IN THE SUPREME COURT FOR THE STATE OF ALASKA

THE ALASKA PUBLIC OFFICES COMMISSION, Petitioner,

v.

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

Sup. Ct. Case No. S-17649

Trial Ct. Case No. 3AN-18-05726CI

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On Petition for Review from the Alaska Superior Court

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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

Respondents adopt Petitioner APOC's statement of jurisdiction.

PARTIES TO THE PROCEEDING

Respondents are Alaska citizens Donna Patrick, John P. "Pat" Lambert, and James K. Barnett. Petitioner 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 the Superior Court on June 1, 2018.

ISSUES FOR REVIEW

On March 27, 2020, this Court granted review and requested briefing on the following two issues:

1. Does APOC have discretionary authority to decline to enforce statutes within its enforcement purview? Is a formal APOC advisory opinion that a statute within its enforcement purview is unconstitutional and therefore unenforceable contrary to Alaska law regarding administrative agencies' jurisdiction to decide constitutional issues? When APOC believes a statute within its enforcement purview is unconstitutional, is it required to follow the directives of Alaska Statutes § 15.13.380(f) rather than declining enforcement?

2. Is Alaska Statutes' § 15.13.070's limit on contributions to independent expenditure groups constitutional in light of *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and other recent federal case law?

PRELIMINARY STATEMENT

This appeal gives this Court the chance to uphold a long-standing Alaskan law that regulates contributions to independent expenditure groups, by carefully determining the scope of the First Amendment limits on campaign finance regulation. The scope of permissible regulation should be defined using principles that a majority of the U.S. Supreme Court has endorsed: namely, the Framers' original understanding of the powers and limits of a government of free people. Following that method, a clear majority would uphold limits on contributions to independent political action committees.

There is uncontradicted expert testimony in this case that the Framers created a government that could prevent at least two types of corruption: first, individual or quid pro quo corruption, and second, "institutional corruption." Quid pro quo corruption occurs when individual legislators are induced through gifts or bribery to take actions that benefit specific citizens. Institutional corruption, by contrast, occurs when the institutions of our government—like the Congress or state legislatures—become overly dependent on a narrow class of citizens at the expense of the electorate at large. Given the uncontradicted evidence that the law at issue furthers the permissible government interest of reducing institutional corruption, the limits at issue in this case are enforceable.

Procedurally, while APOC has authority to decline to enforce laws it views as unconstitutional, it may do so only if its legal reasoning is subject to administrative challenge and judicial review, both at the time they are issued and in later proceedings, as here. Thus, this Court may—indeed, must—review APOC's legal reasoning *de novo*. In so doing, it should affirm, albeit on alternative grounds, the Superior Court's conclusion that the Final Order in this case refusing to investigate the complaints should be reversed and the relevant advisory opinion revoked and reissued using the proper legal standard.

BACKGROUND

I. The Regulation of Election-Related Contributions In Alaska

A. Alaska has a long and unbroken history of limiting contributions.

Alaskans have long ensured that this State has a government reasonably free of the kind of corruption caused by large political contributions to candidates, political parties, and outside special interest 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]

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[1] Under Alaska law (and analogous federal law), 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

In 1996, the Legislature embarked on an overhaul of campaign finance law to combat what the State recognized as 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). 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 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 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-

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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.

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 law prevented candidates, parties, or groups from becoming too dependent on a narrow set of potentially unrepresentative donors.

The relevant portions of the 1996 contribution limits were upheld as constitutional in 1999 by this 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.

The public objected to the increase in the flow of money to groups and candidates. Citizens organized a ballot initiative to overturn the higher 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, *available at* http://bit.ly/2SYo9rj. 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 with 73% of voters voting in favor. State of Alaska, 2006 Primary Election Official Results, https://perma.cc/ZK36-7GRD (Measure 1). The contribution limits set by the voters of $500 per year from an individual to a group have not been altered by the voters or the Legislature since that time. *See* Alaska Statutes § 15.13.070.

B. The Alaska Attorney General finds 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). *Citizens United* did not address whether political contributions to, as distinct from expenditures by, independent groups could give rise to corruption, nor did it consider the various types of corruption a government may seek to prevent through campaign finance regulation.

Following the decision, then–Attorney General Daniel Sullivan issued a memorandum about *Citizen United*'s impact on Alaska law. *See* Exc. 197-204. Sullivan found that Alaska's prohibition on independent *expenditures* by corporations was unconstitutional, since those laws were analogous to those struck down in *Citizens United*. Exc. 200. But Sullivan also concluded that the Supreme Court's decision "does not directly call into question the constitutionality of any other *contribution*, expenditure, disclaimer or disclosure law." *Id.* (citing Alaska Statutes § 15.13.070) (emphasis added). Thus, during the 2010 election cycle, the contribution limits in § 15.13.070 remained in effect.

C. 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 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], [the group] can obtain contributions and make independent expenditures in unlimited amounts, with no restriction on the amounts or sources." Exc. 2.

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 8. 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 8 n.13 (citing *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1112 (9th Cir. 2011), and others). 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." *Id.* at 9.

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.

II. This case.

A. Administrative proceedings.

Respondents Donna Patrick, John P. "Pat" Lambert, and James K. Barnett are Alaska citizens interested in good government in Alaska and 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 above the statutory limits in

Alaska Statutes § 15.13.070. *See* Exc. 10-73. Commission staff rejected the complaints on the grounds that contributions above the statutory limit were permitted by the 2012 Advisory Opinion. Exc. 74 (rejection letter).

