No. _____

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

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Petition for a Writ of Certiorari

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Questions Presented

Montana law imposes two types of candidate campaign contribution limits per election, which are among the lowest in the Nation. The *Base Limits* restrict individual or political committee candidate contributions to the following: governor/lieutenant governor ($680), other statewide office ($340), and all other candidates ($180), and the *Aggregate Limits* restrict candidate contributions from all political party entities in aggregate to the following: governor/ lieutenant governor ($24,500), other statewide office ($8,850), public service commission ($3,550), senate ($1,450), and all other candidates ($900).

Petitioners present two questions:

1. Whether Montana's base candidate contribution limits on individual and political committees are unconstitutional under the First Amendment.
2. Whether Montana's aggregate candidate contribution limits from all political party entities are unconstitutional under the First Amendment.

Parties to the Proceeding Below

Plaintiffs-Appellees ("Contributors") below were: **1)** Doug Lair, **2**) Steven Dogiakos, **3)** Lake County Republican Central Committee, and **4)** Beaverhead County Republican Central Committee.

Defendants-Appellants ("Montana") below were: **1**) Jonathan Motl,[1] in his official capacity as the Montana Commissioner of Political Practices; **2)** Timothy Fox, in his official capacity as Montana Attorney General; and **3**) Leo Gallagher, in his official capacity as Lewis and Clark County Attorney.

Corporate Disclosure

No petitioner is incorporated, nor does any petitioner have a parent corporation or publicly held stock. Rule 29.6.

[1] Commissioner Motl's successor in office, Jeff Mangan, has been automatically substituted as a party. Rule 35.3.

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Petition for Writ of Certiorari

Petitioners respectfully request a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

Opinions and Orders Below

The relevant opinions and orders below are:

Lair v. Motl, 873 F.3d 1170 (9th Cir. 2017) ("*Lair III*") (opinion and order reversing the district court's granting of summary judgment) (App. 1a);

Lair v. Motl, 189 F. Supp. 3d 1024 (D. Mont. 2016) ("*Motl*") (order granting summary judgment and declaring unconstitutional the three statutory sections at issue) (App. 44a);

Lair v. Motl, No. 16-35424, 2018 U.S. App. LEXIS 11300 (9th Cir. May 2, 2018) ("*Lair En Banc*") (order denying rehearing en banc with dissent and response to dissent) (App. 73a);

Lair v. Bullock, 798 F.3d 736 (9th Cir. 2015) ("*Lair II*") (order remanding the case to the district court) (App. 101a);

Lair v. Bullock, 697 F.3d 1200 (9th Cir. 2012) ("*Lair I*") (order entering stay of the district court's decision) (App. 127a);

Lair v. Murry, 903 F. Supp. 2d 1077 (D. Mont. 2012) ("*Murry*") (opinion striking down the base and aggregate contribution limits) (App. 163a); and

Lair v. Murry, 903 F. Supp. 2d 1077 (D. Mont. 2012) ("*Murry Order*") (order declaring Montana's limits unconstitutional) (App. 201a).

Jurisdiction

The Ninth Circuit filed the decision below and entered judgment on October 23, 2017 (App. 1a), and it denied rehearing en banc on May 2, 2018 (App. 73a). This Court has jurisdiction under 28 U.S.C. 1254(1).

Constitution, Statutes & Regulations Involved

U.S. Const., amend. I is in the Appendix at 260a.

Mont. Code. Ann. 13-37-216 is in the Appendix at 261a.

Admin. R. Mont. 44.11.227 is in the Appendix at 264a.

Statement of the Case

This case presents a constitutional challenge to Montana's base and aggregate candidate contribution limits because they unconstitutionally restrict the Contributors' First Amendment rights.

I. The Facts

A. The History of Montana's Candidate Contribution Limits

In 1975, Montana adopted its first contribution limits to candidates from individuals and political committees ("Base Limits") and from all political party entities in aggregate ("Aggregate Limits"),per election cycle:

1975 Limits	Base Limits	Aggregate Limits
Governor/Lieutenant Governor	$1,500	$8,000
Other Statewide Office	$750	$2,000
Public Service Comm'r	$400	$1,000
District Court Judge	$300	$250
Legislative Candidates	$250	$250
City or County Office	$200	$200

23-4795 R.C.M. 1947, *available at* https://archive.org/stream/supp1975electionlaws00montrich#page/172/mode/2up.[2]

In 1994, Initiative 118 ("I-118") reduced the Base Limits and increased the Aggregate Limits as follows:

1994 Limits	Base Limits	Aggregate Limits
Governor/Lieutenant Governor	$400	$15,000
Other Statewide Office	$200	$5,000
Public Service Comm'r	$100	$2,000
Senate	$100	$800
All Other Candidates	$100	$500

[2] In 1979, these limits were slightly revised. *See* Mont. Code Ann. § 13-37-216 (1987), *available at* https://archive.org/stream/title13electionl00montrich#page/138/mode/2up.

(SER-179 (Doc. 26-2).)[3] In 2003, the Limits were nominally increased. *See* 2003 Montana Laws Ch. 462 (S.B. 423). They are now codified in Mont. Code Ann. § 13-37-216. App. 261a.

In 2007, the Limits were indexed for inflation using the Consumer Price Index. App. 262a. The Limits currently are:

Current Limits	Base Limits	Aggregate Limits[4]
Governor/Lieutenant Governor	$680	$24,500
Other Statewide Office	$340	$8,850
Public Service Comm'r	$180	$3,550
Senate	$180	$1,450
All Other Candidates	$180	$900

App. 264a–265a.[5]

[3] SER refers to the Supplemental Excerpts of Record from *Lair III*, found at Docs. 26-1 through 26-7.

[4] Contributions do not include "a coordinated expenditure made solely by a political party committee in the form of provision of personal services by paid staff of the political party." ARM 44.11.401(2). *See also* App. 265a.

[5] Montana candidates also may not accept contributions from individuals, political committees, or political parties above those allowed under the Limits. App. 262a.

II. The History of the Litigation

A. *Montana Right to Life Association v. Eddleman*

In October 1996, Montana Right to Life Association ("MRTLA")[6] challenged, in *Eddleman I,* the 1994 Base Limits, adopted through I-118. (SER-187 (Doc. 26-2).) The *Eddleman I* court held a trial where it considered evidence regarding the intent of drafters of I-118, the effect of the Base Limits on campaigns, and "corruption" in Montana. *See generally* App. 250a.

