IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

DONNA PATRICK, JAMES K. BARNETT, and JOHN P. LAMBERT, Appellants,

v.

THE ALASKA PUBLIC OFFICES COMMISSION, Appellee.

Case No. 3AN-18-05726CI

On appeal from a Final Order of the Alaska Public Offices Commission

BRIEF OF APPELLANTS

Elizabeth Hodes
M. Scott Broadwell
DAVIS WRIGHT TREMAINE LLP
188 West Northern Lights Blvd., Ste 1100
Anchorage, AK 99503
elizabethhodes@dwt.com
scottbroadwell@dwt.com

Lawrence Lessig (*pro hac vice*)
Jason Harrow (*pro hac vice*)
EQUAL CITIZENS
12 Eliot St.
Cambridge, MA 02138
lessig@law.harvard.edu
jason@equalcitizens.us
Attorneys for Appellants

Dated the 16th day of November, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Other Authorities

PRINCIPAL AUTHORITIES

This case presents the question of whether the contribution limits to independent expenditure groups contained in Alaska Statutes § 15.13.070 are constitutional and enforceable. The relevant provisions are:

(a) An individual or group may make contributions, subject only to the limitations of this chapter and AS 24.45, including the limitations on the maximum amounts set out in this section.

(b) An individual may contribute not more than

(1) $500 per year to a nongroup entity for the purpose of influencing the nomination or election of a candidate, to a candidate, to an individual who conducts a write-in campaign as a candidate, or to a group that is not a political party;

(2) $5,000 per year to a political party.

(c) A group that is not a political party may contribute not more than $1,000 per year

(1) to a candidate, or to an individual who conducts a write-in campaign as a candidate;

(2) to another group, to a nongroup entity, or to a political party.

JURISDICTIONAL STATEMENT

This is an appeal of a Final Order of the Alaska Public Offices Commission, taken pursuant to Alaska Statutes § 44.62.560. The Final Order

was entered on March 15, 2018, and a Notice of Appeal was filed on March 30, 2018. This Court has jurisdiction to hear an appeal from final agency orders pursuant to Alaska Statutes § 22.10.020(d) and Alaska R. App. P. 602(a)(2).

PARTIES TO THE PROCEEDING

Appellants are Alaska citizens Donna Patrick, John P. "Pat" Lambert, and James K. Barnett. Appellee is the Alaska Public Offices Commission. Two prior parties to the proceeding, Working Families of Alaska and Interior Voters for John Coghill, were dismissed by this Court on June 1, 2018.

ISSUE FOR REVIEW

Alaska Statute § 15.13.070 places limits on the amount of money individuals or groups may contribute to independent expenditure groups during any election cycle. The Alaska Public Offices Commission has refused to enforce these limits because it concluded that, as a matter of federal constitutional law, statutory limits on contributions to independent expenditure groups are unconstitutional. The single Issue for Review is:

Must Alaska's statutory limits on contributions to independent expenditure groups be enforced because, contrary to the Commission's conclusion in this case, the limits are consistent with the anti-corruption principles of the U.S. Constitution?

PRELIMINARY STATEMENT

This case gives this Court the chance to uphold a long-standing Alaska law that regulates contributions to independent expenditure groups, by carefully determining the scope of the First Amendment limits on campaign finance regulation.

Courts have frequently determined whether particular campaign finance laws further anticorruption interests. Yet no court has ever defined "corruption" by looking to our Framers' understanding of the idea. Nor has any court ever taken expert testimony on this critical issue, or ever evaluated how that historical understanding may affect the judgment of the members of the United States Supreme Court. This case now gives the Court that chance.

The United States Supreme Court has not determined the rule under which laws regulating contributions to independent expenditures groups (also called "SuperPACs") are to be measured. Appellants submit that the Supreme Court is likely to uphold Alaska's law, because a majority will find a "sufficient interest" in regulating the kind of "corruption" that contributions to independent expenditure groups present. In particular, four justices have already indicated that comprehensive regulation of independent expenditure groups is permissible. And several other justices have stated that courts must adhere to the original understanding of important constitutional concepts like "corruption." If just one of those justices were to apply the originalist

method to the question here, a majority would conclude that the Constitution permits the regulation of SuperPACs.

Appellants in this case are three Alaska citizens who request that the State enforce existing law that furthers the citizenry's compelling interest in having a legislature untainted by corruption. That law, Alaska Statutes § 15.13.070, places limits on the amount of money individuals or associations may contribute to independent expenditure groups that support or oppose political candidates. Appellee Alaska Public Offices Commission ("APOC" or "The Commission") has not enforced these contribution limits since 2012, when it unilaterally concluded that state law is inconsistent with several federal court decisions that (incorrectly) prohibit states from enforcing *any* limits on contributions to independent expenditure groups.

In this proceeding, Appellants identified two organizations that accepted contributions above these statutory limits during the 2016 election cycle, and they requested that APOC investigate the unlawful contributions. By a 3-2 vote, APOC adhered to its 2012 determination that the limits were unconstitutional and declined to investigate, citing only lower federal court decisions. Those lower court decisions did not consider the Framers' understanding of "corruption," nor did they examine Alaska law. Their rule is not binding on this Court.

In this case, there is uncontradicted expert testimony and other evidence that the Constitution's Framers sought to create a government that could prevent at least two types of corruption: first, individual or *quid pro quo* corruption, and second, institutional corruption. Individual corruption occurs when individual legislators are induced through gifts or bribery to take actions that benefit specific citizens; institutional corruption, by contrast, occurs when legislators become overly dependent on a narrow class of citizens at the expense of the electorate at large. In light of the uncontradicted expert evidence that the law at issue furthers the permissible government interest in reducing institutional corruption, the limits at issue are enforceable. Thus, the Final Order in this case refusing to investigate the complaints should be reversed.

BACKGROUND

I. The Regulation of Election-Related Contributions in Alaska

1. Alaska has a long and unbroken history of limiting contributions to candidates and independent expenditure groups.

Alaskans have long pushed their legislators to ensure that this State has a government reasonably free of the kind of corruption caused by large political contributions to candidates, political parties, and outside groups. Alaska first limited campaign contributions in 1974 when it imposed an

annual limit of $1,000 per person to any political candidate. *See* 1974 Alaska Laws Ch. 76 § 1. Those limits remained in place for over twenty years.[1]

In 1996, the Legislature embarked on a major overhaul of campaign finance law in order to combat what the State recognized were emerging problems presented by the role of money in politics. That year, the Legislature found that, among other problems, "organized special interests are responsible for raising a significant portion of all election campaign funds and may thereby gain an undue influence over election campaigns and elected officials, particularly incumbents." 1996 Alaska Laws Ch. 48, § 1(a)(3).[2] Thus, "in order to restore the public's trust in the electoral process and to foster good government," the Legislature included several important new provisions in its campaign finance laws.

As relevant here, the Legislature rewrote the section of law entitled "Limitations on Amount of Political Contributions." *Id.* § 10 (repealing and

---

[1] Under Alaska law (and analogous federal law too), political "contributions" are distinct from "expenditures." A "contribution" is essentially a payment *to* a candidate, group, or political party. Alaska Statutes § 15.13.400(4). An "expenditure," though, is a payment *by* such a group for various election-related services, such as an "electioneering communication." Alaska Statutes § 15.13.400(6). Thus, individual citizens (or certain groups) make "contributions" to candidates, parties, or independent groups; and those candidates, parties, and independent groups in turn make "expenditures" on political advertising to advocate for or against candidates.

