No. 16-35424

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUG LAIR, *et al.*,

Plaintiffs-Appellees,

v.

JONATHAN MOTL, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Montana
Civil Action No. 6:12-cv-00012-CCL

BRIEF FOR *AMICUS CURIAE* CAMPAIGN LEGAL CENTER SUPPORTING DEFENDANTS-APPELLANTS AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Campaign Legal Center is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Campaign Legal Center neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of The Campaign Legal Center.

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STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center is a nonprofit, nonpartisan organization that represents the public interest in administrative and legal proceedings to promote the enforcement of governmental ethics, campaign finance, and election laws. *Amicus* submits this brief because of our concern about the harm that could result if this Court were to affirm the district court decision, which runs counter to long-settled precedent and would jeopardize countless state laws limiting direct contributions to candidates.

INTRODUCTION

Even the plaintiffs in this case concede that "Montana, like all other states, has an interest in preventing corruption." ER 344. And yet the district court here has chosen to adjudicate that which is not in dispute: the connection between base contribution limits and the governmental interest in combatting quid pro quo corruption and its appearance. ER 4-34.

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[1] Appellants and Appellees have consented to the filing of this brief. No party's counsel or other person authored this brief, in whole or in part, or contributed money to fund its preparation or submission.

When the plaintiffs first brought this case, their central challenge to Montana's base contribution limits was that the limits are "too strict" and "too low"—an argument that goes to whether the limits are properly tailored, not to the sufficiency of Montana's anti-corruption interest.[2] In 2012, the district court considered that question and struck down Montana's limits as unconstitutionally low under the First Amendment, relying principally on its belief that the plurality opinion in *Randall v. Sorrell*, 548 U.S. 230 (2006), had abrogated this Court's decision in *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003). This Court initially stayed that ruling, *Lair v. Bullock*, 697 F.3d 1200, 1202 (9th Cir. 2012) ("*Lair I*"), and on the merits, reversed and remanded, *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015) ("*Lair II*").

In *Lair II*, this Court was concerned that *Eddleman* improperly focused on whether Montana's contribution limits were tailored to further the broad interest in "combat[ting] improper *influence*, or the appearance thereof," 798 F.3d at 746, rather than to the state's

[2] All references to corruption in this brief refer to the "quid pro quo" variety.

undisputed interest in avoiding actual and apparent quid pro quo corruption.

Therefore, the question on remand was not whether Montana's base limits are justified by the anti-corruption interest, but whether they are properly tailored to in fact advance this interest—because there is no real dispute that "base limits" advance the governmental interest in preventing quid pro quo corruption and its appearance. Since *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court has consistently treated the substantiality of these interests as self-evident. *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), did nothing to disturb this precedent. *Citizens United* may have clarified that the anti-corruption interest identified in *Buckley* "was limited to quid pro quo corruption," 558 U.S. at 356, but it in no way questioned that *base contribution limits* were designed to prevent this type of corruption. On the contrary, both decisions emphasized that base limits, as opposed to limits on expenditures or aggregate contributions, have long been upheld "as serving the permissible objective of combatting corruption." *McCutcheon*, 134 S. Ct. at 1442.

The district court opted to break from this well-settled law. Once again, it struck down Montana's voter-enacted contribution limits—but this time, not because of a finding that the limits were "too low," but based on the extraordinary conclusion that Montana's limits, unlike virtually every other base contribution limit reviewed by the Supreme Court or a lower court, are not justified by an anti-corruption interest. Remarkably, the district court determined that Montana is unique among its sister jurisdictions in that "corruption is nearly absent," "Montana politicians" are "incorruptible," and even those actually convicted of political bribery in Montana could not evidence a threat of corruption because they were "highly likely" to vote the same way with or without the bribes. ER 21-23.

In other words, although preventing quid pro quo corruption and its appearance has been a sufficient justification for every other base limit to come under constitutional challenge, the district court found no demonstrable anti-corruption interest *in Montana*. This blinkered analysis ignores the long history of contribution limits in federal and state laws, and their well-established validity as anti-corruption measures under controlling Supreme Court case law.

SUMMARY OF ARGUMENT

Amicus focuses principally on the district court's analysis of the scope and validity of the state's anti-corruption interest and its evidentiary standards for the substantiation of that interest. *Amicus* will not address the tailoring of the contribution limits, but adopts the analysis of this question as presented in Montana's merits brief. Appellants' Opening Br. 37-52.

First, the district court's analysis is flawed because it effectively considered *de novo* whether Montana's contribution limits advance the governmental interest in preventing quid pro quo corruption or its appearance. But this ignores the long history of campaign contribution limits at the federal and state levels, as well as the Supreme Court's repeated affirmance that contribution limits target quid pro quo corruption. *McCutcheon* and *Citizens United* only reinforced this principle. *See* Section I, *infra*.

