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NOTE

MORE MONEY, LESS PROBLEMS: WHY STRICT SCRUTINY SHOULD BE APPLIED TO INDIVIDUAL CONTRIBUTION LIMITS

Seth N. K. Long[†]

*And you shall take no bribe, for a bribe
blinds the clear-sighted and subverts the
cause of those who are in the right. Exodus
23:8 (ESV)*

ABSTRACT

Thomas Jefferson stated that “the right to the freedom of speech is the right that protects all other rights.” The right to free expression of political speech is a core right. It is the right to criticize, the right to voice support, and the essence of self-government. In America, “We the People” are the sovereign. It is critically important that the government does not favor one type of speech nor censor another so that “We the People” have unlimited political speech.

Citizens United and *McCutcheon* changed the landscape of campaign finance and expanded individuals’ and corporations’ right to freedom of speech. These decisions destroyed the state’s interest in protecting against “the influence of mass aggregations of wealth.” However, this unlimited right to speech has not been applied to individual contribution limits to candidates. Since *Citizens United* and *McCutcheon*, courts have struggled to determine how to apply these decisions to individual contribution limits. This Note focuses on which standard of review should apply to individual contribution limits. While the Court has not been very clear as to which standard to apply, this Note proposes that strict scrutiny should be used on individual contribution limits, rather than a complex formula that has

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varying results based on what court applies the formula. The right to political speech is a core right and thus strict scrutiny should apply. With this narrowed interest, the least restrictive method to meet the state's interest in protecting against corruption and the appearance of corruption are robust bribery and disclosure laws.

I. INTRODUCTION

Since *Citizens United v. Federal Election Commission*, independent expenditures have grown from around \$200 million to over \$1.4 billion and that number will continue to grow.¹ With the rapidly changing area of campaign finance, there has become a tension between people who think there is an excess of money in politics and the desire for people to freely express their political views with their dollars. One particular area of campaign finance that has remained relatively unchanged since *Buckley v. Valeo* is individual contribution limits. Recently, there have been challenges to these restrictions in the Ninth Circuit.

This Note will focus on the recent decision from the Ninth Circuit Court of Appeals, *Lair v. Motl*, and it will also discuss a decision from the Alaska District Court, *Thomas v. Dauphinais*. It will begin with a discussion on how these cases analyze dollar limits on individual contributions to political candidates in light of modern case law. Next, it will present why strict scrutiny is the appropriate standard of review for individual contribution limits in light of the overarching principles of the First Amendment case law and the original intent and purpose of the First Amendment. Finally, the Note will argue that strict scrutiny will invalidate individual contribution limits and narrow the state's interest to only allowing bribery laws and open disclosure laws to meet the state's interest in preventing corruption and the appearance of corruption.

II. BACKGROUND

A. Campaign Finance in America Prior to Buckley

One of the earliest stories about campaign finance comes from an apocryphal story in the life of George Washington. In 1757 he unsuccessfully ran for the House of Delegates in Virginia.² He ran again in 1758, this time

1. *Citizens United v. Federal Election Commission*, OPENSECRETS.ORG, https://www.opensecrets.org/news/reports/citizens_united.php (last visited Jan. 13, 2018).

2. Peter Brusoe, *That time George Washington bought an election with 160 gallons of booze (and other President's Day stories)*, BLOOMBERG GOV'T (Feb. 12, 2016),

successfully.³ However, this time he changed his campaigning tactics. To win the second election, he engaged in a common political practice of the day: buying alcohol for voters.⁴ This was a widespread practice in early America that was inherited from England where they would roll barrels of liquor onto the lawns of courthouses and near the locations of voting booths.⁵ This practice known as “treating” the voters led to one of the first campaign finance laws being passed in the colonies, banning a person from giving a voter “any money, meat, drink, entertainment or provision . . . in order to be elected.”⁶

In early America, there were few if any restrictions on raising money for a campaign. There are multiple reasons for this. First, it was not considered proper to campaign for office since it was “beneath the dignity of the office.”⁷ Second, campaigns were generally financed by the candidates themselves. Third, the campaigns used their money and connections to create partisan newspapers to communicate their platform and attack the other party and their candidates much like modern television advertisements.⁸ Thomas

<https://about.bgov.com/blog/that-time-george-washington-bought-an-election-with-160-gallons-of-booze-and-other-presidents-day-stories/>; R. T. Barton, *The First Election of Washington to the House of Burgesses*, NEW RIVER NOTES, http://www.newriversnotes.com/topical_books_1892_virginia_washingtontohouseofburgess.htm (last visited Nov. 11, 2017).

3. R. T. Barton, *The First Election of Washington to the House of Burgesses*, NEW RIVER NOTES, http://www.newriversnotes.com/topical_books_1892_virginia_washingtontohouseofburgess.htm (last visited Nov. 11, 2017).

4. Brusoe, *supra* note 2.

5. NATIONAL CONSTITUTION CENTER, *Booze on Election Day was an American tradition* (Nov. 2, 2012), <https://constitutioncenter.org/blog/booze-on-election-day-was-an-american-tradition>.

6. Barton, *supra* note 2. Bans on the selling of alcohol on election day were still in effect in Kentucky until 2013 and South Carolina in 2014. *Legislature approves bill to allow alcohol sales on Election Day*, LEXINGTON HERALD-LEADER (Sept. 26, 2013), <http://www.kentucky.com/news/politics-government/article44414280.html>; Harriet McLeod, *South Carolina lawmakers repeal Election Day alcohol sales ban*, REUTERS (May 29, 2014), <https://www.reuters.com/article/us-usa-south-carolina-liquor/south-carolina-lawmakers-repeal-election-day-alcohol-sales-ban-idUSKBN0E91UB20140529>.

7. Geoffrey Michael, *Money and Politics*, INVESTOPEDIA, <https://www.investopedia.com/articles/economics/12/money-and-politics.asp> (last visited Nov. 11, 2017).

8. Josh Sager, *Wolf-Pac Money in Politics Part #1A: The History of Money in Fed. Politics*, THE PROGRESSIVE CYNIC (Mar. 14, 2017), <http://www.theprogressivecynic.com/2013/03/14/the-history-of-money-in-federal-politics-part1a/>.

Jefferson utilized this strategy. He started a correspondence committee that wrote favorable articles in newspapers, which he then bought and distributed to influential voters.⁹

In the election of 1828, Andrew Jackson opened the door for political campaigning. Andrew Jackson was one of the first candidates to establish campaign offices, raise money, and organize rallies.¹⁰ Additionally, Jackson was one of the first major proponents of the political patronage system.¹¹ After Jackson's presidency, William Henry Harrison raised political campaigning to more modern standards.¹² President Harrison had parades that included a life-sized float of a log cabin with a live bald eagle on top of it.¹³ There was free-flowing hard cider bottled in log cabin containers, donated by Mr. Booze, and sold in order to promote the campaign.¹⁴ Finally, there was sloganeering with, "Tippecanoe and Tyler too" and "the log cabin president."¹⁵ During this time prior to the Civil War, there were virtually no limits on contributions to candidates.¹⁶

However, there were differences in the way people were chosen to run for office since they were chosen primarily by the party itself and not by the voters.¹⁷ Additionally, campaigns raised money by the political patronage system.¹⁸ The President or the Governor would award his supporters with jobs and the people who received jobs would give a percentage of their salary to the party committee that was in power.¹⁹ For example, Abraham Lincoln

9. *Slate's Whistlestop: Keep Your Attack Dog Federal*, SLATE MAGAZINE/PANOPLY (July 28, 2016) (downloaded using iTunes).

10. Charles W. Bryant, *How Campaign Finance Works: Campaign Finance History in the United States*, HOWSTUFFWORKS, <https://money.howstuffworks.com/campaign-finance1.htm> (last visited Nov. 11, 2017).

11. *Money-in-Politics Timeline*, OPENSECRETS.ORG, <https://www.opensecrets.org/resources/learn/timeline> (last visited Nov. 11, 2017).

12. *Slate's Whistlestop: The Art of Political Umbrage-Taking*, SLATE MAG./PANOPLY (Mar. 4, 2015) (downloaded using iTunes).

13. *Id.*

14. *Id.*

15. *Id.*

16. Sager, *supra* note 8.

17. Scott Piroth, *Selecting Presidential Nominees: The Evolution of the Current System and Prospects for Reform*, 64 SOC. EDUC. 278, 279 (2000).

18. David Yee, *A Brief History on Campaign Finance Laws: 1787 to the Rise of Corporations*, INDEP. VOTER NETWORK (Apr. 17, 2014), <https://ivn.us/2014/04/17/a-brief-history-on-u-s-campaign-finance-laws/>.

