed prior to the candidacy;
> (iv) a communication that constitutes a candidate debate or forum or that solely promotes a candidate debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or
> (v) a communication that the commissioner determines by rule is not an electioneering communication.

Mont. Code Ann.§ 13-1-101(15).

Finally, in its third claim for relief, NAGR asserts that MCA § 13-35-225(3), Montana's so-called "vote disclosure" provision, unconstitutionally compels speech. This provision requires that:

> Printed election material described in subsection (1) that includes information about another candidate's voting record must include the following:
> (i) a reference to the particular vote or votes

> upon which the information is based;
> (ii) a disclosure of all votes made by the candidate on the same legislative bill or enactment; and (iii) a statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge, the statements made about the other candidate's voting record are accurate and true.

Mont. Code Ann.§ 13-35-225(3)(a). Following the filing of its Complaint, NAGR moved for preliminary relief requesting that this Court: (1) enjoin the COPP from penalizing NAGR for its 2012 Mailers; and (2) enjoin the State of Montana from enforcing MCA§§ 13-1-101(15) and 13-35-225(3).

Shortly after NAGR filed its Complaint, Plaintiff J.C. Kantorowicz ("Kantorowicz"), who was at the time a candidate for the Republican nomination for Montana Senate District No. 10, also filed suit challenging the constitutionality of MCA § 13-35-225(3). See *Kantorowicz v. Motl, et al*., Cause No. CV 16-33-H-DLC-JTJ. In April of 2016, a complaint was filed with the COPP by Kantorowicz's opponent for the Republican nomination. This complaint states that Kantorowicz allegedly violated Montana's vote disclosure requirements when he mailed a letter in January 2016 which discussed his opponent's voting record but failed to comply with the statute's disclosure requirements. Kantorowicz, like NAGR, filed suit in this Court arguing that MCA § 13-35-225(3) is unconstitutional, and moved for preliminary relief. Due to the similar nature of NAGR and Kantorowicz's arguments concerning MCA § 13-35-

225(3), the Court consolidated their claims for the sake of judicial efficiency. (Doc. 17.)

After hearing arguments on the motions for summary judgment, the Court preliminarily enjoined the enforcement of MCA § 13-35-225(3), i.e., the vote disclosure provision. (Doc. 18.) The Court determined that consolidated Plaintiffs had satisfied their initial burden that all four *Winter*[2] factors weighed in favor of a preliminary injunction. In particular, the Court noted that Plaintiffs were likely to succeed on the merits of their claim that MCA § 13-35-225(3) was unconstitutional. In making this finding, the Court found that MCA § 13-35-225(3) would likely fail to survive strict scrutiny because it was not narrowly tailored to Montana's stated interest in providing accurate information to the voters.

However, the Court denied NAGR's motion as it pertained to the alleged unconstitutionality of MCA § 13-1-101(15), which defines "electioneering communications." The Court denied the motion because NAGR had failed to show that the organization was likely to succeed on their claim that MCA § 13-1-101(15) was unconstitutional. The Court also denied NAGR's request to enjoin the COPP from prosecuting the organization for its 2012 Mailer. In denying NAGR's request, the Court found that this

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[2] *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

claim was likely moot because the statute of limitations for prosecuting any claim regarding the 2012 Mailer was about to run. Further, the COPP signaled through a declaration that it was likely going to forgo litigation against NAGR. Thus, because this claim was about to become moot, the Court refrained from issuing an advisory opinion and denied without prejudice NAGR's request to enjoin any forthcoming prosecution. Following the Court's Order on Plaintiffs' motions for preliminary injunction, the parties began briefing their cross-motions for summary judgment. These motions are now ripe for decision.

II. Applicable Law

A party is entitled to summary judgment if it can demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is warranted where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251 (1986). A party opposing a properly supported motion for summary judgment "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 256. Only disputes over facts that might affect the outcome of the lawsuit will preclude entry of summary judgment; factual disputes that are irrelevant or unnecessary to the outcome are not considered. *Id.* at 248.

