No. 16-35997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANANS FOR COMMUNITY DEVELOPMENT,

Plaintiff-Appellant,

v.

JEFFREY A. MANGAN, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Montana

BRIEF FOR *AMICUS CURIAE* CAMPAIGN LEGAL CENTER SUPPORTING DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Campaign Legal Center is a nonprofit organization organized under Section 501(c)(3) of the Internal Revenue Code. Campaign Legal Center neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of Campaign Legal Center.

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STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center is a nonprofit, nonpartisan organization that represents the public interest in administrative and legal proceedings to promote the improvement and enforcement of government ethics, campaign finance, and election laws. *Amicus* submits this brief because of its concern about the harm that could result from Appellant's arguments, which run counter to long-settled precedent and would jeopardize dozens of state disclosure laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

If there is one settled area of campaign finance jurisprudence, it is disclosure. The Supreme Court has approved comprehensive disclosure regimes three times in recent years, all by 8-to-1 margins.[2] This Court,

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[1] All parties have consented to the filing of this brief. No party or party's counsel authored any part of this brief, and no person, other than *amicus*, contributed money to fund its preparation or submission.

[2] *John Doe No. 1 v. Reed*, 561 U.S. 186, 199 (2010); *id.* at 216-18 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 228 (Scalia, J., concurring in the judgment); *Citizens United v. FEC*, 558 U.S. 310, 366-71 (2010); *McConnell v. FEC*, 540 U.S. 93, 194-99 (2003), *overruled in part on other grounds by Citizens United*, 558 U.S. 310; *id.* at 321-22 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also McCutcheon v. FEC*, 134 S. Ct. 1434, 1459-60 (2014) (plurality opinion) (touting disclosure as an alternative to other campaign finance restrictions).

too, has recently turned away two challenges to state disclosure provisions remarkably similar to those at issue in this case. *See Yamada v. Snipes*, 786 F.3d 1182, 1185 (9th Cir.), *cert. denied sub nom. Yamada v. Shoda*, 136 S. Ct. 569 (2015); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 994-95 (9th Cir. 2010) ("*HLW*"). Indeed, recognizing the importance of information in our electoral process, courts have consistently sustained a diverse range of disclosure requirements against constitutional attack.

Now, in defiance of state law, Montanans for Community Development ("MCD") seeks to spend in Montana elections without releasing information about its funding. To this end, it challenges a number of Montana's campaign finance disclosure requirements—the very sorts of requirements that courts have upheld again and again. As the district court below found, MCD's challenge wholly lacks legal merit. This Court should affirm that finding.

First, Montana's disclosure provisions serve, rather than detract from, First Amendment interests. Voters require a basic level of information about who funds the political messages they hear. This disclosure both enables the meaningful electoral choices that constitute

self-governance and allows voters to hold their elected officials accountable. Political disclosure is "integral" to "the American ideal of government" that the First Amendment protects. *HLW*, 624 F.3d at 1017.

Second, MCD has no basis for asserting that the inclusion of a "support or oppose" test in Montana's disclosure laws renders the laws unconstitutionally vague. This standard is based on the "functional equivalent of express advocacy" test created and applied by the Supreme Court in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), and *Citizens United v. FEC*, 558 U.S. 310 (2010); to question the constitutionality of this test is to question the Supreme Court. Even if these laws had gone beyond *WRTL*'s functional equivalent test, this Court and others have already upheld disclosure provisions employing "support or oppose" language against vagueness challenges.

Third, MCD's facial and as-applied challenges to Montana's definition of "political committee" fail. This Court and others have already determined that states can constitutionally require periodic reporting, and that disclosure requirements can constitutionally apply to groups engaging in electioneering communications as well as express advocacy. Combining these two aspects of disclosure does not

alchemically transform constitutional statutes into unconstitutional ones. To claim that it does, MCD must manufacture a number of supposed jurisprudential dividing lines. But when Montana's political committee definition is viewed through the proper standard—whether it meets exacting scrutiny—it clearly passes constitutional muster. Indeed, Montana's disclosure law differs only in minor details from laws this Court has already upheld, and these differences are justified by the specific contours of Montana elections. Finally, because MCD apparently has the primary purpose of engaging in—and plans to spend significant sums of money for—political advocacy, Montana's political committee status is constitutional as applied to MCD.

For these reasons, the district court decision should be affirmed.