Respondents appealed staff's rejections to the full Commission. Respondents argued on appeal that the lower federal court decisions cited were incorrect because they were inconsistent with the original understanding of the anti-corruption measures permitted by the Constitution. Because the Commission was not bound by the incorrect lower court interpretations, Respondents asked the Commission to reconsider 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.[2]

Following the hearing, the Commission voted 3-2 to affirm staff's rejection of the Complaints. The Commission's Final Order states that it relied on "*SpeechNow.org* [], and related federal cases" in support of the continuing validity of the 2012 Advisory Opinion. Exc. 77. Even though the Commission legally could revise that advisory opinion, *see* 2 AAC 50.840(e), a majority of the Commissioners instead affirmed "that the conclusion in Advisory Opinion 12-

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

09-CD remains valid, and there is thus no good cause to reconsider that opinion." *Id*. Two Commissioners dissented from that determination but did not explain their reasoning. *Id*. at 77 n.2.

Respondents appealed the Final Order to the Superior Court, and the two private parties named in the Complaints were dismissed by consent. The appeal from the Final Order of the Commission thus presented the sole question of whether APOC correctly adhered to its 2012 Advisory Opinion concluding that the contribution limits to independent expenditure groups were unconstitutional and would not be enforced.

B. The Superior Court hears expert testimony on appeal.

On appeal, the Superior Court granted Respondents' request 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* Exc. 221-248. Professor Bonica is a professor in the Department of Political Science at Stanford University and an expert on campaign finance and elections. *See* Exc. 205-209.

On October 4, 2018, Professors Rakove and Bonica appeared for live testimony. As explained below, Professor Rakove provided extensive evidence of

the Framers' understanding of "corruption." Tr. 65-120. Professor Bonica provided detailed evidence of current trends in political donations and their impact on the behavior of legislators. Tr. 8-64. The Superior Court also admitted into evidence the expert reports and CVs of each Professor.

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

C. The Superior Court's decision.

On November 4, 2019, the Superior Court issued its order reversing the dismissal of the complaints and remanding to APOC to reconsider. Exc. 195. The Superior Court reached the correct result, but it relied on a legal theory not advanced by the Respondents that, while creative, has since been called into question by the U.S. Supreme Court's vacatur of the most relevant Ninth Circuit decision in *Thompson v. Hebdon*, 140 S. Ct. 348 (2019).

In particular, the Superior Court reasoned that APOC should have considered revising its advisory opinions in response to a series of federal court decisions culminating in *Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018). Those decisions upheld in relevant part the same contribution limits at issue in this case, though as applied to candidates or to groups that are *not* independent from political parties or candidates. The Superior Court found that APOC "should have re-examined the continuing validity of [the advisory opinion]" following these decisions. Exc. 193. After the Superior Court's decision,

the Supreme Court vacated the Ninth Circuit's decision for reconsideration of the limits under a more exacting standard. *Thompson*, 140 S. Ct. at 351. In its short per curiam opinion vacating the Ninth Circuit's decision, the Supreme Court in *Thompson* again applied the non-originalist framework that so far has governed its campaign finance jurisprudence.

Because the Superior Court relied on grounds not advanced by Respondents here, it noted that it "need not address Patrick's argument about the understanding of corruption that the Founders of the United States Constitution had," though the Court said it "certainly enjoyed" the argument. Exc. 195 n.68. Given the vacatur of *Thompson*, this Court is well-positioned to consider the argument based on the full record.

D. This Court's action.

This Court granted the Commission's petition for review on March 27, 2020. The decision below has been stayed pending resolution of this appeal.

STANDARDS OF REVIEW

The Commission's Final Order refusing to investigate the complaints rests entirely on its conclusion that, as a matter of federal constitutional law, the contribution limits in § 15.13.070 are unconstitutional. That interpretation was first articulated in the Commission's 2012 advisory opinion and then reaffirmed in the Final Order under review in this case. Exc. 75–77.

In a court proceeding reviewing an administrative determination, "[c]onstitutional issues are questions of law subject to independent review." *Eberhart v. APOC*, 426 P.3d 890, 894 (Alaska 2018) (quotation marks omitted); *see also Eagle v. State*, 153 P.3d 976, 978 (Alaska 2007) (courts "review the merits of an administrative determination independently"). This standard of review is equivalent to *de novo* review. *Harrod v. State*, 255 P.3d 991, 995 (Alaska 2011).

Further, this Court "may affirm a judgment on any grounds that the record supports, even grounds not relied on by the superior court." *Winterrowd v. State*, 288 P.3d 446, 449 (Alaska 2012) (quotation marks omitted). Thus, although the authority primarily relied on by the Superior Court has since been vacated, this Court can—and should—affirm the decision to remand to APOC for reconsideration of the advisory opinion based on the originalist testimony in the record and the arguments presented here.

ARGUMENT

I. LIMITS ON CONTRIBUTIONS TO INDEPENDENT GROUPS ARE JUSTIFIED TO AVOID INSTITUTIONAL CORRUPTION.

A. Neither this Court nor the Supreme Court has ever considered whether contribution limits can be justified because they prevent institutional corruption.

The Commission erred in its 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 closer examination of the nature of corruption and whether limits on contributions to independent political action committees further that interest.

Instead, the Commission deferred to a line of federal appellate cases taking a narrow view of the notion of "corruption," most prominently *Speechnow.org,* 599 F.3d at 686. Exc. 8–9; 76–77. Those cases were wrongly decided because the courts in those cases were not presented with evidence about the original understanding of the term "corruption." Regardless, this Court is not required to follow those incompletely reasoned decisions, since they are not binding on Alaskan courts. *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, 964 (Alaska 1995) (Ninth Circuit decisions should be followed "only to the extent that [their] reasoning is persuasive.").