Mr. Jonathan Motl, I-118's drafter, made clear that the initiative's objective was to "solve the problem" of "way too much money in Montana politics," with "special interests and the wealthy [] drowning out the voice of regular people." (SER-268:18–19 (Doc. 26-2), SER-336–338 (Doc. 26-4).) He explained that I-118's impetus was to address unfairness and "corruption" (SER-269:6–12 (Doc. 26-2)), with unfairness meaning "corruption" (SER-267:10–14, 267:22–25, 272:10–11 (Doc. 26-2)). Mr. C.B. Pearson, I-118's campaign manager, confirmed these objectives, (SER-278, 279:5–21, 280:12–24, (Doc. 26-3)), defining "corruption" as "any point when the political system is no longer seen as being fair by the voters" (SER-281:10–18 (Doc 26-3)).

Studies showed that I-118 accomplished the goals of: having less special interest influence, (SER-397 (Doc. 26-3)), leveling the playing field and reducing the money in elections, (SER-358 (Doc. 26-4)), reducing the influence of big money and eliminating the unfair advantages of PACs and the wealthy, (SER-359 (Doc.

[6] MRTLA is also a party to this lawsuit.

26-4)), and lessening the influence of large contributors (SER-355 (Doc. 26-4)).

The only evidence of purported *quid pro quo* corruption occurred over a decade before the Base Limits were lowered, when insurance salesman Senator Anderson sought to influence other senators to vote in favor of an annuity bill to retain financial support of an insurance PAC. (SER-453, 492 (Doc. 26-6).) Legislative witnesses confirmed they knew of no quid pro quo corruption occurring before or after the adoption of the Limits. (SER-261:9–19, 262:6–13 (Doc. 26-2).)

The *Eddleman I* court ruled that the Base Limits were constitutional because they were closely tailored to prevent improper influence and confirmed "the belief of the majority of voters; [sic] that contribution limits were necessary to combat improper influence, or the appearance thereof." App. 254a, 257a, 258a–259a.

On appeal, in *Eddleman II*, the Ninth Circuit affirmed the district court, holding that "[t]he 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." App. 10a (citing App. 221a).

B. *Lair v. Mangan*

1. Prior District Court Proceedings (*Murry)*

Three years later, this Court found Vermont's limits unconstitutional in *Randall v. Sorrell*, and established a two part, multi-factor balancing test for analyzing

whether contribution limits are too low. 548 U.S. 230 (2006). As a result, Contributors challenged Montana's I-118 Limits, arguing that Montana's Base Limits, as well as its Aggregate Limits, were unconstitutional under *Randall*. (SER-493 (Doc. 26-7)).

The *Murry* court conducted a trial and heard testimony from then-Commissioner of Political Practices James Murry, former long-time Commission Supervisor Mary Baker, experts Edwin Bender (for Montana) and Clark Bensen (for Contributors), political party chairmen, and a state legislator. (SER-1, 3, 21, 23, 75, 77 (Doc. 26-1).) Ms. Baker testified that quid pro quo corruption is not an issue for Montana officials, and that even a "pretty big contribution" of $1000 would not have a corrupting effect. (SER-68:7–19 (Doc. 26-1).)

The *Murry* court concluded that *Randall* abrogated *Eddleman's* approach to evaluating candidate contribution limits and found, under *Randall*, that both the Base and Aggregate Limits were unconstitutional, "prevent[ing] candidates from amassing the resources necessary for effective campaign advocacy." App. 186a, 189a, 197a, 199a.

2. Prior Ninth Circuit Proceedings (*Lair I* and *Lair II*)

Montana appealed and sought a stay pending appeal. (SER-546–547 (Doc. 26-7).) The *Lair I* motions panel granted the stay, holding that *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." App. 12a (citing App. 135a) (emphasis in original). So *Eddleman* still controlled. *Id.*

at 12a–13a.

The subsequent *Lair II* merits panel held that they were bound to follow the *Lair I* panel's decision holding that *Randall* did not disturb *Eddleman*'s analysis. App. 121a–122a. But it found that *Citizens United v. FEC*, 558 U.S. 310 (2010) and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) abrogated *Eddleman* by defining the state anti-corruption interest as preventing "quid pro quo corruption, or its appearance." App 118a–120a. "[B]ecause *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." App. 13a.

So the *Lair II* court remanded the case, instructing the district 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 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.

App. 124a–125a.

3. The District Court Proceedings Below (*Motl*)

On remand, on cross motions for summary judgment based on the *Eddleman* record and

additional evidence submitted by both parties, the *Motl* district court held that Montana had not met its burden of proving the Limits prevented quid pro quo corruption or its appearance. App. 62a. It found that the *quids* in Montana's evidence were either "rejected by, or were unlikely to have any behavioral effect upon, the individuals toward whom they were directed." App. 62a. Moreover, the offers were never even accepted. App. 62a. And it determined that Montana's evidence did not amount to an appearance of quid pro quo corruption because, "if anything, the evidence shows that Montana politicians are relatively incorruptible," App. 62a, and 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," App. 63a. The *Motl* court found that the Limits were enacted to combat "*impermissible* interests of reducing influence and leveling the playing field," App. 64a (emphasis in original), and thus failed the first factor of the closely drawn test. App. 65a.

The *Motl* court reiterated that the Limits prevent candidates from amassing sufficient resources to mount effective campaigns, supplementing its 2012 findings that Montana campaigns are underfunded by 7%, a problem that could be remedied by raising the Limits. App. 66a–68a.

4. Ninth Circuit Proceedings Below (*Lair III)*

Montana appealed. (ER-1, Doc, 10-1.)[7] Applying the *Eddleman* test, the Ninth Circuit, in *Lair III*, reasoned

[7] ER refers to the Excerpts of Record from *Lair III*, found at Docs. 10-1 through 10-3.

that "[t]o satisfy its burden, Montana must show the risk of actual or perceived quid pro quo corruption is more than 'mere conjecture.'" App. 15a. "Montana need not show any instances of actual quid pro quo corruption." *Id.* (citation omitted). "It must show 'only that the perceived threat [is] not . . . "illusory."" It held that Montana met this "low bar." App. 4a.