ARGUMENT

Political disclosure has been a cornerstone of American election law for more than a century. *See* Federal Corrupt Practices Act, Pub. L. No. 61-274, §§ 5-8, 36 Stat. 822, 823-24 (1910). The Supreme Court has repeatedly recognized that such laws further multiple important governmental interests: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and

gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell v. FEC*, 540 U.S. 93, 196 (2003), *overruled in part on other grounds by Citizens United*, 558 U.S. 310. The first of these, the public's informational interest, is "alone . . . sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369. These interests likewise sustain Montana's disclosure provisions.

I. Disclosure Laws Promote First Amendment Interests.

Appellant is incorrect to maintain that campaign finance disclosure laws should be perceived and reviewed only in terms of the burdens they impose on speech. It fails to recognize that disclosure laws also *advance* and *protect* First Amendment interests. These laws promote the right to self-government and ensure that officeholders remain responsive to the public—both core First Amendment values.

It is shortsighted to understand a disclosure law as simply a constraint on First Amendment freedoms that must be justified by a sufficiently important state interest. The Supreme Court has made clear that disclosure also *advances* such freedoms, criticizing, for instance, the plaintiffs challenging a federal disclosure law for "ignor[ing] the *competing First Amendment interests* of individual citizens seeking to

make informed choices in the political marketplace." *McConnell*, 540 U.S. at 197 (emphasis added) (citation omitted). A court thus must also assess a disclosure measure in terms of the First Amendment values it promotes.

In our representative democracy, "self-government" means that we govern ourselves by collectively debating and voting on who will be our representatives and executive officers.[3] As the Supreme Court has explained, "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." *Reynolds v. Sims* 377 U.S. 533, 565 (1964). In order to fully participate in the political process, however, voters need enough information to determine who supports which positions and why. Therefore, "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach

[3] Through the initiative process, we engage in an even more direct process of self-government. After all, "the initiative system is, at its core, a mechanism to ensure that the people, rather than corporations or special interests, maintain control of their government." *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 533 (9th Cir. 2015) (en banc).

consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339.[4]

As the Court observed when it first upheld the federal campaign finance disclosure provisions:

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.

Buckley v. Valeo, 424 U.S. 1, 66-67 (1976) (per curiam) (footnote omitted). More generally, a key purpose of the First Amendment is to preserve "uninhibited, robust, and wide-open" public debate. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This Court, too, has made clear that "[p]roviding information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment." *HLW*, 624 F.3d at 1005. By providing the public with information that is crucial to self-

[4] *See also Knox v. SEIU*, 567 S. Ct. 298, 308 (2012) ("Our cases have often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment.").

governance, disclosure laws expand robust debate and advance First Amendment interests.

Closely related but distinct from the interest in self-government is the interest in ensuring that elected officials are responsive to the citizenry as they govern. To ensure that responsiveness, the First Amendment guarantees all citizens the right to speak, assemble, and petition the government, and provides for a free press. *See* Burt Neuborne, *Madison's Music: On Reading the First Amendment* 11-12 (2015) (noting that First Amendment "brings together six ideas" that constitute "a rigorous chronological narrative of free citizens governing themselves in an ideal democracy").

"The maintenance of the opportunity for free political discussion to the end that government may be *responsive to the will of the people* and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931) (emphasis added).[5] Regarding the particular information provided by

[5] *See also West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that

campaign finance disclosures, the Supreme Court has long recognized the role that such disclosure plays in keeping officeholders responsive. *See, e.g.*, *Buckley*, 424 U.S. at 67 ("A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return."); *Citizens United*, 558 U.S. at 370 ("[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.").

By ensuring that Montana citizens have meaningful information about the groups seeking to influence their votes, the disclosure provisions at issue here not only protect against corruption but also actively promote core First Amendment values. It is impossible for "'uninhibited, robust, and wide-open' speech [to] occur when organizations hide themselves from the scrutiny of the voting public." *McConnell*, 540 U.S. at 197 (citations omitted). This is why "disclosure

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consent. Authority here is to be controlled by public opinion, not public opinion by authority.").

requirements have become an important part of our First Amendment tradition." *HLW*, 624 F.3d at 1022.

II. The "Support or Oppose" Standard Is Constitutional.

MCD challenges several Montana statutes that require disclosure of entities or disbursements that "support or oppose" a candidate or ballot measure.[6] MCD argues that this "support or oppose" standard is unconstitutionally vague. *See* Appellant's Br. ("MCD Br.") 39-40, 45-46, 48, 55.

