No. 18-149

# In the Supreme Court of the United States

DOUG LAIR, *et al.*,

*Petitioners*,

v.

JEFF MANGAN, in His Official Capacity as Commissioner of Political Practices, *et al.*,

*Respondents*.

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

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

1. Whether the Court should require a state to experience actual, provable quid pro quo corruption before it can enact limits on direct contributions to candidates.

2. Whether the limits Montana has imposed on direct candidate contributions comply with this Court's precedent.

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## INTRODUCTION

Petitioners ask the Court to adopt a new standard for contribution limits that would make it next to impossible for most states and the federal government to place any restrictions on direct candidate contributions. Their new standard would require a state to prove criminal bribery to support the state's interest in a civil statute that limits—not bans—contributions to candidates for office.

No one questions that preventing bribery is a legitimate state interest. But this Court has held that contribution limits serve a broader preventative, not punitive, function. That is because "few if any contributions to candidates will involve quid pro quo arrangements." *Citizens United v. Federal Election Commn.*, 558 U.S. 310, 357 (2010). Thus, bribery laws "deal with only the most blatant and specific attempts . . . ." *Buckley v. Valeo*, 424 U.S. 1, 28 (1976). Contribution limits exist to prevent (not punish) quid pro quo corruption and its appearance, which large, direct contributions to candidates risk. This concept is not novel.

It is unsurprising then that courts have not struggled to apply this Court's "relatively complaisant" review of contribution limits. *Federal Election Commn. v. Beaumont*, 539 U.S. 146, 161 (2003). Although Petitioners attempt to show circuit court division on the issue, they cannot point to any precedent from the courts of appeal that supports their argument that a state must prove bribery before it can adopt contribution limits. Nor can Petitioners point to any case that has struck contribution limits similar to Montana's.

This Court should deny the petition.

## STATEMENT OF THE CASE

### I. Overview of Montana's Contribution limits

Montana has had contribution limits since 1975. Pet. App. 5a. In 1994, by citizens' initiative, the State passed I-118, which modified those limits by raising some and lowering others. *Id.* at 6a. The law also changed the limits to apply per election, rather than per election cycle. The Ninth Circuit summarized the differences and the current limits (Pet App. 8a):

Pre-Initiative 118 Limits vs. 2017 Limits

| | Pre-Initiative 118 | 2017 | |
|---|---|---|---|
| | Per Cycle | Per Cycle[1] | 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 |

[1] These amounts represent the limits when a candidate has a contested primary. Pet. App. 5a.

The Ninth Circuit recognized that these limits are consistent with those in other states and are particularly reasonable given that Montana is "'one of the least expensive states in the nation in which to run a political campaign.'" Pet. App. 22a-23a (quoting *Montana Right to Life Assn. v. Eddleman*, 343 F.3d 1085, 1094 (9th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004)). Given the low costs of campaigning, "Montana's limits are proportionally higher than both the federal limits and those of 12 other states." Pet. App. 24a. That point was exemplified by the low average contributions in Montana, which fall far short of the maximum contribution limits. Pet. App. 25a (average individual contribution in a house race was $90 while the per cycle limit was $320, and the average contribution for the governor's race was $185 while the limit was $1200).

The Ninth Circuit upheld Montana's limits, finding that they further an important state interest in preventing quid pro quo corruption and its appearance, and that they are closely drawn.

## II. The Ninth Circuit's Decision that Montana Demonstrated an Important State Interest

The court of appeals found that Montana had presented sufficient evidence that its limits furthered the important state interest of preventing quid pro quo corruption or its appearance. First, citing *Buckley*, *Shrink Missouri*, and *McCutcheon*, the court recognized that Montana needed to present evidence that its interest in preventing the risk of actual or apparent corruption was not illusory or based on mere conjecture. Pet. App. 15a. The court held that Montana met this burden based on the evidence presented as

well as Petitioners' concessions. Notably, Petitioners did "not dispute that Montana's interest in combating quid pro quo corruption or its appearance justifies some level of contribution limit." Pet. App. 16a.

In addition to Petitioners' concessions that Montana had a legitimate interest in preventing corruption and circumvention, the court determined that Montana's evidence showed that the threat of actual or perceived quid pro quo corruption was real. Pet. App. 16a-19a. The court based this conclusion on Montana's evidence from state legislators, testimony, and state court decisions. *Ibid*. For example, State Representative Hal Harper testified that groups "funnel[] more money into campaigns when certain special interests know an issue is coming up, because it gets results." Pet. App. 17a. Harper did not say money gets "access" or "influence"; he said it gets "results." *Ibid*. Additionally, the court cited State Senator Mike Anderson's letter that he sent to colleagues when he was trying to get a bill passed, which stated:

> 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.

Pet. App. 17a. A fellow senator testified that the letter was "unconscionable" and "was not the way to pass bills. . . . [T]o remind people that they received money and therefore should pass it, and even to suggest that if they vote for it they'll get more money, it just tainted the bill. It was totally unacceptable." ER 118.

