**No. 17-35019**

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**DAVID THOMPSON, *et al.*,**

*Plaintiffs-Appellants*,

**v.**

**HEATHER HEBDON,**
**Executive Director, Alaska Public Offices Commission, *et al.*,**

*Defendants-Appellees*.

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Appeal from the United States District Court
for the District of Alaska
Civil Action No. 3:15-cv-00218 TMB

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# BRIEF FOR *AMICUS CURIAE* CAMPAIGN LEGAL CENTER SUPPORTING DEFENDANTS-APPELLEES

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## CORPORATE DISCLOSURE STATEMENT

Campaign Legal Center is a nonprofit organization organized under Section 501(c)(3) of the Internal Revenue Code. 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 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 government ethics, campaign finance, and election laws. *Amicus* submits this brief to urge the affirmance of the district court decision, because we fear a reversal would upend long-settled precedent and jeopardize countless state laws limiting direct contributions to candidates.

## INTRODUCTION & SUMMARY OF ARGUMENT

Appellants David Thompson, *et al.* ask this Court to engage in the minutiae of crafting campaign finance laws. They question whether the district court should have credited certain witnesses, quibble with Alaska's evidence of corruption, and ask the Court to parse the distinction between a $500 and a $1,000 annual contribution limit. But this case is ultimately about one thing: "the proper—and properly

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

limited—role of the courts in a democratic society." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

Because of "the respect that the Legislative and Judicial Branches owe to one another," *McConnell v. FEC*, 540 U.S. 93, 137 (2003)—and because contribution limits impose limited burdens and protect important interests, *id.* at 135-37—courts subject base limits to "relatively complaisant review," *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). This is particularly true when examining a limit's dollar amount, a decision for which courts afford legislatures substantial deference. *See Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (per curiam).

Furthermore, because the constitutionality of base limits depends on factual determinations—such as whether the limits are so low as to prevent candidates from running effective campaigns—appellate courts should accord a similar level of deference to district courts. So long as a district court employs the proper First Amendment standards,[2] a

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[2] This requirement is what distinguishes this case from *Lair v. Motl*, No. 16-35424 (9th Cir. argued Mar. 21, 2017), which Appellants have listed as a "related case." Br. app. ("Statement of Related Cases"). In *Lair*, the district court applied erroneous *legal* standards regarding the amount and type of evidence needed to prove anticorruption interests. *See* Brief of Campaign Legal Center Supporting Defendants-Appellants

reviewing court may ask only "whether the court below's view is clearly wrong." *Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017). Both of these considerations counsel for affirmance in this case.

Alaska's base contribution limits are constitutional. There is no real dispute that "base limits" advance Alaska's government interests in preventing corruption and its appearance.[3] Since *Buckley*, the Supreme Court has consistently treated the substantiality of states' anticorruption interests in base limits as self-evident. Even if the Court had not already determined that base limits serve anticorruption interests as a matter of law, there is ample evidence of contribution-related corruption from across the country. Alaska need not further justify its limits—though it did so anyway at trial, by proffering compelling evidence of in-state corruption. The only real question in this case is the limit's tailoring, and the district court properly found that Alaska's base limits satisfy this Court's three-pronged tailoring test from *Montana Right to Life Ass'n v.*

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and Urging Reversal 17-32, *Lair v. Motl*, No. 16-35424 (9th Cir. Oct. 5, 2016).

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

*Eddleman*, 343 F.3d 1085 (9th Cir. 2003). Appellants' attempt to relitigate that finding falls flat.

The district court also correctly upheld Alaska's aggregate limit on donations from nonresidents. Like any other contribution limit, the nonresident contribution cap is constitutional if it meets closely drawn scrutiny. Contrary to Appellants' claims, this limit is neither subject to strict scrutiny nor foreclosed by any prior case. Alaska's geographical and economic situation renders it uniquely susceptible to corruption from out-of-state industrial interests. The nonresident contribution limit thus serves multiple state interests: preventing corruption and its appearance directly, by reducing the likelihood of collective transactional giving; and preventing circumvention of Alaska's base limits by nonresidents over whom Alaska lacks jurisdiction. Because Appellants did not challenge the cap's tailoring, this is enough to uphold it—but the nonresident aggregate limit is also closely drawn to meet Alaska's anticorruption interests.

## ARGUMENT

### I. The District Court Correctly Held That Alaska's Base Contribution Limits Are Constitutional.

Alaska's interests in preventing corruption and its appearance are sufficiently important to warrant the enactment of base limits. Appellants claim that lowering its annual limit from $1,000 to $500 untethers Alaska's base caps from any cognizable corruption concerns. However, "[t]he correct focus . . . is whether the state has presented sufficient evidence of a valid interest, not whether it has justified a particular dollar amount." *Eddleman*, 343 F.3d at 1092. Alaska has cleared this bar with room to spare. The district court also correctly found that the limits are not "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." *Id.* at 1094. Therefore, Alaska's base limits must be upheld.

