No. _____

In the
Supreme Court of the United States

DAVID THOMPSON; AARON DOWNING; and JIM CRAWFORD,
Petitioners,

v.

HEATHER HEBDON, in her Official Capacity as the Executive Director of the Alaska Public Offices Commission, et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

JOHN J. BURSCH
KRISTEN K. WAGGONER
BRETT HARVEY
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001

ROBIN O. BRENA
BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, AK 99501

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioners

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QUESTION PRESENTED

Alaska is a large and sparsely populated state whose unique geography poses distinct and expensive challenges for candidates for elected office. Yet Alaska has some of the lowest campaign contribution limits in the country: It allows individuals to contribute only $500 per year to any candidate for any office, or to any group other than a political party. Alaska Stat. §15.13.070(b)(1). Not only are those limits lower than those of all but three other states; they are significantly lower than any contribution limit this Court has ever upheld. In fact, adjusting for inflation (something Alaska law does not do), those limits are lower than the limits this Court struck down under the First Amendment in *Randall v. Sorrell*, 548 U.S. 230 (2006).

In the decision below, a Ninth Circuit panel upheld those limits—but only because it considered that result "compelled by" circuit precedent that predates several of this Court's most recent campaign finance decisions. The panel openly acknowledged that the Ninth Circuit's campaign finance jurisprudence is in tension with this Court's decisions. Indeed, the panel suggested that Alaska's limits might fail under the test applied by a plurality of this Court in *Randall*. But the panel viewed itself as bound to ignore the plurality's guidance in favor of Ninth Circuit precedent that predated it.

The question presented is:

Whether Alaska's $500 individual-to-candidate and individual-to-group contribution limits violate the First Amendment.

PARTIES TO THE PROCEEDING

David Thompson, Aaron Downing, and Jim Crawford are petitioners here and were plaintiffs-appellants below.

District 18 of the Alaska Republican Party was also a plaintiff-appellant below, but is no longer a party to these proceedings.

Heather Hebdon, in her official capacity as the Executive Director of the Alaska Public Offices Commission, is a respondent here and was a defendant-appellee below.

Anne Helzer, Robert Clift, Jim McDermott, Richard Stillie, and Suzanne Hancock, in their official capacities as members of the Alaska Public Offices Commission, are respondents here and were defendants-appellees below or have been substituted in their official capacities as the successors to former members and defendants-appellees Tom Temple, Irene Catalone, Ron King, and Adam Schwemley.

STATEMENT OF RELATED PROCEEDINGS

- *Thompson, et al. v. Hebdon, et al.*, No. 17-35019 (9th Cir.) (opinion issued and judgment entered Nov. 27, 2018; mandate issued Feb. 20, 2019).
- *Thompson, et al. v. Dauphinais, et al.*, No. 3:15-cv-00218-TMB (D. Alaska) (memorandum of decision issued Nov. 7, 2016; final judgment entered Dec. 8, 2016).

There are no additional proceedings in any court that are directly related to this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Alaska has some of the most extreme campaign contribution limits in the country: It allows individuals to contribute only $500 per year to any candidate for any office, or to any group other than a political party. On their face, those limits are 50% below the lowest contribution limit ($1,000) that this Court has ever upheld. And the Court upheld that $1,000 limit *more than 40 years ago* in *Buckley v. Valeo*, 424 U.S. 1 (1976), when advertising and other electioneering expenses were radically lower. Accounting for inflation—which Alaska law does not do—Alaska's limits are nearly 90% lower than the limit upheld in *Buckley*, and are even below the $400 limit *struck down* in *Randall v. Sorrell*, 548 U.S. 230 (2006). In addition to being extreme outliers in terms of this Court's jurisprudence, Alaska's contribution limits (like the Vermont limits held unconstitutional in *Randall*) are extreme outliers as compared to those of other states. Only three states in the entire country impose such low limits on individual-to-candidate contributions, and only two impose such low limits on individual-to-group contributions. Even in those states, moreover, those low limits apply only to elections for certain down-ticket state offices. No other state in the nation imposes a limit as low as Alaska's on contributions to gubernatorial candidates, who must campaign across Alaska's vast expanse and widely dispersed media markets.

In the decision below, a panel of the Ninth Circuit held that those outlier contribution limits do not violate the First Amendment, while striking down an equally unconstitutional restriction on the aggregate

contributions that candidates may receive from out-of-state residents. The reason for that differential treatment is straightforward: While the panel was free to apply this Court's First Amendment jurisprudence to Alaska's novel effort to limit contributions from nonresidents, it was bound by prior Ninth Circuit precedent when it came to the more typical candidate and group contribution limits.

In particular, as the panel candidly explained, it was "compelled by" circuit precedent to uphold Alaska's sub-*Buckley* limits because an earlier Ninth Circuit panel had concluded that it need not follow the analysis that a plurality of this Court employed to strike down Vermont's comparably low limits in *Randall*. In the Ninth Circuit's view, because three Justices concurred in the result in *Randall* on *broader* grounds than the plurality, it was free to ignore the plurality's reasoning. Instead, the Ninth Circuit insists on adhering to its own watered-down version of scrutiny—a test developed three years before *Randall*—under which a contribution limit will survive First Amendment scrutiny so long as it "focus[es] narrowly on the state's interest," "leave[s] the contributor free to affiliate with a candidate," and "allow[s] the candidate to amass sufficient resources to wage an effective campaign." *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003).

The Ninth Circuit thus does not even attempt to conceal the conflict between its campaign finance jurisprudence and this Court's precedents, which have only gotten more protective of First Amendment rights since *Randall* and *Eddleman*. The inevitable result is

a decision that approves restrictions that strike at the heart of First Amendment values. Much like a law that allows the display of only minuscule campaign buttons, Alaska's $500 limits allow only bare association, while depriving individuals of the ability to provide meaningful support.

The Ninth Circuit has now repeatedly made clear that only this Court can restore First Amendment rights within its boundaries. The Court should grant certiorari and ensure that petitioners and other individuals enjoy their full First Amendment protections.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 909 F.3d 1027 and reproduced at App.1-42. The district court's opinion is reported at 217 F. Supp. 3d 1023 and reproduced at App.45-76.

JURISDICTION

The Ninth Circuit issued its opinion on November 27, 2018. That judgment became final when the judge who had made a sua sponte request for a vote on whether to rehear the case en banc withdrew that request on February 20, 2019. On May 3, 2019, Justice Kagan extended the time for filing a petition for certiorari to and including June 20, 2019. On June 5, 2019, Justice Kagan further extended that time to and including July 20, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part: "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I.

The relevant provisions of Alaska's campaign finance laws, including Alaska Stat. §§15.13.070 and 15.13.072, are reproduced at App.77-81.

STATEMENT OF THE CASE

A. Campaign Finance Jurisprudence

1. The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *McCutcheon v. FEC*, 572 U.S. 185, 191-92 (2014) (plurality opinion). Restrictions on that constitutionally protected conduct, including limits on how much individuals or groups may contribute to candidates, political parties, or other groups, substantially infringe the First Amendment rights of contributors, candidates, and advocacy groups in multiple ways.

"[T]he right of association is a 'basic constitutional freedom' that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.'" *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 206-07 (1982) (citations omitted) (quoting *Buckley*, 459 U.S. at 25). In a democratic society, the ability to associate with others in the political process—and through campaign contributions in particular—is at the core of this fundamental right. For one thing, "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate" in an especially

"important" manner. *Buckley*, 424 U.S. at 22. Moreover, the right to "join together 'for the advancement of beliefs and ideas' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Id.* at 65-66 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

In addition to abridging the right to freedom of association, contribution limits infringe the First Amendment right to freedom of expression. Because a contribution "serves as a general expression of support for the candidate and his views," and the size of a contribution may provide a "rough index of the intensity of the contributor's support for the candidate," contribution limits necessarily restrict a person's "ability to engage in free communication." *Id.* at 20-21. Indeed, the "right of association [and] the right of expression" often "overlap and blend" in the context of contribution limits. C*itizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 300 (1981).

For example, people who contribute to a candidate or political action committee (PAC) "obviously like the message they are hearing … and want to add their voices to that message; otherwise they would not part with their money." *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 495 (1985); *see also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 636 (1996) (Thomas, J., concurring) ("When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political

debate, just as when that individual communicates the message himself.").

The importance of meaningful contributions to free association and expression is particularly evident when it comes to television advertisements and comparable efforts to reach other voters—a crucial effort in Alaska given its vast expanse and widely dispersed population. Few individuals can afford to engage in such expression without combining their resources with other like-minded citizens. Strict limits on the degree to which those resources may be pooled thus strictly constrain an individual's ability to participate in the political expression that is at the heart of the political process.

Finally, stringent contribution limits "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Randall*, 548 U.S. at 249 (plurality opinion). That is particularly true in a state like Alaska, where voters and the major media markets are widely dispersed. In short, "a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote." *Id.*

2. Given these concerns, this Court has held that campaign contribution limits must be closely scrutinized to ensure both that they "target what [this Court] ha[s] called '*quid pro quo*' corruption or its appearance," and that they "employ[] means closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 572 U.S. at 192, 197 (plurality opinion) (first quoting *Citizens United v.*

FEC, 558 U.S. 310, 359 (2010); then quoting *Buckley*, 424 U.S. at 25).

First, under this Court's cases, campaign finance restrictions may be justified only as an effort to prevent quid pro quo corruption or its appearance. They may not be justified by more nebulous objectives, such as "to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others." *Id.* at 191. Indeed, "[i]n a series of cases over the past 40 years," this Court has made clear that "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *Id.* at 192. After all, the fact that contributors "may have influence over or access to elected officials does not mean that th[o]se officials are corrupt." *Citizens United*, 558 U.S. at 359.

That kind of ingratiation and access instead "embod[ies] a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *Id.* Accordingly, campaign finance restrictions may be justified (if at all) only as efforts to combat the appearance or actuality of quid pro quo corruption, defined as "the notion of a direct exchange of an official act for money." *McCutcheon*, 572 U.S. at 192 (plurality opinion); *cf. McDonnell v. United States*, 136 S. Ct. 2355, 2371-72 (2016) (narrowly construing "*quid pro quo* corruption—the exchange of a thing of value for an 'official act'"—as requiring a decision or action involving a formal exercise of governmental power).

Even if a contribution limit permissibly targets quid pro quo corruption or its appearance, it must be "closely drawn" to avoid unnecessary abridgement of protected First Amendment activity. *McCutcheon*, 572 U.S. at 197. Although a majority of this Court has not demanded the exactness of strict scrutiny, "fit matters," and this Court's opinions "still require 'a fit … 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." *Id.* at 218 (second and third alterations in original).[1]

3. It has been 13 years since this Court last considered a challenge to the constitutionality of base (in contrast to aggregate) individual-to-candidate contribution limits. In *Randall*, the Court struck down as unconstitutional a Vermont campaign finance law under which an individual was restricted to contributing, on a per-election-cycle basis: $400 to a candidate for governor, lieutenant governor, or other

[1] *Buckley*'s distinction between limits on campaign *expenditures*, which are subject to strict scrutiny, and limits on campaign *contributions*, which are subject to less "exacting" scrutiny, *see* 424 U.S. at 20-22, has long been subject to criticism that has only grown with practical experience with that dichotomy. *See, e.g.*, *McCutcheon*, 572 U.S. at 231-32 (Thomas, J., concurring). Petitioners submit that the exceptionally low limits here plainly fail the close scrutiny demanded of contribution limits under *Buckley* and *Randall*. But if these extreme limits really are compatible with this Court's precedents, and some Alaskans can expend millions in independent advertisements while ordinary Alaskans cannot support the efforts of their preferred candidates with meaningful contributions, then it would be appropriate to reconsider *Buckley*'s less demanding scrutiny of contribution limits.

statewide office; $300 to a candidate for state senator; and $200 to a candidate for state representative. *See* 548 U.S. at 238 (plurality opinion). While no opinion commanded a majority in *Randall*, Justice Breyer's plurality opinion identified several "danger signs" indicating that Vermont's limits were unconstitutionally low. *Id.* at 249.

In particular, the plurality noted that Vermont's "limits are well below the limits this Court upheld in *Buckley*," both on their face and "in terms of real dollars (*i.e.*, adjusting for inflation)." *Id.* at 250. "[A]s compared to the $1,000 per election limit on individual contributions at issue in *Buckley*" back in 1976, Vermont's limits, adjusting for inflation, were as low as "roughly $57 per election." *Id.* The plurality found almost no states with any limits as low as Vermont's, and further noted that "Vermont's limit is well below the lowest limit this Court has previously upheld." *Id.* at 251. The plurality also found it troubling that "Vermont's failure to index for inflation means that Vermont's levels would soon be far lower than" the lowest limits the Court had ever upheld "regardless of the method of comparison." *Id.* at 252.

Given those "danger signs," the plurality concluded that it "must examine the record independently and carefully to determine whether [Vermont's] contribution limits are 'closely drawn' to match the State's interests." *Id.* at 253. After doing so, it concluded that those limits were "too restrictive." *Id.* at 253. Three Justices concurred in the judgment on broader grounds, noting their view that the Court's test for scrutinizing contribution limits is unduly

lenient. *See id.* at 264 (Kennedy, J., concurring); *id.* at 265 (Thomas, J., concurring, joined by Scalia, J.).

B. Regulatory Background

1. Until 1974, Alaska imposed no limits on campaign contributions. *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 601 (Alaska 1999). That year, Alaska imposed a contribution limit for the first time, limiting individuals to contributing $1,000 per year to any one candidate. *Id.* That limit, which had no inflation-adjustment mechanism, applied to contributions to any candidate for any office. *Id.* In 1975, the legislature applied that same $1,000 annual limit to contributions to groups other than political parties, including but not limited to all political committees, corporations, and labor unions. *Id.* at 601 & n.7; *see also VECO Int'l, Inc v. Alaska Pub. Offices Comm'n*, 753 P.2d 703, 714 (Alaska 1988) (interpreting "group" to include any group that engages in "fundraising, making contributions, holding political meetings, [or] advertising").

Those limits stood unchanged for the next two decades despite substantial inflation, until an attorney named Michael Frank launched a campaign in 1996 to adjust them. But rather than increase the nominal limits or index them to inflation, Frank sought to *cut them in half*. He viewed campaigns as too long and too expensive, and he believed that elected officials were more responsive to large contributors than to the general public. *See* CA9.Dkt.12-2 at 186, 197-98. In his view, reducing Alaska's contribution limits would help address the increasing expense of elections, reduce the amount of money being spent on campaigns, stop the "endless

money chase," and "get big money out of politics." *See* CA9.Dkt.12-2 at 170-74; *but see McCutcheon*, 572 U.S. at 191 (government "may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others"). Frank decided that $500, unadjusted for inflation, was the right limit. He arrived at the number by determining that the average contributor gave about $200 to a campaign, and then doubling that amount and adding $100. CA9.Dkt.12-2 at 175-76, 187-88.

Frank's efforts proved successful. In 1996, the Alaska Legislature passed Senate Bill 191, which was ultimately enacted into law as Chapter 48 SLA 1996. That law reduced both Alaska's individual-to-candidate and individual-to-group contribution limits to a meager $500. S.B. 191, 19th Leg., 2d Sess. §10(b)(1) (Alaska 1996), *available at* https://bit.ly/32BzPFs. Neither was indexed for inflation.

The law's stated purpose was "to substantially revise Alaska's election campaign finance laws in order to restore the public's trust in the electoral process and to foster good government." *Id.* §1(b). In its accompanying findings, the legislature opined, *inter alia*, that campaigns "last too long, are often uninformative, and are too expensive"; that "special interests" raise too much money and "thereby gain an undue influence over election campaigns and elected officials"; and that "incumbents enjoy a distinct advantage in raising money for election campaigns." *Id.* §1(a).

In 2003, the legislature increased the individual-to-candidate and individual-to-group contribution limits from $500 to $1,000. S.B. 119, 23d Leg., 1st Sess. §8 (Alaska 2003), *available at* https://bit.ly/2XS3oUC. Again, neither of the limits was indexed for inflation. Three years later, in 2006, a ballot measure was passed and lowered the limits back to the $500 limit that Frank had championed 10 years earlier. Alaska Stat. §15.13.070(b)(1); *see also* State of Alaska, Division of Elections, Primary Election Voter Pamphlet 7-11 (Aug. 2006), *available at* https://bit.ly/2JQUQDt; State of Alaska, Division of Elections, Initiative History (June 2019), *available at* https://bit.ly/32LIpSf (relevant August 22, 2006 ballot initiative on passed by a vote of 113,130 to 41,836). Those 2006 contribution limits, which still are not indexed for inflation, remain the law today.

2. At $500 per year, Alaska's contribution limits are well below any limits this Court has ever held constitutional. Indeed, adjusted for inflation, they are below some of the limits that this Court held unconstitutional in *Randall*. And like those unconstitutional limits, they are not indexed for inflation and hence will become lower still over time.

Alaska's contribution limits are also among the lowest in the nation. Of the 38 states that impose individual-to-candidate contribution limits, only three—Colorado, Connecticut, and Montana—have *any* limits as low or lower than Alaska's $500 limit. *See* Colo. Const. art. XXVIII, §3(1)(b) ($200 per-election individual-to-candidate contribution limit for state senate, state house of representatives, state board of education, regent of the University of

Colorado, or district attorney candidates); Conn. Gen. Stat. §9-611 ($250 per "campaign for nomination" or "campaign for election" individual-to-candidate contribution limit for state representative or municipal office); Mont. Code §13-37-216 ($130 per-election individual-to-candidate contribution limit for non-statewide public offices).

Alaska's $500 per-year limit is also structured to limit electoral participation when a candidate must contest a primary and general election in the same calendar year. Of the 38 states that impose individual-to-candidate limits, 24 limit contributions per election, rather than per year or per election cycle. *Cf. infra* n.2.

Alaska's one-size-fits-all limits have a particularly extreme and outlying effect on statewide elections. Most states with contribution limits have different limits for different offices, allowing individuals to contribute greater sums to candidates for statewide offices than to candidates in local elections or for the state legislature. *See, e.g.*, Cal. Gov't Code §85301 (individual-to-candidate contribution limits, depending on the office, ranging from $3,000 to $20,000); Mich. Comp. Laws §169.252(1) (same, ranging from $1,000 to $6,800). Alaska, by contrast, imposes the same minimal $500 limit on individual-to-candidate contributions for *all* elected offices. As a result, Alaska has the lowest individual-to-candidate contribution limit for gubernatorial elections in the entire nation.

