Appendix

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[***Editing Note:*** *Page numbers from the reported opinion, 873 F.3d 1170, are indicated, e.g.,* ***[*1172]***.]

[Filed: 10/23/2017]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUG LAIR; STEVE DOGIAKOS; AMERICAN TRADITION PARTNERSHIP; AMERICAN TRADITION PARTNERSHIP PAC; MONTANA RIGHT TO LIFE ASSOCIATION PAC; SWEET GRASS COUNCIL FOR COMMUNITY INTEGRITY; LAKE COUNTY REPUBLICAN CENTRAL COMMITTEE; BEAVERHEAD COUNTY REPUBLICAN CENTRAL COMMITTEE; JAKE OIL, LLC; JL OIL, LLC; CHAMPION PAINTING; JOHN MILANOVICH,
Plaintiffs-Appellees,

RICK HILL, Warden,
Intervenor-Plaintiff-Appellee,

v.

JONATHAN MOTL, in his official capacity as Commissioner of Political Practices; TIM FOX, in his official capacity as Attorney General of the State of Montana; LEO J. GALLAGHER, in his official capacity as Lewis and Clark County Attorney,
Defendants-Appellants.

No. 16-3539

D.C. No. 6:12-cv-00012-CCL

OPINION

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, Senior District Judge, Presiding

Argued and Submitted March 21, 2017
San Francisco, California

Filed October 23, 2017

Before: Raymond C. Fisher, Carlos T. Bea
and Mary H. Murguia, Circuit Judges.

Opinion by Judge Fisher;
Dissent by Judge Bea

SUMMARY*

Civil Rights

The panel reversed the district court's judgment in an action challenging Montana's limits on the amount of money individuals, political action committees and political parties may contribute to candidates for state elective office.

The panel held that Montana's limits, as set forth in Montana Code Annotated § 13-37-216, were both justified by and adequately tailored to the state's interest in combating quid pro quo corruption or its appearance. The panel held that Montana had shown the risk of actual or perceived quid pro quo corruption in Montana politics was more than "mere conjecture." The state offered evidence of attempts to purchase

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

legislative action with campaign contributions. The panel held that contribution limits served the state's important interest in preventing this risk of corruption from becoming reality.

The panel held that Montana's limits were also "closely drawn" to serve the state's anti-corruption interest. The limits targeted those contributions most likely to result in actual or perceived quid pro quo corruption—high-end, direct contributions with a significant impact on candidate fundraising. Moreover, the limits were tailored to avoid favoring incumbents, not to curtail the influence of political parties, and to permit candidates to raise enough money to make their voices heard. Although Montana's limits were lower than most other states' in absolute terms, they were relatively high when comparing each state's limits to the cost of campaigning there. Thus, Montana's chosen limits fell within the realm of legislative judgments the courts could not second guess.

Dissenting, Judge Bea stated that the district court properly evaluated the evidence submitted by Montana's officials and found the officials had not established the only constitutionally permissible and valid state interest sufficient to justify Montana's campaign contribution limits: the prevention of corruption or its appearance.

COUNSEL

Matthew T. Cochenour (argued), Helena, Montana, for Defendants-Appellants.

James Bopp (argued), Terre Haute, Indiana, for Plaintiffs-Appellees.

OPINION

[*1172] FISHER, Circuit Judge:

Montana limits the amount of money individuals, political action committees and political parties may contribute to candidates for state elective office. The district court invalidated these limits as unduly restrictive of political speech under the First Amendment. Because Montana's limits are both justified by and adequately tailored to the state's interest in combating quid pro quo corruption or its appearance, we reverse.

Montana has shown the risk of actual or perceived quid pro quo corruption in Montana politics is more than "mere conjecture," the low bar it must surmount before imposing contribution limits of any amount. The state has offered evidence of attempts to purchase legislative action with campaign contributions. Contribution limits serve the state's important interest in preventing this risk of corruption from becoming reality.

Montana's limits are also "closely drawn" to serve the state's anti-corruption interest. The limits target those contributions most likely to result in actual or perceived quid pro quo corruption—high-end, direct contributions with a significant impact on candidate fundraising. Moreover, the limits are tailored to avoid favoring incumbents, not to curtail the influence of political parties, and to permit candidates to raise enough money to make their voices heard. Although Montana's limits are lower than most other states' in absolute terms, they are relatively high when

comparing each state's limits to the cost of campaigning there. Thus, Montana's chosen limits fall within the realm of legislative judgments we may not second guess.

I. Background

A. Montana's Contribution Limits

In 1994, Montana voters passed Initiative 118, a campaign finance reform package that included the contribution limits at issue here. I-118's limits replaced a regime that had been in place since 1975. That regime permitted individuals and political **[*1173]** parties to contribute up to the following limits:

Table 1: Pre-Initiative 118 Limits

	Governor	Other Statewide Election	Public Service Commission	Legislature	City or County
Individual	$1500	$750	$400	$250	$200
Political Party	$8000	$2000	$1000	$250	$200

See Mont. Code Ann. § 13-37-216 (1975) (enacted by No. 23-4795, 1975 Mont. Laws Ch. 481 § 1).

I-118 lowered the cap on individual contributions while raising the cap on contributions from political parties.[1] Although the contribution limits at issue here

[1] Montana styles its limits on political parties as "aggregate" limits, meaning that a political party is treated as a single entity for contribution purposes, even if the party is broken down into a number of different local committees across the state. *See* Mont. Code Ann. § 13-37-216(2). These aggregate limits are different in kind from the ones the Supreme Court struck down in *McCutcheon v. FEC*, 134 S.

originate from I-118, the limits have not remained static. Since I-118's enactment, the Montana legislature has both amended the limits and indexed them to inflation. *See id.* § 13-37-216 (2003) (raising the limits); Act of Apr. 27, 2007, 2007 Mont. Laws Ch. 328 § 1 (H.B. 706) (indexing the limits to inflation); Admin. R. Mont. 44.11.227. Moreover, unlike the pre-1994 limits, I-118's limits apply per *election* (rather than per *cycle*), so a contributor may give up to the maximum twice if a candidate faces a contested primary (once for the primary and once for the general election). *See* Mont. Code Ann. § 13-37-216(5); Mont. Comm'r of Political Practices, *Amended Office Mgmt. Policy 2.4 Reinstating Pre-Lair 2016 Campaign Contribution Limits* at 2 (May 18, 2016) ("Pre-1994 Limits Policy"), http://politicalpractices.mt.gov/content/ContributionLimitPolicy (explaining that the pre-I-118 limits applied per cycle).

Table 2 shows the post I-118 contribution limits in 1994 (when they were enacted), 2011 (when this lawsuit began) and today. Table 3 compares the pre-I-118 limits to the post I-118 limits as of 2017.

Ct. 1434 (2014). There, the aggregate limits meant that once an individual's contributions to *all* candidates added up to the aggregate limit, he could no longer give *any* money to *any* candidates. *See id.* at 1443, 1448. Montana's aggregation of political party contributions, by contrast, permits a party to contribute up to the limit to as many candidates as the party wishes.

[*1174] Table 2: Post-Initiative 118 Limits[2]

	Governor			Other Statewide Election			Public Service Commission			State Senate			Other Public Office		
	1994	2011	2017	1994	2011	2017	1994	2011	2017	1994	2011	2017	1994	2011	2017
Individual/ PAC	$800	$1000	$1320	$400	$500	$660	$200	$260	$340	$200	$260	$340	$200	$260	$340
Political party	$15,000	$36,000	$47,700	$5000	$13,000	$17,200	$2000	$5200	$6900	$800	$2100	$2800	$500	$1300	$1700

[2] Limits shown are the maximum per cycle assuming a candidate faces a contested primary. Per election limits are one half of the amount shown.

See Mont. Code Ann. § 13-37-216; Admin. R. Mont. 44.11.227.

[*1175] Table 3: Pre-Initiative 118 Limits vs. 2017 Limits

	PRE-INITIATIVE 118	2017	
	Per Cycle	Per Cycle	Per Election
Individuals/PAC			
Governor	$1500	$1320	$660
Other statewide	$750	$660	$330
Public Service Commissioner	$400	$340	$170
State legislature	$250	$340	$170
City or county office	$200	$340	$170
Political Parties			
Governor	$8000	$47,700	$23,850
Other statewide	$2000	$17,200	$8600
Public Service Commissioner	$1000	$6900	$3450
State legislature	$250	$2800	$1400
City or county office	$200	$1700	$850

B. *Eddleman*

We first addressed—and upheld—the constitutionality of Montana's contribution limits in *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003). Applying *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), we held

> state campaign contribution limits will be upheld if (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and (2) if the limits are "closely drawn" — i.e., if they (a) focus narrowly on the state's **[*1176]** interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign.

Eddleman, 343 F.3d at 1092.

At step one, we held Montana's limits furthered the state's "interest in preventing corruption or the appearance of corruption." *Id.* In reaching this conclusion, we noted "[t]he evidence presented by . . . Montana . . . [wa]s sufficient to justify the contribution limits imposed, and indeed carrie[d] more weight than that presented in *Shrink Missouri*." *Id.* at 1093. We defined "corruption" or its appearance to include both "instances of bribery of public officials" and "the broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 1092 (quoting *Shrink*, 528 U.S. at 389).

At step two, we held Montana's limits were "'closely drawn' to avoid unnecessary abridgement of

associational freedoms." *Id.* at 1093. The limits were adequately tailored to the state's "interest in preventing corruption and the appearance of corruption" because they "affect[ed] only the top 10% of contributions, and . . . the percentage affected include[d] the largest contributions" — those most likely to be associated with actual or perceived corruption. *Id.* at 1094. The limits also allowed candidates to amass sufficient resources to wage effective campaigns, as shown by testimony from candidates and statistics demonstrating the minor effects of the limits on fundraising compared to the low cost of campaigning in Montana. *See id.* at 1094-95. The limits, moreover, had caused no significant difference in the amount challengers were able to raise compared to incumbents. *See id.* at 1095. We therefore upheld Montana's limits.

C. *Randall*

Three years later, the Supreme Court's decision in *Randall v. Sorrell*, 548 U.S. 230(2006), left *Eddleman*'s holding on less stable footing. *Randall* invalidated Vermont's contribution limits, and a three-justice plurality led by Justice Breyer proposed a new two-part, multi-factor "closely drawn" test. As we subsequently explained,

> [u]nder [the *Randall*] test, the reviewing court first should identify if there are any "danger signs" that the restrictions on contributions prevent candidates from amassing the resources necessary to be heard or put challengers at a disadvantage vis-a-vis incumbents. [*Randall*, 548 U.S.] at 249-52. The plurality found four "danger signs" in Vermont's contribution limits:

> "(1) The limits are set per election cycle, rather than divided between primary and general elections; (2) the limits apply to contributions from political parties; (3) the limits are the lowest in the Nation; and (4) the limits are below those we have previously upheld." *Id.* at 268 (Thomas, J., concurring) (listing the plurality's "danger signs"). The plurality held, if such danger signs exist, then the court must determine whether the limits are "closely drawn."
>
> The plurality looked to "five sets of considerations" to determine whether the statute was closely drawn: (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." *Id.* at 253-62.

[*1177] *Lair v. Bullock*, 798 F.3d 736, 743 (9th Cir. 2015) (*Lair II*) (last two alterations in original) (citations omitted). Although this test is in many respects similar to the tailoring inquiry at step two of the *Eddleman* analysis, it does not map perfectly onto *Eddleman*.

D. *Lair*

After *Randall*, the plaintiffs commenced this action challenging Montana's limits a second time. The district court concluded *Randall* abrogated *Eddleman*'s approach to evaluating contribution limits and held Montana's limits were invalid under *Randall*. *See Lair v. Murry*, 903 F. Supp. 2d 1077, 1093 (D. Mont. 2012). Montana appealed.

Because the district court's decision came weeks before a state election, Montana sought a stay pending appeal, which a motions panel of this court granted in a published decision. *See Lair v. Bullock*, 697 F.3d 1200, 1202 (9th Cir. 2012) (*Lair I*). The motions panel held *Randall* had *not* abrogated *Eddleman*, because no "opinion [in *Randall*] can be meaningfully regarded as narrower than another *and* can represent a common denominator of the Court's reasoning." *Id.* at 1205 (quoting *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1140 (9th Cir.), *amended by* 416 F.3d 939 (9th Cir. 2005)). Assuming arguendo Justice Breyer's plurality opinion was controlling, *Lair I* concluded *Randall* applied rather than altered *Buckley*, the primary decision upon which *Eddleman* had relied. *Id.* at 1206-08. Finally, even applying *Randall*'s somewhat different "closely drawn" analysis, *Lair I* concluded Montana's limits would likely survive scrutiny. *Id.* at 1208-13.

We then heard Montana's appeal on the merits. *See Lair II*, 798 F.3d at 744. In *Lair II*, we followed the motions panel's holding that *Randall* did not abrogate *Eddleman*'s general approach to evaluating contribution limits. *Id.* at 747. We also held, however, that the Supreme Court's decisions in *Citizens United*

v. FEC, 558 U.S. 310 (2010), and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), had limited the important state interest at *Eddleman*'s first step to preventing "quid pro quo corruption, or its appearance." *Lair II*, 798 F.3d at 746. *McCutcheon* defined quid pro quo corruption as "a direct exchange of an official act for money" or "dollars for political favors" and the "appearance" of quid pro quo corruption as "public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions to particular candidates." 134 S. Ct. at 1441, 1450 (internal quotation marks omitted). Because *Eddleman* had relied on a broader definition of corruption—embracing both quid pro quo and a generalized "access and influence" theory—*Citizens United* and *McCutcheon* undermined *Eddleman*'s holding that Montana's limits were justified by an important state interest. We therefore remanded for the district court to evaluate Montana's limits under the *Eddleman* framework, but with the important state interest limited to preventing actual or perceived quid pro quo corruption.

On remand, the district court held the limits unconstitutional under both prongs of *Eddleman*. In the district court's view, Montana did not provide adequate evidence that its contribution limits further the state's interest in combating quid pro quo corruption or its appearance. The court acknowledged evidence of various attempts to obtain political favors through campaign contributions but concluded these examples were inadequate because they did not show the attempted corruption succeeded. "The sticking point with respect to the evidence Defendants rely upon is that the quids in each one of the **[*1178]** cited

instances were either rejected by, or were unlikely to have any behavioral effect upon, the individuals toward whom they were directed." *Lair v. Motl*, 189 F. Supp. 3d 1024, 1034 (D. Mont. 2016). Under *Eddleman*'s "closely drawn" prong, the district court concluded the limits both prevented candidates from campaigning effectively and were not narrowly focused, "because they were expressly enacted to combat the *impermissible* interests of reducing influence and leveling the playing field." *Id.* at 1035. Montana again appealed. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

II. Standard of Review

We generally review a district court's legal conclusions de novo and its factual findings for clear error. *See Lair II*, 798 F.3d at 745. In the First Amendment context, however, "our review [of the district court's fact finding] is more rigorous than other cases." *Id.* at 748 n.8; *see also Randall*, 548 U.S. at 249 (plurality opinion) ("[C]ourts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of the restrictions."). In addition, we "review the application of [the] law to those facts de novo on free speech issues." *Lair II*, 798 F.3d at 745.

III. Discussion

A. Important State Interest

Under *Eddleman*, we ask first whether "there is adequate evidence that [Montana's] limitation[s] further[] . . . [the] important state interest" of preventing actual or perceived quid pro quo corruption. 343 F.3d at 1092. This step of the inquiry is divorced

from the actual amount of the limits — it is a threshold question whether *any* level of limitation is justified. As we explained in *Eddleman*:

> [The plaintiff] does not dispute that [Montana's interest in combating corruption] is sufficient to justify campaign contribution limits. Rather, [the plaintiff] argues that the limits imposed are unnecessarily stringent
>
> . . . .
>
> This, however, is not the appropriate inquiry [at step one]. The correct focus . . . is whether the state has presented sufficient evidence of a valid interest, not whether it has justified a particular dollar amount. The latter inquiry, if ever appropriate, occurs in the second part of our analysis, in examining whether the restriction is "closely drawn."

Id.

To satisfy its burden, Montana must show the risk of actual or perceived quid pro quo corruption is more than "mere conjecture." *Id.* (quoting *Shrink*, 528 U.S. at 392); *see McCutcheon*, 134 S. Ct. at 1452 (reiterating the "mere conjecture" standard). Montana need not show any instances of actual quid pro quo corruption. *See Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011). It must show "only that the perceived threat [is] not . . . 'illusory.'" *Eddleman*, 343 F.3d at 1092 (quoting *Buckley*, 424 U.S. at 27).

This evidentiary burden is lowest where, as here, the state's purported interest is neither "novel" nor "implausible."

Because the regulations at issue in *Shrink* were

> similar to those in *Buckley*, the state's asserted interest was neither novel nor implausible. Therefore, the Court declined to impose, let alone articulate, a stringent evidentiary burden. *Shrink* dealt with direct contributions to candidates, and *Buckley* established that a limit on the amount of such contributions is "only a marginal restriction upon the contributor's ability to engage in free communication" that can be justified by the government's interest in preventing "political *quid pro quo* from current **[*1179]** and potential office holders." 424 U.S. at 20-21, 26.

Thalheimer, 645 F.3d at 1122 (citations and internal quotation marks omitted).[3]

Here, the important state interest requirement is satisfied. The plaintiffs do not dispute that Montana's interest in combating quid pro quo corruption or its appearance justifies some level of contribution limit. Indeed, the plaintiffs conceded at oral argument that they believed Montana's pre-1994 limits were constitutional.

Even if the plaintiffs challenged this conclusion they would not succeed, because Montana's evidence shows the threat of actual or perceived quid pro quo corruption in Montana politics is not illusory. State

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[3] This conclusion is consistent with the *Randall* plurality's decision, which did not suggest Vermont lacked a valid interest in combating quid pro quo corruption. The plurality's analysis was focused entirely on the tailoring of Vermont's limits. *See Randall*, 548 U.S. at 248-60 (plurality opinion).

Representative Hal Harper testified groups "funnel[] more money into campaigns when certain special interests know an issue is coming up, because it gets results." State Senator Mike Anderson sent a "destroy after reading" letter to his party colleagues, urging them to vote for a bill so a PAC would continue to funnel contributions to the party:

> Dear Fellow Republicans. Please destroy this after reading. Why? Because the Life Underwriters Association in Montana is one of the larger Political Action Committees in the state, and I don't want the Demo's to know about it! In the last election they gave $8,000 to state candidates. . . . Of this $8,000—Republicans got $7,000—you probably got something from them. This bill is important to the underwriters and I have been able to keep the contributions coming our way. In 1983, the PAC will be $15,000. Let's keep it in our camp.

State Senator Bruce Tutvedt stated in a declaration that during the 2009 legislative session the National Right to Work group promised to contribute at least $100,000 to elect Republican majorities in the next election if he and his colleagues introduced and voted for a right-to-work bill in the 2011 legislative session. Finally, a state court found two 2010 state legislature candidates violated state election laws by accepting large contributions from a corporation that "bragged . . . that those candidates that it supported 'rode into office in 100% support of [the corporation's] . . . agenda.'" *See Comm'r of Political Practices v. Prouse*, DDV-2014-250 (1st Jud. Dist. Mont. 2016); *Comm'r of Political Practices v. Boniek*, XADV-2014-202, 2015

Mont. Dist. LEXIS 88 (1st Jud. Dist. Mont. 2015).

In concluding this evidence failed to justify contribution limits, the district court imposed too high an evidentiary burden on Montana.[4] The court held Montana's evidence was inadequate because the attempted **[*1180]** corruption did not succeed — the "quids" did not lead to "quos." *See Lair*, 189 F. Supp. 3d at 1034. But Montana need not show any completed quid pro quo transactions to satisfy its burden. It simply must show the risk of actual or perceived quid pro quo corruption is not illusory, a bar Montana's evidence easily clears. Montana's contribution limits are of the same kind as in *Shrink* and *Buckley*, and they are supported by at least as much evidence as was present in those cases. *See Shrink*, 528 U.S. at 393-94

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[4] Like the district court, the dissent would hold Montana to a more stringent evidentiary burden than our cases or the Supreme Court's permit. The dissent says Montana must prove the *existence* of actual or apparent corruption (Dissent at 37, 38, 41, 42), whereas we — following the Supreme Court — have repeatedly held that all Montana must do is show a "threat" or "risk" of actual or apparent corruption. *Eddleman*, 343 F.3d at 1092; *Farris v. Seabrook*, 677 F.3d 858, 865-66 (9th Cir. 2012). The dissent similarly suggests Montana must show evidence of a completed, successful exchange of dollars for political favors to meets its evidentiary burden. Dissent at 37 n.1, 38, 40, 41-42. But Montana need only show that the threat of actual or apparent corruption is "not . . . illusory" or is more than "mere conjecture." *Buckley*, 424 U.S. at 27; *Shrink*, 528 U.S. at 392. For example, even if the "destroy after reading" letter did not result in the successful purchase of a block of votes in exchange for contributions, it certainly shows that the threat of such arrangements is non-illusory.

(noting a statement from a legislator "that large contributions have 'the real potential to buy votes'"; "newspaper accounts of large contributions supporting inferences of impropriety"; an example of a "state representative . . . 'accused of sponsoring legislation in exchange for kickbacks'" (but not convicted); and a scandal in which the former attorney general pled guilty to misusing state property to benefit campaign contributors); *Buckley*, 424 U.S. at 27 n.28 (referencing generic "abuses uncovered after the 1972 elections"). Montana, therefore, has offered adequate evidence that its limits further the important state interest of preventing quid pro quo corruption or its appearance.[5]

B. "Closely Drawn"

We next address whether "the limits are 'closely drawn' — i.e., [whether] 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." *Eddleman*, 343 F.3d at 1092. This tailoring inquiry "ensures the state's contribution limits are not

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[5] In reaching the contrary conclusion, the dissent points to no case—and we are aware of none—where the risk of actual or apparent corruption was inadequate to justify contribution limits of *some* level. The plaintiffs themselves concede Montana's pre-Initiative 118 limits satisfy the First Amendment. Under the dissent's logic, however, Montana's evidence is inadequate to justify any contribution limits whatsoever, no matter how high. *See Eddleman*, 343 F.3d at 1092 (explaining that the valid interest analysis is divorced from whether the state has justified the particular dollar amount of the limits at issue). On this record, that unprecedented conclusion is simply untenable.

lower than needed to accomplish the state's goal of preventing quid pro quo corruption or its appearance." *Lair II*, 798 F.3d at 740 n.4. In conducting this inquiry, courts owe significant deference to the legislative process. As *Buckley* explained, courts have "no scalpel to probe" these legislative judgments, so "distinctions in degree become significant only when they . . . amount to differences in kind." 424 U.S. at 30 (citation omitted). Thus, "the dollar amounts employed to prevent corruption should be upheld unless they are 'so radical in effect as to render political association ineffective, drive the sound of a candidate's voice [below] the level of notice, and render contributions pointless.'" *Eddleman*, 343 F.3d at 1094 (quoting *Shrink*, 528 U.S. at 397).

1. Narrow Focus

The first part of the closely drawn analysis is whether the limits are narrowly focused on Montana's anti-corruption interest. We assess the "fit between the stated governmental objective and the means selected to achieve that objective," *McCutcheon*, 134 S. Ct. at 1445, looking at whether the limits target "the narrow aspect of political association where the actuality and potential for corruption have been identified," *Buckley*, 424 U.S. at 28.

Here, because Montana's limits target the kinds of contributions most likely to be **[*1181]** associated with quid pro quo corruption, they satisfy the narrow focus inquiry. First, I-118 targeted only the top 10% of pre-1994 contributions in Montana — the high-end contributions most likely to result in actual or perceived corruption. *See Eddleman*, 343 F.3d at 1094. We relied on this fact in *Eddleman* to conclude the

limits were narrowly focused. *See id.* Because the I-118 limits were not indexed to inflation when *Eddleman* was decided, moreover, today's limits affect an even smaller percentage of contributions at the top of the range than they did at that time.

Second, Montana places the strictest limits on direct monetary contributions to candidates—the type of largesse most likely to effect actual or perceived corruption. *See Shrink*, 528 U.S. at 393-94 (focusing on direct contributions in discussing the evidence of corruption justifying Missouri's contribution limits). Political party contributions—i.e., indirect contributions — are capped tens of thousands of dollars higher. *Cf. Randall*, 548 U.S. at 256 (plurality opinion) (imposing the same limits on individuals and political parties cuts against upholding the limits). Moreover, Montana's "statute in no way prevents [individuals and] PACs from affiliating with their chosen candidates in ways other than direct contributions, such as donating money to a candidate's political party, volunteering [their] services, sending direct mail to their supporters, or taking out independent newspaper, radio, or television ads to convey their support." *Eddleman*, 343 F.3d at 1094. This, too, shows tailoring for the type of contribution most likely associated with dollars-for-favors exchanges, without unnecessarily curtailing other forms of political expression.

The plaintiffs argue Montana could accomplish its goals with higher limits, but they seek a level of constitutional precision the Supreme Court has never required — Montana need not "fine tune" its limits to stay within the First Amendment's boundaries. As *Buckley* explained,

> Appellants' first overbreadth challenge . . . rests on the proposition that most large contributors do not seek improper influence . . . . Although the truth of that proposition may be assumed, it does not undercut the validity of the $1,000 contribution limitation. Not only is it difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.
>
> A second, related overbreadth claim is that the $1,000 restriction is unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence . . . . While the contribution limitation provisions might well have been [higher in some cases], Congress' failure to engage in such fine tuning does not invalidate the legislation.

424 U.S. at 29-30. Here, especially given that the plaintiffs do not dispute the constitutionality of the pre-1994 limits, they ask us to police a "distinction[] in degree," not a "difference[] in kind." *Id.* at 30 (noting the difference between $1,000 and $2,000 was a distinction in degree). This is a legislative judgment we decline to second guess.[6]

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[6] At oral argument, the plaintiffs contended Montana must justify the *change* between the pre-1994 limits and today's limits. Every contribution limit case of which we are aware, however, evaluates the *current* limits, and the plain-

[*1182] We acknowledge Montana's chosen dollar amounts might appear low, but they are not constitutionally suspect. First, Montana's limits are not an outlier compared to other states' limits:

Table 4: 2015-2016 Limits on Contributions to Gubernatorial Candidates[7]

State	Limit
Montana	$1320 per cycle
Alaska	$1000 per cycle
Colorado	$1150 per cycle
Delaware	$1200 per cycle
Massachusetts	$1000 per calendar year
Rhode Island	$1000 per calendar year

Second, even if the limits are low in absolute terms, they are quite reasonable compared to the low cost of campaigning in the state. Montana to the present is

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tiffs point to no authority suggesting otherwise. In *Randall*, for example, the Court evaluated Vermont's existing limits without discussing whether the *change* from Vermont's previous regime was justified. *See*548 U.S. at 237, 239, 248-63 (plurality opinion). Even if the change in limits were relevant, for the reasons we have discussed the difference between the pre-1994 limits and today's limits is not constitutionally significant. *See Buckley*, 424 U.S. at 30.

[7] *See* Nat'l Conf. of State Legs., *State Limits on Contributions to Candidates 2015–2016 Election Cycle* (July 31, 2015), www.ncsl.org/research/elections-and-campaigns/state-limits-on-contributions-tocandidates.aspx.

"one of the least expensive states in the nation in which to run a political campaign." *Eddleman,* 343 F.3d at 1094. When contribution limits are viewed in relation to the cost of campaigning for a state house seat, Montana's limits are proportionally higher than both the federal limits and those of 12 other states.[8] Table 5 shows contribution limits relative to the cost of campaigning in the nine states within the Ninth Circuit:

Table 5: Maximum Contributions as a Percentage of Total Fundraising in 2010 State House Races[9] [*1183]

State	Avg. Total	Limit	Ratio
Montana	$8,231	$320	3.89%
Alaska	$36,870	$1000	2.71%
Arizona	$37,411	$410	1.1%
California	$355,789	$7800	2.19%
Hawaii	$26,956	$2000	7.42%
Idaho	$17,245	$2000	11.6%
Nevada	$74,634	$10,000	13.4%
Oregon	$116,536	none	n/a

[8] For state senate races, Montana's limits are proportionally higher than both the federal limits and those of 14 other states.

[9] For simplicity's sake, the term "state house" refers to the lower chamber of the state legislature, even if a given state calls its lower chamber something else.

Washington	$85,039	$1600	1.88%

Montana's limits are low only if we ignore the low cost of campaigning in the state. Once that reality is factored in, Montana's limits fit well within the mainstream.

Third, Montana's limits are reasonable compared to the size of a typical contribution in Montana. In 2010 state house races, for example, the average individual contributed about $90, when the per cycle limit was $320. In the 2008 race for governor, the typical contribution was only $185, when the per cycle limit was $1200. Thus, in addition to targeting only the top 10% of contributions, the limits do not come close to curtailing the average contributor's participation in campaigns.

Fourth, Montana's limits are reasonably keyed to the actual evidence showing a risk of corruption in Montana. In his "burn after reading" letter, written shortly before I-118 was passed, Senator Anderson suggested a political action committee could obtain political favors from an entire block of legislators through contributions totaling just $8,000. Even adjusted for inflation, that is only a few hundred dollars per legislator. If such contributions can corrupt the legislative process, Montana's limits are anything but an exaggerated response to the risk of actual or perceived corruption that exists in the state.

We should not—and indeed cannot—be in the business of fine tuning contribution limits for states. These judgments are for state lawmakers to make (including voters acting through the initiative process). As judges, our limited role is to ensure that a state

chooses limits that are not "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink*, 528 U.S. at 397. Because Montana's limits satisfy this standard, we hold they are narrowly focused.

The district court concluded otherwise because, in the 1994 Voter Information Pamphlet attached to I-118, the initiative's sponsors argued "[t]here is just way too much money in Montana politics" and urged voters to pass I-118 to prevent "[m]oney from special interests and the wealthy" from "drowning out the voice of regular people," reasons that are inadequate **[*1184]** to justify contribution limits under *McCutcheon*. The district court thus concluded the Montana voters who approved I-118 acted with an impermissible motive, meaning the limits "could never be said to focus narrowly on a constitutionally-permissible anti-corruption interest." *Lair*, 189 F. Supp. 3d at 1035. We disagree.

The district court incorrectly cast the narrow focus test as a motive inquiry that looks at the voters' underlying intent when they enacted the limits. The narrow focus test, however, is a tailoring test, not a motive test. It measures how effectively the limits target corruption compared to how much they inhibit associational freedoms—i.e., whether the

> limitation focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression, to associate

> actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.

Buckley, 424 U.S. at 28; *see Eddleman*, 343 F.3d at 1094 (analyzing fit without reference to underlying voter intent). We are aware of no case looking to underlying legislative or voter intent in making this evaluation. Although there is some logic that the sponsors' goal behind I-118 reveals something about the limits' fit, the actual content and effect of the limits—which, as discussed, target the contributions most likely to generate corruption or its appearance— better show their tailoring. We therefore disapprove the district court's reasoning.

2. Contributors' Ability to Affiliate with Candidates

The closely drawn inquiry next assesses whether the contribution limits "leave the contributor free to affiliate with a candidate." *Eddleman*, 343 F.3d at 1092. Montana not only permits such affiliation through direct monetary contributions, but also "in ways other than direct contributions, such as donating money to a candidate's political party, volunteering . . . , sending direct mail . . . , or taking out independent newspaper, radio, or television ads to convey . . . support." *Id.* at 1094. The plaintiffs effectively concede that contributors may associate with candidates, arguing only that some contributors would like to give *more* than the limits allow. Thus, Montana's limits satisfy prong two of the closely drawn analysis.

3. Candidates' Ability to Campaign Effectively

The final part of the closely drawn inquiry asks whether Montana's limits prevent candidates from amassing sufficient resources to campaign effectively. *Eddleman* held they did not, *see* 343 F.3d at 1095, and we see no reason to reach a different conclusion.

To begin with, the evidence from Montana candidates shows the limits do not prevent effective campaigning. Montana Secretary of State Mark Cooney testified, "I don't feel that the limitations . . . have been harmful to my candidacy at all." Representative Harper testified the limits had "[j]ust negligible effects" on his campaigns. Another candidate testified he raised more money after the limits were in place than before. Although one candidate initially testified the limits made it "more difficult" for him to raise enough money, he later clarified he "didn't mean that [his campaigns] were ineffective." He explained, "I mean I did what I had to to win. If my opponents would have been tougher and I felt that I needed to, I would have raised more money, gone out and done the work **[*1185]** that I needed to to run that effective campaign."

One candidate witness (Mike Miller) did suggest the limits made his campaigns ineffective, but the facts belie his claim. Between 2008 and 2014, Miller's campaigns received maxed-out contributions from only seven of his approximately 200 contributors, and Miller won all four of his elections.

Statistical data confirm that the limits do not prevent effective campaigning. Plaintiffs' expert Clark Bensen opined that "a high proportion of maxed-out

donors" would be an indicator that "the limits were too low." Suppl. Excerpts R. 109 ("Bensen Report"). In Montana, however, maximum contributions are relatively rare. In 2010 state house and senate races, for example, 85% of individual contributors gave less than the statutory limit.[10] Political parties contributed below the limit 78% of the time. Numbers from other years and other races are comparable. This low proportion of maximum contributions shows the limits do not unduly inhibit candidate fundraising.

The plaintiffs argue competitive elections provide the proper context for evaluating contribution limits, and they point out that the percentage of maximum contributions in *competitive* elections is higher, about 29%. The plaintiffs are correct that the plurality opinion in *Randall* focused on competitive races rather than average ones. *See* 548 U.S. at 255-56. But this focus was based on the potential advantage contribution limits might grant incumbents in competitive races. *See id.* Because these races tend to be more expensive, challengers may need to rely on large contributions more than incumbents do, so overly strict limits could disproportionately affect challengers. *See id.* at 256.

The plaintiffs, however, have not shown this problem exists in Montana. Incumbents and challengers in competitive races have virtually the same percentage of maxed-out contributors. *See*

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[10] 1,402 maximum donations; 4,469 donations below the maximum but above the $35 reporting threshold; estimated 3,768 donations below the $35 threshold, assuming an average contribution of $20.

Bensen Report at 101 ("There was very little difference with respect to incumbency [versus challengers]" as to who relied on maximum or near maximum contributions in competitive races.); *cf. Randall*, 548 U.S. at 253-55 (citing to an expert report, also by Clark Bensen, showing Vermont's contribution limits significantly reduced challenger fundraising in competitive races). Indeed, we noted in *Eddleman* that "the average gap between the total amount of money raised by incumbents and challengers for all legislative races was only $65.00 per race." 343 F.3d at 1095.

Three other circumstances underscore the tailoring of Montana's limits to avoid unduly favoring incumbents. First, Montana permits political parties to contribute far more than individuals and PACs. As the plaintiffs' own expert testified, political parties give predominantly to challengers in Montana, whereas PACs contribute more often to incumbents. In *Randall*, by contrast, Vermont imposed identical limits on parties, individuals and PACs, reflecting an incumbency bias cutting against the limits' constitutionality. *See* 548 U.S. at 256-57 (plurality opinion). Second, Montana's limits apply per election, rather than per cycle, meaning a contributor may give up to the limit twice if a candidate runs in a contested primary. Because challengers generally face contested primaries more often than incumbents, per election limits mitigate the incumbent **[*1186]** fundraising advantage. This, too, distinguishes this case from *Randall*, where Vermont's per cycle limits were a "danger sign" of the limits' unconstitutionality. *See id.* at 249. Third, by prohibiting "incumbents from using excess funds from one campaign in future campaigns," Montana "keeps incumbents from building campaign

war chests and gaining a fundraising head start over challengers." *Eddleman*, 343 F.3d at 1095. The anti-challenger bias that animated the plurality in *Randall* simply is not present here.

In sum, challengers and incumbents alike remain capable of running effective campaigns in Montana. Even if some candidates might prefer to seek fewer, larger contributions to meet their fundraising needs (rather than more numerous, smaller contributions), when "a candidate is merely required 'to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression,' the candidate's freedom of speech is not impugned by limits on contributions." *Id.* at 1091 (quoting *Buckley*, 424 U.S. at 21-22). We hold Montana's limits do not prevent candidates from amassing sufficient resources to campaign effectively.

* * *

Montana's limits are closely drawn to further the state's important interest in preventing actual or perceived quid pro quo corruption. Montana has shown the risk of quid pro quo corruption in Montana is not illusory. Its chosen contribution limits are narrowly focused; they do not prevent contributors from affiliating with the candidates of their choosing; and they do not prevent candidates from raising the money needed for effective campaigning, whether the candidate is an incumbent or challenger and whether the race is competitive or average. We hold, therefore, that Montana's limits survive First Amendment scrutiny. The district court erred by holding otherwise.

C. *Randall*

Even if we were wrong in *Lair II* to hold *Eddleman* controls our evaluation of Montana's contribution limits, we would reach the same conclusion under the plurality's decision in *Randall*. The *Randall* test first looks for "danger signs" that the limits prevent candidates from raising enough money to be heard and challengers from raising enough to compete against incumbents. *See* 548 U.S. at 249-52 (plurality opinion). The plurality found four such "danger signs" in Vermont's limits: "(1) The limits are set per election cycle, rather than divided between primary and general elections; (2) the limits apply to contributions from political parties; (3) the limits are the lowest in the Nation; and (4) the limits are below those we have previously upheld." *Id.* at 268 (Thomas, J., concurring in the judgment) (listing the plurality's "danger signs").

If these "danger signs" exist, a court then assesses

> "five sets of considerations" to determine whether the statute was closely drawn: (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." [*Randall*, 548 U.S.] at 253-62.

[*1187] *Lair II*, 798 F.3d at 743 (first alteration in original) (citations omitted).

The motions panel in *Lair I* addressed each of these "danger signs" and "considerations" at length, concluding that *Randall* likely "would not have mandated a different result in *Eddleman*." 697 F.3d at 1208; *see id.* at 1208-13. We agree. Montana's limits apply per election, not per cycle. The lowest limits do not apply to political parties. The limits are not the lowest in the nation; they are higher than Alaska's ($1000 per cycle for governor), Colorado's ($1150), Delaware's ($1200) and arguably Massachusetts' ($1000 per calendar year) and Rhode Island's ($1000 per calendar year). Although Montana's limits are lower in absolute terms than those the Court has previously upheld, they are significantly higher than those the Court struck down in *Randall* ($400 per cycle for governor). They are also higher as a percentage of the cost of campaigning than the federal limits *Buckley* upheld.[11] Montana's limits do not favor incumbents or

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[11] As discussed above, Montana's limits are particularly modest when the cost of campaigning is taken into account—a useful way to measure a maximum contribution's impact on a campaign. A maximum contribution in Montana accounted for 3.89% of the total amount a 2010 state house candidate raised. This percentage was higher than the percentage for the federal limits (0.5% across all House of Representatives races), the dollar amounts of which the Court approved in *Buckley*. Montana's limits are also proportionally higher than those in Alaska (2.71%), Arizona (1.1%), California (2.19%), Colorado (1.1%), Connecticut (2.19%), Delaware (1.91%), Florida (0.87%), Massachusetts (2.14%), Michigan (0.94%), Tennessee (3.78%),

prevent challengers from fundraising effectively. Political parties may contribute far more than individuals and PACs; they also may provide campaigns with paid staffers, whose wages are not counted against the party's contribution limits. *See* Mont. Admin. R. 44.11.225(3). Contributors may volunteer for campaigns and otherwise express their support in ways beyond direct contributions. Finally, Montana's limits are adjusted for inflation. Accordingly, Montana's contribution limits would survive scrutiny even if *Randall* governed.

