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.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 369 (2010), this Court rejected the contention that "disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." Instead, the Court applied "exacting scrutiny" to review the constitutionality of the disclaimers and disclosures required for "electioneering communications" under the Bipartisan Campaign Reform Act of 2002. *Id*. at 366-68. Since *Citizens United*, the courts of appeal have uniformly applied exacting scrutiny to state disclosure provisions. The court below applied exacting scrutiny and upheld Montana's "electioneering communications" statute, determining that the statute is substantially related to the State's interests in transparency, informing voters about who is behind the messages vying for their attention, and decreasing circumvention of campaign finance laws.

The question presented is:

Did the Ninth Circuit err when, applying exacting scrutiny, it upheld Montana's electioneering communication statute?

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INTRODUCTION

This case involves a challenge to the State of Montana's electioneering communication disclosure law. This law requires groups that publicly distribute political mailers mentioning a clearly identified candidate shortly before an election to disclose basic information about who they are and their spending so that voters can make informed decisions in state elections. Petitioner National Association for Gun Rights, Inc. (NAGR) argues that the Ninth Circuit erred in failing to apply the "major-purpose test" from *Buckley v. Valeo*, 424 U.S. 1 (1976), which NAGR alleges prevents a state from requiring groups to register and report ongoing campaign spending unless a majority of the group's spending is on political advocacy. According to NAGR, a "deep split" exists among the courts of appeal on how to apply the test.

Whatever relevance a group's major purpose may have to disclosure laws, this is not the case to decide it because NAGR did not raise the issue below, and thus waived it. NAGR's failure to raise the major-purpose argument is evident not only from its briefing and oral argument to the Ninth Circuit, but also by the fact that the court of appeals' decision does not mention the major-purpose test—neither addressing it, adopting it, nor rejecting it.

In addition to waiving its major-purpose argument, NAGR expressly conceded that disclosure provisions can constitutionally apply to issue advocacy, and it abandoned its challenge to disclosure requirements, informing the Ninth Circuit that the propriety of disclosure in this context was a "settled matter."

Having made this concession in the court of appeals, Petitioner cannot now ask this Court to take up the issue.

This Court recently denied certiorari to consider the same challenge to the same state law in a case where the petitioners argued that the court below should have applied the major-purpose test. *Montanans for Community Development v. Mangan*, 139 S. Ct. 1165 (2019). In that case, however, the petitioners consistently advanced the major-purpose argument in the federal courts, and the Ninth Circuit considered and rejected it. *See Montanans for Community Development v. Mangan*, 735 F. App'x 280, 284-85 (9th Cir. 2018). If certiorari was not warranted in *Montanans for Community Development*, even though that case had none of the vehicle problems presented by this case, it is certainly not warranted here.

Moreover, NAGR's claimed circuit split is manufactured because there is no dispute on the standard of review to apply to disclosure laws. Every circuit court to address the question, including the Ninth Circuit, has applied exacting scrutiny to laws requiring disclosure in the electoral context—the standard that this Court has repeatedly affirmed, most recently in *Citizens United*. Nevertheless, NAGR claims that the Ninth Circuit erred by not applying the major-purpose test (without being asked to do so).

No circuit court has adopted NAGR's view. And those that have found a group's major purpose relevant only considered it a non-dispositive factor; the cases were ultimately resolved on whether the statute met exacting scrutiny. Even then, the major-purpose test

became a factor only when a state subjected groups whose major purpose was not political advocacy to the same extensive regulations as full-fledged Political Action Committees (PACs).

Montana's regulations for major-purpose and non-major-purpose groups differ substantially. Major-purpose groups are regulated similarly to federal PACs, while non-major-purpose groups like NAGR are subject to what the Ninth Circuit and the Montana federal district court have repeatedly found to be minimal burdens. So even in those circuits where the major-purpose test may be a factor, it would not be in this case.

The Ninth Circuit correctly determined that the State of Montana's minimal requirements for groups like NAGR are substantially related to the State's interest in deterring corruption, enforcing the State's election laws, and informing voters about who supports and opposes candidates for election. That decision, too, is consistent with this Court's precedent and decisions from other circuits.

The Court should deny the petition.

STATEMENT OF THE CASE

I. Montana's "Electioneering Communication" Statute, and the Different Disclosure Requirements for Incidental Committees and Independent Committees.

Like all citizens, Montanans have a legitimate "interest in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369. This interest extends not only to express advocacy that supports or opposes a candidate, but to issue advocacy and even commercial advertisements that mention candidates shortly before an election. *Id*.

1. Montana, like other states and the federal government, has disclosure laws aimed at furthering the State's legitimate interests in providing the electorate information about groups that spend money on election-related advocacy. Before 2015, Montana did not require disclosure for election-related advocacy communications that fell short of express advocacy but that mentioned clearly identified candidates in the runup to an election. The 2015 Montana Legislature closed this loophole. As Republican Senator Duane Ankey, the primary sponsor of the bill, put it: "Things that look like you are trying to influence an election, when done right before an election, have to be disclosed too." Supp. Excerpts of Record (SER) 5, ECF No. 34 18-35010. The disclosure provision requires groups that spend more than $250 on an "electioneering communication" shortly before an election to provide information about themselves and their spending so that voters can make informed decisions in state elections. *See* Mont. Code Ann. § 13-1-101(16), (31)(d).

