No._____

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 UNITES STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment permits imposing burdensome political-committee regulations upon groups that do not engage in any express advocacy for or against the nomination or election of a candidate.

PARTIES TO THE PROCEEDING

The National Association For Gun Rights, Inc., which was the Plaintiff-Appellant in the court below, is the petitioner in this Court.

Jeff Mangan, who was the Defendant-Appellee in the court below, is the respondent in this Court.

LIST OF DIRECTLY RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

CORPORATE DISCLOSURE STATEMENT

Petitioner National Association For Gun Rights, Inc., is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation that owns 10% or more of Petitioner.

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JURISDICTION

The Ninth Circuit affirmed the District Court's judgment on August 12, 2019. On October 31, 2019, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including December 12, 2019. No. 19A478. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The relevant Montana statutory provisions imposing political-committee regulations upon groups that do not conduct any express advocacy are reproduced at Pet. App. 60-76.

INTRODUCTION

This Court has held that political-committee regulations can be imposed upon "organizations that are under the control of a candidate or the *major purpose of which is the nomination or election of a candidate*." *Buckley v. Valeo,* 424 U.S. 1, 79 (1976) (emphasis added). There has been a deep split among the circuit courts as to how to apply what is often referred to as *Buckley's* "major purpose" test. With the Ninth Circuit's decision in this case, what had been a two-way circuit split on this issue has now fractured into a three-way split.

Three circuits (the Fourth, Seventh, and Tenth Circuit) interpret *Buckley's* major-purpose test as a constitutional imperative and strictly apply it. In so doing, they have prohibited states from imposing political-committee regulations upon a group unless express advocacy (*i.e.*, speech in support of, or opposition to, candidates for public office) is the major purpose of the group.

Panels in three other circuits (the First, Second, and Seventh[1] Circuits) have interpreted *Buckley's* major-purpose test as a product of statutory construction of a federal statute – one that is not binding when interpreting state political-committee regulations. These courts have upheld political-committee regulations requiring at least *some* express advocacy by a group.

The Ninth Circuit in this case has strayed even further by abandoning *Buckley's* major-purpose test entirely. The court now permits the imposition of

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[1] Along with a three-way inter-circuit split, there is also currently an *intra*-circuit split within the Seventh Circuit regarding the application of *Buckley's* major-purpose test. See footnote 6, *infra.*

political-committee regulations (such as the Montana regulations it upheld in the instant matter) upon groups that do not conduct *any* express advocacy.

Forcing groups to register as political committees, especially small community groups that avoid express advocacy and engage only in issue advocacy, raises serious First Amendment concerns. This Court has lamented the burdens of political-committee regulations: "[d]etailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 254 (1986). These regulations decrease the amount of protected speech available to the public. *Id.* at 255 ("[f]aced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports . . . it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.").

The Montana political-committee regulations at issue in this case are especially onerous and can apply even when a group merely distributes books near the time of an election that refer to a candidate or political party. A writ of certiorari is strongly warranted in order to bring clarity to this important area of First Amendment jurisprudence.

STATEMENT OF THE CASE

A. Background

The National Association For Gun Rights, Inc. (NAGR), is a non-profit corporation with its principal place of business in Colorado. Pet. App. 5. It is a grassroots organization with 36,000 members and

supporters in Montana and 4.5 million members in the United States. Its mission is to "defend the right to keep and bear arms, and advance that God-given Constitutional right" by educating members of the public and "urging them to take action in the public policy process." Pet. App. 6.

NAGR is exempt from federal income taxes as a social welfare organization registered under 26 U.S.C. § 501(c)(4). To qualify for this exemption, NAGR must be "primarily engaged in promoting in some way the common good and general welfare of the people of the community." 26 C.F.R. § 501(c)(4)-1. Moreover, "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." *Id.* NAGR is in compliance with these requirements and intends to remain so.

