No. 16-35424

In the United States Court of Appeals

for the Ninth Circuit

DOUG LAIR, et al.,
Plaintiffs and Appellees,

vs.

JONATHAN MOTL, et al.,
Defendants and Appellants.

BRIEF OF AMICUS CURIAE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF APPELLANTS AND REVERSAL OF THE JUDGMENT

On Appeal from a Judgment Entered by the United States District Court for the District of Montana, Case No. 6:12-cv-00012 (Hon. Charles C. Lovell)

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INTEREST OF AMICUS CURIAE

The Brennan Center for Justice at NYU School of Law is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full political participation, and to ensure that public policy and institutions reflect diverse voices and interests that make for a rich and energetic democracy.[1]

SUMMARY OF ARGUMENT

The People of the State of Montana, by ballot initiative, enacted limits on contributions to candidates for state office. For decades, courts have upheld such contribution limits as constitutional on the ground that they serve an important state interest in preventing

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[1] All parties have consented to the filing of this amicus brief. No party nor any party's counsel authored any part of this brief. No person—other than the amicus curiae, its members, or its counsel—has contributed money intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of New York University School of Law.

corruption or the appearance of corruption.[2] The district court here, however, broke with this precedent, experience, and history. It held that the evidence showed that the State of Montana—unlike other States and the federal government—has *no* interest in limiting candidate contributions.

This amicus brief aims to assist the Court by setting out the appropriate legal framework for reviewing the district court's decision. Plaintiffs-Appellees allege that the challenged provisions limit their First Amendment freedom to associate with and express support for a candidate through the "symbolic act of contributing." *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). But "state campaign contribution limits will be upheld if (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and (2) if the limits are 'closely drawn'—*i.e.*, if they (a) focus narrowly

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[2] The Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), did not change this reality, but instead merely "clarified … what qualifies as 'corruption' under the 'important state interest analysis'"—namely, quid pro quo corruption. *Lair v. Bullock*, 798 F.3d 736, 746 (9th Cir. 2015). *Citizens United* and subsequent precedents have reaffirmed that direct contribution limits continue to serve a valid anticorruption interest (*see* State Br. at 21).

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." *Lair v. Bullock*, 798 F.3d 736, 742 (9th Cir. 2015). The district court held that Montana's duly-enacted limits did not further any state interest because there is no evidence of corruption in Montana and, in the alternative, that the limits were not closely drawn. Its conclusions were erroneous for a number of reasons outlined more fully by the State. Amicus curiae writes separately to underscore two key points.

First, the district court's analysis of whether there is a risk of corruption or its appearance in Montana sufficient to justify candidate contribution limits was both insufficiently deferential and impermissibly narrow. Whether direct contributions to candidates create a corruption risk is a question of legislative fact, *i.e.*, a question about how the world works that is not particular to the parties.[3] Courts have no special expertise on such matters, and thus

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[3] Whether Montana's statute is "closely drawn" is a question separate from the question whether giving money to candidates in Montana creates a risk of corruption or its appearance. *See Montana*

should afford significant deference to the judgments of lawmakers in making their findings. And, especially if a court intends to second-guess the People or their elected representatives, it ought to do so only after conducting a broad inquiry that takes into account, *inter alia*, guiding precedent, the experience of other jurisdictions, and available empirical research.

In this case, the district court did neither. The court accorded no deference to the People in their capacity as legislators, supplanting their judgment about Montana politics, the conduct of Montana politicians, and how contributions appear to Montana citizens with its own conclusions based solely on its parsing of specific examples from the record. An appropriately broad and deferential inquiry, which this Court should conduct, leads inexorably to the conclusion that Montana did have an interest in

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Right to Life Ass'n v. Eddleman, 343 F.3d 1085, 1092 (9th Cir. 2003); *see also Lair*, 798 F.3d at 748 (reaffirming "*Eddleman*'s framework"). Whether the limit is "closely drawn" to address that risk implicates separate questions of legislative fact that we address below. *See* Part II, *infra*, at 21-32.

preventing corruption and its appearance sufficient to justify candidate contribution limits.