Under Montana law, an electioneering communication is 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" refers to or depicts a clearly identified candidate or ballot issue in the election. Mont. Code Ann. § 13-1-101(16)(a). An electioneering communication does not include news stories, communications from a group to its members, commercial communications relating to a candidate's capacity as a business owner or employee, or communications related to a candidate debate or forum. Mont. Code Ann. § 13-1-101(16)(b). Further, to avoid reaching speech that is clearly not related to elections, communications that reference candidates or parties but are "susceptible to no reasonable interpretation other than as unrelated to the candidacy or the election" are not reportable electioneering communications. Mont. Admin. R. 44.11.605(3).

Montana's electioneering communication statute is modeled off the federal electioneering communication statute, with some state-specific distinctions based on differences between state and federal elections. For example, reporting requirements are triggered at $250 for a single expenditure, rather than $10,000 of

combined expenditures. *See* 52 U.S.C. § 30104(f).[1] This difference simply reflects that the amount of money spent in state elections is generally far lower than that spent in federal races. As courts have noted, Montana is "one of the least expensive states in the nation in which to run a political campaign." *Lair v. Motl*, 873 F.3d 1170 (9th Cir. 2017) (citation omitted), *cert. denied*, 139 S. Ct. 916 (Jan. 14, 2019). For example, *Lair* recognized that the average amount raised for a legislative race in Montana was around $8,200, 873 F.3d at 1182-83, which is far lower than the hundreds of thousands, if not millions, of dollars raised in analogous federal races.

Another difference between Montana and the federal system is that groups must report electioneering communications that can reach 100 recipients in the relevant voting districts, rather than 50,000 recipients. *See* 52 U.S.C. § 30104(f)(3)(C). Again, this reflects a distinction between state and federal races. While the relevant audience in a federal congressional race in Montana is the entire State of more than a million people, the relevant audience concerning a state house seat is only 9,894 people; the relevant audience for a state senate seat is 19,788.[2] The difference in the number of recipients follows from the differences in state and federal elections themselves.

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[1] Notably, federal law requires persons who make aggregate independent expenditures in excess of $250 to file a statement with the Federal Election Commission. 52 U.S.C. § 30104(c)(1).

[2] *See* https://www.ncsl.org/research/about-state-legislatures/2010-constituents-per-state-legislative-district.aspx.

2. By statute, a group that spends more than $250 on a single electioneering communication shortly before an election or on express advocacy is considered a "political committee." Montana law defines a "political committee" as a "combination of two or more individuals" or groups like corporations, partnerships, or associations that receive contributions or make expenditures to engage in express advocacy or its functional equivalent to support or oppose candidates or to make electioneering communications. Mont. Code Ann. § 13-1-101(31). A group is not considered a political committee, however, unless it spends more than $250 on a single qualifying communication. *Id*.

Because not all political committees engage in the same level or type of election-related advocacy, Montana law recognizes four distinct types of political committees: independent committees, ballot issue committees, political party committees, and incidental committees. Mont. Code Ann. § 13-1-101(31)(b). Independent committees and incidental committees are the primary sources of independent expenditures in Montana elections and are the only committees relevant in this case.

Independent committees are committees whose primary existence and focus is on ongoing election advocacy. Mont. Code Ann. § 13-1-101(24). They are the Montana committees most analogous to PACs under the federal system. An independent committee's primary purpose is to receive contributions and make expenditures in elections to support or oppose candidates or ballot issues. Mont. Code Ann. § 13-1-101(24). An incidental committee, on the other

hand, is not specifically organized or maintained for the primary purpose of supporting or opposing candidates. However, it may become a committee in an election by receiving contributions to support or oppose candidates or by making an expenditure on express advocacy or an electioneering communication. Mont. Code Ann. § 13-1-101(23).

All political committees file a statement of organization with the Montana Commissioner of Political Practices (Commissioner) by filling out a short fill-in-the-blank C-2 form listing the committee's name and address, the treasurer/contact person, a bank name and address,[3] a brief description of the committee, and the candidate names identified by expenditure. The statement takes less than ten minutes to complete. *See* Pet. App. 55; *see also National Ass'n for Gun Rights v. Murry* (*NAGR I*), 969 F. Supp. 2d 1262, 1265 (D. Mont. 2013).

Political committees in Montana are subject to different reporting and disclosure obligations based on their level of election-related advocacy. Petitioner's implication that "any group that makes more than $250 of 'expenditures'" is subject to the same PAC-like disclosure requirements, Pet. 8, is demonstrably incorrect as determined by every court to have considered the issue. Rather, instead of using a one-size-fits-all disclosure system, Montana employs a

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[3] NAGR misrepresents that a committee must "establish a *separate* bank account." Pet. 9 (emphasis added). Rather, a committee may designate its current bank if it is authorized to conduct business in Montana, as all national banks are.

sliding-scale approach, with disclosure requirements increasing as political activity increases. *See NAGR I*, 969 F. Supp. 2d at 1267-68 (comparing the different reporting requirements for independent and incidental committees). Independent committees have the most reporting and disclosure obligations, while incidental committees have the least. *Compare* Mont. Code Ann. § 13-37-229 *with* Mont. Code Ann. § 13-37-232.[4]

Independent committees file their disclosures with the Commissioner on a ten-page C-6 form, on which they report, among other things: beginning and ending cash balances; receipts, including information such as the contributor's name, address, occupation and employer, and the date of contribution; and expenditures, including information such as the recipient's name, address, occupation and place of business, the date of expenditure, and a brief description of the purpose of the expenditure. *See* Mont. Code Ann. § 13-37-229; *NAGR I*, 969 F. Supp. 2d at 1267-68. Because independent committees are ongoing, they file reports in off-election years and file updated C-2 forms each election cycle.

