No. 19-767

In The
Supreme Court of the United States

NATIONAL ASSOCIATION FOR GUN RIGHTS, INC.,

Petitioner,

v.

JEFF MANGAN, in His Official Capacity as the Commissioner of Political Practices for the State of Montana, et al.,

Respondents.[1]

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF RANDY ELF IN SUPPORT OF PETITIONER NATIONAL ASSOCIATION FOR GUN RIGHTS, INC.

RANDY ELF
Counsel of Record
Post Office Box 525
Lakewood, N. Y. 14750
Telephone (202) 423-2122
ForEFilingOnly@gmail.com

December 31, 2019 *Counsel for Amicus*

QUESTIONS PRESENTED

● Not all political-speech-"disclosure" laws are alike: Some require Track 2, *non*-political-committee disclosure; others trigger Track 1, political-committee or political-committee-like burdens. Do the tracks have different First Amendment analyses?

● Does this action involve *only* Track 1 law, not Track 2 law?

● Under the First Amendment, may government trigger Track 1 burdens only for "organizations" that are "under the control of a candidate" or candidates in their capacities as candidates, or for "organizations" having "the major purpose" under the case law and engaging in more than small-scale speech? Do these go to the tailoring, rather than the government-interest, part of constitutional scrutiny? How do these apply here?

● Does the appeal-to-vote test—once known as the "functional equivalent of express advocacy"—no longer affect whether government may ban, otherwise limit, or regulate political speech? Does the test no longer have any place in law?

● Does strict scrutiny, rather than substantial-relation exacting scrutiny, apply to law triggering Track 1 burdens?

● Is the proper challenge to such law to the political-committee(-like) definitions, rather than to the political-committee(-like) burdens themselves?

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[1] This copyrighted brief is based on copyrighted drafts of briefs at https://ssrn.com/abstract=2926067 (U.S.) (Track 2), and https://ssrn.com/abstract=3329448 (U.S.) (Track 1), and the copyrighted filed briefs at https://ssrn.com/abstract=3135458 (9th Cir.) (Track 1) and https://ssrn.com/abstract=3490175 (D.C. Cir.) (Track 1). This copyrighted brief as filed is at https://ssrn.com/abstract=3490176 (all Internet sites, except the one for this copyrighted brief as filed and those in the next paragraph, visited Nov. 25, 2019).

The caption on the cover is the Court's caption as of Amicus's submitting this brief to the printer. *See* Mem. to those Intending to File an Amicus Curiae Br. in the Sup. Ct. of the U.S. at 3 (Oct. 2019) ("The caption ... should be identical to the caption ... on the Court's docket, unless the Clerk's Office has provided other instructions."), *available at* https://www.supremecourt.gov/casehand/AmicusGuide2019.pdf. However, the caption has multiple respondents while the certiorari petition has only one. *Compare Nat'l Ass'n for Gun Rights, Inc., Pet'r, v. Jeff Mangan, in His Official Capacity as the Comm'r of Political Practices for the State of Mont., et al.* (docket) (indicating multiple respondents), *available at* https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public\19-767.html, *with* (CERT. PET. at cover, ii (indicating one respondent)).

TABLE OF AUTHORITIES[2]

CASES

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[2] "Authorities upon which [this filing] chiefly rel[ies] are marked with asterisks." D.C.CIR.R. 28(a)(2), *available at* https://www.cadc.uscourts.gov/internet/home.nsf/Content/Court+Rules+and+Operating+Procedures; *accord* 11TH CIR.R. 28-1(e), *available at* http://www.ca11.uscourts.gov/rules-procedures.

This filing cites slip- or manuscript-opinion/order pages, rather than Westlaw star pages, where bound-volume pagination will later be available, because Westlaw removes star pagination when West issues bound-volume pagination.

STATUTES

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GLOSSARY[3]

Montana	Defendant-Respondent Jeff Mangan, Defendant Tim Fox, and Defendant Leo Gallagher
NAGR	Plaintiff-Petitioner National Association for Gun Rights, Inc.
OP.	9TH CIR. DOC. 51-1 (Ninth Circuit opinion)
ORDER	D.CT. DOC. 44 (summary-judgment order)
Triggering	Randy Elf, *The Constitutionality of State Law Triggering Burdens on Political Speech and the Current Circuit Splits,* 29 REGENT U.L. REV. 35 (2016)

[3] D.C.CIR.R. 28(a)(3); 10TH CIR.R. 28.2(C)(6), *available at* https://www.ca10.uscourts.gov/clerk/rules.

INTEREST OF AMICUS CURIAE[4]

Amicus has practiced political-speech law, presented many briefs and oral arguments on the constitutionality of such law, and written a law-review article addressing much of what is at issue here. Randy Elf, *The Constitutionality of State Law Triggering Burdens on Political Speech and the Current Circuit Splits,* 29 REGENT U.L. REV. 35 (2016) ("*Triggering*"), *available at* http://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/docs/issues/v29n1/10_Elf_vol_29_1.pdf.

Since *Triggering* has analysis that applies here, Amicus summarizes and presents it in this brief. Where *Triggering* most efficiently makes points that apply here, this brief quotes *Triggering*. When this brief quotes *Triggering* text, some cites from corresponding *Triggering* footnotes are inserted into the text, and some cites remain in footnotes. *Triggering* cites are converted from law-review style to brief style, and many are condensed. Emphases are as they are in *Triggering*.

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[4] Counsel of record for all parties received timely notice of Amicus's intent to file this brief and consent to this filing. No party's counsel wholly or partly authored this brief. No such counsel, party, or other person—other than Amicus or Amicus's counsel—contributed monetarily to preparing or submitting this brief. Amicus has no members. *Cf.* S.CT.R. 37.2(a), 37.6.

For all readers' convenience, a *Triggering* draft, with string cites not published in the law review, remains at https://ssrn.com/abstract=2713496.

