No. 18-149

In The

Supreme Court of the United States

Doug Lair, et al., *Petitioners*

v.

Jeff Mangan, in his official capacity as the Montana Commissioner of Political Practices, et al.,
Respondents

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

---

Reply Brief

James Bopp, Jr.
Counsel of Record
Anita Y. Milanovich
Courtney Turner Milbank
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 telephone
812/235-3685 facsimile
jboppjr@aol.com
Counsel for Petitioners

November 2018

Table of Contents

Table of Authorities. . . . . (ii)

Argument.. 1

I. This Court Should Grant Review of this Case to Correct the Lower Courts' Failure to Follow this Court's High Evidentiary Bar... 2

A. *McCutcheon* Requires a Rigorous Standard of Review... 2

B. *Citizens United* and *McCutcheon* Require Evidence of Quid Pro Quo Corruption or Its Appearance.. 3

1. Quid Pro Quo Corruption Has an Established Definition.. 3

2. Montana Did Not Meet Its Evidentiary Burden.. 5

C. Lower Courts Have Misapplied Randall, Which this Court Should Correct.. 6

II. Under *McCutcheon*, Lower Courts Cannot Uphold Aggregate Limits.. 10

A. The Decision Below Conflicts With *McCutcheon* and the Fifth Circuit, Which This Court Should Resolve.. 10

B. Montana's Aggregate Limits Are Not Justified Under *McCutcheon*.. 11

Conclusion. 12

Table of Authorities

Cases

Ala. Democratic Conference v. AG, 838 F.3d 1057 (11th Cir. 2016). 10

Anderson v. Spear, 356 F.3d 651 (6th Cir. 2004). . . . 9

Buckley v. Valeo, 424 U.S. 1 (1976). 1, 4

California ProLife Council v. Scully, 164 F.3d 1189 (9th Cir. 1999). 8

Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995). 8

Casino Ass'n v. State, 820 So. 2d 494 (La. 2002). . . 10

Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409 (5th Cir. 2014).. 11

Citizens United v. FEC, 558 U.S. 310 (2010). 5

Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996). 11

Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000). . . 8, 9

Dallman v. Ritter, 225 P.3d 610 (Colo. 2010).. 9

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994). 8

DePaul v. Commonwealth, 969 A.2d 536 (Pa. 2009). 9

FEC v. Beaumont, 539 U.S. 146 (2003). 2

Frank v. City of Akron, 290 F.3d 813 (6th Cir. 2002). 9

Green Party of Conn. v. Garfield, 616 F.3d 189 (2d Cir. 2010). 4, 9

Lavin v. Husted, 689 F.3d 543 (6th Cir. 2012). 9

McCutcheon v. FEC, 572 U.S. 185 (2014). . . . *passim*

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000). 2
Ognibene v. Parkes, 671 F.3d 174 (2d Cir. 2011). . . . 9
Preston v. Leake, 660 F.3d 726 (4th Cir. 2011). 9
Randall v. Sorrell, 548 U.S. 377 (2006). 1, 7
Russell v. Burris, 146 F.3d 563 (8th Cir. 1998). 8
State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999). 9
Thalheimer v. City of San Diego, 645 F.3d 1109 (9th Cir. 2011). 8, 9, 10
Zimmerman v. City of Austin, No. 1:15-cv-628-LY, 2016 156799 (W.D. Tex. July 20, 2016). 5
Zimmerman v. City of Austin, 881 F.3d 378 (5th Cir. 2018). 8, 9, 11
Zimmerman v. City of Austin, 888 F.3d 163, 164 (5th Cir. 2018).. 5

Other Authorities

Stephen Ansolabehere, et al., *Campaign Finance Regulations and the Return on Investment from Campaign Contributions* (Aug. 2004), available at https://scholar.harvard.edu/jsnyder/files/8._cf.return.regs__0.pdf.. . . . . 3, 4
Matt Nese and Luke Wachob, *Do Lower Contribution Limits Decrease Public Corruption?* (Aug. 2013), http://www.ifs.org/wp-content/uploads/2013/08/2013-08-01_Issue-Analysis-5_Do-Lower-Contribution-Limits-Decrease-Public-Corruption1.pdf.. 4

Argument

Since *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court has established that contribution limits are subject to a rigorous standard of review that requires record evidence of quid pro quo corruption and its appearance, precisely defined.