By contrast, incidental committees that make contributions or expenditures report on a three-page C-4 form. *See NAGR I*, 969 F. Supp. 2d at 1267-68. Unlike independent committees, incidental committees

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[4] While independent committees are similar to PACs in the federal system, an incidental committee's disclosure requirements are more akin to those required for federal electioneering communications. *See* FEC Form 9 for Electioneering Communications, available at: https://www.fec.gov/resources/cms-content/documents/fecfrm9.pdf.

do not report contributions unless the contribution is specifically earmarked for a specified candidate or ballot issue or unless the incidental committee requested the contribution to support its election advocacy. Mont. Code Ann. § 13-37-232(1), (4). Failure to comply with registration and reporting requirements may result in civil penalties, but not criminal penalties. Mont. Code Ann. §§ 13-35-103, 13-37-128.

Petitioner's assertion that Montana requires "multiple reports, even if the group makes only one 'electioneering communication' during the relevant election period" is also incorrect. Pet. 7. To the contrary, an incidental committee that makes a single expenditure can satisfy all registration and reporting obligations in a single filing. *See* Pet. App. 56 ("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 [filing.]"). Incidental committees usually do not file ongoing reports because they do not engage in political advocacy post-election. *See NAGR I*, 969 F. Supp. 2d at 1268.

As such, federal courts have repeatedly found that Montana's disclosure requirements on incidental committees are minimal. *See* Pet. App. 32; *Montanans for Community Development*, 735 F. App'x at 284 (disclosure requirements "not overly burdensome"); *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1034 (9th Cir. 2009) (observing that reporting burdens were "not exceedingly onerous"); *NAGR I*, 969 F. Supp. 2d at 1267 (requirements on incidental committees are

"minimal and straightforward"); *National Ass'n for Gun Rights, Inc. v. Motl*, 188 F. Supp. 3d 1021, 1033 (D. Mont. 2016) (quoting *NAGR I*, 969 F. Supp. 2d at 1270) (public's informational interest outweighs the "minimal burden" of incidental committee disclosure requirements).

II. Petitioner's Challenge to Montana's Electioneering Communication Statute.

1. NAGR wanted to circulate political advertisements that mentioned candidates in the 60 days preceding elections during the 2018 election cycle; specifically, it wanted to send mailers "to inform Montanans of the positions and voting records of public officials and candidates regarding the Second Amendment." Pet. App. 51 n.3 (citation omitted). NAGR asserted that many public officials "inaccurately claim to strongly support the rights of citizens to keep and bear arms as well as to engage in lawful self-defense," and that "NAGR seeks to inform the public of the identities of these officials, as well as provide the public with information about these officials' voting records." Excerpts of Record (ER) 32, ECF No. 23 18-35010. NAGR stated that the mailers it sought to send shortly before the election would contain "the positions and voting records of public officials and candidates regarding the Second Amendment." Pet. App. 51. NAGR asserted, however, that it would not send these political mailers if it had to comply with Montana's disclosure requirements. *Id*. n.3.

NAGR sued the Commissioner, challenging Montana's electioneering communication statute as overbroad because it required issue-advocacy groups to

register as political committees and comply with disclosure regulations if their advocacy included a candidate's name. ER 28.[5] NAGR alleged that Montana's electioneering communication statute was overbroad because it reached issue advocacy. ER 39. NAGR did not allege that the statute was unconstitutional because it was not limited to groups with the major purpose of nominating or electing candidates. ER 39. Rather, NAGR's claim was that the State simply cannot regulate any issue advocacy—full stop. ER 38-39.

Both Montana and NAGR moved for summary judgment. NAGR did not present a major-purpose argument to the district court. Rather, NAGR again claimed that Montana's electioneering communication statute was overbroad because it reached issue advocacy, which NAGR asserted was "outside of the government's power to regulate." SER 27; Pet. App. 52-53. NAGR's position continued to be that "disclosure requirements are only appropriate for groups that engage in express advocacy." Pet. App. 53.

2. The district court issued a decision granting NAGR's motion in part and granting Montana's motion in part. Pet. App. 42. Regarding NAGR's challenge to Montana's electioneering communication provision, the court rejected NAGR's position that Montana could impose disclosure requirements only on groups that engage in express advocacy. The court observed that both this Court and the Ninth Circuit, following

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[5] NAGR's complaint raised two other challenges that are not relevant to its Petition.

Citizens United, had rejected the notion that disclosure must be limited to only express advocacy. Pet. App. 53. Rather than applying an artificial bright-line rule, the court applied exacting scrutiny to NAGR's challenge to the electioneering communication statute, which NAGR conceded was the appropriate test for determining whether the statute was constitutional. Pet. App. 54.

Under exacting scrutiny, the court determined that the challenged law was "'substantially related to a sufficiently important governmental interest.'" Pet. App. 54 (quoting *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010)). The district court determined that Montana's disclosure laws serve "important, if not compelling, government interests," including increasing transparency, informing Montanans about who was behind the messages competing for their attention, and preventing circumvention. Pet. App. 54. The court observed that this Court had already recognized the importance of these interests. *Id*. (citing *Citizens United*, 558 U.S. at 369).

In upholding the disclosure law, the court recognized that Montana does not impose one-size-fits-all disclosure requirements on election spending; rather, the disclosure obligations "are tailored to the degree of an organization's political activity and the timing of its communications." Pet. App. 55. The court rejected NAGR's attempt to analogize Montana's laws to those held unconstitutional by the Seventh Circuit in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). Whereas the disclosure laws in

Barland "indiscriminately imposed full-blown PAC duties and required complicated and detailed reporting requirements," Montana's were "straightforward," imposed "minimal burdens," and were tailored to a group's political activities. Pet. App. 52 n.4 (internal quotation marks and citations omitted).

