No. 19-122

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

REPLY BRIEF FOR PETITIONERS

JOHN J. BURSCH
KRISTEN K. WAGGONER
BRETT HARVEY
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001

ROBIN O. BRENA
BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, AK 99501

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioners

October 9, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY BRIEF

The decision below upholds $500 individual-to-candidate and individual-to-group campaign contribution limits that are among the very lowest in the country. Indeed, adjusting for inflation (which Alaska does not do), those limits are lower than limits this Court struck down in *Randall v. Sorrell*, 548 U.S. 230 (2006), and about 10% of the lowest limit this Court has ever approved. Respondents attempt to portray the decision below upholding those exceedingly low limits as the product of a factbound application of settled law. But the secret to the Ninth Circuit's approval of these artificially low limits is not factbound determinations that Alaska's tundra is somehow more fertile ground for corruption than Vermont's pastures; it is that the Ninth Circuit ignores *Randall* and other teachings of this Court's recent campaign finance cases in favor of its own pre-*Randall* precedents. And while respondents claim that the watered-down scrutiny demanded by that circuit precedent made no difference, the panel in fact noted—twice—that it may well have reached different conclusions had it not been constrained by the Ninth Circuit's pre-*Randall* campaign finance jurisprudence.

Indeed, respondents' efforts to reconcile the decision below with this Court's precedent succeed only in demonstrating that their vision of campaign finance jurisprudence is just as divorced from this Court's most recent cases as the Ninth Circuit's. For example, respondents make the remarkable claim that contribution limits impose no associational burden at all so long as they leave individuals free to

make "nominal" contributions. They likewise claim that contribution limits impose no expressive burden at all so long as individuals remain free to make independent expenditures and contribute to groups that do the same. According to respondents, then, the only real question is whether contribution limits are too low to allow candidates to amass sufficient funds. In other words, in respondents' view, contribution limits raise meaningful First Amendment concerns only for candidates, not contributors.

It is little surprise that respondents are forced to embrace such a radical and backwards position, as Alaska's unprecedentedly low limits for statewide office could not survive any meaningful form of First Amendment scrutiny. And they certainly could not survive the exacting scrutiny that this Court recently admonished is required. Indeed, even putting aside the problem that the First Amendment applies equally in our 49th state, the purportedly "unique" factors respondents invoke to justify Alaska's outlier limits largely rehash the same factors unsuccessfully advanced in defense of Vermont's extreme limits in *Randall*. Only by adhering to pre-*Randall* circuit precedent that treats political contributions as presumptively constitutional could the Ninth Circuit find those same arguments sufficient here. This case thus provides an ideal opportunity both to provide the lower courts with sorely needed guidance on what scrutiny the Constitution actually demands when the government constrains this core First Amendment right, and to restore to residents of Alaska and other states in the Ninth Circuit the full protections of the First Amendment.

I. The Ninth Circuit's Watered-Down Scrutiny Conflicts With This Court's Campaign Finance Jurisprudence.

1. Accounting for inflation—which Alaska law does not do—Alaska's $500 individual-to-candidate and individual-to-group limits are nearly 90% lower than the $1,000 limit upheld more than 40 years ago in *Buckley*, and are below the $400 limit that six members of the *Randall* Court held unconstitutional. *See* West Egg, Inflation Calculator, https://bit.ly/2ObjuUR (last visited October 9, 2019) ($1,000 in 1976 equivalent to $4,460.75 in 2018; $400 in 2006 equivalent to $508.81 in 2018). The decision below upheld those limits only by eschewing the analysis employed by the *Randall* plurality in favor of applying lenient evidentiary and tailoring standards articulated in *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), a Ninth Circuit case decided three years before *Randall*. In the Ninth Circuit's view, because three Justices in *Randall* employed *broader* reasoning than the plurality to condemn Vermont's contribution limits, it may continue to apply a more lenient test that negates *Randall* and effectively rubber-stamps sub-*Buckley* and sub-*Randall* limits.

