No. 17-35019

United States Court of Appeals for the Ninth Circuit

DAVID THOMPSON, AARON DOWNING, JIM CRAWFORD, and DISTRICT 18 of the ALASKA REPUBLICAN PARTY,
Appellants,

v.

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

Appeal from U.S. District Court, District of Alaska, Anchorage
Honorable Timothy M. Burgess
No. 3:15-cv-00218 TMB

ANSWERING BRIEF OF APPELLEES

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INTRODUCTION

The State of Alaska employs campaign contribution limits—a long-recognized anti-corruption tool—to try to preserve the democratic ideal that elected officials should be dependent on votes for their jobs, not on money. Three individuals and a subunit of the Alaska Republican Party (collectively, "Thompson") unsuccessfully challenged some of these limits, arguing that the First Amendment entitles them to contribute larger sums than the State allows.

On appeal, Thompson both downplays the State's anti-corruption interest and exaggerates the State's First Amendment burden. Given that Alaskans recently experienced a major public corruption scandal involving ten percent of their legislators, Alaskans should not be required to sit back and hope, as Thompson does, that all of their elected officials will have the "self-fortitude" to refuse any corrupt quid pro quo offers. And although contribution limits implicate the First Amendment, they are not subject to strict scrutiny, so the State need not prove that they are set at the perfect level. Instead, they "should be upheld unless they are 'so radical in effect as to render political association ineffective . . . and render contributions pointless.' "[1] Based on the evidence the State presented at trial, the district court correctly found that Alaska's limits do not have this radical effect. This Court should affirm the district court decision in all respects.

[1] *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003) (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000)).

JURISDICTIONAL STATEMENT

The State agrees with Thompson's jurisdictional statement. [Op.Br. 1]

ISSUES PRESENTED FOR REVIEW

1. *Individual-to-candidate limit*. Alaska voters have chosen to limit individual contributions to candidates to $500, an amount that the State proved still allows candidates to raise sufficient funds to effectively campaign. Did the district court err in upholding this limit under the less demanding First Amendment scrutiny applicable to contribution limits?

2. *Nonresident aggregate limit*. The State limits the total amount a candidate may accept in contributions from nonresidents of Alaska, which reduces the potential for actual and apparent corruption involving nonresidents that the State would have difficulty policing, and also furthers the State's interest in self-governance. Did the district court err in upholding the challenged limit?

3. *Individual-to-group limit*. To inhibit the use of election advocacy groups as simple pass-through devices to circumvent the limit for individuals, the State also limits how much an individual may contribute to a group. Did the district court err in upholding this limit, consistent with Supreme Court precedent?

4. *Political party limit*. The State limits how much a political party may contribute to a candidate. Thompson does not argue that no such limit is permissible or that the limit is too low. Instead, he argues that the contributions of

party subunits—which owe their existence to the party and are governed by party rules—should not count as party contributions. Did the district court err in concluding that this claim does not trigger First Amendment concerns?

TEXT OF PERTINENT AUTHORITIES

Alaska Stat. § 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. 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) While the legislature is convened in a regular or special legislative session, a legislator or legislative employee may not solicit or accept a contribution to be used for the purpose of influencing the outcome of an election under this chapter unless

(1) it is an election in which the legislator or legislative employee is a candidate and the contribution is for that legislator's or legislative employee's campaign;

(2) the solicitation or acceptance occurs during the 90 days immediately preceding that election; and

(3) the solicitation or acceptance occurs in a place other than the capital city or a municipality in which the legislature is convened in special session if the legislature is convened in a municipality 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.

Alaska Stat. § 15.13.400. Definitions

In this chapter,

. . .

(8) "group" means

(A) every state and regional executive committee of a political party;

(B) any combination of 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; a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate shall be considered to be controlled by that candidate; a group whose major purpose is to further the nomination, election, or candidacy of only one individual, or intends to expend more than 50 percent of its money on a single candidate, shall be considered to be controlled by that candidate and its actions done with the candidate's knowledge and consent unless, within 10 days from the date the candidate learns of the existence of the group the candidate files with the commission, on a form provided by the commission, an affidavit that the group is operating without the candidate's control; a group organized for more than one year preceding an election and endorsing candidates for more than one office or more than one political party is presumed not to be controlled by a candidate; however, a group that contributes more than 50

> percent of its money to or on behalf of one candidate shall be considered to support only one candidate for purposes of AS 15.13.070, whether or not control of the group has been disclaimed by the candidate; and
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> (C) any combination of two or more individuals acting jointly who organize for the principal purpose of filing an initiative proposal application under AS 15.45.020 or who file an initiative proposal application under AS 15.45.020;
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> . . .
>
> (15) "political party" means any group that is a political party under AS 15.80.010 and any subordinate unit of that group if, consistent with the rules or bylaws of the political party, the unit conducts or supports campaign operations in a municipality, neighborhood, house district, or precinct;
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> . . .

STATEMENT OF THE CASE

I. For decades, Alaska has used campaign contribution limits, an anti-corruption tool approved by the Supreme Court in *Buckley v. Valeo*.[2]

The State of Alaska has used limits on contributions to political campaigns as one of the tools in its anti-corruption toolbox since 1974.[3] Alaska's original campaign finance regulations limited an individual's contributions to a political candidate to $1,000 annually, and also limited total campaign expenditures.[4]

In 1976, the U.S. Supreme Court decided the landmark First Amendment case *Buckley v. Valeo*, upholding the federal government's campaign contribution

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[2] 424 U.S. 1 (1976). Underlined legal and factual citations are hyperlinked for the convenience of the Court when reading this brief electronically.

[3] *See* 1974 Alaska Laws Ch. 76 § 1.

[4] *See* former Alaska Stat. § 15.13.070(a) and (f), repealed by 1986 Alaska Laws Ch. 85 § 45.

limits.[5] The Court differentiated between campaign contribution and expenditure limits, reasoning that compared to an expenditure limit, a contribution limit "entails only a marginal restriction upon the contributor's ability to engage in free communication."[6] Alaska repealed its expenditure limits in 1985, but left its contribution limits in place.[7]

In 1996, the Alaska Legislature passed legislation to "substantially revise Alaska's campaign finance laws in order to restore the public's trust in the electoral process and to foster good government."[8] This legislation imposed $500 annual limits on individual contributions to a candidate or a group that was not a political party, and aggregate limits on total contributions a candidate could accept from political parties or nonresidents of Alaska.[9] It was based on a ballot initiative; by passing legislation similar to the initiative, the legislature prevented the initiative from going before the voters.[10] [ER189, 202-03; SER470-78]

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5 424 U.S. at 143.

6 *Id*. at 20.

7 *See* 1986 Alaska Laws Ch. 85 § 45.

8 1996 Alaska Laws Ch. 48 § 1(b).

9 *Id*. at §§ 10-11.

10 *See* Alaska Const. Art. 11, § 4.

In 2003, the Alaska Legislature relaxed some of the contribution limits put in place by the 1996 legislation, including by raising the individual-to-candidate and individual-to-group limits from $500 to $1,000.[11] [SER485]

But in 2006, Alaska citizens successfully lowered those limits back to $500 by ballot initiative.[12] [ER327-28] The voter information packet included a statement describing the initiative's anti-corruption 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. [SER501]

Seventy-three percent of voters voted in favor of the measure. [SER504]

II. In 2015, Thompson sued the State, challenging four of Alaska's contribution limits under the First Amendment.

In November 2015, Thompson filed this First Amendment challenge to the State's campaign finance laws, targeting four provisions:

1. The $500 annual limit on individual contributions to a candidate;[13]
2. The $500 annual limit on individual contributions to a group that is not a political party;[14]

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11 2003 Alaska Laws Ch. 108, §§ 8-10.

12 2006 Alaska Laws Initiative Meas. 1, § 1.

13 Alaska Stat. § 15.13.070(b)(1).

14 Alaska Stat. § 15.13.070(b)(l);

3. The annual limits on total contributions a candidate may accept from nonresidents of Alaska;[15] and
4. The annual limits on what a political party (including its local subdivisions) may contribute to a candidate in total.[16]

The State moved for partial summary judgment on the basis that Thompson failed to establish standing to challenge some of the limits encompassed by the complaint—specifically, two of Alaska's three nonresident limits and three of Alaska's four political party limits—because none of the plaintiffs expressed any desire to make contributions exceeding those limits. [District Court Docket (D.Dkt.) 56] The court granted the State's motion, thus limiting the scope of its review to one specific nonresident limit and one specific party limit. [SER1-7]

III. After a trial, the district court rejected all of Thompson's claims.

The district court held a seven-day bench trial in April and May of 2016. [ER415] The court heard from eighteen witnesses, including seven experts. The court also admitted nearly one hundred exhibits, including a video clip showing a legislator accepting a bribe. [Ninth Circuit Docket (Dkt.) 15-2; SER638]

In November 2016, the district court issued a decision rejecting all of Thompson's claims. [ER2-27] The court applied the intermediate scrutiny test

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15 Alaska Stat. § 15.13.072(a)(2) and (e).

16 Alaska Stat. § 15.13.070(d) and § 15.13.400(15).

described by this Court in *Montana Right to Life Association v. Eddleman*,[17] looking at whether the challenged limits were "closely drawn" to further an "important state interest." [ER6-20]

The court found that the State "put forward evidence that the risk of quid pro quo corruption or its appearance in Alaska politics and government is both actual and considerable" and "pervasive and persistent." [ER7, 11] The court concluded that the $500 individual-to-candidate and individual-to-group limits further the State's interest in preventing such corruption. [ER11]

In rejecting Thompson's argument that these limits are not "closely drawn," the court observed 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.'" [ER14] The court nonetheless also found that the 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." [ER15] And the court found that the individual-to-group limit "works to keep contributors from circumventing the $500 individual-to-candidate base limit." [ER15]

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[17] 343 F.3d 1085 (2003).

The court found that under Alaska's current limits, "candidates for state elected office, including challengers in competitive races, have been able to raise funds sufficient to run effective campaigns." [ER16-20] It found that the testimony of Thompson's expert Clark Bensen about hypothetical lost campaign revenue and candidate overspending was not "credible," noting that Mr. Bensen himself conceded that he "didn't do a very sophisticated analysis." [ER18] Instead, the court credited the testimony of the State's campaign consultant experts Thomas Begich and John-Henry Heckendorn, who explained that candidates can run effective campaigns under the current limits, that the cost of campaigning does not rise in lockstep with inflation, and that the limits do not prevent challengers from running effective campaigns. [ER18-19]

The court also upheld the challenged aggregate limit on contributions by nonresidents. [ER20-26] The court found that the State "produce[d] evidence at trial establishing a nexus between the prevention of quid pro quo corruption or its appearance and the nonresident aggregate limit." [ER24] The court credited the expert testimony of Dr. Gerald McBeath and Professor Richard Painter about Alaska's special vulnerability to corruption, and found that the nonresident 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" and "discourages circumvention of the $500 base limit and other game-playing by outside interests, particularly given [the Alaska Public Offices Commission (APOC)'s] limited ability and jurisdiction to investigate and prosecute out-of-state violations." [ER25-26] The court declined to assess whether the nonresident limit is "closely drawn," because Thompson disavowed any challenge to the dollar amount of the limit. [ER26]

Finally, the court upheld the challenged limit on contributions by a political party and its subunits, holding that the limit "does not trigger First Amendment concerns, at least under Plaintiffs' theory of the case." [ER27]

SUMMARY OF THE ARGUMENT

Campaign contribution limits are subject to the intermediate scrutiny test described in *Eddleman*, meaning they must further an important state interest, focus narrowly on that interest, leave contributors free to affiliate with candidates, and allow candidates to amass sufficient resources to wage effective campaigns.[18]

Base limits on direct contributions to candidates—like the $500 individual-to-candidate base limit chosen by Alaska voters—are a long-recognized means of furthering the compelling state interest in preventing quid pro quo corruption or its appearance. This anti-corruption interest is not as narrow as Thompson argues—

[18] 343 F.3d at 1092.

quid pro quo corruption is not coextensive with criminal bribery. And the State showed at trial that corruption is an ongoing concern in Alaska.

