No. 12-A_____

In the Supreme Court of the United States

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JAMES MURRY, in his official capacity as the Montana Commissioner of Political Practices; and STEVE BULLOCK, in his official capacity as Montana Attorney General, ***Appellants***

v.

DOUG LAIR, ET AL., ***Appellees*****,**

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Appeal from No. 12-35809 in the
United States Court of Appeals for the Ninth Circuit

and

Case No. 6:12-cv-00012-CCL in the
U.S. District Court for Montana

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Application of Doug Lair, et al. to Vacate the Ninth Circuit's Stay of the District Court's Permanent Injunction

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To the Honorable Anthony M. Kennedy

Associate Justice of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

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Application of Doug Lair, et al. to Vacate the Ninth Circuit's Stay of the District Court's Permanent Injunction

To the Honorable Anthony M. Kennedy, Associate Justice of the United States and Circuit Justice for the U.S. Court of Appeals for the Ninth Circuit:

This Application is a request to vacate a stay issued by the Ninth Circuit, which stays a permanent injunction issued in the District of Montana. The district court held on October 3, 2012, after conducting a 3-day trial and a careful and thorough review of substantial briefing from both sides, that Montana's contribution limits were unconstitutionally low under *Randall v. Sorrell,* 548 U.S. 230 (2006), and declined to stay the resulting permanent injunction prior to the 2012 election.[1] But the Ninth Circuit, on October 15, 2012, determined for the second time that *Randall* offers no controlling authority for contribution limit challenges, *see Thalheimer v. City of San Diego,* 645 F.3d 1109, 1127 n.5 (9th Cir. 2011), and that the Ninth Circuit's pre-*Randall* decision in *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003) is determinative for this case. So it issued a stay pending appeal.

As is demonstrated more fully below, this analysis is flatly contrary to United States Supreme Court's jurisprudence governing plurality opinions. It undermines the appropriate weight Supreme Court's rulings ought to have on lower court decisions. But most critically, the resulting stay allows the First Amendment speech rights of Montanans to continue to be chilled

[1] Indeed, a State's witness expressly acknowledged at trial that contribution limits of $1000—over 6 times the limits challenged here—would not create a risk of corruption for Montana's legislative candidates. And the State stipulated that money used to pay for campaign staff was not a contribution. (*Findings of Fact*, Doc. 168, at 36; *Stay Opinion*, Doc. 14, at 29.)

and burdened during this crucial election season. *Randall*, not *Eddleman,* governs the tailoring analysis of contribution limits.

Therefore, Applicants respectfully request that the stay be vacated until such time as the decision on the permanent injunction is issued, and Applicants can seek a writ of certiorari on the issues. This request would preserve the First Amendment rights of applicants and other Montana contributors to engage in political speech during the 2012 election.

Standard for Vacating a Stay Granted by an Appellate Court

The decision to vacate a stay of the Ninth Circuit is considered, on appeal to a Circuit Judge, under the same standards as the Circuit Judge would consider a stay application. *See Western Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 480 U.S. 1301, 1310 (1987) (applying stay standards to a motion to vacate a stay issued by the Court of Appeals); *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308-1313 (1973) (same). On a motion to vacate a stay, "The conditions that must be shown to be satisfied before a Circuit Justice may grant such an application are familiar: a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued; a reasonable probability that the Court will grant certiorari; and a fair prospect that the applicant will ultimately prevail on the merits." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 510 U.S. 1309, 1310 (1994).

As to a Circuit Judge's ability to act in this situation, "[t]he power of a Circuit Justice to dissolve a stay is well settled." *New York v. Kleppe*, 429 U.S. 1307, 97 S. Ct. 4, 5 (1976). Further, when asking for relief prior to a final decision of the Court of Appeals, "[p]erhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of

appeals would be to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals." *Kleppe*, 429 U.S. 1307, 97 S. Ct. at 6 (1976). Moreover, "a Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers).

Facts

Under Montana Code Annotated Section 13-37-216(3), political committees are subject to the following aggregate limitations, subject to inflation . . .:

> (a) for candidates filed jointly for the offices of governor and lieutenant governor, not to exceed $18,000;
> (b) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $6,500;
> (c) for a candidate for public service commissioner, not to exceed $2,600;
> (d) for a candidate for the state senate, not to exceed $1,050;
> (e) for a candidate for any other public office, not to exceed $650.