MCD's argument is flatly contrary to settled law. Montana has statutorily limited its "support or oppose" regulations to reach only "express advocacy," which is advocacy that

> (a) us[es] express words . . . that call for the nomination, election, or defeat of one or more clearly identified candidates . . . [or] ballot issues . . . ; or
>
> (b) . . . is susceptible of no reasonable interpretation other than as a call for the nomination, election, or defeat of the candidate . . . [or] ballot issue . . . .

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[6] *See* Mont. Code Ann. § 13-1-101(7), (9)(a)(i), (15), (17)(a)(i), (22), (30)(a)(i)-(ii) (defining ballot issue committee, contribution, electioneering communication, expenditure, incidental committee, and political committee).

Mont. Code Ann. § 13-1-101(49). MCD appears to challenge the constitutionality of the second portion of this definition, which is generally known as the "functional equivalent of express advocacy" standard. *See Citizens United*, 558 U.S. at 324-25.[7] But this standard—and Montana's corresponding statutory language—is derived directly from the First Amendment test that the Supreme Court established in *WRTL*: a communication is "the functional equivalent of express advocacy" if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 469-70. And not only did the Supreme Court create this First Amendment test, the Court then explicitly applied it in *Citizens United*. 558 U.S. at 325. The Supreme Court's constitutional standard cannot be unconstitutional. *See WRTL*, 551 U.S. at 474 n.7 (rejecting concurring opinion's argument that functional equivalent of express advocacy standard was "impermissibly vague").

The Montana definition is also essentially identical to the Hawaii statute that this Court, citing *WRTL*, upheld against a vagueness

[7] In its brief, MCD refers to this as the "appeal-to-vote" test. *See, e.g.*, MCD Br. 10, 25, 39.

challenge in *Yamada*, 786 F.3d 1182. The *Yamada* Court held that Hawaii's regulation of express advocacy—which Hawaii had construed as encompassing communications "susceptible to no other reasonable interpretation but as an exhortation to vote for or against a candidate"—was "consistent with . . . Supreme Court decisions," including *WRTL*. *Id.* at 1189. The four other Courts of Appeals to consider this question have reached the same conclusion. *Free Speech v. FEC*, 720 F.3d 788, 795-96 (10th Cir. 2013) (rejecting claim that federal regulation requiring disclosure of functional equivalent of express advocacy was overbroad and unconstitutionally vague); *Real Truth About Abortion v. FEC*, 681 F.3d 544, 552-54 (4th Cir. 2012) (holding that vagueness challenge to functional equivalent standard of express advocacy was "counter to . . . [the] established Supreme Court precedent" of *WRTL* and *Citizens United*); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 69 (1st Cir. 2011) (rejecting vagueness challenge to functional equivalent standard as "misguided" under *WRTL* and "find[ing] no support in the text of *Citizens United*"); *Nat'l Org. for Marriage v. Roberts*, 753 F. Supp. 2d 1217, 1221 (N.D. Fla. 2010) (holding standard "not void for vagueness" because it "was created and applied by the United States Supreme Court"), *aff'd sub*

nom. Nat'l Org. for Marriage v. Sec'y, St. of Fla., 477 F. App'x 584, 585 (11th Cir. 2012) (per curiam) (affirming "for the reasons indicated by the district court and for the reasons [of] the First Circuit in [*McKee*]").

In any event, Montana's "support or oppose" statutes would be constitutional even if they were not limited to express advocacy. In *McConnell*, the Supreme Court rejected a vagueness challenge to a support-or-oppose standard in federal campaign finance law, now codified at 52 U.S.C. § 30101(20)(A)(iii). The Court concluded that words like "'promote,' 'oppose,' 'attack,' and 'support' . . . 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *McConnell*, 540 U.S. at 170 n.64 (citation omitted).

Applying *McConnell*, this Court upheld the constitutionality of a Washington state law that defined "political committee" similarly to Montana's definition, *i.e.*, as any person "receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition" with a primary purpose of "supporting or opposing candidates or ballot propositions." *HLW*, 624 F.3d at 1008-12. And more recently, this Court specifically rejected a vagueness challenge to a state

"support or oppose" standard, holding that Hawaii's disclosure requirement for advertising that "advocates," "supports," or "oppos[es]" was "sufficiently precise" under the holding of *McConnell*. *Yamada*, 786 F.3d at 1192-93 (citing *McConnell*, 540 U.S. at 170 n.64).