Because strict scrutiny does not apply, the State did not need to show that $500 is a better choice of dollar limit for furthering its anti-corruption interest than $1,000 or any other possible limit. The State met its burden under *Eddleman* by showing that its base limit is neither overbroad nor underinclusive; leaves contributors free to affiliate by contributing, volunteering, or making independent expenditures; and allows candidates to raise enough money to effectively campaign. And even if, as Thompson suggests, *Randall v. Sorrell*[19] provided the applicable test—which it does not—the $500 limit passes muster under its "four 'danger signs' " and "five sets of considerations."[20] In his argument to the contrary, Thompson highlights evidence that the district court properly found to be outweighed by the State's evidence. The court's findings are not clearly erroneous.

The district court also properly upheld the challenged aggregate limit on nonresident contributions. Neither *McCutcheon v. Federal Election Commission*[21] nor *VanNatta v. Keisling*[22] bans all such limits as a matter of law. And the State

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19 548 U.S. 230 (2006).

20 *See Lair v. Bullock*, 798 F.3d 736, 743 (9th Cir. 2015) (describing *Randall*) & at 747 (recognizing prior holding in *Lair*, 697 F.3d 1200, 1204 (9th Cir. 2012), that *Randall* is not binding because there was no opinion of the Court).

21 134 S.Ct. 1434 (2014).

22 151 F.3d 1215 (9th Cir. 1998).

showed that its limit is justified by its compelling anti-corruption interest, given Alaska's special vulnerability to corruption and outside influence and the difficulty of policing out-of-state contributions. The limit is also justified by the State's interest in preserving its self-governing political community.

The district court correctly upheld Alaska's $500 individual-to-group limit as an anti-circumvention measure to inhibit the use of groups as pass-through devices to exceed the individual-to-candidate base limit. In *California Medical Association v. Federal Election Commission*, the Supreme Court approved this method and rejected arguments like those Thompson summarily advances here.[23]

Finally, the district court properly upheld the challenged political party limit. Counting party subunit contributions toward the party limit is the only way to effectively administer the party limit, and treating party subunits differently from union PACs is justified by the major differences between these entities.

STANDARDS OF REVIEW

This Court reviews legal determinations de novo.[24]

Thompson asserts that this Court also reviews the facts de novo in a First Amendment case, but this is an oversimplification. [Op.Br. 7] In *Bose Corp. v. Consumers Union*, the Supreme Court, concerned about harmonizing First

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23 453 U.S. 182, 195-99 (1981).

24 *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009).

Amendment rights with deference to trial courts, held that independent review applies to constitutional questions like whether the facts in a defamation case amount to "actual malice."[25] But this Court has explained that such "independent review" does not require an "original appraisal of all the evidence."[26] Rather, to afford "appropriate deference" to the trier of fact, the Court will "consider the undisputed facts as true, and construe the historical facts, the findings on the statutory elements, and all credibility determinations in favor of the prevailing party."[27] Thus, "[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*."[28]

In reviewing factual findings for clear error, the Court "must view the evidence in the light most favorable to the prevailing party."[29] "So long as the district court's view of the evidence is plausible in light of the record viewed in its

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25 466 U.S. 485, 498-511 (1984).

26 *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1069 (9th Cir. 2002) (quoting *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 670 n.10 (9th Cir.1990)).

27 *Id*. at 1070; *see also U.S. v. Lincoln*, 403 F.3d 703, 705-06 (9th Cir. 2005).

28 *Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006).

29 *S.E.C. v. Rubera*, 350 F.3d 1084, 1093 (9th Cir. 2003) (citing *Lozier v. Auto Owners Ins. Co.*, 951 F.2d 251, 253 (9th Cir. 1991)).

entirety, it cannot be clearly erroneous, even if the reviewing court would have weighed the evidence differently had it sat as the trier of fact."[30]

ARGUMENT

I. Alaska's campaign contribution limits are subject to the intermediate scrutiny test laid out in *Eddleman*.

As Thompson acknowledges, campaign contribution limits—unlike expenditure limits—are not subject to strict scrutiny. [Op.Br. 9-10] Instead, they are "subject to relatively complaisant review" because contributions of money—although a form of "speech"—are farther from the core of the First Amendment than other speech.[31] As the Supreme Court has explained, lesser scrutiny is appropriate because "the transformation of contributions into political debate involves speech by someone other than the contributor."[32] Applying a "less rigorous standard of review" to contribution limits also gives lawmakers

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30 *Id*. (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985)).

31 *See FEC v. Beaumont*, 539 U.S. 146, 161-62 (2003) (contribution restrictions "have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression."), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).

32 *Id*. at 161 (quoting *Buckley*, 424 U.S. at 20-21).

"sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process."[33]

So instead of strict scrutiny, contribution limits are subject to the intermediate scrutiny test this Court described in *Eddleman*.[34] Under this test, which has four major parts, 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.[35]

In *Lair v. Bullock*,[36] this Court held that *Eddleman* continues to provide the proper legal test for contribution limits, even after the Supreme Court's subsequent decisions in *Randall v. Sorrell*,[37] *Citizens United v. Federal Election Commission*,[38] and *McCutcheon v. Federal Election Commission*.[39]

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33 *McConnell v. FEC*, 540 U.S. 93, 137 (2003), *overruled on other grounds by Citizens United*, 558 U.S. 310; *see also Beaumont*, 539 U.S. at 155 ("[D]eference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption.").

34 343 F.3d 1085.

35 *Id.* at 1092.

36 798 F.3d at 748.

37 548 U.S. 230 (2006).

38 558 U.S. 310 (2010).

39 134 S.Ct. 1434 (2014).

Thompson relies on the Supreme Court's plurality opinion in *Randall*, which lists "four 'danger signs' " and "five sets of considerations," but *Randall* is not binding because it was a fractured decision with no opinion of the Court.[40] [Op.Br. 12-13, 35-38] Thompson asserts that *Randall* and *Eddleman* are similar, but in *Lair*, this Court reversed the district court for using *Randall* to assess a state's contribution limits.[41] [Op.Br. 13] Consistent with *Lair*, this Court should employ *Eddleman* rather than *Randall* to assess Alaska's limits.

II. The district court correctly upheld the $500 individual-to-candidate base contribution limit.

A. The limit furthers the State's compelling interest in preventing quid pro quo corruption and its appearance.

Alaska's individual-to-candidate limit[42] passes the first part of the *Eddleman* test because as a matter of long-settled law, a limit on direct contributions to candidates furthers the important (indeed, compelling) governmental interest in preventing quid pro quo corruption and its appearance. To the extent that the State had to show that corruption is a valid concern in Alaska, it did so. [ER7-11]

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40 *See Lair*, 798 F.3d at 743 (describing and quoting *Randall*) & at 747 (recognizing prior opinion in *Lair*, 697 F.3d 1200, 1204 (9th Cir. 2012), holding that *Randall* is not binding because there was no opinion of the Court).

41 *See id.* at 748 ("[T]he district court's decision to apply *Randall*'s 'closely drawn' analysis to the [contribution limits] was legal error.").

42 Alaska Stat. § 15.13.070(b)(1).

i. Base limits are a recognized anti-corruption tool.

The State's burden on this part of the *Eddleman* test is low, because "[t]he importance of the governmental interest in preventing [corruption] has never been doubted,"[43] and ever since *Buckley*, this interest has been consistently recognized as supporting individual-to-candidate base contribution limits.[44] In *McCutcheon*, even as it struck down certain federal aggregate limits, the Supreme Court acknowledged the corruption danger that can be combatted with base limits.[45]

In *Nixon v. Shrink Missouri Government PAC*, the Supreme Court explained that "*Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible."[46] The Court said "there 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."[47] The Court held that a state

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43 *Beaumont*, 539 U.S. at 154 (alteration in original) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978)).

44 *See* 424 U.S. at 26.

45 *See* 134 S.Ct. at 1450-51; *see also Citizens United*, 558 U.S. at 359 ("contribution limits . . . have been an accepted means to prevent quid pro quo corruption.").

46 528 U.S. 377, 391 (2000).

47 *Id* at 394-95.

justifying base limits on this theory bears a lesser evidentiary burden than one advancing a less well-established justification.[48]

Thompson cites *Citizens for Clean Government v. City of San Diego*[49] in support of a higher evidentiary burden for the State. [Op.Br. 41] But as this Court explained in *Thalheimer v. City of San Diego*, no higher burden applies when it comes to base limits directly analogous to those upheld in *Buckley*.[50]

Moreover, imposing a higher evidentiary burden would be unworkable. Many states, including Alaska, have had base limits in place for decades. As the Supreme Court has recognized, "no data can be marshaled to capture perfectly the counterfactual world" in which an existing restriction "do[es] not exist."[51] As the D.C. Circuit has observed, "we would not expect to find—and we cannot demand—continuing evidence of large-scale quid pro quo corruption" in the face of a longstanding limit designed to prevent it.[52]

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48 *See id.* ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

49 474 F.3d 647, 653 (9th Cir. 2007).

50 645 F.3d 1109, 1122 (9th Cir. 2011) ("There is no such need to clarify the analogy to *Buckley* where [the challenged law] operates as a limitation on traditional direct candidate contributions.").

51 *McCutcheon*, 134 S.Ct. at 1457.

52 *Wagner v. FEC*, 793 F.3d 1, 14 (D.C. Cir. 2015).

ii. The State's anti-corruption interest is not as narrow as Thompson asserts.

The district court did not "misconstrue[] what is and what is not corruption" when it found that Alaska's base limit furthers the State's anti-corruption interest. [Op.Br. 26-27; ER7-11]

Although *McCutcheon* says that a regulation may only target "quid pro quo corruption" or its appearance,[53] that does not mean it may only target criminal bribery. *McCutcheon* says "quid pro quo corruption" is "a direct exchange of an official act for money," and that mere influence and access are not enough.[54] But *McCutcheon* does not say corruption is coextensive with criminal conduct. In *Buckley*—which *McCutcheon* reaffirmed, rather than overruling—the Court observed that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action."[55] And *McCutcheon* quoted with approval a broader definition of quid pro quo corruption under which it "occurs when '[e]lected

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53 134 S.Ct. at 1441.

54 *Id*. at 1451. Although the State disagrees with *McCutcheon* on this point, this brief assumes that *McCutcheon* controls because this Court cannot overrule it. For purposes of preserving the issue, however, the State asserts that broader governmental interests also justify campaign finance limits. *See* *McCutcheon*, 134 S.Ct. at 1466-68 (Breyer, J., dissenting).

55 424 U.S. at 27-28.

officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.'"[56]

An elected official might feel improper pressure to act favorably to a large campaign donor even if no criminal bribery arrangement exists. *McCutcheon* drew a distinction between money for which a candidate feels "obligated" and money for which the candidate merely feels "grateful."[57] Even if the State may not regulate gratitude, it still may attempt to ensure that elected officials make decisions based on the merits of the issues and the desires of their constituents, rather than based on obligations tied to campaign money. Quid pro quo corruption exists whenever an elected official makes a decision he or she would not otherwise make because of financial dependency, and not all such arrangements involve criminal conduct. [ER236, 248, 251-52, 264; SER104, 137-39]

Thompson argues that financial dependency "is not corruption," but rather is "nothing more than a combination of legal ingratiation, access, and responsiveness" that is a "natural byproduct of a democratically elected government." [Op.Br. 29, 32] But the natural byproduct of a democratically elected government is elected officials dependent on, and responsive to, people's *votes* rather than their *money*. [SER138] As Professor Richard Painter—an expert in

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[56] 134 S.Ct. at 1461 (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 297 (1981) (added emphasis omitted)).

[57] *Id*.

government ethics and institutional corruption—explained at trial, the "entire point of a representative democracy" is that "elected officials should be dependent upon votes, voters, the citizens, for their jobs, not upon money." [SER138] The State may validly enact campaign finance laws to protect this ideal.

Although Thompson largely rejects Professor Painter's views about dependency and corruption, he simultaneously uses that analysis to attack the role of labor unions in elections. [Op.Br. 31-32] But Thompson does not advance his case by pointing out that labor union PACs could be a source of dependency and corruption. The potential for corruption that he identifies is why labor union PACs are subject to contribution limits too.

Thompson cites *McDonnell v. U.S.*[58] in support of his very narrow conception of corruption, but *McDonnell* was a criminal prosecution, and campaign finance laws that reached only provable and prosecutable criminal conduct would be redundant and useless. [Op.Br. 11; SER538] As Professor Painter explained, not all quid pro quo corruption is criminally prosecutable because sophisticated actors can mask quid pro quo corruption, making bribery prosecutions very difficult. [ER236-38, 249, 252, 259; SER103, 107, 132-34, 140, 146] And corruption may be present even when no criminal conduct has occurred, such as when an official is financially dependent on a contributor and "is made to

[58] 136 S.Ct. 2355 (2016).

know that that money will walk if the official doesn't do what that contributor wants." [ER252; SER140] Neither the official nor the contributor could be criminally prosecuted for bribery, but this situation nonetheless crosses the line from "responsiveness" into the kind of corruption that the State may attempt to constrain via contribution limits.