III. Analysis

As mentioned above, NAGR's Complaint requests three claims for relief: (1) enjoin the COPP from pursuing civil penalties against the organization as a result of the 2012 Mailer (Claim 1); (2) declare MCA § 13-1-101(15) (Claim 2) and MCA § 13-35-225(3)(a) (Claim 3) as unconstitutional. Additionally, consolidated Plaintiff Kantorowicz's Complaint raises one claim, i.e., the challenge to Montana's vote disclosure law. Although it appears that Plaintiffs' claims regarding the prosecution of NAGR for its 2012 mailers and its challenge to the vote disclosure statute are now either moot or no longer contested by Defendants, in the interest of thoroughness, the Court will briefly address all three claims in order.

A. Prosecution of the 2012 Mailer (Claim 1)

As discussed, the Court denied NAGR's request to preliminarily enjoin the COPP from prosecuting the organization because the claim would soon become moot. Indeed, the parties have conceded that the statute of limitations for prosecuting any claim surrounding the 2012 Mailer ran, at the latest, on June 5, 2016. (Doc. 18 at 11.) Consequently, because this date has come and gone, and no prosecution was pursued against NAGR, the Court will dismiss Claim 1 of NAGR's complaint as moot.

B. Electioneering Communication-Claim 2

Next, Claim 2 of NAGR's complaint alleges that MCA § 13-1-101(15), which defines "electioneering

communication," is unconstitutionally overbroad.[3] NAGR contends that its mission of "educating the public" through its mailers which, the organization affirms, will contain "the positions and voting records of public officials and candidates regarding the Second Amendment," is purely "issue advocacy." (Docs. 28 at 2; 28-1 at 2.) Although NAGR stresses that "it will not advocate for or against a candidate for office" (Doc. 28 at 2), the mere fact that its mailers contain the name of political candidates or political parties could require the organization to comply with Montana's political committee reporting requirements.

Indeed, under Montana law, NAGR's mailers would qualify as an "electioneering communication" if they: (1) are "publicly distributed by radio, television, cable, satellite, internet website, newspaper, periodical, billboard, mail, or any other distribution of printed materials"; (2) distributed "within 60 days of

[3] Although the parties do not raise the issue of NAGR's standing to challenge this statute, the Court briefly notes that NAGR has satisfied constitutional standing requirements. NAGR has submitted a declaration from Dudley Brown, President of NAGR, that states the organization intends to send out mailers similar to its 2012 Mailer "to Montanans during the 2018 election cycle and will spend more than $250.00 (primarily printing and mailing to inform Montanans of the positions and voting records of public officials and candidates regarding the Second Amendment." (Doc. 28-1 at 2.) However, NAGR asserts that it will not send these mailers in 2018 if it is required to comply with Montana's disclosure requirements for political committees. For the reasons discussed in the Court's Order on Plaintiffs' motion for preliminary injunction, the Court finds NAGR's second claim raises a constitutional injury-in-fact. (*See* Doc. 18 at 12-16).

the initiation of voting in an election"; (3) do "not support or oppose a candidate or ballot issue"; (4) "can be received by more than 100 recipients in the district voting on the candidate or ballot issue"; and (5) either "(i) refers to one or more clearly identified candidates in that election; (ii) depicts the name, image, likeness, or voice of one or more clearly identified candidates in that election; or (iii) refers to a political party, ballot issue, or other question submitted to the voters in that election." Mont. Code Ann. § 13-1-101(15)(a).

Further, if NAGR spends at least $250.00 on these mailers, it has made an "expenditure" under MCA 13-l-101(17)(a)(ii), and must register as a "political committee." Mont. Code Ann. § 13-1-101(30)(b), (d). Because sending its mailers would require NAGR to register as political committee, which would trigger specific disclosure requirements, NAGR contends that Montana's definition of "electioneering communication" is unconstitutionally overbroad because it regulates issue advocacy, as opposed to express political advocacy.

