Docket No. 16-35424

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUG LAIR, et al.

Appellees,

v.

JONATHAN MOTL, in his official capacity as Montana Commissioner of Political Practices, TIMOTHY FOX, in his official capacity as Montana Attorney General, and LEO GALLAGHER, in his official capacity as Lewis and Clark County Attorney,

Appellants.

On Appeal from the Final Order and Judgment
of the United States District Court for the District of Montana
(Hon. Charles C. Lovell, Presiding)

District of Montana Case No. 6:12-cv-00012-CCL

APPELLANTS' OPENING BRIEF

TIMOTHY FOX
Montana Attorney General
DALE SCHOWENGERDT
Solicitor General
MATTHEW T. COCHENOUR
PATRICK M. RISKEN
Assistant Attorneys General
Montana Department of Justice
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
Fax: (405) 444-3549
mcochenour2@mt.gov

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES
Cont.

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
Cont.

OTHER AUTHORITIES

TABLE OF AUTHORITIES
Cont.

INTRODUCTION

Since the United States Supreme Court decided *Buckley v. Valeo*, 424 U.S. 1 (1976) four decades ago, it has been well settled that states may enact contribution limits to prevent quid pro quo corruption and the appearance of corruption. *See McCutcheon v. Federal Election Commn.*, 134 S. Ct. 1434, 1441 (2014) (plurality). Contribution limits are not a punitive measure; rather, they are preventative. *Citizens United v. Federal Election Commn.*, 558 U.S. 310, 357 (2010). A state's interest in preventing corruption is not limited to preventing actual quid pro quo arrangements but includes preventing the appearance of corruption stemming from the public's awareness of "the opportunities for abuse." These principles are nothing new—they are settled law.

Following this Court's remand in *Lair v. Bullock* (*Lair II*), 798 F.3d 736 (9th Cir. 2015), however, the district court did not follow settled law, but instead imposed a higher standard. The court discounted Montana's interest in preventing the appearance of corruption, instead adopting an analysis that would require states to demonstrate actual corruption. The court's incorrect application of constitutional standards led it to make factual and legal errors and to wrongly conclude that Montana's contribution limits were unconstitutional.

Montana's contribution limits serve the State's interests in preventing quid pro quo corruption and its appearance. They are aimed at the recognized

corrupting influence of large, direct contributions. They do not prevent a contributor from associating with a candidate. Nor do they prevent a candidate from amassing resources to engage in effective advocacy. Under the framework set forth in *Montana Right to Life PAC v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), and *Lair II*, Montana's limits are constitutional. Thus, Montana asks this Court to reverse the district court and uphold its contribution limits.

STATEMENT OF JURISDICTION

The *Lair* Plaintiffs-Appellees (Lair) challenged Montana campaign finance statutes under the First Amendment to the United States Constitution, and the district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. Following cross-motions for summary judgment, the court held unconstitutional Montana's contribution limits on individuals, political committees, and political parties, and permanently enjoined Montana from enforcing the limits. ER 32-35. The order disposed of all parties' claims and constitutes a final order. The court entered its order and judgment on May 17, 2016. *Id*. On May 19, 2016, Appellants (Montana) timely filed a notice of appeal pursuant to Fed. R. App. P. 4(a)(1). ER 1-3. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether the district court incorrectly ruled that the contribution limits set forth in Mont. Code Ann. §§ 13-37-216(1), (3), and (5), did not further a sufficiently important state interest, were not closely drawn, and were thus unconstitutional,

ADDENDUM

The following constitutional provisions, statutes, and rules are set forth verbatim in the addendum to this brief: U.S. Const. amend. I; Mont. Code Ann. § 13-37-216 (2011); Mont. Admin. R. 44.11.225; and Mont. Admin. R. 44.11.227.

STATEMENT OF THE CASE AND FACTS

Montana's Contribution Limits

In rejecting a constitutional challenge to federal contribution limits, the United States Supreme Court determined that preventing "the actuality and appearance of corruption resulting from large individual financial contributions" is a constitutionally sufficient justification for contribution limits. *Buckley*, 424 U.S. at 26. After *Buckley*, several states moved to enact flat $100 limits, regardless of the race or the office sought. ER 101 (*Eddleman* Tr., Jon Motl). Montana did not follow the trend, and instead sought to amend existing contributions limits in a manner consistent with *Buckley*. ER 96-99.

Montana's limits were amended in 1994 through Citizen's Initiative I-118. *See Eddleman*, 343 F.3d at 1087. The new limits were based on historical data and targeted only the top 10 percent of contributions. ER 104-05, 109; *also Eddleman*, 343 F.3d at 1094. I-118 reduced Montana's limits for individuals and political committees and increased the limits for political parties. *Compare* Mont. Code Ann. § 13-37-216 (1993) *with* Mont. Code Ann. § 13-37-216 (1995).[1] After I-118, the limits applied to each election, rather than to the election cycle. Mont. Code Ann. § 13-37-216 (1995). Montana's limits are adjusted for inflation using the consumer price index. *See* Mont. Code Ann. § 13-37-216(3) (2011).

Prior to the district court's order, individuals and political committees could contribute in each election up to $660 to a gubernatorial candidate, $330 to candidates running for other statewide office, and $170 to candidates running for other public offices, including for the state house and senate. Mont. Admin. R. 44.11.227. Political parties and their affiliated committees could aggregate their funds to contribute up to $23,850 to a gubernatorial candidate, $8,600 to candidates running for other statewide offices, $3,450 to candidates for public

[1] For example, under the 1993 statute, individuals could contribute $400 to a state senator for the election cycle and political committees and political parties could contribute $600. Under the 1995 statute, individuals and political committees could contribute $100 to a state senator per election and political parties could contribute $800.

service commissioner, $1,400 to candidates for state senate, and $850 to candidates running for other public office, including for the state house. *Id*.[2]

Montana campaigns are relatively inexpensive, particularly when compared to campaigns in other states or in the federal system. ER 270-71 (Bender Suppl, Charts 5-1, 5-2); *also Eddleman*, 343 F.3d at 1095. Montana's limits apply only to direct contributions to candidates. There are no limits on how much candidates can contribute to their own campaigns; there are no limits on how much an individual can give to political party committees or PACs; and there are no limits on how much a political committee can give to political committees or PACs. ER 216 (Contribution Limits Summary).

While Montana's limits cap the dollar amount that contributors can give, they do not prevent contributors from affiliating with a candidate in other ways, such as volunteering, going door-to-door, making phone calls, writing letters, maintaining a blog, and hosting fund-raisers. *See, e.g.*, ER 162-64 (*Lair* Tr., Doug Lair). Further, in addition to providing financial support, political parties help candidates by hosting training seminars, developing campaign messages, organizing volunteers, scheduling events, and identifying known donors to streamline fund-raising efforts. ER 132 (*Lair* Tr., John Milanovich); ER 190-92

[2] In its order, the district court referred to the limits in place in 2011, which were applicable when this lawsuit began. The limits cited reflect the inflationary factor, which is applied by statute. *See* Mont. Code Ann. § 13-37-216.

(*Lair* Tr., Edwin Bender). Political parties have higher limits than other political committees and individual donors. Mont. Code Ann. § 13-37-216; *Lair II*, 798 F.3d at 741. Additionally, political parties can further their associational interests by providing candidates with assistance from paid staffers, whose salaries are not subject to contribution limits. Mont. Admin. R. 44.11.225.

The Ninth Circuit Upheld Montana's Contribution Limits in Eddleman

In 2000, Montana's contribution limits were challenged by some of the same parties and attorneys involved in this case. The district court upheld Montana's limits, and this Court affirmed. *Eddleman*, 343 F.3d 1085. *Eddleman* established the test for measuring the constitutionality of contribution limits:

> 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 on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign.

Eddleman, 343 F.3d at 1092.

Based upon *Nixon v. Shrink Missouri Govt. PAC*, 528 U.S. 377 (2000), *Eddleman* observed that a state's interest in preventing actual or apparent corruption included the threat of politicians who are "too compliant" with large contributors' wishes. *Eddleman*, 343 F.3d at 1092. This Court held that the evidence presented supported "Montana's interest in avoiding corruption or the

appearance of corruption," and that Montana's interest was "neither illusory or conjectural." *Id*. at 1093. Judge James A. Teilborg, who dissented in part, agreed that Montana had demonstrated a constitutionally sufficient interest and that the limits were tailored to "preventing improper influence, and quid pro quo arrangements arising from large contributions." *Id*. at 1099 (Teilborg, J., dissenting in part.) *Eddleman* also held that Montana's contribution limits were closely drawn because the limits affected only large contributions; they did not prevent donors from affiliating in ways other than direct contributions or from independently supporting a candidate; and because Montana candidates were able to amass the resources necessary for effective advocacy. *Eddleman*, 343 F.3d at 1094-95.

