No. _____

In the
Supreme Court of the United States

DAVID THOMPSON; AARON DOWNING; and JIM CRAWFORD,
Petitioners,

v.

HEATHER HEBDON, in her Official Capacity as the Executive Director of the Alaska Public Offices Commission, et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Alaska is a large and sparsely populated state whose unique geography poses distinct and expensive challenges for candidates for elected office. Yet Alaska has some of the lowest campaign contribution limits in the country: It allows individuals to contribute only $500 per year to any candidate for any office, or to any group other than a political party. Alaska Stat. §15.13.070(b)(1). Not only are those limits lower than those of all but three other states; they are significantly lower than any contribution limit this Court has ever upheld. In fact, adjusting for inflation (something Alaska law does not do), those limits are lower than the limits this Court struck down under the First Amendment in *Randall v. Sorrell*, 548 U.S. 230 (2006).

In the decision below, a Ninth Circuit panel upheld those limits—but only because it considered that result "compelled by" circuit precedent that predates several of this Court's most recent campaign finance decisions. The panel openly acknowledged that the Ninth Circuit's campaign finance jurisprudence is in tension with this Court's decisions. Indeed, the panel suggested that Alaska's limits might fail under the test applied by a plurality of this Court in *Randall*. But the panel viewed itself as bound to ignore the plurality's guidance in favor of Ninth Circuit precedent that predated it.

The question presented is:

Whether Alaska's $500 individual-to-candidate and individual-to-group contribution limits violate the First Amendment.

PARTIES TO THE PROCEEDING

David Thompson, Aaron Downing, and Jim Crawford are petitioners here and were plaintiffs-appellants below.

District 18 of the Alaska Republican Party was also a plaintiff-appellant below, but is no longer a party to these proceedings.

Heather Hebdon, in her official capacity as the Executive Director of the Alaska Public Offices Commission, is a respondent here and was a defendant-appellee below.

Anne Helzer, Robert Clift, Jim McDermott, Richard Stillie, and Suzanne Hancock, in their official capacities as members of the Alaska Public Offices Commission, are respondents here and were defendants-appellees below or have been substituted in their official capacities as the successors to former members and defendants-appellees Tom Temple, Irene Catalone, Ron King, and Adam Schwemley.

STATEMENT OF RELATED PROCEEDINGS

- *Thompson, et al. v. Hebdon, et al.*, No. 17-35019 (9th Cir.) (opinion issued and judgment entered Nov. 27, 2018; mandate issued Feb. 20, 2019).
- *Thompson, et al. v. Dauphinais, et al.*, No. 3:15-cv-00218-TMB (D. Alaska) (memorandum of decision issued Nov. 7, 2016; final judgment entered Dec. 8, 2016).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Alaska has some of the most extreme campaign contribution limits in the country: It allows individuals to contribute only $500 per year to any candidate for any office, or to any group other than a political party. On their face, those limits are 50% below the lowest contribution limit ($1,000) that this Court has ever upheld. And the Court upheld that $1,000 limit *more than 40 years ago* in *Buckley v. Valeo*, 424 U.S. 1 (1976), when advertising and other electioneering expenses were radically lower. Accounting for inflation—which Alaska law does not do—Alaska's limits are nearly 90% lower than the limit upheld in *Buckley*, and are even below the $400 limit *struck down* in *Randall v. Sorrell*, 548 U.S. 230 (2006). In addition to being extreme outliers in terms of this Court's jurisprudence, Alaska's contribution limits (like the Vermont limits held unconstitutional in *Randall*) are extreme outliers as compared to those of other states. Only three states in the entire country impose such low limits on individual-to-candidate contributions, and only two impose such low limits on individual-to-group contributions. Even in those states, moreover, those low limits apply only to elections for certain down-ticket state offices. No other state in the nation imposes a limit as low as Alaska's on contributions to gubernatorial candidates, who must campaign across Alaska's vast expanse and widely dispersed media markets.

In the decision below, a panel of the Ninth Circuit held that those outlier contribution limits do not violate the First Amendment, while striking down an equally unconstitutional restriction on the aggregate

contributions that candidates may receive from out-of-state residents. The reason for that differential treatment is straightforward: While the panel was free to apply this Court's First Amendment jurisprudence to Alaska's novel effort to limit contributions from nonresidents, it was bound by prior Ninth Circuit precedent when it came to the more typical candidate and group contribution limits.

In particular, as the panel candidly explained, it was "compelled by" circuit precedent to uphold Alaska's sub-*Buckley* limits because an earlier Ninth Circuit panel had concluded that it need not follow the analysis that a plurality of this Court employed to strike down Vermont's comparably low limits in *Randall*. In the Ninth Circuit's view, because three Justices concurred in the result in *Randall* on *broader* grounds than the plurality, it was free to ignore the plurality's reasoning. Instead, the Ninth Circuit insists on adhering to its own watered-down version of scrutiny—a test developed three years before *Randall*—under which a contribution limit will survive First Amendment scrutiny so long as it "focus[es] narrowly on the state's interest," "leave[s] the contributor free to affiliate with a candidate," and "allow[s] the candidate to amass sufficient resources to wage an effective campaign." *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003).

The Ninth Circuit thus does not even attempt to conceal the conflict between its campaign finance jurisprudence and this Court's precedents, which have only gotten more protective of First Amendment rights since *Randall* and *Eddleman*. The inevitable result is

a decision that approves restrictions that strike at the heart of First Amendment values. Much like a law that allows the display of only minuscule campaign buttons, Alaska's $500 limits allow only bare association, while depriving individuals of the ability to provide meaningful support.

The Ninth Circuit has now repeatedly made clear that only this Court can restore First Amendment rights within its boundaries. The Court should grant certiorari and ensure that petitioners and other individuals enjoy their full First Amendment protections.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 909 F.3d 1027 and reproduced at App.1-42. The district court's opinion is reported at 217 F. Supp. 3d 1023 and reproduced at App.45-76.

JURISDICTION

The Ninth Circuit issued its opinion on November 27, 2018. That judgment became final when the judge who had made a sua sponte request for a vote on whether to rehear the case en banc withdrew that request on February 20, 2019. On May 3, 2019, Justice Kagan extended the time for filing a petition for certiorari to and including June 20, 2019. On June 5, 2019, Justice Kagan further extended that time to and including July 20, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part: "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I.

