No. 12-35809

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUG LAIR, *et al*.,

Plaintiffs-Appellees,

v.

JONATHAN MOTL, *et al.*,

Defendants-Appellants.

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

BRIEF *AMICI CURIAE* FOR THE CAMPAIGN LEGAL CENTER, COMMON CAUSE, JUSTICE AT STAKE AND THE LEAGUE OF WOMEN VOTERS, SUPPORTING DEFENDANTS-APPELLANTS JONATHAN MOTL, ET AL. AND URGING REVERSAL

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STATEMENT OF INTEREST[1]

Amicus Campaign Legal Center is a nonprofit, nonpartisan organization that represents the public interest in administrative and legal proceedings to promote the enforcement of governmental ethics, campaign finance and election laws.

Amicus Common Cause is a nonprofit, nonpartisan organization, with approximately 400,000 members and supporters nationwide, that has long been concerned with the growing problem of money in the political process. The organization has publicly advocated for appropriate regulation, including contribution limits, to restore and maintain the integrity of the electoral system.

Amicus Justice at Stake Justice at Stake is a non-profit, nonpartisan national partnership of more than fifty organizations that focuses exclusively on keeping courts fair and impartial through public education, litigation and reform.

Amicus League of Women Voters of the United States is a nonpartisan, community based organization, with more than 140,000 members and supporters nationwide, that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy.

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

SUMMARY OF THE ARGUMENT

Less than five weeks before the November 2012 general election, the U.S. District Court for the District of Montana struck down Montana's political campaign contribution limits, which had been in effect since 1995, as unconstitutionally low under the First Amendment. In so doing, the Montana court misapplied relevant Supreme Court precedent as well as the settled law of this Circuit.

Montana imposes a range of limits on contributions from individuals, parties, and political committees (i.e., PACs) to candidates for state office. Mont. Code Ann. § 13-37-216 (2013). As they apply to individuals and PACs, these limits were already reviewed and held constitutional in *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085, 1088 (9th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004).[2] There, this Court found that the limits are "sufficiently tailored to achieving Montana's important interest in preventing corruption and the appearance of corruption in Montana politics" to withstand constitutional scrutiny. *Id.* However, the district court concluded—wrongly—that it was no longer bound by *Eddleman* in light of the intervening Supreme Court decision in *Randall v. Sorrell*, 548 U.S. 230 (2006) (plurality opinion).

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[2] The limits applicable to political party contributions, Mont. Code Ann. § 13-27-216(3), were not challenged in *Eddleman*.

Plaintiffs-Appellees Lair *et al.* now contend that the Supreme Court's recent decision in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), is also in irreconcilable conflict with *Eddleman*. Their argument is unavailing. *McCutcheon* explicitly did not change the standard of review or basic analytical framework that the Supreme Court has long applied to laws limiting individual contributions. *Id.* at 1445. Instead, it considered a very particular form of aggregate contribution limit, and concluded that the valid "base" contribution limits underlying the aggregate limit—as well as other distinctive attributes of federal law—made corruption via circumvention "highly implausible." *Id.* at 1453. Montana's "aggregate" political party limits are easily distinguishable from the federal provision invalidated in *McCutcheon*. Indeed, the limits are "aggregate" in name alone: as the only restrictions on political party giving, they are properly characterized as "base" limits. Further distinguishing this case from *McCutcheon*, Montana permits unlimited contributions to political parties, so the risk of circumvention absent the party limits is not "implausible" but plain.

The lower court erred: first, by finding that *Randall* is inconsistent with this Court's decision in *Eddleman*, and second, by finding that Montana's contribution limits are insufficiently tailored to pass muster under the First Amendment. *McCutcheon*, moreover, does nothing to impair the constitutionality of Montana's contribution limits. The judgment below should be reversed.

ARGUMENT

I. *Eddleman* Controls This Case.

This Court has already considered and upheld the constitutionality of Montana's contribution limits. In *Eddleman*, Montana Code Annotated § 13-37-216 was thoughtfully evaluated and found constitutional "in the face of a virtually indistinguishable attack." *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012) (staying the district court's permanent injunction pending appeal). Appellees do not argue that Montana campaigns have fundamentally changed since 2003 in a way that would support revisiting *Eddleman*. *Id.* at 1204. Instead, their argument is based exclusively on the Supreme Court's intervening decisions in *Randall* and *McCutcheon*, neither of which compels overruling *Eddleman*.

Even assuming that Justice Breyer's plurality in *Randall* did represent a majority opinion,[3] it "is not clearly irreconcilable with the pre-existing law that [this Court] applied in *Eddleman*." *Id.* The *Randall* plurality did not depart from the Court's longstanding approach to the evaluation of political contribution limits, but adhered to the same analytical framework that has been applied in every challenge to campaign contribution limits since *Buckley v. Valeo*, 424 U.S. 1, 25

[3] The precedential value of Justice Breyer's opinion in *Randall* is far from clear. This Court—characterizing *Randall* as "the epitome of a splintered decision"—has questioned whether the six separate opinions it generated can be synthesized into a majority view. *Lair*, 697 F.3d at 1205; *see also Thalheimer v. City of San Diego*, 645 F.3d 1109, 1127 & n.5 (9th Cir. 2011).

