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 Montana's Commissioner of Political Practices,
Respondent.

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

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONER

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QUESTIONS 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.

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INTEREST OF *AMICUS CURIAE*

The Institute for Free Speech ("Institute") is a nonpartisan, nonprofit organization that works to defend the rights to free speech, assembly, press, and petition. Over the last decade, the Institute has represented individuals and civil society groups in cases at the intersection of political regulation and First Amendment liberties. These efforts have included challenges to campaign finance regulations at all levels of government and have given the Institute substantial experience wrestling with the various standards announced by this Court and the federal courts of appeal.[1]

[1] Pursuant to Rule 37.6, *Amicus Curiae* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court's Rule 37.2, all parties were timely notified of *Amicus's* intent to file this brief, and they have provided their consent.

SUMMARY OF ARGUMENT

The First Amendment represents our society's decision to shelter speech, association, and matters of conscience from unnecessary governmental intrusion and censure. Because the last fifty years have seen a dramatic increase in regulation of core political speech pursuant to various campaign finance laws, this Court's precedents in that area have been central to the development of First Amendment jurisprudence.

This Court has recognized the fundamental tension inherent in campaign finance regulation. While governments may have an interest in capturing potentially corrupting activity and informing voters about the financial constituencies standing behind a given candidate, they must act without sweeping civil society into a bureaucratic world of standards, restrictions, and permissions. This Court has already weighed that balance and ruled in *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam), that only groups with the "major purpose" of electoral advocacy may be regulated as political committees. That prescription has been ignored, in this case and elsewhere.

"Speech concerning public affairs is more than self-expression; it is the essence of self government[,]" *Garrison v. La.*, 379 U.S. 64, 74-75 (1964), and heightened constitutional protections apply to such expressions regardless of whether the speaker is an individual or a group, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010). *Buckley*'s rule shields civil society from overregulation, and this Court has repeatedly held that political committee regulations can place undue burdens on community groups focused on issue advocacy. *E.g. Mass. Citizens*

for Life, Inc. v. Fed. Election Comm'n, 479 U.S. 238, 254 (1986) ("*MCFL*") ("Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of records, impose administrative costs that many small entities may be unable to bear."). Such regulations threaten to decrease public debate among grass roots civil society groups and the general public. *Id.* at 255 ("[I]t would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.").

The decision below abandons the major purpose test that this Court explicitly crafted to protect vibrant public discourse. The Ninth Circuit's error jeopardizes civil discourse interests, and without this Court's correction and clarification this problem will undoubtedly worsen. The Petition should be granted.

ARGUMENT

I. *Certiorari* Ought to Be Granted to Preserve *Buckley*'s Major Purpose Requirement.

Petitioner succinctly summarizes the severe circuit fracture caused by the Ninth Circuit's decision, which exacerbates a distinct disharmony among states and circuit courts of appeal regarding the possible regulation of core political speech. Pet. 2-3; 13-20. Petitioner also succinctly describes how Montana imposes political committee ("PAC") reporting requirements on groups that do not engage in *any* express advocacy. *Id.* at 7-8. *Amicus* will not repeat those observations. Rather, *Amicus* writes to provide reasons why this Court should again clarify *Buckley*'s major purpose test in order to protect the

constitutional speech rights that test was designed to foster and shelter.

Because "those who govern should be the last people to help to decide who should govern," *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014) (emphasis omitted), this Court has strictly limited the tools available to governments wishing to regulate the participation of Americans in political discourse. These rules preserve our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). One of these limits on government power is the "major purpose test" that the Ninth Circuit's decision eviscerates.

That rule comes from *Buckley*, this Court's "seminal campaign finance case." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 757 (2011) (Kagan, J. dissenting). There, this Court narrowly construed a federal statute that imposed PAC status—which consisted of contribution limits together with registration, reporting, and donor disclosure requirements—on civil society groups. This Court held that such regulations were constitutionally impermissible unless the group was "under the control of a candidate or the major purpose of [the group] … [was] the nomination or election of a candidate." *Buckley*, 424 U.S. at 79.

This rule, designed to save an otherwise overbroad statute from invalidation under the First Amendment, ensures that the registration and disclosure burdens of PAC status fall only upon unambiguously political organizations, those which

are "by definition, campaign related." *Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 265 (O'Connor, J., concurring) ("In *Buckley*, the Court was concerned not only with the chilling effect of reporting and disclosure requirements on an organization's contributors, but also the potential burden of disclosure requirements on a group's own speech.") (internal citations omitted).

