No. 17-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID THOMPSON; AARON DOWNING; and JIM CRAWFORD,

Plaintiffs-Appellants,

v.

HEATHER HEBDON, in her Official Capacity as the Executive Director of the Alaska Public Offices Commission; and ANNE HELZER, ROBERT CLIFT, VAN LAWRENCE, RICHARD STILLIE JR., and SUZANNE HANCOCK, in their Official Capacities as Members of the Alaska Public Offices Commission,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Alaska, No. 3:15-cv-00218

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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INTRODUCTION

In its per curiam opinion vacating and remanding for this Court "to revisit whether Alaska's contribution limits are consistent with our First Amendment precedents," the Supreme Court made two things crystal clear: (1) Alaska's exceedingly low contribution limits impose such a severe burden on constitutional rights as to demand particularly close scrutiny, and (2) only a "special justification" could even potentially "warrant a contribution limit so low." *Thompson v. Hebdon*, 140 S. Ct. 348, 351 (2019). Rather than focus on trying to identify any such "special justification," the state spends much of its brief relitigating the first point, insisting that its limits do not really impose all that serious of a burden on First Amendment activity. Indeed, not content with challenging the premise of the Supreme Court's remand, the state even goes so far as to challenge core aspects of *Randall v. Sorrell*, 548 U.S. 230 (2006), maintaining that indexing for inflation is not critical and that contribution limits do not actually aid incumbents. The Supreme Court did not remand for consideration of those precedent-defying arguments.

The state's reluctance to focus on the question the Supreme Court actually left open is understandable. When the state finally turns to trying to identify a special justification that might permit such a severe restriction on First Amendment rights, it comes up woefully short. All the state has to offer in defense of its individual-to-candidate limit are a 15-year-old public corruption scandal and arguments that are

materially indistinguishable from the ones the Supreme Court rejected in *Randall*. And the state defends its outlier individual-to-group limit only by steadfastly denying that it warrants any scrutiny at all. In fact, both limits are presumptively unconstitutional, and the state has come nowhere close to meeting its burden of proving that either can withstand First Amendment scrutiny.

ARGUMENT

I. Alaska's $500 Individual-To-Candidate Contribution Limit Is Unconstitutional.

After cataloguing reasons why Alaska's exceedingly low contribution limit demands particularly close scrutiny, the Supreme Court closed by observing that "[t]he parties dispute whether there are pertinent special justifications here" "'that might warrant a contribution limit so low,'" and remanded for this Court to "revisit" whether Alaska's contribution limits are constitutional. *Thompson*, 140 S. Ct. at 351 (quoting *Randall*, 548 U.S. at 261). Remarkably, the state begins by insisting that it need not identify any such "special justification" at all. Instead, in the state's view, this Court must analyze *five* additional "sets of considerations," Dkt.96 at 1-2—including three that the Supreme Court conspicuously declined to mention, and one that it already concluded weighs against the state—and may uphold the law even in the absence of any "special justifications" so long as enough of them are satisfied.

That is plainly not what the Supreme Court had in mind. After all, the state made the exact same argument in its brief in opposition, imploring that even if

Randall's "danger signs exist, the Court must look to 'five sets of considerations,'" and that "Alaska's limits pass muster under these five considerations." Respondents' Br. in Opp'n, *Thompson v. Hebdon*, 2019 WL 4795656, at *15 (U.S. Sept. 25, 2019) ("BIO"). Yet the Supreme Court identified one and only one issue for this Court to explore on remand: "whether there are pertinent special justifications here" "'that might warrant a contribution limit so low.'" *Thompson*, 140 S. Ct. at 351.