The other four Courts of Appeals to have addressed this question have all agreed. The First Circuit rejected a vagueness challenge to multiple Maine statutes that incorporated "promoting," "support," and "opposition," as definitional terms, noting that "*McConnell* remains the leading authority relevant to interpretation of the terms before us." *McKee*, 649 F.3d at 62-64. The Seventh Circuit rejected a vagueness claim involving an Illinois statute that used a "support" and "oppose" standard for disclosure, holding that "[t]his part of *McConnell* . . . forecloses the [plaintiff's] argument that . . . support/ opposition language is unconstitutionally vague." *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 486 (7th Cir. 2012). The Fourth Circuit, reviewing a West Virginia disclosure statute, held that "pursuant to *McConnell*, the words 'promote' and 'oppose' do not render the grassroots lobbying exemption vague." *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 287 (4th Cir. 2013). And the Second Circuit upheld a Vermont disclosure

statute that incorporated a "support or oppose" standard, noting that "[i]n *McConnell*, the Supreme Court explained that these terms are not unconstitutionally vague . . . because they 'clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision.'" *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 128 (2d Cir. 2014) ("*VRTL*") (quoting *McConnell*, 540 U.S. at 170 n.64).[8]

In sum, under the unanimous precedent of the Supreme Court, this Court, and other Courts of Appeals, Montana's statutory incorporation of the "support or oppose" standard is constitutional, regardless of whether it is limited to express advocacy. *See Citizens United*, 558 U.S. at 368-69.

III. Montana's Definition of "Political Committee" Is Constitutional.

MCD also attacks Montana's "political committee" definition, Mont. Code Ann. § 13-1-101(30), as facially overbroad. This claim is meritless.

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[8] The Tenth Circuit also rejected an attempt to "limit disclosure laws to speech that identifies a candidate and 'promotes,' 'supports,' 'attacks,' or 'opposes' that candidate," and held that Colorado could require disclosure for ads that only mention a candidate because the plaintiff "ha[d] not shown that Colorado's requirements are vague or overbroad on their face or as applied." *Indep. Inst. v. Williams*, 812 F.3d 787, 796-97 (10th Cir. 2016).

MCD can succeed in a facial challenge only if it can prove that the political committee definition is constitutional under "no set of circumstances," or at least that "a substantial number of its applications are unconstitutional." *United States v. Stevens*, 559 U.S. 460, 472-73 (2010). However, "[t]he overbreadth doctrine is 'strong medicine' that is used 'sparingly and only as a last resort.'" *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988) (citation omitted). For this reason, the Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008).

Because Montana's reporting requirements are not burdensome, and because they apply only to organizations engaging in express advocacy or electioneering communications, MCD "cannot show that the [political committee definition] fails exacting scrutiny in a 'substantial' number of cases, 'judged in relation to [its] plainly legitimate sweep.'" *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1315 (9th Cir.), *cert. denied*, 136 S. Ct. 480 (2015).

A. Periodic reporting requirements are not unduly burdensome, and disclosure laws can permissibly reach electioneering communications.

At bottom, MCD's overbreadth claim is simply an effort to re-litigate settled doctrine. MCD asserts that section 13-1-101(30) is overbroad because it (1) sets periodic reporting requirements (2) for organizations that engage in electioneering communications rather than express advocacy. MCD Br. 57-61. Cases from the Supreme Court and this Court have already addressed both halves of this argument, and have found them wanting. Montana's disclosure law is not meaningfully different from those already upheld across the country, and is likewise constitutional.

Montana may constitutionally require periodic reports as well as "one-time, event-driven reporting." *Contra* MCD Br. 59. Montana law requires political committees to file a registration certification, reports of significant contributions received in close proximity to an election, and four scheduled reports.[9] These requirements are neither unreasonable

[9] Specifically, the law requires the following: (1) an initial certification once it reaches the $250 expenditure threshold in a given election; (2) reports 35 and 12 days before an election; (3) reports after each contribution of $100 received within 17 days of an election; (4) one

nor unconstitutional. In *HLW*, 624 F.3d 990, and *Yamada*, 786 F.3d 1182, this Court upheld Washington's and Hawaii's similar periodic reporting mandates. Those cases foreclose MCD's "argument that these burdens are substantial," as both held that "materially indistinguishable registration and reporting requirements were 'modest' and 'not unduly onerous.'" *Yamada*, 786 F.3d at 1195 (quoting *HLW*, 624 F.3d at 1013-14); *see id.* at 1199 n.9.[10]

Even if this Court had not already decided this issue, the overwhelming weight of circuit precedent would point to the same

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post-election report; and (5) a closing report for the cycle. Mont. Code Ann. §§ 13-37-201, -226(2), -228(3).

