No. 17-35019

In the United States Court of Appeals
for the Ninth Circuit

DAVID THOMPSON, AARON DOWNING, JIM CRAWFORD, and DISTRICT 18 of the ALASKA REPUBLICAN PARTY,

Plaintiffs and Appellants,

vs.

HEATHER HEBDON, in her official capacity as the Executive Director of the Alaska Public Offices Commission, and IRENE CATALONE, RON KING, TOM TEMPLE, ROBERT CLIFT, and ADAM SCHWEMLEY, in their official capacities as Members of the Alaska Public Offices Commission,

Defendants and Appellees.

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

On Appeal from a Judgment Entered by the United States District Court for the District of Alaska, Case No. 3:15-cv-00218 (Hon. Timothy M. Burgess)

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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 Alaska, by ballot measure, enacted a $500 limit 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 quid pro quo corruption or the appearance of corruption. In

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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.

accordance with this precedent, experience, and history, the district court here properly upheld Alaska's contribution limits.

This amicus brief aims to assist the Court in two ways.

First, this amicus brief examines the broad set of considerations that should inform the Court's determination that the State's contribution limits serve an important interest in preventing quid pro quo corruption and its appearance. As explained below, whether contributions create a risk of corruption—and thus whether contribution limits further an interest in preventing corruption—is a question of "legislative fact." Legislative facts are facts that are not particular to the parties in a case. Instead, they are general propositions about how the world works that do not change from case to case. Case law, empirical studies, the experience of other jurisdictions, jurisdiction-specific factors, judicial deference to lawmakers, and the record before the court are all relevant to such questions. The district court properly considered these sources, and so too should this Court.

Second, this amicus brief identifies legal errors and mistaken arguments in plaintiffs' opening brief. In particular, plaintiffs err in arguing, among other things, that the district court misapprehended the meaning of quid pro quo corruption; that the State's contribution

limit is based on "improper purposes"; that the limit should have been higher and indexed for inflation; and that the State's limit unfairly favors incumbents and disfavors challengers. The district court properly rejected these arguments. This Court should reject them as well.

The Brennan Center has focused its effort to assist the Court on issues arising in connection with plaintiffs' challenges to Alaska's individual contribution limits, but the limited scope of its amicus brief should not be construed as taking a position adverse to Alaska on other issues not discussed here. The Court should affirm the judgment in full.

ARGUMENT

I. The District Court's Decision Rested on Proper Considerations

Plaintiffs contend that not even the "slightest evidence" (AOB/26) supports the district court's finding that "the risk of quid pro quo corruption or its appearance in Alaska politics and government from large campaign contributions is pervasive and persistent." (ER/11) Their contention is wrong.

As explained below, (A) whether large contributions create a risk of corruption or its appearance is a question of legislative fact, and Alaska voters' answer to that question deserves deference; (B) the record, case law, and empirical studies show that campaign contributions create a risk of corruption or its appearance; and (C) the court was correct to credit jurisdiction-specific evidence about the risk or appearance of corruption that exists in Alaska, including evidence that a single industry dominates the Alaskan economy. Accordingly, Alaska has easily carried its burden to show that its contribution limits address a genuine risk and appearance of corruption sufficient for its limits to be upheld.

A. Courts Should Consider and Defer to Legislative Fact-Finding That Large Contributions Create a Risk of Corruption or Its Appearance

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 Alaska who must live under state law.

Because courts are in no better position than the coordinate branches to make such 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 measure 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). In fact, a ballot measure enacting 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 Gov't 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.'") (citation omitted); *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.").

The reality that the People of Alaska have collectively exercised their judgment in a sovereign capacity in enacting the challenged statute 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 and brackets omitted), voters, legislators, and judges sometimes cannot reach agreement about what the truth *is*, especially when a question is complex, 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, in the event of any doubt, they should accord deference to the People's judgment, implicit in enacting contribution limits, that it does.

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 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—just as the district court did.