In fact, limits on contributions to independent groups are consistent with avoiding the primary type of corruption that the Framers were focused on. The expert evidence in this case shows that the idea of "institutional corruption"—and not just quid pro quo corruption—was central to the Framers' thinking. And because limits on contributions to independent groups prevent institutional corruption, those limits are valid and consistent with *Citizens United* and other cases. The Commission's contrary conclusion must be reversed.

The parties agree that this case is about the meaning of "corruption." APOC Br. 15–16. That is because the U.S. Supreme Court has held that states and the federal government may regulate political speech to avoid "corruption" or the "appearance of corruption." *Buckley v. Valeo*, 424 U. S. 1, 26–27 (1976) (per curiam). The question raised by this appeal, then, is whether that "corruption" is limited to quid pro quo corruption alone.

Buckley did not resolve that question. In upholding the Federal Election Campaign Act, the Court accepted the government's argument that limiting contributions to candidates or political action committees would avoid quid pro quo corruption or its appearance. The government had not advanced a different conception of corruption to justify the law. The conception it had advanced was only individual, or quid pro quo, corruption.

Though decades have passed since *Buckley*, the government's arguments have not changed. The sole issue in *McCutcheon* was whether aggregate limits on contributions could be justified within a quid pro quo corruption framework. The government did not ask the Court to adopt a conception of corruption other than quid pro quo corruption. The Court therefore applied the quid pro quo framework and found that aggregate limits could not be justified.

In neither case did the government advanced a conception of corruption that was distinct from individual, or quid pro quo, corruption. In each case—and in many decided between the two decisions—the government had simply asked the Court to embrace a broader meaning of quid pro quo corruption, yet a conception still focused on the corrupting effect of money upon *individuals*. Despite that appeal, the Supreme Court has consistently resisted efforts to blur the line around individual corruption.

Therefore, this case raises a question so far unaddressed by the Supreme Court: Whether *institutional* corruption, rather than individual corruption, can also justify campaign finance regulation. The Supreme Court has never been presented with an argument that advanced institutional corruption as a type of "corruption" within the scope of the *Buckley* doctrine. Yet because, as the testimony in this case evinces, institutional corruption was a core concern of the Framers of our Constitution, there could be no principled reason for prohibiting legislatures from regulations aimed at limiting such corruption, at

least among originalists. Thus, if the U.S. Supreme Court were presented with the question and at least one originalist justice adopted an institutional understanding of the scope of the "corruption" that might be remedied under the First Amendment, a majority of the Court would permit the type of regulation at issue in this case.

In its brief to this Court, APOC agrees in principle with this analysis. It recognizes that the regulations here could be sustained if the Supreme Court were to hold that the "government may permissibly target a broader concept of corruption" than merely quid pro quo. APOC Br. 19. And it recognizes that the "creative legal theories" here have "not yet [been] argued to the U.S. Supreme Court." *Id.* But that does not mean Respondents' success in this case a "long shot," as APOC claims. *Id.* Instead, it means this Court may lead the way for the U.S. Supreme Court to, at last, place the idea of government regulations of campaign contributions on an intellectually strong foundation. As explained, that foundation begins with the unique evidence in the record here.

B. Testimony in this case shows that the prevention of both quid pro quo and institutional corruption were important state interests that could be advanced through regulation.

The historical evidence presented here conclusively establishes that the Framers were focused on at least three types of corruption: quid pro quo cor-

ruption, institutional corruption, and societal corruption. Tr. 70-77. The evidence in this case shows that institutional corruption was the most important to them as they developed their constitutional design.

1. The Framers considered both "quid pro quo" arrangements and institutional corruption to be core types of corruption that our government was designed to minimize.

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." Exc. 250. The evidence for this is 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 concerned about other bribery scandals, including allegations of bribery in the Continental Congress and against the speaker of one house of the Virginia legislature. Exc. 251. No one can reasonably dispute that the Framers were worried about this form of corruption; none could suggest that they meant their Constitution—or the First Amendment—to bar effective regulation of this form of corruption.

But "while bribery was, by definition, the most obvious form of corruption," Professor Rakove testified that "it was only one example of the ways in which a political system could be corrupted." *Id.* Bribery was not even the "primary concern." Tr. 93. Instead, in the Framers' view, corruption "could also describe a set of relationships between institutions that had befouled the true principles of constitutional government." Exc. 251. It was this type of corruption—that is, "institutional corruption"—that Professor Rakove identified as the "primary concern" of the Framers. Tr. 93.

An institutional focus addresses structural corruption. Its concern is not the morals of individuals; it is instead the structure of incentives allowed to evolve within institutions of constitutional government. Institutional corruption occurs when those incentives undermine the intended manner in which those institutions were meant to function. It is not a corruption of individuals within those institutions.

For example, it was common for the Framers to remark on the "corruption" of the British Parliament. Tr. 70-72, 84. Yet that corruption was not evinced by any bribery engaged in by Members of Parliament. It was instead the consequence of an improper influence that the Crown had effected within Parliament. The House of Commons was to be representative of the People of Britain. But the system of selecting representatives from "rotten" and "pocket"

boroughs[3] was viewed as "corrupt" by the Framers, because those Representatives were effectively chosen by the Crown, and therefore dependent on the Crown, not the people. "The [royal] government or some local aristocrat or member of the gentry," Professor Rakove explained, would essentially control the electoral outcome, and thus "the improper influence was that the Crown was essentially creating a dependency with those representatives who were in the Parliament." Tr. 80. That "dependence" by those Members of the Commons on the Crown rather than the people "corrupted" the Commons. Tr. 71. It was thus an improper dependence *within the institution* but without express quid pro quos that rendered the institution corrupted.