Furthermore, the district court failed to apprehend that even today, the Supreme Court does not conceive of "quid pro quo" corruption as mere bribery; instead, it remains fairly flexible it its approach. To be sure, the Supreme Court has not always spoken with the utmost clarity

on this subject. But it continues to apply a definition of corruption that "has firm roots in *Buckley* itself," *McCutcheon*, 134 S. Ct. at 1451, and *Buckley* recognized that concerns about political quid pro quos corruption extended beyond bribery or its equivalent. *McCutcheon* and *Citizens United* also explicitly confirmed the continuing validity of the Court's earlier decisions—most notably, *McConnell v. FEC*, 540 U.S. 93 (2003), which had relied upon a broader understanding of corruption in upholding the federal "soft money" contribution limits. *See* Section I.C, *infra*.

Second, even if the scope of "quid pro quo corruption" is defined narrowly, the district court's analysis was unsound:

- The court appeared to accept only evidence of actual political *bribery* in reviewing whether the state had sufficiently demonstrated its anti-corruption interest in the challenged limits. But neither the Supreme Court nor this Circuit has ever set such an exacting evidentiary standard for campaign finance cases; indeed, it is unclear whether an evidentiary record is necessary at all given that base contribution limits are "neither novel nor implausible." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000).

- The district court appeared to accept only evidence of actual political bribery within Montana's borders. But states may defend their base limits both by relying on the "evidence and findings accepted in *Buckley*," *Shrink Missouri*, 528 U.S. at 393, and by looking to the "experience of states with and without similar laws." *Wagner v. FEC*, 793 F.3d 1, 14 (D.C. Cir. 2015) (en banc), *cert. denied sub nom. Miller v. FEC*, 136 S. Ct. 895 (2016). There is no reason to think that Montana officeholders are uniquely immune to political corruption.

- The district court's analysis was fatally incomplete because it paid only lip service to any analysis of Montana's interest in preventing the *appearance* of quid pro quo corruption. And when reviewing Montana's party contribution limits, it wholly failed to consider whether such limits furthered the government's interest in preventing circumvention of the individual contribution limits. *See* Section II, *infra*.

Finally, the district court disregarded the broader consequences of its ruling on the laws of other jurisdictions, including at the federal level. It has created a standard of review and evidentiary test for contribution limits that admits only failure. *See* Section III, *infra*.

For all of these reasons, the district court decision should be reversed.

ARGUMENT

I. Limiting Direct Contributions to Candidates Is a Well-Established and Clearly Constitutional Means of Targeting Actual and Apparent Quid Pro Quo Corruption.

A. Base Contribution Limits Have Long Been a Core Feature of Campaign Finance Laws.

Limits on direct contributions to candidates have deep roots in federal and state campaign reform efforts. At the federal level, Congress established individual contribution limits almost seventy-five years ago in its 1940 amendments to the Hatch Act. Act of July 19, 1940, Pub. L. No. 76-753, 54 Stat. 767. Then, in response to the Watergate scandal, the Federal Election Campaign Act ("FECA") was amended to incorporate stricter limits on the amounts that individuals, political parties, and political committees could contribute directly to candidates. FECA Amendments of 1974, Pub. L. No. 93-443, § 101(b)(1)-(2), 88 Stat. 1263 (codified as amended at 52 U.S.C. § 30116(b)(1)-(2)).

States and municipalities have likewise recognized the need for contribution limits and restrictions. Two states had passed individual contribution limits by 1932, and another five had enacted limits by

1962. Donald August Gross & Robert K. Goidel, *The States of Campaign Finance Reform* 2 (2003). The campaign finance scandals related to President Richard Nixon's 1972 reelection campaign created a simultaneous awareness of corruption issues in state elections, and states began to enact contribution limits similar to those in FECA. *Id.* at 7-8. By 1978, twenty-two states had passed laws restricting individual contributions; another nine followed suit by 1990. *Id.* at 8. Today, thirty-eight states now impose contribution limits for state elections.[3]

Other forms of contribution limits have an even longer history. Federal law has restricted corporate campaign contributions since 1907. Tillman Act, Ch. 420, 34 Stat. 864 (1907). *See also FEC v. Beaumont*, 539 U.S. 146, 152-53 (2003). Similarly, by 1932, thirty-four states prohibited corporations from donating to campaigns. Gross & Goidel, *supra*, at 2.

The judiciary has consistently affirmed the importance of base limits. The Supreme Court upheld FECA's base limits for individuals in *Buckley*, which established the basic framework for judicial review of

[3] *See* note 6, *infra*.

contribution limits. 424 U.S. at 29. Subsequent decisions reinforced *Buckley*'s holding and applied it to other base limits, such as party and PAC contribution restrictions. *McConnell*, 540 U.S. at 156 (upholding soft money ban that restricts contributions above the base limits); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 464-65 (2001) ("*Colorado II*"); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197-99 (1981) ("*CalMed*"). And, with respect to the special category of limitations on corporate giving, courts have repeatedly upheld the federal law and its state counterparts as entirely consonant with the First Amendment. *E.g.*, *Beaumont*, 539 U.S. at 149; *United States v. Danielczyk*, 683 F.3d 611, 616 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1459 (2013).