19. *Id.*

awarded many patronage jobs.²⁰ He also awarded Civil War military contracts, including one to the Brooklyn Naval Yard.²¹ During Lincoln's presidential re-election, Henry Raymond, former New York Speaker of the House and editor of the *New York Herald*, went to the Naval Yard to demand money from the workers or they would lose their job.²²

The first real federal campaign finance law arose due to this issue. The Naval Appropriations Bill of 1867 "prohibited officers and employees of the federal government from soliciting money for political campaigns from naval yard workers."²³ Later, in 1883, President Arthur signed the Pendleton Act into law making it unlawful to fire a federal employee for failing to contribute to a political campaign and establishing a merit-based system of hiring through competitive exams to curb the political patronage system.²⁴

This change led candidates to search for new sources of contributions. Political candidates discovered new streams of revenue from corporations and their affluent owners at the height of the Gilded Age.²⁵ One of the first campaigns funded by the wealthy industrialists was Ulysses S. Grant's campaign.²⁶ His campaign was primarily financed by Cornelius Vanderbilt and a quarter of his donations were given to him by the investment banker Jay Cooke.²⁷ After Ulysses S. Grant's election, money continued to pour into presidential elections. Individuals could still give unlimited money to political candidates but now corporations were donating millions of dollars to campaigns.²⁸ In the election of 1880, railroad magnate Jay Gould gave

20. Harold Holzer, *This Is How Abraham Lincoln Played Politics. And It Won Him Re-Election*, HIST. NEWS NETWORK (Oct. 19, 2014), <http://historynewsnetwork.org/article/157247>.

21. *Id.*

22. *Id.*

23. OPENSECRETS.ORG, *supra* note 11.

24. *Approved on January 16, 1883, the Pendleton Act established a merit-based system of selecting gov'ernment officials and supervising their work*, OUR DOCUMENTS, <https://www.ourdocuments.gov/doc.php?flash=true&doc=48> (last visited Nov. 11, 2017).

25. Calin Brown, *Grant to Trump: How court cases influenced campaign finance*, OPENSECRETS.ORG (Oct. 6, 2017), <https://www.opensecrets.org/news/2017/10/grant-to-trump-how-court-cases-influenced-campaign-finance/>.

26. *Id.*

27. Aaron Ross et al., *250 Years of Campaigns, Cash, and Corruption*, MOTHER JONES (Aug. 9, 2012), <http://www.motherjones.com/politics/2012/08/campaign-finance-timeline-dark-money/>.

28. ROBERT E. MUTCH, *BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM* 14-16, 22 (2014).

James A. Garfield a reported \$150,000 alongside another \$150,000 from railroad magnate Collis Huntington.²⁹

Additionally, the election of 1896 between William McKinley and William Jennings Bryan was the most expensive race ever at the time.³⁰ The Republicans and McKinley raised around \$16 million mostly from corporate donors including a \$250,000 contribution from Standard Oil.³¹ McKinley's campaign manager, who gave his campaign \$100,000 and raised an additional \$6 million for his campaign, stated, "There are two things that are important in politics. The first is money and I can't remember what the second one is."³² They raised the 2011 equivalent of \$200,000,000, a number that would not be matched until 1960.³³ During the presidential race of 1904, Theodore Roosevelt raised over \$2,000,000 from corporations.³⁴ J.P. Morgan gave \$150,000 to Roosevelt's political campaign, Standard Oil gave him \$100,000, and five other donors collectively gave Roosevelt \$566,000, which was about a quarter of his total campaign fund. After Theodore Roosevelt was elected, his feelings toward corporate campaign donations changed. This led to the beginnings of modern campaign finance laws.

After concerns from progressives about the new influx of money into politics, Theodore Roosevelt called for a ban on corporate contributions to any political campaign, even though he took millions from corporate donors for his election bid.³⁵ In response, Congress passed the Tillman Act banning all corporate contributions to political campaigns.³⁶ Additionally, in 1947, the Taft-Hartley Act extended the ban on corporate donations to unions. Following Congress's lead, by 1928 twenty-seven states had banned all corporate contribution to political campaigns.³⁷

Continuing the restrictions on campaign donations, Congress passed the Federal Corrupt Practices Act in 1910 requiring public disclosure for House of Representative races, which was later amended to include Senate and

29. *Id.* at 14.

30. Sager, *supra* note 8.

31. OPENSECRETS.ORG, *supra* note 11; MUTCH, *supra* note 28, at 22.

32. OPENSECRETS.ORG, *supra* note 11.

33. Sager, *supra* note 8.

34. MUTCH, *supra* note 28, at 29-30.

35. OPENSECRETS.ORG, *supra* note 9.

36. MUTCH, *supra* note 28, at 53-54. The Tillman Act was largely ineffective because it contained no enforcement provision. *Id.* at 50.

37. Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELECTION L.J. 337, 339 (2014).

primary races.³⁸ The amendment also had contribution limits of five thousand dollars for House candidates and ten thousand for Senate candidates.³⁹ However, the Court struck down portions of this law regulating primary races.⁴⁰ In the end, the Court said that states may regulate campaigns under their police powers and the House and Senate may regulate their general elections under the Qualifications Clause.⁴¹ The Federal Corrupt Practice Act was amended again in 1925, this time requiring quarterly financial disclosure reports and disclosure of contributions of a hundred dollars or more.⁴² As with the Tillman Act, the law was largely ineffective because it lacked proper enforcement mechanisms.⁴³ The Federal Corrupt Practice Act was the law of the land until the adoption of the Federal Election Campaign Act (FECA) in 1971.⁴⁴

In the period between the Federal Corrupt Practice Act and FECA, the Court validated public disclosure and regulation of primary elections.⁴⁵ The Court also upheld the ban on corporations and unions donating to support political campaigns in *United States v. Auto Workers*.⁴⁶ The majority were concerned about “great aggregations of wealth” influencing elections and stated that it was not required to make a decision whether the law was constitutional and so the statutes were upheld.⁴⁷ However, the dissent offered a scathing response saying that, up until now, “political speech [had] never been considered a crime,” and that this was a “broadside assault” on the First Amendment.⁴⁸

In 1971, Congress passed the FECA. The bill provided a comprehensive plan for campaigns to disclose their donations and expenses. The FECA placed limits on advertisement spending, allowed corporations and unions

38. OPENSECRETS.ORG, *supra* note 11.

39. *Id.*

40. *Newberry v. United States*, 256 U.S. 232, 258 (1921).

41. *Id.*

42. OPENSECRETS.ORG, *supra* note 11.

43. *Id.*

44. PEARSON, *Federal Corrupt Practices Act of 1910, Revised 1925, Replaced 1971*, http://wps.prenhall.com/wps/media/objects/751/769950/Documents_Library/corrupt.htm (last visited Nov. 11, 2017).

45. *See Smith v. Allwright*, 321 U.S. 649 (1944); *Burroughs v. United States*, 290 U.S. 534 (1934).

46. *See United States v. Auto. Workers*, 352 U.S. 567, 571-72 (1957).

47. *See generally id.* at 570-82 (discussing the reasons why contribution limits statutes are passed showing that the concerns of mass aggregations of wealth is a legitimate state interest since the statute was upheld).

48. *Id.* at 593-94, 598 (Douglas, J., dissenting).

to form PACs, and gave the enforcement powers to the Department of Justice.⁴⁹ FECA was in effect for a year before the Watergate scandal. Watergate created a public crisis of trust in the American electoral system. In response to this crisis of trust, Congress revamped the FECA and created the Federal Election Commission “tasked with receiving candidates’ campaign finance disclosure reports and enforcing the law” and created a public financing program.⁵⁰

B. *Buckley v. Valeo*

Buckley v. Valeo set the stage for all the challenges to contribution limits to come. Senator Buckley challenged FECA saying that it violated the First Amendment’s Free Speech clause. The Court stated that “the use of funds to support a political candidate is ‘speech.’”⁵¹ In this decision, the Court held that the independent expenditure limits in the FECA were a substantial restraint on political speech and were invalid under the First Amendment.⁵² Since the expenditures are independent, the Court reasoned that they do not pose the same danger for the appearance of quid pro quo corruption or actual quid pro quo because they are not directly involved with the campaign.⁵³ The Court held that there were no limits on personal expenditures by the candidates themselves.⁵⁴

However, contribution limits for individuals to a candidate or political party were upheld since the Court reasoned that the restrictions were only a slight restraint on political speech.⁵⁵ Reasoning that the individual campaign contribution limits and aggregate contribution limitations are valid statutes, the Court stated the government has an interest in protecting against quid pro quo corruption and the appearance of quid pro quo corruption.⁵⁶ It is a

49. OPENSECRETS.ORG, *supra* note 11.

50. *Id.* Nixon received two million dollars from the associated milk producers in exchange for an increase in the subsidies for milk. Monetta, *supra* note 8.

51. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990) (citing *Buckley v. Valeo*, 424 U.S. 1, 39 (1976)).

52. *Buckley*, 424 U.S. at 45. Black’s Law Dictionary states that Independent Expenditures are express advocacy that is made independent of the candidate’s campaign. To be independent the communication must be made without the knowledge, coordination, or cooperation of any candidate or political party. *Independent Expenditures*, BLACK’S LAW DICTIONARY (10th ed. 2014).

53. *Buckley*, 424 U.S. at 45.

54. *Id.* at 52-53.

55. *Id.* at 25, 28-29.

56. *Id.* at 45.

legitimate state interest to protect the image of integrity in the American political system.⁵⁷ The Court rejected the ideas that any law limiting contributions must be narrowly tailored to protect only actual instances of quid pro quo corruption and that bribery laws were sufficient to prevent quid pro quo corruption.⁵⁸ One issue the Court highlighted was the difference between expenditure limits and contribution limits; the expenditure limits were invalid, while the contribution limits were valid, creating a dichotomy of strict scrutiny for expenditure limits and something less for contribution limits.⁵⁹ After *Buckley*, the Court carved out some exceptions for corporate spending. First, in *Bellotti*, the Court allowed corporations to spend money on campaigns for or against ballot initiatives.⁶⁰ Second, the Court in *Massachusetts Citizens for Life* allowed non-profit corporations that did not take donations from unions or corporations, that had no shareholders, and that were created solely for political ideas, to spend money on campaign expenses.⁶¹

C. *Austin v. Michigan State Chamber of Commerce*

After *Buckley*, the first major challenge to the ban on independent expenditures from corporations was *Austin v. Michigan State Chamber of Commerce*.⁶² Michigan had a ban on corporate independent expenditures, and the Michigan Chamber of Congress challenged the ban, deeming it to be an unconstitutional limitation on free speech.⁶³ The Court upheld the ban on corporate independent expenditures.⁶⁴ In doing so, the Court held that in addition to the government interest of preventing quid pro quo corruption and its appearance, the government has an interest in protecting against the influence of “the corrosive and distorting effects of immense aggregations of wealth.”⁶⁵ Justice Scalia, dissenting, mocked this decision and the new added governmental interest saying that the First Amendment was “brought down not by brute force but by poetic metaphor,” and this restriction was an

57. *Id.* at 30.

58. *Id.* at 27-28.

59. *Buckley*, 424 U.S. at 143.

60. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 794-95 (1978).

61. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263-64 (1986).

62. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990).

63. *Id.* at 654-55.

64. *Id.* at 655.

65. *Id.* at 660.

“Orwellian censorship” of ideas that the Court did not like.⁶⁶ Eventually, Scalia’s opinion would be the majority’s opinion.⁶⁷

D. *Nixon v. Shrink Missouri Government PAC*

In *Nixon v. Shrink Missouri Government PAC*, the Court dealt with state limits on campaign contributions.⁶⁸ The Court affirmed the principles in *Buckley* stating that under *Buckley*’s standard of scrutiny, strict scrutiny did not apply to contribution limits. The Court stated, “‘significant interference’ with associational rights could survive if the Government demonstrated that contribution regulation was ‘closely drawn’ to match a ‘sufficiently important interest,’ though the dollar amount of the limit need not be ‘fine tuned.’”⁶⁹ Additionally, the Court said, “[t]he prevention of corruption and the appearance of corruption,’ was found to be a ‘constitutionally sufficient justification.”⁷⁰ However, it was “not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”⁷¹ The Court made an analogous argument, as it did in *Austin*, for corporations about the “distorting effects of mass aggregations of wealth” and applied it to individual contribution limits. Yet, there are some limitations to individual contribution limits. The Court’s rule said to find those, “outer limits of contribution regulation by asking whether there was any showing that the limits were so low as to impede the ability of candidates to ‘amass the resources necessary for effective advocacy.’”⁷²

The dissenters, Justices Scalia and Thomas, argued that strict scrutiny applied here and stated that political speech is core speech and the Court should go out of its way to protect it.⁷³ The dissenters would have also reversed *Buckley*.⁷⁴ The dissenters went further and took a limited view of corruption with individual contribution limits.⁷⁵ They defined corruption as, “a subversion of the political process. [When] elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money in their campaigns. The hallmark of

66. *Id.* at 684 (Scalia, J., dissenting).

67. *See* *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

68. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 381-82 (2000).

69. *Id.* at 387-88.

70. *Id.* at 388.

71. *Id.* at 389.

72. *Id.* at 397.

73. *Id.* at 410-11 (Thomas, J., dissenting).

74. *Nixon*, 528 U.S. at 410 (Thomas, J., dissenting).

75. *Id.* at 423-24.

corruption is the financial *quid pro quo*: dollars for political favors.”⁷⁶ Justices Scalia and Thomas stated that the proper way to prevent corruption or its appearance is to use bribery and disclosure laws, which are not a burden on free speech, unlike contribution limits.⁷⁷ The dissenters held that Missouri failed to meet strict scrutiny because the state failed to narrowly tailor its laws to prevent actual or apparent corruption.⁷⁸

E. FEC v. McConnell

In 2002, Congress passed the Bipartisan Campaign Finance Reform Act, commonly known as the McCain-Feingold Act.⁷⁹ The Act banned what is known as “soft money.”⁸⁰ The Supreme Court upheld the ban on soft money and bans on corporate contributions⁸¹ and affirmed that “both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption” were legitimate government interests in burdening the First Amendment.⁸² The Court here affirmed the expansive view of corruption found in *Nixon*. The Court declined to use strict scrutiny on the limits and expanded the powers of Congress to regulate campaign contributions.⁸³

F. Randall v. Sorrell

Randall v. Sorrell was a plurality decision and subsequent courts have declined to follow its holding.⁸⁴ In *Randall*, the Court struck down Vermont contribution limits for individuals, saying that they were insufficient and violated the First Amendment.⁸⁵ Additionally, the Court limited the decision to the facts of the case.⁸⁶ However, *Randall* included factors to determine

76. *Id.* at 423.

77. *Id.* at 428.

78. *Id.* at 427-28.

79. OPENSECRETS.ORG, *supra* note 11.

80. *McConnell v. FEC*, 540 U.S. 93, 114 (2003). Soft money is where individuals, corporations, and unions can give their particular party unlimited amounts of money for purposes other than supporting candidates for office. *Money*, BLACK'S LAW DICTIONARY (10th ed. 2014).

81. *McConnell*, 540 U.S. at 224.

82. *Id.* at 136.

83. *Id.* at 137.

84. *Randall v. Sorrell*, 548 U.S. 230, 236 (2006). See generally *Lair v. Motl*, 873 F.3d 1170 (9th Cir. 2017); *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015).

85. *Randall*, 548 U.S. at 236-37.

86. *Id.* at 262-64.

whether campaign contributions are invalid because the limits are so low as to impede the ability of candidates to “amass[] the resources necessary for effective advocacy.”⁸⁷ They included, “(1) the limits are set per election cycle, rather than divided between primary and general elections; (2) the limits apply to contributions from political parties; (3) the limits are the lowest in the Nation; and (4) the limits are below those we have previously upheld.”⁸⁸ If these factors were met, the plurality in *Randall* held that the Court must examine the record to determine whether the limits were “‘closely drawn’ to match the State’s interests.”⁸⁹ The factors to determine whether the law was closely drawn were

(1) whether the “contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns”; (2) whether “political parties [must] abide by *exactly* the same low contribution limits that apply to other contributors”; (3) whether “volunteer services” are considered contributions that would count toward the limit; (4) whether the “contribution limits are . . . adjusted for inflation”; and (5) “any special justification that might warrant a contribution limit so low or so restrictive.”⁹⁰

Justices Scalia and Thomas repeated in their concurrence the argument made in their dissent in *Shrink Missouri Government PAC* that they would overturn *Buckley* and apply strict scrutiny here.⁹¹

G. *Citizens United and its Progeny*

Citizens United v. FEC changed the entire nature of campaign finance in America. First, it allowed corporations and unions to make independent expenditures and electioneering communications out of general treasury funds.⁹² The Court believed that these restrictions were a chilling of speech.⁹³ Chief Justice Roberts made it clear, “Congress may not prohibit political

87. *Id.* at 247.