The relevant provisions of Alaska's campaign finance laws, including Alaska Stat. §§15.13.070 and 15.13.072, are reproduced at App.77-81.

STATEMENT OF THE CASE

A. Campaign Finance Jurisprudence

1. The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *McCutcheon v. FEC*, 572 U.S. 185, 191-92 (2014) (plurality opinion). Restrictions on that constitutionally protected conduct, including limits on how much individuals or groups may contribute to candidates, political parties, or other groups, substantially infringe the First Amendment rights of contributors, candidates, and advocacy groups in multiple ways.

"[T]he right of association is a 'basic constitutional freedom' that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.'" *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 206-07 (1982) (citations omitted) (quoting *Buckley*, 459 U.S. at 25). In a democratic society, the ability to associate with others in the political process—and through campaign contributions in particular—is at the core of this fundamental right. For one thing, "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate" in an especially

"important" manner. *Buckley*, 424 U.S. at 22. Moreover, the right to "join together 'for the advancement of beliefs and ideas' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Id.* at 65-66 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

In addition to abridging the right to freedom of association, contribution limits infringe the First Amendment right to freedom of expression. Because a contribution "serves as a general expression of support for the candidate and his views," and the size of a contribution may provide a "rough index of the intensity of the contributor's support for the candidate," contribution limits necessarily restrict a person's "ability to engage in free communication." *Id.* at 20-21. Indeed, the "right of association [and] the right of expression" often "overlap and blend" in the context of contribution limits. C*itizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 300 (1981).

For example, people who contribute to a candidate or political action committee (PAC) "obviously like the message they are hearing … and want to add their voices to that message; otherwise they would not part with their money." *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 495 (1985); *see also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 636 (1996) (Thomas, J., concurring) ("When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political

debate, just as when that individual communicates the message himself.").

The importance of meaningful contributions to free association and expression is particularly evident when it comes to television advertisements and comparable efforts to reach other voters—a crucial effort in Alaska given its vast expanse and widely dispersed population. Few individuals can afford to engage in such expression without combining their resources with other like-minded citizens. Strict limits on the degree to which those resources may be pooled thus strictly constrain an individual's ability to participate in the political expression that is at the heart of the political process.

Finally, stringent contribution limits "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Randall*, 548 U.S. at 249 (plurality opinion). That is particularly true in a state like Alaska, where voters and the major media markets are widely dispersed. In short, "a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote." *Id.*

2. Given these concerns, this Court has held that campaign contribution limits must be closely scrutinized to ensure both that they "target what [this Court] ha[s] called '*quid pro quo*' corruption or its appearance," and that they "employ[] means closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 572 U.S. at 192, 197 (plurality opinion) (first quoting *Citizens United v.*

FEC, 558 U.S. 310, 359 (2010); then quoting *Buckley*, 424 U.S. at 25).

First, under this Court's cases, campaign finance restrictions may be justified only as an effort to prevent quid pro quo corruption or its appearance. They may not be justified by more nebulous objectives, such as "to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others." *Id.* at 191. Indeed, "[i]n a series of cases over the past 40 years," this Court has made clear that "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *Id.* at 192. After all, the fact that contributors "may have influence over or access to elected officials does not mean that th[o]se officials are corrupt." *Citizens United*, 558 U.S. at 359.

That kind of ingratiation and access instead "embod[ies] a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *Id.* Accordingly, campaign finance restrictions may be justified (if at all) only as efforts to combat the appearance or actuality of quid pro quo corruption, defined as "the notion of a direct exchange of an official act for money." *McCutcheon*, 572 U.S. at 192 (plurality opinion); *cf. McDonnell v. United States*, 136 S. Ct. 2355, 2371-72 (2016) (narrowly construing "*quid pro quo* corruption—the exchange of a thing of value for an 'official act'"—as requiring a decision or action involving a formal exercise of governmental power).

Even if a contribution limit permissibly targets quid pro quo corruption or its appearance, it must be "closely drawn" to avoid unnecessary abridgement of protected First Amendment activity. *McCutcheon*, 572 U.S. at 197. Although a majority of this Court has not demanded the exactness of strict scrutiny, "fit matters," and this Court's opinions "still require 'a fit … whose scope is 'in proportion to the interest served,' … that employs not necessarily the least restrictive means but … a means narrowly tailored to achieve the desired objective." *Id.* at 218 (second and third alterations in original).[1]

3. It has been 13 years since this Court last considered a challenge to the constitutionality of base (in contrast to aggregate) individual-to-candidate contribution limits. In *Randall*, the Court struck down as unconstitutional a Vermont campaign finance law under which an individual was restricted to contributing, on a per-election-cycle basis: $400 to a candidate for governor, lieutenant governor, or other

[1] *Buckley*'s distinction between limits on campaign *expenditures*, which are subject to strict scrutiny, and limits on campaign *contributions*, which are subject to less "exacting" scrutiny, *see* 424 U.S. at 20-22, has long been subject to criticism that has only grown with practical experience with that dichotomy. *See, e.g.*, *McCutcheon*, 572 U.S. at 231-32 (Thomas, J., concurring). Petitioners submit that the exceptionally low limits here plainly fail the close scrutiny demanded of contribution limits under *Buckley* and *Randall*. But if these extreme limits really are compatible with this Court's precedents, and some Alaskans can expend millions in independent advertisements while ordinary Alaskans cannot support the efforts of their preferred candidates with meaningful contributions, then it would be appropriate to reconsider *Buckley*'s less demanding scrutiny of contribution limits.

statewide office; $300 to a candidate for state senator; and $200 to a candidate for state representative. *See* 548 U.S. at 238 (plurality opinion). While no opinion commanded a majority in *Randall*, Justice Breyer's plurality opinion identified several "danger signs" indicating that Vermont's limits were unconstitutionally low. *Id.* at 249.

In particular, the plurality noted that Vermont's "limits are well below the limits this Court upheld in *Buckley*," both on their face and "in terms of real dollars (*i.e.*, adjusting for inflation)." *Id.* at 250. "[A]s compared to the $1,000 per election limit on individual contributions at issue in *Buckley*" back in 1976, Vermont's limits, adjusting for inflation, were as low as "roughly $57 per election." *Id.* The plurality found almost no states with any limits as low as Vermont's, and further noted that "Vermont's limit is well below the lowest limit this Court has previously upheld." *Id.* at 251. The plurality also found it troubling that "Vermont's failure to index for inflation means that Vermont's levels would soon be far lower than" the lowest limits the Court had ever upheld "regardless of the method of comparison." *Id.* at 252.