NAGR's activities include informing the public as to where legislators stand on issues related to the Second Amendment and inviting the public to express its views on these issues to legislators and other public officials. Pet.App. 6. NAGR seeks to inform the public about officials' voting records by mailing educational literature to Montanans in 2020 describing those public officials who have supported the rights of citizens to keep and bear arms and engage in self-defense, and those who have not. Pet. App. 6.[2]

NAGR will spend more than $250 to mail this educational literature. Pet. App. 6-7. NAGR does not desire to distribute this educational literature,

[2] The educational literature NAGR desires to mail is materially similar to the mailer found at CA9 Dkt. 23 at ER 45.

however, if the literature will be deemed an "electioneering communication" under Montana law and thereby result in NAGR having to register as a Montana political committee. Pet. App. 7.

B. Montana's Extension of Its Political-Committee Regulations to Groups That Avoid All Forms of Express Advocacy

In 2015, Montana began regulating "electioneering communications," defined as speech that merely *references* either a candidate or a political party so long as it is published near in time to an election.[3] The state ostensibly modeled the law after the Bipartisan Campaign Reform Act (BCRA) enacted by Congress in 2002. In reality, however, BCRA's regulation of "electioneering communications" is far less onerous than Montana's in several respects.

First, the federal statute regulates a very narrow category of speech by limiting "electioneering communications" to only communications that:

- are published via broadcast, cable, or satellite;
- refer to a candidate for federal office;
- are made within 60 days before a general election or 30 days before a primary;
- and can be received by 50,000 or more persons in the applicable voting district.

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[3] Montana defines an "electioneering communications" as any "paid communication that is publicly distributed by radio, television, cable, satellite, internet website, newspaper, periodical, billboard, mail, or any other distribution of printed materials." Mont. Code Ann. § 13-1-101(16). As Montana's statute regulates "any other distribution of printed materials," it is broad enough to sweep even books into its regulatory ambit.

52 U.S.C. § 30101(f)(3).

Second, federal law does not impose any organizational structure on a group making electioneering communications and the reporting required of such groups is a one-time event driven disclosure. Reporting is only required if more than $10,000 in a calendar year is spent to broadcast electioneering communications. 52 U.S.C. § 30101(f)(1). Under federal law, the required disclosure must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of persons who contributed $1,000 or more to the person making the electioneering communication. 52 U.S.C. § 30101(f)(2)(E) & (F). If, after reaching the $10,000 threshold, a group makes another electioneering communication, the group simply makes another one-time event driven disclosure; if the group does not make another electioneering communication, there is no further reporting required by the federal law.

Montana's electioneering-communication regulations sweep far more broadly than their federal counterparts and apply to communications made in practically any medium. Montana regulates communications that:

- are printed as well as those that are broadcast;
- refer to political parties as well as candidates;
- are made within 85 days of a general or primary election;
- can be received by just 100 persons in the applicable voting district, rather than 50,000 persons as required by the federal statute.

Mont. Code Ann. § 13-1-101(16); Mont. Adm. Rule

44.11605(2)(b). And Montana's regulations have a much lower monetary trigger than BCRA. Compare Mont. Code Ann. § 13-1-101(31)(d) (group expenditure of more than $250 requires registration as a political committee) to 52 U.S.C. § 30101(f)(1) (establishing a $10,000 threshold for reporting federal electioneering communications).

What makes Montana's electioneering regulations particularly onerous is that they mandate compliance with a periodic reporting scheme that requires a group to file multiple reports, even if the group makes only one "electioneering communication" during the relevant election period. Federal law, by contrast, requires only the one-time, event driven report described above. Even worse, Montana imposes political-committee regulations upon groups that spend as little as $250.01 on electioneering-communications, thereby turning the groups into regulated political committees.

Montana categorizes political committees as either "independent committees" or "incidental committees."[4] Mont. Code Ann. § 13-1-101(31)(b). Categorization is based upon the group's purpose. An "independent committee" is one that is "organized for the primary purpose" of receiving "contributions" or making "expenditures." Mont. Code Ann. § 13-1-101(24). "Expenditures" include payments made to produce either express advocacy or issue advocacy in the form of "electioneering communications." Mont. Code Ann. § 13-1-101(18)(a). An "incidental committee" is one that is "*not* specifically organized for

[4] Montana also regulates "ballot issue committees" and "political party committees," Mont. Code Ann. § 13-1-101(31)(b), neither of which are at issue in this case.

the primary purpose of supporting or opposing candidates" but incidentally receives "contributions" or makes "expenditures" of more than $250. Mont. Code Ann. § 13-1-101(23)(a) (emphasis added).