#### A. Base limits are presumptively constitutional.

Alaska's anticorruption interests are presumptively sufficient, as a matter of law, to justify its adoption of base limits. On this the Supreme Court has been unequivocal: "The importance of the governmental interest in preventing [corruption] has never been doubted." *Beaumont*,

539 U.S. at 154 (alteration in original) (citation omitted). Indeed, the Supreme Court's acceptance of the prevention of corruption and its appearance as sufficiently important government interests is so established that Alaska should be *presumed*, as a matter of law, to have sufficiently important interests to sustain its base limits.

For example, in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), the Supreme Court stated that "[t]he Government has a strong interest, no less critical to our democratic system, in combatting corruption and its appearance," *id.* at 1462 (plurality opinion). Indeed, the Court reasoned that not only are "the Government's interest[s] in preventing *quid pro quo* corruption or its appearance . . . sufficiently important," but that "the same interest[s] may properly be labeled compelling" and therefore "would satisfy even strict scrutiny." *Id.* at 1445 (internal quotation marks and citation omitted). And "the risk of corruption arises"—inevitably—"when an individual makes large contributions to the candidate or officeholder himself." *Id.* at 1460.

Likewise, in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court noted that "there is little reason to doubt that sometimes large contributions will work actual corruption of our political

system, and no reason to question the existence of a corresponding suspicion among voters," *id.* at 395.

Appellants attempt to undercut the legitimacy of Alaska's anticorruption interests by contending that the Supreme Court has narrowed the interests' scope to *quid pro quo* corruption in its recent decisions, and that Alaska's limits were founded upon a now obsolete, unduly broad theory of corruption. Br. 25-26. But the Supreme Court's case law on this point is unsettled.

The Court did discuss corruption in terms of quid pro quo exchanges in *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McCutcheon*, as did this Court in *Lair v. Bullock*, 798 F.3d 736, 746 (9th Cir. 2015). However, the Supreme Court has also reaffirmed—four times—the part of its *McConnell* decision that applied a broader understanding of corruption to uphold the federal "soft money" contribution limits. *See Republican Party of La. v. FEC*, 137 S. Ct. 2178 (2017), *aff'g* 219 F. Supp. 3d 86, 99 (D.D.C. 2016) (three-judge court); *McCutcheon*, 134 S. Ct. at 1451 n.6; *Republican Nat'l Comm. v. FEC*, 561 U.S. 1040, *aff'g* 698 F. Supp. 2d 150, 158-60 (D.D.C. 2010) (three-judge court); *Citizens United*, 558 U.S. at 360-61. This Court in *Lair* did not have the benefit of the most recent of

these decisions, which came only a few months ago—and which suggests that *McCutcheon*'s narrower corruption frame still does not apply to all forms of contribution limits. *See Republican Party of La.*, 137 S. Ct. 2178. Appellants' argument thus rests on speculation about how a volatile body of Supreme Court precedents will evolve in the future.

In any event, the scope of the permissible government interests—whether *quid pro quo* only or some more comprehensive conception of "corruption"—is not an issue that this Court needs to address. The Supreme Court has repeated, time and again, that base limits are an appropriate means of targeting *quid pro quo* corruption. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1451; *Citizens United*, 558 U.S. at 359.

Furthermore, the Supreme Court has clarified that contribution limits are "preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 558 U.S. at 357. Alaska 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 FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 500 (1985) ("*NCPAC*") (recognizing Court's "deference to a congressional determination of the need for a

prophylactic rule where the evil of potential corruption ha[s] long been recognized"); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("*NRWC*") (refusing to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"). Alaska was entitled to rely on this rule of deference in choosing to further its anticorruption interests.

Finally, the Supreme Court has acknowledged that its own decisions have "promoted considerable reliance." *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (lead opinion). Alaska was free to rely on the "strong" government interests—identified in *Buckley*, and repeated countless times since—"in combatting corruption and its appearance." *McCutcheon*, 134 S. Ct. at 1462.

### B. Alaska can prove the existence of its anticorruption interests with evidence of out-of-state corruption.

The Supreme Court has already demonstrated that states' anticorruption interests, as a rule, justify base limits. Regardless, the long history of political corruption beyond Alaska's borders is more than enough to satisfy whatever additional burden Alaska bears.