IV. Conclusion

Our Constitution permits contribution limits to serve the narrow but vital purpose of preventing actual or apparent quid pro quo corruption in politics. Because the limitations imposed by Montana Code Annotated § 13-37-216 both further that interest and are adequately tailored to it, they satisfy the First Amendment.

REVERSED.

BEA, Circuit Judge, dissenting:

Our representative government requires and relies on the ready flow of ideas between elected legislators and the voters. Those ideas are mostly transmitted during election campaigns by advertisements and organized rallies, examples of free speech, neither of which come free. Contributors to the campaigns want

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Washington (1.88%) and Wisconsin (2.98%). Thus, although Montana's limits are on the low side in absolute terms—but not an outlier—they are relatively high given the low cost of campaigning in the state.

their ideas made known and accepted by the campaigning legislators. Restrictions on citizens' campaign contributions limit their ability to make their ideas known and to influence the legislators to accept and further those ideas. For these reasons, our First Amendment law permits limits on such contributions only if the restrictions are closely drawn to a valid, important state interest. Courts must carefully scrutinize such limitations. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1451 (2014) ("the First Amendment requires us to err on the side of protecting political speech rather than suppressing it" (citation omitted)). Here, the district court **[*1188]** properly evaluated the evidence submitted by Montana's officials and found the officials had not established the only constitutionally permissible and valid state interest sufficient to justify Montana's campaign contribution limits: the prevention of corruption or its appearance. Thus, I respectfully dissent.

In *Montana Right to Life v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003), we upheld Montana's campaign contribution limits under a two-part test: 1) the contribution limits must respond to a valid important state interest and 2) the contribution limits must be closely drawn to that interest. In that decision, we recognized that discouraging "undue influence" gained over legislators by contributors through their contributions could be a valid important state interest. 343 F.3d at 1096-97. As we recognized in *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015), the Supreme Court's plurality decision in *Randall v. Sorrell*, 548 U.S. 230 (2006), which held Vermont's campaign contribution limits unconstitutional under the First Amendment, did not alter *Eddleman*'s

framework because no opinion received the support of a majority of the justices.

If *Citizens United* had not been decided the way it was, the Montana officials' claims here of a valid important state interest would make this an easy case for reversal. But *Citizens United* changed all that because it narrowed what can constitute a valid important state interest (at *Eddleman*'s first step) to only the state's interest in eliminating or reducing quid pro quo corruption or its appearance. The Supreme Court explained in *FEC v. National Conservative Political Action Committee* that "[t]he hallmark of corruption is the financial quid pro quo: dollars for political favors." 470 U.S. 480, 497 (1985). The mere prevention of influence on legislators by contributors is now *not* a valid important state interest that could justify campaign contribution limits. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010); *see also McCutcheon*, 134 S. Ct. at 1441. As such, only the avoidance of corruption or the appearance of corruption remain as a state interest valid and important enough to limit the free speech rights of contributors exercised through their contributions to their legislators.

To establish this sole valid important state interest defendants here must demonstrate that the existence of actual or apparent quid pro quo corruption is more than "mere conjecture" and is not "illusory."[1]

[1] A common sense understanding of quid pro quo corruption suggests that it is limited to exchanges in which a politician personally pockets money in exchange for an official action that violated the politician's obligations of office. The notion that contributions to a candidate's campaign fund, one of the key mechanisms by which constituents

Eddleman, 343 F.3d at 1092. While an appellate court's review of a district **[*1189]** court's factual findings is more rigorous in the First Amendment context, our prior precedent has confirmed that we still review such factual findings with some deference. *See Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 670 (9th Cir. 1990) ("[W]e must simultaneously ensure the appropriate appellate protection of First Amendment values and still defer to the findings of the trier of fact."); *see also Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1066-70 (9th Cir. 2002). Because the district court entered judgment on cross motions for summary judgment, however, a de novo standard of review as to the existence of a material triable issue of fact properly applies here.

A close examination of relevant evidence from the

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influence their elected representatives, could ever constitute part of an improper exchange for an official act seems implausible since the contribution of funds to a campaign to effect influence is their expected and proper purpose. Despite this, the Supreme Court has earlier recognized that quid pro quo corruption includes occasions when "[e]lected 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*." *McCutcheon*, 134 S. Ct. at 1460-61 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. at 497 (emphasis added)). As such, under Supreme Court precedent contributions made for the permissible purpose of influencing legislators can apparently constitute quid pro quo corruption in certain circumstances. Such influence is improper corruption when, in fact, the legislator acts contrary to his legal obligation(s). In our record, there is no evidence of such an illegal act.

record makes clear that the district court's finding that defendants failed to carry their burden to prove the appearance or existence of quid pro quo corruption at the first step of *Eddleman*, as narrowed by *Citizens United*, was correct even if reviewed under a de novo standard. That is because the record here is devoid of any evidence of exchanges of dollars for political favors—much less for any actions contrary to legislators' obligations of office—or any reason to believe the appearance of such exchanges will develop in the future.

First, consider the letter sent by Senator Mike Anderson to his party-colleagues, urging them to vote for a bill so that money from certain political action committees would continue to flow to the Republican Party's coffers. None of the record evidence shows that any legislator accepted the deal articulated by Senator Anderson and, despite five separate investigations, Anderson himself was never found to have engaged in any unlawful practices. *Eddleman*, 343 F.3d at 1093. Rather than actual or apparent quid pro quo corruption, the event shows rejection of temptation. Next, consider the offer to contribute $100,000 to the Republican Legislative Campaign Committee in exchange for Republican legislators' support for a right-to-work bill, as testified to by Senator Bruce Tutvedt. This offer also did not constitute quid pro quo corruption because the Republican legislators rejected it. Further, they likely would have introduced and supported such a right-to-work bill regardless of this offer, as it was consistent with their political party's policy position. More importantly, even had certain legislators accepted these offers (as Representative Hal Harper's generalized testimony suggests sometimes

occurred), such actions would appear to constitute nothing more than the trading of influence and access, which are critical mechanisms through which our political system responds to the needs of constituents. *See Citizens United*, 130 S. Ct. at 910 ("that speakers may have influence over or access to elected officials does not mean that these officials are corrupt").

Similarly, the Montana state court decisions referenced by defendants do not establish actual or apparent quid pro quo corruption. These include:

- The Montana Supreme Court held in 2013 that a Public Service Commissioner unlawfully accepted financial gifts from power companies that "would tend to improperly influence a reasonable person in [the Commissioner's] position," a number of which payments the Commissioner returned to the contributor shortly after they were received. *Molnar v. Fox*, 2013 MT 132, 370 Mont. 238, 301 P.3d 824, 832 (Mont. 2013).
- Two Montana state trial court decisions found that two 2010 legislative primary candidates violated state campaign finance laws by accepting corporate contributions in return for **[*1190]** promising 100 percent support for the corporations' agenda and without properly reporting such contributions. *Comm'r of Political Practices v. Boniek*, XADV-2014-202, 2015 Mont. Dist. LEXIS 88 (1st Jud. Dist. Mont. 2015); *Comm'r of Political Practices v. Prouse*, DDV-2014-250 (1st Jud. Dist. Mont. 2016).

None of these cases involved bribery or the improper trading of official acts by violating a legislator's legal obligations for monetary contributions. Two of these cases (*Boniek* and *Prouse*) were default judgments

against individuals who never even made it to a general election (each lost in the Republican primaries), making quid pro quo corruption in each circumstance impossible as neither candidate ever held any office from which to grant official favors. Although the Montana court that adjudicated *Boniek* and *Prouse* labeled the conduct in both of these cases as "corruption," the court did not delineate which official actions taken by defendants in these cases constituted an illegal official act, define what "corruption" meant in this context, or explain how this finding was related to the legal claims against defendants before that court. Moreover, defendants Boniek and Prouse already held out-spoken conservative positions on issues like right-to-work, abortion, guns, and government, meaning that any official acts they may have taken to further the interests of conservative contributors had they been elected would have been consistent with their longstanding policy positions and not primarily motivated as an exchange of an illegal official act for campaign contributions.

Finally, the declaration of Montana's Commissioner of Political Practices (Jonathan Motl) that numerous cases of quid pro quo corruption occurred in Montana was rebutted by sworn declarations from the very politicians and political candidates who, according to Motl, engaged in quid pro quo corruption. Given defendant Motl's position as Commissioner of Political Practices, which gives him broad authority to investigate political misdeeds, *see* Montana Code Annotated § 13-37-111, it is surprising, to say the least, that the only enforcement actions against purported quid pro quo corruption in Montana cited by defendants are the above-referenced, non-starter cases

for violations of campaign finance or ethics rules. One would expect that if quid pro quo corruption was as widespread as Commissioner Motl asserts, he could point at least to some actual court convictions for bribery or other forms of quid pro quo corruption.

Taken together, a detailed examination of the evidence offered by defendants establishes that the district court concluded correctly that the record evidence failed to prove any actual quid pro quo corruption. This still leaves the possibility that the evidence in the record establishes the *appearance* of corruption in Montana. As *Buckley v. Valeo* explained, "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. 1, 27 (1976); *see also McCutcheon*, 134 S. Ct. at 1450. In other words, the appearance of quid pro quo corruption is the "public awareness of the opportunities for abuse." For the very reasons discussed above, however, none of the record evidence establishes the existence of any opportunity for quid pro quo corruption or other abuses. Where is the evidence that a legislator caused the re-routing of a freeway to benefit a commercial landowner, who had paid the legislator's vacation travels? Where is the evidence that an airport construction contractor was awarded a contract, and had remodeled the legislator's home at little or no cost to the legislator? Rather, the record makes **[*1191]** clear that Montana politicians often rejected even efforts by certain interests to influence or access legislators, that even seemingly minor violations of campaign finance laws by unelected primary

candidates were rigorously punished, and that Montana's Commissioner of Political Practices consistently reviewed the propriety and legality of the actions of politicians, political candidates, and various interest groups. In other words, the only reasonable inference that may be drawn from the record evidence is that there were few opportunities for abuse and, therefore, scant public awareness of such opportunities. As such, on this record the existence of actual or apparent quid pro quo corruption is, at best, "illusory" or "mere conjecture," such that defendants have not met their burden to establish a valid important state interest to justify the contribution limits at issue in this lawsuit. *Eddleman*, 343 F.3d at 1092.

While it is admittedly difficult at times to distinguish between proscribed corruption and acceptable influence, given the important First Amendment interests at stake when restricting political speech we are obliged to scrutinize carefully whether a valid important state interest exists before upholding the constitutionality of such restrictions. *See McCutcheon*, 134 S. Ct. at 1451 ("The line between quid pro quo corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights."). Although there is admittedly some common sense to the notion that limiting the amount of money citizens may contribute to political candidates inherently forestalls corruption, because so doing also restricts speech our federal constitution requires a greater evidentiary showing than made on this record before a state may restrict political speech through campaign contribution limits. While the panel

majority's opinion pays lip service to the changes in the *Eddleman* framework rendered by *Citizens United*, the contents of its analysis at *Eddleman*'s first step demonstrate it has failed to account substantively for this change.

In footnote 5, the majority opinion notes that "[u]nder the dissent's logic...Montana's evidence is inadequate to justify any contribution limit whatsoever, no matter how high." This is quite correct. Absent a showing of the existence or appearance of quid pro quo corruption based on objective evidence, the presence of a subjective sense that there is a risk of such corruption or its appearance does not justify a limit on campaign contributions. Restrictions on speech must be based on fact, not conjecture.

Because I do not think defendants established the existence of a valid important state interest at step one of the *Eddleman* framework, I respectfully dissent.

[***Editing Note:*** *Page numbers from the reported opinion, 189 F. Supp. 3d 1024, are indicated, e.g., **[*1026]**.*]

[Filed: 5/17/2016]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

DOUG LAIR; STEVE DOGIAKOS; AMERICAN TRADITION PARTNERSHIP; AMERICAN TRADITION PARTNERSHIP PAC; MONTANA RIGHT TO LIFE ASSOCIATION PAC; SWEET GRASS COUNCIL FOR COMMUNITY INTEGRITY; LAKE COUNTY REPUBLICAN CENTRAL COMMITTEE; BEAVERHEAD COUNTY REPUBLICAN CENTRAL COMMITTEE; JAKE OIL, LLC; JL OIL LLC; CHAMPION PAINTING INC; JOHN MILANOVICH, *Plaintiffs,* and RICK HILL, Warden, *Plaintiff-Intervenor,* *v.* JONATHAN MOTL, in his official capacity as Commissioner of Political Practices; TIM FOX, in his official capacity as Attorney General of the State of Montana; LEO J. GALLAGHER, in his official capacity as Lewis and Clark County Attorney, *Defendants-Appellants.*	CV 12-12-H-CCL ORDER

[*1026] Before the Court are cross-motions for summary judgment in this case involving Montana's 2011 political campaign contribution limits, codified at Montana Code Annotated § 13-37-216(1), (3), and (5).[1] For the reasons explained below, the Court grants Plaintiffs' motion for summary judgment, denies Defendants' motion for summary judgment, and again declares unconstitutional these three statutory subsections.

BACKGROUND

Plaintiffs filed this lawsuit in the Billings Division for the District of Montana on September 6, 2011, alleging that the following Montana state statutes violate the First Amendment and are facially unconstitutional:

> Montana Code Annotated § 13-35-225(3)(a), which requires authors of political election materials to disclose another candidate's voting record;
>
> Montana Code Annotated § 13-37-131, which makes it unlawful for a person to misrepresent a candidate's public voting record or any other matter relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether it is false;
>
> Montana Code Annotated § 13-37-216(1), (5), which limits contributions that individuals and

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[1] The challenged provisions are currently found at Montana Code Annotated § 13-37-216(1), (2), and (4). In this order, all references to the campaign contribution limits are to the 2011 version of the statute.

political committees may make to candidates;

Montana Code Annotated § 13-37-216(3), (5), which imposes an aggregate contribution limit on all political parties; and

[*1027] Montana Code Annotated § 13-35-227, which prevents corporations from making either direct contributions to candidates or independent expenditures on behalf of a candidate.

Plaintiffs moved for a preliminary injunction on September 7, 2011, seeking to enjoin enforcement of these statutes. However, before any action was taken on the motion, Defendants moved to change venue and the case was transferred to the undersigned.

On February 16, 2012, the Court held a hearing on the motion for a preliminary injunction and enjoined enforcement of Montana's vote-reporting requirement and political-civil libel statute, Montana Code Annotated §§ 13-35-225(3)(a), 13-37-131. The Court denied the motion as to the remaining statutes.

The Court issued its first scheduling order on March 9, 2012. The parties agreed that all of the issues regarding the contribution limits in Montana Code Annotated § 13-37-216(1), (3), and (5) would be resolved through a bench trial and that all other matters would be adjudicated by summary judgment.

The parties then cross-moved for summary judgment, and the Court held a hearing on May 12, 2012. The Court granted both motions in part and denied them in part. The Court permanently enjoined Montana's vote-reporting requirement, political-civil libel statute, and ban on corporate contributions to

political committees used by those committees for independent expenditures. *See* Mont. Code Ann. §§ 13-35-225(3)(a), 13-37-131, 13-35-227. However, the Court concluded that Montana's ban on direct and indirect corporate contributions to candidates and political parties was constitutional. *Id.* at § 13-35-227. The parties cross-appealed that order but then voluntarily dismissed the appeals on July 23, 2012.

The Court held a bench trial from September 12, 2012, to September 14, 2012, in order to resolve Plaintiffs' claims related to Montana's campaign contribution limits in Montana Code Annotated § 13-37-216(1), (3), and (5). On October 3, 2012, less than three weeks after the close of evidence, the Court issued an order declaring the contribution limits unconstitutional and permanently enjoining their enforcement The order indicated that complete findings of fact and conclusions of law would follow, but that the Court wished to make its ultimate ruling known as far in advance of the pending November election as possible. That same day, Defendants filed a motion to stay the Court's ruling pending appeal to the Ninth Circuit Court of Appeals. The Court did not rule on the motion immediately, instead giving Plaintiffs five days to respond. The Court ultimately denied Defendants' motion to stay.

On October 4, 2012, Defendants filed a notice of appeal of the Court's October 3rd order and judgment. On October 10, 2012, the Ninth Circuit motions panel assigned to the case temporarily stayed the Court's order and judgment pending appeal, citing the fact that the Court had yet to issue its findings of fact and conclusions of law. That same afternoon, this Court

issued its findings and conclusions, relying primarily on the United States Supreme Court's plurality opinion in *Randall v. Sorrell*, 548 U.S. 230 (2006), to find that Montana's campaign contribution limits do not pass constitutional muster.

On October 16, 2012, the Ninth Circuit motions panel issued its full opinion granting Defendants' motion to stay for the duration of the appeal. In essence, the motions panel concluded that Defendants were likely to succeed on appeal because the Ninth Circuit's decision in *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003) [hereinafter, **[*1028]** *Eddleman*], likely remained good law despite *Randall*. *See Lair v. Bullock*, 697 F.3d 1200, 1202 (9th Cir. 2012) [hereinafter, *Lair I*].

On May 26, 2015, the Ninth Circuit merits panel assigned to the case issued its opinion, which was subsequently amended and re-issued on September 1, 2015. *See Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015) [hereinafter, *Lair II*]. The *Lair II* court reversed and remanded, directing this Court to apply the following test from *Eddleman* to the case at bar: "state campaign contribution limits will be upheld if (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and (2) if the limits are 'closely drawn'—i.e., if they (a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign." 798 F.3d at 748. The *Lair II* court expressly held that *Randall* did not overrule the *Eddleman* closely-drawn analysis "because there simply was no binding . . . decision on that point." *Id.*

at 747. However, the *Lair II* court did hold that the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), abrogated *Eddleman* to the extent the latter relied upon an impermissible notion of what constitutes an "important state interest" vis-á-vis contribution limits. *Id.* at 745-746. Thus, the litmus test for state campaign contribution limits in the Ninth Circuit—which is to be applied here on remand—is that articulated in *Eddleman*, except that the only state interest which contribution limits may permissibly combat is quid pro quo corruption or its appearance.

The *Lair II* court provided instructions to this Court on remand. First, having interpreted the Court's October 10, 2012 findings and conclusions as silent on the issue of whether Defendants established an important state interest underlying the statutes at issue, the *Lair II* court directed the Court "either (1) to decide whether Montana has carried its burden in showing the contribution limits further a valid 'important state interest' or, if the [Court] again assumes the state has carried its burden, (2) to identify expressly what interest the [Court] assumes exists."[2] *Id.* at 748. Furthermore, if the Court either

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[2] The *Lair II* court noted that this Court "assumed Montana had shown an 'important state interest' but did not identify what that interest was." 798 F.3d at 748. In the October 10, 2012 findings and conclusions, this Court stated that "*[e]ven assuming* that the State of Montana has a 'sufficiently important interest' in setting contribution limits, the limits ... are not 'closely drawn' to match that interest." (Doc. 168 at 27.) Thus, only in order to reach its analysis under the "closely drawn" prong did the Court assume an

expressly finds or assumes that the contribution limits further a sufficiently important state interest, the *Lair II* court directed this Court to apply the three-part closely-drawn test from *Eddleman*. *Id.*

Following the *Lair II* court's remand, I ordered the parties to file status reports addressing the posture of the case, and set a status conference for October 20, 2015. The Court ultimately held the status conference on November 10, 2016, whereat the parties discussed: (a) the appropriate test to be applied to the contribution limits at issue, (b) the scope of discovery, if any, necessary to address the appropriate test, and (c) the scope and necessity of proceedings going forward. Relying on footnote 8 of the *Lair II* court's decision, at the status conference, the parties agreed to several additional months of discovery in the case. Plaintiffs stipulated to Defendants' requests to introduce portions of the district **[*1029]** court record from *Eddleman* and "to supplement the existing record with witness testimony and documentary evidence such as court decisions, campaign finance decisions, and public campaign finance records." (Doc. 204 at 4.) The Court reluctantly agreed to the proposed additional discovery. The parties further represented at the status conference that the case could likely be resolved on motions for summary judgment. Thereafter, the Court issued a scheduling order setting a discovery deadline of February 5, 2016, a motions deadline of March 4, 2016, a hearing on the motions for April 18, 2016, and a bench trial—to the extent

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interest. And that limited assumption was based on this Court's misplaced confidence that *Randall* controlled even notwithstanding the admission.

necessary—on May 23, 2016.

The parties filed cross-motions for summary judgment on March 4, 2016, and included with their opening and subsequent briefs numerous exhibits and affidavits. The Court heard oral argument on the cross-motions on April 18, 2016, and the parties and Court generally agreed that this matter can be resolved at summary judgment. Accordingly, the Court vacated all pending deadlines, with the exception of the bench trial date.

LEGAL STANDARD

A party is entitled to summary judgment if it can demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is warranted where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). Only disputes over facts that might affect the outcome of the lawsuit will preclude entry of summary judgment; factual disputes that are irrelevant or unnecessary to the outcome are not considered. *Id.* at 248. In ruling on a motion for summary judgment, a court must view the evidence "in the light most favorable to the opposing party." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). "[T]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 1863 (quoting *Anderson*, 477 U.S, at 255).

ANALYSIS

I. Montana's campaign contribution limits

Montana Code Annotated § 13-37-216(1), (3), (5) provides:

> (1)(a) Subject to adjustment as provided for in subsection (4),[3] aggregate contributions for each election in a campaign by a political committee or by an individual, other than the candidate, to a candidate are limited as follows:
>
> (i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed $500;
>
> (ii) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $250;
>
> (iii) for a candidate for any other public

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[3] Subsection 4 provides:

> (a) The commissioner shall adjust the limitations in subsections (1) and (3) by multiplying each limit by an inflation factor, which is determined by dividing the consumer price index for June of the year prior to the year in which a general election is held by the consumer price index for June 2002.
>
> (b) The resulting figure must be rounded up or down to the nearest:
>
> (i) $10 increment for the limits established in subsection (1); and
>
> (ii) $50 increment for the limits established in subsection (3).
>
> (c) The commissioner shall publish the revised limitations as a rule.

office, not to exceed $130.

[*1030] (b) A contribution to a candidate includes contributions made to the candidate's committee and to any political committee organized on the candidate's behalf.

...

(3) All political committees except those of political party organizations are subject to the provisions of subsections (1) and (2). For purposes of this subsection, "political party organization" means any political organization that was represented on the official ballot at the most recent gubernatorial election. Political party organizations may form political committees that are subject to the following aggregate limitations, adjusted as provided for in subsection (4), from all political party committees:

(a) for candidates filed jointly for the offices of governor and lieutenant governor, not to exceed $18,000;

(b) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $6,500;

(c) for a candidate for public service commissioner, not to exceed $2,000;

(d) for a candidate for the state senate, not to exceed $1,050;

(e) for a candidate for any other public office, not to exceed $650.

...

(5) A candidate may not accept any contributions, including in-kind contributions, in excess of the limits in this section.

After adjusting the limits above for inflation, see Mont. Code Ann. § 13-37-216(4), Montana's current contribution limits are:

Contribution limits for individuals and political committees

(Admin. R. Mont. 44.10.338(1))

Governor	$650
Other statewide offices	$320
All other public offices	$170

Aggregate contribution limits for political parties

Admin. R. Mont. 44.10.338(2))

Governor	$23,350
Other statewide offices	$8,450
Public Service Commission	$3,350
State Senate	$1,350
All other public offices	$850

II. Governing law

While laws limiting campaign expenditures are

subject to strict scrutiny, restrictions on contributions are subject to a "lesser standard." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1117 (9th Cir, **[*1031]** 2011) (citing *Buckley v. Valeo*, 424 U.S. 1, 20 (1976)). "Contribution limits need only be 'closely drawn' to match a sufficiently important interest to survive a constitutional challenge." *Id.* Under this standard, a contribution limit is constitutional as long as the limit is "closely drawn" to match "a sufficiently important interest." *See id.; Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-388 (2000); *Buckley*, 424 U.S. at 25. However, while the government enjoys a lower evidentiary threshold in contribution limits cases, the Ninth Circuit has "never accepted mere conjecture as adequate to carry a [state's] First Amendment burden." *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 653 (9th Cir. 2007). Nor has the Ninth Circuit credited "the argument that a state may limit contributions simply because they may sway the outcome of an election," instead requiring that "contribution limits ... target some 'greater or more imminent danger to the public interest.'" *Id.* at 652 (citing *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057-1058 (9th Cir. 2000)).

As mentioned above, the *Lair II* court determined that while *Citizens United* provides the standard for what constitutes an important state interest in this field of law, *Eddleman* nevertheless provides the overall analytical framework. Thus, the Court should uphold Montana's campaign contribution limits if: (1) there is adequate evidence that the limits further the sufficiently important state interest of combating quid pro quo corruption or its appearance, and (2) if the limits are closely drawn, meaning they (a) focus

narrowly on the above 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. *Lair II*, 798 F.3d at 748.

III. *Montana Chamber of Commerce v. Argenbright*, 28 F. Supp. 2d 593 (D. Mont. 1998), *aff'd*, 226 F.3d 1049 (9th Cir. 2000)

This Court has once before grappled with the issue of what constitutes quid pro quo corruption or its appearance in the election law context. In 1996, the people of the State of Montana passed Initiative 125, which banned direct and indirect corporate contributions and expenditures related to ballot issues. *Argenbright*, 28 F. Supp. 2d at 595. The Montana Chamber of Commerce and several other plaintiffs challenged the initiative as an abridgement of their First Amendment rights to free speech and association, with the undersigned presiding. *Id.* In declaring Initiative 125 unconstitutional, this Court held that the State of Montana failed to "demonstrate the existence or appearance of corruption, which the [C]ourt define[d] as real harm to the integrity of Montana's ballot initiative process." *Id.* at 600. The Ninth Circuit affirmed the Court's order, concluding that "a restriction so destructive of the right of public discussion as [Initiative] 125, *without greater or more imminent danger to the public interest than existed in this case*, is incompatible with the freedoms secured by the First Amendment." *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1058 (9th Cir. 2000) (citations omitted) (emphasis added).

The Court therefore considers quid pro quo corruption or its appearance as those actual or

apparent arrangements which pose a real harm to the election process or to the public's interest in the election process. *See* James J. Lopach, *Montana's Role in the Free Speech vs. Equal Speech Debate*, 60 Mont. L. Rev. 475, 497 (1999) (providing excellent analysis of *Argenbright*, and positing that "[t]he critical issue at trial [in the case] was not unequal voices but degradation of . . . elections"). There is some distinction in the cases between **[*1032]** ballot elections and candidate elections, the discussion of both of which seems useful in determining how the courts regard or define quid pro quo corruption or its appearance.

IV. The constitutionality of Montana's campaign contribution limits

A. Sufficiently important state interest

The parties devote the majority of their briefing and argument to the first question in the modified *Eddleman* test—whether Defendants have presented adequate evidence that Montana's campaign contribution limits further the sufficiently important state interest of combating quid pro quo corruption or its appearance.

Plaintiffs urge the Court to employ what they contend is the Supreme Court's established definition of quid pro quo corruption. Citing various cases—some construing criminal bribery statutes, some more germane to the issues at hand—Plaintiffs assert that quid pro quo corruption only occurs when there is "1) an explicit arrangement 2) for the direct exchange of something of value for 3) a public official's improper promise or commitment that is 4) contrary to the obligations of his or her office 5) in an effort to control a specific official, sovereign act." (Doc. 237 at 9.)

Moreover, as Defendants are quick to point out, Plaintiffs pay little attention to the disjunctive form corruption may take in the *Eddleman* test, i.e. quid pro quo corruption *or its appearance.*

Defendants, on the other hand, argue that the Supreme Court has never so formulaically mandated what is and is not quid pro quo corruption, instead contending that its presence, absence, or appearance is a sort of "know it when you see it" question of fact. Defendants cite to *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434, 1450-1451 (2014), wherein the Supreme Court affirmed its reliance on *Buckley* in stating that the First Amendment does not permit governmental regulation of the electoral process in order to level the playing field, level electoral opportunities, equalize the financial resources of candidates, or limit "the possibility that an individual who spends large sums may gamer influence over or access to elected officials or political parties." While these examples leave lower courts and litigants knowing what is *not* quid pro quo corruption or its appearance, rather than knowing what is, Defendants argue that the inclusion of both actual and apparent corruption in the definition necessarily means that a sufficiently important state interest can be found with proof short of Plaintiffs' proposed evidentiary floor. Indeed, the *McCutcheon* court applied a "definition of corruption . . . [with] firm roots in *Buckley*"—"[t]he Court in that case upheld base contribution limits because they targeted 'the danger of actual quid pro quo arrangements' and 'the impact of the appearance of corruption stemming from public awareness' of such a system of unchecked direct contributions[, and] simultaneously rejected limits on spending that was

less likely to 'be given as a quid pro quo for improper commitments from the candidate.'" 134 S. Ct. at 1451 (citing *Buckley*, 424 U.S. at 27, 47). Citing *Citizens for Clean Government*, Defendants contend that, because contribution limits of the sort at issue in this case are common and most often enacted to combat a "neither novel nor implausible" avenue for corruption, their evidentiary burden is relatively low. 474 F.3d at 652-653.

Nevertheless, Defendants rely on a host of examples of purported actual and apparent quid pro quo corruption as justification for the contribution limits. First, they point to portions of the *Eddleman* district court record, including testimony from Representative Hal Harper and evidence of a letter sent to Republican senators in **[*1033]** the early 1980's. Harper, when asked about forces which influence state legislators' behavior, testified that over the years he had "seen efforts put into hiring more lobbyists and tunneling more money into campaigns when certain special interests [knew] an issue [was] coming up, because it gets results." (Doc. 243-1 at 29). He further testified as to his opinion that "the people that lobby the Legislature and . . . make substantial donations to campaigns . . . know . . . that there's a connection between support and between outcome and bills." (*Id.*) The letter referenced in *Eddleman*, sent by a Republican senator to other senators of the same party in advance of a bill affecting life insurance underwriters, stated the following:

> Dear Fellow Republicans. Please destroy this after reading. Why? Because the Life Underwriters Association in Montana is one of

> the larger Political Action Committees in the state, and I don't want the Demo's to know about it! In the last election they gave $8,000 to state candidates . . . . Of this $8,000-Republicans got $7,000-you probably got something from them. This bill is important to the underwriters and I have been able to keep the contributions coming our way. In 1983, the PAC will be $15,000. Let's keep it in our camp.

(Doc. 241 at 17.) At the bench trial in March 2000, the *Eddleman* defendants presented the testimony of another senator who rejected the implicit offer contained in the letter, referring to it as "unconscionable" and "not the way to pass bills." (Doc. 243-1 at 58.)

Defendants also cite more recent examples of what they deem actual or apparent quid pro quo corruption. First, they reference the declaration of Senator Bruce Tutvedt, who claims to have been among a group of Republican state legislators offered $100,000 by National Right to Work in exchange for introducing and bringing to a "vote of record" a right-to-work bill. (Doc. 244 at 2.) Tutvedt expressly declares that "[a]fter a brief discussion, the offer was rejected." (*Id.*)

Second, Defendants cite Commissioner of Political Practices Jonathan Motl's ("Motl") opinion "that several 2010 candidates engaged in quid pro quo arrangements by pledging '100% support' for particular corporate groups' legislative agendas in exchange for the corporate groups orchestrating a large scale campaign plan on" behalf of those that made pledge. (Doc. 241 at 18.) This opinion is similar to the circumstances underlying three other pieces of

evidence upon which Defendants rely—two state district court decisions wherein candidates were "found" to have engaged in quid pro quo corruption, and a third wherein a candidate was found to have accepted an illegal campaign contribution allegedly as part of a quid pro quo.[4] (*Id.* at 19; Doc. **[*1034]** 263 at 8.) In each of these instances, the individuals either found to or alleged to have engaged in quid pro quo corruption were identified by National Right to Work through surveys *prior* to receiving any of the alleged

[4] Though the Court does not judge the weight of this evidence, the Court nevertheless notes the nature of the disposition of these cases. In the first two cases, Republican state legislators Wesley Prouse and Joel Boniek were found to have engaged in improper quid pro quo arrangements. In both cases, following complaints filed in early 2014 in state district court by Motl in his capacity as Commissioner of Political Practice, the defendants had defaults entered against them after failing to appear and answer the complaints. (See Docs. 243-6 at 2; 243-7 at 2.) In the third case, Republican state legislator Art Wittich was found to have accepted an illegal campaign contribution, and the issue of whether the contribution was part of a quid pro quo arrangement has yet to be tried. In all three cases, the allegations that the contributions at issue were in exchange for one or more official acts were not levied in the initial complaints—in Boniek's and Prouse's cases, the allegations surfaced at the default judgment hearings in the form of Motl's own testimony (see Docs. 243-6, passim; 243-7, passim), and in Wittich's case, the allegation was stricken from the court's final pretrial order and ordered to be tried before the court in a separate proceeding because it was not raised in the complaint (see Doc. 267-4 at 10, 14, 17.) (See also Doc. 267-7 at 170-171 (acknowledging that the complaints did not contain quid pro quo allegations).)

illegal contributions. (*See e.g.* Doc. 267-7 at 122-123.) Only after National Right to Work identified the candidates' positions on various points of its own agenda did the group offer the alleged illegal support.

While the Court is not prepared to adopt verbatim Plaintiffs' definition of quid pro quo corruption, neither is the Court satisfied that the evidence presented by Defendants proves the existence of an important state interest here. The sticking point with respect to the evidence Defendants rely upon is that the quids in each one of the cited instances were either rejected by, or were unlikely to have any behavioral effect upon, the individuals toward whom they were directed. Certainly, that the offers were never accepted in exchange for certain acts means Defendants' evidence does not exemplify actual corruption. But, perhaps more importantly, Defendants' evidence cannot reasonably exemplify appearances of corruption because, if anything, the evidence shows that Montana politicians are relatively incorruptible. Legislators denounced the life insurance underwriters' offer in the 1980's, and Senator Tutvedt confirmed that National Right to Work's offer—to the extent it even represented a "favors-for-dollars" arrangement—was rejected. Moreover, each of the legislators whom Motl alleges accepted campaign services in exchange for allegiance to National Right to Work's agenda were highly likely to vote parallel to that agenda notwithstanding those services. National Right to Work promotes what are hot-button core issues for the majority of conservative legislators, including stances against abortion, in favor of individual rights under the Second Amendment, and against forced unionism. These legislators are dyed-in-the-wool when it comes to these issues, and their

positions are not, nor seemingly ever will be, for sale. Thus, the Court is simply unable to conclude that receiving National Right to Work's assistance in any way affected the candidates' voting. Viewing these circumstances, the public would more reasonably conclude that corruption is nearly absent from Montana's electoral system—the evidence shows that despite a hand-full of opportunities, legislators chose to keep their noses clean. In short, none of Defendants' examples demonstrate a real harm to the election process or to the public's interest in that process, as is required by the Ninth Circuit.

Based on the foregoing, the Court finds that Defendants have failed to prove that Montana's campaign contribution limits further the important state interest of combating quid pro quo corruption or its appearance. On these grounds alone, Montana Code Annotated § 13-37-216(1), (3), and (5) (2011) are in violation of the First Amendment of the United States Constitution.

B. Closely drawn

Assuming for arguments sake that a sufficiently important anti-corruption interest supports the contribution limits at issue here, those limits would nevertheless fail to clear the "closely-drawn" hurdle of the modified *Eddleman* test. The Court agrees with Defendants that the contribution limits "leave the contributor free to affiliate with a candidate" in other ways, *Lair II*, 798 F.3d at 748, including through **[*1035]** volunteering, knocking on doors, writing letters, maintaining a blog, putting up signs and bumper stickers, holding fundraisers, and placing ads in newspapers. (Doc. 241 at 23-24.) However, the Court

concludes that the limits neither "focus narrowly on [Montana's] interest," nor "allow [a] candidate to amass sufficient resources to wage an effective campaign." *Lair II*, 798 F.3d at 748.

1. Narrow focus

Simply put, the contribution limits at issue here could never be said to focus narrowly on a constitutionally-permissible anti-corruption interest because they were expressly enacted to combat the *impermissible* interests of reducing influence and leveling the playing field. *See McCutcheon*, 134 S. Ct. at 1450-1451. The Court need look no further than the Montana Secretary of State's voter information pamphlet describing Initiative 118, the successful ballot measure which resulted in the reduced contribution limits at issue. In their argument for the initiative, proponents of the measure—including Motl—stated the following:

> There is just way too much money in Montana politics. Passage of Initiative 188 works to solve this problem by: limiting campaign contributions from special interests and the wealthy; stopping incumbent politicians from building up carry-over campaign war chests; preventing special interests from evading current limits; and forbidding politicians from making personal use of campaign funds.
>
> *Money from special interests and the wealthy is drowning out the voice of regular people in Montana politics.* The legislature has been asked over the years to address these many problems but the very interests that dominate the process have prevented any solutions. The

> political system is a mess and needs to be rebuilt.
>
> The growth of money in Montana politics is unprecedented. In 1992 candidates for governor raised $2.16 million; a 500% increase from 1976 when $437,000 was spent. Likewise in 1992, candidates for the Montana legislature raised $1.1 million; a four fold increase since 1976.
>
> Much of that increase comes from special interests (PACs) and the wealthy. I-118 changes Montana's laws to *lower and standardize* the maximum contribution that special interests and the wealthy can make to a candidate in any one election.
>
> . . .
>
> The opponents argument against [I-118] are flawed because they are part of the problem. They represent the very interests whose *money and influence have drowned out citizen voices, caused government gridlock and blocked political reform*.

(Doc. 237-11 at 3, 5 (emphasis added).) The reductions to contribution limits embodied in this measure run contrary to the First Amendment and *McCutcheon*. State governments may not restrict the political speech of one group in order to elevate that of another group. Thus, even were we to assume a valid anticorruption interest at the first step in the modified *Eddleman* test, the contribution limits at issue would have failed this conjunctive factor of the closely-drawn analysis.

2. Amassing sufficient resources to effectively campaign

Though in the context of its significant-restriction-of-funds analysis under *Randall*, this Court addressed the spirit of this *Eddleman* closely-drawn factor in its October 2012 findings of fact and conclusions of law. For the same reasons explained in that order, and repeated below, the Court finds that Montana's campaign contribution limits prevent candidates **[*1036]** from amassing sufficient resources to wage effective campaigns.

Generally speaking, candidates in Montana spend more money on their campaigns than they raise. According to Clark Bensen, who testified at the September 2012 bench trial as an expert witness on Plaintiffs' behalf, the average competitive campaign spends 7% more money than it raises. This suggests that most competitive campaigns are not adequately funded. The record shows, though, that more funding would be available to candidates if Montana's contribution limits were raised. Bensen testified that, on average, 29% of the contributors in the competitive campaigns that he analyzed had donated at the maximum level permitted by Montana law. The contributions that candidates receive from maxed-out contributors are substantial, constituting approximately 44% of the funds raised through itemized contributions.

