

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DAVID THOMPSON; AARON
DOWNING; JIM CRAWFORD; DISTRICT
18 OF THE ALASKA REPUBLICAN
PARTY,

Plaintiffs-Appellants,

v.

HEATHER HEBDON, in Her Official
Capacity as the Executive Director
of the Alaska Public Offices
Commission; TOM TEMPLE; IRENE
CATALONE; RON KING; ROBERT
CLIFT; ADAM SCHWEMLEY, in Their
Official Capacities as Members of
the Alaska Public Offices
Commission,

Defendants-Appellees.

No. 17-35019

D.C. No.
3:15-cv-00218-
TMB

OPINION

Appeal from the United States District Court
for the District of Alaska
Timothy M. Burgess, Chief Judge, Presiding

Argued and Submitted June 11, 2018
Anchorage, Alaska

Filed November 27, 2018

Before: Sidney R. Thomas, Chief Judge, and Consuelo M. Callahan and Carlos T. Bea, Circuit Judges.

Opinion by Judge Callahan;
Partial Concurrence and Partial Dissent by
Chief Judge Thomas

SUMMARY*

Civil Rights

The panel affirmed in part and reversed in part the district court's bench trial judgment and remanded for entry of a judgment consistent with the panel's opinion in an action alleging that Alaska law regulating campaign contributions violates the First Amendment.

Plaintiffs, three individuals and a subdivision of the Alaska Republican Party, challenged: (1) the \$500 annual limit on an individual contribution to a political candidate, (2) the \$500 limit on an individual contribution to a non-political party group, (3) annual limits on what a political party—including its subdivisions—may contribute to a candidate, and (4) the annual aggregate limit on contributions a candidate may accept from nonresidents of Alaska.

The panel held that affirmance on the individual-to-candidate and individual-to-group limits was compelled by

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Lair v. Motl, 873 F.3d 1170 (9th Cir. 2017) (*Lair III*), *reh'g en banc denied*, 889 F.3d 571 (9th Cir. 2018), and *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981), respectively. The panel also upheld the political party-to-candidate limit. However, it reversed as to the nonresident limit. The panel held that the first three restrictions were narrowly tailored to prevent quid pro quo corruption or its appearance and thus did not impermissibly infringe constitutional rights. The nonresident limit, which at most, targeted contributors' influence over Alaska politics, did not target an "important state interest" and therefore violated the First Amendment.

Concurring in part and dissenting in part, Chief Judge Thomas agreed with the majority that Alaska's limitations on individual contributions to candidates and election-related groups and on political party contributions to individual candidates did not violate the First Amendment. However, he would hold that the nonresident aggregate contribution limit, which furthers Alaska's important state interests in preventing quid pro quo corruption or its appearance and in preserving self-governance, also did not violate the First Amendment. Thus, Judge Thomas respectfully dissented from Section III(B)(iv) of the majority opinion.

COUNSEL

Kevin G. Clarkson (argued) and Matthew C. Clarkson, Brena Bell & Clarkson P.C., Anchorage, Alaska, for Plaintiffs-Appellants.

Laura Fox (argued), Assistant Attorney General, Department of Law, Anchorage, Alaska, for Defendants-Appellees.

Brian A. Sutherland, Reed Smith LLP, San Francisco, California; M. Patrick Yingling, Reed Smith LLP, Chicago, Illinois; Brent Ferguson and Daniel I. Weiner, Brennan Center for Justice, New York, New York; for Amicus Curiae Brennan Center for Justice at NYU School of Law.

Ronald A. Fein and John C. Bonifaz, Free Speech for People, Newton, Massachusetts, for Amici Curiae Free Speech for People and Professor David Fontana.

Tara Malloy, Noah B. Lindell, Megan P. McAllen, and Mark P. Gaber, Campaign Legal Center, Washington, D.C., for Amicus Curiae Campaign Legal Center.

OPINION

CALLAHAN, Circuit Judge:

We must decide whether an Alaska law regulating campaign contributions violates the First Amendment. At issue are Alaska's limit on contributions made by individuals to candidates, its limit on contributions made by individuals to election-related groups, its limit on political party-to-candidate contributions, and its limit on the total funds a candidate may receive from out-of-state residents. The district court upheld all four provisions against a constitutional challenge by three individuals and a subdivision of the Alaska Republican Party. Affirmance on the individual-to-candidate and individual-to-group limits is compelled by *Lair v. Motl*, 873 F.3d 1170 (9th Cir. 2017) (*Lair III*), *reh'g en banc denied*, 889 F.3d 571 (9th Cir. 2018), and *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981), respectively, and we also uphold the political party-

to-candidate limit. However, we reverse as to the nonresident limit. While the first three restrictions are narrowly tailored to prevent quid pro quo corruption or its appearance and thus do not impermissibly infringe constitutional rights, the nonresident limit does not target an “important state interest” and therefore violates the First Amendment.

I.

A.

Alaska has long regulated campaign contributions to political candidates. In 1974, Alaska enacted a statute prohibiting individuals from contributing more than \$1,000 annually to a candidate. *See Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 601 (Alaska 1991). One former Alaska state representative testified in the bench trial in this case that, even under this \$1,000 limit, “there was an inordinate influence from contributions on the actions of the legislature.” *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1029 (D. Alaska 2016). A former member of the Anchorage Assembly, Charles Wohlforth, testified that “the system was rigged by money[ed] interests and that too frequently the decisions of the assembly were controlled by those interests and their desires, based on the kind of contributions they would make.” *Id.* at 1030 (alteration in original).

In 1996, the Alaska Legislature enacted a revised campaign finance law “to restore the public’s trust in the electoral process and to foster good government.” 1996 Alaska Sess. Laws ch. 48 § 1(b). Among other things, the law lowered the annual limit on contributions by individuals to a candidate from \$1,000 to \$500 and set a \$500 limit on annual contributions by individuals to a group that is not a

political party. *Id.* §§ 10–11. The law also set aggregate limits on the amount candidates could accept from nonresidents of Alaska. In 2003, the Alaska legislature revised the 1996 law by raising the individual-to-candidate and individual-to-group limits from \$500 to \$1,000. 2003 Alaska Sess. Laws ch. 108, §§ 8–10.

In 2006, a ballot initiative—Ballot Measure 1 (the “2006 Initiative”)—proposed a further revision of the limits. 2006 Alaska Laws Initiative Meas. 1, § 1. The 2006 Initiative is the law at issue here. The 2006 Initiative returned the individual-to-candidate and individual-to-group limits to their pre-2003 levels of \$500 per year. Alaska Stat. § 15.13.070(b)(1). It also capped the amount a non-political party group could contribute to a candidate at \$1,000, restricted the amount candidates could receive from nonresidents to \$3,000 per year, and limited the amount a political party—including its subdivisions—could contribute to a candidate. Alaska Stat. §§ 15.13.070(c) & (d), 15.13.072(a)(2) & (e)(3), 15.13.400(15). The voter information packet included the following statement of the 2006 Initiative’s purpose:

Corruption is not limited to one party or individual. Ethics should be not only bipartisan but also universal. From the Abramoff and Jefferson scandals in Washington D.C. to side deals in Juneau, special interests are becoming bolder every day. They used to try to buy elections. Now they are trying to buy the legislators themselves.

The 2006 Initiative passed with 73% of the popular vote.

B.

Plaintiffs are three individuals and a subdivision of the Alaska Republican Party. In 2015, Plaintiffs brought a First Amendment challenge against Defendants, Alaska public officials, targeting, as relevant to this appeal, (1) the \$500 annual limit on an individual contribution to a political candidate, (2) the \$500 limit on an individual contribution to a non-political party group, (3) annual limits on what a political party—including its subdivisions—may contribute to a candidate, and (4) the annual aggregate limit on contributions a candidate may accept from nonresidents of Alaska. Plaintiffs sought a declaratory judgment that each of the challenged provisions is unconstitutional, a permanent injunction prohibiting enforcement of the challenged provisions, and costs and attorney’s fees under 42 U.S.C. § 1983. *Thompson*, 217 F. Supp. 3d at 1027.

Two of the Plaintiffs, Aaron Downing and Jim Crawford, are Alaska residents who wanted to, but legally could not, contribute more than \$500 to individual candidates running for state or municipal office. Crawford would also like to give more than \$500 to a non-political party group. David Thompson is a Wisconsin resident whose brother-in-law is Alaska State Representative Wes Keller. Thompson sent Keller a \$100 check for his campaign in 2015, but Keller returned the check because the campaign had already hit the \$3,000 nonresident limit. Finally, District 18 is a subdivision of the Alaska Republican Party that was limited in the amount it could give to Amy Demboski’s mayoral campaign due to Alaska’s aggregate limit on the amount a campaign can accept from a political party.

After granting Alaska’s motion for partial summary judgment for lack of standing on certain of Plaintiffs’

claims,¹ the district court held a seven-day bench trial. In November 2016, the district court issued a decision rejecting all of Thompson’s remaining claims. *Thompson*, 217 F. Supp. 3d at 1027–40. Applying the intermediate scrutiny standard for evaluating contribution limitations set forth in *Montana Right to Life Ass’n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), the district court determined that each of the four challenged provisions was aimed at the “important state interest” of combating quid pro quo corruption or its appearance, and was “closely drawn” to meet that interest. *Thompson*, 217 F. Supp. 3d at 1040. Plaintiffs (collectively, “Thompson”) timely appealed.

II.

“We review a district court’s legal determinations, including constitutional rulings, *de novo*.” *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc). “When the issue presented involves the First Amendment . . . [h]istorical questions of fact (such as credibility determinations or ordinary weighing of conflicting evidence) are reviewed for clear error, while constitutional questions of fact (such as whether certain restrictions create a ‘severe burden’ on an individual’s First Amendment rights) are reviewed *de novo*.” *Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006).

III.

“The starting place in the analysis of the constitutionality of campaign finance reform legislation is *Buckley v. Valeo*, 424 U.S. 1 (1976) [(per curiam)].” *Eddleman*, 343 F.3d at

¹ The district court’s partial summary judgment determination is not at issue in this appeal.