[2] This passed bill can also be cited as 1995 Alaska S.B. 191.

rewriting Alaska Statutes § 15.13.070). The new law imposed annual limits based on the identity of both the donor and recipient. Individuals could donate at most $500 per year to a political candidate or to an independent expenditure group (defined as a "group that is not a political party"), and could donate at most $5,000 per year to a political party. Alaska Statutes § 15.13.070(b) (1996). Non-party independent groups, in turn, could contribute $1,000 per year to candidates, groups, or parties. *Id.* § (c). And political parties could contribute in much larger amounts across the political spectrum. *Id.* § (d). By setting contribution limits, the revised law prevented candidates, parties, or groups from relying too heavily on contributions from a very narrow set of potentially unrepresentative donors.

The relevant portions of the 1996 contribution limits were upheld as constitutional in 1999 by the Alaska Supreme Court. *See State v. Alaska Civil Liberties Union*, 978 P.2d 597, 600 (Alaska 1999). But in 2003, the Legislature doubled many of the contribution limits. Under the revision, individuals could contribute $1,000 per year to candidates or independent expenditure groups, instead of $500 per year. 2003 Alaska Laws Ch. 108 § 8.[3]

The public objected to the increase in the flow of money to groups and candidates. Citizens organized a ballot initiative to overturn the higher

---

[3] This bill is also cited as 2003 Alaska S.B. 119.

limits, and the "Take Our State Back" Initiative appeared on Alaska's primary ballot in 2006. In support of the measure, its proponents—a bi-partisan group of notable Alaska politicians—stated that "[c]orruption is not limited to one party or individual." 2006 Alaska Primary Election Voter Pamphlet at 10.[4] The proponents also reminded voters that "[m]ost Alaskans don't write huge checks to political campaigns," and warned that "[t]he more special interests can contribute, the more influence they have over our politicians." *Id.*

On August 22, 2006, the initiative passed overwhelmingly, with 73% of voters voting in favor and agreeing that the contribution limits should be reduced. State of Alaska, 2006 Primary Election Official Results, http://bit.ly/2QyUNyt. The contribution limits set by the voters, which were returned to $500 per year from an individual to an independent group, have not been altered by the voters or the Legislature since that time. *See* Alaska Statutes § 15.13.070.

---

[4] Available at http://bit.ly/2SYo9rj.

2. The Alaska Attorney General advises the Governor that contribution limits are unaffected by *Citizens United*.

In 2010, the U.S. Supreme Court issued its decision in *Citizens United v. FEC*, 558 U.S. 310. In *Citizens United*, the Supreme Court held unconstitutional a federal law that prohibited corporations and unions from using general treasury funds to make independent expenditures for so-called "electioneering communications." *Id.* at 318–19. In so holding, the Supreme Court re-affirmed that the interest in preventing "corruption" is enough to sustain a campaign finance restriction against constitutional attack, but it held a ban on direct political expenditures by corporations or unions did not further an anticorruption interest because "independent *expenditures*, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Id.* at 357 (emphasis added). In *Citizens United*, the Court did not address whether political *contributions* to, as distinct from *expenditures* by, independent groups could give rise to corruption, nor did it comprehensively consider the various types of corruption the government may seek to prevent through campaign finance regulation.

Following the decision, then–Attorney General (and current U.S. Senator) Daniel Sullivan issued a memorandum about the impact of *Citizens United* on Alaska campaign finance law. *See* E.R. 77–84. Sullivan found that Alaska's prohibition on independent expenditures by corporations was

unconstitutional, since those laws were directly analogous to the ones struck down in *Citizens United*. E.R. 80. But Sullivan also concluded that the Supreme Court's decision was relatively narrow and "does not directly call into question the constitutionality of any other contribution, expenditure, disclaimer or disclosure law." *Id.* (citing Alaska Statutes § 15.13.070). Thus, during the 2010 election cycle, the contribution limits in § 15.13.070 remained in effect.

3. APOC reverses course and declines to enforce contribution limits to independent groups.

In 2012, the Commission broke with Attorney General Sullivan's opinion that contribution limits were unaffected by *Citizens United*.

In May 2012, APOC received a request for an advisory opinion from an independent expenditure group called "Alaska Deserves Better" that wished to receive contributions in unlimited amounts, despite the statutory requirement that it accept contributions of at most $500 per person per year. It thus formally asked APOC to "confirm that, as an [independent expenditure group], [Alaska Deserves Better] can obtain contributions and make independent expenditures in unlimited amounts, with no restriction on the amounts or sources." E.R. 111.

In an advisory opinion answering that question in the affirmative, APOC departed from the 2010 position of the Attorney General and reasoned

that "it appears that . . . *Citizens United* . . . has potentially rendered [contribution] restrictions unconstitutional as applied to groups that can make only independent expenditures." *Id.* at 7. In its explanation, APOC acknowledged that *Citizens United* "directly impacted" only the prohibition on direct expenditures by corporations or unions. *Id.* But it nonetheless concluded that *Citizens United* "also affected the validity of other campaign finance laws" such as those that limit contributions to independent expenditure groups. *Id.* In support of this broader reading, it cited in a footnote, though did not substantively discuss, several decisions by federal district and appellate courts that had "invalidated other states' restrictions on amounts of contributions to organizations that make only independent campaign expenditures." *Id.*

APOC was correct that the decisions on which it relied prohibited enforcement of various limits on contributions to independent groups for local elections in San Diego, California and Long Beach, California, and state elections in Wisconsin and Hawai'i. *Id.* at 7 n.3 (citing, *inter alia*, *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1112 (9th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 698 (9th Cir. 2010)). As APOC later recognized, this line of cases began with *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), a D.C. Circuit decision decided months after *Citizens United* that did not even receive briefing on the

critical issue of *Citizens United*'s impact on contribution limits to independent expenditure groups.

In its 2012 Advisory Opinion, the Commission never discussed the merits of these appellate cases, nor did it evaluate whether these non-binding cases were correctly decided. Instead, after citing the cases, the Commission found that unlimited contributions to independent expenditure groups should "be allowed because the statutory limitation may be unconstitutional." E.R. 118.

Since the 2012 advisory opinion was adopted, APOC has not enforced the statutory limits on contributions to independent expenditure groups. Thus, beginning with the 2012 election cycle, many independent expenditure groups have accepted contributions well above the statutory limit. That practice continues through the most recent election cycle.[5]

II. This case.

1. Administrative proceedings.

Appellants Donna Patrick, John P. "Pat" Lambert, and James K. Barnett are Alaska citizens interested in good government in Alaska and

---

[5] *See, e.g.*, Independent Expenditures Form 15-6 of Dunleavy for Alaska, dated September 1, 2018, http://bit.ly/2qL75Zi (disclosing contributions of $8,500 each from three different individuals during the reporting period).

across the country. They also have an interest in the enforcement of Alaska's validly enacted campaign finance laws.