As even the most cursory review of this history reveals, "base limits remain the primary means of regulating campaign contributions." *McCutcheon*, 134 S. Ct. at 1451. And that is because, in all of the Supreme Court's decisions on the subject, "[t]he importance of the governmental interest in preventing [corruption] has never been doubted." *Beaumont*, 539 U.S. at 154 (second alteration in original) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978)).

B. The Supreme Court Has Consistently Recognized that Contribution Limits Take Direct Aim at Quid Pro Quo Corruption Without Imposing Inordinate Burdens on Speech.

Contribution limits are "designed to protect the integrity of the political process," *id.* at 137—and this, as the Supreme Court has continually affirmed, is a governmental interest of the highest order. *See McCutcheon*, 134 S. Ct. at 1450 (noting "compelling nature of the 'collective' interest in preventing corruption in the electoral process"). Far from questioning the connection between base contribution limits and the prevention of quid pro quo corruption, both *Citizens United* and *McCutcheon* reaffirmed it.

In *Citizens United*, which did not consider contribution limits, the Court acknowledged that limits on direct monetary contributions presented a qualitatively different question than the independent expenditure prohibition at issue. 558 U.S. at 356. Contribution limits, the Court noted with approval, have been sustained as preventative measures that "ensure against the reality or appearance of corruption." *Id.* at 356-57. In contrast, *independent expenditures*—by virtue of being uncoordinated with candidates and subject to the higher demands of strict scrutiny review—no longer implicated those concerns with enough

force to sustain their limitation. *Id.* at 357, 360. *Citizens United* thus affirmed that limiting contributions to candidates remains "an accepted means to prevent quid pro quo corruption." *SpeechNow.org v. FEC*, 599 F.3d 686, 693 n.3, 695 (D.C. Cir. 2010) ("*Of course*, the government still has an interest in preventing quid pro quo corruption." (emphasis added)).

McCutcheon again confirmed that the prevention of quid pro quo corruption or its appearance is a sufficiently weighty state interest—as a matter of law—to justify base contribution limits. As the plurality explicitly noted, *McCutcheon* did not involve any challenge to the base limits; indeed, Chief Justice Roberts carefully distinguished *Buckley*'s approval of base limits from the aggregate limits under review, because "*Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself." 134 S. Ct. at 1460. There is nothing equivocal in this statement: the Court was clear that "the risk of corruption arises" from direct giving to candidates.

C. *Citizens United* and *McCutcheon* Leave Undisturbed Supreme Court Rulings that Conceptualized Cognizable "Corruption" in Broader Terms Than Bribery or "Quid Pro Quo" Arrangements.

It is clear that both *Citizens United* and *McCutcheon* recognized that base contribution limits directly further the governmental interest in preventing quid pro quo corruption. Less clear is whether those decisions purported to rule out *all* consideration of a broader anti-corruption interest relating to concerns about the purchase of political influence and access, at least in the context of base contribution limits. One might interpret these decisions as holding that these broader concerns, without more, cannot alone justify a contribution limit. But *Citizens United* and *McCutcheon* also made explicit that they were not questioning *McConnell*'s soft money holding—a holding that in large part relied upon evidence of the purchase of access and influence, not merely quid pro quos.

After Congress passed the Bipartisan Campaign Reform Act ("BCRA"), the Supreme Court upheld BCRA's new "soft money" limits on contributions to political parties based on the concern that parties were "peddling access to federal candidates and officeholders in exchange for large soft-money donations." *McConnell*, 540 U.S. at 150.

Both *Citizens United* and *McCutcheon* expressly recognized that this holding remains good law. *Citizens United* acknowledged that the government's broader interest in preventing the purchase of access had been found to support certain contribution limits. 558 U.S. at 360-61. Indeed, it noted that the "BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials," and recognized that it should defer to any such congressional findings of corruption. *Id. See also McCutcheon*, 134 S. Ct. at 1451 n.6. (denying that the plurality "silently overruled the Court's holding in *McConnell*"). The discussion of corruption in these two later cases must be read in a manner consistent with *McConnell*'s concern about the sale of access and influence.