Consequently, the "major purpose" requirement is a crucial limit on the state's capacity to regulate civil society and, at the federal level, thanks to *Buckley* and its progeny, it works to protect issue speakers from the thicket of registration, regulation, filing requirements, contribution limits, and disclosure mandates. *See NAACP v. Ala.*, 357 U.S. 449, 466 (1958) (First Amendment protects "the right" of all Americans "to pursue their lawful private interests privately and to associate freely with others in so doing").

It also is a clear and simple test: if an organization spends more than 50 percent of its expenditures on speech which either expressly advocates an outcome in electoral contests for public office, *Buckley*, 424 U.S. at 44 n. 52,[2] or is the functional equivalent of such speech,[3] the government may impose "a more

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[2] "[C]ommunications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *See also* 11 C.F.R. § 100.22(a).

[3] 11 C.F.R. § 100.22(b) ("[I]f the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."); *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007); *see also MCFL*, 479 U.S. at 265 (O'Connor, J., concurring).

formalized organizational form," *MCFL*, 479 U.S. at 266 (O'Connor, J., concurring), including the regular filing of disclosure reports. Otherwise, it may not. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012) ("*MCCL*") (en banc) (striking down campaign finance law that imposed repeated disclosure requirements for making a single election related communication); *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016) (striking down PAC requirements, including regular filing of disclosure reports, for group spending less than $3,500 on express advocacy).

Nevertheless, circuit courts of appeal have increasingly refused to apply the *Buckley* major purpose standard, failing to comply with "past judicial efforts to ensure laws imposing PAC status and accompanying burdens are limited in their reach." *MCCL*, 692 F.3d at 872. Despite this Court's instruction that appellate courts should "leav[e] this Court the prerogative of overruling its own decisions," *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), the First, Second, Seventh, and Ninth Circuits "have concluded that the major purpose test is not a constitutional requirement." *Vt. Right to Life, Inc. v. Sorrell*, 758 F.3d 118, 135 (2d Cir. 2014); *accord Ctr. for Individual Freedom v. Madiga*n, 697 F.3d 464 (7th Cir. 2012); *Nat'l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34 (1st Cir. 2011). As Petitioner notes, the present case is now the most drastic departure from *Buckley*'s precedent, as it essentially eliminates the major purpose test entirely. Pet. 2-3; 13-20.

Without review here, the major purpose test risks becoming a dead letter nationwide—as it now is in the Ninth Circuit—allowing uneven state regulation of core political speech in different areas of our country. And without the protection of *Buckley*'s standard, many organizations, including grassroots groups lacking counsel or sophisticated internal procedures, will be thrust into a regulatory structure aimed at groups specifically built for high dollar electioneering. *See United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972) (finding that it would be "abhorrent" to regulate "every little Audubon Society chapter" as a PAC); *cf. Citizens United*, 558 U.S. at 324 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney … or seek declaratory rulings before discussing … salient political issues."). Because many small groups will have failed to register and comply with PAC status laws, they will invite prosecution and substantial civil and even criminal penalties. *See Sampson v. Buescher*, 625 F.3d 1247, 1251 (10th Cir. 2010) ("[O]ppos[ing] annexation, Plaintiffs," "purchased and distributed No Annexation signs .... On July 3, 2006, Putnam, with Hopkins as her attorney, filed a complaint with the Secretary of State alleging that Plaintiffs had violated the campaign finance law…."). Others will unquestionably choose to stay silent. *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 488 (D.C. Cir. 2016) (campaign finance regulation "chills speech"). Such regulation is what Petitioner faces here.

This Court ought to grant the writ, both to restore the integrity of its own precedents and to resolve the circuit fracture broadened by the Ninth Circuit.

II. The Major Purpose Requirement Serves as an Important Constitutional Check on State Intrusions Upon Free Political Expression.

This Court's decision not to intervene and preserve the *Buckley* major purpose test in earlier cases, *e.g., Corsi v. Ohio Elections Comm'n*, 571 U.S. 826 (2013); *Indep. Inst. v. Buescher*, 558 U.S. 1024 (2009), has allowed the present case to turn a fracture in a cornerstone precedent into a fissure, leaving core political speech on a precarious precipice.