The Ninth Circuit below, like many other Circuits, refused to apply that rigorous standard of review, *see generally* Amicus Brief of Institute of Free Speech, and, instead, used the "'low' evidentiary bars of older cases to eclipse the more precise quid pro quo evidentiary bar established in *Buckley* and recently reiterated in *Citizens United* and *McCutcheon*." Amicus Brief of Public Policy Legal Institute, at 8. This has led lower courts to improperly uphold base and aggregate contribution limits without any actual evidence, *see generally* Amicus Brief of The Legacy Foundation, of quid pro quo corruption, properly defined, Amicus Brief of Wisconsin Institute for Law & Liberty, at 10-19, that are substantially lower than any contribution limits this Court has ever approved. They have ignored this Court's admonitions in *Randall v. Sorrell* that such low limits "generate suspicion that they are not closely drawn," and require "special justification," 548 U.S. 230, 249, 261 (2006), when the Court struck down comparable low limits.

These low contribution limits have severely damaged candidate campaigns, benefitted incumbents, and distorted political campaigns by funneling money that would have otherwise been given to candidates to third party groups that are less accountable and often less transparent. Amicus Brief of Wisconsin Institute for Law & Liberty, at 19-26. They have also damaged First Amendment rights that this Court should repair by granting review.

I. This Court Should Grant Review of this Case to Correct the Lower Courts' Failure to Follow this Court's High Evidentiary Bar.

A. *McCutcheon* Requires a Rigorous Standard of Review.

Montana defends its low contribution limits by ignoring *McCutcheon*'s rigorous standard of review in favor of a "relatively complaisant" review under *Beaumont* that, under *Shrink*, only requires proof that is not "illusory" or "mere conjecture." Resp. at 1, 3. This fundamental error conflicts with decisions of this Court.

Under *McCutcheon,* states must prove that any contribution limits target quid pro corruption or its appearance and are closely drawn, with courts "err[ing] on the side of protecting political speech rather than suppressing it" in close cases. *McCutcheon v. FEC*, 572 U.S. 185, 209 (2014) (citation omitted). *See infra* Part I.B. This Court's jurisprudence requires rigorous review, not the relaxed standard some lower circuits,[1] including the Ninth Circuit below, have followed under *FEC v. Beaumont*, 539 U.S. 146, 161 (2003), and *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000). *See* Resp. at 3, 20-21.

The Ninth Circuit's assertion that only evidence of "the risk" or "threat" of quid pro quo corruption is sufficient compounds its error, App. 4a, 15a, allowing Montana to avoid proving the existence of quid pro corruption at all. Even where quid pro quo arrangements do not exist, as the district court below found, *see infra* Part I.B.2, Montana's contribution limits sur-

[1] *See* Pet. at 23 nn.13 & 14 (collecting cases applying a relaxed standard of review).

vived.

This improper evidentiary burden is further aggravated by Montana's repeated claim that Petitioners conceded a quid pro quo corruption interest, relieving Montana of its evidentiary burden. Resp. at 3-4, 10-12, 24.[2] Petitioners have simply acknowledged what the *McCutcheon* court held: that a state's interest in preventing quid pro quo corruption could justify its limits, but it still must be proved. Pet. at 13-15.[3]

This Court should grant certiorari to correct these errors.

B. *Citizens United* and *McCutcheon* Require Evidence of Quid Pro Quo Corruption or Its Appearance.

1. Quid Pro Quo Corruption Has an Established Definition.

As laid out in the Petition, this Court has articulated what quid pro quo corruption is: it involves **(1)** a quid (things of value given to an official); **(2)** a pro (the unambiguous agreement connecting the quid to the quo); and **(3)** a quo (an official act). Pet. at 17. It does not include efforts to influence or to gain access. *McCutcheon*, 572 U.S. at 208.[4]

---

[2] Montana also contends that Petitioners have conceded that Montana's prior limits are constitutional. Resp. at 11. Petitioners simply stated at oral argument, however, that they would not challenge the prior limits of $1,000; they didn't concede their constitutionality.

[3] Montana cites to cases stating that factual stipulations bind a party. Resp. at 12. Where, as here, a legal standard is merely being stated, such case law is inapplicable.