This broader conception of corruption is all the more relevant because it flows from *Buckley* itself. As noted in *McConnell*, "[m]any of the 'deeply disturbing examples' of corruption cited by th[e] Court in *Buckley* . . . to justify FECA's contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials." 540 U.S. at 150 (citation omitted). Many other decisions, which remain

good law, also grounded themselves in *Buckley*'s understanding of corruption. In *Shrink Missouri*, the challengers argued that Missouri's contribution limits could not be upheld without "relax[ing]" the *Buckley* standard. The Supreme Court explicitly disagreed. 528 U.S. at 389 n.4 ("[W]e do not relax *Buckley*'s standard."). Instead, the Court emphasized that *Buckley* and its progeny conceived of quid pro quo corruption as a "broader threat":

> In speaking of "improper influence" and "opportunities for abuse" in addition to "quid pro quo arrangements," we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.

Id. at 389.

Both *Citizens United*, 558 U.S. at 359, and *McCutcheon*, 134 S. Ct. at 1451, claimed simply to be applying *Buckley*'s understanding of corruption. In assessing the general validity of a contribution limit, therefore, *Buckley*, *Shrink Missouri*, and *McConnell* remain relevant. *See, e.g.*, *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124 (9th Cir. 2011) (noting that *Citizens United* "made clear that it was not revisiting

the long line of cases finding anti-corruption rationales sufficient to support [contribution] limitations").

The district court ignored these additional relevant Supreme Court precedents and went further still, formulating a more restrictive interpretation of quid pro quo corruption than even the narrowest reading of *McCutcheon* would support. Indeed, the district court appears to believe that the only cognizable form of corruption in the campaign finance context is outright bribery. ER 22-23. But the Supreme Court has never retreated from the position that contribution limits can extend beyond bribery prohibitions. *See McCutcheon*, 134 S. Ct. at 1450; *Citizens United*, 558 U.S. at 361. Unlike bribery laws, contribution limits are prophylactic: they are designed to prevent quid pro quo arrangements from arising in the first instance. The Court has recognized the validity of base contribution limits even though not every contributor seeks to exchange cash for favors. *See Buckley*, 424 U.S. at 27-28 ("[L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action."). If the district court's conception of

corruption had won the day in *Buckley*, no contribution limits would have been sustained.

II. The District Court's Exacting Constitutional Test Is Irreconcilable with Governing Precedent.

In the forty years since *Buckley*, the Supreme Court has adhered to the same "overall analytical framework" in assessing the constitutionality of contribution limits. *Lair I*, 697 F.3d at 1208. Because contributions "lie closer to the edges than to the core of political expression," contribution limits are subject to a "relatively complaisant" standard of review, and will pass muster so long as they are "closely drawn" to a "sufficiently important" interest. *Beaumont*, 539 U.S. at 161-62.

And, as *Buckley* and its progeny make clear, limits on contributions to candidates are a constitutionally permissible means of advancing the government's interests in preventing quid pro quo corruption and its appearance, as well as the circumvention of candidate contribution limits. *See* Section I, *supra*. Therefore, base contribution limits are presumptively valid unless they are so low as to prevent candidates and PACs from amassing the resources necessary for effective advocacy. *See, e.g.*, *Randall*, 548 U.S. at 246-48; *Buckley*,

424 U.S. at 20-29. Neither *McCutcheon* nor *Citizens United* did anything to disturb this line of precedent.

Departing from this well-settled mode of analysis, the district court demanded a heightened—and unprecedented—demonstration of Montana's anti-corruption interest to sustain the challenged limits. In its review, it accepted only evidence of criminal bribery in assessing the validity of the government's anti-corruption interest; disregarded the record of political corruption compiled both in existing judicial precedents and in other states and localities; and failed to consider Montana's interests in preventing the *appearance* of corruption, as well as in avoiding circumvention of the limits. Its approach has no basis in fact or in law.

A. The District Court Has No Basis for Its Demand that Montana Substantiate its Anti-Corruption Interest with Evidence of "Actual," Present-Day Bribery.

In light of the long line of decisions upholding contribution limits, and the substantial record of corruption compiled in those cases, the "evidentiary burden" on a state to demonstrate that its particular contribution limits prevent quid pro quo corruption is minimal. But the district court erected a near-insurmountable evidentiary bar, requiring

a showing that Montana is plagued by ongoing and endemic bribery, unique to the state, that "pose[s] a real harm to the election process or the public's interest in the election process." ER 23.[4]

Montana was not required to prove that state officials frequently accepted bribes of campaign contributions in order to demonstrate its important state interest in preventing quid pro quo corruption or its appearance. Although the amount of evidence that may be required in support of an asserted state interest "will vary up or down with the novelty and plausibility of the justifications raised," the interest in avoiding actual or apparent corruption arising from large contributions is "neither novel nor implausible." *Shrink Missouri*, 528 U.S. at 391. Base contribution limits and restrictions, some more than a century old,

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[4] The court appears to believe, mistakenly, that proof of a "real harm to the election process" is "required by the Ninth Circuit." ER 23. The phrase itself comes from a 2000 opinion by the same district court judge striking down a ban on corporate *expenditures* in *ballot measure* elections. This Court affirmed, *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1052 (9th Cir. 2000), but did so specifically based on the higher degree of scrutiny applicable to expenditure restrictions and the relevant differences between candidate and ballot measure elections, as recognized by controlling Supreme Court precedent. *See Bellotti*, 435 U.S. at 790 (striking down similar Massachusetts law because "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.").

are found in federal, state, and local jurisdictions nationwide. *See* Section I.A., *supra*. They have been routinely upheld by the Supreme Court and the lower courts as advancing valid anti-corruption purposes. Montana's evidentiary burden here should be exceedingly light.