Appellee Beaverhead County Republican Central Committee had candidate contributions returned to it because candidates have received the legal limit of contributions from other political committees throughout the state. Appellee Lake County Republican Central Committee adjusted the amount of its contributions in light of contributions already received by candidates. Representative Miller, a witness in this matter, was $140 away from hitting the political party aggregate contribution limit at the time of trial and would need to return any checks beyond that

amount. As a result of the aggregate contribution limit, the Lake County Republican Central Committee's campaign speech and association was burdened, the speech and associational rights of the Beaverhead County Republican Central Committee were completely chilled, and candidates like Mike Miller and John Milanovich are likewise burdened and chilled from associating with political party committees.

The individual and PAC contribution limits, found at MCA Sections 13-37-216(1) and (3), set contribution limits at the following:

> (i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed $500;
> (ii) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $250;
> (iii) for a candidate for any other public office, not to exceed $130.
> (1)(b) A contribution to a candidate includes contributions made to the candidate's committee and to any political committee organized on the candidate's behalf.

Appellees Doug Lair and Steve Dogiakos both would give beyond these limits. And candidates like Rep. Miller and Appellee John Milanovich would, whether in this or in future election cycles, accept contributions from both PACs and individuals in excess of the contribution limit.

Argument

I. Assuming the correctness of Applicants argument, the Applicants will suffer immediate and irreparable injury if the stay is not vacated.

"The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Assuming that the Applicants are correct that contributions are political speech deserving of the First Amendment's protections, and that the individual contribution limits, the PAC contribution limits, and the political party

aggregate limits are not sufficiently tailored to serve an important government interest, the Applicants will suffer such irreparable injury.[2] Staying the district court's injunction to allow an unconstitutionally low contribution limit to be in force during a campaign cycle—a time where interest in engaging in the political debate is at its peak and a time when their contributions may matter most—irreparably burdens and chills Applicants, as well as other Montanans' First Amendment freedoms.

Indeed, the United States Supreme Court in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) has said that the fact that an ad is run near an election does not mean it is regulable. *Id.* at 472 ("If this were enough to prove that an ad is the functional equivalent of express advocacy, then [the electioneering-communication prohibition] would be constitutional in all of its applications."). And in *Citizens United v. FEC*, 130 S.Ct. 876 (2010), the Court recognized that challenges to campaign-finance laws would, by their nature, be brought near elections:

> It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others.

Id. at 895. These principles show that the fact that a challenge is brought near an election has no bearing on whether the challenged provision is likely unconstitutional and, therefore, no bearing on whether an injunction should issue. *See Randall*, 548 U.S. 230 (striking down Vermont's contribution limits the summer before gubernatorial and legislative elections occurred and before Vermont's biennial 2007 legislative session could convene to consider new contribution limits). That a challenge is brought and resolved near an election may not be held against a plaintiff

[2] The standard and the government's interest will be discussed in greater detail at Part III, *infra*.

because that is naturally when such challenges arise. And every effort should be made to promote robust public debate on issues of the day.

The Ninth Circuit's observation that voting has already begun, (*Stay Opinion*, Doc. 14, at 34) does not justify enforcing a constitutionally infirm law that undermines at the most relevant juncture a fundamentally cherished right: involvement in the political debate. Enjoining Section 13-37-216 has no bearing on the content of Montana's ballots, but would allow those desiring to participate robustly in the final weeks of the 2012 election cycle to do so.

II. There is a reasonable probability that the Court will grant certiorari.

Based on the rationale of the Ninth Circuit's decision, there is a reasonable probability that the Court will grant certiorari, for three reasons.

A. The *Randall* Plurality Is Controlling Precedent.

The Ninth Circuit determined that *Marks v. United States*, 430 U.S. 188, 193 (1977), is inapplicable to the determination of whether *Randall* is controlling precedent in this case, relying on the United States Supreme Court decision in *Nichols v. United States*, 511 U.S. 738 (1994). In *Nichols*, the Supreme Court reviewed the lower courts' application of *Marks* to its decision in *Baldasar v. Illinois*, 446 U.S. 222 (1980), but found substantial confusion among the lower courts regarding what constituted the narrowest position of the Court, thus warranting review of the *Baldasar* decision. *Nichols*, 511 U.S. at 745-46 ("This degree of confusion following a splintered decision such as *Baldasar* is itself a reason for reexamining that decision."). Thus, at most, *Nichols* stands for the proposition that a splinter decision ought to be reexamined, not that the *Marks* analysis does not apply. The Ninth Circuit is still obligated to follow the *Marks* analysis.