The court also relied on State Senator Bruce Tutvedt's testimony about an attempted quid pro quo in which a national advocacy 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 bill that would benefit the group. Pet. App. 17a. Additionally, the court observed that Montana state courts found that two legislative candidates violated election laws by accepting large corporate contributions.[2] *Ibid*. Montana also presented evidence of several settlements that legislative candidates entered to resolve investigations into their receipt of corporate contributions, as well as a jury

[2] Petitioners assert that the state court decisions below were "manufactured," and they imply that the court of appeals should have given more weight to the self-serving declarations of candidates who were found to have accepted illegal corporate contributions and who entered into settlement agreements. *See* Pet. 21. Petitioners also mischaracterize the testimony of a former employee of the Commissioner of Political Practices, *see* Pet. 20, omitting that she testified that she understood the distinction between actual corruption and the appearance of corruption, and that a $1,000 contribution could create the appearance of corruption. The state court decisions and candidates' declarations illustrate the serious threats of abuse, even in the face of existing campaign finance regulations, and the former employee's testimony supported that Montana's limits were effective. In any event, this Court should decline to weigh in on the factual disputes that were resolved below.

verdict finding that the former State Senate Majority Leader took illegal corporate contributions.

The court of appeals determined that Montana had adequately justified its interest in preventing quid pro corruption and the appearance of quid pro quo corruption. The court rejected the district court's finding that Montana must show "completed quid pro quo transactions to satisfy its burden." *Id.* at 18a.

### III. The Ninth Circuit's Decision that Montana's Limits are Closely Drawn

In determining whether contribution limits are narrowly drawn, the Ninth Circuit applies a three-part test drawn from *Buckley*. Limits must: "(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." Pet. App. 19a (quoting *Eddleman*, 343 F.3d 1085).

The court determined that the first factor—whether limits focus narrowly on the State's interest—was met because (1) the citizens' initiative that enacted the limits targeted only the highest pre-initiative contributions that were "most likely to result in actual or perceived corruption," Pet. App. 20a; (2) the limits on direct, monetary contributions were more stringent for individuals and PACs than for political parties, Pet. App. 21a; (3) the limits were reasonable in relation to the size of typical contributions and did "not come close to curtailing the average contributor's participation in campaigns," Pet. App. 25a; and (4) the limits were "reasonably keyed to the actual evidence showing a risk of corruption in Montana," which was described above,

Pet. App. 25a. In analyzing this factor, the court of appeals focused on the interplay between how effectively the contribution limits targeted corruption compared to the risk that they might infringe on associational freedoms. *See* Pet. App. 26a-27a.

Second, the court found that Montana's limits leave contributors free to affiliate with candidates. *Buckley* recognized that contribution limits focused on the problem of large contributions but left "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. The court below recognized that Petitioners "effectively concede[d]" this factor, Pet. App. 27a, and rightfully so. In addition to contributing to candidates financially, donors can put bumper stickers on their cars and signs in their yards; they can go door to door, participate in phone drives, or do any number of activities. Trial testimony from Petitioners' own witnesses illustrated the opportunities available: in addition to contributing, they volunteered, wrote letters to the editor, helped others write letters, reviewed candidates' letters, maintained an active blog, put up signs, went door to door, held fundraisers, placed ads in the local paper, and participated in strategy meetings. *E.g.*, ER 162-64.

Third, the court determined that Montana's limits do not prevent candidates from amassing the resources necessary to engage in effective advocacy. *Buckley* observed that contribution limits could severely impact political discourse if they prevented a candidate from "amassing the resources necessary for effective

advocacy." *Buckley*, 424 U.S. at 21. Requiring candidates to raise funds from more sources, however, does not violate the First Amendment. *Buckley*, 424 U.S. at 21-22.

The court of appeals determined that the third factor was met based on the testimony of Montana candidates as well as expert testimony. The candidates' testimony established that, though the limits required the candidates to raise money from more donors, the limits had not harmed their political campaigns. *E.g.*, ER 79-86; Pet. App. 28a. Even the testimony of Representative Mike Miller, Petitioners' primary witness (*see* ER 207-08), showed that contribution limits did not prevent him from engaging in effective advocacy. During his testimony, Miller lamented that contribution limits had stayed the same while the costs of pencils, stamps, and gas had increased, and he suggested that the limits made his campaign ineffective. ER 142; Pet. App. 28a. The court below determined that "the facts belied[d]" Miller's claim: Miller entered four races, and he won every election; over those four races, he received donations from hundreds of donors, and only *seven* gave the maximum contribution. Pet. App. 28a.

The court further recognized that Montana's limits do not provide political advantages to incumbents. The court noted that the overall percentage of maximum contributions in Montana is low and that incumbents and challengers receive contributions from "virtually the same percentage of maxed-out contributors." Pet. App. 29a. This conclusion was supported by Petitioners' expert witness, who was the same expert relied upon in

*Randall v. Sorrell*, 548 U.S. 230 (2006). *See* Pet. App. 29a-30a.

In analyzing tailoring, the court of appeals distinguished Montana's limits from those struck down in *Randall*. *See* Pet. App. 30a-31a. First, unlike in *Randall*, political parties can contribute significantly more than individuals and PACs. *Id*. at 30a. Second, Montana's limits apply per election, rather than per election cycle. *Id*. Thus, as Judge Bybee recognized below, when a primary is contested, the amount that may be contributed doubles. *See* Pet. App. 148a. Third, Montana law prohibits incumbents from carrying over excess funds from one election to another and thereby establishing a war chest for future campaigns. *Id.* at 30a-31a. Based on these factors, the court of appeals concluded that *Randall*'s concerns that incumbents might enjoy an unfair advantage over challengers "simply is not present here." Pet. App. 31a.