Second, with respect to its "closely drawn" analysis, neither of the two bases on which the court principally relied was sufficient to show that Montana's limits were not closely drawn. First, the court was wrong to infer—based on a handful of statements in a voter information pamphlet referencing justifications other than preventing corruption—that the limits are not "narrowly focused" on preventing corruption. The relevant inquiry is whether the challenged statute operates so as to target those contributions that give rise to corruption or the appearance of corruption, not whether a pamphlet contains references to other possible justifications for the statute. In fact, this Circuit has routinely upheld contribution limits as valid anticorruption measures despite references to other possible justifications in the legislative history.

The district court also erred in holding that the limits do not allow candidates to amass sufficient resources to mount effective campaigns. It based its conclusion entirely on testimony indicating

that a) the average campaign in a competitive race raises slightly less money than it spends; and b) some donors would prefer to give more, as evidenced by the fact that they contributed an amount equal to the limit. Neither of these findings is unique to Montana or an adequate basis to overturn the will of the voters.

For all these reasons, amicus curiae urges this Court to reverse.

ARGUMENT

I. Whether Contributions To Candidates Create A Risk Of Corruption Or Its Appearance In Montana Is A Question Of Legislative Fact Necessitating A More Deferential And Broader Inquiry Than The District Court Performed

The decision below rests primarily on the district court's startling conclusion that Montana has no important interest in combating corruption because corruption does not exist in Montana. The court declared that it was not "satisfied that the evidence presented by Defendants proves the existence of an important state interest here" (ER 22). If anything, the court concluded, "the evidence shows that Montana politicians are relatively incorruptible" (ER 22). This reasoning rested solely on the district court's interpretation of

snippets of evidence from the record. The court essentially walked through a series of examples from the record and dismissed each as insufficient to establish the existence of corruption in the State (ER 19-23). Apparently, the district court would have been satisfied only by direct evidence that a specific Montana legislator made an explicit bargain to change a vote in exchange for money.

As the State explains, the Supreme Court has never imposed such a high evidentiary bar to justify candidate contribution limits. Amicus curiae agrees that the record before the court was more than sufficient for the district court to conclude that the State had carried its burden (State Br. at 26-37). More broadly, the district court not only answered the wrong legal question, but also fundamentally misperceived the nature of the relevant inquiry.

A. Whether Contributions To Candidates Pose A Risk Of Corruption Or Its Appearance Is A Question Of Legislative Fact

The district court's narrow parsing of the record to determine that there is no corruption risk in Montana elections failed to

account for the type of question it was answering—*i.e.*, a question of legislative fact.

In contrast to adjudicative facts—which are simply "the facts of the particular case"—legislative facts "are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Fed. R. Evid. 201, Advisory Committee Notes (citing Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 404-07 (1942)). "Legislative facts … do not usually concern only the immediate parties but are general facts which help the tribunal decide questions of law, policy and discretion." *Perry v. Brown*, 671 F.3d 1052, 1075 (9th Cir. 2012) (quotation marks and brackets omitted), *vacated and remanded on other grounds by Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). In other words, "'legislative facts … are 'established truths, facts or pronouncements that do not change from case to case but apply universally.'" *United States v. Davis*, 726

F.3d 357, 366 (2d Cir. 2013) (quoting *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976)).