B. Courts Should Consider Not Only Record Evidence, But Also Precedent and Empirical Studies in Determining Whether Contributions Create a Risk of Corruption or Its Appearance

Plaintiffs devote considerable space to parsing the record evidence on which the district court relied. Their objections are unavailing, *see* Alaska Br. at 27-33, and, in any event, legislative facts are established not only through such record evidence but also 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." 1 Christopher B. Mueller and Laird C. Kirkpatrick, 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, as well as empirical evidence in the public record.

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 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)). *Yamada* 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 that reasonable limits are justified. This Court may turn to that precedent and history again here. *See G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1073 (9th Cir. 2006) (litigants may justify restrictions "based solely on history, consensus, and simple common sense" (quotation marks omitted)).

It is also proper for trial and appellate courts to consult the unending stream of press reports and empirical studies from other jurisdictions that regularly document how contributions serve as the primary "quid" in quid pro quo exchanges.[2] In one recent example, an Orange County, Florida elected official pleaded guilty when charged with promising to fast-track a building project in exchange for a $1,000 contribution—an amount plaintiffs claim will not lead to quid pro quo corruption.[3] (AOB/26-27, 42, 44-45) In another example, a Congressman introduced legislation tailored to meet the needs of a donor one day after receiving a $1,000 contribution from the donor.[4]

In New York, a state legislator was convicted of accepting, among other things, a $2,000 campaign contribution in exchange for assisting businessmen with opening an adult daycare center in his

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[2] *See., e.g., Nixon*, 528 U.S. at 393 (relying in part on newspaper reports cited by district court to determine that "this case does not present a close call requiring definition of whatever the State's evidentiary obligation may be").

[3] *See* Susan Jacobson, *County Commissioner Mildred Fernandez Arrested on Bribery Charges*, Orlando Sentinel, April 27, 2010, https://goo.gl/DL925W (describing commissioner's arrest for "accept[ing] $1,000 … for speeding a building project through the government planning process").

[4] *See* Usha R. Rodrigues, *The Price of Corruption*, 31 Journal of Law & Politics 45, 49 (2015).

district.[5] In Georgia, a county executive was caught on tape threatening to cancel a local businessman's contract with the county if the businessman did not give a $2,500 contribution to the official's re-election campaign.[6] All of these quid pro quo exchanges took place in jurisdictions with far more people, larger media markets, and consequently higher campaign costs than Alaska. Many other examples have been documented.[7]

Courts ruling on campaign finance and other constitutional questions routinely take account of such information in making determinations of legislative fact. *See, e.g., Wagner v. FEC*, 793 F.3d

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[5] Press Release, U.S. Attorney's Office, Former Assemblyman Eric Stevenson Sentenced in Manhattan Federal Court (May 21, 2014), https://goo.gl/voKPo3.

[6] Rhonda Cook, *Business Owner: Ellis Threatened Him for Campaign Donation*, Atlanta Journal-Constitution, Sept. 17, 2014, https://goo.gl/xhVnT9.

[7] *See, e.g., Preston v. Leake*, 660 F.3d 726, 729 (4th Cir. 2011) (exchange of illegal contribution for state contract); Associated Press, *Carnival Officer Pleads Guilty in Phipps Case*, Star News Online (June 8, 2004), https://goo.gl/lbfPPY; *Green Party of Connecticut v. Garfield*, 590 F. Supp. 2d 288, 305 (D. Conn. 2008) (exchange of illegal contributions for "investing over $500 million of the state's pension funds with certain financial institutions"); Wayne T. Price, *Key Witness Details Allegations in BlueWare Corruption Case*, Florida Today, Apr. 4, 2017, https://goo.gl/Dtc1og (exchange of contributions for state contract).

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, 494-95 & n.11 (1954) (citing multiple psychological studies to support holding that segregated school system was "inherently unequal").

Accordingly, based on precedent and empirical evidence in the public record, this Court can and should reaffirm the legislative fact that large contributions create a risk of corruption or its appearance.