Alaska's individual-to-group limit also falls well below the national norm. Only two states, Colorado and Massachusetts, have individual-to-group limits as

low or lower than Alaska's $500 annual limit. Colo. Const. art. XXVIII, §3(5) (individual-to-group limit of $625 per two-year election period); Mass. Gen. Laws ch. 55 §7A(a)(3) (individual-to-group limit of $500 per year). By contrast, 29 states—Alabama, Arizona, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming—impose no limits at all on individual-to-group contributions. Of the 21 states that do limit such contributions, 19 have limits higher than Alaska's; two of those states, Louisiana and New York, cap individual-to-group contributions at $100,000. *See* La. Stat. §18:1505.2(K) (per four-year election period); N.Y. Elec. Law §14-114 (per election).

Alaska's exceedingly low individual-to-candidate and individual-to-group limits are not the only aspects of its campaign finance laws that are extreme. Unique among all 50 states, Alaska also imposes restrictions on the aggregate dollar amount of contributions that a candidate may accept from individuals who do not reside in Alaska. Alaska Stat. §15.13.072(e). For candidates seeking election as a state representative, that limit is $3,000 per year. *Id.* §15.13.072(e)(3). In other words, once a candidate has received a total of $3,000 from any combination of nonresidents, no other nonresident may contribute *any* money to that candidate.

3. Nothing about Alaska's political geography explains these dramatically low limits. To the contrary, Alaska's sparse and widely dispersed

population makes campaigning for statewide office uniquely difficult and expensive. To the extent population is concentrated in urban areas like Anchorage and Fairbanks, those urban areas are widely separated and served by distinct media markets. *See* Polidata, County-Based Regions and Markets for Alaska (2002), *available at* https://bit.ly/2Y4IpZD.

C. Procedural History

1. Aaron Downing and Jim Crawford are Alaska residents. App.47. In 2015, each contributed the maximum amounts permitted under Alaska law. Downing contributed $500 each to the campaigns of mayoral candidate Larry DeVilbiss and state house candidate George Rauscher, and Crawford contributed $500 each to the campaign of mayoral candidate Amy Demboski and to the Alaska Miners' Association PAC. App.47. Each wished to contribute more, but was prohibited from doing so by Alaska's contribution limits. App.47. David Thompson is a resident of Wisconsin and wished to contribute $500 to the campaign of his brother-in-law, Alaska State Representative Wes Keller. But he was unable to do so because Keller had already accepted an aggregate $3,000 in contributions from other nonresident supporters. App.48.

2. In November 2015, Thompson, Downing, and Crawford filed suit, challenging Alaska's individual-to-candidate, individual-to-group, and aggregate nonresident contribution limits under the First Amendment. App.48. After a bench trial, the district court upheld all the challenged provisions.

In analyzing whether those limits are "closely drawn" to prevent unnecessary abridgement of First Amendment rights, the court declined to apply the analysis employed by a plurality of this Court in *Randall*. App.56-57. Instead, the court was bound by Ninth Circuit precedent to follow a three-part test articulated by that court three years earlier in *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003). App.57 (citing *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015)). Under *Eddleman*, "limits on contributions are 'closely drawn' if they '(a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign.'" App.57. Applying that test, the district court concluded that both the individual-to-candidate and the individual-to-group contribution limits were "closely drawn."

The court held the first prong of that test satisfied because the 2003 ballot measure "explicitly contemplated an anticorruption purpose," and because the state's expert testified that "lower contribution limits are often more effective at decreasing the risk of quid pro quo arrangements or their appearance." App.59-61. As to the individual-to-group limit, the court noted that the limit "works to keep contributors from circumventing the $500 individual-to-candidate base limit." App.61. The court then concluded that because Alaska's contribution limits do not wholly preclude individuals from associating with candidates, or prevent candidates from amassing sufficient resources to wage a campaign, they are "neither 'too low' nor 'too strict'

so as to run afoul of the First Amendment." App.67 (footnote omitted).

The district court likewise upheld the aggregate nonresident contribution limit, reasoning that it "furthers the State's anticorruption interest directly by avoiding large amounts of out-of-state money from being contributed to a single candidate, thus reducing the appearance that the candidate feels obligated to outside interests over those of his constituents." App.74. The court further posited that it "discourages circumvention of the $500 base limit and other game-playing by outside interests." App.74.

3. The Ninth Circuit affirmed the district court as to the individual-to-candidate and individual-to-group contribution limits, but reversed as to the aggregate nonresident limit. The court began by acknowledging that, under this Court's precedent, "states must show that any [contribution] limitation serves to combat actual quid pro quo corruption or its appearance"—*i.e.*, "[i]t no longer suffices to show that the limitation targets 'undue influence' in politics." App.8. But the court emphasized that, under circuit precedent in *Eddleman*, "the quantum of evidence necessary to justify a legitimate state interest is low: the perceived threat must be merely more than 'mere conjecture' and 'not … illusory.'" App.9-10 (quoting *Eddleman*, 343 F.3d at 1092).

The panel observed that "*McCutcheon* and *Citizens United* created some doubt as to the continuing vitality of the standard for the evidentiary burden we announced in *Eddleman*." App.10 n.2. But the panel was bound by circuit precedent to adhere to *Eddleman*. App.10 n.2. Applying *Eddleman*, the

court deemed itself "compelled to conclude that the State's evidence suffices to show that the individual-to-candidate limit 'further[s] the important state interest of preventing quid pro quo corruption or its appearance.'" App.11 (alteration in original) (quoting *Lair v. Motl*, 873 F.3d 1170, 1179-80 (9th Cir. 2017), *cert. denied*, *Lair v. Mangan*, 139 S. Ct. 916 (2019)).

Turning to the "closely drawn" question, the panel once again followed *Eddleman*, and therefore asked only whether Alaska's individual-to-candidate limit "'focus[es] narrowly on the state's interest,' 'leave[s] the contributor free to affiliate with a candidate,' and 'allow[s] the candidate to amass sufficient resources to wage an effective campaign.'" App.13 (alterations in original) (quoting *Eddleman*, 343 F.3d at 1092). Although the court held that minimal test satisfied, it suggested that the outcome might well be different if "Justice Breyer's plurality opinion in *Randall*" were "binding," noting that "at least one of the 'warning signs' identified in *Randall* is present here." App.16 n.5.

As for the individual-to-group limit, the panel acknowledged that a contribution to a group "reflects a more attenuated risk of quid pro quo corruption or its appearance than does the individual-to-candidate limit." App.20. But the panel concluded that the combination of circuit precedent and this Court's decision in *California Medical Association v. FEC* (*CalMed*), 453 U.S. 182 (1981), compelled upholding the individual-to-group limit as an anti-circumvention measure. *See* App.20-21.

Finally, when it came to Alaska's aggregate nonresident contribution limit, the panel majority did

not view itself as hemmed in by circuit precedent—and, not coincidentally, it invalidated the limit. The panel concluded that, "[a]t most, the law aims to curb perceived 'undue influence' of out-of-state contributors—an interest that is no longer sound after *Citizens United* and *McCutcheon*." App.23-24. Chief Judge Thomas dissented from that part of the panel's holding and would have upheld the aggregate nonresident contribution limit, too. App.31.

4. Shortly after its opinion issued, the panel informed the parties that "[a] judge made a sua sponte request for a vote on whether to rehear this matter en banc," and directed the parties to file supplemental briefs on that question. App.43. After reviewing that briefing, in which the state agreed with petitioners that rehearing en banc was not warranted, the panel informed the parties that the judge who had made the request withdrew it. App.43-44.

REASONS FOR GRANTING THE PETITION

The decision below is an acknowledged departure from this Court's teachings and resulted in the approval of drastically low contribution limits that preclude meaningful participation in core activities protected by the First Amendment. This Court has made abundantly clear that campaign contribution limits will survive scrutiny only if they are confined to targeting "'*quid pro quo*' corruption or its appearance," and do so through "means closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 572 U.S. at 192, 197. The Ninth Circuit's watered-down test for evaluating whether a state has satisfied that burden is deeply entrenched and deeply wrong.

There is no better illustration of that than this case. Alaska's contribution limits are among the lowest in the country. Indeed, those $500 limits are 50% lower than the limits *Buckley* approved *back in 1976*—without accounting for inflation. Taking inflation into account (which Alaska's law fails to do), Alaska's limits are barely 10% of what was upheld in *Buckley* and lower than some of the limits that this Court *struck down* in *Randall*. It should be obvious, then, that Alaska's limits do not comport with the First Amendment, as they not only were motivated by objectives that this Court has since made clear are impermissible, but leave Alaskans with only nominal means of exercising their core rights to associate with and express their support for candidates through campaign contributions.

Yet a panel of the Ninth Circuit nonetheless held those sub-*Buckley* limits constitutional. That outcome, while remarkable under this Court's cases, is unsurprising given the current state of Ninth Circuit precedent. As the panel candidly acknowledged, the Ninth Circuit has concluded that it need not abide by the reasoning of the opinion of a plurality of this Court in *Randall*, but rather may apply its own test for evaluating the constitutionality of contribution limits. In the Ninth Circuit's view, the fact that three Justices employed *broader* reasoning to condemn Vermont's limits empowers the Ninth Circuit to ignore the narrower reasoning of the plurality in favor of pre-existing circuit precedent that is even *less* protective of First Amendment rights. That treatment of *Randall* conflicts with the treatment of every other circuit to confront *Randall* and ensures that the Ninth Circuit's approach

conflicts with both *Randall* and the views reflected in more recent decisions of this Court.

The Ninth Circuit's alone-in-the-nation view is obviously wrong and, left standing, will continue to have extremely distorting effects, both on Alaskans and more broadly. The lesson lower courts should have drawn from *Randall*, *Citizens United*, and *McCutcheon* is that courts should err on the side of protecting the core First Amendment rights that campaign contributions entail. Yet the Ninth Circuit has drawn precisely the opposite lesson, instead insisting that deference to state law is the paramount concern. This Court should grant certiorari, both to ensure that residents of the nation's largest circuit remain free to meaningfully exercise their First Amendment rights, and to provide the more definitive guidance on evaluating contribution limits that this case proves lower courts so sorely need.

I. The Decision Below Upholds Radically Low Contribution Limits Under Ninth Circuit Precedent That Conflicts With Cases From This Court And Other Circuits.

"There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon*, 572 U.S. at 191 (plurality opinion). That includes the right to "contribute to a candidate's campaign." *Id.* Accordingly, this Court has long held that contribution limits must be closely scrutinized for compatibility with the First Amendment. Under any faithful reading of this Court's cases, Alaska's $500 limits cannot withstand that close scrutiny. The Ninth Circuit concluded otherwise only because, as the panel candidly

acknowledged, it was bound by circuit precedent *not* to faithfully follow those cases. The resulting decision conflicts with this Court's precedents, with decisions from every other circuit to consider the import of *Randall*, and with first principles.

A. The Ninth Circuit's Approval of Alaska's Unrealistically Low Candidate Contribution Limits Conflicts With Decisions of This Court, Decisions of Other Circuits, and First Principles.

1. Under this Court's most recent opinions addressing contribution limits, this should have been an easy case. Alaska's unindexed $500 limit on contributions to candidates suffers from all the same "danger signs" that a plurality of this Court concluded in *Randall* "generate suspicion that they are not closely drawn." *Randall*, 548 U.S. at 249.

First, just like Vermont's limits, Alaska's limits are "well below the lowest limit this Court has previously upheld," both on their face and "in terms of real dollars (*i.e.*, adjusting for inflation)." *Id.* at 250-51. Indeed, adjusting for inflation, Alaska's $500 limits are barely one-tenth of the $1,000 limit upheld in *Buckley*. *See* West Egg, Inflation Calculator, https://bit.ly/2ObjuUR (last visited July 22, 2019) ($1,000 in 1976 equivalent to $4,460.75 in 2018). In fact, adjusting for inflation, Alaska's $500 limits are lower than the $400 limit that this Court *struck down* in *Randall*. *See id.* ($400 in 2006 equivalent to $508.81 in 2018). Even these adjusted numbers understate how low Alaska's limits are in practical terms, as the cost of campaigns and advertising expenses has outstripped general rates of inflation.

See, e.g., Adobe Digital Insights, Digital Advertising Report (2017), *available at* https://bit.ly/2vuGzTB. Both on their face and in practical terms, the limits imposed here are far below any contribution limit approved by this Court.

Like Vermont's unconstitutional limits, Alaska's limits are also among "the lowest in the Nation," *Randall*, 548 U.S. at 250, as the panel acknowledged, *see* App.14. Only two other states have *any* limits as low as Alaska's—and even those states do not apply those limits to all elections. *See supra* pp.12-13.[2] Alaska, by contrast, applies its $500 limits to every campaign in the state, thus producing the single lowest limit for gubernatorial races in the country. And unlike most states, Alaska does not index its limits for inflation, so its limits (like Vermont's) will continue to decrease in real terms over time to well below what this Court has held acceptable.

The history and justifications for Alaska's exceedingly restrictive limits underscore their incompatibility with this Court's precedents. Alaska began its efforts to limit individual-to-candidate back

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[2] The panel suggested that "[a]t least four other states (Colorado, Kansas, Maine, and Montana) have the same or lower limit for state house candidates." App.15 (citing *Lair*, 873 F.3d at 1174 tbls. 2 & 3). That is incorrect. While Colorado and Montana do have comparably low limits for some elections, Kansas and Maine's limits are not directly comparable. Kansas permits individuals to contribute $500 both for each primary election, caucus, or convention, *and* for each general election. Kan. Stat. §25-4153(a)(2). Maine's lowest base limit ($350) is similarly a *per-election* limit, and Maine defines "election" to include both primary and general elections, and both regular and special referenda. Me. Stat. tit. 21-A, §§1(2), 1015(1).

in 1974 with a limit comparable to the federal limit upheld in *Buckley*. In the ensuing 45 years, campaigns for elected office have gotten substantially more expensive, while Alaska has halved its contribution limits in nominal terms. The net effect of inflation and the dramatic reduction in the nominal limits is that the contribution limits in Alaska today are 90% lower in real terms than what the people of Alaska deemed sufficient to preclude quid pro quo corruption in 1974.

As problematic as those reductions in both real and nominal limits are under this Court's precedents, the justifications for the reductions are even worse. In the past 45 years, this Court has systematically cut back on the permissible justifications for the restriction of First Amendment activity inherent in contributions. *E.g.*, *McCutcheon*, 572 U.S. at 191; *Citizens United*, 558 U.S. at 359. During the same period, Alaska has twice reduced its contribution limits based on justifications that precisely mirror justifications discarded by this Court.

For example, the reduction to $500 began as an avowed effort to make elections cheaper and "get big money out of politics." *See* CA9.Dkt.12-2 at 170-74. The legislature then accompanied the initial reduction from $1,000 to $500 with findings about campaigns being too long and expensive, and special interest groups having too much access and influence. S.B. 191, 19th Leg., 2d Sess. §1(a) (Alaska 1996). Yet this Court has made crystal clear that a state "may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative

influence of others." *McCutcheon*, 572 U.S. at 191. And it has squarely rejected the notion that contribution limits may target "ingratiation and access." *Citizens United*, 558 U.S. at 360.

In short, it should have been abundantly clear under this Court's cases that Alaska's contribution limits cannot survive First Amendment scrutiny. Not only are those limits "substantially lower than both the limits [this Court] ha[s] previously upheld and comparable limits in other States"—two "danger signs" that strongly suggest that they "fall outside tolerable First Amendment limits," *Randall*, 548 U.S. at 253—but those low limits (unsurprisingly) have been justified by impermissible concerns over access, ingratiation, and too much "money in politics," rather than targeted concerns with eliminating quid pro quo corruption.

2. The Ninth Circuit effectively acknowledged the conflict with this Court's cases by deeming itself bound by pre-*Randall* circuit precedent and upholding these restrictive limits only by applying that less-demanding circuit precedent. The panel readily acknowledged that "at least one of the 'warning signs' identified in *Randall* is present here," and that "*Randall*, if binding, may aid [petitioners'] position." App.16 n.5. But it believed itself "compelled" to ignore those warning signs on account of Ninth Circuit precedent holding that "*Randall* is not binding authority because no opinion commanded a majority of the Court." App.16 n.5. Instead, the panel was forced to apply a far more lenient test that, as it acknowledged, manages to water down *both* the analysis of whether contribution limits actually

"target … *quid pro quo* corruption or its appearance" *and* the analysis of whether they are "closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 572 U.S. at 192, 197 (plurality opinion).

As to the former, in the Ninth Circuit, "the quantum of evidence necessary to justify a legitimate state interest is low: the perceived threat must be merely more than 'mere conjecture' and 'not ... illusory.'" App.9-10. As the panel observed (with considerable understatement), there is "some doubt as to the continuing vitality of th[at] standard" after *McCutcheon* and *Citizens United*, which squarely rejected "mere conjecture" and "highly implausible" corruption concerns. *See McCutcheon*, 572 U.S. at 210-18. Yet in the Ninth Circuit, under precedents that predate *Randall*, *Citizens United*, and *McCutcheon*, "the fact that [contribution limits'] proponents in the legislature articulated … an intent to create a 'level playing field'" is not constitutionally problematic, as long as there is at least *some* evidence that the legislature also had at least *some* concern about quid pro quo corruption. App.12. As Judge Ikuta noted in a recent dissent from the denial of rehearing en banc: "Our court may not ignore such an important change in Supreme Court jurisprudence. But the [Ninth Circuit] does just that by applying the same legal standard and evidentiary burden that we had adopted before the Supreme Court decided *McCutcheon* and *Citizens United*." *Lair v. Motl*, 889 F.3d 571, 572 (9th Cir. 2018).

The Ninth Circuit's *Eddleman* test is just as inconsistent with this Court's jurisprudence when it

comes to tailoring. Instead of asking whether a contribution limit is closely drawn to avoid unnecessary abridgement of First Amendment rights as this Court demands, *e.g.*, *McCutcheon*, 572 U.S. at 197, the Ninth Circuit asks only whether the limits "(a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign." *Eddleman*, 343 F.3d at 1092. In the Ninth Circuit's words, a contribution limit should survive scrutiny unless it is "so radical in effect as to render political association ineffective, drive the sound of the candidate's voice below the level of notice, and render contributions pointless." App.7-8 (quoting *Eddleman*, 343 F.3d at 1091-92).

Unsurprisingly, that undemanding test led the Ninth Circuit to uphold Alaska's exceedingly low limits. After all, that test essentially assumes that contribution limits further an important state interest, and then declares them permissible so long as they leave the would-be contributor some avenue to affiliate with the candidate (which, of course, every contribution limit does), and leave the candidate not wholly incapable of waging a campaign. Such a toothless standard is completely divorced from the text of the First Amendment and this Court's case law. The First Amendment demands an inquiry into whether state action "abridges" free speech and association, not whether it obliterates them. And this Court's tailoring analysis asks not whether state laws leave some modest avenues for free speech and association, but whether a contribution limit *abridges more First Amendment activity than necessary*. *McCutcheon*, 572 U.S. at 197. The conflict between

the Ninth Circuit's diluted standard and the test demanded by this Court's precedents and the First Amendment could hardly be clearer.