The analysis from Edwin Bender, Defendants' expert witness at trial, was largely consistent with these statistics. Bender additionally determined that across all Montana races (excluding the gubernatorial races) between 45% and 58% of contributing political

committees make the maximum contribution permitted by Montana law. But only 9% to 11% of legislative candidates' funds come from political committees, and only 0% to 3% of statewide candidates' funds come from political committees.

Consistent with the testimony of Plaintiffs Doug Lair and Steve Dogiakos, many, if not most, of these maxed out contributors might have donated beyond the contribution limit if Montana law had permitted them to do so. Moreover, Bender determined that between 22% and 32% of all Montana candidates accepted the maximum aggregate contribution from their political party. According to Bensen, this percentage is higher—at 40%—for candidates in competitive campaigns.

The number of contributors making contributions at the maximum level is significant, and significantly greater funds would be available to candidates if the contribution limits are raised. Defendants do not dispute these propositions, instead arguing that "candidates may have to raise money from more sources than if no limits existed[,] but that candidates can nonetheless run effective campaigns." (Doc. 241 at 25.) The Court disagrees, and finds that the record shows that those additional funds are needed because most campaigns are insufficiently funded. Of primary concern with regard to the adequacy of funding is the threat that "too low a limit [may] magnify the reputation-related or media-related advantages of incumbency and thereby insulate legislators from effective electoral challenge." *Randall*, 548 U.S. at 248 (citations and internal quotation marks omitted). The "free discussion of governmental affairs" requires that

the voices of all those who would represent the public as legislators are heard by voters. *Mills v. Ala.*, 384 U.S. 214, 218 (1966); *see also Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, (9th Cir. 2007) ("political speech . . . operates at the core of the First Amendment," and "[t]he First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open") (citations omitted).

Based on the foregoing, even if Defendants had adequately proven the existence of an anti-corruption interest underlying the limits, the limits would have failed this conjunctive factor of the *Eddleman* closely-drawn analysis.

V. Motl's expert witness testimony

The Court is called upon to determine whether Commissioner Motl's testimony **[*1037]** as an expert witness should be considered in this case. As mentioned above, Motl was the driving force behind the initiative which resulted in the current unconstitutional contribution limits. Before his appointment as Commissioner, he shepherded several other initiatives through the validation and ballot election process, including the measures found unconstitutional in *Argenbright* and, more recently, an initiative directing Montana's state and federal legislators to further a policy declaring that corporations do not have constitutional rights. He attempted unsuccessfully to overturn the circuit opinion in *Argenbright* by initiative. Motl has also called for a national constitutional convention to change the First Amendment of the Bill of Rights. Plaintiffs object to Motl's lack of impartiality to testify

as an expert witness. There is no question that he has strong views as to what the law is and what it should be.

As Commissioner of Political Practices, Motl possesses broad investigational powers, *see* Mont. Code Ann. §§ 13-37-111(2), 13-37-116, and is charged with promulgating the very rules he is to enforce, *Id.*, § 13-37-114. He is granted the power to initiate civil or criminal actions, at his discretion, for violation of state campaign finance law, as well as the power to prosecute those same actions in the venue of his choosing. *Id.*, §§ 13-37-124, 13-37-128. Finally, as is the case here, Motl often serves as a dual-role witness in the cases which he initiates, testifying to both facts and opinions.

In declaring the contribution limits at issue in this case unconstitutional, the Court has considered Motl's testimony for what it is worth.

VI. *Randall v. Sorrell*, 548 U.S. 230 (2006)

Although the *Randall* decision is not binding on this Court, it is persuasive in a number of respects. It identifies Montana as one of a number of states with low contribution limits—lower than those found to be too low. It alerts Montana to a potential problem and motivates the analysis which resulted in this case. Of course Montana presents a unique and different situation from Vermont by virtue of its huge size and sparse population. Campaigning for statewide office is obviously more costly in both time and money when it takes a full day to drive across our state. Low contribution limits unduly empower incumbency. Limits that are too low violate the First Amendment.

Randall is useful in this analysis.

CONCLUSION

Defendants have not proven that the campaign contribution limits codified at Montana Code Annotated § 13-37-216(1), (3), and (5) (2011) further the important state interest of combating quid pro quo corruption or its appearance. Regardless, had they met their burden, the limits are neither narrowly focused on an anti-corruption interest, nor do they allow candidates in Montana to amass sufficient resources to wage effective political campaigns. Therefore, according to *McCutcheon* and other controlling Supreme Court and Ninth Circuit law, they are unconstitutional and must be enjoined.

Defendants have suggested that the contribution limits pre-dating Initiative 118—which the Court notes were significantly higher for individuals and political committees, but quite a bit lower for political parties—should spring into effect in the event the Court declares the 2011 contribution limits unconstitutional. The Court expresses no opinion on this point, as it was neither a subject at trial nor in the briefing submitted on summary judgment. The Court leaves this question for the Montana Attorney General to consider.

[*1038] Now, this decision directly disposes of this case with respect to all but Plaintiff-Intervenor Rick Hill ("Hill"). Hill accepted a $500,000 donation from the Montana Republican Party two days after this Court originally declared the statutes at issue here unconstitutional in October 2012, an act for which Commissioner Motl has threatened but not yet filed an enforcement action against Hill seeking treble

damages. The Ninth Circuit granted Hill intervenor status in this case. This Court, however, has held Hill's motion to file a supplemental complaint in abeyance pending the outcome of the instant motions for summary judgment. By his proposed complaint, Hill seeks a declaration that the enforcement action—which is predicated on Montana Code Annotated § 13-37-216—violates his constitutional rights, and he seeks restraint of that enforcement action.

The Court remains at a loss as to how Commissioner Motl will prove that Hill could be liable for accepting the alleged illegal contribution *after* the duly appointed and acting United States District Court, with unchallenged jurisdiction in the case, declared the contribution limits unconstitutional and unenforceable *before* the Ninth Circuit motions panel stayed this Court's order. In that short window in early October 2012, seemingly there were no campaign contribution limits in effect for Hill to violate. The Commissioner's prosecutorial grounds in that matter appear shaky at best, and, more likely, non-existent.

Both publicly[5] and before this Court at the November 2015 status conference (*see* Doc. 226 at 12-14), Defendants have represented that the Commissioner will defer to the Court's ruling in this case, a stance which can only be interpreted to mean that Montana will relent against Hill in the event the

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[5] The Commissioner's official website indicates that "[w]hatever action that is taken [on the Hill complaint] will defer to the eventual Federal Court Decision on the constitutionality of Montana's 2012 contribution limits." See http://politicalpractices.mt.gov/2recentdecisions/docket.mcpx.

contribution limits are declared unconstitutional. Though Hill apparently remains on alert that the enforcement action against him will be resuscitated, in reality that has not occurred and, apparently, will not occur. On that premise, Hill's motion for leave to file a supplemental complaint should now be denied as moot.

As was the case in 2012, the Montana Legislature convenes next year and will have the opportunity to revisit campaign contribution limits once again, in a manner which comports with the protections afforded by the First Amendment. As the limits currently stand, those protections are not honored.

Accordingly, IT IS ORDERED that:

(1) Plaintiffs' motion for summary judgment (Doc. 236) is GRANTED.

(2) Defendants' motion for summary judgment (Doc. 240) is DENIED.

(3) Plaintiff-Intervenor's motion for leave to file a supplemental complaint (Doc. 212) is DENIED AS MOOT.

(4) The contribution limits codified at Montana Code Annotated § 13-37-216(1), (3), and (5) (2011) are hereby declared unconstitutional. Defendants are PERMANENTLY ENJOINED from enforcing these limits.

(5) The Clerk of Court is directed to enter judgment in favor of Plaintiffs and against Defendants.

DATED this 17th day of May, 2016.

/s/ Charles C. Lovell
Charles C. Lovell
Senior United States District Judge

[***Editing Note:*** *Page numbers from the reported opinion, No. 16-35424, 2018 U.S. App. LEXIS 11300, are indicated, e.g., [***1**].*]

[Filed: 5/2/2018]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUG LAIR; STEVE DOGIAKOS; AMERICAN TRADITION PARTNERSHIP; AMERICAN TRADITION PARTNERSHIP PAC; MONTANA RIGHT TO LIFE ASSOCIATION PAC; SWEET GRASS COUNCIL FOR COMMUNITY INTEGRITY; LAKE COUNTY REPUBLICAN CENTRAL COMMITTEE; BEAVERHEAD COUNTY REPUBLICAN CENTRAL COMMITTEE; JAKE OIL, LLC; JL OIL, LLC; CHAMPION PAINTING; JOHN MILANOVICH, *Plaintiffs-Appellees,* RICK HILL, Warden, *Intervenor-Plaintiff-Appellee,* *v.* JONATHAN MOTL, in his official capacity as Commissioner of Political Practices; TIM FOX, in his official capacity as Attorney General of the State of Montana; LEO J. GALLAGHER, in his official capacity as Lewis and Clark County Attorney, *Defendants-Appellants.*	No. 16-35424 D.C. No. 6:12-cv-00012-CCL ORDER

Filed May 2, 2018

Before: Raymond C. Fisher, Carlos T. Bea and Mary H. Murguia, Circuit Judges.

Order;

Dissent by Judge Ikuta;

Response to Dissent by Judges Fisher and Murguia

SUMMARY*

Civil Rights

The panel denied the petition for rehearing en banc on behalf of the Court.

In its opinion, filed November 6, 2017, the panel reversed the district court's judgment in an action challenging Montana's limits on the amount of money individuals, political action committees and political parties may contribute to candidates for state elective office.

Judge Ikuta, joined by Judges Callahan, Bea, M. Smith, and N.R. Smith dissented from the denial of rehearing en banc because the majority applied a legal standard inconsistent with *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), and *Citizens United v. FEC*, 558 U.S. 310 (2010), and as a result, relied on evidence of access or influence that could not prove Montana's state interest in restricting contribution limits. Judge Ikuta would require Montana to present evidence of actual or

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

apparent quid pro quo corruption.

Judges Fisher and Murguia responded to the dissent from the denial of rehearing en banc, and wrote that the evidentiary burden proposed by the dissent has never been adopted by the U.S. Supreme Court or this court.

ORDER

Judge Murguia has voted to deny the petition for rehearing en banc, and Judge Fisher has so recommended. Judge Bea has voted to grant the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc, filed November 6, 2017, is **DENIED**.

IKUTA, Circuit Judge, with whom CALLAHAN, BEA, M. SMITH, and N.R. SMITH, CIRCUIT Judges, join, dissenting from denial of rehearing en banc:

In two important cases, *Citizens United* and *McCutcheon* **[*4]**, the Supreme Court clarified that the only state interest that can justify restrictions on campaign contributions is "quid pro quo" corruption or its appearance, and that the government must present objective evidence that such a problem exists. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1441, 1444-45,

(2014); *Citizens United v. FEC*, 558 U.S. 310, 359 (2010). In doing so, the Court swept away the Ninth Circuit's case law that gave states essentially free rein to restrict campaign contributions. *See Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1096 (9th Cir. 2003) (holding that a state may justify its restrictions by showing merely a problem of "undue influence and the appearance of undue influence by special interest groups").

Our court may not ignore such an important change in Supreme Court jurisprudence. But the majority here does just that by applying the same legal standard and evidentiary burden that we had adopted before the Supreme Court decided *McCutcheon* and *Citizens United*. *See Lair v. Motl*, 873 F.3d 1170, 1178 (9th Cir. 2017). Applying this superseded standard, the majority upholds Montana's contribution limits without *any* evidence of actual or apparent quid pro quo corruption. *See id.* at 1178-80.

Because the majority's framework contravenes *Citizens United* and *McCutcheon*, we should have taken this case en banc to correct the panel opinion's error.

I

Donor contributions are a form of political speech that **[*5]** merit the respect the First Amendment requires. "[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association." *McCutcheon*, 134 S. Ct. at 1448. "When an individual contributes money to a candidate, he exercises both of those rights: The contribution 'serves as a general expression of support for the candidate and his views'

and 'serves to affiliate a person with a candidate.'" *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976)). By contributing money, an individual participates "in an electoral debate that we have recognized is 'integral to the operation of the system of government established by our Constitution.'" *Id.* (quoting *Buckley*, 424 U.S. at 14). Thus, the First Amendment protects an individual's "right to participate in democracy through political contributions." *Id.* at 1441.

Because the First Amendment protects political contributions, states may restrict contributions only if they can show that the restrictions meet a heightened standard of scrutiny: a state must demonstrate "a sufficiently important interest" and employ "means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25; *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000).

In *Eddleman*, our court misinterpreted *Buckley* and *Shrink Missouri* as setting a low bar for the sort of state interest that was "sufficiently **[*6]** important" to justify restrictions on campaign contributions. We read *Buckley* as identifying two sufficient state interests: (1) quid pro quo corruption and (2) "the avoidance of the appearance of improper influence." 424 U.S. at 27. Focusing primarily on the second prong, we extended this interpretation to hold that a state's interest in "preventing undue influence and the appearance of undue influence by special interest groups" was a sufficiently important state interest to justify limitations on campaign contributions. *Eddleman*, 343 F.3d at 1096. As a practical matter, this standard means that a state can restrict political contributions

with little or no evidence of any corruption problem. *See, e.g., Jacobus v. Alaska*, 338 F.3d 1095, 1114 (9th Cir. 2003) (upholding a complete ban on contributions to political parties based solely on a legislative statement that "organized special interests are responsible for raising a significant portion of all election campaign funds and may thereby gain an undue influence over election campaigns and elected officials." (quoting 1996 Alaska Sess. Laws 48 § 1(a)(3)).

But *Citizens United* and *McCutcheon* clarified that we misinterpreted *Buckley* in *Eddleman* and *Jacobus*. We now know that the only qualifying state interest is an interest in preventing **[*7]** quid pro quo corruption or its appearance, *Citizens United*, 558 U.S. at 359, and we also have a definition of this qualifying interest. "[Q]uid pro quo corruption" means "a direct exchange of an official act for money," *McCutcheon*, 134 S. Ct. at 1441, or "dollars for political favors," *id.* (quoting *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)), or "the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder," *McCutcheon*, 134 S. Ct. at 1452 (quoting *McConnell v. FEC*, 540 U.S. 93, 310 (2003) (opinion of Kennedy, J.)). In short, the only state interest that justifies contribution limits is the prevention of acts that "would be covered by bribery laws if a quid pro quo arrangement were proved." *Citizens United*, 558 U.S. at 356 (citation omitted).

Most important for correcting our case law, the Supreme Court has now made clear an interest in combating influence and access is not enough. *Id.* at

359. Indeed, the Court expressly rejected any "influence" standard, holding that "[r]eliance on a 'generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.'" *Id.* (quoting *McConnell*, 540 U.S. at 296 (opinion of Kennedy, J.)).[1]

In light of the Supreme Court's clarification, a state can justify imposing regulations limiting individuals' political speech (via limiting political contributions) only by producing evidence **[*8]** that it has a real problem in combating actual or apparent quid pro quo corruption.[2] The Court regularly imposes such an evidentiary burden in intermediate scrutiny contexts: the government must provide evidence that "the harms it recites are real and that its restriction will in fact

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[1] The Supreme Court identified other legislative objectives that are also insufficient to suppress campaign speech, such as trying to "level the playing field," or "level electoral opportunities"; to "equaliz[e] the financial resources of candidates"; or to "restrict the speech of some elements of our society in order to enhance the relative voice of others." *McCutcheon*, 134 S. Ct. at 1450 (citations omitted).

[2] The majority notes that "a state's contribution limits may even be 'prophylactic,'" Response at 22, citing a passage in *McCutcheon* warning against imposing "prophylaxis-upon-prophylaxis." 134 S. Ct. at 1458 (citation omitted). But while a state's contribution limit may be prophylactic (meaning that a state is not limited to barring only the very act of quid pro quo corruption), the state may not impose such a limit until it has carried its burden of showing it has a problem with actual or apparent quid pro quo corruption in the first place. *Id.* at 1452.

alleviate them to a material degree." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (citation omitted) (applying intermediate scrutiny to commercial speech). To meet this test here, a state must show that it has a realistic need to prevent acts that "would be covered by bribery laws," *Citizens United*, 558 U.S. at 356, by (for instance) presenting evidence that large monetary contributions were made "to control the exercise of an officeholder's official duties," *McCutcheon*, 134 S. Ct. at 1450, or "point[ing] to record evidence or legislative findings suggesting any special corruption problem," *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (principal opinion). One thing is certain: the state cannot carry its burden with evidence showing only that large contributions increase donors' influence or access. *McCutcheon*, 134 S. Ct. at 1441, 1451. Even if the "line between quid pro quo corruption and general influence may seem vague at times . . . 'the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.'" *Id.* at 1451 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007) (opinion of Roberts, C.J.)).

II

[*9] Despite the Supreme Court's timely clarification, the majority elects to ignore it in upholding Montana's limitations on contributions. Instead, the majority articulates the following legal standard: "To satisfy its burden, Montana must show the *risk* of actual or perceived quid pro quo corruption is more than '*mere conjecture*.'" *Motl*, 873 F.3d at 1178 (emphasis added) (quoting *Eddleman*, 343 F.3d at 1092). Moreover, "Montana need not show any

completed quid pro quo transactions to satisfy its burden." *Id.* at 1180. Rather, Montana "simply must show *the risk* of actual or perceived quid pro quo corruption is *not illusory*, a bar Montana's evidence easily clears." *Id.* (emphasis added).

This highly attenuated standard is two steps removed from the standard explained by *Citizens United* and *McCutcheon*. Under the majority's test, rather than prove the existence of corrupt arrangements or their appearance, a state need produce evidence only of a "risk" of such arrangements or a "perceived threat" of such arrangements. And the majority further reduces even that light burden: the "risk" or "perceived threat" need only be "more than mere conjecture" or "not illusory." *Motl*, 873 F.3d at 1178-79.

Under this standard, Montana can carry its burden of proving the need to combat actual or apparent quid pro quo corruption without presenting *any* evidence of such a problem. Instead, Montana need only produce evidence of a risk or perception of a threat that is more than merely illusory. *See Motl*, 873 F.3d at 1179. This means that a state can justify its restrictions merely by showing a substantial donation by a special interest **[*10]** or a news article or survey suggesting the public is concerned about donors furthering their legislative goals. But this of course is merely evidence of access or influence, which the Supreme Court has specifically disavowed as inadequate. *Citizens United*, 558 U.S. at 359.

The majority's minimal benchmark is wholly an invention of our Ninth Circuit. Although the majority cites *McCutcheon* for its "mere conjecture" standard, it

plucks the citation out of context. *Motl*, 873 F.3d at 1178. *McCutcheon* emphasized that "we 'have never accepted mere conjecture as adequate to carry a First Amendment burden,'" 134 S. Ct. at 1452 (quoting *Shrink Mo.*, 528 U.S. at 392), but it notably did not hold that a scintilla of evidence *more* than mere conjecture was sufficient. The majority's citation to *Buckley* for the "not illusory" baseline is similarly flimsy. *Buckley* held that "the deeply disturbing examples [of quid pro quo corruption] surfacing after the 1972 election demonstrate that the problem [of quid pro quo corruption] is not an illusory one." 424 U.S. at 27. Again, this is a far cry from holding that a state can justify a contribution limitation by producing a peppercorn of evidence that is not entirely imaginary. Rather, *Buckley* relied on the government's evidence of numerous specific examples of quid pro quo corruption **[*11]** to justify FECA's regulations.[3]

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[3] *Buckley* relied on the D.C. Circuit's opinion, which detailed a "number of abuses uncovered after the 1972 elections." 424 U.S. at 27 n.28 (citing *Buckley v. Valeo*, 519 F.2d 821, 839–40 & nn. 36–38 (D.C. Cir. 1975), *aff'd in part*, *rev'd in part*, 424 U.S. 1, *and modified*, 532 F.2d 187 (D.C. Cir. 1976) (mem)). For instance, the D.C. Circuit noted that dairy organizations had pledged $2,000,000 to President Nixon's 1972 campaign, and "after a meeting with dairy organization representatives, President Nixon decided to overrule the decision of the Secretary of Agriculture and to increase price supports." 519 F.2d at 839 n.36. The court also observed that a major fund raiser "pleaded guilty to a charge of violation of 18 U.S.C. § 600, in having promised, in 1971, a more prestigious post to Ambassador (to Trinidad) J. Fife Symington, in return for a $100,000 contribution to be split between 1970 senatorial candidates desig-

III

Because the majority articulates the wrong standard, it relies on the wrong type of evidence. In upholding Montana's strict contribution limits, the majority relies on evidence that showed merely influence and access. First, the majority cites a state representative's testimony that "groups funnel more money into campaigns when certain special interests know an issue is coming up, because it gets results." *Motl*, 873 F.3d at 1179 (internal quotation marks and alteration omitted). This "ingratiation and access" by interest groups is not quid pro quo corruption. *McCutcheon*, 134 S. Ct. at 1441 (quoting *Citizens United*, 558 U.S. at 360).

Second, the majority cites a letter sent to party colleagues that urged other Republican representatives to vote for a bill that was "important to" a certain PAC in hopes it would "keep the contributions coming our way" and "keep [the PAC] in our camp." *Motl*, 873 F.3d at 1179. The state representative didn't offer money in exchange for votes, or state that the PAC offered money in exchange for votes; rather, he tried to impress on his colleagues that they should be influenced by the PAC's history of donations. A legislator's effort to motivate votes by pointing to helpful support **[*12]** from an interest group does not show the state has a problem with quid pro quo corruption. Moreover, *McCutcheon* is clear that "there is not the same risk of quid pro quo corruption or its appearance when money flows through independent

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nated by the White House and Mr. Nixon's 1972 campaign." *Id.* at 839 n.38.

actors to a candidate, as when a donor contributes money to a candidate directly." 134 S. Ct. at 1452. Rather, quid pro quo corruption can occur only "when an individual makes large contributions to the candidate or officeholder himself," *Id.* at 1460; *see also id.* at 1452, and here the letter cited by the majority focuses on PAC contributions towards Republicans generally — not individual contributions to individual officeholders, *see id.* at 1441-42, 1460-61.

The majority next cites a state senator's declaration "that during the 2009 legislative session the National Right to Work group promised to contribute at least $100,000 to elect Republican majorities in the next election if he and his colleagues introduced and voted for a right-to-work bill in the 2011 legislative session." *Motl*, 873 F.3d at 1179. As with the other letter, this declaration does not show quid pro quo corruption because it discusses PAC contributions funneled towards the party generally.[4] *See McCutcheon*, 134 S.

[4] The majority cites *McCutcheon* for its argument that "[i]ndirect contributions to candidates can raise the same corruption concerns as direct contributions." Response at 26. But this adopts the position of the *McCutcheon* dissent, which faulted the majority for discounting the risk party committees would indirectly funnel money to a specific candidate. 134 S. Ct. at 1471–72 (Breyer, J., dissenting). By contrast, *McCutcheon* concluded that the risk of indirect contributions was too speculative to justify aggregate contribution limits. 134 S. Ct. at 1452–56. *McCutcheon* explained that scenarios that might require limits on indirect contributions were "implausible." *Id*. at 1453. For instance, a donor wishing to channel money to Representative Smith would be limited to contributing to "PACs that are likely to give to Smith." *Id*. But his contributions "will be signifi-

Ct. at 1441-42, 1460-61. It also confuses donations geared towards a common ideological interest **[*13]**—here, advancing a right-to-work bill—with quid pro quo corruption. Such "widely distributed support" intended "to further common political beliefs" does not constitute quid pro quo corruption because treating donors' "shared interest, standing alone, as an opportunity for quid pro quo corruption would dramatically expand government regulation of the political process." *Id.* at 1461.

Finally, the majority cites two default judgments in which "a state court found two 2010 state legislature candidates violated state election laws by accepting large contributions from a corporation that 'bragged . . . that those candidates that it "supported rode into office in 100% support of [the corporation's] . . . agenda."'" *Motl*, 873 F.3d at 1179 (alterations in original) (citations omitted). Here again, general support for a corporation's agenda is not a *quid* sufficient to justify restrictions on campaign contributions. *See McDonnell v. United States*, 136 S.

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cantly diluted by all the contributions from others to the same PACs," and he will discover that "[h]e cannot retain control over his contribution," or "direct his money 'in any way' to Smith, or even imply that he would like his money to be recontributed to Smith." *Id.* (citations omitted). Therefore, "[h]is salience as a Smith supporter has been diminished, and with it the potential for corruption." *Id.* Here, as in *McCutcheon*, the National Right to Work's donation to the Republican Legislative Campaign Committee will have little "salience" to any particular candidate, and therefore presents little potential for quid pro quo corruption. *Id.*; *Motl*, 873 F.3d at 1179.

Ct. 2355, 2372 (2016) (explaining that an official act "must involve a formal exercise of governmental power" and be "something specific and focused that is 'pending' or 'may by law be brought' before a public official"); *McCutcheon*, 134 S. Ct. at 1441, 1450-51; *Citizens United*, 558 U.S. at 356.

The district court reviewed the evidence **[*14]** presented by the parties, concluding that Montana had not proven a sufficiently important state interest in preventing actual or apparent quid pro quo corruption. *Lair v. Motl*, 189 F. Supp. 3d 1024, 1032-34 (D. Mont. 2016), *rev'd*, 873 F.3d 1170 (9th Cir. 2017). The district court found that "the public would more reasonably conclude that corruption is nearly absent from Montana's electoral system — the evidence shows that despite a hand-full of opportunities, legislators chose to keep their noses clean." *Id.* at 1034. Moreover, the court concluded that "none of Defendants' examples demonstrate a real harm to the election process or to the public's interest in that process." *Id.*

The district court got it exactly right. As Judge Bea eloquently explained, *Motl*, 873 F.3d at 1187-91 (Bea, J., dissenting), Montana's evidence cannot justify contribution limits because it shows only attempts by donors to garner access or influence, or officeholders' gratitude towards supporters. Montana provided no evidence of an attempted "direct exchange of an official act for money"—just potential influence over legislators because of donors' past or future support. *McCutcheon*, 134 S. Ct. at 1441. Nor did the evidence show a public perception of quid pro quo corruption. Montana provided no surveys or empirical evidence other than its own ipse dixit regarding **[*15]** the

public's views.

In short, the majority applies a legal standard inconsistent with *Citizens United* and *McCutcheon*, and as a result, relies on evidence of access or influence that cannot prove Montana's state interest in restricting contribution limits. As Judge Bea explains in dissent, "[w]hile the panel majority's opinion pays lip service" to *Citizens United* and *McCutcheon*'s shift, its analysis utterly fails "to account substantively for this change." *Motl*, 873 F.3d at 1191 (Bea, J., dissenting). Rather than follow *Citizens United* and *McCutcheon*, the majority undermines them. I would follow the Supreme Court and require Montana to present evidence of actual or apparent quid pro quo corruption. I therefore dissent from the denial of rehearing en banc.

FISHER and MURGUIA, Circuit Judges, responding to the dissent from the denial of rehearing en banc:

Forty states and the federal government place limits on direct contributions to candidates for elective office. In our opinion, we upheld Montana's direct contribution limits against a First Amendment challenge, holding they served a sufficiently important interest in preventing quid pro quo corruption or its appearance and were closely drawn to achieve that purpose. *See Lair v. Motl*, 873 F.3d 1170 (9th Cir. 2017) **[*16]**.

The dissent from the denial of rehearing en banc contends that, to demonstrate a sufficiently important state interest, Montana needed to produce evidence

that quid pro quo arrangements actually exist. Dissent at 9-10. The evidentiary burden the dissent proposes, however, has never been adopted by the Supreme Court or this court. The evidentiary standard established by the Supreme Court requires that a state need only demonstrate a *risk* of quid pro quo corruption or its appearance that is neither conjectural nor illusory. That is the standard we correctly applied here. Montana, moreover, has presented evidence of large contributors, state legislators and candidates for election attempting to enter into direct exchanges of campaign dollars for official legislative acts. This evidence is more than sufficient to demonstrate a concrete *risk* of actual quid pro quo corruption or its appearance. Because we correctly stated and applied the law, we agree with the denial of rehearing en banc.

1.

The basic framework is not in dispute. All agree that First Amendment challenges to contribution limits are subject to a two-step test. Direct contribution limits will be sustained when a state (1) "demonstrates a sufficiently important **[*17]** interest" and (2) "employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam). Only the first step in this framework is at issue here.

All also agree that, under the first step, the Supreme Court "has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014). States, moreover, "may target only a specific type of corruption—'*quid pro quo*' corruption." *Id.* That

is, states "may permissibly seek to rein in 'large contributions that are given to secure a political quid pro quo from current and potential office holders.'" *Id.* (alteration and emphasis omitted) (quoting *Buckley*, 424 U.S. at 26). In addition, states "may permissibly limit 'the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions' to particular candidates." *Id.* (quoting *Buckley*, 424 U.S. at 27).

Although legislating to prevent actual or apparent quid pro quo corruption is permitted, legislating to prevent lesser forms of corruption — mere access and influence — is not. "Spending large sums of money in connection with elections, but not in connection **[*18]** with an effort to control the exercise of an officeholder's official duties, does not give rise to such quid pro quo corruption." *Id.* (emphasis omitted). "Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties." *Id.* at 1451 (quoting *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)).

Thus, after *Citizens United* and *McCutcheon*, at step one a state must demonstrate that the limitation furthers the state's interest in preventing quid pro quo corruption or its appearance, where "quid pro quo corruption" is defined as "a direct exchange of an official act for money," or "'dollars for political favors.'" *McCutcheon*, 134 S. Ct. at 1441 (quoting *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)).

Although we faithfully applied all of these principles in our opinion, the dissent from the denial of

rehearing en banc contends otherwise. As we shall explain, the dissent's contentions are without merit.

2.

The dissent begins by accusing us of "ignor[ing] the "important change in Supreme Court jurisprudence" brought about by *Citizens United* and *McCutcheon*. Dissent at 5. Not so. Our opinion specifically held that "*Citizens United* . . . and *McCutcheon* . . . limited the important state interest at [the] first step to preventing 'quid pro quo corruption, or its appearance,'" *Lair*, 873 F.3d at 1177 (quoting *Lair v. Bullock*, 798 F.3d 736, 746 (9th Cir. 2015)), and we expressly **[*19]** required Montana to meet this revised standard, *see id.* at 1178-80.

3.

The dissent also disagrees with us regarding the nature of the evidence a state must produce to establish a sufficiently important interest in preventing quid pro quo corruption or its appearance. The dissent contends a state can meet its burden at step one only by proving "the *existence* of corrupt arrangements or their appearance." Dissent at 9 (emphasis added). Without such evidence, according to the dissent, states are wholly precluded from imposing direct contribution limits in *any* amount. We, by contrast, held that a state can satisfy its burden at step one by showing a *risk* of quid pro quo corruption or its appearance that is neither conjectural nor illusory. *See Lair*, 873 F.3d at 1178. A review of the case law compels the conclusion that our approach is correct.

Tellingly, the dissent can cite to no authority, at either the Supreme Court or any other level, requiring

a state to prove the *existence* of quid pro quo arrangements at step one. The Supreme Court has never required a state to do so. Instead, the Court has required a state to demonstrate only "a cognizable *risk* of corruption" — a "*risk* of quid pro quo corruption or its appearance" that rises above **[*20]** "mere conjecture." *McCutcheon*, 134 S. Ct. at 1452 (emphasis altered) (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000)). The state need only "demonstrate that the problem is not an illusory one." *Buckley*, 424 U.S. at 27.

When it comes to direct contribution limits, the Court has never imposed an onerous evidentiary burden at step one. As the Court made clear in *Shrink Missouri*, "[t]he 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." *Shrink Missouri*, 528 U.S. at 391. Because "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible," *id.*, the Court has "declined to impose, let alone articulate, a stringent evidentiary burden" in the context of direct contribution limits, *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1122 (9th Cir. 2011) (quoting *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 653 (9th Cir. 2007)).

This low evidentiary burden is confirmed by case law. Because "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt" are generally understood as presenting a real problem, *Shrink Missouri*, 528 U.S. at 391, the Supreme Court has never held that a

state—or Congress—failed to meet its evidentiary burden at step one. The Court has either upheld direct contribution limits, or struck them down at step two, which **[*21]** is not at issue here. *See Buckley*, 424 U.S. at 20-28 (upholding federal limits); *Shrink Missouri*, 528 U.S. at 390-97 (upholding state limits); *Randall v. Sorrell*, 548 U.S. 230, 249-62 (2006) (plurality opinion) (rejecting state limits at step two, i.e., because they were "not closely drawn").

The dissent's view that a state must show the *existence* of quid pro quo corruption or its appearance is not supported by the four cases upon which the dissent relies — *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001), *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 618 (1996) (plurality opinion), *Citizens United* and *McCutcheon.*

Lorillard is a commercial speech case concerning tobacco regulations, not campaign contribution limits. *Buckley, Shrink Missouri* and *McCutcheon* govern here, not *Central Hudson* or *Lorillard.*[1]

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[1] *Lorillard* applied the *Central Hudson* commercial speech test. Under *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980), "[a]t the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 475 (1989) (quoting

The dissent's reliance on *Colorado Republican* is also misplaced. Because *Colorado Republican* is a campaign *expenditure* case, not a contribution case, it has no application here. As the Supreme Court explained in *Shrink Missouri, Colorado Republican* "did not deal with a government's burden to justify limits on contributions." *Shrink Missouri*, 528 U.S. at 392. "Although the principal opinion in that case charged the Government with failure to show a real risk of corruption, the issue in question was limits on independent expenditures by political parties, which the principal opinion expressly distinguished **[*22]** from contribution limits: 'limitations on independent expenditures are less directly related to preventing corruption' than contributions are." *Id.* (citation omitted) (quoting *Colorado Republican*, 518 U.S. at 615 (plurality opinion)).

Nor does anything in *Citizens United* or *McCutcheon* require a state produce evidence that quid pro quo arrangements actually *exist*. On the contrary, "because few if any contributions to candidates will involve quid pro quo arrangements," and "'the scope of such pernicious practices can never be reliably ascertained,'" *Citizens United* expressly recognizes that "restrictions on direct contributions are *preventative*." *Citizens United*, 558 U.S. at 356-57 (emphasis altered) (quoting *Buckley*, 424 U.S. at 27). They "*ensure against* the reality or appearance of corruption." *Id.* at 357 (emphasis added). Similarly, recognizing "'the opportunities for abuse *inherent* in a regime of large individual financial contributions' to particular

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Central Hudson, 447 U.S. at 566).

candidates," *McCutcheon* requires a state to demonstrate only "a cognizable *risk* of corruption" — a "*risk* of quid pro quo corruption or its appearance" that rises above "'mere conjecture.'" *McCutcheon*, 134 S. Ct. at 1450, 1452 (emphasis altered) (quoting *Buckley*, 424 U.S. at 27, and *Shrink Missouri*, 528 U.S. at 392).[2]

When it comes to direct contribution limits, then, **[*23]** *Citizens United* and *McCutcheon* go hand in hand with previous decisions, not toe to toe. This line of cases, beginning with *Buckley* and continuing through *McCutcheon*, demonstrates that, in the context of contribution limits, the anti-corruption interest is sufficiently well-established that a state need not satisfy a stringent evidentiary burden at step one. Indeed, a state's contribution limits may even be "prophylactic." *See McCutcheon*, 134 S. Ct. at 1458 (describing direct contribution limits as a "preventative," "prophylactic measure"); *Nat'l Conservative Political Action Comm.*, 470 U.S. at 500 (noting that the Court will accord "proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption

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[2] We do not read *Citizens United* and *McCutcheon* as calling the ongoing validity of direct contribution limits into doubt. *Citizens United* noted that direct contribution limits "have been an accepted means to prevent quid pro quo corruption." *Citizens United*, 558 U.S. at 359 (emphasis omitted). In the post-*Citizens United*, post-*McCutcheon* world, the Supreme Court continues to recognize that "contribution limits advance the interest in preventing quid pro quo corruption and its appearance in political elections." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1672 (2015) (emphasis omitted).

had long been recognized"); *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

In sum, we properly held that a state need only produce evidence of a cognizable *risk* of quid pro quo corruption or its appearance. *See McCutcheon*, 134 S. Ct. at 1452. The state need not, as the dissent contends, "prove the existence of corrupt arrangements or their appearance." Dissent at 9.

4.

Assuming we are correct that a state is required to demonstrate only a *risk* of quid pro quo corruption rather **[*24]** than the *existence* of such corruption, the dissent contends we nonetheless erred by requiring Montana to show only that the problem is neither illusory nor conjectural. Dissent at 9-10. Because the Supreme Court has repeatedly used these very words, however, we believe we properly included them in our opinion. *See McCutcheon*, 134 S. Ct. at 1452 ("mere conjecture"); *Shrink Missouri*, 528 U.S. at 392 ("merely conjectural"); *id.* ("mere conjecture"); *Buckley*, 424 U.S. at 27 ("the problem is not an illusory one"). We were, moreover, bound by circuit precedent on this point. *See Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003) ("With respect to the quantum of evidence necessary to justify this interest, the Supreme Court has required only that the perceived threat not be 'illusory,' *Buckley*, 424 U.S. at 27, or 'mere conjecture,' *Shrink Missouri*, 528 U.S. at 392), *abrogated on other grounds as stated in a Lair*, 798 F.3d at 745. And in any event, as discussed below,

the evidence Montana has presented here demonstrates a concrete risk of quid pro quo corruption. This case, therefore, "does not present a close call requiring further definition of whatever the State's evidentiary obligation may be." *Shrink Missouri*, 528 U.S. at 393.

5.

The dissent also contends our opinion, in effect, allows a state to impose direct contribution limits based on evidence of mere "access or influence, which the Supreme Court has specifically disavowed as inadequate." **[*25]** Dissent at 10. Under our opinion, according to the dissent, "a state c[ould] justify its restrictions merely by showing a substantial donation by a special interest or a news article or survey suggesting the public is concerned about donors furthering their legislative goals." Dissent at 10.

We disagree. Our opinion does *not*, as the dissent charges, allow a state to "carry its burden with evidence showing only that large contributions increase donors' influence or access." Dissent at 8. On the contrary, the opinion squarely rejects the access or influence theory, *see Lair*, 873 F.3d at 1177, and it makes abundantly clear that the problem the state must demonstrate is quid pro quo corruption or its appearance, *see id.* at 1172, 1177, 1178, 1179, 1180, 1181, 1186. We do not hold that the type of evidence the dissent describes—the mere existence of a large contribution, or evidence that voters are concerned that contributors have access or influence—would suffice. Notably, the evidence in this case, which we discuss in greater detail below, does not relate to mere access or influence. It demonstrates a concrete risk of actual and

apparent quid pro quo corruption.

6.

We also disagree with the dissent's contention that the evidence Montana presented in this case was insufficient to satisfy step **[*26]** one. The dissent's evaluation of the evidence, of course, is based on its contention that Montana was required to prove the *existence* of quid pro quo corruption or its appearance. As we have explained, Montana was required to show only a *risk* of such corruption. Thus, to the extent the dissent finds Montana's evidence wanting merely because it fails to establish the existence of quid pro quo arrangements or their appearance, the dissent's arguments are unpersuasive for the reasons already discussed.

We further disagree that Montana failed to establish even a *risk* of quid pro quo corruption or its appearance, because the state's evidence shows only "influence and access." Dissent at 11. Montana's evidence, which shows attempts by contributors, lawmakers and candidates to exchange campaign contributions for official legislative acts, plainly demonstrates a *risk* of quid pro quo arrangements that Montana was constitutionally permitted to legislate to prevent.