Furthermore, the *Lair III* court concluded that the Limits were closely drawn, because they "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," App. 4a, and that the Limits permitted association through volunteer services and direct contributions, making the limits " not constitutionally suspect," App. 21–23a. Finally, the *Lair III* court held that the Limits do not prevent candidates from amassing sufficient resources to run an effective campaign. App. 28a.

Judge Bea dissented, arguing that "[w]hile 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." App. 42a–43a. Accordingly, Judge Bea would hold that Montana failed to carry its burden of proving quid pro quo corruption or its appearance, "as narrowed by *Citizens United*[,]" "because the record . . . 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." App. 38a. And that while "there were

few opportunities for abuse and, therefore, scant public awareness of such opportunities[,]"the record of actual or apparent quid pro quo corruption or its appearance "is, at best, 'illusory' or 'mere conjecture,' such that defendants have not met their burden[.]" App. 42a (citation omitted).

5. Rehearing En Banc Denied with Dissents (*Lair En Banc*)

The Contributors' rehearing en banc petition was denied on November 6, 2017. App. 75a. Five judges dissented, arguing that *McCutcheon* and *Citizens United* presented a dramatic change in Supreme Court jurisprudence that the panel majority had ignored "by applying the same legal standard and evidentiary burden that we had adopted before the Supreme Court decided *McCutcheon* and *Citizens United*." App. 75a–76a. In applying the superseded standard from *Eddleman*, the *Lair En Banc* dissent argued that the *Lair III* court "upholds Montana's contribution limits without *any* evidence of actual or apparent quid pro quo corruption." App. 76a (emphasis in original, citation omitted).

Judges Fisher and Murguia responded by reiterating that "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." App. 88a (emphasis in original). A burden they claimed Montana met. *Id*.

Reasons to Grant the Petition

Montana imposes two types of candidate contribution limits. The first, the Base Limits, restrict the amount an individual or political committee can

contribute to a candidate. These limits are among the lowest in the nation. The second, the Aggregate Limits restrict the amount all political party entities in aggregate can make to a particular candidate, even though each political party entity is organized and operates independently from all others.

Candidate contribution limits have seriously distorted both state and federal campaigns. Because the federal government and most states have imposed candidate contribution limits that are way below what could be justified as preventing quid pro quo corruption, a significant number of potential donors are left with money on the table after they make their maximum contribution to a candidate. Of course, they spend this money on the election anyway and are forced to use 527s, SuperPACs, trade associations, non-profits, regular PACs, and political parties as vehicles to participate. Many of these vehicles are less transparent then candidate committees, all but political parties are unaccountable, and their campaign spending is often inefficient, negative, and disruptive. In many competitive races, third party spending substantially exceeds candidate spending, making candidates bit players in their own election. This distortion, this lack of transparence and accountability, and this inefficiency, negativity, and disruption is a direct result of campaign contribution limits.

Thus, this case presents the exceptionally important question of whether Montana can stifle the voices of individuals, political committees, and political parties through very low contribution limits without any evidence of quid pro quo corruption, and, with respect to the Aggregate Limits, without any evidence of circumvention concerns, contrary to this Court's

First Amendment jurisprudence and conflicting with other Circuits.

The Ninth Circuit conflicts with the Second and Sixth Circuits (in upholding the Limits without actual evidence of quid pro quo corruption or its appearance), the Sixth and Eighth Circuits (in failing to recognizing the Limits are different in kind than those previously upheld), the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits and the Colorado Supreme Court (in failing to recognize *Randall* as mandatory authority), and with the Fifth Circuit (in upholding the Aggregate Limits). This Court should resolve these splits by granting the petition.

I. The Ninth Circuit Decision Upholding the Base Limits Conflicts with Decisions of the U.S. Supreme Court and Other Circuits.

A. This Court Requires That the State Prove That the Limits Are Closely Drawn to a Sufficient Important State Interest.

This Court applies a "rigorous standard of review" and will uphold contribution limits only if "the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[8] *McCutcheon*,

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[8] However, Contributors will urge this Court to adopt strict scrutiny for its review of these Limits:

> Strict scrutiny is the proper standard of review for analyzing contribution limits because contribution limits restrict freedom of association and thereby "operate in an area of the most fundamental First Amendment activities." The Supreme Court has repeatedly stated . . . that when core First

134 S. Ct. at 1444. The State's burden applies both to proof of a cognizable interest, *id.* at 1452-53, as well to proof the limits are closely drawn. *Id.* at 1457. Its proof cannot be speculative, "mere conjecture," "highly implausible," irrational, premised on illegal conduct, largely inapplicable, or "divorced from reality." *Id.* at 1452, 1453, 1454, 1455, 1456.

1. This Court Requires Evidence of Quid Pro Quo Corruption.

This Court has recognized as a sufficiently important government interest preventing quid pro quo corruption or its appearance: "a direct exchange of an official act for money[,]" *id.* at 1441 (citations omitted), and conduct "akin to bribery." *Id.* at 1466 (Breyer, J., dissenting).[9] And it has expressly rejected

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> Amendment rights are involved, such as political association, strict scrutiny always applies. If contribution limits "operate in an area of the most fundamental First Amendment activities," and restricting contributions is the restriction of "a basic constitutional freedom," to wit, the freedom of association, then strict scrutiny must apply. To hold otherwise is to say that strict scrutiny applies to analyzing the infringement of certain "fundamental First Amendment activities" and certain "basic constitutional freedoms," but not to others.

James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 11 Regent U.L. Rev. 235, 243 (1999) (internal citations omitted).

[9] *See also Citizens United*, 558 U.S. at 356 ("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." (citation omitted)).

the following interests: "reduc[ing] the amount of money in politics," "restrict[ing] the political participation of some in order to enhance the relative influence of others," mitigating "general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford," "level[ing] the playing field," "level[ing] electoral opportunities," "equalizing the financial resources of candidates," or "limit[ing] the appearance of mere influence or access." *Id.* at 1441, 1450, 1451 (internal citations omitted). Restrictions that pursue objectives other than quid pro quo corruption or its appearance, "impermissibly inject the Government 'into the debate over who should govern'" "[a]nd those that govern should be the *last* people to help decide who *should* govern." *Id.* at 1441–1442 (citations omitted) (emphasis in original). So when 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.)).

a. The Ninth Circuit Only Required a "Risk" of Quid Pro Quo Corruption.