(1976) (holding that contribution restrictions need only be "closely drawn" to match a "sufficiently important interest"). *See, e.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000) (applying *Buckley*'s "closely drawn" standard); *FEC v. Beaumont*, 539 U.S. 146, 161-62 (2003) (same).

The Supreme Court's recent decision in *McCutcheon* does nothing to alter *Buckley*'s enduring standard. In fact, the *McCutcheon* plurality specifically and repeatedly disavowed the contention that it was overruling its past precedents involving contribution limits. *See, e.g.*, 134 S. Ct. at 1451 & n.6. Contribution limits accordingly remain subject to the "closely drawn" standard of review established by the Supreme Court in *Buckley* and applied by this Court in *Eddleman*. *See id.* at 1445 ("[W]e see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review."). Similarly, as discussed in more detail in Part II.B *infra*, the *McCutcheon* decision in no way undermines the continued validity of the anti-circumvention interest. As with *Randall*, nothing in *McCutcheon*'s analysis is "clearly irreconcilable" with *Eddleman*.

This Court has already scrutinized and upheld Montana's contribution limits under *Buckley*, so there was no justification for the lower court to reexamine Mont. Code Ann. § 13-37-216 under the same "closely drawn" standard. There has been no change of circumstance in Montana that would justify overruling *Eddleman*,

and the Supreme Court has not provided sufficient legal authority to do so. Therefore, the lower court's decision was clear error and should be reversed.

II. Montana's Contribution Limits Are Justified by Compelling State Interests.

Buckley and its progeny make clear that limits on contributions to candidates, as well as limits on contributions to PACs that contribute to candidates, are a closely drawn, constitutionally permissible means of advancing the government's vital interests in preventing corruption, the appearance of corruption, and the circumvention of candidate contribution limits. Contribution limits are therefore valid unless they are so low as to prevent candidates and PACs from amassing the resources necessary for effective advocacy. *See, e.g.*, *Buckley*, 424 U.S. at 20-29; *Cal. Medical Ass'n v. FEC*, 453 U.S. 182, 194-99 (1981) ("*CalMed*"); *Shrink Missouri*, 528 U.S. at 381-98; *Randall*, 548 U.S. at 238-63.

McCutcheon does nothing whatsoever to disturb this line of precedent. Nor does it have any effect on the constitutionality of Montana's limits on political party contributions, which—although called "aggregate"—are not at all like the federal aggregate limits invalidated in *McCutcheon*.

A. Montana's Individual And Non-Party Contribution Limits Constitutionally Advance Its Interest In Preventing Actual And Apparent Corruption.

Montana subjects individuals and non-party committees to the following contribution limitations:

(1) $650 for candidates for Governor and Lieutenant Governor;
(2) $320 for other statewide offices, including candidates for Attorney General, Secretary of State, and Supreme Court Justice;
(3) $170 for all other public offices, including candidates for state house, state senate, and district judge.

Mont. Code Ann. § 13-37-216(1)(a), *as adjusted by* Mont. Admin. R. § 44.10.338 (2013).[4] Under longstanding Supreme Court precedent, contribution limits are subject to a more lenient standard of review than are other regulations involving electoral speech, such as expenditure restrictions. Since *Buckley*, the Court has maintained that a contribution limit "entails only a marginal restriction upon [one's] ability to engage in free communication," because a contribution "serves as a general expression of support . . . , but does not communicate the underlying basis for the support." 424 U.S. at 20-21. A contribution limit therefore imposes "little direct restraint on . . . political communication, for it permits the symbolic evidence of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* at 21; *see also Beaumont*, 539 U.S. at 161 (noting that contribution limits are "subject to relatively complaisant review . . . , because contributions lie closer to the edges than to the core of political expression").

[4] *See* Mont. Comm'r of Political Practices, *State of Montana Political Campaign Contribution Limits Summary* (Mar. 19, 2014), http://politicalpractices.mt.gov/content/5campaignfinance/2014ContributionLimitSummary.

Therefore, a contribution restriction "passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *Beaumont*, 539 U.S. at 162 (internal quotations omitted). Although the amount of evidence that may be required in support of an asserted state interest "will vary up or down with the novelty and plausibility of the justifications raised," the interest in avoiding actual or apparent corruption arising from large contributions is "neither novel nor implausible." *Shrink Missouri*, 528 U.S. at 391. Far from being "novel," the anti-corruption interest has long been—and still remains—central to the Court's campaign finance jurisprudence. *See Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124 (9th Cir. 2011) (noting that the Court made clear in *Citizens United* "that it was not revisiting the long line of cases finding anti-corruption rationales sufficient to support [contribution] limitations").