Observing that NAGR would likely be considered an incidental committee, the court rejected the argument that disclosure requirements were too burdensome and determined that "registering as an incidental committee imposes a minimal burden." Pet. App. 55. The court noted that the statement of organization form was available online and that it would take NAGR less than ten minutes to provide the basic information, including the treasurer/contact name, its committee type and purpose, a list of the names of candidates by expenditure, and the name and address of its bank. *Id*. As for reporting, the court noted that, if NAGR sought to make only a single expenditure, it could accomplish all the reporting requirements in a single filing. Pet. App. 56.

The court further noted the limited reach of the disclosure requirements, citing the numerous statutory exceptions, the spending threshold, the recipient requirement, and the temporal requirement that communications must occur during the "months just before an election" to be reportable. Pet. App. 56-57. The court concluded 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." *Id.* at 57.

3. On appeal, NAGR abandoned any challenge to Montana's disclosure requirements. Indeed, at oral argument, Judge Berzon specifically questioned NAGR on disclosure: "Can I just clarify that you're not complaining about the disclosure requirements?" Video of Oral Argument at 2:10, *NAGR v. Mangan*, 933 F.3d 1102 (March 5, 2019) ("Oral Argument").[6] NAGR's counsel conceded that it was not challenging disclosure and that disclosure requirements were a "settled matter" under *Citizens United* and other cases based on the government's interest in "finding out who's funding particular speech." *Id.* at 2:10-2:30.

NAGR also turned its back on its district court arguments and conceded that a State could "require disclosure" on issue advocacy and that Montana's reporting requirements were minimal; but, it argued, a State could not require "full blown PAC-like reporting obligations" on an issue-advocacy group. Oral Argument at 2:30-2:50, 4:05. NAGR did not present a major-purpose argument at oral argument. *Id.* at 0:00-13:20, 28:35-30:48. Rather, NAGR argued that Montana's registration and record-keeping requirements were not substantially related to the government's interests in providing information to the public, increasing transparency, or preventing circumvention. *Id.*

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[6] Video of the oral argument is available on the Ninth Circuit's website: https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015277.

The Ninth Circuit affirmed in part and reversed in part. Pet. App. 1. First, the court followed this Court in rejecting the notion that disclosure requirements could apply only to express advocacy, observing that *Citizens United* had declined to import the distinction between express advocacy and issue advocacy into the disclosure requirement context. Pet. App. 18-19. The court of appeals also rejected NAGR's interpretation of the Seventh Circuit's *Barland* decision, noting that "[c]onsidered as a whole, *Barland*'s reading of *Citizens United* is not to the contrary." Pet. App. 19. The court reasoned that *Barland* had addressed "sweeping disclosure requirements," and had not determined that "appropriately tailored disclosure laws" could apply only to express advocacy. Pet. App. 20.

The court next applied exacting scrutiny to Montana's laws. The court determined that requiring a group's treasurer to be a registered voter did not satisfy exacting scrutiny, and it struck that provision. Pet. App. 35. The court recognized that, although "the State has a strong interest in assuring that it can subpoena treasurers of political committees," and can only subpoena individuals within the State, the interest could be served without requiring a treasurer to be a registered voter. Pet. App. 38. Montana has not cross-petitioned for certiorari on that ruling.

The court determined that the remaining disclosure requirements were substantially related to Montana's important interests in disclosing to the public who is behind political messages, deterring corruption, and preventing circumvention of campaign finance laws. Pet. App. 25-26 (citing *Citizens United*, 558 U.S. at 368;

McConnell v. Federal Election Comm'n, 540 U.S. 93, 196 (2003)). The court found that Montana's disclosure laws allow varying levels of disclosure "commensurate with an organization's level of political advocacy." Pet. App. 27. The court observed that, unlike a PAC, which has significant reporting obligations, an incidental committee like NAGR need only report expenditures, unless their contributions were earmarked or solicited for spending on a specific candidate or ballot issue. Pet. App. 27-28.

Additionally, the court determined that Montana's reporting requirements are "carefully tailored to pertinent circumstances, distinguishing them from one-size-fits-all disclosure regimes that other circuits have invalidated." Pet. App. 30. The court observed that committees making only a single expenditure could fulfill all necessary registration and reporting in one filing. On the other hand, a committee wanting to engage in activity throughout the election cycle could do so by making reports at specific intervals. Pet. App. 29-30.

Finally, the court determined that the requirements associated with registration, namely that a committee provide basic identifying information, appoint a treasurer, use a bank authorized to do business in Montana for contributions and expenditures, and keep up-to-date records, were not onerous. Pet. App. 31-32. This information was necessary to prevent circumvention and allow the State to enforce substantive campaign finance laws. *Id*. Thus, with the exception of the voter-registration requirement for treasurers, the court held that "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." Pet. App. 41.

REASONS FOR DENYING THE PETITION

I. This Case Is A Poor Vehicle for Addressing the Issues Raised in the Petition.

NAGR focuses much of its petition arguing that the Ninth Circuit abandoned *Buckley*'s major-purpose test and created a three-way circuit split for this Court to resolve. Contrary to Amicus's assertion that this case provides a "clean vehicle" for addressing the major-purpose test, Br. of Amicus Curiae Institute for Free Speech 15, this case is an exceptionally poor vehicle because NAGR did not seek the test's application below and conceded that Montana's disclosure requirements complied with "settled law."