On February 2, 2018, each filed nearly identical complaints with APOC contending that two registered independent expenditure groups, Working Families of Alaska and Interior Voters for John Coghill, violated Alaska campaign finance law by accepting contributions well in excess of the statutory limits in Alaska Statutes § 15.13.070. *See* Record ("R.") at 3–64 (complaints). Commission staff rejected the complaints on the grounds that contributions above the statutory limit were permitted by the 2012 Advisory Opinion. E.R. 76 (rejection letter).

Appellants appealed staff's rejections of the complaints, and, on February 21, 2018, the full Commission heard argument on Appellants' request for Commission review. Appellants argued that the lower federal court decisions relied on by the Commission were incorrect interpretations of federal law because they were inconsistent with the original understanding of the anti-corruption measures permitted by the U.S. Constitution. Because the Commission was not bound by these incorrect lower court interpretations, Appellants urged the Commission to reconsider its conclusion in the 2012 Advisory Opinion and investigate the complaints. The attorney for the

Commission's staff presented her view that the 2012 Advisory Opinion was correct as a matter of federal law.[6]

Following the hearing, the Commission voted 3-2 to affirm staff's rejection of the Complaints. On March 15, 2018, at Appellants' request, the Commission issued a written order explaining its decision. *See* E.R. 102–103.

The March 15 Final Order states that the Commission relied on "*SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), and related federal cases" in support of the continuing validity of the 2012 Advisory Opinion. E.R. 103. But, although the Commission had the power to revisit or revise that advisory opinion, *see* 2 AAC 50.840(e), a majority of the Commissioners instead affirmed "that the conclusion in Advisory Opinion 12-09-CD remains valid, and there is thus no good cause to reconsider that opinion." E.R. 103. Although two Commissioners dissented from that determination, the dissenters did not explain their reasoning in a written dissent. E.R. 103 n.2.

Appellants appealed the Final Order to this Court, and the two private parties named in the Complaints were dismissed by consent of all the parties. Order of June 4, 2018. This appeal from the Final Order thus presents the sole question of whether APOC correctly adhered to its 2012 Advisory

---

[6] Unfortunately, no recording of that hearing was made due to an equipment malfunction, so no transcript is available.

Opinion concluding that the contribution limits to independent expenditure groups were unconstitutional and would not be enforced.

2. This Court hears expert testimony on appeal.

To assist the Court in assessing whether the 2012 Advisory Opinion was correct as a matter of federal constitutional law, Appellants asked this Court to admit the testimony of two expert witnesses: Professors Jack Rakove and Adam Bonica. Professor Rakove is the William Robertson Coe Professor of History and American Studies at Stanford University, a leading authority on the original meaning of the U.S. Constitution and a Pulitzer-Prize winning author. *See* E.R. 152–79. Professor Bonica is a professor in the Department of Political Science at Stanford University and an expert on campaign finance and elections. *See* E.R. 136–140. Appellants argued that their live testimony would assist this Court in its determination of whether the U.S. Constitution permits Alaska to prevent the type of corruption targeted by the contribution limits at issue. *See* Appellants' Mot. for Partial Trial *De Novo*.

This Court granted the motion for expert testimony, and, on October 4, 2018, heard several hours of testimony from Professors Rakove and Bonica. As explained in greater detail below (at Arg. § I.2.d.), Professor Rakove provided extensive evidence of the Framers' understanding of "corruption." E.R. 278–333. Professor Bonica provided detailed evidence of current trends in political donations and their impact on the behavior of legislators. E.R.

221–76. During the hearing, this Court also admitted into evidence one expert report prepared by each Professor, as well as their respective CVs.

APOC did not attempt to cross-examine either Professor Rakove or Bonica, nor did it offer any testimony to counter the experts' evidence or conclusions.

3. This appeal.

With the expert testimony concluded, this appeal is now ripe for decision. The record for decision consists of the previously-filed administrative record, the transcript of expert testimony on October 4, 2018, and the four exhibits admitted during the testimony: the expert reports and CVs of Professors Rakove and Bonica.

STANDARD OF REVIEW: INDEPENDENT JUDGMENT

The Commission's Final Order refusing to investigate the complaints in this case rests entirely on its conclusion that, as a matter of federal constitutional law, the contribution limits in § 15.13.070 were unconstitutional. That interpretation was first articulated in the Commission's 2012 advisory and then specifically re-affirmed in the Final Order under review in this case. E.R. 101–03.

In a court proceeding reviewing an administrative determination, "[c]onstitutional issues are questions of law subject to independent review." *Eberhart v. APOC*, No. S-16187, 2018 Alas. LEXIS 116, at *7–8 (Aug. 24,

2018) 426 P.3d 890 (quotation marks omitted) (not yet officially paginated); *see also Eagle v. Dep't of Revenue*, 153 P.3d 976, 978 (Alaska 2007) (same, and noting further that courts "review the merits of an administrative determination independently"). The "independent judgment" standard of review is not deferential to the agency and instead permits a court "to adopt the rule of law that is most persuasive in light of precedent, reason, and policy." *Harrod v. State*, 255 P.3d 991, 995 (Alaska 2011). Thus, this Court reviews the Commission's legal reasoning *de novo*.

ARGUMENT

THE FINAL ORDER OF THE COMMISSION SHOULD BE REVERSED

I. Alaska's Contributions Limits To Independent Expenditure Groups Are Constitutional.

The Commission erred in its legal analysis of the key legal question in this case. It is undisputed that the prevention of corruption is a governmental interest that may support limits on the amount of contributions from individuals to groups engaged in political activities. *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (the legislature "may regulate campaign contributions to protect against corruption or the appearance of corruption"); *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) ("The importance of the governmental interest in preventing [corruption] has never been doubted." (quotation marks omitted)). Indeed, the governmental interest in preventing corruption

was sufficient to sustain the precise limits at issue here against a constitutional attack in 1999. *See State v. ACLU*, 978 P.2d at 624–25 (upholding relevant limits on contributions to candidates, groups, and political parties). The Commission should have used these important principles and binding precedents as the starting point for a close examination of the nature of corruption and whether limits on contributions to independent groups further that interest.

Instead, the Commission deferred to a line of federal appellate cases taking an excessively narrow view of the notion of "corruption." E.R. 102–103; 117–18. Appellants maintain that the federal cases given dispositive weight by APOC—beginning with *SpeechNow*—were wrongly decided: Courts in those cases did not engage in the proper mode of analysis, which would have considered more carefully how the Supreme Court would determine the question. These appellate cases are not binding on this Court. *Native Vill. of Tununak v. State, Dep't of Health & Soc. Servs.*, 334 P.3d 165, 175 (Alaska 2014) (Alaska state courts "are not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law." (quotation marks omitted)); *Totemoff v. State*, 905 P.2d 954, 963 (Alaska 1995) (noting that Alaska courts are not bound by Ninth Circuit decisions, and those decisions should be followed "only to the extent that [their]

reasoning is persuasive."). They should not be used to defeat the legitimate regulations of the Alaska legislature.[7]

Limits on contributions to independent groups are perfectly consistent with the primary type of corruption that our Framers aimed at avoiding. As the expert evidence in this case shows, the concept of "institutional corruption"—and not merely *quid pro quo* corruption—was central to the Framers' thinking. And because limits on contributions to independent groups prevent institutional corruptions, the limits are valid and indeed consistent with *Citizens United* and other Supreme Court precedent. The Commission's conclusion to the contrary, relying upon federal authority that does not bind this Court, is legally incorrect and must be reversed.