88. *Id.* at 268 (Thomas, J., concurring).

89. *Id.* at 253.

90. *Lair v. Bullock*, 798 F.3d 736, 743 (9th Cir. 2015) (quoting *Randall*, 548 U.S. at 253-62).

91. *Randall*, 548 U.S. at 265-66 (Thomas, J., concurring).

92. *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

93. *Id.* at 329.

speech, even if the speaker is a corporation or union.”⁹⁴ Even though the media corporations have immense amounts of wealth and resources, they are still allowed to exercise their First Amendment rights and their political speech is not hindered.⁹⁵ Additionally, the Court rejected the idea from *Austin* that the “distorting effects of immense aggregations of wealth” was sufficient for corruption, or the appearance of corruption, and that it was a compelling government interest.⁹⁶ The Court added that only the appearance of corruption or actual corruption was a sufficient governmental interest to uphold a contribution limit.⁹⁷ However, the Court specifically mentioned that *Citizens United* does not apply to individual direct contribution limits.⁹⁸

After *Citizens United*, the D.C. Circuit in *Speechnow.org v. FEC* built on *Citizen United*'s foundation. In its decision, the court allowed corporations and individuals to give unlimited amounts of money to independent expenditure organizations like “Super PACs.”⁹⁹

The Court in *McCutcheon* struck down another campaign finance limitation: aggregate limits.¹⁰⁰ The FECA had placed a restriction on, “how much money a donor may contribute in total to all candidates or committees.”¹⁰¹ The Court stated as to what standard applied, “that the Government’s interest in preventing *quid pro quo* corruption or its appearance was ‘sufficiently important,’ [and] we have elsewhere stated that the same interest may properly be labeled ‘compelling,’ so that the interest would satisfy even strict scrutiny.”¹⁰² The Court went further and stated “[m]oreover, regardless whether we apply strict scrutiny or *Buckley*’s ‘closely drawn’ test . . . between the stated governmental objective and the means selected to achieve that objective [I]f a law that restricts political speech does not ‘avoid unnecessary abridgement’ of First Amendment rights, it cannot survive ‘rigorous’ review.”¹⁰³ Additionally, “Congress may target only

94. *Id.* at 376 (Roberts, C.J., concurring).

95. *Id.* at 353 (majority opinion).

96. *Id.* at 354.

97. *Id.* at 345.

98. *Citizens United*, 558 U.S at 357.

99. *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010).

100. Aggregate limits are limits on “how much an individual can give *in total* to all candidates, PACs and party committees combined.” OPENSECRETS.ORG, *2016 Campaign Contribution Limits*, <https://www.opensecrets.org/overview/limits.php> (last visited Nov. 24, 2017).

101. *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014).

102. *Id.* at 199 (citations omitted).

103. *Id.*

a specific type of corruption—‘*quid pro quo*’ corruption.”¹⁰⁴ “[I]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”¹⁰⁵ Justice Thomas concurred in judgment here stating that all contribution limits are invalid because they are restrictions on core political speech.¹⁰⁶

III. *Lair v. Motl*

The *Lair* case began in 2011 in the Montana state court.¹⁰⁷ The plaintiffs challenged Montana’s contribution limits as well as a host of other election restrictions as a violation of their First Amendment free speech rights.¹⁰⁸ Montana had passed contribution limits for its state elections in 1994.¹⁰⁹ At the time of the suit, individuals could give only \$500 to a candidate for governor, \$250 to any other candidate seeking statewide office, and \$130 for all other public officials.¹¹⁰ Political parties could only give \$18,000 to a candidate for governor, \$6,500 for any other candidate seeking statewide office, \$1,050 to a candidate for state senate, and \$650 for a candidate for any other position.¹¹¹ The defendants moved for a change of venue and the case was transferred to the Federal District Court of Montana.¹¹² They were denied a preliminary injunction in 2012, but in the end, they were awarded an injunction for part of their causes of action.¹¹³

104. *Id.*

105. *Id.* at 207-08.

106. *Id.* at 231 (Thomas, J. concurring).

107. *Lair v. Motl*, 189 F. Supp. 3d 1024, 1026 (D. Mont. 2016).

108. *Lair v. Murry*, 903 F. Supp. 2d 1077, 1078 (D. Mont. 2012).

The law which requires authors of political election materials to disclose another candidate’s voting record, makes it unlawful for a person to misrepresent a candidate’s public voting record or any other matter relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether it is false, limits contributions that individuals and political committees may make to candidates, imposes an aggregate contribution limit on all political parties; and prevents corporations from making either direct contributions to candidates or independent expenditures on behalf of a candidate.

Id. at 1079.

109. MONT. CODE ANN. § 13-37-216 (West 2017).

110. *Lair v. Murry*, 903 F. Supp. 2d 1077, 1085 (D. Mont. 2016).

111. *Id.* at 1085-86.

112. *Lair v. Motl*, 189 F. Supp. 3d 1024, 1027 (D. Mont. 2016).

113. *Id.*

After a bench trial, the court held that Montana's contribution limits were unconstitutional and granted an immediate injunction.¹¹⁴ The court concluded that under the *Randall* factors, the contribution limits prevented candidates from "amassing the resources necessary for effective campaign advocacy."¹¹⁵ The Ninth Circuit temporarily stayed the lower court's injunction.¹¹⁶ The Ninth Circuit "motions panel issued a full opinion granting the defendants' motion to stay" until the appeal was completed believing that the defendants would win on appeal.¹¹⁷

The Ninth Circuit reheard the case on the merits in 2015.¹¹⁸ The Ninth Circuit held the lower court used the wrong legal standard.¹¹⁹ It held that since *Randall* was a plurality decision, it was not applicable, and the Ninth Circuit's standard found in *Montana Right to Life Association v. Eddleman* was still the proper standard to be used.¹²⁰ The *Eddleman* test states:

[S]tate 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"—*i.e.*, if they (a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign.¹²¹

The court held that the "state[s] interest" portion had been limited by *Citizens United*, and the expansive view in *Missouri Shrink Government PAC* was no longer applicable.¹²² Now, the only compelling government interests are corruption and the appearance of corruption.¹²³ The Ninth Circuit remanded the case back to the district court ordering them to use the *Eddleman* standard.¹²⁴

On remand, the district court used a "lesser standard [than strict scrutiny]" for determining whether restrictions on contributions were

114. *Lair v. Murry*, 903 F. Supp. 2d 1077, 1093 (D. Mont. 2016).

115. *Id.* (quoting *Randall*, 548 U.S. at 249).

116. *Lair v. Motl*, 189 F. Supp. 3d 1024, 1027 (D. Mont. 2016).

117. *Id.*

118. *Id.* at 1028.

119. *Lair v. Bullock*, 798 F.3d 736, 748-49 (9th Cir. 2015).

120. *Id.*

121. *Id.* at 748.

122. *Id.* at 746.

123. *Id.*

124. *Id.* at 748.

valid.¹²⁵ The court reviewed the decision using the *Eddleman* factors; the first was the state interest.¹²⁶ The plaintiffs urged the court to take the definition of quid pro quo corruption as bribery.¹²⁷ They gave a specific rule for bribery saying that was the only compelling government interest that they could use.¹²⁸ However, the defendants pointed out that the *Eddleman* test required actual quid pro quo corruption or the appearance of corruption.¹²⁹ The defendants stated that the appearance of corruption “is a sort of ‘know it when you see it’ question of fact,” and that they had a low evidentiary burden.¹³⁰

The district court took the position of the defendants. The court relied on the Supreme Court in *McCutcheon* where they affirmed *Buckley*, stating that corruption or the appearance of corruption were the only two compelling government interests, but not the standard of “know it when you see it” for the appearance of corruption.¹³¹ However, the district court looked at the evidence and stated that there was no actual quid pro quo corruption, and further said the defendants failed to bring up one instance of the appearance of corruption.¹³² The court stated, “Montana politicians are relatively incorruptible.”¹³³ The court reasoned that this alone was enough to make the law unconstitutional.¹³⁴

Even though the restrictions failed the initial test, the court continued to look at the other *Eddleman* factors. The court said that the law was not closely drawn.¹³⁵ The restrictions were imposed to combat corruption, but they “restrict the political speech of one group in order to elevate that of another group.”¹³⁶ The court said the law failed the first factor of the closely drawn test.¹³⁷ The court skipped the second factor and went straight to the issue of “[a]massing sufficient resources to effectively campaign.”¹³⁸ The trial court

125. *Lair v. Motl*, 189 F. Supp. 3d 1024, 1030 (D. Mont. 2016).