NAGR's district court briefing included no argument that Montana's electioneering communication statute was unconstitutional because it was not limited to groups with the major purpose of nominating or electing candidates. Rather, NAGR claimed that "disclosure requirements are only appropriate for groups that engage in express advocacy." Pet. App. 53. NAGR's argument was that states could not impose any regulations on issue advocacy. ER 37-40. In its briefing and oral argument before the Ninth Circuit, NAGR was again silent as to the major-purpose test. Instead, it argued that Montana's regulations did not meet exacting scrutiny. NAGR's Opening Br. 13-14, ECF No. 22 18-35010.

At oral argument, NAGR further narrowed its statutory challenge, maintaining that its challenge was only to the overbreadth of the term "electioneering communications" and not to the accompanying disclosure requirements. Petitioner conceded that the disclosure requirements complied with "settled law" under *Citizens United* and cases going back to *Buckley*. Oral Argument at 2:10. Petitioner further conceded that Montana could "require disclosure" on issue advocacy but argued a State cannot require "full blown PAC-like reporting obligations" on an issue-advocacy group. *Id.* at 2:30-2:50.

Having failed to ask the Ninth Circuit to apply the major-purpose test, or to even address the issue, NAGR cannot now fault the Ninth Circuit's analysis. The court did not address NAGR's recently constructed major-purpose argument because NAGR failed to raise the issue, at all, below. As a "court of review, not of first view," this Court should deny certiorari to review an argument made for the first time in NAGR's Petition. *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018).

Nor can NAGR now challenge Montana's disclosure requirements after explicitly conceding that disclosure for issue advocacy was proper under "settled law." A party's concessions guide how courts decide cases, and parties must therefore be bound by them. *See, e.g.*, *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 676-78 (2010) (stating parties are bound by factual stipulations that lower courts relied on). It is improper for NAGR to concede that the State may require disclosure below, but then ask this

Court to review that very issue. While NAGR may attempt to distinguish disclosure from registration requirements such as listing a treasurer or contact person, those requirements *are* disclosure requirements. Moreover, they are analogous to the required disclosures for federal electioneering communications. *See* FEC Form 9 (requiring, among other things, contact information for the "custodian of records"). NAGR is bound by its concessions, and its concessions make this a poor case to address the issues raised in the petition.

The major-purpose theory, though, is not the only argument that NAGR attempts to raise for the first time in its Petition. NAGR also attempts to broaden its claims by now arguing that Montana's disclosure provisions would apply to small community groups, nature clubs, and the like, and could encompass pamphlets and books. As discussed below, NAGR's interpretive attempts to broaden the reach of Montana's statute are misguided. But perhaps more importantly, NAGR did not make these arguments below. Rather, throughout this litigation, NAGR has tied its claims to its plans to send political mailers that contain public officials' positions and voting records on the Second Amendment. *See* Pet. App. 50-53. Neither the district court nor the Ninth Circuit had an opportunity to consider these new claims, and this Court, as a court of "review" only, should decline to take them up at this late stage. *Jennings*, 138 S. Ct. at 851.

II. There Is No Circuit Split Because Lower Courts Agree on the Standard of Review for Disclosure Laws like Montana's and No Circuit Has Adopted NAGR's Proposed Bright-Line Major-Purpose Rule.

NAGR asserts that a three-way split exists among the circuit courts regarding the proper analysis for disclosure and reporting laws. NAGR is incorrect. First, the courts of appeal are unanimous that the correct constitutional standard to apply to disclosure laws is exacting scrutiny. Second, that courts have upheld some disclosure laws and invalidated others does not illustrate a circuit split, but rather that courts applying exacting scrutiny have determined that some disclosure laws were not substantially related to legitimate government interests, while others were.

1. Before *Citizens United*, there was some confusion about the proper standard of scrutiny to apply to disclosure requirements. *See Brumsickle*, 624 F.3d at 1005 (noting the "somewhat unclear" level of scrutiny). *Citizens United*, however, clarified that the constitutional standard for disclaimer and disclosure requirements was exacting scrutiny. 558 U.S. at 366. As the Ninth Circuit recognized, "[r]ecent Supreme Court decisions have eliminated the apparent confusion as to the standard of review applicable in disclosure cases. The Court has clarified that a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny, meaning that it is substantially related to a sufficiently important governmental interest." *Brumsickle*, 624 F.3d at 1005 (citing *Doe v.*

Reed, 561 U.S. 186, 196 (2010); *Citizens United*, 558 U.S. at 366; *McConnell*, 540 U.S. at 201).

Following this Court's clarification of the standard, the courts of appeal have uniformly reviewed disclosure laws under the exacting scrutiny standard. *E.g.*, *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1244 (11th Cir. 2013) (noting that "every one of our sister Circuits who have considered the question . . . have applied exacting scrutiny to disclosure schemes"); *Justice v. Hosemann*, 771 F.3d 285, 296 (5th Cir. 2014) (applying exacting scrutiny and recognizing that "[o]ther circuits have uniformly adopted the same standard"); *see also Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 136-37 (2d Cir. 2014); *Barland*, 751 F.3d at 840-42 (7th Cir. 2014); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 872 (8th Cir. 2012) (en banc)[7]; *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010); *Real Truth About Abortion, Inc. v. Federal Election Comm'n*, 681 F.3d 544, 549 (4th Cir. 2012); *National Organization for Marriage v. McKee*, 649 F.3d 34, 55 (1st Cir. 2011); *SpeechNow.org v. Federal Election Comm'n*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).

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[7] The Eighth Circuit has questioned whether exacting scrutiny should apply to laws that apply "the full panoply of regulations that accompany status as a PAC" but has nonetheless consistently applied exacting scrutiny to disclosure laws. *Swanson*, 692 F.3d at 875 (citation omitted). Moreover, the Eighth Circuit explicitly rejected arguments like NAGR's that "any disclosure requirement other than 'one-time, event driven reporting' is likely a PAC-style burden, invalid as applied to groups lacking *Buckley*'s major purpose." *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 592 (8th Cir. 2013).