SUMMARY OF ARGUMENT

The Court has applied constitutional scrutiny and established the two-track system under which government may regulate—i.e., require disclosure of—political speech. *E.g., Buckley v. Valeo,* 424 U.S. 1, 63-64, 79-82 (1976) (per curiam); *Triggering* at 35-37 & nn.1-12.

This action does not address Track 2, non-political-committee disclosure requirements. Instead, this action addresses law triggering Track 1, political-committee(-like) burdens.

The Ninth Circuit has a different two-track system for *state* law. *Triggering* at 54 & n.109.

However, the Ninth Circuit should have conformed its law to Supreme Court case law, under which government may trigger Track 1 burdens only for "organizations" that are "under the control of" candidates in their capacities as candidates, or for "organizations" having "the major purpose" under *Buckley,* 424 U.S. at 79; *Triggering* at 48 & n.84, and engaging in more than small-scale speech, *Sampson v. Buescher,* 625 F.3d 1247, 1249, 1251, 1261 (10th Cir. 2010); *Triggering* at 62-64 & nn.153-54.

Moreover, "the appeal-to-vote test—once known as the 'functional equivalent of express advocacy'—

no longer affects whether government may ban, otherwise limit, or regulate speech, and the appeal-to-vote test is vague. It has no place in law." *Triggering* at 77.

ARGUMENT

I. The Court has applied constitutional scrutiny and established the two-track system under which government may regulate—i.e., require disclosure of—political speech.

Beginning with First Principles, *id.* at 38-42, which include

> [r]ecognizing that political speech is at the "core" of what the First Amendment protects, *e.g., Buckley,* 424 U.S. at 44-45, the ... Court has applied constitutional scrutiny and established the two-track system under which government may regulate political speech.[5]

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[5] In other words, require disclosure of, which differs from "ban" or otherwise "limit." *See Yamada v. Kuramoto,* 744 F.Supp.2d 1075, 1082 & n.9 (D. Haw. 2010) (distinguishing restrictions, i.e., bans or other limits, from regulation, i.e., disclosure). The umbrella term "disclosure" can cover registration,

Under "Track 1," government may under some circumstances—and subject to further inquiry, *see, e.g., id.* at 74 (addressing "threats, harassment, or reprisals")[6]—trigger political-committee or political-committee-like burdens, *see, e.g., id.* at 63, 79 (addressing "organizations" that are "under the control of a candidate" or candidates in their capacities as candidates

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recordkeeping, reporting, attributions, and disclaimers in all their forms. *Wis. Right to Life, Inc. v. Barland,* 751 F.3d 804, 812-16, 836 (7th Cir. 2014). *Barland* understands the difference between attributions and disclaimers. *Id.* at 815-16. By definition, an "attribution" attributes and says who *is* speaking, while a "disclaimer" disclaims and says who is *not* speaking. *Id.*

Triggering at 35 n.2. *Independence Institute v. Williams,* 812 F.3d 787, 795 & n.9 (10th Cir. 2016), frames this differently by applying the label "disclosure" only to Track 2 law, not Track 1 law. Either way, constitutional principles—not "mere labels"—are what matters. *NAACP v. Button,* 371 U.S. 415, 429 (1963); *Triggering* at 51 n.91, 52-53 n.103.

And either way, the Court should please dispense with the phrase "disclaimer and disclosure requirements." *E.g., Citizens United,* 558 U.S. at 319, 321-22, 366-67, 371. It is like saying "apples and fruit," because the latter includes the former. The Court should also please dispense with using the label "disclaimer" for *both* attributions and disclaimers, *e.g., id.*, because they are different.

[6] *Compare Barland*, 751 F.3d at 816, 832 (striking down an attribution and disclaimer requirement), *with Gable v. Patton,* 142 F.3d 940, 944-45 (6th Cir. 1998) (upholding an attribution requirement for a political committee). *Triggering* at 35 n.3.

> or have "the major purpose" under *Buckley*), *followed in FEC v. Mass. Citizens for Life, Inc.,* 479 U.S. 238, 252 n.6, 262 (1986), *and quoted in McConnell v. FEC,* 540 U.S. 93, 170 n.64 (2003) (*overruled on other grounds by Citizens United v. FEC,* 558 U.S. 310, 365-66 (2010)); *Sampson,* 625 F.3d at 1249, 1251, 1261 (addressing organizations with the *Buckley* major purpose but only small-scale speech). ...
>
> Under "Track 2,"[7] apart from whether government may trigger Track 1, political-committee(-like) burdens, government may—subject to further inquiry, *see, e.g., Citizens United,* 558 U.S. at 370 (addressing "threats, harassment, or reprisals" (quoting *McConnell,* 540 U.S. at 198))—require attributions, disclaimers, and *non*-political-committee reporting for:
>
> - independent expenditures properly understood, *Buckley,* 424 U.S. at 63-64, 79-82;[8] *cf. McIntyre v. Ohio Elections*

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[7] The *terms* "Track 1" and "Track 2" are [Amicus's], yet the *concepts* have been in the case law since the ... Court first distinguished what [Amicus] calls Track 1 law and Track 2 law in *Buckley,* 424 U.S. at 63-64.

Triggering at 36 n.7.

[8] Under the Constitution, "independent expenditure" means *Buckley* express advocacy, *Buckley,* 424 U.S.

Comm'n, 514 U.S. 334, 354-56 (1995) (rejecting a Track 2, non-political-committee disclosure requirement for other[9] speech), and

- Federal Election Campaign Act electioneering communications, *Citizens United,* 558 U.S. at 366-71.[10]

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at 44 & n.52, 80, that is not coordinated with a candidate, *id.* at 46-47, 78. Thus, *non*-coordinated spending for political speech that is not *Buckley* express advocacy is independent *spending* but not an independent *expenditure. See id.* at 44 & n.52, 80 (addressing express advocacy and thereby independent expenditures).