Given those "danger signs," the plurality concluded that it "must examine the record independently and carefully to determine whether [Vermont's] contribution limits are 'closely drawn' to match the State's interests." *Id.* at 253. After doing so, it concluded that those limits were "too restrictive." *Id.* at 253. Three Justices concurred in the judgment on broader grounds, noting their view that the Court's test for scrutinizing contribution limits is unduly

lenient. *See id.* at 264 (Kennedy, J., concurring); *id.* at 265 (Thomas, J., concurring, joined by Scalia, J.).

B. Regulatory Background

1. Until 1974, Alaska imposed no limits on campaign contributions. *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 601 (Alaska 1999). That year, Alaska imposed a contribution limit for the first time, limiting individuals to contributing $1,000 per year to any one candidate. *Id.* That limit, which had no inflation-adjustment mechanism, applied to contributions to any candidate for any office. *Id.* In 1975, the legislature applied that same $1,000 annual limit to contributions to groups other than political parties, including but not limited to all political committees, corporations, and labor unions. *Id.* at 601 & n.7; *see also VECO Int'l, Inc v. Alaska Pub. Offices Comm'n*, 753 P.2d 703, 714 (Alaska 1988) (interpreting "group" to include any group that engages in "fundraising, making contributions, holding political meetings, [or] advertising").

Those limits stood unchanged for the next two decades despite substantial inflation, until an attorney named Michael Frank launched a campaign in 1996 to adjust them. But rather than increase the nominal limits or index them to inflation, Frank sought to *cut them in half*. He viewed campaigns as too long and too expensive, and he believed that elected officials were more responsive to large contributors than to the general public. *See* CA9.Dkt.12-2 at 186, 197-98. In his view, reducing Alaska's contribution limits would help address the increasing expense of elections, reduce the amount of money being spent on campaigns, stop the "endless

money chase," and "get big money out of politics." *See* CA9.Dkt.12-2 at 170-74; *but see McCutcheon*, 572 U.S. at 191 (government "may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others"). Frank decided that $500, unadjusted for inflation, was the right limit. He arrived at the number by determining that the average contributor gave about $200 to a campaign, and then doubling that amount and adding $100. CA9.Dkt.12-2 at 175-76, 187-88.

Frank's efforts proved successful. In 1996, the Alaska Legislature passed Senate Bill 191, which was ultimately enacted into law as Chapter 48 SLA 1996. That law reduced both Alaska's individual-to-candidate and individual-to-group contribution limits to a meager $500. S.B. 191, 19th Leg., 2d Sess. §10(b)(1) (Alaska 1996), *available at* https://bit.ly/32BzPFs. Neither was indexed for inflation.

The law's stated purpose was "to substantially revise Alaska's election campaign finance laws in order to restore the public's trust in the electoral process and to foster good government." *Id.* §1(b). In its accompanying findings, the legislature opined, *inter alia*, that campaigns "last too long, are often uninformative, and are too expensive"; that "special interests" raise too much money and "thereby gain an undue influence over election campaigns and elected officials"; and that "incumbents enjoy a distinct advantage in raising money for election campaigns." *Id.* §1(a).

In 2003, the legislature increased the individual-to-candidate and individual-to-group contribution limits from $500 to $1,000. S.B. 119, 23d Leg., 1st Sess. §8 (Alaska 2003), *available at* https://bit.ly/2XS3oUC. Again, neither of the limits was indexed for inflation. Three years later, in 2006, a ballot measure was passed and lowered the limits back to the $500 limit that Frank had championed 10 years earlier. Alaska Stat. §15.13.070(b)(1); *see also* State of Alaska, Division of Elections, Primary Election Voter Pamphlet 7-11 (Aug. 2006), *available at* https://bit.ly/2JQUQDt; State of Alaska, Division of Elections, Initiative History (June 2019), *available at* https://bit.ly/32LIpSf (relevant August 22, 2006 ballot initiative on passed by a vote of 113,130 to 41,836). Those 2006 contribution limits, which still are not indexed for inflation, remain the law today.

2. At $500 per year, Alaska's contribution limits are well below any limits this Court has ever held constitutional. Indeed, adjusted for inflation, they are below some of the limits that this Court held unconstitutional in *Randall*. And like those unconstitutional limits, they are not indexed for inflation and hence will become lower still over time.

Alaska's contribution limits are also among the lowest in the nation. Of the 38 states that impose individual-to-candidate contribution limits, only three—Colorado, Connecticut, and Montana—have *any* limits as low or lower than Alaska's $500 limit. *See* Colo. Const. art. XXVIII, §3(1)(b) ($200 per-election individual-to-candidate contribution limit for state senate, state house of representatives, state board of education, regent of the University of

Colorado, or district attorney candidates); Conn. Gen. Stat. §9-611 ($250 per "campaign for nomination" or "campaign for election" individual-to-candidate contribution limit for state representative or municipal office); Mont. Code §13-37-216 ($130 per-election individual-to-candidate contribution limit for non-statewide public offices).

Alaska's $500 per-year limit is also structured to limit electoral participation when a candidate must contest a primary and general election in the same calendar year. Of the 38 states that impose individual-to-candidate limits, 24 limit contributions per election, rather than per year or per election cycle. *Cf. infra* n.2.

Alaska's one-size-fits-all limits have a particularly extreme and outlying effect on statewide elections. Most states with contribution limits have different limits for different offices, allowing individuals to contribute greater sums to candidates for statewide offices than to candidates in local elections or for the state legislature. *See, e.g.*, Cal. Gov't Code §85301 (individual-to-candidate contribution limits, depending on the office, ranging from $3,000 to $20,000); Mich. Comp. Laws §169.252(1) (same, ranging from $1,000 to $6,800). Alaska, by contrast, imposes the same minimal $500 limit on individual-to-candidate contributions for *all* elected offices. As a result, Alaska has the lowest individual-to-candidate contribution limit for gubernatorial elections in the entire nation.

Alaska's individual-to-group limit also falls well below the national norm. Only two states, Colorado and Massachusetts, have individual-to-group limits as

low or lower than Alaska's $500 annual limit. Colo. Const. art. XXVIII, §3(5) (individual-to-group limit of $625 per two-year election period); Mass. Gen. Laws ch. 55 §7A(a)(3) (individual-to-group limit of $500 per year). By contrast, 29 states—Alabama, Arizona, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming—impose no limits at all on individual-to-group contributions. Of the 21 states that do limit such contributions, 19 have limits higher than Alaska's; two of those states, Louisiana and New York, cap individual-to-group contributions at $100,000. *See* La. Stat. §18:1505.2(K) (per four-year election period); N.Y. Elec. Law §14-114 (per election).