Specifically, NAGR argues that the imposition of political committee disclosure requirements is an impermissible burden on the First Amendment rights of groups who engage in issue advocacy.[4] Instead,

[4] NAGR cites to *Wisconsin Right To Life, Inc. v. Barland,* 751 F.3d 804 (7th Cir. 2014), in support of its argument. However, the Court is not persuaded by this authority and finds that the statute at issue in that case is distinguishable from the one at bar. For instance, unlike Montana's statute, which tailors the amount of disclosure to the committee's political activities, the disclosure provisions in *Barland* "indiscriminately" imposed "full-blown PAC duties" and required complicated and detailed

NAGR contends, disclosure requirements are only appropriate for groups that engage in express advocacy. The United States Supreme Court has found that political speech constitutes express advocacy or its functional equivalent "if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Fed. Election Commn. v. Wisconsin Right To Life, Inc.,* 551 U.S. 449, 469-470 (2007). Because NAGR's proposed mailers do not "appeal to vote for or against a specific candidate," and, instead, merely educate the public about a candidate's voting record or positions concerning Second Amendment issues, NAGR contends that it does not engage in express advocacy and cannot be burdened with political committee disclosure requirements. The Court disagrees.

As recognized in the Court's Order denying in part NAGR's motion for preliminary injunction, the United States Court of Appeals for the Ninth Circuit, citing the Unites States Supreme Court's decision in *Citizens United v. FEC,* has declined to recognize "a bright-line rule distinguishing express and issue advocacy," and "reject[s] [the] contention that . . . disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Human Life of Washington Inc. v. Brumsickle,* 624

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reporting requirements. *Barland,* 751 F.3d at 839-841. In contrast, as discussed *infra,* Montana's disclosure requirements are relatively straightforward and impose minimal burdens on an organization.

F.3d 990, 1016 (9th Cir. 2010) (quoting 558 U.S. 310, 369 (2010)). Rather, as previously discussed by this Court, Montana's definition of electioneering communication triggers disclosure requirements for political committees and thus must be viewed through the lens of exacting scrutiny, i.e., whether it is "substantially related to a sufficiently important governmental interest." *Brumsickle,* 624 F.3d at 1016.[5]

Here, taking this test in reverse, Defendants contend that MCA § 13-1-101(15), and other statutes which trigger disclosure requirements, fulfill an important government interest by "increasing transparency, informing Montanans about who is behind the messages vying for their attention, and decreasing circumvention." (Doc. 35 at 12.) Indeed, both the Ninth Circuit and the United States Supreme Court have recognized these interests to be important. *See Citizens United,* 558 U.S. at 369; *Brumsickle,* 624 F.3d at 1005, 1008, 1011-1012; *Alaska Right to Life v. Miles,* 441 F.3d 773, 793 (9th Cir. 2006). Likewise, this Court agrees that these are important, if not compelling, government interests.

Next, Defendants assert that Montana's disclosure requirements for political committees is substantially related to these interests. The Court agrees. As discussed in previous orders by this Court, Montana's disclosure laws satisfy constitutional scrutiny

[5] The Court notes that NAGR's opening brief in support of its motion concedes that exacting scrutiny is the appropriate test for determining the constitutionality of MCA § 13-1-101(15). (Doc. 28 at 12.)

because they are tailored to the degree of an organization's political activity and the timing of its communications. *See Montanans for Community Dev. v. Motl,* 216 F. Supp. 3d 1128, 1152 (D. Mont. 2016); *see also Brumsickle,* 624 F.3d 990 at 1013 (finding that state disclosure laws satisfy constitutional scrutiny when the "required disclosure increases as a political committee more actively engages in campaign spending and as an election nears").

This Court has found that registering as an incidental committee imposes a minimal burden on an organization. *NAGR I,* 969 F. Supp. 2d at 1267. Indeed, a political committee registers by completing a Form C-2, "Statement of Organization," which can be completed in less than 10 minutes. (Doc. 14-2 at 3-4.) This form, like all COPP forms, is available online. *(Id.* at 7-8.) To register, the organization need only disclose its "treasurer/contact ..., a brief description of the committee type and purpose, a list of the names of candidates identified by expenditure and the name and address of the bank used by the political committee." (*Id.* at 3.)