The Current Lawsuit

In 2011, Lair filed this lawsuit and alleged, among other things, that Montana's contribution limits were unconstitutional. In October 2012, the district court struck down Montana's limits based on its view that it was not bound by *Eddleman*. *Lair v. Bullock* (*Lair I*), 697 F.3d 1200, 1202 (9th Cir. 2012). This Court stayed the district court's ruling because Montana was "likely to succeed on appeal." *Id*. On the merits, this Court reversed and remanded. *Lair II*, 798 F.3d 736.

Lair II reaffirmed *Eddleman*'s test for analyzing whether contribution limits are constitutional. However, this Court viewed *Citizens United* as narrowing the meaning of corruption that had been deemed a sufficient interest in *Eddleman*, and stated that, after *Citizens United*, "'corruption' means only quid pro quo corruption, or its appearance." *Lair II*, 798 F.3d at 746. This Court remanded for the district court to measure Montana's contribution limits under this standard. The Opinion provided Montana the "opportunity to develop a record aimed at the new 'important state interest' standard as well as the corresponding 'closely drawn' analysis." *Lair II*, 798 F.3d at 748 n.8.

In the district court, Montana presented evidence to support its sufficiently important state interest and that its limits were appropriately tailored. Regarding the sufficient interest, Montana developed a record based on a combination of evidence previously presented in the *Eddleman* and *Lair* proceedings, recent state court decisions finding that legislative candidates had engaged in quid pro quo corruption, and testimony from a Montana state senator and the Commissioner of Political Practices. *See* ER 61-215, 217-55, 279-98. Additionally, Lair admitted that "Montana, like all other states, has an interest in preventing corruption," and that "[i]n addition to an interest in preventing quid pro quo corruption, Montana, like all other states has an anti-circumvention interest, so long as the law being circumvented is an otherwise constitutional law." ER 343-45.

From *Eddleman*, Montana presented testimony from Representative Hal Harper, who testified that groups funneled money into campaigns before a vote "because it gets results." ER 89. Representative Harper testified that contributors who make "substantial donations to campaigns feel—I think they know—that there's a connection between support and between outcome and bills." *Id*. Montana also presented evidence of a confidential letter written by Senator Mike Anderson to his colleagues when he was trying to get a bill passed. The letter explained that an upcoming bill was important to a large insurance PAC, that the senator had been able to keep the PAC's money "coming our way," and that the legislators should keep the PAC's money "in our camp." ER 115. A fellow senator testified that the letter was "unconscionable": "remind[ing] people that they received money and therefore should pass [the bill], and even to suggest that if they vote for it they'll get more money, it just tainted the bill." ER 118.

Montana also presented more recent evidence supporting its anti-corruption interest. State Senator Bruce Tutvedt testified that, in 2009, he and fellow Republican senators were informed that if they introduced and voted on a right-to-work bill, then the National Right to Work group would make at least $100,000 available to elect Republican majorities. ER 280. The senators rejected the offer. *Id*. Montana also provided recent state court decisions in which Montana courts determined that legislative candidates had engaged in quid pro quo

corruption. *See* ER 217-240 (*Commissioner of Political Practices v. Boniek*, XADV-2014-202 (1st Jud. Dist. Mont. 2015)); ER 241-255 (*Commissioner of Political Practices v. Prouse*, DDV-2014-250 (1st Jud. Dist. Mont. 2016)). Both *Boniek* and *Prouse* were default judgments that were not appealed.

Additionally, in *Molnar v. Fox*, 301 P.3d 824 (Mont. 2013), the Montana Supreme Court found quid pro quo arrangements in the context of "gifts" and elected officials. Further, during summary judgment briefing below, a Montana jury found that a state legislator, who was one of Lair's witnesses, had taken illegal corporate contributions. ER 284-85. Montana also presented expert witness testimony from the Commissioner of Political Practices, who found evidence that, as in *Boniek* and *Prouse*, several 2010 candidates engaged in quid pro quo arrangements by pledging "100% support" for particular corporate groups' legislative agendas in exchange for the groups orchestrating large-scale campaign plans for the candidates. ER 294-98.

Regarding, "closely drawn" tailoring, Montana showed that its limits were narrowly focused because they aim at only large, direct contributions to candidates. Further, while Montana's limits cap direct contributions, they leave contributors free to affiliate with candidates in other ways. As for whether candidates can amass necessary resources, Montana presented the testimony from *Eddleman* witnesses who testified that they could raise the money necessary for their

campaigns by talking to more people. *E.g.*, ER 79 (Secretary of State Mike Cooney); ER 86 (Representative Hal Harper); ER 70-71 (Representative Larry Grinde).

Montana also presented evidence showing that the contribution limits did not prevent Representative Mike Miller from engaging in effective advocacy. Miller was Lair's primary witness on this question. ER 207-08. Miller ran for office four times and won every time. ER 262 (Bender Suppl.). Perhaps even more importantly, in all of Miller's races combined, only seven out of the hundreds of contributors reached the limit. ER 274 (Bender Suppl., Chart 6-3). Miller could have sought additional contributions from the pool of his known donors who had given below the maximum. ER 262-63 (Bender Suppl.). Even Lair's expert Clark Bensen agreed that known contributors are more likely to give again compared with someone who has not donated. ER 135. Additionally, Miller never received the maximum contribution from a political party, and he never asked a political party for assistance from paid staffers. ER 145, 157-58 (*Lair* Tr., Mike Miller); ER 274 (Bender Suppl., Chart 6-4).

Notwithstanding Montana's evidence, the district court determined that Montana had not demonstrated a sufficiently important state interest. It reached this conclusion based on its view that the candidates in the State's examples had rejected the potentially corrupt offers. ER 22-23 (Order). According to the court,

these rejections showed that "Montana politicians are relatively incorruptible." ER 23. The court appeared to acknowledge that Montana had shown that opportunities for abuse existed, but nonetheless rejected that Montana had shown an interest in preventing the appearance of corruption: "the evidence shows that despite a hand-full of opportunities, legislators chose to keep their noses clean." ER 23. The court further determined that Montana's limits were not "closely drawn" because, in the court's view, they were not narrowly focused and candidates could not amass the resources necessary for effective advocacy. ER 24-28.

Based on Montana law, the district court's summary judgment ruling effectively reinstated the contribution limits that existed before I-118. *See, e.g.*, *State ex rel. Woodahl v. District Ct.*, 511 P.2d 318, 322 (Mont. 1973) (unconstitutional amendment to a law "leav[es] the section intact as it had been before the attempted amendment."); *accord* 51 Op. Att'y Gen. 2 (Mont. 2005) Mont. AG LEXIS 2 (effect of judicial decision invalidating state constitutional amendments is to restore the constitution's language as it existed before the invalid amendments). Because the limits on political parties that existed before I-118 were lower than those struck down by the district court, Montana sought a stay of the district court's ruling as it pertained to political parties, which the court granted. ER 36-39.

Montana now appeals the district court's order striking as unconstitutional Montana's contribution limits on individuals, political committees, and political parties.

SUMMARY OF THE ARGUMENT

For 40 years, it has been well settled that contributions can be limited because preventing corruption or the appearance of corruption constitute sufficiently important state interests. There is nothing novel about large contributions posing a threat of corruption; in fact, the United States Supreme Court has long viewed the threat of corruption as *inherent* in a system of large contributions. But, while the threat of corruption is inherent, most contributions do not involve quid pro quo arrangements. Accordingly, the Court recognizes that, unlike a criminal statute, contribution limits are preventative. Though contribution limits can impact First Amendment rights, courts do not apply strict scrutiny when assessing the constitutionality of contribution limits, but instead apply a "relatively complaisant" review.

The district court sharply departed from these established legal principles when it struck down Montana's contribution limits. Rather than accepting as a matter of law Montana's interest in preventing actual or apparent corruption, the court adopted an evidentiary standard that required examples of actual corruption,

even though the challenged limits have been in place since 1994. What's more, when Montana presented evidence of corruption through testimony from Montana legislators, the district court dismissed it out of hand, stating that, notwithstanding "a hand-full of opportunities, legislators chose to keep their noses clean." *Id*. at 20. In other words, the district court acknowledged that Montana had shown a legitimate state interest in preventing the appearance of corruption but then rejected it because the court viewed it as falling short of actual corruption.

In adopting an overly stringent and incorrect state-interest standard that requires actual corruption, the court ignored the preventative nature of contribution limits. If the standard that the district court applied to Montana's limits were correct, it is unlikely that even *Buckley*'s examples of corruption would pass muster. The impact of affirming the district court on this issue would go far beyond Montana; the court's unduly high standard jeopardizes all states' contribution limits. The court was wrong, and this Court must correct the error.