126. *Id.* at 1032.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Lair*, 189 F. Supp. 3d at 1032.

132. *Id.* at 1034.

133. *Id.*

134. *Id.*

135. *Id.* at 1035.

136. *Id.*

137. *Lair*, 189 F. Supp. 3d at 1035.

138. *Id.* at 1035-36.

reasoned that the law failed this portion of the test as well because, on average, campaigns in Montana spent seven percent more than they fundraised.¹³⁹ Finally, the court discussed the *Randall* decision saying that, while it is not binding on the court, it was still persuasive.¹⁴⁰ Using some of the *Randall* factors, the court found that Montana's contribution limits were lower than the ones in *Randall* that were deemed unconstitutional.¹⁴¹ Additionally, Montana's size increases the expense of campaigning in the state and the limits empower incumbents.¹⁴²

In conclusion, the court held the contribution limits failed to meet any of the *Eddleman* factors, held the law unconstitutional, and enjoined the law.¹⁴³ The decision was appealed to the Ninth Circuit.

The Ninth Circuit reversed the district court's decision, holding that Montana's contribution limits on individual donations were valid.¹⁴⁴ Montana's limitations on contributions were "closely drawn" to serve the state's interest in preventing corruption and the appearance of corruption.¹⁴⁵

First, the court noted that Montana indexed their contribution limits according to inflation and as a result, they have not remained static since 1994.¹⁴⁶ The Ninth Circuit affirmed the use of the modified *Eddleman* factors and rejected applying *Randall* to determine whether the statute sufficiently furthered an important state interest and whether it was closely drawn.¹⁴⁷

As to the important state interest, Montana only needs to show that the threat of corruption is not "mere conjecture" it does not need to show any actual instances of actual quid pro quo corruption only that the "threat is not illusory."¹⁴⁸ Montana met this burden by showing evidence that it has a general interest in preventing corruption and by testimony showing that the threat of corruption is not "illusory."¹⁴⁹

Montana brought in a state representative who testified that special interests poured money into campaigns when their particular issue was

139. *Id.* at 1036.

140. *Id.* at 1037.

141. *Id.*

142. *Id.*

143. *Lair*, 189 F. Supp. 3d at 1037.

144. *Lair v. Motl*, 873 F.3d 1170, 1172 (9th Cir. 2017).

145. *Id.*

146. *Id.* at 1173.

147. *Id.* at 1175.

148. *Id.* at 1178.

149. *Id.*

“coming up, because it gets results.”¹⁵⁰ Another state senator received a letter from a fellow state senator that stated that he was to “destroy this [letter] after reading,” and he needed to vote a certain way so that the PAC would continue to support the party.¹⁵¹ One of the key pieces of evidence for the court was a state senator who testified that the National Right to Work organization offered the Republican party \$100,000 if the Republicans would “introduce[] and vote[] for a right-to-work bill in the 2011 session,” which the Republicans declined.¹⁵² Finally, Montana brought evidence that two state representative candidates received large donations from a corporation and the corporation bragged that the representatives wholly supported their agenda.¹⁵³

While the district court viewed this evidence as showing that Montana’s politicians were virtually incorruptible, the Ninth Circuit disagreed.¹⁵⁴ The Ninth Circuit held that even though the “quids’ did not lead to ‘quos,’” Montana still met its burden through the testimonies that the threat of corruption was not illusory and that the testimonies were evidence of the appearance of corruption.¹⁵⁵ The majority stated that the threat or “risk of actual or [apparent] . . . corruption” is sufficient, while the district court and the dissent stated that Montana must “prove the existence of actual or apparent corruption.”¹⁵⁶

After satisfying the important state interest portion, the Ninth Circuit analyzed the “closely drawn” portion of the *Eddleman* test.¹⁵⁷ First, was the law narrowly focused to prevent corruption and the appearance of corruption?¹⁵⁸ The law was narrowly focused since it only targeted the top ten percent of contributions, and the limits are more strict on individual contributions than donations from political parties.¹⁵⁹ The different limits show a focus on individual donations, the donations most susceptible to corruption.¹⁶⁰

The court rejected the claim of overbreadth, stating that while Montana’s contribution limits were low overall, they were not low compared to states

150. *Lair*, 873 F.3d at 1179.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Lair v. Motl*, 189 F. Supp. 3d 1024, 1034 (D. Mont. 2016).

155. *Lair v. Motl*, 873 F.3d 1170, 1180 (9th Cir. 2017).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1180-81.

160. *Id.* at 1181.

such as Alaska, Colorado, Delaware, Massachusetts, and Rhode Island.¹⁶¹ In addition, even though the limits are low compared to other states, Montana “is one of the least expensive states in the nation in which to run a political campaign.”¹⁶² The ratio of contributions raised and the maximum contribution for state house races is higher than the federal limits and twelve other states.¹⁶³ Next, the average contribution to a campaign is a fraction of the limit.¹⁶⁴ Finally, to defeat the claim of overbreadth, the court stated that the limits were “reasonably keyed” to the risk of corruption.¹⁶⁵ If the small amounts of money offered by lobbyists and political action committees were enough to threaten corruption, then the limitations are reasonable.¹⁶⁶ Therefore, the Ninth Circuit held that the contribution limits were narrowly tailored.¹⁶⁷

The Ninth Circuit rejected the district court’s findings that the reason limits were instituted was to limit the money in politics and limit the powers of special interests.¹⁶⁸ However, it does not matter what the intent of the limits are, but instead how much the limits inhibit the freedom of association and speech in relation to the state’s interest to prevent corruption.¹⁶⁹

Next, the court looked at the ability to affiliate with candidates and stated that the people of Montana may still give to candidates, meeting the standard.¹⁷⁰

Finally, the court looked at the third prong of the narrowly focused analysis: the candidates’ ability to campaign effectively.¹⁷¹ Montana introduced testimony from the secretary of state stating that he does not “feel that the limitations . . . have been harmful to [his] candidacy at all,” and another from a state representative testifying that the limitations had only a “negligible effect[.]”¹⁷² Another representative testified that he received more money after the limitations were put in place and another stated that, while it did make it harder to campaign, he was still able

161. *Lair*, 873 F.3d at 1182.

162. *Id.*

163. *Id.*

164. *Id.* at 1183.

165. *Id.*

166. *Id.*

167. *Lair*, 873 F.3d at 1183.

168. *Id.* at 1183-84.

169. *Id.* at 1184.

170. *Id.*

171. *Id.*

172. *Id.* (alteration in original).

to raise enough money.¹⁷³ Additionally, in 2010 state congressional races, only 15% of individual contributors gave the contribution limit, 22% of political parties gave the maximum to their candidate, and even in the most competitive races, only 29% of contributors maxed out their contribution limit.¹⁷⁴ The court reasoned that there was nothing here that hindered the candidates' abilities to campaign effectively.¹⁷⁵

The court showed that incumbents do not have an unfair advantage.¹⁷⁶ First, political parties have a greater donation limit and they generally support challengers in Montana.¹⁷⁷ Second, the limits are per election, not per cycle, therefore, the contributor may give the contribution limit twice: once during the primary election and once during the general election. Finally, there is no ability to accumulate a war chest.¹⁷⁸ The court stated that the anti-challenger bias is simply not here.¹⁷⁹

Although it did not apply, the court looked at the *Randall* danger signs.¹⁸⁰ The court held that the contribution limits were valid even if *Randall* were to be applied since the limits are applied per election and not per cycle, "[t]he limits are not the lowest in the nation," and "[t]he lowest limits do not apply to political parties."¹⁸¹ The limits in relation to the cost of the campaign are higher than the federal limits, and the limits neither favor incumbents nor hinder the ability to raise enough money to effectively campaign.¹⁸²

The court held that the Constitution allows contribution limits to protect against corruption and the appearance of corruption.¹⁸³ Montana's limits meet the standards set forth in *Eddleman* and even *Randall* since they were for the important state interest and narrowly focused to the state's interest.¹⁸⁴

Judge Bea dissented, agreeing with the district court that the limits were unconstitutional.¹⁸⁵ While Judge Bea agreed with the majority that the *Eddleman* factors applied, he argued that *Citizens United* had changed the

173. *Lair*, 873 F.3d at 1184-85.

174. *Id.* at 1185.

175. *Id.* at 1185-86.

176. *Id.* at 1185.

177. *Id.* at 1185-86.

178. *Id.*

179. *Lair*, 873 F.3d at 1186.