C. Courts Should Consider Jurisdiction-Specific Factors Relating to the Risk and Appearance of Corruption

Even as courts weigh out-of-jurisdiction evidence, they should also weigh jurisdiction-specific factors. Some States are different from others. Relying on qualified expert testimony, the district court found that several factors "make Alaska highly, if not uniquely, vulnerable to corruption." (ER/7) This was an entirely proper consideration.

The district court properly determined here that a single industry dominates the Alaskan economy—indeed, plaintiffs do not dispute that finding. (AOB/42-43) And the significance of that finding is clear: one industry, without significant rivals vying for legislative favor, has the financial incentives and wherewithal to make contributions in exchange for requested government action or inaction. The disparity between the economic power of global corporate entities within that industry and everyone else creates risks of corruption that are unique to Alaska. *See State v. Alaska Civil Liberties Union*, 978 P.2d 597, 617 (Alaska 1999) ("Alaska has a long history of both support from and exploitation by nonresident interests.").

The district court's consideration of the fact that one industry indisputably accounts for a startling proportion of Alaska's entire budget does not mean that the court denigrated or targeted the oil industry, as plaintiffs contend. (AOB/32, 42-43) Rather, it credited expert testimony that the industry's outsized influence over the Alaskan economy, together with the small size of Alaska's legislature and population, meant that the industry had a tremendous incentive to and readily could marshal resources in the form of contributions to secure favorable treatment. (ER/7-8) The experience of individual

legislators corroborated that testimony, further establishing that the risk or appearance of corruption arising from campaign contributions is especially acute in Alaska, warranting limits that are lower than those in other States.

II. Plaintiffs' Attacks on the District Court's Reasoning Are Meritless

Plaintiffs launch a number of attacks on the district court's opinion and findings. While none has merit, the Brennan Center will aim to assist the Court by identifying plaintiffs' key conceptual errors and unfounded assertions.

A. The District Court Properly Considered the Risk of Corruption Arising from Dependency on Large Contributions

Contrary to plaintiff's core contention, the district court did not confuse quid pro quo corruption with influence or access. (AOB/26 ("The district court's fundamental flaw is that it misconstrued what is and what is not corruption as a matter of law.")) Rather, in determining whether Alaska's limits are "closely drawn" to meet the State's permissible anti-corruption objective, the court properly considered whether a candidate who depends on large campaign contributions to finance his or her campaign is more likely to

exchange political favors for large contributions, *i.e.*, engage in conduct constituting quid pro quo corruption, than a candidate who is less dependent on such contributions. (ER/15) The court credited Professor Richard Painter's testimony that Alaska's contribution limits reduce the likelihood that candidates will become dependent on comparatively large donors, thereby decreasing the risk of quid pro quo corruption. (ER/15) This was proper.

Plaintiffs contend that the district court improperly equated "dependency" with "corruption." (AOB/32) But plaintiffs mischaracterize the court's opinion, which explained that dependency on major donors creates a *risk* of quid pro quo corruption—especially in Alaska, where the cost of campaigns is low. (ER/15) Plaintiffs, not the court, conflate "dependency" with "influence," "access," and "ingratiation," as the latter three terms are described by the Supreme Court in *Citizens United*. (AOB/28, 29).

In that case, the Court held that Congress could not limit independent corporate spending on political messages solely in an effort to reduce corporations' access to or influence over elected officials. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010). The question here, however, is whether dependency on large contributions may lead to quid pro quo corruption—not, as plaintiffs

claim, whether the State has an interest in preventing dependency. Plaintiffs are confusing the question of whether the State has asserted a valid interest to justify its contribution limits with the question whether its means for pursuing that interest are "closely drawn." *Buckley v. Valeo*, 424 U.S. 1, 21, 25 (1976). Professor Painter's testimony indicates that they are, and plaintiffs point to no countervailing evidence.

Plaintiffs observe that "talking at a fundraiser or a park bench" could lead to corruption, yet those activities cannot be prohibited or regulated. (AOB/32) But this observation leads nowhere. If plaintiffs mean to suggest that "talking" and making large contributions upon which candidates depend are activities that engender comparable risks of corruption, they are obviously wrong. And if they mean to argue that the government can regulate only "*actual* quid pro quo corruption or its appearance" (AOB/32 (italics modified)), that argument is wrong as well. Restrictions on direct contributions are "preventative," *Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011), *i.e.*, the goal of a contribution limit is to prevent quid pro quo corruption before it occurs.