The Ninth Circuit cites the dissent in *U.S. v. Rodriguez-Preciado*, 399 F.3d 1118 (9th Cir. 2005) to show that numerous circuits, including the Ninth Circuit, have determined that the Marks analysis is applicable only where "'one opinion can be meaningfully regarded as "narrower" than another' " and "can 'represent a common denominator of the Court's reasoning.'" *Preciado*, 399 F.3d at 1140 (*quoting Anker Energy Corp. v Consolidation Coal Co.*, 1177 F.3d 161, 170 (3d Cir. 1999) *and King v. Palmer*, 950 F.2d 771, 781 (D.C.Cir. 1991)). But this places an improper gloss put on the *Marks* analysis. *Marks* states that courts must follow "the position taken by those Members who concurred on the narrowest grounds." *Marks*, 430 U.S. at 193. It is the "position" that is most relevant to the analysis, not some opinion. The position that prevailed in *Randall* is that, in the circumstances articulated in the plurality opinion at least, the contribution limit was too low. That position is binding precedent. Therefore, any contribution limit analysis must be by analogy to *Randall*'s circumstances and examine how closely those limits approximate *Randall*'s. Lower courts cannot not avoid analyses like that in *Marks* simply to follow a holding in their own circuit.

B. *Eddleman* Does Not Faithfully Follow The *Randall* Analysis.

The Ninth Circuit states that even if *Randall* applied, its prior 1996 decision in *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003) still controls the outcome of this case because it does not conflict with *Randall*. (*Stay Opinion*, Doc. 14, at 4.)

The Ninth Circuit acknowledges that *Randall* established a "lower bound" but "did not present a new test." (*Stay Opinion*, Doc. 14, at 17.) These two statements are in tension because the "lower bound" established in Randall is, in fact, a new test, a test employed by analogy. The

fact that *Eddelman* considered in some way the various signs and considerations of *Randall* is not relevant if *Eddelman* reached a different result than *Randall* under analogical facts.

The *Eddleman* court found that the contribution limits were constitutional, applying the standard articulated in *Buckley* and *Shrink Missouri*. *Id.* Specifically, the *Eddleman* court determined that

> state campaign contribution limits will be upheld if (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and (2) if the limits are 'closely drawn'-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.

Id. And indeed, "[a]s long as the limits are otherwise constitutional, it is not the prerogative of the courts to fine-tune the dollar amounts of those limits." *Id.* at 1095.

This analysis is insufficient under *Randall*. There, the United States Supreme Court introduced a five factor test that applied once it was confirmed that the limits at issue served a cognizable interest: "the interests underlying contribution limits, preventing corruption and the appearance of corruption, "directly implicate the integrity of our electoral process," but where there are danger signs under the five factor test, "courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's "tailoring," that is, toward assessing the proportionality of the restrictions." *Randall*, 548 U.S. at 249 (internal citations omitted).

The Ninth Circuit acknowledges that *Eddleman* did not review the Montana's contribution limits for several danger signs considered by the *Randall* plurality, though it seeks recast *Eddleman*'s findings to minimize this deficiency. (*Stay Opinion*, Doc. 14, at 20-21.) The five factor test was thus not employed in *Eddleman* and so the Montana limits have not been

"independently and carefully" assessed under the *Randall* test as the court below suggests. (*Stay Opinion*, Doc. 14, at 22.)

For example, the *Eddleman* court relied on an expert report that analyzed all candidate races. But the *Randall* decision makes very plain that the proper analysis requires review of funding available for competitive races. *See Randall*, 548 U.S. at 254-55. Additionally, the *Eddleman* court focused exclusively on what *Randall* articulates as the first factor: the competitiveness of a challenger's campaign. *See Eddleman*, 343 F.3d at 1092 (focusing its analysis on whether the limits "allow the candidate to amass sufficient resources to wage an effective campaign."). The *Eddleman* decision barely scrapes the surface of the concerns raised in *Randall* and does not look at competitive races properly. And nowhere did the *Eddleman* review the constitutionality of political party aggregate contribution limits.

In presenting their evidence to the district court below, Applicants faithfully followed *Randall*'s proof requirements, showing that an analysis under the five factors made the limits constitutionally suspect and that an independent review of the record showed that the limits were, in fact, unconstitutionally low.[3] For example, Applicants' expert, Clark Bensen, who served as the expert in the *Randall* case, showed how the limits undermined the ability of candidates to run effective campaigns, with losses to campaign funding akin to those reviewed in *Randall*. Unlike the expert in *Eddleman*, Bensen focused his analysis on competitive races. And testimony from witness Rep. Miller showed how even he, as an incumbent candidate, was never able to raise enough to reach up to half of his voters or to offset the ever-rising costs of postage, signs, and gasoline—costs which outpace the Consumer Price Index and are an important component of any

[3] *See infra* Part III for a full discussion of the evidence offered at trial.

campaign due to the size of legislative districts in Montana. The evidence presented to the trial court was predicated on *Randall* principles and for that reason went well beyond the evidence presented in *Eddleman*.