3. The Ninth Circuit's approach to contribution limits and the status of *Randall* as controlling authority conflicts with the approach of its sister circuits. Indeed, the Ninth Circuit stands alone in refusing to treat *Randall* as controlling authority. Every other court to consider *Randall* has correctly recognized that it must follow the reasoning of the plurality opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977).[3] While *Marks* analysis can sometimes be difficult, in *Randall* it is plain as day that the plurality test is the narrowest and therefore controlling ground, as three members of this Court considered the plurality's test *too lenient*. *See Randall*, 548 U.S. at 264 (Kennedy, J., concurring); *id.* at 265 (Thomas, J., concurring, joined by Scalia, J.). Thus, while it might be tempting for a circuit court to apply a test even more demanding than *Randall*, especially in light of subsequent cases like *McCutcheon*, it is inexplicable that the Ninth Circuit

[3] *See, e.g.*, *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 60-61 (1st Cir. 2011); *Ognibene v. Parkes*, 671 F.3d 174, 192 (2d Cir. 2011); *Preston v. Leake*, 660 F.3d 726, 739-40 (4th Cir. 2011); *Zimmerman v. City of Austin*, 881 F.3d 378, 387 (5th Cir. 2018); *McNeilly v. Land*, 684 F.3d 611, 617-20 (6th Cir. 2012); *Ill. Liberty PAC v. Madigan*, 904 F.3d 463, 469-70 (7th Cir. 2018); *Minn. Citizens Concerned for Life v. Swanson*, 640 F.3d 304, 319 n.9 (8th Cir. 2011), *rev'd in part on other grounds*, 692 F.3d 864 (8th Cir. 2012) (en banc); *Indep. Inst. v. Williams*, 812 F.3d 787, 791 (10th Cir. 2016); *Ala. Democratic Conference v. Att'y Gen. of Ala.*, 838 F.3d 1057, 1069-70 (11th Cir. 2016); *Holmes v. FEC*, 875 F.3d 1153, 1165 (D.C. Cir. 2017).

has deemed itself free to ignore *Randall* altogether and apply far-less demanding pre-*Randall* circuit precedent. That conclusion conflicts with the conclusion reached by ten other circuits, and the predictable result is that the Ninth Circuit upheld contribution limits that at least six Justices would have invalidated in *Randall*.

The Ninth Circuit's stubborn adherence to its pre-*Randall* precedent not only conflicts with the approach of ten other circuits, but underscores the need for this Court's review. This Court granted certiorari 14 years ago in *Randall* to consider the constitutionality of Vermont's unusually low contribution limits, which had been upheld by the Second Circuit, and to provide guidance on the proper analysis of contribution limits, especially limits set at a sub-*Buckley* level. While *Randall* did not produce a majority opinion, ten circuits have understood that the plurality opinion both is controlling and provides guidance that the panel here acknowledged would call into question the constitutionality of Alaska's unindexed sub-*Buckley* limits. By doubling down on its pre-*Randall* circuit precedent, the Ninth Circuit has presented a case for this Court's review more compelling than *Randall* itself. The Ninth Circuit has refused to accept the instruction that this Court granted *Randall* to provide, has upheld sub-*Buckley* contribution limits materially indistinguishable from those invalidated in *Randall*, and as an added bonus has solidified a circuit split on *Randall*'s proper construction.

B. The Ninth Circuit's Approval of Alaska's Unrealistically Low Individual-to-Group Contribution Limits Conflicts With Decisions of This Court, Decisions of Other Circuits, and First Principles.

The Ninth Circuit's test not only distorted its analysis of Alaska's individual-to-candidate limit, but also infected its analysis of Alaska's individual-to-group limit. The panel started on the right foot, acknowledging that the individual-to-group limit presents a more difficult question for the state "because that limit reflects a more attenuated risk of quid pro quo corruption or its appearance than does the individual-to-candidate limit." App.20. After all, the very fact that such contributions are made to a group, rather than to a candidate, makes them even less likely to be an effort to engage in quid pro quo corruption, rather than simply to exercise core First Amendment rights.

Moreover, individual-to-group limits produce even greater infringement on First Amendment rights than individual-to-candidate limits, for individuals contribute to groups for many reasons beyond a desire to associate with and express support for a particular candidate. They may seek to associate with and express support for a group because of the particular positions the group espouses, or because the group is particularly effective at countering messages with which the individual disagrees. In addition, the combined effect of the individual-to-candidate and individual-to-group limits is even more restrictive of First Amendment activity than either one standing alone. By foreclosing both options at anything more

than *de minimis* levels, the Alaska contributions limits squelch far more political participation than can be justified. *Cf. Randall*, 548 U.S. at 255 (noting how interplay between Vermont's various exceedingly low limits exacerbated the First Amendment burden).

Alaska's exceedingly low $500 individual-to group limit is every bit as outlying as Alaska's individual-to-candidate limit. Compared to both the limits this Court has upheld and limits imposed by other states, the limits are far more restrictive. They are significantly lower than limits deemed sufficient by the federal government and other states to guard against quid pro quo corruption. And, like the candidate limits, the group limits are unindexed for inflation and stand at the same nominal level as when they were first introduced in 1975.

Despite all this, the panel deemed itself bound to uphold the individual-to-group limit, based on its erroneous belief that individual-to-candidate and individual-to-group limits must stand or fall together under this Court's decision in *CalMed*. *See* App.20. As the panel put it: "If, as we hold, the individual-to-candidate limit is constitutional, then under *California Medical Ass'n* so too is Alaska's law that prevents evasion of that limit." App.21. Setting aside the problem that the individual-to-candidate limit is in fact *un*constitutional, that is a radical overreading of *CalMed*.

To be sure, Justice Blackman's concurring opinion (which set forth the narrowest, and hence controlling, rationale supporting the judgment) held the $5,000 individual-to-group limit at issue there constitutional on the theory that it permissibly furthered an anti-

circumvention interest. *See CalMed*, 453 U.S. at 203 (Blackman, J., concurring). But he did not embrace the proposition that if an individual-to-candidate limit is permissible, then a corresponding individual-to-group limit necessarily must be as well—let alone that an *identical* individual-to-group limit is always and inevitably constitutional. Indeed, there was no need to consider the latter proposition, for the individual-to-group limit at issue there was *five times higher* than the relevant individual-to-candidate limit, *see id.* at 198 (plurality opinion)—a differential reflective of the far lesser risks of quid pro quo corruption in the individual-to-group context.

Moreover, even if *CalMed* could be read as standing for the sweeping proposition that *any* limit designed to prevent evasion of a constitutional limit is ipso facto constitutional, that proposition could not be reconciled with subsequent decisions of this Court. As *McCutcheon* has since clarified, "the *base limits* themselves are a prophylactic measure," for "few if any contributions to candidates will involve *quid pro quo* arrangements." 572 U.S. at 221 (quoting *Citizens United*, 558 U.S. at 357). Accordingly, when additional limits are "layered on top, ostensibly to prevent circumvention of the base limits," that kind of "'prophylaxis-upon-prophylaxis approach' requires that [courts] be particularly diligent in scrutinizing the law's fit." *Id.* That is precisely what individual-to-group contribution limits constitute: constitutionally suspect prophylaxis-on-prophylaxis that demands particularly rigorous scrutiny.

Far from giving this extra prophylaxis extra scrutiny, the panel gave the group limits a free pass,

engaging in no independent analysis whatsoever of whether there are other, less restrictive "alternatives available to [Alaska] that would serve [its] anticircumvention interest, while avoiding 'unnecessary abridgment' of First Amendment rights." *Id.* The panel justified the group limit based on its approval of the candidate limit and the concern that, without the $500 group limit, "any two individuals could form a 'group,' which could then funnel money to a candidate," and "[s]uch groups could easily become pass-through entities for, say, a couple that wants to contribute more than the $500 individual-to-candidate limit." App.21. But to the extent that concern is not already fully addressed by other aspects of Alaska law, including Alaska's low $1,000 *group-to-candidate* contribution limit, *see* Alaska Stat. §15.13.070(c), it could easily be addressed—indeed, *has* been addressed by other jurisdictions—through far less restrictive means.

For example, federal law treats "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, *including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate*, … as contributions from such person to such candidate." 52 U.S.C. §30116(a)(8) (emphasis added). Federal law also imposes lower limits on contributions to and from PACs that have fewer contributors or contribute only to a small number of candidates. *Id.* §30116(a)(4). Those kinds of provisions far more directly address the kinds of circumvention concerns that the panel raised—and do so without imposing anywhere near as severe of

burdens on the ability of individuals to engage in constitutionally protected activity.

The decision below thus manages to uphold not one but two exceedingly low contribution limits that, under a faithful reading of this Court's more recent cases, are obviously unconstitutional. That result can be explained only by the panel's belief that it was constrained to follow circuit precedent that predates *Randall* and *McCutcheon* and all but guarantees that any non-zero contribution limits will be approved.[4] It bears emphasis, moreover, that the decision below conflicts not just with the approach of this Court and other circuits, but with first principles. The limits at issue here touch at the core of the First Amendment interest in political participation. And the state's touch is not a light one. An individual of modest means who wants to participate in the political process in Alaska in a meaningful manner is foreclosed at nearly every turn. The right to engage in meaningful independent expenditures may be foreclosed as a practical matter, and the right to associate with candidates and groups that support them is foreclosed as a legal matter. The First Amendment does not tolerate that outcome, and neither should this Court.

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[4] That reality is underscored by the panel majority's invalidation of the one provision—an aggregate limit on contributions by nonresidents—as to which it did not perceive itself to be hemmed in by circuit law. The reason for that differential treatment is clear: The panel was bound to apply Ninth Circuit law to the former, but was free to apply this Court's jurisprudence to the latter.

II. The Question Presented Is Exceptionally Important.

The Ninth Circuit's insistence on elevating its outmoded jurisprudence above the decisions of this Court is wrong, and is producing profoundly misguided results. That test has twice led the court to uphold some of the lowest individual-to-candidate limits in the country—first Montana's, *see Lair*, 873 F.3d 1170, and now Alaska's. Making matters worse, that test has now infected the Ninth Circuit's analysis of individual-to-group limits as well, for the court has (erroneously) decreed that the two must stand or fall together. And given how undemanding the court's analysis of contribution limits has proven, the Ninth Circuit has now adopted tests that all but guarantee the approval of contribution limits at sub-*Buckley* levels—indeed, at levels that in real terms are more than 90% below the lowest limits approved by this Court.

Two of the most common forms of contribution limits thus will get essentially no serious scrutiny in the Ninth Circuit. And as this case illustrates, those limits will reinforce each other to foreclose meaningful political participation. Not only are Alaskans now left with nothing more than a bare ability to associate with candidates without providing meaningful support; the individual-to-group limit achieves the same effect to an even greater degree, reducing Alaskans to bare association with all manner of advocacy groups on the implausible and unsubstantiated theory that such groups are nothing more than conduits for circumventing limits on contributions to candidates. While narrowly targeted anti-circumvention

provisions like those employed by other jurisdictions (including the federal government) may vindicate valid limits, the kind of prophylaxis-upon-prophylaxis approach approved below exacerbates all the constitutional concerns that six members of this Court embraced in *Randall*. The fact that no member of the Ninth Circuit can vindicate those concerns is reason enough to grant certiorari.

Moreover, there is every reason to think that Alaska's constitutionally dubious approach will spread to other jurisdictions now that it has been endorsed by the Ninth Circuit. Indeed, Oregon is currently deciding whether to impose new limits on all manner of political contributions—limits that were first proposed a mere two months after the decision in this case. *See, e.g.*, H.B. 2714, 80th Leg. Assemb., Reg. Sess. (Or. 2019); S.J. Res. 18, 80th Leg. Assemb., Reg. Sess. (Or. 2019). This Court should step in before the Ninth Circuit's deeply flawed and underprotective test can be employed to validate any more efforts to interfere with rights as to which the First Amendment should have "its fullest and most urgent application." *McCutcheon*, 572 U.S. at 191-92.

Finally, this case is an excellent vehicle for this Court's review. Unlike the panel in *Lair*, the panel here did not opine that it would have upheld the challenged limits even if it applied the *Randall* plurality's analysis. *See Lair*, 873 F.3d at 1186-87. In fact, the panel intimated precisely the opposite. *See* App.16 n.5. Thus, the deviation from the law of this Court's and other circuits likely was outcome determinative. And the misguided analysis of the individual-to-candidate limits preordained the

approval of individual-to-group limits that reinforce the constitutional injury to ordinary Alaskans like petitioners. In sum, this case is a perfect vehicle to vindicate the promise of the First Amendment in Alaska and the Ninth Circuit.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

JOHN J. BURSCH
KRISTEN K. WAGGONER
BRETT HARVEY
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001

ROBIN O. BRENA
BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, AK 99501

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioners

July 22, 2019

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-35019

DAVID THOMPSON, AARON DOWNING; JIM CRAWFORD, DISTRICT 18 OF THE ALASKA REPUBLICAN PARTY,

Plaintiffs-Appellants,

v.

HEATHER HEBDON, in Her Official Capacity as the Executive Director of the Alaska Public Offices Commission; TOM TEMPLE; IRENE CATALONE; RON KING; ROBERT CLIFT; ADAM SCHWEMLEY, in Their Official Capacities as Members of the Alaska Public Offices Commission,

Defendants-Appellees.

Argued and Submitted: June 11, 2018
Filed: November 27, 2018

Before: Sidney R. Thomas, Chief Judge, and Consuelo M. Callahan and Carlos T. Bea, Circuit Judges.

OPINION

CALLAHAN, Circuit Judge:

We must decide whether an Alaska law regulating campaign contributions violates the First Amendment. At issue are Alaska's limit on contributions made by individuals to candidates, its limit on contributions made by individuals to election-related groups, its limit on political party-to-candidate contributions, and its limit on the total funds a candidate may receive from out-of-state residents. The district court upheld all four provisions against a constitutional challenge by three individuals and a subdivision of the Alaska Republican Party. Affirmance on the individual-to-candidate and individual-to-group limits is compelled by *Lair v. Motl*, 873 F.3d 1170 (9th Cir. 2017) (*Lair III*), *reh'g en banc denied*, 889 F.3d 571 (9th Cir. 2018), and *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981), respectively, and we also uphold the political party-to-candidate limit. However, we reverse as to the nonresident limit. While the first three restrictions are narrowly tailored to prevent quid pro quo corruption or its appearance and thus do not impermissibly infringe constitutional rights, the nonresident limit does not target an "important state interest" and therefore violates the First Amendment.

I.

A.

Alaska has long regulated campaign contributions to political candidates. In 1974, Alaska enacted a statute prohibiting individuals from contributing more than $1,000 annually to a candidate. *See Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 601 (Alaska 1991). One former Alaska

state representative testified in the bench trial in this case that, even under this $1,000 limit, "there was an inordinate influence from contributions on the actions of the legislature." *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1029 (D. Alaska 2016). A former member of the Anchorage Assembly, Charles Wohlforth, testified that "the system was rigged by money[ed] interests and that too frequently the decisions of the assembly were controlled by those interests and their desires, based on the kind of contributions they would make." *Id.* at 1030 (alteration in original).

In 1996, the Alaska Legislature enacted a revised campaign finance law "to restore the public's trust in the electoral process and to foster good government." 1996 Alaska Sess. Laws ch. 48 § 1(b). Among other things, the law lowered the annual limit on contributions by individuals to a candidate from $1,000 to $500 and set a $500 limit on annual contributions by individuals to a group that is not a political party. *Id.* §§ 10-11. The law also set aggregate limits on the amount candidates could accept from nonresidents of Alaska. In 2003, the Alaska legislature revised the 1996 law by raising the individual-to-candidate and individual-to-group limits from $500 to $1,000. 2003 Alaska Sess. Laws ch. 108, §§ 8-10.

In 2006, a ballot initiative—Ballot Measure 1 (the "2006 Initiative")—proposed a further revision of the limits. 2006 Alaska Laws Initiative Meas. 1, § 1. The 2006 Initiative is the law at issue here. The 2006 Initiative returned the individual-to-candidate and individual-to-group limits to their pre-2003 levels of

$500 per year. Alaska Stat. § 15.13.070(b)(1). It also capped the amount a non-political party group could contribute to a candidate at $1,000, restricted the amount candidates could receive from nonresidents to $3,000 per year, and limited the amount a political party—including its subdivisions—could contribute to a candidate. Alaska Stat. §§ 15.13.070(c) & (d), 15.13.072(a)(2) & (e)(3), 15.13.400(15). The voter information packet included the following statement of the 2006 Initiative's purpose:

> Corruption is not limited to one party or individual. Ethics should be not only bipartisan but also universal. From the Abramoff and Jefferson scandals in Washington D.C. to side deals in Juneau, special interests are becoming bolder every day. They used to try to buy elections. Now they are trying to buy the legislators themselves.

The 2006 Initiative passed with 73% of the popular vote.

B.

Plaintiffs are three individuals and a subdivision of the Alaska Republican Party. In 2015, Plaintiffs brought a First Amendment challenge against Defendants, Alaska public officials, targeting, as relevant to this appeal, (1) the $500 annual limit on an individual contribution to a political candidate, (2) the $500 limit on an individual contribution to a non-political party group, (3) annual limits on what a political party—including its subdivisions—may contribute to a candidate, and (4) the annual aggregate limit on contributions a candidate may

accept from nonresidents of Alaska. Plaintiffs sought a declaratory judgment that each of the challenged provisions is unconstitutional, a permanent injunction prohibiting enforcement of the challenged provisions, and costs and attorney's fees under 42 U.S.C. § 1983. *Thompson*, 217 F. Supp. 3d at 1027.

Two of the Plaintiffs, Aaron Downing and Jim Crawford, are Alaska residents who wanted to, but legally could not, contribute more than $500 to individual candidates running for state or municipal office. Crawford would also like to give more than $500 to a non-political party group. David Thompson is a Wisconsin resident whose brother-in-law is Alaska State Representative Wes Keller. Thompson sent Keller a $100 check for his campaign in 2015, but Keller returned the check because the campaign had already hit the $3,000 nonresident limit. Finally, District 18 is a subdivision of the Alaska Republican Party that was limited in the amount it could give to Amy Demboski's mayoral campaign due to Alaska's aggregate limit on the amount a campaign can accept from a political party.

After granting Alaska's motion for partial summary judgment for lack of standing on certain of Plaintiffs' claims,[1] the district court held a seven-day bench trial. In November 2016, the district court issued a decision rejecting all of Thompson's remaining claims. *Thompson*, 217 F. Supp. 3d at 1027-40. Applying the intermediate scrutiny standard for evaluating contribution limitations set forth in

[1] The district court's partial summary judgment determination is not at issue in this appeal.