At bottom, plaintiffs appear to suggest that courts reviewing contribution limits may not consider circumstances that lead to quid

pro quo corruption, but only actual instances in which quid pro quo corruption has happened. But plaintiffs provide no support for their position, and the Second Circuit has explicitly rejected it. *Ognibene*, 671 F.3d at 188 (concluding that "evidence of recent scandals" was not required to justify a contribution limit). Instead, courts regularly look at many factors that could indicate a danger of quid pro quo corruption well beyond the scope of what plaintiffs claim is permissible. *See, e.g.*, *id.* at 189 (considering a report finding that government contractors were more likely to give large donations and more likely to give to incumbents, leading to "an appearance that larger contributions are made to secure … whatever municipal benefit is at issue"); *Wagner*, 793 F.3d at 19, 20 (weighing "the enormous increase in the government's reliance on contractors," which "necessarily poses an increased threat of both corruption and coercion," in upholding federal prohibition on contractor contributions).

Under plaintiffs' flawed understanding of precedent, such commonsense analysis would be improper, and courts would be unable to make a full assessment of the circumstances in which contributions give rise to a risk of corruption or its appearance. This is simply not the law.

B. Statements from Proponents Do Not Show That the Contribution Limit Lacks Narrow Focus

Plaintiffs also contend that Alaska's $500 contribution limit is not narrowly focused on the State's interest in preventing quid pro quo corruption because statements from its proponents indicate that the limit was based on "improper purposes," and thus "'could never be said to focus narrowly on a constitutionally-permissible anti-corruption interest.'" (AOB/39 (quoting *Lair v. Motl*, 189 F. Supp. 3d 1024, 1035 (D. Mont. 2016), *appeal pending*).[8] This argument does not reflect controlling law, which requires courts to examine how contribution limits operate, not statements about the reasons why the limits were passed.

The Court's decision in *Yamada* is instructive. There, the Court found Hawaii's ban on contributions by government contractors to be "closely drawn because it targets … the contributions most closely linked to actual and perceived quid pro quo corruption[,]" 786 F.3d at

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[8] Though plaintiffs accurately describe the court's opinion in *Lair v. Motl*, that decision incorrectly interpreted the law of this Circuit in several respects, and is currently on appeal to this Court. For a more thorough discussion of the district court's errors in *Lair*, see Brief of Amicus Curiae Brennan Center for Justice at NYU School of Law in Support of Appellants and Reversal of the Judgment, *Lair v. Motl*, Ninth Cir. Case No. 16-35424 (9th Cir. Oct. 5, 2016) (dkt. no. 12).

1205-06 (citing *Green Party*, 616 F.3d at 202), despite the fact that 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. And while plaintiffs rely (AOB/39) on the district court opinion in *Lair v. Motl*, *supra*, relating to Montana's contribution limits, they ignore the fact that this Court, in *Montana Right to Life Ass'n v. Eddleman*, upheld Montana's contribution limits and made no mention of the voter information pamphlet that discussed issues other than corruption. 343 F.3d 1085 (9th Cir. 2003).[9] Similarly, in *Ognibene*, the Second Circuit held that contractor contribution limits were narrowly tailored due to "heightened risk of actual and apparent corruption," notwithstanding references in legislative record to other goals. 671 F.3d at 188.

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9 *Eddleman* has been superseded with respect to the definition of corruption it employed, but its approach is still binding precedent. The narrower definition of corruption drawn from *Citizens United* does not affect the method by which the Court should determine whether the statute operates to serve its purpose. And that method does not include examination of whether a ballot measure's proponents argued that contribution limits would have additional benefits beyond protecting against quid pro quo corruption.

Yamada, *Eddleman*, and *Ognibene* are consistent with the Supreme Court's holding in *Buckley*, in which 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. *Buckley* 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) (reaffirming the relevant portion of *Buckley*).[10]

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10 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 indicia 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 was dispositive.