Alaska's exceedingly low individual-to-candidate and individual-to-group limits are not the only aspects of its campaign finance laws that are extreme. Unique among all 50 states, Alaska also imposes restrictions on the aggregate dollar amount of contributions that a candidate may accept from individuals who do not reside in Alaska. Alaska Stat. §15.13.072(e). For candidates seeking election as a state representative, that limit is $3,000 per year. *Id.* §15.13.072(e)(3). In other words, once a candidate has received a total of $3,000 from any combination of nonresidents, no other nonresident may contribute *any* money to that candidate.

3. Nothing about Alaska's political geography explains these dramatically low limits. To the contrary, Alaska's sparse and widely dispersed

population makes campaigning for statewide office uniquely difficult and expensive. To the extent population is concentrated in urban areas like Anchorage and Fairbanks, those urban areas are widely separated and served by distinct media markets. *See* Polidata, County-Based Regions and Markets for Alaska (2002), *available at* https://bit.ly/2Y4IpZD.

C. Procedural History

1. Aaron Downing and Jim Crawford are Alaska residents. App.47. In 2015, each contributed the maximum amounts permitted under Alaska law. Downing contributed $500 each to the campaigns of mayoral candidate Larry DeVilbiss and state house candidate George Rauscher, and Crawford contributed $500 each to the campaign of mayoral candidate Amy Demboski and to the Alaska Miners' Association PAC. App.47. Each wished to contribute more, but was prohibited from doing so by Alaska's contribution limits. App.47. David Thompson is a resident of Wisconsin and wished to contribute $500 to the campaign of his brother-in-law, Alaska State Representative Wes Keller. But he was unable to do so because Keller had already accepted an aggregate $3,000 in contributions from other nonresident supporters. App.48.

2. In November 2015, Thompson, Downing, and Crawford filed suit, challenging Alaska's individual-to-candidate, individual-to-group, and aggregate nonresident contribution limits under the First Amendment. App.48. After a bench trial, the district court upheld all the challenged provisions.

In analyzing whether those limits are "closely drawn" to prevent unnecessary abridgement of First Amendment rights, the court declined to apply the analysis employed by a plurality of this Court in *Randall*. App.56-57. Instead, the court was bound by Ninth Circuit precedent to follow a three-part test articulated by that court three years earlier in *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003). App.57 (citing *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015)). Under *Eddleman*, "limits on contributions 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.'" App.57. Applying that test, the district court concluded that both the individual-to-candidate and the individual-to-group contribution limits were "closely drawn."

The court held the first prong of that test satisfied because the 2003 ballot measure "explicitly contemplated an anticorruption purpose," and because the state's expert testified that "lower contribution limits are often more effective at decreasing the risk of quid pro quo arrangements or their appearance." App.59-61. As to the individual-to-group limit, the court noted that the limit "works to keep contributors from circumventing the $500 individual-to-candidate base limit." App.61. The court then concluded that because Alaska's contribution limits do not wholly preclude individuals from associating with candidates, or prevent candidates from amassing sufficient resources to wage a campaign, they are "neither 'too low' nor 'too strict'

so as to run afoul of the First Amendment." App.67 (footnote omitted).

The district court likewise upheld the aggregate nonresident contribution limit, reasoning that it "furthers the State's anticorruption interest directly by avoiding large amounts of out-of-state money from being contributed to a single candidate, thus reducing the appearance that the candidate feels obligated to outside interests over those of his constituents." App.74. The court further posited that it "discourages circumvention of the $500 base limit and other game-playing by outside interests." App.74.

3. The Ninth Circuit affirmed the district court as to the individual-to-candidate and individual-to-group contribution limits, but reversed as to the aggregate nonresident limit. The court began by acknowledging that, under this Court's precedent, "states must show that any [contribution] limitation serves to combat actual quid pro quo corruption or its appearance"—*i.e.*, "[i]t no longer suffices to show that the limitation targets 'undue influence' in politics." App.8. But the court emphasized that, under circuit precedent in *Eddleman*, "the quantum of evidence necessary to justify a legitimate state interest is low: the perceived threat must be merely more than 'mere conjecture' and 'not … illusory.'" App.9-10 (quoting *Eddleman*, 343 F.3d at 1092).

The panel observed that "*McCutcheon* and *Citizens United* created some doubt as to the continuing vitality of the standard for the evidentiary burden we announced in *Eddleman*." App.10 n.2. But the panel was bound by circuit precedent to adhere to *Eddleman*. App.10 n.2. Applying *Eddleman*, the

court deemed itself "compelled to conclude that the State's evidence suffices to show that the individual-to-candidate limit 'further[s] the important state interest of preventing quid pro quo corruption or its appearance.'" App.11 (alteration in original) (quoting *Lair v. Motl*, 873 F.3d 1170, 1179-80 (9th Cir. 2017), *cert. denied*, *Lair v. Mangan*, 139 S. Ct. 916 (2019)).

Turning to the "closely drawn" question, the panel once again followed *Eddleman*, and therefore asked only whether Alaska's individual-to-candidate limit "'focus[es] narrowly on the state's interest,' 'leave[s] the contributor free to affiliate with a candidate,' and 'allow[s] the candidate to amass sufficient resources to wage an effective campaign.'" App.13 (alterations in original) (quoting *Eddleman*, 343 F.3d at 1092). Although the court held that minimal test satisfied, it suggested that the outcome might well be different if "Justice Breyer's plurality opinion in *Randall*" were "binding," noting that "at least one of the 'warning signs' identified in *Randall* is present here." App.16 n.5.

As for the individual-to-group limit, the panel acknowledged that a contribution to a group "reflects a more attenuated risk of quid pro quo corruption or its appearance than does the individual-to-candidate limit." App.20. But the panel concluded that the combination of circuit precedent and this Court's decision in *California Medical Association v. FEC* (*CalMed*), 453 U.S. 182 (1981), compelled upholding the individual-to-group limit as an anti-circumvention measure. *See* App.20-21.