Whether contributions to candidates create a risk of corruption or its appearance is a quintessential question of legislative fact, as courts have recognized. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 455 (1st Cir. 2000) ("Our decision must be based largely on legislative, as opposed to adjudicative, facts"); *Ognibene v. Parkes*, 599 F. Supp. 2d 434, 448 (S.D.N.Y. 2009) ("legislative facts" are to be considered "in determining whether a reasonable person would believe that corruption or the potential for corruption exists"), *aff'd*, 671 F.3d 174 (2d Cir. 2011). Whether money has the power to corrupt is not a factual matter that "concern[s] only the immediate parties," *Perry*, 671 F.3d at 1075 (quotation marks and brackets omitted), but instead concerns all the present and future citizens of Montana who must live under state law. It cannot be decided solely by reference to record evidence concerning "who did what, where, when, how, why, with what motive or intent." *Id.* (quotation marks omitted). Instead,

it is a question about how human beings behave and are perceived as behaving within a political system. The district court's approach to answering this question was deeply flawed.

B. The District Court Failed To Accord Appropriate Deference To The Voters

First, the court failed to show appropriate deference to the People in their capacity as legislators. As noted, legislative facts represent broad judgments about how complex systems operate (human beings, markets, governments). Because courts are in no better position than the coordinate branches to make these judgments, they traditionally accord deference to the legislative fact-finding of elected lawmakers. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665 (1994) ("We agree that courts must accord substantial deference to the predictive judgments of Congress."). A ballot initiative and the implicit findings of legislative fact that it embodies are entitled to no less deference. "[T]he people, acting directly through either the initiative or referendum, are exercising

the same power of sovereignty as that exercised by the legislature in passing laws." *Rodgers v. FTC*, 492 F.2d 228, 229-30 (9th Cir. 1974).

That the People of Montana have collectively exercised their judgment in a sovereign capacity in enacting the challenged statutes is of paramount importance in this case. Although legislative facts are defined as "established truths … [that] apply universally[,]" *Davis*, 726 F.3d at 366 (quotation marks omitted), voters, legislators, and judges sometimes cannot reach agreement about what the truth *is*, especially when a question is extremely complex, hotly contested, and not readily subject to objective measurement or verification. In the absence of consensus, scientific or otherwise, the question of *who* gets to decide the underlying legislative facts to which the law will apply—the People or the courts—takes on decisive significance.

Because courts are not better situated than the People to assess whether giving money to politicians creates a risk of corruption or its appearance, they should accord deference to the People's judgment, implicit in enacting contribution limits, that it does. In fact, a ballot initiative vote on contribution limits warrants special deference

because it constitutes direct evidence of a popular perception of the legislative fact that contributions must be regulated to combat corruption. *See Nixon v. Shrink Missouri Govt. PAC*, 528 U.S. 377, 394 (2000) ("[T]he statewide vote on Proposition A certainly attested to the perception relied upon here: '[A]n overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof.'"); *see also Ognibene*, 599 F. Supp. 2d at 446 ("The vote in favor of the referendum … constitutes evidence of a popular perception that contributions by those doing business with the City need to be regulated in order to combat corruption.").

Of course, judicial deference to lawmakers is not absolute. When adjudicating constitutional cases, courts must still exercise independent judgment. Particularly in a case like this one, however, where—as discussed below—decades of history, precedent, and the experience of other jurisdictions all *support* the empirical conclusions the People reached, a court should proceed with great caution before overturning their judgment. The district court failed to do so.

C. The District Court Erred In Limiting Its Analysis To Parsing Specific Examples From The Record

Apart from its lack of deference, the district court's analysis of the core legislative fact question in this case was also unduly narrow. While the record examples that the court parsed were certainly relevant—as noted *supra*, they strongly support the State—the court had an obligation to do more than simply bat them away if it wanted to gainsay the will of Montana's voters.

While adjudicative facts are usually established through the introduction of evidence or judicial notice under Federal Rule of Evidence 201, "[n]o rule deals with judicial notice of 'legislative' facts." Fed. R. Evid. 201, Advisory Committee Notes. Instead, legislative facts are established through judicial "appraisals of the nature and ways of the world, undertaken in an effort to give meaning to the law in light of important ends." Christopher B. Mueller and Laird C. Kirkpatrick, 1 Federal Evidence § 2:12 (4th ed. May 2016).