The district court also ignored both United States Supreme Court and Ninth Circuit precedent in considering whether Montana's limits were closely drawn. Rather than assess whether Montana's limits focus narrowly on large, direct contributions as *Buckley* requires, the court looked to the "pros" and "cons" arguments contained in a 1994 voter information pamphlet and decided that combatting corruption was not the actual purpose of Montana's contribution limits

and thus Montana's limits "could never be said to focus narrowly" on a constitutional interest. ER 24. By ignoring Supreme Court precedent in favor of a voter pamphlet, the court engaged in the wrong analysis and failed to follow *Buckley* and the *Eddleman* test. Under the proper inquiry, Montana's limits are narrowly focused.

The district court further erred when it determined that candidates could not amass sufficient resources to engage in effective advocacy. The court discounted or ignored data showing that campaigns had significant sources for contributions, and the court ignored the testimony from actual candidates who stated that the limits did not negatively impact their ability to campaign. Instead, the court incorporated its analysis from its 2012 order—an order this Court has already noted as having "sufficient problems[.]" *Lair I*, 697 F.3d at 1214. By adopting its earlier analysis, the district court failed to address the problems in its previous order and instead only compounded its errors.

The court failed to correctly apply the *Eddleman* test to Montana's contribution limits. Montana asks this Court to apply the correct constitutional analysis, uphold Montana's limits, and reverse the district court.

STANDARD OF REVIEW

The parties filed cross-motions for summary judgment on the constitutionality of Montana's contribution limits. The district court denied Montana's motion and granted Lair's motion, holding that Montana's contribution limits on individuals, political committees, and political parties were unconstitutional. ER 32-35.

This Court reviews *de novo* the district court's decision on cross motions for summary judgment. *Trunk v. City of San Diego*, 629 F.3d 1099, 1105 (9th Cir. 2011). Viewing the evidence in the light most favorable to the nonmoving party, this Court determines whether any genuine issues of material fact exist and whether the district court correctly applied the law. *Id.*

ARGUMENT

THE DISTRICT COURT ADOPTED AND APPLIED AN INCORRECT HEIGHTENED STANDARD TO MEASURE WHETHER MONTANA HAD AN INTEREST IN PREVENTING ACTUAL OR APPARENT QUID PRO QUO CORRUPTION, AND IT ERRED IN DETERMINING THAT MONTANA'S LIMITS WERE NOT CLOSELY DRAWN.

Contribution limits are not held to the same high constitutional standard as expenditure limits. Instead, courts assess the constitutionality of contribution limits under a "relatively complaisant" review. *Federal Election Commn. v. Beaumont*, 539 U.S. 146, 161 (2003). The reason for this less stringent standard is

that, unlike an expenditure limit, a contribution limit "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21. Contributions are not direct speech; rather they are general expressions of support. *Id*. at 21. A contribution limit "permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id*. The "overall effect" of contribution limits is that candidates must get contributions from more donors, and donors who have given the maximum must engage in other forms of political expression. *Id*. at 21-22.

Contribution limits are constitutional if they further a sufficiently important state interest and if they are closely drawn. *Buckley*, 424 U.S. at 25; *McCutcheon*, 134 S. Ct. at 1444. In *Eddleman*, the Ninth Circuit distilled this standard into a multi-part framework, which *Lair II* affirmed. A court must uphold a state's contribution limits 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 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 II, 798 F.3d at 748.

Lair II determined that, after *Eddleman*, *Citizens United* had narrowed the meaning of corruption, Montana's "sufficiently important state interest," such that

a remand was necessary, but it did nothing to change the tailoring factors that *Eddleman* had found were satisfied. *Id*. at 747-48.

On remand, Montana developed a record supporting its interest in preventing quid pro quo corruption and its appearance. Montana also showed that its limits satisfied the tailoring factors. The district court rejected Montana's contentions and ruled that Montana had not demonstrated a sufficiently important state interest and that Montana's contribution limits could *never* satisfy the tailoring framework. ER 23-24. The district court applied the wrong standards and reached the wrong results.

A. The District Court Erred In Requiring Montana to Provide Evidence of Actual Corruption to Support Its Legitimate State Interest in Preventing Corruption and the Appearance of Corruption.

In the district court, Montana unambiguously articulated that preventing quid pro quo corruption or its appearance were the interests that it was advancing in support of its contributions limits. The Supreme Court has long recognized these interests as legitimate. *See Buckley*, 424 U.S. at 26. Further, the Court has long recognized that contribution limits are a constitutional means to address these interests. *McCutcheon*, 134 S. Ct. at 1441 ("Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption.").

In the district court, Lair admitted that "Montana, like all other states, has an interest in preventing corruption" and in preventing circumvention. ER 344-45. Based on the case law and Lair's admissions, the district court should have simply determined that Montana's limits furthered a constitutionally sufficient interest and then moved on to consider tailoring.

Instead, the district court waded into whether Montana had presented sufficient evidence to justify its interest and then rejected Montana's evidence based on the court's view that it fell short of actual corruption. ER 22-23. The court was wrong on the law and the facts. As a matter of law, Montana's limits further the sufficiently important interests of preventing actual and apparent corruption. Moreover, if additional evidence were required, Montana provided sufficient evidence supporting that its limits further its anti-corruption interest.

1. As a Matter of Law, Montana's Contribution Limits Further the State's Interest in Preventing Actual and Apparent Corruption.

Preventing corruption or its appearance is a constitutional justification for contribution limits. The Supreme Court has made this clear in numerous cases beginning with *Buckley* and continuing through its most recent contribution limits case. *See Buckley*, 424 U.S. at 26; *McCutcheon*, 134 S. Ct. at 1441. Montana is entitled to rely on existing case law as evidence to support that its contribution limits protect against actual and apparent corruption. *See Jacobus v. Alaska*,

338 F.3d 1095, 1112-13 (9th Cir. 2003) (relying on Supreme Court's decision in *Federal Election Commn. v. Colorado Republican Fed. Campaign Comm.* (*Colorado II*), 533 U.S. 431 (2001) for a "compelling account of the danger of corruption inherent in unlimited soft money contributions" to political parties); *Citizens for Clean Government v. City of San Diego*, 474 F.3d 647, 654 (9th Cir. 2007) (observing that government could not rely on case law to support an anti-corruption interest in the ballot measure context because there was none: the City "has no recourse to legal authority addressing these exact issues because none exists.").

Here, ample case law supports that contribution limits further the important state interest of preventing actual corruption *and* the appearance of corruption. *Buckley* recognized that "large contributions" "given to secure political quid pro [quos] from current and potential office holders" undermined the integrity of representative democracy. *Buckley*, 424 U.S. at 26-27. In politics, the "hallmark of corruption is the financial quid pro quo: dollars for political favors." *McCutcheon*, 134 S. Ct. at 1441 (quoting *Federal Election Commn. v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)). However, while the proof of actual dollars for favors may result in criminal proceedings, contribution limits serve a different purpose than criminal laws. The Court has recognized that the vast majority of contributions do not actually involve

quid pro quos; thus "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements." *Citizens United*, 558 U.S. at 357.

The Supreme Court's view of corruption is not limited to actual, demonstrable quid pro quo corruption. Rather, *Buckley* understood corruption as encompassing the "appearance of improper influence" and the public's perception of opportunities for abuse: "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse *inherent* in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27 (emphasis added). This Court has determined that the appearance of corruption remains a valid constitutional justification for contributions limits and that neither *Citizens United* nor *McCutcheon* overruled this holding from *Buckley*. *United States v. Whittemore*, 776 F.3d 1074, 1081 (9th Cir. 2015).

The Supreme Court's concern with the appearance of corruption is highlighted in the "deeply disturbing" examples of corruption that *Buckley* referenced. *See Buckley*, 424 U.S. at 27 n.28. One example cited by the *Buckley* court of appeals described the dairy organizations' relationship to President Nixon's fundraisers. The court noted that, after meeting with industry representatives, the President overruled a decision by the Secretary of Agriculture

in a way favorable to the industry. *Buckley v. Valeo*, 519 F.2d 821, 839-40 n.36 (D.C. Cir. 1975). Before the public announcement, the White House informed the dairymen that it wanted them to reaffirm a $2 million pledge. *Id.* Notably, it was disputed whether the President's decision actually was tied to the financial pledge; however, the court found it immaterial "whether the President's decision was in fact, or was represented to be conditioned upon or 'linked' to, the reaffirmation of the pledge." *Id*. The Court's corruption concerns also extended to illegal corporate contributions, attempts to gain "governmental favor in return for large campaign contributions," and a link between large contributions and the appointment of ambassadors. *See Buckley*, 519 F.2d at 839-840, nn. 36-38; *Buckley*, 424 U.S. at 27.

