No. 19-343

IN THE

Supreme Court of the United States

NEW YORK REPUBLICAN STATE COMMITTEE,
Petitioner,
v.
SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JASON TORCHINSKY
Counsel of Record
SHAWN SHEEHY
CHRIS WINKELMAN
JONATHAN LIENHARD
DENNIS W. POLIO
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
(540) 341-8808
jtorchinsky@hvjt.law

Counsel for Petitioner

December 19, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Mindful of Supreme Court Rule 15(6), Petitioners write here only to inform the Court of new authority and its applicability to the present appeal, and to request that the Court grant this petition, vacate the judgment below, and remand to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of this new authority.[1] *See* Sup. Ct. R. 15(6). The new authority is *Thompson v. Hebdon*, 140 S. Ct. 348 (2019), attached hereto as Addendum A. Petitioners assert that *Thompson v. Hebdon* is directly applicable to the present appeal because that case also concerns burdensome contribution limits. *Thompson* not only counsels strongly in favor of granting the petition but also counsels in favor of vacating the judgment of the United States Court of Appeals for the District of Columbia Circuit for further consideration of that case.

On November 25, 2019, roughly one month after Petitioners filed their petition for a writ of certiorari in the present case, this Court granted the petition for a writ of certiorari and vacated the judgment of the United States Court of Appeals for the Ninth Circuit in *Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018), *vacated*, 140 S. Ct. 348 (2019). In that case, a group of Alaska residents challenged Alaska's contribution limits, which limited the amount individuals could contribute to candidates for political office or to election-oriented groups to $500 per year. *Id*. at 246. Those

[1] Through the filing of this reply, Petitioners do not waive any of their arguments or claims, nor do Petitioners concede to any of the arguments or defenses contained in Respondent's Opposition Brief.

plaintiffs challenged the contribution limits as violative of the First and Fourteenth Amendments.

The United States District Court for the District of Alaska upheld Alaska's $500 contribution limits. It found that Alaska's contribution limits furthered the state's sufficiently important interest in preventing quid pro quo corruption or its appearance. *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1031 (D. Alaska 2016). The District Court went on to find that the limits were "neither 'too low' nor 'too strict' so as to run afoul of the First Amendment." *Id*. at 1036 (citing *Randall v. Sorrell*, 548 U.S. 230 (2006) (plurality op.)).

The Ninth Circuit agreed with the district court and upheld Alaska's low contribution limits. Add. A at 2a. That court found that the contribution limits were "focuse[d] narrowly on the state's interest, leav[ing] the contributor free to affiliate with a candidate, and allow[ing] the candidate to amass sufficient resources to wage an effective campaign, and thus survive[d] First Amendment scrutiny." *Id*. (citing *Thompson v. Hebdon*, 909 F.3d at 1036) (internal quotation marks omitted). In reaching that conclusion, the Ninth Circuit declined to apply this Court's precedent in *Randall v. Sorrell*, Add. A at 3a, a decision on which Petitioners in the present case rely heavily. *See, e.g.*, Pet. 22, 24, 27, 30. The *Thompson* plaintiffs filed a petition for a writ of certiorari to this Court.

In granting the *Thompson* plaintiffs' petition and vacating the judgment of the Ninth Circuit, this Court framed its First Amendment analysis on that of *Randall*, which was the last time this court considered non-aggregate contribution limits prior to *Thompson*. Add. A at 3a-6a. The Court identified several "danger signs" of Alaska's $500 contribution limits that warranted closer review, including that Alaska's limits

were: (1) substantially lower than limits this Court had previously upheld; (2) substantially lower than comparable limits in other states; and, (3) not adjusted for inflation. *Id*. Accordingly, the Court granted the petition, vacated the decision of the Court of Appeals, and remanded the case for that court to revisit whether Alaska's contribution limits are consistent with the First Amendment. *Id*. at 6a.