Thompson argues that criminal prosecutions are the proper way to deal with corruption, [Op.Br. 35] but dangling the possibility of criminal prosecution over people's political activities is actually *more* constitutionally problematic than reducing corruption risk by decreasing financial dependency via contribution limits. In *McDonnell*, the Supreme Court rejected a broad reading of a criminal corruption statute because it would have "cast a pall of potential prosecution" over legitimate attempts to influence officials, such that "[o]fficials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse."[59] A simple campaign contribution limit creates no such chilling effect and is thus a better tool for inhibiting corruption.

Moreover, the State's interest is not just in preventing quid pro quo corruption itself, but also in preventing the *appearance* of such corruption "stemming from public awareness of the opportunities for abuse inherent in a

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[59] *Id*. at 2372.

regime of large individual financial contributions."[60] An appearance of quid pro quo corruption exists in an even broader set of circumstances, because even a truly innocent situation may appear corrupt from the outside: the only difference between a corrupt exchange of a contribution for a political favor and an innocent contribution to a legislator who shares the donor's views lies in the private motives and communications of the people involved. [ER65] Yet preventing apparent corruption—in addition to actual corruption—is vital to averting erosion of public confidence in representative government.[61] This is because "[d]emocracy works 'only if the people have faith in those who govern.'"[62] "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."[63] In a democracy, elected officials should be (and should appear to be) accountable to voters and dependent on their votes, not accountable to donors and dependent on their money. [SER137-39] The State's anti-corruption interest properly encompasses all of these concerns.

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60 *McCutcheon*, 134 S.Ct. at 1450 (quoting *Buckley*, 424 U.S. at 27).

61 *Buckley*, 424 U.S. at 27.

62 *Shrink Missouri*, 528 U.S. at 390 (quoting *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

63 *Id*.

iii. The State showed that quid pro quo corruption and its appearance are concerns in Alaska.

The State showed that quid pro quo corruption and its appearance are concerns in Alaska, and the findings about that are not clearly erroneous. [ER7-11]

The district court correctly found that several factors make Alaska particularly vulnerable to corruption. [ER7-8; SER70-71, 86-87, 453, 152, 154] Alaska has a very small legislature, meaning more benefit can be gained by corrupting a single member. [SER70-71] This finding is logical, not "incongruous." [Op.Br. 41-42] Attempting to sway legislative action through corruption will be a better strategy when only a few votes must be bought, because identifying and paying off a few corruptible legislators is easier than identifying and paying off many. This is true precisely because, as Thompson acknowledges, the "character and personal fortitude" of public officials varies. [Op.Br. 41-42]

The district court also found that Alaska is highly dependent on fossil fuels, meaning candidates can become reliant on contributors from just a few industries. [ER169-70; SER72-75, 453] Although the district court recognized this economic reliance, it did not approve of campaign contribution limits "targeting" the oil industry—indeed, the State has no such limits targeting specific industries. [Op.Br. 32, 42-43] Nor did the district court "denigrat[e]" the oil industry as "*ipso facto* corrupt." [Op.Br. 32-33, 42] The court simply noted that "[t]he 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." [ER8] This is supported by the record. [ER169-70; SER72] This undiversified economy heightens corruption risk. [SER115, 124]

The district court further found that Alaska's small population means fewer people are monitoring the actions of candidates and elected officials. [ER8; SER88-89] The vast distances within Alaska and the high cost of developing its resources also contribute to its vulnerability. [*Id*.] There cannot be any reasonable factual dispute about Alaska's population and geography.

Next, the district court correctly found that the politicians who testified at trial "experienced and observed pressure to vote in a particular way or support a certain cause in exchange for past or future campaign contributions." [ER8-9] David Finkelstein, a former state representative, testified that "there was an inordinate influence from contributions on the actions of the legislature" and that it "inevitably" affected his vote if he had received large contributions from one side. [ER315; SER179-82, 185] Former Anchorage Assembly member Charles Wohlforth testified that contributions affected his official actions and those of other members. [ER379, 381; SER226-33] When asked if he had ever given a "corrupt quid pro quo political favor" in exchange for a contribution, he candidly responded, "I guess I'd have to say yes." [ER379] Anchorage Assembly member Eric Croft testified that although he has never been asked for an explicit quid pro

quo, there have been times where "that was understood" to be the subtext and "it is clear that if you don't vote the way that somebody wants, you're not going to get their continued contribution." [SER189-90] Senator John Coghill testified about being approached by a lobbyist demanding he vote a certain way, saying, "This is why we gave to you. Now we need your help." [SER28-31] Although he thought this demand was "unacceptable," he testified that "people will be willing to" make such demands. [ER66] Former Anchorage Assembly member Bob Bell's testimony was in accord: an executive offered to hold a fundraiser for him if he would support a private prison project, and when Mr. Bell refused, the executive held a fundraiser for Mr. Bell's opponent instead. [ER368; SER209-10]

Thompson does not challenge the district court's factual findings about these witnesses' experiences, instead asserting that they represent "nothing more than legal 'influence,' 'expectation,' and 'pressure' . . . none of which is corruption." [Op.Br. 46] But as discussed above, Thompson's view of corruption is unduly narrow. [*Supra* 22-26] The unsurprising fact that some witnesses were reluctant to use the word "corrupt" to describe themselves is unimportant—what matters is the situations they described, which all reveal corruption of the democratic ideal that "elected officials should be dependent upon votes, voters, the citizens, for their jobs, not upon money." [SER138]

Moreover, Thompson undermines his own argument that none of the testimony reveals corruption: he impugns the State's witnesses' integrity, suggesting that they lacked "self-fortitude" and had the "infirm rectitude of the worst examples of Alaska's public figures." [Op.Br. 45-46] But he cannot have it both ways. Either the testimony describes a well-functioning system that Thompson views as perfectly acceptable, in which case his personal attacks are unwarranted, or the testimony reveals that quid pro quo corruption exists and is a valid concern in Alaska. The trial court did not clearly err in finding the latter.

In the end, wherever the Court locates the line between quid pro quo corruption and "influence," the politicians' testimony indicates that contributors and candidates in Alaska will, at the very least, tread distressingly close to that line and be publicly perceived as doing so. And a 1990 legislative survey, which concluded that "[t]he reputation and image of the legislature is unacceptably low," further supports this impression. [ER10; SER480]

The district court also correctly found that the legislature's public image was recently further damaged by a widely publicized 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." [ER9-10; SER77-80, 457, 357-62] Some of these

officials jokingly referred to themselves as the "Corrupt Bastards Club," a fact widely reported throughout the state. [ER172; SER80-81, 13, 191, 208] A federal investigation led to a series of indictments and convictions. [SER82-85, 457-59, 314-62] Alaskans experienced the spectacle of FBI surveillance video broadcast in the news; in one segment, Rep. Kohring asks Mr. Allen and another VECO official for help with a personal debt, accepts cash from them, and asks what he can do for them on pending oil tax legislation. [SER68, 183-84, 193, 196, 208, 234-53, 638] Rep. Kohring later wrote a newspaper column in which he said that other legislators were no better than he was and were only critical of him because he got caught. [SER90, 458]

Thompson insists that the Court disregard Rep. Kohring's views because he is a convicted felon, but that is exactly the point—Rep. Kohring, a corrupt person willing to sell his votes for "as little as $200, or candy," as Thompson puts it, served as a legislator in Alaska for many years. [Op.Br. 46-47] Yet Thompson suggests that despite this experience, Alaskans should just hope that their officials will uniformly refuse any quid pro quo offers involving campaign money. [Op.Br. 46 n.6] Thompson is correct that "Alaska's campaign finance laws are not required to be molded to accommodate the infirm rectitude of the worst examples of Alaska's public figures." [Op.Br. 46] Indeed, the State is not "required" to regulate campaign finance at all. But the State is entitled to take reality into

account when it does regulate, and the VECO scandal demonstrates that Alaska's political reality includes people like Rep. Kohring—and the legislative colleagues he asserts share his values and conduct.

The VECO scandal does not show that contribution limits are superfluous because "bribery and extortion laws are sufficient to address Alaska's bottom-of-the-barrel elected officials." [Op.Br. 46] What it shows is that not all politicians in Alaska have the kind of "self-fortitude" that Thompson wants the court to assume they have. [Op.Br. 46] Common sense suggests that if ten percent of the Alaska Legislature was willing to engage in prosecutable criminal bribery, an even higher percentage would be susceptible to lesser, but still corrupt, quid pro quo exchanges involving campaign money. And although contribution limits did not stop Mr. Allen and his cohorts from engaging in criminal corruption, if the State had no contribution limits, they could have accomplished their corrupt goals through legal contributions without ever breaking the law. [SER197]

The timing of the VECO scandal in relation to the 2006 ballot initiative that lowered Alaska's base limit to $500 is irrelevant. [Op.Br. 34-35] Regardless of when the scandal occurred, it shows that corruption is a valid concern. Moreover, although the FBI raids that broke the scandal occurred shortly after the initiative vote, the public was concerned about corruption before then. [SER192-94] Earlier that year, a newspaper column listed elected officials who had received significant

contributions from VECO employees. [ER172; SER81, 196] During a debate over oil taxes, Mr. Allen passed a note to a lawmaker on the House floor, prompting attempts to make the note public. [SER194-95] Rep. Ethan Berkowitz made a speech—carried in the news—opining that special interests should not be influencing votes by passing notes. [SER194-95] And Eric Croft, who was a legislator at the time, made prescient comments—carried in the news—that "somebody was going to go to jail" over fishy sole-source private prison proposals. [SER194] Thus, although the VECO scandal did not break before the initiative vote, corruption was on the public's mind throughout the year.

In sum, the State's evidence about corruption amply met its burden—which is not very high—to show that its base limits further an important state interest.

B. The limit focuses narrowly on the State's interest and leaves contributors free to affiliate with candidates.

Alaska's individual-to-candidate limit also passes the second and third parts of the *Eddleman* test because it focuses narrowly on the State's interest and leaves contributors free to affiliate with candidates.

i. The Court's task is to examine the current limit, not the difference between it and other limits.

Thompson directs many of his arguments at the differences between a $1,000 and a $500 limit, but this focus evinces a mistaken view of the legal standard. [Op.Br. 1-2, 8, 24-27, 39, 41] Because strict scrutiny does not apply to

contribution limits, the State need not prove that a $500 limit is better than a $1,000 limit or that the prior $1,000 limit did not adequately serve the State's interests. Thus, the State's position is not, as Thompson claims, that "lower is always better." [Op.Br. 41] The State need not show that its limit is "better." It need only show that its limit furthers its interests and is not overly extreme.

Contribution limits do not have to be perfect.[64] In *Wagner v. Federal Election Commission*, the D.C. Circuit rejected arguments that a contribution limit was unconstitutionally imprecise.[65] The Court did not "discount the possibility that Congress could have narrowed its aim even further," but observed that the First Amendment neither "confine[s] a State to addressing evils in their most acute form" nor "require[s] the government to curtail as much speech as may conceivably serve its goals."[66] Similarly, in *Williams-Yulee v. Florida Bar*, the Supreme Court said perfection was not necessary even for a law subject to a stricter level of scrutiny, observing that "[t]he impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public

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64 *See* *McCutcheon*, 134 S.Ct. at 1456-57 (saying courts require "a fit that is not necessarily perfect, but reasonable") (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

65 793 F.3d at 22-23.

66 *Id*. at 26 (quoting *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1671 (2015)) & 27 (quoting *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995)).

confidence in the integrity of the judiciary."[67] Likewise here, the intangible nature of the State's interest in preventing the appearance of corruption makes a perfect means-to-ends fit impossible.