Moreover, contrary to the Ninth Circuit's assertion that "plaintiffs in this case do not argue that anything has fundamentally changed in Montana political campaigns since our decision in *Eddleman*," (*Stay Opinion*, Doc. 14, at 8), Applicants presented stipulated evidence of a May 2012 Commission decision that interpreted the definition of "contribution" to exclude payments from political parties for campaign staff, (*Stay Opinion*, Doc. 14, at 29), an interpretation that renders the limits underinclusive. *See infra* Part III.A. This interpretation was not in force when *Eddleman* was decided.

It is this evidence, not the insufficient evidence in *Eddleman*, that should be reviewed to determine whether the contribution limits are unconstitutionally low.

C. Strict Scrutiny Applies To Contribution Limits Challenges.

The Ninth Circuit applies intermediate scrutiny to the challenged contribution limits, (*Stay Opinion*, Doc. 14, at 18), a standard Applicants have argued from the very outset is improper and ought to be revisited.

The contribution limits at issue here either chill or substantially burden core political activity protected by the First Amendment rights of free expression and association, so Montana must justify them under "the closest scrutiny" and any restriction must "avoid unnecessary abridgement of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 21-22, 24-25 (1976). *Buckley* held that contribution limits pose lesser First Amendment burdens than do expenditure limits and so imposed what has been interpreted as lower scrutiny on contributions. *Compare*

424 U.S. at 23 ("expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association") *with id.* at 25 (contribution limits require "sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms") *and id.* at 44-45 ("exacting scrutiny applicable to limitations on core First Amendment rights of political expression"). In *McConnell v. FEC*, 540 U.S. 93, 141 (2003), the Court said, "we apply the less rigorous scrutiny applicable to contribution limits." 540 U.S. at 141.

More recently, the Court has imposed higher "strict scrutiny" on "laws that burden political speech," *Citizens United*, 130 S.Ct. at 898 (citation omitted) (emphasis added), albeit in the context of a political speech ban. The Applicants have and continue to challenge any lowered scrutiny of limits on campaign contributions as unconstitutional and, to the extent that *Buckley* is interpreted as imposing lowered scrutiny on contribution limits than on expenditure limits, expressly call for the reconsideration of *Buckley* on that issue.

For these three reasons, there is a reasonable probability that the Court will grant certiorari.

III. There is a fair probability that Applicants will ultimately prevail on the merits.

The courts below focused their analysis on the merit and application of *Randall*. Applicants also made more fundamental arguments to both courts calling the limits into question based upon their failure to serve cognizable interests. Applicants include those arguments here, along with evidence showing the limits fail under the *Randall* analysis.

A. None of the Limits Serve A Cognizable Interest.

1. No Anti-Corruption Interest Applies.

"[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative PAC*, 470 U.S. 480, 496-97 (1985) ("NCPAC"). Corruption is strictly defined: "Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors." *Id.* at 497. *Citizens United* reaffirmed that corruption involves only quid-pro-quo corruption; it rejected influence, access, gratitude, and leveling the political playing field as cognizable corruption. 130 S.Ct. at 909-12. *See also Davis v. FEC*, 554 U.S. 724, 742 (2008) (rejecting equalizing interest).

A cognizable quid-pro-quo corruption is based on a financial benefit to a particular candidate in such a "large" amount, *Buckley*, 424 U.S. at 26 (anticorruption interest triggered by "large contributions"), as to cause a candidate "to act contrary to [his or her] obligations of office," *Citizens United*, 130 S.Ct. at 497.

Political party committees pose no cognizable quid-pro-quo-corruption risk to their candidates:. As stated by three Justices in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado-I*"), "We are not aware of any special dangers of corruption associated with political parties. . . ." *Id.* at 616 ("Breyer, J., joined by O'Connor & Souter, JJ.). Another three agreed:

> As applied in the specific context of campaign funding by political parties, the anti-corruption rationale loses its force. . . . What could it mean for a party to "corrupt" its candidate or to exercise "coercive" influence over him? The very aim of a political

> party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes. When political parties achieve that aim, that achievement does not, in my view, constitute "a subversion of the political process."

Id. at 646 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment and dissenting in part) (citations omitted). Montana's political party aggregate contribution serves no cognizable interest.

And the individual and PAC contribution limits are too low to serve a corruption interest. As Appellant's witness Ms. Baker of the Commission of Political Practices testified, there is no risk of corrupting a candidate with a $1,000 contribution. (*Findings of Fact*, Doc. 168, at 36.) Yet these limits are set as low as $160 for legislative candidates, well below that amount.