This appraisal necessarily involves a broad inquiry that encompasses, at the very least, a careful examination of precedent. There is a long history of legislative fact-finding by other courts, including the Supreme Court, on the issue of whether campaign contributions to candidates and others pose a risk of corruption. This Court has regularly turned to that history in ruling on the constitutionality of contribution limits.

For example, in *Jacobus v. Alaska*, this Court upheld Alaska's limits on contributions of "soft money" to political parties, noting that large contributions "create[] a danger of corruption and the appearance of corruption." 338 F.3d 1095, 1113 (9th Cir. 2003). In making this finding, the Court focused in particular on the Supreme Court's findings of legislative fact in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001). "[B]y recognizing that political parties serve as a conduit from contributors to candidates," this Court stated, "the [Supreme] Court effectively resolved the question of whether corruption constitutes a sufficiently

important governmental interest in the context of the regulation of soft money." *Jacobus*, 338 F.3d at 1112.

Similarly, in *Yamada v. Snipes*, this Court addressed a challenge to Hawaii's campaign finance laws and concluded that "Hawaii's government contractor contribution ban serves sufficiently important governmental interests by combating both actual and the appearance of quid pro quo corruption." 786 F.3d 1182, 1205 (9th Cir. 2015). In reaching this conclusion, the Court relied on the Second Circuit's finding that a government contractor ban "'unequivocally addresses the perception of corruption' because 'by totally shutting off the flow of money from contractors to state officials, it eliminates any notion that contractors can influence state officials by donating to their campaigns.'" *Id.* (quoting *Green Party of Connecticut v. Garfield*, 616 F.3d 189, 205 (2d Cir. 2010)). The *Yamada* Court also relied on the Fourth Circuit's finding that a complete ban on contributions by lobbyists works "'as a prophylactic to prevent not only actual corruption but also the appearance of corruption in future

state political campaigns.'" *Id.* (quoting *Preston v. Leake*, 660 F.3d 726, 736-37 (4th Cir. 2011)).

Cases like *Jacobus* and *Yamada* draw on and are consistent with decades of Supreme Court precedent recognizing that campaign contributions can create a risk of corruption and its appearance, and therefore that reasonable limits are justified (*see* State Br. at 18-25).[4]

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[4] This is not to say that prior judicial determinations of legislative fact, even by the Supreme Court, should always be dispositive. As one respected federal judge has noted, "legislative facts are not sacrosanct." *Frank v. Walker*, 773 F.3d 783, 795 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc). The Supreme Court itself routinely updates its jurisprudence based on new data and evidence. *See, e.g.*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007) (overruling longstanding precedent applying Sherman Act pricing rules in part because "[r]espected economic analysts … conclude that vertical price restraints can have procompetitive effects"); *Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954) (overruling *Plessy v. Ferguson* because "modern authority," including psychological studies, showed detrimental effects of segregation). Where the Court's prior factual conclusions are clearly outdated in light of changed circumstances or new research, it is implausible to think that a lower court would be powerless to respond. *Frank*, 773 F.3d at 796 (Posner, J., dissenting from denial of rehearing en banc) ("Does the Supreme Court *really* want the lower courts to throw a cloak of infallibility around its factual errors of yore?"). There is no need to delve into such issues here, however, because the district court provided no justification whatsoever for its departure from the established consensus.