An organization's committee classification is driven by its "reportable election activity." (*Id.* at 4.) Here, because NAGR asserts that its proposed mailers will refer to candidates for office by name, but "will not advocate for or against a candidate for office" (Doc. 28 at 2), NAGR's mailers would likely require the organization to register as an incidental committee and complete a Form C-4. *See* Mont. Code Ann.§ 13-1-101(22)(a) ("Incidental committee means a political committee that is not specifically organized

or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure."); (*see also* Doc. 14-2 at 4) (internal quotation marks omitted).

Completing Form C-4 requires disclosure of "receipts and expenditures, including some basic information -- name, address and date; occupation and employer for contributions; and the purpose, by brief description, of the expenditures." *(Id.* at 7.) An incidental committee that makes a single expenditure may open and close within the same reporting period, and may satisfy its reporting requirements through one combined C-2 and C-4 filling. *(Id.* at 5.) Further expenditures by an incidental committee require the completion of additional Form C-4 reports. *(Id.)* Depending on the complexity of the organization's contributions and expenditures, more disclosure by an organization may be required. For example, an incidental committee that solicits funds for a specific purpose must report the names of any contributors who provide these "earmarked contributions." *See* Mont. Code Ann. § 13-37-232(1); *see also* Mont. Admin. R. 44.11.404 (defining "earmarked contribution").

Additionally, the Court notes that not all communications which mention the name of a political candidate trigger disclosure requirements. In addition to the numerous qualifiers which limit the reach of this statute,[6] including the requirement that more than $250.00 must be spent on the

[6] *See* Mont. Code Ann. 13-1-101(15)(b).

communication and that it must be "received by more than 100 recipients," the statute only imposes disclosure requirements on communications made "within 60 days of the initiation of voting in an election." Mont. Code Ann. § 13-1-101(15)(a). Though the parties dispute whether this limitation comes into play around 85 days before an election or 105 days due to Montana's absentee voter system, it is undisputed that this time period is limited to the months just before an election. Thus, under this sliding scale system of mandated disclosures, reporting requirements for electioneering communications are limited to the specific period in time just before an election.

Consequently, the Court finds that any burdens imposed by distributing electioneering communications before an election are minimal and outweighed by the public's interest in transparency and disclosure of the individuals or groups vying for their attention. Further, the disclosure requirements imposed on groups that distribute electioneering communications are substantially related to these interests. Accordingly, the Court finds that MCA § 13-1-101(15)(a) satisfies exacting scrutiny. Thus, the Court grants Defendants' motion for summary judgment and denies Plaintiff motion as it pertains to the constitutionality of electioneering communications. Claim 2 of NAGR's complaint is dismissed.

C. Montana's Vote Disclosure Law-Claim 3

As discussed, in its third claim for relief, NAGR

asserts that Montana's vote disclosure law, i.e., MCA § 13-35-225(3), violates the First Amendment. Defendants do not oppose summary judgment on this claim and state that they "do not plan to further defend against the challenge to [MCA] § 13-35-225(3)." (Doc. 35 at 14.) Although it could be argued that this claim is now moot because NAGR's challenge to this statute is uncontested, Ninth Circuit precedent dictates otherwise. *See Jacobus v. Alaska,* 338 F.3d 1095, 1102 (9th Cir. 2003) ("[D]ismissal of a case on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought."). Indeed, because MCA § 13-35-225(3) has not been repealed, the only thing preventing the COPP from enforcing the law is the office's voluntary cessation. The law is thus still theoretically enforceable and NAGR's claim is not moot. *Jacobus,* 338 F.3d at 1103 ("Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways.") (citation omitted).

Accordingly, because the motion is uncontested as to this claim, the Court will grant NAGR's motion in part and award judgment on its third claim for relief. It thus appears that NAGR's requested declaratory relief should be granted and a permanent injunction issued. As such, Defendants will be given 30 days to show cause why declaratory relief should not be awarded and why a permanent injunction should not be issued.