Applying "closely drawn" scrutiny, the *Buckley* Court concluded that "[i]t is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the [challenged] contribution limitation." 424 U.S. at 26. So long as contribution limits are supported by a valid state interest and do not "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy," *id.* at 21, they are constitutionally valid.

In *Shrink*, the Court applied *Buckley* to uphold a Missouri law imposing contribution limits ranging from $275 to $1,075.[5] The Court noted that, as in *Buckley*, there was "no indication" that the limits "would have any dramatic[ally] adverse effect on the funding of campaigns and political associations, and thus no showing that the limitations prevented the candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 395-96 (alteration in original) (citation and quotation marks omitted).

Then, in *Randall*, the Court considered the constitutionality of Vermont's limits on contributions to candidates for state office, which ranged from $200 to $400 depending on the office sought. 548 U.S. at 238. The plurality found that Vermont's law fell short of *Buckley*'s "closely drawn" standard, *id.* at 253, because the challenged limits prevented candidates "from 'amassing the resources necessary for effective [campaign] advocacy.'" *Id*. at 248 (alteration in original) (quoting *Buckley*, 424 U.S. at 21). Noting, for example, that Vermont's $400 limit on contributions to gubernatorial candidates was "well below the lowest limit" the Court had previously considered—*Shrink*'s $1,075 limit, *id*. at 251—the Court concluded that Vermont's contribution limits threatened "to inhibit effective advocacy by those who seek election, particularly challengers," and "mute[d] the voice of political parties," rendering them unconstitutional. *Id.* at 261.

[5] Only the $1,075 limit applicable to candidates for statewide office was at issue in the case. 528 U.S. at 383.

Throughout its precedents, therefore, the Supreme Court has adhered to the same "overall analytical framework" that it announced in *Buckley*. The recent *McCutcheon* decision does nothing whatsoever to disturb this line of precedent with respect to base contribution limits, which were not at issue in *McCutcheon* and, as the plurality noted, have long been upheld "as serving the permissible objective of combatting corruption." 134 S. Ct. at 1442; *see also id.* at 1451 & n.6 (noting that the decision "leave[s] the base limits undisturbed"); *id.* at 1445 (declining to revisit *Buckley*'s "closely drawn" standard of review).

Montana's limits pass constitutional muster under the closely drawn standard. They serve important anticorruption objectives, and were already held in *Eddleman* to be "closely drawn to further [the State's] interest in preventing corruption and the appearance of corruption." 343 F.3d at 1094. Appellees offer no valid reason to depart from this analysis, apart from unsupported claims that more money would allow for more competitive elections—an argument already rejected by this Court. *Id.* at 1095. Therefore, this Court's decision in *Eddleman*—which reviewed Montana's contribution limits under the proper "closely drawn" standard and even subjected them to the "closest scrutiny"—continues to hold sway. *Lair*, 697 F.3d at 1208.

B. The Aggregate Limits Applicable to Political Party Organizations Prevent Circumvention of the Candidate Contribution Limits.

This Court has already sustained the constitutionality of the contribution limits applicable to individuals and non-party committees. Political party organizations are subject to a different set of limits on aggregate contributions to candidates for public office:

- To candidates for Governor/Lt. Governor: $23,350 per election;
- To a candidate for Other Statewide Office: $8,450 per election;
- To a candidate for Public Service Commissioner: $3,350 per election;
- To a candidate for State Senate: $1,350 per election; and
- To a candidate for Other Public Office: $850 per election.

Mont. Code Ann. § 13-37-216(3), *as adjusted by* Mont. Admin. R. § 44.10.338.[6] Because these limits directly prevent the circumvention of the individual and non-party limits, they are likewise constitutional.

Under a long line of Supreme Court precedent beginning with *Buckley*, both anticircumvention and anticorruption are recognized as valid and interrelated justifications for contribution restrictions. In *Buckley*, the Supreme Court recognized that laws preventing the circumvention of candidate contribution limits serve important governmental interests by protecting the integrity of the individual limits. Accordingly, in addition to sustaining a $1,000 limit on contributions from individuals to federal candidates, *Buckley* also upheld a $25,000 aggregate annual limit on contributions by individuals to all federal political committees. 424 U.S.

[6] *See* Mont. Comm'r of Political Practices, *supra* note 4.

at 38. Having found that the $1,000 individual limit served the government's interest in preventing the "actuality and appearance of corruption," *id.* at 26, the Court reasoned that the aggregate limit likewise effectuated the anti-corruption interest because it "serve[d] to prevent evasion" of individual contribution limits. *Id.* at 38. Although the federal aggregate limit at issue in *Buckley* was later invalidated in *McCutcheon* on the basis that other amendments to federal law had made circumvention of the base limits "highly implausible," 134 S. Ct. at 1453, *Buckley*'s formulation of the "anti-circumvention interest" remains intact.