Further, "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (citation omitted). Under *Buckley*, contribution limits are a constitutional means to serve a state's interest in preventing quid pro quo arrangements and to mitigate the "appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25; *Citizens for Clean Government*, 474 F.3d at 652. While preventing a contributor

from obtaining "generic" or "mere" influence with a candidate may not be a valid theory of corruption, *see McCutcheon*, 134 S. Ct. at 1441, the Court certainly has not endorsed "improper" or "undue" influence as being essential to representative democracy.

The Supreme Court's recent decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), does not undermine the understanding of corruption discussed above. *McDonnell* arose after former Virginia Governor Robert McDonnell was convicted of bribery for accepting loans and gifts in exchange for committing, or agreeing to commit, an official act. *See McDonnell*, 136 S. Ct. at 2361. The question on appeal was whether the district court correctly instructed the jury on what constitutes an "official act," a term included in the criminal statutes. *Id*. Ultimately, the Court determined that for something to qualify as an "'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so." *Id*. at 2372.

McDonnell has nothing to do with contribution limits, but rather dealt with the correctness of a criminal conviction for bribery. Thus, it has limited, if any, relevance to this case as Montana does not have to prove the elements of criminal bribery to support its contribution limits. Further, unlike criminal bribery laws, which punish actual corruption that has already taken place, contribution limits are

a constitutional means to prevent actual or apparent corruption from occurring. *See Citizens United*, 558 U.S. at 357 (noting the preventative nature of contribution limits).

Nonetheless, Montana's evidence of quid pro quo corruption or its appearance consisted of "official acts" even within the meaning of the statutes at issue in *McDonnell*. As discussed in detail below, Montana presented a legislator's testimony that groups donate more money to campaigns when an issue was approaching; a legislator's letter to his colleagues urging them to vote for a bill because it was important to a PAC, and he wanted to keep the PACs' money flowing to the party; and a legislator's testimony that campaigns would receive money if he and other legislators introduced and voted on a bill. Though drafting and voting on legislation are not the only "official acts" that legislators perform, they are perhaps the quintessential ones. Even if *McDonnell* were relevant, Montana's evidence supported an interest in preventing corruption in the context of actual or apparent quid pro quos involving official acts.

Montana's interests in preventing corruption also extends to political parties. *See Colorado II*, 533 U.S. at 455 (party occupies "same position as some individuals and PACs, as to whom coordinated spending limits have already been held valid . . . ."). The Court recognizes that "parties continue to organize to elect candidates, and also function for the benefit of donors whose object is to place

candidates under obligation . . . ." *Id*. at 455. Further, the "parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits" that are binding on individuals and political committees. *Id*. In Montana, no limits cap how much individuals and political committees can donate to a party, and so the limits on political parties' contributions to a candidate serve to prevent circumvention. *Id*. at 456.

The bottom line is this: as a matter of law, preventing corruption and the appearance of corruption and circumvention are valid state interests, and contribution limits further that interest. Further, "corruption" includes actual quid pro quo arrangements, such as an exchange of "dollars for political favors," *McCutcheon*, 134 S. Ct. at 1450, and the appearance of corruption that comes from the public's awareness of the opportunities for this type of abuse, *Buckley*, 424 U.S. at 27.

Montana's interest in having its contribution limits upheld is preventing quid-pro-quo corruption or the appearance of corruption. That is the interest Montana advanced in the district court, and it is the interest Montana advances here in the Ninth Circuit. There is nothing novel about Montana's interest, and it is well accepted by the Supreme Court. Even Lair has admitted that Montana has an interest in preventing quid pro quo corruption. ER 344-45. Given the law and the

facts, the district court was wrong to conclude that Montana's limits did not further a sufficiently important state interest.

2. Montana Presented Sufficient Evidence to Justify Its Interest in Preventing Actual and Apparent Corruption.

The quantum of evidence necessary to justify contribution limits depends on the "novelty and plausibility of the justification raised." *Citizens for Clean Govt.*, 474 F.3d at 652. Montana's burden is low because preventing corruption and the appearance of corruption in the context of direct contributions to candidates is "neither novel nor implausible"; rather, it is the ultimate state interest. *Id.* at 652-53 ("The paradigmatic sufficient state interest under *Buckley* is the prevention of corruption, or the appearance of corruption, in the political process."). Notably, the federal government and most states have enacted contribution limits. *See* ER 270-71 (Bender Suppl., Charts 5-1, 5-2). And, as discussed above, Montana may rely on court decisions addressing the same issues. *Citizens for Clean Govt.*, 474 F.3d at 654.

Further, the Supreme Court has recognized that it can be difficult to gather evidence to support existing statutes. *See Colorado II*, 533 U.S. at 457. "[N]o data can be marshaled to capture perfectly the counterfactual world in which" an existing campaign finance law does not exist. *McCutcheon*, 134 S. Ct. at 1457. Thus, the Court looks to "whether experience under the present law confirms a

serious threat of abuse." *Id*. (quoting *Colorado II*, 533 U.S. at 457). Here, the challenged limits have been effective since 1994, and thus, in addition to Montana's evidence of actual or apparent corruption, evidence showing serious threats of abuse under existing law also supports upholding Montana's limits.

In the district court, Montana presented evidence from the *Eddleman* trial as well as more recent evidence to support its interest in preventing quid pro quo corruption or its appearance. From the *Eddleman* record, Montana presented the testimony of Representative Hal Harper, who testified that groups "funnel[] more money into campaigns when certain special interests know an issue is coming up, because it gets results." ER 89. Harper did not say money gets "access" or "influence"; he said it gets "results." Harper testified that "people that make substantial donations to campaigns feel—I think they know—that there's a connection between support and between outcome and bills." *Id*. Harper was describing quid pro quo corruption or, at the least, its appearance.

Montana also presented evidence of a confidential letter that Senator Mike Anderson sent to his party-colleagues, urging them to vote for a bill so that PAC money would continue to flow to the party. The letter stated:

> Dear Fellow Republicans. Please destroy this after reading. Why? Because the Life Underwriters Association in Montana is one of the larger Political Action Committees in the state, and I don't want the Demo's to know about it! In the last election they gave $8,000 to state candidates. . . . Of this $8,000—Republicans got $7,000—you probably got something from them. This bill is important to the

> underwriters and I have been able to keep the contributions coming our way. In 1983, the PAC will be $15,000. Let's keep it in our camp.

ER 115; *see also Eddleman*, 343 F.3d at 1093. Anderson was trying to get a bill passed when he sent the letter. ER 111.

A fellow senator testified that the letter was "unconscionable" and was not the right way to pass a bill: "to remind people that they received money and therefore should pass it, and even to suggest that if they vote for it they'll get more money, it just tainted the bill. It was totally unacceptable." ER 118. When the letter became public, Senator Anderson sent another, which only reinforced the content of the first. In it, he reminded legislators that the PAC had an "active base of support" in each of the legislators' communities, that voting for the bill would make sense from "all aspects" of their next campaigns, and that voting for the bill would "be most appreciated by your local life underwriter." ER 121.

Lair II observed that these examples from *Eddleman* satisfied an understanding of corruption that was broader than quid pro quo corruption. *See Lair II*, 798 F.3d at 872 ("Neither we nor the district court relied on a holding that Montana showed exclusively quid pro quo corruption or its appearance."). That is unsurprising given that the Supreme Court understood "corruption" as including quid pro quo corruption *and* the "broader threat from politicians too compliant with the wishes of large contributors." *Eddleman*, 343 F.3d at 1092 (quoting

Shrink Missouri, 528 U.S. at 389).[3] Once the *Eddleman* courts determined that the evidence satisfied the broader interest, there was no reason to go on to answer the unnecessary constitutional question of whether the quid pro quo interest was also satisfied. *See United States v. Raines*, 362 U.S. 17, 21 (1960) (citation omitted) (courts are bound by two rules: "one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.")

Moreover, that *Eddleman* found these examples sufficient to satisfy a broader understanding of corruption does not alter that they are also examples of quid pro quo corruption. Notably, Judge Teilborg agreed that Montana's limits were tailored to "the significant interest of preventing improper influence, *and quid pro quo arrangements* arising from large contributions." *Eddleman*, 343 F.3d

[3] Notably, though *Lair II* interpreted *Citizens United* as abrogating *Eddleman*'s sufficient interest, the Supreme Court has not overruled numerous decisions involving constitutional challenges to contribution limits wherein the Court interpreted corruption more broadly. *See, e.g.*, *Colorado II*, 533 U.S. at 440-41 (contribution limits are "more clearly justified" than other kinds of limits due to the connection to corruption, which is "understood not only as quid pro quo agreements, but also as undue influence on an officerholder's [sic] judgment, and the appearance of such influence."); *Beaumont*, 539 U.S. at 155-56 (same); *McConnell v. FEC*, 540 U.S. 93, 143 (2003), *overruled in part*, *Citizens United*, 558 U.S. 310 (corruption not limited to "cash-for-votes exchanges," or "'confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.'") (quoting *Shrink Missouri*, 528 U.S. at 389.

at 1099 (Teilborg, J., dissenting in part) (emphasis added). Implicit in both Representative Harper's testimony and the testimony surrounding Senator Anderson's letter is that money was being exchanged for political favors: donating money got "results"; senators should vote for a bill because of past donations and potential future donations. These are examples of quid pro quo corruption. At the least, they demonstrate the opportunity for abuse and thus the appearance of corruption.