1. Contribution limits are subject to intermediate constitutional scrutiny.

As a doctrinal matter, when subjected to attack under the First Amendment, restrictions on campaign contributions, as distinct from expenditures, are subject to a relaxed or intermediate standard of First

---

[7] Indeed, as a formal matter, APOC should have concluded it was bound by the 1999 Alaska Supreme Court decision upholding the relevant contribution limits, *see State v. ACLU*, 978 P.2d at 624–25, and not the Ninth Circuit decisions implying that the limits are invalid. If APOC thought that an intervening U.S. Supreme Court decision had undermined the conclusion of the Alaska Supreme Court in *State v. ACLU*, the better practice would have been to wait for the courts to weigh in. This Court now has that chance.

Amendment scrutiny. That is because "limiting contributions [leaves] communications significantly unimpaired," and therefore "contribution limits . . . more readily clear the [constitutional] hurdles before them than would analogous expenditure limits." *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1091 (9th Cir. 2003) (quotation marks omitted). This standard remains in place after *Citizens United*, which declined to "reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny." 558 U.S. at 359.

Under that standard, state campaign contribution limits will be upheld if "(1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and (2) if the limits are 'closely drawn.'" *Eddleman*, 343 F.3d at 1092; *see also State v. ACLU*, 978 P.2d at 603 ("Concerning contribution limits . . . 'even a significant interference with protected rights may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (alterations omitted)).

2. The prevention of both quid pro and institutional corruption is an important state interest.

For the first prong of this test, the "sufficiently important state interest" that can justify limits on the amounts of campaign contributions is

the interest in "preventing corruption or the appearance of corruption." *SpeechNow*, 599 F.3d at 692; *Davis v. FEC*, 554 U.S. 724, 737 (2008) (same). The limits at issue here directly further that interest, especially if "corruption" is defined as the Framers would have defined it.

a. The courts have used different conceptions of the term "corruption."

Court decisions have identified at least three conceptions of corruption. First, and most obviously, the courts have said that regulations may target "*quid pro quo* corruption or its appearance"—that is, bribery and similar arrangements in which official acts are exchanged for money. *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014). In other words, the government may prevent arrangements involving "dollars for political favors." *FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 497 (1985). Using this definition, the Supreme Court has repeatedly held that "contribution limits" directly to political candidates "have been an accepted means to prevent quid pro quo corruption." *Citizens United*, 558 U.S. at 359.

Second, courts have frequently articulated a distinct view of corruption that properly goes by the name "dependence" or "institutional" corruption. Using this definition, the courts have recognized as valid "a concern not confined to bribery of public officials but extending to the broader threat from politicians too compliant with the wishes of large contributors." *Nixon v.*

Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000). This definition, like the first, goes back to *Buckley v. Valeo*, which recognized that corruption could go beyond "proven and suspected quid pro quo arrangements" because "the giving and taking of bribes [were] only the most blatant and specific attempts of those with money to influence governmental action." 424 U.S. at 28. Instead, this interest looks to the systemic effect of a particular system of campaign funding. The Alaska Supreme Court, too, has recognized "the general evidence of the influence of money and political system corruption" is distinct from "quid pro quo corruption." *State v. ACLU*, 978 P.2d at 615.

Third, Justice Scalia in his concurrence in *Citizens United* considered the proposition that "'corruption' was originally understood to include 'moral decay' and even actions taken by citizens in pursuit of private rather than public ends." 558 U.S. at 391 (Scalia, J., concurring). In other words, he proposed that "societal corruption" could well come within the ambit of the idea of "corruption." But he rejected the notion that "societal corruption" could be targeted through speech regulation because "if speech can be prohibited because . . . it leads to 'moral decay' or does not serve 'public ends,' then there is no limit to the Government's censorship power."[8] *Id.*

---

[8] The Supreme Court has also stated that Congress had the "authority to regulate the appearance of undue influence and the cynical assumption

(*continued on the next page*)

b. State courts must determine the conception of "corruption" that would control a decision of the Supreme Court.

Given these distinct conceptions of the idea of "corruption," and given that the U.S. Supreme Court has not yet ruled on the standard that should apply to the regulations of contributions to independent political groups, a state court must determine which of these three conceptions might validly support the regulation of campaign contributions. Four justices have already expressed the view that comprehensive regulation of independent groups is permissible. Several other justices have repeatedly said that courts must be constrained by concepts and definitions originally understood by the Framers. Accordingly, given that this is an open question of law, a state court should look to constitutional principles that might guide a Supreme Court majority to determine how the Court would view limitations on contributions to independent political action committees.

---

that large donors call the tune" which "could jeopardize the willingness of voters to take part in democratic governance." *McConnell v. FEC*, 540 U.S. 93, 144 (2003). The *Citizens United* court, though, retreated from this idea when it said that "[i]ngratiation and access . . . are not corruption." 558 U.S. at 361.

This debate is not relevant to this case. Appellants do not wish to re-litigate what gives rise to an appearance of corruption nor whether any definition of corruption includes mere access or ingratiation. Instead, this case seeks to examine the *actual* relationships that give rise to *actual* corruption, in the original sense of the term.

i. Four justices have already expressed the view that limitations on contributions to SuperPACs are valid.

Four justices of the Supreme Court have clearly indicated that they believe expenditures by and contributions to independent groups can be regulated, consistent with the First Amendment, and they would adopt a generally more permissive approach to campaign finance regulations. *McCutcheon*, 572 U.S. at 235–36 (Breyer, J., dissenting joined by Justices Ginsburg, Sotomayor, and Kagan) (voting to uphold federal aggregate limit on campaign contributions); *cf. Citizens United*, 558 U.S. at 447–460 (Stevens, J., dissenting in relevant part, joined by Justices Ginsburg, Breyer, and Sotomayor) (voting to uphold ban on independent, direct expenditures by corporations). As the standard for regulating contributions is less demanding than expenditures, *supra* § I.1., it follows that these four justices would also vote to uphold regulations of contributions to independent political action committees.

ii. A majority of the remaining five justices would apply an originalist methodology to determine the scope of "corruption"

Several of the remaining five justices of the Supreme Court have clearly affirmed the constraint of originalism. Justice Thomas has consistently accepted original meaning as a constraint on judicial decision making. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 58–74 (2005) (Thomas, J.,

dissenting) (arguing for a strictly originalist interpretation of the Commerce Clause and the Necessary and Proper Clause). Justice Gorsuch, too, has repeatedly advanced originalism in his short time on the bench. *See Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018) (Thomas, J., dissenting, joined by Justice Gorsuch) (inviting briefing and argument in a future case on the "original meaning of the Fourth Amendment"); Rachel Del Guidice, *Gorsuch Touts Originalism...*, Daily Signal, Nov. 17, 2017 (quoting Justice Gorsuch as stating that "[a] person can be both a committed originalist and textualist and be confirmed to the Supreme Court of the United States"). And Justice Kavanaugh, though only recently confirmed, endorsed originalist approaches earlier in his judicial career. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 688 (2008) (Kavanaugh, J., dissenting) ("As the Supreme Court has indicated, it is always important in a case of this sort to begin with the constitutional text and the original understanding, which are essential to proper interpretation of our enduring Constitution."); Akhil Reed Amar, *A Liberal's Case for Brett Kavanaugh*, N.Y. Times, July 9, 2018 ("Judge Kavanaugh . . . prioritizes the Constitution's original meaning."). Thus, although Chief Justice Roberts and Justice Alito have not necessarily taken consistent originalist stands with respect to the value of originalism, at least three justices are firmly committed to this mode of analysis.

c. Originalism is an appropriate methodology for determining the meaning of "corruption."