Much like *Thompson v. Hebdon*, the present case concerns "suspiciously low" contribution limits that exhibit several constitutional "danger signs". *Id*. at 4a-5a. While this Court indicated that Alaska's $500 contribution limit was "substantially lower than the limits [this Court had] previously upheld", *id*. at 4a (citations and alterations omitted), Rule 2030 prohibits contributions except in the *de minimis* amounts of $350 (if the covered associate is entitled to vote for the receiving official) or $150 (if the covered associate is not entitled to vote for the receiving official). *See* Pet. 6-7. This *de minimis* exception effectively acts as a contribution limit, permitting covered associates to contribute to certain officials, but only in very small amounts. The contribution limits at issue in the present case are therefore $150 and $350 lower, respectively, than those at issue in *Thompson*. The SEC's contribution limits are substantially lower than the lowest political contribution limits this Court has ever upheld, which translate to $1,600 in today's dollars. Add. A at 4a.

Further, in *Thompson* this Court explained that more "danger signs" are raised because Alaska's contribution limits are not adjusted for inflation, similar to the contribution limits at issue in *Randall*. *Id*. The contribution limits at issue in this case also are not indexed to inflation, *see* Pet. 11. This means that

"limits which are already suspiciously low will almost inevitably become too low over time." Add. A at 5a (citations and quotation marks omitted). Therefore, the Rule 2030's contribution limits raise many of the same "danger signs" as the limits in *Thompson* and *Randall*.

This Court's recent decision in *Thompson* is highly relevant to the consideration of this case and counsels strongly in Petitioner's favor. As the first opinion of this Court in 13 years to consider non-aggregate contribution limits, *see* Add. A. at 3a, *Thompson* has greatly clarified First Amendment campaign finance jurisprudence. In similar circumstances, where this Court has issued an intervening opinion changing the legal landscape, this Court has vacated the judgment of the lower court and remanded the case for consideration in light of the Court's intervening decision. *See*, *e.g.*, *Honchariw v. Cty. of Stanislaus*, 139 S. Ct. 2772 (2019) (granting petition for a writ of certiorari, vacating judgment, and remanding case to Court of Appeals in light of *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019)); *City of Pensacola v. Kondrat'yev*, 139 S. Ct. 2772 (2019) (granting petition for a writ of certiorari, vacating judgment, and remanding case to Court of Appeals in light of *American Legion v. American Humanist Assn.*, 139 S. Ct. 2067 (2019)); *Jefferson v. United States*, 139 S. Ct. 2772 (2019) (granting petition for a writ of certiorari, vacating judgment, and remanding case to Court of Appeals in light of *United States v. Davis*, 139 S. Ct. 2319 (2019)). The case should, therefore, be remanded to the District of Columbia Circuit for it to apply the newly clarified standards to the circumstances of the case.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant this petition, vacate the judgment below, and remand to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Thompson v. Hebdon*, 140 S. Ct. 348 (2019).

Respectfully submitted,

JASON TORCHINSKY
Counsel of Record
SHAWN SHEEHY
CHRIS WINKELMAN
JONATHAN LIENHARD
DENNIS W. POLIO
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
(540) 341-8808
jtorchinsky@hvjt.law

Counsel for Petitioner

December 19, 2019

ADDENDUM

ADDENDUM

Cite as: 589 U.S. ____ (2019)

Per Curiam

SUPREME COURT OF THE UNITED STATES

No. 19-122

DAVID THOMPSON, *et al.*,

v.

HEATHER HEBDON, EXECUTIVE DIRECTOR OF THE ALASKA PUBLIC OFFICES COMMISSION, *et al*.

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

---

Decided November 25, 2019

PER CURIAM.

Alaska law limits the amount an individual can contribute to a candidate for political office, or to an election-oriented group other than a political party, to $500 per year. Alaska Stat. § 15.13.070(b)(1) (2018). Petitioners Aaron Downing and Jim Crawford are Alaska residents. In 2015, they contributed the maximum amounts permitted under Alaska law to candidates or groups of their choice, but wanted to contribute more. They sued members of the Alaska Public Offices Commission, contending that Alaska's

individual-to-candidate and individual-to-group contribution limits violate the First Amendment.