The point of the *Eddleman* test is not to assess whether a limit is set at the perfect level, but rather to determine whether it is so radically restrictive that it falls below the lower bound of what is permissible. As the Supreme Court said in *Buckley*, "a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000."[68] Thompson suggests that this wise observation from *Buckley* no longer applies because " 'influence' is no longer considered corrupt." [Op.Br. 40] But Thompson does not explain why the *Buckley* observation would not apply equally under a narrowed definition of corruption. Whether the purpose of a limit is to curtail influence or quid pro quo corruption, the Court has no way to choose the best dollar amount for the task. So instead, *Eddleman* directs the Court to assess whether the limit the people have chosen is so restrictive that it impedes effective candidacies. As this Court instructed in *Lair*, "the dollar amounts employed to prevent corruption should be upheld unless they are so radical in

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67 135 S.Ct. at 1671.

68 424 U.S. at 30 (quoting Court of Appeals).

effect as to render political association ineffective, drive the sound of a candidate's voice [below] the level of notice, and render contributions pointless."[69]

Thompson thus misstates the legal test when he insists that the State had to prove "a nexus between the $500 amount of the limit, i.e., the reduction from $1,000 to $500, and the prevention of quid pro quo corruption or its appearance," or had to "quantify a difference in the risk of quid pro quo corruption or its appearance as between a contribution limit of $500 and $1,000." [Op.Br. 1, 39, 41, 45, 48] These are formulations of a strict scrutiny test that would require the State to establish that a $500 limit is the least restrictive means of accomplishing the State's anti-corruption goals. But because strict scrutiny does not apply, the State need not quantify a difference in corruption risk between $500 and $1,000.

Similarly, because strict scrutiny does not apply, the State need not quantify a difference in corruption risk between its limit and other limits. The State thus need not prove that "an inflation adjustment would have created a risk or appearance of corruption" or that "there are higher corruption risks in . . . other states because their contribution limits are higher." [Op.Br. 44, 43]

Nor does the fact that Alaska formerly had a $1,000 limit show that "Alaska viewed [$1,000] contributions as being free of corruption for twenty-six years,"

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[69] 798 F.3d at 742 (quoting *Eddleman*, 343 F.3d at 1092, quoting *Shrink Missouri*, 528 U.S. at 397).

and thus that a $500 limit does not advance the State's anti-corruption interest. [Op.Br. 26-27] The existence of a $1,000 limit is not a statement that $1,000 is an intrinsically innocent sum of money, just as a lack of any limit is not a statement that no politician could ever be corrupted by a campaign contribution. Setting a limit at a certain level does not preclude a state from later lowering it, nor does it create a higher burden if the state later decides to adjust its limit. Nothing in *Eddleman*, or even *Randall*, supports such a view.

Thompson's focus on the motives of those who drafted the 1996 and 2006 legislation reducing the limit is likewise misplaced. [Op.Br. 24-25, 39] A piece of legislation may have many purposes and people may vote for it for many reasons. The *Eddleman* test does not ask about this, nor should it. Such an inquiry would lead to anomalous results: a limit enacted with broad purposes before *Citizens United* and *McCutcheon* could be struck down for failure to confine its idea of corruption to the quid pro quo variety, while the very same dollar limit would be upheld if repealed and reenacted with reference only to quid pro quo corruption. The $500 base limit should stand or fall based on its own merits, not based on the diverse purposes that might have motivated its drafters. And in any event, the information provided to the voters about the initiative specifically contemplated an anti-corruption purpose. [SER501]

In sum, because strict scrutiny does not apply, the Court should not assess Alaska's $500 limit by comparing it to other limits such as the prior $1,000 limit.

ii. The limit is narrowly focused because it is neither overbroad nor underinclusive.

The $500 limit is not overbroad because it applies only to the type of contributions that create the greatest risk of quid pro quo corruption or its appearance—i.e., large contributions from a donor to a candidate. The Supreme Court has long recognized the risk such contributions create and has long upheld base limits as a means of lessening this risk.[70] Alaska's base limit does not apply to other types of campaign contributions that do not create the same risk: for example, contributions in support of ballot measures rather than candidates,[71] because a ballot measure is not a person who can participate in a quid pro quo arrangement, or contributions to independent expenditure groups, because the Supreme Court has held that such contributions do not risk corruption.[72] Thus, the limit is appropriately targeted at the right kind of contributions.

Citizens United precludes Thompson's argument that the $500 base limit is underinclusive because it places no cap on independent expenditures, leaving open an attractive avenue for corruption. [Op.Br. 47-48] As Thompson knows, *Citizens*

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70 *See Buckley*, 424 U.S. at 25-29.

71 *See* Alaska Stat. § 15.13.065(c).

72 *See Citizens United*, 558 U.S. at 357.

United prohibits limiting independent expenditures.[73] Its major premise was that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[74] In arguing that independent expenditures create a higher corruption risk than contributions, Thompson contradicts this major premise and essentially contends that *Citizens United* was wrong. [Op.Br. 47-48] This may be true, but *Citizens United* is nonetheless controlling authority that bars this argument. And even assuming independent expenditures create a higher risk of corruption, the fact that the State is legally unable to block one avenue of corruption does not mean that it cannot block others.

As for the dollar amount of the limit, the Court should afford some deference to the Alaskan public's policy judgment. The limit was not chosen by incumbent legislators trying to protect themselves. In fact, incumbent legislators *raised* the limit, and then the public lowered it again.[75] In *Shrink Missouri*, the Supreme Court noted that "although majority votes do not, as such, defeat First Amendment protections, the statewide vote on [the contribution limits] certainly attested to the perception" that they were necessary to combat apparent

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73 *Id*.

74 *Id*.

75 *See* 2003 Alaska Laws Ch. 108 (raising limits to $1,000); 2006 Alaska Laws Initiative Meas. 1 (lowering limits back to $500).

corruption.[76] And the fact that the public chose the limit renders inapplicable the Court's admonition in *McCutcheon* that "those who govern should be the last people to help decide who *should* govern."[77] In 2006, when Alaskan voters were presented a choice between a $500 limit and a $1,000 limit, 73 percent chose $500. [SER504] That same year, the VECO scandal revealed that the public was right to be concerned, because some Alaska legislators were willing to trade official actions for mere hundreds of dollars. [*See supra* 30-32]

The $500 amount of the limit strikes a balance between the State's interest and contributors' rights by allowing contributions, but capping them below a sum Alaskans view as large enough to create an unacceptable risk. Any limit represents a balance—no sum is inherently corrupt nor is any sum inherently free of all possibility of corruption. Even Thompson's witness Sen. Coghill admitted that the choice of a dollar amount is "somewhat arbitrary." [ER66] Indeed, that is why courts stay out of the business of selecting the dollar amount. As Thompson notes, some politicians can be corrupted for "as little as $200, or candy," whereas others might not be corruptible for any amount. [Op.Br. 46-47] Thus, any limit will inevitably allow some corrupt conduct (by those who are easily corrupted) and prevent some innocent conduct (by those who cannot be corrupted).

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76 528 U.S. at 394.

77 134 S.Ct. at 1441-42 (emphasis in original).

This inevitable imprecision does not doom a contribution limit as insufficiently narrowly focused. Thompson asserts that "[l]imiting every honest citizen's campaign contributions in order to address a few criminals is overbroad," but this position is foreclosed by longstanding precedent upholding contribution limits. [Op.Br. 35] Every contribution limit restricts the contributions of "every honest citizen" in order to corral a few bad actors and curtail the appearance of possible corruption that even innocent contributions can create. Yet such limits are nonetheless upheld because of the importance of preventing corruption from eroding our democracy.[78]

Contrary to Thompson's assertions, the percentage of donors that hit Alaska's $500 limit does not show that it is insufficiently focused. [Op.Br. 47] Expert witness Edwin Bender's analysis showed that the number of maximum individual contributions represents only 12.6 percent of the total number of individual contributions received by all candidates in the election cycles since Alaska voters restored the $500 limit in 2006, ranging from a low of 10 percent in 2014 to a high of 19 percent in 2011. [SER570, 169; ER300] Thompson, citing his own expert, argues that if 30 percent of donors are hitting the maximum, "that is an indication the limit is not proportional." [Op.Br. 47] But Thompson does not

[78] *See* *Buckley*, 424 U.S. at 25-29; *Randall*, 548 U.S. at 247 ("Since *Buckley*, the Court has consistently upheld contribution limits in other statutes.").

explain why a limit reached by only *12.6 percent* of donors is overbroad. Instead, he pivots to an apples-to-oranges comparison, pointing to the percentage of campaign dollars that came from maximum donors rather than the percentage of donors who hit the limit. [*Id*.] But he does not explain why this number is significant or how it shows that Alaska's limit is too low.

Although Alaska's $500 limit is lower than some other jurisdictions' limits, that also does not mean Alaska's limit is insufficiently focused. Different jurisdictions vary in population, cost of campaigns, public views on corruption, and other characteristics. [SER113-14, 542] And any contribution limit represents a policy balance; other jurisdictions may choose to balance policy differently. Because strict scrutiny does not apply, the State does not have to show that its limit is better than those of other jurisdictions.

Finally, even though, as explained above, the State did not need to show that $500 is a better choice than $1,000 or $750, the district court did not clearly err in finding that the State did so. [*Supra* 30-37; ER14-15] The trial testimony supports the district court's findings that lower limits "increase the donor base and decrease the impact of an individual contribution," thereby "making it easier for a candidate to decline a contribution contingent upon the performance of a political favor," which is true "especially in a state like Alaska where the cost of campaigns for

state or municipal office [is] relatively low." [ER14, 267-68, 250; SER105-06, 107-08, 111-12, 124, 135-36, 24; ER125, 351]

Eddleman does not require the Court to wade into policy and try to decide whether the public's choice of $500 strikes the perfect balance. [*Supra* 33-37] Instead, *Eddleman* proceeds to more judicially manageable questions.[79]

iii. The limit allows contributors to affiliate with candidates.

Alaska's $500 base limit passes the third part of the *Eddleman* test because it leaves a contributor free to affiliate with a candidate.[80] Contributors may donate up to $500 and may also volunteer, make independent expenditures, and contribute to groups and political parties.[81] [SER58, 116, 10-11, 18-19] Thompson does not deny any of this. The availability of independent expenditures as an alternative

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79 *See* 343 F.3d at 1092.

80 *See id.* (asking whether limits "leave the contributor free to affiliate with a candidate").

81 *Cf. Wagner*, 793 F.3d at 25 ("[I]t is also important to consider how much the statute leaves untouched. . . . The plaintiffs are free to volunteer for candidates, parties, or political committees; to speak in their favor; and to host fundraisers and solicit contributions from others."); *Williams-Yulee*, 135 S.Ct. at 1670 (observing that law "leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media").

avenue for political expression, in particular, shows that the contribution limits are not very burdensome.[82]

C. The limit allows candidates to amass sufficient resources to effectively campaign.

Alaska's individual-to-candidate limit passes the final part of the *Eddleman* test because a candidate in Alaska can "amass sufficient resources to wage an effective campaign."[83] [ER16-20] Thompson's brief does not even clearly assert that candidates in Alaska cannot effectively campaign. [Op.Br. 48-54]

The district court found 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." [ER20] In support, the court cited the expert testimony of Alaskan political consultants Thomas Begich and John-Henry Heckendorn. [ER18-19] Both testified that candidates in Alaska can and do run effective campaigns under the current limits. [SER45-46, 50, 56-57, 158, 161] Both also testified that the cost of campaigns has not necessarily increased with inflation because although some

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82 *Cf. Thalheimer*, 645 F.3d at 1125 ("In terms of both the fundamental First Amendment interests at stake and actual influence on the political process, an organization's ability to directly contribute $500 to a candidate pales in significance to its ability to make unlimited independent expenditures.").

83 *Eddleman*, 343 F.3d at 1092.

campaign elements have gotten more expensive, others have gotten cheaper. [SER50-51; ER276-77]

The district court considered the testimony of Thompson's opposing witnesses, but disagreed that this evidence showed that candidates cannot effectively campaign. [ER17-18] Thompson's campaign consultant expert, Michael Pauley, addressed several topics related to *Randall* and speculated that some candidates have to work harder to raise funds under Alaska's limits, [ER124-25], but he never actually opined that the limits render any candidates unable to effectively campaign. [D.Dkt. 120 at 33-167; D.Dkt. 125 at 45-100] Thompson's other expert, Clark Bensen, likewise never actually opined that Alaska's $500 limit renders any candidates unable to effectively campaign. [D.Dkt. 119 at 161-219; D.Dkt. 120 at 3-32] And in any event, the court rejected Mr. Bensen's opinion that Alaska's limits are too low, finding him not to be credible because "his analysis was based on exaggerated estimates." [ER18]

It was well within the district court's prerogative as the factfinder to find Mr. Bensen not to be credible and to credit the opinions of Mr. Begich and Mr. Heckendorn over those of Mr. Bensen and Mr. Pauley. [ER17-19] These kinds of "credibility determinations" and "ordinary weighing of conflicting evidence" are reviewed for clear error, even in a First Amendment case.[84] [*Supra* 15-16] And

[84] *Prete*, 438 F.3d at 960.