In applying *Randall* to Montana's limits, the Ninth Circuit noted that a motions panel had already addressed the danger signs and factors in detail, and it agreed with that decision. Pet. App. 33a. But the court further explained why Montana's limits raised no concerns under *Randall*:

> 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 ($1,000 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. Montana's limits do not favor incumbents or 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. . . . Contributors may volunteer for campaigns and otherwise express their support in ways beyond direct contributions. Finally, Montana's limits are adjusted for inflation.

Pet. App. 33a-34a (footnote omitted).

## REASONS FOR DENYING THE PETITION

### I. This Case Is a Poor Vehicle Because Petitioners Conceded the State's Interest Below.

Petitioners focus much of their firepower arguing that Montana has no legitimate interest to support contribution limits. Pet. 13-21. But this case is a poor vehicle to address that issue because Petitioners conceded the point multiple times below.

Petitioners' primary contention is that the Ninth Circuit failed to adequately analyze whether the State had met its burden to show that it has a sufficient interest to restrict direct contributions to candidates and that it failed to adequately define quid pro quo corruption. *See* Pet. 19. They also claim that "Montana

has presented no evidence of quid pro corruption or its appearance." Pet. 21. Those arguments misrepresent the Ninth Circuit's decision and the State's evidence—the court both defined quid pro quo corruption and its appearance and found that the State had met its burden to show it based on this Court's most recent precedent concerning contribution limits. Pet. App. 14a-19a.

Regardless, Petitioners cannot now argue that the Ninth Circuit's analysis is lacking since they repeatedly conceded that Montana has a legitimate state interest in preventing corruption and circumvention of contribution limits. *See* Pet. App. 16a ("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."); Pet. App. 19a ("The plaintiffs themselves concede Montana's pre-Initiative 118 limits satisfy the First Amendment."); Pet. App. 22a ("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.'). Petitioners made similar concessions in the district court. *See, e.g.,* ER 344-45 (summary judgment response stating that "Montana, like all other states, has an interest in preventing corruption" and circumvention). In light of Petitioners' concessions, any more exhaustive discussion below would have been academic.

A party's concessions guide how courts decide cases, and they must therefore be bound by them. *See, e.g., Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 676-78 (2010) (party bound by factual stipulation that lower courts relied on). It is improper for Petitioners to concede the State's interest in preventing quid pro quo corruption below, but then ask this Court to review that very question. While Petitioners have consistently argued that Montana's contribution limits are too low, that is a question of tailoring. Pet. App. 22a. Petitioners' argument now, however, is that no contribution limit would survive scrutiny because Montana, according to them, has no evidence of quid pro quo corruption as they define it (*i.e.*, bribery) or its appearance.

Petitioners adopted this argument from the panel dissent, which argued that "Montana's evidence is inadequate to justify any contribution limit whatsoever, no matter how high." Pet. App. 43a. The panel majority, however, rejected the argument, in part because Petitioners had already conceded the issue. Pet. App. 19a, n.5. Petitioners are bound by the concession, which makes the majority of their argument for certiorari defective, and thus a poor vehicle to resolve the issues presented.

## II. Petitioners Incorrectly Claim that Lower Courts Are in Conflict.

### A. There Is No Conflict Among Lower Courts Concerning Whether a State Must Prove Actual Quid Pro Quo Corruption and Its Appearance to Support Contribution Limits.

The Ninth Circuit's definition of quid pro quo corruption is not in conflict with the Second and Sixth Circuits as Petitioners contend. Pet. 23-24. As an initial matter, the Second and Sixth Circuit cases are factually distinct because they involved contribution bans, not limitations. As the Second Circuit recognized, "a ban is a drastic measure" and there are "many situations in which a strict contribution limit—as opposed to an outright contribution ban—will adequately achieve the government's objectives." *Green Party of Connecticut v. Garfield*, 616 F.3d 189, 204 (2d Cir. 2010); *see also Lavin v. Husted*, 689 F.3d 543, 548 (6th Cir. 2012) ("Ohio could have taken the qualitatively less restrictive approach, by limiting campaign contributions from Medicaid providers rather than banning them).

Second, Petitioners are incorrect that these cases applied a different standard than the Ninth Circuit. Petitioners cite the Second Circuit's decision in *Green Party*, 616 F.3d at 200, for the proposition that the court "require[d] evidence of actual quid pro quo corruption." Pet. 23. But the Second Circuit held no such thing. The court found that the ban on contractor contributions was supported by actual corruption in the government and the "*appearance* of impropriety in the transfer of any money between contractors and state

officials—whether or not the transfer involved an illegal *quid pro quo*." *Green Party*, 616 F.3d at 200. Indeed, the court upheld Connecticut's ban on donations from spouses and children of contractors, even though there was no evidence that spouses or children had been involved in corruption, because "the legislature must be given 'room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.'" *Id*. at 203 (quoting *McConnell v. Federal Election Commn.*, 540 U.S. 93, 137 (2003)). Because the ban was supported by more than "scant evidence" about concerns over the appearance of corruption, the court upheld the contribution ban on contributions from spouses and children of contractors. *Id.* at 204 (quoting *McConnell*, 540 U.S. at 232).