Accordingly, IT IS ORDERED that:

(1) Defendants' Cross-Motion for Summary Judgment (Doc. 34) is GRANTED;

(2) Consolidated Plaintiffs' Cross-Motion for Summary Judgment (Doc. 27) is GRANTED in part and DENIED in part in accordance with the above order; and

(3) Defendants shall show cause, within thirty (30) days of this Order, why declaratory relief should not be awarded on NAGR' s third claim for relief and why a permanent injunction should not be issued.

Dated this 6th day of September, 2017.

/s/ Dana L. Christensen
Dana L. Christensen, Chief Judge
United States District Judge

APPENDIX C

PERTINENT PROVISIONS OF THE MONTANA CODE ANNOTATED

13-1-101. Definitions. As used in this title, unless the context clearly indicates otherwise, the following definitions apply:

(9) (a) "Contribution" means:

(i) the receipt by a candidate or a political committee of an advance, gift, loan, conveyance, deposit, payment, or distribution of money or anything of value to support or oppose a candidate or a ballot issue;

(ii) an expenditure, including an in-kind expenditure, that is made in coordination with a candidate or ballot issue committee and is reportable by the candidate or ballot issue committee as a contribution;

(iii) the receipt by a political committee of funds transferred from another political committee; or

(iv) the payment by a person other than a candidate or political committee of compensation for the personal services of another person that are rendered to a candidate or political committee.

(b) The term does not mean services provided without compensation by individuals volunteering a

portion or all of their time on behalf of a candidate or political committee or meals and lodging provided by individuals in their private residences for a candidate or other individual.

(c) This definition does not apply to Title 13, chapter 37, part 6.

(16) (a) "Electioneering communication" means a paid communication that is publicly distributed by radio, television, cable, satellite, internet website, newspaper, periodical, billboard, mail, or any other distribution of printed materials, that is made within 60 days of the initiation of voting in an election, that does not support or oppose a candidate or ballot issue, that can be received by more than 100 recipients in the district voting on the candidate or ballot issue, and that:

(i) refers to one or more clearly identified candidates in that election;

(ii) depicts the name, image, likeness, or voice of one or more clearly identified candidates in that election; or

(iii) refers to a political party, ballot issue, or other question submitted to the voters in that election.

(b) The term does not mean:

(i) a bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, internet website, or other periodical publication of general circulation unless the facilities are owned or controlled by a candidate or political committee;

(ii) a communication by any membership organization or corporation to its members, stockholders, or employees;

(iii) a commercial communication that depicts a candidate's name, image, likeness, or voice only in the candidate's capacity as owner, operator, or employee of a business that existed prior to the candidacy;

(iv) a communication that constitutes a candidate debate or forum or that solely promotes a candidate debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(v) a communication that the commissioner determines by rule is not an electioneering communication.

(18) (a) "Expenditure" means a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value:

(i) made by a candidate or political committee to support or oppose a candidate or a ballot issue; or

(ii) used or intended for use in making independent expenditures or in producing electioneering communications.

(b) The term does not mean:

(i) services, food, or lodging provided in a manner that they are not contributions under subsection (9);

(ii) payments by a candidate for personal travel expenses, food, clothing, lodging, or personal necessities for the candidate and the candidate's family;

(iii) the cost of any bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication of general circulation; or

(iv) the cost of any communication by any membership organization or corporation to its members or stockholders or employees.

(c) This definition does not apply to Title 13, chapter 37, part 6.

(23) (a) "Incidental committee" means a political committee that is not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure.

(b) For the purpose of this subsection (23), the primary purpose is determined by the commissioner by rule and includes criteria such as the allocation of budget, staff, or members' activity or the statement of purpose or goal of the person or individuals that form the committee.

(24) "Independent committee" means a political committee organized for the primary purpose of receiving contributions and making expenditures that is not controlled either directly or indirectly by a candidate and that does not coordinate with a candidate in conjunction with the making of

expenditures except pursuant to the limits set forth in **13-37-216**(1).

(25) "Independent expenditure" means an expenditure for an election communication to support or oppose a candidate or ballot issue made at any time that is not coordinated with a candidate or ballot issue committee.

(31) (a) "Political committee" means a combination of two or more individuals or a person other than an individual who receives a contribution or makes an expenditure:

(i) to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination;

(ii) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or

(iii) to prepare or disseminate an election communication, an electioneering communication, or an independent expenditure.