180. *Id.*

181. *Id.* at 1187.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Lair*, 873 F.3d at 1187-88 (Bea, J., dissenting).

state's interest to only corruption and the appearance of corruption, not "[t]he mere prevention of influence on legislators by contributors."¹⁸⁶ Now, the state must prove actual instances of quid pro quo corruption or its appearance.¹⁸⁷ Judge Bea stated that there was nothing in the record that showed an elected official was bribed with a contribution nor that he acted contrary to his legal obligation.¹⁸⁸

The dissent argued that no testimony offered demonstrated an example of quid pro quo corruption or its appearance.¹⁸⁹ In every instance, the elected official "reject[ed] [the] temptation."¹⁹⁰ Additionally, had the Republican legislators accepted the \$100,000 from the National Right to Work organization, how could the court prove quid pro quo corruption since the Republican's official position is to support right to work legislation?¹⁹¹ The other testimonies could be dismissed since none of the cases involved any actual bribery or violation of the legal duty of legislators for money donated to their campaigns.¹⁹² Additionally, the two court cases were default judgments against candidates who lost in the primaries.¹⁹³ These candidates were never even afforded the opportunity to violate their legal duty.¹⁹⁴ In all of the commissioner's enforcement actions, none of them were for bribery or quid pro quo corruption.¹⁹⁵

Judge Bea concluded that the record failed to show any evidence of quid pro quo corruption, only the appearance of corruption with "public awareness of the opportunities for abuse."¹⁹⁶ The corruption found by the majority was mere conjecture and was illusory, and there was no valid state interest here.¹⁹⁷ While it is difficult to determine what corruption is and what an acceptable level of influence is, Judge Bea stated that the First Amendment requires "a greater evidentiary showing . . . before a state may restrict political speech through campaign contribution limits."¹⁹⁸

186. *Id.*

187. *Id.*

188. *Id.* at 1189.

189. *Id.*

190. *Id.*

191. *Lair*, 873 F.3d at 1189.

192. *Id.* at 1190.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Lair*, 873 F.3d at 1191.

198. *Id.*

The dissent ends with the statement:

the majority opinion notes that “[u]nder the dissent’s logic . . . Montana’s evidence is inadequate to justify any contribution limit whatsoever, no matter how high.” This is quite correct. Absent a showing of the existence or appearance of quid pro quo corruption based on objective evidence, the presence of a subjective sense that there is a risk of such corruption or its appearance does not justify a limit on campaign contributions. Restrictions on speech must be based on fact, not conjecture.¹⁹⁹

Lair then was denied rehearing en banc at the Ninth Circuit, however, it drew a scathing dissent from Judge Ikuta, joined by Judge Bea.²⁰⁰ Judge Ikuta agreed with Judge Bea’s dissent that corruption is the only compelling government interest after *Citizens United* and *McCutcheon*.²⁰¹ After denial of rehearing en banc, the plaintiff has petitioned for certiorari to the Supreme Court.²⁰²

IV. ANALYSIS OF *LAIR V. MOTL*

In *Lair*, the court wrestled with individual contribution limits in a post-*Citizens United* and post-*McCutcheon* world. *Lair* is the first major challenge to individual contribution limits since *Citizens United* and *McCutcheon*. With the state’s interest of protecting against the “distorting effects of mass aggregations of wealth” gone, the only state interests remaining are protecting against corruption and the appearance of corruption. In *McCutcheon*, the Court defined quid pro quo corruption, stating “[t]hat [the] Latin phrase captures the notion of a direct exchange of an official act for money . . . [or] ‘dollars for political favors.’”²⁰³

The majority and the dissent both misunderstand the nature of the freedom of speech and attempt to restrict it based on an elaborate test from *Eddleman* and *Nixon*. However, if one keeps the unconstitutional *Nixon* standard, the majority decision is the correct decision.

199. *Id.* (alteration in original).

200. See generally *Lair v. Motl*, 889 F.3d 571 (9th Cir. 2018).

201. *Id.* at 577.

202. See Petition for Writ of Certiorari, *Lair v. Mangan*, No. 18-149, 2018 U.S. S. Ct. Briefs LEXIS 2805.

203. *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)).

A. Majority

The majority applied the correct standard under *Nixon* and *Eddleman*. The State of Montana met its burden of proving a legitimate state interest by proving that there was an appearance of corruption. The evidence brought by Montana that the Republican party was offered \$100,000 to support right-to-work and even though the state representative candidates never made it to the state house, the corporate statement still gives the appearance of quid pro quo corruption.²⁰⁴ According to *Buckley's* definition of the appearance of corruption that was reaffirmed in *McCutcheon*, “the appearance of corruption stem[s] from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions’ to particular candidates . . . [the appearance of corruption is] ‘limited to *quid pro quo* corruption.’”²⁰⁵ These statements were public after the trial and these large contributions could result in abuse in the system even though no evidence of an elected official violating that official’s duty was ever found.²⁰⁶

B. Thompson v. Dauphinis

There was an additional case in the Ninth Circuit that upheld contribution limits. In *Thompson v. Dauphinis*, Alaska had even lower contribution limits than Montana.²⁰⁷ However, the limits were upheld due to the unique nature of Alaska’s geography and politics.²⁰⁸

Alaska only has twenty senators so the potential to purchase eleven senators to control a key vote is a much easier task than in a more populated state.²⁰⁹ Another identified difference from other states is Alaska’s dependence on the oil and gas industry.²¹⁰ The state has a large, sparsely populated geographic area that limits the abilities for non-governmental organizations to keep a close watch on corruption.²¹¹

Additionally, the state had testimony from a state representative stating that the priority of bills was determined by how much a particular special

204. *Lair*, 873 F.3d at 1179.

205. *McCutcheon*, 572 U.S. at 207 (quoting *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)).

206. *Lair*, 873 F.3d at 1179-80.

207. *Thomas v. Dauphinis*, 217 F. Supp. 3d 1023, 1027 (D. Alaska 2016).

208. *Id.* at 1039-40.

209. *Id.* at 1029.

210. *Id.*

211. *Id.*

interest donated to the party.²¹² Even a witness for the plaintiffs admitted that lobbyists would tell him that they gave money to his campaign so he would vote a certain way.²¹³

Finally, the state brought evidence of a major public scandal where ten percent of the state representatives accepted money from VECO, an oilfield services firm, in exchange for votes and political favors.²¹⁴ The court emphasized the fact that one member only received a relatively small amount of money in exchange for his vote.²¹⁵

In both *Thompson* and *Lair*, the court correctly applied the state's interest in preventing corruption and the appearance of corruption according to *Nixon* and as defined in *McCutcheon*. In both instances, the court presented evidence of corruption or its appearance. In *Thompson*, the court showed actual corruption with the VECO scandal and the appearance of corruption with the testimony from the state representatives, stating that special interests and lobbyists both expected something in return for their donations.

Using the standards from *Lair v. Motl* and *Montana Right to Life Association v. Eddleman*, the Ninth Circuit affirmed the trial court's decision.²¹⁶ The Ninth Circuit emphasized "the substantial evidence of attempts to secure votes for contributions" from the testimony of the state representatives and the evidence of actual corruption with the VECO scandal.²¹⁷

C. Zimmerman v. Austin

The Fifth Circuit also upheld low contribution limits in *Zimmerman v. Austin*.²¹⁸ In *Zimmerman*, the contribution limit for city council in Austin, Texas, was only \$350.²¹⁹ First, the court stated that this was not a content based restriction because it did not discriminate between incumbents and candidates for office.²²⁰ Afterward, it quickly dismissed an argument that indirect limitations on expenditures garnered strict scrutiny.²²¹ The court

212. *Id.*

213. *Thompson*, 217 F. Supp. 3d at 1030.

214. *Id.*

215. *Id.*

216. *Thompson v. Hebdon*, No. 17-35019, 2018 U.S. App. LEXIS 33235, at *12-23 (9th Cir. Nov. 27, 2018).

217. *Id.* at *13-14.

218. *Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018).

219. *Id.* at 382.

220. *Id.* at 384.