Apart from these precedents, if it was still unsatisfied, the district court could have examined evidence from other jurisdictions and found extensive examples of candidate contributions serving as the primary "quid" in quid pro quo exchanges.[5] It could also have turned to reams of empirical evidence showing how such contributions help to determine policy outcomes.[6] Courts ruling on campaign finance and other constitutional questions routinely take account of such information in making determinations of legislative fact, regardless of whether it has been incorporated into the formal

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[5] *See, e.g.*, *Preston v. Leake*, 660 F.3d 726, 729 (4th Cir. 2011) (noting corruption conviction of North Carolina Commissioner of Agriculture for accepting illegal contributions from businessmen seeking a state contract); *Green Party of Connecticut v. Garfield*, 590 F. Supp. 2d 288, 305 (D. Conn. 2008) (describing scheme in which Connecticut State Treasurer accepted laundered campaign contributions in return for "investing over $500 million of the state's pension funds with certain financial institutions"); Utah House of Rep., Report of the Special Investigative Committee, Mar. 11, 2014, https://goo.gl/YPyoDW (last visited Oct. 4, 2016) (finding that former Utah Attorney General solicited over $450,000 in disguised contributions from the payday lending industry after promising to protect the industry's interests once elected).

[6] *See, e.g.*, Lynda W. Powell, *The Influence of Campaign Contributions in State Legislatures* (2012) (finding that campaign contributions can affect the content and passage of legislation in state legislatures).

record. *See, e.g., Wagner v. FEC*, 793 F.3d 1, 16-18, 19 (D.C. Cir. 2015) (en banc) (citing state examples and empirical research to justify a federal restriction on contractor contributions); *see also FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 470 n.6 (2007) (controlling opinion of Roberts, C.J.) (discussing "prominent study" that sought to determine voter knowledge about candidates for Congress); *Brown v. Board. of Education*, 347 U.S. 483, 494 & n.11 (1954) (citing multiple psychological studies to support holding that segregated school system was "inherently unequal"). Notwithstanding the novelty of the result it reached, the district court did nothing of the sort.

D. This Court Should Find That The State Has Carried Its Burden And Reverse The District Court

Given the deference that should be afforded to the People's judgment as legislators and the broad scope of the relevant inquiry, the district court's approach cannot pass muster. This Court should

reverse its judgment and find that the State met its burden to show a cognizable risk of quid pro quo corruption or its appearance.[7]

While the State does have the burden in this regard, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon*, 528 U.S. at 391; *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011) (same). The "dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." *Nixon*, 528 U.S. at 391. Accordingly, the State's burden in this case was and remains light.

The State may carry this burden by pointing to, *inter alia*, controlling precedent, the record from other cases, or experience

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[7] Judicial determinations of legislative fact resemble decisions of law and are therefore appropriate for an appellate court to make *de novo*. Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 Minn. L. Rev. 1, 27 (1988). Accordingly, this Court can and should make its own findings of legislative fact on the question of whether campaign contributions pose a risk of quid pro quo corruption or its appearance, rather than remanding the question to the district court.

generally. In *G.K. Ltd. Travel v. City of Lake Oswego*, for example, this Court stated that "'litigants [may] justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny … justify restrictions based solely on history, consensus, and simple common sense.'" 436 F.3d 1064, 1073 (9th Cir. 2006) (quoting *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 555 (2001)); *see also Jacobus*, 338 F.3d at 1112-13. Here, the State did much more than was required (*see* State Br. at 18-36).

Ultimately, nothing in the evidence, experience, or, for that matter, common sense indicates that candidates for state office in Montana are more pure of heart than candidates in other States or that the confidence of the People of Montana in their government is less likely to be shaken by the appearance of impropriety. Indeed, a citizen of Montana may run for federal office, in which case federal contribution limits would apply. It is, to say the least, peculiar to maintain that that individual's susceptibility to corruption, and the public's perception of the same, turns on whether he or she is seeking

state or federal office. This Court should resolve the incongruity the district court created by finding, as a matter of legislative fact, that contributions to candidates create a risk of actual or apparent corruption in Montana, as they do elsewhere, sufficient to justify candidate contribution limits.