Following *Buckley*, the Court has maintained that reducing circumvention is part of the government's compelling interest in protecting the integrity of candidate contribution limits and thereby combating corruption, and has upheld a broad range of campaign finance laws on this basis. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 144 (2003) (upholding the party "soft money" restrictions on grounds that "[anti-corruption] interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits"); *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 455 (2001) ("*Colorado II*") (upholding coordinated party spending limits to prevent the "exploitation [of parties] as channels for circumventing contribution and coordinated spending limits binding on other political players"); *CalMed*, 453 U.S. at 197-98 (1981) (upholding limits on contributions to political committees "to

prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*"); *Beaumont*, 539 U.S. at 155 ("[R]estricting contributions by various organizations hedges against their use as conduits for circumvention of [valid] contribution limits.") (quotation marks omitted).

These decisions all make clear that measures to prevent circumvention of valid contribution limits advance the vital governmental and public interest in preventing real and apparent corruption, and that "circumvention is a valid theory of corruption." *Colorado II*, 533 U.S. at 456. Therefore, as this Court has recognized, the anti-circumvention interest remains valid as "part of the familiar anti-corruption rationale." *Thalheimer*, 645 F.3d at 1124; *see also, e.g.*, *Ognibene v. Parkes,* 671 F.3d 174, 195 n. 21 (2d Cir. 2011) (acknowledging that *Citizens United* preserved the anti-circumvention interest); *United States v. Danielczyk*, 683 F.3d 611, 618 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1459 (2013) (same).

The recent decision in *McCutcheon*, which invalidated federal aggregate limits on total contributions to candidates and parties, did nothing to undermine or call into question the anti-circumvention interest. Instead, the plurality's analysis focused on the "improbability of circumvention" absent the aggregate limits, and emphasized the fact that "statutory safeguards against circumvention have been considerably strengthened since *Buckley*." 134 S. Ct. at 1446, 1456. Under the "highly implausible" circumvention scenarios offered in support of the aggregate

limits—which hypothesized that a donor would be able to circumvent the base limit on his contributions to a candidate by channeling funds through an array of separate committees—the connection between donor and candidate was simply too attenuated for corruption to take root. *See id.* at 1452.

Consequently, *McCutcheon* in no way discounted the legitimacy of circumvention as a valid anti-corruption rationale; the plurality simply highlighted technical aspects of federal law that made circumvention "improbable." For example—and notably unlike the Montana statute at issue here—federal law incorporates "base limits" on an individual's contributions to party committees. Therefore, the "highly implausible" circumvention schemes rejected by the plurality envisioned a donor contributing the maximum amount permitted under the base limits to 50 or more committees, which would then aggregate those funds through a complex series of transfers and ultimately route them to a particular candidate. The plurality found it "hard to believe that a rational actor would engage in such machinations" just to evade the limits on individual contributions. *Id.* at 1454. The plurality also noted the limited efficacy of such schemes given the existence of base limits on contributions to PACs and parties, which prevent the donor from "dominat[ing] the [committee's] total receipts" and thereby reduce his "salience" as a campaign supporter of any particular candidate. *Id.* at 1453. Ultimately, because base limits "create an additional hurdle for a donor who

seeks . . . to channel a large amount of money to a particular candidate," *id.* at 1446, the probability of circumvention was too remote to support the aggregate limits.

There are no corresponding limits on contributions to political party committees in Montana, however, so the risk of circumvention here is not "speculative" or "implausible." Under Montana law, individual and non-party committee contributions to a candidate are limited to $170, $320, or $650 in the 2014 election cycle, depending on the office sought by the candidate. *See* Mont. Admin. R. § 44.10.338. That same donor, however, may give an unlimited amount to political party committees throughout the State. Despite the appellees' efforts to characterize the political party limits contained in Montana Code Annotated § 13-37-216(3) and (5) as impermissible "prophylaxis-upon-prophylaxis" measures, *see* Appellees' Motion to Lift Stay Pending Appeal at 11, these "aggregate limits" bear scant resemblance to the individual aggregate limits invalidated in *McCutcheon*. Because an individual can give an unlimited amount to a likewise unlimited number of political party committees in Montana, the potential associational burdens on individuals stressed in *McCutcheon* are simply not present here.

Instead, Montana's "aggregate" political party limits operate as the exclusive control on party giving, and are thus directly analogous to the political party

coordinated expenditure limits upheld in *Colorado II*. Just as the aggregate party limits upheld in *Colorado II* are a permissible means of preventing the "risk of corruption (and its appearance) through circumvention of valid contribution limits," 533 U.S. at 456, so too are the limits established by Mont. Code Ann. § 13-37-216(3) and (5) a permissible means of preventing corruption and its appearance through circumvention of the valid contribution limits established by Mont. Code Ann. § 13-37-216(1). If political party committees are permitted to make unlimited contributions to candidates in Montana—as they will be unless the district court's decision is overturned—"the inducement to circumvent would almost certainly intensify." *Colorado II*, 533 U.S. at 460. As the Supreme Court explained:

> [I]f a candidate could be assured that donations through a party could result in funds passed through to him for spending on . . . his own campaign . . . a candidate enjoying the patronage of affluent contributors would have a strong incentive not merely to direct donors to his party, but to promote circumvention as a step toward reducing the number of donors requiring time-consuming cultivation.