Because the interests in preventing corruption and its appearance are so plausible, the Court explained in *Shrink Missouri* that a government seeking to establish them will bear only a minimal burden:

> The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible . . . .
>
> While *Buckley*'s evidentiary showing exemplifies a sufficient justification for contribution limits, it does not speak to what may be necessary as a minimum.

528 U.S. at 391. Thus, although Alaska may not proffer "mere conjecture as adequate to carry [its] First Amendment burden," *id.* at 392, *Shrink Missouri* also made clear that states may "rel[y] on the evidence and findings accepted in *Buckley*" as a basis for their own contribution limits, *id.* at 393; *see also id.* at 382 (holding "*Buckley* to be authority for comparable state regulation, which need not be pegged to *Buckley*'s dollars"). In addition, the government may rely on "[t]he experience of states with and without similar laws." *Wagner v. FEC*, 793 F.3d 1, 14 (D.C. Cir. 2015) (en banc); *see also McCutcheon*, 134 S. Ct. at 1451 n.7; *Citizens United*, 558 U.S. at 357.

Federal experience, both before and after *Buckley*, makes clear the dangers inherent in large campaign contributions. In the years before and during Alaska's 2006 initiative campaign, the Abramoff scandal became the latest imbroglio to shake the political world. After a long investigation—widely reported in the media—former Ohio Congressman Bob Ney pleaded guilty in October 2006 to corruption charges for "performing official acts for lobbyists in exchange for campaign contributions, expensive meals, luxury travel and skybox sports tickets."[4] His guilty plea followed that of lobbyist Jack Abramoff, who in January 2006 admitted to offering "things of value"—including "campaign contributions"—to numerous legislators in exchange for official acts.[5] Even if this far-reaching and well-publicized campaign cash scandal did not reach Alaskan state lawmakers, it certainly informed the perception of voters—in Alaska and nationwide—that campaign contributions were associated with corrupt *quid pro quos*. Indeed, the voter guide for the

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[4] Susan Schmidt & James V. Grimaldi, *Ney Pleads Guilty to Corruption Charges*, Wash. Post (Oct. 14, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/10/13/AR2006101300169.html.

[5] Susan Schmidt & James V. Grimaldi, *Abramoff Pleads Guilty to 3 Counts*, Wash. Post (Jan. 4, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/01/03/AR2006010300474.html.

2006 Alaska initiative specifically referenced the Abramoff scandal. ER13.

Even a cursory review of the experience of other states, meanwhile, confirms the nexus between unchecked campaign contributions and corruption scandals. Illinois, for instance, endured a long history of official corruption before enacting contribution limits.[6] Most infamous were the multiple scandals associated with 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). His well-publicized efforts to sell various official acts in return for large campaign donations finally spurred the Illinois Legislature to pass contribution limits.[7]

The experience of New Mexico, which saw a "cascade of . . . corruption scandals" in the late 2000s, is also illustrative.

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[6] *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.

[7] Monique Garcia, *Illinois Campaign Reform: Gov. Pat Quinn Signs Donation Limits*, Chi. Trib. (Dec. 10, 2009), http://articles.chicagotribune.com/2009-12-10/news/0912090979_1_illinois-campaign-campaign-finance-limits.

Stephanie Simon, *New Mexico's Political Wild West*, Wall St. J. (Jan. 17, 2009), http://www.wsj.com/articles/SB123233959874194545. A kickback investigation sent two state treasurers to prison. *Id.* Two separate corruption probes also embroiled Governor Bill Richardson. One, a federal grand jury investigation, involved a California company that received a state contract after its executive donated 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 its own contribution limits. 2009 N.M. Laws ch. 68, § 1 (codified at N.M. Stat. Ann. § 1-19-34.7).

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 v. City of San Diego*, 645 F.3d 1109, 1123 n.3 (9th Cir. 2011). There is plainly no shortage of corruption and scandal in this country, and Alaska is entitled to rely on others' experiences to justify its own contribution limits.

### C. Alaska proffered sufficient evidence to establish its interests in preventing corruption and its appearance.

Even if the Supreme Court had not established, as a matter of law, that Alaska's interests in preventing corruption and its appearance are presumptively sufficient to justify its base limits, the State proffered abundant evidence at trial to establish those interests.

In *Shrink Missouri*, the Court assessed the evidence Missouri had proffered in support of its anticorruption interests. That evidence included an affidavit from a Missouri state senator (and campaign finance committee chair) "stat[ing] that large contributions have the real potential to buy votes." 528 U.S. at 393 (internal quotation marks omitted). The Court noted that "newspaper accounts of large contributions support[ed] inferences of impropriety," *id.*, including large donations to statewide officers and a corruption case in which the former state attorney general used state funds to benefit campaign contributors, *id.* at 393-94. The Court also reasoned that "the statewide vote [on Missouri's limits] certainly attested to the perception relied upon here: [A]n overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the

appearance thereof." *Id.* at 394 (internal quotation marks omitted). Considering this evidence, the Court concluded that "this case does not present a close call" as to whether Missouri met its "evidentiary obligation." *Id.* at 393.