That the Court focused on that issue makes eminent sense, as that is the only one of the "five considerations" discussed in *Randall* that addresses the critical question of whether anything justifies such a severe restriction on First Amendment rights. The other four—(1) that Vermont's "limits will significantly restrict the amount of funding available for challengers to run competitive campaigns," (2) that Vermont required "political parties to abide by *exactly* the same low contribution limits that apply to other contributors," (3) that Vermont counted "volunteer services" toward its contribution limits, and (4) that Vermont's "contribution limits [we]re not adjusted for inflation"—were just further evidence that Vermont's limits imposed severe burdens on First Amendment rights, such that they could survive (if at all) only if the state could demonstrate some "special justification that might warrant a contribution limit so low." *Randall*, 548 U.S. at 253-61. Here, the Supreme Court has already concluded that Alaska's limits are so burdensome that they too can survive (if at all) only if Alaska can demonstrate some such "special

justification." *Thompson*, 140 S. Ct. at 351. Accordingly, there is no work left for the other four considerations to do.

Even if there were, the state's analysis of those issues resists bedrock principles established in *Randall* and other Supreme Court cases. For instance, the state claims that the first consideration—whether the "limits will significantly restrict the amount of funding available for challengers to run competitive campaigns"—cuts in its favor only by resisting the premise, long established in Supreme Court cases, that contribution limits generally favor incumbents. According to the state, this Court should reject *Randall*'s "speculation" on this matter *categorically* because "incumbents win reelection at a high rate across the country, regardless of contribution limits," and continued to do so in Alaska during the brief period when its limits were $1,000 per year. Dkt.96 at 3-4. But the entrenched nature of incumbent advantage is hardly a justification for perpetuating limits that prevent some challengers from mounting serious challenges. And two elections under slightly higher, but still constitutionally suspect, limits is hardly a sufficient basis to reject a concern that the Supreme Court has repeatedly articulated. Indeed, the state's $1,000 unindexed-for-inflation, per-year limit during those two elections was still lower than any contribution limit the Supreme Court has ever upheld.

The state next takes issue with the premise that its refusal to index for inflation is problematic, invoking the district court's "findings … that Alaska's lack of inflation indexing does not prevent effective campaigns." Dkt.96 at 7. Once again, the state made the same argument to the Supreme Court, *see, e.g.*, BIO.16 ("Thompson's real objection is to the district court's factual findings" on inflation), and the Court was not persuaded, *see, e.g.*, *Thompson*, 140 S. Ct. at 351 (identifying failure to index for inflation as one of the "danger signs" present here). The state thus concedes, as it must, that this "consideration" would not weigh in its favor even if it were still open to this Court. Dkt.96 at 8.

When the state finally reaches the question that is open to this Court, all it has to offer are a dated scandal and the same purported "special justifications" that the Supreme Court found insufficient in *Randall*. The state repeatedly invokes a "recent" public corruption scandal, by which it means a scandal that occurred 15 years ago, and one from which it concedes the state has since "recovered." *See, e.g.*, Dkt.96 at 1, 9-10, 16. To state the obvious, a single, decade-and-a-half-old public corruption scandal hardly qualifies as the kind of "special justification" that would allow the imposition of contribution limit that "is less than two-thirds of the [lowest] contribution limit" the Supreme Court has upheld. *Thompson*, 140 S. Ct. at 351. Indeed, multiple jurisdictions, including the United States, have seen more recent public corruption scandals, yet Alaska's limits remain a national outlier. And the

Supreme Court still subjected the federal limits in *Buckley v. Valeo*, 424 U.S. 1 (1976), to meaningful constitutional scrutiny even though they were a response to a much more recent public corruption scandal—and twice as high as Alaska's even without taking inflation into account. The risk of public corruption inheres in having public officials, and that risk is what justifies having *any* contribution limits. The fact that public corruption prosecutors are able to identify and combat corruption directly is hardly a justification for unusually low prophylactic limits.