Thus, Montana subjects any group that makes more than $250 of "expenditures" to political committee regulations. As stated previously, Montana defines "expenditure" to include "electioneering communications," which are nothing more than issue advocacy referencing the name of a candidate or a political party and published within 85 days of an election. Thus, Montana subjects at least some issue-advocacy groups to political-committee regulations even if those groups do not engage in *any* express advocacy.

Montana requires all political committees, whether "independent committees" or "incidental committees," to do all of the following:

- **File a Statement of Organization.** Mont. Code Ann. § 13-37-201. This includes the name and address of the committee, the names and addresses of affiliated political committees, the complete names, addresses and titles of its officers, and the name, office sought, and party affiliation of each candidate (or ballot) the committee is supporting or opposing; Mont. Code Ann. § 13-37-201; Mont. Adm. Rule 44.10.405. The statement must be filed within five days of the committee's first expenditure. Mont. Code Ann. § 13-37-201.

- **Appoint a treasurer.** Mont. Code Ann. § 13-37-201. Treasurers must keep "detailed

accounts" of the committee's contributions and expenditures. Mont. Code Ann. § 13-37-208. These accounts must be maintained "as prescribed and published in manual form by the Commissioner." Mont. Adm. Rule 44.10.501. All committee accounts, together with all reports filed with the Commissioner, must be kept for at least four years. Mont. Code Ann. § 13-37-208(3), §13-37-231(2). All committee deposits and expenditures must be made through its treasurer. Mont. Adm. Rule 44.10.503.

- **Establish a separate bank account.** Mont. Code Ann. § 13-37-205, MCA. This account must be used for all of the committee's contributions and expenditures. *Id.* All contributions must be deposited in the account within five days of receipt. Mont. Code Ann. § 13-37-207. The committee's account must be in a bank authorized to transact business in Montana. Mont. Code Ann. § 13-37-205.

- **File periodic reports.** Mont. Code Ann. § 13-37-226. Periodic reports must be filed "even though no contributions or expenditures may have been received or made during the period." Mont. Code Ann. § 13-37-228.

- **Disclose the identities of contributors.** Independent committees must disclose the names, addresses, and occupations of all contributors who contribute $35 or more. Mont. Code Ann. § 13-37-229(1). Incidental committees must disclose the same

> information regarding contributors concerning contributions that are (1) designated by the contributor for a specified candidate, ballot issue, or petition for nomination or (2) "made by the contributor in response to an appeal by the incidental committee for contributions to support incidental committee election activity, including in-kind expenditures, independent expenditures, election communications, or electioneering communications." Mont. Code Ann. § 13-37-232(1).

Violations of these rules may result in civil penalties of $500 or three times the amount of an unlawful contribution or expenditure, whichever is greater. Mont. Code Ann. § 13-37-128.

C. Procedural Background

NAGR filed its complaint in the District Court on March 18, 2016. Dist. Ct. Doc. 1. On September 6, 2017, the District Court granted the State's motion for summary judgment with regard to NAGR's Second Claim For Relief.[5] Pet. App. 57. On appeal, the Ninth Circuit upheld Montana's expansion of its political-committee regulations to groups such as NAGR that do not engage in any express advocacy. Pet.App. 41.

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[5] The District Court dismissed NAGR's First Claim for Relief as moot. Pet. App. 50. NAGR did not appeal the court's ruling with regard to that claim. The District Court granted NAGR's motion for summary judgment with regard to its Third Claim for Relief. Pet. App. 58. The State did not appeal that ruling.

REASONS FOR GRANTING CERTIORARI

Political speech is "indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (citation omitted); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self government"). This heightened protection applies regardless of whether the speaker is an individual or entity. *Citizens United*, 558 U.S. at 343 ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'").

While not as severe as outright bans on speech, political-committee regulations can nevertheless infringe upon a group's First Amendment rights. This includes infringement of associational privacy rights whenever groups are required to disclose the identities of their contributors. *Buckley*, 424 U.S. at 66.