All of the contribution limits challenged here are also underinclusive as to any anticorruption interest. A law is underinclusive when large portions of speech which would advance the interest propounded by the state are left unregulated, thereby "render[ing] belief in the purpose a challenge to the incredulous." *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) (*citing City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994)) (noting that underinclusiveness "diminish[es] the credibility of the government's rationale for restricting speech") *and Florida Star v. B.J. F.*, 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring in judgment) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited" (internal quotation marks and citation omitted)).
As both parties stipulated, contributions in Montana do not include paying for candidate's staff or any expenses they incur. (*Stay Opinion*, Doc. 14, at 29.) This exclusion is fatal to the claim that contribution limits serve an anticorruption interest. As Ms. Baker testified, providing services to

a candidate is effectively the same as giving money to that candidate's campaign and serves as a benefit to that candidate's campaign. Quid-pro-quo corruption could as readily result from providing unlimited campaign staffing support to a candidate as from giving unlimited amounts of money to that candidate directly.

Moreover, as Appellants' expert Bender testified, the structure of Montana's contribution limit scheme allows PACs to contribute more to candidates than political parties. While it is true that political parties cannot corrupt candidates, the same is not true of PACs. Allow PACs to contribute more than political parties renders the aggregate contribution limit underinclusive. The aggregate contribution limits, the individual contribution limits, and the PAC contribution limits do not serve the purpose of preventing corruption.

2. No Anti-Circumvention Interest Exists for the Aggregate Contribution Limits.

While "preventing corruption" is the only cognizable interest "for restricting campaign finances," *NCPAC*, 470 U.S. at 496-97, the Supreme Court has recognized a prophylactic interest in preventing circumvention of the contribution limits that eliminate the quid-pro-quo risk. But just as the scope of cognizable "corruption" was strictly limited by the Supreme Court, *see Citizens United*, 130 S.Ct. at 909-10, "circumvention" is also limited.

Because the anti-circumvention interest is derivative and prophylactic, there must be a viable quid-pro-quo-corruption risk to begin with. It must be possible to "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Buckley,* 424 U.S. at 38. The government must prove that asserted

"harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). And perceived "circumvention"—based on barred contributors moving on to other political activity that remains legal—can be a reason to overturn restrictions, not multiply them:

> Austin [v. Michigan Chamber of Commerce, 494 U.S. 652 (1990),] is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws. See, e.g., McConnell[, 540 U.S. at] 176-177 ("Given BCRA's tighter restrictions on the raising and spending of soft money, the incentives . . . to exploit [26 U.S.C. 527] organizations will only increase[.]"). Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights.

Citizens United, 130 S.Ct. at 912 (emphasis added). So if would-be contributors to candidates are restricted by contribution limits and instead give to a political committee, that "circumvention" requires careful examination of whether the contribution limits are constitutionally justified.

Since political parties cannot corrupt their own candidates, Montana must rely exclusively on the anti-circumvention interest to justify the aggregate contribution limits. However, Montana cannot credibly claim that interest. Any Montanan or Montana organization can circumvent both individual and aggregate limits by paying for unlimited amounts of staff and staff expenses—up to as much as $1,000, $10,000, even $1 million, according to Ms. Baker and Mr. Murry's testimonies. This makes the aggregate contribution limits underinclusive to any anti-circumvention interest. A circumvention interest does not justify any of Montana's contribution limits.[1]

[1] Circumvention as an interest was not discussed nor argued in *Eddleman*.

Both the district court and the Ninth Circuit failed to address this preliminary scrutiny analysis. Under it, the aggregate contribution limits, the individual and PAC contribution limits fail to even serve a cognizable interest. Thus, they fail under either strict or "closely drawn" scrutiny and are unconstitutional.

B. The Limits Are Not Closely Drawn Because They Are Too Low.

Even if the aggregate contribution limits, the individual contribution limits, and the PAC limits somehow serve a cognizable state interest, they must still be properly drawn to ensure that they are "no broader than necessary to achieve that interest." *California Medical Ass'n v. FEC*, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring in part and in the judgment). The Court in *Randall* established five factors to ascertain whether contribution limits suffer from improper tailoring. These are: **1)** whether the contribution limits significantly restrict the amount of funding available for challengers to run competitive campaigns, *Randall*, 548 U.S. at 253-256; **2)** whether a political party and its affiliates must abide by the same contribution limits that apply to individual contributors, resulting in harm of the right to associate, *id.* at 256-259; **3)** whether it excludes the expenses that volunteers incur in the course of campaign activities, *id.* at 259-260; **4)** whether the limits are adjusted for inflation, *id.* at 261; and **5)** whether there is any special justification for the contribution limits, *id.* at 261. If some of these risk factors exist or "there is a strong indication in a particular case . . . that such risks exist," courts must review the record carefully, focusing on whether the statute is proportionate, that is, whether the restrictions placed on First Amendment rights are in proportion to the harm such restrictions are averting. *Id.* at 249.