Triggering at 36 n.9. The Court should please dispense with using the word "expenditure," *e.g., Citizens United,* 558 U.S. at 366, 368, where only "spending" is correct.

[9] I.e., small-scale. 514 U.S. at 358 (Ginsburg, J., concurring).

[10]

Federal Election Campaign Act electioneering communications (1) are broadcast, (2) run in the 30 days before a primary or 60 days before a general election, (3) have a clearly identified candidate in the jurisdiction, (4) are targeted to the relevant electorate, and (5) do not expressly advocate. *McConnell,* 540 U.S. at 189-94. To be a Federal Election Campaign Act electioneering communication, speech about presidential or vice-presidential candidates need not be targeted to the relevant electorate, *id.* at 189-90, yet it must meet the other criteria, *id.* at 189-94.

Triggering at 36 n.10.

Triggering at 35-36 & nn.1-4, 6-10; (*accord* 9TH CIR. DOC. 15 at ADDENDUM.1, *available at* https://ssrn.com/abstract=3135458).

II. The Court distinguishes Track 1 and Track 2 law. This action involves only Track 1 law, so only Track 1 analysis—not Track 2 analysis—applies.

Defendant-Respondent Jeff Mangan, Defendant Tim Fox, and Defendant Leo Gallagher ("Montana") do not assert Plaintiff-Petitioner National Association for Gun Rights, Inc. ("NAGR") must *form or have* a separate political committee and let only the separate political committee speak. Rather, Montana asserts NAGR itself must *be* a political committee or a political-committee-like organization and bear Track 1 burdens. (9TH CIR. DOC. 51-1 at 8-12, CERT. PET. at APP.9-13, 931 F.3d 1102 (9th Cir. 2019) (Ninth Circuit opinion) ("OP."); D.CT. DOC. 44 at 11-16, CERT. PET. at APP.52-56, 279 F.Supp.3d 1100 (D. Mont. 2017) (summary-judgment order) ("ORDER")); *cf. Triggering* at 43 & nn.56-59 (describing the difference).

The Court evaluates Track 1 and Track 2 law differently, *Mass. Citizens,* 479 U.S. at 262; *Buckley*, 424 U.S. at 79, because they are different. Track 1 law can trigger political-committee(-like) burdens, *Citizens United*, 558 U.S. at 338; *Buckley*, 424 U.S. at 63; *Triggering* at 43-44 & nn.60-62, including registration (including, in turn, treasurer designation, bank-account designation, and termination, i.e., deregistration), recordkeeping,

extensive reporting, and ongoing reporting, *see, e.g., Citizens United*, 558 U.S. at 338 (describing such law); *Mass. Citizens*, 479 U.S. at 253-56 & nn.7-9 (opinion of Brennan, J.) (same); *Buckley*, 424 U.S. at 63 (same); *Triggering* at 44 & nn.63-65. These are "onerous" burdens, *Citizens United,* 558 U.S. at 339; *FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 477 n.9 (2007) (opinion of Roberts, C.J.) (citing *Mass. Citizens,* 479 U.S. at 253-55 (opinion of Brennan, J.)), particularly—yet not only—when law chills speech, i.e., when speech is "simply not worth it," *Mass. Citizens,* 479 U.S. at 255 (opinion of Brennan, J.). *Triggering* at 44-45 & nn.66-70, 52 n.102, 57-58 & nn.129-37.[11] By contrast, Track 2, non-political-committee reporting—which *Buckley* and *Citizens United* uphold for particular speech, *supra* at 5-6—includes none of these Track 1 burdens. Instead,

> Track 2 reporting occurs only for reporting periods when the particular speech occurs,[12]

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[11] Law need not trigger all of these burdens to require Track 1 analysis. *See Justice v. Hosemann,* 771 F.3d 285, 288-89 (5th Cir. 2014) (addressing law with extensive and ongoing reporting yet not recordkeeping as Track 1 law); *Iowa Right to Life Comm., Inc. v. Tooker,* 717 F.3d 576, 589 (8th Cir. 2013) (same); *N.M. Youth Organized v. Herrera,* 611 F.3d 669, 672-73 (10th Cir. 2010) (same); *Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1013 (9th Cir. 2010) (addressing law with extensive but not ongoing reporting as Track 1 law); *Triggering* at 45-46 & nn.71-72; *id.* at 56 & nn.117-24 (explaining that registration is a Track 1 burden). *But cf. Del. Strong Families v. Att'y Gen. of Del.,* 793 F.3d 304, 312-13 n.10 (3d Cir. 2015) (addressing law with extensive but not ongoing reporting as Track 2 law when the parties did so).

> and the reports are less burdensome than extensive or ongoing reporting. *See, e.g., Mass. Citizens,* 479 U.S. at 262 ("less than the full panoply of" Track 1 burdens); *Buckley*, 424 U.S. at 63-64 (describing Track 2, *non*-political-committee reporting); 52 U.S.C. 30104(c), (f)-(g) (same).

Triggering at 57 & nn.126-28 (ellipses omitted).

Thus, it contradicts *Buckley*, *Massachusetts Citizens, Wisconsin Right to Life,* and *Citizens United* to downplay Track 1 burdens, as *Yamada v. Snipes*, 786 F.3d 1182, 1195-96 (9th Cir. 2015), and other opinions following *SpeechNow.org v. FEC,* 599 F.3d 686, 690-92, 697-98 (D.C. Cir. 2010) (en banc), do. *Triggering* at 58 n.131 (collecting authorities). It also contradicts *Wisconsin Right to Life* and *Citizens United* to believe—as *Yamada,* 786 F.3d at 1196, 1199 nn.8-9, does—that Track 1 burdens may not be onerous. *Triggering* at 44 n.66, 84 & nn.269-71. And notwithstanding *Yamada,* 786 F.3d at 1196 n.7, the Track 1 burdens discussion on *Citizens United* pages 337-40, *supra* at 7-8, which strike down a speech *ban,*

> appl[ies] not only to speech bans and other limits but also to burdens that law triggers

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> This is what "one-time" and "event-driven" mean. *E.g.*, *Barland,* 751 F.3d at 824, 836, 841. It is time to abandon these confusing labels and simply say what one means.