Montana Right to Life Ass'n v. Eddleman, 343 F.3d 1085 (9th Cir. 2003), the district court determined that each of the four challenged provisions was aimed at the "important state interest" of combating quid pro quo corruption or its appearance, and was "closely drawn" to meet that interest. *Thompson*, 217 F. Supp. 3d at 1040. Plaintiffs (collectively, "Thompson") timely appealed.

II.

"We review a district court's legal determinations, including constitutional rulings, *de novo*." *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc). "When the issue presented involves the First Amendment . . . [h]istorical questions of fact (such as credibility determinations or ordinary weighing of conflicting evidence) are reviewed for clear error, while constitutional questions of fact (such as whether certain restrictions create a 'severe burden' on an individual's First Amendment rights) are reviewed *de novo*." *Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006).

III.

"The starting place in the analysis of the constitutionality of campaign finance reform legislation is *Buckley v. Valeo*, 424 U.S. 1 (1976) [(per curiam)]." *Eddleman*, 343 F.3d at 1090. The Court in *Buckley* explained that limitations on campaign contributions implicate the contributor's First Amendment rights. *Buckley*, 424 U.S. at 20-21. But it distinguished limits on expenditures made *by* candidates from limits on contributions made *to* candidates. *Id.* The Court reasoned that the former amounts to a direct affront to the regulated entity's

free speech rights, while the latter "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 19-21. *Buckley* further explained that

> [a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Id. at 21. Put another way, unlike expenditure limitations, "limiting contributions [leaves] communication significantly unimpaired." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000). Accordingly, while expenditure limitations must survive exacting scrutiny, limits on contributions are "subject to [a] relatively complaisant review under the First Amendment." *FEC v. Beaumont*, 539 U.S. 146, 161 (2003); *see also Shrink Mo.*, 528 U.S. at 387-88. The question is whether the law targets an "important state interest," and, if so, "whether 'the contribution limitation is so radical in effect as to render political

association ineffective, drive the sound of the candidate's voice below the level of notice, and render contributions pointless.'" *Eddleman*, 343 F.3d at 1091-92 (quoting *Shrink Mo.*, 528 U.S. at 397).

> The bottom line is this: After *Buckley* and *Shrink Missouri*, state campaign contribution limits will be upheld if (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and (2) if the limits are "closely drawn"—i.e., if they (a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign.

Id. at 1092. The State bears the burden of satisfying both prongs of this inquiry. *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014). We recently reaffirmed this test in *Lair III*, 873 F.3d at 1178-80.

A.

In recent years, the Supreme Court has limited the type of state interest that justifies a First Amendment intrusion on political contributions. After *Citizens United* and *McCutcheon*, states must show that any such limitation serves to combat actual quid pro quo corruption or its appearance. *McCutcheon*, 572 U.S. at 206-07; *Citizens United v. FEC*, 558 U.S. 310, 359-60 (2010). It no longer suffices to show that the limitation targets "undue influence" in politics. *McCutcheon*, 572 U.S. at 208 (holding that "the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties" is not a sufficient state

interest for limiting campaign contributions (quoting *Citizens United*, 558 U.S. at 359)); *see also Lair III*, 873 F.3d at 1188 (Bea, J., dissenting) ("*Citizens United* . . . narrowed what can constitute a valid important state interest . . . to only the state's interest in eliminating or reducing quid pro quo corruption or its appearance.").

The Court's limitation on what constitutes an "important state interest" does not necessarily undermine the government's ability to cap contributions made directly to a candidate. *See McCutcheon*, 572 U.S. at 192-93 ("[W]e have previously upheld [limits on direct contributions to a candidate] as serving the permissible objective of combatting corruption."); *Citizens United*, 558 U.S. at 356-57. That is because the appearance of such corruption is "'inherent in a regime of large individual financial contributions' to particular candidates." *See McCutcheon*, 572 U.S. at 207. To address that risk, states may implement prophylactic limits because individual-to-candidate contributions *could* compel "elected officials [to be] influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *Id.* at 225 (emphasis omitted) (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)). Indeed, "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve [actual] *quid pro quo* arrangements." *Citizens United*, 558 U.S. at 357.

In *Eddleman*, we held that the quantum of evidence necessary to justify a legitimate state

interest is low: the perceived threat must be merely more than "mere conjecture" and "not . . . 'illusory.'" *Eddleman*, 343 F.3d at 1092.[2]

B.

We turn to assessing the four challenged provisions of the 2006 Initiative. For each, we consider whether it is (1) targeted at an "important state interest," and, if so, (2) whether it is "closely drawn" to meet that interest. *Eddleman*, 343 F.3d at 1092.

i.

We begin with the $500 individual-to-candidate contribution limit. Thompson challenges both Alaska's power to impose the limit at all and its intent in halving the prior $1,000 limit with the challenged $500 limit.

Thompson first argues that Alaska's evidence amounts to showing only an "undue influence" by contributors on candidates for office. In light of *Lair III*, we reject this argument. Alaska proffered substantial evidence of attempts to secure votes for contributions. For example, Senator Coghill testified that he was approached by a lobbyist demanding his vote, saying: "This is why we gave to you. Now we need your help." Similarly, Anchorage Assembly member

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[2] *McCutcheon* and *Citizens United* created some doubt as to the continuing vitality of the standard for the evidentiary burden we announced in *Eddleman*. *See Lair v. Motl*, 889 F.3d 571, 575 (9th Cir. 2018) (Ikuta, J., dissenting from denial of rehearing en banc) ("This highly attenuated standard is two steps removed from the standard explained by *Citizens United* and *McCutcheon*."). However, in *Lair III* we reaffirmed this evidentiary standard, 873 F.3d at 1178, and we denied a petition for rehearing en banc, 889 F.3d at 572.

Bob Bell testified that an executive offered to hold a fundraiser for him if he would support a private prison project. When he refused, the executive held a fundraiser for his opponent instead. These examples demonstrate attempts by individuals to affect public officials' voting behavior through the prospect of financial gain, thereby giving rise to a risk of quid pro quo corruption. Finally, there is Alaska's VECO public corruption scandal, which came to light shortly after the 2006 Initiative was passed. That scandal snared roughly 10% of Alaska's legislature in a scheme of accepting money from VECO, an oil services firm, in return for votes and other political favors.[3] Under *Lair III*, we are compelled to conclude that the State's evidence suffices to show that the individual-to-candidate limit "further[s] the important state interest of preventing quid pro quo corruption or its appearance." 873 F.3d at 1179-80.

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[3] Thompson dismisses the VECO scandal as irrelevant because Alaska fails to show that it was the impetus for the 2006 Initiative. As noted, however, the legislative purpose of the initiative is beside the point. But Thompson's argument fails for an additional reason. He reasons that prosecuting violators under bribery laws—as occurred with the VECO scandal—is the only legitimate means of preventing corruption. Not so. By allowing limits on contributions directly to candidates as a prophylactic measure, the Supreme Court has made clear that the state interest of preventing corruption is not limited to prosecuting instances of *past* corruption. *See McCutcheon*, 572 U.S. at 196-98 (citing *Buckley*, 424 U.S. at 26-29); *Shrink Mo.*, 528 U.S. at 389 ("Congress [can] constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery." (quoting *Buckley*, 424 U.S. at 28)).

Thompson next argues that Alaska fails to show that the legislative purpose for cutting the individual contribution limit in half was to prevent quid pro quo corruption or its appearance. According to Thompson, Alaska needed to but failed to explain why $500 is better suited to combating corruption than the prior $1,000 limit. Absent such a showing, Thompson asserts, the $500 limit targets at most the "influence" and "pressure" that contributors can have on elected officials.

We are unpersuaded. First, the State must demonstrate only that when the 2006 Initiative was approved by the voters "the risk of actual or perceived quid pro quo corruption is more than 'mere conjecture.'" *Lair III*, 873 F.3d at 1178 (quoting *Eddleman*, 343 F.3d at 1092). We have rejected—albeit *sub silentio*—such purpose-based arguments in the past. In *Yamada v. Snipes*, 786 F.3d 1182, 1205-06 (9th Cir. 2015), we held that a limit on contributions by government contractors withstood scrutiny because it "target[ed] . . . the contributions most closely linked to actual and perceived quid pro quo corruption." This was notwithstanding the fact that the ban's proponents in the legislature articulated other goals, including an intent to create a "level playing field." *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1058 n.26 (D. Haw. 2012). Thompson's proposed rule—requiring Alaska to show that reducing the limit from $1,000 to $500 is necessary to combat corruption—would significantly restrict the deference the Supreme Court has given to states to determine how precisely to advance the important state interest of combating corruption.

Second, Thompson's argument about the exact amount of the limit misses the mark because the first step of *Eddleman* "is divorced from the actual amount of the limits—it is a threshold question whether *any* level of limitation is justified." *Lair III*, 873 F.3d at 1178.

Concluding, as we must, that the individual-to-candidate contribution limit targets an "important state interest," we turn to the second *Eddleman* factor: whether the limit is "closely drawn." *Lair III*, 873 F.3d at 1180; *Eddleman*, 343 F.3d at 1092. To pass scrutiny, Alaska must show that the limit "focus[es] narrowly on the state's interest," "leave[s] the contributor free to affiliate with a candidate," and "allow[s] the candidate to amass sufficient resources to wage an effective campaign." *Eddleman*, 343 F.3d at 1092. "In making this determination, we look at all dollars likely to be forthcoming in a campaign, rather than the isolated contribution, and we also consider factors such as whether the candidate can look elsewhere for money, the percentage of contributions that are affected, the total cost of a campaign, and how much money each candidate would lose." *Id.* at 1094 (internal citations omitted).

Narrow Focus. Whether a contribution limit has a narrow focus requires us to "assess the 'fit between the stated governmental objective and the means selected to achieve that objective,' looking at whether the limit[] target[s] 'the narrow aspect of political association where the actuality and potential for corruption have been identified.'" *Lair III*, 873 F.3d at 1180 (internal citations omitted) (quoting *McCutcheon*, 572 U.S. at 199 and *Buckley*, 424 U.S. at

28). Consistent with the intermediate scrutiny we apply to contribution limits, the fit need not be "perfect, but reasonable." *McCutcheon*, 572 U.S. at 218 (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). Thus, while the 2006 Initiative need not employ "the least restrictive means," it should be "narrowly tailored to achieve the desired objective." *Id.* (quoting *Fox*, 492 U.S. at 480).

Thompson argues that the individual-to-candidate limit lacks a narrow focus because, he asserts, Alaska fails to show that reducing the limit from $1,000 to $500 was necessary, and because the limit is among the lowest in the nation. We have already explained that Alaska need not show that it was necessary to reduce the contribution limit to $500, only that the new limit targets quid pro quo corruption or its appearance. *See Buckley*, 424 U.S. at 30. On the question of whether the $500 limit is "narrowly focused" on that interest, we must uphold the dollar amount unless it is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Mo.*, 528 U.S. at 397.

Although the $500 limit is low compared to the laws of most other states, whether it is unreasonably low requires a deeper dive. The $500 limit affects only the top 12.6% of contributions that all candidates received in elections occurring after the initiative passed in 2006. This is on par with the Montana law's limit, which we upheld in *Eddleman* and *Lair III*. That limit targeted the top 10% of contributions—i.e., "the high-end contributions most likely to result in actual or perceived corruption." *Lair III*, 873 F.3d at 1181;

Eddleman, 343 F.3d at 1094.[4] Moreover, although the $500 limit is on the low-end of the range of limits adopted by various states, it is not an outlier. At least four other states (Colorado, Kansas, Maine, and Montana) have the same or lower limit for state house candidates, as do at least five comparably sized cities (Austin, Portland, San Francisco, Santa Cruz, and Seattle). We recently upheld a comparable limit. *Lair III*, 873 F.3d at 1174 tbls.2 & 3.

Contributors' Ability to Affiliate With Candidates. Thompson does not argue that the $500 individual-to-candidate limit prevents supporters from affiliating with candidates. His tacit acknowledgment that Alaska has met its burden on this factor is well taken. As with Montana's limit upheld in *Eddleman* and *Lair III*, Alaska "not only permits such affiliation through direct monetary contributions, but also 'in ways other than direct contributions, such as donating money to a candidate's political party, volunteering . . . , sending direct mail . . . , or taking out independent newspaper, radio, or television ads to convey . . . support.'" *Lair III*, 873 F.3d at 1184 (alterations in original) (quoting *Eddleman*, 343 F.3d at 1094). Accordingly, we

[4] Thompson relies on a different metric: the percentage of campaign dollars that came from contributors giving the $500 maximum, which he asserts amounted to nearly 40%. Regardless of the accuracy of Thompson's statistic, it is not well-suited to determining "the percentage of contributions that are affected." *Eddleman*, 343 F.3d at 1094. It merely reflects that large contributions will command a relatively outsize share of a candidate's campaign war chest.

conclude that the $500 limit does not hobble contributors' ability to affiliate with candidates.

Candidates' Ability to Campaign Effectively. Thompson argues the $500 individual-to-candidate limit is impermissibly low because, he asserts, it favors incumbents at the expense of challengers, causes campaigns in competitive races to run deficits, and is not indexed for inflation. Each of these contentions misses its mark, however, because none directly addresses the dispositive question: whether the individual-to-candidate limit "impede[s] a candidate's ability to 'amass the resources necessary for effective advocacy.'" *Eddleman*, 343 F.3d at 1091 (quoting *Shrink Mo.*, 528 U.S. at 397). A limit does so if it is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Mo.*, 528 U.S. at 397.[5]

The district court weighed expert testimony from both sides in concluding that the $500 limits allow candidates to "amass" the necessary funds.[6]

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[5] Thompson relies heavily on *Randall v. Sorrell*, 548 U.S. 230 (2006). It appears that Justice Breyer's plurality opinion in *Randall*, if binding, may aid Thompson's position because at least one of the "warning signs" identified in *Randall* is present here. However, as we recognized in *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (*Lair I*), and reiterated in *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015) (*Lair II*), *Randall* is not binding authority because no opinion commanded a majority of the Court.

[6] The testimony and the district court's decision addressed together the relevant inquiry of both the $500 individual-to-candidate limit and the $500 individual-to-group limit. The individual-to-group limit is discussed in more detail in Part III.B.ii of our opinion.

Thompson, 217 F. Supp. 3d at 1035. Thompson submitted the testimony of Michael Gene Pauley, a campaign manager and consultant, who stated his belief that the $500 limits are too low because they are not indexed for inflation and because the limits are annual in nature. *Id.* at 1034-35. Thompson also offered the testimony of Senator John Coghill, who stated that "he has always been able to raise sufficient funds to run an effective campaign, but that it was 'just harder' under the current $500 limits than under the $1,000 limits because 'the lower limits do cause you to have to go broad.'" *Id.* at 1035.

Thompson also called Clark Bensen, a consultant and former director of political analysis for the Republican National Committee, who testified that, under the $500 limits, candidates often spend more than they raise. *Id.* The district court did not credit Bensen's testimony, however, because he acknowledged that his analysis was based on exaggerated estimates. *Id.* Moreover, Bensen's determination that campaigns run deficits under current law is also unpersuasive because it is analytically unsound. By simply comparing total contributions to total expenditures, Bensen did not control for certain expenditures that have little or nothing to do with running an effective campaign—e.g., charitable contributions, loan repayments, and payment transfers to future campaign accounts. Campaigns often must make such non-campaign-related expenditures because they are required to run a zero balance at the end of the campaign. Considering the analytical flaws in Bensen's analysis and his own admission that "I didn't do a very sophisticated analysis . . . . It's not like I didn't do it, but I didn't do it well, shall we say, or

completely," *id.*, we hold that the district court's credibility determination was not clearly erroneous. *See Prete*, 438 F.3d at 960. Accordingly, we, like the district court, discount Bensen's testimony.

Defendants relied on the expert testimony of Thomas Begich and John-Henry Heckendorn, both of whom are political consultants. *Thompson*, 217 F. Supp. 3d at 1035. Both testified that candidates—challengers and incumbents alike—can run effective campaigns under the $500 limits and "have done so." *Id.* They explained that the candidate who raises the most money does not necessarily win the election, that it is not—contrary to Thompson's experts' testimony—getting more expensive to run campaigns, and that the limits do not favor incumbents over challengers, also contrary to Thompson's claim. *Id.* at 1035-36. For example, they testified that while the cost of some campaign elements have gone up, others have gotten cheaper, such as advertising and outreach to voters through new technologies. *Id.*

Additional record evidence supports Defendants' position. For example, in the 2012 and 2014 election cycles, several successful non-incumbent candidates raised in excess of $100,000 from individual contributions alone. While different races will require varying levels of fundraising, witness testimony established that amassing $100,000 allows a candidate to mount an effective campaign. For example, TV spending by a state legislative candidate generally would not exceed $40,000; radio advertising could cost $20,000; consultant services could cost another $20,000; a mailer might cost up to $3,000; and signs could cost up to $10,000. Thus, even if a

candidate spent the maximum estimated expenditure in each of these categories, she would still spend less than $100,000. And that sum does not include the candidate's total campaign war chest. Candidates also receive contributions from political action committees ("PACs") and political parties.

Viewing the evidence as a whole, we agree with the district court that the $500 individual-to-candidate limit allows candidates to amass sufficient funds to run an effective campaign.[7] And because Defendants also show that the limit is narrowly focused on Alaska's interest in combating quid pro quo corruption or its appearance and does not impede an individual's ability to associate with a candidate, we affirm the district court's determination that the $500

[7] It is unclear whether a district court's determination that a contribution limit allows candidates to amass sufficient funds to run an effective campaign is owed any deference. Arguably, such a finding is a "constitutional question of fact," which we review de novo. *Prete*, 438 F.3d at 960. In reversing the district court in Lair III, we implicitly applied de novo review. *Lair III*, 873 F.3d at 1184-86 (holding that "Montana's limits do not prevent candidates from amassing sufficient resources to campaign effectively" without giving any deference to the district court and without identifying any clear error); *see id.* at 1178 ("In the First Amendment context . . . 'our review [of the district court's fact finding] is more rigorous than other cases.'" (second alteration in original) (quoting *Lair II*, 798 F.3d at 748 n.8)). In other First Amendment contexts, we have suggested some level of deference is appropriate. *See, e.g.*, *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 670 (9th Cir. 1990) ("[W]e must simultaneously ensure the appropriate appellate protection of First Amendment values and still defer to the findings of the trier of fact."). We need not resolve this question because we agree with the district court's conclusion based on our own independent view of the evidence.

individual-to-candidate limit is "closely drawn." *Eddleman*, 343 F.3d at 1092.

ii.