Committees that support or oppose statewide candidates for office have somewhat more frequent reporting requirements: they must file reports quarterly before the election, and monthly from March to November in the election year. Mont. Code Ann. § 13-37-226(1). However, committees may file their closing reports as soon as they have "finished making contributions and expenditures during an election cycle." Mont. Admin. R. 44.11.306(4); *see* Mont. Code Ann. § 13-37-226(9).

[10] While constitutionality does not hinge on a nose count of reports mandated, it should be noted that—in addition to registration and event-driven or post-contribution reporting—Hawaii's law required six reports per biennial election cycle and Washington's three, as compared to Montana's four. *Yamada*, 786 F.3d at 1195; *HLW*, 624 F.3d at 997-98. Washington committees must also make weekly reports of contributions for the five months prior to each election. Wash. Rev. Code § 42.17A.235(3).

conclusion.[11] Montana may ask for a few short reports to ensure that voters receive timely disclosure of political activity.

It is just as plain that Montana can mandate disclosure from groups that fund electioneering communications. The Supreme Court has explicitly, and repeatedly, upheld such requirements. In *McConnell*, the Court "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy," and held that legislatures can apply "disclosure requirements to the entire range of 'electioneering communications.'" 540 U.S. at 194, 196. Likewise, in *Citizens United*, the Court rejected the "contention that . . . disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." 558 U.S. at 369.

MCD's overbreadth claim runs headlong into these precedents. MCD argues, as the plaintiff in *Citizens United* did, that the informational interest that justifies disclosure laws cannot extend

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[11] *See, e.g.*, *Justice v. Hosemann*, 771 F.3d 285, 299-301 (5th Cir. 2014); *VRTL*, 758 F.3d at 137; *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1250 (11th Cir. 2013); *Madigan*, 697 F.3d at 471-72, 488; *McKee*, 649 F.3d at 58; *SpeechNow.org v. FEC*, 599 F.3d 686, 697-98 (D.C. Cir. 2010) (en banc); *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 439-40 (4th Cir. 2008).

beyond express advocacy. MCD Br. 58. The Court emphatically rejected this view, because "the public has an interest in knowing who is speaking about a candidate shortly before an election"—even if that speech is not express advocacy. *Citizens United*, 558 U.S. at 369. The Court therefore upheld a federal disclosure scheme that employs a definition of electioneering communications quite similar to Montana's. *Compare* 52 U.S.C. § 30104(f)(3), *with* Mont. Code Ann. § 13-1-101(15).[12]

This Court has likewise foreclosed MCD's argument, holding in *HLW* that the Constitution does not require a distinction between express advocacy and issue advocacy in the disclosure context. 624 F.3d at 1016; *see also Indep. Inst. v. Williams*, 812 F.3d 787, 796 (10th Cir. 2016) ("The logic of *Citizens United* is that advertisements that mention

[12] That Montana's law applies to printed as well as broadcast communications is not of constitutional significance. *See Yamada*, 786 F.3d at 1191, 1201 (upholding Hawaii committee definition and disclosure law that "extend to speech in printed form"). Montana's law parallels the federal definition in all other significant respects: it requires that communications be "paid"; mandates that they be capable of receipt by more than 100 people in—and thereby targeted to—the relevant electorate; and exempts bona fide news stories, opinion pieces, or promotions of candidate debates. Mont. Code Ann. § 13-1-101(15); *see Williams*, 812 F.3d at 797 (upholding nearly identical statute, noting that it "is only slightly broader, if at all, than the language of [the federal statute]").

a candidate shortly before an election *are* deemed sufficiently campaign-related to implicate the government's interests in disclosure."). Indeed, "the Supreme Court and every court of appeals to consider the question have already . . . closed the door to [MCD's] argument that the constitutionality of a disclosure provision turns on the content of the advocacy accompanying an explicit reference to an electoral candidate." *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 187 (D.D.C. 2016) (three-judge court), *aff'd*, 137 S. Ct. 1204 (2017).