"[s]o long as the district court's view of the evidence is plausible in light of the record viewed in its entirety, it cannot be clearly erroneous, even if the reviewing court would have weighed the evidence differently had it sat as the trier of fact."[85] In light of the record here, the district court's conclusions are more than plausible.

One of the pillars supporting Mr. Bensen's opinions was his analysis purportedly showing that candidates would raise far more money if Alaska's $500 limits were instead $750 or $1,000. [SER32, 396-99] But at trial, he acknowledged that his lost revenue estimates were "[p]robably almost twice as high as they should be" because he exaggerated the numbers of $500 donors who would also make maximum donations at the $750 or $1,000 levels. [SER37] And even his inflated estimates were much lower than the Vermont numbers that concerned the *Randall* court.[86] [SER37-38]

Mr. Bensen's analysis purportedly showing that Alaska's limits cause campaigns to run deficits was also flawed and unpersuasive. He testified only that "on average" "there was a slight deficit" in the races that he looked at. [ER73-74] And he admitted that he concluded that candidates overspent simply by comparing

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85 *Rubera*, 350 F.3d at 1093 (citing *Anderson*, 470 U.S. at 573-74).

86 *See Randall*, 548 U.S. at 253-54 (noting that the limits "would have reduced the funds available in 1998 to Republican challengers in competitive races in amounts ranging from 18% to 53% of their total campaign income" and "would cut the party contributions by between 85% (for the legislature on average) and 99% (for governor)").

total contributions to total expenditures, without deducting transfers to Public Official Expense Term (POET) accounts, transfers to future campaign accounts, or charitable contributions—all of which are indications of excess funds. [ER73-74, 59; SER34, 43-44, 188, 216-17, 608-10, 622-23, 629, 633, 637] Candidates must have a zero balance when they close their accounts, and they often achieve that by repaying themselves for loans or contributing to POET accounts. [SER47-48, 63-64] In 2004, 2006, 2012, and 2014, around 80 percent of state house and senate campaigns made expenditures towards POET accounts, loan repayments, charitable contributions, and future campaigns. [SER97-99, 213-19, 123, 587-607] When a candidate repays a loan to her campaign, that is not a separate campaign expense because the expenses paid for with the loan money are already accounted for as expenditures at the time they are made.

Given these major analytical flaws, the district court did not clearly err in finding Mr. Bensen's opinions unpersuasive. [ER17-18]

Thompson asserts that the district court "ignored" evidence of campaigns running out of money, but the district court did not clearly err in finding the scant evidence he cites to be outweighed by the State's contrary evidence. [Op.Br. 50-51] Thompson points to just two campaigns out of 114 competitive races over seven election cycles. [Op.Br. 51] And even this anecdotal evidence is flawed: candidate Bob Bell testified that his campaign ran out of money, but anomalies in

his APOC reporting make this impossible to verify. [SER205-07, 221-24, 254-313] Thompson also leans on Mr. Pauley's testimony, but like Mr. Bensen, he used raw data from APOC reports without adjusting to deduct expenditures on POET accounts, loan repayments, charitable contributions, and future campaigns. [Op.Br. 50-51; SER43-44, 34] In contrast, the state presented evidence that most campaigns have leftover funds. [SER98-99, 587-607] Moreover, even if a campaign runs out of money, that does not necessarily reflect a problem with contribution limits. As Mr. Heckendorn explained, campaigns naturally *try* to come as close as possible to running out of money: "when you have $4,000 left in the bank after the election and you lose by 50 votes, you feel bad." [ER287]

The district court's conclusion that candidates can effectively campaign in Alaska is also supported by additional record evidence. Every witness who ran for office under the current limits was able to run effective campaigns. [ER330, 352; SER187-89, 201-03, 24-25] Candidate Bell speculated that if he had been allowed to accept more money from his wealthy contributors, he would have been able to win his 2012 senate race. [ER375] But Mr. Bell was able to amass an impressive sum for his campaign quite quickly, kicking off his late-initiated campaign with a fundraiser that he called "the most successful fundraiser in the history of Alaska." [ER353-54; SER200-03] And his campaign was very effective—he nearly defeated an incumbent, losing by only a small margin. [ER374-75] Victory cannot be the

only measure of effectiveness, because at least half of candidates in contested races will necessarily lose regardless of how well they campaign. Mr. Bell's experience does not show that candidates cannot run effective campaigns under the current limits—in fact, it shows the opposite.

Because many factors affect a candidate's fundraising success, a good way to isolate the impact of the individual contribution limit is to look at the largest totals raised from individual contributors. Candidates who raise very little money may be facing weak competition, may lack appeal, or may not be very good at asking for money. [SER157-58] In contrast, candidates who raise large sums likely have most of these peripheral factors favoring them; the extent of their fundraising success, then, illustrates the impact of the limits most clearly. In the 2014 cycle, senate candidate Mia Costello raised $132,191 from individual contributors alone.[87] [SER554] House candidate Gabrielle LeDoux raised $127,199. [SER553] In 2012, senate candidate Hollis French raised $172,174 and LeDoux raised $114,743. [SER555-56] These figures demonstrate the level of fundraising from individual contributors that is possible under the current limit. That many candidates do not raise such large sums does not suggest that the limit keeps them from doing so, but rather that other factors are at play—including perhaps that they recognize that effective campaigns can be run in Alaska for much less money.

[87] Candidates can (and do) also raise money from PACs and political parties.

Although no witness systematically evaluated the cost of an effective campaign in Alaska, the trial testimony shows that limits that permit candidates to raise well in excess of $100,000 from individual contributors alone allow candidates to amass sufficient resources. Witnesses estimated that the highest TV spending by a state legislative candidate in Alaska would not exceed $40,000 [ER293]; that generous radio advertising might cost $20,000 [SER211-12]; that full-service campaign consultant services cost about $20,000 [SER168]; and that one mailer might cost in the range of $1,000 to $3,000. [SER166-67] Mr. Croft's campaign spent a little less than $6,000 for signs for his recent Anchorage Assembly race [SER401-51]; an assembly district is larger than a state senate district and about two-and-a-half times the size of a state house district. [SER198] Even if we imagine a campaign that spends on all of these things, using both TV and radio while also burying voters in mailers—an approach which no witness actually advocated—its costs add up to perhaps $105,000 (allowing $40,000 for TV, $20,000 for radio, $15,000 for mailers, $20,000 for consultants, and $10,000 for signs). That sum can demonstrably be raised under the current limits. Although campaigns do incur other expenses, the expenditure reports filed by Mr. Croft's campaign—which spent just over $100,000—suggest that they are not as substantial. [SER401-51, 212]

The mere operation of inflation does not mean that candidates in Alaska can no longer effectively campaign. The district court did not find that inflation does not apply to campaigns—rather, the court found that the relationship between inflation and campaign costs is not as simple as Thompson asserts, because certain costs have risen and others have fallen due to technological advances. [ER19] This is supported by the expert testimony of Mr. Begich and Mr. Heckendorn and is thus not clear error. [ER136, 139, 164, 276-77, 329; SER50-53, 65-66, 159, 162-65, 110, 187-88, 39-42, 551-52] But even if campaign costs rose in lockstep with inflation, that still would not render Alaska's $500 limit unconstitutional because it did not represent a "floor" when it was enacted. Because "the dictates of the First Amendment are not mere functions of the Consumer Price Index,"[88] the decreased buying power of $500—whether in general or specifically for campaign costs—only matters if it means candidates cannot run effective campaigns. The same is true for the decrease in inflation-adjusted dollars per voter that candidates raise—it only matters if it means candidates cannot run effective campaigns. [Op.Br. 52] As discussed above, the State proved that candidates can still run effective campaigns.

Thompson makes the simple point that if the $500 limit were higher, candidates would raise more money, and argues that "[t]he fact that some candidates manage to make do with less under the current limits does not satisfy

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88 *Shrink Missouri*, 528 U.S. at 397.

[the State's] burden," but it is not clear what Thompson thinks the State's burden is. [Op.Br. 52-54] The *Eddleman* test asks not whether candidates are raising as much money as possible, but rather whether despite the limits they can raise enough money to effectively campaign.[89] Moreover, as Mr. Heckendorn explained, candidates have not taken full advantage of the fundraising potential in Alaska, and fundraising techniques are improving with technology. [ER276, 295-96, 273-74; SER54-55, 549-50] The evidence therefore showed that contribution limits are not preventing candidates from raising sufficient funds.

Accordingly, the district court correctly upheld Alaska's $500 individual-to-candidate limit because it passes every element of the *Eddleman* test.

D. Even if *Randall* were applicable, the limit still passes muster.

Randall's "four 'danger signs' " and "five sets of considerations"[90] do not provide the correct legal test as Thompson asserts, but even if they did, the $500 limit should still be upheld. [Op.Br. 12-13, 35-38]

As this Court has explained, the four "danger signs" the *Randall* Court saw in Vermont's contribution limits were:

> (1) The limits are set per election cycle, rather than divided between primary and general elections; (2) the limits apply to contributions

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89 *Eddleman*, 343 F.3d at 1092.

90 *See Lair*, 798 F.3d at 743 (describing and quoting *Randall*) & at 747 (recognizing prior opinion in *Lair*, 697 F.3d 1200, 1204 (9th Cir. 2012), holding that *Randall* is not binding because there was no opinion of the Court).

> from political parties; (3) the limits are the lowest in the Nation; and (4) the limits are below those we have previously upheld.[91]

Alaska's limits do not bear all of these "danger signs."

First, Alaska's limits are neither set per election cycle nor divided between primary and general elections—instead, they apply on a calendar year basis.[92] This means anybody can declare candidacy in the year before the election and receive two maximum contributions from any donor—effectively doubling all of the limits. This renders Alaska's limits much less burdensome than the limits that the *Randall* plurality disapproved of, which covered a full two-year cycle.[93]

An annual limit is not "equivalent to a per-cycle limit for challengers," as Thompson asserts. [Op.Br. 35] The law treats challengers and incumbents equally—both are allowed to declare candidacy and accept contributions in the year before an election. As this Court has said, "*Buckley* undercut the argument that a law that treats all parties equally can burden First Amendment rights by favoring incumbents."[94] Although incumbents more often declare earlier, any fundraising advantage from this is partially offset by the prohibition on sitting legislators' raising money during the legislative session.[95] [ER63] And although

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91 *See Lair*, 798 F.3d at 743.

92 Alaska Stat. § 15.13.070(b), (d).

93 *See* 548 U.S. at 238.

94 *Thalheimer*, 645 F.3d at 1122.

95 Alaska Stat. § 15.13.072(d); Alaska Stat. § 24.60.031.

candidates who fail to plan ahead may be disadvantaged by annual limits, the State need not design its laws so that candidates can procrastinate without consequences.[96] Nor is leveling the playing field between challengers and incumbents a permissible purpose of campaign finance laws.[97]

Second, Alaska's limits do not share the aspect of Vermont's limits that most bothered the *Randall* plurality: imposition of the same contribution limits on political parties (including their subunits) as on individuals.[98] Alaska's political

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[96] *Cf.* *Thalheimer*, 645 F.3d at 1122 (holding that the "district court reasonably concluded that it was not a serious burden for candidates to 'merely be "forced to rearrange their fundraising" ' ").

[97] *See* *McCutcheon*, 134 S.Ct. at 1450 ("No matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates.' " (quoting *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 751 (2011))).