Political-committee regulations also decrease the amount of protected speech available to the public. Political committees are burdensome, expensive to administer, and groups must comply with extensive regulations just to speak. *See Citizens United*, 558 U.S. at 337-38 (describing various political committee requirements). When "[f]aced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports . . . it would not be surprising if at least some groups decided that the contemplated

political activity was simply not worth it." *Mass. Citizens for Life Inc.*, 479 U.S. at 255.

Such requirements "cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U.S. at 64; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995) ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit."). They must instead withstand exacting scrutiny. *Buckley*, 424 U.S. at 64. That requires the State to establish a "'substantial relation" between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67, citing *Buckley*, 424 U.S. at 64-65. Exacting scrutiny is demanding:

> In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served…that employs not necessarily the least restrictive means but…a means narrowly tailored to achieve the desired objective.

McCutcheon v. FEC, 134 S.Ct. 1434, 1456 (2014), quoting *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989).

Because political-committee regulations diminish the amount of political speech available in the marketplace of ideas, this Court has never allowed

them to be imposed upon "groups engaged purely in issue discussion." *Buckley,* 424 U.S. at 79. Instead, political-committee regulations can be imposed only upon "organizations that are under the control of a candidate or the *major purpose of which is the nomination or election of a candidate*." *Id.* (emphasis added). The italicized portion of this quote is often referred to as *Buckley's* major-purpose test. The test is premised upon the distinction between "express advocacy," which consists of "communications that in express terms advocate the election or defeat of a clearly identified candidate," *id.*, 424 U.S. at 44, and "issue advocacy," which consists of "speech about public issues…." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 456 (2007). Groups whose major purpose is express advocacy may be regulated as political committees – other groups may not. *Buckley,* 424 U.S. at 79.

I. A Three-Way Circuit Split Now Exists As to the Amount of Express Advocacy That is Necessary to Subject Groups to Political-Committee Regulations.

A. The Fourth, Seventh, and Tenth Circuits Require That Express Advocacy Constitute a Group's Major Purpose In Order to Impose Political-Committee Regulations.

Several circuits have strictly applied *Buckley's* major-purpose test and invalidated state political-committee regulations that apply to groups other than those having express advocacy as their major purpose. For example, the Fourth Circuit held unconstitutional a North Carolina political-committee statute that regulated groups for whom express advocacy was "*a*

major purpose" rather than "*the* major purpose," because the "*a* purpose" scope of the law was too broad:

> [T]he Court in *Buckley* must have been using "*the* major purpose" test to identify organizations that had the election or opposition of a candidate as their only or primary goal — this ensured that the burdens facing a political committee largely fell on election-related speech, rather than on protected political speech….If organizations were regulable merely for having the support or opposition of a candidate as "*a* major purpose," political committee burdens could fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate.

North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274, 287 (4th Cir. 2008) (emphasis in original). The court in *Leake* reached this result because it was "convinced that the Court in *Buckley* did indeed mean exactly what it said when it held that an entity must have '*the* major purpose' of supporting or opposing a candidate to be designated a political committee." *Id.* at 288 (emphasis in original).

The Tenth Circuit cited the Fourth Circuit's reasoning in *Leake* when it invalidated similar political-committee regulations enacted by New Mexico. *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 677-78 (10th Cir. 2010). New Mexico had required any group that spent $500 or more on express advocacy to register as a political committee. This enabled the state to impose political-committee burdens upon the plaintiff (an organization with an

annual budget of over $1 million) based upon an expenditure constituting 5/100 of one percent of its budget. *Id.* at 679. The regulations therefore failed *Buckley's* major-purpose test. *Id.*

The Seventh Circuit in *Wisconsin Right to Life v. Barland,* 751 F.3d 804 (7th Cir. 2014) reviewed Wisconsin regulations that, like Montana's, imposed political-committee regulations upon groups making "electioneering communications," which included "all issue advocacy that refers to a candidate in the lead-up to an election." *Id.* at 825-26. Wisconsin authorities insisted that *Buckley's* major-purpose test was no longer in force. *Id.* at 839. The Seventh Circuit disagreed, describing the test as "an application of the constitutional-avoidance doctrine to address vagueness and overbreadth concerns." *Id.* at 811. The court further held the following:

> The major-purpose limitation announced in *Buckley* has not receded from the scene. It continues in force and effect as an important check against regulatory overreach and becomes more significant as the scope and burdens of the regulatory system increase.