Montana also presented the district court with evidence since *Eddleman* that supported its interest in preventing actual and apparent corruption. Senator Bruce Tutvedt testified that, in 2009, he and other Republican senators were informed that, if they introduced and voted on a right-to-work bill, then the National Right to Work group would make at least $100,000 available to elect Republican majorities in the next election. ER 280. According to Senator Tutvedt, the group of legislators rejected the offer. *Id*. However, the offer of the quid pro quo illustrates that opportunities for abuse exist and demonstrates the appearance of corruption.

Montana also presented the district court with Montana court decisions that addressed quid pro quo arrangements and found examples of quid pro quo corruption. For example, in *Molnar v. Fox*, 301 P.3d 824 (Mont. 2013), the Montana Supreme Court held that a Public Service Commissioner unlawfully

accepted financial gifts from power companies because the gifts "would tend to improperly influence a reasonable person in [the Commissioner's] position." *Molnar*, ¶ 30. Similar to the *Buckley* examples, the Court's inquiry was "not whether the gifts, in fact, influenced [the Commissioner] to depart from the faithful and impartial discharge of his public duties (a subjective standard), but, rather whether the gifts would tend to improperly influence a 'reasonable person' in [his] position (an objective standard)." *Molnar*, ¶ 29. While *Molnar* did not involve contribution limits, it demonstrates the presence of quid pro quo corruption and its appearance in Montana.

In the contribution-limits context, Montana presented the *Boniek* and *Prouse* decisions, in which state district courts ruled that 2010 legislative candidates engaged in quid pro quo corruption. *See* ER 217-40 (*Boniek*); ER 241-55 (*Prouse*). In both cases, the courts determined that the candidates exhibited quid pro quo corruption by accepting large corporate contributions in return for promising 100 percent support for the corporations' agenda: "What Candidate Boniek received, then, (the quid) was the appearance of a grass roots campaign created by direct mail for which he did not pay, report or disclose. What Candidate Boniek promised in return (the pro quo) for that benefit was unswerving fealty to the corporations carrying out the direct mail campaign[.]" ER 238 (*Boniek*); *accord* ER 253-54 (*Prouse*). Under Mont. Code. Ann. § 2-2-103, holding public

office is a public trust, and officeholders must perform their duties for the "benefit of the people of the state." These courts determined that pledging loyalty to the corporations corrupted the public trust. ER 239, 254-55. Both *Boniek* and *Prouse* were default judgments. To date, neither candidate has filed a notice of appeal of the rulings against them.[4]

Montana's Commissioner of Political Practices also submitted a report in which he described evidence of how several 2010 candidates engaged in quid pro quo arrangements by pledging "100% support" for particular corporate groups' legislative agendas in exchange for the corporate groups orchestrating a large scale campaign plan on the candidates' behalves. ER 294-98. Most of the candidates filed declarations below disputing the Commissioner's claims; however, their declarations revealed that most were involved in ongoing state litigation with the Commissioner's office over campaign finance violations or had already paid fines and settled their cases. *See* ER 302-03, 307, 314, 319, 323, 326, 330, 335. Significantly, seven days after one of Lair's legislator-witnesses signed his declaration, a Montana jury found that the legislator had violated campaign finance laws, including accepting illegal corporate contributions. ER 284-85.

[4] Prouse filed a declaration in this case disputing the *Prouse* court's finding. Lair's counsel attempted to obtain a similar declaration from Boniek; however, Boniek declined to provide a declaration. ER 338.

In total, of the candidates cited in the report, two have court decisions finding that they engaged in quid pro quo corruption (Boniek and Prouse); one has a jury verdict finding that he took illegal corporate contributions (Wittich); one has a court judgment accepting that the candidate will pay a $4,000 fine and refrain from seeking public office for office for four years (Miller); one settled by paying a $19,599 fine (Kennedy); one settled by paying a $500 fine (Sales), and three are still involved in litigation (Bannan, Murray, and Wagman).[5] If the Commissioner's report, the candidates' declarations, the court orders, and the candidate's settlements do not amount to evidence showing actual or apparent corruption, they at least show that there is a "serious threat of abuse" even under the current laws. *McCutcheon*, 134 S. Ct. at 1457. Thus, they support upholding Montana's contribution limits.

The district court rejected Montana's evidence. Rather than accepting Lair's admissions, settled case law, and Montana's evidence and arguments in support of its sufficiently important state interest, the district court determined it all fell short.

[5] The *Boniek* and *Prouse* decisions are located at ER 217-40 and 241-55. The judgments and settlement agreements are available on the Commissioner of Political Practices website at the following links:
Art Wittich: http://politicalpractices.mt.gov/content/2recentdecisions/WittichJudgment; Mike Miller: http://politicalpractices.mt.gov/content/2recentdecisions/WardvMillerFinalSettlement;
Dan Kennedy: http://politicalpractices.mt.gov/ content/2recentdecisions/BonogofskyvKennedySettlement; Scott Sales: http://politicalpractices.mt.gov/content/2recentdecisions/MadinvSalesSettlementAgreement.

According to the court, the "sticking point" with Montana's evidence was that "the quids in each one of the cited instances were either rejected by, or were unlikely to have any behavioral effect upon, the individuals toward whom they were directed." ER 22. Because the offers were rejected, the court determined that they could not be examples of actual corruption. *Id.*

But the court went beyond its actual-corruption analysis and determined that, "perhaps more importantly," the rejections meant that the evidence could not show "appearances of corruption" and that, "if anything, the evidence shows that Montana politicians are relatively incorruptible." ER 22. In other words, the district court ruled that Montana had not established an important state interest based on the court's determination that Montana had not provided evidence of actual corruption.

By adopting and applying a quid pro quo standard that required Montana to prove actual corruption, the district court's analysis departed sharply from the Supreme Court's understanding of actual and apparent corruption. In particular, the district court's analysis wholly ignored that the "impact of the appearance of corruption stemming from public awareness of the opportunities for abuse" constitutes a constitutionally sufficient justification for contribution limits. *Whittemore*, 776 F.3d at 1081 (quoting *Buckley*, 424 U.S. at 26-27).

The district court's myopic view of corruption is evident in its treatment of Montana's evidence. Regarding Senator Anderson's letter—which urged a vote on particular legislation based on a PAC's contributions—the district court stated that legislators "denounced" the letter. ER 22. Certainly, *some* legislators denounced Senator Anderson's letter, which is likely why it became public, but the record is silent on what others did. What is known, however, is that Senator Anderson's letter was published in the Montana press, *see Eddleman*, 343 F.3d at 1093, and that the letter "remind[ed] people that they received money and therefore should pass" the bill and even "suggest[ed] that if they vote for it they'll get more money[.]" ER 118. There can be no doubt that the public was aware of the "opportunities for abuse" and that Senator Anderson's letter and the testimony presented about the letter showed the appearance of corruption. Similarly, that Senator Tutvedt and his colleagues rejected an offer to introduce and vote on a bill in exchange for $100,000 does not change that there was the opportunity for quid pro quo abuses.

Perhaps the most troubling aspect of the district court's order is that the court acknowledged that opportunities for corruption existed, but then incongruously ruled that Montana had failed to show the appearance of corruption. The court stated: "the evidence shows that despite a hand-full of opportunities, legislators chose to keep their noses clean." ER 23. Stated in terms of the

sufficiently important interest, the district court essentially acknowledged that Montana had shown an appearance of corruption. Based on the opportunities for corruption *that the district court recognized* it should have determined that Montana met the first part of the *Eddleman* test.

The district court also rejected Montana's evidence based on the court's view that the legislators whom the Commissioner had identified as engaging in quid pro quo arrangements with National Right to Work would have likely voted "parallel" to the group's agenda anyway. ER 22-23. But this type of reasoning is wholly inconsistent with the *Buckley* examples of corruption, which establish that it is immaterial whether an officeholder's decisions are actually linked to particular contributions. *See Buckley*, 519 F.2d at 839-40 n.36 (D.C. Cir. 1975). Further, the district court's reasoning ignores the preventative nature of contribution limits. There is no need to analyze a candidate's voting record relative to each of the candidate's contributors because, as the Supreme Court has recognized, "few if any contributions to candidates will involve quid pro quo arrangements." *Citizens United*, 558 U.S. at 357.

