No. 19-767

IN THE
Supreme Court of the United States

NATIONAL ASSOCIATION FOR GUN RIGHTS, INC.
Petitioner,

v.

JEFF MANGAN, in his capacity as Montana's Commissioner of Political Practices,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY OF THE PETITIONERS

In its response to the Petition filed by the National Association For Gun Rights, Inc. (NAGR), the State of Montana argues that NAGR waived its claims and, furthermore, no circuit split exists with regard to the level of express advocacy necessary to justify imposing burdensome political-committee regulations. As shown below, both arguments are patently false.

I. NAGR Has Not Waived Its Claims

Montana's claims of waiver are neither legally nor factually sound. An issue is preserved for review when it is "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). And "once a [First Amendment] claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010), quoting *Lebron v. Nat'l Railroad Passenger Corp.,* 513 U.S. 374, 379 (1995).

The central issue in this case is whether Montana can saddle issue-advocacy groups with political committee regulations. NAGR has been pressing this issue from the time it filed its complaint in the District Court four years ago to the framing of its Question Presented in its Petition to this Court.[1]

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[1] D.C. Doc. 1 (Complaint), at 3, ¶ 7, D. Mont. Case No. 16-0023. The District Court addressed the issue. Pet. App. 52 ("Specifically, NAGR argues that the imposition of political committee disclosure requirements is an impermissible burden

Montana takes issue with NAGR not discussing the major-purpose test in the court below. But NAGR repeatedly argued below that this Court's decision in *Buckley* prohibits the imposition of political-committee regulations upon "groups engaged purely in issue discussion." *Buckley v. Valeo,* 424 U.S. 1, 79 (1976). A state law imposing political-committee regulations upon groups engaged only in issue advocacy necessarily violates *Buckley's* major-purpose test, which requires that groups engage in express advocacy as their major purpose before states may regulate them as political committees. The Ninth Circuit's stunning decision in this case allows states to impose political-committee regulations upon groups like NAGR that do not engage in *any* express advocacy.

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on the First Amendment rights of groups who engage in issue advocacy."). NAGR pressed the same issue in its Ninth Circuit briefing. See, *e.g.*, NAGR AOB (9th Cir. Case No. 18-35010), ECF No. 22 at 22 ("Political committee requirements are onerous, and the Supreme Court has long rejected imposing them upon 'groups engaged purely in issue discussion.' *Buckley,* 424 U.S. at 79."). NAGR's counsel emphasized the issue at oral argument:

> And here, the specific question for this Court to answer is this: *When you're dealing with pure issue advocacy, can Montana regulate that by essentially imposing PAC-like burdens?*

Oral Arg., 1:52–2:05 (emphasis added). A recording is at www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015277. The Ninth Circuit addressed the issue at length. Pet. App. 33-34.

Montana's claims of "waiver" by NAGR are misrepresentations of the record. For example, the state complains that "[i]t is improper for NAGR to concede that the State may require disclosure below, but then ask this Court to review that very issue." Resp. at 19-20. The "very issue" upon which NAGR seeks review, however, is whether political-committee regulations can be imposed upon issue-advocacy groups – an issue NAGR has pressed every step of the way from the District Court to this Court.[2] NAGR has acknowledged that requiring simple, event-driven disclosure from issue-advocacy groups passes constitutional muster. Pet. 22, citing *Citizens United*, 588 U.S. at 366-71. Imposing burdensome political-committee regulations upon issue-advocacy groups is a very different issue. *Buckley,* 424 U.S. at 79.

Montana also falsely claims that NAGR "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." Resp. 20. NAGR has not "broadened its claims." It has *always* framed its challenge of Montana's political-committee regulations as an overbreadth claim. Plaintiffs alleging overbreadth may "challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. American Booksellers Ass'n.*, 484 U.S. 383,

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[2] See n.1, *supra.*

392-93 (1988) (citations omitted); see also *Connection Distributing Co. v. Holder*, 557 F.3d 321, 335 (6th Cir. 2009) ("Although 'litigation by hypothetical' generally is frowned upon, if not barred, in other areas of constitutional litigation…it is sometimes *required* in free-speech cases.") (emphasis in original). Besides arguing overbreadth in this Court, Pet. 23-25, NAGR did so in both the District Court and the Ninth Circuit by arguing Montana's laws were needlessly burdening speech by grassroots issue-advocacy groups.[3]

Montana also claims NAGR failed to argue in the courts below that Montana lacked evidence to support its imposition of political-committee burdens on issue-advocacy groups. Resp. at 32. That "waiver" claim, like Montana's other "waiver" claims, is also patently false.[4]

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[3] D.C. Doc. 28 at 11-16 (explaining in detail the Montana statute's overbreadth, then concluding that "Given the significant expense, burden, and chilling effect of political committee regulations on ordinary citizens, grassroots issue-advocacy groups, and 501(c)(4) social-welfare organizations, the [Montana] statute was overbroad."); NAGR AOB (9th Cir. Case No. 18-35010), ECF No. 22 at 13-19 (explaining in detail the Montana statute's overbreadth and also arguing that "any group that merely mentions the name of a Montana candidate, or political party, within 105 days of most elections makes an 'electioneering communication.'"). Both the District Court and the Ninth Circuit addressed NAGR's overbreadth claim on the merits. Pet. App. 3, 13, 21 n.12, 45, 51, 54.