Id. at 839. Because *Buckley's* major-purpose test remains viable, "it's a mistake to read *Citizens United* as giving the government a green light to impose political-committee status on every person or group that makes a communication about a political issue that also refers to a candidate." *Id.* at 836-37. The Seventh Circuit concluded by holding that Wisconsin's attempt to impose political-committee regulations was "unconstitutional as applied to organizations not engaged in express advocacy as their major purpose."

Id. at 844.[6]

Thus, under the major-purpose test established by this Court in *Buckley* and applied by the Fourth, Seventh, and Tenth Circuits, states are prohibited from imposing political-committee regulations upon groups that do not have express advocacy as their major purpose. It follows, *a fortiori*, that Montana's political-committee regulations, which apply to groups that do not engage in *any* express advocacy, would not pass muster in those circuits.

B. The First and Second Circuits Permit Imposition of Political-Committee Regulations Upon Groups That Engage In Some Express Advocacy

While the circuits cited above have strictly applied *Buckley's* major-purpose test, other circuits have not. In *National Organization for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), the First Circuit upheld a Maine statute establishing "non-major-purpose PACs," defined as political committees that spend over $1,500 annually on express advocacy but do not have express advocacy as their major purpose. *Id.* at 42. The court upheld the statute because "[w]e find no reason to believe that this so-called 'major purpose' test…is anything more than an artifact of the Court's

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[6] Besides deepening the inter-circuit split regarding *Buckley's* major-purpose test, *Barland* also created an *intra*-circuit split within the Seventh Circuit. See *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 491 (7th Cir. 2012) (Illinois' "regulation as political committees of groups that lack the major purpose of influencing elections does not condemn the [state's] disclosure law as unconstitutionally overbroad."); *Citizens for Responsibility v. FEC*, 209 F. Supp. 3d 77, 91 (D.D.C. 2016) (noting the intra-circuit split between *Barland* and *Madigan*).

construction of a federal statute." *Id.* at 59.

The Second Circuit cited the First Circuit's decision in *McKee* when it upheld a Vermont statute imposing political-committee regulations upon groups spending $1000 on express advocacy in any two-year election cycle. *Vermont Right to Life Committee, Inc. v. Sorrell,* 758 F.3d 118, 136 (2d Cir. 2014). The court further held that "the Constitution does not require disclosure of regulatory statutes to be limited to groups having 'the major purpose' of nominating or electing a candidate." *Id.* The court in *Sorrell* explicitly disapproved of the Fourth Circuit's holding in *Leake*. *Id.* at 135.

The Washington Supreme Court also explicitly disapproved of *Leake* and refused to strictly apply *Buckley's* major-purpose test. *Utter v. Building Industry Ass'n of Washington*, 341 P.3d 953, 967 (Wash. 2015). But the court acknowledged that a group had to engage in at least *some* express advocacy in order to be regulated as a political committee. *Id.* Thus, "[r]eading some stringent purpose requirement, like the 'a' primary purpose test, into our statute is necessary to satisfy First Amendment concerns." *Id.*

C. The Ninth Circuit Permits Imposition of Political-Committee Regulations Even For Groups that Do Not Engage in *Any* Express Advocacy

Until issuing its decision in this case, the Ninth Circuit required as least some express advocacy by groups as a condition to regulate them as political committees and was thereby aligned with the First and Second Circuits. In *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1009-1010 (9th Cir.

2010), the Ninth Circuit upheld a Washington state political-committee regulation that, like the North Carolina regulations in *Leake*, applied to "groups with 'a' primary purpose of political advocacy." *Id.* at 1008. The court reasoned that having express advocacy as *the* major purpose of a group is a sufficient rather than a necessary condition to satisfy *Buckley*. *Id.* at 1009-1010. Accordingly, states could apply political-committee regulations to additional groups so long as the regulations were "tailored to reach only those groups with *a* 'primary' purpose of political activity." *Id.* at 1011 (emphasis added). Washington's law met this standard and was not overbroad because it did not "sweep[ ] into its purview groups that only incidentally engage in such advocacy." *Id.* Thus, the Ninth Circuit in *Brumsickle* applied a loose interpretation of *Buckley's* major-purpose test.

