**No. 17-35019**

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

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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*.

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

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# PLAINTIFFS-APPELLANTS' BRIEF OPPOSING REHEARING EN BANC

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## INTRODUCTION

This case arises out of a challenge to the constitutionality of several provisions of Alaska's exceedingly restrictive campaign finance laws, which (among other things) limit both individual-to-candidate and individual-to-group contributions to a mere $500 per year. A panel of this Court initially upheld both limits based on its application of circuit precedent holding that the Supreme Court's decision in *Randall v. Sorrell*, 548 U.S. 230 (2006), was "not binding authority because no opinion commanded a majority of the Court." *Thompson v. Hebdon*, 909 F.3d 1027, 1037 n.5 (9th Cir. 2018). At that time, the panel deemed itself "compelled by" circuit precedent—namely, *Lair v. Motl*, 873 F.3d 1170 (9th Cir. 2017)—to reject Plaintiffs' constitutional challenges to the individual-to-candidate and individual-to-group limits. *Thompson*, 909 F.3d at 1031. Although it was bound by existing circuit precedent, the panel acknowledged that the "plurality opinion in *Randall*, if binding, may aid Thompson's position because at least one of the 'warning signs' identified in *Randall* is present here." *Id.* at 1037 n.5.

After the initial panel opinion, Plaintiffs filed a petition for writ of certiorari urging the Supreme Court to intervene and bring this Court's precedent in line with its own. The Supreme Court obliged. In a per curiam opinion, it granted certiorari, vacated this Court's judgment, made clear that *Randall* applies with full force, identified numerous factors that raised serious doubts about the constitutionality of

Alaska's meager contribution limits, and remanded for this Court "to revisit whether Alaska's contribution limits are consistent with [the Supreme Court's] First Amendment precedents." *Thompson v. Hebdon*, 140 S.Ct. 348, 349-51 & n.* (2019).

On remand, the panel did just that, and this time around concluded that Alaska's outlier contribution limits are unconstitutional. *Thompson v. Hebdon*, 7 F.4th 811, 818-23 (9th Cir. 2021). Faithfully applying *Randall* and its instruction to engage in an independent examination of the record, the Court found that most of the *Randall* factors weighed against the state, and that the state fell woefully short of identifying some "special justification" that would allow it to have contribution limits radically lower than those in the rest of the country.

That decision is eminently correct—especially given the Supreme Court's recent admonition (in another case reversing the First Amendment jurisprudence of this Court) that the "exacting scrutiny" that governs contribution limits requires "narrow tailoring." *See Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2383-84 (2021). And the only potential conflict is with aspects of earlier decisions, like *Lair*, that the Supreme Court effectively abrogated in its per curiam decision. Revisiting the panel's revised opinion thus would accomplish little more than to put this case back in the Supreme Court's crosshairs—which likely explains why the state declined to seek rehearing itself and does not support it now. The Court should follow the state's lead and let this long-running litigation finally come to an end.

## BACKGROUND

Alaska has some of the most extreme campaign contribution limits in the country. While federal law permits Alaskans to contribute $2,900 per election (*i.e.*, up to $5,800 for the primary and general elections in a single cycle) to any candidate for federal office, 52 U.S.C. §30116(a)(1)(A); U.S. Federal Election Commission, Contribution Limits for 2020-2021 Federal Elections, *available at* https://bit.ly/3kFMYH8 (last visited September 10, 2021), Alaska state law allows individuals to contribute only $500 *per year* (*i.e.*, no more than $500 even when, as is typical, the primary and general elections are in the same calendar year) to any candidate for any office, or to any group other than a political party, Alaska Stat. §15.13.070(b)(1).

Those limits are lower than those of all but three other states, and are significantly lower than any contribution limit the Supreme Court has ever upheld. In fact, adjusting for inflation (something Alaska law does not do), those limits are barely 10 percent of the limit the Supreme Court upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976), and are lower than the limits the Supreme Court *struck down* in *Randall*. *See* West Egg, Inflation Calculator, https://bit.ly/2ObjuUR (last visited September 10, 2021) ($1,000 in 1976 equivalent to $4,618.19 in 2020; $400 in 2006 equivalent to $526.77 in 2020).