Respondents claim that "[t]here is no conflict between the Ninth Circuit's test and *Randall*." BIO.2. The Ninth Circuit itself begs to differ. As the panel explained, while "at least one of the 'warning signs' identified in *Randall* is present here," it could not consider those signs because the Ninth Circuit is of the view that "*Randall* is not binding authority." Pet.App.16 n.5. And it is not just *Randall* with which

the decision below conflicts. The panel further noted that "*McCutcheon* and *Citizens United* created some doubt as to the continuing vitality of the standard for the evidentiary burden we announced in *Eddleman*." Pet.App.10 n.2. As Judge Ikuta explained in dissenting from the court's decision to adhere to that standard, *Eddleman*'s "highly attenuated standard" is a "minimal benchmark" that "is wholly an invention of [the] Ninth Circuit," and is (at least) "two steps removed from the standard explained by *Citizens United* and *McCutcheon*." *Lair v. Motl*, 889 F.3d 571, 575 (9th Cir. 2018) (Ikuta, J., dissenting from denial of rehearing en banc); *see also* Pet.App.9-10 (noting the atypically "low" "quantum of evidence necessary to justify a legitimate state interest" under *Eddleman*).

Respondents attempt to excuse that deviation from this Court's precedents by noting that other courts have not expressly engaged in *Marks* analysis as to the import of *Randall*. BIO.28-30. But there is a difference between declining to engage in *Marks* analysis and evading this Court's decisions, and the Ninth Circuit has engaged in the latter. Other circuits have not bothered with *Marks* analysis because it is obvious that when the concurring Justices would more broadly condemn a wide swath of contribution limits, the plurality controls. For that reason, no other court has even suggested that it was not bound to follow *Randall*. Indeed, respondents do not and cannot deny that the Ninth Circuit stands alone in using *Marks* to make *Randall* disappear.

Moreover, the test the Ninth Circuit insists on applying is flatly inconsistent with *all* of this Court's most recent guidance in this area, not just *Randall*'s

plurality opinion. As those cases have made clear, including in the specific context of contribution limits, "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *McCutcheon v. FEC*, 572 U.S. 185, 209 (2014) (plurality opinion); *see also Citizens United v. FEC*, 558 U.S. 310, 327 (2010) ("First Amendment standards … 'must give the benefit of any doubt to protecting rather than stifling speech.'" (citation omitted)). Yet the Ninth Circuit continues to adhere to a conception of campaign finance jurisprudence that does just the opposite.

Indeed, the speech and associational rights of *individuals* (like petitioners) to voice their support in a meaningful way does not even play a role in the Ninth Circuit's test, which views individuals' rights as exhausted by an ability to contribute in any amount, no matter how modest, so long as *candidates* are sufficiently unaffected. *See* Pet.App.57. That backwards mode of analysis not only ignores *Randall*, but contradicts *McCutcheon*, which certainly did not require a showing that the aggregate contribution limits precluded candidates from amassing sufficient funds before holding those limits unconstitutional. Instead, the Court underscored that the real question is whether the government has proven that its limits are "closely drawn to avoid unnecessary abridgement of" individuals' and candidates' First Amendment rights. *McCutcheon*, 572 U.S. at 197 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).[1] The Ninth Circuit's test effectively ignores that critical inquiry.

---

[1] Respondents' critiques of petitioners' evidence regarding the severity of the impact of the limits on candidates thus accomplish

2. Respondents alternatively claim that "the outcome of this case would have been the same even if the Ninth Circuit had explicitly used the 'danger signs' and 'considerations' discussed in *Randall*." BIO.2; *see also* BIO.10-11, 30. Again, the Ninth Circuit itself begs to differ. As the panel explained, the pre-*Randall* test reaffirmed by *Lair* distorted its analysis twice over. First, it "compelled" the panel to conclude that Alaska satisfied its burden of proving that its individual-to-candidate limits further its interest in preventing quid pro quo corruption or its appearance, even though the panel expressed doubt that the state's evidence could satisfy that burden under more recent decisions. Pet.App.10-11 & n.2. Second, it compelled the panel to ignore *Randall*'s "warning signs" regarding the degree of the burden on First Amendment rights in favor of focusing almost exclusively on whether a contribution limit "impede[s] a candidate's ability to 'amass the resources necessary for effective advocacy.'" Pet.App.16 & n.5.