This institutional corruption was a central focus of the Framers' attention. It was the primary way in which the Framers and "eighteenth-century British opposition writers used" the term "corruption"—specifically, "to lambaste the Crown's influence over the House of Commons." Exc. 251. Yet in speaking of this "corruption," the Framers did not intend or imply any bribery or any improper quid pro quo. "Dependence" does not require a quid pro quo. The Framers were familiar with the English practice of creating politicians who "depend[ed] upon aristocratic favor, which in an 18th century republican

[3] They are "constituencies where either the government or [a] local aristocrat or . . . member of the gentry had a kind of dominant personal interest, so they could easily sway or influence or control the electorate." Tr. 72.

culture like that in the United States would have seemed dishonorable and unseemly," and therefore, from their perspective, "corrupt." Tr. 74. Importantly, as Professor Rakove testified, "even if everyone involved was living completely beyond the means of bribery," it was still "corruption." Tr. 81.

2. Preventing these two types of corruption is a valid governmental objective.

The Framers were keenly focused on preventing both individual and institutional corruption within the American Republic. The Constitution itself references individual corruption. *See* U.S. Const. art. II § 4 (including bribery as an impeachable offense). And the representative democracy the Constitution established would avoid institutional corruption by assuring a properly representative "dependence" within Congress. Madison described extensively the mechanisms by which such a proper dependence would be formed. There was a "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." Tr. 106. In the Framers' view, the British Parliament was structured to obscure that "mirror." Seven-year terms for members of the House of Commons removed them from the people. By contrast, 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. Such a system of "rotation" would "reduc[e] the

risk of corruption or the danger of corruption, because [it] would enhance and promote the independence of the legislature from anybody else other than the desires of their own constituents." Tr. 96. "Independence," in other words, was to be secured by assuring a proper dependence. As Madison put it, the Congress should be dependent "upon the people *alone*." *The Federalist* No. 52 (Madison) (emphasis added). By "the people," Madison meant "[n]ot the rich more than the poor." *The Federalist* No. 57 (Madison).

Professor Rakove's testimony is confirmed by familiar historical sources. 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 (Hamilton). 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 (Hamilton). Avoiding these incentives to corruption was thus their objective in designing the Republic the Constitution creates.

This focus on structural independence, by securing a proper dependence, is shot through the Constitution's design. The Ineligibility Clause prevents anyone from serving simultaneously in Congress and the executive branch. U.S. Const. art. I § 6. This assures that legislators will be dependent on the people,

not the President, and therefore "preserv[es] 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 state they represent, per George Mason, prohibits "[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.

Finally, "institutional corruption" is distinct, as Professor Rakove testified, from the third conception of corruption that the Framers addressed, "societal corruption." Tr. 70. Societal corruption is the corruption of the "society as a whole," Tr. 75, and was the type of corruption that Justice Scalia insisted that no free government could address, at least through speech-restrictive means. *See Citizens United*, 558 U.S. at 391 (Scalia, J., concurring) (noting that the government cannot address the problem of "moral decay" that concerned the Framers). Justice Scalia was correct: whether societal corruption is a problem or not, our tradition does not permit its remedy through the restriction of speech. But whether or not this third category of corruption can be addressed by a legislature, it is distinct from the two that were most salient and present to the Framers: individual corruption and institutional corruption.

APOC did not attempt to contradict this historical account in any way, and does not attempt to undermine any of it in this Court. That is because the evidence is well-established and uncontroversial. It evinces the systemic focus of our framers, and indeed, anyone crafting a constitutional system.

Together, the evidence establishes two critical points. First, it establishes that the Framers' primary concern in designing the structural features of the Constitution was preventing institutional corruption, not merely quid pro quo corruption. Second, it establishes the strong and legitimate interest of Congress and state legislatures in protecting the institutions of our Republic from this type of institutional corruption.

C. This Court must determine the conception of "corruption" that would control in the U.S. Supreme Court.

To resolve this case, this Court must determine the conception of "corruption" that would control a decision by the U.S. Supreme Court. If that conception is limited to individual, or quid pro quo corruption, then Alaska's law would not stand. If it includes institutional corruption, then Alaska's law should be upheld. Thus, whether the Supreme Court would recognize institutional corruption as a kind of "corruption" justifying regulation is the central question that this Court must resolve.

To date, the Supreme Court has not been presented with an originalist argument about the scope of "corruption" that might properly be regulated under the First Amendment. Neither has the Court addressed the question whether the unlimited contributions to independent political action committees are protected by the First Amendment. The Court did not review the decision in *SpeechNow* that found a constitutional right to make unlimited contributions to an independent political action committee because the federal government declined even to petition for certiorari. Instead, the government assessed—incorrectly, as we now know—that the *SpeechNow* decision would affect only a "small subset" of contributions. Letter from Attorney General Holder to the Speaker of the House, June 16, 2010, *available at* https://perma.cc/6N2V-DQYM. Thus, to date, the Court has only explicated the meaning of corruption with "firm roots in *Buckley*," *McCutcheon*, 572 U.S. at 208, not in any original understanding at the founding. In the two most 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* Br. of Appellee in *McCutcheon* (filed July 18, 2013) *available at* https://perma.cc/T2PD-YWDD; Br. of Appellee and Supp. Br. of Appellee in *Citizens United v. FEC*, *both available at* https://perma.cc/LQJ5-2RBR.

This Court is thus in the same situation as other courts were in when the Supreme Court ultimately announced that the Second Amendment protects an individual's right to bear arms for self-defense. When the Court heard *D.C. v. Heller,* 554 U.S. 570 (2008), the prior leading decision on the question, *United States v. Miller*, 307 U.S. 174 (1939), had been largely bereft of historical analysis and "did not even purport to be a thorough examination of the Second Amendment." 554 U.S. at 623. But that deficiency in *Miller* 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." *Id.* at 623–24. Moreover, "the Court was presented with no counter-discussion" of the issue because one side in *Miller* failed even to file a brief in the Supreme Court. *Id.* The Court in *Heller* was thus free to examine freshly what the historical evidence showed. Based on that review, the Court remade the scope of the Second Amendment.