221. *Id.* at 385.

proceeded to apply the *Nixon* standard and upheld the statute because it met the government's interest in preventing the appearance of corruption.²²² The court reasoned that most Austinites believed that there was a "pay-to-play system" at the city council, and that inferences in the newspapers about the influence of big donations damaged public trust in the democratic system.²²³

After the appearance of corruption analysis, the court looked at the *Randall* factors and said there were no "danger signs."²²⁴ Here the limit was only per election, the limit was similar to those in other localities that were upheld by the Court, it was indexed for inflation, and testimony from a former councilwoman stated that she was not inhibited at all from running an effective campaign.²²⁵ The plaintiffs have since petitioned for certiorari to the Supreme Court.²²⁶

D. Dissent

The dissent in *Lair* at the circuit court offers a unique approach to the state's interest in protecting against corruption or its appearance. The dissent seems to indicate that the mere appearance of corruption is not enough.²²⁷ It states that there must be very specific objective evidence to prove that quid pro quo corruption or its appearance exists, and it cannot be a "subjective sense" of the risk.²²⁸

It is not clear what evidence the dissent would find sufficient to invalidate the contribution limits. With *Thompson* being appealed to the Ninth Circuit, would Judge Bea find that the evidence the state presented there is sufficient to meet the objective standard he espoused?²²⁹ According to Judge Bea's own words, the risk cannot be a subjective sense of a risk, but there must be objective evidence of quid pro quo corruption.²³⁰ In *Thompson*, the evidence that the state presented of the VECO scandal was a quid pro quo, and it even had specific evidence of one state representative who had a \$17,000 debt paid

222. *Id.* at 386.

223. *Id.*

224. *Zimmerman*, 881 F.3d at 387.

225. *Id.* at 387-88.

226. See Petition for Writ of Certiorari, *Zimmerman v. City of Austin*, No. 18-93, 2018 U.S. S. Ct. Briefs LEXIS 2618; *Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018), *petition for cert. filed*, (U.S. Jul. 17, 2018) (No. 18-93).

227. See *Lair v. Motl*, 873 F.3d 1170, 1191 (9th Cir. 2017) (Bea, J., dissenting).

228. *Id.*

229. *Id.*

230. *Id.*

in exchange for voting according to VECO's wishes on oil tax legislation.²³¹ According to Judge Bea, this would seem to be objective evidence of a quid pro quo. However, it is unclear if he would view this as having any relation to the state's contribution limit since this would have probably occurred with or without Alaska's low contribution limits.

Notwithstanding that, it appears that Judge Bea's standard seeks actual evidence of quid pro quo corruption. In *Lair* the state never presented any evidence of actual corruption, only evidence of attempted corruption.²³² However, this is not the government interest put forth in *Citizens United* and *McCutcheon*.²³³ Judge Bea dismisses the government's interest in preventing the appearance of corruption.²³⁴

This ambiguous standard would invalidate any contribution that was found where the state does not present evidence of actual quid pro quo corruption and how it relates to the contribution limits. States could easily get over this evidentiary burden by simply showing (as Alaska showed) instances of actual corruption if that is all that is required.²³⁵ Since Judge Bea was unclear what would be sufficient to invalidate the law, this would create an unnecessary and vague standard. This vague and difficult to comprehend standard would easily be solved by simply applying strict scrutiny to the already existing government interests of preventing corruption and its appearance.

V. STRICT SCRUTINY SHOULD BE APPLIED

Strict scrutiny is the proper standard to evaluate individual contribution limits. However, the Supreme Court and the lower courts continue to apply vague standards of scrutiny for individual contribution limits found in *Buckley* even after *Citizens United* and *McCutcheon*.²³⁶ These standards were articulated as "a lesser [than exacting scrutiny] but still 'rigorous standard of review.'"²³⁷ Under that standard, "even a significant interference with

231. *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1030 (D. Alaska 2016).

232. *Lair*, 873 F.3d at 1191.

233. *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014); *Citizens United v. FEC*, 558 U.S. 310, 359 (2010).

234. *Lair*, 873 F.3d at 1191.

235. In *Thompson v. Hebdon*, Judge Bea did in fact rule in favor of the state of Alaska upholding their contribution limits. In that case, the state proffered evidence of actual corruption with the VECO scandal. See generally *Thompson v. Hebdon*, No. 17-35019, 2018 U.S. App. LEXIS 33235 (9th Cir. Nov. 27, 2018).

236. *Buckley v. Valeo*, 424 U.S. 1, 19-21 (1976).

237. *McCutcheon*, 572 U.S. at 197 (citing *Buckley*, 424 U.S. at 29).

protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”²³⁸ This framework for the analysis of expenditures and contributions from *Buckley* should be overturned and it should be replaced with strict scrutiny.

This standard of less than strict but still rigorous scrutiny does not reflect that political speech is a core right. According to *Buckley* and reaffirmed in *Citizens United*, “the use of funds to support a political candidate is ‘speech.’”²³⁹ Additionally, this lesser standard of scrutiny does not reflect the original intent of the First Amendment.

A. Original Intent

Under the original intent²⁴⁰ of the First Amendment, these restrictions are unconstitutional. For the first one hundred and twenty-three years of our country’s existence, there were no restrictions on individual contribution limits for federal elections. The first limits that were actually enforced were created by the FECA in 1971.²⁴¹

According to Madison, one of the main purposes of the First Amendment’s Free Speech clause was to encourage free discussion and criticism of the government publically and privately.²⁴² This was also the general consensus among the founding fathers.²⁴³ Madison followed the tradition in the English Bill of Rights “[t]hat the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.”²⁴⁴ In England,

238. *Id.* (internal quotations omitted).

239. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657 (1990) (citing *Buckley*, 424 U.S. at 39).

240. Black’s Law defines originalism as “[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif, the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect.” *Originalism*, BLACK’S LAW DICTIONARY (10th ed. 2014).

241. *Supra* Part II.A.

242. See James Madison, *James Madison, Report on the Virginia Resolutions*, THE FOUNDERS’ CONSTITUTION (Jan. 1800), http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html.

243. William Haun, *An Originalist Critique of the Court’s Free Speech Tradition* (Mar. 29, 2016), <http://www.thepublicdiscourse.com/2016/03/16401/>.

244. ENGLISH BILL OF RIGHTS, Dec. 16, 1689. The United States Constitution has a similar provision, “for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.” U.S. CONST. art. 1, § 6, cl. 1.

Parliament was sovereign, whereas, in America, “We the People” are sovereign and hold the unlimited right to discuss and debate the issues and to criticize the government under the First Amendment.²⁴⁵ “It is therefore important—vitaly important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.”²⁴⁶ When you limit contributions you are limiting how much one can criticize the government and whose voices are heard. Restricting speech based on a person’s identity is a concept wholly foreign to the original intent of the First Amendment.

While political campaigning was not common in 1791, partisan newspapers were.²⁴⁷ With the arrival of political parties came newspapers which each party funded. Alexander Hamilton founded the *Evening Post* to support Federalist candidates after the election of Thomas Jefferson.²⁴⁸ In addition, other partisan newspapers included the Federalist *Gazette of the United States* and the Democratic-Republican *National Gazette*.²⁴⁹ At no point did the Federal government restrict the the spending.²⁵⁰ In early America, newspapers were the primary method of communication for the American people much like television and the internet are today.²⁵¹ Today there are partisan newspapers and television channels that are not restricted in how much they spend on their shows or who appears on the show.²⁵² In the 2016 election, President Trump received an estimated five billion dollars worth of airtime from the media.²⁵³ Justice Kennedy discussed media outlets and spending in *Citizens United*:

There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of

245. Jeffrey C. Tuomala, Part Ten: First Amendment Speech, Press, Assembly, and Petition Clauses: Chapter 1, 10-11 (2017) (unpublished manuscript) (on file with the author).

246. *United States v. Auto. Workers*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting).

247. James Breig, *Early American Newspapering*, COLONIAL WILLIAMSBURG, <http://www.history.org/Foundation/journal/spring03/journalism.cfm> (last visited January 12, 2018).

248. ALLAN NEVINS, *THE EVENING POST: A CENTURY OF JOURNALISM* 9-10 (1922).

249. Breig, *supra* note 247.

250. *Supra* Part II.

251. *Citizens United v. FEC*, 558 U.S. 310, 353 (2010).

252. *Partisanship and Cable News Audiences*, PEW RESEARCH CENTER (Oct. 30, 2009), <http://www.pewresearch.org/2009/10/30/partisanship-and-cable-news-audiences/>.

253. Ginger Gibson & Grant Smith, *At Under \$5 each, Trump’s votes came cheap*, REUTERS (Nov. 9, 2016, 4:46 AM), <https://www.reuters.com/article/us-usa-election-spending/at-under-5-each-trumps-votes-came-cheap-idUSKBN1341JR>.

political speech by media corporations . . . [T]elevision networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times. The First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media. It was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the Colonies. The great debates between the Federalists and the Anti-Federalists over our founding document were published and expressed in the most important means of mass communication of that era—newspapers owned by individuals. At the founding, speech was open, comprehensive, and vital to society's definition of itself; there were no limits on the sources of speech and knowledge. The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.²⁵⁴

Limits on how much a person could give to a candidate were unheard of in the Founding era. While active campaigning was not an activity until the 1820s, the Founding era still had an ample supply of newspapers and other outlets where political campaigns could convey their message that were not restricted.