Id. Indeed, the threat of actual and apparent corruption in Montana would be significantly greater than the threat envisioned in *Colorado II*: there, the Court was concerned about the threat of corruption posed by a donor's evasion of the candidate contribution limit through a limited $20,000 contribution to a party committee. *Id.* The threat of corruption would increase exponentially with a $100,000, $1 million, or greater unlimited contribution to a party committee, as

allowed under Montana law, if Mont. Code Ann. § 13-37-216(3) and (5) is invalidated: there would be nothing to prevent the party committee from channeling all of those funds to a candidate.

III. *Randall* Does Not Warrant Invalidating Montana's Individual Contribution Limits.

As explained in Part I, *supra*, the *Randall* decision does not compel a different outcome from that reached by this Court in *Eddleman*: Montana's contribution limits have already been carefully reviewed and held constitutional. However, even if this Court decides to revisit *Eddleman* in light of *Randall*, it should reach the same result: Montana's limits pass constitutional muster.

Randall's review of Vermont state contribution limits did not articulate a new standard for determining the constitutionality of such limits. This Court has recognized as much: "[i]f anything, *Randall*'s plurality only clarified and reinforced *Buckley* and its progeny." *Lair*, 697 F.3d at 1207. The plurality's discussion of "danger signs" and its following analysis of "five sets of considerations" ultimately offered only a "<u>mode</u> for determining whether the limits were 'narrowly tailored' under *Buckley*." *Id.* at 1208 (emphasis added) (citing *Randall*, 548 U.S. at 249-262). *Randall* merely acknowledged that there must be some "lower bound" below which contribution limits cannot be constitutionally applied. Where there are certain "danger signs" that a challenged statute is

approaching that impermissible "lower bound," *Randall* instructs courts to carefully review it to ensure proper tailoring. 548 U.S. at 248-49.

This Court has already carefully considered the tailoring of Montana's contribution limits. There is no need to replicate *Eddleman*'s analysis. Nevertheless, upon reexamination, the appellees' challenge still fails: *Randall*'s "danger signs" are not present here, and even if they were, applying Justice Breyer's five "sets of considerations" would not warrant invalidating Montana's contribution limits.

A. The "Danger Signs" Identified in *Randall* Are Not Present.

In *Buckley*, the Supreme Court broadly sustained the constitutionality of contribution limits, noting that they "involv[e] little direct restraint" on individual speech. 424 U.S. at 21. Still, the Court cautioned against limits that were so low as to prevent candidates from "amassing the resources necessary for effective [campaign] advocacy." 424 U.S. at 21. This admonition was not a call for courts to "fine tune" limits on their own; as the Supreme Court has repeatedly affirmed, courts have "no scalpel to probe each possible contribution level." *Randall*, 548 U.S. at 248 (quoting *Buckley*, 424 U.S. at 30) (internal quotation marks omitted). The appropriate inquiry is whether, taken as a whole, contribution limits "magnify the advantages of incumbency to the point where they put challengers to a

significant disadvantage." *Id.* (emphasis added). If so, they may be "too low and too strict to survive First Amendment scrutiny." *Id.*

Justice Breyer's opinion in *Randall* identifies four "danger signs" that, if present in a campaign contribution statute, may suggest that the limits impose a "significant disadvantage" on challengers: the limits (1) are set per election cycle rather than divided between a primary and a general election; (2) apply to contributions from political parties; (3) are the lowest in the Nation; and (4) are "well below" limits the Court has previously upheld. *Id.* at 249-251; *see also id.* at 268 (Thomas, J., concurring in the judgment) (listing Justice Breyer's "danger signs"). The plurality found that "where there is strong indication . . . that such risks exist (both present in kind and likely serious in degree), courts . . . must review the record independently and carefully with an eye toward assessing the statute's 'tailoring' . . . ." *Id.* at 249 (emphasis added).

This Court has already undertaken the second part of *Randall*'s two-step analysis. Using the same or substantially the same considerations as Justice Breyer, the *Eddleman* Court "carefully" and "independently" reviewed the record to assess whether Montana's statute is sufficiently tailored, finding that it was. *Lair*, 697 F.3d at 1209. But in fact, a *Randall*-style analysis can be resolved at step one, because the challenged limits do not evoke Randall's "danger signs."

First, Montana's limits apply to "each election" in a campaign where there is a contested primary, Mont. Code Ann. § 13-37-216(6), so the district court understated them by half—leading to the erroneous conclusion that Montana's contribution limits are "lower than those declared unconstitutional in *Randall*." ER 30 & n.4. They are not. Vermont's limits of $200 and $300 for state representative and senate elections applied to an entire two-year election cycle, whereas Montana's analogous limit applies to "each election" in a two-year cycle, or $320 overall.[7] Compared to Vermont's $200 per-election (or $400 per two-year cycle) limit on contributions to candidates for statewide office, which included candidates for governor, the inflation-adjusted statewide limits in Montana are also much higher: $650/election, $1300/cycle for gubernatorial candidates, and $320/election, $640/cycle for other statewide candidates.