As in the *Heller* litigation, here there is no Supreme Court precedent discussing the historical understanding of corruption. That absence of historical analysis renders the existing decisions of the Court incomplete. *See id.* at 623. Because the United States Supreme Court has not yet addressed this question, the only way that this Court can resolve the issue is to aggregate the positions articulated by the justices on the Supreme Court, to determine the

likely majority position on that Court. Adopting that methodology, Alaska's law is constitutional.

1. Four Justices would uphold Alaska's law.

Four Supreme Court justices have already expressed the view that regulation of independent political action committees is broadly permissible. *McCutcheon*, 572 U.S. at 235–36 (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.) (voting to uphold federal aggregate limit on campaign contributions). This clear position by these four justices means that the only question is whether there is a single additional justice who would uphold regulations of institutional corruption.

Of the remaining five, at least three justices have consistently signaled that the Constitution's original meaning must constrain courts in their interpretation of constitutional doctrine. Thus, the question for this Court is whether the principles articulated by those three justices would lead at least one to recognize that they could have no principled reason for denying a legislature the power to regulate to avoid "institutional corruption."

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

Three of the remaining five justices have clearly embraced the interpretive discipline 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, 57–74 (2005) (Thomas, J., dissenting) (arguing for a strictly originalist interpretation of the Commerce Clause and the Necessary and Proper Clause). Justice Gorsuch, too, has advanced originalism in his short time on the bench. *See Carpenter v. United States*, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting) (inviting briefing and argument 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 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 stands with respect to the value of originalism, at least three justices are firmly committed to this mode of analysis.

As is well recognized, originalism is both a method for (a) interpreting the words of the Constitution as well as a technique for (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. As Justice Scalia described, "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 of discretion. *Id.*

Following this framework in *Heller*, 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." *Heller*, 554 U.S. at 616. Likewise, when examining the type of testimony subject to cross-examination under the Sixth Amendment, the Court noted that "text does not alone resolve"

the issue, and it therefore looked to "the historical background" of the Constitution to "understand [the confrontation right's] meaning." *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004). In *Crawford*, the Court further noted that the "founding generation's immediate source of the concept" of "confrontation" was the English common law. *Id.* at 43. It thus proceeded to parse that body of law to determine the scope of the right the Framers must have meant to protect. *Id.* at 43–44. These cases use the tools of originalism—including close textual and historical analysis—to fix the meaning of ambiguous or open-ended terms and concepts.

But again, as the most prominent originalists have insisted, originalism is not only a tool for discerning the meaning of a constitutional text. It is also a tool for constraining the discretion of judges. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), for example, Justice Scalia's plurality opinion acknowledged that determining the scope of the substantive liberty interest protected by the Due Process clause had been a been a "treacherous field" because of the multitude of possible interpretations. *Id.* at 121. To limit that discretion, Justice Scalia used originalism not to interpret the words "due process," but to constrain the Court in its application of the doctrine of due process. So understood, the liberties protected by the Due Process Clause would only be those "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 122–24 (quotation marks omitted); *see also Washington v. Glucksberg*,

521 U.S. 702, 720–21 (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 as a constraint on the contours of the 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 apply through an historically fixed reference point. Thus, according to an 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." *Heller*, 554 U.S. at 634–35; *see generally* William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349 (2015).

D. Applying the proper methodology, Alaska's law would be upheld by the Supreme Court.

If, as described, four justices have already indicated that they would uphold laws like those at issue here, the question for this Court is whether there is a fifth vote to uphold the law here using originalist reasoning. Respondents suggest there is. An originalist would conclude that a legislature could be justified in limiting the contributions to independent political action committees. And even an originalist applying modern First Amendment doctrine must conclude that a Court could have no principled reason to restrict the ability of legislatures to limit contributions to independent political action committees.

1. The First Amendment was not originally intended to prevent regulations plausibly advancing the "public good."

The First Amendment originally did not bar Congress from regulating contributions to political action committees. Even if such regulation would have been considered a regulation of "speech" under the First Amendment as originally conceived, the original conception of the First Amendment would have permitted such regulation of speech—so long as the purpose of that regulation was to advance "the public good."

At the founding, freedom of speech was deemed a "natural right." Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 Const. Comment 85, 86 (2017). But the notion of a "right" was radically different from how

it is conceived today. "Rights" were not trump cards to be invoked to strike down legislation. "Rights" were modes for channeling reasoning through representative government. *Id.* A "natural right" was a presumptive liberty that could only be infringed by a representative government exercising its power through a law advancing the common good. *Id.* at 93.

No doubt, a legislature could mistake the "public good" or fail to act according to "general purposes." But at the founding, no court would have questioned a plausible claim to advance the public good by a legislature. *See United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1584 (2020) (Thomas, J., concurring) ("[T]here is no evidence from the founding indicating that the First Amendment empowered judges to determine whether particular restrictions of speech promoted the general welfare.") (citations omitted); Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 1 *The Papers Of James Madison: Retirement Series* 500, 501 (David B. Mattern et al. eds., 2009) (Questions "of mere expediency or policy" not amenable to judicial resolution.). And certainly, in the context of republican-supportive legislation (such as a limit to aristocratic power), no court would have questioned a legislature's power. If the Alien & Sedition Act was constitutional despite it restricting speech because it arguably advanced a public good, a limit on independent political action committees would *certainly* have been held to plausibly advance a public good. "Natural liberty," as Professor Jud Campbell describes, "could be restrained only in the

public interest," but "the Founders were equally insistent that natural liberty *should be restrained* when doing so promoted a common good." Campbell, 32 Const. Comment at 93; *cf.* 1 William Blackstone, *Commentaries*, *125 ("[E]very man, when he enters into society, gives up a part of his natural liberty.").