1090. The Court in *Buckley* explained that limitations on campaign contributions implicate the contributor's First Amendment rights. *Buckley*, 424 U.S. at 20–21. But it distinguished limits on expenditures made *by* candidates from limits on contributions made *to* candidates. *Id.* The Court reasoned that the former amounts to a direct affront to the regulated entity's free speech rights, while the latter "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 19–21. *Buckley* further explained that

[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Id. at 21. Put another way, unlike expenditure limitations, "limiting contributions [leaves] communication significantly unimpaired." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000). Accordingly, while expenditure limitations must survive exacting scrutiny, limits on contributions are "subject to [a] relatively complaisant

review under the First Amendment.” *FEC v. Beaumont*, 539 U.S. 146, 161 (2003); *see also Shrink Mo.*, 528 U.S. at 387–88. The question is whether the law targets an “important state interest,” and, if so, “whether ‘the contribution limitation is so radical in effect as to render political association ineffective, drive the sound of the candidate’s voice below the level of notice, and render contributions pointless.’” *Eddleman*, 343 F.3d at 1091–92 (quoting *Shrink Mo.*, 528 U.S. at 397).

The bottom line is this: After *Buckley* and *Shrink Missouri*, 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. at 1092. The State bears the burden of satisfying both prongs of this inquiry. *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014). We recently reaffirmed this test in *Lair III*, 873 F.3d at 1178–80.

A.

In recent years, the Supreme Court has limited the type of state interest that justifies a First Amendment intrusion on political contributions. After *Citizens United* and *McCutcheon*, states must show that any such limitation serves to combat actual quid pro quo corruption or its appearance. *McCutcheon*, 572 U.S. at 206–07; *Citizens United v. FEC*, 558 U.S. 310, 359–60 (2010). It no longer

suffices to show that the limitation targets “undue influence” in politics. *McCutcheon*, 572 U.S. at 208 (holding that “the possibility that an individual who spends large sums may garner ‘influence over or access to’ elected officials or political parties” is not a sufficient state interest for limiting campaign contributions (quoting *Citizens United*, 558 U.S. at 359)); see also *Lair III*, 873 F.3d at 1188 (Bea, J., dissenting) (“*Citizens United* . . . narrowed what can constitute a valid important state interest . . . to only the state’s interest in eliminating or reducing quid pro quo corruption or its appearance.”).

The Court’s limitation on what constitutes an “important state interest” does not necessarily undermine the government’s ability to cap contributions made directly to a candidate. See *McCutcheon*, 572 U.S. at 192–93 (“[W]e have previously upheld [limits on direct contributions to a candidate] as serving the permissible objective of combatting corruption.”); *Citizens United*, 558 U.S. at 356–57. That is because the appearance of such corruption is “‘inherent in a regime of large individual financial contributions’ to particular candidates.” See *McCutcheon*, 572 U.S. at 207. To address that risk, states may implement prophylactic limits because individual-to-candidate contributions *could* compel “elected officials [to be] influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.” *Id.* at 225 (emphasis omitted) (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)). Indeed, “restrictions on direct contributions are preventative, because few if any contributions to candidates will involve [actual] *quid pro quo* arrangements.” *Citizens United*, 558 U.S. at 357.

In *Eddleman*, we held that the quantum of evidence necessary to justify a legitimate state interest is low: the perceived threat must be merely more than “mere conjecture” and “not . . . ‘illusory.’” *Eddleman*, 343 F.3d at 1092.²

B.

We turn to assessing the four challenged provisions of the 2006 Initiative. For each, we consider whether it is (1) targeted at an “important state interest,” and, if so, (2) whether it is “closely drawn” to meet that interest. *Eddleman*, 343 F.3d at 1092.

i.

We begin with the \$500 individual-to-candidate contribution limit. Thompson challenges both Alaska’s power to impose the limit at all and its intent in halving the prior \$1,000 limit with the challenged \$500 limit.

Thompson first argues that Alaska’s evidence amounts to showing only an “undue influence” by contributors on candidates for office. In light of *Lair III*, we reject this argument. Alaska proffered substantial evidence of attempts to secure votes for contributions. For example, Senator Coghill testified that he was approached by a lobbyist

² *McCutcheon* and *Citizens United* created some doubt as to the continuing vitality of the standard for the evidentiary burden we announced in *Eddleman*. See *Lair v. Motl*, 889 F.3d 571, 575 (9th Cir. 2018) (Ikuta, J., dissenting from denial of rehearing en banc) (“This highly attenuated standard is two steps removed from the standard explained by *Citizens United* and *McCutcheon*.”). However, in *Lair III* we reaffirmed this evidentiary standard, 873 F.3d at 1178, and we denied a petition for rehearing en banc, 889 F.3d at 572.

demanding his vote, saying: “This is why we gave to you. Now we need your help.” Similarly, Anchorage Assembly member Bob Bell testified that an executive offered to hold a fundraiser for him if he would support a private prison project. When he refused, the executive held a fundraiser for his opponent instead. These examples demonstrate attempts by individuals to affect public officials’ voting behavior through the prospect of financial gain, thereby giving rise to a risk of quid pro quo corruption. Finally, there is Alaska’s VECO public corruption scandal, which came to light shortly after the 2006 Initiative was passed. That scandal snared roughly 10% of Alaska’s legislature in a scheme of accepting money from VECO, an oil services firm, in return for votes and other political favors.³ Under *Lair III*, we are compelled to conclude that the State’s evidence suffices to show that the individual-to-candidate limit “further[s] the important state interest of preventing quid pro quo corruption or its appearance.” 873 F.3d at 1179–80.

Thompson next argues that Alaska fails to show that the legislative purpose for cutting the individual contribution limit in half was to prevent quid pro quo corruption or its

³ Thompson dismisses the VECO scandal as irrelevant because Alaska fails to show that it was the impetus for the 2006 Initiative. As noted, however, the legislative purpose of the initiative is beside the point. But Thompson’s argument fails for an additional reason. He reasons that prosecuting violators under bribery laws—as occurred with the VECO scandal—is the only legitimate means of preventing corruption. Not so. By allowing limits on contributions directly to candidates as a prophylactic measure, the Supreme Court has made clear that the state interest of preventing corruption is not limited to prosecuting instances of *past* corruption. See *McCutcheon*, 572 U.S. at 196–98 (citing *Buckley*, 424 U.S. at 26–29); *Shrink Mo.*, 528 U.S. at 389 (“Congress [can] constitutionally address the power of money ‘to influence governmental action’ in ways less ‘blatant and specific’ than bribery.” (quoting *Buckley*, 424 U.S. at 28)).

appearance. According to Thompson, Alaska needed to but failed to explain why \$500 is better suited to combating corruption than the prior \$1,000 limit. Absent such a showing, Thompson asserts, the \$500 limit targets at most the “influence” and “pressure” that contributors can have on elected officials.

We are unpersuaded. First, the State must demonstrate only that when the 2006 Initiative was approved by the voters “the risk of actual or perceived quid pro quo corruption is more than ‘mere conjecture.’” *Lair III*, 873 F.3d at 1178 (quoting *Eddleman*, 343 F.3d at 1092). We have rejected—albeit *sub silentio*—such purpose-based arguments in the past. In *Yamada v. Snipes*, 786 F.3d 1182, 1205–06 (9th Cir. 2015), we held that a limit on contributions by government contractors withstood scrutiny because it “target[ed] . . . the contributions most closely linked to actual and perceived quid pro quo corruption.” This was notwithstanding the fact that the ban’s proponents in the legislature articulated other goals, including an intent to create a “level playing field.” *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1058 n.26 (D. Haw. 2012). Thompson’s proposed rule—requiring Alaska to show that reducing the limit from \$1,000 to \$500 is necessary to combat corruption—would significantly restrict the deference the Supreme Court has given to states to determine how precisely to advance the important state interest of combating corruption.

Second, Thompson’s argument about the exact amount of the limit misses the mark because the first step of *Eddleman* “is divorced from the actual amount of the limits—it is a threshold question whether *any* level of limitation is justified.” *Lair III*, 873 F.3d at 1178.

Concluding, as we must, that the individual-to-candidate contribution limit targets an “important state interest,” we turn to the second *Eddleman* factor: whether the limit is “closely drawn.” *Lair III*, 873 F.3d at 1180; *Eddleman*, 343 F.3d at 1092. To pass scrutiny, Alaska must show that the limit “focus[es] narrowly on the state’s interest,” “leave[s] the contributor free to affiliate with a candidate,” and “allow[s] the candidate to amass sufficient resources to wage an effective campaign.” *Eddleman*, 343 F.3d at 1092. “In making this determination, we look at all dollars likely to be forthcoming in a campaign, rather than the isolated contribution, and we also consider factors such as whether the candidate can look elsewhere for money, the percentage of contributions that are affected, the total cost of a campaign, and how much money each candidate would lose.” *Id.* at 1094 (internal citations omitted).

Narrow Focus. Whether a contribution limit has a narrow focus requires us to “assess the ‘fit between the stated governmental objective and the means selected to achieve that objective,’ looking at whether the limit[] target[s] ‘the narrow aspect of political association where the actuality and potential for corruption have been identified.’” *Lair III*, 873 F.3d at 1180 (internal citations omitted) (quoting *McCutcheon*, 572 U.S. at 199 and *Buckley*, 424 U.S. at 28). Consistent with the intermediate scrutiny we apply to contribution limits, the fit need not be “perfect, but reasonable.” *McCutcheon*, 572 U.S. at 218 (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). Thus, while the 2006 Initiative need not employ “the least restrictive means,” it should be “narrowly tailored to achieve the desired objective.” *Id.* (quoting *Fox*, 492 U.S. at 480).

Thompson argues that the individual-to-candidate limit lacks a narrow focus because, he asserts, Alaska fails to show that reducing the limit from \$1,000 to \$500 was necessary, and because the limit is among the lowest in the nation. We have already explained that Alaska need not show that it was necessary to reduce the contribution limit to \$500, only that the new limit targets quid pro quo corruption or its appearance. *See Buckley*, 424 U.S. at 30. On the question of whether the \$500 limit is “narrowly focused” on that interest, we must uphold the dollar amount unless it is “so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.” *Shrink Mo.*, 528 U.S. at 397.