Second, Montana's statute applies much higher limits to contributions from political parties than to those from individuals and PACs. Mont. Code Ann. 13-37-216(1), (3); *see also Eddleman*, 343 F.3d at 1088, 1094 (noting that the statute raised the amount political parties could contribute to candidates). Vermont, in stark contrast, applied the same low limits to all three categories of contributors; for example, the total amount that all Democratic Party committees could give to a single gubernatorial candidate under Vermont's law was capped at $400 per two-

[7] The current inflation-adjusted limits are $170 per election, or $340 overall.

year election cycle—the same limit applicable to individuals. *See Randall*, 548 U.S. at 238-39. The Vermont statute also imposed a $2,000 limit on the amount an individual could give to a political party during a 2-year election cycle, *id.* at 239; Montana imposes no limits whatsoever on individual contributions to political parties.

Finally, the district court erred by taking the third and fourth "danger signs" identified in *Randall*—whether the limits are among the lowest in the nation and whether they are lower than other limits previously upheld by the Supreme Court—to be dispositive of its inquiry. The court's perfunctory analysis, which made no mention of the first two factors discussed above, does not amount to a "strong indication" that danger signs like those identified in *Randall* are either "present in kind" or "serious in degree" here. 548 U.S. at 249. Moreover, to the extent that the district court based its decision on faulty math, its analysis on this point is particularly questionable. Although Montana's limits are "some of the lowest in the country," that is "unsurprising in light of the fact that Montana is one of the least expensive states in the nation in which to mount a political campaign." *Eddleman*, 343 F.3d at 1095. The appellees do not contend that the relative expense of mounting political campaigns in Montana has changed since *Eddleman*. And finally, even though limits previously upheld by the Supreme Court have all been higher, this Court looked to an arguably more relevant comparison in

upholding the Montana statute in *Eddleman*: the change in total campaign spending associated with the introduction of lower limits. 343 F.3d at 1094 (noting that in *Shrink Missouri*, the Supreme Court sustained Missouri's contribution limits "despite a decrease of more than 50% in total spending in Missouri elections, nearly twice the decrease present [in Montana]").

In sum, there is no "strong indication" that Justice Breyer's warning signs are present at all, and even if they are, they are plainly not "serious in degree." Because Montana's contribution limits do not give rise to the same "danger signs" as did Vermont's, "it is not the prerogative of the courts to fine-tune the dollar amounts of those limits." *Id.* at 1095 (citation omitted).[8]

B. Even if *Randall*'s "Danger Signs" Were Present, Montana's Contribution Limits Are Sufficiently Tailored.

After detailing the serious and multiple "warning signs" triggered by Vermont's law, the *Randall* plurality proceeded to its "independent[] and careful[]" review of the record. Justice Breyer described five "sets of considerations" that he weighed in determining that Vermont's contribution limits were unconstitutionally low:

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[8] Even the *Randall* plurality, despite finding that Vermont's contribution limits were unconstitutionally low, cautioned against attempts to "fine tune" the precise limits that legislatures adopt based on their experience and expertise. 548 U.S. at 248 (noting that courts "have no scalpel to probe" the finer points of complex legislative enactments).

> (1) Whether the limit would "significantly restrict the amount of funding available for challengers to run competitive campaigns";
> (2) Whether political parties were subject to the same limits as other contributors;
> (3) Whether volunteer services were treated as contributions;
> (4) Whether the limits were adjusted for inflation;
> (5) And finally, if the limit was "so low" as to create "serious associational and expressive problems," whether there was "any special justification" warranting such a limit.

548 U.S. at 253-61. Justice Breyer did not characterize these factors as exhaustive, nor did he identify any one factor as dispositive of a limit's constitutionality. Instead, "[t]aken together," *id.* at 253, the factors must demonstrate that the challenged contribution limits are not "closely drawn" to a "sufficiently important interest." Proceeding to this second "step" of *Randall*'s analytical framework yields the same conclusion reached in *Eddleman*: Montana's law is sufficiently tailored.

1. Significant restriction of funds for challengers

Much of appellees' argument relies on the same faulty reasoning that this Court rejected in *Eddleman*: the mere fact that certain candidates might have raised more money absent the contribution limits does not prove that their campaigns were ineffective. 343 F.3d at 1095 ("[A]part from bald, conclusory allegations that their campaigns would have been more effective had they been able to raise more money, none of the witnesses offered any specifics as to why their campaigns were not effective.") (internal quotation marks omitted). Furthermore, other aspects of

Montana's law protect challengers from the "advantages of incumbency." Unlike Vermont, for instance, the term limits established under Art. IV, § 8 of the Montana Constitution ensure that challengers have ample opportunities to seek office. Montana law also includes statutory protections for non-incumbent candidates, such as "provision[s] preventing incumbents from using excess funds from one campaign in future campaigns." *Id.* at 1095. The existence of these protections for challengers, which "keep incumbents from building campaign war chests and gaining a fund-raising head start over challengers," *id.*, presents a strong point of departure from the Vermont law invalidated in *Randall*.