Triggering at 57 n.127 (explaining why).

> for an organization itself when it must *be* a political committee/political-committee-like organization to speak, or when a fund/account that is part of the organization must *be* a political-committee-like fund/account. *Wis. Right to Life, Inc. v. Barland,* 751 F.3d 804, 840 (7th Cir. 2014); *Sampson,* 625 F.3d at 1255.

Triggering at 53 n.103 (collecting competing authorities). Why? Because when law bans or otherwise limits an organization's speech, and the organization *forms or has* a separate political committee that speaks, Track 1 law can trigger Track 1 burdens for the separate political committee. *Citizens United*, 558 U.S. at 337-40; *Mass. Citizens*, 479 U.S. at 253-56 & nn.7-9 (opinion of Brennan, J.). These are the same "full panoply of" Track 1 burdens that Track 1 law can trigger for an organization itself when it speaks. *Mass. Citizens*, 479 U.S. at 262; *Buckley*, 424 U.S. at 63; *supra* at 7-8.

Yet this action turns on none of these parts of *Yamada.* Even if any of them were correct—and none is—this action involves *only* Track 1 law. (OP. at 8-12, CERT. PET. at APP.9-13; ORDER at 11-16, CERT. PET. at APP.52-56.) So *only* Track 1 analysis—not Track 2 analysis—applies.[13]

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[13] *See Barland,* 751 F.3d at 841-42 (declining to apply Track 2 analysis to Track 1 law); *accord Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1280 n.6

Which brings us to *Ninth Circuit* Track 1 analysis. *Infra* at 11-12.

III. The Ninth Circuit should have conformed its law to Supreme Court case law.

The Ninth Circuit has a different two-track system for *state* law. Under Track 1, the Ninth Circuit—while retaining a *Sampson*-like-small-scale-speech test, *Triggering* at 64 n.156—waters down the *Buckley* major-purpose test, *id.* at 54 & n.109. Under current Ninth Circuit law, a state may trigger Track 1, political-committee(-like) burdens only for organizations that:

- either "make political advocacy a priority," as opposed to only "incidentally engag[ing] in such advocacy," (OP. at 21, 24, CERT. PET. at APP.23, 27); *Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1011 (9th Cir. 2010), *followed in Yamada,* 786 F.3d at 1198-1200, or are "a significant participant in [the] electoral process," *Yamada,* 786 F.3d at 1200 (reaching organizations that "may not make political advocacy a priority"), and

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(10th Cir. 2016) (considering Track 1 law and distinguishing *Independence Institute v. Williams,* 812 F.3d 787 (10th Cir. 2016), as considering "a different disclosure framework," *i.e.*, Track 2 law).

Triggering at 37 n.16.

- engage in more than small-scale speech, *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth,* 556 F.3d 1021, 1033-34 (9th Cir. 2009).[14]

See generally Triggering at 81-83 n.268 (discussing disclosure thresholds).

Just as what government may regulate with Track 2 law, *supra* at 5-6, goes to the tailoring part of constitutional scrutiny, not the government-interest part, *see, e.g., Indep. Inst. v. Williams,* 812 F.3d 787, 791 (10th Cir. 2016) (addressing overbreadth);[15] *Ctr. for Individual Freedom, Inc. v. Tennant,* 706 F.3d 270, 282-85 (4th Cir. 2013) (addressing underinclusiveness); *Triggering* at 50 n.87 (collecting competing authorities), the tests for the constitutionality of law triggering Track 1 burdens, *supra* at 4-5, 11-12, go to tailoring, not the government interest, *e.g., Barland*, 751 F.3d at 841-42; *Canyon Ferry,* 556 F.3d at 1032-34; *Buckley v. Valeo,* 519 F.2d 821, 869 (D.C. Cir. 1975) (en banc), *aff'd in part and rev'd on other grounds*, 424 U.S. 1 (1976) (per curiam); *Triggering* at 49-50 & nn.87-89, 64 & nn.155-56 (collecting competing authorities). A

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[14] This holding was unnecessary in *Canyon Ferry*; then-Ninth Circuit law was overlooked. *Triggering* at 64 n.156.

[15] "Overbreadth" applies to both as-applied and facial claims. *E.g., Alaska Right to Life Comm. v. Miles,* 441 F.3d 773, 785 (9th Cir. 2006).

Triggering at 41-42 n.53.

court does "not [look to a government interest and] truncate this tailoring test at the outset." *McCutcheon v. FEC,* 134 S.Ct. 1434, 1450 (2014) (opinion of Roberts, C.J.) (addressing another tailoring test). "Thus, pounding the table about the *government interest* in regulating political speech is no answer to the *tailoring* part of constitutional scrutiny." *Triggering* at 50 & n.89, 64.

In other words, the *government interest*—e.g., in particular information, *Buckley,* 424 U.S. at 66-67 (addressing Interest 1); *Triggering* at 50 n.88—is *not* the point here. *Tailoring* is. While *Citizens United* considers "the informational interest alone," 558 U.S. at 369, this—rather than demoting tailoring—considers only Interest 1, not 2 or 3, from *Buckley,* 424 U.S. at 66-68.[16]

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[16] Besides, Interest 2—government's interest in preventing quid-pro-quo corruption or the appearance of quid-pro-quo corruption, *compare Buckley,* 424 U.S. at 67 (addressing Interest 2), *with McCutcheon,* 134 S.Ct. at 1441, 1450-51 (opinion of Roberts, C.J.) (defining these terms)—cannot apply to independent spending for political speech, *e.g., Citizens United,* 558 U.S. at 357-61, or contributions *not* directed to candidates/officeholders, *McCutcheon,* 134 S.Ct. at 1452 (opinion of Roberts, C.J.) (quoting *McConnell,* 540 U.S. at 310 (Kennedy, J., concurring/dissenting)).