Although the \$500 limit is low compared to the laws of most other states, whether it is unreasonably low requires a deeper dive. The \$500 limit affects only the top 12.6% of contributions that all candidates received in elections occurring after the initiative passed in 2006. This is on par with the Montana law’s limit, which we upheld in *Eddleman* and *Lair III*. That limit targeted the top 10% of contributions—i.e., “the high-end contributions most likely to result in actual or perceived corruption.” *Lair III*, 873 F.3d at 1181; *Eddleman*, 343 F.3d at 1094.⁴ Moreover, although the \$500 limit is on the low-end of the range of limits adopted by various states, it is not an outlier. At least

⁴ Thompson relies on a different metric: the percentage of campaign dollars that came from contributors giving the \$500 maximum, which he asserts amounted to nearly 40%. Regardless of the accuracy of Thompson’s statistic, it is not well-suited to determining “the percentage of contributions that are affected.” *Eddleman*, 343 F.3d at 1094. It merely reflects that large contributions will command a relatively outsize share of a candidate’s campaign war chest.

four other states (Colorado, Kansas, Maine, and Montana) have the same or lower limit for state house candidates, as do at least five comparably sized cities (Austin, Portland, San Francisco, Santa Cruz, and Seattle). We recently upheld a comparable limit. *Lair III*, 873 F.3d at 1174 tbls.2 & 3.

Contributors’ Ability to Affiliate With Candidates.

Thompson does not argue that the \$500 individual-to-candidate limit prevents supporters from affiliating with candidates. His tacit acknowledgment that Alaska has met its burden on this factor is well taken. As with Montana’s limit upheld in *Eddleman* and *Lair III*, Alaska “not only permits such affiliation through direct monetary contributions, but also ‘in ways other than direct contributions, such as donating money to a candidate’s political party, volunteering . . . , sending direct mail . . . , or taking out independent newspaper, radio, or television ads to convey . . . support.’” *Lair III*, 873 F.3d at 1184 (alterations in original) (quoting *Eddleman*, 343 F.3d at 1094). Accordingly, we conclude that the \$500 limit does not hobble contributors’ ability to affiliate with candidates.

Candidates’ Ability to Campaign Effectively.

Thompson argues the \$500 individual-to-candidate limit is impermissibly low because, he asserts, it favors incumbents at the expense of challengers, causes campaigns in competitive races to run deficits, and is not indexed for inflation. Each of these contentions misses its mark, however, because none directly addresses the dispositive question: whether the individual-to-candidate limit “impede[s] a candidate’s ability to ‘amass the resources necessary for effective advocacy.’” *Eddleman*, 343 F.3d at 1091 (quoting *Shrink Mo.*, 528 U.S. at 397). A limit does so if it is “so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the

level of notice, and render contributions pointless.” *Shrink Mo.*, 528 U.S. at 397.⁵

The district court weighed expert testimony from both sides in concluding that the \$500 limits allow candidates to “amass” the necessary funds.⁶ *Thompson*, 217 F. Supp. 3d at 1035. Thompson submitted the testimony of Michael Gene Pauley, a campaign manager and consultant, who stated his belief that the \$500 limits are too low because they are not indexed for inflation and because the limits are annual in nature. *Id.* at 1034–35. Thompson also offered the testimony of Senator John Coghill, who stated that “he has always been able to raise sufficient funds to run an effective campaign, but that it was ‘just harder’ under the current \$500 limits than under the \$1,000 limits because ‘the lower limits do cause you to have to go broad.’” *Id.* at 1035.

Thompson also called Clark Bensen, a consultant and former director of political analysis for the Republican National Committee, who testified that, under the \$500 limits, candidates often spend more than they raise. *Id.* The district court did not credit Bensen’s testimony, however, because he acknowledged that his analysis was based on

⁵ Thompson relies heavily on *Randall v. Sorrell*, 548 U.S. 230 (2006). It appears that Justice Breyer’s plurality opinion in *Randall*, if binding, may aid Thompson’s position because at least one of the “warning signs” identified in *Randall* is present here. However, as we recognized in *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (*Lair I*), and reiterated in *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015) (*Lair II*), *Randall* is not binding authority because no opinion commanded a majority of the Court.

⁶ The testimony and the district court’s decision addressed together the relevant inquiry of both the \$500 individual-to-candidate limit and the \$500 individual-to-group limit. The individual-to-group limit is discussed in more detail in Part III.B.ii of our opinion.

exaggerated estimates. *Id.* Moreover, Bensen’s determination that campaigns run deficits under current law is also unpersuasive because it is analytically unsound. By simply comparing total contributions to total expenditures, Bensen did not control for certain expenditures that have little or nothing to do with running an effective campaign—e.g., charitable contributions, loan repayments, and payment transfers to future campaign accounts. Campaigns often must make such non-campaign-related expenditures because they are required to run a zero balance at the end of the campaign. Considering the analytical flaws in Bensen’s analysis and his own admission that “I didn’t do a very sophisticated analysis It’s not like I didn’t do it, but I didn’t do it well, shall we say, or completely,” *id.*, we hold that the district court’s credibility determination was not clearly erroneous. *See Prete*, 438 F.3d at 960. Accordingly, we, like the district court, discount Bensen’s testimony.

Defendants relied on the expert testimony of Thomas Begich and John-Henry Heckendorn, both of whom are political consultants. *Thompson*, 217 F. Supp. 3d at 1035. Both testified that candidates—challengers and incumbents alike—can run effective campaigns under the \$500 limits and “have done so.” *Id.* They explained that the candidate who raises the most money does not necessarily win the election, that it is not—contrary to Thompson’s experts’ testimony—getting more expensive to run campaigns, and that the limits do not favor incumbents over challengers, also contrary to Thompson’s claim. *Id.* at 1035–36. For example, they testified that while the cost of some campaign elements have gone up, others have gotten cheaper, such as advertising and outreach to voters through new technologies. *Id.*

Additional record evidence supports Defendants' position. For example, in the 2012 and 2014 election cycles, several successful non-incumbent candidates raised in excess of \$100,000 from individual contributions alone. While different races will require varying levels of fundraising, witness testimony established that amassing \$100,000 allows a candidate to mount an effective campaign. For example, TV spending by a state legislative candidate generally would not exceed \$40,000; radio advertising could cost \$20,000; consultant services could cost another \$20,000; a mailer might cost up to \$3,000; and signs could cost up to \$10,000. Thus, even if a candidate spent the maximum estimated expenditure in each of these categories, she would still spend less than \$100,000. And that sum does not include the candidate's total campaign war chest. Candidates also receive contributions from political action committees ("PACs") and political parties.

Viewing the evidence as a whole, we agree with the district court that the \$500 individual-to-candidate limit allows candidates to amass sufficient funds to run an effective campaign.⁷ And because Defendants also show

⁷ It is unclear whether a district court's determination that a contribution limit allows candidates to amass sufficient funds to run an effective campaign is owed any deference. Arguably, such a finding is a "constitutional question of fact," which we review *de novo*. *Prete*, 438 F.3d at 960. In reversing the district court in *Lair III*, we implicitly applied *de novo* review. *Lair III*, 873 F.3d at 1184–86 (holding that "Montana's limits do not prevent candidates from amassing sufficient resources to campaign effectively" without giving any deference to the district court and without identifying any clear error); *see id.* at 1178 ("In the First Amendment context . . . 'our review [of the district court's fact finding] is more rigorous than other cases.'" (second alteration in original) (quoting *Lair II*, 798 F.3d at 748 n.8)). In other First Amendment contexts, we have suggested some level of deference is

that the limit is narrowly focused on Alaska’s interest in combating quid pro quo corruption or its appearance and does not impede an individual’s ability to associate with a candidate, we affirm the district court’s determination that the \$500 individual-to-candidate limit is “closely drawn.” *Eddleman*, 343 F.3d at 1092.

ii.

At first glance, the individual-to-group contribution limit of \$500 appears to present a closer question because that limit reflects a more attenuated risk of quid pro quo corruption or its appearance than does the individual-to-candidate limit. In *McCutcheon*, the Supreme Court rejected a limitation that capped aggregate contributions to PACs. 572 U.S. at 210–18. Because money was not transacted directly between contributor and candidate, “there [wa]s not the same risk of *quid pro quo* corruption or its appearance.” *Id.* at 210. While the government articulated an important interest in preventing circumvention of the base limits, the Court held that the “Government ha[d] not carried its burden of demonstrating that the aggregate limits further[ed] its anticircumvention interest.” *Id.* at 211. The Court did not, however, call into doubt anticircumvention as an important state interest; the government simply failed to meet its evidentiary burden.

McCutcheon’s tacit embrace of anticircumvention as an important state interest in combating quid pro quo corruption

appropriate. *See, e.g., Newton v. Nat’l Broad. Co.*, 930 F.2d 662, 670 (9th Cir. 1990) (“[W]e must simultaneously ensure the appropriate appellate protection of First Amendment values and still defer to the findings of the trier of fact.”). We need not resolve this question because we agree with the district court’s conclusion based on our own independent view of the evidence.

or its appearance means that another Supreme Court case, *California Medical Ass’n*, 453 U.S. 182, remains good law. In that case, applying intermediate scrutiny to limits on individual contributions to PACs, the Court upheld the limits as “further[ing] the governmental interest in preventing the actual or apparent corruption of the political process” because they prevent contributors from “evad[ing] the . . . limit on contributions to candidates . . . by channeling funds through a multicandidate political committee.” *Cal. Med. Ass’n*, 453 U.S. at 197–98; *see also* *FEC v. Colo. Republican Fed. Campaign Comm’n*, 533 U.S. 431, 456 (2001) (“[A]ll Members of the Court agree that circumvention is a valid theory of corruption”); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1125 (9th Cir. 2011) (“[T]here is nothing in the explicit holdings or broad reasoning of *Citizens United* that invalidates the anti-circumvention interest in the context of limitations on direct candidate contributions.”). We conclude that Alaska has demonstrated the same interest here where the risk of circumvention of the individual-to-candidate limit is apparent: under Alaska law, any two individuals could form a “group,” which could then funnel money to a candidate. Alaska Stat. § 15.13.400(8)(B). Such groups could easily become pass-through entities for, say, a couple that wants to contribute more than the \$500 individual-to-candidate limit.