Unique among all 50 states, Alaska also imposes restrictions on the aggregate dollar amount of contributions that a candidate may accept from individuals who reside outside Alaska. Alaska Stat. §15.13.072(e). For candidates seeking election as a state representative, that limit is $3,000 per year. *Id.* §15.13.072(e)(3). This means that once a candidate has received a total of $3,000 from any combination of nonresidents, no other nonresident may contribute *any* money to that candidate. To take an example from Plaintiffs' experience, David Thompson is a resident of Wisconsin and wished to contribute $100 to his brother-in-law's campaign, but he was unable to do so because the campaign had already accepted an aggregate $3,000 in contributions from other nonresident supporters. *See Thompson*, 7 F.4th at 817.

In November 2015, Plaintiffs filed this lawsuit arguing that Alaska's individual-to-candidate, individual-to-group, and aggregate nonresident contribution limits violate the First Amendment. Plaintiffs also challenged Alaska's aggregation of political party sub-units for purposes of the state's $5,000-per-year limit on the amount a political party may contribute to a municipal candidate, which limits party sub-units to the $5,000 limit but does not subject multiple labor-union political action committees (PACs) to the same limit. *See* Alaska Stat. §§15.13.070(d), 15.13.400(17). Plaintiffs sought a declaratory judgment holding each of the challenged provisions unconstitutional, as well as a permanent injunction prohibiting enforcement of the provisions. The district court upheld all four

challenged provisions as constitutional. *See Thompson v. Dauphinais*, 217 F.Supp.3d 1023, 1029-40 (D. Alaska 2016).

On appeal, a divided panel of this Court (Chief Judge Thomas and Judges Callahan and Bea) reversed as to the $3,000 aggregate nonresident limit, explaining that, "[a]t most, the law aims to curb perceived 'undue influence' of out-of-state contributors—an interest that is no longer sound after *Citizens United* [*v. FEC*, 558 U.S. 310 (2010)] and *McCutcheon* [*v. FEC*, 572 U.S. 185 (2014)]." *Thompson*, 909 F.3d at 1041. Chief Judge Thomas dissented from that part of the panel's holding and would have upheld the aggregate nonresident contribution limit. *See id.* at 1044-49 (Thomas, C.J., concurring in part and dissenting in part). The panel affirmed as to the individual-to-candidate and individual-to-group limits, as well as the aggregation of political party sub-units for purposes of the $5,000 political-party-to-municipal-candidate limit. *See id.* at 1031-44 (majority opinion).

The panel recognized that Alaska's $500 individual-to-candidate and individual-to-group limits are "among the lowest in the nation" and "low compared to the laws of most other states." *Id.* at 1036-37. The panel also observed that the Supreme Court's "plurality opinion in *Randall*, if binding, may aid Thompson's position because at least one of the 'warning signs' identified in *Randall* is present here." *Id.* at 1037 n.5. And it acknowledged that "*McCutcheon* and *Citizens United* created some doubt as to the continuing vitality" of the standard articulated in

*Montana Right to Life Association v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), under which state contribution limits "are 'closely drawn' … if they '(a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign,'" and under which "the quantum of evidence necessary to justify a legitimate state interest is low: the perceived threat must be merely more than 'mere conjecture' and 'not … "illusory."'" *Thompson*, 909 F.3d at 1033-34 & n.2 (quoting *Eddleman*, 343 F.3d at 1091-92). But the panel deemed itself bound by circuit precedent holding that the Supreme Court's decision in *Randall* was "not binding authority because no opinion commanded a majority of the Court," *id.* at 1037 n.5, and concluded that it was "compelled" to reject Plaintiffs' arguments based on circuit precedent upholding Montana's "comparable limit" in *Eddleman* and *Lair*, *id.* at 1031, 1035-37.

After the opinion issued, a judge issued a sua sponte request for a vote on whether to rehear the matter en banc and directed the parties to file simultaneous briefs on the issue. *See* 12/26/18 Order, ECF No. 63. After the Court reviewed the supplemental briefing, in which the state agreed with Plaintiffs that rehearing en banc was not warranted, the request was withdrawn, and the mandate issued. 2/20/19 Order, ECF No. 78.