Interest 3 applies only to facilitating enforcement of constitutional "restrictions," *McConnell,* 540 U.S. at 196 (discussing *Buckley*), i.e., constitutional bans or other constitutional limits on contributions received, *Buckley,* 424 U.S. at 67-68 (addressing Interest 3).

NAGR claims Montana's electioneering-communication definition is unconstitutional. (OP. at 12, CERT. PET. at APP.13.) NAGR asserts this law unconstitutionally triggers Track 1 burdens. (D.CT. DOC. 28 at 13-16.)

And NAGR may claim Montana's political-committee(-like) burdens are unconstitutional, because the Ninth Circuit (OP. at 19-31, CERT. PET. at APP.21-34) "addressed"/"passed upon" this. *Citizens United,* 558 U.S. at 323, 330 (quoting *Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 379 (1995)).

The same arguments apply to the electioneering-communication-definition and political-committee(-like)-burdens claims: Ninth Circuit law errs. *E.g., Triggering* at 44 n.66, 49-50 nn.86-87, 50 n.90, 51-52 & n.98, 52 & nn.100-01, 52-53 & n.103, 53 & n.105, 54 & nn.108-09, 55 & n.115, 56 n.120, 58 n.131, 60 n.148, 66 n.161, 71 n.189, 72 n.190, 73 nn.193-94, 75 & nn.210-16, 75-76 nn.218-20, 78 n.243, 79 nn.246-47, 79-80 n.250, 80 n.255, 80-81 n.257, 82 n.268, 84 & n.269, 84 n.271. Among the errors are these four.

First, notwithstanding *Human Life,* 624 F.3d at 1009-10,

> [e]ven if the *Buckley* major-purpose test were a narrowing gloss for *federal* law ... the

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Nothing in the record—including NAGR's speech, which includes only independent spending (*e.g.,* CERT. PET. at 4)—implicates Interest 2 or 3.

> purpose of the test would be to avoid as-applied and facial overbreadth, *infra* at 17 & n.18, so the test would still apply as a constitutional principle, not as a narrowing gloss, to state law. *E.g., Barland,* 751 F.3d at 811, 842; *Minn. Citizens Concerned for Life, Inc. v. Swanson,* 692 F.3d 864, 872 (8th Cir. 2012) (en banc) (collecting authorities).

Triggering at 51 & nn.93-96.

Second, notwithstanding (OP. at 15-17, CERT. PET. at APP.16-19), *Human Life,* 624 F.3d at 994, 1005-13 (discussing disclosure/transparency under *Citizens United* pages 366-71), and *Yamada,* 786 F.3d 1197-98, 1200-01 (discussing disclosure/transparency/information under *Citizens United* pages 366-71); *Triggering* at 51-52 & nn.97-102 (collecting competing authorities), *Citizens United* pages 366-71 do not apply here, because they address/support only Track 2 law, not Track 1 law.[17]

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[17] *E.g.*, *Citizens United*, 558 U.S. at 369 (recalling that such Track 2 "disclosure is a less restrictive alternative to more comprehensive [Track 1] regulations of speech" (citing *Mass. Citizens,* 479 U.S. at 262 (holding that the "state interest in disclosure can be met in a manner less restrictive than imposing the full panoply of [Track 1] regulations that accompany status as a political committee" and that if an organization's "independent spending bec[a]me so extensive that the organization[] [had the *Buckley*] major purpose, the [organization] would be classified as a political

Third, watering down the *Buckley* major-purpose test for state law, *supra* at 11-12, cannot be right. It gives state governments

> more power than the federal government to trigger Track 1 burdens. But political speech needs protection from both federal and state governments, *see Am. Tradition P'ship v. Bullock,* 567 U.S. 516, 516-17 (2012) (per curiam) (addressing state law), and *McDonald v. City of Chicago* rejects "watered-down" standards for state governments under the Bill of Rights. 561 U.S. 742, 765, 785-86 (2010) (opinion of Alito, J.). "States have no greater power" than the federal government to "restrain First Amendment freedoms." *Wallace v. Jaffree,* 472 U.S. 38, 48-49 (1985).

Triggering at 54-55 & nn.112-14 (brackets and ellipsis omitted).

Fourth, even if watering down the First Amendment were proper, *Human Life*'s

> "a priority"-"incidentally" test is unconstitutionally vague for two reasons: It

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committee" (citing *Buckley,* 424 U.S. at 79))); *Indep. Inst.,* 812 F.3d at 795 & n.9; *Barland,* 751 F.3d at 824, 836-37, 839, 841, *followed in Del. Strong Families,* 793 F.3d at 312-13 n.10; *Minn. Citizens,* 692 F.3d at 875 n.9.

Triggering at 52 n.103 (brackets in original) (ellipses omitted).

> is based on "political advocacy," 624 F.3d at 1011, so it is vague under *Buckley*, 424 U.S. at 42-43, and the boundary between "a priority" and "incidentally" is unclear. ... *Yamada's* "a significant participant in [the] electoral process" test ... is also vague. 786 F.3d at 1200.

Triggering at 54 n.109 (brackets in original).

Therefore, the Ninth Circuit should have conformed its law to Supreme Court case law, under which NAGR prevails. *Infra* at 17-22.

IV. Government may trigger Track 1, political-committee or political-committee-like burdens only for organizations that are under the control of candidates in their capacities as candidates, or for organizations having "the major purpose" under *Buckley* and engaging in more than small-scale speech.