If, as we hold, the individual-to-candidate limit is constitutional, then under *California Medical Ass’n* so too is Alaska’s law that prevents evasion of that limit.

iii.

Alaska law limits the amount a political party may contribute to a municipal candidate to \$5,000. Alaska Stat. §§ 15.13.070(d), 15.13.400(15). Thompson does not challenge the dollar amount; he instead argues that the law’s

aggregation of political party sub-units is unconstitutional. He reasons that limiting party sub-units to the \$5,000 limit but not limiting multiple labor-union PACs to the same limit is discriminatory.

Thompson's discriminatory treatment argument fails because independent labor union PACs are not analogous to political party sub-units. Party sub-units, by definition, are subsidiaries of a parent entity—the umbrella political party. As such, they share the objectives and rules of the party. In the past, we have observed without remark that at least one other state similarly aggregates party sub-units for purposes of campaign contribution limits. *See, e.g., Lair II*, 798 F.3d at 740 (“Montana treats all committees that are affiliated with a political party as one entity.”). Different labor unions, by contrast, are entirely different entities. Moreover, political parties may donate more than labor union PACs (\$5,000 versus \$1,000), which undercuts the basis for a direct comparison between the two disparate sets of organizations. Alaska Stat. § 15.13.070(c), (d). We therefore reject Thompson's inchoate disparate treatment argument and uphold the political party-to-candidate limit.⁸

iv.

Finally, we address Thompson's challenge to Alaska's nonresident aggregate limit, which bars a candidate from accepting more than \$3,000 per year from individuals who are not residents of Alaska. Alaska Stat. § 15.13.072(a)(2), (e). This particular provision prevented Thompson from making a desired \$100 contribution to a candidate for the

⁸ Our holding should not be construed as foreclosing a constitutional challenge to the dollar amount of Alaska's (or some other state's) limit on political party-to-candidate contributions.

Alaska House of Representatives—his brother-in-law—because his brother-in-law had already received \$3,000 in out-of-state contributions.

The district court held that the nonresident aggregate limit serves an anti-corruption purpose. The court cited Alaska’s unique vulnerability to “exploitation by outside industry and interests,” and referenced trial testimony that those entities “can and do exert pressure on their employees to make contributions to state and municipal candidates.” *Thompson*, 217 F. Supp. 3d at 1039. The court determined that the nonresident limit therefore

further Alaska’s sufficiently important interest in preventing quid pro quo corruption or its appearance in two ways. First, [it] furthers the State’s anticorruption interest directly by avoiding large amounts of out-of-state money from being contributed to a single candidate, thus reducing the appearance that the candidate feels obligated to outside interests over those of his constituents. Second, the nonresident aggregate limit discourages circumvention of the \$500 base limit and other game-playing by outside interests, particularly given [the Alaska Public Offices Commission’s] limited ability and jurisdiction to investigate and prosecute out-of-state violations of Alaska’s campaign finance laws.

Id.

Taking the district court’s evidentiary findings as true, on de novo review we cannot agree that the nonresident limit targets quid pro quo corruption or its appearance. At most,

the law aims to curb perceived “undue influence” of out-of-state contributors—an interest that is no longer sound after *Citizens United* and *McCutcheon*. *McCutcheon*, 572 U.S. at 206–08. Indeed, Alaska’s argument that the nonresident limit “reduces the appearance that a candidate will be obligated to outside interests rather than constituents” says nothing about *corruption*.⁹ It is not enough to show that out-of-state firms—and particularly those wishing to exploit Alaska’s natural resources—“can and do exert pressure on their employees to make contributions to state and municipal candidates.” *Thompson*, 217 F. Supp. 3d at 1039.

Moreover, even if we agreed with Alaska that limiting the inflow of contributions from out-of-state extractive industries served an anti-corruption interest, the nonresident aggregate limit is a poor fit. Out-of-state interests can still maximize their influence across a large number of candidates—they just need to be early players so that they can contribute the maximum \$500 donation before each of those candidates reaches the \$3,000 limit.

McCutcheon is instructive on this point. There, the Court invalidated aggregate contribution limits that allowed an individual to contribute the maximum to multiple candidates but not to any additional candidates once the contributor hit the aggregate limit. 572 U.S. at 210–18. The Court held that the law was a poor fit for combating quid pro quo corruption or its appearance because contributions to a candidate before a contributor has reached the aggregate

⁹ In *Landell v. Sorrell*, the Second Circuit opined that the Alaska Supreme Court’s upholding of the nonresident limit “is a sharp departure from the corruption analysis adopted by the Supreme Court in *Buckley* and *Shrink*.” 382 F.3d 91, 148 (2d Cir. 2004), *rev’d on other grounds sub nom. Randall*, 548 U.S. 230.

limit are not somehow less corrupting than contributions to another candidate after the aggregate limit is reached. *See id.*

Alaska's showing as to its nonresident limit is analogous. Alaska fails to show why an out-of-state individual's early contribution is not corrupting, whereas a later individual's contribution—i.e., a contribution made after the candidate has already amassed \$3,000 in out-of-state funds—is corrupting. Nor does Alaska show that an out-of-state contribution of \$500 is inherently more corrupting than a like in-state contribution—only the former of which is curbed under Alaska's nonresident limit. Alaska fails to demonstrate that the risk of quid pro quo corruption turns on a particular donor's geography. Accordingly, while we do not foreclose the possibility that a state could limit out-of-state contributions in furtherance of an anti-corruption interest, Alaska's aggregate limit on what a candidate may receive is a poor fit.

As an alternative defense of the law, Alaska argues that the nonresident limit targets the important state interest of protecting its system of self-governance. We reject Alaska's proffered state interest for three reasons.

First, what Alaska calls "self-governance" is really a re-branding of the interest of combating influence and access that the Supreme Court has squarely rejected. To understand Alaska's proffered state interest, it is important to be clear on what the State does *not* mean by "self-governance." In the distinct context of a law restricting "who may exercise official, legislative powers," we recognized "self-governance" as a legitimate state interest. *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 531 (9th Cir. 2015) (en banc). In *Norris*, we used the

term “self-governance” to mean a state’s interest in controlling who governs.

Alaska’s (and the dissent’s) proffered state interest is materially different from what we called self-governance in *Norris*. Alaska’s version of “self-governance” is concerned with limiting not who governs (as in *Norris*) but who is allowed to contribute to the campaigns of those who would govern. Indeed, the dissent correctly characterizes Alaska’s proffered interest as seeking “to ensure that its legislators are responsive to the individuals that they represent, not to out-of-state interests.” Dissent at 37. The premise of Alaska’s concern with “outside control” is that Alaska state officials will feel pressure to kowtow to out-of-state entities because of nonresident contributions.

The dissent makes a cogent case for the view that states should be able to limit who may “directly influence the outcome of an election” by making financial contributions. See Dissent at 37. But that debate is over. The Supreme Court has expressly considered and rejected those arguments. See *McCutcheon*, 572 U.S. at 206–08 (holding that states do not have a legitimate interest in curbing “influence over or access to’ elected officials” by individuals “spend[ing] large sums” (quoting *Citizens United*, 558 U.S. at 359)). In short, Alaska’s proffered interest in “self-governance” is indistinguishable from the disavowed state interest in combating “influence over or access to” public officials.¹⁰

¹⁰ The Supreme Court has given no indication that the First Amendment interest in protecting political access waxes or wanes depending on the representative relationship between contributor and

Second, even if Alaska’s “self-governance” interest could be construed as distinct from the interest in combating influence and access, the Supreme Court’s recent campaign finance decisions leave no room for us to accept the State’s proffered interest. The Supreme Court’s opinions articulate “only one” narrowly defined legitimate state interest in capping campaign contributions: “preventing quid pro quo corruption or its appearance.” *McCutcheon*, 572 U.S. at 206–07. In *McCutcheon*, its banner campaign contribution case, the Court explains that it has “consistently rejected attempts to suppress campaign speech based on other legislative objectives.” *Id.* at 207. *McCutcheon* resolved that “[a]ny regulation *must instead target* what we have called ‘quid pro quo’ corruption or its appearance.” *Id.* at 192 (emphasis added) (citing *Citizens United*, 558 U.S. at 359). Indeed, “[c]ampaign finance restrictions that pursue other objectives . . . impermissibly inject the Government ‘into the debate over who should govern.’” *Id.* (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011)); *see also VanNatta v. Keisling*, 151 F.3d

candidate. *See Buckley*, 424 U.S. at 48–49. In fact, *Buckley*’s language arguably compels the opposite conclusion:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Id. (internal quotation marks omitted). Far from serving the goal of “secur[ing] the widest possible dissemination of information from diverse and antagonistic sources,” the nonresident limit artificially suppresses the free exchange of political ideas.

1215, 1217 (9th Cir. 1998) (noting “the lack of support for any claim based on the right to a republican form of government”). That unqualified directive leaves no room for Alaska’s averred self-governance interest. Campaign contribution limits rise or fall on whether they target quid pro quo corruption or its appearance.

The dissent suggests we are free to accept “self-governance” as an important state interest in justifying limits on campaign contributions because the Supreme Court has not expressly considered and rejected that specific interest. Although a prior three-judge opinion of our court does not bind a later panel on an issue that was not before the prior panel, when it comes to Supreme Court precedent, our court is bound by more than just the express holding of a case. Our decisions must comport with the “reasoning or theory,” not just the holding, of Supreme Court decisions (even in the face of prior contrary Ninth Circuit precedent). *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (adopting the view that lower courts are “bound not only by the holdings of higher courts’ decisions but also by their ‘mode of analysis’” (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989))); *see id.* at 900 (“[T]he issues decided by the higher court need not be identical in order to be controlling.”). The dissent’s conclusion that self-governance is an important state interest in this context is “clearly irreconcilable” with the Supreme Court’s reasoning in *McCutcheon*. *See id.*

Third, even if *McCutcheon* did not shutter the possibility of alternative state interests, self-governance is not an important state interest in light of countervailing First Amendment concerns. Indeed, Alaska fails to prove that nonresident participation in a state’s election infringes state sovereignty. Instead, it alleges in conclusory fashion that the

“nonresident limit also furthers the important state interest in protecting Alaska’s system of self-government from outside control.”