Furthermore, Montana is under no constitutional obligation to suffer the very corruption it fears before taking preventative steps when its fears are justifiable and rooted in common experience. *See Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011). Instead, because political corruption is "neither easily detected nor practical to criminalize," the Supreme Court has permitted a prophylactic approach. *McConnell*, 540 U.S. at 153 (noting that "[t]he best means of prevention is to identify and remove the temptation"). *Cf. Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995) ("Although the record contains only allegations, no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic."). A state need not experience a campaign bribery scandal to have a legitimate interest in avoiding one.

Flexibility in terms of the evidentiary burden is all the more appropriate when a state is called upon to defend a long-enforced

statute. In Montana, individual base contribution limits have been in effect since the 1970s. Montana Laws 1975, ch. 481, § 1. And, "[a]s the Supreme Court has recognized, 'no data can be marshaled to capture perfectly the counterfactual world in which' an existing campaign finance restriction 'do[es] not exist.'" *Wagner*, 793 F.3d at 14 (quoting *McCutcheon*, 134 S. Ct. at 1457). Instead, the Court "asks 'whether experience under the present law confirms a serious threat of abuse.'" *McCutcheon*, 134 S. Ct. at 1457 (quoting *Colorado II*, 533 U.S. at 457).

Nevertheless, even though it was not obliged to do so, Montana did compile a significant record of quid pro quo corruption in the state. For instance, the state proffered evidence of an explicit cash-for-votes scheme wherein "a group of Republican state legislators [were] offered $100,000 by National Right to Work in exchange for introducing and bringing to a 'vote of record' a right-to-work bill"—evidence that the district court dismissed outright because the quid pro quo offer was eventually rejected. ER 20. The court was simply not "satisfied that the evidence presented by [the State] proves the existence of an important state interest" in Montana, because evidence of an attempted bribery

scheme could not "exemplify actual corruption" or "appearances of corruption." ER 22.

Even when presented with evidence of actual bribery convictions, the court was unmoved: it discounted multiple recent prosecutions in Montana, based upon its theory that they involved quid pro quo arrangements between an interest group and legislators who were "highly likely to vote parallel to [the group's] agenda" anyway. ER 24. This assumption does not consider that "the exchange between donors and candidates is a repeated game": past contributions could themselves have changed the legislators' positions and, thereby, their susceptibility to later quid pro quos. Lynda W. Powell, *The Influence of Campaign Contributions in State Legislatures* 2-3 (2012). The court's single-minded focus on votes also ignores the full range of quos that a pledge of "100% support" to an interest group might include. ER 21. *See* Powell, *supra*, at 5 ("Examining only floor votes that determine the final passage or failure of a bill ignores all the decisions that determine the details of its substantive content, as well as those that determine whether or not a bill is ever written or comes to a vote. And it is in these

less observable areas of legislative activity that legislators may most easily accommodate the interests of donors.").

Moreover, experience suggests that "corruption and its appearance are no doubt more widespread . . . than our criminal dockets reflect." *Wagner*, 793 F.3d at 15. Whatever evidence was necessary to establish that campaign contributions pose a risk of quid pro quo corruption, Montana undoubtedly provided it to the district court.

B. Montana Was Not Limited to "Prov[ing] the Existence" of Its Anti-Corruption Interest with Evidence of Quid Pro Quo Corruption Within Its Borders.

The district court took an equally myopic view of the extent to which jurisdictions may constitutionally "borrow" from the laws and experiences of other states to combat similar problems. By demanding that the state limit itself to a record of bribery specific to Montana, the district court's approach once again runs counter to governing Supreme Court precedent.

The Supreme Court has affirmed that states may "rel[y] on the evidence and findings accepted in *Buckley*" as a basis for their own contribution limits, *Shrink Missouri*, 528 U.S. at 393, and has "h[e]ld *Buckley* to be authority for comparable state regulation, which need not

be pegged to *Buckley*'s dollars," *id.* at 382. When passing on contribution restrictions, "[t]he experience of states with and without similar laws is also relevant." *Wagner*, 793 F.3d at 14. *See also McCutcheon*, 134 S. Ct. at 1451 n.7; *Citizens United*, 558 U.S. at 357.