At first glance, the individual-to-group contribution limit of $500 appears to present a closer question because that limit reflects a more attenuated risk of quid pro quo corruption or its appearance than does the individual-to-candidate limit. In *McCutcheon*, the Supreme Court rejected a limitation that capped aggregate contributions to PACs. 572 U.S. at 210-18. Because money was not transacted directly between contributor and candidate, "there [wa]s not the same risk of *quid pro quo* corruption or its appearance." *Id.* at 210. While the government articulated an important interest in preventing circumvention of the base limits, the Court held that the "Government ha[d] not carried its burden of demonstrating that the aggregate limits further[ed] its anticircumvention interest." *Id.* at 211. The Court did not, however, call into doubt anticircumvention as an important state interest; the government simply failed to meet its evidentiary burden.

McCutcheon's tacit embrace of anticircumvention as an important state interest in combating quid pro quo corruption or its appearance means that another Supreme Court case, *California Medical Ass'n*, 453 U.S. 182, remains good law. In that case, applying intermediate scrutiny to limits on individual contributions to PACs, the Court upheld the limits as "further[ing] the governmental interest in preventing the actual or apparent corruption of the political process" because they prevent contributors from "evad[ing] the . . . limit on contributions to

candidates . . . by channeling funds through a multicandidate political committee." *Cal. Med. Ass'n*, 453 U.S. at 197-98; *see also FEC v. Colo. Republican Fed. Campaign Comm'n*, 533 U.S. 431, 456 (2001) ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption . . . ."); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1125 (9th Cir. 2011) ("[T]here is nothing in the explicit holdings or broad reasoning of *Citizens United* that invalidates the anti-circumvention interest in the context of limitations on direct candidate contributions."). We conclude that Alaska has demonstrated the same interest here where the risk of circumvention of the individual-to-candidate limit is apparent: under Alaska law, any two individuals could form a "group," which could then funnel money to a candidate. Alaska Stat. § 15.13.400(8)(B). Such groups could easily become pass-through entities for, say, a couple that wants to contribute more than the $500 individual-to-candidate limit.

If, as we hold, the individual-to-candidate limit is constitutional, then under *California Medical Ass'n* so too is Alaska's law that prevents evasion of that limit.

iii.

Alaska law limits the amount a political party may contribute to a municipal candidate to $5,000. Alaska Stat. §§ 15.13.070(d), 15.13.400(15). Thompson does not challenge the dollar amount; he instead argues that the law's aggregation of political party sub-units is unconstitutional. He reasons that limiting party sub-units to the $5,000 limit but not limiting multiple labor-union PACs to the same limit is discriminatory.

Thompson's discriminatory treatment argument fails because independent labor union PACs are not analogous to political party sub-units. Party sub-units, by definition, are subsidiaries of a parent entity—the umbrella political party. As such, they share the objectives and rules of the party. In the past, we have observed without remark that at least one other state similarly aggregates party sub-units for purposes of campaign contribution limits. *See, e.g.*, *Lair II*, 798 F.3d at 740 ("Montana treats all committees that are affiliated with a political party as one entity."). Different labor unions, by contrast, are entirely different entities. Moreover, political parties may donate more than labor union PACs ($5,000 versus $1,000), which undercuts the basis for a direct comparison between the two disparate sets of organizations. Alaska Stat. § 15.13.070(c), (d). We therefore reject Thompson's inchoate disparate treatment argument and uphold the political party-to-candidate limit.[8]

iv.

Finally, we address Thompson's challenge to Alaska's nonresident aggregate limit, which bars a candidate from accepting more than $3,000 per year from individuals who are not residents of Alaska. Alaska Stat. § 15.13.072(a)(2), (e). This particular provision prevented Thompson from making a desired $100 contribution to a candidate for the Alaska House of Representatives—his brother-in-law—because his

[8] Our holding should not be construed as foreclosing a constitutional challenge to the dollar amount of Alaska's (or some other state's) limit on political party-to-candidate contributions.

brother-in-law had already received $3,000 in out-of-state contributions.

The district court held that the nonresident aggregate limit serves an anti-corruption purpose. The court cited Alaska's unique vulnerability to "exploitation by outside industry and interests," and referenced trial testimony that those entities "can and do exert pressure on their employees to make contributions to state and municipal candidates." *Thompson*, 217 F. Supp. 3d at 1039. The court determined that the nonresident limit therefore

> furthers Alaska's sufficiently important interest in preventing quid pro quo corruption or its appearance in two ways. First, [it] furthers the State's anticorruption interest directly by avoiding large amounts of out-of-state money from being contributed to a single candidate, thus reducing the appearance that the candidate feels obligated to outside interests over those of his constituents. Second, the nonresident aggregate limit discourages circumvention of the $500 base limit and other game-playing by outside interests, particularly given [the Alaska Public Offices Commission's] limited ability and jurisdiction to investigate and prosecute out-of-state violations of Alaska's campaign finance laws.

Id.

Taking the district court's evidentiary findings as true, on de novo review we cannot agree that the nonresident limit targets quid pro quo corruption or its appearance. At most, the law aims to curb

perceived "undue influence" of out-of-state contributors—an interest that is no longer sound after *Citizens United* and *McCutcheon*. *McCutcheon*, 572 U.S. at 206-08. Indeed, Alaska's argument that the nonresident limit "reduces the appearance that a candidate will be obligated to outside interests rather than constituents" says nothing about *corruption*.[9] It is not enough to show that out-of-state firms—and particularly those wishing to exploit Alaska's natural resources—"can and do exert pressure on their employees to make contributions to state and municipal candidates." *Thompson*, 217 F. Supp. 3d at 1039.

Moreover, even if we agreed with Alaska that limiting the inflow of contributions from out-of-state extractive industries served an anti-corruption interest, the nonresident aggregate limit is a poor fit. Out-of-state interests can still maximize their influence across a large number of candidates—they just need to be early players so that they can contribute the maximum $500 donation before each of those candidates reaches the $3,000 limit.

McCutcheon is instructive on this point. There, the Court invalidated aggregate contribution limits that allowed an individual to contribute the maximum to multiple candidates but not to any additional candidates once the contributor hit the aggregate limit. 572 U.S. at 210-18. The Court held that the law

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[9] In *Landell v. Sorrell*, the Second Circuit opined that the Alaska Supreme Court's upholding of the nonresident limit "is a sharp departure from the corruption analysis adopted by the Supreme Court in *Buckley* and *Shrink*." 382 F.3d 91, 148 (2d Cir. 2004), *rev'd on other grounds sub nom. Randall*, 548 U.S. 230.

was a poor fit for combating quid pro quo corruption or its appearance because contributions to a candidate before a contributor has reached the aggregate limit are not somehow less corrupting than contributions to another candidate after the aggregate limit is reached. *See id.*

Alaska's showing as to its nonresident limit is analogous. Alaska fails to show why an out-of-state individual's early contribution is not corrupting, whereas a later individual's contribution—i.e., a contribution made after the candidate has already amassed $3,000 in out-of-state funds—is corrupting. Nor does Alaska show that an out-of-state contribution of $500 is inherently more corrupting than a like in-state contribution—only the former of which is curbed under Alaska's nonresident limit. Alaska fails to demonstrate that the risk of quid pro quo corruption turns on a particular donor's geography. Accordingly, while we do not foreclose the possibility that a state could limit out-of-state contributions in furtherance of an anti-corruption interest, Alaska's aggregate limit on what a candidate may receive is a poor fit.

As an alternative defense of the law, Alaska argues that the nonresident limit targets the important state interest of protecting its system of self-governance. We reject Alaska's proffered state interest for three reasons.

First, what Alaska calls "self-governance" is really a re-branding of the interest of combating influence and access that the Supreme Court has squarely rejected. To understand Alaska's proffered state interest, it is important to be clear on what the State

does *not* mean by "self-governance." In the distinct context of a law restricting "who may exercise official, legislative powers," we recognized "self-governance" as a legitimate state interest. *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 531 (9th Cir. 2015) (en banc). In *Norris*, we used the term "self-governance" to mean a state's interest in controlling who governs.

Alaska's (and the dissent's) proffered state interest is materially different from what we called self-governance in *Norris*. Alaska's version of "self-governance" is concerned with limiting not who governs (as in *Norris*) but who is allowed to contribute to the campaigns of those who would govern. Indeed, the dissent correctly characterizes Alaska's proffered interest as seeking "to ensure that its legislators are responsive to the individuals that they represent, not to out-of-state interests." Dissent at 37. The premise of Alaska's concern with "outside control" is that Alaska state officials will feel pressure to kowtow to out-of-state entities because of nonresident contributions.

The dissent makes a cogent case for the view that states should be able to limit who may "directly influence the outcome of an election" by making financial contributions. *See* Dissent at 37. But that debate is over. The Supreme Court has expressly considered and rejected those arguments. *See McCutcheon*, 572 U.S. at 206-08 (holding that states do not have a legitimate interest in curbing "'influence over or access to' elected officials" by individuals "spend[ing] large sums" (quoting *Citizens United*, 558 U.S. at 359)). In short, Alaska's proffered interest in

"self-governance" is indistinguishable from the disavowed state interest in combating "influence over or access to" public officials.[10]

Second, even if Alaska's "self-governance" interest could be construed as distinct from the interest in combating influence and access, the Supreme Court's recent campaign finance decisions leave no room for us to accept the State's proffered interest. The Supreme Court's opinions articulate "only one" narrowly defined legitimate state interest in capping campaign contributions: "preventing quid pro quo corruption or its appearance." *McCutcheon*, 572 U.S. at 206-07. In *McCutcheon*, its banner campaign contribution case, the Court explains that it has "consistently rejected attempts to suppress campaign speech based on other legislative objectives." *Id.* at 207. *McCutcheon* resolved that "[a]ny regulation *must instead target* what we have called '*quid pro quo*'

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[10] The Supreme Court has given no indication that the First Amendment interest in protecting political access waxes or wanes depending on the representative relationship between contributor and candidate. *See Buckley*, 424 U.S. at 48-49. In fact, *Buckley*'s language arguably compels the opposite conclusion:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Id. (internal quotation marks omitted). Far from serving the goal of "secur[ing] the widest possible dissemination of information from diverse and antagonistic sources," the nonresident limit artificially suppresses the free exchange of political ideas.

corruption or its appearance." *Id.* at 192 (emphasis added) (citing *Citizens United*, 558 U.S. at 359). Indeed, "[c]ampaign finance restrictions that pursue other objectives . . . impermissibly inject the Government 'into the debate over who should govern.'" *Id.* (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011)); *see also VanNatta v. Keisling*, 151 F.3d 1215, 1217 (9th Cir. 1998) (noting "the lack of support for any claim based on the right to a republican form of government"). That unqualified directive leaves no room for Alaska's averred self-governance interest. Campaign contribution limits rise or fall on whether they target quid pro quo corruption or its appearance.

The dissent suggests we are free to accept "self-governance" as an important state interest in justifying limits on campaign contributions because the Supreme Court has not expressly considered and rejected that specific interest. Although a prior three-judge opinion of our court does not bind a later panel on an issue that was not before the prior panel, when it comes to Supreme Court precedent, our court is bound by more than just the express holding of a case. Our decisions must comport with the "reasoning or theory," not just the holding, of Supreme Court decisions (even in the face of prior contrary Ninth Circuit precedent). *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (adopting the view that lower courts are "bound not only by the holdings of higher courts' decisions but also by their 'mode of analysis'" (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989))); *see id.* at 900 ("[T]he issues decided by the higher court need not be identical in order to be controlling."). The

dissent's conclusion that self-governance is an important state interest in this context is "clearly irreconcilable" with the Supreme Court's reasoning in *McCutcheon*. *See id.*

Third, even if *McCutcheon* did not shutter the possibility of alternative state interests, self-governance is not an important state interest in light of countervailing First Amendment concerns. Indeed, Alaska fails to prove that nonresident participation in a state's election infringes state sovereignty. Instead, it alleges in conclusory fashion that the "nonresident limit also furthers the important state interest in protecting Alaska's system of self-government from outside control."

Accordingly, we hold that Alaska's aggregate nonresident contribution limit violates the First Amendment, and we reverse the district court's judgment on this issue.[11]

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[11] The dissent relies on *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), but that case is inapplicable. The plaintiffs in *Bluman* were foreign citizens who sought the right to participate in the United States campaign process by, among other things, making financial contributions to candidates. *Id.* at 282-83. They argued they should be treated the same as American citizens (such as minors and American corporations) who, though unable to vote, are permitted to make campaign contributions. *Id.* at 290. The court rejected that argument and based its holding on the conclusion that the plaintiffs, in contrast to American citizens who are unable to vote, were, by definition, outside "the American political community." *Id.* Thus, contrary to the dissent's statement that *Bluman* cannot "be distinguished on the grounds that it involved a distinction between United States citizens and foreign nationals," Dissent at 39, that distinction was the very basis for the *Bluman* court's holding.

CONCLUSION

States have an important interest in preserving the integrity of their political institutions. A vital method of doing so is by curbing large monetary contributions, which can corrode the public's faith in its government's responsiveness to the popular will. Thus, while campaign contributions implicate a contributor's First Amendment right to express a particular political viewpoint, the State has an important interest in combating quid pro quo corruption or its appearance.

Under existing precedent, the district court correctly held that three of the four challenged provisions of Alaska's 2006 campaign finance law are closely drawn to serve this interest. But the court erred in upholding the nonresident aggregate contribution limit because it, at most, targets contributors' influence over Alaska politics. Since *Citizens United* and *McCutcheon*, preventing "undue influence" is no longer a legitimate basis for restricting contributions under the First Amendment. Accordingly, we reverse the district court on that provision and remand for entry of judgment consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

The parties shall bear their own costs.

THOMAS, Chief Judge, concurring in part and dissenting in part:

I agree with the majority that Alaska's limitations on individual contributions to candidates and election-related groups and on political party contributions to individual candidates do not violate the First Amendment. However, I would hold that the nonresident aggregate contribution limit, which furthers Alaska's important state interests in preventing quid pro quo corruption or its appearance and in preserving self-governance, also does not violate the First Amendment. Thus, I respectfully dissent from Section III(B)(iv) of the majority opinion. I would affirm the district court's well-reasoned decision in its entirety.

I

To survive First Amendment scrutiny in this case, Alaska must establish that the limits are justified by the risk of quid pro quo corruption or its appearance. And its burden is light.[1] Alaska need only show that "the risk of actual or perceived quid pro quo corruption" by out-of-state actors is neither "illusory" nor "mere conjecture." *Lair v. Motl*, 873 F.3d 1170, 1188 (9th Cir. 2017) ("*Lair III*") (quoting *Eddleman*, 343 F.3d at 1092). After a seven-day bench trial, the district court concluded that Alaska had satisfied its burden. Its factual findings were not clearly

[1] Because Thompson raised no challenge to the amount of the aggregate limit, the only question is whether "there is adequate evidence that the limitation furthers" Alaska's anti-corruption interest. *Lair v. Bullock*, 798 F.3d 736, 742 (9th Cir. 2015) ("*Lair II*") (quoting *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003)).

erroneous, *see Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006) (describing standard), and its conclusions were amply supported by the record. Alaska demonstrated that nonresident contributions present a particular risk of quid pro quo corruption or its appearance.[2]

Alaska is uniquely vulnerable to exploitation by out-of-state actors. The district court found that this is so, in part, because of "Alaska's almost complete reliance on one industry for a majority of its revenues." *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1029 (D. Alaska 2016). Indeed, while 85 to 92% of Alaska's budget derives from the oil and gas industry, that industry is not responsible for more than 50% of any other state's budget. *Id.* As one pro-oil and gas organization proclaims on its website, "Alaska is the only state in the Union that is so dependent on one industry to fund its government services." ALASKA OIL & GAS ASS'N, *State Revenue*, https://www.aoga.org/facts-and-figures/state-revenue (last visited Nov. 9, 2018). Today, not only does the State depend on the industry to fund its services, but

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[2] The Supreme Court has specifically rejected Thompson's argument that a ban is treated differently than a limit when it comes to connecting the regulation to the state's important interest. *Fed. Elections Comm'n v. Beaumont*, 539 U.S. 146, 162 (2003) ("It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected[.]"). And there is no question that Alaska may limit campaign contributions to prevent quid pro quo corruption or its appearance. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (9th Cir. 2000). Thus, the issue here is essentially whether the state may draw a line between residents and non-residents.

boom-and-bust cycles have a more immediate impact on Alaskans' daily lives, too: "the petroleum industry supports one-third of all Alaska jobs." ALASKA OIL & GAS ASS'N, *Facts and Figures*, https://www.aoga.org/facts-and-figures (last visited Nov. 9, 2018).

The economic benefits of natural resource extraction do not come without a cost. The interests of out-of-state oil companies are often at odds with the interests of some Alaska residents. Today, "[a]bout 17 percent of Alaskans—or 120,000 people—live in rural areas, where 95 percent of households use fish and 86 percent use game for subsistence purposes[.]" Azmat Khan, *Living off the Land in Rural Alaska*, PBS, https://www.pbs.org/wgbh/frontline/article/ living-off-the-land-in-rural-alaska (last visited Nov. 9, 2018). Resource extraction has the potential to cause irremediable damage to Alaskan lands and culture: "any change that depletes wild resources, reduces access to wild areas and resources, or increases competition between user groups can create problems for subsistence[,]" which is "among the most highly valued parts of [Alaska] culture" and "essential . . . to rural economies." Alaska Dep't of Fish & Game, *Subsistence in Alaska: FAQs*, http://www.adfg.alaska.gov/index.cfm?adfg=subsistence.faqs#QA14 (last visited Nov 9, 2018).

Given the oil and gas industry's outsized impact on Alaska's economy, it is not difficult to see why, as the district court found, Alaska is dependent upon and therefore particularly vulnerable to corruption by out-of-state corporations, whose interests are likely to be indifferent to those of Alaska's residents. Alaska is

vulnerable for another reason, too—with "the second smallest legislature in the United States and the smallest senate," it takes only "ten votes [to] stop a legislative action such as an oil or gas tax increase from becoming law." *Dauphinais*, 217 F. Supp. 3d at 1029. "Consequently, the incentive to buy a vote, and the chances of successfully doing so, are therefore higher in Alaska than in states with larger legislative bodies." *Id.* The district court was persuaded by trial testimony that "the unique combination of Alaska's small population, geographic isolation, and great natural resources make it extremely dependent on outside industry and interests." *Id*. at 1039. Alaska cannot afford to extract its natural resources without out-of-state corporations. *Id*. And because out-of-state corporations cannot extract without the cooperation of government, these corporations do all they can to influence state politics. *Id.*

As the Supreme Court has recognized, "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." *Shrink Mo.*, 528 U.S. at 391 (citing *Buckley v. Valeo*, 424 U.S. 1, 27 (1976)). Thus, it is enough to demonstrate that out-of-state contributors are particularly interested in corrupting the political process in Alaska, as the State has easily done.