Accordingly, we hold that Alaska’s aggregate nonresident contribution limit violates the First Amendment, and we reverse the district court’s judgment on this issue.¹¹

CONCLUSION

States have an important interest in preserving the integrity of their political institutions. A vital method of doing so is by curbing large monetary contributions, which can corrode the public’s faith in its government’s responsiveness to the popular will. Thus, while campaign contributions implicate a contributor’s First Amendment right to express a particular political viewpoint, the State has an important interest in combating quid pro quo corruption or its appearance.

¹¹ The dissent relies on *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), but that case is inapplicable. The plaintiffs in *Bluman* were foreign citizens who sought the right to participate in the United States campaign process by, among other things, making financial contributions to candidates. *Id.* at 282–83. They argued they should be treated the same as American citizens (such as minors and American corporations) who, though unable to vote, are permitted to make campaign contributions. *Id.* at 290. The court rejected that argument and based its holding on the conclusion that the plaintiffs, in contrast to American citizens who are unable to vote, were, by definition, outside “the American political community.” *Id.* Thus, contrary to the dissent’s statement that *Bluman* cannot “be distinguished on the grounds that it involved a distinction between United States citizens and foreign nationals,” Dissent at 39, that distinction was the very basis for the *Bluman* court’s holding.

Under existing precedent, the district court correctly held that three of the four challenged provisions of Alaska’s 2006 campaign finance law are closely drawn to serve this interest. But the court erred in upholding the nonresident aggregate contribution limit because it, at most, targets contributors’ influence over Alaska politics. Since *Citizens United* and *McCutcheon*, preventing “undue influence” is no longer a legitimate basis for restricting contributions under the First Amendment. Accordingly, we reverse the district court on that provision and remand for entry of judgment consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

The parties shall bear their own costs.

THOMAS, Chief Judge, concurring in part and dissenting in part:

I agree with the majority that Alaska’s limitations on individual contributions to candidates and election-related groups and on political party contributions to individual candidates do not violate the First Amendment. However, I would hold that the nonresident aggregate contribution limit, which furthers Alaska’s important state interests in preventing quid pro quo corruption or its appearance and in preserving self-governance, also does not violate the First Amendment. Thus, I respectfully dissent from Section III(B)(iv) of the majority opinion. I would affirm the district court’s well-reasoned decision in its entirety.

I

To survive First Amendment scrutiny in this case, Alaska must establish that the limits are justified by the risk of quid pro quo corruption or its appearance. And its burden is light.¹ Alaska need only show that “the risk of actual or perceived quid pro quo corruption” by out-of-state actors is neither “illusory” nor “mere conjecture.” *Lair v. Motl*, 873 F.3d 1170, 1188 (9th Cir. 2017) (“*Lair III*”) (quoting *Eddleman*, 343 F.3d at 1092). After a seven-day bench trial, the district court concluded that Alaska had satisfied its burden. Its factual findings were not clearly erroneous, *see Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006) (describing standard), and its conclusions were amply supported by the record. Alaska demonstrated that nonresident contributions present a particular risk of quid pro quo corruption or its appearance.²

¹ Because Thompson raised no challenge to the amount of the aggregate limit, the only question is whether “there is adequate evidence that the limitation furthers” Alaska’s anti-corruption interest. *Lair v. Bullock*, 798 F.3d 736, 742 (9th Cir. 2015) (“*Lair II*”) (quoting *Mont. Right to Life Ass’n v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003)).

² The Supreme Court has specifically rejected Thompson’s argument that a ban is treated differently than a limit when it comes to connecting the regulation to the state’s important interest. *Fed. Elections Comm’n v. Belmont*, 539 U.S. 146, 162 (2003) (“It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected[.]”). And there is no question that Alaska may limit campaign contributions to prevent quid pro quo corruption or its appearance. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (9th Cir. 2000). Thus, the issue here is essentially whether the state may draw a line between residents and non-residents.

Alaska is uniquely vulnerable to exploitation by out-of-state actors. The district court found that this is so, in part, because of “Alaska’s almost complete reliance on one industry for a majority of its revenues.” *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1029 (D. Alaska 2016). Indeed, while 85 to 92% of Alaska’s budget derives from the oil and gas industry, that industry is not responsible for more than 50% of any other state’s budget. *Id.* As one pro-oil and gas organization proclaims on its website, “Alaska is the only state in the Union that is so dependent on one industry to fund its government services.” ALASKA OIL & GAS ASS’N, *State Revenue*, <https://www.aoga.org/facts-and-figures/state-revenue> (last visited Nov. 9, 2018). Today, not only does the State depend on the industry to fund its services, but boom-and-bust cycles have a more immediate impact on Alaskans’ daily lives, too: “the petroleum industry supports one-third of all Alaska jobs.” ALASKA OIL & GAS ASS’N, *Facts and Figures*, <https://www.aoga.org/facts-and-figures> (last visited Nov. 9, 2018).

The economic benefits of natural resource extraction do not come without a cost. The interests of out-of-state oil companies are often at odds with the interests of some Alaska residents. Today, “[a]bout 17 percent of Alaskans—or 120,000 people—live in rural areas, where 95 percent of households use fish and 86 percent use game for subsistence purposes[.]” Azmat Khan, *Living off the Land in Rural Alaska*, PBS, <https://www.pbs.org/wgbh/frontline/article/living-off-the-land-in-rural-alaska> (last visited Nov. 9, 2018). Resource extraction has the potential to cause irremediable damage to Alaskan lands and culture: “any change that depletes wild resources, reduces access to wild areas and resources, or increases competition between user groups can create problems for subsistence[.]” which is “among the most highly valued parts of [Alaska] culture”

and “essential . . . to rural economies.” Alaska Dep’t of Fish & Game, *Subsistence in Alaska: FAQs*, <http://www.adfg.alaska.gov/index.cfm?adfg=subsistence.faqs#QA14> (last visited Nov 9, 2018).

Given the oil and gas industry’s outsized impact on Alaska’s economy, it is not difficult to see why, as the district court found, Alaska is dependent upon and therefore particularly vulnerable to corruption by out-of-state corporations, whose interests are likely to be indifferent to those of Alaska’s residents. Alaska is vulnerable for another reason, too—with “the second smallest legislature in the United States and the smallest senate,” it takes only “ten votes [to] stop a legislative action such as an oil or gas tax increase from becoming law.” *Dauphinais*, 217 F. Supp. 3d at 1029. “Consequently, the incentive to buy a vote, and the chances of successfully doing so, are therefore higher in Alaska than in states with larger legislative bodies.” *Id.* The district court was persuaded by trial testimony that “the unique combination of Alaska’s small population, geographic isolation, and great natural resources make it extremely dependent on outside industry and interests.” *Id.* at 1039. Alaska cannot afford to extract its natural resources without out-of-state corporations. *Id.* And because out-of-state corporations cannot extract without the cooperation of government, these corporations do all they can to influence state politics. *Id.*

As the Supreme Court has recognized, “the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.” *Shrink Mo.*, 528 U.S. at 391 (citing *Buckley v. Valeo*, 424 U.S. 1, 27 (1976)). Thus, it is enough to demonstrate that out-of-state contributors are particularly interested in

corrupting the political process in Alaska, as the State has easily done.

But the proof at trial was more than theoretical. The district court found that “natural resource extraction firms can and do exert pressure on their employees” to contribute to political campaigns in Alaska. *Dauphinais*, 217 F. Supp. 3d at 1039. In other words, these out-of-state interests have found a way to circumvent the generally applicable contribution limits.

And, as the trial evidence demonstrated, Alaska’s history of corruption is, in fact, storied. As the majority has aptly noted, in the mid-2000s, a highly publicized scandal implicated ten percent of Alaska’s legislators for improperly taking money from VECO, a corporation that provided support services to out-of-state oil and gas corporations. *Id.* at 1030.

Unsurprisingly, the VECO scandal did not go unnoticed by the public. News outlets played an FBI surveillance video showing one member of the legislature, Representative Vic Kohring, accepting cash from VECO in exchange for his vote on pending oil tax legislation. Representative Kohring went on to pen a newspaper column claiming that the only thing separating him from other Alaska lawmakers was that he got caught. *Id.* at 1030. As the district court determined, the publicity surrounding the VECO scandal supports Alaska’s interest in limiting the appearance of quid pro quo corruption by out-of-state interests in order to preserve Alaskans’ belief in the integrity of their political system. *Id.* at 1031.

In sum, I would hold that Alaska’s important anti-corruption interest justifies a limit on nonresident speech. Nonresident contributions present a special risk of quid pro

quo corruption that is neither “illusory” nor “mere conjecture.” *Lair III*, 873 F.3d at 1188 (quoting *Eddleman*, 343 F.3d at 1092). Particularly in the aftermath of the VECO scandal, the nonresident aggregate contribution furthers Alaska’s interest in preventing the appearance of corruption, thereby increasing “[c]onfidence in the integrity of [Alaska’s] electoral processes,” a value “essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (per curiam). The district court was entirely correct, and the record supports its conclusion.

II

The nonresident aggregate cap is also justified by a second important state interest: self-governance. I would hold that self-governance is a sufficiently important interest to justify the nonresident aggregate cap.

A

“[T]he right to govern is reserved to citizens.” *Foley v. Connelie*, 435 U.S. 291, 297 (1978). There is no question that Alaska may bar nonresidents from voting, no matter how tangible their interest in a state election, *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68–69 (1978), even though “[n]o right is more precious” than the right to vote, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Because of the need for responsiveness to local interests, states may also closely guard from nonresident interference those “functions that go to the heart of representative government,” such as “state elective or important nonelective executive, legislative, and judicial positions[.]” *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973).

States should be able to prevent out-of-state interests from advancing candidates for whom the contributor cannot even vote. Campaign contributions are made primarily to directly influence the outcome of an election rather than to broadcast one's one political opinion. *Beaumont*, 539 U.S. at 161 (“[C]ontributions lie closer to the edges than to the core of political expression.”). Thus, they are “subject to relatively complaisant review.” *Id.*

The nonresident aggregate limit furthers Alaska's important state interest in protecting state sovereignty in governance. It is “the choice, and right, of the people to be governed by their citizen peers.” *Foley*, 435 U.S. at 296. When out-of-state interests fund political campaigns, they place an obstacle between the people and their representatives. Alaska must be able to take measures to ensure that its legislators are responsive to the individuals that they represent, not to out-of-state interests.