More importantly for these purposes, there is no evidence, as Campbell describes, "that the Founders actually supported the judicial protection of retained natural rights, either directly or through a narrow construal of governmental power." Campbell, 32 Const. Comment at 104. Rather, history "shows that they preserved retained natural rights principally through constitutional structure, giving legislators, not judges, nearly complete responsibility for determining their proper scope." *Id.*; *see generally* Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 Geo. J. L. & Pub. Pol'y 569 (2017); Jud Campbell, *Natural Rights and the First Amendment,* 127 Yale L.J. 246 (2017). *See also* Jack Rakove, *Original Meanings* 333 (1996) ("a national bill of rights would have [no] great practical value."); Hortensius [George Hay], *An Essay On The Liberty Of The Press* 38 (Philadelphia, Aurora 1799) (First Amendment would "amount precisely to the privilege of publishing, *as far as the legislative power shall say*, the public good requires.") (emphasis added).

On this understanding, a strict originalist would not intervene to strike laws passed by a legislature to advance the public good under the First Amend-

ment, so long, at least, as the constitutional structure was respected. The protection of such right was for the legislature, not the judges. *See* Rakove, *Original Meanings*, at 335 (Madison "did not expect the adoption of amendments to free judges to act vigorously in defense of rights.").

This understanding was confirmed by Justice Thomas in his opinion concurring in the denial of certiorari in *McKee v. Cosby*, 139 S. Ct. 675 (2019). That case addressed the standard limiting defamation cases derived from *New York Times v. Sullivan*, 376 U.S. 254 (1964). Justice Thomas argued the Court should revisit that doctrine, because he viewed *Sullivan* and its progeny as "policy-driven decisions masquerading as constitutional law." 139 S. Ct. at 677. Instead of being guided by that policy, the question the Court should determine is "the original meaning of the First and Fourteenth Amendments." *Id.* So framed, the *Sullivan* doctrine improperly displaced the "common law of libel." *Id.* at 678. That common law doctrine did not afford any special protection to speech about public figures. And nothing in the First Amendment indicated a purpose to displace that common law doctrine.

The same methodology would apply here for any originalist. There was no common law protection against a law regulating political contributions. Such a law was constitutional if a legislature could believe it advanced a public interest. In the anti-aristocratic age of the founding, a law limiting the influence of the very rich would clearly be seen to advance a public interest. Nothing

in the First or Fourteenth Amendment could be seen to modify that original understanding. Thus, under the analysis offered by Justice Thomas, there could be no reason to render vulnerable regulations such as Alaska's.

These authorities demonstrate that any justice committed to applying the First Amendment as it was originally understood could not apply it to restrict regulations of contributions to political action committees.

2. The regulation of institutional corruption is a "public good" under its original meaning that can support regulation of political contributions.

Obviously, as Professor Richards has described, "it is now almost conventional wisdom that the modern doctrine of free speech bears little relation to its history, in particular, to the original understanding of free speech when the first amendment was drafted and ratified in 1791." David A. J. Richards, *A Theory of Free Speech*, 34 UCLA L. Rev. 1837, 1838 (1987). *See also* Cass Sunstein, "What Did The Founders Mean By Free Speech?" *Richmond Times Dispatch*, Dec. 22, 2017, pg. 9A, *available at* https://perma.cc/7LYH-VB2P ("[E]ngagement with the historical materials raises hard questions for free-speech enthusiasts."); David Dorsen, *The Unexpected Scalia* at 55 (2017) (Justice Scalia telling the author that he "recognized that most of his free-speech jurisprudence was not originalist"); Eric J. Segall, *Originalism Off the Ground,*

34 Const. Comment. 313, 316 (2019) (the Court's "complicated and comprehensive common law free speech doctrines have not been justified (and probably could not be justified) by the First Amendment's original meaning").

But in applying the modern doctrine, an originalist is still constrained by originalist values, including the objective to minimize judicial discretion. That discretion is a significant risk with a concept like "corruption." As Justice Breyer argued in his dissent in *McCutcheon*, there are many conceptions of corruption. 572 U.S. at 235–45 (Breyer, J., dissenting); *see also* Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 Mich. L. Rev. 1385 (2013), *available at* https://perma.cc/UJ3A-X8TQ. Depending upon which conception is adopted, different regulations would be appropriate. If a Court were free to pick its conception, then, as Attorney General Meese remarked, the Constitution would "be like a picnic to which the framers bring the words and the judges the meaning." Address of the Hon. Edwin Meese III, Nov. 15, 1985 at 12, *available at* https://perma.cc/R5DN-YPRN.

An originalist should seek to limit this discretion by adopting a method that channels judicial interpretation in a way that is most consistent with framing values. Just as Justice Scalia had argued in *Michael H.*, in this context, the clearest way to achieve that constrained discretion would be to embrace the framing conception of "corruption," and constrain the state and fed-

eral governments based on that conception. As that conception included, primarily, institutional corruption, this approach would permit Alaska to regulate to remedy institutional corruption.

The alternative to adopting this framing understanding would be to embrace the ahistorical and most restrictive conception of corruption, limited to quid pro quo corruption only. But an originalist should reject that more limited conception, because it has no foundation in either framing values or constitutional text. Neither at the framing nor at any other constitutional moment did "We the People" adopt a constraint on representative government that disabled our capacity to protect against institutional corruption. Without that constitutional sanction, courts have no authority to constrain democratic action — neither at the federal level nor certainly among the states.