The state also maintains that Alaska "is particularly vulnerable to corruption" on account of its small legislature and the dominant oil and gas industry. *See* Dkt.96 at 9-12. But in so doing, the state stubbornly resists the fact that the Supreme Court considered—and rejected—similar arguments in *Randall*. For example, the Court in *Randall* was unimpressed by the argument that Vermont's unusually low limits were justified by the outsized influence of the slate and bottle industry "in a small state such as Vermont." *See* Br. of Respondents, Cross-Pet'rs Vt. Pub. Int. Research Grp. *et al.*, *Randall v. Sorrell*, 2006 WL 325190, at *12-13 (U.S. Feb. 8, 2006). The state here fights the premise of that argument by insisting that "Vermont's largest industry is outpatient healthcare, which makes up only a modest percentage of its economy." Dkt.96 at 11.[1] But the point is not what Vermont's industry looks like

[1] The state also claims that "Alaska's level of industry dependence is not common," and that "[f]ew states—Vermont not among them—approach Alaska in this regard." Dkt.96 at 11. But the very article the state cites demonstrates that

today. What matters is that the Supreme Court resolved *Randall* on the premise that the slate and bottle industry wielded outsized influence in Vermont, and nonetheless "found nowhere in the record any special justification that might warrant a contribution limit so low or so restrictive." *Randall*, 548 U.S. at 261. Instead, the Court dismissed all the justifications advanced there as not meaningfully different from "those present in *Buckley*." *Id.* The state's arguments here are strikingly similar, and they too fail to identify the kind of "special justification" that might warrant upholding one of the very lowest contribution limits in the country.

II. Alaska's $500 Individual-To-Group Contribution Limit Is Unconstitutional.

The state fares no better in trying to defend its $500 individual-to-group limit. The state continues to resist any meaningful scrutiny of that limit, insisting that this Court is bound by *California Medical Association v. FEC* (*CalMed*), 453 U.S. 182 (1981), to uphold the individual-to-group limit without even considering its size, Dkt.96 at 19-21. The state is mistaken.

Alaska is not that unusual in having one industry that accounts for 15.9% of its GDP. "Oklahoma is heavily dependent on its $23.4 billion oil and gas extraction industry," which "accounts for 14.0% of Oklahoma's GDP." Samuel Stebbins, *These Are the Largest Industries in Every State*, USA Today (Aug. 27, 2018), https://bit.ly/39ffk3q. In addition, 15.1% of Delaware's GDP comes from a single industry (insurance carriers and related activities), as with Iowa (12.4% from insurance carriers and related activities), Nevada (10.5% from accommodation), Oregon (16.0% from computer and electronic product manufacturing), South Dakota (9.4% from monetary authorities), Texas (9.3% from oil and gas extraction), and Wyoming (12.7% from mining). *Id.*

To be sure, *CalMed* held that individual-to-group limits further a *permissible* government interest, in that they may help prevent circumvention of individual-to-candidate limits that target quid pro quo corruption. 453 U.S. at 203 (Blackmun, J., concurring in part and concurring in the judgment). But that does not mean that there is no need to scrutinize their fit. A complete prohibition on individual-to-group contributions would serve the same anti-circumvention rationale, but it would not escape (or survive) constitutional scrutiny. Alaska's exceedingly low $500 limit fares no better. Even a contribution limit that directly targets quid pro quo corruption or its appearance must be "closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014). An individual-to-group limit, which concededly reflects a "prophylaxis-upon-prophylaxis approach," does not escape scrutiny, but rather requires courts to "be particularly diligent in scrutinizing the law's fit." *Id.* at 221.

The state thus gets matters backward in attempting to fault *Plaintiffs* for "never articulat[ing] any reason why $500 would be too low a dollar figure for the limit on contributions to groups." Dkt.96 at 22. It is *the state's* burden to prove that its limits are "closely drawn to avoid unnecessary abridgement of associational freedoms," *McCutcheon*, 572 U.S. at 197, not Plaintiffs' burden to prove that they are not. And here, it is plain that the state has at its disposal many means less restrictive means than a draconian $500 contribution limit to address its

circumvention concerns. For example, the state claims that "[p]rohibitions against earmarking do nothing to prevent using a group to funnel money to a candidate because a group can form to support a single candidate and make public its intention to contribute to that candidate." Dkt.96 at 21. But that is *precisely* what 52 U.S.C. §30116(a)(8) prevents by treating contributions to single-candidate groups as individual-to-candidate contributions. *See* Dkt.91 at 20 (citing 52 U.S.C. §30116(a)(8)).