Plaintiffs filed a petition for certiorari, and the Supreme Court issued a per curiam opinion granting certiorari, vacating this Court's judgment, and remanding for this Court "to revisit whether Alaska's contribution limits are consistent with [the Supreme Court's] First Amendment precedents." *Thompson*, 140 S.Ct. at 349-51. The Court's opinion made clear that Alaska's law triggers at least three of *Randall*'s "danger signs": (1) "Alaska's $500 individual-to-candidate contribution limit is 'substantially lower than … the limits [the Supreme Court has] previously upheld,'" (2) "Alaska's individual-to-candidate contribution limit is 'substantially lower than … comparable limits in other States,'" and (3) "Alaska's contribution limit is not adjusted for inflation." *Id.* at 350-51 (ellipses in original) (quoting *Randall*, 548 U.S. at 253). The Court left it to this Court to determine whether the state demonstrated a "special justification" that warranted contribution limits so low. *Id.*

On remand, after supplemental briefing and argument, the panel issued a revised opinion. "[A]pply[ing] the five-factor test outlined in *Randall* with an emphasis on the 'special justification' factor," the majority concluded that Alaska's $500 individual-to-candidate and individual-to-group contribution limits are unconstitutional. *Thompson*, 7 F.4th at 819-23. The panel also reaffirmed the aspects of its prior opinion holding Alaska's $3,000 aggregate nonresident limit unconstitutional and upholding the aggregation of political party sub-units for purposes of the $5,000 political-party-to-municipal-candidate limit. *Id.* at 823-27;

*Thompson*, 909 F.3d at 1040-43. Chief Judge Thomas dissented as to all three invalidated provisions. He disagreed with the majority's analysis of the individual-to-candidate and individual-to-group limits under *Randall*, contended that only one of the five considerations discussed in *Randall* (failure to adjust for inflation) favors Plaintiffs, and would have upheld all of the challenged provisions. *Thompson*, 7 F.4th at 827-38 (Thomas, C.J., concurring in part and dissenting in part).

The parties' time to file a petition for panel rehearing or rehearing en banc expired on August 13, 2021 (14 days after the Court issued the revised panel opinion on July 30, 2021). *See* Fed. R. App. P. 35(c), 40(a)(1). No party requested rehearing. To the contrary, the state consented to a motion pursuant to Ninth Circuit Rule 39-1.8 to transfer consideration of attorneys' fees on appeal to the district court, indicating that both sides were content to lay the merits of the case to rest and move on while minimizing any additional liability for attorneys' fees. 8/17/21 Unopposed Mot. to Transfer Consideration of Att'ys' Fees on Appeal, ECF No. 115. Nonetheless, on August 20, 2021, a judge of this Court called for a vote to determine whether this case should be reheard en banc, and the Court directed the parties to file simultaneous briefs on that question. 8/20/21 Order, ECF No. 116.

## ARGUMENT

### I. The Panel's Decision Correctly Applies Directly On-Point Supreme Court Precedent.

The decision below faithfully followed the Supreme Court's instructions in its per curiam opinion in reaching the conclusion that Alaska's individual-to-candidate, individual-to-group, and aggregate nonresident contribution limits violate the First Amendment. That decision is eminently correct and does not warrant further review.[1]

1. While the initial panel opinion upheld Alaska's $500 individual-to-candidate limit by applying circuit precedent holding that the Supreme Court's decision in *Randall* was "not binding authority because no opinion commanded a majority of the Court," *Thompson*, 909 F.3d at 1037 n.5, the Supreme Court made clear in its per curiam opinion that this Court is bound by *Randall*, *see Thompson*, 140 S.Ct. at 349-51 & n.*. The Supreme Court also observed that at least three of the "danger signs" that were present in *Randall* are present here too: (1) "Alaska's $500 individual-to-candidate contribution limit is 'substantially lower than … the limits [the Supreme Court has] previously upheld,'" (2) "Alaska's individual-to-candidate contribution limit is 'substantially lower than … comparable limits in

[1] As for the challenge to Alaska's annual limits on political party contributions, the plaintiff that challenged that provision, District 18 of the Alaska Republican Party, is no longer a party to these proceedings. As a result, that aspect of the Court's decision is no longer at issue.

other States,'" and (3) "Alaska's contribution limit is not adjusted for inflation." *Id.* at 350-51 (ellipses in original) (quoting *Randall*, 548 U.S. at 253). The Court noted that, in *Randall*, the state "had failed to provide 'any special justification that might warrant a contribution limit so low,'" and that the parties in this case "dispute whether there are pertinent special justifications here." *Id.* at 351; *see also id.* at 351 (statement of Ginsburg, J.) (noting that special justification "may warrant Alaska's low individual contribution limit"). The Court therefore remanded for this Court "to revisit whether Alaska's contribution limits are consistent with [the Supreme Court's] First Amendment precedents." *Id.* at 351 (per curiam opinion).