The panel's candid admissions that its duty to follow Ninth Circuit precedent was dispositive as to the individual-to-candidate limits stands in stark contrast to *Lair*, in which the panel expressly found that it "would reach the same conclusion under the plurality's decision in *Randall*." *Lair v. Motl*, 873 F.3d 1170, 1186 (9th Cir. 2017), *cert. denied*, *Lair v. Mangan*, 139 S. Ct. 916 (2019). The panel did not and could not reach any such conclusion here. Respondents claim otherwise only by trying to recast *Randall* as "most troubled" with low contribution

---

precious little, as that inquiry should not be "dispositive," Pet.App.16, under an appropriate constitutional inquiry.

limits on political parties. Pet.App.12. That is simply not what *Randall* said or how it has been understood. *See Davis v. FEC*, 554 U.S. 724, 737 (2008) (employing *Randall* as an example of when the Court has "held that [individual contribution] limits that are too low cannot stand"). In reality, the fact that Vermont imposed the same exceedingly low limits on political parties was but one of many factors that doomed Vermont's limits. The plurality was equally concerned with the exceptionally low level of those limits, the fact that they were not adjusted for inflation, and the absence of any special justification for them—all factors that apply equally here. *See Randall*, 548 U.S. at 254-56.[2]

Respondents suggest that Alaska's limits should not give this Court pause because they are not the absolute "lowest in the nation," and attempt to point to a handful of states and municipalities with comparably low contribution limits. BIO.13. But limits for municipal elections distinguish themselves from limits for statewide offices, *see* Pet.23 n.2, and respondents' first example of a state with comparably low limits is Montana—*i.e.*, the very state whose limits the Ninth Circuit upheld in *Lair*. In fact, four of the eight jurisdictions they identify with exceptionally low individual-to-candidate limits lie within the confines of the Ninth Circuit, where the

[2] At any rate, to the extent the plurality's analysis in *Randall* gave insufficient weight to the degree of the burden on First Amendment rights (as three members of the *Randall* Court suggested), that only underscores the need for this Court to grant certiorari to set forth a clear and sufficiently First Amendment-protective test.

message of *Randall* and *McCutcheon* has not yet been received. These comparisons thus just confirm that the Ninth Circuit's dogged adherence to its pre-*Randall* precedent has toxic effects far beyond this case.

3. Respondents have even less to say in defense of Alaska's $500 individual-to-group limit. Their principal argument seems to be that petitioners are to blame for the panel's mistaken view that the individual-to-group limit must rise or fall with the individual-to-candidate limit because petitioners did not devote enough of their Ninth Circuit briefing to preemptively refuting that unanticipated conclusion. BIO.27. But respondents fail to explain why the quantity of briefing an issue received below matters when it is undisputed that the issue was both pressed and passed upon, and indeed has been one of petitioners' core claims from the start. In all events, it was the panel, not petitioners, that treated the individual-to-group limit as a "cursory afterthought," BIO.27, based on its erroneous view that this Court's decision in *California Medical Association v. FEC*, 453 U.S. 182 (1981), somehow insulates individual-to-group limits from any constitutional scrutiny.

Respondents not only wholeheartedly defend that startling notion, but expressly ground it in the lesser scrutiny that contribution limits receive under *Buckley*, insisting that because "contribution limits are not subject to strict scrutiny," it does not matter if the state could accomplish its anticircumvention objectives through means less restrictive of First Amendment rights. BIO.28. That state officials within the Ninth Circuit can take that view and have

it vindicated by the circuit underscores the need for this Court's review. In reality, as this Court reiterated in *McCutcheon*, this is a context in which "fit matters." 572 U.S. at 218. After all, under *Buckley* itself, the government must prove that its chosen means are "closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 197 (quoting *Buckley*, 424 U.S. at 25). And that standard is, if anything, even more demanding in the context of individual-to-group limits, which are exactly the kind of "prophylaxis-upon-prophylaxis approach" for which *McCutcheon* demands "particularly diligent" scrutiny. *Id.* at 221.