What is more, the Second Circuit has already explicitly rejected Petitioners' characterization of *Green Party*:

> Appellants argue that *Green Party* requires evidence of recent scandals in order to justify any contribution restriction, not just a ban. This is not what *Green Party* says . . . *Green Party* only considered whether an outright contribution ban was closely drawn to the anti-corruption interest. As to limits, *Green Party* set the justificatory burden somewhere between a concrete showing of actual *quid pro quo* corruption and the sort of 'mere conjecture' that the Supreme Court has deemed out of bounds.

*Ognibene v. Parkes*, 671 F.3d 174, 188 (2d. Cir. 2011) (citation omitted).[3]

Nor does the Sixth Circuit's *Lavin* decision conflict with the decision below. That case involved a novel contribution ban that made it a crime for state Attorney General or county prosecutor candidates to accept any campaign contributions from Medicaid providers. *Lavin*, 689 F.3d at 545. The court did not hold that the state must have actual evidence of quid pro quo corruption to support the ban. Rather, it held that a state must do more than simply "recite a general interest in preventing corruption. What the state must do, instead, is demonstrate *how* its contribution ban furthers a sufficiently important interest." *Id.* at 547. In *Lavin* the state "conced[ed] that [it] has no evidence to support [its] theory that [the statute] prevents actual or perceived corruption . . . ." *Ibid*. The Government's "claim that [the statute] prevents corruption, therefore, is dubious at best." In other words, the statute was both novel and implausible, and based on mere conjecture, which this Court has held is insufficient to support a contribution limit. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000); *see also McCutcheon v. Federal Election Commn.*, 572 U.S. 185, 210 (2014) (plurality). That is the same standard the Ninth Circuit applied to Montana's contribution limits. Pet. App. 15a.

The Sixth Circuit's unpublished decision in *Schickel v. Dilger*, 2017 U.S. App. LEXIS 27024 (6th Cir. 2017), upholding Kentucky's ban on lobbyist contributions likewise did not require actual evidence of quid pro quo

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[3] Petitioners' counsel was also counsel for the appellants in *Ognibene*.

corruption. The Court noted that the ban was not just intended to prevent actual bribery, but also the appearance of corruption. *Id.* at *5-6 (recognizing that circuit courts have upheld lobbyist bans because they are "especially susceptible to public suspicion of corruption") (quotation omitted).

In sum, no case has adopted Petitioners' argument that a state must have evidence of actual quid pro quo corruption (*i.e.*, bribery) before it can enact contribution limits. Indeed, this Court has already rejected that standard, as discussed below. *See Citizens United*, 558 U.S. at 356 (noting that contribution limits are preventative because the scope of quid pro quo corruption "can never be reliably ascertained.") (quoting *Buckley*, 424 U.S. at 27). There is thus no conflict for this Court to resolve.

### B. This Court Should Reject Petitioners' Argument that the Court Should Grant Certiorari to Hold that *Randall* Is Binding Only to then Overrule it.

Petitioners argue it is important for this Court to resolve what it claims is disagreement among lower courts over whether the splintered plurality opinion in *Randall v. Sorrell* is binding or merely persuasive authority. Pet. 25-29. It is an odd argument, given that Petitioners later argue that "*Randall* has proven unworkable and should be overruled." Pet. 32-33. There are several reasons that this issue is not worth this Court's attention.

First, Petitioners point to a purported split on whether *Randall* is binding (Pet. 28-29), but they ignore that none of the courts they cite actually

analyzed whether the *Randall* plurality was binding. The Ninth Circuit only addressed the question because determining whether *Randall* was binding was necessary to determine whether it displaced circuit precedent on contribution limits, *Montana Right to Life Assn. v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003). Pet. App. 142a. Nonetheless, the Court found that circuit precedent was consistent with *Randall*. Pet. App. 142a-143a (recognizing that "the 'overall analytical framework' in *Eddleman* is in harmony with *Randall*" and that *Eddleman* "considered the same issues that were important in Justice Breyer's plurality opinion"); Pet. App. 32a. None of the cases that Petitioners cite were addressing the same question, and therefore none of the courts even analyzed whether *Randall* was binding.

Second, whether *Randall* is binding is of no consequence because the outcome of that inquiry will have no impact on the case. The Ninth Circuit found that Montana's contribution limits were constitutional under *Randall*. Pet. App. 32a, 34a ("we would reach the same conclusion under the plurality's decision in *Randall*."). The motions panel in this case, while finding *Randall* not binding, nonetheless fully analyzed Montana's contribution limits under *Randall*'s factors and found that they easily survived scrutiny. Pet. App. 143a-153a. Petitioners' argument that the Court should grant certiorari to clarify that *Randall* is binding (and then overrule it), even though the Ninth Circuit applied *Randall*, twice, to Montana's limits is nothing more than sophistry.