Alaska's interest in protecting self-government is “important,” as required under *Eddleman*'s first prong. *Lair II*, 798 F.3d at 742 (quoting *Eddleman*, 343 F.3d at 1092). Indeed, on en banc review, we held that a state's interest in “securing the people's right to self-government” was “compelling” in the face of a First Amendment challenge to a law requiring municipal initiative proponents to be bonafide electors. *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 531 (9th Cir. 2015) (en banc). The Supreme Court reached a similar conclusion regarding residence requirements under an Equal Protection analysis. *Dunn v. Blumstein*, 405 U.S. 330, 343–44 (1972) (recognizing as “substantial” the government's interest in “preserv[ing] the basic conception of a political community”).

B

Bluman v. Federal Election Commission, 800 F. Supp. 2d 281 (D.D.C. 2011), *summarily aff'd*, 132 S. Ct. 1087 (2012) (mem.), decided by a three-judge panel of the D.C. District Court, is analogous. There, the court considered a federal law preventing foreign nationals from making not only contributions but also independent expenditures to influence federal elections. *Id.* at 283. Because spending money to influence an election is not only “speech” but also “participation in democratic self-government,” foreign nationals may be subject to restrictions targeted at protecting sovereignty. *Id.* at 289.

In *Bluman*, the court recognized that “[p]olitical contributions and express-advocacy expenditures are an integral aspect of the process by which Americans elect officials to federal, state, and local government offices.” *Id.* at 288. “[I]t is undisputed that the government may bar foreign citizens from voting and serving as elected officers”; “[i]t follows that the government may bar foreign citizens . . . from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections.” *Id.*

Alaska presents an even stronger case than did the federal government in *Bluman*. There, the challenged law restricted individual expenditures as well as campaign contributions, and the court therefore applied strict scrutiny. *Id.* at 285 (citing *McConnell v. FEC*, 540 U.S. 93, 134–37 (2003) and *Buckley*, 424 U.S. at 20–23). Here, on the other hand, we need not identify a compelling government interest but only a “sufficiently important” one. *Lair II*, 798 F.3d at 742 (quoting *Eddleman*, 343 F.3d at 1092).

Nor can *Bluman* be distinguished on the grounds that it involved a distinction between United States citizens and foreign nationals. “It has long been recognized that resident aliens enjoy the protections of the First Amendment.” *Price v. I.N.S.*, 962 F.2d 836, 841 (9th Cir. 1991) (internal citations omitted). The line drawn in *Bluman* separates citizens with the right to participate in government from foreign nationals subject to federal law but with no corollary right of participation. Alaska draws its line even more carefully by applying the aggregate contribution limit only to nonresidents.³

C

I respectfully disagree that the Supreme Court has foreclosed this issue because it rejected other purported interests. Op. at 29–30. Foundational to the judicial role is a recognition that “[w]ithout jurisdiction the court cannot proceed at all in any cause.” *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (7 Wall.) (1868)). Jurisdiction extends only to “Cases” and “Controversies.” U.S. Const. art. III, § 2. It emphatically does not extend to issues that are not before a court. No court can reject a self-governance theory

³ This, too, is why *VanNatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998), is immediately distinguishable, even if it remains good law and speaks to this precise issue, both of which propositions are questionable. *VanNatta* is distinguishable because it limited out-of-district contributions to candidates for state office. *Id.* at 1217. Further, as we noted in *Eddleman*, reliance on the Court’s approach in *VanNatta* “fails to recognize the impact of the Supreme Court’s . . . decision in *Shrink Missouri*.” 343 F.3d at 1091 n.2. And the majority opinion in *VanNatta* is framed as a rejection of the state’s evidence and legal argument rather than as setting forth a hard-and-fast rule regarding the constitutionality of all limits on out-of-district contributions. 151 F.3d at 1217–18.

unless it is asked to do so. The Supreme Court has yet to take up this question; in resolving this controversy, it is not our role to apply a holding that does not exist.

D

“The Constitution limited but did not abolish the sovereign powers of the States, which retained ‘a residuary and inviolable sovereignty.’” *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1475 (2018) (quoting *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)). This basic principle arises from “a fundamental structural decision incorporated into the Constitution.” *Id.*

Our federalist system is not binary; it does not simply pit the states—as a single entity—against federal power. Rather, it recognizes the sovereignty of each individual state. In the words of Justice Marshall, “[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.” *McCulloch v. Maryland*, 17 U.S. 316, 403 (4 Wheat.) (1819). Under our Constitution, “the people of each state compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.” *Lane Cty. v. Oregon*, 74 U.S. 71, 76 (7 Wall.) (1868). “Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but . . . the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.” *Texas v. White*, 74 U.S. 700, 725 (7 Wall.) (1869).

In the current, highly partisan political climate, regional differences may be obscured by contentious national issues.

Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 962–63 (2016). However, “[e]ven at the level of national politics, . . . there always remains a meaningful distinction between someone who is a citizen of the United States and of Georgia and someone who is a citizen of the United States and of Massachusetts.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 859 (1995) (Thomas, J., dissenting).

Here, of course, we are not dealing with politics at a national level, but only with Alaska’s ability to take measures to “represent and remain accountable to its own citizens.” *Printz v. United States*, 521 U.S. 898, 920 (1997) (internal citations omitted). State governments can and should be “more sensitive to the diverse needs” of their populations. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Alaska must have the right to prevent non-resident interests from taking hold of their elections. See Anthony Johnstone, *Outside Influence*, 13 ELECTION L.J. 117, 122–23(2014) (“No form of federalism, and therefore no form of government under the Constitution, works without limits on outside influence in the states.”). Therefore, I disagree that Alaska’s self-governance interest is not “sufficiently important” for purposes of limiting campaign contributions. *Lair II*, 798 F.3d at 742 (quoting *Eddleman*, 343 F.3d at 1092).

III

For these reasons, I respectfully dissent, in part. I agree that Alaska’s limitations on individual contributions to candidates and election-related groups and on political party contributions to individual candidates do not violate the First Amendment. However, I also would hold that Alaska’s nonresident aggregate contribution limit is constitutional. Alaska has shown that the risk of quid pro quo corruption or

its appearance by out-of-state campaign contributions is neither “illusory” nor “mere conjecture.” *Lair III*, 873 F.3d at 1188 (quoting *Eddleman*, 343 F.3d at 1092). Further, it has demonstrated its important interest in self-governance, which justifies the nonresident aggregate limit. Thus, I would affirm the judgment of the district court in its entirety.



907-272-1481
info@aoga.org

Home Positions Facts and Figures Communications About Industry Contact Us

 Search

More than **1/3** of Alaska's jobs are tied to the oil and gas industry.



STATE REVENUE

Alaska is the only state in the Union that is so dependent on one industry to fund its government services. Since the completion of the Trans-Alaska Oil Pipeline, petroleum revenues to the State of Alaska have averaged over 85 percent.

In the state's 2013 fiscal year, oil and gas revenues represented 92 percent of Alaska's unrestricted revenue. Oil tax revenue has a significant effect on the state's ability to provide services to Alaskans.

TOTAL OIL REVENUE TO STATE FY2011 - FY2015 (\$ MILLIONS)

OIL REVENUE		2015 PROJECTED	2014 ACTUAL (YTD FISCAL)	2013 ACTUAL	2012 ACTUAL	2011 ACTUAL
Unrestricted	Production Tax	1,748.3	2,408.5	4,042.5	6,136.7	4,543.2
	Royalties Net	1,616.4	1,696.3	1,748.4	2,022.8	1,821.3
	Petroleum Corporate Income Tax	463.7	463.8	434.6	568.8	542.1
	Property Tax	97.4	99.6	99.3	111.2	110.6
	Hazardous Release	8.1	8.6	7.8	9.4	9.7
Royalties - Oil and Gas, Bonuses, Rents, Interest		14	21.1	19.4	8.9	22
Restricted	Royalties to Permanent Fund and School Fund	706.6	741.7	855.9	919.6	870.9
	Tax Settlements to Constitutional Budget Reserve Fund	20	20	176.6	102.1	167.3
	NPR-A Royalties, Rents and Bonuses	3.5	4	3.6	4.8	3
Total Oil Revenue		4,676	5,463.6	7,388.1	9,884.3	8,090.1

Facts and Figures

Economic Impact Reports

State Revenue

Corporate Income

Corporate Tax

Production Tax

Property Tax

Royalty

Did You Know?

Permanent Fund Dividend

Who Owns Big Oil?

Today's Stats

Most recent available



Alaska Crude
West Coast Delivery

\$73.24

-\$1.54

11/01/2018



Natural Gas
Henry Hub

\$3.24

-\$0.02

11/01/2018



Oil Production
507,370 bpd

99 bpd

11/01/2018

*cited in Thompson v. Hebdon
No. 17-35019 archived on November 20, 2018*

cited in Thompson v. Hebdon
No. 17-35019 archived on November 20, 2018



907-272-1481
info@aoga.org

Home Positions Facts and Figures Communications About Industry Contact Us

 Search

More than **1/3** of Alaska's
jobs are tied to the oil
and gas industry.



Facts and Figures

Economic Impact Reports

State Revenue

Did You Know?

Permanent Fund Dividend

Who Owns Big Oil?

Today's Stats

Most recent available

Alaska Crude
West Coast Delivery
\$73.24
-\$1.54
11/01/2018

Natural Gas
Henry Hub
\$3.24
-\$0.02
11/01/2018

Oil Production
507,370 bpd
99 bpd
11/01/2018

Source: [DOR-Tax Division](#)

FACTS AND FIGURES

Oil and Gas has Been Good to Alaska, Providing Jobs and Revenue

- The petroleum industry supports one-third of all Alaska jobs, generating 110,000 jobs throughout the state.
- For future generations, a portion of the state's oil revenues was set aside in 1976. Now the Alaska Permanent Fund distributes an annual dividend to every eligible Alaskan.
- Since the annual dividend started being distributed in 1982, a family of four has received a total of \$133,461.
- As of November 2014, the Alaska Permanent Fund was worth approximately \$51.7 billion.
- A family of four received an estimated \$22,000 in value from the oil industry in 2010.
- The State of Alaska has collected \$157 billion (in today's dollars) from oil since 1959.
- Oil and gas revenues continue to dominate the state's unrestricted revenue stream, accounting for 89 percent, or just over \$6 billion in fiscal year (FY) 2010.
- Even with falling production, the state estimates 90 percent of its revenue will continue to come from the oil and gas industry.