The Ninth Circuit in *Lair III* applied the legal review established by this Court prior to, and rejected in, *Citizens United* and *McCutcheon,* "uphold[ing] Montana's contribution limits without any evidence of actual or apparent quid pro quo corruption." App. 76a. In doing so, the court applied the wrong legal standard and ignored "an important change in Supreme Court

jurisprudence."[10] App. 76a.

In misapplying that jurisprudence, the *Lair III* court held that the burden of proof is a "low bar" and that to satisfy their burden, Montana must only show that the *risk* of actual or perceived quid pro quo corruption is more than "mere conjecture" and "not illusory." App.4a, 15a. This standard is "highly attenuated" and "two steps removed" from the standard this Court laid down in *Citizens United* and *McCutcheon*." App. 81a. And it takes *McCutcheon* and *Buckley* out of context. App. 81a–82a.

The *Lair III* court cites *McCutcheon* for its "mere conjecture" standard but *McCutcheon* "did not hold that a scintilla of evidence more than mere conjecture was sufficient." App 82a. Instead, it said that "we 'have never accepted mere conjecture as adequate to carry a First Amendment burden,'" 134 S. Ct. at 1452 (quoting *Nixon v. Shrink Mo. Government PAC*, 528 U.S. 377, 392 (2000)).

Similarly, the *Lair III* court cites *Buckley v. Valeo* for its "not illusory" standard. App. 82a. But *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." App 82a (alteration in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 27

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[10] *See also* App. 87a ("'[T]he panel majority's opinion pays lip service' to *Citizens United* and *McCutcheon*'s shift, its analysis utterly fails 'to account substantively for this change.'") (citing App. 43a). Indeed, the Ninth Circuit's analysis referenced *McCutcheon* a total of three times (once to bolster a citation to *Shrink*) and *Citizens United* not at all. *See* App. 15a, 20a, 26a.

(1976)). Such evidence is a far cry from allowing a "state [to] justify a contribution limitation by producing a peppercorn of evidence that is not entirely imaginary," App. 82a, as the *Lair III* court did below.

Applying the correct standard for contribution limits analysis—which includes an accurate definition of quid pro quo corruption and a rigorous review of evidence presented—is of the utmost importance. This Court should grant certiorari to make clear **1)** what qualifies as quid pro quo corruption or its appearance, **2)** what evidence is sufficient to establish it, and **3)** when contribution limits are closely drawn to that interest. Each are discussed in turn below.

b. Quid Pro Quo Corruption Has an Established Definition Under This Court's Jurisprudence.

An appropriate definition of quid pro quo corruption is critical to First Amendment protections. It prevents the government from pursuing objectives this Court has expressly rejected and keeps the government from improperly injecting themselves into political campaigns. *See McCutcheon*, 134 S. Ct. at 1441-42; *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011).

In *McDonnell v. U.S.*, this Court defined quid pro quo corruption as: **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). 136 S. Ct. 2355, 2372 (2016).

As to the *pro*, an unambiguous agreement is necessary: while "a public official is not required to actually make a decision or take an action on a 'question, matter, cause, suit, proceeding or

controversy'[,] . . . the official [must] agree to do so." *McDonnell*, 136 S. Ct. at 2359 (citing *Evans v. U.S.*, 504 U.S. 255, 268 (1992)); *see also McCormick v. U.S.*, 500 U.S. 257, 273 (1991). Such an agreement, though unambiguous, "need not be explicit": evidence may show "that the public official received a thing of value knowing that it was given with the expectation that the official would perform an 'official act' in return." *McDonnell*, 136 S. Ct. at 2371. But an unambiguous agreement must be a direct one. *McCutcheon*, 134 S. Ct. at 1441 (citing *McCormick,* 500 U.S. at 266) (the hallmark of quid pro quo corruption is "a direct exchange of an official act for money," since "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly."). And the unambiguous agreement must be an improper one. *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996) (quoting *Buckley*, 424 U.S. at 47) (holding expenditures are corrupt only if "given as a *quid pro quo* for improper commitments from the candidate."); *FEC v. Nat'l Conservative Political Action Committee*, 470 U.S. 480, 498 (1985) (observing that a candidate or public official altering or affirming his positions on issues because of a contribution is not evidence of quid pro quo corruption).

As to the *quo*, an official act is required. *McDonnell*, 136 S. Ct. at 2365; *see also U.S. v. Sun-Diamond Growers of California*, 526 U.S. 398, 409 (1999) (stating that it is not enough that the act in question "pertain[s] to the office," it must pertain "to *particular* official acts." (emphasis in original)).

c. Montana Produced No Evidence Of Quid Pro Quo Corruption Or Its Appearance.

The *Motl* district court found, after careful review that the evidence, did not amount to *quid pro quo* corruption: "[t]he 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." App. 62a; *see also* App. 63a ("[T]he 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."). Without evidence of an unambiguous agreement, or even its appearance, the *Motl* district court correctly found that the State failed to meet its burden of proving quid pro quo corruption. Yet, the Ninth Circuit held that the "district court imposed too high an evidentiary burden" on Montana, when all the State needed to show was that the "risk" of corruption is not illusory. App. 18a.

In holding that Montana had met this low bar, the Ninth Circuit failed to even define quid pro quo corruption. Nor did it analyze whether any of Montana's evidence, in fact, involved quid pro quo corruption. If the Ninth Circuit had done what this Court requires, Montana's Limits would have be struck down.