2. NAGR argues that the Fourth, Seventh, and Tenth Circuits have held that *Buckley*'s major-purpose test is required to impose "political committee regulations." Pet. 13. The argument is irrelevant, and incorrect, for two reasons. First, both the cited Seventh and Tenth Circuit decisions applied exacting scrutiny to the disclosure laws at issue, so they do not conflict with the decision below, which also applied exacting scrutiny. The Fourth Circuit also applies exacting scrutiny to disclosure requirements. *Real Truth*, 681 F.3d at 549 ("[A]fter *Citizens United*, it remains the law that provisions imposing disclosure obligations are reviewed under the intermediate scrutiny level of exacting scrutiny.") (citation omitted).[8] While a group's major purpose may have been a factor for some courts, it was not dispositive. *See*, *e.g.*, *Barland*, 751 F.3d at 839-41. Rather, the ultimate inquiry in those cases, as it was for the Ninth Circuit below, is whether the regulation was substantially related to a sufficiently important interest. *See* Pet. App. 16-17.

Second, even those courts that viewed a group's major purpose as relevant did so only when a state applied full-fledged PAC status and burdens to groups whose major purpose was not political advocacy. The Seventh Circuit's decision in *Barland*, the primary case

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[8] Although NAGR leans heavily on the Fourth Circuit's decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), *Leake* predates this Court's clarification that exacting scrutiny applies to disclosure laws. Moreover, in *Real Truth*, the Fourth Circuit recognized that the law at issue in *Leake* was distinguishable from a disclosure law because it "imposed a variety of restrictions on campaign speech, including limits on acceptable contributions and expenditures." 681 F.3d at 553.

that NAGR relies on, provides a good example. There, while determining that a group's major purpose is relevant when subjected to "full-blown PAC duties," the court nonetheless recognized that disclosure could constitutionally apply to groups whose major purpose was not electing candidates. *Barland*, 751 F.3d at 839-41. The court observed that it is "clear that outside groups—even those whose major purpose is not express advocacy—are not completely immune from disclosure and disclaimer rules for their occasional spending on express election advocacy." *Id.* at 839. The Seventh Circuit acknowledged that "[a] simpler, less burdensome disclosure rule for occasional express-advocacy spending by 'nonmajor-purpose groups' would be constitutionally permissible." *Id.* at 841. This follows from *Buckley* itself. *Id.* at 839 ("The major-purpose limitation announced in *Buckley* . . . becomes more significant as the scope and burdens of the regulatory system increase.").

Contrary to NAGR's representation, the Seventh Circuit does not view the major-purpose test as a "constitutional imperative." Pet. 2. Indeed, the Seventh Circuit has expressly declined to apply the major-purpose test to all disclosure systems that apply to political committees, and it has expressly rejected the notion that the limitation is anything more than a product of statutory interpretation. *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 487 (7th Cir. 2012) (reasoning that the major-purpose limitation is "a creature of statutory interpretation, not constitutional command"); *Barland*, 751 F.3d at 839. The reason the "major-purpose limitation" was applicable in *Barland* was because the court faced a

law that was comparable to the one this Court considered in *Buckley*: the law "suffers from the same kind of overbreadth as the federal statute at the time of *Buckley*, so the major-purpose limitation has the same significance here as it did there." *Barland*, 751 F.3d at 839. *Barland* does not stand for the proposition that groups can only be subject to disclosure requirements if their major purpose is express advocacy.

NAGR is also incorrect that *Madigan* and *Barland* represent an intra-circuit conflict. Pet. 2 n.1. Certainly, the Seventh Circuit does not view its cases as conflicting as *Barland*'s discussion of *Madigan* demonstrates. Rather, the cases illustrate the State's point that the court found a group's major purpose to be relevant only when the government subjects groups to the same extensive burdens that apply to full-blown PACs. In *Madigan*, the court held that the major-purpose limitation did not apply because the requirements there were not burdensome like the requirements analyzed in *Buckley*. 697 F.3d at 488. The court noted, though, that the major-purpose limitation could be relevant if the requirements were more robust. *Id. Barland* reiterated this understanding. 751 F.3d at 839 (recognizing that its decision was consistent with *Madigan*'s observation that the major-purpose limitation may become relevant "as the scope and burdens of the regulatory system increase").

Moreover, the major-purpose test was only one factor in the analysis, not a dispositive question as NAGR suggests. Both cases were ultimately resolved on whether the state could meet exacting scrutiny.

Barland, 751 F.3d at 840-42; *Madigan*, 697 F.3d at 477. These cases are not in conflict with each other. Nor are they in conflict with the Ninth Circuit's decision below. Notably, the court below specifically discussed *Barland* and found no conflict between the Ninth Circuit and the Seventh Circuit. Pet. App. 19-20.

The other cases NAGR cites as imposing a major-purpose test likewise found it a factor only when the challenged provision applied full PAC status and obligations to groups. *See Herrera*, 611 F.3d at 675, 677 (major purpose relevant when state imposed "full range of disclosure and report provisions" on non-major-purpose groups, requiring them to report every expenditure and contribution the groups make, "without regard to whether the expenditure was for an election-related expense"); *Leake*, 525 F.3d at 286 (applying major-purpose test where all groups were subject to PAC-like requirements).