The District Court upheld the contribution limits and the Ninth Circuit agreed. 909 F.3d 1027 (2018); *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023 (Alaska 2016). Applying Circuit precedent, the Ninth Circuit analyzed whether the contribution limits furthered a "sufficiently important state interest" and were "closely drawn" to that end. 909 F.3d, at 1034 (quoting *Montana Right to Life Assn. v. Eddleman*, 343 F.3d 1085, 1092 (2003); internal quotation marks omitted). The court recognized that our decisions in *Citizens United v. Federal Election Comm'n* and *McCutcheon v. Federal Election Comm'n* narrow "the type of state interest that justifies a First Amendment intrusion on political contributions" to combating "actual quid pro quo corruption or its appearance." 909 F.3d, at 1034 (citing *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185,206-207 (2014); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 359-360 (2010)). The court below explained that under its precedent in this area "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." 909 F.3d, at 1034 (quoting *Eddleman*, 343 F.3d, at 1092; some internal quotation marks omitted). The court acknowledged that "*McCutcheon* and *Citizens United* created some doubt as to the continuing vitality of [this] standard," but noted that the Ninth Circuit had recently reaffirmed it. 909 F.3d, at 1034, n.2.

After surveying the State's evidence, the court concluded that the individual-to-candidate contribution limit "'focuses narrowly on the state's interest,' 'leaves the contributor free to affiliate with a candidate,' and 'allows the candidate to amass sufficient resources

to wage an effective campaign,'" and thus survives First Amendment scrutiny. *Id.*, at 1036 (quoting *Eddleman*, 343 F.3d, at 1092; alterations omitted); see also 909 F.3d, at 1036-1039. The court also found the individual-to-group contribution limit valid as a tool for preventing circumvention of the individual-to-candidate limit. See *id.*, at 1039-1040.

In reaching those conclusions, the Ninth Circuit declined to apply our precedent in *Randall v. Sorrell*, 548 U.S. 230 (2006), the last time we considered a non-aggregate contribution limit. See 909 F.3d, at 1037, n.5. In *Randall*, we invalidated a Vermont law that limited individual contributions on a per-election basis to: $400 to a candidate for Governor, Lieutenant Governor, or other statewide office; $300 to a candidate for state senator; and $200 to a candidate for state representative. JUSTICE BREYER's opinion for the plurality observed that "contribution limits that are too low can . . . harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." 548 U.S., at 248-249; see also *id.*, at 264-265 (Kennedy, J., concurring in judgment) (agreeing that Vermont's contribution limits violated the First Amendment); *id.*, at 265-273 (THOMAS, J., joined by Scalia, J., concurring in judgment) (agreeing that Vermont's contribution limits violated the First Amendment while arguing that such limits should be subject to strict scrutiny). A contribution limit that is too low can therefore "prove an obstacle to the very electoral fairness it seeks to promote." *Id.*, at 249 (plurality opinion).*

---

* The court below declined to consider *Randall* "because no opinion commanded a majority of the Court," 909 F.3d, at 1037, n.5, instead relying on its own precedent predating *Randall* by

In *Randall*, we identified several "danger signs" about Vermont's law that warranted closer review. *Ibid.* Alaska's limit on campaign contributions shares some of those characteristics. First, Alaska's $500 individual-to-candidate contribution limit is "substantially lower than . . . the limits we have previously upheld." *Id.*, at 253. The lowest campaign contribution limit this Court has upheld remains the limit of $1,075 per two-year election cycle for candidates for Missouri state auditor in 1998. *Id.*, at 251 (citing *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000)). That limit translates to over $1,600 in today's dollars. Alaska permits contributions up to 18 months prior to the general election and thus allows a maximum contribution of $1,000 over a comparable two-year period. Alaska Stat. § 15.13.074(c)(1). Accordingly, Alaska's limit is less than two-thirds of the contribution limit we upheld in *Shrink*.

Second, Alaska's individual-to-candidate contribution limit is "substantially lower than . . . comparable limits in other States." *Randall*, 548 U.S., at 253. Most state contribution limits apply on a per-election basis, with

---

three years. Courts of Appeals from ten Circuits have, however, correctly looked to *Randall* in reviewing campaign finance restrictions. See, *e.g., National Org. for Marriage v. McKee*, 649 F.3d 34, 60-61 (CA1 2011); *Ognibene v. Parkes*, 671 F.3d 174, 192 (CA2 2012); *Preston v. Leake*, 660 F.3d 726, 739-740 (CA4 2011); *Zimmerman v. Austin*, 881 F.3d 378, 387 (CA5 2018); *McNeilly v. Land*, 684 F.3d 611, 617-620 (CA6 2012); *Illinois Liberty PAC v . Madigan*, 904 F.3d 463, 469-470 (CA7 2018); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 319, n.9 (CA8 2011), *rev'd in part on other grounds*, 692 F.3d 864 (2012) (en banc); *Independence Inst. v. Williams*, 812 F.3d 787, 791 (CA10 2016); *Alabama Democratic Conference v. Attorney Gen. of Ala.*, 838 F.3d 1057, 1069-1070 (CA11 2016); *Holmes v. Federal Election Comm'n*, 875 F.3d 1153, 1165 (CADC 2017).