Originalism is a method for both (a) interpreting the words of the Constitution as well as (b) constraining the discretion of judges to import meaning to the Constitution according to their own political preferences. *See* Lawrence B. Solum, *Originalist Methodology*, 84 U. Chi. L. Rev. 269, 269–70 (2017) (noting that the two commitments of originalists are the "Fixation Thesis," which imbues words with a fixed meaning, and the "Constraint Principle," which restricts constitutional practice and interpretation). The originalist looks to the Framers' understanding of the Constitution, as evinced through the public meaning of the words they used, *both* (1) to give content to the meaning of those words, *and* (2) to constrain the doctrine the Court has adopted to give the Constitution effect. In an influential essay on the topic, Justice Scalia stated that "the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 863 (1989). According to Justice Scalia, while "[n]onoriginalism . . . plays precisely to this weakness," adopting originalism as a constraint on judicial decision making solves this problem. *Id.*

Using this framework, in *D.C. v. Heller*, 554 U.S. 570 (2008), the Court looked to the original meaning of the words of the Second Amendment—plus

the historical context of its passage—to conclude that the Constitution conferred on Americans the "individual right to use arms for self-defense." *Id.* at 616. Similarly, when the Court examined the type of testimony subject to cross-examination under the Sixth Amendment, it noted that the "text alone" did not resolve the issue and so looked to "the historical background" of the Constitution to "understand [the right's] meaning." *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004). In *Crawford*, the Court went on to note that the "founding generation's immediate source of the concept" of "confrontation" was the English common law and proceeded to carefully parse that body of law to determine the scope of the right the Framers must have wished to protect. *Id.* at 43. These cases use the tools of originalism—including close textual and historical analysis—to determine fixed meanings of ambiguous or open-ended terms and concepts.

Importantly, the Court has also explained how originalism can provide an objective constraint on judges, even as a way of interpreting the Supreme Court's doctrinal tests for applying the Constitution's constraints. For instance, in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), Justice Scalia's plurality opinion acknowledged that determining the scope of the substantive liberty interest protected by the Due Process Clause had at times been a been a "treacherous field" because of the multitude of possible interpretations. *Id.* at 121 (quotation marks omitted). To limit that range of alternatives, Justice

Scalia applied the doctrine of originalism. So understood, the liberties protected by the Due Clause would only be those "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 122 (quotation marks omitted); *see also Washington v. Glucksberg*, 521 U.S. 702, 740 (1997) (holding there was no constitutional right to assisted suicide because such a right was not "objectively, deeply rooted in this Nation's history and tradition." (quotation marks omitted)). As Justice Scalia further explained, without specific historical analysis, judges would be able "to dictate rather than discern the society's views." *Michael H.*, 491 U.S. at 127 n.6. Originalism was thus applied to constrain the contours of Supreme Court doctrine, to assure that judges are not free to inject into the Constitution's design their own personal political preferences.

These two aspects of originalism serve a common end: To steer the courts away from a political role in defining the scope of constitutional protections, by setting the standard that courts will apply through an historically fixed reference point. Thus, according to the originalist, courts should respect "the choices . . . made in the Constitutional Convention" even if adhering to our Framers' views would "impose burdens on governmental processes that often seem clumsy, inefficient, [or] even unworkable." *INS v. Chadha*, 462 U.S. 919, 959 (1983). Put differently, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people

adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."[9] *Heller*, 554 U.S. at 634–35.

This Court should apply an originalist method to the question presented by this case. So interpreted, the First Amendment would plainly permit Alaska to regulate contributions to independent political action committees.

The Supreme Court has crafted a First Amendment doctrine that permits the regulation of political speech if that regulation addresses "corruption." *See supra* § I.1. The Court has not yet considered the meaning of the idea of "corruption" from an originalist perspective. To determine the scope of the "corruption" that may be regulated by a legislature, an originalist would apply a method for interpreting "corruption" that constrains the discretion of the judge, by selecting the meaning of "corruption" that is closest to the one used by the Framers. This is true, even if the word "corruption" does not appear in the Constitution's text, *see Michael H.*, 491 U.S. at 121–22. Moreover, this method is especially important in this case because, as Justice Breyer noted in his dissent in *McCutcheon*, the term admits of many different meanings. *McCutcheon*, 572 U.S. at 235–45 (Breyer, J., dissenting)

---

[9] For a comprehensive explanation of why "originalism is the law," see William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349 (2015).

(enumerating various definitions of "corruption"). Thus, to avoid judges crafting limits on the regulation of political speech that happen to fit their own personal political preferences, an originalist would adopt a reading that fit the meaning to the ideas of the framers.

The Supreme Court has yet to take a genuinely historical view of the meaning of corruption in any campaign finance case; instead, its most recent examination of the meaning of corruption "has firm roots in *Buckley*," *id.* at 208, not in the founding. This is because the Court has never been directly presented with the line of arguments or expert evidence presented here. For instance, in two recent cases in which the Supreme Court struck down various provisions of federal campaign finance law, the federal government did not present the Court with any evidence of the historical understanding of the types of corruption that the Framers thought were subject to regulation. *See* Brief of Appellee in *McCutcheon v. FEC* (filed July 18, 2013) *available at* http://bit.ly/2zzuYa2, Brief of Appellee and Supp. Brief of Appellee in *Citizens United v. FEC*, *both available at* http://bit.ly/2RHma9u.

This Court is thus in the same situation here that the courts were when they were considering *Heller*, in which the Supreme Court ultimately announced that the Second Amendment protects an individual's right to bear arms for self-defense. When the Court heard *Heller*, the prior leading decision on the question, *United States v. Miller*, 307 U.S. 174 (1939), was largely

bereft of historical analysis and "did not even purport to be a thorough examination of the Second Amendment." *Heller*, 554 U.S. 570 at 623. But that deficiency was "not entirely the Court's fault" because the government's brief in *Miller* had "provided scant discussion of the history of the Second Amendment—and the Court was presented with no counterdiscussion" of the issue because one side in *Miller* failed even to file a brief in the Supreme Court. *Id.* at 624. The Court in *Heller* was thus free to examine freshly what the historical evidence showed.

As in the *Heller* litigation, there is no Supreme Court precedent discussing the historical understanding of corruption. But the lack of precedent only makes the need for a historical examination more pressing. *See id.* 554 U.S. at 623.

d. Historical evidence shows that the Framers drafted a Constitution that permits the government to enact laws that prevent both quid pro quo corruption and institutional corruption.

The historical evidence presented to this Court conclusively establishes that the Framers were focused primarily on at least two kinds of corruption: quid pro corruption and institutional corruption. This evidence comes from both the uncontradicted expert testimony of Professor Jack Rakove as well as other reliable, contemporaneous sources.

i. The Framers considered "quid pro quo" arrangements to be corruption.