C. The State Is Not Constitutionally Required to Set Limits at the Absolute Highest Level Possible or Index Them for Inflation

Plaintiffs also would hold the State and its voters to a near-impossible standard, finding fault with the challenged law because a "2006 Voter's Pamphlet" did not specify the exact amount at which a "contribution might trigger quid pro quo corruption." (AOB/25, 38-39) But plaintiffs misstate the Court's role in assessing the constitutionality of a contribution limit.

As the district court noted, the Supreme Court in *Buckley* rejected the claim that the $1,000 contribution limit at issue was too low because "much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officer." 424 U.S. at 30. "If it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* Plaintiffs' assertion that the State and its voters must identify the exact level of an activity creating an unacceptable risk in order to show that the law is narrowly focused thus is unfounded. Legislatures and voters need not identify a specific dollar amount that would create an unacceptable corruption risk to justify speech restrictions as narrowly focused, just as legislatures and voters need

not identify a specific decibel level in a noise ordinance that restricts (loud) expression to prevent nuisance.

Plaintiffs warn that unless the State establishes a "nexus" between the specific dollar amount of the limit and preventing quid pro quo corruption, the State could impose any limit or even ban contributions altogether. (AOB/41) But their logic is flawed. The proposition that the State need not identify the "the highest possible contribution limit" (ER/14) does not imply that no limit is too low or that "lower is always better." (AOB/41 (quotation marks omitted))

Some contributions will indeed be too small to create an appreciable risk of corruption or its appearance. A contribution exceeding $500 does not fall in that category. The overwhelming majority of Alaskans who approved the ballot measure at issue here recognized that $1,000—the limit they replaced—was no token amount that most or all candidates could easily accept without returning the favor.[11] Especially in a State with relatively low median contributions and campaign costs, voters were justified in

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[11] Recent examination of campaign contributions shows that, contrary to plaintiffs' assertions, $1,000 contributions can lead to quid pro quo corruption. *See* Rodrigues, *supra* note 4, at 58-63, (documenting pattern of campaign contributions, several of $1,000 or less, that led to favorable legislation).

finding that such an amount created intolerable risks of corruption and the appearance of corruption.

Plaintiffs further assert, based on the plurality opinion in *Randall v. Sorrell*, 548 U.S. 230, 261 (2006), that Alaska's contribution limit is not narrowly focused because it lacks an automatic adjustment for inflation. (AOB/44-45) This contention is part of plaintiffs' broader reliance on *Randall*, despite this Court's ruling that the *Randall* plurality opinion did not change Ninth Circuit law. *See Lair*, 798 F.3d at 747. As the Court stated, "[w]ith no majority opinion, *Randall* cannot serve as the requisite 'controlling authority' capable of abrogating our precedent." *Id.*

Moreover, plaintiffs' inflation-adjustment assertion is just a rehash of their argument that Alaska could have selected higher amounts, *e.g.*, the inflation-adjusted amount that it selected in 1996—about $776. (AOB/44) In any event, the courts have made clear that a "mere failure to index for inflation … does not compel a finding that the provisions are not closely drawn." *Ognibene*, 671 F.3d at 192; *see also In re Cao*, 619 F.3d 410, 423 (5th Cir. 2010) (concluding that the absence of "'such fine tuning does not invalidate the legislation'" (quoting *Buckley*, 424 U.S. at 30)).

D. Plaintiffs' Arguments That Alaska's Contribution Limit Does Not Allow Candidates to Amass Sufficient Resources Are Meritless

Plaintiffs argue that challengers cannot run an effective campaign without "enormous amounts of money." (AOB/49) But they make no attempt to show that the amounts candidates can and do raise are insufficiently enormous to communicate effectively with voters, which is the constitutionally-relevant question. Instead, they recite various truisms, to wit:

- Money is helpful to campaigns. Therefore, all else being equal (a theoretical condition not observed in nature), a campaign with more money has an advantage over a campaign with less money. (AOB/48)
- Because candidates want to win, they spend all the money they receive and then some. (AOB/50)
- And if contribution limits were higher, candidates would raise more money. (AOB/53)

None of these self-evident propositions addresses the relevant question that was satisfactorily addressed by the State and the district court: can candidates campaign effectively in Alaska?