Case law guarding against overbreadth, *Barland,* 751 F.3d at 839; *Triggering* at 48 & n.81; *see Mass. Citizens*, 479 U.S. at 252 n.6, 262,[18]

[18] Not vagueness. *Buckley,* 424 U.S. at 63, 79 & n.105,

> does not hold that the challenged political-committee definition *itself* is vague. Instead, it holds that the included terms "contributions" and "expenditures" are vague and limits these two federal-law terms accordingly.

Triggering at 48 n.81.

permits government to trigger Track 1, political-committee(-like) burdens only for "organizations" that are "under the control of a candidate" or candidates in their capacities as candidates, or for "organizations" having "the major purpose" of "nominat[ing] or elect[ing]" a candidate or candidates or passing or defeating a ballot measure or ballot measures, *Buckley,* 424 U.S. at 79; *Cal. Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (applying the test pre-*Human Life,* 624 F.3d at 1005-13, to an organization engaging in ballot-measure speech (quoting *Mass. Citizens,* 479 U.S. at 252-53)); *Triggering* at 48 & nn.83-84*,* and engaging in more than small-scale speech, *Sampson,* 625 F.3d at 1249, 1251, 1261; *Triggering* at 62-64 & nn.153-54.[19]

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[19] *See also Coal. for Secular Gov't,* 815 F.3d at 1269, 1276-81 (addressing an organization engaging in small-scale speech but mistakenly not indicating whether the organization has the *Buckley* major purpose); *Justice,* 771 F.3d at 295 (addressing organizations that have the *Buckley* major purpose and understandably do not press the point); *Worley v. Fla. Sec'y of State,* 717 F.3d 1238, 1249 (11th Cir. 2013) (same).

Triggering at 62 n.154 (collecting competing authorities on small-scale speech).

This assumes government may trigger Track 1 burdens based on ballot-measure speech. *E.g., Cal. Pro-Life Council,* 328 F.3d at 1102-04. *Triggering* at 61 n.150 (collecting competing authorities).

V. An organization has the *Buckley* major purpose if it says so in its organizational documents or public statements, or devotes the majority of its spending to contributions to, or independent expenditures properly understood for, candidates or ballot measures, or perhaps if the organization makes a massive amount—objectively and precisely defined—of contributions or independent expenditures properly understood.

> The *Buckley* major-purpose test
>
> > asks what *the* major purpose of the organization is, not whether something is *a* major purpose. *E.g., N.C. Right to Life, Inc. v. Leake,* 525 F.3d 274, 287-89, 302-04 (4th Cir. 2008). And *major* is the root of *majority*, which means more than half. *Majority*, BLACK'S LAW DICTIONARY (10th ed. 2014). Thus, an organization can have only one major purpose. *See Mass. Citizens,* 479 U.S. at 252 n.6 (opinion of Brennan, J.) (referring to "the major purpose" of an organization and "its central organizational purpose," not purposes).

Triggering at 59 & nn.141-43 (brackets omitted).

The test asks whether an organization **(1)** says in its organizational documents, *Mass. Citizens,* 479 U.S. at 252 n.6, 262, or "public statements," *FEC v. GOPAC, Inc.,* 917 F.Supp. 851, 859 (D.D.C. 1996),

that it has the *Buckley* major purpose, *Triggering* at 59-60 & n.146, or **(2)**

> devot[es] the majority of its spending to contributions to, or independent expenditures properly understood for,[20] candidates, *Iowa Right to Life Comm., Inc. v. Tooker,* 717 F.3d 576, 584 (8th Cir. 2013) (quoting *Colo. Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1152 (10th Cir. 2007)); *N.M. Youth Organized v. Herrera,* 611 F.3d 669, 678 (10th Cir. 2010) (same); *see N.C. Right to Life,* 525 F.3d at 289 & n.6 (equating primary with major, which is incorrect, because what is primary can be the plurality rather than the majority),[21] or ballot measures,

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[20] *Supra* at 5-6 n.8.

[21] *Massachusetts Citizens* states that "should an organization's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the organization would be classified as a political committee." 479 U.S. at 262. This statement—including the nebulous "campaign activity" phrase—does not contemplate looking beyond (1) the organization's central organizational purpose, or (2) whether the organization devotes the majority of its spending to contributions or independent expenditures properly understood, to determine whether the organization has the *Buckley* major purpose. *Colo. Right to Life,* 498 F.3d at 1152 (quoting *Mass. Citizens,* 479 U.S. at 252 n.6, 262), *followed in Iowa Right to Life,* 717

Triggering at 60-61 & nn.147-50,[22] or perhaps, with sufficient notice *not* present here, whether the organization **(3)** "mak[es] a massive amount—objectively and precisely defined—of contributions or independent expenditures properly understood," with courts not "setting the 'massive' threshold so low that it in effect even begins to encroach on the just results to which the *Buckley* major-purpose test leads," *id.* at 65-66 & nn.159-62 (explaining this proposal); *cf.* JOHN GRISHAM, THE APPEAL 163-302 (2008) (giving a fictional example in Part II).

These go to tailoring, not the government interest. *Supra* at 12-13.

Just as "political speech is at the 'core' of what the First Amendment protects," *supra* at 3, the only political speech that *counts toward* permitting government to trigger Track 1 burdens for an organization is what is at the core of political speech: Contributions to candidates or ballot measures, and

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F.3d at 584, *and N.M. Youth Organized,* 611 F.3d at 678.

Triggering at 60 n.149 (brackets omitted).