State Senator Mike Anderson, for example, sent a "destroy after reading" letter to his party colleagues, urging them to vote for a specific bill so a political action committee would funnel contributions to the party's candidates:

> Dear Fellow Republicans. **[*27]** Please destroy this after reading. Why? Because the Life Underwriters Association in Montana is one of

> the larger Political Action Committees in the state, and I don't want the Demo's to know about it! In the last election they gave $8,000 to state candidates. . . . Of this $8,000—Republicans got $7,000—you probably got something from them. This bill is important to the underwriters and I have been able to keep the contributions coming our way. In 1983, the PAC will be $15,000. Let's keep it in our camp. Mike.

State Senator Bruce Tutvedt testified that the National Right to Work group promised to contribute at least $100,000 to the Republican Legislative Campaign Committee if he and his colleagues introduced and voted for a right-to-work bill in the 2011 legislative session. Under the proposed arrangement, "if Republican legislators promised to introduce a right-to-work bill and get a vote of record in both houses, then the Republican Legislative Campaign Committee would receive in exchange $100,000 with more available if needed to elect Republican majorities to the Montana House and Senate."

Montana also presented evidence that a state court found two 2010 state legislature candidates **[*28]** violated state election laws by accepting large contributions from a corporation that "bragged . . . that those candidates that it supported 'rode into office in 100% support of [the corporation's] . . . agenda.'" *See Comm'r of Political Practices v. Prouse*, DDV-2014-250 (1st Jud. Dist. Mont. 2016); *Comm'r of Political Practices for Mont. v. Boniek*, XADV-2014-202, 2015 Mont. Dist. LEXIS 88 (1st Jud. Dist. Mont. 2015).

We are not necessarily persuaded by the dissent's contention that none of these proposed exchanges involved quid pro quo arrangements. For example, that the National Right to Work group planned to funnel contributions to compliant lawmakers through the Republican Legislative Campaign Committee, rather than giving it to the lawmakers directly (Dissent at 11-12), does not negate the possibility of quid pro quo corruption. Indirect contributions to candidates can raise the same corruption concerns as direct contributions. *See McCutcheon*, 134 S. Ct. at 1442, 1446-47, 1453, 1455-56 (recognizing the importance of limits on indirect contributions in order to prevent circumvention of direct contribution limits, because the risk of corruption arises when a contributor "directs his money 'in any way'" to a particular candidate (quoting 2 U.S.C. § 441a(a)(8))); *Cal. Med. Ass'n v. Fed. Election Comm'n*, 453 U.S. 182, 197-98 (1981) (plurality opinion) (same). Quid pro quo corruption **[*29]** requires only that the money is "directed, *in some manner*, to a candidate or officeholder." *McCutcheon*, 134 S. Ct. at 1452 (emphasis added) (quoting *McConnell v. FEC*, 540 U.S. 93, 310 (2003) (opinion of Justice Kennedy)). Similarly, to the extent the dissent suggests that a direct exchange of dollars for legislative acts cannot constitute quid pro quo corruption if lawmakers and contributors share "a common ideological interest" (Dissent at 13), we can find no authority for this proposition. We are similarly skeptical of the dissent's contention that the 2010 legislative candidates promised only "general support" for the corporate contributor's agenda (Dissent at 13); the candidates' promises to provide "100% support of [the contributor's] responsible development agenda" may

well have encompassed promises with respect to specific legislative acts.

These questions, however, are beside the point. Because Montana was required to establish only a cognizable risk of quid pro quo corruption or its appearance, it is irrelevant whether Montana has shown the existence of quid pro quo arrangements. The evidence presented by Montana, which shows serious attempts to exchange campaign dollars for official legislative acts, is more than adequate to show a cognizable risk of corruption. Montana, **[*30]** therefore, has demonstrated a sufficiently important governmental interest in limiting direct contributions.

* * *

We agree with the denial of rehearing en banc.

[***Editing Note:*** *Page numbers from the reported opinion, 798 F.3d 736, are indicated, e.g., [***739**].*]

[Filed: 9/1/2015]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUG LAIR; STEVE DOGIAKOS; AMERICAN TRADITION PARTNERSHIP; AMERICAN TRADITION PARTNERSHIP PAC; MONTANA RIGHT TO LIFE ASSOCIATION PAC; SWEET GRASS COUNCIL FOR COMMUNITY INTEGRITY; LAKE COUNTY REPUBLICAN CENTRAL COMMITTEE; BEAVERHEAD COUNTY REPUBLICAN CENTRAL COMMITTEE; JAKE OIL, LLC; JL OIL, LLC; CHAMPION PAINTING, *Plaintiffs-Appellees,* *v.* STEVE BULLOCK, in his official capacity as Attorney General of the State of Montana; JAMES MURRAY, "Jim", in his official capacity as Commissioner of Political Practices; LEO GALLAGHER, in his official capacity as Lewis and Clark County Attorney, *Defendants-Appellants.*	No. 12-35809 D.C. No. 6:12-cv-00012-CCL

DOUG LAIR; STEVE DOGIAKOS; AMERICAN TRADITION PARTNERSHIP; AMERICAN TRADITION PARTNERSHIP PAC; MONTANA RIGHT TO LIFE ASSOCIATION PAC; SWEET GRASS COUNCIL FOR COMMUNITY INTEGRITY; LAKE COUNTY REPUBLICAN CENTRAL COMMITTEE; BEAVERHEAD COUNTY REPUBLICAN CENTRAL COMMITTEE; JAKE OIL, LLC; JL OIL, LLC; CHAMPION PAINTING,

Plaintiffs,

and

RICK HILL, Warden; A LOT OF FOLKS FOR RICK HILL; LORNA KUNEY

Intervenor-Plaintiffs-Appellants,

v.

STEVE BULLOCK, in his official capacity as Attorney General of the State of Montana; JAMES MURRAY, "Jim", in his official capacity as Commissioner of Political Practices; LEO GALLAGHER, in his official capacity as Lewis and Clark County Attorney,

Defendants-Appellees.

No. 12-35809

D.C. No. 6:12-cv-00012-CCL

ORDER AND AMENDED OPINION

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

Charles C. Lovell, Senior District Judge, Presiding

Argued and Submitted

February 5, 2015 – Seattle Washington

Filed May 26, 2015

Amended September 1, 2015

Before: Raymond C. Fisher, Carlos T. Bea and Mary H. Murguia, Circuit Judges.

Opinion by Judge Bea

SUMMARY*

Civil Rights

The panel reversed the district court's judgment, entered following a non-jury trial, and remanded in an action challenging, under the First Amendment, Montana's dollar limits on contributions to political candidates.

The panel held that the district court applied the wrong legal standard prior to enjoining permanently the enforcement of Montana's restrictions on campaign contributions by individuals, political action committees, and political parties. The panel held that the district court applied neither the new formulation of what constitutes an important state interest set forth in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), nor the correct formulation, set forth in *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d

1085 (9th Cir. 2003), of whether the state's contribution limits are "closely drawn" to the state's goal of preventing quid pro quo corruption or its appearance. The panel remanded in order to allow Montana's political contribution limits to be tested under the new and more restrictive standard of *Citizens United*, and the correct "closely drawn" test set forth in *Eddleman*.

COUNSEL

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James Bopp, Jr. (argued) and Jeffrey Gallant, The Bopp Law Firm, PC, Terre Haute, Indiana; Anita Y. Milanovich, The Bopp Law Firm, PC, Bozeman, Montana, for Plaintiffs-Appellees.

J. Gerald Hebert, Paul S. Ryan, Tara Malloy, and Megan McAllen, Campaign Legal Center, Washington, D.C., for Amici Curiae Campaign Legal Center, Common Cause, Justice at Stake, and League of Women Voters.

Ronald A. Fein and John C. Bonifaz, Free Speech for People, Amherst, Massachusetts, for Amici Curiae Free Speech for People, The Honorable James C. Nelson, American Independent Business Alliance, and American Sustainable Business Counsel.

ORDER

The opinion filed on May 26, 2015 is replaced by the amended opinion filed concurrently with this order. With these amendments, Judges Bea and Murguia have voted to deny the petition for rehearing en banc, and Judge Fisher so recommends.

The suggestion for rehearing en banc has been circulated to the full court, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b). The petition for rehearing en banc is **DENIED**.

No further petitions shall be entertained.

OPINION

[*739] BEA, Circuit Judge:

We are called on to determine whether Montana's dollar limits on contributions to political candidates are constitutional under the federal Constitution's First Amendment. The claims against the limits are familiar. Limitations on contributions effectively abridge free speech in two primary ways. First, the contribution itself is a general expression of the donor's support for the candidate and his views. Limiting the amount a donor can contribute curtails that expression. Second, it costs the candidate money to produce political speech that will be heard. Without that money, candidates will be silenced; their ideas will not be considered by the voters at elections.

[*740] These claims are doubly familiar to us

because we have already considered some of Montana's contribution limits and found they passed constitutional muster.[1] Why consider them again? We must because, after *Citizens United*,[2] what constitutes a sufficiently important state interest to justify limits on contributions has changed. Now, the prevention of quid pro quo corruption, or its appearance, is the only sufficiently important state interest to justify limits on campaign contributions. Before *Citizens United*, it was enough to show the state's interest was simply to prevent the influence contributors of large sums have on politicians, or the appearance of such influence. No longer so.

After a non-jury trial, the district court held Montana's contribution limits were unconstitutional, and permanently enjoined their enforcement.[3] But the district court applied neither *Citizens United*'s new formulation of what constitutes an important state interest nor the correct formulation of whether the state's contribution limits are "closely drawn"[4] to the state's goal of preventing quid pro quo corruption or its

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[1] *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003).

[2] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

[3] We granted a stay of that injunction, pending determination of this appeal. *Lair v. Bullock*, 697 F.3d 1200, 1202 (9th Cir. 2012).

[4] A "closely drawn" test is one that ensures the state's contribution limits are not lower than needed to accomplish the state's goal of preventing quid pro quo corruption or its appearance.

appearance. To allow Montana's political contribution limits to be tested under the new and more restrictive standard of *Citizens United*, and the correct "closely drawn" test, we reverse and remand for proceedings consistent with this opinion.

I.

A.

Since 1994, Montana has limited how much individuals, political action committees, and political-party-affiliated committees are allowed to contribute to candidates for state office. *See* Mont. Code Ann. § 13-37-216; *Lair v. Bullock*, 697 F.3d 1200, 1201 (9th Cir. 2012) ("*Lair I*"). By statute, individuals and political action committees ("PACs") can contribute up to $500 total to two candidates who filed jointly and are **[*741]** running together for the offices of governor and lieutenant governor, $250 to candidates running for other statewide offices, and $130 to candidates running for any other state public office, including candidates for the state senate and the state house of representatives. Mont. Code Ann. § 13-37-216(1)(a) ("Individual/PAC Limits"). These amounts are adjusted for inflation using the Consumer Price Index as a marker. Mont. Code Ann. § 13-37-216(4)(a). The current limits are $650, $320, and $170, respectively. Mont. Admin. R. § 44.10.338(1).

Political parties and their affiliated committees can contribute more than can individuals. Montana treats all committees that are affiliated with a political party as one entity.[5] Mont. Code Ann. § 13-37-216(3). A

[5] The statute defines political parties as "any political

political party or its party-affiliated committees can contribute, in the aggregate, up to $18,000 to two candidates running together for the offices of governor and lieutenant governor, $6,500 to candidates running for other statewide offices, $2,600 to candidates for public service commissioner, $1,050 to candidates for state senate, and $650 to candidates running for any other state public office, including the state house of representatives. Mont. Code Ann. § 13-37-216(3) ("Party Limits"). These amounts are also adjusted for inflation using the Consumer Price Index, and the current limits are $23,350, $8,450, $3,350, $1,350, and $850 respectively. Mont. Admin. R. § 44.10.338(2).

Appellees are individuals, PACs, and party-affiliated committees (together, "Lair") that challenge these restrictions as unconstitutional burdens on their freedom of speech under the federal Constitution's First Amendment. Intervenors are Rick Hill, a 2012 candidate for governor, Hill's campaign treasurer, and a committee associated with the Hill campaign (together, "Hill Campaign"). The Hill Campaign supports Lair's challenge. Appellants are the Attorney General of the State of Montana, Montana's Commissioner of Political Practices, and a county attorney, each sued in their official capacity (together, "Montana").

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organization that was represented on the official ballot at the most recent gubernatorial election." Mont. Code Ann. § 13-37-216(3). Donations that come from the political party itself and from political committees affiliated with that party are subject to one aggregate limit. *Id.*

B.

The district court held a non-jury trial in September 2012 and shortly after issued findings of fact and conclusions of law. The district court concluded Montana's Individual/PAC Limits and Party Limits were unconstitutional under the federal Constitution's First Amendment and permanently enjoined their enforcement. The district court's decision turned on our prior case addressing the constitutionality of Montana's contribution limits and a Supreme Court case that followed. Montana has appealed that decision. Because our decision today relies in large part on the chronology of those prior cases, as well as subsequent cases, we discuss them in chronological order.

1. *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003).

The story begins with our opinion in *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), upon whose continued validity this appeal turns. There, the district court conducted a non-jury trial on the constitutionality of the Individual/PAC Limits and found those limits were constitutional under *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny. *See Montana Right to Life Assoc. v. Eddleman*, 96-165-BLG-JDS, 2000 U.S. Dist. LEXIS 23161, [WL] at *3 (D. Mont. Sept. 19, 2000). We affirmed. We first set out the Supreme Court's framework for addressing campaign contribution limits per *Buckley*, the Court's foundational opinion on what governmental limitations of campaign finance violate the free speech rights guaranteed by the First Amendment. *Eddleman*, 343 F.3d at 1090-92. In

Buckley, the Supreme Court struck down limitations on how much candidates could spend on their campaigns, but upheld limitations on how much donors could give to candidates' campaigns. *Id.* at 1090. Central to the Supreme Court's decision validating contribution limits was its finding of the minimal effect those contribution limits had on individuals' First Amendment free speech rights: "A limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* (emphasis omitted) (quoting *Buckley*, 424 U.S. at 20). Per the Supreme Court, a contribution "serves as a general expression of support for the **[*742]** candidate and his views, but does not communicate the underlying basis for the support." *Id.* (quoting *Buckley*, 424 U.S. at 21). For that reason, a contribution limitation "involves little direct restraint on [the contributor's] political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* (quoting *Buckley*, 424 U.S. at 21). The Supreme Court therefore did not apply the "strict scrutiny" doctrine to contribution limits. *Id.* at 1091.[6] Instead, the Court explained that contribution limits will be upheld "if the State

[6] "Strict scrutiny" is the most demanding test that the First Amendment requires to test governmental regulation of speech for its constitutionality. It requires the governmental regulation serve "a compelling government interest and [be] narrowly drawn to serve that interest." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011).

demonstrates a sufficiently important interest and employs a means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* (quoting *Buckley*, 424 U.S. at 25).

We noted in *Eddleman* that the Supreme Court reaffirmed *Buckley* in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000). *Eddleman*, 343 F.3d at 1091. We synthesized those two cases to create a test for challenges to contribution limits:

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

Eddleman, 343 F.3d at 1092. In conducting this "closely drawn" tailoring analysis, courts must be "mindful that the dollar amounts employed to prevent corruption should be upheld unless they are 'so radical in effect as to render political association ineffective, drive the sound of a candidate's voice beyond the level of notice, and render contributions pointless.'" *Id.* at 1094 (quoting *Shrink Missouri*, 528 U.S. at 397). "[W]e look at all dollars likely to be forthcoming in a campaign, rather than the isolated contribution, and we also consider factors such as [1] whether the candidate can look elsewhere for money, [2] the percentage of contributions that are affected, [3] the total cost of the campaign, and [4] how much money each candidate would lose." *Id.* (internal citations

omitted).

In *Eddleman*, we identified Montana's asserted "important state interest" as "preventing corruption or the appearance of corruption." *Id.* at 1092. We explained that a "state's interest in preventing corruption or the appearance of corruption is not confined to instances of bribery of public officials, but extends 'to the broader threat from politicians too compliant with the wishes of large contributors.'" *Id.* (quoting *Shrink Missouri*, 528 U.S. at 389). We affirmed the district court's holding that Montana carried its burden to show that broad state interest. *Id.* at 1092-93; *see also Eddleman*, 2000 U.S. Dist. LEXIS 23161, at *9, *13 (concluding Montana had shown an important state interest in combating corruption and its appearance). Neither we nor the district court relied on a holding that Montana showed exclusively quid pro quo corruption or its appearance. *See Eddleman*, 343 F.3d at 1092-93; *Eddleman*, 2000 U.S. Dist. LEXIS 23161, at *6-8, *11-12. We **[*743]** also held the Individual/PAC Limits were "closely drawn" under this newly minted standard. *Id.* at 1093-96.

2. *Randall v. Sorrell*, 548 U.S. 230 (2006).

The Supreme Court decided *Randall v. Sorrell*, 548 U.S. 230 (2006), after our opinion in *Eddleman*. That case addressed the constitutionality of Vermont's campaign contribution limits. *Id.* at 236. Like Montana, Vermont limited contributions by individuals, PACs, and political parties to candidates for state office. *Id.* at 238-39. The Supreme Court found the contribution limits violated First Amendment free speech rights and were unconstitutional. *Id.* at 262-63. But no single opinion garnered a majority of the

justices. Justice Breyer wrote the plurality opinion, which Chief Justice Roberts and Justice Alito joined in relevant part. *Id.* at 246-53. The plurality outlined a new two-part, multi-factor "closely drawn" test for restrictions on contributions. Under that test, the reviewing court first should identify if there are any "danger signs" that the restrictions on contributions prevent candidates from amassing the resources necessary to be heard or put challengers at a disadvantage vis-a-vis incumbents. *Id.* at 249-52. The plurality found four "danger signs" in Vermont's contribution limits: "(1) The limits are set per election cycle, rather than divided between primary and general elections; (2) the limits apply to contributions from political parties; (3) the limits are the lowest in the Nation; and (4) the limits are below those we have previously upheld." *Id.* at 268 (Thomas, J., concurring) (listing the plurality's "danger signs"); *see also id.* at 249-53 (plurality op.); *Lair I*, 697 F.3d at 1208-10. The plurality held, if such danger signs exist, then the court must determine whether the limits are "closely drawn." *Randall*, 548 U.S. at 249, 253.

The plurality looked to "five sets of considerations" to determine whether the statute was closely drawn: (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."

Id. at 253-62; *Lair I*, 697 F.3d at 1210. The plurality found each factor weighed against the contribution limits' constitutionality and held the limits violated First Amendment free speech rights. *Randall*, 548 U.S. at 262.

Justice Thomas, joined by Justice Scalia, concurred in the decision to strike down Vermont's contribution limits. *Id.* at 265 (Thomas, J., concurring in the judgment). But Justice Thomas expressly disagreed with the plurality's "rationale for striking down that statute." *Id.* Instead, he would overrule *Buckley* and its progeny because "*Buckley* provides insufficient protection to political speech." *Id.* at 266. He noted "[t]he illegitimacy of *Buckley* is . . . underscored by the continuing inability of the Court (and the plurality here) to apply *Buckley* in a coherent and principled fashion." *Id.* Justice Kennedy concurred "only in the judgment" in a separate opinion that expressed skepticism of *Buckley* and its progeny's viability. *Id.* at 264-65 (Kennedy, J., concurring in the judgment). **[*744]**

3. Lair's Challenge in the District Court: *Lair v. Murry*, 903 F. Supp. 2d 1077 (D. Mont. 2012).

Lair now challenges the Individual/PAC Limits, which the Ninth Circuit upheld in *Eddleman*, and the Party Limits, which were not at issue in *Eddleman*. After a non-jury trial, the district court issued a brief order, without any analysis. It found the Individual/PAC Limits and Party Limits unconstitutional and enjoined their enforcement. Seven days later, the district court issued its findings of fact and conclusions of law. *Lair v. Murry*, 903 F. Supp. 2d 1077 (D. Mont. 2012). The district court

concluded it was not bound by the Ninth Circuit's decision in *Eddleman* because the Supreme Court's "closely drawn" analysis in *Randall* abrogated both *Eddleman*'s "closely drawn" analysis and *Eddleman*'s ultimate holding that the Individual/PAC Limits are constitutional. *Id.* at 1086-89. Unbound by *Eddleman*, the district court then proceeded to analyze Montana's Individual/PAC Limits and Party Limits under the *Randall* plurality's standard. The court first "assum[ed] that the State of Montana has a 'sufficiently important interest' in setting contribution limits." *Id.* at 1089 (quoting *Randall*, 548 U.S. at 247). The court then applied the *Randall* plurality's two-part, multi-factor "closely drawn" analysis to the facts presented at the bench trial and found Montana's limits were not closely drawn. *Id.* at 1089-93. The district court therefore permanently enjoined Montana from enforcing the Individual/PAC and Party Limits. *Id.* at 1093-94.

4. Emergency Motion in the Ninth Circuit to Stay: *Lair v. Bullock*, 697 F.3d 1200 (9th Cir. 2012).

Montana filed in the Ninth Circuit an emergency motion to stay the district court's injunction. *Lair I*, 697 F.3d at 1203. As a part of its analysis, our motions panel was required to determine whether Montana "made a strong showing that [it] is likely to succeed on the merits" of its appeal. *Id.* (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). The panel concluded Montana made that showing because, contrary to what the district court had stated, the Supreme Court's decision in *Randall* did *not* abrogate the Ninth Circuit's opinion upholding the Individual/PAC Limits in *Eddleman*. To that end, the panel applied the

Supreme Court's test from *Marks v. United States*, 430 U.S. 188 (1977), to determine whether *Randall* had a binding majority opinion. *Id.* at 1204-06. That test asks whether, in a fractured Supreme Court decision, "one opinion can be meaningfully regarded as narrower than another *and* can represent a common denominator of the Court's reasoning." *Id.* at 1205 (quoting *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1140 (9th Cir. 2005)). The panel held that Justice Breyer's plurality opinion could not represent a "common denominator" with Justice Thomas's concurring opinion because Justices Thomas and Scalia would strike down *Buckley* and its progeny in their entirety rather than apply *Buckley*, as did Justice Breyer's plurality. *Id.* As a result, there was no majority, controlling opinion in *Randall*: "The only binding aspect of *Randall* . . . is its judgment, striking down the Vermont contribution limit statute as unconstitutional." *Id.* at 1206. The motions panel therefore held Montana was likely to succeed on the merits of its appeal and, after addressing the other stay factors, stayed the district court's permanent injunction pending a decision by a merits panel. *Id.* at 1215-16. The case then came before us. **[*745]**

II.

We review for abuse of discretion a district court's decision to issue a permanent injunction. *Gathright v. City of Portland*, 439 F.3d 573, 576 (9th Cir. 2006). Under that standard, we review legal conclusions de novo. *Brown v. California DOT*, 321 F.3d 1217, 1221 (9th Cir. 2003). We review the district court's findings of fact for clear error, but review the application of law to those facts de novo on free speech issues. *Id.; see also*

La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V., 762 F.3d 867, 879 (9th Cir. 2014) ("If the district court identified and applied the correct legal rule to the relief requested, we will reverse [a permanent injunction] only if the court's decision resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." (citation omitted) (internal quotation marks omitted)).

The most important standard for this case comes from our en banc decision in *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc). *Gammie* explained that three-judge panels are normally bound by the decisions of prior three-judge panels. *Id.* at 892-93. But "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Id.* at 893.

A.

The central question in this appeal is what parts of *Eddleman*, if any, remain good law in this circuit. Lair contends the district court was not bound to apply *Eddleman*'s "closely drawn" analysis or to follow *Eddleman*'s holding that the Individual/PAC Limits are constitutional. Lair makes two arguments in support: (1) *Citizens United* abrogated *Eddleman*'s "important state interest" analysis because, after *Citizens United*, a state may no longer justify limits on political contributions as a means to prevent politicians too compliant with the interests of contributors of large

sums—only quid pro quo corruption or its appearance can justify contribution limits; and (2) *Randall*'s two-part, multi-factor "closely drawn" test, which evaluates various "danger signs" and case-specific factors, abrogated *Eddleman*'s "closely drawn" test, which analyzes (a) whether the contribution limits narrowly combat quid pro quo corruption or its appearance, (b) whether contributors are able to associate with the candidate in ways other than donating money, and (c) whether the candidate is able to amass sufficient resources to wage an effective campaign. We address each argument in turn.

1. *Citizens United* abrogated *Eddleman*'s "important state interest" analysis.

Lair argues the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and by extension *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), abrogated *Eddleman*'s "important state interest" analysis; therefore, *Eddleman* is no longer binding precedent on the point of **[*746]** what constitutes an "important state interest" sufficient to limit political speech through contribution limitations. The Supreme Court has long held that preventing "corruption or the appearance of corruption" is the only valid interest that supports limits on campaign contributions. *See, e.g., Shrink Missouri*, 528 U.S. at 388-89. But what constitutes "corruption" has been open to debate. *Buckley* held that "corruption" includes quid pro quo arrangements or the appearance thereof. *Id.* (explaining *Buckley*). The Supreme Court in *Shrink Missouri* defined "corruption" more broadly, explaining that "corruption" is "not confined to bribery of public

officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 389. To that end, the government can "constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery." *Id.* (quoting *Buckley*, 424 U.S. at 28).

In *Eddleman*, the district court and the Ninth Circuit relied on *Shrink Missouri*'s broader definition of corruption to find Montana had shown an "important state interest." In that regard, the state interest encompassed "combat[ing] improper influence, or the appearance thereof, resulting from large campaign contributions." *Eddleman*, 2000 U.S. Dist. LEXIS 23161, at *6-7. The district court expressly relied on *Shrink Missouri*'s holding that the valid corruption interest is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributions." 2000 U.S. Dist. LEXIS 23161, [WL] at *9 (quoting *Shrink Missouri*, 528 U.S. at 389); *see also* 2000 U.S. Dist. LEXIS 23161, at *6-7, *11-12 (reiterating the district court was relying on an "influence" standard). On appeal, we also relied on the same broader definition of "corruption" in affirming the district court. *See Eddleman*, 343 F.3d at 1092-93.

The Supreme Court has since clarified what qualifies as "corruption" under the "important state interest" analysis. In *Citizens United*, the Court explained that "[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, *that interest was limited to quid pro quo corruption*."

Citizens United, 558 U.S. at 359 (emphasis added). The Court rejected the broader "influence" standard: "Reliance on a 'generic favoritism or *influence* theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.'" *Id.* (alteration in original) (emphasis added) (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 296 (2003) (Kennedy, J., concurring)). We have already recognized that *Citizens United* "narrowed the scope of the anti-corruption rationale to cover quid pro quo corruption only, as opposed to money spent to obtain influence over or access to elected officials." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1119 (9th Cir. 2011) (quoting *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 694 n.5 (9th Cir. 2010)) (internal quotation marks omitted). Because *Eddleman* relied at least in part on a state's interest in combating "influence," whereas *Citizens United* narrowed the analysis to include quid pro quo corruption but to exclude the state's interest in combating "influence," *Citizens United* abrogated *Eddleman*'s "important state interest" analysis. *See Gammie*, 335 F.3d at 893. *Eddleman*'s holding that the Individual/PAC Limits are constitutional is no longer binding on this panel or courts of the Ninth Circuit because that holding relied on a state interest analysis now made invalid by *Citizens United*. We must now follow *Citizens United*'s narrower analysis: "corruption" means only quid pro quo corruption, or its appearance.[7]

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[7] Montana argues that *Citizens United* could not have narrowed the "important state interest" analysis because *Citizens United* addressed only expenditure limits, and not contribution limits. Our prior panels have already held that

[*747]

2. *Randall* did not abrogate *Eddleman*'s "closely drawn" analysis.

Lair also reprises the argument that the Supreme Court abrogated *Eddleman*'s "closely drawn" analysis in *Randall* when a plurality outlined a different "closely drawn" analysis, and the district court's reliance on the *Randall* plurality was therefore not legal error. This argument is foreclosed by *Gammie* because of our motions panel decision. The motions panel in *Lair I* explicitly held that *Randall* did not contain a majority opinion capable of abrogating *Eddleman*. *Lair I*, 697 F.3d at 1204 ("*Randall* is not binding authority because there was no opinion of the Court."); *id.* at 1206 ("The only binding aspect of *Randall* . . . is its judgment, striking down the Vermont contribution limit statute as unconstitutional."); *id.* ("Since *Randall* is otherwise only persuasive, in this context it could not have altered the law as previously dictated by such cases as *Buckley* and *Shrink Missouri*, the law we expressly relied upon in *Eddleman*."). Lair contended at oral argument that a motions panel's decision cannot bind a merits panel, and as a result we are not bound by the

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Citizens United narrowed the interests that can support contribution limits to quid pro quo or its appearance. *Thalheimer*, 645 F.3d at 1119; *Long Beach*, 603 F.3d at 694. But to the extent *Citizens United* left that question open, *McCutcheon* confirmed that quid pro quo or its appearance are the only interests that can support contribution restrictions. *McCutcheon*, 134 S. Ct. at 1450-51 (plurality op.); *id.* at 1462-64 (Thomas, J., concurring).

motions panel's analysis in this case. Not so. We have held that motions panels can issue published decisions. *See Haggard v. Curry*, 631 F.3d 931, 933 n.1 (9th Cir. 2010); *Pearson v. Muntz*, 606 F.3d 606, 608 n.2 (9th Cir. 2010); *see also* General Order 6.3(g)(3)(ii); Circuit Rule 36-1. Under *Gammie*, we are bound by a prior three-judge panel's published opinions, *Gammie*, 335 F.3d at 892-93, and a motions panel's published opinion binds future panels the same as does a merits panel's published opinion, *see* Circuit Rule 36-1 ("A written, reasoned disposition of a case *or motion* which is designated as an opinion [under the Ninth Circuit's criteria for publication] is an OPINION of the Court. . . . All opinions are published . . . . As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies *to be reported and cited*." (emphasis added)). In any event, the *Lair I* panel was not the first one to hold that no opinion in *Randall* carried a majority. Another panel arrived at that same conclusion in 2011. *See Thalheimer*, 645 F.3d at 1127 n.5. We can hold *Eddleman* was abrogated only if "the reasoning or theory" of *Eddleman* "is clearly irreconcilable with the reasoning or theory of . . . later and *controlling* authority." *Gammie*, 335 F.3d at 893 (emphasis added). With no majority opinion, *Randall* cannot serve as the requisite "controlling authority" capable of abrogating our precedent. *See Thalheimer*, 645 F.3d at 1127 n.5.

B.

Where does this leave us? We hold today the district court was incorrect to find *Randall*'s "closely drawn" analysis abrogated *Eddleman*'s "closely drawn" analysis, because there simply was no binding *Randall*

decision on that point. But we also hold that *Citizens United* did abrogate *Eddleman* because *Eddleman* relied on a now-invalid "important state interest"—combating influence, not just preventing quid pro quo corruption or its appearance. Because *Eddleman* relied on a now-invalid state interest, its ultimate **[*748]** holding that the Individual/PAC Limits are constitutional is abrogated. But *Citizens United* left untouched *Eddelman*'s formulation of the overall framework for determining whether contribution limits are constitutional; it simply narrowed what constitutes an "important state interest." *Eddleman*'s framework is otherwise still sound, and the test remains the same going forward:

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

Eddleman, 343 F.3d at 1092. As a result, the district court's decision to apply *Randall*'s "closely drawn" analysis to the Individual/PAC Limits and the Party Limits was legal error. The district court therefore abused its discretion when it entered a permanent injunction, and we remand for the district court to apply the correct standard.[8]

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[8] At oral argument, Lair asked us to review the record independently to determine whether Montana's contribution limits are valid. Though we have recognized review in

We provide some instruction on remand. The district court here assumed Montana had shown an "important state interest" but did not identify what that interest was. But it is difficult to address whether contribution limits further the state's asserted interest, and whether the limits are "closely drawn" to that interest, unless we know exactly what that interest is. *See, e.g., McCutcheon*, 134 S. Ct. at 1445 ("[W]e must assess the fit between the stated governmental objective and the means selected to achieve that objective."); *id.* at 1456 ("In the First Amendment context, fit matters."). On remand, we instruct the district court either (1) to decide whether Montana has

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First Amendment cases is more rigorous than other cases, we still give some deference to the district court's factual findings. *See Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 670 (9th Cir. 1990) ("[W]e must simultaneously ensure the appropriate appellate protection of First Amendment values and still defer to the findings of the trier of fact."); *see also Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1082 (9th Cir. 2002). We have no factual findings to review for either the "important state interest" prong, because the district court assumed Montana had shown an important state interest (without identifying what that interest was), or the correct *Eddleman* "closely drawn" analysis, because the district court applied the incorrect *Randall* "closely drawn" analysis. Further, the parties developed a record with a different "important state interest" standard in mind. Montana should have an opportunity to develop a record aimed at the new "important state interest" standard as well as the corresponding "closely drawn" analysis. We express no opinion on how the parties should supplement the current record if they so choose to do.

carried its burden in showing the contribution limits further a valid "important state interest" or, if the district court again assumes the state has carried its burden, (2) to identify expressly what interest the district court assumes exists. Doing so will ensure the district court and any reviewing courts will be able to evaluate whether the contribution limits are "closely drawn."[9] **[*749]**

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[9] Intervenor Rick Hill was the Republican nominee for governor for the 2012 election who received a $500,000 contribution from the Montana Republican Party during the few days the district court's injunction was in effect. The Montana Commissioner of Political Practices opened an investigation into Hill for his receipt and use of the $500,000 donation. The Commissioner has stayed that investigation pending the outcome of this appeal.

Hill intervened in this appeal after the *Lair I* panel vacated the district court's injunction. Hill argues that if we reverse the district court and vacate the injunction against the enforcement of the Party Limits, as we do today, we should leave in place the district court's order enjoining enforcement of those limits for the few days the injunction was in place. In effect, Hill asks this panel to enjoin Montana from prosecuting Hill for receiving the $500,000 donation while the district court's permanent injunction was in place. This issue was not presented to the district court, as Hill intervened after the *Lair I* decision. Moreover, it is not clear there is a live dispute between Hill and Montana; indeed, a district court has already found Hill's attempt to enjoin Montana from prosecuting him to be unripe because the threat of prosecution was too remote. *See* Order at 13-14, *Hill v. Motl*, 6:13-cv-41-RKS (D. Mont. Oct. 18, 2013), ECF No. 35. We therefore decline to grant the relief Hill requests.

III

The district court applied the wrong legal standard prior to enjoining permanently the enforcement of Montana's restrictions on campaign contributions by individuals, PACs, and political parties. We therefore reverse and remand for proceedings consistent with this opinion.[10]

REVERSED AND REMANDED.

[10] Because we reverse and remand, Lair's renewed motion to lift our stay of the district court's injunction and Montana's motion to strike portions of Lair's motion are denied as moot. We grant the Hill Campaign's motion for judicial notice.

[***Editing Note:*** *Page numbers from the reported opinion, 697 F.3d 1200, are indicated, e.g., [***1201**].*]

[Filed: 10/16/2012]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUG LAIR; STEVE DOGIAKOS; AMERICAN TRADITION PARTNERSHIP; AMERICAN TRADITION PARTNERSHIP PAC; MONTANA RIGHT TO LIFE ASSOCIATION PAC; SWEET GRASS COUNCIL FOR COMMUNITY INTEGRITY; LAKE COUNTY REPUBLICAN CENTRAL COMMITTEE; BEAVERHEAD COUNTY REPUBLICAN CENTRAL COMMITTEE; JAKE OIL, LLC; JL OIL, LLC; CHAMPION PAINTING; JOHN MILANOVICH,

Plaintiffs-Appellees,

v.

STEVE BULLOCK, in his official capacity as Attorney General of the State of Montana; JAMES MURRY, "Jim", in his official capacity as Commissioner of Political Practices; LEO GALLAGHER, in his official capacity as Lewis and Clark County Attorney,

Defendants-Appellants.

No. 12-35809

D.C. No. 6:12-cv-00012-CCL

OPINION

Charles C. Lovell, Senior District Judge, Presiding

Submitted to Motions Panel October 15, 2012

Before: GOULD, CLIFTON, and BYBEE, Circuit Judges.

Opinion by Judge Bybee

BYBEE, Circuit Judge:

[*1201] Since 1994, Montana has regulated the amount that individuals, political committees, and political parties can contribute to candidates for state office. Mont. Code Ann. § 13-37-216, *as adjusted by* Admin. R. Mont. § 44.10.338.[1] In 2003, we upheld this provision against a constitutional challenge based on *Buckley v. Valeo*, 424 U.S. 1, **[*1202]** (1976), and *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000). *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004). Applying the "analytical framework set forth in *Buckley* and [*Shrink Missouri*]," we held that "Montana's interest in purging corruption and the appearance of corruption from its electoral system is sufficiently important to withstand constitutional scrutiny" and that § 13-37-216 was "closely tailored to achieving those ends." *Id*. at 1098. We concluded that § 13-37-216 was "constitutional and [did] not violate the First Amendment." *Id*.

On October 3, 2012, with less than five weeks before the general election and after absentee voting in Montana began, the district court concluded that

[1] We have attached Mont. Code Ann. § 13-37-216 ("Appendix A") and Admin. R. Mont. § 44.10.338 ("Appendix B") as appendices to this opinion.

"Montana's contribution limits in Montana Code Annotated § 13-37-216 are unconstitutional under the First Amendment." Order, *Lair v. Murry*, No. CV 12-12-H-CCL, 2012 U.S. Dist. LEXIS 146645 at *4 (D. Mont. Oct. 10, 2012) [hereinafter Order]. The district court permanently enjoined Montana from enforcing its campaign contribution limits. *Id*. at *5. In an opinion and order issued on October 10, 2012, the district court explained that our decision in *Eddleman* was "not binding on this Court because the U.S. Supreme Court's intervening decision in *Randall [v. Sorrell*, 548 U.S. 230 (2006),] compels a different outcome." Opinion and Order, *Lair v. Murry*, No. CV 12-12-H-CCL, 2012 U.S. Dist. LEXIS 146645 at *28 (D. Mont. Oct. 10, 2012).