B. Montana's political committee definition is substantially related to its interest in disclosure.

As noted above, periodic reporting requirements are not unduly burdensome, and disclosure requirements can validly apply to groups financing electioneering communications. Yet MCD argues that applying a constitutional form of reporting to groups engaging in constitutionally regulable political activity is somehow unconstitutionally overbroad. MCD Br. 57-58. To support this insupportable claim, MCD again distorts existing precedent.

MCD lays out three separate tests that, it asserts, set the constitutional boundaries for state disclosure requirements. MCD Br. 56-57. However, none of these tests actually set such limits.

First, MCD claims that, under *Buckley*, states may impose periodic reporting requirements "*only* if . . . 'the major purpose' of the organization is 'the nomination or election of a candidate' or candidates in the jurisdiction." MCD Br. 56 (emphasis added). But the *Buckley* Court merely determined, as a matter of *statutory interpretation*, that a specific federal disclosure law should be read that way to cure the potential vagueness of its terms. 424 U.S. at 79. As this Court held in *HLW*, outside of the federal context, groups need not meet the "major purpose" test to be subject to disclosure. 624 F.3d at 1009-10.

Second, citing *HLW*, MCD suggests that periodic reporting requirements must "only [be] conferred on groups that have 'a "primary" purpose of political activity.' " MCD Br. 56. But as this Court pointed out in *Yamada*, *HLW* "did not 'hold that the word "primary" or its equivalent [was] constitutionally necessary.' " 786 F.3d at 1198 (citation omitted). As with the "major purpose" test in the Supreme Court's *Buckley* decision, *HLW* merely determined that a "primary purpose" test is "sufficient" to survive First Amendment scrutiny. *Id.*

Third, MCD claims that this Court created a test based on whether all regulated groups "are 'significant participant[s] in [the state's]

electoral process.'" MCD Br. 57. It did not. Rather, the Court held that states can mandate periodic reporting of groups that count political advocacy as one of their many purposes, if they engage in more than an "incidental" amount of advocacy. *Yamada*, 786 F.3d at 1198-99. Thus, all three of MCD's supposed dividing lines exist only in its own brief.

In reality, as with any other disclosure law, the constitutionality of periodic reporting requirements depends on one thing: "whether the burdens imposed by the disclosure requirements are substantially related to the government's important informational interest." *HLW*, 624 F.3d at 1010. To meet this standard, a law defining political committee status simply must "avoid[] reaching organizations engaged in only incidental advocacy." *Yamada*, 786 F.3d at 1198. Here, the "political committee" definition meets this requirement by exempting groups that engage exclusively in issue advocacy or that spend less than a certain amount on electioneering. *See* Mont. Code Ann. § 13-1-101(30)(a), (d).

Indeed, Montana's disclosure law differs in only two relevant ways from the Washington and Hawaii laws this Court has upheld: it triggers political committee status based on spending a certain amount for the purpose of political advocacy, rather than on having an organizational

purpose of engaging in political advocacy; and it sets its monetary threshold at $250 rather than $1,000. These choices, however, are substantially related to Montana's informational interest in disclosure.

The State's decision to use a monetary, rather than a purpose-based, threshold is constitutionally permissible. Focusing solely on what percentage of an organization's purpose is devoted to political activity would "ignore[] the 'fundamental organizational reality that most organizations do not have just one major purpose.'" *Yamada*, 786 F.3d at 1200 (citation omitted). It would also fail to capture many significant actors, since organizations can spend small percentages of their relative time and money on politics while spending a great deal in absolute numbers. *Id.* Montana has sensibly chosen to instead focus on whether groups raise and spend more than a defined amount of money for campaign or ballot-measure purposes. This method "appropriately reaches these multipurpose organizations' participation in the political process," and also "avoids the circumvention of valid campaign finance laws and disclosure requirements." *Id.* It is thus a properly tailored test.