Alaska's evidence here likewise does not present a close call as to whether the State has established its interests in preventing actual and apparent corruption. The district court noted that "the public officials who appeared at trial, regardless of whether they were called by Plaintiffs or the State, uniformly testified that they experienced and observed pressure to vote in a particular way or support a certain cause in exchange for past or future campaign contributions while in office." ER8. For example, the district court credited testimony from former Alaska state representative David Finkelstein, who confirmed that "there was an inordinate influence from contributions on the actions of the legislature":

> [L]egislators would often mention which interest groups had contributed large amounts to their campaigns or to their party during closed-door caucus meetings over whether particular bills would move forward . . . . [Finkelstein said] that "it inevitably would affect [his] vote if [he'd] received a thousand dollars or stacks of thousand dollar[ ] checks, from one side and not the other."

ER8. Two of Appellants' own witnesses, Senator John Coghill and Assemblyman Bob Bell, testified that large donors expected them to vote a certain way on specific bills, and retaliated against them for voting the wrong way by withholding funding or even funding their opponents. ER9. The court also discussed evidence regarding the VECO scandal, "in which approximately ten percent of the Alaska Legislature . . . were directly implicated for accepting money from Bill Allen and VECO, Allen's oilfield services firm, in exchange for votes and other political favors." ER9-10. Finally, the court noted that 73% of Alaska voters supported the measure enacting the $500 annual limits in 2006. ER12.

This evidence is greater in quantity and quality than what the Supreme Court deemed not to present a close call in *Shrink Missouri*.[8] Even if the Court does not presume that Alaska has sufficient interests

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[8] Appellants suggest that the proper way to eliminate corruption is to get more ethical legislators. Br. 41-42, 45-46, 46 n.6. This answer is no answer at all. "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." *The Federalist No. 51*, at 319 (James Madison) (Clinton Rossiter, ed. 2003). The First Amendment does not require us to treat elected officials as demigods. Campaign finance laws can and must be "molded to accommodate the infirm rectitude" of human beings. Appellants' Br.46.

in preventing corruption and its appearance, the evidence credited below easily establishes that Alaska has such interests.

### D. Alaska's base limits are closely drawn to further its anticorruption interests.

Alaska is owed deference in determining the dollar amount of its base limits. Appellants contend that Alaska's choice of $500 for its base limits is unconstitutional because, among other reasons, it marks a change from its previous limit of $1,000, which Appellants claim was not a "corrupt" amount (Br. 38-42, 45-48); and it is not inflation-adjusted, and thus has not risen since it was first set and is below the inflation-adjusted limits approved in *Buckley*, *id.* at 36-38, 52.[9] Appellants' tailoring challenge runs contrary to the settled deferential standard for determining whether base limits are closely drawn to achieve the government's interests in preventing corruption and its appearance.

The Supreme Court has instructed that, in reviewing the dollar amount of base limits to determine whether they are "closely drawn," courts "must determine whether [the limits] prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy,'"

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[9] *Amicus* focuses on these two points so as not to duplicate the parties' briefing.

and "whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage." *Randall*, 548 U.S. at 248 (second alteration in original) (quoting *Buckley*, 424 U.S. at 21); *see Eddleman*, 343 F.3d at 1092. This review must be conducted with deference to Alaska's choices. "As long as the limits are otherwise constitutional, it is not the prerogative of the courts to fine-tune the dollar amounts of those limits." *Eddleman*, 343 F.3d at 1095. Consequently, for four decades, the Supreme Court has consistently counseled deference to legislative and popular judgments when regulating political contributions. *See Davis v. FEC*, 554 U.S. 724, 737 (2008); *Randall*, 548 U.S. at 248; *McConnell*, 540 U.S. at 136-37; *Beaumont*, 539 U.S. at 155; *Shrink Mo.*, 528 U.S. at 391, 397; *id.* at 402-03 (Breyer, J., concurring); *NCPAC*, 470 U.S. at 500; *NRWC*, 459 U.S. at 209-10; *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981); *Buckley*, 424 U.S. at 30.

Because the questions that must be answered during a tailoring analysis are factual in nature, appellate courts must also defer to district courts' findings unless they are clearly erroneous. *Cooper*, 137 S. Ct. at 1468. Applying *Eddleman*'s "closely drawn" test—which is similar to the

tests articulated in *Buckley* and *Randall*—the district court concluded that Alaska's choice of a $500 annual limit was owed deference. ER11-20. In particular, the court examined the evidence and concluded that the $500 base limit permits candidates to amass sufficient campaign resources. ER15-20. Those findings are supported by the evidence and must be upheld. *Cooper*, 137 S. Ct. at 1465.