The more important and relevant point is that every other circuit court and state supreme court to consider the issue is in accord with the Ninth Circuit in upholding contribution limits under *Randall*. *Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018); *Holmes v. Federal Elections Commn.*, 875 F.3d 1153 (D.C. Cir. 2017); *Ala. Democratic Conference v. A.G.*, 838 F.3d 1057 (11th Cir. 2016); *McNeily v. Terri Lynn Land*, 684 F.3d 611 (6th Cir. 2012); *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011); *Minn. Citizens Concerned for Life v. Swanson*, 640 F.3d 304 (8th Cir. 2011); *Dallman v. Ritter*, 225 P.3d 610 (Colo. 2010). There is, again, no division among lower courts that needs this Court's resolution.[4]

### C. There Is No Conflict on Whether Limits Are Different in Kind from those Upheld in *Buckley*.

Petitioners claim that Montana's limits are different in kind from those upheld in *Buckley*, and thus the Ninth Circuit's decision conflicts with the Sixth and Eighth Circuits. But the Ninth Circuit was correct that Petitioners were asking the Court "to police a 'distinction in degree' not a 'difference in kind'" by admitting that if the limits were raised by a few hundred dollars they would be constitutional. Pet. App. 22a (quoting *Buckley*, 424 U.S. at 30).

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[4] Petitioners also note that three circuits held that *Randall* establishes the standard of review, but they correctly do not claim that those decisions are in conflict with the Ninth Circuit (Pet. 29), because the Ninth Circuit cited *Randall* for the standard of review. Pet. App. 14a.

The cases Petitioners cite bear that out even further. In *Anderson v. Spear*, 356 F.3d 651, 671-72 (2004), the Sixth Circuit struck down a Kentucky law that banned all cash contributions. That "first penny requirement" foreclosed "speech by a large body of individuals who will be chilled from making a *de minimis* contribution." *Id.* at 672. A *ban* on all contributions is different in kind from Montana's *limitations* on contributions.

In *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), the Eighth Circuit held that statewide contribution limits of between $100 and $300 were unconstitutional. Those limits were per election cycle, and were the lowest in the country. *Id.* at 641-42. Moreover, the Eighth Circuit found that, based on past elections, the limits targeted relatively low contributions. *Id.* at 643 (finding that between 19 and 35 percent of contributors gave more than those limits); *see also Russell v. Burris*, 146 F.3d 563, 570-71 (8th Cir. 1998) (invalidating statewide contribution limits similar to *Carver*). Montana's contribution limits are per election rather than per election cycle, and Montana's limits are not the lowest in the country. Pet. App. 23a-24a (finding that Montana's limits "are proportionally higher than both the federal limits and those of 12 other states"). Moreover, the limits targeted "only the top 10% of contributions." Pet. App. 25a.

These decisions are not in conflict with the Ninth Circuit.

### III. The Ninth Circuit Correctly Applied this Court's Precedent in Upholding Montana's Contribution Limits.

It is well settled that contribution limits are constitutional if they further a sufficiently important state interest and are closely drawn. *Buckley*, 424 U.S. at 25; *McCutcheon*, 572 U.S. at 197. This constitutional standard is less stringent than the standard applicable to expenditure limits because, unlike limits on independent spending, which directly restrain political speech, a contribution limit "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21.

The Court applies this "relatively complaisant" standard because "contributions lie closer to the edges than to the core of political expression." *Federal Election Commn. v. Beaumont*, 539 U.S. 146, 161 (2003). Contributions are not direct speech; rather, they are general expressions of support. *Buckley*, 424 U.S. at 21. Thus, a contribution limit "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." *Ibid*. The "overall effect" of contribution limits is that candidates must get contributions from more donors, and donors who have given the maximum must engage in other forms of political expression. *Id*. at 21-22.

These principles are nothing new. Since the Court decided *Buckley* more than four decades ago, it has been settled that states may enact contribution limits to combat quid pro quo corruption and the appearance of corruption. *See McCutcheon*, 572 U.S. at 192. Unlike criminal bribery laws, contribution limits are not a

punitive measure; rather, they are preventative. *Citizens United*, 558 U.S. at 357. Moreover, a state's interest in preventing corruption is not limited to preventing actual quid pro quo arrangements but includes preventing the appearance of corruption stemming from the public's awareness of "the opportunities for abuse." *See Buckley*, 424 U.S. at 27. The Ninth Circuit applied these settled principles to uphold Montana's contribution limits.

### A. The Ninth Circuit's Determination that Montana Presented Evidence of A Risk of Actual Or Apparent Quid Quo Pro Corruption Was Correct and Does Not Conflict with this Court's Precedent.

1. The Court has long recognized that the states and federal government have legitimate interests in preventing quid pro quo corruption or its appearance and that contribution limits are a constitutional means to address these interests. *Buckley*, 424 U.S. at 26 (preventing actual and apparent corruption constitute "constitutionally sufficient justification[s]" to uphold federal contribution limits); *Shrink Missouri*, 528 U.S. at 390 (state limits); *McCutcheon*, 572 U.S. at 191 ("Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption.").

This Court has "spelled out" the meaning of corruption in a number of cases involving constitutional challenges to contribution limits. *McCutcheon*, 572 U.S. at 192. Beginning with *Buckley*, the Court recognized that "large contributions" "given to secure political quid pro [quos] from current and potential office holders" amounted to corruption and

undermined the integrity of representative democracy. *Buckley*, 424 U.S. at 26-27. Corruption threatens the political process and occurs when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusion of money into their campaigns." *Federal Election Commn. v. Natl. Conservative PAC*, 470 U.S. 480, 497 (1985). The "hallmark of corruption is the financial quid pro quo: dollars for political favors." *Ibid*.; *McCutcheon*, 572 U.S. at 192.