Plaintiffs also argue that contribution limits unfairly benefit incumbents and harm challengers and that "when contribution limits are raised above $1,000 or to unlimited amounts, the percentage of

successful challengers is increased by a statistically significant margin." (AOB/49 (citing ER-303-307; TE-BR)). Plaintiffs are wrong. They cite testimony about a report indicating that a handful of States in a few election cycles had higher contribution limits than Alaska and a lower incumbency success rate than Alaska. (*See* ER-303-307). But this small, hand-picked sampling of data is unpersuasive.

A far more rigorous and comprehensive analysis found that "the tighter the limits, the more competitive the elections." Thomas Stratmann, *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 Election L.J. 125, 126 (2010). Professor Stratmann gathered data from 42 States with single-member districts spanning a period of 26 years. *See id.* at 130-31. He found that "a $500 limit lowers an incumbent's margin of victory by at least 14.2 percent, while a $1,000 limit lowers this margin of victory by at least 9.3 percent in comparison to states with limits and when these limits are above $2,000." *Id.* at 126; *see also* Kihong Eom & Donald A. Gross, *Contribution Limits and Disparity in Contributions Between Gubernatorial Candidates*, 59 Pol. Research Q. 99 (2006) (analyzing contribution limits and finding "no support for an increased bias in

favor of incumbents resulting from the presence of contribution limits").

Plaintiffs also contend that the $500 contribution limit is unconstitutionally low because campaigns in competitive races routinely run deficits. (AOB/50-51) But the fact that campaigns run deficits is by no means an indication that Alaska 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.[12] 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).[13] This reliance on self-funding and

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[12] Center for Responsive Politics, *Where the Money Came From: Election Cycle 2012*, https://goo.gl/I8q59U.

[13] *See* Dave Levinthal, *14 Presidential Candidates Who Still Owe Campaign Debt*, Salon, May 2, 2013, https://goo.gl/mNxjoU (noting

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").

Finally, plaintiffs argue that the $500 contribution limit is unconstitutionally low because potential campaign funds "are not being realized." (AOB/53) But if contribution limits could be struck down simply because some donors prefer to spend more, *no* meaningful limits would be constitutional, because contribution limits are meant to prevent donors from giving dangerously large contributions. All such limits prevent some donors from giving as much as they otherwise would, possibly leaving candidates with somewhat less money. Controlling precedent shows that plaintiffs ask the wrong question: courts must examine the ability of candidates to campaign effectively rather than the potential willingness of donors to give more. *See Eddleman*, 343 F.3d at 1094-95 (recognizing that because candidates often campaigned door-to-

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existing campaign debt from former presidential candidates including Presidents Obama and Clinton).

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"); *Ognibene*, 671 F.3d at 186 n.12 ("Whether 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.").

In sum, plaintiffs' arguments that Alaska's $500 contribution limit does not allow candidates to amass sufficient resources to wage effective campaigns are meritless.

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In the final analysis, plaintiffs' true position is perhaps best summed up by their declaration that contribution limits cannot be narrowly focused on preventing quid pro quo corruption because the proper remedy for corruption is for officials "to develop and exercise … self-fortitude." (AOB/46) Plaintiffs are perfectly entitled to hold this view, but not to have it mandated under the Constitution. Many Alaskans, like many Americans, doggedly promote candidates with the "self-fortitude" to resist corruption. Yet, rather obviously, Alaska voters (and the U.S. Supreme Court in *Buckley*) concluded that *some*

elected officials are, in fact, unable to resist engaging in misconduct. The People of Alaska are entitled to take reasonable steps *to prevent* corruption or the appearance of corruption in government before it takes hold, which is exactly what they did.

CONCLUSION

This Court should affirm the district court's judgment and hold that Alaska's contribution limits are constitutional.

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Respectfully submitted,

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