primary and general elections counting as separate elections. Because an individual can donate the maximum amount in both the primary and general election cycles, the per-election contribution limit is comparable to Alaska's annual limit and 18-month campaign period, which functionally allow contributions in both the election year and the year preceding it. Only five other States have any individual-to-candidate contribution limit of $500 or less per election: Colorado, Connecticut, Kansas, Maine, and Montana. Colo. Const., Art. XXVIII, § 3(1)(b); 8 Colo. Code Regs. 1505-6, Rule 10.17.1(b)(2) (2019); Conn. Gen. Stat. § 9-611(a)(5) (2017); Kan. Stat. Ann. § 25-4153(a)(2) (2018 Cum. Supp.); Me. Rev. Stat. Ann., Tit. 21—A, § 1015(1) (2018 Cum. Supp.); Mont. Code Ann. §§ 13-37-216(1)(a)(ii), (iii) (2017). Moreover, Alaska's $500 contribution limit applies uniformly to all offices, including Governor and Lieutenant Governor. Alaska Stat. § 15.13.070(b)(1). But Colorado, Connecticut, Kansas, Maine, and Montana all have limits above $500 for candidates for Governor and Lieutenant Governor, making Alaska's law the most restrictive in the country in this regard. Colo. Const., Art. XXVIII, § 3(1)(a)(I); 8 Colo. Code Regs. 1505-6, Rule 10.17.1(b)(1)(A); Conn. Gen. Stat. §§ 9611(a)(1), (2); Kan. Stat. Ann. § 25-4153(a)(1); Me. Rev. Stat. Ann., Tit. 21–A, § 1015(1); Mont. Code Ann. § 13-37–216(1)(a)(i).

Third, Alaska's contribution limit is not adjusted for inflation. We observed in *Randall* that Vermont's "failure to index limits means that limits which are already suspiciously low" will "almost inevitably become too low over time." 548 U.S., at 261. The failure to index "imposes the burden of preventing the decline upon incumbent legislators who may not diligently police the need for changes in limit levels to ensure the

adequate financing of electoral challenges." *Ibid.* So too here. In fact, Alaska's $500 contribution limit is the same as it was 23 years ago, in 1996. 1996 Alaska Sess. Laws ch. 48, § 10(b)(1).

In *Randall*, we noted that the State had failed to provide "any special justification that might warrant a contribution limit so low." 548 U.S., at 261. The parties dispute whether there are pertinent special justifications here.

In light of all the foregoing, the petition for certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded for that court to revisit whether Alaska's contribution limits are consistent with our First Amendment precedents.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 19-122

DAVID THOMPSON, *et al.*,

v.

HEATHER HEBDON, EXECUTIVE DIRECTOR OF THE ALASKA PUBLIC OFFICES COMMISSION, *et al*.

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

Decided November 25, 2019

Statement of JUSTICE GINSBURG.

I do not oppose a remand to take account of *Randall v. Sorrell*, 548 U.S. 230 (2006). I note, however, that Alaska's law does not exhibit certain features found troublesome in Vermont's law. For example, unlike in Vermont, political parties in Alaska are subject to much more lenient contribution limits than individual donors. Alaska Stat. § 15.13.070(d) (2018); see *Randall*, 548 U.S., at 256-259. Moreover, Alaska has the second smallest legislature in the country and derives approximately 90 percent of its revenues from one economic sector—the oil and gas industry. As the District Court suggested, these characteristics make Alaska "highly, if not uniquely, vulnerable to corruption in politics and

government." *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1029 (Alaska 2016). "[S]pecial justification" of this order may warrant Alaska's low individual contribution limit. See *Randall*, 548 U.S., at 261.