With its decision in this case, however, the Ninth Circuit has slipped *Buckley's* leash entirely. While the First Circuit, Second Circuit, and Washington Supreme Court have upheld statutes requiring at least *some* express advocacy as a condition for imposing political-committee regulations, the Ninth Circuit upheld Montana political-committee regulations that can apply even when a group does not engage in *any* express advocacy. Pet. App. 41.

The Ninth Circuit's ruling directly conflicts with the Seventh Circuit's decision in *Barland*, which struck down political-committee regulations nearly identical to Montana's. The Ninth Circuit attempted to distinguish *Barland* based upon alleged differences between Wisconsin's political-committee regulations and Montana's "two-tiered reporting structure" that categorizes political committees as "independent

committees" and "incidental committees." Pet. App. 27-28 and n.13. The Ninth Circuit claimed that Montana's independent committees are subject to "more substantial requirements" than incidental committees and thus Montana "imposes reporting burdens commensurate with an organization's level of political advocacy." Pet. App. 27.

But the burdens imposed by Montana upon incidental committees and independent committees are nearly identical. As explained previously, all Montana political committees are required to (1) file detailed Statement of Organization, (2) establish a separate depository in a bank that must be authorized to transact business in Montana, (3) appoint a treasurer who has sole authority (besides a deputy treasurer) to handle the political committee's financial transactions and maintain records for four years, (4) file detailed, periodic reports of all contributions and expenditures made and received during the reporting period.[7]

With regard to identifying contributors, Montana ostensibly requires less information from incidental committees than from independent committees. An independent committee must disclose the identities of all of its contributors. Mont. Code Ann. § 13-37-229. As a practical matter, so must incidental committees. They must identify contributors who (1) expressly earmark their contributions for specific candidates or ballot issues as well as (2) contributors who respond to an appeal by the incidental committee for contributions to support incidental committee election activity, including electioneering communications.

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[7] See pages 8-10, *supra*.

Mont. Code Ann. § 13-37-232. Compliance with latter requirement is highly burdensome and, for larger organizations like NAGR, impossible. NAGR cannot divine which persons gave to NAGR in response to appeals for contributions to fund electioneering communications and which ones gave for other reasons. Dist. Ct. Doc. 15-1. As a result, many organizations such as NAGR would have to identify *all* of their contributors in order to ensure compliance with Montana law.

Montana's political-committee regulations are thus virtually indistinguishable from the Wisconsin political-committee regulations struck down by the Seventh Circuit in *Barland*. By upholding Montana's regulations, the Ninth Circuit has charted a radically different course from that of the Seventh Circuit which, as with the Fourth and Tenth Circuits, strictly apply *Buckley's* major-purpose test. The Ninth Circuit's approach also differs from that of the First Circuit and Second Circuit, both of which have upheld statutes requiring at least *some* express advocacy as a condition for imposing political-committee burdens. Thus, an already deep divide concerning political-committee regulations has now blossomed into a three-way inter-circuit split – to say nothing of the Seventh Circuit's *intra*-circuit split. This issue cries out for guidance by this Court.

II. The Ninth Circuit Manifestly Erred by Upholding the Imposition of Political-Committee Regulations Upon Groups That Do Not Engage in *Any* Express Advocacy

The Ninth Circuit erred in failing to apply *Buckley's* major-purpose test to Montana's political-committee regulations. And its application of exacting

scrutiny missed the mark.

Exacting scrutiny requires the government to muster evidence or at least offer plausible assumptions for restricting protected speech. *Crawford v. Marion County Election Board,* 553 U.S. 181, 235 (2008) ("the force of the [State's] interest depends upon the facts (or plausibility of the assumptions) said to justify invoking it"); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). The federal government did so in support of BCRA:

> The 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.

McConnell v. FEC, 540 U.S. 93, 196 (2003) (emphasis added).

Montana, by contrast, failed to present evidence or offer explanations for its regulations even though they sweep in much more than just broadcast advertisements. Montana's law regulates any printed material referencing a candidate or political party distributed shortly before an election. And the law is triggered by a much lower monetary threshold than BCRA's regulations. Compare Mont. Code Ann. § 13-1-101(31)(d) (group expenditure of more than $250 requires registration as a political committee) to 52

U.S.C. § 30101(f)(1) (federal reporting of electioneering communications required for $10,000 expenditure).