[4] Considerable scholarly research debunks the claim that campaign contributions buy political favors and that contribution limits are effective in preventing corruption and its appearance. *See, e.g.,* Stephen Ansolabehere, et al., *Campaign Finance Regulations*

Montana argues that Petitioners demand evidence of actual bribery to justify the limits. Resp. at 1, 12, 16, 25-26. But Petitioners simply argue that only quid pro quo corruption (as properly defined) evidence, or its appearance, justifies Montana's contribution limits. Such evidence, though "akin to bribery," *McCutcheon*, 572 U.S. at 235, need not be actual bribery convictions.[5]

Nor may quid pro quo corruption be broadened to the "risk" or "threat" of it. *See* App. 80a-81a. Generally speaking, contribution limits are a prophylactic for contributions that naturally give rise to quid pro quo corruption concerns, particularly "large contributions ... given to secure political quid pro quo's ..." *Buckley v. Valeo,* 424 U.S. 1, 26 (1976).[6] By broadening the scope

---

and the Return on Investment from Campaign Contributions (Aug. 2004), *available at* https://scholar.harvard.edu/jsnyder/files/8._cf. return. regs__0.pdf, at 1 (conducting a study to conclude that "the fundamental critique of campaign finance in America—that donations come with a quid pro quo and extract very high returns for donors—is almost surely wrong."); Matt Nese and Luke Wachob, *Do Lower Contribution Limits Decrease Public Corruption?* (Aug. 2013), http://www. ifs.org/wp-con tent/uploads/2013/08/2013-08-01 _Issue-Analysis-5_Do-Lower-Contribution-Limits-Decrease-Pub lic-Corruption1.pdf, at 3 (conducting a study to conclude that "corruption among elected officials" has no relationship "to campaign contributions").

[5] Montana argues that the Second and Sixth Circuits did not require evidence of actual quid pro corruption when they struck down contribution limits. Resp. at 13. Both Circuits accepted evidence that demonstrated a quid pro quo corruption interest, and not simply its risk. *See, e.g., Green Party of Conn. v. Garfield*, 616, 616 F.3d 189, 200, 203-04 (2d Cir. 2010).

[6] Indeed, unlike here—where Montana lowered its previous $1,000 limit by eliminating the top 10% of contributions, App. 20a—the *Buckley* Court considered limits where previously there were none, allowing large contributions in the millions to be made.

of permissible regulation to "the risk" or "threat" of quid pro quo corruption, the court below added another prophylactic layer to target the underlying "quid pro quo" evil. Doing so creates the very prophylaxis-on-prophylaxis regulatory framework this Court is particularly skeptical of. *McCutcheon,* 572 U.S. at 221. This vastly expands the interest and allows evidence that is barely more than illusory and "mere conjecture" to restrict constitutionally-protected contributions.

This Court should grant review to reestablish this important evidentiary threshold.

2. Montana Did Not Meet Its Evidentiary Burden.

"[T]he Government may not seek to limit the appearance of mere influence or access." *McCutcheon*, 572 U.S. at 208 (citing *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)). Montana's evidence, at most, showed an appearance of ingratiation, influence, and access. Pet. at 19-22. And so it is no surprise that the district court repeatedly rejected it.

The district court's factual findings are consistent and clear. In not one of the district court trials or summary judgment hearings was evidence of quid pro quo corruption found. App. 62a-63a, 168a-169a, 254a.[7] As the en banc dissent[8] below states:

> The district court got it exactly right. As Judge Bea eloquently explained ... Montana's evidence

[7] *Compare with Zimmerman v. City of Austin*, No. 18-93 (where the trial court found that a perception of corruption existed. No. 1:15-cv-628-LY, 2016 156799 at *9-*11 (W.D. Tex. July 20, 2016)).

[8] Here, five judges dissented from the majority panel's decision. App. 75a. Two judges dissented in *Zimmerman v. City of Austin*. 888 F.3d 163, 164 (5th Cir. 2018).

> 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 the public's views.

App. 86a.

Likewise, the district court found that the limits were not focused on preventing quid pro quo corruption "because they were expressly enacted to combat the impermissible interests of reducing influence and leveling the playing field." App. 64a. And Montana provided no justification for lowering the limits—all of its examples involved amounts significantly above even the prior limits (in one case, $100,000). *See* App. 60a. The Ninth Circuit, by shifting the focus to "the risk" of quid pro quo corruption, rather than the existence of quid pro quo corruption itself, overturned the district court's findings. App. 18a. This was error.

This Court should grant review to remedy the Ninth Circuit's faulty application of this Court's rigorous standard of review.