(b) Political committees include ballot issue committees, incidental committees, independent committees, and political party committees.

(c) A candidate and the candidate's treasurer do not constitute a political committee.

(d) A political committee is not formed when a combination of two or more individuals or a person

other than an individual makes an election communication, an electioneering communication, or an independent expenditure of $250 or less.

13-37-201. Campaign treasurer. (1) Except as provided in **13-37-206**, each candidate and each political committee shall appoint one campaign treasurer and certify the full name and complete address of the campaign treasurer pursuant to this section.

(2) (a) A candidate shall file the certification within 5 days after becoming a candidate.

(b) Except as provided in subsection (2)(c), a political committee shall file the certification, which must include an organizational statement and the name and address of all officers, if any, within 5 days after it makes an expenditure or authorizes another person to make an expenditure on its behalf, whichever occurs first.

(c) A political committee that is seeking to place a ballot issue before the electors shall file the certification, including the information required in subsection (2)(b), within 5 days after the issue becomes a ballot issue, as defined in **13-1-101**(6)(b).

(3) The certification of a candidate or political committee must be filed with the commissioner.

13-37-205. Campaign depositories. Except as provided in **13-37-206**, each candidate and each political committee shall designate one primary campaign depository for the purpose of depositing all contributions received and disbursing all expenditures made by the candidate or political committee. The candidate or political committee may also designate one secondary depository in each county in which an election is held and in which the candidate or committee participates. Deputy campaign treasurers may make deposits in and expenditures from secondary depositories when authorized to do so as provided in **13-37-202**(2). Only a bank, credit union, savings and loan association, or building and loan association authorized to transact business in Montana may be designated as a campaign depository. The candidate or political committee shall file the name and address of each designated primary and secondary depository at the same time and with the same officer with whom the candidate or committee files the name of the candidate's or committee's campaign treasurer pursuant to **13-37-201**. This section does not prevent a political committee or candidate from having more than one campaign account in the same depository, but a candidate may not utilize the candidate's regular or personal account in the depository as a campaign account.

13-37-207. Deposit of contributions -- statement of campaign treasurer. (1) All funds received by the campaign treasurer or any deputy campaign treasurer of any candidate or political

committee must be deposited prior to the end of the fifth business day following their receipt, Sundays and holidays excluded, in a checking account, share draft account, share checking account, or negotiable order of withdrawal account in a campaign depository designated pursuant to **13-37-205**.

(2) A statement showing the amount received from or provided by each person and the account in which the funds are deposited must be prepared by the campaign treasurer at the time the deposit is made. This statement along with the receipt form for cash contributions deposited at the same time and a deposit slip for the deposit must be kept by the treasurer as a part of the treasurer's records.

13-37-208. Treasurer to keep records. (1) (a) Except as provided in subsection (1)(b), the campaign treasurer of each candidate and each political committee shall keep detailed accounts of all contributions received and all expenditures made by or on behalf of the candidate or political committee that are required to be set forth in a report filed under this chapter. The accounts must be current within not more than 10 days after the date of receiving a contribution or making an expenditure.

(b) The accounts described in subsection (1)(a) must be current as of the 5th day before the date of filing of a report as specified in **13-37-228**.

(2) Accounts of a deputy campaign treasurer must be transferred to the treasurer of a candidate or political committee before the candidate or political committee finally closes its books or when the position

of a deputy campaign treasurer becomes vacant and no successor is appointed.

(3) Accounts kept by a campaign treasurer of a candidate or political committee must be preserved by the campaign treasurer for a period coinciding with the term of office for which the person was a candidate or for a period of 4 years, whichever is longer.