On remand, the panel faithfully applied the *Randall* framework (as well as *Citizens United* and *McCutcheon*) to correctly conclude that Alaska's individual-to-candidate limits are unconstitutional. Because the Supreme Court had already concluded that "dangers signs" are present here, the panel focused principally on the "five sets of considerations" or "factors" that the *Randall* plurality had employed to determine whether Vermont's limits were constitutional: "(1) whether the limits would significantly restrict the amount of funding available for challengers to run competitive campaigns; (2) whether political parties must abide by the same low limits that apply to individual contributors; (3) whether volunteer services or expenses are considered contributions that would count toward the limit; (4) whether the limits are indexed for inflation; and (5) whether there is any 'special justification'

that might warrant such low limits." 7 F.4th at 818. After "examin[ing] the record independently," the panel concluded that the first, fourth, and fifth factors favored Plaintiffs, while the second and third favored Alaska. *See id.* at 819-22. That analysis was well-grounded in the evidence and provides no basis for further review.

First, ample record evidence supports the panel's conclusion that Alaska's individual-to-candidate contribution limit "significantly restrict[s] the amount of funding available for challengers to run competitive campaigns." *Id.* at 819. Incumbent officeholders in Alaska have several advantages that challengers must overcome to be competitive, including name-recognition. Record evidence and the first-hand testimony of former Senator John Coghill demonstrate that overcoming the advantages of incumbency "can be especially difficult in Alaska's geographically large districts or in its state-wide races." *Id.* Moreover, Alaska's use of annual (rather than per-election) limits favors incumbents because challengers are often not registered as candidates in odd-numbered years (known as "off-years") and cannot raise money in those years, whereas "most incumbents are registered as candidates and raise money year in and year out." *Id.* "Thus, challengers are short the contributions from those who contributed to them during the election year but would have also given during the off-year." *Id.*

In addition, "challengers often have to run first in primary elections for which they need to spend money, while incumbents are less likely to face primary

challenges, and hence they may save that money to use against their challengers in general elections." *Id.* That evidence more than suffices to sustain the panel's conclusion that "the record at least 'suggests'"—which is all the plurality found in *Randall*, *see* 548 U.S. at 253—"that Alaska's individual contribution limit 'significantly restrict[s] the amount of funding available for challengers to run competitive campaigns' and thus 'counts against the constitutional validity of the contribution limits.'" 7 F.4th at 821.

The panel then concluded that the second and third factors both favor Alaska, because political parties in Alaska are subject to much more lenient contribution limits than individual donors, and because it did not read Alaska law as counting volunteer services toward the contribution limits. *Id.* As for the fourth factor, it is undisputed that Alaska's limits are not indexed for inflation, "and thus this factor favors Plaintiffs." *Id.* Indeed, "$500 in 2021 dollars appears to have a real value of about $375 in 2006 dollars, 2006 being the year the Alaska contribution limits at issue were passed." *Id.* at 821-22.

Finally, the panel correctly concluded that the fifth *Randall* factor—whether there is any "special justification" for Alaska's low limits—favored Plaintiffs. Guided by *Randall*, *Citizens United*, and *McCutcheon*, the panel noted that "the prevention of quid pro quo corruption, or its appearance, is the only state interest that can support limits on campaign contributions," and that the presence of "danger

signs" requires the Court to "determine whether Alaska has a 'special justification' indicating that 'corruption (or its appearance) in [Alaska] is significantly more serious a matter than elsewhere.'" *Id.* at 822 (alterations in original) (quoting *Randall*, 548 U.S. at 261). Based on the panel's independent examination of the record evidence, it concluded that "the record contains no indication that corruption or its appearance is more serious in Alaska than in other states." *Id.* While the "small size of the legislature and the influence of the oil industry are risk factors," the panel found "Alaska's anecdotal evidence … insufficient to establish that 'corruption (or its appearance) in [Alaska] is *significantly more serious a matter than elsewhere*.'" *Id.* In reaching that conclusion, the panel acknowledged the 15-year-old VECO scandal involving a handful of state legislators who engaged in criminal bribery—but the panel found that the bribery did not concern campaign contributions and that the lone, long-ago incident was "insufficient for us to conclude that there is a present special justification for Alaska's low individual contribution limit." *See id.*