For example, the Ninth Circuit relied on evidence from *Eddleman* of a letter from insurance salesman Senator Anderson, seeking to influence other senators to vote in favor of an annuity bill to retain financial

support from an insurance PAC. The senator alleged that he could "keep the contributions [from the Life Underwriters Association] coming our way," if other republicans were to vote for a bill. App. 17a. But the evidence did not show any legislator agreed to take the deal, that contributions were promised in exchange for a vote, or that there was even *any* communication from the Association making the alleged offer. App. 38a, 62a. As the *Motl* district court held (App. 62a), this is not quid pro quo corruption, nor does it even appear as such—at best, it is the appearance of a senator trying, but failing, to influence other senators.[11]

Likewise, the Ninth Circuit relied on testimony from Rep. Harper that contributions "get results." App. 17a. But this claim lacks even the appearance of a *pro* and was understood in *Eddleman* to be a description of influence, not a quid pro quo arrangement. *Id.* Moreover, the Ninth Circuit ignored evidence from Rep. Harper and Rep. Grinde confirming that they knew of no quid pro corruption occurring before or after the adoption of the Limits. (SER-261:9-19, 262:6-13 (Doc. 26-2).) Indeed, the court ignored even more recent testimony from the Program Supervisor for the Office of Political Practices that quid pro quo corruption is not likely to occur even for a $1,000 contribution. (68:7-19. (Doc. 26-1).)

Instead, the Ninth Circuit relied on recent testimony from Senator Tutvedt that, in 2009, an offer of a $100,000 contribution was made to the Republican Legislative Campaign Committee from National Right to Work, if Republican Senators introduced and got a

[11] In fact, Senator Anderson was investigated by five different agencies, no corruption was ever found. App. 219a.

vote on a right-to-work bill. App. 17a. But this too was not evidence of quid pro quo corruption: the alleged offer was rejected and, as a result, no unambiguous agreement was reached. App. 38a, 60a. And crucially, there was no evidence that the proposed arrangement sought an official action that was contrary to what those legislators would have done anyway.

Finally, the Ninth Circuit relied on evidence Commissioner Motl manufactured for this case[12] that "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.'" App. 17a–18a. But each of the candidates testified that no quid pro quo corruption occurred between them and third party groups. (ER-299, 304, 309, 316, 321, 324 (Doc. 10-2); ER-328, 332 (Doc. 10-3).) And the district court found that these candidates already held strong positions on the issues presented. App. 62a–63a.

So Montana has presented no evidence of quid pro quo corruption or its appearance. The Ninth Circuit erroneously held that Montana had established that a sufficiently important state interest justifies Montana's

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[12] Commissioner Motl claimed quid pro quo corruption in several lawsuits against Republican legislators, only at the very end of a lawsuit–and after the decision in *Lair II* requiring Montana to prove quid pro quo corruption. The claim of quid pro quo corruption was never part of any citizens' complaints, Commission findings, or the Complaints in those lawsuits. App. 61a. (*See also* ER-302–303, 307, 314, 319, 323, 326 (Doc. 10-2); ER-330, 335 (Doc. 10-3); SER-648, 652, 655 (Doc. 26-7).)

Limits.

2. Under This Court's Jurisprudence, the Base Limits Are Not Closely Drawn.

In addition to failing to establish a sufficiently important interest, the State failed to show that the Base Limits are closely drawn.

The "closely drawn" analysis looks to whether there is a reasonable fit "between the Government's stated objective and the means selected to achieve it." *McCutcheon*, 134 S. Ct. at 1445–46, 1456–57. This reasonable fit, while "not necessarily the least restrictive means," must still be "a means narrowly tailored to achieve the desired objective," with the availability of better, more reasonable alternatives belying a "closely drawn" claim. *Id.* at 1456–1457 (internal citations omitted).

Here, there is "a substantial mismatch between the Government's stated objective and the means selected to achieve it." *Id.* at 1446. Even if Montana's evidence demonstrated quid pro corruption, which it does not, the dollar amounts involved are well-above the Base Limits. For example, the alleged offer from National Right to Work Committee was for $100,000, a substantial mismatch with the $180 limit. Thus, the Ninth Circuit committed error when it held that Montana's limits were closely drawn.

3. The Ninth Circuit's Decision Conflicts with the Decisions of Other Circuits.

a. The Ninth Circuit's Failure to Require Evidence of Quid Pro Quo Corruption or its Appearance Conflicts with Second and Sixth Circuits.

The Ninth Circuit held that a State need not show actual evidence of quid pro quo corruption, or its appearance,[13] only a *risk*. App.4a, 15a. The Second and Sixth Circuits have held otherwise, requiring evidence of actual quid pro quo corruption.[14]

The Second Circuit in *Green Party of Conn. v. Garfield* held that the Connecticut had demonstrated that a state contractor contribution ban was enacted in response to a "series of scandals in which contractors illegally offered bribes, 'kick-backs,' and campaign

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[13] The First, Fifth, and Eighth Circuits, and the Alaska and Louisiana Supreme Courts have also upheld contribution limits without actual evidence of quid pro quo corruption or its appearance. *See Daggett v. Comm'n on Gov. Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000); *Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018); *Minn. Citizens for Life, Inc. v. Kelly*, 427 F.3d 1106 (8th Cir. 2005); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 600 (Alaska 1999); *Casino Ass'n v. State*, 820 So.2d 494 (La. 2002).

[14] The Second and Sixth Circuits also contain intra-circuit splits, upholding contribution limits without actual evidence of quid pro quo corruption or its appearance. *See Ognibene v. Parkes*, 671 F.3d 174 (2nd Cir. 2011); *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002); *Kentucky Right to Life v. Terry*, 108 F.3d 637 (1997).

contributions to state officials in exchange for contracts with the state[,]" which lead to the "criminal conviction and imprisonment" of the governor. 616 F.3d 189, 199–200 (2nd Cir. 2010).

The Sixth Circuit held that this Court requires that "a state must do more than merely recite a general interest in preventing corruption," but must demonstrate it. *Lavin v. Husted*, 689 F.3d 543, 547–548 (6th Cir. 2012) (holding that Ohio had not demonstrated that the limits prevent corruption); *see also Schickel v. Dilger*, No. 17-6456, slip op. at *3–4 (6th Cir. Dec. 28, 2017) (holding that defendants had sufficiently demonstrated that the "challenged restrictions . . . were passed in the wake of massive corruption allegations and successful prosecutions" with specific evidence.).

Unlike these Circuits, the Ninth Circuit upheld the Limits without *any* evidence of quid pro quo corruption or its appearance. This Court should resolve this circuit split.

b. The Ninth Circuit's Failure to Recognize That the Base Limits Are Different in Kind from Those Previously Upheld Conflicts with Other Circuits.