The State's expert Bender conceded in his testimony that Maine, Arizona, Alaska and Montana are among the states with the lowest contribution limits. Consequently, the application of *Randall* in this case is clear. (*See Findings of Fact*, Doc. 168, at 28.)

1. The Limits Inhibit Challengers From Running A Competitive Campaign.[2]

Both the aggregate contribution limits and the individual and PAC contribution limits undermine a challenger from running a competitive campaign. Bensen ran two scenarios that analyzed lost campaign dollars under current contribution data. In the first, the contribution limits were raised 50% beyond their current limits to $240. (Trial Ex. 4, at 3.) In the second scenario, the contribution limits were raised 100% to $320. (*Id.* at 3.) Under these scenarios, the average campaign would have lost 15% or 26% respectively of their projected revenue. (*Id.* at 3.) In *Eddleman*, 10% funding losses were reported of "only the largest contributions," contributions that could be as high as $1000 under the prior contribution limits reviewed. *Eddleman,* 343 F.3d 1094. Extrapolating, then, Bensen's percentages up to the $1000 amount reviewed in *Eddleman* and *Buckley*, or roughly 600% time current rates, the financial loss for current candidates in Montana is much greater than the 10% considered in *Eddleman* and well beyond the 5.1% deprivation found from the $1,000 contribution limit in *Buckley*. *See Buckley*, 424 U.S. at 21 n.23.

Looked at another way, the C.B. Pearson report and Motl testimony from the *Eddleman* case showed losses of 10% when the contribution limit dropped from $1000 to $100. (Tr. Ex. 11, 12.) Bensen's report shows a comparable 15% loss between the current limits of $160 and $240

[2]All factual statements made in Part III can be substantiated with the admitted exhibits and transcript of the trial proceedings conducted by the district court.

(Scenario A), with a 26% loss between the current $160 limits and limits at $320 (Scenario B). (Tr. Ex. 4, at 3.) Putting the two reports on equal footing, the current loss between the limits of $160 and $1000, adjusted for inflation, are a multiple of that 26% loss.

The data show that the competitiveness of races have changed dramatically since *Eddleman*, with the limits imposed creating losses like those reviewed in *Randall*, which projected losses of between 18% to 53%. *Randall*, 548 U.S. at 253.[3] As it did in *Randall*, this suggests that challenger candidates cannot mount an effective campaign in Montana. *Id.*

The Ninth Circuit found that the trial court's disregard for the impact of below threshold donors (i.e., donors of $35 or less) was error. (*Stay Opinion*, Doc. 14, at 26.) But such data is not relevant to whether or not a candidate can mount a effective campaign under Montana's contribution limits. Moreover, the data show that except for in 2006, the receipts from unitemized donors were trivial as compared to those who maxed out. For example, in house races, unitemized contributions amounted to barely more than one quarter of all contributions for 2010, with $75,000 of $272,000 in unitemized contributions. (Tr. Ex. 21.) Likewise, in statewide races, unitemized contributions amounted to under one third of all contributions for 2010, with $10,000 of $32,000 in unitemized contributions. (Tr. Ex. 50.) In senate races, $30,581 were unitemized contributions for 2010 as compared to $199,717 in maxed out contributions (a ratio of roughly 6:1). (Tr. Ex. 22.) And in gubernatorial races, $20,969 were unitemized contributions in 2010 as compared to $254,000 in maxed out contributions (a ratio of roughly 12:1)). (Tr. Ex. 23.) In fact, in 2010, unitemized contributions amounted to only 7%, an amount that, given the margin of error of +/- 4%, is statistically insignificant. (Tr. Ex. 18.)

[3]Projected losses were used in *Randall* to strike down Vermont's limits.

As Rep. Miller testified, his campaign for a House seat in Montana would need about $12,000 to effectively get a message out to that candidate's voters. However, candidates in his district are only able to raise between $7,000 to $8,000. This limitation for Rep. Miller is directly related to the aggregate contribution limits, which have necessitated him returning contributions beyond the limit. And it has forced him to choose which half to one third of his potential constituents their campaign will neglect.