II. The District Court's Factual Findings Cannot Support Its Conclusion That Montana's Limits Are Not "Closely Drawn"

The district court also failed to perform a proper "closely drawn" analysis with respect to its determinations that Montana's limits are not "narrowly focused" and do not allow candidates to raise sufficient resources to compete. The district court erred in relying on a handful of statements in a voter guide to determine that the limits are not "narrowly focused," and in positing that candidates do not have sufficient resources to compete simply because some campaigns spend slightly more than they raise and some donors might prefer to give more than allowed—both circumstances that are anything but unique to Montana.

A. The Text Of A Voter Guide Was Not A Sufficient Basis To Determine That Montana's Limits Are Not "Narrowly Focused"

The district court's "narrow focus" inquiry was nothing if not succinct: it held that the contribution limits could not possibly be narrowly focused on deterring corruption "because they were expressly enacted to combat the impermissible interests of reducing influence and leveling the playing field" (ER 24). To reach this conclusion, the court relied entirely on the "pro" arguments from a voter information pamphlet, which contained statements like "[t]here is just way too much money in Montana politics," "[t]he growth of money in Montana politics is unprecedented," and "money and influence have drowned out citizen voices" (ER 24-25). Based on such statements, the court announced that it "need look no further" to hold that the limits were not narrowly focused (ER 24).

This was not a sufficient inquiry. As this Court has explained, the "narrow focus" inquiry is primarily concerned with whether a challenged limit is justified to prevent the reality or appearance of corruption, not whether the legislative history also contains

references to other possible justifications. In reviewing the *same contribution limits*, the *Eddleman* Court made no mention of the voter information pamphlet upon which the district court placed such weight; it focused instead on the fact that the limits targeted the largest contributions, which are those most likely to cause corruption. *See Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1094 (9th Cir. 2003). *Eddleman* has been superseded with respect to the definition of corruption it employed; its approach was otherwise sound, and should have been treated as binding by the district court. *Lair*, 798 F.3d at 748.[8]

Likewise, in *Yamada*, the Court concluded that Hawaii's ban on contributions by government contractors was "closely drawn because it targets … the contributions most closely linked to actual and perceived quid pro quo corruption." 786 F.3d at 1205-06 (citing *Green Party of Connecticut*, 616 F.3d at 202). In *Yamada*, as in this case,

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[8] The narrower definition of "corruption" does not alter the "closely drawn" inquiry in this respect because the Court still "must assess the fit between the stated governmental objective and the means selected to achieve that objective." *Lair*, 798 F.3d at 748 (quotation marks omitted). Whether the statute is a good "fit" depends on how the statute operates, not on the legislative history of the statute.

legislative proponents of the ban had also expressed other goals, including a desire to create "a level playing field." *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1058 n.26 (D. Haw. 2012). Far from treating that fact as dispositive, the panel did not even mention it. *Yamada*, 786 F.3d 1182; *see also Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011) (contractor contribution limits were narrowly tailored due to "heightened risk of actual and apparent corruption," notwithstanding references in legislative record to other goals).

These decisions are consistent with the Supreme Court's seminal holding in *Buckley*, where the Court concluded that federal contribution limits passed by Congress were closely drawn because they "focuse[d] precisely on the problem of large campaign contributions" in a way that alternative measures like disclosure and anti-bribery laws could not. 424 U.S. at 27-28. The *Buckley* Court mentioned other regulatory justifications proffered by the government, but found no need to review them because the law's anticorruption purpose was "a constitutionally sufficient justification." *Id.* at 26; *see also McCutcheon v. FEC*, 134 S. Ct. 1434,

1444-45 (2014) (plurality opinion) (reaffirming the relevant portion of *Buckley*).[9] Rather than focusing on a few statements in a voter guide, the district court ought to have followed *Buckley*'s longstanding approach.