But the proof at trial was more than theoretical. The district court found that "natural resource extraction firms can and do exert pressure on their employees" to contribute to political campaigns in Alaska. *Dauphinais*, 217 F. Supp. 3d at 1039. In other words, these out-of-state interests have found a way to

circumvent the generally applicable contribution limits.

And, as the trial evidence demonstrated, Alaska's history of corruption is, in fact, storied. As the majority has aptly noted, in the mid-2000s, a highly publicized scandal implicated ten percent of Alaska's legislators for improperly taking money from VECO, a corporation that provided support services to out-of-state oil and gas corporations. *Id.* at 1030.

Unsurprisingly, the VECO scandal did not go unnoticed by the public. News outlets played an FBI surveillance video showing one member of the legislature, Representative Vic Kohring, accepting cash from VECO in exchange for his vote on pending oil tax legislation. Representative Kohring went on to pen a newspaper column claiming that the only thing separating him from other Alaska lawmakers was that he got caught. *Id.* at 1030. As the district court determined, the publicity surrounding the VECO scandal supports Alaska's interest in limiting the appearance of quid pro quo corruption by out-of-state interests in order to preserve Alaskans' belief in the integrity of their political system. *Id.* at 1031.

In sum, I would hold that Alaska's important anti-corruption interest justifies a limit on nonresident speech. Nonresident contributions present a special risk of quid pro quo corruption that is neither "illusory" nor "mere conjecture." *Lair III*, 873 F.3d at 1188 (quoting *Eddleman*, 343 F.3d at 1092). Particularly in the aftermath of the VECO scandal, the nonresident aggregate contribution furthers Alaska's interest in preventing the appearance of corruption, thereby increasing "[c]onfidence in the

integrity of [Alaska's] electoral processes," a value "essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (per curiam). The district court was entirely correct, and the record supports its conclusion.

II

The nonresident aggregate cap is also justified by a second important state interest: self-governance. I would hold that self-governance is a sufficiently important interest to justify the nonresident aggregate cap.

A

"[T]he right to govern is reserved to citizens." *Foley v. Connelie*, 435 U.S. 291, 297 (1978). There is no question that Alaska may bar nonresidents from voting, no matter how tangible their interest in a state election, *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68-69 (1978), even though "[n]o right is more precious" than the right to vote, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Because of the need for responsiveness to local interests, states may also closely guard from nonresident interference those "functions that go to the heart of representative government," such as "state elective or important nonelective executive, legislative, and judicial positions[.]" *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973).

States should be able to prevent out-of-state interests from advancing candidates for whom the contributor cannot even vote. Campaign contributions are made primarily to directly influence the outcome of an election rather than to broadcast one's one political opinion. *Beaumont*, 539 U.S. at 161

("[C]ontributions lie closer to the edges than to the core of political expression."). Thus, they are "subject to relatively complaisant review." *Id.*

The nonresident aggregate limit furthers Alaska's important state interest in protecting state sovereignty in governance. It is "the choice, and right, of the people to be governed by their citizen peers." *Foley*, 435 U.S. at 296. When out-of-state interests fund political campaigns, they place an obstacle between the people and their representatives. Alaska must be able to take measures to ensure that its legislators are responsive to the individuals that they represent, not to out-of-state interests.

Alaska's interest in protecting self-government is "important," as required under *Eddleman*'s first prong. *Lair II*, 798 F.3d at 742 (quoting *Eddleman*, 343 F.3d at 1092). Indeed, on en banc review, we held that a state's interest in "securing the people's right to self-government" was "compelling" in the face of a First Amendment challenge to a law requiring municipal initiative proponents to be bonafide electors. *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 531 (9th Cir. 2015) (en banc). The Supreme Court reached a similar conclusion regarding residence requirements under an Equal Protection analysis. *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972) (recognizing as "substantial" the government's interest in "preserv[ing] the basic conception of a political community").

B

Bluman v. Federal Election Commission, 800 F. Supp. 2d 281 (D.D.C. 2011), *summarily aff'd*, 132 S. Ct. 1087 (2012) (mem.), decided by a three-judge panel

of the D.C. District Court, is analogous. There, the court considered a federal law preventing foreign nationals from making not only contributions but also independent expenditures to influence federal elections. *Id.* at 283. Because spending money to influence an election is not only "speech" but also "participation in democratic self-government," foreign nationals may be subject to restrictions targeted at protecting sovereignty. *Id.* at 289.

In *Bluman*, the court recognized that "[p]olitical contributions and express-advocacy expenditures are an integral aspect of the process by which Americans elect officials to federal, state, and local government offices." *Id.* at 288. "[I]t is undisputed that the government may bar foreign citizens from voting and serving as elected officers"; "[i]t follows that the government may bar foreign citizens . . . from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections." *Id.*

Alaska presents an even stronger case than did the federal government in *Bluman*. There, the challenged law restricted individual expenditures as well as campaign contributions, and the court therefore applied strict scrutiny. *Id.* at 285 (citing *McConnell v. FEC*, 540 U.S. 93, 134-37 (2003) and *Buckley*, 424 U.S. at 20-23). Here, on the other hand, we need not identify a compelling government interest but only a "sufficiently important" one. *Lair II*, 798 F.3d at 742 (quoting *Eddleman*, 343 F.3d at 1092).

Nor can *Bluman* be distinguished on the grounds that it involved a distinction between United States citizens and foreign nationals. "It has long been

recognized that resident aliens enjoy the protections of the First Amendment." *Price v. I.N.S.*, 962 F.2d 836, 841 (9th Cir. 1991) (internal citations omitted). The line drawn in *Bluman* separates citizens with the right to participate in government from foreign nationals subject to federal law but with no corollary right of participation. Alaska draws its line even more carefully by applying the aggregate contribution limit only to nonresidents.[3]

C

I respectfully disagree that the Supreme Court has foreclosed this issue because it rejected other purported interests. Op. at 29-30. Foundational to the judicial role is a recognition that "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (7 Wall.) (1868)). Jurisdiction extends only to "Cases" and "Controversies." U.S. Const. art. III, § 2. It emphatically does not extend to issues that are not before a court. No court can reject a self-governance

[3] This, too, is why *VanNatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998), is immediately distinguishable, even if it remains good law and speaks to this precise issue, both of which propositions are questionable. *VanNatta* is distinguishable because it limited out-of-district contributions to candidates for state office. *Id.* at 1217. Further, as we noted in *Eddleman*, reliance on the Court's approach in *VanNatta* "fails to recognize the impact of the Supreme Court's . . . decision in *Shrink Missouri*." 343 F.3d at 1091 n.2. And the majority opinion in *VanNatta* is framed as a rejection of the state's evidence and legal argument rather than as setting forth a hard-and-fast rule regarding the constitutionality of all limits on out-of-district contributions. 151 F.3d at 1217-18.

theory unless it is asked to do so. The Supreme Court has yet to take up this question; in resolving this controversy, it is not our role to apply a holding that does not exist.

D

"The Constitution limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018) (quoting The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)). This basic principle arises from "a fundamental structural decision incorporated into the Constitution." *Id.*

Our federalist system is not binary; it does not simply pit the states—as a single entity—against federal power. Rather, it recognizes the sovereignty of each individual state. In the words of Justice Marshall, "[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass." *McCulloch v. Maryland*, 17 U.S. 316, 403 (4 Wheat.) (1819). Under our Constitution, "the people of each state compose a State, having its own government, and endowed with all the functions essential to separate and independent existence." *Lane Cty. v. Oregon*, 74 U.S. 71, 76 (7 Wall.) (1868). "Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but . . . the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance

of the National government." *Texas v. White*, 74 U.S. 700, 725 (7 Wall.) (1869).

In the current, highly partisan political climate, regional differences may be obscured by contentious national issues. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 962-63 (2016). However, "[e]ven at the level of national politics, . . . there always remains a meaningful distinction between someone who is a citizen of the United States and of Georgia and someone who is a citizen of the United States and of Massachusetts." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 859 (1995) (Thomas, J., dissenting).

Here, of course, we are not dealing with politics at a national level, but only with Alaska's ability to take measures to "represent and remain accountable to its own citizens." *Printz v. United States*, 521 U.S. 898, 920 (1997) (internal citations omitted). State governments can and should be "more sensitive to the diverse needs" of their populations. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Alaska must have the right to prevent non-resident interests from taking hold of their elections. *See* Anthony Johnstone, *Outside Influence*, 13 ELECTION L.J. 117, 122-23(2014) ("No form of federalism, and therefore no form of government under the Constitution, works without limits on outside influence in the states."). Therefore, I disagree that Alaska's self-governance interest is not "sufficiently important" for purposes of limiting campaign contributions. *Lair II*, 798 F.3d at 742 (quoting *Eddleman*, 343 F.3d at 1092).

III

For these reasons, I respectfully dissent, in part. I agree that Alaska's limitations on individual contributions to candidates and election-related groups and on political party contributions to individual candidates do not violate the First Amendment. However, I also would hold that Alaska's nonresident aggregate contribution limit is constitutional. Alaska has shown that the risk of quid pro quo corruption or its appearance by out-of-state campaign contributions is neither "illusory" nor "mere conjecture." *Lair III*, 873 F.3d at 1188 (quoting *Eddleman*, 343 F.3d at 1092). Further, it has demonstrated its important interest in self-governance, which justifies the nonresident aggregate limit. Thus, I would affirm the judgment of the district court in its entirety.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-35019

DAVID THOMPSON, AARON DOWNING; JIM CRAWFORD, DISTRICT 18 OF THE ALASKA REPUBLICAN PARTY,

Plaintiffs-Appellants,

v.

HEATHER HEBDON, in Her Official Capacity as the Executive Director of the Alaska Public Offices Commission; TOM TEMPLE; IRENE CATALONE; RON KING; ROBERT CLIFT; ADAM SCHWEMLEY, in Their Official Capacities as Members of the Alaska Public Offices Commission,

Defendants-Appellees.

Filed: February 20, 2019

Before: THOMAS, Chief Judge, and CALLAHAN and BEA, Circuit Judges

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ORDER

A judge made a sua sponte request for a vote on whether to rehear this case en banc. After reviewing the supplemental briefing submitted by the parties,

the request has been withdrawn. The mandate shall issue forthwith.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. 3:15-cv-00218-TMB

DAVID THOMPSON, AARON DOWNING; JIM CRAWFORD, DISTRICT 18 OF THE ALASKA REPUBLICAN PARTY,

Plaintiffs,

v.

PAUL DAUPHINAIS, in His Official Capacity as the Executive Director of the Alaska Public Offices Commission; MARK FISH, IRENE CATALONE, RON KING, KENNETH KIRK, and VANCE SANDERS, in Their Official Capacities as Members of the Alaska Public Offices Commission,

Defendants.

Filed: November 7, 2016

MEMORANDUM OF DECISION

I. INTRODUCTION

Plaintiffs David Thompson, Aaron Downing, Jim Crawford, and District 18 of the Alaska Republican Party ("District 18") bring this lawsuit against Defendants Paul Dauphinais, Mark Fish, Irene Catalone, Ron King, Kenneth Kirk, and Vance Sanders (collectively, "Defendants" or "the State") to challenge the constitutionality of four provisions of

Alaska's campaign finance laws under the First and Fourteenth Amendments.[1] The Court called this matter for bench trial on April 25, 2016. The parties concluded their arguments and presentations of evidence on May 3, 2016,[2] and subsequently submitted post-trial briefs.[3] Having carefully considered the pleadings, exhibits, trial testimony, arguments of counsel, and the applicable law, the Court makes the following findings of fact and conclusions of law.[4]

II. BACKGROUND

In 1996, the Alaska Legislature enacted Chapter 48 SLA 1996 for the purpose of "substantially revis[ing] Alaska's campaign finance laws in order to restore the public's trust in the electoral process and to foster good government." Chapter 48 SLA 1996 was based on a ballot initiative drafted by Michael Frank and certified by Lieutenant Governor Fran Ulmer, and established, among other things, $500 annual limits on the amount an individual could contribute to a candidate for state office or to a group that was not a political party, as well as aggregate limits on the dollar amount a candidate could accept from political parties or individuals who were not residents of Alaska. None of the contribution limits were indexed

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[1] Dkt. 1 (Compl.); Dkt. 46 (First Am. Compl.).

[2] Dkt. 125.

[3] Dkt. 129 (re-filed at Dkt. 139 with working hyperlinks); Dkt. 131; Dkt. 140; Dkt. 143. The parties have also submitted notices of supplemental authorities, in accordance with D.Ak. L.R. 7.1(i)(1)[B]. *See* Dkt. 145; Dkt. 147.

[4] *See* Fed. R. Civ. P. 52(a).

for inflation. Chapter 48 SLA 1996 became effective January 1, 1997.

In 2003, the Alaska Legislature modified Alaska's campaign finance laws by enacting Chapter 108 SLA 2003. Chapter 108 SLA 2003 relaxed some of the campaign contribution limits set by Chapter 48 SLA 1996, including by raising the amount an individual could contribute to a political candidate or group that was not a political party from $500 to $1,000, annually. Chapter 108 SLA 2003 became effective September 14, 2003.

Three years later, 73 percent of Alaska voters voted in favor of Ballot Measure 1, which proposed revising Alaska's campaign finance laws to lower the amount an individual could contribute to a political candidate or group that was not a political party back to $500 per year. The $500 base limits became effective December 17, 2006.

Plaintiffs in this case are individuals and a subdivision of a political party who contributed or attempted to contribute the maximum dollar amount permitted under Alaska's current campaign finance laws, as established by the above session laws and initiatives. Downing is an Alaska resident who, in 2015, contributed $500 to the campaign of mayoral candidate Larry DeVilbiss and to the campaign of state house candidate George Rauscher, the maximum contribution amounts permitted under Alaska Stat. 15.13.070(b). Crawford is an Alaska resident who, in 2015, contributed $500 to the campaign of mayoral candidate Amy Demboski and to the Alaska Miners' Association Political Action Committee, the maximum contribution amounts permitted under Alaska Stat.

15.13.070(b). Thompson is a Wisconsin resident and brother-in-law to Alaska State Representative Wes Keller who, in 2015, attempted to make a $500 contribution to Keller's campaign, but was unable to do so because the campaign had already received the maximum dollar amount it could accept from nonresidents under Alaska Stat. 15.13.072(e)(3). And District 18 is a subdivision of the Alaska Republican Party that was limited to a $250 contribution to Amy Demboski's mayoral campaign, the maximum amount that it was permitted to contribute under the aggregate limit on the dollar amount a campaign can accept from a political party set forth in Alaska Stat. 15.13.070(d)(4).

By this suit, Plaintiffs challenge four distinct parts of Alaska's campaign finance laws under the First and Fourteenth Amendments. Each challenged provision is discussed individually below. In relief, Plaintiffs seek a declaratory judgment that each of the challenged provisions are unconstitutional, a permanent injunction prohibiting the State from enforcing the challenged provisions, and full reasonable costs and attorney's fees under 42 U.S.C. § 1983.

The Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343. This civil action arises under the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983.

III. ANALYSIS

It is well established that the First Amendment protects political association as well as political

expression.[5] It is equally well established that laws which limit the amount of money a person may give to a candidate or campaign organization intrude upon both of those First Amendment interests,[6] as a contribution serves both "as a general expression of support for the candidate and his views" and "to affiliate a person with a candidate."[7] But because "contributions lie closer to the edges than to the core of political expression,"[8] laws which regulate political contributions, as opposed to political expenditures, are subject to "a lesser but still 'rigorous standard of review.'"[9] Under that standard of review, "state contribution limits will be upheld if (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and (2) if the

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[5] *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam); *accord McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014); *see also Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

[6] *Buckley*, 424 U.S. at 23; *Lair v. Bullock*, 798 F.3d 736, 741-42 (9th Cir. 2015).

[7] *Buckley*, 424 U.S. at 20-21.

[8] *FEC v. Beaumont*, 539 U.S. 146, 161 (2003); *see also Buckley*, 424 U.S. at 20 ("A limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication.").

[9] *McCutcheon*, 134 S.Ct. at 1444 (quoting *Buckley*, 424 U.S. at 29); *accord Thalheimer v. City of San Diego*, 645 F.3d 1109, 1125 (9th Cir. 2011) ("While expenditures and contributions are different modes of political speech, it is the distinct nature of contributions that lessens the First Amendment rights of donors, and strengthens the government's regulatory power.").

limits are 'closely drawn.'"[10] The State bears the burden of establishing both prongs of the constitutional inquiry.[11]

After *Citizens United*, what constitutes a sufficiently important state interest to support limits on campaign contributions has narrowed. Now, the prevention of quid pro quo corruption, or its appearance, is the only state interest that can support limits on campaign contributions.[12] "That Latin phrase captures the notion of a direct exchange of an official act for money,"[13] or "'dollars for political favors.'"[14] Campaign finance laws that pursue other objectives, such as reducing the amount of money in politics, restricting the political participation of some in order to enhance the relative influence of others, or targeting the general gratitude a candidate may feel toward those who support him or his allies, "impermissibly injects the Government 'into the

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[10] *Lair*, 798 F.3d at 742 (quoting *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003), *abrogated on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010)).

[11] *McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000)).

[12] 558 U.S. at 359; *see also McCutcheon*, 134 S. Ct. at 1441; *Lair*, 798 F.3d at 746-47 n.7 ("But to the extent *Citizens United* left that question open, *McCutcheon* confirmed that quid pro quo corruption of its appearance are the only interests that can support contribution restrictions.").

[13] *McCutcheon*, 134 S. Ct. at 1441 (citing *Citizens United*, 558 U.S. at 359).

[14] *Id.* (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)).

debate over who should govern'" and thus cannot survive constitutional scrutiny.[15]

a. Counts One and Two: Individual-to-Candidate and Individual-to-Group Base Limits

Plaintiffs first challenge the provisions of Alaska's campaign finance laws that prohibit an individual from contributing more than $500 per year to a candidate for political office and to a group that is not a political party.[16] They argue that the $500 individual-to-candidate and individual-to-group base limits set forth in Alaska Stat. 15.13.070(b) are not closely drawn to further the sufficiently important state interest of combating quid pro quo corruption or its appearance.

i. Sufficiently important state interest

As part of that argument, Plaintiffs contend that Defendants did not present adequate evidence at trial to establish that Alaska's $500 base limits further the sufficiently important state interest of combating quid pro quo corruption or its appearance. The Court disagrees.

At trial, the State put forward evidence that the risk of quid pro quo corruption or its appearance in

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[15] *McCutcheon*, 134 S. Ct. at 1441 (quoting *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011)); *see also Thalheimer*, 645 F.3d at 1119 (recognizing that *Citizens United* "narrowed the scope of the anti-corruption rationale to cover quid pro quo corruption only, as opposed to money spent to obtain influence over or access to elected officials" (quoting another source)).

[16] Alaska Stat. 15.13.070(b)(1).