The State of Montana has sought a stay of the district court's order pending appeal. For the reasons we explain below, we believe that the state is likely to succeed on appeal. We conclude that the State of Montana has made a strong showing that a merits panel of this Court will likely conclude that, absent en banc proceedings or an intervening decision of the Supreme Court, we remain bound by our decision in *Eddleman*. *See Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc). We also conclude that a merits panel is likely to hold that the analytical framework of the Supreme Court's decision in *Randall* does not alter the analysis of *Buckley* or *Shrink Missouri* in a way that affects our decision in *Eddleman*, for three reasons. First, there is no opinion of the Court in *Randall*. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1127 n.5 (9th Cir. 2011) ("[T]he plurality opinion [in *Randall*] [i]s persuasive authority, though not a binding precedent." (internal quotation

marks omitted)). Second, even if we thought that Justice Breyer's plurality opinion represented the narrowest view of a majority of the Court, it did not depart from the principles of *Buckley* and *Shrink Missouri* that we applied in *Eddleman*. *Randall*, 548 U.S. at 242 (opinion of Breyer, J.) ("[T]his Court has repeatedly adhered to *Buckley's* constraints . . . ."). Third, even if we applied *Randall* to § 13-37-216, we cannot find, on the basis of the district court's findings, reason to disagree with, much less overturn, *Eddleman*. In light of Montana's interest in regulating campaign contributions, the lack of evidence that other parties will be substantially injured, and the public's substantial interest in the stability of its electoral system in the final weeks leading to an election, we will stay the order pending the state's appeal. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

I. PROCEEDINGS BELOW

The plaintiffs-appellees, various individuals, political action committees, and other political organizations, brought suit in September 2011 to challenge several provisions **[*1203]** of Montana's finance and election laws. The defendants-appellants are various officials of the State of Montana. Only one provision, § 13-37-216 of the Montana Code Annotated, which limits contributions that individuals and political committees can make to candidates, is at issue in this case. The district court held a bench trial on September 12-14, 2012. On October 3, 2012, the district court issued a brief order recounting the procedural history of the suit and the fact of the bench trial. The court stated that "[h]aving reviewed and considered the entire record and the parties' arguments

and evidence, the Court concludes that Montana's contribution limits in Montana Code Annotated § 13-37-216 are unconstitutional under the First Amendment." Order at 4. The court permanently enjoined the enforcement of § 13-37-216. The district court did not issue an opinion, but stated that "complete and extensive findings of fact and conclusions of law that support this order" would be filed separately. Order at 5. The order was filed before it issued the findings of fact and conclusions of law "so that th[e] order c[ould] be issued before voting begins in the upcoming election." *Id*.

The following day, October 4, 2012, the state defendants-appellants filed for a stay pending appeal. We ordered an expedited response from the plaintiffs-appellees, which they filed on October 9, 2012. That same day, noting that the district court had not issued findings and conclusions, we found that we were "severely constrained in [our] consideration of the underlying issues raised in the emergency motion." Order, *Lair v. Murry*, 847 F. Supp. 2d 843, 2012 U.S. App. LEXIS 21656, *2 (9th Cir. 2012). We nevertheless ordered that the injunction be "temporarily stayed pending further order of the court." 2012 U.S. App. LEXIS 21656 at *2.

The district court issued an Opinion and Order containing its findings of fact and conclusions of law on October 10, 2012. The state filed a reply in support of its motion for a stay on October 11, 2012.

II. STANDARD OF REVIEW

"A stay is not a matter of right. . . . It is instead 'an exercise of judicial discretion' . . . [that] 'is dependent upon the circumstances of the particular case.'" *Nken*,

556 U.S. at 433 (internal citations omitted) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672-73 (1926)). Judicial discretion in exercising a stay is to be guided by the following legal principles, as distilled into a four factor analysis in *Nken*: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id*. at 434 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).[2] "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [this Court's] discretion." *Id*. at 433-34.

III. DISCUSSION

As discussed in detail below, we find that the State of Montana has satisfied this burden. As the *Nken* factors illustrate, especially in light of the delicate campaign **[*1204]** contribution equilibrium leading up to the imminent election, we should and will exercise our discretion to stay the district court's order pending resolution of the appeal by a merits panel of this court.

A. *Strong Showing that Success is Likely on the Merits*

The first two *Nken* factors "are the most critical." *Id*. at 434. Regarding the first factor, *Nken* held that it

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[2] As *Nken* recognized, "[t]here is substantial overlap between these and the factors governing preliminary injunctions." *Nken*, 556 U.S. at 434. *Compare id., with Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

is not enough that the likelihood of success on the merits is "better than negligible" or that there is a "mere possibility of relief." *Id.* (internal quotation marks omitted). Since *Nken* did not specify "the exact degree of likely success that stay petitioners must show, . . . courts routinely use different formulations to describe this [factor]." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (per curiam). We have concluded that many of these formulations, including "reasonable probability," "fair prospect," "substantial case on the merits," and "serious legal questions . . . raised," are largely interchangeable. *Id.* at 967-68. All of these formulations indicate that, "at a minimum," a petitioner must show that there is a "substantial case for relief on the merits." *Id.* at 968. The standard does not require the petitioners to show that "it is more likely than not that they will win on the merits." *Id.* at 966.

We find that the State of Montana has met its burden to make a strong showing that success on the merits is likely. In 2003, we specifically considered the constitutionality of the Montana statute at question here. *Eddleman*, 343 F.3d at 1092-96. Our decision in *Eddleman* stands as a barrier to be overcome, a barrier that works significantly to the State of Montana's advantage. The plaintiffs in this case do not argue that anything has fundamentally changed in Montana political campaigns since our decision in *Eddleman* that would call into question our conclusions made in 2003. In fact, the evidence presented before the district court in this case appears quite similar to the evidence that was presented in *Eddleman*. The only change in circumstance pointed to by the plaintiffs is the Supreme Court's decision in *Randall*. The presumption

is that our holding in *Eddleman* is controlling in this case, *see Miller*, 335 F.3d at 892-93, and we find that *Randall* does not overcome this presumption. *Randall* is not binding authority because there was no opinion of the Court. Further, even if we looked to Justice Breyer's plurality opinion in *Randall*, it is not clearly irreconcilable with the pre-existing law that we applied in *Eddleman*. Finally, even if we apply *Randall*, our limited review suggests that *Randall* would not compel a result different from *Eddleman*. This is particularly the case given the points of tension and possible errors that we find on the face of the district court's Opinion and Order. Therefore, taken as a whole, and based upon our limited review, necessitated by the imminent election, we conclude that the State of Montana has made a "substantial case for relief on the merits."

1. Whether *Randall* has a majority opinion

Marks v. United States held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977) (internal quotation marks omitted). The Supreme Court has acknowledged that in some cases "[t]his test is more easily stated than applied," and that under certain circumstances it may not be "useful to pursue the *Marks* inquiry to the utmost logical possibility." *Nichols v. United States*, 511 U.S. 738, 745-46, **[*1205]** (1994) (recognizing that where the application of the *Marks* test to a prior splintered decision "ha[d] so obviously baffled and divided the lower courts that ha[d] considered it," there is reason

to reexamine that prior decision).

Likewise, we have also held that the *Marks* standard is not always helpful, and should only be applied "where one opinion can be meaningfully regarded as narrower than another *and* can represent a common denominator of the Court's reasoning." *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1140 (9th Cir.) (internal quotation marks omitted) (citing other circuits that have held similarly), *amended by* 416 F.3d 939 (9th Cir. 2005). This standard requires that the narrowest opinion is actually the "logical subset of other, broader opinions," such that it "embod[ies] a position implicitly approved by at least five Justices who support the judgment." *Id.* (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)); *see also United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) (explaining that *Marks* requires us to find a "legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree"). If there is no such narrow opinion, "the only binding aspect of a splintered decision is its specific result." *Rodriguez-Preciado*, 399 F.3d at 1140.

Randall is the epitome of a splintered decision. Although six Justices ultimately concurred in the judgment, the case generated six opinions, four of which were required for the six Justices to concur in the judgment. Since the opinions of both Justices Kennedy and Thomas would revisit—or, as preferred by Justices Thomas and Scalia, overrule—*Buckley*, Justice Breyer's plurality decision offers the narrowest rationale in support of the judgment. *See Randall*, 548 U.S. at 265 (Kennedy, J., concurring in the judgment)

("Viewed within the legal universe we have ratified and helped create, the result the plurality reaches is correct; given my own skepticism regarding that system and its operation, however, it seems to me appropriate to concur only in the judgment."); *id.* at 265-66 (Thomas, J., concurring in the judgment) ("Although I agree with the plurality that [the Vermont contribution limit statute] is unconstitutional, I disagree with its rationale for striking down that statute. . . . I continue to believe that *Buckley* provides insufficient protection to political speech, the core of the First Amendment. . . . [*S*]*tare decisis* should pose no bar to overruling *Buckley* and replacing it with a standard faithful to the First Amendment.").

It cannot be said, however, that Justice Breyer's plurality opinion represents a "common denominator of the Court's reasoning," enjoying the assent of five Justices. Justices Thomas and Scalia would "overrule *Buckley* and subject both the contribution and expenditure restrictions of [the Vermont statute] to strict scrutiny, which they would fail." *Id.* at 267 (Thomas, J., concurring in the judgment). Thus, further consideration of Justice Kennedy's position is irrelevant for our purposes, since at most Justice Breyer's rationale could only garner the assent of four Justices. If Justice Kennedy's position were relevant to this inquiry, however, his "skepticism regarding that system and its operation," coupled with his previously asserted criticism of *Buckley*, strongly suggests that only three Justices assented to Justice Breyer's rationale. *Id.* at 265 (Kennedy, J., concurring in the judgment); *see also Shrink Missouri*, 528 U.S. at 409-10 (Kennedy, J., dissenting) ("I would overrule *Buckley*

. . . . The First Amendment ought to be allowed to take its own course without further obstruction from the artificial **[*1206]** system we have imposed. It suffices here to say that the law in question does not come even close to passing any serious scrutiny.").

This analysis is consistent with our previous recognition—a holding binding upon this Court, *see Miller*, 335 F.3d at 892-93—that no position in *Randall* garnered the support of more than three Justices. *Thalheimer*, 645 F.3d at 1127 & n.5 (explaining that "Justice Breyer's plurality opinion announced the judgment of the Court," so "we follow the plurality opinion as persuasive authority, though not a binding precedent" since "Justice Breyer's plurality opinion was [only] joined by two justices, one in full and one in part" (internal quotation marks omitted)). The only binding aspect of *Randall*, then, is its judgment, striking down the Vermont contribution limit statute as unconstitutional. Since *Randall* is otherwise only persuasive, in this context it could not have altered the law as previously dictated by such cases as *Buckley* and *Shrink Missouri*, the law we expressly relied upon in *Eddleman*.

2. Whether Justice Breyer's opinion alters *Buckley*

Even if Justice Breyer's plurality did represent a majority opinion under *Marks*, however, *Randall* is not irreconcilable with the principles of *Buckley* and *Shrink Missouri*. In *Miller v. Gammie*, sitting en banc, we considered the question of "when a three-judge panel may reexamine normally controlling circuit precedent in the face of an intervening United States Supreme Court decision." *Miller*, 335 F.3d at 892. We

held that "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Id*. at 893. We further held that "the issues decided by the higher court need not be identical in order to be controlling." *Id*. at 900. We made it clear that this standard applies not only to three-judge panels but also to district courts within this circuit. *Id*. at 899 (describing prior circuit decisions effectively overruled based on higher intervening authority as "no longer binding on district judges and three-judge panels of this court"); *see also Day v. Apoliona*, 496 F.3d 1027, 1031 (9th Cir. 2007) ("The *Miller* standard is thus not met, and we (and the district court) are bound by our earlier precedent.").

Since *Miller*, we have elaborated on this standard. Recently, in *In re Flores*, we explained that "we are bound by our prior precedent if it can be reasonably harmonized with the intervening authority." *In re Flores*, 692 F.3d 1021, 1030 (9th Cir. 2012). In that case, we explained that under *Miller*, we were compelled to defer to prior circuit precedent because (1) the "overall analytical framework" of the intervening Supreme Court case was "consistent with our overall analytical approach" in prior circuit precedent, *id*. at 1030-31, and (2) the specific application of that framework in the intervening Supreme Court case did not mandate a result in the prior case in conflict with the decision rendered by this Court in that case. *Id*. at 1030-38. As *Flores*' first consideration suggests, "*Miller v. Gammie* . . . instructs us to focus on the *reasoning*

and *analysis* in support of a holding, rather than the holding alone." *United States v. Lindsey*, 634 F.3d 541, 550 (9th Cir. 2011); *see also Miller*, 335 F.3d at 900 (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989)) (favorably discussing Justice Scalia's assertion in a law review essay that lower courts are bound by higher courts' "mode of analysis," not just their holdings).

[*1207] Although we should consider the intervening authority's reasoning and analysis, as long as we can apply our prior circuit precedent without "running afoul" of the intervening authority, we must do so. *United States v. Orm Hieng*, 679 F.3d 1131, 1140 (9th Cir. 2012). It is not enough for there to be "some tension" between the intervening higher authority and prior circuit precedent, *id.* at 1140-41, or for the intervening higher authority to "cast doubt" on the prior circuit precedent, *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011). The intervening higher precedent must be "clearly inconsistent" with the prior circuit precedent. *Orm Hieng*, 679 F.3d at 1141. This is a "high standard." *Delgado-Ramos*, 635 F.3d at 1239.

Applying these principles here, it is obvious that even if Justice Breyer's plurality opinion were binding on this court, *Randall* is not "clearly irreconcilable" with *Eddleman. Miller*, 335 F.3d at 893. On its face, Justice Breyer's plurality opinion does not purport to change the state of the law but expressly looked to *Buckley* and its progeny: "Over the last 30 years, in considering the constitutionality of a host of different campaign finance statutes, this Court has repeatedly adhered to *Buckley's* constraints . . . ." *Randall*, 548

U.S. at 242 (opinion of Breyer, J.); *see id*. at 246 ("[W]e begin with *Buckley*."). Indeed, the Breyer opinion specifically found that "[s]ince *Buckley*, the Court has consistently upheld contribution limits." *Id*. at 247. Although the Court ultimately struck down Vermont's contribution limits, it did so consistent with the principles announced in *Buckley*.

If anything, *Randall's* plurality only clarified and reinforced *Buckley* and its progeny. In *Randall*, Justice Breyer observed that *Buckley* "general[ly] approv[ed] of statutes that limit campaign contributions," as long as the statute could demonstrate a "sufficiently important interest." *Id*. at 246-47. The importance of *Randall*, then, was that the plurality affirmed *Buckley*, while at the same time showing that *Buckley* was not a rubberstamp. Other courts and scholars have concluded that *Randall* is an application of *Buckley*, not a repudiation.[3]

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[3] *See, e.g., McNeilly v. Land*, 684 F.3d 611, 617 (6th Cir. 2012) (finding that *Randall* "[a]ppl[ied] *Buckley*" in analyzing Vermont's contribution limit); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 291 (4th Cir. 2008) (describing *Randall* as affirming principles laid out in *Buckley* in discussing a North Carolina contribution limit); Allison R. Hayward, *The Per Curiam Opinion of Steel*: Buckley v. Valeo *as Superprecedent? Clues from Wisconsin and Vermont*, 2006 Cato Sup. Ct. Rev. 195, 196 (describing *Randall* as "declin[ing] to rework *Buckley v. Valeo's* holding"); Jason B. Frasco, Note, *Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States*, 92 Cornell L. Rev. 733, 742 (2007) ("[W]ith respect to the contribution limits, the plurality again found the principles in Buckley to be controlling."); Aimee Priya Ghosh, Comment, *Disrobing Judicial Campaign Contribu-*

As Justice Breyer wrote, *Buckley* requires that contribution limits not "prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy.'" *Id*. at 248 (quoting *Buckley*, 424 U.S. at 21) (alteration in *Randall*). He also emphasized that contribution limits cannot "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage." *Id.; see also Shrink Missouri*, 528 U.S. at 403-04 (Breyer, J., concurring). But, as **[*1208]** Justice Breyer said, "we have 'no scalpel to probe' each possible contribution level," so the Court "cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives." *Randall*, 548 U.S. at 248 (opinion of Breyer, J.) (quoting *Buckley*, 424 U.S. at 30). Accordingly, "the legislature is better equipped to make such empirical judgments." *Id*. *Randall* reaffirmed *Buckley's* recognition that such deference to the legislature has a limit, that after *Buckley* there is a "lower bound." *Id*. at 248-49.

Randall's discussion of "danger signs" and the plurality's subsequent analysis of "five sets of considerations" did not present a new test for analyzing contribution limits; rather, this discussion only explained a mode for determining whether the limits were "narrowly tailored" under *Buckley*. *Id*. at

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tions: A Case for Using the Buckley *Framework to Analyze the Constitutionality of Judicial Solicitation Bans*, 61 Am. U. L. Rev. 125, 140 (2011) ("[T]he Court recognized that Buckley established the existence of a 'lower bound' under which a regulation would be so restrictive as to violate the First Amendment.").

249-262. *Randall* stands as a warning to lower courts that *Buckley* does not license them to approve any contribution limitation that professes an anti-corruption rationale; instead, lower courts must carefully analyze statutes to ensure that they are narrowly tailored. *Id*. at 249-50.

We took such a careful approach in *Eddleman*. As such, the "overall analytical framework" in *Eddleman* is in harmony with *Randall*. In *Eddleman*, we began with *Buckley's* premise that contribution limits are constitutional as long as they do not prevent candidates from "amassing the resources necessary for effective advocacy." *Eddleman*, 343 F.3d at 1091 (quoting *Buckley*, 424 U.S. at 21). We noted that such restrictions "are subject to the 'closest scrutiny'" and must be "closely drawn." *Id*. (quoting *Buckley*, 424 U.S. at 25). We reviewed the Court's *post-Buckley* opinions and summarized the principles to be derived therefrom.[4]

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[4] We wrote:

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

Eddleman, 343 F.3d at 1092.

3. Whether *Eddleman's* analysis is consistent with *Randall's* analysis

Even if we thought *Randall* altered *Buckley* in some way, our decision in *Eddleman* considered the same issues that were important in Justice Breyer's plurality opinion. The State of Montana has made a strong showing that *Randall* would not have mandated a different result in *Eddleman*.

a. The Four "Danger Signs"

Justice Breyer's opinion in *Randall* identified four "danger signs" to look for in a campaign contribution statute: "(1) The limits are set per election cycle, rather than divided between primary and general elections; (2) the limits apply to contributions from political parties; (3) the limits are the lowest in the Nation; and (4) the limits are below those we have previously upheld." *Id.* at 268 (Thomas, J., concurring in the judgment) (listing Justice Breyer's "danger signs"). We considered, in some form, each of these "danger signs" in *Eddleman*.

First, we found that the Montana contribution limits "apply to 'each election in a campaign,' [so,] the amount an individual may contribute to a candidate doubles when the candidate participates in a contested **[*1209]** primary." *Eddleman*, 343 F.3d at 1088. By comparison, Vermont's limits applied to a "two-year general election cycle." *Randall*, 548 U.S. at 238.

Second, although *Eddleman* did not specifically deal with the limit on campaign contributions by political parties, there was no need to do so, because in Montana the aggregate contribution limits for political parties is much higher than the individual and political committee contribution limits. *See Eddleman*,

343 F.3d at 1094 ("[W]hile decreasing PAC and individual contributions, [Montana's contribution limit statute] simultaneously increased the amount of money political parties may contribute to a candidate, almost doubling the amount that may be contributed in some races."); *see also* Mont. Code Ann. § 13-37-216(3). 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. *Randall*, 548 U.S. at 238-39.

Third, we acknowledged that Montana's limits were "some of the lowest in the country," but also observed that this was "unsurprising in light of the fact that Montana is one of the least expensive states in the nation in which to mount a political campaign." *Eddleman*, 343 F.3d at 1095. As *Randall* shows, Montana retains some of the lowest contribution limits in the nation, but it is not the lowest, a distinction that belonged to Vermont. *See Randall*, 548 U.S. at 250-51.[5]

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[5] The district court appears to read *Randall's* "danger signs" as condemning Montana's contribution limits. Opinion and Order at 28 (concluding without analysis that Montana's limits violate *Randall's* "danger signs" merely because "the U.S. Supreme Court has previously observed that Montana's limits, like Vermont's former limits, are among the lowest in the country"). This reading of *Randall* is flawed. *Randall* referred to Montana's contribution limits—along with those of Arizona, Colorado, Florida, Maine, Massachusetts, and South Dakota—only as a method for illustrating that *Vermont's* limits raised one "danger sign" and solidifying *Vermont's* status as an outlier among other states with regards to contribution limits. *Randall*, 548 U.S. at 250-51. Nothing in *Randall* even hints that Montana's limits are unconstitutional.

Fourth, while *Eddleman* did not specifically compare Montana's contribution limits with other instances where the Court has upheld a contribution limit as constitutional, we did compare the change in Montana's total campaign spending with other instances where the Court had upheld limits that involved greater decreases in total campaign spending. *Eddleman*, 434 F.3d at 1094 ("Indeed, the *Shrink Missouri* Court upheld contributions limits despite a decrease of more than 50% in total spending in Missouri elections, nearly twice the decrease present here.").

We also considered that there are "provision[s] preventing incumbents from using excess funds from one campaign in future campaigns. Such provision[s] keep incumbents from building campaign war chests and gaining a fundraising head start over challengers." *Id*. at 1095. We stressed that, in the end analysis, it is not the dollar amount that is critical, it is whether a candidate can amass the resources necessary to mount an effective campaign, *id*., a position in harmony with *Randall, see* 548 U.S. at 248-49.

Thus, all of *Randall's* "danger signs" were considered in one form or another. Most importantly, and consistent with *Randall*, our decision in *Eddleman* "review[ed] the record independently and carefully with an eye toward assessing the statute's 'tailoring.'" *Id*. at 249. We think *Eddleman* took ample **[*1210]** account of the "danger signs" identified in *Randall*.

b. The "Five Considerations"

Aside from the four "danger signs," our decision in *Eddleman* addressed broadly what Justice Breyer called "five sets of considerations." *Id*. at 261. The five

considerations were: (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) how "volunteer services" are treated; (4) whether "contribution limits are . . . adjusted for inflation"; and (5) whether there exists "any special justification that might warrant a contribution limit so low or so restrictive." *Id*. at 253-61. In *Eddleman*, we addressed each of these considerations in some way.

(1). With respect to the first consideration, whether the limits restrict challengers, the Court in *Randall* considered statistical analyses relevant to discerning "the critical question . . . [, *i.e*., whether] a candidate running against an incumbent officeholder [can] mount an effective *challenge*." *Id*. at 255. The Court noted that it emphasized the competitiveness of races because it was a proxy for the relative ability of a challenger to overcome the advantages of incumbency. *Id*.

In *Eddleman*, we recognized the importance of considering "all dollars likely to be forthcoming in a campaign, rather than the isolated contribution, and . . . consider[ed] factors such as whether the candidate can look elsewhere for money, the percentage of contributions that are affected, the total cost of a campaign, and how much money each candidate would lose." *Eddleman*, 343 F.3d at 1094 (internal citations omitted). We repeatedly emphasized that the mere fact that a candidate could have raised more money without the limits was not the relevant inquiry; rather, the issue was whether the limit prevented a campaign

from being effective. *Id*. at 1095 ("[A]part from bald, conclusory allegations that their campaigns would have been more effective had they been able to raise more money, none of the witnesses offered any specifics as to why their campaigns were not effective.") (internal quotation marks omitted). We found that "Montana candidates remain able to mount effective campaigns." *Id*. (describing candidates who claimed the limits prevented effective campaigns but some of which raised more money after the limits were in place and another who won with a *large* surplus of campaign funds). Additionally, even though the contribution limits restrict the total amount of funds raised, candidates were still able to raise funds "well within the range of money needed to run an effective . . . campaign." *Id*. at 1094-95.

Specific to the Court's concern with challengers to incumbency, we discussed provisions that increased the ability of challengers to overcome the effects of incumbency. First, we pointed out that "§ 13-37-216 also contains a provision preventing incumbents from using excess funds from one campaign in future campaigns." *Id*. at 1095. Second, we found that "the average gap between the total amount of money raised by incumbents and challengers for all legislative races was only $65.00 per race," so there was almost no difference between incumbents and challengers in the amount of money they raised. *Id*. Third, relying on *Buckley* and *Shrink Missouri*, we suggested that there was no evidence that Montana's limitations allowed incumbents to leverage their incumbency unfairly against their challengers. *Id*. at 1095-96.

[*1211] The district court did not look to our

opinion in *Eddleman*. Instead, it conducted its own inquiry. For example, it compared the Vermont limits for state senate and house with those of Montana and concluded that Montana's were lower. Opinion and Order at 29. We think the district court did not account for one key difference between Vermont and Montana. While Vermont's contribution limits apply to a "two-year general election cycle," *Randall*, 548 U.S. at 238-39, Montana's limits apply to "each election," Mont. Code Ann. § 13-37-216(1)(a), meaning that if there is a contested primary, the district court has understated Montana's limits by half. *See Eddleman*, 343 F.3d at 1088 ("[T]he amount an individual may contribute to a candidate doubles when the candidate participates in a contested primary."). In other words, if there is a primary, Montana's limit for the state legislature is $320, which is greater than Vermont's limit for state senate ($300) and much higher than its limit for state house ($200).

Additionally, we are concerned that the evidence the district court received and credited—which because of our time constraints, the parties have not briefed and we have not examined as thoroughly as we ordinarily would like—does not adequately account for the revenues actually available to candidates. For example, Montana only requires that the identity of donors contributing $35 or more, and their aggregate amount of contributions, be disclosed. Mont. Code Ann. § 13-37-229(2)-(3). While a candidate is required to disclose an "itemized account of proceeds that total less than $35 from a person," the donor's identity is not disclosed and therefore does not count against an individual's aggregate contribution limit. Mont. Code Ann. § 13-37-229(8). Thus, it is likely that Montana's

limits understate the actual contributions made to the candidates. These are matters that, undoubtedly, would benefit from briefing and oral argument but raise serious concerns in our minds whether there is sufficient evidence to overrule *Eddleman*.[6]

(2). With respect to the second consideration, the limits on political parties, the Court was concerned that Vermont's statute required "that political parties abide by *exactly* the same low contribution limits that apply to other contributors." *Randall*, 548 U.S. at 256. The cumulative restrictions imposed by the Vermont statute "severely inhibit[ed] collective political activity by preventing a political party from using contributions by small donors to provide meaningful assistance to any individual candidate," including a party's ability to engage in "coordinated spending on advertising, candidate events, voter lists, mass mailings, even yard signs." *Randall*, 548 U.S. at 256-58.

In contrast to Vermont's statute, we noted, in *Eddleman*, that in Montana political parties were *not* subject to the same low contribution limit as individuals. *Eddleman*, 343 F.3d at 1094 (discussing the increase in amount that can be contributed by political parties, "almost doubling the amount that may be contributed in some races").

Despite the obvious differences between Vermont and Montana, the district court concluded that the

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[6] Neither the State of Montana, nor the appellees, had access to the district court's Opinion and Order when the motion and opposition were filed. The State of Montana, however, had the benefit of the district court's Opinion and Order before filing its reply the next day.

Montana statute was inconsistent with this factor because "political committees [were held] to the same contribution limits as individuals" and this "inhibit[s] the associational rights of political committees and, consequently, a full **[*1212]** and robust exchange of views." Opinion and Order at 32 (internal quotation marks omitted). Instead of addressing *Randall's* concern with limits on political *parties*, the district court focused on limits on political *committees* under § 13-37-216. Political committees are not political parties. Political committees—including PACs and local party affiliates—are subject to the same limits as individuals. Mont. Code Ann. § 13-37-216(3). "Political party organizations," however, are exempted from this restriction under the statute and subject to a much higher cap. For example, individuals and political committees may not contribute more than $630 to a gubernatorial candidate, but a political party organization can contribute up to $22,600. *Id*. § 13-37-216(1)(a), (3), *as adjusted by* Admin. R. Mont. § 44.10.338(1)(a), (2)(a).

Furthermore, the district court's opinion fails to acknowledge that even political committees remain free to spend as much money as they desire promoting a candidate. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *see also Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012). As we pointed out, the PACs have many other ways "to convey their support." *Eddleman*, 343 F.3d at 1094. They just cannot give the money directly to the candidate. Thus, the district court's analysis on this point is inapposite; under the Montana statute political committees remain free to participate in a "full and robust exchange of views."

(3). The third consideration is the treatment of volunteer services. Montana's scheme, however, is far more permissive than Vermont's statute. In *Randall*, Vermont counted expenses incurred during the provision of volunteer services as contributions. *Randall*, 548 U.S. at 259-60. As we explained, "the [Montana] statute in no way prevents PACs[, and individuals,] from affiliating with their chosen candidates in ways other than direct contributions, such as donating money to a candidate's political party, volunteering individual members' services, sending direct mail to their supporters, or taking out independent newspaper, radio, or television ads to convey their support." *Eddleman*, 343 F.3d at 1094. Moreover, we noted that nothing prevents "individuals and PACs [from] . . . engag[ing] in independent political expression, to associate actively through volunteering their services, and to assist in a limited but nonetheless substantial extent in supporting the candidates and committees with financial resources." *Id*. at 1096.

The district court concluded that Montana treats volunteer services in the same manner as Vermont, "not exclud[ing] the expenses . . . volunteers incur, such as travel expenses, in the course of campaign activities." Opinion and Order at 34 (internal quotation marks omitted). This conclusion appears to be error. Testimony provided by the plaintiff's own witnesses—as well as a stipulation of the parties—established that expenses incurred by volunteers are not considered contributions under Montana law. Tr. at 50-54, 74-76, 154-56 (Sept. 12, 2012). Even more importantly, other testimony established that an individual, political party, or

political committee can actually hire staff for a candidate, and that would not be considered a contribution. *Id*.

(4). The fourth consideration is whether the limits are adjusted for inflation. Vermont's limits were not. *Randall*, 548 U.S. at 261. As we noted in *Eddleman*, the Montana contribution limits are regularly adjusted for inflation. *Eddleman*, 343 F.3d at 1089.

The district court recognized that Montana adjusts its limits for inflation, but **[*1213]** suggested that the Consumer Price Index ("CPI") is a flawed method of accounting for inflation. Opinion and Order at 35-36. The district court made that determination on the basis of near anecdotal testimony that the cost of pencils, yard signs, postage, and fuel have increased faster than the CPI. *Id*. at 13. The district court also noted that the CPI does not account for certain inputs that an effective campaign requires. *Id*. at 35.

This is too thin a reed to cling to in order to overturn our decision in *Eddleman*. We do not doubt that the CPI fails to capture all changes in campaign costs. It is, however, a well-recognized mechanism for adjusting for inflation, and we have no indication that the Supreme Court intended that states do anything else to "index limits." *Randall*, 548 U.S. at 261. We continue to believe that Montana's statute will survive the Court's analysis in *Randall*. If we were to examine the district court's findings, its methodology would raise a number of questions. For example, the district court apparently did not consider whether pencils, yard signs, postage, and fuel fall within the underlying basket of goods used to calculate the CPI, nor did it question whether other campaign costs—such as office

space—may have gone down during the same period. Further, even as we acknowledge that campaign costs have gone up over time, so have contribution limits risen since their inception in 1994, yet the district court made no attempt to compare the overall increase in the contribution limits with the overall increases in campaign inputs that were the subject of testimony at trial.

(5). The fifth and final consideration is a catchall: Whether there are any "special justification[s]" for the limits that "bring about . . . serious associational and expressive problems." *Randall*, 548 U.S. at 261. We identified at least one justification for why Montana's contribution limits are among the lowest in the nation: "[T]he State of Montana remains one of the least expensive states in the nation in which to run a political campaign." *Eddleman*, 343 F.3d at 1094. Thus, unlike *Randall*, where Vermont's justification was based solely upon the prevention of corruption, Montana specifically justified the low limits based on the relative inexpense of campaigning in Montana, a state where, for many offices, "campaign[ing] primarily [takes place] door-to-door, and only occasionally [through] advertis[ing] on radio and television." *Id.*

Most importantly, in *Eddleman*, after considering all of the factors deemed important by Justice Breyer's plurality opinion in *Randall*, we held that the Montana contribution limit does not prevent candidates from amassing the resources necessary to run an effective, competitive campaign. *Id.* at 1094-95, 1098. We cannot conclude that *Randall* is, in any material way, inconsistent with our analysis in *Eddleman*. Therefore,

under *Miller*, we remain bound by *Eddleman*.[7]

* * * *

Given the procedural posture of the state's motion, we have tried to be careful not to prejudge whether any of the district court's findings of fact are clearly erroneous or its conclusions errors of law. That is the province of a merits panel of this court, to be decided on consideration of the **[*1214]** appeal of the permanent injunction after full briefing. Based on our emergency review, however, we have noted that there appear to be sufficient problems with the district court's findings of fact and conclusions of law such that the State of Montana has met its burden of making a substantial case for relief on the merits. This showing is sufficient for us, under this factor, to exercise our discretion to stay the district court's permanent injunction pending appeal. Moreover, given the imminent nature of the election, we find it important not to disturb long-established expectations that might have unintended consequences, particularly in light of our previous holding in *Eddleman* that this selfsame statute is constitutional, without first allowing a merits panel the benefit of thoroughly examining the Montana statute in light of *Randall*.[8] *See Purcell v.*

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[7] We also note that the district court failed to perform a careful severability analysis. Instead, it relied on the Court's severability analysis of a quite different Vermont statute—leveraging what might be the only offensive part of this statute to strike down the entire statute, the majority of which has not even been effectively challenged. *See* Opinion and Order at 36-37.

[8] *See Randall*, 548 U.S. at 249 ("[A]ppellate courts . . . must review the record independently and carefully with an

Gonzalez, 549 U.S. 1, 5-6 (2006) ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction . . . ."). We conclude that the state is *likely* to succeed in its appeal.

B. *Irreparable Injury to the Party Requesting Stay*

Nken held that the second stay factor, "whether the applicant will be irreparably injured absent a stay," requires more than "some possibility of irreparable injury." *Nken*, 556 U.S. at 434-35 (internal quotation marks omitted). But, in contrast to the first factor, we have interpreted *Nken* as requiring the applicant to show under the second factor that there is a *probability* of irreparable injury if the stay is not granted. *Leiva-Perez*, 640 F.3d at 968 (explaining that while the first factor asks "whether the stay petitioner has made a strong argument on which he could win," the second factor asks us to "anticipate what would happen as a practical matter following the denial of a stay"). In analyzing whether there is a probability of irreparable injury, we also focus on the individualized nature of irreparable harm and not whether it is "categorically irreparable." *Id*. at 969 (quoting *Nken*, 556 U.S. at 435).

The State of Montana has made a showing that there is a probability of irreparable injury if a stay of the district court's permanent injunction is

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eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of the restrictions." (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)).

not granted. Since 1994, a clear framework has been in place allowing candidates to plan for campaigns. In 2003, we held this statute constitutional, in the face of a virtually indistinguishable attack. This has created a background upon which the candidates in the current election have formed their campaign strategies and expectations. Absentee voting has already begun in Montana and the general election is imminent. Allowing the permanent injunction to remain in place before a merits panel of this court can ultimately rule on the constitutionality of the Montana contribution limit statute could throw a previously stable system into chaos. In a state that has operated with some of the most restrictive campaign limits in the country, there would suddenly be no limits whatsoever. In fact, there is some evidence from media reports that before the temporary stay was issued in this case, individuals had already begun to ask for unlimited donations. In light of the fact that the State of Montana has made a substantial case for **[*1215]** relief on the merits, this calls into question the fairness and integrity of elections in Montana. Not all candidates might feel comfortable taking unlimited donations in the wake of conflicting judicial decisions. Furthermore, once the election is over, it cannot be reversed, and any consequences flowing from the disruption in equilibrium in the campaign contribution laws would also be irreversible. Regardless, because of the likely disruption to the election and the untold, irreversible consequences that might result, the State of Montana has satisfied its burden of showing a probability that irreparable harm will occur.

C. *Substantial Injury to Other Parties Interested in the Proceeding*

Finally, *Nken* explained that the last two factors of the test require us to weigh the public interest against the harm to the opposing party. *Nken*, 556 U.S. at 435; *see also Leiva-Perez*, 640 F.3d at 964-66 (holding that the stay inquiry is "flexible"and involves an equitable balancing of the stay factors). In doing so, we again consider "the particulars of each individual case." *Leiva-Perez*, 640 F.3d at 970 (citing *Nken*, 556 U.S. at 436).

We find that the other interested parties are not likely to be harmed. We well understand that "political speech [is] the core of the First Amendment," *Randall*, 548 U.S. at 266, but for 36 years the Court has held that states may restrict political contributions as "only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21. Montana largely restricts cash contributions to candidates; it thus leaves interested parties with a number of other options for engaging in political speech, from volunteering—or even paying for the provision of volunteer services to candidates—to engaging in independent activities to support a candidate. *See, e.g., Bullock*, 132 S. Ct. at 2491. Additionally, we have already carefully analyzed the Montana contribution limit statute and found it to be constitutional. *Eddleman*, 343 F.3d at 1098. All interested parties, who have operated under Montana's contribution limit statute since 1994, had clear notice of its constitutionality since 2003. Any harm that might be felt would, at most, be minimal and vastly outweighed by the public interest.

D. *Public Interest*

Finally, we find that the public interest is closely aligned with the irreparable harm shown by the State of Montana. The people comprising the State of Montana have a deep interest in fair elections. *See United States v. Gradwell*, 243 U.S. 476, 480 (1917) ("[T]he people of the United States . . . have an interest in and a right to honest and fair elections . . . ."). The Montana contribution limit statute has long stood, not only to prevent corruption, *see Eddleman*, 343 F.3d at 1092-93, but also to create an background of fairness to allow candidates to plan their campaigns and implement their strategies upon the foundation of well-laid and understood ground-rules. Given the deep public interest in honest and fair elections and the numerous available options for the interested parties to continue to vigorously participate in the election, the balance of interests falls resoundingly in favor of the public interest.

IV. CONCLUSION

The State of Montana has satisfied the standards for a stay pending appeal. Given the formidable obstacle presented by our decision in *Eddleman*, the fact that *Randall* does not compel a different result in *Eddleman*, and the tensions and possible errors in the district court's application of *Randall*, the State of Montana has **[*1216]** made a strong showing that it is likely to succeed on appeal. Furthermore, because the fairness of the imminent election would be put in danger by our failure to stay the permanent injunction, the State of Montana and the public interest would be irreparably harmed, and that harm vastly outweighs any minimal harm that might come to the interested

parties who have operated under the established Montana contribution limits for almost two decades. We therefore find it necessary to exercise our judicial discretion, and we will stay the district court's permanent injunction pending resolution of the appeal by a merits panel of this court. The State of Montana's motion for stay pending appeal is **GRANTED**.

APPENDIX A

Montana Code Annotated § 13-37-216

13-37-216. Limitations on contributions—adjustment

(1) (a) Subject to adjustment as provided for in subsection (4), aggregate contributions for each election in a campaign by a political committee or by an individual, other than the candidate, to a candidate are limited as follows:

(i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed $500;

(ii) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $250;

(iii) for a candidate for any other public office, not to exceed $130.

(b) A contribution to a candidate includes contributions made to the candidate's committee and to any political committee organized on the candidate's behalf.

(2) (a) A political committee that is not independent of the candidate is considered to be organized on the candidate's behalf. For the purposes of this section, an independent committee means a committee that is not specifically organized on behalf of a particular candidate or that is not controlled either directly or indirectly by a candidate or candidate's committee and that does not act jointly with a candidate or candidate's committee in conjunction with the making of expenditures or accepting

contributions.

(b) A leadership political committee maintained by a political officeholder is considered to be organized on the political officeholder's behalf.

(3) All political committees except those of political party organizations are subject to the provisions of subsections (1) and (2). For purposes of this subsection, "political party organization" means any political organization that was represented on the official ballot at the most recent gubernatorial election. Political party organizations may form political committees that are subject to the following aggregate limitations, adjusted as provided for in subsection (4), from all political party committees:

(a) for candidates filed jointly for the offices of governor and lieutenant governor, not to exceed $18,000;

(b) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $6,500;

(c) for a candidate for public service commissioner, not to exceed $2,600;

(d) for a candidate for the state senate, not to exceed $1,050;

(e) for a candidate for any other public office, not to exceed $650.