The sole remaining issue, then, is that Montana sets its threshold for committee status at $250 in spending, rather than at the $1,000

threshold upheld in *Yamada*. Courts have already upheld similar monetary thresholds for periodic disclosure requirements. *See, e.g.*, *Justice v. Hosemann*, 771 F.3d 285, 300 (5th Cir. 2014) (Mississippi's $200 threshold); *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 441 (5th Cir. 2014) (Texas' $500 threshold); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1251 (11th Cir. 2013) (Florida's $500 threshhold). But Montana need not peg its disclosure requirements to those of other states. "[D]isclosure thresholds, like contribution limits, are inherently inexact; courts therefore owe substantial deference to legislative judgments fixing these amounts." *Family PAC v. McKenna*, 685 F.3d 800, 811 (9th Cir. 2012); *see Yamada*, 786 F.3d at 1200.

Montana's threshold is substantially related to the State's informational interest, and therefore deserves deference. Montana is the seventh smallest state in the country by population,[13] and, in 2014, the average state House of Representatives candidate in Montana raised

[13] *See Annual Estimates of the Resident Population: 2016 Population Estimates*, U.S. Census (2016), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2016_PEPANNRES&src=pt.

only $6,295.[14] These facts are crucial to any analysis of Montana's political committee definition. *See Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 310 (3d Cir. 2015), *cert. denied sub nom. Del. Strong Families v. Denn*, 136 S.Ct. 2376 (2016); *Hosemann*, 771 F.3d at 299. After all, "[s]maller elections can be influenced by less expensive communications." *Williams*, 812 F.3d at 797. The choice of a $250 threshold for disclosure is thus substantially justified by the realities of Montana elections.

Finally, it bears repeating that MCD has brought a facial overbreadth claim. The Supreme Court "has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied." *New York v. Ferber*, 458 U.S. 747, 770 n.25 (1982) (citation omitted). Most applications of Montana's political committee definition already fall within the ambit of this Court's decisions in *HLW* and *Yamada*. Even if there were some hypothetical set of groups to which the law could not constitutionally apply, MCD has neither identified such a set nor shown

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[14] *See Montana House of Representatives Elections, 2016*, Ballotpedia (2016), https://ballotpedia.org/Montana_House_of_Representatives_elections,_2016.

that it is substantial when compared to the statute's plainly legitimate sweep. In such a situation, the "strong medicine" of overbreadth analysis is inappropriate. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008). Montana's political committee definition is constitutional.

C. Montana's political committee definition constitutionally applies to MCD.

MCD also challenges the definition of "political committee" as applied to it. *See* MCD Br. 61-63. This claim is equally meritless. MCD's as-applied challenge is based on the same arguments about the burdens of periodic reporting and the supposed dividing line between express and issue advocacy that undergird its overbreadth challenge. *Id.* This Court and the Supreme Court have already rejected those arguments. *See supra* Part III.A.

Moreover, MCD suggests that it intends to expend substantial amounts of money to engage in electioneering activity. MCD Br. 22. It does not specify how much it plans to spend, only that it will spend "more than $250." *Id.*; Am. Compl. ¶ 31. The actual amount could be significantly more. MCD's "pleas on behalf of a few people pooling a small amount of money ring a bit hollow to the extent that they refuse to

foreclose their option for raising big money." *Worley*, 717 F.3d at 1251. And it certainly appears that electioneering is MCD's primary purpose: MCD has engaged in no other activity since it was formed, MCD Br. 11-12, 14, and it allowed its corporate status to lapse when it feared that it could not engage in disclosure-free electioneering communications, MCD Br. 4 n.4. Even under MCD's own proposed tests, then, MCD can constitutionally be subject to disclosure.[15]

[15] MCD also challenges Montana's disclaimer requirement for electioneering communications. MCD Br. 65-66. Its claim is frivolous. MCD relies almost entirely on *ACLU of Nev. v. Heller*, 378 F.3d 979 (2004), which applied a standard the Supreme Court developed in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), to deal with a lone pamphleteer. But the Court later upheld federal disclaimer requirements for electioneering communications in *Citizens United*. 558 U.S. at 367-69. *Citizens United* confirmed that disclaimer requirements are subject to the same standard of scrutiny as other disclosure laws, *id.* at 366-67, not to the strict scrutiny that *Heller* applied, 378 F.3d at 992. "*Citizens United*'s post-*McIntyre,* post-*Heller* discussion makes clear that disclaimer laws such as [Montana's] may be imposed on political advertisements that discuss a candidate shortly before an election." *Yamada*, 786 F.3d at 1203 n.14.

CONCLUSION

For the reasons set forth above, the district court decision should be **AFFIRMED**.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,552 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amicus Curiae* for Campaign Legal Center with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 21, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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