Alaska has Oil – but Higher Taxes Leads to Less Produced

- Prudhoe Bay remains one of the largest oil field in North America, with four of the top 10 producing oil fields existing on the North Slope.
- Alaska's waters are believed to contain more than 30 percent of the nation's known recoverable offshore

*cited in Thompson v. Hebdon
No. 17-35019 archived on November 20, 2018*

resources.

- Alaska's oil and gas industry has produced more than 17 billion barrels of oil and 13 billion cubic feet of natural gas.
- The Trans-Alaska Pipeline System (TAPS) is operating at only one-third of its capacity, and there has been a 39 percent decline in the past 10 years.
- Furthermore, production has dropped 68 percent since hitting a peak of 2 million barrels per day in 1988. It currently produces about 600,000 barrels per day. However, only one exploration well was drilled in 2011.

© 2018 Alaska Oil and Gas Association

cited in *Thompson v. Hebdon*
No. 17-35019 archived on November 20, 2018

ALASKA GOLD

Living Off the Land in Rural Alaska

JULY 24, 2012 / by AZMAT KHAN



Opponents of the proposed Pebble Mine argue that it could have far-reaching environmental impacts that could alter the Bristol Bay region's pristine ecosystem — and local residents' livelihoods.

Going back centuries, Bristol Bay's backbone has been salmon. With few stable year-round jobs, subsistence — defined by Alaska's Department of Fish and Game as

“noncommercial customary and traditional uses of fish and wildlife” — is the most consistent and reliable part of the local way of life in rural Alaska.

The state recognizes the cultural and economic value of native traditions of living off the land in a law known as “subsistence priority,” which protects “reasonable” opportunities for subsistence living over commercial or recreational fishing and gaming. Both the state and federal government have rules regulating the practice in rural areas, including seasonal and bag limits and restrictions on wasteful taking.

About 17 percent of Alaskans — or 120,000 people — live in rural areas, where 95 percent of households use fish and 86 percent use game for subsistence purposes, according to James Fall, the state-wide program manager for the Department of Fish and Game’s Division of Subsistence. The department says there’s “little evidence” this traditional way of life is disappearing.

Research from the Division of Subsistence (PDF) shows that fish is the most commonly harvested subsistence food in the state. In Bristol Bay, about 50 percent of the local subsistence harvest is Pacific salmon (PDF), mainly sockeye, and 10 percent is other fish, including halibut, herring, whitefishes, cod and Arctic char.

Land mammals, including moose and caribou, make up about 20 percent of the state’s subsistence harvest; marine mammals make up 14 percent; and birds, shellfish and wild plants account for 2 percent each. Subsistence living can also include using trees, like spruce, birch, hemlock, willow and cottonwood, for house logs, furs for clothing and wood for fuel.

Today Bristol Bay residents rely on a combination of cash-based economies and subsistence. A report on Bristol Bay (PDF) from the Alaskan Department of Fishing and Game estimated in 2005 that the cost of replacing wild foods in the region — based on buying meat at a local store or importing meat — would range between \$4,851 in Levelock to \$14,973 per household in the Iliamna Lake area.

In the excerpt from Alaska Gold embedded above, 75-year-old Bristol Bay native Mary

No. 17-35019 archived on November 20, 2018
cited in Thompson v. Hebert

Olympic explains how generations of her family have relied on the local ecosystem to sustain them.

But some supporters of the Pebble Mine argue the tradition of living off the land is no longer sustainable.

Sonny Lamont’s family is part of that group. “We live on salmon, we love our salmon, we enjoy our salmon,” he tells FRONTLINE in the above clip. “But it’s not going to get us gas for the Honda, it’s not going to get us gas for the truck, it’s not going to get us gas for the boat. It’s not going to pay the light bill, any kind of bills. Internet bill, phone bill, it’s not going to do that for us. And we need jobs to do that.”

RELATED STORIES

EPA Takes Step to Restrict Pebble Mine Project in Alaska

MARCH 3, 2014

EPA: "Alaska Gold" Mine a Threat to Salmon Fisheries

JANUARY 16, 2014

Anglo American Abandons "Alaska Gold" Mine

SEPTEMBER 16, 2013

Partner in Pebble Mine Fires Back At EPA Report

JULY 31, 2012

*No. 17-35019 archived on November 20, 2018
cited in Thompson v. Hebdon*



FILM:

> Alaska Gold

Your email address

Submit

Home

Films

Podcasts

Investigations

Schedule

Contact Us

Our Funders

Privacy Policy

PBS Privacy Policy

PBS Terms of Use

Corporate Sponsorship

ABOUT

About Us

History

Awards

Journalistic Guidelines

OUR TEAM
Senior Editorial Team

Jobs/Internships

Pressroom

*cited in Thompson v. Hebdon
No. 17-35019 archived on November 20, 2018*

TEACHER CENTER

PBS LearningMedia

FRONTLINE Teacher Center



Jon and Jo Ann Hagler on behalf of the Jon L. Hagler Foundation

FRONTLINE DIGITAL SUPPORTERS

Chris and Lisa Kaneb



MacArthur
Foundation



ABRAMS
FOUNDATION



JOHN AND HELEN
GLESSNER
FAMILY TRUST



Funding for FRONTLINE is provided through the support of PBS viewers and by the Corporation for Public Broadcasting. Major funding for FRONTLINE is provided by the John D. and Catherine T. MacArthur Foundation and the Ford Foundation. Additional funding is provided by the Abrams Foundation, the Park Foundation, The John and Helen Glessner Family Trust, Wyncote Foundation, and the FRONTLINE Journalism Fund with major support from Jon and Jo Ann Hagler on behalf of the Jon L. Hagler Foundation.

FRONTLINE is a registered trademark of WGBH Educational Foundation. Web Site Copyright ©1995-2018 WGBH Educational Foundation. PBS is a 501(c)(3) not-for-profit organization.

*cited in Thompson v. Hebdon
No. 17-35019 archived on November 20, 2018*



Search

 Fish & Game State of Alaska

Subsistence Information

[Subsistence Home](#)
[Harvest Data & Reports](#)
[Customary & Traditional](#)
[Reasonably Necessary](#)
[Subsistence Fishing](#)
[Subsistence Hunting](#)
[Nonsubsistence Areas](#)
[Federal Subsistence](#)
[Bird and Egg Harvest Data](#)
[Regulations & Permits](#)
[- Subsistence Fishing](#)
[- Subsistence & Personal Use Permits](#)
[FAQs](#)
[More Resources](#)
[- Videos](#)
[ADF&G Home](#) » [Subsistence Hunting & Fishing](#)
[Sign in](#)
[myADF&G](#)

Subsistence in Alaska

FAQs

These frequently asked questions focus primarily on state subsistence hunting and fishing. Some subsistence hunting and fishing in Alaska is regulated by agencies of the federal government, including:

- Subsistence hunting and fishing on federal lands and waters is regulated by the Federal government under a state-federal co-management Memorandum of Understanding.
- The Federal Subsistence Board and Regional Advisory Councils are administered by the [U.S. Fish and Wildlife Service, Office of Subsistence Management](#).
- Subsistence hunting for sea otters, polar bears, and walrus is managed by the [U.S. Fish and Wildlife Service](#).
- Subsistence hunting for seals, sea lions, and whales is managed by the [National Marine Fisheries Service \(NMFS\)](#).
- Subsistence hunting for migratory waterfowl is co-managed by the state and federal government through the [Alaska Migratory Bird Co-Management Council](#).
- Subsistence fishing for halibut is managed by the [National Marine Fisheries Service \(NMFS\)](#) under the [Restricted Access Management \(RAM\) Program](#).

1. [Q. What is subsistence fishing and hunting?](#)

Answer. Subsistence is defined in Alaska state laws as the “noncommercial customary and traditional uses” of fish and wildlife. These uses include:

- Food. In the 1990s (the last period for which a comprehensive estimate is available), the Division of Subsistence estimates that average rural subsistence harvest statewide was about 375 pounds of food per person per year. That is more than the U.S. average consumption of 255 pounds of domestic meat, fish, and poultry per year. Traditional foods are provided during funerals, potlatches, weddings, dances, and other ceremonial occasions.
- Sharing. Division research shows that fish and wildlife are widely shared with neighbors who cannot harvest for themselves because of age, disability, or other circumstances.
- Homes and other buildings. Spruce, birch, hemlock, willow, and cottonwood are used for house logs, fish racks, and many other items.
- Fuel. Wood is a major source of energy in rural homes, and is also used for smoking and preserving fish and meat.
- Clothing. Survey respondents report that wild furs and hides are still the best materials for ruffs (wind guards), mittens, parkas, kuspuks, linings, and mukluks (winter boots) in many regions.

No. 17-35019 archived on November 20, 2018
cited in *Hempson v. Hebdon*

- Tools and home goods. Hides are used as sleeping mats. Seal skins are used as pokes to store food. Wild grasses are made into baskets and mats.
- Transportation. Fish, seals, and other products are used to feed dog teams. Wood is used for sleds.
- Handicrafts (from non-edible portions of subsistence harvests). Division research shows that traditional products are also used in funerals, potlatches, weddings, dances, and other ceremonial occasions. Ivory, antlers, grass, wood, skins, and furs are crafted into beautiful items of art for sale and enjoyment.

Customary and traditional uses also include barter as well as “customary trade,” which is narrowly defined as the “limited noncommercial exchange, for minimal amounts of cash, as restricted by the appropriate board, of fish or game resources” (Alaska Statute 16.05.940[33]). Specialized products like seal oil are bartered and exchanged in traditional trade networks between communities. Furs sold to outside markets provide an important source of income to many rural areas.