Alaska politics and government is both actual and considerable. To start, Dr. Gerald McBeath, a Professor Emeritus of Political Science at the University of Alaska Fairbanks who was qualified as an expert in this case on the topic of Alaska state and local politics and government, identified several factors that make Alaska highly, if not uniquely, vulnerable to corruption in politics and government. The first of these factors is legislative size. Alaska has the second smallest legislature in the United States and the smallest senate, with only twenty senators. As Dr. McBeath explained at trial, that means that just ten votes can stop a legislative action such as an oil or gas tax increase from becoming law. Consequently, the incentive to buy a vote, and the chances of successfully doing so, are therefore higher in Alaska than in states with larger legislative bodies. A second factor is Alaska's almost complete reliance on one industry for a majority of its revenues. The percentage of Alaska's budget generated by royalties, taxes, and revenues from oil and gas is the highest among all of the oil and gas producing states in the United States. In fact, it is exponentially greater: typically 85 to 92 percent in Alaska compared to less than 50 percent for every other state. Another factor making Alaska susceptible to corruption in politics and government is its small population coupled with its vast size. According to Dr. McBeath, these characteristics make enforcement of campaign finance laws much more challenging, as it limits both the number and abilities of watchdog organizations.

In addition to Dr. McBeath's testimony, the public officials who appeared at trial, regardless of whether they were called by Plaintiffs or the State, uniformly

testified that they experienced and observed pressure to vote in a particular way or support a certain cause in exchange for past or future campaign contributions while in office. Defense witness David Finkelstein, a former Alaska state representative who served from 1989 to 1996 testified that "there was an inordinate influence from contributions on the actions of the legislature," and that legislators would often mention which interest groups had contributed large amounts to their campaigns or to their party during closed-door caucus meetings over whether particular bills would move forward. He further testified that "it inevitably would affect [his] vote if [he'd] received a thousand dollars or stacks of thousand dollar[] checks, from one side and not the other." Defense witness Charles Wohlforth, who served two terms as a member of the Anchorage Assembly from 1993 to 1999, similarly testified that "the system was rigged by money[ed] interests and that too frequently the decisions of the assembly were controlled by those interests and their desires, based on the kind of contributions they would make." And Eric Croft, who is currently a member of the Anchorage Assembly and who previously served in the state legislature for ten years, testified at trial that although he has never been directly asked for a political favor in exchange for a contribution, he has experienced situations where "it [was] clear that if you don't vote the way somebody wants, you're not going to get their continued contribution."

Witnesses for the Plaintiffs also provided evidence that some large contributors expect political favors in

exchange for their contribution.[17] Senator John Coghill testified that on one occasion during the legislative session, he was approached in the hallway of the State Capitol by a lobbyist demanding that Senator Coghill vote a certain way, saying "This is why we gave to you. Now we need your help." Senator Coghill refused, and those represented by that lobbyist never made a contribution to Senator Coghill again. Bob Bell testified that during his tenure on the Anchorage Assembly in the 1990s, an oil executive offered to hold a fundraiser for him if he would publicly support a private prison project in South Anchorage. When Bell refused to support the project, the oil executive held a fundraiser for his opponent instead.

Beyond this testimony, the State presented evidence about the widely publicized VECO public corruption scandal, in which approximately ten percent of the Alaska Legislature, including state representatives Vic Kohring, Pete Kott, and Beverly Masek, were directly implicated for accepting money from Bill Allen and VECO, Allen's oilfield services firm, in exchange for votes and other political favors.[18] A surveillance video from the VECO investigation introduced at trial showed Kohring in a Juneau hotel

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[17] *See McCutcheon*, 134 S. Ct. at 1450 ("Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption.").

[18] Kohring, Kott, and Masek were all part of a larger group of Alaska legislators who referred to themselves as the "Corrupt Bastards Club" after a patron at a Juneau bar called some of the legislators who received large VECO contributions "corrupt bastards."

room asking Allen and Rick Smith, another VECO official, for help with his (Kohring's) $17,000 debt. In the video, Kohring accepts a relatively small cash payment from them in response to his request, and then, in the same exchange, asks Allen and Smith what he can do for them on oil tax legislation that was then pending before the Alaska Legislature. After being criminally charged, Kohring wrote a newspaper column in which he stated that other legislators were no better than he was and were unfairly critical of him because he got caught.

The State also introduced at trial a Government Ethics Center study commissioned by the Alaska State Senate in 1990 in which the Government Ethics Center surveyed Alaska legislators, public officials, and lobbyists as to the image of and the public trust in the Alaska Legislature. The study concluded that "that things are not what they should be" and that "[t]he reputation and image of the legislature is unacceptably low." Of particular relevance to this case, the survey results showed that 24 percent of lobbyists surveyed believed that "about half" or more of Alaska's legislators could "be influenced to take or withhold some significant legislative action . . . by campaign contributions or other financial benefits provided by lobbyists and their employers," and that 40 percent of legislators surveyed believe that very few members of the public had a sufficiently high degree of trust and confidence in legislators' integrity.[19]

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[19] *See Buckley*, 424 U.S. at 27 ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the

Taking all of the testimony and other evidence together, the Court finds that Defendants have made an adequate showing that the risk of quid pro quo corruption or its appearance in Alaska politics and government from large campaign contributions is pervasive and persistent.[20] Quid pro quo corruption, or even its appearance, undermines public trust in the electoral process and government. Having concluded that the $500 base limits set forth in 15.13.070(b) further Alaska's sufficiently important interest in preventing quid pro quo corruption or its appearance, the Court turns to the question of whether those $500 limits are "closely drawn" to further that interest.

ii. Closely drawn

In determining the constitutionality of Alaska's $500 base limits, Plaintiffs contend that the Court should apply the two-part, multi-factor "closely drawn" test articulated by the Supreme Court in *Randall v. Sorrell*[21] rather than the test laid out by the

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opportunities inherent in a regime of large individual financial contributions.").

[20] *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 395 (2000) ("[T]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters."); *see also Zimmerman v. City of Austin*, Findings of Fact and Conclusions of Law, No. 1:15-CV-628-LY (W.D. Tex. July 20, 2016) (finding base limit furthered the City of Austin's interest in preventing quid pro quo corruption or its appearance where the City of Austin presented evidence that there was a "widespread" perception that economic interests had "inordinate influence" over the Austin City Council).

[21] 548 U.S. 230 (2006) (plurality opinion).

Ninth Circuit Court of Appeals in *Eddleman*.[22] Plaintiffs' position, however, is foreclosed by the Ninth Circuit's opinion in *Lair*.[23] In *Lair*, the Ninth Circuit considered whether and to what extent *Randall* abrogated *Eddleman*'s "closely drawn" analysis.[24] Applying *Miller v. Gammie*,[25] it found that "there simply was no binding *Randall* decision on that point,"[26] and that the district court's decision to apply *Randall*'s "closely drawn" analysis to the contribution limits at issue in that case was therefore legal error.[27] The Court will therefore determine the constitutionality of Alaska's campaign contribution laws using *Eddleman*'s "closely drawn" test.

Under *Eddleman*'s "closely drawn" test, limits on contributions are "closely drawn" if they "(a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign."[28] In conducting that tailoring analysis, a court must be "mindful that the

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[22] 343 F.3d 1085 (9th Cir. 2003).

[23] 798 F.3d at 747.

[24] *Id.* at 745-48; *see also Lair v. Bullock*, 697 F.3d 1200, 1204-06 (9th Cir. 2012).

[25] 335 F.3d 889 (9th Cir. 2003) (en banc).

[26] *Lair*, 798 F.3d at 747; *accord Lair*, 697 F.3d at 1204 ("*Randall* is not binding authority because there was no opinion of the Court.").

[27] *Lair*, 798 F.3d at 748; *accord Lair v. Motl*, No. CV 12-12-H-CCL, 2016 WL 2894861, at *4 (May 17, 2016) (noting *Eddleman* "provides the overall analytical framework" for evaluating the constitutionality of a contribution limit).

[28] *Lair*, 798 F.3d at 742 (quoting *Eddleman*, 343 F.3d at 1092).

dollar amounts employed to prevent corruption should be upheld unless they are 'so radical in effect as to render political association ineffective, drive the sound of a candidate's voice beyond the level of notice, and render contributions pointless.'"[29]

Here, Plaintiffs do not dispute and the Court agrees with Defendants that the base limits set forth in Alaska Stat. 15.13.070(b) leave an individual free to affiliate with a candidate. Plaintiffs do, however, dispute that Alaska's $500 base limits focus narrowly on Alaska's interest in the prevention of quid pro quo corruption or its appearance. They further claim that the State has failed to prove that the $500 base limits allow candidates, particularly challengers in competitive races, to amass sufficient resources to run effective campaigns. The Court addresses each claim in turn.

1. Focus narrowly

Citing Frank's testimony as to why and how he selected $500 as the individual-tocandidate and individual-to-group contribution limit amounts for his ballot initiative back in the 1990s, Plaintiffs contend that the $500 individual-to-candidate and individual-to-group contribution limits were put in place for impermissible purposes other than preventing quid pro quo corruption or its appearance, and that the State therefore cannot show that those limits satisfy the first part of *Eddleman*'s "closely drawn" test. But Plaintiffs' argument forgets that Ballot Measure 1, which established the current $500 base limits and

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[29] *Eddleman*, 343 F.3d at 1094 (quoting *Shrink Missouri*, 528 U.S. at 397).

which was approved by a 73 percent margin of Alaska voters, explicitly contemplated an anticorruption purpose.[30] Indeed, the statement in support of the successful initiative included in the Alaska Division of Elections voter information packet stated as follows:

> Corruption is not limited to one party or individual. Ethics should be not only bipartisan but also universal. From the Abramoff and Jefferson scandals in Washington D.C. to side deals in Juneau, special interests are becoming bolder every day. They used to try to buy elections. Now they are trying to buy the legislators themselves.

Plaintiffs also argue that the $500 base limits impermissibly restrict their free speech and associational rights because Defendants have not shown that a higher contribution limit, such as a $750 or $1,000 limit (or even a $500 limit indexed for inflation), would be ineffective at preventing quid pro quo corruption or its appearance. That argument, however, misunderstands both the Court's role in assessing and the State's task in proving the constitutionality of a contribution limit. In *Buckley*, the Supreme Court rejected an overbreadth claim that the $1,000 contribution limit at issue in that case was "unrealistically low" because "much more than that amount would still not be enough to enable an

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[30] *Contra Motl*, 2016 WL 2894861, at *7 (holding base limits at issue in that case "could never be said to focus narrowly on a constitutionally-permissible anti-corruption interest because they were expressly enacted to combat the *impermissible* interests of reducing influence and leveling the playing field").

unscrupulous contributor to exercise improper influence over a candidate or officeholder."[31] In rejecting the claim, the *Buckley* Court adopted the Court of Appeals for the District of Columbia's observation that "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe whether, say, a $2,000 ceiling might not serve as well as $1,000."[32] The law instead requires "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."[33] In the context of this case, that means that the State need not prove that $500 is the highest possible contribution limit that still serves to prevent quid pro quo corruption or its appearance, but rather that the challenged $500 contribution limits further that interest and also permit candidates to "amas[s] the resources necessary for effective advocacy."[34]

What is more, the State did elicit testimony at trial indicating that the $500 individual-to-candidate and individual-to-group limits are, in fact, likely more effective at furthering the State's interest in preventing quid pro quo corruption or its appearance than a hypothetical $750 or $1,000 limit. Professor Richard Painter, whom the Court qualified as an

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[31] 424 U.S. at 30.

[32] *Id.* ("Such distinctions in degree become significant only when they can be said to amount to differences in kind."); *see also Randall*, 548 U.S. at 248 (explaining a court "cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives").

[33] *McCutcheon*, 134 S. Ct. at 1456.

[34] *Buckley*, 424 U.S. at 21.

expert in government ethics and institutional corruption with an emphasis on campaign finance reform, explained that lower contribution limits are often more effective at decreasing the risk of quid pro quo arrangements or their appearance because they make a candidate less dependent upon an individual or group of individuals for financial support, especially in a state like Alaska where the cost of campaigns for state or municipal office are relatively low. Lower limits often increase the donor base and decrease the impact of an individual contribution, thus making it easier for a candidate to decline a contribution contingent upon the performance of a political favor. Consistent with Professor Painter's expert testimony, Croft testified that the higher the contribution limit, "it's harder and harder to turn that down."

Finally, with respect to the individual-to-group contribution limit, the Court finds that Defendants have made the appropriate showing that Alaska Stat. 15.13.070(b)'s individual-to-group limit focuses narrowly on the State's interest in reducing the risk of quid pro quo corruption or its appearance, as it works to keep contributors from circumventing the $500 individual-to-candidate base limit. The Supreme Court in *McCutcheon* affirmed that the anticircumvention interest originally recognized in *Federal Election Commission v. Beaumont*[35] remains valid after *Citizens United*.[36] Alaska's campaign

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[35] 539 U.S. 146 (2003), *overruled on other grounds by Citizens United*, 558 U.S. 310.

[36] *McCutcheon*, 134 S. Ct. at 1456; *accord Thalheimer*, 645 F.3d at 1125 ("[T]here is nothing in the explicit holdings or broad reasoning of *Citizens United* that invalidates the

finance laws define a "group" as "two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election."[37] Under Alaska Stat. 15.13.070(c), a group that is not a political party may contribute up to $1,000 per year to a candidate. Without the $500 individual-to-group limit, an individual could make unlimited donations to a group, $1,000 of which could then be passed on to the candidate—double the individual-to-candidate limit.

2. Amassing sufficient resources to effectively campaign

In addition to their argument that the $500 base limits set forth in Alaska Stat. 15.13.070(b) do not focus narrowly on the State's interest in avoiding actual or apparent quid pro quo corruption, Plaintiffs argue that those limits are unconstitutionally low under the third prong of *Eddleman*'s "closely drawn" test. While it is certainly true that a contribution limit that is too low "could itself prove an obstacle to the very electoral fairness it seeks to promote,"[38] the Supreme Court in *Buckley* specifically rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures

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anticircumvention interest in the context of limitations on direct candidate contributions.").

[37] Alaska Stat. 15.13.400(8)(A).

[38] *Randall*, 548 U.S. at 248-49 ("[C]ontribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.").

could not regulate.[39] It instead held that courts should determine "the outer limits of contribution regulation by asking whether there was any showing that the limits were so low as to impede the ability of candidates to 'amas[s] the resources necessary for effective advocacy.'"[40] In making that determination, the Ninth Circuit has instructed courts to "look at all dollars likely to be forthcoming in a campaign, rather than the isolated contribution" and to "consider factors such as whether the candidate can look elsewhere for money, the percentage of contributions that are affected, the total cost of a campaign, and how much money each candidate would lose."[41]

In this case, Plaintiffs claim that the $500 base limits set forth in Alaska Stat. 15.13.070(b) are not closely drawn because they do not allow candidates in Alaska, and in particular challengers in competitive races, to amass the resources necessary for effective advocacy. But Plaintiffs' evidence does not show that Alaska's $500 base limits are "'so radical in effect as to render political association ineffective, drive the sound of a candidate's voice beyond the level of notice, and render contributions pointless.'"[42] Michael Gene Pauley, a campaign manager and consultant whom the Court qualified as an expert in Alaska political campaigns, testified that he considers Alaska's $500

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[39] *Shrink Missouri*, 528 U.S. at 397 (citing *Buckley*, 424 U.S. at 21).

[40] *Id.* (quoting *Buckley*, 424 U.S. at 21).

[41] *Lair*, 798 F.3d at 742 (quoting *Eddleman*, 343 F.3d at 1094 (internal citations omitted)).

[42] *Eddleman*, 343 F.3d at 1094 (quoting *Shrink Missouri*, 528 U.S. at 397).

base limits to be too low because they are not indexed for inflation, because the cost of campaigns is generally increasing, and because the limits are annual in nature. Pauley further testified that most challengers in Alaska do not enter political races in the off year. Plaintiffs also offered the testimony of Senator Coghill, who testified that he has always been able to raise sufficient funds to run an effective campaign, but that it was "just harder" under the current $500 limits than under the $1,000 limits because "the lower limits do cause you to have to go broad." In other words, it requires more work.

Plaintiffs also called Clark Bensen, a consultant and a former director of political analysis for the Republican National Committee whom the Court qualified as an expert "in the area of analyzing campaign finance data for the purpose of determining whether contribution limits permit candidates to amass the resources that they need to mount effective campaigns," to testify at trial. Based on his analysis of campaign finance data for the State of Alaska, Bensen opined that the $500 base limits set forth in Alaska Stat. 15.13.070(b) are unconstitutionally low because candidates in competitive campaigns often spend more than they raise and because those candidates would be able to raise more money if the $500 limits were instead $750 or $1,000. The Court, however, does not find Bensen's testimony to be credible. At trial, Mr. Bensen acknowledged that his analysis was based on exaggerated estimates and therefore flawed. He stated, "I didn't do a very sophisticated analysis . . . . It's not like I didn't do it, but I didn't do it well, shall we say, or completely."

In support of the $500 base limits set forth in Alaska Stat. 15.13.070(b), Defendants called expert witnesses Thomas Begich and John-Henry Heckendorn to provide their opinions as to whether Alaska's current contribution limits interfere with a candidate's ability to amass the resources necessary for effective advocacy.[43] Begich is a political consultant with extensive experience working, consulting, and volunteering for Alaska campaigns. Heckendorn is also a political consultant who served as the political director for the Alaska Democratic Party in 2014 and now co-owns a political and commercial communications firm with offices in Anchorage and Juneau. Begich and Heckendorn both testified that candidates, whether challengers or incumbents, can run effective campaigns under the current limits and, to use Begich's words, "have done so." As an example, Begich cited Matt Claman's campaign for state house in 2014 in which Claman was able to raise upwards of $110,000 under the current contribution limits.

Begich and Heckendorn also testified that the candidate who raises the most money does not necessarily win the election. Heckendorn explained at trial that in 2012, three of the eight competitive state senate races and seven of the fourteen competitive state house races were won by the candidate who raised less money than his opponent—"almost a 50/50 split in terms of campaigns that raise more money being successful and campaigns that raised less money being successful." According to Begich, this is because a number of factors other than the amount of

[43] The Court qualified both Begich and Heckendorn as experts on political campaigns in Alaska.

money available to a candidate influence a candidate's success and ability to run an effective campaign, including demographics, the quality of the candidate, and the cost of the candidate's campaign.