B. Core Political Speech Doctrine

Political speech is a core right. *Citizen United* stated that “political speech . . . is central to the meaning and purpose of the First Amendment.”²⁵⁵ Core political speech was defined as “[c]onduct or words that are directly intended to rally public support for a particular issue, position, or candidate; expressions, proposals, or interactive communication concerning political change.”²⁵⁶ The Court has erroneously excepted individual contributions from this doctrine. A donation to a political campaign is conduct that is directly intended to rally public support for a candidate. When the courts

254. *Citizens United*, 558 U.S. at 353-54 (citations omitted).

255. *Id.* at 329.

256. *Speech*, BLACK'S LAW DICTIONARY (10th ed. 2014). See *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

restrict this speech, they are relegating the people's speech to independent expenditures and "Super PACs" a less effective means of voicing their support to the political candidate.²⁵⁷ The Supreme Court even stated that "[c]ontributions [are] . . . a very significant form of political expression."²⁵⁸ Additionally, the government is limiting the political speech of the political candidates themselves in the same manner.

Individual contributions fall under the political speech doctrine, and under *McIntyre v. Ohio Elections Commission*, core political speech deserves exacting or strict scrutiny.²⁵⁹ Campaign donations should not fall under an arbitrary exception but should fall under the political speech doctrine and be subjected to strict scrutiny.

C. Restrictions on Speech with a Criminal Sanction

Violations of individual contribution limits are subject to criminal sanctions. In *Ashcroft v. Free Speech Coalition*, Justice Kennedy states, "[A] law imposing criminal penalties on protected speech is a stark example of speech suppression"²⁶⁰ and "[t]he prospect of crime, however, by itself does not justify laws suppressing protected speech."²⁶¹

If a person violates the federal law regulating individual contribution limits to federal candidates or their authorized committees, they can be convicted of a felony, imprisoned for up to five years, and fined up to \$250,000.²⁶² While minor violations are generally subjected to civil fines or misdemeanors, the opportunity for such stark criminal sanctions on free speech is startling. One example is former CEO of the Fiesta Bowl, John Junker. Junker donated at least \$46,000 to political candidates through straw donors.²⁶³ He was sentenced to eight months in prison and subjected to a \$36,000 fine for violations of campaign finance law and participating in a criminal conspiracy to violate campaign finance laws.²⁶⁴

257. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 418 (2000) (Thomas, J., dissenting).

258. *Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 298 (1981).

259. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

260. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002).

261. *Id.* at 245.

262. 52 U.S.C. § 30116 (2012); 52 U.S.C. § 30109 (2012); 18 U.S.C. § 3571 (2012).

263. AP, *Ex-CEO of Fiesta Bowl sentenced*, ESPN (Mar. 20, 2014), http://www.espn.com/college-football/story/_/id/10639098/john-junker-ex-ceo-fiesta-bowl-gets-2nd-sentence-week.

264. *Id.*

The federal laws on campaign contributions carry criminal sanctions and “chill” free speech like the laws in *Ashcroft* that were held invalid for “chilling” free speech and were overbroad to prevent the narrow government interest of protecting children.²⁶⁵

D. Content Restrictions on Speech

When the government restricts the donation amount, the government is restricting the content of the speech. In *Sable Communications v. FEC*, content-based restrictions are subject to strict scrutiny, and *Ashcroft* states that content-based restrictions are presumed invalid.²⁶⁶ When the government limits the amount of money an individual can contribute, it is saying who will get the donation and how much speech the donee can make. The government is, in essence, limiting the amount of criticism and dissent a person can make, and as Justice Thomas stated, “[t]hrough contributing, citizens see to it that their views on policy and politics are articulated.”²⁶⁷ When a person donates to a particular candidate, especially challengers to incumbents, they are voicing their criticism of the status quo and of the current political atmosphere. Traditionally, spending limits favor incumbents with established name recognition and the wealthy since they are allowed to use their own money. Unlimited spending is equal to unlimited speech. When the government limits the amount of money a person can give to a candidate, it is limiting the content of the speech.

Additionally, according to *Citizens United*, the government is making a restriction based on the speaker, “[the general rule that] political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”²⁶⁸ When the government places limits on individual contributions, it is restricting political speech based on the wealth of the speaker. If you are wealthy, then your voice is limited by the same amount that a person of a more modest means is and thus limits the amount of speech she can make.

E. Bribery and Disclosure Laws

People are afraid that if contribution limits are removed cash will rule everything around them. However, the government’s narrowly tailored

265. *Ashcroft*, 535 U.S. at 258.

266. *Sable Commc’ns. of Cal. v. FCC*, 492 U.S. 115, 126 (1989).

267. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 414 (2000) (Thomas, J., dissenting).

268. *Citizens United v. FEC*, 558 U.S. 310, 350 (2010).

interest in preventing quid pro quo corruption and the appearance of corruption can be met by bribery laws and disclosure laws. Contribution limits suppress protected political speech and the laws regulate a large amount of political speech that does not fall into the government's interest of preventing quid pro quo corruption or its appearance. Additionally, the individual contribution laws are a heavy burden on the First Amendment and are not the most effective means of preventing corruption and the appearance thereof.

The bribery laws currently on the books meet *McCutcheon's* definition of quid pro quo corruption and are narrowly tailored to meet the government's interests. "[*Q*uid pro quo' corruption . . . captures the notion of a direct exchange of an official act for money,"²⁶⁹ and "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors."²⁷⁰ These laws are narrowly tailored to the government's interest. The current bribery laws provide that if a public official accepts anything of value in return for violating or influencing his official duty or act, then that person can be convicted of a felony and go to prison for up to fifteen years.²⁷¹ The person may also be fined for triple the monetary value of the thing the person was imprisoned for and can be disqualified from holding any federal office.²⁷²

269. *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014).

270. *Id.* (citing *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)).

271. 18 U.S.C. § 201 (2012).

272. *Id.*

(b) Whoever - (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent - (A) to influence any official act; or (B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person; (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act; (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) being induced to do or omit to do any act in violation of the official duty of such official or person;

This is the hallmark of corruption, and this severe punishment should be sufficient to meet the state's narrow interest in preventing corruption and its appearance and even the implicit quid pro quo agreements can be prosecuted under this law.²⁷³

Additionally, robust disclosure laws are constitutional and protect against corruption and the appearance of corruption. *Buckley* states that "disclosure [laws] deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."²⁷⁴ Public disclosure laws are less burdensome on the right to political speech and meet the government's narrow interest.

Bribery laws and robust implementation of disclosure laws leave the onus on the people. The laws require citizens to be watchful of the government and watchful of their leaders's actions to see if they are being influenced by political donations. The laws restricting campaign contributions are a severe limit on political speech, that can easily be remedied by open disclosure laws and enforcement of the laws already in place. The American people are the safeguard of our liberties and the fearmongering over *Citizens United* was unfounded. The most well-funded candidates and the candidates supported by corporations have not consistently outperformed their opponents. While the candidates that have more money generally win the election, those who consistently get the most money are the candidates that are the most popular.²⁷⁵ Generally, the performance of a candidate is based on several factors and not on money alone.²⁷⁶

VI. CONCLUSION

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."²⁷⁷ The First Amendment Free

....

[S]hall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

Id.

273. Jacqueline E. Shulman, *Convictions Under Section 666 and Requiring Proof of a Quid Pro Quo*, LAW SCHOOL STUDENT SCHOLARSHIP 26-27 (2013), http://scholarship.shu.edu/student_scholarship/302.

274. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

275. Steven D. Levitt, *Using Repeat Challengers to Estimate the Effect of Campaign Spending on Election Outcomes in the U.S. House*, 102 J. POL. ECON. 777, 795-96 (1994).

276. *Id.*

277. U.S. CONST. amend. I.

Speech Clause's main purpose was to protect the political speech of the people. Individual contribution limits are an abridgment of the right to political speech. The government is telling us how much speech we can make, and limiting speech has an impact.

The modern interpretation of campaign finance laws and its relation to the First Amendment is an anomaly in the entirety of First Amendment and political speech jurisprudence. Generally, strict scrutiny applies when dealing with political speech, speech with a criminal sanction attached to it, content-based restrictions, or identity-based restrictions on speech. Individual contribution limits should be no exception.

Under the Constitution, it is "We the People" who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation so it is key that the voice of the people is not silenced. While people may be worried about the distorting effects of money in politics, Justice Brandeis stated, "to avert the evil . . . the remedy to be applied is more speech, not enforced silence."²⁷⁸

278. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).