Finally, when it came to Alaska's aggregate nonresident contribution limit, the panel majority did

not view itself as hemmed in by circuit precedent—and, not coincidentally, it invalidated the limit. The panel concluded that, "[a]t most, the law aims to curb perceived 'undue influence' of out-of-state contributors—an interest that is no longer sound after *Citizens United* and *McCutcheon*." App.23-24. Chief Judge Thomas dissented from that part of the panel's holding and would have upheld the aggregate nonresident contribution limit, too. App.31.

4. Shortly after its opinion issued, the panel informed the parties that "[a] judge made a sua sponte request for a vote on whether to rehear this matter en banc," and directed the parties to file supplemental briefs on that question. App.43. After reviewing that briefing, in which the state agreed with petitioners that rehearing en banc was not warranted, the panel informed the parties that the judge who had made the request withdrew it. App.43-44.

REASONS FOR GRANTING THE PETITION

The decision below is an acknowledged departure from this Court's teachings and resulted in the approval of drastically low contribution limits that preclude meaningful participation in core activities protected by the First Amendment. This Court has made abundantly clear that campaign contribution limits will survive scrutiny only if they are confined to targeting "'*quid pro quo*' corruption or its appearance," and do so through "means closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 572 U.S. at 192, 197. The Ninth Circuit's watered-down test for evaluating whether a state has satisfied that burden is deeply entrenched and deeply wrong.

There is no better illustration of that than this case. Alaska's contribution limits are among the lowest in the country. Indeed, those $500 limits are 50% lower than the limits *Buckley* approved *back in 1976*—without accounting for inflation. Taking inflation into account (which Alaska's law fails to do), Alaska's limits are barely 10% of what was upheld in *Buckley* and lower than some of the limits that this Court *struck down* in *Randall*. It should be obvious, then, that Alaska's limits do not comport with the First Amendment, as they not only were motivated by objectives that this Court has since made clear are impermissible, but leave Alaskans with only nominal means of exercising their core rights to associate with and express their support for candidates through campaign contributions.

Yet a panel of the Ninth Circuit nonetheless held those sub-*Buckley* limits constitutional. That outcome, while remarkable under this Court's cases, is unsurprising given the current state of Ninth Circuit precedent. As the panel candidly acknowledged, the Ninth Circuit has concluded that it need not abide by the reasoning of the opinion of a plurality of this Court in *Randall*, but rather may apply its own test for evaluating the constitutionality of contribution limits. In the Ninth Circuit's view, the fact that three Justices employed *broader* reasoning to condemn Vermont's limits empowers the Ninth Circuit to ignore the narrower reasoning of the plurality in favor of pre-existing circuit precedent that is even *less* protective of First Amendment rights. That treatment of *Randall* conflicts with the treatment of every other circuit to confront *Randall* and ensures that the Ninth Circuit's approach

conflicts with both *Randall* and the views reflected in more recent decisions of this Court.

The Ninth Circuit's alone-in-the-nation view is obviously wrong and, left standing, will continue to have extremely distorting effects, both on Alaskans and more broadly. The lesson lower courts should have drawn from *Randall*, *Citizens United*, and *McCutcheon* is that courts should err on the side of protecting the core First Amendment rights that campaign contributions entail. Yet the Ninth Circuit has drawn precisely the opposite lesson, instead insisting that deference to state law is the paramount concern. This Court should grant certiorari, both to ensure that residents of the nation's largest circuit remain free to meaningfully exercise their First Amendment rights, and to provide the more definitive guidance on evaluating contribution limits that this case proves lower courts so sorely need.

I. The Decision Below Upholds Radically Low Contribution Limits Under Ninth Circuit Precedent That Conflicts With Cases From This Court And Other Circuits.

"There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon*, 572 U.S. at 191 (plurality opinion). That includes the right to "contribute to a candidate's campaign." *Id.* Accordingly, this Court has long held that contribution limits must be closely scrutinized for compatibility with the First Amendment. Under any faithful reading of this Court's cases, Alaska's $500 limits cannot withstand that close scrutiny. The Ninth Circuit concluded otherwise only because, as the panel candidly

acknowledged, it was bound by circuit precedent *not* to faithfully follow those cases. The resulting decision conflicts with this Court's precedents, with decisions from every other circuit to consider the import of *Randall*, and with first principles.

A. The Ninth Circuit's Approval of Alaska's Unrealistically Low Candidate Contribution Limits Conflicts With Decisions of This Court, Decisions of Other Circuits, and First Principles.

1. Under this Court's most recent opinions addressing contribution limits, this should have been an easy case. Alaska's unindexed $500 limit on contributions to candidates suffers from all the same "danger signs" that a plurality of this Court concluded in *Randall* "generate suspicion that they are not closely drawn." *Randall*, 548 U.S. at 249.

First, just like Vermont's limits, Alaska's limits are "well below the lowest limit this Court has previously upheld," both on their face and "in terms of real dollars (*i.e.*, adjusting for inflation)." *Id.* at 250-51. Indeed, adjusting for inflation, Alaska's $500 limits are barely one-tenth of the $1,000 limit upheld in *Buckley*. *See* West Egg, Inflation Calculator, https://bit.ly/2ObjuUR (last visited July 22, 2019) ($1,000 in 1976 equivalent to $4,460.75 in 2018). In fact, adjusting for inflation, Alaska's $500 limits are lower than the $400 limit that this Court *struck down* in *Randall*. *See id.* ($400 in 2006 equivalent to $508.81 in 2018). Even these adjusted numbers understate how low Alaska's limits are in practical terms, as the cost of campaigns and advertising expenses has outstripped general rates of inflation.

See, e.g., Adobe Digital Insights, Digital Advertising Report (2017), *available at* https://bit.ly/2vuGzTB. Both on their face and in practical terms, the limits imposed here are far below any contribution limit approved by this Court.

Like Vermont's unconstitutional limits, Alaska's limits are also among "the lowest in the Nation," *Randall*, 548 U.S. at 250, as the panel acknowledged, *see* App.14. Only two other states have *any* limits as low as Alaska's—and even those states do not apply those limits to all elections. *See supra* pp.12-13.[2] Alaska, by contrast, applies its $500 limits to every campaign in the state, thus producing the single lowest limit for gubernatorial races in the country. And unlike most states, Alaska does not index its limits for inflation, so its limits (like Vermont's) will continue to decrease in real terms over time to well below what this Court has held acceptable.