The Ninth Circuit held that the Base Limits are not different in kind from those previously upheld in *Buckley* and *Shrink*. App. 22a. In contrast, the Sixth and Eighth Circuits have held that similar limits were different in kind and were therefore unconstitutionally low.

The Sixth Circuit held that a cash ban was different in kind because it foreclosed the smallest contributions and so was not closely drawn. *Anderson v. Spear*, 356

F.3d 651, 671–672 (6th Cir. 2004). Similarly, in *Carver v. Nixon*, the Eighth Circuit held that limits ranging from $100 to $300 per election cycle were "differen[t] in kind from the limits in *Buckley*" and not closely drawn. 72 F.3d 633, 641–642, 644 (1995). Likewise in *Russell v. Burris*, the Eighth Circuit found limits that represented between 4% and 12% of the inflation-adjusted limits previously upheld, were "dramatically lower than, and different in kind from" the limits in *Buckley*.146 F.3d 563, 571 (8th Cir. 1998).

Like *Russell*, Montana's lowest base limit is $180, which represents just 4% of what *Buckley's* limit would be worth today. This represents a difference in kind and the Ninth Circuit's failure to recognize this creates a significant circuit split that should be resolved by this Court.

B. The Ninth Circuit Erred in Holding That *Randall* Did Not Contain a Majority Opinion, Making It Only Persuasive Rather than Mandatory Authority, Which Is Contrary to This Court's Jurisprudence and Is In Conflict With Other Circuits.

The Ninth Circuit's motions panel in *Lair I,* and the merits panel in *Lair II*, rejected *Randall* as the mandatory authority because they held that *Randall* did not contain a majority opinion sufficient to overrule *Eddleman*. App. 14a (citing App. 135a–136a). The court's failure to recognize *Randall* as mandatory authority is erroneous and creates a circuit split.

1. *Randall* Is Mandatory Authority.

"When 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." *Marks v. United States*, 430 U.S. 188, 193 (1977) (citations omitted).

In *Randall*, two pluralities presented themselves: three Justices—Justices Kennedy, Thomas, and Scalia—agreed that Vermont's contribution limits are unconstitutional, because candidate contribution limits are never constitutional. *Randall*, 548 U.S. at 264-73. And three other Justices—Justices Breyer, Roberts, and Alito—decided to strike down the Vermont contribution limits under a two part, multi-factor balancing test. *Id*. at 236–263.

Justice Breyer's opinion "recognize[d] the existence of some lower bound," when it struck down Vermont's base contribution limits. *Id*. at 248. So where there are "danger signs" that the limits are too low, the court "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." *Id*. at 249.

The danger signs considered in *Randall* included that: **1)** the limits are per-cycle, rather than per-election, **2)** the limits apply to both contributions from individuals and from political parties, **3)** the limits are among the lowest in the nation, and **4)** the limits are below those the Court has previously upheld.[15] "These

[15] Importantly, *Randall* did not say these are the only danger signs a court could consider. Instead, *Randall* pointed to several aspects of Vermont's law that supported its conclusion that the danger signs were there. 548 U.S. at 268 (Thomas, J. concurring). Nevertheless, the same danger signs are present here.

are danger signs that [the] contribution limits may fall outside tolerable First Amendment limits." When danger signs are present, the court "must examine the record independently and carefully to determine whether [the] contribution limits are 'closely drawn' to match the State's interests." *Id*. at 249–253.

The second part of *Randall's* test assesses five factors: **1)** whether the contribution limits significantly restrict the amount of funding available for challengers to run competitive campaigns; **2)** whether a political party must abide by the same contribution limits that apply to individual contributors, resulting in harm of the right to associate; **3)** whether it excludes the expenses that volunteers incur in the course of campaign activities; **4)** whether the limits are adjusted for inflation; and **5)** whether there is any special justification for the contribution limits. *Id.* at 253–261.

Justice Breyer's opinion is the narrower of the two pluralities. So under *Marks*, his two part, multi-factor balancing test is controlling and mandatory authority. Thus, *Lair I* and *Lair II* is erroneous in deciding otherwise.

2. The Ninth Circuit's Failure to Recognize *Randall* as Mandatory Authority Has Also Created a Circuit Split.

The Ninth Circuit's holding that *Randall's* plurality is not mandatory authority[16] conflicts with the decisions of ten other circuits and the Colorado Supreme Court.

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[16] No other circuit agrees with the Ninth Circuit on this point.

a. Six Circuits and the Colorado Supreme Court Have Recognized *Randall* as Mandatory Authority and Have Applied It to Contribution Limit Cases.

The Second, Fifth, Sixth, Eighth, Eleventh and D.C. Circuits and the Colorado Supreme Court have all applied *Randall* as mandatory authority and upheld the challenged contribution limits. *See Ognibene v. Parkes*, 671 F.3d 174, 192 (2d Cir. 2011) (finding that the failure to index for inflation was different from *Randall* because the limits at issue were not "suspiciously low" and that the limits differed because they did not "magnify the advantages of incumbency."); *Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018) (finding the City of Austin's contribution limits constitutional); *see also Republican Nat'l Comm. v. FEC* (*In re Anh Cao)*; 619 F.3d 410, 422 (5th Cir. 2010) (holding that limits in question were not unconstitutional under *Randall* because *Randall* considered limits that were already "suspiciously low" rather than the "more reasonable limitation of $5,000"); *McNeilly v. Terri Lynn Land,* 684 F.3d 611, 618 (6th Cir. 2012) (after examining the *Randall* factors, holding that "sufficient evidence was not presented [at the preliminary injunction phase] to show a likelihood of success on the merits."); *Minn. Citizens Concerned for Life v. Swanson,* 640 F.3d 304, 319 n.9 (8th Cir. 2011) (plaintiffs had "not meaningfully argue[d], and the record before the district court does not show, that Minnesota's ban on direct corporate contributions is interfering with the ability of candidates to mount effective campaigns[,]"); *Ala. Democratic Conference v. AG*, 838 F.3d 1057, 1069-70 (11th Cir. 2016) (a PAC-to-PAC transfer ban

did not prevent the plaintiff from "amass[ing] the resources necessary for effective advocacy" under *Randall*); *Holmes v. FEC*, 875 F.3d 1153, 1165 (D.C. Cir. 2017) (plaintiffs did not argue that "the contribution ceiling is 'too low' to permit an effective campaign. Rather, plaintiffs took issue with the limit being per-election instead of per-cycle."); *Dallman v. Ritter*, 225 P.3d 610, 622–23 (Colo. 2010) (the record was insufficient to determine whether the limits prevented candidates from amassing the necessary resources for effective advocacy).

b. Three Other Circuits Have Recognized *Randall* as Mandatory Authority To Establish the Standard Review.