Appellants contend that Alaska has proffered insufficient justification for its decision to reduce the base limit from $1,000 to $500. Br. 38-42, 45-48. This argument is misplaced. *Buckley* approved the selection of a base limit intended to *avoid* large contributions and stated that courts were particularly ill-equipped to make judgments about the amount chosen, noting that "a court has no scalpel to probe" the chosen limit. 424 U.S. at 30. The Court has further explained that the judiciary "cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives." *Randall*, 548 U.S. at 248.

States' choices about the appropriate dollar amount are not carved in stone, and Alaska was not required to first establish that its prior limit of $1,000 was inherently corrupting before it made a choice to change the

amount. Rather, Alaska was permitted to respond to current conditions to combat the appearance of corruption. This perception had magnified in the public consciousness when the 2006 initiative was passed—both because of Alaska-specific incidents identified by the court below, and because of national corruption scandals like the Abramoff matter. ER13.

Nothing in the Supreme Court's campaign finance jurisprudence prevented Alaska from responding to new information suggesting that its existing limits might be insufficient to protect the state from corruption. Such a rule would make no sense. If Alaska had enacted a $500 cap in the first instance, it would have been constitutional under *Buckley* and *Shrink Missouri*. Similarly, Alaska can *change* the dollar amount of its limit so long as the new limit itself—not the change—satisfies closely drawn scrutiny. Appellants' effort to create a one-way ratchet, whereby limits may only be raised but never lowered, finds no support in the relevant case law.[10]

Likewise, Appellants' comparison to the inflation-indexed limits upheld in *Buckley*, or to the inflation-indexed amounts from when the law

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[10] Notably, Alaska's *legislators*, who benefit from increased contributions, raised the annual base limit from $500 to $1,000 in 2003––and the *people*, who suffer the corruption and its appearance that those

was originally enacted, is misplaced—most importantly, because the Supreme Court has "specifically rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate." *Shrink Mo.*, 528 U.S. at 397. Because the tailoring analysis focuses on whether the chosen limits impede effective candidacies, *see Randall*, 548 U.S. at 248; *Eddleman*, 343 F.3d at 1092, lack of inflation indexing is of minimal relevance unless the limits are already dangerously low, *see Randall*, 548 U.S. at 261. If Alaska never increases its limits, and campaign costs rise to the point where candidates can no longer run effective races, then a tailoring challenge would become appropriate. But, as the district court found, ER20, this is not that time.

No dollar cap can universally and perfectly balance anticorruption concerns and associational rights, but closely drawn scrutiny does not require perfection. *McCutcheon*, 134 S. Ct. at 1456-57. A law must be not "perfect, but reasonable"; the legislature must adopt not "the single best disposition[,] but one whose scope is in proportion to the interest served."

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higher limits create, voted to return the limits to their prior levels in 2006. ER3-4.

*Id.* at 1456 (internal quotation marks omitted). Alaska's $500 annual limits are more than "reasonable" and are drawn "in proportion to the interest served." *Id.*

## II. Alaska's Aggregate Contribution Limit for Nonresidents Is Constitutional

Appellants also challenge Alaska's $3,000 annual aggregate limit on how much a state house candidate can accept from nonresidents. Their argument is based almost entirely on specious claims that prior cases prohibit *all* aggregate or out-of-state limits. They do not. Under the proper standard of scrutiny, Alaska has provided more than sufficient evidence that its nonresident cap furthers a number of anticorruption purposes, and—though this was not actually at issue below—that the cap is closely drawn to serve those purposes.

### A. Out-of-state contribution limits are constitutional if they meet closely drawn scrutiny.

Alaska's nonresident contribution cap, like any contribution limit, is subject to intermediate scrutiny. "[B]ecause contributions lie closer to the edges than to the core of political expression," they are "subject to relatively complaisant review under the First Amendment." *Beaumont*, 539 U.S. at 161. It does not matter whether the limit is a base limit or an

aggregate limit, since "the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association," not on the specific design of a contribution cap. *Id.* at 161; *see also McCutcheon*, 134 S. Ct. at 1456 (applying closely drawn scrutiny to aggregate limit). Thus, Appellants' unsupported declaration (Br. 21) that the cap should be subject to strict scrutiny is incorrect. *See Family PAC v. McKenna*, 685 F.3d 800, 811 (9th Cir. 2012) ("Contribution limits, however, are not subject to strict scrutiny.").