Even a cursory review of the political experience of other states confirms that unchecked campaign contributions are inextricably tied to quid pro quo corruption scandals. Illinois, for instance, had a long history of official quid pro quo corruption prior to the enactment of contribution limits.[5] Most infamous were the multiple scandals of then-Governor Rod Blagojevich, who was convicted on eighteen counts of public corruption-related charges. *United States v. Blagojevich*, 794 F.3d 729, 733 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1491, *reh'g denied*, 136 S. Ct. 2386 (2016). His well-publicized efforts to sell various official acts in return for large campaign contributions spurred the Illinois Legislature to pass campaign contribution limits. 2009 Ill. Legis. Serv. P.A. 96-832, § 5.

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[5] *See, e.g.*, Kate Zernike, *In Illinois, a Virtual Expectation of Corruption*, N.Y. Times (Dec. 13, 2008), http://www.nytimes.com/2008/12/14/us/14corrupt.html.

The experience of New Mexico, which saw a "cascade of . . . corruption scandals" in the late 2000s, is also illustrative. Stephanie Simon, *New Mexico's Political Wild West*, Wall St. J. (Jan. 17, 2009), http://www.wsj.com/articles/SB123233959874194545. A kickback investigation led two state treasurers to be sent to prison." *Id.* Governor Bill Richardson also became embroiled in two separate corruption probes. One, a federal grand jury investigation, involved a California company that received a state contract after its executive donated over $100,000 to the governor's political committees. *Id.* The other alleged that state officials were pressured to invest $90 million with an Illinois company, and that the company's executives then donated to Richardson. *Id.* In 2009, in response to these events, New Mexico passed legislation to restrict campaign contributions. 2009 N.M. Laws ch. 68, § 1.

Quid pro quo corruption is a concern at the municipal level, too. This Court's "own case law," for instance, "contains a vivid illustration of corruption in San Diego municipal government involving campaign contributions timed to coincide with the donors' particular business before the city council." *Thalheimer*, 645 F.3d at 1123 n.3.

There is plainly no shortage of corruption and scandal in this country, but the district court overlooked all of it. That complete disregard for the experience of other jurisdictions cannot be justified.

C. The District Court's Extraordinary Conclusion That "Politicians Are Relatively Incorruptible in Montana" Does Not Obviate the Need to Protect Against the *Appearance* of Corruption.

The district court also all but ignored Montana's vital interest in avoiding the *appearance* of corruption. Since *Buckley*, the Court has maintained that alongside and "[o]f concern almost equal to" the threat of actual quid pro quo arrangements is the "perception of corruption 'inherent in a regime of large individual financial contributions' to candidates for public office." *Shrink Missouri*, 528 U.S. at 390 (quoting *Buckley*, 424 U.S. at 27). As noted in *McCutcheon,* although "most large donors do not seek improper influence over legislators' actions," Congress is nevertheless "justified in concluding that the interest in safeguarding against the *appearance* of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *McCutcheon*, 134 S. Ct. at 1445 (emphasis added).

The district court here utterly disregarded the compelling government interest in maintaining public confidence in the integrity of government. In *Shrink Missouri*, the Court made clear that a statewide voter referendum on a contribution restriction "attested to the perception" that "contribution limits are necessary to combat corruption and the appearance thereof." 528 U.S. at 394. The state defendant compiled a fairly slim record to support Missouri's contribution limit: it "present[ed] an affidavit from State Senator Wayne Goode, the co-chair of the state legislature's Interim Joint Committee on Campaign Finance Reform at the time the State enacted the contribution limits," and the district court "cited newspaper accounts of large contributions supporting inferences of impropriety." *Id.* at 393. *See also Eddleman*, 343 F.3d at 1092-93 (noting that *Shrink Missouri* deemed the following evidence sufficient: "a state senator's statement that contributions had the 'real potential to buy votes,' a smattering of newspaper articles reporting large contributions, and the fact that 74% of Missouri voters determined that contribution limits were necessary.").

That minimal showing was nevertheless sufficient, because much of the state's evidence in *Shrink Missouri* confirmed that Missouri's

contribution limits were motivated, at least in part, by the public's perception of corruption. Similarly, here, the public vote on Initiative 118, as well as Montana's much more comprehensive record of bribery and attempted bribery, amply supports the conclusion that the challenged limits were aimed at preventing the appearance of corruption as well as the reality of political quid pro quos.

D. The District Court Entirely Failed to Consider the Valid Anti-Circumvention Interest Served by Montana's Political Party Limits.

Reducing the limits applicable to individuals and political committees was just one aspect of Initiative 118; the law also *increased* the limits applicable to political parties and applied all contribution limits on a per-election rather than per-election-cycle basis. Appellants' Opening Br. 4. The initiative also included a prohibition on the carryover of surplus campaign funds to keep incumbents from building large "war chests," as well as new limitations on in-kind contributions from PACs. 1994 Montana Laws Init. Meas. 118 §§ 1-3 (codified as amended at Mont. Code. Ann. §§ 13-37-216, -218, -240). Many of these changes were explicitly designed to close loopholes in the law that had

enabled widespread circumvention of Montana's existing contribution limits.