B. The District Court Misapprehended The Meaning Of "Amass Sufficient Resources To Wage An Effective Campaign"

The district court also failed to determine properly whether the contribution limits allow candidates to amass sufficient resources to wage effective campaigns. In answering this question, the court gave no reason for its departure from *Eddleman*'s analysis of the identical

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[9] In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), the Court invalidated part of Arizona's public financing law on the ground that its purpose was to "level the playing field." Its decision was based on how the law worked, not on indices of legislative intent. *See id.* at 748 (explaining that the strongest evidence "that the matching funds provision seeks to 'level the playing field' … is of course the very operation of the provision"). In a footnote, the Court mentioned that the State's website had previously contained a page explaining that the law "was passed by the people of Arizona in 1998 to level the playing field when it comes to running for office." *Id.* at 749 n.10. Yet that reference was meant only to reinforce the Court's conclusion about how the law worked. There was no indication that the statement itself would have been dispositive.

question (*see* State Br. at 39-40). Rather than conducting a similar inquiry, the court focused only on (1) whether Montana candidates sometimes spend more money than they raise, and (2) whether a significant number of donors give the maximum legal contribution. But neither of these questions addresses whether candidates are able to reach potential voters effectively. If contribution limits could be struck down simply because candidates and donors prefer to spend more, *no* meaningful limits would be constitutional, because all such limits prevent some donors from giving as much as they otherwise would, possibly leaving candidates with somewhat less money.[10]

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[10] The district court did not specifically examine whether candidates are capable of raising more money under the limits by altering their fundraising practices. The district court also appeared to conclude that candidates cannot run effective campaigns because low limits may provide incumbents with an advantage over challengers (ER 27-28 (quoting *Randall v. Sorrell*, 548 U.S. 230, 248 (2006))). Yet the court did not appear to review any evidence of whether Montana's limits have led to incumbent entrenchment. In fact, more incumbents are defeated in Montana than in most States: in 2014, more incumbent legislators were defeated in general elections in Montana than in 34 other States, including many States with no contribution limits or very high limits. Ballotpedia, *Incumbents defeated in 2014's state legislative elections*, https://goo.gl/wkNKFq (last visited Oct. 4, 2016). In 2012, Montana ranked even higher, with more incumbents defeated in general elections than in 38 other States. *See id.*

Under *Eddleman*, district courts must examine whether contribution limits prevent candidates from raising amounts "within the range of money needed to run an effective house campaign." 343 F.3d at 1094-95. In *Eddleman*, the district court found that, at the time, Montana House candidates raised an average of about $4,500 and Senate candidates raised almost $6,900. *Id.* This Court reviewed those averages, the size of Montana's districts, and the typical method of campaigning. It noted that House districts were comprised of fewer than 8,000 people, and Senate districts contained about 16,000. *Id.* at 1094. Because candidates often campaigned door-to-door and only occasionally paid for television or radio advertisements, the relatively low amount of money they raised still allowed them "to mount effective campaigns." *Id.* at 1095.

Other circuits perform a similar analysis, examining the ability of candidates to campaign effectively, rather than the potential willingness of donors to give more. In *Ognibene*, for example, the Second Circuit explained that "[w]hether the contribution limits hinder the ability to amass contributions from business interests is

not the relevant test. Rather, the test is whether candidates have access to sufficient funds to run campaigns where they can effectively engage with the electorate." 671 F.3d at 186 n.12.

Here, the district court failed to consider whether Montana candidates have been able to engage effectively with the electorate. Its analysis should have mirrored *Eddleman*'s, looking at amounts raised, methods of campaigning, and district size, yet it instead relied on cherry-picked statistics that have little bearing on whether candidates have enough money to reach voters.