But while a promise of dollars for political favors may be the "hallmark of corruption," it is not the extent of corruption. *Buckley* did not understand "corruption" as being limited to actual, demonstrable quid pro quo corruption but as encompassing the "appearance of improper influence" and the public's perception of opportunities for abuse: "[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." *Buckley*, 424 U.S. at 27 (emphasis added). Further, "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.'" *Ibid*. (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)). The constitutional justification of preventing the appearance of corruption has not diminished over time. *See McCutcheon*, 572 U.S. at 207 ("In addition to 'actual quid pro quo arrangements,' Congress may permissibly limit the appearance of corruption . . . .") (quoting *Buckley*, 424 U.S. at 27).

The amount of evidence a state must show to support its contribution limits depends on the "novelty and plausibility of the justification raised." *Shrink Missouri*, 528 U.S. at 391. Where a state's justification is preventing corruption, as in this case, the quantum of evidence required is low because, as this Court has repeatedly observed, "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." *Id*. (citing *Buckley*, 424 U.S. at 27, and n.28). This is underscored by the fact that the federal government and most states have enacted contribution limits. *See* ER 270-71. Moreover, this Court has recognized the inherent difficulty in gathering evidence to support existing statutes. *See Federal Elections Commn. v. Colorado Republican Federal Campaign Committee* (*Colorado II*), 533 U.S. 431, 457 (2001). "[N]o data can be marshaled to capture perfectly the counterfactual world in which" an existing campaign finance law does not exist. *McCutcheon*, 572 U.S. at 219. Thus, the Court looks to "whether experience under the present law confirms a serious threat of abuse." *Id*. (quoting *Colorado II*, 533 U.S. at 457).

This Court has also set forth examples of corruption that justify contribution limits. For instance, *Buckley* pointed to the "deeply disturbing examples" of corruption that surfaced in the 1972 presidential election. *See Buckley*, 424 U.S. at 27, n.28. One example cited by the *Buckley* court of appeals described the dairy organizations' relationship to President Nixon's fundraisers. The court noted that, after meeting with industry representatives, the President overruled a decision by the Secretary of Agriculture in a way favorable to the industry. *Buckley v. Valeo*, 519

F.2d 821, 839-40, n.36 (D.C. Cir. 1975). Before the public announcement, the White House informed the dairymen that it wanted them to reaffirm a $2 million pledge. *Id*. Notably, it was disputed whether the President's decision actually was tied to the financial pledge; however, the court found it immaterial "whether the President's decision was in fact, or was represented to be conditioned upon or 'linked' to, the reaffirmation of the pledge." *Id*. The Court's corruption concerns also extended to illegal corporate contributions, attempts to gain "governmental favor in return for large campaign contributions," and a link between large contributions and the appointment of ambassadors. *See Buckley*, 519 F.2d at 839-840, nn.36-38; *Buckley*, 424 U.S. at 27. The court of appeals' decision is wholly consistent with the principles that this Court has established over the past 40 years.

2. Petitioners' assertion that the court of appeals somehow erred by failing to define quid pro quo corruption is unpersuasive. First, as discussed above, Petitioners repeatedly conceded that Montana had a legitimate state interest in preventing actual corruption, the appearance of corruption, and circumvention of contribution limits. *See* Pet. App. 16a; ER 344-45. Given Petitioners' concessions, it is unsurprising that the court below did not engage in any lengthy academic discussion. Second, it is unclear why any exhaustive discussion of quid pro quo corruption would be necessary. As discussed, the Court has explained what quid pro quo corruption means in *Buckley*, *McCutcheon*, and other campaign finance decisions. Moreover, since *Buckley*, the Court has issued numerous campaign finance decisions describing the kinds of corruption that states may address with

contribution limits, including the "deeply disturbing" examples set forth in *Buckley*, 424 U.S. at 26-27 n.28. As the court of appeals recognized, Montana's evidence was similar to the evidence this Court has previously accepted as justifying contribution limits. Pet. App. 18a.

Further, Petitioners unpersuasively assert that a risk of corruption is insufficient to justify contribution limits and that states can justify limits only if they are able to prove actual corruption, which, according to Petitioner is defined as an individual and a public official having directly, unambiguously, and improperly agreed to exchange something of value for a specific, official act. *See* Pet. 15-18. First, Petitioners are wrong. As *McCutcheon* recognized: "In analyzing the base limits, *Buckley* made clear that the *risk of corruption* arises when an individual makes large contributions to the candidate or officeholder himself." *McCutcheon*, 572 U.S. at 225 (emphasis added).

Second, if a state were able to amass the evidence that Petitioner would require, then it would have proof of bribery, which is a crime. While there is no dispute that preventing bribery is a legitimate state interest, the fact—and the law—remains that contribution limits serve a preventative function. Petitioners' view ignores this preventative function, and it eliminates the "appearance of corruption" as a constitutional justification. As *McCutcheon* and *Citizens United* recognized: "It is worth keeping in mind that the base limits themselves are a prophylactic measure. As we have explained, 'restrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements.'"

*McCutcheon*, 572 U.S. at 221 (quoting *Citizens United*, 558 U.S. at 357). Moreover, bribery laws do not govern the reach or the purpose of contribution limits because, as the Court has recognized, criminal bribery laws "deal with only the most blatant and specific attempts . . . ." *Buckley*, 424 U.S. at 28.