First, as Professor Rakove noted, "[t]here is obviously no question that [the Framers] understood overt forms of bribery to be blatant forms of corruption." E.R. 181. The evidence for this is myriad and uncontroversial. The Constitution itself makes "bribery" an impeachable offense. *Id.* The Framers added a Clause forbidding the unconsented acceptance of foreign emoluments in light of the "well-established historical knowledge of the formerly secret Treaty of Dover of 1670, when Louis XIV had effectively bribed Charles II of England to pursue a pro-French foreign policy and privately commit himself to support the Church of Rome." *Id.* And there is evidence the Framers were deeply concerned by several other bribery scandals, including allegations of bribery in the Continental Congress and against the speaker of one house of the Virginia legislature. E.R. 182. No one can reasonably dispute that the Framers were concerned with this form of corruption and thought our Constitution provided for ways to prevent and counteract it.

ii. Quid pro corruption can support some campaign finance regulations.

The Supreme Court has repeatedly affirmed that the government may seek to regulate campaign finance if the regulation prevents quid pro quo corruption or its appearance. *See supra* pp. 17–19. That said, because the

contribution limits at issue in this case are made to groups that are nominally independent of politicians and their campaigns, many courts have held that there is no risk of bribery or of "individual corruption" of legislators. *See SpeechNow*, 599 F.3d at 694–95. In order to sustain the regulation at issue here, there must be available another conception of corruption that extends beyond mere bribery of elected officials.

iii. The Framers considered "institutional corruption" to be an even more important type of "corruption."

"[W]hile bribery was, by definition, the most obvious form of corruption, it was only one example of the ways in which a political system could be corrupted." E.R. 182. Indeed, bribery was not even their "primary concern." E.R. 306. Instead, in their view, corruption "could also describe a set of relationships between institutions that had befouled the true principles of constitutional government." E.R. 182. This was how the Framers and "eighteenth-century British opposition writers used" the term "to lambaste the Crown's influence over the House of Commons." *Id.* Specifically, it was this conception that Professor Rakove identified as the "primary concern" of many of the Founders. E.R. 306 ("The primary concern in 18th century Anglo-American political thinking . . . was the belief that the extensive use of all the techniques of corruption and influence on behalf of the Crown had effectively subverted the independence of the House of Commons.").

As one example, Professor Rakove testified that many early Americans would have "thought about the East India Company" and its influence over British policy "as a paradigmatic example of the corruption of the government on behalf of a specific corporate interest that . . . became so dominant, so pervasive that it was exercising undue influence over policymaking." E.R. 323. That was a form of "institutional corruption" because if American politicians became too dependent on a small number of aristocratic or corporate backers or supporters, the Framers "would have still felt themselves engaged in a corrupt enterprise" even if there was no "quid pro quo bribery." E.R. 288–89.

Professor Rakove also testified that the Framers were familiar with the English practice of creating politicians who "depend[ed] upon aristocratic favor, which in an 18th Century republican culture like that in the United States would have seemed dishonorable and unseemly." E.R. 287. He cited specific examples from English political culture in the 18th Century and noted that the system was "corrupt even if everyone involved was living completely beyond the means of bribery." E.R. 294. Instead, in the Framers' view, the Parliament's system of selecting representatives from rotten and pocket boroughs was corrupt because those members of parliament were not dependent upon their constituents. Rather, "the [royal] government or some local aristocrat or member of the gentry" would essentially control the

electoral outcome, and "the improper influence was that the Crown was essentially creating a dependency with those representatives who were in the Parliament." E.R. 293.

Early Americans were obsessed with preventing this type of "corrupt" arrangement, because, to them "[a] Commons controlled by patronage and influence, representing too many pocket and rotten boroughs, serving seven-year terms insulated from the wishes of their constituents, was inherently corrupt." E.R. 197. The consequence was dire: such an arrangement would "enable the real holders of power to strip subjects of their liberty." *Id.* And if there were one value held in the highest of esteem by the Framers, it was the protection of liberty.

The specific political system the Framers attempted to create with the Constitution would combat this form of corruption and thus protect individual liberty. There was a "very strong conviction" from, among others, John Adams and George Mason, "that a representative assembly should be . . . a mirror, a miniature, a portrait, a transcript of the entire society." E.R. 319. In the Framers' view, the seven-year terms of members of the House of Commons prevented politicians from being "mirrors" of their constituents, and so that feature received particular scorn from the Framers. In contrast to the House of Commons, the Framers instituted frequent elections for the lower chamber of Congress—every two years, *see* U.S. Const. art. I § 2—with

what they expected to be heavy turnover and few incumbents, because such a system would "reduc[e] the risk of corruption or the danger of corruption, because they would enhance and promote the independence of the legislature from anybody else other than the desires of their own constituents." E.R. 309.

The State did not attempt to contradict this historical evidence in any way, and, indeed, there is much more history than Professor Rakove could ever discuss in a single session. After all, Alexander Hamilton explained that in drafting the Constitution, "[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption." *The Federalist* No. 68. And the Framers were all too aware that "[i]n republics, persons elevated from the mass of the community by the suffrages of their fellow-citizens to stations of great pre-eminence and power may find compensations for betraying their trust," *The Federalist* No. 22. Hence, the Constitution set out to create a government "dependent on the people alone," *The Federalist* No. 52, rather than one that relied on "an inconsiderable proportion or a favored class" for sustenance, *The Federalist* No. 39.[10]

---

[10] Counsel for Appellants have in fact examined every use of the term "corruption" within the standard Framing-era documents. Of the 325 usages identified, the Framers were discussing corruption of institutions, not individuals, in 57% of the cases. By contrast, discussion of quid pro quo

(continued on the next page)

The constitutional separation between branches of government was also meant to serve an anti-corruption purpose. The Ineligibility Clause prevents anyone from serving simultaneously in Congress and the executive branch. U.S. Const. art. I § 6. This ensured that legislators would be dependent on the people, not the President, and would therefore "preserv[e] the Legislature as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption." 1 *Farrand's Records of the Federal Convention* 386 (Rutlidge). Similarly, the requirement that legislators live in the place they represent would, per George Mason, prohibit "[r]ich men of neighbouring States" from using "means of corruption in some particular district" to "get into the public Councils after having failed in their own State." 2 *Farrand's Records of the Federal Convention* 218.

All of this evidence illuminates the central point: the Framers (1) understood corruption to include institutional corruption that went beyond bribery and (2) meant our Constitution to prevent such corruption, and accordingly put in place several structures with the goal of doing so.

---

corruption was rare—only six instances, all of them focused on corruption of individuals. *See* Brief of Amicus Curiae Professor Lawrence Lessig at 9, in *McCutcheon v. FEC*, S. Ct. Dkt. No. 12-536 (filed July 25, 2013), *available at* http://bit.ly/2RDBWlC.

iv. Institutional corruption can support some campaign finance regulation.