13-37-226. Time for filing reports. (1) Except as provided in **13-37-206** and **13-37-225**(3), a candidate shall file reports required by **13-37-225**(1)(a) containing the information required by **13-37-229**, **13-37-231**, and **13-37-232** as follows:

(a) quarterly, due on the 5th day following a calendar quarter, beginning with the calendar quarter in which funds are received or expended during the year or years prior to the election year that the candidate expects to be on the ballot and ending in the final quarter of the year preceding the year of an election in which the candidate participates;

(b) the 20th day of March, April, May, June, August, September, October, and November in the year of an election in which the candidate participates;

(c) within 2 business days of receiving a contribution of $100 or more if received between the 15th day of the month preceding an election in which the candidate participates and the day of the election;

(d) within 2 business days of making an expenditure of $100 or more if made between the 15th

day of the month preceding an election in which the candidate participates and the day of the election;

(e) semiannually on the 10th day of March and September, starting in the year following an election in which the candidate participates until the candidate files a closing report as specified in **13-37-228**(3); and

(f) as provided by subsection (3).

(2) Except as provided in **13-37-206**, **13-37-225**(3), and **13-37-227**, a political committee shall file reports required by **13-35-225**(1)(a) containing the information required by **13-37-229**, **13-37-231**, and **13-37-232** as follows:

(a) quarterly, due on the 5th day following a calendar quarter, beginning with the calendar quarter in which the political committee receives a contribution or makes an expenditure after an individual becomes a candidate or an issue becomes a ballot issue, as defined in **13-1-101**(6)(b), and ending in the final quarter of the year preceding the year in which the candidate or the ballot issue appears on the ballot;

(b) the 30th day of March, April, May, June, August, September, October, and November in the year of an election in which the political committee participates;

(c) within 2 business days of receiving a contribution, except as provided in **13-37-232**, of $500 or more if received between the 25th day of the month before an election in which the political committee participates and the day of the election; and

(d) within 2 business days of making an expenditure of $500 or more that is made between the 25th day of the month before an election in which the political committee participates and the day of the election;

(e) quarterly, due on the 5th day following a calendar quarter, beginning in the calendar quarter following a year of an election in which the political committee participates until the political committee files a closing report as specified in **13-37-228**(3); and

(f) as provided by subsection (3).

(3) In addition to the reports required by subsections (1) and (2), if a candidate or a political committee participates in a special election, the candidate or political committee shall file reports as follows:

(a) a report on the 60th, 35th, and 12th days preceding the date of the special election; and

(b) 20 days after the special election.

(4) Except as provided by **13-37-206**, candidates for a local office and political committees that receive contributions or make expenditures referencing a particular local issue or a local candidate shall file the reports specified in subsections (1) through (3) only if the total amount of contributions received or the total amount of funds expended for all elections in a campaign exceeds $500.

(5) A report required by this section must cover contributions received and expenditures made pursuant to the time periods specified in **13-37-228**.

(6) A political committee may file a closing report prior to the date in **13-37-228**(3) and after the complete termination of its contribution and expenditure activity during an election cycle.

(7) For the purposes of this section:

(a) a candidate participates in an election by attempting to secure nomination or election to an office that appears on the ballot; and

(b) a political committee participates in an election by receiving a contribution or making an expenditure.

13-37-228. Time periods covered by reports. Reports filed under **13-37-225** and **13-37-226** must be filed to cover the following time periods even though no contributions or expenditures may have been received or made during the period:

(1) The initial report must cover all contributions received or expenditures made by a candidate or political committee from the time that a person became a candidate or a political committee, as defined in **13-1-101**, until the 5th day before the date of filing of the appropriate initial report pursuant to **13-37-226**. Reports filed by political committees organized to support or oppose a statewide ballot issue must disclose all contributions received and expenditures made prior to the time an issue becomes a ballot issue by transmission of the petition to the proponent of the ballot issue or referral by the secretary of state even if the issue subsequently fails to garner sufficient signatures to qualify for the ballot.

(2) Subsequent periodic reports must cover the period of time from the closing of the previous report to 5 days before the date of filing of a report pursuant to **13-37-226**. For the purposes of this subsection, the reports required under **13-37-226**(1)(c), (1)(d), (2)(c), and (2)(d) are not periodic reports and must be filed as required by **13-37-226**(1)(c), (1)(d), (2)(c), and (2)(d), as applicable.