In sum, there is nothing novel about direct campaign contributions posing a threat of corruption; the threat is inherent. *Buckley*, 424 U.S. at 27. Thus, Montana's evidentiary burden is low. The corruption examples discussed above are not illustrations of "mere influence" or democracy in action; rather, they fall

much closer to the "disturbing" examples identified in *Buckley*. They are examples of actual quid pro quo corruption and the "opportunities for abuse" that give rise to the appearance of corruption. Further, they illustrate that, even under existing law, there is a "serious threat of abuse." *McCutcheon*, 134 S. Ct. at 1457. The federal and state court decisions, the evidence presented in *Eddleman*, the testimony of Montana's Commissioner of Political Practices, the candidates' declarations and settlements, and the testimony of Senator Tutvedt establish that Montana has a sufficiently important state interest in preventing quid pro quo corruption and its appearance and that the contribution limits—which are in place at the federal level and most states—further that interest.

B. The District Court Applied Incorrect Legal Standards and Ignored Key Material Facts When It Assessed Whether Montana's Limits Were "Closely Drawn."

Contribution limits are "closely drawn" if they "(a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign." *Lair II*, 798 F.3d at 748. Contribution limits should be upheld unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice beyond the level of notice, and render contributions pointless." *Shrink Missouri*, 528 U.S. at 397. While *Lair II* determined that the corruption interest had been narrowed, it expressly upheld the "'closely drawn'

analysis" from *Eddleman*. *Lair II*, 798 F.3d at 747. *Eddleman*'s fact findings have not been disturbed and its tailoring analysis remains valid when applied to the narrower corruption interest.

The district court agreed with Montana that the contribution limits did not prevent contributors from associating with candidates, but the court determined that Montana's limits were not narrowly focused and that they prevented a candidate from amassing sufficient resources for effective advocacy. ER 23-24. The district court's determinations on the first and third factors were incorrect. The district court ignored *Buckley*'s analysis for determining whether limits are closely drawn and, instead, applied a form of strict scrutiny to Montana's contribution limits. The court also ignored testimony from actual candidates who testified that the limits did not prevent them from amassing necessary resources. Applying the correct standards to the evidence presented, Montana's limits are closely drawn.

1. Montana's Limits Focus Narrowly on the State's Interest.

Montana's contribution limits are narrowly focused because they limit only relatively large, direct contributions to candidates. In *Buckley*, the Court upheld contribution limits and, in determining that the limits were appropriately tailored, stated that the limits "focus[] precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and

potential for corruption have been identified . . . ." *Buckley*, 424 U.S. at 28. This Court reached the same conclusion in upholding a contribution ban in *Yamada v. Snipes*, 786 F.3d 1182, 1186 (9th Cir. 2015) (contribution ban was closely drawn "because it targets direct contributions" to candidates, "the contributions most closely linked to actual and perceived quid pro quo corruption.").

McCutcheon similarly recognized that base limits were constitutional because "they targeted 'the danger of actual quid pro quo arrangements' and 'the impact of the appearance of corruption stemming from public awareness' of such a system of unchecked direct contributions." *McCutcheon*, 134 S. Ct. at 1451 (quoting *Buckley*, 424 U.S. at 27). *McCutcheon* observed that "the risk of quid pro quo corruption is generally applicable only to 'the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder.'" *McCutcheon*, 134 S. Ct. at 1452 (citation omitted). The Court is deferential regarding dollar amounts and, if a limit is justified, the Court will not invalidate it for lack of "fine tuning[.]" *See Buckley*, 424 U.S. at 30.

This Court has already found that Montana's limits reach only relatively large contributions. *Eddleman*, 343 F.3d at 1094 (agreeing with district court that Montana's contribution limits affect only the largest contributions). Further, comparing Montana's limits to federal limits reveals that, as a matter of percentages, Montana's contribution limits are higher than the comparable federal

limits, which have been upheld. In 2010, for example, the average cost of a federal House seat in Montana was $858,848 and the contribution limit was $4,800 per election cycle. ER 271 (Bender Suppl., Chart 5-2). As a percentage, the federal limit was .56 percent of the average raised for a federal House seat. *Id*. By contrast, the average cost of a state House seat was $8,231 and the contribution limit was $320 per election cycle. ER 270 (Bender Suppl., Chart 5-1). As a percentage, the state contribution limit was 3.89 percent of the average raised for a state House seat. *Id*. Contrasting the percentages, Montana's contribution limits are nearly seven times higher than federal limits. Further, depending on the office, limits for political parties range from 5 to 36 times higher than the limits for individuals and political committees. Mont. Admin. R. 44.11.227. Thus, relative to Montana's elections, the limits affect only large contributions.

Moreover, Montana's limits apply only to direct contributions from individuals, political committees, and political parties to candidates. The limits do not affect how much candidates can contribute to their own campaigns. They do not limit how much individuals or political committees can contribute to a political committee or to a political party. *See* Mont. Code Ann. § 13-37-216; ER 216 (Contribution Limits Summary). They do not limit independent spending. Because there are no limits on contributions to political party committees, the limits on party contributions to a candidate also serve to prevent circumvention of

individual contribution limits, which is a well-recognized form of corruption. *Colorado II*, 533 U.S. at 456.

The district court did not question that Montana's limits only applied to large, direct contributions. Instead, the court determined that Montana's limits "could never be said to focus narrowly on a constitutionally-permissible anti-corruption interest because they were expressly enacted" to reduce influence and level the playing field, rather than to address quid pro quo corruption. ER 24. In reaching this conclusion, the court chose to "look no further than the Montana Secretary of State's voter information pamphlet" from the 1994 election. *Id*.

In striving to discern the actual purpose of the law from a voter's pamphlet, the district court departed from the Supreme Court's standards and applied a form of strict scrutiny, which has no place in analyzing the constitutionality of contribution limits. As discussed above, contribution limits receive a "relatively complaisant" review. *See Beaumont*, 539 U.S. at 161. Further, under *Buckley*, contribution limits that focus on large contributions—"the narrow aspect of political association where the actuality and potential for corruption have been identified"—are narrowly focused limits. *Buckley*, 424 U.S. at 28. As demonstrated above, under the correct standard, Montana's limits limit only large, direct contributions to candidates and, thus, they are narrowly focused.

2. Montana's limits do not prevent candidates from amassing the resources necessary to engage in effective advocacy.

The third "closely drawn" factor looks to the impact that contribution limits have on a candidate's ability to engage in political advocacy. *Buckley* observed that contribution limits could severely impact political discourse if they prevented a candidate from "amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21; *accord Eddleman*, 343 F.3d at 1091. Requiring candidates to raise funds from more sources, however, does not violate the First Amendment. *Eddleman*, 343 F.3d at 1091 (quoting *Buckley*, 424 U.S. at 21-22) ("If a candidate is merely required 'to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression,' the candidate's freedom of speech is not impugned by limits on contributions."). When analyzing tailoring, courts must consider "all dollars likely to be forthcoming in a campaign" and whether a "candidate can look elsewhere for money[.]" *Eddleman*, 343 F.3d at 1094 (citing *Buckley*, 424 U.S. at 21-22).

In the district court, Montana presented evidence from *Eddleman* as well as more recent evidence establishing that Montana's limits do not prevent candidates from amassing the resources necessary to engage in effective advocacy. For example, in *Eddleman*, Secretary of State Mike Cooney testified that the "biggest

impact" of contribution limits was that he had "to go out and talk to a lot more people, and I'm chasing probably more, smaller contributions[.]" ER 79. Cooney acknowledged that candidates must spend significant time raising money, but he viewed the time as valuable: "I think as you're out there talking to people, and they're people that can probably write you a check for $10 or $15, that's good contact to make. And so I guess I figure if I can talk to more of those people, that would be beneficial to my campaign." ER 80. Cooney turned the time spent raising money "into an advantage as in going out and making greater contact with the people." ER 83. He didn't feel the contribution limits had harmed his candidacy. ER 80. Representative Hal Harper similarly testified that the contribution limits had "negligible effects" on the ability to raise money. ER 86. The limits weren't a "big issue"; they just required talking "to more people to raise the same amount of money." *Id*.

Even the *Eddleman* plaintiffs' witnesses' testimony showed that candidates could get the funds necessary for effective advocacy by raising money from more people. For example, Representative Larry Grinde stated that he had to go to more donors to raise the same amount of money. ER 70. At one point, Grinde stated that he won elections even though his campaigns were ineffective. ER 73. But he later clarified that his campaigns were not ineffective and that he could raise whatever money he needed so long as he did the necessary work: "I didn't mean

that they were ineffective. I mean I did what I had to to win. If my opponents would have been tougher and I felt that I needed to, I would have raised more money, gone out and done the work that I needed to to run that effective campaign against the opponent." ER 76. Though Senator Ric Holden claimed it was harder to get his message out, he admitted to actually raising more money under the new limits. ER 63, 66; *Eddleman*, 343 F.3d at 1095. The Ninth Circuit agreed with the district court's finding that candidates were able to mount effective campaigns, notwithstanding the limits. *Eddleman*, 343 F.3d at 1095.