Petitioners also wrongly assert that the court of appeals applied too low an evidentiary standard and that Montana's evidence amounted to no more than a "peppercorn" or a "scintilla" more than conjecture. Pet. 16-17. But Petitioners ignore that 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" constitutes a constitutionally sufficient justification for limits. *Buckley*, 424 U.S. at 27. Senator Anderson's letter spawned five investigations. The Montana press covered the corruption trial of the former Senate Majority Leader. SER 696-97. Clearly the public is aware that opportunities for abuse exist. The court of appeals correctly held that Montana's evidence was "at least" as much as this Court accepted in *Buckley* and *Shrink Missouri*. Pet. App. 18a.

Moreover, under Petitioners' theory, every state and the federal government would need to experience an actual bribery scandal before they could enact or amend laws related to contribution limits. But this is not the law. In addition to whatever evidence they may muster, states are also entitled to rely on "evidence and findings" that other courts have accepted. *Shrink Missouri*, 528 U.S. at 393; *id.* n.6 ("The First Amendment does not require a city, before enacting . . . an ordinance, to conduct new studies or produce

evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses) (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)). The court's determination that sufficient evidence existed showing that Montana's limits furthered the important interests of preventing quid pro corruption or its appearance was correct.

### B. The Ninth Circuit's Determination that Montana's Limits Were Closely Drawn Was Correct and Does Not Conflict with this Court's Precedent.

1. *Buckley* requires that contribution limits be "closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25. The Court determined that the federal limits were appropriately tailored because the limits

> focuse[d] 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.

*Id*. at 28. *Buckley* also recognized that contribution limits could negatively impact political conversation if they kept candidates from obtaining the resources to engage in effective advocacy. *Id*. at 21. The Ninth

Circuit synthesized this rule into a three-part test: limits are closely drawn if they "(a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign." *Eddleman*, 343 F.3d at 1092. The court of appeals' test does little more than restate *Buckley*, and it was properly applied below, as discussed.

If the Ninth Circuit had upheld Montana's limits based solely on the three-part test derived from *Buckley*, its decision would have been entirely consistent with the principles underlying this Court's contribution limits jurisprudence. But the Court further solidified its decision by setting forth an alternate holding based on the factors articulated in *Randall*. *See* Pet. App. 32a-34a.

In *Randall*, a plurality of this Court struck down Vermont's contribution limits because they were insufficiently tailored. The plurality first found "danger signs," which indicated that the limits might be unconstitutional. Those danger signs included (1) that the limits applied to an election cycle, rather than to individual elections; (2) that the same limits applied to contributions from individuals and political parties; (3) that the limits were the lowest in the Nation; and (4) that the limits were lower than any the Court had previously upheld. *Randall*, 548 U.S. at 249-251. *Randall* went on to consider five factors: whether the limits would significantly restrict the funds available for challengers to run competitive campaigns; whether political parties are subject to the same limits as other contributors; whether volunteer services were treated as contributions; whether the limits are adjusted for

inflation; and whether any special justifications might warrant low contribution limits. *Id*. at 253-261.

As discussed above, Montana's limits bear very little similarity to Vermont's limits and do not even implicate the majority of *Randall*'s concerns. *See Supra* Statement, section III. Nonetheless, the court of appeals, as well as the motions panel below, applied the *Randall* factors to Montana's limits and held that Montana's limits were constitutional. Pet. App. 30a-34a; Pet. App. 143a-154a. The court's analysis under *Randall* was correct and raises no conflict with this Court's jurisprudence.

2. Petitioners make a number of conclusory arguments that the court of appeals' decision was wrong. First, while acknowledging that, unlike in *Randall*, Montana's limits apply per election, Petitioners assert that the limits are still "suspiciously low." Pet. 30. Petitioners offer no argument or evidence in support of this assertion, and the Court should reject it out of hand. Moreover, the limits are not suspiciously low; as the court of appeals recognized, at least 85% of contributors gave below the limit. Pet. App. 29a. There is no cause for suspicion.

Second, Petitioners assert, without analysis, that the aggregate limits can prevent a political party from contributing even $1. Pet. 30. This is flat wrong. Under Montana law, political parties have significantly higher limits than individuals and political committees. *See* Pet. App. 7a-8a. For example, in 2017, an individual could contribute $1,320 to a gubernatorial candidate if the candidate had a contested primary, while a political party could contribute $47,700. *Id*. at 7a; ER 216. An individual could contribute $340 to a candidate for

state senate, while a political party could contribute $2,800. ER 216. The "aggregate limit" does not prevent any party from donating to a candidate; rather, it caps how much money a party can give to a single candidate from funds that are "aggregated" from any of the political party's committees. *See* Mont. Code Ann. § 13-37-216(2).

Third, Petitioners assert that the court of appeals held that Montana's limits were not among the lowest in the Nation, purportedly in conflict with *Randall*. Pet. App. 30. This misrepresents the opinion below. The court of appeals recognized that Montana's limits might appear low "in absolute terms," but that they were reasonable when compared to the cost of campaigning in the State. Pet. App. 23a-24a. Further, viewing the limits relative to the cost of a campaign, "Montana's limits are proportionally higher than both the federal limits and those of 12 other states." *Id*. at 24a. Moreover, while it is true that *Randall* referenced Montana's limits as a comparison when reviewing Vermont's limits, "[n]othing in *Randall* even hints that Montana's limits are unconstitutional," which the motions panel below recognized. Pet. App. 144a.