C. Lower Courts Have Misapplied Randall, Which this Court Should Correct.

Lower courts are misapplying *Randall*'s four factor test causing circuit splits,[9] and are using its factors to

[9] Contrary to Montana's assertion, Resp. at 16-17, some circuit

avoid striking down *any* limits. Pet. at 28-30. Here, Montana's evidence is shoehorned into *Randall*'s factors to justify the limits.

For the first factor, Montana argues that the limits are not "suspiciously low." Resp. at 29. But *Randall's* "suspiciously low" limits ranged from $200 to $400 per cycle. Montana's limits are within that same range.

For the second factor, Montana argues that Petitioners have not demonstrated that some political parties could be prevented from giving even $1. Resp. at 29. But Montana's Republican Party, for example, has a State party and approximately 50 county party committees that are independently governed and all subject to the same overall contribution limit. App. 193a. If one county party committee gives the maximum amount (in this case $900), all other party committees are banned from giving even one cent. *See infra* Part II.A.[10]

For the third factor, Montana and the Ninth Circuit compare the limits to the other lowest limits in the nation to conclude that Montana's limit are proportionally higher than some other states and so are not among the lowest. Resp. at 19, 30. This reasoning has the perverse result where only the lowest limit in the country could be unconstitutional. This is contrary to *Randall*, which found that Montana's limits are among the lowest in the country, and therefore "suspiciously" low. *Randall*, 548 U.S. at 250-251.

Most notably, Montana ignores *Randall*'s fourth factor entirely, that Montana's limits are significantly

---

courts determined *Randall* was binding when they recognized *Randall* as mandatory authority. Pet. at 27-30.

[10] This is exactly what occurred with the political party plaintiffs here.

below the $1,000 and $1,075 contribution limits that this Court previously upheld in *Buckley* and *Shrink*, and fails to even try to justify its limits under this factor. *See* Resp. at 28 (listing *Randall*'s four factors) *and* Resp. at 30 (concluding discussion of *Randall*'s four factors at the third one). Indeed, Montana's $180 limit[11] represents just 4% of what *Buckley*'s limit would be worth today and more closely resembles the limits struck down in *Randall*.[12]

Of course, a substantial circuit split exists regarding the constitutionality of limits under $1,000.

Two circuits, the Eighth and Ninth, have struck down such limits. *Carver v. Nixon*, 72 F.3d 633, 635, 645 (8th Cir. 1995) (striking limits between $100 and $300); *Day v. Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994) (striking a $100 limit); *Russell v. Burris*, 146 F.3d 563, 568 (8th Cir. 1998) (striking limits between $100 and $300); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011) (upholding preliminary injunction of $500 contribution limit); *California ProLife Council PAC v. Scully*, 164 F.3d 1189, 1190 (9th Cir. 1999) (upholding preliminary injunction of contribution limits between $100 and $500).

In contrast, five other circuits, including the Ninth Circuit below, and a state supreme court have upheld them. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 452,472 (1st Cir.

---

[11] Montana's $180 per-election limit for state House candidates is even lower than Austin's mayoral limit of $350 in *Zimmerman v. City of Austin*. 881 F.3d 378, 382 (5th Cir. 2018).

[12] Contrary to Montana's arguments, Resp. at 18-19, Montana's limits are different in kind from those that this Court has previously upheld, as recognized by other circuits. Pet. at 24-25.

2000) (upholding limits of $250); *Ognibene v. Parkes*, 671 F.3d 174, 180, 197 (2d Cir. 2011) (upholding limits between $250 and $400); *Zimmerman*, 881 F.3d at 383-84 (upholding citywide limits of $350); *Frank v. City of Akron*, 290 F.3d 813, 818-19 (6th Cir. 2002) (upholding $25 to $300 limits); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 621, 634 (Alaska 1999) (upholding $500 limits).

Circuits are also split when considering the constitutionality of contribution bans (i.e., $0 contribution limits). While Montana argues that contribution ban cases are factually distinct because "a ban is a drastic measure[,]" Resp. at 13, the limits in this case are an equally drastic measure and are, in some cases, just $180 above what a ban would impose. So contribution bans are comparable to the low contribution limits here.