This is not for lack of candidate support. Many individuals are maxing out on their contributions, with 1,402 maxing out compared to 4,469 giving under the limit (a ratio of roughly 1:3) in 2010 state house races, (Tr. Ex. 21), and with 1,091 maxing out compared to 2,152 giving under the limit (a ratio of roughly 1:2) in 2010 state senate races, (Tr. Ex. 22). Rep. Miller's testimony confirms this phenomenon. The difficulty for candidates is that their contributors simply cannot give more.

Meanwhile, PAC and party voices have been reduced to a whisper. *Randall*, 548 U.S. at 259. In 2010, PAC contributions in statewide races were 2% of all contributions. (Tr. Ex. 19.) Political party contributions were 4% in both 2008 and 2010. (*Id*.) In 2008 gubernatorial races, PACs gave no contributions at all and political parties contributions were 2% of all contributions. (Tr. Ex. 20.) And in 2010, legislative candidate contributions from political committees amounted to 3% of all contributions, and PAC contributions amounted to 9% of all contributions. (Tr. Ex. 18.) Yet in 2010, 22% legislative candidates maxed out on party committee donations. (Tr. Ex. 26.) And in 2008, 18% of statewide candidates maxed out on party committee contributions. (Tr. Ex. 27.) (*See also Findings of Fact*, Doc. 168, at 30.)

Additionally, as both parties' experts agree, challengers bear the additional structural burden of PACs, which have greater aggregate contribution limits, giving predominantly to incumbents while political parties, which have lower aggregate contribution limits, give predominantly to challengers. This bears out factually in all election years studied except 2006. (Tr. Ex. 25.)

Challenger candidates simply cannot run competitive campaigns under the challenged limits.

2. The Aggregate Contribution Limits Are Much Lower Than The Individual Contribution Limits And Identical PAC Contribution Limits.

The aggregate contribution limits for all political parties is $800. MCA 13-37-216(3). As testimony reflects, there are 50 independent Republican county parties in addition to the state Republican Party, representing approximately 100,000 Republicans across the state. (*See Findings of Fact*, Doc. 168, at 31.) The $800 cap then, representing these 100,000 Montanans, amounts to an eighth of a penny per Montanan. And for each of the 51 parties to be able to associate with any one of their given candidates, they would need to limit their contribution to $15.69. (*See id.*) Individuals can give $160 to legislative seats, ten times the amount of any one party. The aggregate contribution limits prevents to the point of trivializing any meaningful association with Montana's political parties. *Randall*, 548 U.S. at 257-58. And this trivialization crosses party lines. As Mary Baker testified, over 120 political party committees exist in Montana. That any one of these 120 committees can instead choose to contribute unlimited amounts to fund campaign staff for a candidate and get entangled in a campaign they are not running nor have an interest in running (and which candidates would probably rather they not

run) does not negate the fact that when political parties engage in the speech they wish to engage in by making contributions to candidates, the contribution limits imposed on them undermine the value of associating with Montana's political parties.

As the district court found, individuals are subject to the same contribution limits as PACs. MCA § 13-37-216(1) & (3). (*Findings of Fact*, Doc. 168, at 31.) The Ninth Circuit found this conclusion to be in error, (*Stay Opinion*, Doc. 14, at 26), but imposing the same limit on PACs as individuals seriously undermines individual contributors' ability to associate. Individual contributors who would give money to a PAC for the purpose of having that PAC support whatever candidates that PAC believes is appropriate are thwarted in their attempt to meaningfully associate with PACs because of the identically low limits on PACs. See Randall, 548 U.S. at 257-58.

3. The Contribution Limits are Nor Properly Indexed for Inflation.

The contribution limits are to be adjusted for inflation using the consumer price index. MCA § 13-37-216(4). The last time the contribution limits were raised was in 2008. This is because the Consumer Price Index has not increased since then. But as Rep. Miller testified, since 2008, the cost of yard signs has risen 8%, the cost of pencils has risen 15%, the cost of postage 10%, and the cost of gas 60%. These increased costs are not reflected in the Consumer Price Index. (*See Findings of Fact*, Doc. 168, at 35.) The Consumer Price Index is not a sufficient index to reflect a candidate's campaign needs, and so Montana's already low contribution amount "inevitably [has] become[] too low over time." *Randall*, 548 U.S. at 261.