In an effort to avoid the distinctions courts have drawn between reporting obligations that amount to "full-blown PAC duties" and lesser disclosure obligations, NAGR repeatedly asserts that states cannot impose "political-committee regulations" on certain groups. *See e.g.* Pet. 13, 16, 20. NAGR never explains what it means by this vague and loaded phrase, but the implication is clear: it would have this Court believe that Montana's disclosure requirements for electioneering communications are identical to full-fledged burdens imposed on groups whose only purpose is to elect or defeat candidates. That is assuredly not the case.

Montana's disclosure requirements for electioneering communications by incidental committees are significantly less burdensome than those imposed on independent political committees, Montana's corollary to a federal PAC. As noted above, incidental committees are subject to fewer reporting requirements than PACs, and federal courts have repeatedly found that Montana's disclosure requirements on incidental committees are minimal and appropriately tailored. Pet. App. 32, 55-57; *Montanans for Community Development*, 735 F. App'x 280; *Canyon Ferry*, 556 F.3d 1021; *NAGR I*, 969 F. Supp. 2d 1262; *National Ass'n for Gun Rights, Inc. v. Motl*, 188 F. Supp. 3d 1021.

Moreover, electioneering communications do not even trigger disclosure obligations unless they are made in the 60 days before voting begins in an election. Mont. Code Ann. § 13-1-101(16). Even then, a communication must cost more than $250, mention a clearly identified candidate, and be publicly distributed in the district where the candidate is running for office to be reportable. *Id.*; Pet. App. 11. For most of an election year and in off-election years, a group like NAGR need not register or report electioneering communications at all. But during the leadup to an election, the Montana public has a right to know who or what is behind the political messages competing for voters' attention. Pet. App. 41.

3. The decision below also does not conflict with the First and Second Circuits. NAGR asserts that, while these circuits do not follow the major-purpose test, they require groups to engage in at least some express

advocacy before allowing a state to impose disclosure obligations. Pet. 16. But neither of the cited decisions support NAGR's view. To the contrary, the First Circuit followed this Court's lead in recognizing that "the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws." *McKee*, 649 F.3d at 55. Like the Ninth Circuit below, the First Circuit resolved the case by applying exacting scrutiny to the challenged disclosure laws. *Id*. at 55-56.

The Second Circuit also did not hold that some express advocacy was required before a state could impose disclosure obligations. Rather, the court reasoned that *Citizens United* removed all uncertainty that disclosure laws could extend beyond express advocacy. *Sorrell*, 758 F.3d at 132. And, like the First Circuit and other circuits, the Second Circuit applied exacting scrutiny to the challenged disclosure laws. The decisions of the First and Second Circuits do not conflict with the Ninth Circuit's decision below nor do they create a conflict among the other courts of appeal.

The state court decision in *Utter v. Building Industry Ass'n of Washington*, 341 P.3d 953 (Wash. 2015), also poses no conflict. The reporting law challenged in *Utter* defined political committee without reference to any purpose test at all, and it contained no limit regarding the purpose of a committee. *Utter*, 341 P.3d at 967. As discussed above, that is not the case in Montana, which distinguishes between independent committees that have express advocacy as their primary purpose, and incidental committees, which do not have express advocacy as their primary purpose

and which have correspondingly lesser reporting obligations. Moreover, though the Washington court did not reach the question of whether political committee registration requirements would be constitutional, the court recognized that exacting scrutiny was the applicable constitutional standard to apply. *Id*. at 968.

In sum, NAGR's claim that the Ninth Circuit decision below conflicts with every other circuit and that the court has "slipped *Buckley*'s leash" rests on the false premise that the courts of appeal apply different standards when reviewing disclosure laws. Pet. 18. But the courts all apply exacting scrutiny. To be sure, some laws have been upheld and others struck down, but that is a function of courts applying the exacting scrutiny standard, not because some courts apply a talismanic major-purpose test to all disclosure requirements.

4. No federal circuit has adopted NAGR's view that the major-purpose test is a bright-line rule prohibiting committee regulation and disclosure unless a group's major purpose is to elect or defeat a candidate. Indeed, circuit courts have recognized that defining a group's major purpose raises a host of line-drawing problems and would lead to perverse results in the disclosure context. *See Brumsickle*, 624 F.3d at 1011; *McKee*, 649 F.3d at 59. For example, if a group's major purpose were determined in relation to whether expenditures on political speech constitute a majority of its annual spending, then small groups with small budgets could be required to register and disclose even though they spent only a small amount on political advocacy, while

large corporations could spend millions of dollars on similar advocacy without being required to register and disclose so long as their expenditures were less than a majority of the group's overall spending.

A simple example highlights the problems with this approach. Consider, for example, two otherwise identical groups that spend $20,000 to inform voters of a candidate's record, with the only difference being the size of the groups' budgets; for the first group, the $20,000 represents 100 percent of its budget, and for the second group, the $20,000 represents 10 percent. Under a major-purpose theory, the State could constitutionally require disclosure from the first group but not the second, even though the voting public would be subjected to the same $20,000 message. This theory defies common sense in addition to lacking any constitutional support.

NAGR's major-purpose theory would undercut the government's informational interest and is divorced from the principles furthered by the exacting scrutiny standard. Among other things, disclosure advances the important and well-recognized interest of providing voters with information so that they can make informed decisions about their elected officials. *See Citizens United*, 558 U.S. at 365. The public's interest in knowing who is behind a message does not diminish based on some unknown group's decision to allocate a lesser percentage of its budget to election-related spending. NAGR's view would allow well-heeled entities to avoid disclosure simply because they have more money in the bank. The unworkability of this proposal is highlighted by the fact that no federal

circuit has adopted it as a bright-line requirement. In sum, NAGR identifies no circuit that conflicts with the Ninth Circuit's decision in this case that warrants this Court's review.