(4) (a) The commissioner shall adjust the limitations in subsections (1) and (3) by multiplying each limit by an inflation **[*1217]** factor, which is determined by dividing the consumer price index for June of

the year prior to the year in which a general election is held by the consumer price index for June 2002.

(b) The resulting figure must be rounded up or down to the nearest:

(i) $10 increment for the limits established in subsection (1); and

(ii) $50 increment for the limits established in subsection (3).

(c) The commissioner shall publish the revised limitations as a rule.

(5) A candidate may not accept any contributions, including in-kind contributions, in excess of the limits in this section.

(6) For purposes of this section, "election" means the general election or a primary election that involves two or more candidates for the same nomination. If there is not a contested primary, there is only one election to which the contribution limits apply. If there is a contested primary, then there are two elections to which the contribution limits apply.

APPENDIX B

Admin. R. Mont. § 44.10.338

44.10.338 LIMITATIONS ON INDIVIDUAL AND POLITICAL PARTY CONTRIBUTIONS

(1) Pursuant to the operation specified in 13-37-216, MCA, limits on total combined contributions from individuals to candidates are as follows:

   (a) a candidate for governor may receive no more than $630;

   (b) a candidate for other statewide office may receive no more than $310;

   (c) a candidate for all other public offices may receive no more than $160.

(2) Pursuant to the operation specified in 13-37-216, MCA, limits on total combined contributions from political party committees to candidates are as follows:

   (a) a candidate for governor may receive no more than $22,600;

   (b) a candidate for other statewide offices may receive no more than $8150;

   (c) a candidate for Public Service Commission may receive no more than $3260;

   (d) a candidate for senate may receive no more than $1300;

   (e) a candidate for all other public offices may receive no more than $800.

(3) Pursuant to 13-37-218, MCA, in-kind contributions must be included in computing these limitation totals.

[***Editing Note:*** *Page numbers from the reported opinion, 903 F. Supp. 2d 1077, are indicated, e.g., [***1078**].*]

[Filed: 10/10/2012]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

DOUG LAIR; STEVE DOGIAKOS; AMERICAN TRADITION PARTNERSHIP; AMERICAN TRADITION PARTNERSHIP PAC; MONTANA RIGHT TO LIFE ASSOCIATION PAC; SWEET GRASS COUNCIL FOR COMMUNITY INTEGRITY; LAKE COUNTY REPUBLICAN CENTRAL COMMITTEE; BEAVERHEAD COUNTY REPUBLICAN CENTRAL COMMITTEE; JAKE OIL, LLC; JL OIL, LLC; CHAMPION PAINTING; JOHN MILANOVICH, *Plaintiffs,* vs. JAMES MURRY, in his official capacity as Commissioner of Political Practices; STEVE BULLOCK, in his official capacity as Attorney General of the State of Montana; LEO GALLAGHER, in his official capacity as Lewis and Clark County Attorney, *Defendants.*	CV 12-12-H-CCL FINDINGS OF FACT CONCLUSIONS OF LAW OPINION AND ORDER

[*1078] The remainder of this case—the constitutionality of Montana's contribution limits in Montana Code Annotated § 13-37-216—came before the Court in a bench trial held from September 12, 2012, to September 14, 2012. The plaintiffs were represented by James Bopp, Jr., and the defendants were represented by Michael Black and Andrew Huff. The plaintiffs argue that the contribution limits are unconstitutional under the First Amendment. For the reasons below, the Court declares those limits unconstitutional and permanently enjoins the defendants from enforcing them.

JURISDICTION, VENUE, AND PARTIES

The plaintiffs seek injunctive and declaratory relief under 42 U.S.C. § 1983. Jurisdiction is proper under 28 U.S.C. §§ 1331 and 1343(a). Venue is proper under 28 U.S.C. § 1391(b).

Plaintiffs American Tradition Partnership PAC, Montana Right to Life Association PAC, Lake County Republican Central Committee, and Beaverhead County Republican Central Committee each constitute a "political committee" as defined by Mont. Code Ann. § 13-1-101(22). Plaintiffs Lake County Republican Central Committee and Beaverhead County Republican Central Committee further qualify as "political party organizations" within the meaning of Mont. Code Ann. § 13-37-216(3). Plaintiffs Doug Lair and Steve Dogiakos both want to make contributions above the contribution limits to candidates for various Montana elected offices. They would do so but for Montana's contribution limits. Plaintiff John Milanovich has run for State House in the past and intends to run again in the future.

[*1079] As Commissioner of Political Practices, Defendant Jim Murry has authority to investigate violations of, enforce the provisions of, and hire attorneys to prosecute violations of, Montana Code Chapters 35 and 37 and the rules adopted to carry out these provisions. The Commissioner acts under color of state law and is sued in his official capacity. As Montana Attorney General, Defendant Steve Bullock has power to investigate and prosecute violations of Montana Code Chapters 35 and 37 by and through the county attorneys under his supervision. The Attorney General acts under color of state law and is sued in his official capacity. As Lewis and Clark County Attorney, Defendant Leo Gallagher has power to investigate and prosecute violations of Montana Code Chapters 35 and 37. The County Attorney acts under color of state law and is sued in his official capacity.

BACKGROUND

The plaintiffs filed this lawsuit in the Billings Division for the District of Montana on September 6, 2011. They claim that several of Montana's campaign finance and election laws are unconstitutional under the First Amendment. The statutes that they challenge are:

> Montana Code Annotated § 13-35-225(3)(a), which requires authors of political election materials to disclose another candidate's voting record;
>
> Montana Code Annotated § 13-37-131, which makes it unlawful for a person to misrepresent a candidate's public voting record or any other matter relevant to the issues of the campaign with knowledge that the assertion is false or

with a reckless disregard of whether it is false;

Montana Code Annotated § 13-37-216(1), (5), which limits contributions that individuals and political committees may make to candidates;

Montana Code Annotated § 13-37-216(3), (5), which imposes an aggregate contribution limit on all political parties; and

Montana Code Annotated § 13-35-227, which prevents corporations from making either direct contributions to candidates or independent expenditures on behalf of a candidate.

The plaintiffs moved for a preliminary injunction on September 7, 2011, seeking to enjoin the defendants from enforcing each of these statutes. Before any action was taken on the motion, the defendants moved to change venue that Court granted that motion on January 31, 2012, and the case was transferred to the Helena Division assigned by lot to the undersigned.

On February 16, 2012, the Court held a hearing on the motion for a preliminary injunction and enjoined enforcement of Montana's vote-reporting requirement and political-civil libel statute (*See* doc. 66); Mont. Code Ann. §§ 13-35-225(3)(a), 13-37-131. The Court denied the motion as to the remaining statutes. (*Id.*)

The Court issued its scheduling order on March 9, 2012. The parties agreed that all of the issues regarding the contribution limits in Montana Code Annotated § 13-37-216(1), (3), and (5) would be resolved through a bench trial and that all other matters would be adjudicated by summary judgment. (*See* doc. 73.) The Court and the parties all agreed to

place this matter on an expedited schedule so that it will be resolved prior to this year's election.

The parties cross-moved for summary judgment, and the Court held a hearing on May 12, 2012. The Court granted both motions in part and denied them in part. (*See* doc. 90.) The Court permanently enjoined Montana's vote-reporting requirement, political-civil libel statute, and ban on corporate contributions to political committees that the committees use for independent expenditures. *See* Mont. Code Ann. §§ 13-35-225(3)(a), 13-37-131,13-35-227. **[*1080]** The Court, however, concluded that Montana's ban on direct and indirect corporate contributions to candidates and political parties is constitutional. *Id.* at § 13-35-227. The parties cross-appealed that order but then voluntarily dismissed the appeals on July 23, 2012.

On June 20, 2012, the defendants—without leave of the Court—moved for summary judgment on the plaintiffs' claims concerning Montana's contribution limits. The Court denied the motion because, as explained in the scheduling order, the parties agreed that those claims would be resolved only through a bench trial. Moreover, the defendants' motion was untimely.

The Court held a bench trial from September 12, 2012, to September 14, 2012, in order to resolve the plaintiffs' claims related to Montana's campaign contribution limits in Montana Code Annotated § 13-37-216(1), (3), and (5). At the final pretrial conference immediately preceding the trial, the plaintiffs renewed their motion for summary judgment, and the Court took that motion under advisement.

TESTIMONY AT THE BENCH TRIAL

James Bopp, Jr. argued the plaintiffs' case.[1] Michael Black and Andrew Huff argued the defendants' case. Having considered the testimony of both the plaintiffs' and the defendants' witnesses, the Court finds the plaintiffs' witnesses more persuasive and that the facts weigh in favor of the plaintiffs.

I. Plaintiffs' expert witness: Clark Bensen

The plaintiffs presented an expert, Clark Bensen, who analyzed the effect of Montana's contribution limits. Bensen analyzed "competitive" races in Montana, which he defined as elections where the margin of victory was 10% or less. Bensen studied 112 campaigns. Those campaigns were for either Public Service Commission offices or the Legislature. Most of these elections were for the 2008 or 2010 elections, but there were some for the 2004 and 2006 elections. Bensen considered only "itemized contributions," which are contributions over $35.

Bensen concluded that these campaigns relied substantially on "maxed-out donors" for campaign revenue. Bensen calculated that, on average, 29% of the contributors in the campaigns had donated to the maximum level (26% for Democrats, and 34% for Republicans). Roughly 37% of the contributors were at a "near-max" level. On average, the campaigns that Bensen analyzed receive 86% of their itemized contributions from individuals (generating 74% of their

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[1] James E. Brown initially appeared on behalf of the plaintiffs, but he was called as the plaintiffs' first witness and was therefore barred from subsequently arguing the plaintiffs' case at the trial. *See* Mont. R. Prof. Conduct 3.7.

overall revenue), 9% of their itemized contributions from political committees (generating 10% of their overall revenue), and 2% of their itemized contributions from political parties (generating 6% of their overall revenue). Many campaigns are self-financed to some degree.

Bensen found that the reliance on maxed-out donors is substantial: On average, 44% of the aggregate amount of funds raised by itemized contributions from individuals and political committees are generated by maxed-out donors. This percentage rises to 54% when considering "near-max" donors.

Of the 112 campaigns at issue (excepting one candidate from the Constitution Party), Bensen determined that 40% of the candidates received the maximum aggregate contribution limit from their political parties.

[*1081] Of particular note and relevance here, the average campaign spends more than it raises, by about 7%. Bensen therefore concluded that campaigns struggle "to meet their perceived needs for operations and communication with voters."

II. Testimony from other witnesses for the plaintiffs

The Lake County Republican Central Committee ("Lake County Republicans") is the local Republican Party for Lake County. It has a history of making contributions to Republican candidates, including in the last election. Darren Breckenridge testified on behalf of the Lake County Republicans.

The Lake County Republicans plans to make contributions to candidates in the 2012 election. Specific planned contributions include a contribution

to Joe Reed, who will be running for election in House District 15, and a contribution to whichever Republican runs for election in Senate District 6, It plans to contribute up to the limits allowed by law. The Lake County Republicans wants to make its planned contributions, including a $2,000 contribution to Reed, even if other political parties also make contributions to their chosen candidates. If other political parties contribute to its chosen candidates, the Lake County Republicans would make its planned contributions, but for the aggregate limits imposed by Montana Code Annotated § 13-37-216(3), (5), and the penalties imposed on those who violate them. Montana's law, however, limits its contributions to $800 for State House candidates. The Lake County Republicans would have made a contribution of more than $400 to House District candidate Jenna Taylor except she had already received $400 and so could only legally accept $400 more.

The Beaverhead County Republican Central Committee ("Beaverhead County Republicans") is the local Republican Party for Beaverhead County. It has a history of making contributions to Republican candidates, including in the last election. James E. Brown testified at trial on behalf of the Beaverhead County Republicans.[2] The Beaverhead County Republicans plans to make contributions to candidates in the 2012 election. The Beaverhead County Republicans plans to make a contribution to Joe Reed, who will be running for election in House District 15, a contribution to Debby Barrett, who will be running for re-election in Senate District 36, and a contribution

[2] *See* note 1, *supra.*

to Rick Hill. It plans to contribute up to the limits allowed by law.

The Beaverhead County Republicans wants to make its planned contributions, even if other political parties also make contributions to its chosen candidates. If other political parties contribute to its chosen candidates, the Beaverhead County Republicans would still make its planned contributions, but for the aggregate limits imposed by Montana Code Annotated § 13-37-216(3), (5), and the penalties imposed on those who violate them. The Beaverhead County Republicans attempted to make contributions to several candidates for State House and State Senate during the 2010 election. Because of the aggregate party contribution limits, five of those candidates were forced to return the Beaverhead County Republicans' contributions.

Plaintiff Doug Lair is a Big Timber area rancher and investor. Plaintiff Steve Dogiakos is a political activist and small businessman who owns a company offering web design services, Both Lair and Dogiakos have previously made contributions to candidates running for office in Montana. Lair and Dogiakos intend to make contributions **[*1082]** to candidates running for office in 2012.

Lair has already contributed the maximum to candidates Ken Miller, Debra Lamm, Bob Faw, and Tim Fox in the 2012 primary and plans to contribute the maximum amount to Republican candidates like Ed Walker, Dan Kennedy, Rick Hill, and Dan Skattum, He would give more if allowed by law.

Dogiakos intends to make contributions to Republican candidates for the Public Service

Commission and the State House. Dogiakos would give $500 to Christy Clark, 2012 candidate for the State House from House District 17; $1,000 to Bob Lake, a Public Service Commissioner candidate; $500 to Wylie Galt, a candidate for House District 83; and Liz Bangerter, a candidate for House District 80, except he is prohibited from giving that much by law.

Plaintiff John Milanovich resides in Bozeman. Milanovich ran unsuccessfully for the State House in 2008. He appeared on the ballot for the Republican primary in 2010, but decided to endorse one of his primary opponents in that race. Milanovich intended to run for the State House again in 2012 from House District 69, but after filing his candidacy, withdrew due to growing obligations with his growing business. Milanovich filed his "Statement of Candidate" Form C-1 with the Office of the Commissioner of Montana Political Practices. Form C-1 must be filed within five days after a candidate for office receives or spends money, appoints a campaign treasurer, or files for office, whichever occurs first. The statutory authority for Form C-1 is contained in Montana Code Annotated §§ 13-37-201, 13-37-202, 13-37-205. Because Milanovich filed his Form C-1, he was allowed to solicit and accept contributions for his campaign. Milanovich began doing so.

Milanovich would have solicited and accepted contributions above the $160 contribution limit if the law did not prohibit and penalize him for doing so. Moreover, Milanovich would have solicited and accepted contributions from the Montana Republican Party above the $800 contribution limit. He also would have solicited and accepted contributions from various county Republican parties above the $800 contribution

limit if the law had permitted him to do so.

Richard Mike Miller was first elected as the House District 84 Representative in 2008. Representative Miller is a Republican. He ran successfully in 2010 and is now a candidate for the same seat in the 2012 election. House District 84 is primarily rural and is approximately 2,500 square miles in size. Approximately 9,500 people live in Representative Miller's House District 84.

Representative Miller ran an opposed campaign in 2008 and 2010, and his current campaign is opposed. In the 2008 election, Representative Miller raised between $8,000 and $9,000 for his campaign. In 2010, he raised between $5,000 and $6,000. In the current election, Representative Miller has raised approximately $3,500. Between 5% and 10% of Representative Miller's donors have made donations up to the contribution limits.

In 2008, Representative Miller received the contribution limit from political committees, but he did not receive the contribution limit from his political party. Since Representative Miller received the maximum aggregate contribution from political committees in 2008, he was not able to accept additional money from political committees after reaching that limit and he was not able to identify additional political committees as contributors. In 2010, Representative Miller came within $10 of reaching the aggregate contribution limit for political committees and then **[*1083]** stopped accepting contributions from political committees. For his 2012 campaign, Representative Miller has received the aggregate contribution limit for political committees.

During his 2008, 2010, and 2012 campaigns, Representative Miller received contributions from political committees after reaching the aggregate limit, and he has been forced to return those contributions.

A significant aspect of Representative Miller's campaign involves mailing information to potential voters. He believes that roughly $12,000 would be necessary to effectively reach potential voters through mailings. Representative Miller testified that the cost of running a campaign has increased while he has been in office. For example, in 2008, 1,000 pencils cost Representative Miller $170. They now cost $195, a 15% increase. In 2008, 100 yard signs cost $320. They are now $345, an 8% increase. Postage has increased from 41 to 45 cents, a 10% increase. Perhaps most significantly, Representative Miller testified that his cost of gasoline has increased from $2.25 a gallon to $3.75 a gallon, a 67% increase. Representative Miller testified that these are essential items that he needs to run a campaign, Representative Miller testified that, but for Montana's contribution limits, he believes he could raise the necessary funds to run an effective campaign.

III. Defendants' expert witness: Edwin Bender

The defendants presented an expert, Edwin Bender, who analyzed the effects of Montana's contribution limits. Bender's analysis, unlike Bensen's, is based on all campaigns, not just "competitive" campaigns. And, unlike Bensen, he analyzed campaigns for all statewide races, legislative races, and the gubernatorial race.

Bender's analysis shows that, between 2004 and 2010, legislative candidates raised between 56% and

70% of their itemized campaign funds from individuals, between 9% and 11% from political committees, between 3% and 4% from political parties, and between 7% and 11% from unitemized contributions (contributions less than $35). Between 11% and 18% of the contributions were self-financed contributions. For statewide campaigns, those statistics are: between 52% and 71% from individual contributors, between 0% and 3% from political committees, between 2% and 4% from political parties, and between 7% and 9% from unitemized contributions. Between 17% and 38% of the contributions were self-financed contributions. For the 2004 and 2008 gubernatorial campaigns, those statistics are: between 89% and 96% from individuals, 0% from political committees, between 0% and 2% from political parties, and 1% from unitemized contributions. Between 1% and 10% of the contributions were self-financed contributions.

Bender also analyzed the number of individuals and political committees that donated at the maximum levels for the 2004 to 2010 elections. In State House races where the primary was not contested, between 15% and 29% of individual contributors donated at the maximum level. Between 45% and 49% of the political committees donated at the maximum level. In State Senate races, where the primary was not contested, Bender found that between 18% and 33% of individual contributors donated at the maximum level. Between 48% and 64% of the political committees donated at the maximum level. In statewide office races, where the primary was not contested, Bender found that between 0% and 19% of individual contributors donated at the maximum level. Between 0% and 58% of the political committees donated at the maximum level. In the 2004

and 2008 gubernatorial races, 2% of the individual contributors donated at the maximum level. Virtually **[*1084]** none of the political committees made maximum contributions. For each of these campaigns, when the primary was contested, a much smaller percentage of individuals and political committees made maximum contributions during both the primary and general elections.

From 2000 to 2010, Montana candidates received an average of 3.8% of their contributions from political parties. Challengers generally received more money from political parties than incumbents. In legislative races between 2004 and 2010, where the primary was not contested, Bender found that between 22% and 32% of the candidates accepted the maximum aggregate contribution from political parties. In statewide races between 2004 and 2010, where the primary was not contested, between 0% and 18% of the candidates accepted the maximum aggregate contribution from political parties. In the 2004 and 2008 gubernatorial races, none of the candidates received the maximum aggregate contribution from political parties. Again, for each of these campaigns, when the primary was contested, a much smaller percentage of individuals and political committees made maximum contributions during both the primary and general elections.

IV. Testimony from other witnesses for the defendants

Defendant Jim Murry is the Commissioner of Political Practices. Commissioner Murry testified that "effective" campaigns require more than monetary contributions. They require volunteers to help deliver

a candidate's message to the voters.

On May 15, 2012, the Deputy Commissioner of Political Practices, Jay Dufrechou, issued a Commissioner's Opinion stating that services provided to a campaign by volunteers do not constitute contributions. *See In re Bullock*, (Commr. of Political Pracs. May 15, 2012) (Ex. 8). Political parties and political action committees, therefore, may provide unlimited volunteer services to candidates.

Mary Ellen Baker is the Program Supervisor for the Office of Political Practices. She has a number of responsibilities with the Office, including ensuring that candidates comply with Montana's laws and regulations. According to Baker, many candidates utilize volunteer services that are provided by political parties.

Baker testified that there are 141 or 142 current and active political committees registered in the State of Montana. There are approximately 123 political party committees in the State, approximately 50 of which are Republican party committees. Baker testified that she believed a contribution of up to $1,000 would not have a corruptive effect.

ANALYSIS

I. Montana's contribution limits

Montana Code Annotated § 13-37-216(1), (3), (5) provides:

> (1)(a) Subject to adjustment as provided for in subsection (4),[3] aggregate contributions for

[3] Subsection 4 provides:

(a) The commissioner shall adjust the limitations in subsections (1) and (3) by multiplying each limit by an

each election in a campaign **[*1085]** by a political committee or by an individual, other than the candidate, to a candidate are limited as follows:

(i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed $500;

(ii) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $250;

(iii) for a candidate for any other public office, not to exceed $130.

(b) A contribution to a candidate includes contributions made to the candidate's committee and to any political committee organized on the candidate's behalf.

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inflation factor, which is determined by dividing the consumer price index for June of the year prior to the year in which a general election is held by the consumer price index for June 2002.

(b) The resulting figure must be rounded up or down to the nearest:

(i) $10 increment for the limits established in subsection (1); and

(ii) $50 increment for the limits established in subsection (3).

(c) The commissioner shall publish the revised limitations as a rule.

. . .

(3) All political committees except those of political party organizations are subject to the provisions of subsections (1) and (2). For purposes of this subsection, "political party organization" means any political organization that was represented on the official ballot at the most recent gubernatorial election. Political party organizations may form political committees that are subject to the following aggregate limitations, adjusted as provided for in subsection (4), from all political party committees:

> (a) for candidates filed jointly for the offices of governor and lieutenant governor, not to exceed $18,000;
>
> (b) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $6,500;
>
> © [sic] for a candidate for public service commissioner, not to exceed $2,000;
>
> (d) for a candidate for the state senate, not to exceed $1,050;
>
> (e) for a candidate for any other public office, not to exceed $650.

. . .

(5) A candidate may not accept any contributions, including in-kind contributions, in excess of the limits in this section.

Montana law also limits the total aggregate contributions that state legislative candidates may receive from political committees:

> A candidate for the state senate may receive no more than $2,150 in total combined monetary contributions from all political committees contributing to the candidate's campaign, and a candidate for the state house of representatives may receive no more than $1,300 in total combined monetary contributions from all political committees contributing to the candidate's campaign. The limitations in this section must be multiplied by an inflation factor, which is determined by dividing the consumer price index for June of the year prior to the year in which a general election is held by the consumer price index for June 2003. The resulting figure must be rounded up or down to the nearest $50 increment. The commissioner shall publish the revised limitations as a rule. In-kind contributions must be included in computing these limitation totals. The limitation provided in this section does not apply to contributions made by a political party eligible for a primary election under 13-10-601.

Mont. Code Ann. § 13-37-218.

The aggregate limit in Montana Code Annotated § 13-37-218 applies only to state legislative campaigns, *Id.* The limits do not apply to other offices. So, for example, candidates in the governor election may accept unlimited total contributions from political committees, but those committees are limited to

contributing $500 apiece (adjusted for inflation). *See* Mont. Code Ann § 13-37-216(1)(a)(i). The plaintiffs do not challenge the constitutionality **[*1086]** of Montana Code Annotated § 13-37-218. The Court, therefore, makes no determination as to the constitutionality of this statute, and this decision does not impact the defendants' ability to enforce Montana Code Annotated § 13-37-218.

After adjusting the limits above for inflation, *see* Mont. Code Ann. §§ 13-37-216(5), 13-37-218, Montana's contribution limits are:

Contribution limits for individuals and political committees

(Admin. R. Mont. 44.10.338(1))

Office	Contribution limit
Governor	$630
Other statewide offices	$310
All other public offices	$160

Aggregate contribution limits for political parties

(Admin. R. Mont. 44.10.338(2))

Office	Contribution limit
Governor	$22,600
Other statewide offices	$8,150
Public Service Commission	$3,260
Senate	$1,300
All other public offices	$800

Aggregate contribution limits for political committees
(Admin. R. Mont. 44.10.331(1))

Office	Contribution limit
Senate	$2,650
House Representative	$1,600

II. Standard of review

While laws limiting campaign expenditures are subject to strict scrutiny, restrictions on contributions are subject to a "lesser standard." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1117 (9th Cir. 2011) (citing *Buckley v. Valeo*, 424 U.S. 1, 20 (1976)). "Contribution limits need only be 'closely drawn' to match a sufficiently important interest to survive a constitutional challenge." *Id.* (quoting *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (plurality opinion)). Under this standard, a contribution limit is constitutional as long as the limit is "closely drawn" to match "a sufficiently important interest." *See id.; Nixon v. Shrink Mo. Gov't. PAC*, 528 U.S. 377, 387-88 (2000); *Buckley*, 424 U.S. at 25.

The Ninth Circuit held that, after *Buckley* and *Shrink Missouri*, state campaign contribution limits will be upheld if:

> (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and
>
> (2) if the limits are "closely drawn"—i.e., if they (a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a

> candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign.

Mont. Right to Life Ass'n. v. Eddleman, 343 F.3d 1085, 1092 (9th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004).

Similarly, the U.S. Supreme Court later explained in *Randall:*

> Following *Buckley*, we must determine whether . . . contribution limits prevent candidates from "amassing the resources necessary for effective [campaign] advocacy"; whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny.

548 U.S. at 248. (quoting *Buckley*, 424 U.S. at 21).

As the *Randall* plurality noted, courts have "no scalpel to probe" each possible contribution level. 548 U.S. at 249. Courts cannot "determine with any degree of exactitude the precise restriction necessary to carry out [a] statute's legitimate objectives." *Id.* That task is better left to state legislatures. **[*1087]** *Id.* That being said, there are lower bounds to contribution limits. *Id.* at 248.

The *Randall* plurality articulated a two-step framework for analyzing the question of whether a contribution limit is "closely drawn." First, a court must look for "danger signs" as to whether the contribution limit at issue is too low. 548 U.S. at 249-53. A court, for instance, should compare the limit at issue with limits that have been previously upheld or

declared constitutional and compare the limit to other limits across the country. *Id.* If "danger signs" are present, then a court must move to the second step—"examin[ing] the record independently and carefully . . . determin[ing] whether [the] contribution limits are 'closely drawn' to match the State's interest." *Id.* at 253.

In *Randall*, the plurality discussed five factors when it examined the record to determine whether the contribution limit in that case was closely drawn:

> 1. whether the record suggests that the contribution limit "will significantly restrict the amount of funding available for challengers to run competitive campaigns," *id.* at 253-56;
>
> 2. whether political parties must abide by the same limits that apply to other contributors, *id.* at 256-59;
>
> 3. whether volunteer services are treated as contributions for purposes of the contribution limit, *id.* at 259-60;
>
> 4. whether the contribution limit is adjusted for inflation, *id.* at 260; and
>
> 5. if the contribution limit is "so low or so restrictive to bring about . . . serious associational and expressive problems," whether there is "any special justification" that warrants such a limit, *id.* at 261-62.

Nothing in the *Randall* opinion suggests that this list of five factors is exhaustive or that each factor must weigh against a limit in order for it to be unconstitutional.

III. *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003)

This case is not the first time that a court has examined Montana's contribution limits. In 2000, the Billings Division for the District of Montana held a four-day bench trial to determine the constitutionality of the same statutes. *See Mont. Right to Life Assn. v. Eddleman*, CV 96-165-BLG-JDS, 2000 U.S. Dist. LEXIS 23161 (D. Mont. Sept. 19, 2000) (Ex. 11). The Court upheld the limits, and the Ninth Circuit affirmed that decision in 2003. *See Mont. Right to Life Assn.*, 343 F. 3d 1085.

In affirming the district court, the Ninth Circuit relied on both *Buckley* and *Shrink Missouri* and concluded that the contribution limits are closely drawn. *Mont. Right to Life Assn.*, 343 F.3d at 1094. It held that the evidence showed that the limits do not prevent candidates in Montana from raising the funds necessary to mount effective campaigns. *Id.* at 1094-95. That decision is not binding on this Court because the U.S. Supreme Court's intervening decision in *Randall* compels a different outcome. *See Kilgore v. KeyBank, Nat. Assn.*, 673 F.3d 947, 959 (9th Cir. 2012).

IV. *Randall v. Sorrell*, 548 U.S. 230 (2006)

In *Randall*, which was decided after the Ninth Circuit's decision in *Montana Right to Life Assn.*, the U.S. Supreme Court examined Vermont's contribution limits and held, for the first time, that a contribution limit violated the First Amendment by failing the closely-drawn scrutiny standard **[*1088]** of review, 548 U.S. 230; *see Thalheimer*, 343 F.3d at 1127 (discussing *Randall*, 548 U.S. 230).

Prior to *Randall*, Vermont limited single,

individual contributions to a campaign during a two-year general election cycle as follows: governor, lieutenant governor, and other statewide offices, $400; state senator, $300; and state representative, $200. *Randall*, 548 U.S. at 239. Political committees and political parties were subject to the same limits. *Id.* "Volunteer services" did not qualify as contributions under Vermont's law prior to *Randall*. *Id.*

When it analyzed the constitutionality of Vermont's contribution limits, the *Randall* Court applied the familiar *Buckley* and *Shrink Missouri* test described above—i.e., contribution limits are unconstitutional under the First Amendment if they "prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy.'" *Randall*, 548 U.S. at 248 (quoting *Buckley*, 424 U.S. at 21).

A majority of justices in *Randall* concluded that Vermont's contribution limits were unconstitutional. Three justices—Justices Kennedy, Thomas, and Scalia—opposed contribution limits as a matter of principle and concluded that they violate the First Amendment, 548 U.S. at 264-73. Three other justices—Justices Breyer and Alito and Chief Justice Roberts—opposed the Vermont contribution limits based on the five factors discussed in Justice Breyer's plurality opinion. *Id.* at 253-64. These six justices are a strong majority of the Court, and their judgment is binding on this Court, even if Justice Breyer's plurality opinion is only persuasive. *See Thalheimer*, 645 F.3d at 1127 n.5.

The *Randall* plurality first observed that Vermont's contribution limits showed "danger signs" by comparing those limits to the much higher limits that

the Court had previously upheld. 548 U.S. at 249-53. Prior to *Randall*, the lowest limit the Court had upheld was Missouri's limit of $1,075 per election (adjusted for inflation) to candidates for Missouri state auditor. *Id.* at 251 (citing *Shrink Mo.*, 528 U.S. 377). Of particular importance here, the *Randall* plurality also observed that Vermont's contribution limits—along with Montana's limits and the limits of six other states—were among the lowest in the country. *Id.* 548 U.S. at 251.

After discussing these "danger signs," the *Randall* plurality examined the record independently and carefully to determine whether Vermont's contribution limits were "closely drawn" to match Vermont's interests. *Id.* at 253. In doing so, the plurality pointed to five specific factors that led it to conclude that Vermont's contribution limits were unconstitutionally low:

> 1. the record suggested that Vermont's contribution limits significantly restricted the amount of funding available for challengers to run competitive campaigns, *id.* at 253-56;
>
> 2. Vermont's insistence that political parties abide by exactly the same contribution limits that applied to other contributors threatened the political parties' associational rights, *id.* at 256-59;
>
> 3. while Vermont's law did not count "volunteer services" as contributions, the law appeared to count the expenses of volunteers (e.g., the volunteers' travel expenses) as contributions, *id.* at 259-60;
>
> **[*1089]** 4. Vermont's contribution limits were

not adjusted for inflation, *id.* at 260; and

5. there was no special justification that supported the contribution limits, *id.* at 261-62.

The *Randall* opinion is directly on point here. The *Randall* decision undeniably paints a new gloss on the law and provides important insight into the lower bound for contribution limits. *Randall* is intervening law that obviates *Montana Right to Life's* precedential value, particularly in light of the *Randall* plurality's expressed suspicion of Montana's contribution limits. *See Randall*, 548 U.S. at 251.

V. The constitutionality of Montana's contribution limits after *Randall*

Randall compels the Court to conclude that Montana's contribution limits are unconstitutionally low. Montana's contribution limits are, in part, lower than those declared unconstitutional in *Randall*.[4] But, more fundamentally, the same "danger signs" are present here as in *Randall*, and the same five *Randall* factors demonstrate that Montana's limits are unconstitutional. Even assuming that the State of Montana has a "sufficiently important interest" in setting contribution limits, the limits in Montana Code Annotated § 13-37-216 are not "closely drawn" to match that interest. *See Randall*, 548 U.S. at 247.

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[4] In *Randall*, the U.S. Supreme Court found unconstitutional Vermont's contribution limit of $200 for state representative elections and $300 for state senate elections. 548 U.S. at 239, 249-62. By comparison, Montana's limits for these same elections is $160. Admin. R. Mont. 44.10.338(1).

A. "Danger signs"

The Court does not need to look far to see the same "danger signs" present here that were present in *Randall*. Montana's contribution limits are far lower than any limits that the U.S. Supreme Court has previously upheld. *See Randall*, 548 U.S. at 249-52; *See Shrink Mo.*, 528 U.S. 377 (upholding a $1,075 contribution limit); *Buckley*, 424 U.S. 1 (upholding a $1,000 contribution limit). Indeed, Montana's limits are lower, in part, than limits that the Supreme Court declared unconstitutional in *Randall*. Moreover, the U.S. Supreme Court has previously observed that Montana's limits, like Vermont's former limits, are among the lowest in the country, *Id.* at 251. Given these "danger signs," the Court "must examine the record independently and carefully to determine whether [Montana's contribution limits] are 'closely drawn' to match the State's interests." *Id.* at 253.

B. The five *Randall* factors

The five *Randall* factors listed above are not exhaustive. Nor must all of the factors weigh against the constitutionality of a limit in order for that limit to be unconstitutional. In other words, the *Randall* "factors" do not constitute a "test." They are merely considerations. That being said, the Court concludes that the *Randall* factors compel the Court to conclude that Montana's contribution limits are unconstitutional.

1. Significant restriction of available funds

As in *Randall*, the record here suggests that Montana's contribution limits significantly restrict the

amount of funds available for candidates to run competitive campaigns. 548 U.S. at 256.

By way of comparison, Montana's contribution limit for individuals and political **[*1090]** committees contributing to state legislative candidates is significantly lower than Vermont's contribution limits that were declared unconstitutional in *Randall*. Vermont's limits were $300 for State Senate and $200 for State House, *see Randall*, 548 U.S. at 239, but Montana's current limit for those candidates is $160, Admin. R. Mont. 44.10.338(1).

Generally speaking, candidates in Montana spend more money on their campaigns than they raise. According to Clark Bensen, the plaintiffs' expert witness, the average competitive campaign spends 7% more money than it raises. This suggests that most competitive campaigns are not adequately funded. The record shows, though, that more funding would be available to candidates if Montana's contribution limits are raised. Bensen testified that, on average, 29% of the contributors in the competitive campaigns that he analyzed had donated at the maximum level permitted by Montana law. The contributions that candidates receive from maxed-out contributors are substantial, constituting approximately 44% of the funds raised through itemized contributions.

The analysis from Edwin Bender, the defendants' expert, is largely consistent with these statistics. Bender additionally determined that across all Montana races (excluding the gubernatorial races) between 45% and 58% of contributing political committees make the maximum contribution permitted by Montana law. But only 9% to 11% of legislative

candidates' funds come from political committees, and only 0% to 3% of statewide candidates' funds come from political committees.

Consistent with the testimony of Plaintiffs Doug Lair and Steve Dogiakos, many, if not most, of these maxed out contributors might have donated beyond the contribution limit if Montana law had permitted them to do so. Moreover, Bender determined that between 22% and 32% of all Montana candidates accepted the maximum aggregate contribution from their political party. According to Bensen, this percentage is higher—at 40%—for candidates in competitive campaigns.

The number of contributors making contributions at the maximum level is significant. And significantly greater funds would be available to candidates if the contribution limits are raised. The defendants do not dispute this proposition. The record shows that those additional funds are needed because most campaigns are insufficiently funded. This factor "counts against the constitutional validity of the contribution limits." *Id.* at 256.

2. Uniformity of contribution limits

In *Randall*, the fact that Vermont's law required political parties to abide by the same contribution limits as other contributors weighed against the constitutionality of those limits. 548 U.S. at 256. The *Randall* Court held that the uniform contribution limit "threaten[ed] harm to a particularly important political right, the right to associate in a political party." *Id.* (citations omitted).

Here, the contribution limits for political parties are 5 to 36 times greater than the limits for individuals

and political committees, depending on office. But those limits are deceptive. Suppose there is a competitive State House race and all of the approximately 50 Republican party committees in the State would like to contribute to that candidate's campaign. The aggregate limit for political party contributions to State House races is $800. Admin. R. Mont. 44.10.338(2). That means that each Republican party committee would be permitted to contribute only $16 to the campaign if all committees contributed. This is an extreme and perhaps unlikely example. **[*1091]** Nevertheless, this example shows that relatively higher, aggregate contribution limits for political parties do not always protect associational rights for political parties.

Even assuming that the aggregate limit for political parties is constitutional, Montana's contribution limits still raise associational concerns because the same contribution limits apply to both individuals and political committees.

As the Ninth Circuit recently acknowledged, "voters in Montana" are constitutionally entitled to a "full and robust exchange of views." *Sanders Co. Republican. C. Comm. v. Bullock*, 698 F.3d 741, 2012 WL 4070122 at *1 (9th Cir. Aug. 31, 2012). The Supreme Court explained in *Buckley* that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." 424 U.S. at 15 (citations and internal quotation marks omitted). A political committee's campaign contribution is political speech, protected by the First Amendment, that fosters a full and robust exchange of views. *See generally Citizens United*, 558 U.S. 310; *Buckley*, 424 U.S. 1.

By holding political committees to the same contribution limits as individuals, Montana's contribution limits inhibit the associational rights of political committees and, consequently, a "full and robust exchange of views." *Sanders Co. Republican C. Comm.*, 698 F.3d 741, 2012 WL 4070122 at *1.

This conclusion can be illustrated by a hypothetical that the U.S. Supreme Court employed in *Randall*. Suppose that thousands of voters in Montana support the agenda advanced by a particular political committee. Suppose also that the voters do not know which elections in the State are most critical to advancing that agenda. Those voters may simply donate their money to the political committee instead of a particular candidate and then let the committee determine the elections to which those funds should be contributed. If the political committee has, as a result, thousands of dollars available to contribute but targets only a handful of races, the committee will quickly reach its contribution limits without being able to deploy all of the money it received. Consequently, the aims of thousands of donors will be thwarted. *Cf. Randall*, 548 U.S. at 257-58 (applying the same hypothetical to political parties).

By holding political committees to the same contribution limits as individuals, Montana has "reduce[d] the voice of political [committees] to a whisper." *Randall*, 548 U.S. at 259 (citations and internal quotation marks omitted). This inhibition is aggravated by the fact that Montana imposes an aggregate contribution limit on political committees, *see* Mont. Code Ann. § 13-37-218, although, as noted above, the constitutionality of that aggregate

limitation is not at issue in this case.