2. *Uniformity of limits*

In *Randall*, Justice Breyer was particularly troubled that Vermont's law required political parties to "abide by <u>exactly</u> the same low contribution limits that apply to other contributors . . . ." 548 U.S. at 256. Montana, as the district court acknowledged, imposes contribution limits on political parties that are "5 to 36 times greater than the limits for individuals and political committees." ER 34. For instance, individuals and political committees may contribute up to $650 to a gubernatorial candidate, but a political party organization can contribute up to $23,350. Mont. Admin. R. § 44.10.338(1)(a), (2)(a). Nevertheless, the district court concluded that Montana's limits, like Vermont's, do not satisfy this factor. In reaching its decision, however, the court failed to address *Randall*'s specific

concerns about political parties; instead, the court focused on the fact that political committees are held to the same limits as individuals. ER 36 (concluding that Montana has "reduce[d] the voice of political [committees] to a whisper") (citing *Randall*, 548 U.S. at 259). But committees are not parties, and limits on committees have no bearing on whether Montana's limits "would reduce the voice of political parties . . . to a whisper," *Randall*, 548 U.S. at 259 (emphasis added) (citation and internal quotation marks omitted), as Justice Breyer feared Vermont's law would do. A campaign contribution statute that subjects political committees and individuals to the same limits, while establishing much higher caps for political parties, in no way contravenes this *Randall* factor, nor does it prevent the "full and robust exchange of views." ER 35.

3. Volunteer services

The Vermont law's approach to volunteer services was considerably more stringent than the statute here; although Vermont included an exception for volunteer services, its overly broad definitions would count expenses incurred by volunteers against their individual contribution limits. The district court found that Montana's law is "just like Vermont's statute prior to *Randall*" in this regard. ER 37. However, this Court came to the opposite conclusion in its stay opinion, and noted that "[t]estimony provided by the plaintiff's own witnesses—as well as a

stipulation of the parties—established that expenses incurred by volunteers are not considered contributions under Montana law." 697 F.3d at 1212.

4. Inflation adjustment

Montana's contribution limits, unlike those of Vermont prior to *Randall*, are adjusted for inflation. Mont. Code Ann. § 13-37-216(4). There is nothing in *Randall* to suggest that the inquiry must go any further. Nevertheless, the lower court disputed whether this factor actually weighs in favor of the law's constitutionality, and expressed doubts as to the adequacy of the inflationary adjustment given its reliance on the Consumer Price Index ("CPI"). ER 38. However, CPI is "a well-recognized mechanism for adjusting for inflation, and [there is] no indication that the Supreme Court intended that states do anything else to 'index limits.'" *Lair*, 697 F.3d at 1213.

5. Special justification

Montana remains a comparatively inexpensive place to campaign, so its contribution limits should be correspondingly low in order to achieve proper tailoring. As this Court has recognized, whereas Vermont justified its statute "based solely upon the prevention of corruption, Montana specifically justified the low limits based on the relative inexpense of campaigning in Montana . . . ." *Lair*, 697 F.3d at 1213 (quoting *Eddleman*, 343 F.3d at 1094). The "relative inexpense" of Montana campaigns warrants relatively lower contribution limits.

In addition, the judicial election context provides a compelling "special justification" for Montana's contribution limits, which apply not only to candidates for legislative and executive offices, but also to candidates for the judiciary. As discussed in greater detail in Part IV *infra*, the state has a clear interest in ensuring the integrity and independence of its judiciary.

IV. Montana's Contribution Limits Are Particularly Important and Clearly Constitutional as Applied to Candidates in Judicial Elections.

A. Contribution Limits Serve Additional Compelling State Interests in Judicial Elections.

The contribution limits at issue in this case apply not only to candidates for executive and legislative offices, but also to candidates for the judiciary. During the 2013-14 election cycle, Mont. Code Ann. § 13-37-216(1) imposed per-election limits of $320 on contributions to candidates for the office of Supreme Court Justice and $170 on contributions to candidates for the office of District Judge.[9]

The Supreme Court has repeatedly recognized that regulation of judicial election conduct serves the Due Process guarantee of a fair trial before a fair tribunal and the related need to protect judicial impartiality, as well as the governmental interest in avoiding the perception of bias in order to preserve public confidence in the judiciary. "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S.

[9] *See* Comm'r of Political Practices, *supra* note 4.

868, 876 (2009). Justice Kennedy, who authored the Court's opinion in *Caperton*, had earlier made clear his understanding that "[j]udicial integrity is . . . a state interest of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). To this end, the Supreme Court has long recognized that the Due Process guarantee of our constitution requires greater regulation of the judiciary than of the executive and legislative branches of government. Justice Kennedy has explained:

> The differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the other, may call for a different understanding of . . . the legitimate restrictions that may be imposed upon them.

Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2353 (2011) (Kennedy, J., concurring) (internal citation omitted) (emphasis added). Review of Montana's contribution limits as applied to judicial elections therefore requires special consideration of the state's compelling interests in a judiciary that is, and appears to be, free from bias.

B. Montana's Contribution Limits Are Closely Drawn to Advance These Compelling State Interests.

Contributions to judicial campaigns have an actual and perceived impact on judicial impartiality. In a recent survey conducted by *amicus* Justice at Stake, almost 50% of responding judges reported that they think campaign contributions

have at least a little influence on judicial decisions.[10] This perception is born out in data tracking the relationship between contributor identity and judicial decisions. Another recent study found a correlation between the size of business contributions that supreme court justices receive and the frequency of pro-business decisions from those justices.[11]

Judges believe that this correlation between contributions and outcomes favorable to contributors motivates judicial campaign spending. One sitting justice, Paul E. Pfiefer, told the New York Times that he "never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race. Everyone interested in contributing has very specific interests. . . . They mean to be buying a vote."[12] Bob Gammage, a former member of the Texas

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[10] Justice at Stake, *State Judges Frequency Questionnaire* 5 (Nov. 2001–Jan. 2002), http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf.

[11] American Constitution Society, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions* 1 (2013), http://www.acslaw.org/ACS%20Justice%20at%20Risk%20%28FINAL%29%206_10_13.pdf.

[12] Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, *available at* http://www.nytimes.com/2006/10/01/us/01judges.html.

Supreme Court, described the reliance of judges on campaign donors: "If you don't dance with them that brung you, you may not be there for the next dance."[13]

Indeed, the veracity of the theory that judicial campaign spending is motivated by contributors' desire to influence judicial decisions is supported by the fact that the primary contributors to judicial campaigns are lawyers and businesses that frequently appear in court. In 2011-12, of the $30.7 million in campaign contributions received by supreme court candidates nationally, lawyers and lobbyists donated more than $10.1 million and business interests donated more than $7.1 million.[14]

Contributions in judicial elections not only increase the risk of actual bias, they also increase the appearance of bias. Data from a 2013 public opinion poll conducted by *amicus* Justice at Stake demonstrates that the vast majority of respondents—87%—believe that contributions to judicial elections have at least

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[13] *Justice for Sale*. Frontline, http://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/synopsis.html (last visited June 26, 2014).

[14] Brennan Center for Justice and Justice at Stake, *The New Politics of Judicial Elections* 15 (2013), http://newpoliticsreport.org/content/uploads/JAS-NewPolitics2012-Online.pdf.

some impact on judicial decisions.[15] The 2013 data reflects a decade long trend that has only gotten worse (up from 71% in 2004).[16]

Fundraising and spending in judicial elections is skyrocketing in states with few or no limits on contributions to judicial election candidates. A recent report by *amicus* Justice at Stake analyzing political spending in 2012 state supreme court elections concluded: "States saw record levels of spending on television advertising in high court races. The 2011-12 cycle saw $33.7 million in TV spending, far exceeding the previous two-year record of $26.6 million in 2007-08 ($28.5 million in inflation-adjusted terms)."[17] Currently Montana is not among the states with skyrocketing judicial election spending. Total judicial election spending in Montana's Supreme Court races in 2011-12, at $371,384, ranks 17 among 23 states.[18] However, if unlimited contributions to judicial election candidates were allowed in Montana, such large contributions could very well create a "probability of actual bias on the part of the judge . . . too high to be constitutionally tolerable." *Caperton*, 556 U.S. at 872. The risk that a contributor's influence would "engender[] actual bias is sufficiently substantial that

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[15] Justice at Stake and Brennan Center for Justice, *National Poll* 3 (2013), http://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf.

[16] Justice at Stake, *Americans Speak Out on Judicial Elections* 1 (2004), http://www.justiceatstake.org/media/cms/ZogbyPollFactSheet_54663DAB970C6.pdf.

[17] *The New Politics of Judicial Elections* (2013), *supra* note 14, at 1.

[18] *Id.* at 6.

it must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at 885 (internal quotation marks omitted).

The contribution limits of section 13-37-216(1) are closely drawn to the state's compelling interest in protecting Montanans' Due Process guarantee of a fair trial before a fair tribunal, as well as the state's interest in a judiciary that is, and appears to be, free from bias. The contribution limits of section 13-37-216(1) are clearly constitutional in the judicial election context.

CONCLUSION

For the reasons set forth above, the district court's permanent injunction order should be **REVERSED**.

RESPECTFULLY SUBMITTED this 1st day of July, 2014.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(5), (7)(B), the attached Brief *Amici Curiae* is proportionally spaced, has a typeface of 14 points and contains 6,999 words.

DATED this 1st day of July, 2014.

Respectfully submitted,

/s/ Paul S. Ryan
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amici Curiae* for the Campaign Legal Center, Common Cause, Justice at Stake and the League of Women Voters 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 1, 2014. 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.

/s/ Paul S. Ryan
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