First, the court noted that "the average competitive campaign spends 7% more money than it raises," from which it deduced that "most competitive campaigns are not adequately funded" (ER 26). However, that finding is by no means an indication that Montana candidates cannot adequately spread their message; rather, it reflects the unsurprising reality that many candidates across the country, even in jurisdictions with high contribution limits, spend more than they raise. For example, in the 2012 elections, the average Republican candidate for U.S. Senate relied on self-funding for over

28% of campaign costs, and House candidates of both parties personally paid about 7% of their campaign bills.[11] Importantly, federal candidates (both winners and losers) often spend more than they raise even when they are unable or unwilling to contribute their own money, leaving their campaigns in significant debt (which they can retire through continued fundraising).[12] This reliance on self-funding and campaign debt is not considered an indicator that federal contribution limits (currently $2,700 per election) are unconstitutionally low—indeed, the Supreme Court has not seriously questioned their validity even when striking down different campaign finance rules. *See McCutcheon*, 134 S. Ct. at 1451 (noting that federal base contribution limits were left "undisturbed").

The district court also erred in concluding that candidates cannot amass sufficient resources based on its finding that

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[11] Center for Responsive Politics, *Where the Money Came From: 2012*, https://goo.gl/I8q59U (last visited Oct. 4, 2016).

[12] *See* Dave Levinthal, *14 presidential candidates who still owe campaign debt*, Salon, May 2, 2013, https://goo.gl/mNxjoU (last visited Oct. 4, 2016) (noting existing campaign debt from former presidential candidates including Presidents Obama and Clinton).

candidates in competitive races received 44% of their funds from maxed-out contributors (and assuming that many of these donors wished to give more) (ER 26-27). Like candidates' willingness to spend money, donors' willingness to give additional money does not show that a candidate will be unable to spread his or her message effectively. The *Eddleman* Court made this point clearly when it observed that in the election before Montana's limits were enacted, 24-30% of campaign money came from contributions that would have violated the new limits. Yet it held that this fact did "not make the contribution limits unconstitutional." 343 F.3d at 1094.

Just as federal candidates often spend more than they raise, they also rely heavily on contributors who have given the maximum permitted contribution. For example, in 2012, Republican Presidential nominee Mitt Romney received 49% of his campaign money from contributors who gave the maximum.[13] Candidate Rick Perry received 76% of his contributions from donors who gave the

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[13] Campaign Finance Institute, Aggregated Individual Contributions by Donors to 2012 Presidential Candidates Cumulative through December 31, 2012, https://goo.gl/fq7dWa (last visited Oct. 4, 2016).

maximum; all told, 43% of Republican Presidential candidates' money came from contributions at the legal limit.[14] President Obama raised 22% of his 2012 money from maxed-out contributors,[15] and through April 30 of this year, Democratic nominee Hillary Clinton had raised 44% of her contributions from donors giving the maximum.[16] There has been no serious suggestion based on these statistics that the federal contribution limits are unconstitutional.

In sum, the district court asked the wrong questions when it attempted to determine whether candidates can amass sufficient resources to campaign. As *Eddleman* and other courts have recognized, contribution limits must affect some donors if they are to prevent or deter quid pro quo corruption or its appearance; if they did not prevent some large contributions, they would be meaningless. This Court should make clear that its jurisprudence does not call for invalidation of limits simply because they operate as intended.

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14 *See id.*

15 *See id.*

16 Campaign Finance Institute, Sources of Funds: Individual Donors to 2016 Presidential Candidates through April 30, 2016, https://goo.gl/TcJZJs (last visited Oct. 4, 2016).

CONCLUSION

This Court should hold that Montana's contribution limits are constitutional and reverse and remand with directions to enter judgment for the State of Montana.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify as follows:

1. This Amicus Brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 5,885 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Amicus Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point Century Schoolbook font.

In preparing this Certificate, I have relied on the word count of Microsoft Office Word 2010, the word-processing system used to prepare this Amicus Brief.

DATED: October 5, 2016

s/ Brian A. Sutherland

CERTIFICATE OF SERVICE

I hereby certify that, on October 5, 2016, I electronically filed this BRIEF OF AMICUS CURIAE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF APPELLANTS AND REVERSAL OF THE JUDGMENT with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF System. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED: October 5, 2016

s/ Brian A. Sutherland