Additional evidence confirms that candidates can still amass the resources needed. Montana's expert witness, Edwin Bender, the executive director of the National Institute on Money in State Politics,[6] testified that Montana's electoral process is healthy. Specifically, he testified that there is significant participation in elections, campaigns are competitive, and candidates can amass the necessary resources to mount an effective campaign. ER 195-96. Bender compared current data with that presented in *Eddleman* and determined that no significant changes had occurred in donor participation or the health of Montana's elections. ER 184. Further, numerous witnesses testified that effective campaigns are not solely about money, but about developing a network of supporters and volunteers, door-to-door campaigning, and "boots on the ground." *E.g.*, ER 124-26 (Beaverhead County

[6] www.followthemoney.org

Republican Central Committee Representative Jim Brown); ER 152-54 (Representative Mike Miller); ER 171-73 (Commissioner of Political Practices Jim Murry); ER 187 (Ed Bender).

Data that tracks contributions to candidates also supports that limits do not prevent candidates from amassing necessary resources. For example, in the 2010 elections for the Montana House, 4,469 individuals gave below the maximum but above the $35 reporting threshold, and 1,402 individuals contributed the maximum to candidates who ran in a single election. ER 265 (Bender Suppl., Chart 2-1). Plaintiffs' and Defendants' experts agreed that individuals who contribute once are more likely to contribute again. ER 135 (Clark Bensen); ER 179-80 (Ed Bender). Thus, the 4,469 individuals who gave below the maximum represent a significant potential source for additional contributions.

Further, under Montana law, candidates need not itemize or report contributions below $35. Mont. Code Ann. § 13-37-229. In the races just discussed, the amount of unitemized contributions was $75,366, meaning that more than $75,000 came from donations of less than $35. ER 265 (Bender Suppl., Chart 2-1). Assuming an average $20 contribution, there were 3,768 below-threshold donors. Donors who contribute below the reporting threshold are another valuable source for repeat donations. ER 179-80. Thus, the 3,768 potential donors represented a significant source for additional contributions.

Political parties provide another source for candidates to amass resources. In the 2010 legislative races, political parties gave the maximum financial contribution to only 22 percent of the candidates. ER 268 (Bender Suppl., Chart 4-1). Most candidates could look to political parties for additional contributions. Moreover, witnesses testified that political parties can provide additional resources; they can train candidates, help candidates develop their message, organize volunteers, develop issues, schedule events, and provide information about previous contributors to facilitate fundraising. ER 132 (John Milanovich); ER 190-92, 203-04 (Ed Bender). Political parties can also associate with candidates by providing assistance from paid staffers, whose wages are not subject to contribution limits. Mont. Admin. R. 44.11.225.

The testimony from Lair's witness, Representative Mike Miller, and the contribution-data relating to his campaigns also showed that candidates could amass the necessary resources. Lair relied heavily on Miller's testimony, and he was Appellees' principal witness on whether candidates could raise enough resources; when the court asked "Plaintiff about any testimony where a candidate has indicated through testimony that the contribution limits prevented that individual from amassing the resources necessary for an effective campaign," counsel responded: "To answer your specific question, Representative Miller." ER 207-08. Miller lamented that the contribution limits had stayed the same while

the costs of pencils, postage stamps, yard signs, and gasoline had increased. ER 142. Lair represented that Miller could not raise the amount of money necessary to send out as many mailings as he wanted and that he had a "significant number of maxed out donors" who would have given more if they could. ER 209.

This Court has already reviewed Miller's testimony and characterized it as being "near anecdotal testimony . . . ." *Lair I*, 697 F.3d at 1213. But in addition to being anecdotal, Miller's testimony was not credible. A review of the contributions to Miller's campaigns establishes that, whatever problems Miller may have thought he had getting his message out, they weren't caused by contribution limits. For example, in Miller's 2008 campaign, not one individual reached the contribution limit and only one PAC did. ER 274 (Bender Suppl., Chart 6-3). Thirty individuals gave below the limit and were a potential source for additional donations. *Id*. Further, Miller received $596 dollars in unitemized donations, which translates into an additional 29 potential contributors if a $20 average contribution is assumed. *Id*. Similarly, in Miller's 2010 campaign, only one individual maxed out, while 51 gave below the limit. *Id*. Miller received $500 in unitemized contributions, which represents another 25 potential donors, assuming a $20 average contribution. *Id*.

In all four of Miller's successful campaigns combined, *only 7 individuals maxed out*, while 140 gave below the limit and above the reporting threshold.

ER 274 (Bender Suppl., Chart 6-3). Additionally, Miller received $2,056 in unitemized contributions. *Id*. Assuming a $20 average contribution, this number represents an additional 102 donors. Notably, when Miller's contributors are tallied, they amount to only about half of one percent of the voting age population in Miller's district. ER 273 (Bender Suppl., Chart 6-2). But even that is an overstatement because nearly half of Miller's contributors did not even live in his district. ER 262. Regardless, the contributors who gave below the limit and who gave unitemized contributions were sources that Miller could look to for addition contributions if necessary. In any event, it strains credulity to suggest that the contribution limits prevented Miller from amassing sufficient resources to wage an effective campaign when he won every election he ever entered and, out of hundreds of donors, *only seven* gave the maximum contribution.[7]

Miller also never received the maximum contribution from a political party, and he never asked for assistance from paid staffers. ER 274 (Bender Suppl., Chart 6-4); ER 139, 145, 157 (Mike Miller). Thus, the political party was another source Miller could have looked to for contributions. Additionally, Miller received

[7] Miller attempted to rebut these facts by asserting that he actually had eight donors max out in 2008 and 2010, five in 2012, and nine in 2014, but he arrived at these numbers by using the limits for a single election with an uncontested primary. ER 310-11 (Mike Miller); ER 341-42 (Ed Bender). Miller's numbers ignored that three of his races involved contested primaries, and when a primary is contested, the "amount an individual may contribute to a candidate doubles[.]" *Lair I*, 697 F.3d at 1211 (citation omitted); Mont. Code Ann. § 13-37-216(5).

less than the maximum aggregate PAC contributions allowable under Mont. Code Ann. § 13-37-218 (a statute Lair did not challenge) in his 2010 and 2014 campaigns. ER 274 (Bender Suppl., Chart 6-3); ER 139 (Mike Miller). Thus, in these elections, PACs were another source for contributions.

The district court ignored this evidence. The court's analysis of this tailoring factor contains no discussion, or even mention, of the candidates who testified that Montana's contribution limits did not limit their abilities to amass the resources necessary. There is no mention of Secretary of State Cooney, Representative Harper, Senator Holden, Representative Grinde, or even Representative Miller—all witnesses who actually ran for office in Montana. *See* ER 25-28. Notwithstanding the significant evidence to the contrary, the district court pronounced that most campaigns were insufficiently funded. The court determined that candidates spend more than they raise, that donors would give more if the limits were higher, and that more funds would be available to the candidates with higher limits. ER 26-27.

To be clear, Montana has no doubt that if there were higher contribution limits, some candidates would take more money and some donors would give more money. That is presumably true. After all, contribution limits limit contributions. Further, some candidates may spend more than they raise. But it does not follow that these campaigns are inadequately funded. It is common knowledge that many

candidates, including presidential candidates, spend their own money in pursuit of office. Further, in the words of Representative Grinde, if "I felt that I needed to, I would have raised more money, gone out and done the work that I needed to to run that effective campaign against the opponent." ER 76. The evidence before the district court made clear that there are no shortage of sources for financial contributions.

In sum, the district court engaged in the wrong analysis. Whether candidates would take more money if they could or donors would give more money if they could are irrelevant inquiries. The question isn't whether contribution limits might make a campaign different than the candidate would like, but whether they make the candidate's campaign ineffective. *Eddleman*, 343 F.3d at 1095. That is why courts consider all the dollars likely to be forthcoming and whether a candidate can look to other sources for donations. *Id*. at 1094.

The district court also misplaced its reliance on Lair's expert witness, Clark Bensen. In its order, the court cited Bensen's testimony that 29 percent of contributors in the campaigns he looked at had given the maximum contribution and that the contributions amounted to about 44 percent of the funds raised in itemized contributions. ER 26. The problem with these numbers, and with Bensen's testimony in general, is that he failed to take into account how Montana campaigns function and the impact of unitemized donations below the

$35 reporting threshold. In particular, Bensen completely disregarded the impact of below-threshold donors. ER 134-36. As discussed above, these donors play a huge role in Montana elections and are a major source for potential contributions. Significantly, even Bensen agreed that, had he included unitemized donors in his analysis, the percentages that he arrived at regarding potential donors would go down. ER 136. And not just by a little; they would go down "precipitously." *Id*. The district court did not acknowledge or take into account Bensen's significant qualifications or admissions but simply accepted his overinflated numbers.[8]

In *Lair I*, this Court stated that it was "concerned that the evidence the district court received and credited . . . does not adequately account for the revenues actually available to candidates." *Lair I*, 697 F.3d at 1211. The Court specifically pointed to unitemized donations as an example of how Montana's contributions could be understated. *Id*. The district court's order did nothing to address this Court's concerns and, if anything, only accentuated the errors contained in the first order.