"On balance," the panel's thoughtful consideration of the five *Randall* factors led it to "hold that Alaska has failed to meet its burden of showing that its individual contribution limit is 'closely drawn to meet its objectives.'" *Id.* (quoting *Randall*, 548 U.S. at 253). That conclusion is consistent with the law and the facts and does not warrant further review. Indeed, the Supreme Court has already taken the extraordinary step of intervening to express doubt about the constitutionality of

Alaska's contribution limits. And since then, the Court has intervened in another of this Court's cases to reject an unduly lax form of scrutiny of restrictions on First Amendment activity. *See Ams. for Prosperity*, 141 S.Ct. at 2383-84. Reconsideration of the panel's decision would likely accomplish little more than prompting Supreme Court intervention yet again.

2. So too with respect to the panel's conclusion that Alaska failed to meet its burden of showing that the $500 individual-to-group limit is closely drawn to restrict contributors from circumventing the individual-to-candidate limit. *Id.* While the previous panel opinion had determined that *California Medical Association v. FEC*, 453 U.S. 182 (1981), compelled upholding that limit as an anti-circumvention measure, *see Thompson*, 909 F.3d at 1039-40, the revised panel opinion correctly recognized that individual-to-group contribution limits are a form of "'prophylaxis-upon-prophylaxis'" that requires courts to be "particularly diligent in scrutinizing the law's fit," *Thompson*, 7 F.4th at 823 (quoting *McCutcheon*, 572 U.S. at 221). Applying that close scrutiny, the panel recognized that the individual-to-group limit "exhibits danger signs in its own right" because, "like the individual-to-candidate limit, it is not adjusted for inflation, and it is lower than limits in other states," and concluded that the limit is "poorly tailored to the Government's interest in preventing circumvention of the base limits." *Id.* That conclusion is likewise eminently correct—particularly given the Supreme Court's recent admonition that

*all* forms of heightened scrutiny require "narrow tailoring." *Ams. for Prosperity*, 141 S.Ct. at 2383-84.

3. Finally, just as last time this Court sua sponte requested briefing on the potential of rehearing en banc, there is no reason to reconsider the panel's conclusion that Alaska's anomalous aggregate nonresident contribution limit is unconstitutional. Alaska stands alone in trying to restrict the First Amendment rights of nonresidents to participate in its political dialogue. As the panel correctly explained, that provision targets exactly the kind of "undue influence" concerns that the Supreme Court has repeatedly held are not a permissible basis for restricting the core political speech of making a campaign contribution. *Thompson*, 7 F.4th at 824 (citing *McCutcheon* and *Citizens United*). Indeed, "Alaska's proffered interest in 'self-governance' is indistinguishable from the disavowed state interest in combating 'influence over or access to' public officials." *Id.* at 826. Even were that not the case, moreover, the nonresident aggregate limit is plainly "a poor fit for combating quid pro quo corruption or its appearance." *Id.* at 825. The state thus did not come close to showing that this draconian measure is narrowly tailored to accomplish any permissible state interest—which likely explains why the state has now twice declined the opportunity to ask this Court reconsider the panel's conclusion that it is unconstitutional.

* * *

In sum, the revised panel opinion is fully consistent with the Supreme Court's guidance in its per curiam opinion, with the Supreme Court's First Amendment precedents, and with the record evidence. There is no reason for further review.

## II. The Panel's Decision Creates No Conflict That Warrants This Court's Review.

The panel's decision does not conflict with any decisions from this Court or others that remain good law. To be sure, the revised panel opinion does depart from circuit precedent insofar as it rightly elevates the Supreme Court's First Amendment precedents over less-stringent standards espoused in cases like *Eddleman* and *Lair*. But that is because the panel correctly understood the Supreme Court's opinion to effectively abrogate those decisions as inconsistent with Supreme Court precedent: "The Supreme Court remanded, taking issue with our failure to apply *Randall* to the two $500 limits on individuals to candidates and election-related groups." *Thompson*, 7 F.4th at 818.