As a result, government intrusion on core political speech grows. In addition to the circuit disharmony already noted, many States seem to have taken this Court's silence as an invitation to do away with the major purpose requirement and impose PAC status upon the expenditure of an arbitrary, and often low, dollar figure. *See*, *e.g.*, Mo. Rev. Stat. § 130.011(7)(a) (threshold for PAC registration and reporting is receiving contributions or making expenditures totaling more than $500 during a calendar year, or receiving contributions totaling more than $250 during a calendar year from a single contributor). The same is true in the present case, as Montana's statutory scheme would impose PAC-like status—including repeated filings and organizational structure requirements—on issue-advocacy groups spending a mere $250 on electioneering communications, which include pamphlets or books that merely reference a candidate or political party, within 85 days of a primary or general election. *See* Mont. Code Ann. § 13-1-101(16) (defining "electioneering communication"); *id*. § 13-1-101(31)(d) (group expenditure of more than $250 requires registration as a political committee); *id*. § 13-37-201

(organization statement filing requirement); *id.* § 13-37-201 (organizational treasurer and treasurer activities requirement); *id.* § 13-37-226 (periodic reports requirement); *id.* § 13-37-229(1) (contributor identity disclosure requirement); *see also* Pet. 7-10. This intrusion on core political speech is now allowed, under the Ninth Circuit's ruling, even as applied to groups that do not conduct *any* express advocacy.

While this Court has, as discussed *supra*, held that the government may regulate speech about candidates, public officials, and the issues of the day, it has demanded that such regulations be narrowly tailored to vindicate especially crucial governmental interests. *NAACP v. Button*, 371 U.S 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."). Laws that impose PAC status, with its attendant registration, reporting, and disclosure requirements are subject to—at minimum—exacting scrutiny, and "cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U.S. at 64. In short, "[i]n the First Amendment context, fit matters." *McCutcheon*, 572 U.S. at 218.

Buckley directly addressed the proper constitutional fit and memorably declared that substantial segments of civil society should be unregulated or minimally regulated. There, the Court confronted the Federal Election Campaign Act of 1971 ("FECA")—86 Stat. 3—which imposed a $1,000-per-year expenditure threshold (in 1976 dollars), rather than Montana's $250 threshold—for each two-year electoral cycle. *See* FECA § 431(d); *Buckley*, 424 U.S. at 79 n.105 (quoting same). Despite its higher

monetary trigger, FECA would thus have turned many civil society groups into organizations that could speak only upon the condition of registering and publicly disclosing sensitive data concerning their financial supporters.

To prevent the meritless regulation of wide swaths of First Amendment activity, this Court substantially narrowed FECA's reach to ensure a constitutional fit between a given regulation and an identifiable state interest. *Buckley* interpreted the relevant definition of "expenditure" to reach only communications containing "express words of advocacy," such as "Smith for Congress" or "vote for" Smith. 424 U.S. at 80 n. 108. It further held that "[t]o fulfill the purposes of the Act, [PACs] need only encompass organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate*." *Id.* at 79 (emphasis provided). This holding ensured that invasive and burdensome government regulation reached only those activities that were, "by definition, campaign related." *Id.*

Subsequent decisions of this Court have expanded the type of speech that must be disclosed by organizations that are not PACs to include one-time reports concerning speech close in time to an election, *Citizens United*, 558 U.S. at 366-367 (upholding disclosure and disclaimer requirements for corporations making "electioneering communications"), but this Court has not permitted PAC status to be imposed beyond the bounds announced in *Buckley*. Accordingly, *Buckley* and its progeny have protected a large segment of civil society

groups, and individuals, from federal regulation, even though the Court undoubtedly knew that groups engaging in limited amounts of express advocacy would not have to register with the government beyond reporting specific expenditures, nor would they be required to disclose their donor lists.

This commitment to a vibrant political sphere, one in which the citizens monitor their representatives, is also seen in the differences between the required disclosures and regulatory burdens the *Buckley* and *Citizens United* Courts allowed, respectively, for PACs and for independent speech. *See MCCL*, 692 F.3d at 872 (noting "past judicial efforts [by the Supreme Court and other courts] to ensure laws imposing PAC status and accompanying burdens are limited in their reach"). The Court, in *Buckley* and since, has allowed disclosures from groups making independent expenditures, but these regulations must reflect "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-367 (quotations omitted).

Here, it is undisputed that Petitioner is neither under the control of a candidate, nor does it have the major purpose of nominating or electing any particular would-be politician. Yet the Ninth Circuit requires Petitioners and those similarly situated in Montana to shoulder the exact types of burdens that *Buckley* held could not be imposed on a non-PAC entity.