4. The Individual Contribution Limits Lack A Special Justification.

Montana might be able to overcome an unconstitutionally low contribution limit by demonstrating a "special" justification beyond that which is normally required to sustain contribution limits. *Randall*, 548 U.S. at 261. Notably, the *Eddleman* decision shows no factual evidence of corruption its appearance. The only evidence was a vague statement that contributions "get results." *Eddleman*, 343 F.3d at 1093. As the district court observes, the same is true here. At most, Ms. Baker testified that $1,000 in Montana is not a large contribution and presents no contribution problem and that there is no evidence of quid pro quo corruption in Montana at that level. (*Findings of Fact*, 168, at 36.)

The Ninth Circuit construes *Eddleman* to hold that Montana does have a special justification for its low limits: Montana is an inexpensive place to campaign. (*Stay Opinion*, Doc. 14, at 31.) Even if this was a "special justification" within the meaning of *Randall*, *see Randall*, 548 U.S. at 261, the evidence contradicts it. Rep. Miller testimony regarding campaign expenses and how many of his targeted voters he must choose to ignore shows that Montana is not so inexpensive as to make $160 and $800 contribution limits adequate. By way of example, House District 72 in Beaverhead County is 5500 square miles, requiring substantial time and gas to traverse. Gas prices are higher in Montana than elsewhere, and the rural nature of Montana's population imposes more travel and thus greater costs. Moreover, Montana's reservations, with their unique advertising requirements, impose additional costs for those whose district includes them. All of these facts impose greater expenses on Montana's candidates.

5. The Contribution Limits Are Not Proportionate to the Averted Harm.

With almost all factors implicated, *Randall* directs that the record be carefully looked at to determine whether the restriction on First Amendment rights is proportionate to the harm it is preventing. *Randall*, 548 U.S. at 249. It is not.

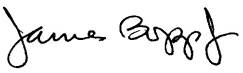
While contribution limits as a general matter can prevent quid pro quo corruption resulting from large contributions, *see Buckley*, 424 U.S. at 26, Ms. Baker testified that, as a practical matter, $1000 contributions have shown no risk of corruption in Montana. In fact, in her eleven years of working at the Office of Political Practices, she knew of no candidate that could be corrupted by a contribution of $2500 or less. Yet as Rep. Miller testified, Montana's contribution limits—all well under $1000—in some cases barely cover a tank of gasoline to knock on doors in many districts and force candidates to choose which voters to reach. Political parties voices are "reduced to a whisper," *Randall*, 548 U.S. at 259, with political parties never contributing greater than 4.2% of all candidate contributions between the years 2000-2010. (Tr. Ex. 24.) And this reality imposes even greater burdens on challengers, who in all years since 2000 except 2006 received more contributions from political parties than incumbents. (Tr. Ex. 25.) Thus the burdens candidates face because of Montana's contribution limits are wildly disproportionate to the nonexistent anticorruption harm they are purported to prevent. The State never disputed this disproportionality.

The contribution limits are not tailored to any cognizable interest. They are unconstitutionally too low. Thus, the district court properly entered an injunction, and the Ninth Circuit's stay of that injunction should be lifted.

Conclusion

Applicants have met their burden of proving that they will suffer immediate and irreparable harm because of the Ninth Circuit's opinion, that it is likely the Supreme Court would grant certiorari, and that the Applicants will prevail on the merits. In light the harms caused by failing to allow the injunction to stand, Applicants' requested relief of vacating the stay of the Ninth Circuit should be granted, to allow Montanan contributors to exercise their First Amendment rights during the pendency of the appeal in the Ninth Circuit and any petition in the Ninth Circuit for rehearing, or for rehearing en banc, or petition to this Court for a writ of certiorari.

Respectfully Submitted,



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No. 12-A_____

In the Supreme Court of the United States

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JAMES MURRY, in his official capacity as the Montana Commissioner of Political Practices; and STEVE BULLOCK, in his official capacity as Montana Attorney General, ***Appellants***,

v.

DOUG LAIR, ET AL., ***Appellees,***

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Appeal from No. 12-35809 in the
United States Court of Appeals for the Ninth Circuit

and

Case No. 6:12-cv-00012-CCL in the
U.S. District Court for Montana

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Certificate of Service for Application of Doug Lair, et al. to Vacate the Ninth Circuit's Stay of the District Court's Permanent Injunction

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To the Honorable Anthony M. Kennedy

Associate Justice of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

_____

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October 18, 2012

I, James Bopp, Jr., a member of the bar of this court, certify that on October 18, 2012, I served a copy of the *Application of Doug Lair, et al. to Vacate the Ninth Circuit's Stay of the District Court's Permanent Injunction* with the following individuals at the addresses listed below by placing a copy for delivery by Federal Express, and served a courtesy copy of the same via email upon the following persons:

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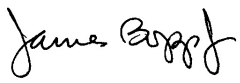

James Bopp, Jr.