One such revision applied to political party organizations. Because Montana does not limit what individuals or political committees can contribute to political parties, parties are subject to a different set of limits on their contributions to candidates for public office: the limits range from $23,850 per election (candidates for Governor/Lt. Governor) to $1,400 per election (State Senate candidates). ER 216. *See also* Mont. Code Ann. § 13-37-216(3), as adjusted by Mont. Admin. R. § 44.10.338. These limits directly prevent the circumvention of the individual and non-party limits, and were specifically enacted for that purpose. ER 24.

Despite the obvious risk of evasion posed by Montana's lack of base limits on contributions to political parties, the district court entirely failed to consider this possibility—and did so notwithstanding a long line of Supreme Court precedent recognizing both anticircumvention and anti-corruption as valid and interrelated justifications for contribution restrictions.

Starting with *Buckley*, 424 U.S. at 38, the Court has maintained that reducing circumvention is part of the government's compelling

interest in protecting the integrity of candidate contribution limits and thereby combating corruption, and has upheld a broad range of campaign finance laws on this basis. *See, e.g.*, *McConnell*, 540 U.S. at 144 (upholding the party "soft money" restrictions on grounds that "[anti-corruption] interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits"); *Colorado II*, 533 U.S. at 455 (upholding coordinated party spending limits to prevent the "exploitation [of parties] as channels for circumventing contribution and coordinated spending limits binding on other political players").

These decisions all make clear that measures to prevent circumvention of valid contribution limits advance the vital governmental interest in preventing real and apparent corruption, because "circumvention is a valid theory of corruption." *Colorado II*, 533 U.S. at 456. Although *McCutcheon* rejected an anti-circumvention rationale for the federal aggregate limit that it invalidated, it did so on grounds that other provisions in federal law had made circumvention of the base limits "highly implausible." 134 S. Ct. at 1453. Therefore, as this Court has recognized elsewhere, the "anti-circumvention interest"

remains valid as "part of the familiar anti-corruption rationale." *Thalheimer*, 645 F.3d at 1124. *See also, e.g.*, *Ognibene,* 671 F.3d at 195 n. 21 (acknowledging that *Citizens United* preserved the anti-circumvention interest); *Danielczyk*, 683 F.3d at 618 (same).

Moreover, because Montana has no "base" limits on contributions to political party committees, the risk of circumvention here is neither speculative nor implausible. With or without the amendments of I-118, Montana law limits what an individual or non-party committee can contribute to a candidate, depending on the office sought. ER 30, 37-39. That same donor, however, may give an *unlimited amount* to political party committees. Thus, Montana's political party limits operate as the exclusive control on party giving, and are directly analogous to the political party coordinated expenditure limits upheld in *Colorado II*.

If political party committees are permitted to make unlimited contributions to candidates in Montana—as they will be unless the district court's decision is overturned—"the inducement to circumvent would almost certainly intensify." *Colorado II*, 533 U.S. at 460. Indeed, the threat of actual and apparent corruption in Montana would be significantly greater than the threat envisioned in *Colorado II*. There,

the Court was concerned about the threat of corruption posed by a donor's evasion of the candidate contribution limit through a *limited* $20,000 contribution to a party committee. *Id.* The threat of corruption would increase exponentially with the *unlimited* contributions to a party committee that would be allowed under Montana law if Mont. Code Ann. § 13-37-216(3) and (5) is invalidated: there would be nothing to prevent the party committee from channeling all of those funds directly to a candidate.

Even the plaintiffs in this case admit: "Montana, like all other states, has an anti-circumvention interest." ER 345. The district court's complete failure to consider that interest only underscores the weakness of its overall analysis.

III. The District Court Decision Imperils State and Local Contribution Limits Across the Country.

As discussed in Section II.B above, the district court improperly disregarded the experience of corruption in other states when reviewing Montana's limits. But the court also turned a blind eye to the prospective nationwide impact of its ruling. Its opinion does not only threaten Montana's contribution limits; it also has the potential to upend states campaign finance regimes across the country.

Today, thirty-eight states impose contribution limits for state elections.[6] Forty-four states limit or ban corporate contributions. Nat'l Conf. on State Legislatures, *Contribution Limits Overview*, http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx (last visited Sept. 27, 2016). The logic of the district court's opinion would cast doubt on many of these state restrictions, including Montana's pre-1994 limits—or, at the very least, would subject them to unwarranted judicial scrutiny.