Compared to Montana's PAC-like burdens placed on entities that may not engage in *any* express advocacy, noted *supra*, the statute that the *Buckley*

Court upheld regarding independent expenditure reports—Section 434(e)—required higher spending on expenditures to trigger disclosure requirements and imposed far fewer regulatory burdens. *See Buckley*, 424 U.S. at 74-82. In addressing groups making incidental independent expenditures, this Court expressly worried that these groups could be lumped together with PACs and saddled with the more onerous PAC regulations. For groups "engaged purely in issue discussion," as well as groups—such as Petitioner—still further removed from electoral politics, the Court concluded that "the purposes" of political regulation "may be too remote." *Id.* at 79-80. Accordingly, the Court defined "expenditure" narrowly, only as "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 80.[4] That is, the expansion of regulation beyond candidates and PACs was "not fatal," because it was "narrowly limited." *Id.* at 81. The law did "not seek the contribution list of any association. Instead, it require[d only] direct disclosure of what [the] group . . . spen[t]." *Id.* at 75.

Similarly, in *Citizens United*, this Court held that limited reporting and registration, well short of PAC status, could apply to speech that was not express advocacy, but was instead "pejorative" toward the presidential candidacy of then-Senator Hillary Clinton. 558 U.S. at 320, 325. Yet the Court did not allow the government to impose PAC-style regulatory burdens, and in fact contrasted the disclosure at issue

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[4] Such spending included "communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80.

with PAC status. *Id.* at 369. Consequently, government may require that a person file a disclosure statement "identify[ing] the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors." *Id.* at 366. In *Citizens United* the Court did not approve anything beyond the filing of a single report. Unlike Montana's law here, FECA did not demand either continuing reporting or the organization of a committee, committee termination, appointment of officers, repeat filings, or disclosures of funds or contributors unrelated to the expenditures at issue. *Id.*

As noted *supra*, Montana law imposes much greater regulation than the *Buckley* Court permitted only for candidates and PACs. And it does so based on a significantly lower expenditure threshold and, under the Ninth Circuit's ruling, without the requirement of the major purpose test. But these burdens—detailed record-keeping of both contributions and expenditures, including the names and addresses of those making contributions and the date and amount of contribution (and occupation and principal place of business for those making larger contributions); and continued filing requirements, including name, address, and occupation information for all contributors and the amount and date of their contributions—may only be imposed upon speakers with the major purpose of express advocacy. *Buckley*, 424 U.S. at 63-64, 79.

Buckley narrowed the government's ability to impose PAC-style burdens even though the disclosure of donors to other groups might arguably serve some

state information interest. Forgetting this point, Montana imposes these same burdens on entities which do not meet the major purpose test. The Ninth Circuit's interpretation-through-evisceration of the major purpose test forces any individual or group to choose between becoming a PAC (or shouldering PAC-like burdens under another name) and not engaging in even the most incidental electoral speech. As a result, the Ninth Circuit has unconstitutionally increased the level of burden upon independent speakers that the First Amendment permits. *See*, *e.g.*, *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 836-37 (7th Cir. 2014) (holding that "it's a mistake to read *Citizens United* as giving the government a green light to impose political-committee status on every person or group that makes a communication about a political issue that also refers to a candidate"); *MCCL*, 692 F.3d at 872, 876-77 (invalidating a law that "substantially extended the reach of PAC-like regulation to all associations").

Our Republic was founded on the belief that the public should monitor the government, that ideas should be expressed and tested, and that this is the preferred and only means of advancing the general welfare and avoiding the danger of seething silence. Reviewing the regulation of core political speech, this Court has balanced our commitment to a vibrant civil sphere and a free republic against the public's need to better understand a candidate's constituency before going to the polls. This case would permit the Court to affirm the continued viability of its precedents and to announce that mere independent speech may not alone trigger PAC-like regulatory burdens.

Moreover, this case provides a clean vehicle doing so. The Ninth Circuit has not advanced a reasonable interpretation of *Buckley*'s major purpose test; it has flatly eliminated it. Faced with such erasure, and the consequent incongruent regulatory framework, this Court can clarify and harmonize the patchwork of different standards that has evolved around our country subsequent to *Buckley*, while providing needed certainty for those engaged in core political speech.

CONCLUSION

This Court should provide Petitioner with a writ.

Respectfully submitted,

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