[4] In its motion for summary judgment in the District Court, NAGR argued that Montana "has *failed to prove* that imposing onerous political committee burdens on groups that engage only in issue advocacy (and spend as little as $250 doing so) is necessary to achieve a compelling or even important state interest." D.C. Doc. 41 (Brf in Support of MSJ) at 15, D. Mont.

That Montana makes several claims of "waiver" that are so clearly refuted by the record speaks poorly of its opposition to NAGR's Petition.

II. The Circuits Themselves Acknowledge a Deep Split As to When Political-Committee Regulations Are Constitutional

Montana insists there is no circuit split concerning the level of express advocacy necessary to justify political-committee regulations. Resp. at 21. But the circuit courts *themselves* have repeatedly acknowledged that there is. See, *e.g.*, *Wisconsin Right to Life v. Barland,* 751 F.3d 804, 839 n.23 (7th Cir. 2014) ("Other circuits have taken varying approaches to *Buckley's* major-purpose principle when reviewing state campaign-finance systems."); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 591 (8th Cir. 2013) ("The Courts of Appeals that have addressed the issue are split on whether state campaign-finance disclosure laws can impose PAC status or burdens on groups lacking *Buckley's* major purpose."); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 487 & n.23 (7th Cir. 2012) (comparing the approach taken by the First and Ninth Circuits, which interpret

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Case No. 16-0023 (emphasis added). NAGR also pressed this argument on appeal. NAGR AOB (9th Cir. Case No. 18-35010), ECF No. 22 at 18. ("The Supreme Court has thus made clear that the government must produce at least some evidence showing that the burdens imposed upon protected speech by government regulations are substantially related to an important interest. In this case, the State produced no evidence concerning how imposing political committee burdens upon issue advocacy groups is substantially related to any State interest.").

Buckley's major-purpose rule as one of statutory construction of a federal statute, with the Fourth and Tenth Circuits, which interpret the rule as a constitutional mandate); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 872 (8th Cir. 2012) (contrasting strict adherence to *Buckley's* major-purpose rule by the Fourth and Tenth Circuits with the rule's loose application by the First and Ninth Circuits); *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1009 (9th Cir. 2010) (expressly rejecting the Fourth Circuit's strict application of *Buckley's* major-purpose rule).

Commentators have expounded upon this split. See, *e.g.*, Note, *Disclosure's Last Stand? The Need To Clarify The "Informational Interest" Advanced By Campaign Finance Disclosure*, 119 COLUM. L. REV. 487, 511 (2019) (noting circuit split over whether "'PAC-like' ongoing disclosure burdens can only be assessed to organizations that dedicate more than half of their spending to political activity, regardless of the amount spent by the organization."); Zachary R. Clark, *Constitutional Limits on State Campaign Finance Disclosure Laws: What's the Purpose of the Major Purpose Test?*, 2015 U. CHI. LEGAL F. 527, 529 (2016) ("[c]ircuit courts are split on whether this 'major purpose test' is a constitutional limit that applies to state laws, or is merely statutory interpretation and therefore irrelevant to state disclosure regulation" and that "[t]he impact of this split has enormous ramifications for states seeking to exercise control over campaign finance."); Ciara Torres-Spelliscy, *The $500 Million Question: Are the Democratic and Republican Governors Associations Really State PACs Under Buckley's Major Purpose*

Test, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 485, 520-21 (2012) ("lower courts have split regarding the meaning of *Buckley's* major purpose language," thus "[a]s if campaign finance law did not already give practitioners splitting headaches, the particular dispute has created a circuit split on the issue of whether *Buckley* dictates 'a' (indefinite article) major purpose test or 'the' (definite article) major purpose test."); Douglas Oosterhouse, *Campaign Finance Reform and Disclosure: Stepping-Up IRS Enforcement as a Remedial Measure to Partisan Deadlock in Congress and the FEC,* 65 RUTGERS L. REV. 261, 280 n. 161 (2012); Kristy Eagan, *Dark Money Rises: Federal and State Attempts to Rein in Undisclosed Campaign-Related Spending*, 40 Fordham Urb. L. J. 801, 847-48 (2012) ("Lower courts are divided over whether a 'major purpose' is constitutionally required under the First Amendment and, if so, what constitutes a major purpose."); Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. R., 413, 460-61 n.300 (2012) ("As Justice O'Connor predicted…courts are split on to what extent the 'major purpose' test restricts disclosure of members."); Richard Briffault, *Two Challenges for Campaign Finance Disclosure after Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 1007 n.24 (2011).