To this end, Begich and Heckendorn took issue with Plaintiffs' testimony that the cost of campaigns is increasing. Begich testified that while the cost of certain parts of a campaign may be increasing, it is not, in fact, getting more expensive to run campaigns: "[T]he cost of a campaign depends on the technology you apply, and those costs change. So you can't use a direct period of inflation to reflect that." Heckendorn testified that evolution in fundraising techniques and in social media and digital advertising has significantly improved both the cost-efficiency and effectiveness of campaigns, particularly at the local level. Consistent with this testimony, defense witness Croft testified that the production and dissemination of video advertising has "gotten much simpler and cheaper" since his first campaign back in 1996.

Finally, Begich and Heckendorn testified that Alaska's campaign contribution limits do not, as Plaintiffs claim, favor incumbents over challengers, nor do the limits prevent challengers from running effective campaigns. Their opinions are bolstered by the results of the most recent Alaska primary elections, in which Alaska voters dispatched seven incumbents from the Alaska Legislature.[44]

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[44] Nathaniel Herz & Devin Kelly, Incumbents Feel Sting of Voters in Alaska Primary Election (Aug. 24, 2016), *available at* https://www.adn.com/slideshow/visual/photos/2016/08/16/alaska-votes-in-2016-primary-election/.

In light of the above evidence, the Court finds that in the period since the current $500 base limits became effective, candidates for state elected office, including challengers in competitive races, have been able to raise funds sufficient to run effective campaigns. The Court therefore holds that the $500 base limits set forth in Alaska Stat. 15.13.070(b) further the sufficiently important interest in reducing the risk of quid pro quo corruption or its appearance, and are neither "too low" nor "too strict"[45] so as to run afoul of the First Amendment.

b. Count Three: Nonresident Aggregate Limit

Plaintiffs next challenge the provision of Alaska's campaign finance laws that prohibits an individual seeking the office of state representative, municipal office, or office other than governor, lieutenant governor, or state senator from accepting more than $3,000 per year from an individual who is not a resident of Alaska.[46] Plaintiffs challenge the nonresident aggregate limit set forth in Alaska Stat. 15.13.072(e)(3) under both the First Amendment and the equal protection and privileges or immunities clauses of the Fourteenth Amendment.

In evaluating the constitutionality of Alaska's aggregate nonresident limit, Plaintiffs claim the Court should apply strict scrutiny because the aggregate limit, once reached for a candidate, prevents all other nonresidents from contributing any amount to that particular candidate. Alternatively, Plaintiffs argue

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[45] *Randall*, 548 U.S. at 248.

[46] Alaska Stat. 15.13.072(a); Alaska Stat. 15.13.072(e)(3).

strict scrutiny applies in light of their equal protection challenge. Plaintiffs' first argument for strict scrutiny fails under the Supreme Court's opinion in *Beaumont*.[47] In *Beaumont*, the Supreme Court rejected the plaintiff's argument that a strict level of scrutiny should apply to a statute banning political contributions from certain sources, explaining that "the level of scrutiny is based on the importance of the political activity at issue to effective speech or political association" and that "restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to a rather complaisant review under the First Amendment."[48]

Nor can Plaintiffs obtain strict scrutiny of the nonresident limit set forth in Alaska Stat. 15.13.072(e)(3) by invoking equal protection. Indeed, the Court of Appeals for the District of Columbia in *Wagner v. Federal Election Commission* rejected this "doctrinal gambit" in clear and uncertain terms:

> Although the Court has on occasion applied strict scrutiny in examining equal protection challenges in cases involving First Amendment rights, it has done so only when a First Amendment analysis would itself have required such scrutiny. There is consequently

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[47] 539 U.S. at 161-62.

[48] *Id.* (explaining that "degree of scrutiny turns on the nature of the activity regulated"); *see also Family PAC v. McKenna*, 685 F.3d 800, 811 (9th Cir. 2012) (holding contribution limits, even those that operate as a ban, not subject to strict scrutiny); *Vannatta v. Keisling*, 151 F.3d 1215, 1220 (9th Cir. 1998) (nothing the Ninth Circuit "has applied less-than-strict, rigorous scrutiny to total restrictions on contributions").

> no case in which the Supreme Court has employed strict scrutiny to analyze a contribution restriction under equal protection principles.[49]

Moreover, to the extent Plaintiffs' Fourteenth Amendment claims are not subsumed by their First Amendment claim,[50] their equal protection claim fails because Alaska residents and nonresidents are not

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[49] 793 F.3d 1, 32 (D.C. Cir. 2015), *cert. denied sub nom. Miller v. FEC*, 136 S. Ct. 895 (2016); *see also Wagner v. FEC*, 854 F. Supp. 2d 83, 95 (D.D.C. 2012), *vacated on other grounds*, 717 F.3d 1007 (D.C. Cir. 2013) ("If strict scrutiny were to apply to equal-protection claims in the area of campaign contributions, it would lead to the anomalous result that a statutory provision could survive closely drawn scrutiny under the First Amendment, but nevertheless be found to violate equal-protection guarantees because of its impingement upon the very same rights."); *Orin v. Barclay*, 272 F.3d 1207, 1213 (9th Cir. 2001) (holding that an equal protection claim was "no more than a First Amendment claim dressed in equal protection clothing" and was thus "subsumed by, and co-extensive with" the First Amendment claim); John E. Nowak, Ronald D. Rotunda & J. Nelson Young, Handbook on Constitutional Law (1978) ("It is generally unnecessary to analyze laws which burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the strongest protection against the limitations of these rights.").

[50] *Wagner*, 793 F.3d at 33 ("But in a case like this one, in which there is no doubt that the interests invoked in support of the challenged legislation classification are legitimate, and no doubt that the classification was designed to vindicate those interests rather than disfavor a particular speaker or viewpoint, the challengers 'can fare no better under the Equal Protection Clause than under the First Amendment itself.'").

similarly situated with respect to state elections.[51] Plaintiffs' privileges and immunities claim fails for a similar reason; the right to make a contribution to a candidate running of office in another state does not "bear[] upon the vitality of the Nation as a single entity."[52]

Turning to the First Amendment challenge, Plaintiffs stated in their summary judgment papers and at oral argument on the parties' summary judgment motions that they are challenging the "common unconstitutional denominator of the discriminatory aggregation of nonresident contributions" that Alaska Stat. 15.13.072(a) and (e)(3) impose upon nonresident contributors, but not the $3,000 aggregate limit amount itself. They argue that Defendants "presented no evidence of a nexus between residency and *quid pro quo* corruption or its appearance," and that Alaska's nonresident aggregate contribution limit is unconstitutional under *McCutcheon* and *Vannatta*.[53] The Court disagrees.

In *McCutcheon*, the Supreme Court considered the constitutionality of a provision of the Federal Election Campaign Act of 1971, as amended by the

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[51] *See Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1140 (9th Cir. 2011) (stating an equal protection claim "fails ab initio" without evidence that similarly situated persons are treated differently).

[52] *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 934 (9th Cir. 2008).

[53] Plaintiffs argue that the nonresident limit is also unconstitutional under *Whitmore v. FEC*, 68 F.3d 1212, 1216 (9th Cir. 1996). The Court, however, does not consider *Whitmore* on point.

Bipartisan Campaign Reform Act of 2002, that limited how much money a contributor could contribute in total to all political candidates or committees under the First Amendment. Noting that a court must be "particularly diligent in scrutinizing the law's fit" in the context of an aggregate limit,[54] the Court found "a substantial mismatch between the Government's stated objective and the means selected to achieve it"[55] and consequently struck down the aggregate limit at issue in that case. But even as it struck down the provision, the plurality opinion recognized that aggregate limits, when appropriately tailored, can further an anticorruption interest.[56]

In *Vannatta*, the Ninth Circuit considered the constitutionality of an Oregon ballot measure which prohibited state candidates from using or directing any contributions from out-of-district residents and penalized candidates when more than ten percent of their total "funding" came from such individuals.[57] It held that the measure "fail[ed] to pass muster under the First Amendment," in large part because the measure "ban[ned] all out-of-district donations, regardless of size or any other factor that would tend to indicate corruption" and because the appellants

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[54] *McCutcheon*, 134 S. Ct. at 1458.

[55] *Id.* at 1446.

[56] *Id.* at 1450 ("[W]e do not doubt the compelling nature of the 'collective' interest in preventing corruption in the electoral process. But we permit Congress to pursue that interest only so long as it does not unnecessarily infringe an individual's right to freedom of speech; we do not truncate this tailoring test at the outset.").

[57] 151 F.3d at 1218.

were "unable to point to any evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in *Buckley*."[58] The decision does not suggest, as Plaintiffs claim, that any campaign finance law that limits the dollar amount a candidate may accept from nonresidents runs afoul of the First Amendment as a matter of law.

Moreover, Alaska Stat. 15.13.072 is distinguishable from the provisions at issue in *McCutcheon* and *Vannatta*. In particular, unlike the provision at issue in *McCutcheon*, Alaska Stat. 15.13.072(a) and (e)(3) do not limit the total amount of money an individual can contribute during an election cycle. Rather, Alaska Stat. 15.13.072 is directed at the amount of out-of-state money a candidate for state or municipal office may accept;[59] once the nonresident aggregate limit is reached, a nonresident retains the ability to contribute to a political party or other group that supports the candidate. And unlike the measure at issue in *Vannatta*, Alaska Stat. 15.13.072 does not ban all nonresident contributions.[60]

More importantly, and unlike the defendants in those cases, Defendants in this case did produce evidence at trial establishing a nexus between the prevention of quid pro quo corruption or its appearance and the nonresident aggregate limit set

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[58] *Id.* at 1221.

[59] *Contra McCutcheon*, 134 S. Ct. at 1461 ("For our purposes here, it is enough that the aggregate limits at issue are not directed specifically to candidate behavior.").

[60] *See Vannatta*, 151 F.3d at 1221 (noting challenged measure "bans all out-of-district donations, regardless of size or any other factor that would tend to indicate corruption").

forth in Alaska Stat. 15.13.072. At trial, Dr. McBeath testified that the unique combination of Alaska's small population, geographic isolation, and great natural resources make it extremely dependent on outside industry and interests. He explained that because it is enormously expensive to develop Alaska's natural resources and because that amount of capital is not available locally, Alaska is dependent on outside firms to invest in the infrastructure and provide the labor necessary to extract its natural resources. He further testified that such dependency makes Alaska especially vulnerable to exploitation by outside industry and interests, citing the Alaska Syndicate as an early example of such exploitation.[61]

In addition to Dr. McBeath's testimony, Professor Painter opined that Alaska's nonresident aggregate limit furthers the State's interest in avoiding actual or apparent quid pro quo relationships. Citing the number of foreign and out-of-state corporations involved in natural resource extraction in Alaska and the fact that profits from that extraction are often sent out of state, Professor Painter explained that the interests of those corporations are frequently in conflict with the interests of Alaska residents who absorb the externalities of extraction while only getting some of the monetary benefits. He further testified that natural resource extraction rarely can be

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[61] The Alaska Syndicate was formed in 1906 by J.P. Morgan and the Guggenheim Family and came to control vast amounts of Alaska's natural resources, including the Kennecott Copper Mine. Between 1906 and 1938, it is estimated that the Syndicate, as put by Dr. McBeath, "pulled out of Alaska a couple of hundred million dollars . . . and left precious little behind them."

accomplished without the cooperation of government, and that natural resource extraction firms can and do exert pressure on their employees to make contributions to state and municipal candidates.

Based on that evidence, the Court concludes that the State has presented adequate evidence that the nonresident aggregate limit set forth in Alaska Stat. 15.13.072(a) and (e)(3) furthers Alaska's sufficiently important interest in preventing quid pro quo corruption or its appearance in two ways. First, the nonresident aggregate limit furthers the State's anticorruption interest directly by avoiding large amounts of out-of-state money from being contributed to a single candidate, thus reducing the appearance that the candidate feels obligated to outside interests over those of his constituents. Second, the nonresident aggregate limit discourages circumvention of the $500 base limit and other game-playing by outside interests, particularly given APOC's limited ability and jurisdiction to investigate and prosecute out-of-state violations of Alaska's campaign finance laws.

Whether Alaska's nonresident aggregate limit is closely drawn to further the State's anticorruption interest remains an open question. As explained above, Plaintiffs' challenge to Alaska Stat. 15.13.072(a) and (e)(3) does not raise that issue, and the Court has not evaluated, and has no opinion on, the provision's fit.

c. Count Four: Political Party Aggregate Limit

Finally, Plaintiffs challenge the provision of Alaska's campaign finance laws that prohibits a political party, including any subordinate unit of that

group, from contributing more than $5,000 per year to a candidate seeking municipal office. As with Count III, Plaintiffs clarified in their summary judgment papers and at oral argument that they are not claiming that the $5,000 limit is unconstitutionally low, but rather are challenging the "unconstitutional concept of discriminatory aggregation of party components" that Alaska Stat. 15.13.070(d)(4), together with Alaska Stat. 15.13.400(15), imposes on political parties. Plaintiffs, however, have not explained how Alaska's political party aggregate limit interferes with First Amendment free speech and associational freedoms. A subordinate unit of a political party chooses to affiliate with the party, and Alaska's campaign finance laws treat political parties more favorably, not less favorably, than individuals or groups that are not a political party.[62]

IV. CONCLUSION

When this case was first filed, the Court was skeptical that Defendants would be able to defend any of the provisions of Alaska's campaign finance laws at issue in this case. But, for the reasons stated above, the Court finds that Defendants have presented adequate evidence that the $500 base limits set forth in Alaska Stat. 15.13.070(b) further the sufficiently important state interest of preventing quid pro quo corruption or its appearance and that those limitations are closely drawn to that end; that the $3,000 nonresident aggregate limit set forth in Alaska Stat. 15.13.072 furthers the sufficiently important

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[62] *Compare* Alaska Stat. 15.13.070(d), *with* Alaska Stat. 15.13.070(b) *and* Alaska Stat. 15.13.070(c).

state interest of preventing quid pro quo corruption or its appearance; and that the political party aggregate limit does not trigger First Amendment concerns, at least under Plaintiffs' theory of the case. Accordingly, the challenged provisions of Alaska's campaign finance laws are upheld as constitutional.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 7th day of November, 2016.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES
DISTRICT JUDGE

Appendix D

RELEVANT STATUTORY PROVISIONS

Alaska Stat. § 15.13.070 (2006)

Sec. 15.13.070. Limitations on amount of political contributions.

(a) An individual or group may make contributions, subject only to the limitations of this chapter and AS 24.45, including the limitations on the maximum amounts set out in this section.

(b) An individual may contribute not more than

(1) $500 per year to a nongroup entity for the purpose of influencing the nomination or election of a candidate, to a candidate, to an individual who conducts a write-in campaign as a candidate, or to a group that is not a political party;

(2) $5,000 per year to a political party.

(c) A group that is not a political party may contribute not more than $1,000 per year

(1) to a candidate, or to an individual who conducts a write-in campaign as a candidate;

(2) to another group, to a nongroup entity, or to a political party.

(d) A political party may contribute to a candidate, or to an individual who conducts a write-in campaign, for the following offices an amount not to exceed

(1) $100,000 per year, if the election is for governor or lieutenant governor;

(2) $15,000 per year, if the election is for the state senate;

(3) $10,000 per year, if the election is for the state house of representatives; and

(4) $5,000 per year, if the election is for

(A) delegate to a constitutional convention;

(B) judge seeking retention; or

(C) municipal office.

(e) This section does not prohibit a candidate from using up to a total of $1,000 from campaign contributions in a year to pay the cost of

(1) attendance by a candidate or guests of the candidate at an event or other function sponsored by a political party or by a subordinate unit of a political party;

(2) membership in a political party, subordinate unit of a political party, or other entity within a political party, or subscription to a publication from a political party; or

(3) co-sponsorship of an event or other function sponsored by a political party or by a subordinate unit of a political party.

(f) A nongroup entity may contribute not more than $1,000 a year to another nongroup entity for the purpose of influencing the nomination or election of a candidate, to a candidate, to an individual who conducts a write-in campaign as a candidate, to a group, or to a political party.

Alaska Stat. § 15.13.072 (2006)

Sec. 15.13.072. Restrictions on solicitation and acceptance of contributions.

(a) A candidate or an individual who has filed with the commission the document necessary to permit that individual to incur election-related expenses under AS 15.13.100 may not solicit or accept a contribution from

(1) a person not authorized by law to make a contribution;

(2) an individual who is not a resident of the state at the time the contribution is made, except as provided in (e) of this section;

(3) a group organized under the laws of another state, resident in another state, or whose participants are not residents of this state at the time the contribution is made; or

(4) a person registered as a lobbyist if the contribution violates AS 15.13.074(g) or AS 24.45.121 (a)(8).

(b) A candidate or an individual who has filed with the commission the document necessary to permit the individual to incur election-related expenses under AS 15.13.100 , or a group, may not solicit or accept a cash contribution that exceeds $100.

(c) An individual, or one acting directly or indirectly on behalf of that individual, may not solicit or accept a contribution

(1) before the date for which contributions may be made as determined under AS 15.13.074 (c); or

(2) later than the day after which contributions may not be made as determined under AS 15.13.074 (c).

(d) A candidate or an individual who has filed with the commission the document necessary to permit that individual to incur election-related expenses under AS 15.13.100 for election or reelection to the state legislature may not solicit or accept a contribution while the legislature is convened in a regular or special legislative session unless the solicitation or acceptance occurs

(1) during the 90 days immediately preceding an election in which the candidate or individual is a candidate; and

(2) in a place other than the capital city.

(e) A candidate or an individual who has filed with the commission the document necessary to permit that individual to incur election-related expenses under AS 15.13.100 may solicit or accept contributions from an individual who is not a resident of the state at the time the contribution is made if the amounts contributed by individuals who are not residents do not exceed

(1) $20,000 a calendar year, if the candidate or individual is seeking the office of governor or lieutenant governor;

(2) $5,000 a calendar year, if the candidate or individual is seeking the office of state senator;

(3) $3,000 a calendar year, if the candidate or individual is seeking the office of state representative or municipal or other office.

(f) A group or political party may solicit or accept contributions from an individual who is not a resident

of the state at the time the contribution is made, but the amounts accepted from individuals who are not residents may not exceed 10 percent of total contributions made to the group or political party during the calendar or group year in which the contributions are received.

(g) A candidate or an individual who has filed with the commission the document necessary to permit that individual to incur election-related expenses under AS 15.13.100 for election or reelection to the office of governor or lieutenant governor may not solicit or accept a contribution in the capital city while the legislature is convened in a regular or special legislative session.

(h) A nongroup entity may solicit or accept contributions for the purpose of influencing the nomination or election of a candidate from an individual who is not a resident of the state at the time the contribution is made or from an entity organized under the laws of another state, resident in another state, or whose participants are not residents of this state at the time the contribution is made. The amounts accepted by the nongroup entity from these individuals and entities for the purpose of influencing the nomination or election of a candidate may not exceed 10 percent of total contributions made to the nongroup entity for the purpose of influencing the nomination or election of a candidate during the calendar year in which the contributions are received.