Here too, then, the decision below employs a mode of analysis (or, more aptly, lack thereof) that simply cannot be reconciled with this Court's most recent precedents. Indeed, it is telling that the principal authority on which respondents rely is *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), a decision that arguably attempted to "weaken" the standard articulated by *Buckley*, *id.* at 410 (Thomas, J, dissenting), in ways that the Court has since walked back, *see, e.g.*, *Citizens United*, 558 U.S. at 340. This Court should grant certiorari and make clear once and for all that neither *Buckley* nor anything else in this Court's campaign finance cases insulates contribution limits from the exacting scrutiny that the First Amendment demands.[3]

---

[3] To the extent lower courts continue to refuse to get that message, that is a reason to reevaluate *Buckley*'s two-tiered approach, *see* Br. of the Cato Institute & the Institute for Justice as *Amici Curiae* 13-17; Pet.8 n.1—or at least reiterate that having two different levels of *heightened* scrutiny does not mean

II. This Case Is An Ideal Vehicle To Ensure That All Lower Courts Vindicate The Promise Of The First Amendment.

This case is an excellent vehicle for this Court to bring clarity to its contribution limits jurisprudence. As explained, the panel repeatedly suggested that the governing legal standard was dispositive. Indeed, only a standard even less demanding than what the *Randall* plurality applied could produce a decision upholding limits even lower than those that six members of the *Randall* Court found unconstitutional.

Respondents attempt to chalk that outlier result up to purported "Alaska-specific" factors. BIO.31-34. But the panel could not have been clearer that it was circuit precedent, not something unique to Alaska, that compelled it to reach the conclusion it did. *See, e.g.*, Pet.App.2 ("[a]ffirmance on the individual-to-candidate … limits is compelled by *Lair*"); Pet.App.10 ("In light of *Lair* …, we reject this argument."); Pet.App.11 ("Under *Lair* …, we are 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.'" (quoting *Lair*, 873 F.3d at 1179-80)); Pet.App.15 ("We recently upheld a comparable limit." (citing *Lair*, 873 F.3d at 1174 tbls.2 & 3)).

Moreover, many of respondents' allegedly "Alaska-specific" factors just rehash arguments that were considered and rejected in *Randall* itself. For

---

that the government always win when it restricts First Amendment rights via contribution limits.

example, respondents claim that "the very small size of its legislature, its heavy dependence on a single industry, its small population, and its large geographical area" "make Alaska 'highly, if not uniquely, vulnerable to corruption in politics and government.'" BIO.6 (quoting Pet.App.52). But virtually identical arguments were made in unsuccessful defense of Vermont's exceedingly low contribution limits. *See, e.g.*, Br. of Respondents, Cross-Pet'rs Vt. Pub. Int. Research Grp. *et al.*, *Randall v. Sorrell*, 2006 WL 325190, at *12-13, *45 (U.S. Feb. 8, 2006) (emphasizing "Vermont's small population and intimate campaigning style" and lamenting the outsized influence of slate and bottle industry donors "in a small state such as Vermont"). The similarity of those factors demonstrates that they are hardly unique—more states resemble Alaska and Vermont than New York and California—and in all events are unavailing.

Respondents also claim that this case is unimportant because few Alaskans presently choose to make political contributions at the high end of the limits Alaska imposes. BIO.34. But the anti-majoritarian principles of the First Amendment are most needed when speech restrictions burden the few and not the many. Very few individuals have an interest in pamphleteering, and fewer still want to protest at military funerals or watch videos where animals meet a violent end. But this Court has repeatedly granted certiorari to vindicate First Amendment rights that few will exercise. That is equally true in this particular context, where the Court has not hesitated to review—and strike down—campaign finance restrictions that impact a relatively

small number of individuals as a practical matter. *See, e.g.*, *McCutcheon*, 572 U.S. at 205; *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Davis*, 554 U.S. at 739.

Finally, respondents echo the Ninth Circuit in making the remarkable claim that Alaska's limits do not burden *anyone* "[b]ecause a contribution of even a nominal amount" suffices to exhaust an individual's associational interests, and the ability to make independent expenditures and contributions to super-PACs suffices to exhaust an individual's expressive interests. BIO.33. But this Court has recognized since *Buckley* that the size of a contribution matters, as it provides a "rough index of the intensity of the contributor's support for the candidate." 424 U.S. at 21. Indeed, if all that mattered was whether a contribution limit leaves someone "free to associate with as many candidates and groups as he chooses," even if only at a "nominal" level, then *McCutcheon* would have come out the other way. Respondents' defense of Alaska's exceedingly low limits thus succeeds only in confirming that the decision below flies in the face not just of *Randall*, but of *Citizens United* and *McCutcheon* and, more fundamentally, with the first principles that those decisions vindicate.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JOHN J. BURSCH
KRISTEN K. WAGGONER
BRETT HARVEY
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001

ROBIN O. BRENA
BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, AK 99501

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioners

October 9, 2019