The history and justifications for Alaska's exceedingly restrictive limits underscore their incompatibility with this Court's precedents. Alaska began its efforts to limit individual-to-candidate back

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[2] The panel suggested that "[a]t least four other states (Colorado, Kansas, Maine, and Montana) have the same or lower limit for state house candidates." App.15 (citing *Lair*, 873 F.3d at 1174 tbls. 2 & 3). That is incorrect. While Colorado and Montana do have comparably low limits for some elections, Kansas and Maine's limits are not directly comparable. Kansas permits individuals to contribute $500 both for each primary election, caucus, or convention, *and* for each general election. Kan. Stat. §25-4153(a)(2). Maine's lowest base limit ($350) is similarly a *per-election* limit, and Maine defines "election" to include both primary and general elections, and both regular and special referenda. Me. Stat. tit. 21-A, §§1(2), 1015(1).

in 1974 with a limit comparable to the federal limit upheld in *Buckley*. In the ensuing 45 years, campaigns for elected office have gotten substantially more expensive, while Alaska has halved its contribution limits in nominal terms. The net effect of inflation and the dramatic reduction in the nominal limits is that the contribution limits in Alaska today are 90% lower in real terms than what the people of Alaska deemed sufficient to preclude quid pro quo corruption in 1974.

As problematic as those reductions in both real and nominal limits are under this Court's precedents, the justifications for the reductions are even worse. In the past 45 years, this Court has systematically cut back on the permissible justifications for the restriction of First Amendment activity inherent in contributions. *E.g.*, *McCutcheon*, 572 U.S. at 191; *Citizens United*, 558 U.S. at 359. During the same period, Alaska has twice reduced its contribution limits based on justifications that precisely mirror justifications discarded by this Court.

For example, the reduction to $500 began as an avowed effort to make elections cheaper and "get big money out of politics." *See* CA9.Dkt.12-2 at 170-74. The legislature then accompanied the initial reduction from $1,000 to $500 with findings about campaigns being too long and expensive, and special interest groups having too much access and influence. S.B. 191, 19th Leg., 2d Sess. §1(a) (Alaska 1996). Yet this Court has made crystal clear that a state "may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative

influence of others." *McCutcheon*, 572 U.S. at 191. And it has squarely rejected the notion that contribution limits may target "ingratiation and access." *Citizens United*, 558 U.S. at 360.

In short, it should have been abundantly clear under this Court's cases that Alaska's contribution limits cannot survive First Amendment scrutiny. Not only are those limits "substantially lower than both the limits [this Court] ha[s] previously upheld and comparable limits in other States"—two "danger signs" that strongly suggest that they "fall outside tolerable First Amendment limits," *Randall*, 548 U.S. at 253—but those low limits (unsurprisingly) have been justified by impermissible concerns over access, ingratiation, and too much "money in politics," rather than targeted concerns with eliminating quid pro quo corruption.

2. The Ninth Circuit effectively acknowledged the conflict with this Court's cases by deeming itself bound by pre-*Randall* circuit precedent and upholding these restrictive limits only by applying that less-demanding circuit precedent. The panel readily acknowledged that "at least one of the 'warning signs' identified in *Randall* is present here," and that "*Randall*, if binding, may aid [petitioners'] position." App.16 n.5. But it believed itself "compelled" to ignore those warning signs on account of Ninth Circuit precedent holding that "*Randall* is not binding authority because no opinion commanded a majority of the Court." App.16 n.5. Instead, the panel was forced to apply a far more lenient test that, as it acknowledged, manages to water down *both* the analysis of whether contribution limits actually

"target … *quid pro quo* corruption or its appearance" *and* the analysis of whether they are "closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 572 U.S. at 192, 197 (plurality opinion).

As to the former, in the Ninth Circuit, "the quantum of evidence necessary to justify a legitimate state interest is low: the perceived threat must be merely more than 'mere conjecture' and 'not ... illusory.'" App.9-10. As the panel observed (with considerable understatement), there is "some doubt as to the continuing vitality of th[at] standard" after *McCutcheon* and *Citizens United*, which squarely rejected "mere conjecture" and "highly implausible" corruption concerns. *See McCutcheon*, 572 U.S. at 210-18. Yet in the Ninth Circuit, under precedents that predate *Randall*, *Citizens United*, and *McCutcheon*, "the fact that [contribution limits'] proponents in the legislature articulated … an intent to create a 'level playing field'" is not constitutionally problematic, as long as there is at least *some* evidence that the legislature also had at least *some* concern about quid pro quo corruption. App.12. As Judge Ikuta noted in a recent dissent from the denial of rehearing en banc: "Our court may not ignore such an important change in Supreme Court jurisprudence. But the [Ninth Circuit] does just that by applying the same legal standard and evidentiary burden that we had adopted before the Supreme Court decided *McCutcheon* and *Citizens United*." *Lair v. Motl*, 889 F.3d 571, 572 (9th Cir. 2018).

The Ninth Circuit's *Eddleman* test is just as inconsistent with this Court's jurisprudence when it

comes to tailoring. Instead of asking whether a contribution limit is closely drawn to avoid unnecessary abridgement of First Amendment rights as this Court demands, *e.g.*, *McCutcheon*, 572 U.S. at 197, the Ninth Circuit asks only whether the limits "(a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign." *Eddleman*, 343 F.3d at 1092. In the Ninth Circuit's words, a contribution limit should survive scrutiny unless it is "so radical in effect as to render political association ineffective, drive the sound of the candidate's voice below the level of notice, and render contributions pointless." App.7-8 (quoting *Eddleman*, 343 F.3d at 1091-92).

Unsurprisingly, that undemanding test led the Ninth Circuit to uphold Alaska's exceedingly low limits. After all, that test essentially assumes that contribution limits further an important state interest, and then declares them permissible so long as they leave the would-be contributor some avenue to affiliate with the candidate (which, of course, every contribution limit does), and leave the candidate not wholly incapable of waging a campaign. Such a toothless standard is completely divorced from the text of the First Amendment and this Court's case law. The First Amendment demands an inquiry into whether state action "abridges" free speech and association, not whether it obliterates them. And this Court's tailoring analysis asks not whether state laws leave some modest avenues for free speech and association, but whether a contribution limit *abridges more First Amendment activity than necessary*. *McCutcheon*, 572 U.S. at 197. The conflict between

the Ninth Circuit's diluted standard and the test demanded by this Court's precedents and the First Amendment could hardly be clearer.