Appellants also claim that *McCutcheon* "establishes that aggregate limits . . . are unconstitutional." Br. 19. This is not so. Rather, *McCutcheon* determined that the federal government could not justify, based on its anticorruption interests, a particular type of aggregate limit: a restriction on the total amount a *single donor* could give to *all* federal candidates, parties, and PACs. 134 S. Ct. at 1462.

The aggregate limit at issue in *McCutcheon* is readily distinguishable from Alaska's nonresident contribution cap. Because the cap applies to individual candidates rather than to donors, Alaska's provision does not force any donor to "limit the number of candidates he supports," or "to choose which of several policy concerns he will advance."

*Id.* at 1448. Neither does it "impose a special burden on broader participation in the democratic process," *id.* at 1449; nonresidents can donate widely to candidates, parties, and committees, ER24.

Thus, unlike the donor-centered cap in *McCutcheon*, under Alaska's limit "any burden on [donors'] freedom of choice and association is borne only by those who fail to identify their candidate of choice until" close to the election, once the candidate has reached the cap. *Burdick v. Takushi*, 504 U.S. 428, 436-37 (1992). This burden "is a very limited one," however, as the Constitution gives "little weight to the interest [a] candidate and his supporters may have in making a late rather than an early decision to" associate. *Id.* at 437 (internal quotation marks omitted). On the other hand, as discussed below, Alaska has provided compelling evidence of the anticorruption interests justifying its nonresident cap.

Just as Appellants stretch *McCutcheon* beyond its bounds, so too do they over-read this Court's decision in *VanNatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998). *VanNatta*'s continuing relevance is questionable, given intervening case law. *See Eddleman*, 343 F.3d at 1091 n.2 ("[R]eliance on *VanNatta* . . . fails to recognize the impact of the Supreme Court's superseding decision in *Shrink Missouri*."). Even if *VanNatta*

were still good law, however, it does not stand for the broad propositions that Appellants attribute to it. Br. 21.

Appellants mistake this Court's rejection of a Guarantee Clause argument in that case for a general finding that all nonresident contribution limits are unconstitutional. *Compare* Br. 21-24, *with VanNatta*, 151 F.3d at 1216-18. This Court's First Amendment decision was far more limited. It determined only that a complete ban on out-of-district (not out-of-state) contributions failed closely drawn scrutiny, because Oregon was "unable to point to any evidence" that the law served an anticorruption purpose. *VanNatta*, 151 F.3d at 1221. Nowhere did this Court say that nonresident contribution limits are unconstitutional as a general matter. "[W]e pay our precedents no respect when we extend them far beyond the circumstances for which they were designed." *Cooper*, 137 S. Ct. at 1481.

In contrast, this Court upheld a law in *Eddleman* that was structurally identical to Alaska's nonresident limit. There, Montana Right to Life Association ("MRLA") challenged a Montana statute setting a $1,250 aggregate limit on how much each state house candidate could accept from PACs. 343 F.3d at 1096. MRLA made many of the same

arguments that Appellants make here: that the aggregate limit discriminated against those regulated, that it did not distinguish between the size of each donor's contribution, and that it was insufficiently tailored because it prevented some donors from giving. *Id.* at 1096-97.

However, "the record demonstrate[d] that the danger of corruption, or the appearance of such a danger, is greater when dealing with PAC money as opposed to other contributions"; and that the limits were not "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." *Id.* at 1096, 1098. The limit was therefore constitutional. *Id.* at 1098. Similarly, the record here documents evidence that nonresident contributions pose a greater danger of corruption than do in-state ones. The amount of the cap, meanwhile, is not at issue. ER22.

This Court, therefore, writes on the same slate here as it does for every other contribution limit case. Alaska's nonresident contribution cap is constitutional if it meets the "relatively complaisant" standard of closely drawn scrutiny. *Beaumont*, 539 U.S. at 161. Like the aggregate PAC limit in *Eddleman*, Alaska's cap meets this standard.

### B. Alaska's unique potential for out-of-state corruption justifies its nonresident contribution cap.

Alaska's out-of-state contribution limit permissibly furthers the State's "compelling" interests in preventing corruption and its appearance. *McCutcheon*, 134 S. Ct. at 1445. The limit serves these interests in several distinct ways. It directly reduces the threat of corruption and its appearance by precluding the aggregation of contributions given to induce the same political favor. And it prevents circumvention of Alaska's base limits by prohibiting candidates from accepting potentially illegal contributions from difficult-to-regulate nonresident donors.