If the original conception of "corruption" includes the idea of "institutional corruption," then a Court constrained by originalism should permit a legislature to regulate speech to avoid that "institutional corruption." Judging whether particular campaign finance regulations meet this standard is a manageable, neutral task that is within the competence of the judiciary. Indeed, although courts have not necessarily spoken of "institutional corruption" in historical terms, they have often applied a similar standard in campaign finance cases. *See supra* § I.2.a. A government must have a substantial basis for believing that a legislature has been or can be corrupted by the particular mode of funding attacked by a regulation. Courts are well equipped to review that judgment.

Moreover, the State of Alaska has consistently recognized the interest in preventing institutional corruption, although the State has not viewed the problem through an originalist lens. Notably, in a recent brief to the Ninth Circuit defending the State's limits on contributions directly to candidates, the State argued that campaign finance restrictions may do more than "only target criminal bribery." State Br. in *Thompson v. Hebdon* at 22, 9th Cir. No. 17-35019, Dkt. Entry 23-3 (July 19, 2017). Instead, the State recognized that "[a]n elected official might feel improper pressure to act favorably to a large

campaign donor even if no criminal bribery arrangement exists," and the State accordingly may "ensure that elected officials make decisions based on the merits of the issues and the desires of their constituents, rather than based on obligations tied to campaign money." *Id.* at 23. As the State then helpfully summarized: "corruption exists whenever an elected official makes a decision he or she would not otherwise make because of *financial dependency*, and not all such arrangements involve criminal conduct." *Id.* at 23 (emphasis added).

The state is not correct to conceive of this type of corruption as a broad species of quid pro corruption. It is instead precisely the "institutional corruption" that the Framers were obsessed with. From that framing perspective, the Constitution should allow a government to prevent more than just individual bribery. Instead, it may permit the regulation of contributions to prevent "financial dependencies" that would prevent legislators from "making decisions based on the merits of the issues and the desires of their constituents" rather than "obligations tied to campaign money."

v. Societal corruption likewise concerned the Framers.

Finally, Professor Rakove testified about a third conception that the Framers were familiar with—but this was one that would be inappropriate as

a source of authority for government regulation. Citing the writings of Machiavelli, he noted that the idea of what might be called societal corruption "had little to do with prosaic acts of bribery or nepotism or non-bid contracts." E.R. 185. Instead, "[i]t involved forces more essential and corrosive: the emergence of a degraded way of life that would prevent a community from leading a political life or a civil life or from living in a 'free state.'" *Id.* (Italian phrases removed).

vi. The government does not have a valid interest in preventing societal corruption.

Although some of the Framers thought the idea of preserving civic virtue was critical to the flourishing of the young republic, this conception of corruption is not among those appropriate for regulation, for two reasons.

First, unlike the other two conceptions, there is scant evidence that the Framers thought that civic virtue could be preserved through adoption of the Constitution. To the contrary: the Framers famously thought that in fact most people would not act with civic virtue and would instead tend to form "factions," which were "a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community." *The Federalist* No. 10. The job of the Framers was thus not to somehow create an unusually enlightened citizenry; actually, this would be

"worse than the disease," because it would destroy liberty. *Id.* Instead, the Framers created a "republic" that would neatly manage factions and so permit Americans to have a noble government *even where civic virtue was not attainable.* It thus cannot be government's job to enforce this idea of a virtuous, uncorrupted society.

Second, even if preventing this form of societal corruption were somehow a permissible goal of government regulation, it could not be used as a basis to sustain regulations because, as Justice Scalia rightly noted in his *Citizens United* concurrence, this conception of corruption is not sufficiently objective or even discernable. 558 U.S. at 391 (Scalia, J., concurring). Rather than providing an objective standard by which to measure a law, looking to this definition would instead give courts virtually unlimited censorship power. *Id.* Courts may not adopt a standard if it "lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable." *Widmar v. Vincent*, 454 U.S. 263, 271 n.9 (1981).

e. Contribution limits to independent expenditure groups are reasonably tailored to further the compelling interest in preventing institutional corruption.

Contribution limits to independent expenditure groups and SuperPACs further the governmental interest in preventing institutional corruption, properly defined.

i. *SpeechNow* used an incorrect and ahistorical definition of corruption.

In *SpeechNow*, the plaintiff, SpeechNow, was an independent "political organization," which was similar in structure to what in Alaska would be an independent expenditure group (or what the federal government today calls a SuperPAC). 599 F.3d at 689. That is, it was an organization that wished to run political ads but that was not affiliated with a candidate or political party.

SpeechNow sought to accept contributions in excess of the then-effective statutory limit on donations to independent groups, and it challenged the limits as unconstitutional under the First Amendment. *Id.* at 690. Because of an unusual jurisdictional provision applicable to the case, the district court certified the constitutional question directly to the D.C. Circuit, which was required to hear the case en banc. *See SpeechNow.org v. FEC*, 2009 U.S. Dist. LEXIS 89011, *1–*3 (certifying questions and sending findings of fact to the Court of Appeals).

But the timing of the en banc hearing in the D.C. Circuit was unfortunate. Six days before oral argument was scheduled, and with the briefing fully completed, the Supreme Court issued its decision in *Citizens United*, which did not address contribution limits but struck down the federal ban on independent expenditures by corporate entities. *See Citizens United*,

558 U.S. at 310 (decided January 21, 2010); *SpeechNow*, 599 F.3d at 686 (argued January 27, 2010). Worse, when the D.C. Circuit heard argument, it did not have the benefit of any briefing on how *Citizens United* would apply to the central question of whether contributions to independent groups were constitutional. Instead, it received a single, two-paragraph letter from the challengers and, remarkably, nothing at all from the FEC. *See* Docket in *SpeechNow v. FEC*, D.C. No. 08-5223.

Nonetheless, the D.C. Circuit relied exclusively on *Citizens United* in striking down the contribution limits to independent groups. The *SpeechNow* court first correctly stated that the "only interest [it] may evaluate to determine whether the government can justify contribution limits as applied to SpeechNow is the government's anticorruption interest." *Id.* at 692. Then, after briefly canvassing the Court's campaign finance jurisprudence, it claimed that "[i]n light of the Court's holding as a matter of law [in *Citizens United*] that independent expenditures do not corrupt or create the appearance of quid pro quo corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." *Id.* at 694. The court then said it "must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechNow." *Id.* at 695. The Supreme Court never reviewed the decision.

This incorrect, overly simplistic approach, which was adopted without the benefit of any briefing addressing the issue, quickly proliferated across the country. Two years later, APOC recognized the trend: the two Ninth Circuit decisions on which APOC relied both cited *SpeechNow* in support of their decisions to strike down contribution limits to independent groups in California local elections. *Thalheimer*, 645 F.3d at 1113, 1119; *Long Beach Area Chamber of Commerce*, 603 F.3d at 698.

But these decisions were wrong when they were decided because they used an ahistorical definition of corruption. In reasoning that contributions to independent groups by definition cannot give rise to quid pro quo corruption, the court in *SpeechNow* necessarily adopted a definition of corruption limited to bribery. 599 F.3d at 694. And that is not surprising, given the swift decision, the lack of briefing, and the fact that the Supreme Court had not been presented with historical interpretations of corruption in *Citizens United*. But the idea of "corruption" to our Framers was not exhausted by the idea "bribery." Now that it is equipped with the proper tools, this Court need not adopt the ahistorical, narrow definition used by the D.C. Circuit and other courts and may instead examine the laws through the lens of institutional corruption that our Framers would have used.

ii. Contribution limits to independent groups give rise to institutional corruption.