3. The Ninth Circuit's approach to contribution limits and the status of *Randall* as controlling authority conflicts with the approach of its sister circuits. Indeed, the Ninth Circuit stands alone in refusing to treat *Randall* as controlling authority. Every other court to consider *Randall* has correctly recognized that it must follow the reasoning of the plurality opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977).[3] While *Marks* analysis can sometimes be difficult, in *Randall* it is plain as day that the plurality test is the narrowest and therefore controlling ground, as three members of this Court considered the plurality's test *too lenient*. *See Randall*, 548 U.S. at 264 (Kennedy, J., concurring); *id.* at 265 (Thomas, J., concurring, joined by Scalia, J.). Thus, while it might be tempting for a circuit court to apply a test even more demanding than *Randall*, especially in light of subsequent cases like *McCutcheon*, it is inexplicable that the Ninth Circuit

[3] *See, e.g.*, *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 60-61 (1st Cir. 2011); *Ognibene v. Parkes*, 671 F.3d 174, 192 (2d Cir. 2011); *Preston v. Leake*, 660 F.3d 726, 739-40 (4th Cir. 2011); *Zimmerman v. City of Austin*, 881 F.3d 378, 387 (5th Cir. 2018); *McNeilly v. Land*, 684 F.3d 611, 617-20 (6th Cir. 2012); *Ill. Liberty PAC v. Madigan*, 904 F.3d 463, 469-70 (7th Cir. 2018); *Minn. Citizens Concerned for Life v. Swanson*, 640 F.3d 304, 319 n.9 (8th Cir. 2011), *rev'd in part on other grounds*, 692 F.3d 864 (8th Cir. 2012) (en banc); *Indep. Inst. v. Williams*, 812 F.3d 787, 791 (10th Cir. 2016); *Ala. Democratic Conference v. Att'y Gen. of Ala.*, 838 F.3d 1057, 1069-70 (11th Cir. 2016); *Holmes v. FEC*, 875 F.3d 1153, 1165 (D.C. Cir. 2017).

has deemed itself free to ignore *Randall* altogether and apply far-less demanding pre-*Randall* circuit precedent. That conclusion conflicts with the conclusion reached by ten other circuits, and the predictable result is that the Ninth Circuit upheld contribution limits that at least six Justices would have invalidated in *Randall*.

The Ninth Circuit's stubborn adherence to its pre-*Randall* precedent not only conflicts with the approach of ten other circuits, but underscores the need for this Court's review. This Court granted certiorari 14 years ago in *Randall* to consider the constitutionality of Vermont's unusually low contribution limits, which had been upheld by the Second Circuit, and to provide guidance on the proper analysis of contribution limits, especially limits set at a sub-*Buckley* level. While *Randall* did not produce a majority opinion, ten circuits have understood that the plurality opinion both is controlling and provides guidance that the panel here acknowledged would call into question the constitutionality of Alaska's unindexed sub-*Buckley* limits. By doubling down on its pre-*Randall* circuit precedent, the Ninth Circuit has presented a case for this Court's review more compelling than *Randall* itself. The Ninth Circuit has refused to accept the instruction that this Court granted *Randall* to provide, has upheld sub-*Buckley* contribution limits materially indistinguishable from those invalidated in *Randall*, and as an added bonus has solidified a circuit split on *Randall*'s proper construction.

B. The Ninth Circuit's Approval of Alaska's Unrealistically Low Individual-to-Group Contribution Limits Conflicts With Decisions of This Court, Decisions of Other Circuits, and First Principles.

The Ninth Circuit's test not only distorted its analysis of Alaska's individual-to-candidate limit, but also infected its analysis of Alaska's individual-to-group limit. The panel started on the right foot, acknowledging that the individual-to-group limit presents a more difficult question for the state "because that limit reflects a more attenuated risk of quid pro quo corruption or its appearance than does the individual-to-candidate limit." App.20. After all, the very fact that such contributions are made to a group, rather than to a candidate, makes them even less likely to be an effort to engage in quid pro quo corruption, rather than simply to exercise core First Amendment rights.

Moreover, individual-to-group limits produce even greater infringement on First Amendment rights than individual-to-candidate limits, for individuals contribute to groups for many reasons beyond a desire to associate with and express support for a particular candidate. They may seek to associate with and express support for a group because of the particular positions the group espouses, or because the group is particularly effective at countering messages with which the individual disagrees. In addition, the combined effect of the individual-to-candidate and individual-to-group limits is even more restrictive of First Amendment activity than either one standing alone. By foreclosing both options at anything more

than *de minimis* levels, the Alaska contributions limits squelch far more political participation than can be justified. *Cf. Randall*, 548 U.S. at 255 (noting how interplay between Vermont's various exceedingly low limits exacerbated the First Amendment burden).

Alaska's exceedingly low $500 individual-to group limit is every bit as outlying as Alaska's individual-to-candidate limit. Compared to both the limits this Court has upheld and limits imposed by other states, the limits are far more restrictive. They are significantly lower than limits deemed sufficient by the federal government and other states to guard against quid pro quo corruption. And, like the candidate limits, the group limits are unindexed for inflation and stand at the same nominal level as when they were first introduced in 1975.

Despite all this, the panel deemed itself bound to uphold the individual-to-group limit, based on its erroneous belief that individual-to-candidate and individual-to-group limits must stand or fall together under this Court's decision in *CalMed*. *See* App.20. As the panel put it: "If, as we hold, the individual-to-candidate limit is constitutional, then under *California Medical Ass'n* so too is Alaska's law that prevents evasion of that limit." App.21. Setting aside the problem that the individual-to-candidate limit is in fact *un*constitutional, that is a radical overreading of *CalMed*.

To be sure, Justice Blackman's concurring opinion (which set forth the narrowest, and hence controlling, rationale supporting the judgment) held the $5,000 individual-to-group limit at issue there constitutional on the theory that it permissibly furthered an anti-

circumvention interest. *See CalMed*, 453 U.S. at 203 (Blackman, J., concurring). But he did not embrace the proposition that if an individual-to-candidate limit is permissible, then a corresponding individual-to-group limit necessarily must be as well—let alone that an *identical* individual-to-group limit is always and inevitably constitutional. Indeed, there was no need to consider the latter proposition, for the individual-to-group limit at issue there was *five times higher* than the relevant individual-to-candidate limit, *see id.* at 198 (plurality opinion)—a differential reflective of the far lesser risks of quid pro quo corruption in the individual-to-group context.