Three circuits and two state supreme courts have struck down contribution bans. *Green Party of Conn.*, 616 F.3d at 207 (striking lobbyist ban); *Lavin v. Husted*, 689 F.3d 543, 545, 548 (6th Cir. 2012) (striking Medicaid provider ban); *Anderson v. Spear*, 356 F.3d 651, 671-672 (6th Cir. 2004) (striking post-election ban and cash ban); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1127-28 (9th Cir. 2011) (upholding preliminary injunction on political party ban); *Dallman v. Ritter*, 225 P.3d 610, 616, 628 (Colo. 2010) (upholding preliminary injunction on contract holder ban); *DePaul v. Commonwealth*, 969 A.2d 536, 538 (Pa. 2009) (striking licensed gaming ban).

In contrast, four circuits and a state supreme court have upheld them. *Green Party of Conn.*, 616 F.3d at 205 (upholding contractor ban); *Preston v. Leake*, 660 F.3d 726, 729 (4th Cir. 2011) (upholding lobbyist ban);

Thalheimer v. City of San Diego, 645 F.3d 1109, 1123-24 (9th Cir. 2011) (denying preliminary injunction of a temporal ban and non-individual ban); *Ala. Democratic Conference v. AG*, 838 F.3d 1057, 1070 (11th Cir. 2016) (upholding PAC-to-PAC transfer ban); *Casino Ass'n v. State*, 820 So. 2d 494, 495 (La. 2002) (upholding casino ban).

The misapplication of *Randall* by the Ninth Circuit, and other Circuits, is a serious error. This Court should grant review to make clear how *Randall* is applied.[13]

II. Under *McCutcheon*, Lower Courts Cannot Uphold Aggregate Limits.[14]

A. The Decision Below Conflicts With *McCutcheon* and the Fifth Circuit, Which This Court Should Resolve.

Montana attempts to distinguish Montana's aggregate limits from *McCutcheon* and a Fifth Circuit case by emphasizing factual differences. Resp. at 31, 33-34. These are immaterial.

The aggregate limits in *McCutcheon* prevented one donor from contributing to multiple candidates, whereas Montana's aggregate limits prevent multiple donors from contributing to a single candidate. The same harms exist under both: they have the effect of a ban. Here, the ban manifests itself when one political party committee gives the maximum to a candidate and all other political parties in the state are banned

[13] Petitioners didn't ask this Court to hold that *Randall* applies only to overrule it. *See* Resp. at 16-17. Petitioners presented alternative arguments. Pet. at 25-34.

[14] The Fifth Circuit found that Zimmerman didn't have standing to challenge Austin's aggregate limits. *Zimmerman*, 881 F.3d at 388. No such standing issues are present in this case.

from contributing to that same candidate. *McCutcheon* applies.

Likewise, the Fifth Circuit struck down a political committee aggregate limit. *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409 (5th Cir. 2014). Although not a political party aggregate limit, Resp. at 33-34, this is not a material difference. Political parties are entitled at least as much constitutional protection as political committees, *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (Breyer, J., joined by O'Connor & Souter, J.J.), and political parties are even less corrupting. *Id*. at 646-47 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment, dissenting in part).

Montana's aggregate limits fail constitutional review. The Ninth Circuit's failure to strike them creates a circuit split this Court should resolve. Pet. at 37-38.

B. Montana's Aggregate Limits Are Not Justified Under *McCutcheon*.

The district court found that Montana hadn't provided any evidence of quid pro quo corruption or its appearance to justify the aggregate limits. App. 62a-63a. Additionally, circumvention of Montana's base limits through political parties has never been a problem in Montana. Pet. at 36.

Montana makes no effort to justify aggregating political party limits and ignores the district court's finding by offering new evidence of a $500,000 political party contribution made while the aggregate limit was enjoined in 2012, but before the stay of the injunction. Resp. at 33. This is evidence outside the record and presented for the first time here. In any event, Montana provides no evidence that this contribution was given as part of a quid pro quo exchange or in an

effort to circumvent another, constitutional limit. And $500,000 vastly exceeds both the current and prior limits, so it does not justify it.

This Court should grant review to correct this faulty approach.

Conclusion

This Court should grant this Petition for Certiorari.

Respectfully submitted,

James Bopp, Jr.
jboppjr@aol.com
Counsel of Record
Anita Y. Milanovich
aymilanovich@bopplaw.com
Courtney Turner Milbank
cmilbank@bopplaw.com
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 (telephone)
812/235-3685 (facsimile)
Counsel for Petitioners