Contributions to independent political groups do not create a risk of bribing any candidate. That is because, as a formal matter, independent groups must be unaffiliated with the campaigns and political parties that they support. But that does not mean that such contributions cannot cause corruption at an institutional level. To the contrary: the uncontradicted expert evidence here, as well as evidence from other sources, shows that it can, and that it often does.

Using data from federal elections going back to the 1970s, Professor Bonica concluded that prior to the 2010 election cycle, "most money was being raised in limited amounts from a larger number of individuals." E.R. 241. But after the D.C. Circuit issued its opinion in *SpeechNow* and created the SuperPAC, there was "a lot more money coming from a smaller number of individuals." *Id.* As he put it, following that decision, "the amount of money . . . going into politics became more concentrated." *Id.*

He provided extensive data to back-up his assertion. For instance, in his expert report, Professor Bonica found that "[t]otal donations from the top 400 donors increased from $772 million in 2012 to $1.3 billion in 2016, accounting for about 70% of the total growth in total federal contributions during that period." E.R. 147–48. What this means is that "[b]asically all of

the increase [in recent political spending] has been due to . . . greater donations from a very small group of individuals." E.R. 249. By contrast, for "the rest of the population," their "contribution of total federal spending has not been increasing as close to as fast within the rest of the population." *Id.* In real dollar terms, "right now about 20 percent of all money donated to federal elections is coming from about 400 individuals." *Id.*

Professor Bonica also testified that the trends were similar for state level elections. E.R. 244–45. And while he testified that the total contributions to independent expenditure groups in Alaska specifically, especially from wealthy individuals, "appears to be increasing," E.R. 243, he also testified that "often state-level analyses are done as a group" because individual races or issues can cause wide variation in individual state numbers from one election cycle to the next. E.R. 244.[11] Thus, the evidence from federal and state elections generally was applicable to the state provision at issue here.

---

[11] That said, the 2018 election cycle in Alaska set statewide records. An independent expenditure group supporting Governor-elect Mike Dunleavy received donations of over $500,000 from the candidate's brother, along with several other very large donations from just a few individuals. Kyle Hopkins and Alex DeMarba, *How Independent Expenditure Groups Are Fueling Alaska's Governor and Salmon Campaigns*, Anchorage Daily News (Oct. 31, 2018), http://bit.ly/2PHJlTZ.

Crucially, Professor Bonica also testified that the change in the way elections are funded affects the behavior of politicians: it makes them dependent on a comparatively small set of wealthy donors, which is the hallmark of institutional corruption. He cited "evidence from the political science literature that politicians are more responsive with respect to their time to donors rather than non-donors." E.R. 264. And he noted that the more concentrated the funding becomes, the more pronounced this effect will be, because politicians "probably would have a lot of incentives to go talk to [those who donate large sums to independent groups] over talking to a bunch of people that may only be able to write, you know, a thousand or a few thousand dollars as a check." E.R. 265. Thus, he concluded based on his research that the only circumstance "where you would expect maybe that dependence to be lesser would be if donations were capped." *Id.*

The behavior that Professor Bonica described is direct evidence of the kind of institutional corruption that concerned the Framers: the creation of "a set of relationships between institutions that had befouled the true principles of constitutional government." E.R. 182. Or, as the State more recently put it in its own recent Ninth Circuit brief, this form of "corruption exists whenever an elected official makes a decision he or she would not otherwise make because of financial dependency." State Br. in *Thompson v. Hebdon* at 22–23.

Further, the evidence shows that politicians are aware of who is donating to independent groups and they are responsive to those donors—indeed, legislators may well be *more* responsive to donors to supportive independent groups than to their own campaign donors, because donors to independent groups may give unlimited amounts of money. *See* E.R. 266 (Q: Would it be "rational for politicians at virtually all levels, state and federal, including here in Alaska, to be very responsive to and perhaps even dependent on large donations which can come in in even larger donations to independent expenditures than directly to political campaigns"? A: "Yes."). If Alaska's limits were enforced once again, candidates will be forced to raise money "in limited amounts from a larger number of individuals," E.R. 241, which would lessen the corruption of our institutions that so concerned the Framers.

3. The limits on contributions to independent expenditure groups are supported by the state interest in preventing institutional corruption.

In light of this evidence, it is clear that the limits on contributions to independent expenditure groups in § 15.13.070 are supported by the State's interested in preventing institutional corruptions and are thus valid. The State's legal opinion to the contrary is incorrect.

Accordingly, as a formal matter, this Court should vacate APOC's order, hold that the conclusion in the 2012 advisory opinion was incorrect as

a matter of law, and require the Commission to enforce the statutory limits on contributions to independent groups. Identical limits of $500 per person per year have already been approved by the Alaska Supreme Court, *see State v. ACLU*, 978 P.2d at 624–25. Thus, APOC and this Court must, as a matter of precedent, adhere to that determination.[12]

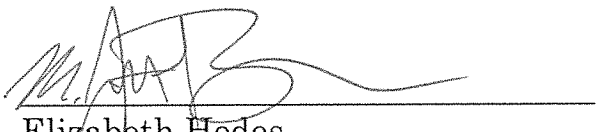
CONCLUSION

The Final Order of the Commission should be reversed.

---

[12] In 2016, a federal district court upheld the $500 limits to candidates and party-affiliated groups. *See Thompson v. Dauphinais*, 217 F. Supp. 3d 1023 (D. Alaska 2016). An appeal of that ruling is currently pending in the Ninth Circuit. *See* 9th Cir. Dkt. No. 17-35019. If the Ninth Circuit were to strike down the limits as too low, this Court may be free to consider the argument that the $500 limits on contributions to independent groups are also too low, and supplemental briefing may be helpful. But the Ninth Circuit's decision will not affect the fundamental question here of whether *any* limits to independent groups are permissible.

Dated: November 16, 2018



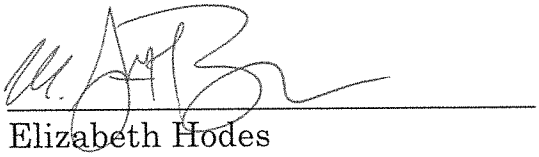
Elizabeth Hodes
M. Scott Broadwell
DAVIS WRIGHT TREMAINE LLP
188 West Northern Lights Blvd., Ste 1100
Anchorage, AK 99503
elizabethhodes@dwt.com
scottbroadwell@dwt.com

Lawrence Lessig
Jason Harrow
EQUAL CITIZENS
12 Eliot St.
Cambridge, MA 02138
lessig@law.harvard.edu
jason@equalcitizens.us

CERTIFICATE OF TYPEFACE

This brief was prepared in 13-point Century Schoolbook font.

Dated: November 16, 2018



Elizabeth Hodes
M. Scott Broadwell
DAVIS WRIGHT TREMAINE LLP
188 West Northern Lights Blvd., Ste 1100
Anchorage, AK 99503
elizabethhodes@dwt.com
scottbroadwell@dwt.com

Lawrence Lessig
Jason Harrow
EQUAL CITIZENS
12 Eliot St.
Cambridge, MA 02138
lessig@law.harvard.edu
jason@equalcitizens.us