Even the testimony of the defendants' expert supports this conclusion. Bender testified that, in legislative races, contributions from political committees accounted for only 9% to 11% of the total contributions from 2004 to 2010. For statewide races, the percentage was between 0% and 3%, and for the gubernatorial races it was 0%.

The potential harms to political committees' associational rights is an additional factor weighing against the constitutionality of Montana's contribution limits.

3. Volunteer services

Montana, like Vermont prior to *Randall*, does not count the value of volunteer services as a contribution. *See In re Bullock* (Ex. 8).

[*1092] The decision from the Commissioner of Political Practices in *In re Bullock*, which recently affirmed this proposition, is consistent with Montana's statute defining "contributions." *See* Mont. Code Ann. § 13-1-101(7)(b)(i). That statute expressly excludes from the definition of "contribution": "services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee . . . ." *Id.; see also* Admin. R. Mont. 44.10.321(2). But, just like Vermont's statute prior to *Randall*, Montana law "does not exclude the expenses those volunteers incur, such as travel expenses, in the course of campaign activities." *Randall*, 548 U.S. at 259.

The *Randall* Court observed that "[t]he absence of some such exception may matter . . . where

contribution limits are very low." *Id.* at 260. It explained:

> That combination, low limits and no exceptions, means that a gubernatorial campaign volunteer who makes four or five round trips driving across the State performing volunteer activities coordinated with the campaign can find that he or she is near, or has surpassed, the contribution limit. . . . Such supporters will have to keep careful track of all miles driven, postage supplied (500 stamps equals $200), pencils and pads used, and so forth. And any carelessness in this respect can prove costly, perhaps generating a headline, "Campaign laws violated," that works serious harm to the candidate.

Id. As in *Randall*, then, this factor weighs against the constitutionality of Montana's contribution limits.

4. Inflation adjustment

Montana's contribution limits, unlike Vermont's prior to *Randall*, are adjusted for inflation, Mont. Code Ann. § 13-37-216(4), although feebly so. So this factor does not necessarily weigh against the constitutionality of Montana's contribution limits.

Nevertheless, the Court notes that the testimony at the bench trial suggests that the inflationary adjustment, which is based on the Consumer Price Index, has not have kept pace with the actual increasing cost of running an effective campaign. As Bensen testified, the Consumer Price Index does not consider factors such as the increasing cost of advertising, hiring media consultants, and technology that may be needed to run an effective campaign. We

are in a new age when it comes to campaign financing.

Even if Montana's inflationary adjustment adequately accounts for the increasing costs of running a campaign, the problem with Montana's limits is that the inflationary adjustment is added to a base limit that is simply too low to allow candidates to "amass[ ] the resources necessary for effective campaign advocacy." *Randall*, 548 U.S. at 249 (citations and internal quotation marks omitted).

5. Special justification

Finally, as in *Randall*, there is no evidence in the record of "any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems" described above. *Randall*, 548 U.S. at 261. The defendants have not presented any evidence showing that corruption in Montana is more rampant than in any other state where contribution limits are much higher. As Ms. Baker, of the office of the Commissioner of Political Practices, testified, larger contribution limits—such as $1,000—would not likely have a corruptive effect. While the Court has "no scalpel to probe each possible contribution level," *Randall*, **[*1093]** 548 U.S. at 249, such a limit comes closer to the limits that the U.S. Supreme Court has previously upheld, *see Buckley*, 424 U.S. 1; *Shrink Mo.*, 528 U.S. 377.

C. Severability

Apparently because of the large number of candidates and elections involved, plaintiffs have focused their efforts on attacking the lowest of Montana's contribution limits—e.g., the $160 limit for individual contributors to "other public office[s]," such

as state house and senate races. They have not so seriously challenged, for instance, the contribution limits for gubernatorial candidates. Nevertheless, the Court will not sever some of the contribution limits from others that could conceivably be constitutional. *See Randall*, 548 U.S. at 262. As the *Randall* Court explained:

> We add that we do not believe it possible to sever some of the Act's contribution limit provisions from others that might remain fully operative. *See Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932) ("invalid part may be dropped if what is left is fully operative as a law"); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191(1999) (severability "essentially an inquiry into legislative intent"); Vt. Stat. Ann., Tit. 1, § 215 (2003) (severability principles apply to Vermont statutes). To sever provisions to avoid constitutional objection here would require us to write words into the statute (inflation indexing), or to leave gaping loopholes (no limits on party contributions), or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found. Given these difficulties, we believe the Vermont Legislature would have intended us to set aside the statute's contribution limits, leaving the legislature free to rewrite those provisions in light of the constitutional difficulties we have identified.

Randall, 548 U.S. at 262. Indeed, as the U.S. Supreme

Court presaged in *Randall*, the Montana Legislature will have an opportunity to revisit the contribution limits in three months when it convenes.

This court's October 3, 2012 Order and its October 9, 2012 Order Denying Stay are hereby incorporated herein by reference.

As the Court stated in its order denying the defendants' motion to stay the judgment in this case, much has been made of whether striking Montana's contribution limits is good policy and good for Montana voters. This case, though, is not about policy. It is about following the law that the United States Supreme Court set out.

CONCLUSION

Montana's contribution limits in Montana Code Annotated § 13-37-216 prevent candidates from "amassing the resources necessary for effective campaign advocacy." *Randall*, 548 U.S. at 249 (citations and internal quotation marks omitted). They are therefore unconstitutional.

The 2013 Legislature will convene in less than three months, and it will probably consider whether to address the other statutes that the Court has already declared unconstitutional and for which the appeals have been dismissed. With entry of this order, the Legislature will have a clean canvas upon which to paint, should it choose to do so.

IT IS ORDERED that the Court's order declaring the contribution limits in Montana Code Annotated § 13-37-216 unconstitutional and permanently enjoining the defendants from enforcing those limits **[*1094]** is hereby confirmed subject however to the Circuit's temporary stay order received only minutes ago.

Dated this 10th day of October 2012.

/s/ Charles C. Lovell
CHARLES C. LOVELL
SENIOR UNITED STATES
DISTRICT JUDGE

[Filed: 10/3/2012]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

DOUG LAIR; STEVE DOGIAKOS; AMERICAN TRADITION PARTNERSHIP; AMERICAN TRADITION PARTNERSHIP PAC; MONTANA RIGHT TO LIFE ASSOCIATION PAC; SWEET GRASS COUNCIL FOR COMMUNITY INTEGRITY; LAKE COUNTY REPUBLICAN CENTRAL COMMITTEE; BEAVERHEAD COUNTY REPUBLICAN CENTRAL COMMITTEE; JAKE OIL, LLC; JL OIL, LLC; CHAMPION PAINTING; and JOHN MILANOVICH,

Plaintiffs,

vs.

JAMES MURRY, in his official capacity as Commissioner of Political Practices; STEVE BULLOCK, in his official capacity as Attorney General of the State of Montana; LEO GALLAGHER, in his official capacity as Lewis and Clark County Attorney,

Defendants.

CV 12-12-H-CCL

ORDER

The remainder of this case—the constitutionality of Montana's election limits set out in Montana Code Annotated § 13–37–216—came on regularly for trial before the undersigned sitting without a jury from September 12, 2012, to September 14, 2012. Plaintiffs were represented by James Bopp, Jr., and the defendants were represented by Michael Black and Andrew Huff.

Plaintiffs filed this case in the Billings Division for the District of Montana on September 6, 2011, claiming that several of Montana's campaign finance and election laws are unconstitutional under the First Amendment. The statutes that they challenged are:

Montana Code Annotated § 13–35–225(3)(a), which requires authors of political election materials to disclose another candidate's voting record; Montana Code Annotated § 13–37–131, which makes it unlawful for a person to misrepresent a candidate's public voting record or any other matter relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether it is false;

Montana Code Annotated § 13–37–216(1), (5), which limits contributions that individuals and political committees may make to candidates;

Montana Code Annotated § l3–37–216(3), (5), which imposes an aggregate contribution limit on all political parties; and

Montana Code Annotated § l3–35–227, which prevents corporations from making either direct contributions to candidates or independent expenditures on behalf of a candidate.

Plaintiffs moved for a preliminary injunction on September 7, 2011, seeking to enjoin the defendants from enforcing each of these statutes. Before any action was taken on the motion, defendants moved to change venue. That motion was granted on January 31, 2012, and the case was transferred to the undersigned and the Helena Division of the Court.

On February 16, 2012, this Court held a hearing on the motion for a preliminary injunction and enjoined enforcement of Montana's vote-reporting requirement and political-civil libel statute. (*See* doc. 66); Mont. Code Ann. §§ 13–35–225(3)(a), 13–37–131. The Court denied the motion as to the remaining statutes. (*Id.*) Status conferences with the parties were held.

The Court issued its scheduling order on March 9, 2012. The parties agreed that all of the issues regarding the contribution limits in Montana Code Annotated § 13–37–216(1), (3), and (5) would be resolved through a bench trial and that all other matters would be adjudicated by summary judgment. The Court accepted the stipulation. (*See* doc. 73.)

The Court and the parties all agreed to place this matter on an expedited schedule so that it will be resolved prior to this year's election.

The parties filed cross-motions for summary judgment, and the Court held a hearing on May 12, 2012. The Court granted both motions in part and denied them in part. (*See* doc. 90.) The Court *inter alia* permanently enjoined: (1) Montana's vote-reporting requirement, (2) political-civil libel statute, and (3) ban on corporate contributions to political committees that the committees use for independent expenditures. *See* Mont. Code Ann. §§ 13–35–225(3)(a),

13–37–131,13–35–227.

The Court held a bench trial from September 12, 2012, to September 14, 2012, in order to resolve the remainder of the case—i.e. plaintiffs' claims related to Montana's campaign contribution limits in Montana Code Annotated § 13–37–216.

Briefing by the parties was completed September 26, 2012. The transcript of testimony and record of proceedings was filed September 28, 2012 and October 1, 2012.

Having reviewed and considered the entire record and the parties' arguments and evidence, the Court concludes that Montana's contribution limits in Montana Code Annotated § 13–37–216 are unconstitutional under the First Amendment.[1] *Randall v, Sorrell*, 548 U.S. 230 (2006). The contribution limits prevent candidates from "amassing the resources necessary for effective campaign advocacy." *Id*. at 249 (citations and internal quotation marks omitted). The defendants are therefore permanently enjoined from enforcing these limits.

The Court will in due course issue complete and extensive findings of fact and conclusions of law that support this order. They will be filed separately,

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[1] The plaintiffs do not challenge the constitutionality of Montana Code Annotated § 13–37–218, which imposes an aggregate contribution limit on political committees. The plaintiffs make no mention of that statute in their complaint, and they did not argue at the bench trial that the statute is unconstitutional. The Court, therefore, makes no determination as to the constitutionality of this statute, and this decision does not impact the defendants' ability to enforce Montana Code Annotated § 13–37–218.

though, so that this order can be issued before voting begins in the upcoming election.

IT IS ORDERED that the contribution limits in Montana Code Annotated § 13–37–216 are declared unconstitutional. The defendants are permanently enjoined from enforcing those limits.

IT IS FURTHER ORDERED that the defendants' renewed motion for summary judgment is DENIED.

IT IS FURTHER ORDERED the Clerk of Court is directed to enter judgment in favor of the plaintiffs.

Dated this 3rd day of October 2012. 1:50 p.m.

/s/ Charles C. Lovell
CHARLES C. LOVELL
SENIOR UNITED STATES
DISTRICT JUDGE

[***Editing Note:*** *Page numbers from the reported opinion, 343 F.3d 1085, are indicated, e.g.,* ***[*1087]***.]

[Filed: 09/11/2003]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONTANA RIGHT TO LIFE ASSOCIATION, MONTANA RIGHT TO LIFE POLITICAL ACTION COMMITTEE, JULIE DAFFIN, President of Montana Right to Life Association, Plaintiffs-Appellants, vs. ROBERT EDDLEMAN, in his official capacity as County Attorney for Stillwater County, Montana, and as a representative of the class of district attorneys in the State of Montana, and ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices for the State of Montana, Defendants-Appellees.	No. 00-35924 D.C. No.CV-96-00165-JDS ORDER

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

Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted March 7, 2002
Seattle, Washington

Filed September 11, 2003

Before: Arthur L. Alarcon and Barry G. Silverman,
Circuit Judges, and James A. Teilborg,
District Judge.

Opinion by Barry G. Silverman, Circuit Judge

OPINION

[*1087] SILVERMAN, Circuit Judge:

In 1994, Montana voters passed various campaign finance reform measures contained in a ballot proposition known as Initiative 118. At issue in this case are two of the provisions contained in that initiative. The first lowers the maximum dollar amount both political action committees **[*1088]** and individuals may contribute to a political candidate; the second limits the aggregate dollar amount a candidate may receive from all PACs combined. Plaintiffs-appellants brought suit to invalidate some of the measures in Initiative 118, claiming they unduly burdened protected speech and associational rights. After a four-day bench trial, the district court made numerous factual findings and struck down portions of Initiative 118 not at issue here. As to the two provisions challenged on appeal, the district judge upheld them as sufficiently tailored to achieving

Montana's important interest in preventing corruption and the appearance of corruption in Montana politics.

We affirm. The district court's factual findings are adequately supported by the record and are not clearly erroneous. Applying these facts to the analytical framework set forth in *Buckley v. Valeo*, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) and *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 145 L. Ed. 2d 886, 120 S. Ct. 897 (2000), we agree that the two challenged provisions do not violate the First Amendment.

I. Factual Background

In 1994, Montana voters passed Initiative 118, a campaign finance reform scheme containing, among other provisions, two sections that were subsequently enacted as Mont. Code Ann. (M.C.A.) §§ 13-37-216 and -218. The first provision at issue here, M.C.A. § 13-37-216, imposes limits on individual and political action committee contributions to state candidates, the amount of which varies with the office sought.

> Aggregate contributions for each election in a campaign by a political committee or by an individual, other than a candidate, to a candidate are limited as follows:
>
> (i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed $ 400;
>
> (ii) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $ 200;
>
> (iii) for a candidate for any other public office, not to exceed $ 100.

Mont. Code Ann. § 13-37-216(1)(a). Because these limits apply to "each election in a campaign," the amount an individual may contribute to a candidate doubles when the candidate participates in a contested primary. While M.C.A. § 13-37-216 lowered the amount of money that individuals and PACs can contribute to candidates, it increased the amount that political parties are permitted to contribute. *Id.* § 13-37-216(3).[1]

The second provision at issue in this appeal, M.C.A. § 13-37-218, limits the amount that a candidate for the state legislature may receive from all political action committees combined. It provides in pertinent part: **[*1089]**

> A candidate for the state senate may receive no more than $ 1,000 in total combined monetary contributions from all political committees contributing to the candidate's campaign,

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[1] M.C.A. § 13-37-216(3) reads: "All political committees except those of political party organizations are subject to the provisions of subsections (1) and (2). For purposes of this subsection, "political party organization" means any political organization that was represented on the official ballot at the most recent gubernatorial election. Political party organizations may form political committees that are subject to the following aggregate limitations from all political party committees: (a) for candidates filed jointly for the offices of governor and lieutenant governor, not to exceed $ 15,000; (b) for a candidate to be elected for state office in a statewide election, other than candidates for governor or lieutenant governor, not to exceed $ 5,000; (c) for a candidate for public service commissioner, not to exceed $ 2,000; (d) for a candidate for the state senate, not to exceed $ 800; (e) for a candidate for any other public office, not to exceed $ 500."

and a candidate for the state house of representatives may receive no more than $600 in total combined monetary contributions from all political committees contributing to the candidate's campaign. The limitations in this section must be multiplied by the inflation factor [defined elsewhere]. The resulting figure must be rounded off to the nearest $50 increment.

Id. § 13-37-218. Adjusted for inflation, the PAC contribution ceiling at the time of trial was $ 2,000 for state senate candidates and $ 1,250 for state house candidates. Under M.C.A. § 13-37-218, a candidate is permitted to accept additional PAC contributions once the aggregate PAC contribution limit has been reached, provided that he returns funds to earlier PAC donors to make room for later-received contributions. It is important to note that M.C.A. § 13-37-218 does not prevent PACs from contributing to political parties, nor does it prevent PACs from spending money on independent political advertisements or otherwise engaging in political speech. Section 13-37-218 merely limits how much PACs as a group can donate to any one candidate.

The Montana Right to Life Association, Montana Right to Life Political Action Committee, and Julie Daffin, President of the Montana Right to Life Association (collectively, "MRLA") have all made or attempted to make contributions to Montana legislative candidates. MRLA brought this lawsuit in 1996, challenging six of the campaign finance reform measures contained in Initiative I-118.

The district court granted partial summary judgment to MRLA, declaring four of the initiative's

provisions unconstitutional, but left for trial the constitutionality of M.C.A. §§ 13-37-216 and -218. After a four-day bench trial, the district court issued findings of fact and conclusions of law, upholding the two provisions at issue here. The district court relied in part on the testimony of Jonathon Motl, the drafter of the ballot initiative, that I-118 affects only the largest contributions to the various offices. The judge found that the limits imposed by M.C.A. § 13-37-216 "were in the upper 10% of contributions for the particular offices." That is, nine out of ten donations to political candidates were unaffected by this measure.

The district court also found that M.C.A. § 13-37-218, the aggregate PAC contribution limit provision, had the effect of limiting the amount the average candidate received from PACs to about 29% of all contributions received. The court found that, at the time of trial, state house candidates continued to raise an average of $ 4,464.87, and state senate candidates continued to raise an average of $ 6,869.04, despite the limits imposed by M.C.A. § 13-37-218. The evidence further showed that the cost of a House race in Montana was between $ 3,000 and $ 7,000, and a Senate race between $ 6,000 and $ 9,000. The district court thus found that MRLA was unable to demonstrate that the limits imposed left candidates with insufficient funds to run an effective campaign: "Outside of bald, conclusory allegations that their campaigns would have been more 'effective' had they been able to raise more money, none of the witnesses offered any specifics as to why their campaigns were not effective." It further found that "there is no indication that the contribution limitations imposed would have any dramatically adverse effect on the

funding of campaigns and political associations . . . ."

Applying the standards announced by the Supreme Court in *Shrink Missouri*, **[*1090]** the district court ultimately ruled that the State of Montana's political contribution limits were "closely drawn to match the constitutionally sufficient interest in pre-venting campaign corruption and the appearance thereof." The limits "are not so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." MRLA appeals this ruling.

II. Standard of Review

We review the constitutionality of state statutes *de novo*. *California Democratic Party v. Jones*, 169 F.3d 646, 647 (9th Cir. 1999), *rev'd on other grounds*, 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000); *Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1007 (9th Cir. 2003). We review the district court's findings of fact for clear error. *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1054 (9th Cir. 2000) (reviewing a district court's findings of fact in a campaign contribution limit case under the "clearly erroneous" standard without discussion); *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1316 (9th Cir. 1992) (same). The district court's application of the law to those facts is reviewed *de novo*. *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 499, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984).

III. Supreme Court Decisions Regarding the Constitutionality of Campaign Finance Restrictions

The starting place in the analysis of the

constitutionality of campaign finance reform legislation is *Buckley v. Valeo*, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976). *Buckley* involved a challenge to the Federal Election Campaign Act. The Act (1) limited individual contributions to any single candidate to $ 1,000 per election, with an overall annual limitation of $ 25,000 by any contributor; (2) limited independent expenditures by individuals and groups relative to a clearly identified candidate to $ 1,000 per year; (3) subjected campaign spending by candidates and political parties to prescribed limits; and (4) required public disclosure of all contributions and expenditures above defined limits.

The *Buckley* Court held that although the provisions limiting contributions to candidates were constitutional, the provisions limiting expenditures by candidates were invalid, violating candidates' freedom of speech. *Id.* at 20-21. With respect to the contribution limitations, the Court made three important observations. First, regarding a contributor's right to free speech, the effect of the contribution limitation was minimal:

> A limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated,

> symbolic act of contributing . . . . *A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.*

Id. (emphasis added).

Second, regarding the effect on a candidate's free speech rights, the *Buckley* **[*1091]** Court held that contribution limits are constitutional as long as they do not prevent candidates from "amassing the resources necessary for effective advocacy." *Id.* at 21. If a candidate is merely required "to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression," the candidate's freedom of speech is not impugned by limits on contributions. *Id.* at 21-22.

Finally, the *Buckley* Court observed that the main concern raised by contribution limitations was whether they interfered with a contributor's right of association. *Id.* at 24-25. "Making a contribution, like joining a political party, serves to affiliate a person with a candidate." *Id.* at 22. Recognizing that freedom of political association is a "basic constitutional freedom," the Court held that restrictions on that right are subject to the "closest scrutiny." *Id.* at 25. The Court was careful to note, however, that "neither the right to associate nor the right to participate in political activities is absolute . . . . Even a significant

interference may be sustained if the State demonstrates a sufficiently important interest and employs a means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25 (citations and internal quotation marks omitted).

The Supreme Court reaffirmed the principles announced in *Buckley* when it upheld a state campaign contribution limitation in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 145 L. Ed. 2d 886, 120 S. Ct. 897 (2000).[2] *Shrink Missouri* involved a Missouri statute that imposed contribution limits ranging from $ 275 to $ 1,075, depending on the office or size of the candidate's constituency and accounting for inflation. *Id.* at 382. The Shrink Missouri Government PAC and an unsuccessful candidate for state auditor sued to enjoin enforcement of the statute, claiming that it violated the First and Fourteenth Amendments.

Upholding the statute as constitutional, the *Shrink Missouri* Court emphasized *Buckley*'s holding that "a contribution limit involving a 'significant interference' with associational rights could survive if the Government demonstrated that the regulation was 'closely drawn' to match a 'sufficiently important interest,' though the dollar amount of the limit need not be 'fine-tuned.'"*Id.* (citations omitted). *Shrink Missouri* also stressed that courts considering contribution limits, as opposed to expenditure limits, need not be overly concerned with the precise standard

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[2] MRLA's reliance on *VanNatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998); *Service Employees Int'l Union*, 955 F.2d at 1312; and other Ninth Circuit cases interpreting *Buckley* fails to recognize the impact of the Supreme Court's superceding decision in *Shrink Missouri*.

of scrutiny to be applied because, in general, "limiting contributions [leaves] communications significantly unimpaired," and "contribution limits . . . more readily clear the hurdles before them" than would analogous expenditure limits. *Id.* at 387-88.

Shrink Missouri recognized that *Buckley* "specifically rejected the contention that $ 1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate." *Id.* at 397. Rather, the Court said that the outer limits of constitutional contribution limitations are defined by whether the limitation is so low as to impede a candidate's ability to "amass the resources necessary for effective advocacy." *Id.* at 397. The question to be asked in **[*1092]** evaluating laws that limit campaign contributions, then, is whether "the contribution limitation is so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id.*

Recently, in *FEC v. Beaumont*, 539 U.S. 146, 156 L. Ed. 2d 179, 123 S. Ct. 2200 (2003), the Supreme Court reaffirmed the principles enunciated in *Buckley*. The Supreme Court noted that "going back to *Buckley*. . . restrictions on political contributions 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." *Id.* at 2210.

The bottom line is this: After *Buckley* and *Shrink Missouri*, state campaign contribution limits will be upheld if (1) there is adequate evidence that the

limitation furthers a sufficiently important state interest, and (2) if the limits are "closely drawn" -- i.e., if they (a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign. With these principles in mind, we now turn to whether Montana's campaign limits pass muster under *Buckley* and *Shrink Missouri.*

IV. M.C.A. § 13-37-216, limiting individual and PAC campaign contributions, is constitutional.

A. The State of Montana presented sufficient evidence of its asserted interest in avoiding corruption or the appearance of corruption.

Montana asserts that the campaign contribution limitation on individuals and PACs is necessary to avoid corruption or the appearance of corruption in Montana politics. MRLA does not dispute that this interest is sufficient to justify campaign contribution limits. Rather, it argues that the limits imposed are unnecessarily stringent and there is no evidence that restricting contributions to such small amounts is needed to combat corruption.

This, however, is not the appropriate inquiry. The correct focus under *Shrink Missouri* is whether the state has presented sufficient evidence of a valid interest, not whether it has justified a particular dollar amount. The latter inquiry, if ever appropriate, occurs in the second part of our analysis, in examining whether the restriction is "closely drawn." *See, e.g.*, *California Pro-life Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1292 (E.D. Cal. 1998) ("As

a general matter, the court will not second guess a legislative determination as to where the line for contribution limits shall be drawn."). With respect to whether Montana has presented sufficient evidence of corruption or the appearance of corruption, we agree with the district court that it has.

A state's interest in preventing corruption or the appearance of corruption is not confined to instances of bribery of public officials, but extends "to the broader threat from politicians too compliant with the wishes of large contributors." *Shrink Missouri*, 528 U.S. at 389. With respect to the quantum of evidence necessary to justify this interest, the Supreme Court has required only that the perceived threat not be "illusory," *Buckley*, 424 U.S. at 27, or "mere conjecture," *Shrink Missouri*, 528 U.S. at 392. The amount of evidence needed will thus "vary up or down with the novelty and plausibility of the justification raised." *Id.* at 391. The *Shrink Missouri* Court found sufficient evidence of the potential of contributions to corrupt simply in a state senator's statement that contributions had the **[*1093]** "real potential to buy votes," a smattering of newspaper articles reporting large contributions, and the fact that 74% of Missouri voters determined that contribution limits were necessary. *Id.*

The evidence presented by the State of Montana in this case is sufficient to justify the contribution limits imposed, and indeed carries more weight than that presented in *Shrink Missouri*. The record contains the testimony of a 30-year veteran of the Montana legislature who stated that special interests funnel more money into campaigns when particular issues approach a vote "because it gets results." The state also

pointed to a 1981 incident in which a Republican state senator dispatched a letter to his colleagues urging them to vote for passage of a bill favoring variable annual annuities to ensure that a highly disproportionate share of PAC contributions from the insurance industry continued to flow to the Republican party. The letter read in part:

> Please destroy this letter after reading. Why? Because the Life Underwriters Association in Montana is one of the larger Political Action Committees in the state, and I don't want the demos to know about it! In the last election they gave $ 8000 to state candidates . . . . Of this $ 8,000 -- Republicans got $ 7000 -- you probably got something from them. This bill is important to the underwriters and I have been able to keep the contributions coming our way. In 1983, the PAC will be $ 15,000. Let's keep it in our camp.

The Montana press published the contents of the senator's letter. Although the author of the letter was ultimately cleared of wrongdoing, the letter and attendant publicity spawned five separate investigations.

A 1982 poll indicated that 78.3% of Montana voters believe money is synonymous with power. Another 69% of Montanans say that elected officials give special treatment to individuals and businesses that make large contributions. The district court found that MRLA had offered no evidence that Montana voter suspicion or perception was to the contrary. Moreover, MRLA is incorrect to suggest that our reliance on such evidence is impermissible. In *Shrink Missouri,* the

Court relied, in part, on similar evidence: the result of a referendum election relating to contribution limits. *See Shrink Missouri*, 528 U.S. at 394. *Cf. Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 2248-50, 153 L. Ed. 2d 335 (2002) (relying on public consensus as evidence of what constitutes cruel and unusual punishment in a death penalty case). Taken together, the evidence presented below suffices under *Shrink Missouri* to establish Montana's interest in avoiding corruption or the appearance of corruption. The state's interest is neither illusory or conjectural.

B. M.C.A. § 13-37-216 is "closely drawn" to avoid unnecessary abridgment of associational freedoms.

MRLA also challenges M.C.A. § 13-37-216 as insufficiently tailored to the state's interest in preventing corruption, arguing that it prevents candidates from amassing needed resources, discriminates against challengers, and unconstitutionally prohibits both small and large contributions. We disagree.

A campaign contribution limitation is "closely drawn" if it

> focuses on the narrow aspect of political association where the actuality and potential for corruption have been identified -- while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist in a limited but nonetheless substantial extent **[*1094]** in supporting the candidates and committees with financial resources.

Buckley, 424 U.S. at 28. In examining whether a

contribution limitation is sufficiently tailored to a state's asserted interest, the focus is as much on those aspects of associational freedom unaffected by the law as the limitations that are imposed. We are mindful that the dollar amounts employed to prevent corruption should be upheld unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice beyond the level of notice, and render contributions pointless." *Shrink Missouri*, 528 U.S. at 397. In making this determination, we look at all dollars likely to be forthcoming in a campaign, rather than the isolated contribution, *id.*, and we also consider factors such as whether the candidate can look elsewhere for money, *Buckley*, 424 U.S. at 21-22, the percentage of contributions that are affected, *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 461, the total cost of a campaign, *id.*, and how much money each candidate would lose, *id.*

We agree with the district court that the state's contribution limits are closely drawn to further its interest in preventing corruption and the appearance of corruption. The district court found that the contribution limits affect only the top 10% of contributions, and that the percentage affected includes the largest contributions. As the testimony of the statute's drafter, Jonathon Motl, makes clear, this finding was not clearly erroneous. MRLA's contention that M.C.A. § 13-37-216 unconstitutionally prohibits both small and large contributions is thus without merit.

In addition, M.C.A. § 13-37-216, while decreasing PAC and individual contributions, simultaneously

increased the amount of money political parties may contribute to a candidate, almost doubling the amount that may be contributed in some races. The statute also did not limit the amount a candidate may give to himself, or the number of individuals from whom he can seek contributions. Candidates can therefore look elsewhere for forms of funding unaffected by the limitations imposed by M.C.A. § 13-37-216. Moreover, the statute in no way prevents PACs from affiliating with their chosen candidates in ways other than direct contributions, such as donating money to a candidate's political party, volunteering individual members' services, sending direct mail to their supporters, or taking out independent newspaper, radio, or television ads to convey their support.

The evidence before the district court showed that the State of Montana remains one of the least expensive states in the nation in which to run a political campaign. Montana's 100 house districts average only 7,991 people, its 50 senate districts 15,981 people. Legislative candidates in Montana campaign primarily door-to-door, and only occasionally advertise on radio and television. It is undisputed that the total money contributed to political campaigns in the State of Montana has decreased considerably since the challenged measures went into effect. The parties agree that, of the money raised in the 1992 legislative election, before M.C.A. § 13-37-216 was enacted, 24% to 30% came from contributions that would now violate the new limits. That alone, however, does not make the contribution limits unconstitutional. Indeed, the *Shrink Missouri* Court upheld contributions limits despite a decrease of more than 50% in total spending in Missouri elections, nearly twice the decrease present

here. *See Shrink Missouri*, 528 U.S. at 426 n.10 (Thomas, J., dissenting). The district court found that the average amount raised by a Montana house candidate in 1998, with the challenged limits in effect, was $ 4,464.87, a **[*1095]** figure well within the range of money needed to run an effective house campaign. The same is true for the $ 6,869.00 average raised by state senate candidates. We cannot agree with MRLA that the challenged limits have impeded candidates' campaigns to such an extent that speech and associational rights have been impermissibly abridged.

As the district court found, Montana candidates remain able to mount effective campaigns, a primary concern in our inquiry. MRLA, however, presented the testimony of three candidates who claimed that the new limits preclude effective campaigning. We agree with the district court that this evidence is unpersuasive. Two of the witnesses raised more money *after* the enactment of M.C.A. § 13-37-216 than before, two were successfully elected to their positions, and the one losing candidate admitted that his absence during a pivotal campaign period prevented him from raising sufficient funds to win. Another MRLA witness, a campaign manager for a successfully elected Montana legislator, acknowledged that her candidate won with a $ 70,000.00 surplus of funds. We fully agree with the district court's conclusion that, apart from "bald, conclusory allegations that their campaigns would have been more 'effective' had they been able to raise more money, none of the witnesses offered any specifics as to why their campaigns were not effective."

It is true that the contribution limits imposed by M.C.A. § 13-37-216 are some of the lowest in the country. This is unsurprising in light of the fact that

Montana is one of the least expensive states in the nation in which to mount a political campaign. As long as the limits are otherwise constitutional, it is not the prerogative of the courts to fine-tune the dollar amounts of those limits. *See, e.g.*, *Shrink Missouri*, 528 U.S. at 388 ("The dollar amount of the limit need not be fine tuned.") (internal quotations omitted).

MRLA also claims that the state's argument, that a candidate can campaign through less expensive means, is unpersuasive if the candidate is unable to mount the same type of campaign he could have run without the limit. This ignores the point emphasized in both *Buckley* and *Shrink Missouri* that a limit on what others can give a candidate is fundamentally different from a limit on what a candidate can spend. Limitations on candidates' expenditures are viewed as direct restrictions on speech, while contribution limits are only rarely seen as restrictions on donors' First Amendment rights. Under the standards articulated for contribution limits in *Buckley* and *Shrink Missouri*, MRLA cannot argue that Montana's contribution limits impermissibly alter a candidate's message, or result in a different kind of campaign as compared to when the limits did not exist. Rather, MRLA must show that limiting donations prevents candidates from amassing the resources necessary for effective advocacy, making a donee candidate's campaign to be not merely different but ineffective. This MRLA has not done.

Finally, MRLA, noting that 40-50% of legislative seats went uncontested in the 1998 campaign, argues that the contribution limits unconstitutionally discriminate against challengers. This assertion fails for two reasons. First, while imposing contribution limits, M.C.A. § 13-37-216 also contains a provision

preventing incumbents from using excess funds from one campaign in future campaigns. Such a provision keeps incumbents from building campaign war chests and gaining a fund-raising head start over challengers. The record shows that the average gap between the total amount of money raised by incumbents and challengers for all legislative races was only $ 65.00 per race. Second, **[*1096]** *Buckley* squarely held that, without a record of "invidious discrimination against challengers as a class," there is "no support for the proposition that an incumbent's advantages [are] leveraged into something significantly more powerful by contribution limitations applicable to all candidates, whether veterans or upstarts." *Shrink Missouri*, 528 U.S. at 389 n.4. Accordingly, MRLA's argument is without merit.

Because individuals and PACs remain "free to engage in independent political expression, to associate actively through volunteering their services, and to assist in a limited but nonetheless substantial extent in supporting the candidates and committees with financial resources," *Buckley*, 424 U.S. at 28, we agree with the district court that M.C.A. § 13-37-216 is constitutional.

V. M.C.A. § 13-37-218, imposing an aggregate limit on PAC contributions to state legislative candidates, is constitutional.

We now turn to the aggregate limit on PAC contributions. M.C.A. § 13-37-218 provides:

> A candidate for the state senate may receive no more than $ 1,000 [now increased to $ 2,000] in total combined monetary contributions from all political committees

> contributing to the candidate's campaign, and a candidate for the state house of representatives may receive no more than $ 600 [now $ 1,250] in total combined monetary contributions from all political committees contributing to the candidate's campaign. The limitations in this section must be multiplied by the inflation factor [defined elsewhere].

MRLA argues that the statutory limits on what a candidate may receive from all PACs unconstitutionally discriminates against PACs, unconstitutionally prohibits certain contributions entirely, impermissibly functions as a candidate spending limit, and is not tailored to any legitimate state interest.

A. The aggregate PAC limit is justified by a sufficiently important interest and does not unconstitutionally discriminate against PACs.

MRLA argues that M.C.A. § 13-37-218 unconstitutionally discriminates against PACs as opposed to individual donors. However, the differential treatment of PACs is constitutionally permissible where, as here, that treatment is necessary to serve a substantial government interest. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972) ("The crucial question is whether there is an appropriate government interest suitably furthered by the differential treatment."). The State of Montana contends that the aggregate PAC limit is justified by the state's concern over the corrupting influence of PAC money on campaigns. If the record demonstrates that the danger of corruption, or the

appearance of such a danger, is greater when dealing with PAC money as opposed to other contributions, then the state's justification is constitutionally sufficient. *See, e.g.*, *Austin v. Michigan Chamber of Comm.*, 494 U.S. 652, 658-60, 108 L. Ed. 2d 652, 110 S. Ct. 1391 (1990) (prevention of corruption justification sufficient to justify differential treatment of corporations).

The district court found that the aggregate PAC limits are "essential" to preventing undue influence and the appearance of undue influence by special interest groups. As noted above, this finding is supported by a quantum of evidence that more than exceeds that found sufficient in *Shrink Missouri*. The most damning evidence was the letter from a state senator urging legislators to vote for a bill in order to **[*1097]** keep insurance industry PAC money in the Republican camp. It is true that the investigations spawned by the letter did not result in criminal charges, but that is not the test. The voters of Montana were entitled to view the widely-publicized letter as unwholesome and indicative of the corrosive influence of PAC money on the legislative process, as they apparently did.

This view was echoed by veteran legislator Hal Harper, who testified that, in general, PACs funnel money into state legislative campaigns only when their interests are at stake in order to "get results." This testimony, like that of Missouri Senator Wayne Goodein, who stated that large contributions have "the real potential to buy votes," *Shrink Missouri*, 528 U.S. at 393, speaks not to particular PACs but to the potentially corrosive effects of special interest groups in general, and the corresponding justification for

government actions to counteract such effects.

Many courts have recognized that the danger of corruption in the political system is greater with respect to PAC contributions than it is for individuals. *See, e.g.*, *Kentucky Right to Life v. Terry*, 108 F.3d 637 (6th Cir. 1997) (upholding a law to combat corruption by placing greater restrictions upon direct corporate and PAC contributions to political candidates, and lesser restrictions upon individual contributions); *Landell v. Sorrell*, 118 F. Supp. 2d 459, 489 (D. Vt. 2000) ("The anti-corruption rationale . . . is arguably even stronger when applied to PAC contributions . . . . As their name suggests, PACs exist in order to affect certain political action. The likelihood of actual quid pro quo arrangements between PACs and candidates is high."). One court has even explicitly held that, due in part to the disproportionate influence of special interests on a candidate's campaign, aggregate PAC limits are constitutionally permissible. *Gard v. Wisconsin State Elections Bd.*, 156 Wis. 2d 28, 456 N.W.2d 809, 820 (Wis. 1990).

MRLA argues that the State's interest in preventing corruption and the appearance of corruption does not justify the aggregate PAC limit because M.C.A. § 13-37-218 does not differentiate on the basis of the size of any individual PAC's contribution. This ignores the fact that the size of an individual PAC's contribution is already limited by M.C.A. § 13-37-216. The two provisions before us work hand-in-glove to avoid corruption and the appearance of the same by reducing the impact of PAC money on Montana's elections, thereby encouraging candidates to have a diverse base of support. The district court found that the aggregate PAC limit was justified in

part because otherwise PACs could easily evade the individual contribution limits by contributing the statutory maximum through a multitude of individual committees. Like the district court, we find this justification persuasive. Accordingly, we hold that the aggregate PAC limit is justified by a sufficiently important state interest and does not unconstitutionally discriminate against PACs.

B. The aggregate PAC limit is closely drawn to serve the state's anti-corruption purpose.

MRLA argues that M.C.A. § 13-37-218 is not sufficiently tailored to the state's anti-corruption interest, preventing some PACs from contributing anything at all. The argument goes like this: If a candidate for, say, state senate has already accepted $ 2,000 in PAC money, he has "PAC'd out," and other PACs are now prevented from contributing and can no longer express their support for the candidate. The flaw in this argument is that it fails to recognize that, under the Montana scheme, a candidate can return some money from one PAC to make room for other **[*1098]** PAC money. For example, in our hypothetical, suppose the senate candidate received twenty contributions of $ 100 each from twenty different PACs, thus reaching the aggregate $ 2,000 limit. If a twenty-first PAC wished to make a $ 100 contribution, and if the candidate wished to accept it, the candidate could refund $ 100 (for example, by returning five dollars to each of the other twenty PACs) to make room for the new contribution. What matters is that so long as a candidate wants a PAC involved in funding his campaign, Montana's law does not infringe on the PACs' associational freedoms. A candidate is free to manage his PAC contributions so

as to be able to accept contributions from an unlimited number of PACs, allowing them to show their support for candidates they back and participate in the electoral process.