[22] Thus, *Buckley* protects not only non-candidate-controlled/non-major-purpose organizations engaging in independent spending for political speech—including issue advocacy and *Buckley* express advocacy—but also those making contributions. *E.g.*, *Iowa Right to Life,* 717 F.3d at 581; *Minn. Citizens,* 692 F.3d at 867; *N.C. Right to Life,* 525 F.3d at 277-78; *Triggering* at 49 n.84. *See generally* Randy Elf, *Track 2 Law* at 1-2 (May 25, 2017) (illustrating issue advocacy as a perfect complement of *Buckley* express advocacy), *available at* https://ssrn.com/abstract=2925328.

independent expenditures properly understood, *supra* at 19-21.

Since neither contributions to candidates or ballot measures, nor independent expenditures properly understood, arise here (*see* D.CT. DOC. 28 at 4), this action—like *New Mexico Youth Organized,* 611 F.3d at 678—"present[s] the easiest case under Method 2," *supra* at 19-20, of determining the *Buckley* major purpose. *Triggering* at 61 n.150. Absent proof that NAGR otherwise falls under *Buckley, supra* at 17-18, government may not trigger Track 1 burdens for NAGR. Absent proof that NAGR has the *Buckley* major purpose, *Sampson* is unnecessary to consider. *Supra* at 18; *Triggering* at 49 n.86, 62-64 & nn.153-56. And *SpeechNow,* 599 F.3d at 696-98, is distinguishable, because SpeechNow *has* the *Buckley* major purpose, *Triggering* at 80 n.253 (citation omitted), and raises no *Sampson*-like argument.[23]

Notwithstanding (OP. at 19-31, CERT. PET. at APP.21-34), the only contributions or independent spending that *count toward* permitting government to trigger Track 1 burdens for an organization are its contributions to candidates or ballot measures, and

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[23]

> *It incumbent on those who dislike the major-purpose test to suggest an improvement, as* [Amicus] *does. Supra* at 21 (Method **(3)**). Suggesting that *Citizens United* pages 366-71 allow all disclosure in the name of transparency will not do. *Supra* at 15 & n.17.

Triggering at 63-64 n.154.

its independent expenditures properly understood. *Supra* at 19-21. This excludes Montana electioneering communications, because they are not *Buckley* express advocacy. (*E.g.,* ORDER at 4-5, 10-11, CERT. PET. at APP.45-46, 51-52.) By including such electioneering communications (OP. at 19-31, CERT. PET. at APP.21-34), the Ninth Circuit perpetuates the split with the Fourth,[24] Eighth, and Tenth[25] circuits. *Supra* at 19-20.

Does this mean government may *never* regulate, with Track 1 law, contributions other than contributions to candidates or ballot measures, or independent spending other than independent expenditures properly understood? No. Instead, it means such contributions and spending do not *count toward* permitting government to trigger Track 1 burdens in the first place. *Supra* at 19-21. However,

> [o]nce it *is* constitutional to trigger Track 1 burdens for an organization, government may—subject to further inquiry, *supra* at 4—require disclosure of *all* income and spending by the organization, *see Citizens United,* 558 U.S. at 338 (describing Track 1 burdens); *Buckley,* 424 U.S. at 63 (same),

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[24] As *Triggering* at 59 n.144, 73 & n.196, details, *North Carolina Right to Life* is the controlling Fourth Circuit opinion.

[25] As *Triggering* at 49 n.86 details, *Colorado Right to Life* and *New Mexico Youth Organized* are the controlling Tenth Circuit opinions.

Triggering at 61 n.149, including contributions and independent spending. Whether government may trigger such burdens for an organization in the first place is a separate question. *Supra* at 4-5.

Along that line: Analyzing which *types of* independent spending the Court has permitted regulating (OP. at 16-17, CERT. PET. at APP.17-19 (discussing *Buckley* express advocacy plus the appeal-to-vote test)) is incorrect here, because it overlooks this distinction. More fundamentally, such analysis is Track 2 analysis, not Track 1 analysis. *Compare supra* at 5-6 *with Citizens United,* 558 U.S. at 368-69 (discussing *Buckley* express advocacy plus the appeal-to-vote test under Track 2, not Track 1) (*discussed in Triggering* at 37 n.12), *and* Randy Elf, *Track 2 Law* at 1-2 (May 25, 2017), *available at* https://ssrn.com/abstract=2925328. "Applying Track 2 analysis to Track 1 law makes it *less* difficult for government to trigger Track 1 burdens; it lowers the hurdle that government must clear to trigger Track 1 burdens." *Triggering* at 46 n.72.

Besides, as Amicus has explained, the appeal-to-vote test—once known as the "functional equivalent of express advocacy"—never was a form of express advocacy (9TH CIR. DOC. 15 at 26-28), never was part of the major-purpose test (*id.* at 29), and no longer has any place in law (*id.* at 28-31). *Triggering* at 68-73 & nn.168-92.[26]

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[26] *Accord O'Keefe v. Chisholm,* 769 F.3d 936, Nos. 14-1822, 14-1888, 14-1899, 14-2006, 14-2012, 14-2023, AMICI BR.

Thus, applying the appeal-to-vote test, *e.g., Barland,* 751 F.3d at 834-38 (misstating some arguments and confounding vagueness/overbreadth)—even if *only* in as-applied/facial *vagueness* challenges, *e.g., id.* at 832-34 (referring nevertheless to vagueness/overbreadth)—is *in*correct. *Not* applying it in as-applied/facial *overbreadth* challenges, *e.g., id.* at 838-41 (addressing Track 1), or elsewhere is correct.

Furthermore, raising the appeal-to-vote test, *e.g., supra* at 24, or *genuine*-issue speech overlooks Fourth, Eighth, and Tenth circuit holdings. *Supra* at 19-20.

Besides, on Track 1, whether issue speech, *see generally Triggering* at 49 n.84 (addressing "issue discussion"), is *genuine*-issue speech is unnecessary to consider. Why? Because *genuine*-issue speech is not a perfect complement of the independent spending that *counts, supra* at 19-21, even if one also counted appeal-to-vote speech, *contra supra* at 24. *See* Randy Elf, *Track 2 Law* at 2 (illustrating these); *Triggering* at 69 n.181 (addressing perfect complements).