III. The Ninth Circuit Correctly Applied Exacting Scrutiny.

NAGR admits, as it must, that the Ninth Circuit applied the correct test, exacting scrutiny, when analyzing Montana's electioneering communication disclosure provision. Pet. 20-21. Indeed, the Ninth Circuit determined that the registered-voter requirement did not meet exacting scrutiny and struck that requirement. Pet. App. 35. The merits question here is thus one of degree, not kind. NAGR merely quibbles with the result the Ninth Circuit reached. But NAGR's request that this Court analyze the court's application of the correct test demonstrates that this is not an exceptionally important question, or even an important question. Rather, it highlights that this Court should deny certiorari review. Sup. Ct. R. 10 (Petitions are rarely granted when the asserted errors consist of "erroneous factual findings or the misapplication of a properly stated rule of law.").

A. Montana's Disclosure Provision Meets Exacting Scrutiny.

Exacting scrutiny requires a "substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-67 (citation and internal quotation marks omitted). NAGR first claims that Montana "failed to

present evidence or offer explanations for its regulations." Pet. 21. This is false.

Montana's brief to the Ninth Circuit offered a detailed explanation of its important interests in regulating electioneering communications, including providing the electorate with information, gathering data necessary to enforce more substantive electioneering restrictions, and increasing transparency and decreasing circumvention. Answer Br. 19-20, ECF No. 33 18-35010. And Montana relied in part on a prior Ninth Circuit panel's discussion, in a different case, of these disclosure interests. *Id.*

NAGR suggests that Montana should have also presented specific factual evidence demonstrating the need for disclosure. Pet. 21. But NAGR did not raise this issue in the district court below, as Montana noted on appeal, Answer Br. 24, and the Ninth Circuit did not address it in its decision. Indeed, in the district court, NAGR asserted that "no genuine issue as to any material fact" existed. SER 24. In any case, "Montana's disclosure regime furthers identical interests" to those determined important by this Court. Pet. App. 26 (citing *Citizens United*, 558 U.S. at 369; *McConnell*, 540 U.S. at 196). NAGR points to no case requiring Montana to reinvent the wheel. Moreover, states are entitled to rely on "evidence and findings" that other courts have accepted. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393 & n.6 (2000) ("The First Amendment does not require a city, before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city

relies upon is reasonably believed to be relevant to the problem that the city addresses'") (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)).

NAGR also suggests that the law sweeps too broadly compared to the Bipartisan Campaign Reform Act of 2002 (BCRA). Pet. 21. But this is comparing apples to oranges; Montana's political market is tiny compared to the market for federal elections. The Ninth Circuit specifically analyzed Montana's $250 single-expenditure threshold, and determined that this limit ensures "that disclosure requirements do not burden minimal political activity." Pet. App. 31. And Montana's regulation reasonably includes internet communication and print mailers, media used to address Montana voters.[9] NAGR, for example, sent, and seeks to send during future elections, print mailers discussing candidates' voting records on gun issues. Pet. 4 n.2.

As described above, NAGR conflates the burdens imposed on "independent" and "incidental" committees under Montana law. Montana does not impose "full-blown PAC duties" on groups engaged in issue advocacy or treat them "the same" as groups engaged in express advocacy. Pet. 22 (quoting *Barland*, 751 F.3d at 841). On the contrary, Montana's "two-tiered reporting structure" assigns "reporting burdens commensurate with an organization's level of political advocacy." Pet. App. 27. An organization that makes a single expenditure can "fulfill all registration,

[9] NAGR did not raise this breadth of covered communications issue in its appeal below.

reporting, and closing requirements in one filing of two forms." Pet. App. 30. In this respect, Montana's regulation does provide for "simple, event-driven disclosure." Pet. 22. On the other hand, if an organization chooses to make multiple expenditures close to an election, it can disclose on a scheduled basis as opposed to every time it makes a communication, as BCRA requires.

The Ninth Circuit also determined Montana's disclosure provision is "carefully tailored to pertinent circumstances" by, among other things, being limited to the window "within 60 days of the initiation of voting in an election." Pet. App. 29-30. And the "disclosure-related registration requirements" (with the exception of the invalidated registered-voter requirement) reasonably allow Montana to gather "the data necessary to enforce more substantive electioneering restrictions." Pet. App. 31-32 (citation omitted). In short, the Ninth Circuit carefully applied exacting scrutiny and correctly determined that Montana's tailored disclosure requirements meet this standard.

B. Montana's Disclosure Provision Is Narrower than NAGR Represents.

Grasping at straws, NAGR makes yet another argument that it did not raise below: that Montana's disclosure provision applies to pamphlets or books that mention candidates or political parties even if the topic is unrelated to the candidate or election (such as a political reporter's retrospective). Pet. 3, 23-24. This argument is off base for two reasons. First, the provision is tied to elections and voting on the "candidate or ballot issue," and it only applies to

references to clearly identified candidates "in that election," or to political parties subject to an issue on the ballot "in that election" (not political parties in general). Mont. Code Ann. § 13-1-101(16)(a). Second, as discussed above, a communication referencing a candidate or political party is *not* an electioneering communication if it "is susceptible to no reasonable interpretation other than as unrelated to the candidacy or the election." Mont. Admin. R. 44.11.605(3)(a) and (b). Mr. Dennison's book, as described, is unrelated to any particular candidate or election, and its distribution would not require disclosure.

Montana's disclosure provision is appropriately tailored and substantially related to important informational and regulatory interests, consistent with this Court's precedent. This Court should reject NAGR's attempts to inflate the provision's breadth and decline to entertain NAGR's new arguments.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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