Moreover, even if *CalMed* could be read as standing for the sweeping proposition that *any* limit designed to prevent evasion of a constitutional limit is ipso facto constitutional, that proposition could not be reconciled with subsequent decisions of this Court. As *McCutcheon* has since clarified, "the *base limits* themselves are a prophylactic measure," for "few if any contributions to candidates will involve *quid pro quo* arrangements." 572 U.S. at 221 (quoting *Citizens United*, 558 U.S. at 357). Accordingly, when additional limits are "layered on top, ostensibly to prevent circumvention of the base limits," that kind of "'prophylaxis-upon-prophylaxis approach' requires that [courts] be particularly diligent in scrutinizing the law's fit." *Id.* That is precisely what individual-to-group contribution limits constitute: constitutionally suspect prophylaxis-on-prophylaxis that demands particularly rigorous scrutiny.

Far from giving this extra prophylaxis extra scrutiny, the panel gave the group limits a free pass,

engaging in no independent analysis whatsoever of whether there are other, less restrictive "alternatives available to [Alaska] that would serve [its] anticircumvention interest, while avoiding 'unnecessary abridgment' of First Amendment rights." *Id.* The panel justified the group limit based on its approval of the candidate limit and the concern that, without the $500 group limit, "any two individuals could form a 'group,' which could then funnel money to a candidate," and "[s]uch groups could easily become pass-through entities for, say, a couple that wants to contribute more than the $500 individual-to-candidate limit." App.21. But to the extent that concern is not already fully addressed by other aspects of Alaska law, including Alaska's low $1,000 *group-to-candidate* contribution limit, *see* Alaska Stat. §15.13.070(c), it could easily be addressed—indeed, *has* been addressed by other jurisdictions—through far less restrictive means.

For example, federal law treats "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, *including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate*, … as contributions from such person to such candidate." 52 U.S.C. §30116(a)(8) (emphasis added). Federal law also imposes lower limits on contributions to and from PACs that have fewer contributors or contribute only to a small number of candidates. *Id.* §30116(a)(4). Those kinds of provisions far more directly address the kinds of circumvention concerns that the panel raised—and do so without imposing anywhere near as severe of

burdens on the ability of individuals to engage in constitutionally protected activity.

The decision below thus manages to uphold not one but two exceedingly low contribution limits that, under a faithful reading of this Court's more recent cases, are obviously unconstitutional. That result can be explained only by the panel's belief that it was constrained to follow circuit precedent that predates *Randall* and *McCutcheon* and all but guarantees that any non-zero contribution limits will be approved.[4] It bears emphasis, moreover, that the decision below conflicts not just with the approach of this Court and other circuits, but with first principles. The limits at issue here touch at the core of the First Amendment interest in political participation. And the state's touch is not a light one. An individual of modest means who wants to participate in the political process in Alaska in a meaningful manner is foreclosed at nearly every turn. The right to engage in meaningful independent expenditures may be foreclosed as a practical matter, and the right to associate with candidates and groups that support them is foreclosed as a legal matter. The First Amendment does not tolerate that outcome, and neither should this Court.

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[4] That reality is underscored by the panel majority's invalidation of the one provision—an aggregate limit on contributions by nonresidents—as to which it did not perceive itself to be hemmed in by circuit law. The reason for that differential treatment is clear: The panel was bound to apply Ninth Circuit law to the former, but was free to apply this Court's jurisprudence to the latter.

II. The Question Presented Is Exceptionally Important.

The Ninth Circuit's insistence on elevating its outmoded jurisprudence above the decisions of this Court is wrong, and is producing profoundly misguided results. That test has twice led the court to uphold some of the lowest individual-to-candidate limits in the country—first Montana's, *see Lair*, 873 F.3d 1170, and now Alaska's. Making matters worse, that test has now infected the Ninth Circuit's analysis of individual-to-group limits as well, for the court has (erroneously) decreed that the two must stand or fall together. And given how undemanding the court's analysis of contribution limits has proven, the Ninth Circuit has now adopted tests that all but guarantee the approval of contribution limits at sub-*Buckley* levels—indeed, at levels that in real terms are more than 90% below the lowest limits approved by this Court.

Two of the most common forms of contribution limits thus will get essentially no serious scrutiny in the Ninth Circuit. And as this case illustrates, those limits will reinforce each other to foreclose meaningful political participation. Not only are Alaskans now left with nothing more than a bare ability to associate with candidates without providing meaningful support; the individual-to-group limit achieves the same effect to an even greater degree, reducing Alaskans to bare association with all manner of advocacy groups on the implausible and unsubstantiated theory that such groups are nothing more than conduits for circumventing limits on contributions to candidates. While narrowly targeted anti-circumvention

provisions like those employed by other jurisdictions (including the federal government) may vindicate valid limits, the kind of prophylaxis-upon-prophylaxis approach approved below exacerbates all the constitutional concerns that six members of this Court embraced in *Randall*. The fact that no member of the Ninth Circuit can vindicate those concerns is reason enough to grant certiorari.

Moreover, there is every reason to think that Alaska's constitutionally dubious approach will spread to other jurisdictions now that it has been endorsed by the Ninth Circuit. Indeed, Oregon is currently deciding whether to impose new limits on all manner of political contributions—limits that were first proposed a mere two months after the decision in this case. *See, e.g.*, H.B. 2714, 80th Leg. Assemb., Reg. Sess. (Or. 2019); S.J. Res. 18, 80th Leg. Assemb., Reg. Sess. (Or. 2019). This Court should step in before the Ninth Circuit's deeply flawed and underprotective test can be employed to validate any more efforts to interfere with rights as to which the First Amendment should have "its fullest and most urgent application." *McCutcheon*, 572 U.S. at 191-92.

Finally, this case is an excellent vehicle for this Court's review. Unlike the panel in *Lair*, the panel here did not opine that it would have upheld the challenged limits even if it applied the *Randall* plurality's analysis. *See Lair*, 873 F.3d at 1186-87. In fact, the panel intimated precisely the opposite. *See* App.16 n.5. Thus, the deviation from the law of this Court's and other circuits likely was outcome determinative. And the misguided analysis of the individual-to-candidate limits preordained the

approval of individual-to-group limits that reinforce the constitutional injury to ordinary Alaskans like petitioners. In sum, this case is a perfect vehicle to vindicate the promise of the First Amendment in Alaska and the Ninth Circuit.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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