[98] *See* *Randall*, 548 U.S. at 257 ("The Act applies its $200 to $400 limits—precisely the same limits it applies to an individual—to virtually all affiliates of a political party taken together as if they were a single contributor. . . . That means, for example, that the Vermont Democratic Party, taken together with all its local affiliates, can make one contribution of at most $400 to the Democratic gubernatorial candidate . . . .") & 254 ("Their statistics showed that the party contributions accounted for a significant percentage of the total campaign income in those races. And their studies showed that [the Act's] contribution limits would cut the party contributions by between 85% (for the legislature on average) and 99% (for governor).") & 259 ("the Act's contribution limits 'would reduce the voice of political parties' in Vermont to a 'whisper.' ").

party limits are much higher than its individual limits, allowing parties to perform their traditional function of pooling resources to support party candidates.[99]

Third, Alaska's limits are not the lowest in the nation. Until recent court action, Montana's individual limits were $170 per election for a legislative candidate and $320 per election for a candidate for statewide office other than governor.[100] Colorado and Maine have $200 and $400 per-election individual limits, respectively, for legislative candidates.[101] Kansas has a $500 per-election individual limit for state house candidates.[102] Some large cities with populations similar to Alaska's also have limits as low as Alaska's: for instance, Seattle ($500),[103] Austin ($350),[104] San Francisco ($500),[105] Multnomah County

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99 *See* Alaska Stat. § 15.13.070(d) (setting party limits including, for example, a $100,000 limit on contributions to gubernatorial candidates, in contrast to the $400 limit imposed by Vermont in *Randall*); *cf. Lair v. Bullock*, 697 F.3d 1200, 1209 (9th Cir. 2012) ("In this regard, Montana's statute stands in stark contrast with Vermont's, which applied the same low contribution limit to individuals, PACs, and political parties alike.").

100 Order, *Lair v. Motl*, No. CV 12-12-H-CCL at 11 (D. Mont. May 17, 2016).

101 Colo. Const. Art. 28, § 3; Me. Rev. Stat. tit. 21-A §1015.

102 Kan. Stat. § 25-4153(a)(2).

103 Seattle Municipal Code Section 2.04.370.

104 Austin City Code Article III § 8(A)(1) & http://www.austintexas.gov/edims/document.cfm?id=252205. A federal district court has upheld the $350 limit; see Order, *Zimmerman v. City of Austin*, No. 1:15-CV-628-LY (W.D.Tex. July 20, 2016).

105 San Francisco C&GC Code Section 1.114(a).

(Portland) ($500),[106] and Santa Cruz County ($350).[107] The district court in *Thalheimer v. City of San Diego* concluded that a challenge to a $500 limit in San Diego was unlikely to succeed.[108] And Arkansas, Delaware, Georgia, Hawaii, Idaho, Kansas, Maine, Nevada, and New Mexico allow political parties to contribute less to candidates than Alaska permits.[109]

Fourth, although Alaska's limits are below some of those the Supreme Court has previously upheld, its $500 annual limit is higher than at least one of the Missouri limits the Court upheld in *Shrink Missouri*.[110] And the Alaska Supreme Court has previously upheld Alaska's limits.[111] Moreover, like the United States Congress, Alaska applies the same individual limit to all candidates, regardless of the size of their constituency.[112] And because Alaska's population is so small

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106 Chapter XI, Section 11.60, Multnomah County Home Rule Charter.

107 Santa Cruz Municipal Code Chapter 2.10.065.

108 *See* *Thalheimer v. City of San Diego*, 706 F.Supp.2d 1065, 1074 (S.D. Cal. 2010), *aff'd*, 645 F.3d 1109 (9th Cir. 2011).

109 *See* Ark. Code § 7-6-203; Del. Code tit. 15 § 8010(b); Ga. Code § 21-5-41; Haw. Rev. Stat. § 11-357; Idaho Code § 67-6610A; Kan. Stat. § 25-4153(a)(2); Me. Rev. Stat. tit. 21-A §1015; Nev. Rev. Stat. §294A.100; N.M. Stat. § 1-19-34.7.

110 528 U.S. at 382-97 (upholding per-election limits from $275 to $1,075).

111 *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999).

112 52 U.S.C. § 30116.

compared to other states, when evaluated on a dollar-per-voter basis, Alaska's individual limits are considerably more generous than the federal limits.[113]

But even assuming Alaska's limits bear *Randall*'s four "danger signs," that does not conclude the inquiry. The *Randall* plurality said that "if such danger signs exist, then the court must determine whether the limits are 'closely drawn'" by looking to "five sets of considerations":

> (1) whether the "contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns"; (2) whether "political parties [must] abide by exactly the same low contribution limits that apply to other contributors"; (3) whether "volunteer services" are considered contributions that would count toward the limit; (4) whether the "contribution limits are ... adjusted for inflation"; and (5) "any special justification that might warrant a contribution limit so low or so restrictive."[114]

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[113] An average Alaska house district has about 2.6 percent of the population of an average federal congressional house district (compare https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf (average population of 710,767) with http://live.laborstats.alaska.gov/pop/estimates/pub/chap3.pdf at 1 (average population of 18,441)). 2.6 percent of the federal limit of $5,400 is $140.40, which is lower than Alaska's $500 limit. And although in statewide races, Alaska's $500 limit might seem low compared to the $5,400 federal limit applied to candidates for Alaska's U.S. Senate and House seats, the federal limit is the same for candidates in every state, regardless of size, including, for example, California, which had a population of 37,254,522 in 2010 (https://www.census.gov/quickfacts/fact/table/CA,US/PST045216). Alaska's population is about 1.9 percent of California's; 1.9 percent of $5,400 is $102.60—significantly less than $500. Thus, Alaska's limit when evaluated on a dollar-per-resident basis is considerably higher than the federal limit.

[114] *See* *Lair*, 798 F.3d at 743 (summarizing *Randall*).

Alaska's limits pass muster under these considerations, so even under *Randall* they are constitutional.

First, Alaska's limits do not significantly restrict the amount of funding available for challengers to run competitive campaigns. As an anecdotal example, challenger Bob Bell—who entered his race late and reluctantly—was able to raise $55,000 at a single fundraising event in 2012. [SER203-04] The *Randall* plurality noted that Vermont's limits reduced challengers' funds by "amounts ranging from 18% to 53% of their total campaign income," particularly because Vermont applied the same limit to political parties as to individuals, and parties provided a "significant percentage of the total campaign income" in competitive races.[115] But in Alaska, the limits simply do not have a comparable impact. Mr. Bensen acknowledged that even his inflated estimates of lost campaign revenue were much lower than the Vermont numbers in *Randall*. [SER37-38]

No data support Thompson's claim that lower limits disadvantage challengers. [SER174-78; Op.Br. 8, 49] National Institute on Money in State Politics data indicate that incumbents win reelection at a high rate across the country, including in Alaska. [SER583-86] This is likely due to the inherent advantages incumbents enjoy, including name recognition, campaign experience, and access to voter and donor data. [ER62-63, 124, 140] The incumbent success

115 548 U.S. at 253-54.

rate in Alaska did not drop when the contribution limits were doubled during the 2004 and 2006 election cycles. [ER302; SER571-74] Nor were there more competitive elections—those with a margin of victory of less than ten percent—during those cycles. [SER170-71, 575-78] Mr. Bensen testified that lower limits reduced candidate fundraising, but he did not find a difference in this effect as between challengers and incumbents—in other words, lower limits did not have a disparate impact on challengers. [SER35-36]

Thompson asserts that nationally, "the percentage of successful challengers is increased by a statistically significant margin" when contribution limits are raised, but his citations do not support that claim. [Op.Br. 49] Thompson cites Mr. Bender's testimony, but Mr. Bender testified the opposite, opining that "incumbency advantage is a very solid phenomena in our electoral process. Whether there are limits or high limits, low limits, or no limits." [SER174, 177] On the pages Thompson cites, Mr. Bender merely agreed with Thompson's counsel's observation that each year, Alaska has had a higher incumbency success rate than some of the states that have higher (or no) contribution limits. [ER303-07] But the converse is also true: each year, Alaska has had a lower incumbency success rate than some of the states that have higher (or no) contribution limits. [SER583-86] No witness testified that there is any "statistically significant" correlation between a state's incumbency success rate and its contribution limit.

Not only do Alaska's limits not disadvantage challengers, but raising the limits would actually benefit incumbents because they typically have more maximum donors. [SER528-30; ER278, 322] During the seven election cycles since 2001-02, in 45 competitive house elections, incumbents had 641 maximum donors but challengers had only 502. [SER363-84] The incumbent fundraising advantage—i.e., the disparity in average funds raised by incumbents and challengers from individual donors—did not drop when the limits were doubled during the 2004 and 2006 election cycles: to the contrary, when the limit was $1,000, the incumbent fundraising advantage was significantly higher than in 2002, 2008, 2010, 2012, and 2014, when the limit was $500. [SER172-73, 579-80] In the senate, challengers actually outraised incumbents in 2008 and 2010, when the limit was $500; in all other cycles since 2002, including when the limit was $1,000, incumbents raised more than challengers from individual contributors. [SER172-73, 580] Experts Mr. Heckendorn and Mr. Begich agreed that increasing the limits would increase incumbents' advantage. [ER284-85; SER161-62, 50, 62, 529-30]

And even if Alaska's limits were somehow harder on challengers than on incumbents—which they are not—that disparate impact would not render them unconstitutional. *Eddleman* asks whether the limits allow candidates to amass sufficient resources to run effective campaigns, not whether the limits have a

disparate impact on a particular group.[116] And even *Randall* focused on whether the limits prevented challengers from being competitive, not on the comparative effects of the limits.[117]

Thompson fares no better with the remaining considerations from *Randall*. Alaska does not require political parties to abide by exactly the same limits as other contributors; instead, they have much higher limits.[118] It does not treat volunteer services as contributions that count toward the contribution limits.[119] [SER220] And although Alaska's contribution limits are not indexed for inflation, the absence of inflation adjustments does not prevent candidates from running effective campaigns.[120] [SER50; ER276] Moreover, in the words of witness Eric Croft, after the VECO scandal, "it seems like it's as cheap or cheaper than it's

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116 343 F.3d at 1092; *see also Thalheimer*, 645 F.3d at 1122 ("*Buckley* undercut the argument that a law that treats all parties equally can burden First Amendment rights by favoring incumbents.").

117 *See* 548 U.S. at 253-56.

118 *See id*. at 256. *Compare* Alaska Stat. § 15.13.070(d) (establishing annual limits from $5,000 to $100,000, depending on the office, for party contributions to candidate) *with* Alaska Stat. § 15.13.070(b)(1) (establishing $500 annual limit on individual's contributions to candidate or group) *and* Alaska Stat. § 15.13.070(c) (establishing $1,000 annual limit on contributions by nonparty group).

119 *See Randall*, 548 U.S. at 259. Alaska Stat. § 15.13.400(4)(B)(i) (excluding volunteer services from definition of "contribution"); 2 Alaska Admin. Code 50.250(d) (stating that volunteer services are not contributions). The language exempting volunteer services was adopted in response to *Jacobus v. Alaska*, 182 F.Supp.2d 881 (D.Alaska 2001), *aff'd in relevant part by* 338 F.3d 1095, 1124-25 (9th Cir. 2003), which invalidated the limitation Thompson cites. [Op.Br. 44]

120 *See Randall*, 548 U.S. at 261.

ever been to influence public officials." [ER329] Finally, special justifications exist for having lower limits in Alaska.[121] The district court correctly found that Alaska is particularly vulnerable to corruption. [*Supra* 27; ER7-8; ER169; SER70, 86-87, 453-69, 152, 154]

In sum, even if the Court were to apply *Randall*—which it should not—Alaska's limits would still pass muster.

III. The district court correctly upheld the challenged nonresident aggregate contribution limit.

Alaska's $3,000 annual limit on contributions that a candidate for state house or municipal office may accept from nonresidents[122] is also constitutional. Thompson relies on *McCutcheon v. Federal Election Commission*[123] and *VanNatta v. Keisling*[124] to argue that such limits are barred as a matter of law, but those cases are distinguishable, so the Court should consider the merits of the State's justifications for the nonresident limit. The district court did not err in finding that Alaska is unique in both its vulnerability to corruption and its inability to police

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121 *See id.*

122 The district court held that Thompson had standing to challenge only this limit, codified at Alaska Stat. § 15.13.072(e)(3), not all of the nonresident limits. [SER7] Thompson has not appealed this holding.

123 134 S.Ct. 1434.

124 151 F.3d 1215 (9th Cir. 1998).

potential corruption involving nonresidents, and thus may properly employ nonresident limits to protect itself.

A. *McCutcheon* does not ban all "aggregate" limits.

Thompson cites *McCutcheon* for the proposition that "[a]ggregate limits" are unconstitutional as a rule. [Op.Br. 19] But Alaska's nonresident limits—despite being "aggregate"—are so dissimilar from the kind of limits considered in *McCutcheon* that *McCutcheon*'s analysis and holding are not controlling here.