In particular, as the revised panel opinion explained, the prior panel opinion had "declined to apply *Randall* because we believed that it was 'not binding authority because no opinion commanded a majority of the Court.'" *Id.* at 818 n.2 (quoting *Thompson*, 909 F.3d at 1037 n.5). But the Supreme Court made emphatically clear that this Court is bound to apply the analysis set forth in *Randall*. *Thompson*, 140 S.Ct. at 349-51 & n.*. The revised panel opinion therefore properly discarded *Eddleman*'s watered-down version of scrutiny in favor of an analysis

faithfully rooted in *Randall* and the Supreme Court's other binding First Amendment precedents. For example, while the panel had previously identified factual findings that "supported a conclusion that the limit allows candidates 'to amass sufficient resources to run effective campaigns,'" the panel explained that those findings "do[] not necessarily answer the different question the Supreme Court posed to us by asking us to apply *Randall*—whether the limit 'significantly restrict[s] the amount of funding available for challengers to run competitive campaigns.'" *Thompson*, 7 F.4th at 820 (first quoting *Eddleman*, 343 F.3d at 1092; then quoting *Randall*, 548 U.S. at 253). The fact that the revised panel opinion departed from outmoded circuit precedent in heeding the Supreme Court's directive to harmonize this Court's jurisprudence with Supreme Court jurisprudence does not create any conflict with valid circuit law that might warrant further review.

Nor does the panel's decision conflict with decisions from other courts of appeals. In fact, the precise opposite is true. This Court was previously an outlier among the courts of appeals in declining to apply the analysis employed by a plurality of the Supreme Court in *Randall*. Instead of abiding by *Randall*, this Court adhered to its own test for evaluating the constitutionality of contribution limits, as set forth in *Eddleman* and reaffirmed in *Lair*. *See Thompson*, 909 F.3d at 1033-34. The revised panel opinion brings this Court in line with other courts of appeals that have considered *Randall* and correctly recognized that they must follow the

reasoning of the plurality opinion.[2] All that is left, then, is a dispute over how the *Randall* test applies to this record. As the state itself has recognized in declining to seek en banc review and stating that it "does not favor" rehearing, 9/10/2021 Appellees' Br., ECF No. 117, that is not the kind of issue that warrants the attention of the en banc Court. To the contrary, further review could only occasion further liability for attorneys' fees and Supreme Court intervention if the panel's sound conclusions were revisited.

[2] *See, e.g.*, *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 60-61 (1st Cir. 2011); *Ognibene v. Parkes*, 671 F.3d 174, 192 (2d Cir. 2011); *Preston v. Leake*, 660 F.3d 726, 739-40 (4th Cir. 2011); *Zimmerman v. City of Austin*, 881 F.3d 378, 387 (5th Cir. 2018); *McNeilly v. Land*, 684 F.3d 611, 617-20 (6th Cir. 2012); *Ill. Liberty PAC v. Madigan*, 904 F.3d 463, 469-70 (7th Cir. 2018); *Minn. Citizens Concerned for Life v. Swanson*, 640 F.3d 304, 319 n.9 (8th Cir. 2011), *rev'd in part on other grounds*, 692 F.3d 864 (8th Cir. 2012) (en banc); *Indep. Inst. v. Williams*, 812 F.3d 787, 791 (10th Cir. 2016); *Ala. Democratic Conf. v. Att'y Gen. of Ala.*, 838 F.3d 1057, 1069-70 (11th Cir. 2016); *Holmes v. FEC*, 875 F.3d 1153, 1165 (D.C. Cir. 2017).

## CONCLUSION

The Court should not order rehearing en banc.

Respectfully submitted,

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September 10, 2021

## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellants state that the only related cases are those directly preceding this case, including: *Thompson v. Hebdon*, No. 19-122 (U.S.) (decided Nov. 25, 2019; judgment issued Dec. 27, 2019); *Thompson v. Hebdon*, No. 17-35019 (9th Cir.) (opinion issued and judgment entered Nov. 27, 2018; mandate issued Feb. 20, 2019); and *Thompson v. Dauphinais*, No. 3:15-cv-00218-TMB (D. Alaska) (memorandum of decision issued Nov. 7, 2016; final judgment entered Dec. 8, 2016).

September 10, 2021

s/Paul D. Clement
Paul D. Clement

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the Court's order of August 20, 2021, because it contains 4,196 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.

September 10, 2021

s/Paul D. Clement
Paul D. Clement

**CERTIFICATE OF SERVICE**

I hereby certify that on September 10, 2021, 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.

s/Paul D. Clement
Paul D. Clement