*First*, the district court rightly found that the nonresident contribution cap prevents corruption. ER25. Alaska is uniquely vulnerable to the concentrated aggregation of donations from out-of-state interests. As the district court found, Alaska is heavily dependent on outside industry and investment. ER24. Because Alaska is geographically isolated, and because it does not have the capital or the labor force to support much industry itself, it must rely on out-of-state corporations that employ out-of-state workers. ER24.

The oil and gas industry follows this pattern, and it poses a particular corruption problem in Alaska. Energy extraction comprises a far larger percentage of the state's economy than does any other activity. ER170. The state is also more dependent on revenue, royalties, and taxes from oil and gas companies than is any other energy-producing state. ER170. Indeed, Alaska relies on the energy extraction industry for 85-92% of its budget, as compared to less than 50% for the next most energy-reliant jurisdiction. ER8. In essence, Alaska is in danger of becoming a company state.

Alaska's nonresident contribution cap, then, cannot be characterized as simply a "get off my tundra" policy. Rather, it targets a different avenue for corruption than does the $500 annual base limit. One way to corrupt is through a single large donation. Base limits guard against this threat. *See Buckley*, 424 U.S. at 26-27. But while the prototypical example of corruption involves the exchange of one quid for one quo, it need not be that simple. Corruption can also consist of a *series* of quids that are all given in expectation of a single quo—either from one donor over time or, as in this case, from a number of donors associated

with a single company or industry who wish to procure from the candidate political favors that will collectively benefit them. ER268.

Such collective transactional giving poses a particular threat to Alaska. The State's history of exploitation by out-of-state industrial interests, ER24-25, and its current dependence on those same interests for nine-tenths of its budget, shows that the state legislature is uniquely vulnerable to capture from concentrated groups of nonresident extraction-industry donors. Professor Richard Painter's trial testimony established that extraction industry employers tend to pressure their employees to donate to state legislators. ER25. This is the sort of "soft pressure" on employees that earmarking rules would not reach, but that could direct concentrated donations at susceptible legislators. ER261. Professor Painter also determined, based on contribution activity in Alaska, that Alaska's combination of base limits and nonresident contribution caps has successfully eliminated the incentive for nonresident employers to so pressure their employees. ER265. Simply

put, the aggregate limit makes collective transactional giving impracticable.[11]

*Second*, the nonresident contribution cap also directly serves Alaska's interest in preventing the appearance of corruption. This interest is "[o]f almost equal concern as the danger of actual quid pro quo arrangements." *Buckley*, 424 U.S. at 27. Avoiding the appearance, as well as the actuality, of corruption is "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* (citation omitted); *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.").

As the district court found, large aggregate contributions from members of a regulated out-of-state industry to a particular candidate create a potent perception of corruption. ER25. Alaska's unique political and geographic situation, as well as the relative ease through which out-

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[11] Appellants attack some of Professor Painter's testimony as "conjecture." Br. 19. Their objection is related to the potential effects of raising the base limit, not of eliminating the nonresident contribution cap. *Id.* Regardless, Appellants cannot re-litigate the trial in this manner. Appeals courts must "give singular deference to a trial court's judgments about the credibility of witnesses." *Cooper*, 137 S. Ct. at 1474.

of-state interests can capture the legislature—the Alaska State Senate has only twenty members—gives Alaskans greater reason for concern on this account than it would other states' voters. ER25, 169. The appearance that a candidate is financially obligated to side with "outside interests over those of his constituents," ER25, "drives honest citizens out of the democratic process and breeds distrust of our government," *Purcell*, 549 U.S. at 4. Alaska therefore has a "compelling interest" in preventing the appearance of collective transactional giving, *id.*, which an aggregate cap furthers.

*Third*, aside from serving Alaska's direct anticorruption interests, the nonresident contribution cap reduces donors' ability to circumvent the State's base limits. Alaska is an unusually large state with an unusually small population. ER8. As the district court found, this combination makes it difficult for the Alaska Public Offices Commission ("APOC") to "investigate and prosecute" campaign finance violations. ER26. It also "limits both the number and abilities of watchdog organizations" in the state, ER8, so that there is little independent supervision of Alaska's campaign finance system.

Moreover, even if APOC had the capacity to investigate potentially illegal out-of-state donations, it faces jurisdictional and logistical difficulties in attempting to prosecute and enforce judgments against nonresident donors. ER26. Under these circumstances, nonresidents can easily evade Alaska's base contribution limits through straw donors or PACs without fear of reprisal. By focusing on the candidates themselves––who are subject to APOC supervision, *see* Alaska Stat. Ann. §§ 15.13.040, -.380(a)-(e)—and limiting the amount each can receive, the nonresident contribution limit prevents such law-breaking. ER249. The base limits and the nonresident contribution cap therefore "work hand-in-glove to avoid corruption and the appearance of the same." *Eddleman*, 343 F.3d at 1097.