The originalist would thus read the First Amendment to constrain judicial discretion by fixing the meaning of the First Amendment doctrine to an original understanding of the concepts deployed. Applying that framework here, the term "corruption" within the *Buckley* standard should be interpreted in the sense the word "corruption" was understood originally. As Professor Rakove evidences, so understood, a legislature would have the freedom to regulate to avoid institutional corruption.

3. Evidence supports the view that removing contribution limits to independent groups leads directly to increased institutional corruption.

The ability of restrictions like those at issue here in reducing the corrupting dependence of concentrated wealth is clear and undisputed. Using data from elections since 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." Tr. 28. But after the D.C. Circuit issued its opinion in *SpeechNow*, thus creating the SuperPAC, there was "a lot more money coming from a smaller number of individuals." *Id.* That is, "the amount of money . . . going into politics became more concentrated." *Id.*

Professor Bonica provided extensive data to back-up his assertion. For instance, in his expert report, he 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." Exc. 216-217. 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." Tr. 36. 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. Tr. 31-32. And while he testified that the total contributions to independent expenditure groups in Alaska specifically, especially from wealthy individuals, "appears to be increasing," Tr. 30, 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, Tr. 31.[4] Thus, the evidence from federal and state elections generally was applicable to the state provision at issue here.

Finally, and critically, Professor Bonica also testified that the change in the way elections are funded affects the behavior of politicians by making them dependent on a comparatively small set of wealthy donors. That is the hallmark of institutional corruption. Bonica cited "evidence from the political science literature that politicians are more responsive with respect to their time to donors rather than non-donors." Tr. 51. 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

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[4] The 2018 election cycle in Alaska, completed after the testimony here, set statewide records. Kyle Hopkins and Alex DeMarban, *How Independent Expenditure Groups Are Fueling Alaska's Governor and Salmon Campaigns*, Anchorage Daily News (Oct. 31, 2018), http://bit.ly/2PHJlTZ.

that may only be able to write, you know, a thousand or a few thousand dollars as a check." Tr. 52. 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." Exc. 251. Or, as the State more recently wrote in a Ninth Circuit brief, it is a kind of "corruption [that] 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, 9th Cir. No. 17-35019, Dkt. Entry 23-3 (July 19, 2017).

Further, the evidence shows that politicians are aware of who is donating to independent groups and that 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* Tr. 53 (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," Tr. 28, which would lessen the corruption of our institutions that so concerned the Framers.

4. Regulations designed to limit large contributions to political action committees help remedy institutional corruption.

As *Buckley* recognized, by limiting the size of contributions, regulations can induce campaigns to rely upon a wider range of contributors. 424 U.S. at 22 n.23. That increased spread thus decreases the dependence on an unrepresentative few. Laws limiting the size of contributions thus advance the objective of reducing institutional corruption within a representative democracy.

This dynamic reveals again the difference between institutional and individual corruption. Nothing in the objective to assure a wider dependence by representatives upon "the People" presupposes any quid pro quo by any particular representative. A concern with institutional corruption does not entail any improper behavior or unethical actions by particular representative. Every representative within an institutionally corrupt republic could be free of individual or quid pro quo corruption. The latter has no necessary connection to the former. But to the framers, as Professor Rakove testified without contradiction, avoiding the former was even more important than avoiding the latter.

Alaska has consistently recognized an interest in preventing institutional corruption, although the State's lawyers have not viewed the problem through an originalist lens. For instance, the State has elsewhere argued that campaign finance restrictions may do more than "only target criminal bribery." State *Thompson* 9th Cir. Br. at 22. 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).

If the state may advance the interest of reducing institutional corruption, then laws limiting contributions to independent political action committees would support that interest. Such laws do not address individual or quid pro quo corruption. But they would help restore a properly dependent representative democracy, by diluting a concentrated dependence upon the very few. That dependence *is* the corruption. It is distinct from any quid pro quo transaction.

* * *

There is in this case uncontradicted evidence from a leading historian that the Framers' conception of corruption encompassed institutional corruption and not just quid pro quo corruption. The Supreme Court has never confronted this evidence or decided a case with this record. But when it does, there will be a majority that concludes that this interest can provide the grounds for states to regulate contributions to independent expenditure committees. Thus, the body of law on which APOC relied when it determined that contribution limits could not enforced was not correctly decided.

II. THIS COURT HAS JURISDICTION TO ANSWER THE CONSTITUTIONAL QUESTION.

Independently, this Court asked the parties to brief three related questions regarding APOC's ability to decline to enforce statutes. APOC raises the additional argument that it was prohibited from considering the complaints here because those complaints "concerned an activity approved in an advisory opinion." APOC Br. 11. While Respondents agree with APOC that the agency was permitted to issue an advisory opinion and decline to enforce the statute, it follows directly from that conclusion that APOC may reconsider that advisory opinion in response to the complaints filed here. The Superior Court's decision to order reconsideration of the advisory opinion was thus correct.