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[6] Alaska Stat. § 15.13.070; Ariz. Rev. Stat. § 16-905(A)-(B); Ark. Code Ann. §§ 7-6-201(7), -203; Cal. Gov't Code §§ 82022, 85301; Colo. Const. art. XXVIII, § 3(1); Conn. Gen. Stat. § 9-611; 15 Del. Code Ann. §§ 8002(11)(a), 8010(a); Fla. Stat. § 106.08(1); Ga. Code Ann. § 21-5-41(a)-(b); Haw. Rev. Stat. §§ 11-302 (defining "election"), -357; Idaho Code Ann. § 67-6610A(1); 10 Ill. Comp. Stat. 5/9-1.9(1)-(2), 5/9-8.5(b); Kan. Stat. Ann. § 25-4153(a); Ky. Rev. Stat. Ann. §§ 121.015(2), -.150(6); La. Stat. Ann. § 18:1505.2(H)(1)(a), (3)(a); Me. Rev. Stat. tit. 21-A, §§ 1001(2), 1015(1); Md. Code Ann., Elec. Law §§ 1-101(w), 13-226(b); Mass. Gen. Laws ch. 55, § 7A(a)(1); Mich. Comp. Laws §§ 169.205(3), -.252(1); Minn. Stat. §§ 10A.01 subd. 16, 10A.27 subd. 1(a); Mont. Code Ann. § 13-37-216(1), (5); Nev. Rev. Stat. § 294A.100; N.H. Rev. Stat. Ann. § 664:4; N.J. Stat. Ann. §§ 19:44A-3(e), -4, -11.3(a); N.M. Stat. Ann. § 1-19-34.7(A)(1); N.Y. Elec. Law § 14-114(1); N.C. Gen. Stat. § 163-278.13(a), (d); Ohio Rev. Code § 3517.102(B)(1); Okla. Stat. tit. 74, ch. 62, app. 1, Rule 2.37; 17 R.I. Gen. Laws § 17-25-10.1(a); S.C. Code Ann. §§ 8-13-1300(10), -1314(A)(1); S.D. Codified Laws §§ 12-27-7 to -8; Tenn. Code Ann. §§ 2-10-102(5), -302(a); Vt. Stat. Ann. tit. 17, § 2941(a)(1)-(3), (c); Wash. Rev. Code Ann. § 42.17A.405(2); W. Va. Code Ann. § 3-8-12(f)-(g); Wis. Stat. §§ 11.1101(1), -.1103; Wyo. Stat. Ann. § 22-25-102(c), (j).

By declining to look at any evidence outside of Montana, refusing to consider the state interests in preventing the appearance of quid pro quo corruption and the circumvention of contribution limits, and then nitpicking Montana's proffered evidence of quid pro quo corruption out of existence, the district court went far beyond the "relatively complaisant review" to which contribution limits are subject. *Beaumont*, 539 U.S. at 161. The only evidence that the district court apparently deemed valid were local, successful examples of actual bribery, which could then be proven to have changed legislators' votes. ER 22-23.

Such a shortsighted test "would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove" corruption, and "would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986). If affirmed, the district court's decision would threaten a raft of state statutes that are clearly constitutional under current law. *See, e.g.*, *Ognibene*, 671 F.3d at 186-188 & 186 n.12.

This standard is particularly problematic because many state and local contribution limits are of relatively old vintage. And because "we

would not expect to find . . . continuing evidence of large-scale quid pro quo corruption" in states that have already passed contribution limits to prevent it, *Wagner*, 793 F.3d at 14, few states may show the sort of recent corruption scandals that the district court apparently demands.

Moreover, the district court's standard would appear to exclude even the evidence put forward in *Buckley*. As discussed in Section I.A, the largest wave of state contribution laws were passed in the aftermath of, and in reaction to, the same corruption issues that drove the passage of FECA and formed the basis for the Supreme Court's opinion in *Buckley*. Montana's prior limits, which were first adopted by the legislature in 1975, were among this group. *See* Mont. Laws 1975, ch. 481, § 1.

The Supreme Court has affirmed that states may use the record of corruption outlined in *Buckley* to justify their own contribution limits. *Shrink Missouri*, 528 U.S. at 393. But using the district court's reasoning, this evidence is irrelevant because it does not involve recent, state-specific examples of actual bribery. That standard flouts Supreme Court precedent, and it would put at risk the entire range of laws passed after FECA—including Montana's original 1975 limits.

The *Buckley* record and the foregoing history of corruption in states lacking contribution limits, as well as the extensive evidence Montana presented below, make clear that contribution limits remain necessary tools to combat quid pro quo corruption and its appearance. But the district court's cramped state interest analysis took none of this into account. Its erroneous conception of the anti-corruption interest would endanger nearly every state's contribution limits.

CONCLUSION

For the reasons set forth above, the district court decision should be **REVERSED**.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,816 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amicus Curiae* for the Campaign Legal Center with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 5, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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