As the Supreme Court has recently reiterated, preventing circumvention of base limits is a sufficient state interest to sustain contribution limits, including aggregate limits. *McCutcheon*, 134 S. Ct. at 1452; *see also Thalheimer*, 645 F.3d at 1125. This Court has likewise allowed aggregate limits when those regulated "could easily evade the individual contribution limits by contributing the statutory maximum through a multitude of individual committees." *Eddleman*, 343 F.3d at

1097. Thus, the district court found more than "adequate evidence" that the nonresident contribution cap furthers three "sufficiently important state interest[s]": preventing actual corruption, apparent corruption, and circumvention of the state's base limits. *Id.* at 1092.

### C. Though not at issue, the nonresident contribution cap is closely drawn to meet Alaska's anticorruption interests.

This Court need go no further than to affirm the district court's finding that the aggregate cap furthers Alaska's substantial interests. Below, Appellants waived any challenge to "the $3,000 aggregate limit amount itself," and their suit "does not raise" the question of whether the cap is closely drawn to serve Alaska's interests. ER21, 25. Nor do Appellants raise this issue now. Br. 14-24. Because the nonresident limit passes the first step of the *Eddleman* test, Appellants' challenge fails. However, if this Court were to read a tailoring claim into Appellants' arguments, the trial record and this Court's decision in *Eddleman* already confirm that the cap is closely drawn to serve Alaska's anticorruption interests.

Appellants' sole argument on point is that the cap is "not limited to those tied to 'outside industry' 'interests.'" Br. 18. It is true that the

energy extraction industry is responsible for much of Alaska's nonresident corruption problem. ER24-25. However, other out-of-state interests potentially pose similar concerns. For instance, nonresident mining companies also hold a great deal of sway over the state's economy, as multiple witnesses testified at trial. ER48, 263. "There is no reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures." *Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011). Alaska is not prevented from protecting itself against both the harms it already faces and the harms it reasonably anticipates.

Moreover, "most problems arise in greater and lesser gradations, and the First Amendment does not confine a State to addressing evils in their most acute form." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015). Closely drawn scrutiny requires not a "perfect" fit, but a "reasonable" one. *McCutcheon*, 134 S. Ct. at 1456. Alaska's nonresident limit is a more-than-reasonable solution to its historical corruption problem.

Any other tailoring concerns, meanwhile, are foreclosed by this Court's decision in *Eddleman*. As with the aggregate PAC contribution

limit at issue there—but not the donor-centered limit at issue in *McCutcheon*—"a candidate can return some money from one [nonresident] to make room for other [nonresident] money." *Eddleman*, 343 F.3d at 1097-98. The out-of-state contribution cap therefore does not harm nonresidents' associational rights, so long as a candidate likewise wishes to associate with the donor. *See id.* at 1098.

Nonresident donors also have numerous other ways to associate with their favored candidates. They "can continue, for example, to volunteer services to a candidate's campaign, to endorse a candidate, to independently buy advertising in support of a candidate, etc." *Id.* at 1098. Appellant Thompson admitted during trial that he could still have volunteered for his brother-in-law, made phone calls, contributed to groups that supported him, taken ads out in an Alaska newspaper—or even contributed to him the next year for the exact same election. ER37. That the aggregate cap leaves open many other means of affiliating with one's chosen candidates counsels in favor of its constitutionality. *See, e.g.*, *Buckley*, 424 U.S. at 22; *Thalheimer*, 645 F.3d at 1125.

Even the dollar amount itself, to which Appellants expressly disclaimed a challenge, ER22, is closely drawn to meet Alaska's interests.

In 2003, the legislature effectively doubled the caps by changing them from election-cycle limits to annual ones. S.B. 119, § 1, 23d Leg., 1st Reg. Sess., 2003 Alaska Laws Ch. 108. Thus, even in the years when Alaska had raised its base limit from $500 to $1,000, only 2.8%-6.2% of state house candidates reached the $3,000 nonresident cap. ER307-08. The limit does not "render political association ineffective, drive the sound of a candidate's voice beyond the level of notice, [or] render contributions pointless." *Eddleman*, 343 F.3d at 1098. It is constitutional.[12]

[12] If there is a particular concern about preventing family members like Thompson from donating, such concerns are properly dealt with through an as-applied challenge. However, Appellants have expressly limited themselves to a facial challenge, Reply Supp. Mot. for Partial Summ. J. 25, and the nonresident cap is facially constitutional.

## CONCLUSION

For the reasons set forth above, the district court's decision should be **AFFIRMED**.

Dated: July 26, 2017

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 6,838 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amicus Curiae* for 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 July 26, 2017. 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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