In *McCutcheon*, the Supreme Court considered a challenge to a statutory limit on how much money one individual donor may contribute in total to all of the candidates to whom he or she wishes to contribute.[125] But Alaska's nonresident contribution limits are not aggregate limits on how much money one individual donor can contribute to candidates in total. Alaska has no such aggregate limits.

Not only do the limits here differ from the limits struck down in *McCutcheon*, but the justifications put forward in defense differ from those rejected in *McCutcheon*. In *McCutcheon*, the government defended its aggregate limits as a way of preventing donors from circumventing the base limits by channeling money to a candidate through other entities.[126] The Court rejected this specific rationale, but it did not hold that preventing circumvention of base limits

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125 134 S.Ct. at 1442.

126 *Id*. at 1452.

could never be a valid interest—instead, the Court simply found the kind of circumvention discussed in that case to be implausible, noting the many ways in which the Federal Election Commission (FEC) could prevent it.[127] But APOC's jurisdiction and resources are dwarfed by the FEC's, and circumvention of the base limits through nonresident channels that are beyond APOC's reach is a real possibility. [*See infra* 66-69] Moreover, the nonresident limits are justified by an alternative state interest not applicable in *McCutcheon*—the interest in preserving Alaska's system of self-government. [*See infra* 69-76] Because the contribution limits and supporting rationales at issue here are different from those at issue in *McCutcheon*, *McCutcheon* is not dispositive.

B. *VanNatta* does not ban all nonresident limits.

Nor is *VanNatta* dispositive, as Thompson argues. [Op.Br. 21-24] In *VanNatta*, this Court struck down an Oregon ballot measure prohibiting candidates for state office from using contributions from outside their electoral districts.[128] But this Court later suggested that *VanNatta* was superseded by the Supreme Court's decision in *Shrink Missouri*.[129]

Even if *VanNatta* remains good law, it is distinguishable, as the Alaska Supreme Court observed when upholding Alaska's nonresident limits in *State v.*

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127 *Id*. at 1452-56.

128 151 F.3d at 1225.

129 528 U.S. 377. *See Eddleman*, 343 F.3d at 1091 n.2.

Alaska Civil Liberties Union.[130] The Oregon out-of-district restrictions struck down in *VanNatta* "applied to both nonresidents and residents of Oregon," whereas Alaska's nonresident limits "apply only to nonresidents of Alaska, and do not limit speech of those most likely to be directly affected by the outcome of a campaign for state office—Alaska residents regardless of what district they live in."[131]

And even putting aside this distinction, *VanNatta* did not hold that any nonresident limits violate the First Amendment as a matter of law. The Court struck down the disputed measure in *VanNatta* in large part because it "ban[ned] all out-of-district donations" and because the proponents were "unable to point to any evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in *Buckley*."[132] Not only does Alaska's nonresident limit not ban all nonresident contributions, but also unlike in *VanNatta*, the State "did produce evidence at trial establishing a nexus between the prevention of quid pro quo corruption or its appearance and the nonresident aggregate limit." [ER24]

C. The nonresident limit is not subject to strict scrutiny.

Contrary to Thompson's assertions, the nonresident limit is not subject to strict scrutiny—it is subject to the *Eddleman* test. [Op.Br. 20-21] Strict scrutiny does not apply even though the nonresident limit may ban some donors from

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130 978 P.2d 597, 616 (Alaska 1999).

131 *Id*.

132 151 F.3d at 1221.

making any contributions to a candidate. Contribution limits are subject to intermediate scrutiny not because they are limits rather than bans, but because money contributions—although they may be a form of "speech"—are farther from the core of the First Amendment than other forms of speech.[133] As the Supreme Court explained in *Beaumont*, "[i]t 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, not in selecting the standard of review itself."[134]

D. The nonresident limit furthers the State's compelling anti-corruption interest.

As the district court correctly found, applying intermediate scrutiny, the nonresident limit furthers Alaska's anti-corruption interest in two ways. [ER25] It "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." [ER25-26] And it reduces "the appearance that the candidate feels obligated to outside interests over those of his constituents." [ER25]

In support of these conclusions, the district court found that Alaska is particularly vulnerable to corruption and exploitation. [ER24-25] Dr. McBeath

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133 *See* *Beaumont*, 539 U.S. at 161-62, *overruled on other grounds by* *Citizens United*, 558 U.S. 310.

134 *Id*. at 162.

explained that this is due to Alaska's small legislature, its large geographical size, its remoteness, its enormous natural resources, the high cost of developing those resources, and the absence of sufficient local capital to finance their development. [ER169-70; SER91-92, 72-75, 88-89, 460] Alaska has a history of out-of-state interests exploiting its resources to the detriment of Alaskans: for example, in the early twentieth century a company made $200 million extracting copper with little benefit to Alaskans. [SER92-93, 460-61] Alaska voters are wary because of Alaska's pattern of economic dependency and one-sided relationships with outside interests. [SER462-63, 94-95; ER170, 179]

As Professor Painter explained, Alaska's dependency on natural resource extraction makes it a target for outside interests that may want to extract resources without absorbing the externalities. [SER124-25, 541] This includes foreign interests, creating a risk of corruption by foreign corporations using U.S. subsidiaries and citizens as conduits. [SER124-25, 131] Resource extraction "rarely can be accomplished without the cooperation of government," and firms "can and do exert pressure on their employees to make contributions to state and municipal candidates." [ER25, 266; SER117-23] Such strategies have risks, and at lower limits those risks may not be worth the payoff. [SER122, 135]

The district court correctly concluded that the nonresident caps discourage circumvention of the $500 base limit by out-of-state and foreign interests that

could otherwise use nonresident surrogates or reimburse employees to exceed the base limit. [ER25-26, 267; SER109, 126-27, 141-43, 153, 155, 72-77, 96] Alaska's remoteness makes it expensive and difficult to investigate such out-of-state violations. [SER126-30] So Alaska's nonresident caps combat nonresident circumvention from another angle, by lowering the potential payoff. The caps reduce the incentive for a candidate to, for example, travel to Texas to solicit large amounts of bundled or earmarked contributions from an outside firm. [SER127] Such an arrangement would be very difficult for Alaska to police, and would be unlikely to be prosecutable under federal law. [SER127-30, 144-45, 150-51, 154] But limiting the total amount of money that could be obtained in this way disincentivizes this strategy. [ER267; SER143, 153, 155] The nonresident caps thus create an efficient rule that Alaska can enforce even though it cannot police conduct in Texas or China. [SER150-51, 128-30]

Thompson argues that certain aspects of Professor Painter's testimony were "proven false" because candidates did not see an increase in nonresident contributions during the years when Alaska's base limit was increased from $500 to $1,000. [Op.Br. 19] Professor Painter testified that an increase in base limits could increase the incentive for a firm—such as an outside resource extraction firm—to pressure its employees to make contributions. [ER261; SER118-19, 147-49] This observation is in no way undercut by the lack of an increase in

nonresident contributions during $1,000 limit years, because Alaska's nonresident caps remained in place during those years. Outside firms would have had little incentive to increase pressure on nonresident employees when their contributions would be limited by nonresident caps. Indeed, the nonresident caps have been in place for nearly twenty years, so it is unsurprising that nonresident contributions are not flooding Alaska campaigns.

The district court also correctly concluded that the nonresident limit reduces the appearance that a candidate will be obligated to outside interests rather than constituents. [ER25] The total monetary resources available outside Alaska dwarf those available in state, meaning that nonresident contributions have more potential to create a corrupt dependency relationship than resident contributions. [ER248; SER111, 143] Alaskans worry about outside money controlling their state politicians. [SER26-27, 189, 101-02] The nonresident limit reduces the appearance of corruption that Alaskans will perceive if a politician seems obligated to large pools of out-of-state or foreign money.

Accordingly, the district court did not err in concluding that the nonresident limit furthers the State's compelling anti-corruption interest.

E. As an alternative ground for affirmance, the nonresident limit furthers the State's important self-governance interest.

The challenged nonresident limit also furthers the important state interest in protecting Alaska's system of self-government from outside control.

Precedent does not preclude the State from invoking interests other than preventing quid pro quo corruption. In *Lair*, this Court said that "the prevention of quid pro quo corruption, or its appearance, is the only sufficiently important state interest to justify limits on campaign contributions."[135] But *Lair* and the cases it relied on did not involve nonresident limits and thus naturally did not consider interests specific to nonresident limits, like self-governance. Statements in *Lair* rejecting justifications for laws not before the Court are dicta.[136]

Alaska's interest in self-governance is rooted in bedrock principles of federalism. The U.S. Constitution "established a system of 'dual sovereignty'" that "contemplates that a State's government will represent and remain accountable to *its own citizens*."[137] "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."[138] As one commentator explains, "[n]o form of federalism, and therefore no form of government under the Constitution, works without limits on

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135 798 F.3d at 740.

136 *See Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) ("A statement is dictum when it is made during the course of delivering a judicial opinion, but is unnecessary to the decision of the case and is therefore not precedential." (internal citation, alterations, and quotation marks omitted)).

137 *Printz v. United States*, 521 U.S. 898, 919-20 (1997) (emphasis added).

138 *Id.* at 928.

outside influence in the states."[139] This is particularly crucial for small-population states like Alaska that could easily become dominated by outside forces.

Alaska may limit nonresident participation in its political processes for the same reason it may prohibit nonresidents from voting—because they are not members of Alaska's self-governing political community. In *Holt Civic Club v. City of Tuscaloosa*, a case involving the right to vote in local elections, the Supreme Court observed that "our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders."[140] And in *Ambach v. Norwick*, a case involving legal distinctions based on alienage, the Court similarly recognized "the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government."[141] A political community can thus permissibly decide to be

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139 Anthony Johnstone, *Outside Influence*, 13 Election L.J. 117, 122-23 (2014) (emphasis in original).

140 439 U.S. 60, 68-69 (1978).

141 441 U.S. 68, 73-74 (1979).

controlled by its members, even though this may involve restricting rights of non-members such as the right to vote.[142]

Bluman v. Federal Election Commission[143] demonstrates that this principle naturally extends to campaign participation. In *Bluman*, a three-judge panel of the district court upheld federal laws even more restrictive than Alaska's; they prevented foreign nationals from contributing to federal candidates or even making independent expenditures.[144] The court observed 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."[145] Such activities that are "directly targeted at influencing the outcome of an election" are "both speech and participation in democratic self-government."[146] The court recognized "a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S.

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142 *Cf.* *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 383 (1978) ("Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State.").

143 800 F.Supp.2d 281 (D.D.C. 2011).

144 *Id*. at 283.

145 *Id*.

146 *Id*. at 289.

political process."[147] Given that "it is undisputed that the government may bar foreign citizens from voting and serving as elected officers," the court reasoned, "[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."[148] Even though the laws at issue in *Bluman* were more restrictive than Alaska's, the three-judge panel nonetheless upheld them, and the Supreme Court summarily affirmed.[149]

Although *Bluman* considered limitations on foreign participation in federal elections, the analogy to nonresident participation in state elections is direct and apt. *Bluman* reasoned that "it follows" from the fact that the federal government may "may bar foreign citizens from voting and serving as elected officers" that it may also bar them from "participating in the campaign process that seeks to influence how voters will cast their ballots."[150] Likewise, it follows from the fact that Alaska may bar nonresidents from voting and running for state office that it may also restrict nonresident participation in the state campaign process. Just as a Canadian citizen is not part of the U.S. political community, a Florida resident is not part of the Alaska political community.

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147 *Id*. at 288.

148 *Id*.

149 *Bluman v. FEC*, 132 S.Ct. 1087 (2012).

150 800 F.Supp.2d at 288.

This reasoning applies to candidates for state offices even if not to state candidates for federal offices. A state's congressional delegation represents only that state's citizens, but the U.S. Congress governs the entire country, including all of the other states in the Union. Thus, although a nonresident is not a constituent of Alaska's congressional delegation, he or she is still part of the political community governed by the U.S. Congress. The same cannot be said for nonresidents with respect to state officers—a nonresident is neither a constituent of any Alaska legislator nor part of the political community governed by the Alaska Legislature.

This Court's precedent does not foreclose the self-governance rationale. In *VanNatta*, the Court rejected a state interest in a republican form of government as a justification for Oregon's out-of-district restrictions.[151] But *VanNatta* is distinguishable because the restrictions applied to both nonresidents and Oregon residents, and the self-governance rationale would not justify such restrictions on state residents. Moreover, *VanNatta* is unpersuasive because it reads too much into *Whitmore v. Federal Election Commission*.[152] In *Whitmore*, the plaintiffs sought to enjoin all nonresident contributions, asserting that such contributions violated their rights to free association, equal protection, and a republican form of government.[153] In other words, the question before the Court was not whether a limit on

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151 151 F.3d at 1217-18.