Petitioners' claim that Montana's limits "closely resemble the limits struck down in *Randall*," Pet. 31, simply ignores the differences described above, namely that Montana's limits apply per election, are higher for political parties than individuals, do not apply to volunteer services, are indexed for inflation, and do not inhibit challengers. The court's determination that Montana's limits were closely drawn was correct.

## IV. Montana's "Aggregate Limits" On Political Party Contributions Bear No Similarity to Those Invalidated in *McCutcheon*, and the Ninth Circuit's Decision Upholding Them Does Not Conflict with this Court's Precedent.

Petitioners assert that the aggregate limits that apply to political parties are similar to those invalidated in *McCutcheon* and that the court of appeals erroneously upheld them. Pet. 34-35. Petitioners further argue that no evidence supports Montana's limits on political parties and that the Ninth Circuit's decision creates a split with the Fifth Circuit. Petitioners are wrong on all counts.

First, Montana's "aggregate" limits on political parties bear no similarity to the aggregate limit held invalid in *McCutcheon*. Under the federal system at issue in *McCutcheon*, donors were subjected to two limits: a base limit, which capped how much money a donor could contribute to a single candidate; and an aggregate limit, which capped how much money a donor could contribute in total. *See McCutcheon*, 572 U.S. at 192. Thus, the aggregate limit effectively restricted *how many* candidates a donor could contribute to; upon reaching the limit, the donor was banned from giving to more candidates in any amount. *Id*. at 204, 210.

By contrast, Montana's "aggregate" limits on political parties are more akin to the base limits that *McCutcheon* left untouched. Montana law treats local committees that are affiliated with a party as a single entity. Mont. Code Ann. § 13-37-216(2). The limits cap how much the party can contribute to a single

candidate, but the amount that can be contributed can come from any of the political party committees; stated differently, a political party can "aggregate" funds from its committees to contribute an amount up to the contribution limit to as many candidates as the party desires. The "aggregate" limits do not cap how many candidates a party can contribute to; rather, they limit how much money the party can give to a candidate with its aggregated funds. While the contribution limit is described as an "aggregate" limit, it is functionally a base limit for all committees of a political party, and, thus *McCutcheon*'s discussion of "aggregate" limits is inapplicable.[5]

Petitioners also contend that no cognizable interest supports contribution limits on political parties and that Montana presented no evidence to support a corruption interest or a circumvention interest. *See* Pet. 35-37. But this argument ignores that Montana can rely on "evidence and findings" from other courts. *Shrink Missouri*, 528 U.S. at 393; *id*., n.6. The State's interest in preventing actual and apparent quid pro quo corruption discussed above applies equally to political parties. *See Colorado II*, 533 U.S. at 455 (party is "in the same position as some individuals and PACs, as to whom coordinated spending limits have already been held valid . . . ."). This Court has already recognized that a purpose of political parties is to "function for the benefit of donors whose object is to

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[5] Petitioners' real quarrel appears to be with how party committees are grouped with the party as a singular entity, something Petitioners did not challenge below. While Petitioners attempt to argue that aggregating donors and contributions make Montana's limits more restrictive, that is an argument that Petitioners have waived.

place candidates under obligation . . . .” *Id*. Additionally, because there are no limits on how much individuals and PACs can donate to a party, the limits on political party contributions to a candidate serve to prevent circumvention, which is a well-recognized theory of corruption. *Id*. at 456 (“all members of the Court agree that circumvention is a valid theory of corruption.”).

Moreover, the history of this case demonstrates that Montana’s circumvention interest is not divorced from reality. As discussed, it is difficult if not impossible to marshal data to “capture perfectly the counterfactual world in which” an existing campaign finance law does not exist. *McCutcheon*, 572 U.S. at 219. However, in this case, a Montana gubernatorial candidate’s campaign presents an example of what that counterfactual world might look like. Within two days of the district court striking down Montana’s contribution limits in 2012, the candidate’s campaign accepted a $500,000 contribution from the Montana Republican Party. *See* Doc. 213-1 at 4. There are no limits on how much a donor can give to a political party, and, as this Court has recognized, “[i]f suddenly every dollar of spending could be coordinated with the candidate, the inducement to circumvent would almost certainly intensify.” *Colorado II*, 533 U.S. at 460.

Finally, Petitioners are incorrect that the court of appeals’ ruling conflicts with a Fifth Circuit ruling, which Petitioners represent as striking “down an aggregate political party contribution limit.” Pet. 36 (citing *Catholic Leadership Coalition of Texas v. Reisman*, 764 F.3d 409 (5th Cir. 2014). But *Reisman* said nothing about political party limits, aggregate or

otherwise. On the contrary, *Reisman* considered the constitutionality of a $500 limit on *both* contributions and expenditures that applied to newly formed general purpose committees, which were not political parties but groups dedicated to candidates with "a particular point of view (e.g., pro-life or pro-choice candidates)." *Reisman*, 764 F.3d at 414. Montana does not limit political party expenditures and it does not limit how many candidates a party may contribute to. Thus, the Fifth Circuit's decision and the Ninth Circuit's decision below dealt with different kinds of committees and different kind of limits. There is no split to resolve.

## CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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