The Sixth, Seventh, and Tenth Circuits also relied on *Randall* to establish the appropriate standard of review. *See Lavin,* 689 F.3d at 545; *Wisconsin Right to Life State PAC v. Barland*. 664 F.3d 139, 152 (7th Cir. 2011); *Riddle v. Hickenlooper*, 742 F.3d 922, 928 (10th Cir. 2014); *Indep. Inst. v. Williams*, 812 F.3d 787, 791 (10th Cir. 2016).

c. Three Additional Circuits Have Recognized *Randall* as Mandatory Authority and Would Have Applied It If Base Contribution Limits Had Been At Issue.

The First, Second, and Fourth Circuits would have employed *Randall* if it applied.

The First, Second and Fourth Circuits recognized *Randall* as mandatory authority but did not apply it because base contribution limits were not at issue. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 60–61

(1st Cir. 2011) (reporting requirements); *Green Party of Conn. v. Garfield*, 616 F.3d 189, 201 (2d Cir. 2010) (contribution ban on contractors); *Preston v. Leake*, 660 F.3d 726, 739–740 (4th Cir. 2011) (contribution ban of lobbyists).

The Ninth Circuit decision, therefore, conflicts with ten other Circuits and a State Supreme Court, warranting this Court's review.

C. The Ninth Circuit Also Erred in Holding That Under *Randall*, Montana's Limits Are Unconstitutional.

The district court in *Murry* held that, under *Randall*, the Limits should be struck down. The court below in *Lair I*, misapplying *Randall*, disagreed. This was error.

As to the first step, *Randall's* danger signs are present in this case. First, the Ninth Circuit states that the Limits are "per election," rather than "per cycle." App. 33a. But even the per cycle limit of $360 for state legislator ($180 per election) is suspiciously low.

Second, the Ninth Circuit states that "[t]he lowest limits do not apply to political parties." *Id.* But the Aggregate Limits can prevent even a contribution of $1 (significantly lower than the $180 Base Limit), if other independent political parties have already given $900 to a particular candidate.

Third, the Ninth Circuit held that the Limits are not among the lowest in the nation, *id.*, a holding directly contrary to this Court's prior findings. *Randall*, 548 U.S. at 250–251.

Finally, the Ninth Circuit ignores the fact that the Limits are significantly lower than those this Court

has previously upheld in *Buckley*[17] and *Shrink Missouri*,[18] and more closely resemble the limits struck down in *Randall*.

Because the danger signs are present, the Ninth Circuit should have continued to the second step of analysis and "examine[d] the record independently and carefully to determine whether [the] contribution limits are 'closely drawn' to match the State's interests." *Id.* at 253. Applying *Randall's* analysis shows that they are not.

First, the Ninth Circuit held that the Limits do not prevent challengers from raising sufficient funding to run an effective campaign, (App. 28a–31a) contradicting the finding of the district court (App. 66a–68a).

Second, the Ninth Circuit held that political parties can contribute more than individuals and PACs. App. 34a. But "those limits are deceptive," App.193a, because if all of the roughly 50 state Republican party committees in Montana wanted to contribute to a particular candidate, they could only give $16. App. 193a. So the Limits are lower than those on individuals and PACs. Additionally, individuals and PACs are subject to the same Limits, which has "reduce[d] the voice of political [committees] to a whisper."[19] App.

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[17] The $1,000 limit in *Buckley* is equal to more than $4,500 in 2018. *See* CPI Inflation Calculator https://www.bls.gov/data/inflation_calculator.htm

[18] The $1,075 limit in *Shrink Missouri* is equal to more than $1,600 in 2018. *Id.*

[19] PACs only accounted for between 0% and 3% of total contributions for statewide races. App. 195a.

194a.

Third, the Ninth Circuit credits the Limits for being adjusted for inflation but the trial court held that the inflation adjustment used in Montana has not "kept pace with the actual increasing cost of running an effective campaign[,]" including costs associated with things like "advertising, hiring media consultants, and technology." App. 196a. Additionally, even if the inflation adjustment were adequate, adding it to Limits that were already suspiciously low still prevents candidates from amassing necessary resources. App. 197a.

Finally, the Ninth Circuit ignores that there is no "special justification" for the Limits. Montana has not shown that corruption is any more prevalent in Montana than in other states. *See Randall*, 126 S. Ct. at 2499 ("The record contains no indication that, for example, corruption (or its appearance) in Vermont is significantly more serious a matter than elsewhere.").

The Ninth Circuit erred in upholding the Base and Aggregate Limits under *Randall* and this error merit review.

D. *Randall* Has Proven Unworkable and Should be Overruled.

As described above, *Randall* has proven to be unworkable, as the courts below struggle to understand and to apply *Randall's* two-step, multi-factor balancing test. But this is inherent in the test *Randall* adopted, since "[n]either step of this test can be reduced to a workable inquiry to be performed by States attempting to comply with this Court's jurisprudence." 548 U.S. at 268 (Thomas, J.

concurring).

At step one, it is unclear how to evaluate whether the limits are too low to constitute "danger" signs. This Court did not lay out specifically which danger signs should be considered (only giving examples of danger signs relevant to its analysis of Vermont's limits), nor how a court should weigh these danger signs, or how many danger signs are needed to move to step two of the analysis. *See id*. at 249–252.

Similarly, at step two, this Court "provides no insight on how to draw the constitutional line" between "suspiciously low" and "too low." *Id*. at 270 (Thomas, J., concurring). This Court does not explain if all factors carry equal weight, how many factors are need to tip the scales, and what should be considered when analyzing each factor. "Indeed, its discussion offers nothing resembling a rule at all. From all appearances, the plurality simply looked at these limits and said, in its 'independent judicial judgment,' that they are too low." *Id.* at 267 (Thomas, J., concurring) (quoting *Randall*, 548, U.S. at 249).