152 68 F.3d 1212 (9th Cir.1995).

153 *Id*. at 1214.

nonresident contributions is constitutionally *permissible*, but rather whether a total ban on such contributions is constitutionally *required*. The Court concluded that it is not; indeed, the court held that the plaintiffs lacked standing and that their novel claim—that a federal law was unconstitutional because it *failed to ban* nonresident contributions—was frivolous.[154] The Court's quick rejection of this oddly formulated claim has little bearing here. The Court speculated that banning nonresident contributions to enhance the weight of in-state opinions "may violate the rights of the out-of-state contributors,"[155] but that was not the question the Court faced—it only had to decide whether any source of law *required* a ban.[156]

Thompson fares no better in his reliance on two out-of-circuit cases, which are not binding on this Court. [Op.Br. 23-24, 34] In *Krislov v. Rednour*, the Seventh Circuit invalidated an Illinois law requiring a petition circulator to be a voter registered in the relevant political subdivision.[157] But petition circulation laws are quite different from campaign contribution limits; indeed, the court applied strict scrutiny to the challenged law.[158]

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154 *Id*. at 1215-16.

155 *Id*. at 1216.

156 *Cf. VanNatta*, 151 F.3d at 1225 (Brunetti, J., dissenting) (explaining that *Whitmore* "did not intend to resolve the First Amendment rights of the contributors").

157 226 F.3d 851, 855 (7th Cir. 2000).

158 *Id*. at 863.

Thompson also cites *Landell v. Sorrell*,[159] in which the Second Circuit rejected an anti-distortion rationale for nonresident limits. The court was "unpersuaded that the First Amendment permits state governments to preserve their systems from the influence, exercised only through speech-related activities, of non-residents."[160] But the rejected anti-distortion rationale differs from the self-governance rationale advanced here. Alaska does not limit nonresident contributions "because it questions the value of what they have to say"—the rationale rejected in *Landell*—but rather because nonresidents are not part of Alaska's system of self-government. Just as this was a permissible rationale for limiting the contributions of foreign nationals in *Bluman*,[161] it is a permissible rationale for limiting the contributions of nonresidents here.

F. The Court need not apply the rest of *Eddleman*.

The district court stopped its analysis after concluding that the nonresident limit furthers an important state interest, reasoning that Thompson's challenge was not about whether the nonresident limit was closely drawn. [ER26] On appeal, Thompson does not argue that the court should have applied the rest of the *Eddleman* test. [Op.Br. 14-24] This Court therefore should uphold the nonresident limit because it furthers an important state interest.

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159 382 F.3d 91 (2d Cir. 2004) (the case that became *Randall*).

160 *Id*. at 148.

161 800 F.Supp.2d at 288.

IV. The district court correctly upheld the $500 individual-to-group limit.

The Court should uphold the $500 limit on individual contributions to election-related groups[162] because Thompson's arguments are barred by precedent and because regardless, the limit passes the *Eddleman* test.

Thompson argues that the State cannot limit contributions to groups because such contributions pose no corruption risk and because such limits are superfluous, but *California Medical Association v. Federal Election Commission*[163] precludes these arguments. [Op.Br. 54-55] In that case, the Supreme Court upheld a limit on contributions to groups that contribute to candidates. The Court rejected the position—identical to Thompson's here—that "because the contributions here flow to a political committee, rather than to a candidate, the danger of actual or apparent corruption . . . is not present."[164] Even Justice Blackmun, who dissented in *Buckley* and wrote separately in *California Medical Association*, recognized that such groups are "essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption."[165] The Court also rejected the position—identical to Thompson's here—that the group limit was "superfluous and therefore constitutionally defective because other antifraud provisions . . .

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162 Alaska Stat. § 15.13.070(b)(l).

163 453 U.S. 182 (1981).

164 *Id*. at 195.

165 *Id*. at 203 (Blackmun, J., concurring in part and concurring in the judgment).

adequately serve" the government's anti-corruption and anti-circumvention ends.[166] The Supreme Court has never overruled *California Medical Association*—on the contrary, it has repeatedly cited the case without expressing any disapproval, including in *McCutcheon*,[167] *Citizens United*,[168] and *Randall*.[169] This Court must leave to the Supreme Court "the prerogative of overruling its own decisions."[170]

But even leaving *California Medical Association* aside, the $500 individual-to-group limit is constitutional because it passes the *Eddleman* test.

First, the limit furthers the State's anti-corruption interest by making it harder for contributors to evade the individual-to-candidate base limit. If the $500 base limit furthers an important state interest, then measures that help prevent circumvention of it do too. The Supreme Court has recognized the importance of preventing circumvention.[171] Groups are easy to form—they require only two people, as Thompson acknowledges—and they may make contributions directly to

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166 *Id*. at 199 n.20.

167 *See* 134 S.Ct. at 1446.

168 *See* 558 U.S. at 348.

169 *See* 548 U.S. at 242.

170 *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

171 *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) (plurality opinion) ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption . . . ."); *see also Thalheimer*, 645 F.3d at 1124-25; *McCutcheon*, 134 S.Ct. at 1446-47.

candidates. [Op.Br. 55] The individual-to-group limit inhibits the use of groups as pass-through devices for excess individual contributions.

Thompson argues that two other laws make the individual-to-group limit unnecessary—the earmarking prohibition and the group-to-candidate limit. [Op.Br. 55] But because strict scrutiny does not apply, the State need not show that the individual-to-group limit is *necessary*—only that it is *useful*.[172] The State did so.

Moreover, Thompson is incorrect in asserting that other laws make the individual-to-group limit unnecessary. A group can form to support a single candidate, and can make public its intention to contribute to that candidate; the prohibition against earmarking contributions for particular candidates would do nothing to prevent the use of such a group to easily circumvent the base limit. Nor does the $1,000 group-to-candidate limit by itself prevent circumvention. If a donor could make unlimited donations to a group, $1,000 of which could then be passed on a candidate, this would permit the donor to make in effect a $1,500 contribution to the candidate—$500 directly, and $1,000 through the group. If the $500 limit is constitutional, measures making it harder for contributors to give three times that limit by using a group as a simple pass-through device are also

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[172] *See supra* 33-37; *cf.* *Cal. Med. Ass'n*, 453 U.S. at 199 n.20 ("Congress was not required to select the least restrictive means of protecting the integrity of its legislative scheme. Instead, Congress could reasonably have concluded [the limit] was a useful supplement to the other antifraud provisions of the Act.").

constitutional.[173] Thompson asserts that "there is no evidence that individuals are using group formation to circumvent base limits," but such evidence would not be expected because Alaska's current system of limits makes the task harder. [Op.Br. 55] The success of a measure is not evidence of its uselessness.

Second, the individual-to-group limit is narrowly focused. It only limits contributions to groups formed "with the principal purpose of influencing the outcome of one or more [candidate] elections," and does not apply to ballot measure groups or independent expenditure groups.[174] It therefore applies only to the precise kinds of contributions to groups that implicate the State's anti-corruption interest. And the limit is set at the same $500 level as the individual-to-candidate limit, which is valid. [*Supra* 19-62] Beyond his challenge to the $500 base limit, Thompson has not articulated any reason why $500 would be too low a number for the limit on contributions to groups, specifically.

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[173] *Cf. Cal. Med. Ass'n*, 453 U.S. at 198 ("Since multicandidate political committees may contribute up to $5,000 per year to any candidate . . . an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channelling funds through a multicandidate political committee.").

[174] Alaska Stat. § 15.13.400(8) (defining "group"); Alaska Stat. § 15.13.065(c) (providing, in part, that the contribution limits in Alaska Stat. § 15.13.070 do not apply to ballot measure groups). APOC does not apply contribution limits to independent expenditure groups. *See* Alaskans Deserve Better, AO 12-09-CD at 7-8 (2012), available at http://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=4781.

Third, the individual-to-group limit leaves contributors free to affiliate with candidates and groups in many ways, including contributions up to the limit.

And fourth, the individual-to-group limit does not prevent candidates from raising sufficient funds because, as discussed above, candidates in Alaska are able to run effective campaigns under the current system. [*Supra* 44-52] The limit therefore passes the *Eddleman* test.

V. The district court correctly upheld the challenged political-party-to-candidate limit.

Finally, the Court should reject Thompson's challenge to the $5,000 annual limit on contributions to a municipal candidate by a political party and its subunits.[175] The district court correctly held that this limit "does not trigger First Amendment concerns, at least under Plaintiffs' theory of the case." [ER27]

Because Thompson has never argued that the First Amendment prohibits any limit on political party contributions, or that $5,000 is an unconstitutionally low dollar amount for such a limit, the Court should assume, for purposes of this case, that the $5,000 limit itself is valid. What Thompson challenges is not the limit, but "[t]he aggregation of financially independent political Party units" for purposes of administering the limit. [Op.Br. 56-57; D.Dkt. 61 at 18-19] But such

[175] The district court held that Thompson had standing to challenge only this limit, codified at Alaska Stat. § 15.13.070(d)(4)(C), not all of the party limits. [SER7] Thompson has not appealed this holding.

aggregation is necessary for the limit to operate, and the State's non-aggregation of labor union PAC contributions is inapposite.

The State allows political parties higher contribution limits than all other contributors;[176] to administer such a limit, the State must have a way of distinguishing between party contributions and non-party contributions. So Alaska law defines a "political party" as an organized group that nominated a candidate who received a threshold percentage of votes in a recent election.[177] And Alaska law further says that a party includes "any subordinate unit of that group if, consistent with the rules or bylaws of the political party, the unit conducts or supports campaign operations in a municipality, neighborhood, house district, or precinct."[178] Because the higher party limits are tied to parties' special status within our political system, they naturally apply to the subunits that share that special status. Party status thus comes with both requirements (like established voter support) and benefits (like higher limits). A group is free to choose whether to try to meet these requirements and attain these benefits; no group is forced to do so.

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176 *See* Alaska Stat. § 15.13.070(b)-(d). The State may—indeed, arguably must—allow parties to contribute more than others. Courts have rejected challenges to such laws. *See Illinois Liberty PAC v. Madigan*, 902 F.Supp.2d 1113, 1121 (N.D. Ill. 2012), *aff'd*, No. 12-3305, 2012 WL 5259036 (7th Cir. 2012).

177 Alaska Stat. § 15.80.010(27).

178 Alaska Stat. § 15.13.400(15).

The party limits challenged in *Lair* similarly aggregated party subunit contributions, and this practice received little comment from this Court.[179]

Thompson argues that the State's justification for aggregating party subunit contributions is undermined by its failure to aggregate labor union PAC contributions, but his analogy falls flat. [Op.Br. 56-57] First, the State aggregates party subunits so that it can administer the higher party limit. There is no reason for it to aggregate union PAC contributions, because it has no analogous higher labor-union-PAC limit to administer. Second, a political party and its subunits are not like a collection of different labor union PACs. On the contrary, the evidence at trial was undisputed that party subunits owe their existence to the party, are governed by party rules, and work with the party to elect party candidates. [SER59-60, 9, 12-17, 20-23] Different labor unions, by contrast, are independent entities whose interests frequently diverge. [SER60-61, 199, 525-26] A union PAC is created and governed on its own terms, unlike a political party subunit. [SER12, 14-15, 20-22] A union PAC may contribute to any candidate; by contrast, a subunit of the Alaska Republican Party may only contribute to a registered Republican candidate. [SER452] The differential treatment of party subunits and labor union PACs is justified by the major differences between these entities.

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[179] *See Lair*, 798 F.3d at 740 ("Montana treats all committees that are affiliated with a political party as one entity.").

Accordingly, Thompson has failed to identify any constitutional problem with the $5,000 party limit, and this Court should uphold it.

CONCLUSION

For these reasons, the Court should affirm the decision below in all respects.

STATEMENT OF RELATED CASES

The appellees are not aware of any related cases other than those already identified by the appellants in their opening brief.

DATED: July 19, 2017.

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I hereby certify that on July 19, 2017, a copy of the foregoing **ANSWERING BRIEF OF APPELLEES** was served electronically on the following parties of record pursuant to the Court's electronic filing procedures:

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