A. APOC was permitted, in the first instance, to decline to enforce a law it determined was unconstitutional.

The unilateral determination by an executive agency that a validly enacted law is both unconstitutional and will not be enforced is a drastic step. The best practice, even where executive-branch lawyers believe that a law is unconstitutional and cannot be reasonably defended in court, is to nonetheless continue to *enforce* the law so that the judiciary may have the definitive say about "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Thus, for instance, when the U.S. Attorney General determined that the federal Defense of Marriage Act was unconstitutional and should not be defended in court, the Attorney General nonetheless informed Congress "that [the law] will continue to be enforced by the Executive Branch" because the government "recogniz[ed] the judiciary as the final arbiter of the constitutional claims raised." *United States v. Windsor*, 570 U.S. 744, 754 (2013). APOC could have, and perhaps should have, done the same thing here by issuing an advisory opinion indicating its view of the constitutionality of the statute, but nonetheless still enforcing the duly-enacted law until a court struck it down.[5]

[5] This Court asked the parties to brief whether AS 15.13.380(f) might provide a means for APOC to affirmatively initiate litigation to have the courts resolve the constitutional question. Respondents agree with APOC that the statute does not provide such a mechanism. *See* APOC Br. 33–35.

But APOC chose another course, and, for the reasons APOC explains, that route was legally available to it. As APOC itself recognizes, though, that action is subject to the important caveat that judicial review of the agency's constitutional reasoning remains available. APOC Br. 27; *infra* § II.B. Thus, in 2012, when a group requested an advisory opinion on the contribution limits to independent groups, APOC was legally permitted to answer with its best view of the law, and then to implement that guidance.

Moreover, APOC did not exceed its jurisdiction in ruling on that constitutional issue. In addition to the reasons given in APOC's brief, Respondents note that the all public officers must take an oath to support and defend the Constitution of the United States and the Alaska Constitution. *See* Alaska Const. art. XII § 5. Although that oath does not render every state employee a constitutional court of one, it does support the proposition that agency officials given authority to issue advisory opinions should be cognizant of constitutional limitations on their power. In other words, although Respondents disagree with APOC's reasoning in the advisory opinion, Respondents do not question APOC's ability to issue it nor their good faith in doing so.

B. This Court must be able to review APOC's constitutional reasoning in this proceeding, even though the relevant conduct was similar to that described in the 2012 advisory opinion.

APOC repeatedly emphasizes that its administrative determinations on constitutional issues must be subject to judicial review. APOC Br. 27 ("APOC is not arguing that it has *unreviewable* enforcement discretion and that the Court cannot look at its reasons for not pursuing a complaint."); *id.* at 32 ("The Court can override the legal analysis of an agency like APOC."). Yet it also presses its argument, rejected by the Superior Court, that APOC was s prohibited from even considering the complaints here because they concerned activity approved in an advisory opinion. APOC Br. 11–13. But APOC's broad view of the instruction in Alaska Statute 15.13.374(e)(2) not to penalize parties that reasonably rely on APOC advisory opinions would render the advisory opinions themselves unreviewable. That is contrary to its own stated position on judicial review. APOC's position is thus both contradictory and unconstitutional.

That conclusion follows directly from *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27 (Alaska 2007). In that case, this Court considered whether a provision granting decisions of the Workers' Compensation Appeals Commission "the force of legal precedent" was constitutional. *Id.* at 42. In considering the question, the Court noted that "[t]he judiciary alone among the branches of government is charged with interpreting the law." *Id.* at 43. Thus, "[a]ny

attempt to undermine independent judicial review of agency action cannot be constitutional." *Id.* This Court construed that statute narrowly so that administrative decisions would not have the force of "legal precedent" anywhere but the agency itself, ensuring the judiciary has the final say. *Id.* at 45.

The same principle applies here. APOC notes that it may reconsider its advisory opinions under 2 AAC 50.840(e), but there is no provision for any citizen to request that APOC do so. Thus, Alaska Statute 15.13.374(e)(2)'s safe harbor provision may not be read to preclude APOC's authority to investigate complaints if the underlying advisory opinion is not good law. If it were otherwise, then any advisory opinion concluding a law is unconstitutional really would be unreviewable. That would be the very kind of "attempt to undermine independent judicial review of agency action," that this Court has already said "cannot be constitutional."[6]

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[6] APOC analogizes the procedures governing review of its actions to those applicable to the Federal Election Commission. *See* APOC Br. 11 n.24. Yet it fails to recognize that the courts there permitted plaintiffs to use an identical procedural path as that here to go forward with the judicial review of agency action similar to that here. *See Lieu v. FEC*, 370 F. Supp. 3d 175, 177 (D.D.C. 2019) (explaining that the Plaintiffs there "brought an administrative complaint against several Super PACs alleging violations of [federal campaign finance law] when the Super PACs knowingly accepted contributions in excess of monetary limits," that the agency dismissed the complaint pursuant to its view that the limits were unconstitutional, and that judicial review followed). The path available in *Lieu* is the same as the one available here. It assures judicial review of agency advisory opinions, but it also poses no threat of unfairness to anyone who relied on prior interpretations of law.

Finally, APOC complains that this is somehow "unfair" to the groups named in the complaints, but that is not so. Those two groups charged with exceeding the contribution limit have been dismissed from this case, because both APOC and Respondents agree that their reliance on the advisory opinion means they should face no sanction whatsoever, regardless of how this case turns out. Respondents acknowledge, then, that the complaint process is a mere vehicle for judicial review of the relevant advisory opinion. But because it is the only available vehicle, it must be open to Respondents and other citizens.[7]

CONCLUSION

The Superior Court's order should be affirmed and the case remanded to APOC for consideration under the proper legal standard.[8]

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[7] To preserve judicial review, this Court could also construe the Complaints filed with APOC as requests for reconsideration of the 2012 advisory opinion. That appears to be how APOC views this appeal.

[8] Respondents recognize that the $500 per-year limits at issue here are lower than those in most other jurisdictions. If this Court agrees with the legal framework here but is unsure if the particular limits are too low, the proper remedy would be to remand to APOC to consider that in the first instance using the correct standard. *See Thompson*, 140 S. Ct. at 348 (remanding challenge to Alaska campaign contribution limits to lower court for review under correct First Amendment standard).

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