Montana's denial of the existence of this circuit split rings hollow in the face of circuit courts and commentators insisting -- for over a decade -- that there is one. And now that split has deepened. Until the Ninth Circuit's decision in this case, the circuit courts fell into two camps – those that apply *Buckley's* major-purpose rule strictly and those that do so

loosely. Pet. at 13-17. But even the latter courts at least paid lip-service to this Court's major-purpose rule and required at least *some* express advocacy as a condition for imposing political-committee burdens. Until this case, none had ignored *Buckley's* prohibition against imposing political committee regulations upon "groups engaged purely in issue discussion." *Buckley,* 424 U.S. at 79. The Ninth Circuit has now jettisoned *Buckley's* constraints entirely by upholding political-committee regulations imposed upon groups like NAGR that do not engage in *any* express advocacy.

A decade of disarray amongst the lower courts concerning this crucial area of First Amendment jurisprudence is enough. Guidance from this Court is sorely needed by state legislators, lower courts, election-law practitioners, and everyone else who participates in one of the thousands of political committees around the nation each election cycle.

III. Montana Has Not Produced Any Evidence Justifying the Imposition of Political-Committee Regulations Upon Issue-Advocacy Groups

Montana's regulations of electioneering communications – *i.e.*, issue advocacy containing the name of a candidate or party made within 85 days of an election – are far more pervasive than federal electioneering regulations. Pet. 6-7. Federal electioneering regulations apply only to large (over $10,000) expenditures on *broadcast* media reaching more than 50,000 persons, and require identification

of a contributor only if he or she gives more than $1000 to broadcast the communication. 52 U.S.C. § 30101(f).

Montana's political committee regulations, by contrast, are triggered anytime a group spends more than $250 on any communication (print or broadcast) which merely contains the name or likeness of a candidate or political party if done within 85 days of an election. Mont. Code Ann. § 13-1-101(16). And despite the State's repeated insistence that its "two-tiered" system minimizes the burdens on "incidental" committees, all Montana political committees are subject to nearly all of the same regulations. Pet. 19-20.

The relatively narrow federal electioneering statute is confined to large broadcast advertisements and was supported by ample evidence. *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (emphasis added) ("[t]he factual record demonstrates that the abuse of the present law not only permits corporations and labor unions to fund *broadcast advertisements* designed to influence elections, but permits them to do so while concealing their identities from the public.") (emphasis added).

Montana, by contrast, did not offer a shred of evidence to the District Court in support of its much broader regulations of both broadcast and printed communications. The state insists that it did not have to "reinvent the wheel" and could rely upon evidence previous courts have accepted. Resp. at 32. But Montana's imposition of political-committee regulations upon issue-advocacy groups are nothing like what other federal courts have approved. The

only regulations of issue advocacy comparable in their expansiveness to Montana's were the Wisconsin regulations that the Seventh Circuit struck down in *Barland*.

Montana's other excuse for failing to present evidence to the District Court was its claim that NAGR "waived" the issue. That claim is patently false.[5]

Apparently aware of how problematic Montana's electioneering laws are, the Commissioner has performed regulatory triage. Even though the Montana Legislature has declared that every communication containing the name of a candidate or political party constitutes an "electioneering communication" when made within 85 days of an election, the Commissioner has promulgated a regulatory exception: a communication 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).

But the basic premise of Montana's sweeping electioneering laws is that the mere mention of a candidate's name 85 days before an election, by its nature, will influence the outcome of that election. Mont. Code Ann. § 13-1-101(16). Now, the Commissioner will somehow divine which of those mentions actually do influence elections – and which do not. He will do this by looking at the "purpose,

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[5] See n.4, *supra*.

timing, and distribution of the communication." Mont. Admin. R. 44.11.605(5). This Court, however, has repeatedly warned against regulating speech on the basis of a speaker's purpose or intent. See*, e.g.*, *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 467 (2007) ("After noting the difficulty of distinguishing between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other, the *Buckley* Court explained that analyzing the question in terms 'of intent and of effect' would afford 'no security for free discussion.'").

Put more simply, all communications identifying a Montana candidate or political party made within 85 days of an election are electioneering communications – unless they're not. The Commissioner now defines an "electioneering communication" much the same way Justice Stewart defined hard-core pornography – he knows it when he sees it. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Grassroots citizens groups deserve more clarity when they contemplate speech on matters of public concern – speech that, unlike pornography, "falls within the core of First Amendment protection." *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 600 (2008) And they deserve less burdensome – and needless – regulation than what Montana imposes.

CONCLUSION

For all of the foregoing reasons, the petition should be granted.

Respectfully submitted,

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