[8] According to news accounts, Bensen recently admitted erring in overestimating how much campaigns might lose due to contribution limits as an expert in a case challenging Alaska's contribution limits. *See* Alex DeMarban, "*Error" by expert witness marks second day of campaign contributions trial*, Alaska Dispatch News (April 26, 2016), available online at: http://www.adn.com/politics/article/error-witness-marks-second-day-campaign-contributions-trial/2016/04/27/.

The evidence presented in district court—the testimony of candidates and experts, the data from election contributions, and the law allowing parties to make financial contributions and to associate through paid staffers—shows that Montana's contribution limits do not prevent candidates from amassing the resources necessary to engage in effective advocacy. Candidates may have to look to more sources for contributions, but this is the "overall effect" of contribution limits, and it does not amount to a constitutional infirmity. *Buckley*, 424 U.S. at 22.

CONCLUSION

Montana's contribution limits further the sufficiently important state interest of preventing corruption and the appearance of corruption and they are appropriately tailored under the closely drawn standard. For the reasons set forth above, this Court should reverse the district court's ruling striking Montana's limits as unconstitutional.

STATEMENT OF RELATED CASES

Appellees are unaware of any cases pending in the Ninth Circuit within the meaning of Ninth Circuit Rule 28-2-6.

Respectfully submitted this 28th day of September, 2016.

TIMOTHY FOX
Montana Attorney General
MATTHEW T. COCHENOUR
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Matthew T. Cochenour*
MATTHEW T. COCHENOUR
Assistant Attorney General
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: September 28, 2016

/s/ Matthew T. Cochenour
MATTHEW T. COCHENOUR
Assistant Attorney General
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I certify that this document is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 11,798 words, excluding certificate of service and certificate of compliance.

Dated: September 28, 2016

/s/ Matthew T. Cochenour
MATTHEW T. COCHENOUR
Assistant Attorney General
Counsel for Appellants

Docket No. 16-35424

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUG LAIR, et al.

Appellees,

v.

JONATHAN MOTL, in his official capacity as Montana Commissioner of Political Practices, TIMOTHY FOX, in his official capacity as Montana Attorney General, and LEO GALLAGHER, in his official capacity as Lewis and Clark County Attorney.

Appellants.

On Appeal from the Final Order and Judgment
of the United States District Court for the District of Montana
(Hon. Charles C. Lovell, Presiding)
District of Montana Case No. 6:12-cv-00012-CCL

ADDENDUM

Constitution of the United States

Amendment 1 - Freedom of Religion, Press

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Montana Code Annotated (2011)

13-37-216. Limitations on contributions -- adjustment. (1) (a) Subject to adjustment as provided for in subsection (4), aggregate contributions for each election in a campaign by a political committee or by an individual, other than the candidate, to a candidate are limited as follows:

(i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed $500;

(ii) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $250;

(iii) for a candidate for any other public office, not to exceed $130.

(b) A contribution to a candidate includes contributions made to the candidate's committee and to any political committee organized on the candidate's behalf.

(2) (a) A political committee that is not independent of the candidate is considered to be organized on the candidate's behalf. For the purposes of this section, an independent committee means a committee that is not specifically organized on behalf of a particular candidate or that is not controlled either directly or indirectly by a candidate or candidate's committee and that does not act jointly with a candidate or candidate's committee in conjunction with the making of expenditures or accepting contributions.

(b) A leadership political committee maintained by a political officeholder is considered to be organized on the political officeholder's behalf.

(3) All political committees except those of political party organizations are subject to the provisions of subsections (1) and (2). For purposes of this subsection, "political party organization" means any political organization that was represented on the official ballot at the most recent gubernatorial election. Political party organizations may form political committees that are subject to the following aggregate limitations, adjusted as provided for in subsection (4), from all political party committees:

(a) for candidates filed jointly for the offices of governor and lieutenant governor, not to exceed $18,000;

(b) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $6,500;

(c) for a candidate for public service commissioner, not to exceed $2,600;

(d) for a candidate for the state senate, not to exceed $1,050;

(e) for a candidate for any other public office, not to exceed $650.

(4) (a) The commissioner shall adjust the limitations in subsections (1) and (3) by multiplying each limit by an inflation factor, which is determined by dividing the consumer price index for June of the year prior to the year in which a general election is held by the consumer price index for June 2002.

(b) The resulting figure must be rounded up or down to the nearest:

(i) $10 increment for the limits established in subsection (1); and

(ii) $50 increment for the limits established in subsection (3).

(c) The commissioner shall publish the revised limitations as a rule.

(5) A candidate may not accept any contributions, including in-kind contributions, in excess of the limits in this section.

(6) For purposes of this section, "election" means the general election or a primary election that involves two or more candidates for the same nomination. If there is not a contested primary, there is only one election to which the contribution limits apply. If there is a contested primary, then there are two elections to which the contribution limits apply.

History: En. 23-4795 by Sec. 1, Ch. 481, L. 1975; amd. Sec. 67, Ch. 365, L. 1977; R.C.M. 1947, 23-4795; amd. Sec. 253, Ch. 571, L. 1979; amd. Sec. 1, I.M. No. 118, approved Nov. 8, 1994; amd. Sec. 1, Ch. 462, L. 2003; amd. Sec. 1, Ch. 328, L. 2007; amd. Sec. 1, Ch. 94, L. 2009.

Administrative Rules of Montana

44.11.225 LIMITATIONS ON CONTRIBUTIONS FROM POLITICAL PARTY COMMITTEES

(1) Political committees formed by "political party organizations," as that phrase is defined in 13-1-101, MCA, are subject to the aggregate contribution limits, which include in-kind contributions and expenditures, established in 13-37-216, MCA. Such committees are "political party committees," and include all county central committees, city central committees, clubs, and other committees, that fit within the definition of "political committee" in 13-1-101, MCA, and were formed by a political party organization.

(2) Candidates shall be responsible for monitoring contributions from political party committees to ensure that the contribution limits are not exceeded.

(3) For the purposes of determining compliance with political party contribution limits established pursuant to 13-37-216, MCA, a "contribution" does not include a coordinated expenditure made solely by a political party committee in the form of provision of personal services by paid staff of the political party that benefit the associational interest of the political party but also constitute reportable election activity benefitting a particular candidate of the same political party.

History: 13-37-114, MCA; IMP, 13-37-216, MCA; NEW, 1995 MAR p. 2048, Eff. 9/28/95; AMD, 2001 MAR p. 2049, Eff. 10/12/01; TRANS and AMD, from ARM 44.10.333, 2016 MAR p. 28, Eff. 1/9/16.

44.11.227 LIMITATIONS ON INDIVIDUAL AND POLITICAL PARTY CONTRIBUTIONS TO A CANDIDATE

(1) Pursuant to the calculation specified in 13-37-216, MCA, limits on total combined contributions by a political committee, other than a political party committee, or by an individual to candidates are as follows:

(a) candidates filed jointly for governor and lieutenant governor may receive no more than $660;

(b) a candidate for other statewide office may receive no more than $330;

(c) a candidate for all other public offices may receive no more than $170.

(2) Pursuant to the operation specified in 13-37-216, MCA, limits on total combined contributions from political party committees to candidates are as follows:

(a) candidates filed jointly for governor and lieutenant governor may receive no more than $23,850;

(b) a candidate for other statewide offices may receive no more than $8,600;

(c) a candidate for Public Service Commission may receive no more than $3,450;

(d) a candidate for senate may receive no more than $1,400;

(e) a candidate for all other public offices may receive no more than $850.

(3) Pursuant to 13-37-216 and 13-37-218, MCA, all contributions must be included in computing these limitation totals, except the personal services exemption found in ARM 44.11.401.

(4) A candidate may make unlimited contributions to his or her own campaign, but shall report and disclose each contribution and expenditure according to these rules.

History: 13-37-114, MCA; IMP, 13-37-216, 13-37-218, MCA; NEW, 2008 MAR p. 1034, Eff. 5/23/08; AMD, 2010 MAR p. 560, Eff. 2/26/10; AMD, 2011 MAR p. 2545, Eff. 11/26/11; AMD, 2013 MAR p. 2318, Eff. 12/13/13; TRANS and AMD, from ARM 44.10.338, 2016 MAR p. 28, Eff. 1/9/16.