The state responds that "the individual-to-group limit does not severely limit the association or expression of individuals" because "[i]ndividuals are only restricted in the one type of expression that implicates *quid pro quo* corruption concerns—i.e., spending money that can be directed to candidates." Dkt.96 at 23-24. But that attempt to trivialize the First Amendment interests in individual-to-group contributions flies in the face of well-established Supreme Court precedent. The Supreme Court has long recognized that an individual's contribution "serves as a general expression of support for the candidate and his views," and the size of a contribution may provide a "rough index of the intensity of the contributor's support for the candidate." *Buckley*, 424 U.S. at 20-21. That holds equally true of support for a group. That the state still refuses to recognize the value of these constitutionally protected rights only reinforces the conclusion that its exceedingly low limits are woefully underprotective of such rights and cannot stand.

III. Alaska's Contribution Limits Do Not Meaningfully Target Quid Pro Quo Corruption Or Its Appearance.

The state expends considerable effort defending the proposition that it has "an important state interest in preventing corruption," Dkt.96 at 15—a puzzling focus given that Plaintiffs have not disputed that proposition. Certainly Alaska has the same important interest in preventing corruption as any government. But the relevant question here is whether its outlier contribution limits actually further that interest, and whether they do so in a manner that is "closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 572 U.S. at 197. They do neither.

Under the Supreme Court's precedents, quid pro quo corruption or its appearance is neither all-encompassing nor a concept that states are at liberty to define for themselves. It is a very specific concept, confined to "the notion of a direct exchange of an official act for money." *Id.* at 192 (plurality opinion). Campaign finance restrictions cannot be justified by more nebulous anti-corruption objectives, such as "to reduce the amount of money in politics," or to "target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *Id.* at 191-92. After all, the fact that contributors "may have influence over or access to elected officials does not mean that th[o]se officials are corrupt." *Citizens United v. FEC*, 558 U.S. 310, 359 (2009). That kind of ingratiation and access "embod[ies] a central feature of

democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon*, 572 U.S. at 192.

Alaska's $500 limits were not, as a matter of historical fact, even designed to target quid pro quo corruption or its appearance. While the state repeatedly portrays the choice of a $500-limit as the product of its 15-year-old public corruption scandal, *see, e.g.*, Dkt.96 at 1, 9-10, 16, that number was in fact selected a decade earlier, as part a sweeping effort not just to address quid pro quo corruption or its appearance, but "to foster good government." S.B. 191, 19th Leg., 2d Sess. §1(b) (Alaska 1996), *available at* https://bit.ly/32BzPFs. In the findings accompanying the 1996 law, the state legislature opined, *inter alia*, that campaigns "last too long, are often uninformative, and are too expensive"; that "special interests" raise too much money and "thereby gain an undue influence over election campaigns and elected officials"; and that "incumbents enjoy a distinct advantage in raising money for election campaigns." *Id.* §1(a). Those concerns, none of which is a valid consideration under current Supreme Court doctrine, are what led to the low and unindexed $500 number. Indeed, neither that initiative's sponsors nor the legislature even considered what types or amounts of limits were needed to prevent quid pro quo corruption or its appearance. Nor did anyone do so when the $500 limits were reimposed by ballot measure in 2006. *See* Dkt.12-2 at ER211-12, 217-26, 333-35. Alaska's contribution

limits are thus among the very lowest in the country precisely because they are the product of the type of impermissible, nebulous objectives that the Supreme Court has squarely rejected as a justification for burdening core political speech. *See McCutcheon*, 572 U.S. at 191; *Citizens United*, 558 U.S. at 360.

CONCLUSION

For the foregoing reasons, the Court should hold Alaska's $500 individual-to-candidate and individual-to-group contribution limits unconstitutional.

Respectfully submitted,

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March 31, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with the Court's order of January 13, 2020, because it contains 2,797 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

March 31, 2020

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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