(3) Closing reports must cover the period of time from the last periodic report to the final closing of the books of the candidate or political committee. A candidate or political committee shall file a closing report following an election in which the candidate or political committee participates whenever all debts and obligations are satisfied and further contributions or expenditures will not be received or made that relate to the campaign unless the election is a primary election and the candidate or political committee will participate in the general election.

13-37-229. Disclosure requirements for candidates, ballot issue committees, political party committees, and independent committees. (1) The reports required under **13-37-225** through **13-37-227** from candidates, ballot issue committees, political party committees, and independent committees must disclose the following information concerning contributions received:

(a) the amount of cash on hand at the beginning of the reporting period;

(b) the full name, mailing address, occupation, and employer, if any, of each person who has made

aggregate contributions, other than loans, of $35 or more to a candidate or political committee, including the purchase of tickets and other items for events, such as dinners, luncheons, rallies, and similar fundraising events;

(c) for each person identified under subsection (1)(b), the aggregate amount of contributions made by that person within the reporting period and the total amount of contributions made by that person for all reporting periods;

(d) the total sum of individual contributions made to or for a political committee or candidate and not reported under subsections (1)(b) and (1)(c);

(e) the name and address of each political committee or candidate from which the reporting committee or candidate received any transfer of funds, together with the amount and dates of all transfers;

(f) each loan from any person during the reporting period, together with the full names, mailing addresses, occupations, and employers, if any, of the lender and endorsers, if any, and the date and amount of each loan;

(g) the amount and nature of debts and obligations owed to a political committee or candidate, in the form prescribed by the commissioner;

(h) an itemized account of proceeds that total less than $35 from a person from mass collections made at fundraising events;

(i) each contribution, rebate, refund, or other receipt not otherwise listed under subsections (1)(b) through (1)(h) during the reporting period;

(j) the total sum of all receipts received by or for the committee or candidate during the reporting period; and

(k) other information that may be required by the commissioner to fully disclose the sources of funds used to support or oppose candidates or issues.

(2) (a) Except as provided in subsection (2)(c), the reports required under **13-37-225** through **13-37-227** from candidates, ballot issue committees, political party committees, and independent committees must disclose the following information concerning expenditures made:

(i) the full name, mailing address, occupation, and principal place of business, if any, of each person to whom expenditures have been made by the committee or candidate during the reporting period, including the amount, date, and purpose of each expenditure and the total amount of expenditures made to each person;

(ii) the full name, mailing address, occupation, and principal place of business, if any, of each person to whom an expenditure for personal services, salaries, and reimbursed expenses has been made, including the amount, date, and purpose of that expenditure and the total amount of expenditures made to each person;

(iii) the total sum of expenditures made by a political committee or candidate during the reporting period;

(iv) the name and address of each political committee or candidate to which the reporting committee or candidate made any transfer of funds, together with the amount and dates of all transfers;

(v) the name of any person to whom a loan was made during the reporting period, including the full name, mailing address, occupation, and principal place of business, if any, of that person and the full names, mailing addresses, occupations, and principal places of business, if any, of the endorsers, if any, and the date and amount of each loan;

(vi) the amount and nature of debts and obligations owed by a political committee or candidate in the form prescribed by the commissioner; and

(vii) other information that may be required by the commissioner to fully disclose the disposition of funds used to support or oppose candidates or issues.

(b) Reports of expenditures made to a consultant, advertising agency, polling firm, or other person that performs services for or on behalf of a candidate or political committee must be itemized and described in sufficient detail to disclose the specific services performed by the entity to which payment or reimbursement was made.

(c) A candidate is required to report the information specified in this subsection (2) only if the transactions involved were undertaken for the purpose of supporting or opposing a candidate.

13-37-231. Reports to be certified as true, complete, and correct. (1) A report required by this chapter to be filed by a candidate or political committee must be verified as true, complete, and correct by the oath or affirmation of the individual filing the report. The individual filing the report must be the candidate or an officer of a political committee who is on file as an officer of the committee with the commissioner.

(2) A copy of a report or statement filed by a candidate or political committee must be preserved by the individual filing it for a period coinciding with the term of office for which the person was a candidate or for a period of 4 years, whichever is longer.