Furthermore, M.C.A. § 13-37-218 does not prevent PACs from otherwise affiliating with a candidate in ways other than direct contributions. PACs can continue, for example, to volunteer services to a candidate's campaign, to endorse a candidate, to independently buy advertising in support of a candidate, etc.

It is important to recognize that the aggregate PAC limit does not directly affect a candidate's speech. A candidate is free to obtain additional money from other sources, including an unlimited number of individual donors, the candidate's own funds, and the candidate's political party. Moreover, a PAC may still donate to political parties without limitation. As the district court found, even with the aggregate PAC limit imposed, PAC contributions comprised nearly a third of candidates' total campaign funds in the last election. Clearly, PACs still play a significant role in Montana political campaigns, and MRLA's attempts to characterize M.C.A. § 13-37-218 as stifling PACs' voices in Montana elections are unconvincing. The limits imposed by Montana voters are not "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice beyond the level of notice, and render contributions pointless." *Shrink Missouri*, 528 U.S. at 387-88, 397. We therefore agree with the district court that M.C.A. § 13-37-218 is constitutional.

VI. Conclusion

The voters of Montana are entitled to considerable deference when it comes to campaign finance reform initiatives designed to preserve the integrity of their electoral process. *See FEC v. Beaumont*, 539 U.S. 146, 156 L. Ed. 2d 179, 123 S. Ct. 2200, 2208, 2209 (2003). Our analysis in reviewing such initiatives is highly fact-intensive and relies heavily on the factual findings made by the district court in the wake of a four-day bench trial, findings that have ample support in the record and are not clearly erroneous. Applying these facts to the analytical framework set forth in *Buckley* and *Missouri Shrink*, we hold that Montana's interest in purging corruption and the appearance of corruption from its electoral system is sufficiently important to withstand constitutional scrutiny, and that M.C.A. §§ 13-37-216 and -218 are closely tailored to achieving those ends. We therefore affirm the district court and hold that these statutes are constitutional and do not violate the First Amendment.

AFFIRMED.

DISSENT

TEILBORG, District Judge, Dissenting in Part:

Under *Buckley*, contribution limitations can be upheld only "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976). I agree with the majority that Montana has **[*1099]** a sufficiently important interest in preventing corruption and the perception of corruption in Montana elections. I do not disagree with the majority in upholding the individual contribution

limits placed on individuals and PACs. Such limits are closely drawn to the significant interest of preventing improper influence, and quid pro quo arrangements arising from large contributions. As intended, the individual limits target the upper 10% of contributions.

Where I depart from the majority is on the constitutionality of the aggregate PAC contribution limit. I disagree that the State has demonstrated a "genuine threat to its important governmental interests" or has "employed means closely drawn to avoid unnecessary abridgment" of protected activity. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 302, 70 L. Ed. 2d 492, 102 S. Ct. 434 (1981) (Blackmun, & O'Connor, J.J., concurring) (internal quotation marks omitted).

The Supreme Court has previously defined corruption as "a subversion of the political process" where "elected 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." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497, 84 L. Ed. 2d 455, 105 S. Ct. 1459 (1985) ("NCPAC"). I agree that Montana has a significantly important interest in preventing corruption associated with large contributions. However, I submit that large individual contributions from persons and PACs have been addressed by Montana's individual contribution limits as set forth in Mont. Code Ann. § 13-37-216 (2001). I find that having a limit on the amount an individual PAC may contribute to a candidate sufficiently prevents any one PAC from exerting "unfair influence" over a candidate. Nevertheless, the

State has chosen to enact an aggregate PAC contribution limit to prevent a candidate from being overly influenced by special interests generally. The predicate for such a position must necessarily be that all PACs operate with a monolithic agenda. This ignores the obvious. Like individual persons, each PAC has its own interests and its own reasons for contributing. There is no evidence to support a proposition that all PACs exert unfair influence, or are collectively capable of doing so. I conclude that not only has the State failed to demonstrate a genuine threat, i.e., that all PAC contributions exert an unfair influence over candidates to justify the State's interest in preventing perceived and actual corruption, but the State has also failed to employ means closely drawn to that interest.

I. Inadequate evidence exists to sustain the aggregate limit.

While states should be permitted to respond to potential electoral deficiencies "with foresight rather than reactively," the response must not significantly impinge on constitutionally protected rights. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195, 93 L. Ed. 2d 499, 107 S. Ct. 533 (1986). To sustain the aggregate PAC contribution limit, we must find under the present law a serious threat of abuse exists from collective PAC special interest contributions. *See FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457, 150 L. Ed. 2d 461, 121 S. Ct. 2351 (2001).

Here, Montana's asserted purpose for the aggregate PAC limit is to prevent a candidate from

being overly influenced by special interests.[1] The majority finds that **[*1100]** the State's evidence of isolated incidents speaks not to particular PACs but to the nature of special interest groups in general. From this narrow evidence, the majority concludes that the regulation is necessary to limit the total amount of PAC contributions and encourage a diverse base of support in order to "eliminate the corrosive effects of large amounts of special interest money." It appears that Montana and the majority equate all special interest contributions with corruption without any evidentiary support.

Because the aggregate limit discriminates between PACs and individuals, the "discrimination itself [must be] necessary to serve a substantial governmental interest." *Arizona Right to Life PAC v. Bayless*, 320 F.3d 1002, 1010-11 (9th Cir. 2003). Moreover, while some courts have recognized that the potential danger of corruption is greater with respect to PAC contributions than with individuals, I find that the State has failed to demonstrate a serious threat of influence by all PACs in Montana to justify the aggregate limit or that the discrimination between PACs and individual donors is necessary to serve a substantial governmental interest. Even if one assumes there are instances of abuse by particular

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[1] It is worth observing that the term "special interest" seems to be used in the pejorative sense by Montana, even to the point of subtly equating it with corruption. In a democracy, every thoughtful voter and financial supporter (large or small) represents a "special interest." It is only when a particular interest becomes a corrupting one that the state can claim an interest which justifies regulation.

PACs, an aggregate limit on PAC contributions is no more justified than an aggregate limit on all individual contributions to regulate abuses by a particular contributor. Notably, in striking down a criminal statute limiting PAC expenditures, the Supreme Court observed that even if the large pooling of financial resources by PACs poses a potential for corruption or the appearance of corruption, a PAC expenditure limit is overly broad. *See NCPAC*, 470 U.S. at 498. It applies not only to "multimillion dollar war chests," but equally to "informal discussion groups that solicit neighborhood contributions." *Id.*

By contrast, in upholding a limitation on corporate contributions and independent expenditures, the Supreme Court in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660, 108 L. Ed. 2d 652, 110 S. Ct. 1391 (1990), specified that the "mere fact that corporations may accumulate large amounts of wealth is not the justification for [the expenditure restriction]; rather, the unique state-conferred corporate structure . . . warrants the limit on independent expenditures." The Court upheld the limitation on corporation expenditures based on the inherent structure of the corporation -- a structure which exists in all corporations. Here, as in *Vannatta v. Kiesling*, the State is unable to point to any evidence which demonstrates that *all* PAC contributions inherently lead to the sort of corruption that Montana purportedly seeks to prevent. 151 F.3d 1215, 1221 (9th Cir. 1998) (holding unconstitutional a contribution limit on out-of-district residents because it was not closely drawn to advance the goal of preventing corruption).

Interestingly, in footnote 2, the majority concludes

that *Vannatta* and another case, *Service Employees Int'l Union*, 955 F.2d 1312 (9th Cir. 1992), were "superseded" by *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 145 L. Ed. 2d 886, 120 S. Ct. 897 (2000). The majority's dismissal of *Vannatta* and *Service Employees*, is inconsistent with *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (*en banc*). In *Miller*, the court addressed "when, if ever, a district court or a three-judge panel is free to reexamine the holding of a prior panel in **[*1101]** light of an inconsistent decision by a court of last resort on a closely related, but not identical issue." *Id.* at 899. The court concluded that intervening Supreme Court authority "need not be identical," but the decision "must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are *clearly irreconcilable*." *Id.* at 900 (emphasis added).

Neither *Vannatta* nor *Service Employees* is clearly irreconcilable with *Shrink Missouri.* As discussed in more detail below, the volume of evidence presented in *Shrink Missouri* to justify its individual limits was substantial. *See, e.g.*, 528 U.S. at 393-94. That factor alone is sufficient to distinguish *Shrink Missouri* from *Vannatta* where the court found that the State had failed "to point to any evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in *Buckley*." *Vannatta*, 151 F.3d at 1221.

Similarly, *Service Employees* is distinguishable from *Shrink Missouri* because the former involved, among other things, an outright ban on certain types of campaign contributions, while the latter only involved limits on contributions. In finding a ban on

inter-candidate contributions unconstitutional, the court in *Service Employees* noted that "the potential for corruption stems not from campaign contributions *per se* but from large campaign contributions." 955 F.2d at 1323. The majority does not explain how that decision is inconsistent, much less clearly irreconcilable, with the Supreme Court's decision in *Shrink Missouri* upholding individual contribution limits. *See Shrink Missouri*, 528 U.S. at 387-89.

Moreover, under both *Vannatta* and *Shrink Missouri*, actual evidence is required; mere conjecture that special interest money corrodes politics in Montana is inadequate to carry a First Amendment burden. *See Shrink Missouri*, 528 U.S. at 392; *Vannatta*, 151 F.3d at 1221.[2] Nevertheless, the majority finds that the evidence here exceeds the evidence presented in *Shrink Missouri*. I disagree. In *Shrink Missouri*, the State presented an affidavit from a state senator who expressed that large contributions have "'the real potential to buy votes.'" *Id.* at 393 (quoting *Shrink Mo. Gov't PAC v. Adams*, 5 F. Supp. 2d 734, 738 (E.D. Mo. 1998)). There were newspaper accounts of large contributions supporting inferences

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[2] As noted by the majority, the Supreme Court's recent decision in *FEC v. Beaumont*, 539 U.S. 146, 156 L. Ed. 2d 179, 123 S. Ct. 2200 (2003) reiterates many of the important principles set forth in *Buckley* and *Shrink Missouri*, including the standard for review. "[A] contribution limit involving significant interference with associational rights passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *Beaumont*, 123 S. Ct. at 2210 (internal quotation marks omitted).

of impropriety. One such account examined the state treasurer's decision to engage in substantial state business with a bank which contributed $ 20,000 to the treasurer's campaign. *Shrink Missouri*, 528 U.S. at 393. Another report disclosed a $ 40,000 contribution from a brewery and one for $ 20,000 from a bank to a candidate for state auditor. *Id.* A PAC linked to an investment bank contributed $ 420,000 to candidates in northern Missouri; three scandals ensued including one involving a state representative who was " 'accused of sponsoring legislation in exchange for kickbacks.'" *Id.* (quoting *Carver v. Nixon*, 72 F.3d 633, 642, and n. 10 (8th Cir. 1995)). Another resulted in Missouri's former attorney general pleading guilty to charges of conspiracy to misuse state property after being indicted for using a state worker's **[*1102]** compensation fund to benefit campaign contributors. *Shrink Missouri*, 528 U.S. at 393-94. Finally, "'an overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof.'" *Id.* at 394 (quoting *Carver v. Nixon*, 882 F. Supp. 901, 905 (W.D. Mo. 1995)). These instances of actual and perceived corruption based on large contributions sufficiently justified the individual limits upheld in *Shrink Missouri.*

Not only do Montana's instances of corruption pale by comparison to the facts in *Shrink Missouri*, in my opinion, they simply do not demonstrate a serious threat of abuse by all PACs to justify an aggregate limit on PACs while simultaneously raising the amount political parties may contribute to a candidate. Montana cites a memorandum by a Republican legislator as evidence of corruption in the Montana legislature. The memorandum states that the

legislator wants to keep the particular PAC money within the Republican party and not allow that money to be shared with Democrats. Although five separate investigations were conducted, no convictions, or even indictments ensued. Thus, this incident does not justify a restriction placed on PACs generally. It is ironic that the State cites this episode as a justification for restraining aggregate PAC contributions to candidates, when it can be cited as powerful evidence of PAC influence on political parties, parties to which this very legislation permits PACs to make unlimited contributions. As discussed below, this anomaly simply dramatizes how inadequately tailored this law is to prevent a supposed corruption of Montana politics.

Montana also cites efforts by the gambling industry to prevent the passing of an automatic system of monitoring video gambling and efforts by the electric power industry to deregulate prices as examples of corruption associated with PAC contributions. Without any evidence of quid pro quo arrangements or other illegal or improper conduct, Montana asserts that these "results" are manifest examples of undue influence by PAC money. I find that this evidence is at most inconclusive.

Next, the State points to a poll of voters in support of campaign reform as evidence of perceived corruption. This poll did not specifically address PACs or special interest groups. Even if it did, I question whether a poll of the constituents is sufficient evidence, or is even probative to show the existence of perceived corruption. Issues of fundamental freedom should not be decided by majority vote, much less by a public opinion poll; thus, the poll results here should not be considered by the panel. The Tenth Circuit noted that "we should not

allow generic public dissatisfaction to support the restriction of political speech." *FEC v. Colo. Republican Fed. Campaign Comm.*, 213 F.3d 1221, 1230 n.6 (10th Cir. 2000), *rev'd on other grounds,* 533 U.S. 431, 150 L. Ed. 2d 461, 121 S. Ct. 2351 (2001) (citing *NCPAC*, 470 U.S. at 499-500) ("newspaper articles and polls purportedly showing a public perception of corruption" are insufficient to justify a limitation on the independent expenditures of PACs).[3] In *NCPAC*, the Supreme Court **[*1103]** implicitly affirmed the district court's exclusion of the proffered evidence of newspaper articles and polls purportedly showing a public perception of corruption as irrelevant. 470 U.S. at 499. Likewise, in an Eighth Amendment challenge to capital punishment for 16- and 17-year-old offenders, the Supreme Court "declined the invitation to rest constitutional law upon such uncertain foundations" as public opinion polls. *Stanford v. Kentucky*, 492 U.S. 361, 377, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (1989). The panel should follow the Supreme Court's dictate to reject public opinion polls on issues of constitutional

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[3] Conversely, in *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445, 457 (1st Cir. 2000), under the guidelines of *Shrink Missouri*, the First Circuit Court of Appeals relied on a poll as evidence of corruption and the appearance of corruption. Similarly, the district court in *Landell v. Sorrell*, 118 F. Supp. 2d 459, 469, 478 (D. Vt. 2000), relied on polling information to demonstrate an erosion of public confidence, noting that "typical barometers of citizen concern such as polls and media coverage" have been used by many other courts in reviewing the governmental interest in enacting contribution limits.

importance.[4]

Finally, the State relies on low voter turnout to demonstrate the negative impact on public perception created by the involvement of large amounts of PAC money in political campaigns. I agree that voter turnout may be a better measure of the constituency's perceived corruption of elections. The Supreme Court, however, has noted that the fact that the voters passed the initiative to establish contribution limits is not dispositive; "majority votes do not defeat First Amendment protections." *Shrink Missouri*, 528 U.S. at 394. Montana enjoys one of the five highest voter

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[4] The majority in *Compassion in Dying v. State of Wash.*, 79 F.3d 790, *amended by* 85 F.3d 1440 (9th Cir. 1996), *cert. granted by Washington v. Glucksberg*, 518 U.S. 1057, 135 L. Ed. 2d 1128, 117 S. Ct. 37 (1996), *rev'd by* 521 U.S. 702, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997), relied on public opinion polls to determine the current societal attitudes as one factor in deciding whether a liberty interest in physician assisted suicide exists. That case is distinguishable. Here, the Supreme Court has already recognized an important state interest in preventing perceived corruption. *See Buckley*, 424 U.S. at 26-27. Rather than relying on public opinion polls to determine whether an important state interest exists to prevent perceived corruption, here the State seeks to offer public opinion polls as evidence of perceived corruption. As Judge Trott's dissent notes, "the Constitution's explicit provisions for amendment rely on the government process, not on random sampling of public opinions. Polls are for the other branches of our government, not for the judiciary." *Compassion in Dying*, 85 F.3d at 1449 (Trott, J., dissenting). Similarly here, such reliance on public opinion polls on issues of constitutional significance is improper and unnecessary.

turnouts in the country. (ER 246). Although the State asserts that nearly half of the eligible voters in Montana did not vote in the 1998 general election because they lacked faith that their vote made a difference, the record does not reflect increased voter confidence post-reform.

Thus, the State fails to justify the need for the aggregate PAC contribution limit, in addition to the individual PAC limit, in order to prevent the type of corruption or perceived corruption that allegedly exists in Montana. Based on the inconclusive evidence of undue influence by PAC contributions in the record, the individual PAC limit more than suffices to prevent any undue influence on legislators caused by large contributions. I have found no basis for concluding that PACs are generally corrupt or perceived to be corrupt, nor any justification for further restricting PAC participation in legislative campaigns.

II. The limit is not closely drawn to avoid unnecessary abridgement of First Amendment freedoms.

The majority concludes that there is sufficient justification in the record to demonstrate that the danger of corruption (or the appearance of corruption) is greater when dealing with PAC money as opposed to other contributions. Assuming that PACs are perceived to be a source of corruption, the State's goal of encouraging a diverse base of support is thwarted when the State places a limit on the aggregate amount of **[*1104]** PAC contributions a candidate may receive. By instituting such a limit, the State has, unjustifiably, restricted PAC participation in legislative campaigns and unnecessarily abridged their

associational freedoms.

To be "closely drawn," the degree of restriction must bear a sufficiently close relation to the reasons proffered by the State. We must consider whether, "within the full panoply of legislative choices otherwise available to the State, there exist alternative means of furthering the State's purpose without implicating constitutional concerns." *Supreme Ct. of Va. v. Friedman*, 487 U.S. 59, 67, 101 L. Ed. 2d 56, 108 S. Ct. 2260 (1988) (deciding whether the degree of discrimination is closely drawn to the State's reasons in the Privileges and Immunities clause context); *see also Elrod v. Burns*, 427 U.S. 347, 363, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) ("to survive constitutional challenge, [the encroachment of First Amendment protections] must further some vital government end by a means that is *least restrictive* of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.") (emphasis added).

The State argues that by placing an aggregate limit on PAC contributions, candidates obtain a more diverse base of contributions and thereby prevent undue influence by special interests. However, the State fails to demonstrate that PAC contributions, when individually limited to $ 400/$ 200/$ 100 depending on the office, are not sufficiently curtailed to alleviate a perception of corruption or a danger of undue influence. The State contends that large amounts of special interest money have a corrosive effect on Montana politics. It fails to show that PACs in general create a perception of corruption. I acknowledge that courts have found that the danger of corruption is greater with PAC contributions than with

individuals. Such a determination may justify individual limits to combat quid pro quo arrangements from large contributors, but it does not justify an overbroad aggregate PAC limit that does little more than restrict speech and association rights.

Unlike *Shrink Missouri,* where individual PAC contributions are limited to a certain amount based on the specified state office or size of constituency, here aggregate PAC contributions are capped and a candidate must give back a portion of its PAC collections in order to receive contributions from another PAC. Clearly, Montana's aggregate limit has a more restrictive effect than the contribution limits upheld in *Shrink Missouri.* This restrictive effect is meaningful for purposes of determining whether the State has demonstrated that the aggregate limit is closely drawn to match a sufficiently important interest. *See Beaumont*, 123 S. Ct. at 2211 ("It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider [the difference] is when applying scrutiny at the level selected . . . ."). This demonstrates that the State has not employed the least restrictive alternative in furthering its purpose. *See Service Employees*, 955 F.2d at 1312 (rejecting ban on inter-candidate contributions where the ban did not distinguish on the basis of the size of the donation).

Montana has asserted that corruption (or perceived corruption) exists when PAC contributions make up a large portion of a candidate's campaign treasury, but has not made a closely drawn determination of what portion of a candidates' contributions is "large" enough to create the perception of corruption. Rather, Montana has made an arbitrary determination of what amount

of PAC money is allowed, without regard to the ratio of PAC money to other contributions.

[*1105] While the district court found that the aggregate PAC contribution limit has lowered the amount of PAC money to about 29% of all contributions received by the average candidate, the same result can be achieved when a candidate receives more individual contributions or party contributions, rendering PAC contributions a smaller portion of the candidates' campaign collection. Thus, Montana's aggregate PAC contribution limit arbitrarily restricts more First Amendment rights than necessary without achieving any appreciable goal.

Veteran legislator Hal Harper testified that PACs funnel money into state legislative campaigns only during elections when their interests are at stake. It seems obvious to me that the perception of corruption would be lessened if legislative candidates accepted contributions from PACs on both sides of the issue. A candidate would then have a more diverse base of support to combat the perception of corruption, instead of being precluded from accepting contributions from a competing side because the candidate is "PAC'd out."

The State's chosen means is neither closely drawn, nor effective to achieve a diverse base of contributions. If a candidate "PACs out," a candidate may collect PAC money "funneled" through a party, but from no or very few individuals. This leads to the same supposed corrosive effect of large amounts of special interest money in legislative elections (or the large proportion of PAC money that makes up a candidate's contributions) which Montana seeks to eliminate. As referenced above, the memorandum by the Montana

Republican legislator demonstrates that PAC money may allegedly corrupt or be perceived to corrupt candidates as well as political parties.[5] Placing a limit on the amount PACs can contribute to an individual candidate, but not placing a limit on PAC contributions to a party and simultaneously increasing the amount a party can contribute to a candidate, will tend to encourage circumvention of the statute and possibly create the corruption that Montana seeks to prevent. As the majority noted, a PAC may donate to political parties without limitation. I submit that the aggregate restriction is little more than an arbitrary limitation which substantially impinges on PACs' rights of association and free speech.

While I recognize that the aggregate limit allows candidates to return some PAC money to make room for other PAC contributions, the reality of the limitation is that candidates, such as Senator Ric Holden, are forced to reject contributions and to refrain

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[5] Montana cites as evidence of corruption or perceived corruption complaints from the 1988 election relating to alleged illegal transfers made by the national Republican Party and the Montana Republican Party. (ER 344, 830). The Supreme Court recognized that "political parties also share relevant features with many PAC's, both having an interest in, and devoting resources to, the goal of electing candidates who will 'work to further' a particular 'political agenda,' which activity would benefit from coordination with those candidates." *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 624, 135 L. Ed. 2d 795, 116 S. Ct. 2309 (1996) (citation omitted). Thus, the aggregate PAC contribution limit is not narrowly tailored to achieve Montana's goal of eliminating the influence of large amounts of money in Montana politics.

from soliciting contributions from other PACs which would otherwise support a candidate. (*See* ER 511-12). While the candidate can return some money in order to receive other contributions, there is no incentive for the candidate to do so. A real risk exists that the candidate will not be able to replace the funds he returns, thereby creating even less incentive to refund PAC money already collected. (*See* ER 45, 795-96, 807). If the purpose of the restriction is to increase the **[*1106]** support base of candidates, why is the State making it more difficult for a candidate to receive contributions from multiple PACs?

While the majority applauds the restriction for not imposing a restraint on a candidate's speech, I am not convinced that the associational rights of PACs have not been unnecessarily abridged. The majority's example of this refund system demonstrates the likely encroachment. If a candidate for the senate has already accepted $ 100 from each of twenty different PACs, and wishes to accept a $ 100 contribution from another PAC, the candidate would need to return $ 5 to each of the other twenty PACs. The amount available to the candidate will not change regardless of whether he accepts the twenty-first PAC's contribution. The act of refunding $ 5 to each of twenty PACs every time the candidate would like to receive another PAC's contribution would cause the sheer logistics of the process to discourage the candidate from accepting that twenty-first contribution.

As a result, when a candidate rejects a contribution that he would otherwise have accepted but cannot because he has "PAC'd out" and does not or cannot refund money "to make room for the contribution," the rejected PAC's associational rights have been

abridged.[6] Although this may not be a direct result of the State's action, an indirect abridgement of associational rights is just as obnoxious. *See Buckley*, 424 U.S. at 65 (the Court applies strict scrutiny even when "any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . .").

CONCLUSION

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[6] Although the majority finds that PACs may contribute to a candidate's campaign through other means such as volunteering services, endorsing the candidate or independently buying advertising in support of the candidate, I do not find less corruption or less perceived corruption merely by distinguishing between direct monetary contributions and indirect contributions to a candidate's campaign. What the majority fails to recognize is that influence over a candidate may come in forms other than monetary contributions. In addition, PACs may decide that they "may add more to political discourse by giving rather than spending, if the donee is able to put the funds to more **[*1107]** productive use than can the [PAC];" therefore, depriving PACs of that choice is an abridgement of associational freedoms. *Shrink Missouri*, 528 U.S. at 416-17 (Thomas, J., dissenting) (citing *Colorado Republican*, 518 U.S. at 636 (Thomas, J., concurring in judgment and dissenting in part)); *see also Federal Election Comm'n. v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 261, 93 L. Ed. 2d 539, 107 S. Ct. 616 (1986). "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Shrink Missouri*, 528 U.S.at 418 (Thomas, J., dissenting) (quoting *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 790-91, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988)).

I do not question the legitimacy of the State's interest to prevent corruption and perceived corruption. The State asserts that in order to prevent corruption or the perception of corruption, it must limit the amount of influence special interests exert over candidates. The State fails to provide evidence of corruption or a genuine threat of corruption by PACs as a monolithic group. Furthermore, the State asserts that the limit is closely drawn to its interest in preventing corruption by PACs; however, it increases the amount a political party may contribute to a candidate without imposing any restriction on the amount a PAC may contribute to a political party. In addition, the State seeks to prevent PAC contributions from forming a large portion of a candidate's contributions without first defining what constitutes a "large portion" and instead chooses an arbitrary limit without regard to the ratio of PAC contributions as compared with other contributions. Finally, the State asserts that no associational freedoms have been unnecessarily abridged because if candidates "PAC out," the candidate may refund some PAC money to make room for the other PAC money. In reality, the unintended result is that it limits the number of PACs who can participate in political speech without affecting the amount of PAC money involved in Montana's legislative elections. Based on the foregoing, I conclude that the aggregate PAC limit fails the *Buckley* standard. Accordingly, I respectfully dissent.

[***Editing Note:*** *Page numbers from the reported opinion, No. CV-96-165-BLG-JDS, 2000 U.S. Dist. LEXIS 23161, are indicated, e.g., **[*3]**.*]

[Filed: 09/19/2000]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

MONTANA RIGHT TO LIFE ASSOCIATION, MONTANA RIGHT TO LIFE POLITICAL ACTION COMMITTEE, JULIE DAFFIN, President of Montana Right to Life Association, Plaintiffs, vs. ROBERT EDDLEMAN, in his official capacity as County Attorney for Stillwater County, Montana, and as a representative of the class of district attorneys in the State of Montana, and ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices for the State of Montana, Defendants.	Cause No. CV-96-165-BLG-JDS FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter **[*3]** came to trial before the Court, sitting without a jury.

At issue is the constitutionality of Montana Code Annotated Section 13-37-216, which imposes limitations on the aggregate contributions for each election in a campaign by a political committee or by an individual to a candidate, and Montana Code Annotated 13-37-218, which limits the amount of aggregate contributions candidates for state senate and state house may accept from all political committees. In-kind contributions are included in computing the limitations imposed by Mont. Code Ann. § 13-37-218.

Many of the detailed facts of this case are set forth in the consolidated final pretrial order and order on summary judgment. As a result, the Court finds it unnecessary to engage in a lengthy factual recitation.

Discussion

Plaintiffs challenge the following Montana Code Annotated Sections which read, in relevant part:

> **13-37-216. Limitations on contributions.**
>
> (1)(a) Aggregate contributions for each election in a campaign by a political committee or by an individual, other than the candidate, to a candidate are limited as follows:
>
> > (i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed $400;
> >
> > (ii) **[*4]** for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $200;

(iii) for a candidate for any other public office, not to exceed $100.

* * *

(5) For purposes of this section, "election" means the general election or a primary election that involves two or more candidates for the same nomination. If there is not a contested primary, there is only one election to which the contribution limits apply. If there is a contested primary, then there are two elections to which the contribution limits apply.

13-37-218. Limitations on receipts from political committees.

A candidate for the state senate may receive no more than $1,000 in total combined monetary contributions from all political committees contributing to his campaign, and a candidate for the state house of representatives may receive no more than $600 in total combined monetary contributions from all political committees contributing to his campaign. The foregoing limitations shall be multiplied by the inflation factor as defined in 15-30-101(8) for the year in which general elections are held after 1984; the resulting figure shall be rounded **[*5]** off to the nearest $50 increment. The commissioner of political practices shall publish the revised limitations as a rule. In-kind contributions must be included in computing these limitation totals. The limitation provided in this section does not

> apply to contributions made by a political party eligible for a primary election under 13-10-601.

The current limits adjusted for inflation are $2,000 for state senate and $1,250 for state house.

Contribution limits may survive if the government demonstrates that the challenged regulations are closely drawn to match a sufficiently important interest. Buckley v. Valeo, 424 U.S. 1, 25, 30 (1976); Nixon v. Shrink Missouri PAC, 528 U.S. 377 (2000). However, the dollar amount of the limit need not be fine tuned. Id. The prevention of corruption and the appearance of corruption is a constitutionally sufficient justification for imposing contribution limits. Buckley, 424 U.S. at 25-26.

> To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined . . . Of almost equal concern as the danger of actual quid pro **[*6]** quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions .... Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative government is not to be eroded to a disastrous extent."

Buckley, 424 U.S. at 27, quoting Civil Service Commission v. Letter Carriers, 413 U.S. 548, 565

(1973).

In many respects this case is indistinguishable from Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000). Like their Missouri counterparts, citizens of Montana were of the opinion that large campaign contributions result in at least the appearance of improper influence in the political system. This conclusion is supported by the sound passage of the challenged statutes, citizen initiatives, which in 1994 were approved by Montana voters by a 61% to 39% margin. While a majority vote cannot defeat First Amendment protections, see Shrink, 120 S.Ct. at 908, it certainly confirms the belief of the majority of voters; that contribution limits were necessary to combat improper **[*7]** influence, or the appearance thereof, resulting from large campaign contributions.

The perception held by a majority of Montana voters was further confirmed by the testimony of the chief election official for the State of Montana, Secretary of State Mike Cooney, Montana Representative and candidate for Secretary of State, Hal Harper, and attorney and campaign reform activist, Jonathan Motl, all who were of the opinion that poor voter turnout and lack of participation by citizens in government stems, in large part, from public perception that special interests (large contributors) control government. Representative Harper, with 30 years in the Montana legislature to his credit, testified that "in my time I've seen efforts put into hiring more lobbyists and funneling more money into campaigns when certain special interests know an issue is coming up, because it gets results." Accordingly, there exists more than just voter speculation that money results in

improper influence or the appearance thereof.

The Shrink Court also noted that the closest the party attacking the contribution limits came to challenging the implications of Buckley's evidence was their invocation of academic studies **[*8]** said to indicate that large contributions to public officials or candidates do not actually result in changes in candidates' positions. This is precisely the tact taken by the plaintiffs in this case who presented the testimony of John Lott, a senior research scholar in economics at Yale University. Dr. Lott's testimony can be summed up, in large part, as follows; people give money to candidates or elected officials who value the same things that the person giving the money does. However, this is not inconsistent with Buckley and it's progeny. Buckley "recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." Shrink, 120 S.Ct. at 905. This broader threat specifically includes politicians who value the same things as their contributors.

In response, the defendants offered the testimony of Thomas Stratmann, an economist, who opined that when legislators receive increasing contributions over time they are more likely to vote in the interests of the giver. Dr. Stratmann also opined that special interest groups do not give that much to legislators who they know will clearly **[*9]** vote in their favor or legislators who are clearly opposed to them. Instead, Dr. Stratmann found that special interests tend to contribute most to those politicians who fall in between those two categories - legislators who are undecided.

Shrink reaffirmed what Buckley found over twenty

years ago, "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." Shrink, 120 S.Ct. at 908. Plaintiffs offered no evidence that Montana voter suspicion or perception was to the contrary. In this case the prevention of corruption and appearance of corruption is a constitutionally sufficient justification for interfering with First Amendment associational and speech rights.

The evidence also leads the Court to conclude that the contribution limits imposed effect only "large" contributions by the standards of Montana elections. Jonathan Motl, the drafter of I-118, looked at the historical data of what individuals gave to candidates for public office in the State of Montana and chose a limit that he defines as the "largest contribution limit level for any of **[*10]** those offices." The limits arrived at by Motl, and approved by Montana voters, were in the upper 10% of contributions for particular offices. The data presented by the defendants, exhibit D-24, supports Motl's conclusions. These figures were not rebutted by the plaintiffs.

The PAC receipt limit was enacted in 1983 and includes an automatic adjustment for inflation. The current limits are $2,000 for state senate and $1,250 for state house. The average amount raised for a state house campaign in Montana in 1998 was $4,464.87. The average amount raised for a state senate campaign in Montana in 1998 was $6,869.04. Thus, in 1998 Mont. Code Ann. § 13-37-218 limited an average state house candidate to receiving 28% of her contributions from political committees and an average

state senate candidate to receiving 29% of her contributions from political committees.

The PAC receipt limits are designed to limit the impact of huge special interest contributions on a candidate and to encourage a broad and diverse base of support in order to prevent either actual corruption or the appearance thereof. Without a limitation on the amount a candidate could receive from political committees, the contribution **[*11]** limitations could be easily evaded by special interests contributing the maximum amount to a candidate through a multitude of committees. Moreover, even after a candidate in Montana has reached the PAC limit, she can still receive an unlimited amount of money from other individuals and from the candidates own sources. The Court finds that the PAC limits are essential in order to prevent undue influence, and the appearance thereof, of special interests on a candidate's campaign. The Court's conclusion is further supported by the fact that, based upon the average amounts raised for state senate and house campaigns, political committees were able to contribute almost 30% such campaigns. This Court considers one-third of a politician's campaign money to be a large percentage.

Two of plaintiffs witnesses, Montana State Legislators Larry Grinde and Ric Holden, testified that they had to work harder and talk to more people in order to raise the same amount of campaign money. While this may be true, it is precisely the purpose behind contribution limitations; for candidates to acquire a broad and diverse base of support to eliminate undue influence, or the appearance thereof, from large contributors **[*12]** and special interests.

Both legislators also testified that contribution limits made it difficult for them to run "an effective campaign." However, outside of bald, conclusory allegations that their campaigns would have been more "effective" had they been able to raise more money, none of the witnesses offered any specifics as to why their campaigns were not effective. The Court also notes that while these candidates testified that they could not run effective campaigns, all who testified won the respective state legislative races in which they took part.

To establish the unconstitutionality of the challenged limitations, the plaintiffs must show that the limitations are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." Nixon v. Shrink Missouri Government PAC, 120 S.Ct. at 909. The plaintiffs have failed to so show. Here "there is no indication that the contribution limitations imposed would have any dramatically adverse effect on the funding of campaigns and political associations and thus no showing that the limitations prevented the candidates and political committees **[*13]** from amassing the resources necessary for effective advocacy." Buckley, 424 U.S. at 21; Shrink, 120 S.Ct. at 908-909. The data, as demonstrated by exhibit D-24, mandates such a conclusion. Despite the complained of limitations, candidates in Montana continue amass the resources necessary for effective advocacy.

The Court finds that the challenged statutes are closely drawn to match the constitutionally sufficient interest in preventing campaign corruption and the appearance thereof. The limits are not "so radical in

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

Based on the foregoing, the Court finds that Mont. Code Ann. §§ 13-37-216 and 13-37-218 pass constitutional muster. Plaintiffs' cause of action as it relates to these two claims is dismissed with prejudice.

The Clerk of Court shall forthwith notify the parties of the making of this Order.

Dated this 19th day of September, 2000.

/s/ Jack D. Shanstrom

Chief, United States District Judge

U.S. Const., amend. I

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

Mont. Code. Ann. 13-37-216
Limitations on contributions—adjustment.

(1) (a) Subject to adjustment as provided for in subsection (3) and subject to 13-35-227 and 13-37-219, aggregate contributions for each election in a campaign by a political committee or by an individual, other than the candidate, to a candidate are limited as follows:

(i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed $500;

(ii) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $250;

(iii) for a candidate for any other public office, not to exceed $130.

(b) A contribution to a candidate includes contributions made to any political committee organized on the candidate's behalf. A political committee that is not independent of the candidate is considered to be organized on the candidate's behalf.

(2) All political committees except those of political party organizations are subject to the provisions of subsection (1). Political party organizations may form political committees that are subject to the following aggregate limitations, adjusted as provided for in subsection (3) and subject to 13-37-219, from all political party committees:

(a) for candidates filed jointly for the offices of

governor and lieutenant governor, not to exceed $18,000;

(b) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $6,500;

(c) for a candidate for public service commissioner, not to exceed $2,600;

(d) for a candidate for the state senate, not to exceed $1,050;

(e) for a candidate for any other public office, not to exceed $650.

(3) (a) The commissioner shall adjust the limitations in subsections (1) and (2) by multiplying each limit by an inflation factor, which is determined by dividing the consumer price index for June of the year prior to the year in which a general election is held by the consumer price index for June 2002.

(b) The resulting figure must be rounded up or down to the nearest:

(i) $10 increment for the limits established in subsection (1); and

(ii) $50 increment for the limits established in subsection (2).

(c) The commissioner shall publish the revised limitations as a rule.

(4) A candidate may not accept any contributions, including in-kind contributions, in excess of the limits in this section.

(5) For purposes of this section, "election" means the general election or a primary election that involves two

or more candidates for the same nomination. If there is not a contested primary, there is only one election to which the contribution limits apply. If there is a contested primary, then there are two elections to which the contribution limits apply.

Admin. R. Mont. 44.11.227

LIMITATIONS ON INDIVIDUAL AND POLITICAL PARTY CONTRIBUTIONS TO A CANDIDATE

(1) Pursuant to the calculation specified in 13-37-216, MCA, limits on total combined contributions by a political committee, other than a political party committee, or by an individual to candidates are as follows:

(a) candidates filed jointly for governor and lieutenant governor may receive no more than $680;

(b) a candidate for other statewide office may receive no more than $340;

(c) a candidate for all other public offices may receive no more than $180.

(2) Pursuant to the operation specified in 13-37-216, MCA, limits on total combined contributions from political party committees to candidates are as follows:

(a) candidates filed jointly for governor and lieutenant governor may receive no more than $24,500;

(b) a candidate for other statewide offices may receive no more than $8,850;

(c) a candidate for Public Service Commission may receive no more than $3,550;

(d) a candidate for senate may receive no more than $1,450;

(e) a candidate for all other public offices may receive no more than $900.

(3) Pursuant to 13-37-216 and 13-37-218, MCA, all contributions must be included in computing these limitation totals, except the personal services exemption found in ARM 44.11.401.

(4) A candidate may make unlimited contributions to his or her own campaign, but shall report and disclose each contribution and expenditure according to these rules.