Besides regulating a much wider swath of protected speech than BCRA, Montana's regulations are far more onerous. Rather than simple, event-driven disclosure of the kind approved in *Citizens United*, 588 U.S. at 366-71, Montana imposes political-committee regulations, which raises the same question the Seventh Circuit asked in *Barland*:

> Why impose full-blown PAC duties so indiscriminately? [Wisconsin] does not explain. For groups that engage in express election advocacy as their major purpose, the PAC regulatory system — with its organizational prerequisites, registration duties, and comprehensive, continuous financial reporting — is a relevantly correlated and reasonably tailored means of achieving the public's informational interest. But the same cannot be said for imposing the same pervasive regulatory regime on issue-advocacy groups that only occasionally engage in express advocacy.

Barland, 751 F.3d at 841. Likewise, Montana has never explained why groups that do not engage in *any* express advocacy require full-blown political-committee regulations rather than simple, event-driven disclosure rules. The Ninth Circuit nevertheless upheld the state's regulations. They do not withstand exacting scrutiny – not by a long shot – and the Ninth Circuit manifestly erred when it held that they do.

III. The Imposition of Political-Committee Regulations Upon Groups That Do Not Engage in Any Express Advocacy is an Exceptionally Important Question

The staggering overbreadth of Montana's political-committee regulations makes the question presented by this petition exceptionally important. When challenging an overbroad statute on First Amendment grounds, speakers like NAGR are permitted to assert not only violations of their own rights but also those of non-parties whose speech is also subject to regulation by the statute. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

If Montana is allowed to impose political-committee regulations upon groups that simply recite the name of a candidate or political party within an 85-day time period before an election, large swaths of protected speech will be subject to unnecessary regulation, thereby creating "a serious chill on debate about politics." *Barland,* 751 F.3d at 837. Not only does Montana's statute reach tax-exempt groups like NAGR that avoid express advocacy entirely, it also reaches small community groups. As the Seventh Circuit in *Barland* observed, Wisconsin's political-committee regulations applied when, for example, two neighbors distributed flyers about a school project if the flyers mentioned the positions of local candidates, or when a local nature club distributed a newsletter throughout the community mentioning the positions of local officials towards city parks, or when a Tea Party group distributed pamphlets complaining about high taxes that included local candidates' voting records. *Id.* This was "a far cry" from "BCRA's one-time, event-driven disclosure requirement for federal

electioneering communications" that this Court upheld in *Citizens United*. *Id.* at 841.

Montana's political-committee regulations, which reach issue advocacy referencing not only candidates but also political parties, can chill even larger swaths of protected speech. For example, a group of Montanans that purchases 100 copies of *Inside Montana Politics: A Reporter's View From the Trenches*[8] and distributes them shortly before an election makes an "expenditure" for an "electioneering communication" under Montana law and thereby becomes a political committee.[9]

The likelihood of such large swaths of protected speech being unnecessarily regulated by Montana's overbroad political-committee statutes, and the likely possibility of other states following Montana's lead if

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[8] This book was published earlier this year and authored by Mike Dennison, an award-winning Montana journalist. As one might expect from its title, there are numerous references in the book to the Democratic and Republican Parties. The price of 100 copies of the book would exceed the $250 threshold for a Montana political committee. See <www.amazon.com/Inside-Montana-Politics-Reporters-Trenches-ebook/dp/B07TXKS722>

[9] This example and the examples cited in *Barland* are entirely plausible in Montana because Montana authorities have a long and ugly history of abusing the state's political-committee regulations. For example, the state once attempted to force a church to register as a political committee because its pastor exhorted parishioners to sign a ballot initiative and allowed signatures to be gathered on church property. *Canyon Ferry Baptist Church v. Unsworth*, 556 F.3d 1021, 1025 (9th Cir. 2009). This was too much even for the Ninth Circuit, which declared that "at some point enough must be enough." *Id.* at 1034; see also *id.* at 1037 (Noonan, J., concurring) (describing Montana's enforcement efforts against the church as "petty bureaucratic harassment").

the Ninth Circuit's decision is left undisturbed, make review by this Court essential.

CONCLUSION

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

Respectfully submitted,

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