OF CAMPAIGN LEGAL CTR. & DEMOCRACY 21 at 23, 2014 WL 4402300 (7th Cir. Aug. 8, 2014) (stating that *Citizens United* holdings "effectively mooted *WRTL* and its 'functional equivalent' test"), *available at* http://campaignlegal.org/sites/default/files/CLC__D21_OKeefe_Amici_Curiae_Brief_8-8-14_file_stamped.pdf *and* http://prwatch.org/files/8_8_clc_amicus.pdf.

Finally, as Amicus has also explained (9TH CIR. DOC. 15 at 31-33), strict scrutiny applies[27] and the proper challenge is to the political-committee(-like) definitions,[28] yet NAGR would prevail even if substantial-relation exacting scrutiny applied[29] or the Court considered the political-committee(-like) burdens. *Triggering* at 51-52 & nn.97-103, 56-57 & nn.123-28, 77-81 & nn.233-68.[30]

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[27] It is incorrect to lump into one "disclosure" discussion, claims by organizations that (a) challenge law triggering Track 1 burdens for an organization itself in the first place, *e.g., supra* at i, (b) accept *being* political committees and then challenge particular Track 1 burdens one-by-one, *e.g., Davis v. FEC,* 554 U.S. 724, 744 (2008), and (c) challenge Track 2 law, *e.g., McIntyre, supra* at 5-6. *Triggering* at 45 n.71, 77-78 & nn.236-38, 79 n.247.

[28] Challenging Montana's electioneering-communication definition, *supra* at 14, works, yet a political-committee(-like) definition *proximately* triggers political-committee(-like) burdens.

[29]

> [S]ince *Buckley*, the ... Court has separated strict scrutiny from exacting scrutiny. *See Iowa Right to Life*, 717 F.3d at 590-91 (understanding this point). Meanwhile, [*Doe v.*] *Reed*[, 561 U.S. 186, 196 (2010),] addresses ballot-access law, not political-speech law, much less political-speech law triggering Track 1, political-committee(-like) burdens. *Accord Buckley v. Am. Constitutional Law Found., Inc.,* 525 U.S. 182, 186-87 (1999) (addressing, *inter alia*, ballot-access law).

Triggering at 79 n.247.

[30] Forgoing challenging such burdens *because of Citizens United* (9TH CIR. ORAL ARG. at 0:00.48-0:01.08, 0:02.07-0:02.24,

VI. Four Additional Points.

● As *Triggering* details,

> government's interest in preventing circumvention of law ... can apply only when the challenged law is valid in the first place, *Yamada,* 786 F.3d at 1200, ... because "there can be no freestanding anti-circumvention interest." *Republican Party of N.M. v. King,* 741 F.3d 1089, 1202 (10th Cir. 2013).

Triggering at 66 & nn.163-66.

● Pre- and post-*Citizens United,* speech burdens—not just speech bans and other speech limits—can violate the First Amendment. *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 565-66 (2011) (citations omitted). This includes political-speech burdens. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett,* 564 U.S. 721, 732-35 & n.5 (2011) (striking down law not banning/otherwise limiting speech); *Triggering* at 47-48 & nn.74-78, 48-49 & nn.85-86 (addressing Track 1 law); *supra* at 4-5, 11-12 (same). The Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe"

0:03.32-0:04.03, 0:04.13-0:04.43, 0:13.33-0:14.11, *available at* https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015277) is mistaken, because pages 366-71 do not apply here, *supra* at 15 & n.17; (CERT. PET. at 22). (*Cf.* OP. at 19 n.12, CERT. PET. at APP.21 n.12 (overlooking mistaken *Citizens-United*-based reasoning).)

First Amendment rights. *Buckley,* 424 U.S. at 64; *Triggering* at 58 n.131.

● For some, law unconstitutionally triggering Track 1 burdens chills speech. *Supra* at 8. Others engage in their speech and comply with such law. *E.g., Triggering* at 57-58 n.130 (citation omitted). However:

> That organizations are "*capable*" of complying with law—including "complicated and burdensome" law—does not make the law constitutional. *Minn. Citizens*, 692 F.3d at 874.

Triggering at 46 & n.73 (collecting competing authorities).

● Some who comply with law unconstitutionally triggering Track 1 burdens, and some others, can even *benefit* from such law. *Triggering* at 47 n.73 (listing them); (9TH CIR. DOC. 15 at ADDENDUM.1 (same)).

> It is not necessary to question the motives or "the openness and candor of those on either side of the debate" to appreciate that it quite naturally may not occur to those who can benefit from law unconstitutionally triggering Track 1 burdens to challenge its constitutionality. *Schuette v. Coal. to Defend Affirmative Action,* 134 S.Ct. 1623, 1639 (2014) (Roberts, C.J., concurring).

Triggering at 46 n.73.

For example, such law

> often does *not* discourage the well-heeled few from engaging in political speech ... , because they can afford to hire professionals to help them comply with the law.
>
> When others cannot afford such help, such law often has the effect of shutting them out of—and leaving the well-heeled few with less competition in—the marketplace of ideas. Indeed, the most insidious aspect of such law is the extent to which it protects big players *at the expense of little players*. Those who advocate or defend such law beyond First Amendment boundaries are in effect protecting the well-heeled few. They are in effect protecting big players at the expense of little players. While big players and little players have the same First Amendment rights, big players have no right—none—to political-speech law protecting them at the expense of little players.

Triggering at 58 (citations omitted); (*accord* 9TH CIR. DOC. 15 at ADDENDUM.1).

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

RANDY ELF
Counsel of Record
Post Office Box 525
Lakewood, N. Y. 14750
Telephone (202) 423-2122
ForEFilingOnly@gmail.com

December 31, 2019 *Counsel for Amicus*