This lack of clarity in how to apply *Randall* is why many lower courts, faced with applying the *Randall* analysis, have found grounds to distinguish it, to avoid applying in its entirety, or to apply it inconsistently.

Because *Randall's* test has proven unworkable, this Court should grant certiorari to explain *Randall* or to overrule it and establish a clear test[20] for evaluating

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[20] *See Citizens United*, 558 U.S. at 336 (reconsidering and overruling *Austin v. Michigan State Chamber of Commerce,* 494 U.S. 652 (1990) in light of the "ambiguous," "11-factor test" that the FEC had promulgated).

the constitutionality of candidate contribution limits. This is exceptionally important because without a workable test,[21] there can be no consistency among the circuits.

II. The Ninth Circuit Decision Upholding Montana's Aggregate Limits Conflicts with Decisions of the U.S. Supreme Court and Other Circuits.

Montana's Aggregate Limits apply to political parties and are distinct from the Base Limits. Because these Aggregate Limits restrict political parties' speech and association rights, Montana "bears the burden of proving the constitutionality of its actions." *McCutcheon*, 134 S. Ct. at 1451 (internal citations omitted). Montana has not met its burden.

A. Montana Unconstitutionally Aggregates Candidate Contributions from All Entities Affiliated with a Political Party.

For contributions to a particular candidate, Montana subjects all entities affiliated with a political party to one Aggregate Limit, despite the fact that the state and each county political party committee operate independently from the others and file their own individual reports with the Commission. *See* App. 262a–264a.

So, if all of the Republican political party

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[21] Indeed, "when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Randall*, 548 U.S. at 267 (Thomas, J., concurring) (internal quotation marks omitted) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion)).

committees wanted to give to a particular House candidate, each party committee would only be permitted to give less than $16 dollars. App. 193a. And if one party gave the maximum amount to a particular candidate, all other parties would be prohibited from contributing. This is like *McCutcheon*, where once the aggregate limits are reached, "they ban all contributions of any amount." 134 S. Ct. at 1452.

But the Aggregate Limits here go even a step further. Where the aggregate limits in *McCutcheon* aggregated a single contributors total contributions, Montana aggregates both the donors and the contributions. This makes these Aggregate Limits even more restrictive than those struck down in *McCutcheon*. The Ninth Circuit nevertheless erroneously upheld the Aggregate Limits.

B. No Evidence Shows The Aggregate Limits Further An Anti-Quid Pro Quo Corruption Interest.

1. There is No Cognizable Risk of Corruption From Political Party Contributions.

Montana presented no evidence that involved any donation to a political party or any political party contribution to a candidate, and certainly none that proved that political parties, or their donors, have ever engaged in quid pro quo corruption. This lack of evidence is fatal to their effort to justify the Aggregate Limits.

Furthermore, contributions that political parties make to their candidates are actually indirect contributions, since political parties make contributions from contributions they receive from

their donors. *McCutcheon* is clear that "there is not the same risk of quid pro quo corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *McCutcheon*, 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 1452, 1460; App. 84a. Accordingly, *McCutcheon* concluded that the risk of indirect contributions was too speculative to justify aggregate contribution limits. 134 S. Ct. at 1452–56. App. 84a, n. 4. The same is true here.

2. No Evidence Shows That The Aggregate Limits Further An Anti-Circumvention Interest.

Since Montana presented no evidence of quid pro quo corruption, the only possible interest Montana could have is circumvention of the Base Limits. Montana presented no evidence of such circumvention, which the Ninth Circuit ignored.

The anti-circumvention interest regulates indirect corruption concerns where contributions are made to get around base contribution limits to achieve corrupt ends. *McCutcheon*, 134 S. Ct. at 1452. But for an anti-circumvention interest to justify Aggregate Limits, the underlying Base Limits must be constitutional. *Id.* at 1452–60. As shown, the Base Limits are not. So Montana has no anti-circumvention interest to justify the Aggregate Limits. But assuming the Base Limits are constitutional, Montana did not show that earmarked contributions to a candidate through a political party has ever been a problem in Montana.

Additionally, the Aggregate Limits are

unconstitutionally underinclusive. *See Republican Party v. White*, 536 U.S. 765, 780 (2002). ARM 44.11.401(2) excludes from the Aggregate Limits a political party's payment for campaign staff for candidates. This directly contradicts any purported fear of circumvention through political party contributions. While political parties are prevented from giving money above the current limits, they are able to give thousands, even millions so long as that money is used to pay for staffing. Political parties can thus give unlimited amounts through in-kind contributions to campaigns. (SER-693–694, (Doc. 26-7).) This exception belies any purported circumvention interest.

C. Upholding Montana's Aggregate Limits Creates a Circuit Split With the Fifth Circuit.

The Fifth Circuit struck down an aggregate political party contribution limit in *Catholic Leadership Coal. of Tex. v. Reisman*. 764 F.3d 409 (5th Cir. 2014). The Fifth Circuit found that, because the state had determined that a $500 donation to a candidate did not pose a risk of corruption, three $167 contributions could not pose "a significant risk (of corruption) if the former is permitted and the latter is not." *Id*. at 432. As a result, the state must justify the aggregate limits by demonstrating that they prevent circumvention of the base limits, which they did not do. *Id*. at 432 (quoting *McCutcheon*, 134 S.Ct. at 1452).

Here, it is difficult to see how a contribution of $180 to a candidate is not corrupting but a $100 contribution from ten political parties is. So the Ninth Circuit's

holding conflicts with a decision of the Fifth Circuit.[22] This Court should take this case to resolve this circuit split.

Conclusion

This case presents the exceptionally important question of whether Montana can stifle the voices of individuals, political committees, and political parties through very low contribution limits without any evidence of quid pro quo corruption, and, with respect to the Aggregate Limits, without any evidence of circumvention concerns, contrary to this Court's First Amendment jurisprudence and conflicting with other Circuits. For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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[22] The Sixth and Eighth Circuits agree with the Ninth Circuit. *See Kentucky Right to Life*, 108 F.3d 637; *Minn. Citizens Concerned for Life, Inc.*, 427 F.3d 1106.