The primary requirement for participation in subsistence fishing or hunting is Alaska residency, which is defined as having lived in Alaska for 12 consecutive months.

2. **[Q. How are subsistence fishing and hunting different from sport fishing and hunting?](#)**

Answer. General hunting and sport fishing are not classified as customary and traditional uses by the Alaska Board of Fisheries and the Alaska Board of Game. While subsistence fisheries use highly efficient gear, especially nets and fish wheels, most sport fishing takes place with rod and reel. Sport fisheries are open to non-Alaska residents, while only Alaskans may participate in subsistence fisheries. Wild resources taken in sport fisheries may not be bartered.

In many areas of the state, regulations for Alaska resident general hunts and regulations for subsistence hunts are the same. If there are not enough animals to provide for general hunts, the Alaska Board of Game adopts regulations to provide for subsistence opportunities while still sustaining the population. For more information, see our [Subsistence Hunting and Trapping Regulations information](#).

3. **[Q. Who decides what is a subsistence fishery or a subsistence hunt?](#)**

Answer. The Alaska Board of Fisheries and the Alaska Board of Game identify the fish stocks and game populations that are customarily and traditionally taken for subsistence purposes. To do this, the boards follow 8 criteria that have been adopted by regulation (5 AAC 99.010):

- Length of use
- Seasonality of harvest
- Methods and means of harvest
- Areas of harvest
- Methods of processing
- Transmittal of knowledge from generation to generation
- Sharing
- Reliance on and uses of a wide variety of resources

For more information about the criteria, select “Regulations,” from the global navigation bar above.

4. **[Q. Is subsistence for Alaska Natives only?](#)**

No. 17-35019 cited in *Thompson v. Hebdon*, 2018-11-20, archived on November 20, 2018.

Answer. As long as you are an Alaska resident with 12 consecutive months of residency, both Alaska Natives and non-Natives, and both rural and urban residents, may participate in subsistence fisheries and subsistence hunts (except for marine mammals).

In Alaska state law, subsistence uses include the customary and traditional uses of fish and wildlife outside nonsubsistence-use areas, *regardless of ethnicity*.

Marine mammals are the one exception. Under the federal Marine Mammal Protection Act, only Alaska Natives who live on the coast of the North Pacific Ocean or the Arctic Ocean may harvest marine mammals for subsistence purposes.

5. **Q. Isn't subsistence eligibility based on need? Is subsistence a type of welfare for people with low incomes?**

Answer. No. All Alaska residents are entitled to participate in state-administered subsistence hunts and fisheries in Alaska. In fact, Division of Subsistence research shows that households with the highest cash incomes in rural communities usually produce the most subsistence foods. Households with the lowest cash incomes usually produce less subsistence foods.

The households who produce the most subsistence foods in a community are usually households with large, mature labor forces that are fully equipped for hunting and fishing. Also, these households are usually composed of mature parents and one or more mature children. They have a greater cash income because there are usually several household members with cash-paying jobs.

More importantly, higher income households in rural Alaska typically produce extra subsistence foods—food that they then share with elderly relatives, the less fortunate, and young adults.

Because of the patterns of sharing, rural communities would suffer extreme hardship if subsistence hunting and fishing were limited to only households with low cash incomes. This would cut out the most productive households in the community.

6. **Q. How does subsistence involve money?**

Answer. In addition to basic necessities like fuel oil and electricity, clothing, and shelter, rural families use money to invest in the tools for hunting, fishing, and gathering—guns, ammunition, fishing nets, boats and boat motors, gasoline, rain gear, all-terrain vehicles, snowmachines, and so forth.

It is a common misconception that there is no money in traditional subsistence economies. Division research shows that trade and commerce have been part of traditional subsistence systems for thousands of years in Alaska. As a more recent example, the commercial fur trade with European markets began about 300 years ago, exchanging European currencies and goods for furs taken during subsistence trapping.

It is true that rural Alaskan economies operate differently from urban economies. Today's rural economies are "mixed economies:" families and communities live by combining wild resource harvests with commercial wage employment. Cash-paying jobs tend to be few and unstable (seasonal or temporary) and cash incomes thus smaller and less secure in rural Alaska than in urban Alaska. Rural economic activity tends to occur in family groups, rather than in businesses, and rural economic ventures are of smaller scale. Rural economic goals are usually for the benefit of family groups rather than for the monetary profits of a business. These are major

No. 17-35019 archived on November 20, 2018
cited in Thompson v. Hebdon

differences.

Alaska is a pluralistic society, with “mixed subsistence-cash” economies existing side-by-side with “industrial capital” economies in the population centers of Anchorage, Fairbanks, Juneau, and along the road system.

7. **[Q. If I have a subsistence permit, can I hunt and fish wherever I want and take as much as I want?](#)**

Answer. Generally, the answer is no. Subsistence hunting and fishing, like all other harvest opportunities, are subject to reasonable regulations, including seasons and bag limits. Rules against wasteful taking also apply throughout Alaska.

Select “Fishing” or “Hunting” from the global navigation bar above for specific information about opportunities and regulations in subsistence areas.

In addition, the Joint Boards of Fisheries and Game have designated 5 nonsubsistence areas, where dependence on subsistence is not a principal characteristic of the economy, culture, and way of life (AS 16.05.258 (c)). These areas are the:

- Ketchikan Nonsubsistence Area
- Juneau Nonsubsistence Area
- Anchorage, Matanuska/Susitna, and Kenai Nonsubsistence Area
- Fairbanks Nonsubsistence Area
- Valdez Nonsubsistence Area

Learn more about [Nonsubsistence Areas](#).

8. **[Q. Is big game \(like moose or caribou\) the main subsistence food?](#)**

Answer. As a general rule, no. Many small communities in Alaska depend many wildlife and fish resources, not just moose and caribou.

Division of Subsistence research shows that the main subsistence food is fish. Over 60% of the state's subsistence harvest by weight is fish, which includes salmon, halibut, herring, whitefishes, cod, and Arctic char/Dolly Varden. Land mammals represent about 20% of the state's subsistence harvest, marine mammals are about 14%, birds are about 2%, shellfish are about 2%, and wild plants are about 2%.

Of course, the types of foods people eat vary from place to place. For example, subsistence fishing is a smaller item in extreme coastal Arctic areas, where caribou, seals, whales, and walrus are the major subsistence resources.

9. **[Q. Does subsistence take most of the fish and game?](#)**

Answer. As a general rule, no. In the 1990s, commercial fisheries took about 97% of the statewide harvest of fish and wildlife; subsistence harvesters took 2%, and sport hunters and fishers took 1%.

These proportions vary by area. In the areas with roads, the sport harvest is usually larger than the subsistence harvest. In the areas without roads, the subsistence harvest is larger than the sport harvest. But statewide, commercial fishing is the leader in overall volume.

10. **[Q. Are subsistence foods safe to eat?](#)**

Answer. Overall, wild fish and wildlife are high quality, nutritious, and healthful foods.

No. 17-35019 cited in Thompson v. Heddon
prohibited on November 20, 2018

For advice about food safety, see the Alaska Department of Environmental Conservation [Food Safety and Sanitation Program](#).

For information about wildlife diseases, select "[Species](#)" from the global navigation bar above.

11. [Q. Is subsistence compatible with wildlife conservation?](#)

Answer. Yes. Like all wildlife harvests in Alaska, subsistence harvests are managed under the principle of sustained yield. Survey respondents report that rural communities depend on the land for subsistence. They report that it is to their advantage to maintain undamaged land and ecosystems, so wildlife are abundant and so residents' subsistence needs are met. Research has found that most subsistence communities have customary rules for treating the land and the ecosystem: "Do not waste," "Take only what is needed," "Treat the animals with respect," "Do not damage the land without cause," among others. Many respondents continue to affirm that if the rules are followed, then the land will provide.

12. [Q. Why don't subsistence hunters use bows and arrows?](#)

Answer. No matter the century, harvesting fish and wildlife for food requires equipment that works, is safe, and is ecologically and economically sustainable over the long term. Across the world, anthropological and archeological research shows that subsistence activities have always required the best technologies for the best success. In fact, historical records show that rural Alaska has been using guns for hunting longer than the rest of the United States has been using automobiles for transportation—since the 1860s in most areas. Other methods of harvesting fish and wildlife, such as fish weirs, caribou corrals, and moose snares, were outlawed many years ago.

In any age, subsistence equipment is usually small scale, appropriate technology. It is efficient and modern. In the 21st century, subsistence equipment commonly includes fish nets, fish wheels, aluminum skiffs with small outboard motors, snowmachines, binoculars, radios and mobile phones. These tools may be used alongside technologies that may seem more historical, including dog teams, skin boats, smoke houses, and fish basket traps, depending upon the areas and conditions.

13. [Q. Is subsistence disappearing?](#)

Answer. Although it is constantly changing, division research shows that there is little evidence that subsistence is disappearing as a way of life in Alaska. In many communities, subsistence activities are among the most highly valued parts of the culture. Subsistence harvests still are essential contributions to rural economies.

In general, any change that depletes wild resources, reduces access to wild areas and resources, or increases competition between user groups can create problems for subsistence.

14. [Q. How is subsistence fishing different from personal use fishing?](#)

Answer. Personal use fisheries differ from subsistence fisheries in that they do not meet the criteria established for customary and traditional fisheries (5 AAC 99.010) or they occur in nonsubsistence areas. Also, fish or shellfish harvested using a personal use permit cannot be sold or bartered (AS 16.05.940[24]).

For more information, see [Subsistence and Personal Use Fishing Licenses and](#)

No. 17-35019 archived on November 20, 2018
cited in Thompson v. Hebert

Permits.15. [Q. Do I need a license to go subsistence fishing? What about a permit?](#)

Answer. No fishing license is required, but you may need a permit. For more information, see [Subsistence and Personal Use Fishing Licenses and Permits](#).

16. [Q. Where can I subsistence fish?](#)

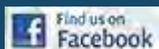
Answer. For areas open to subsistence fishing, visit the [Subsistence Fishing by Area](#) section. Select "Nonsubsistence Areas" for more information about areas closed to subsistence.

17. [Q. How can I go subsistence fishing for halibut?](#)

Answer. This is a federally-managed fishery. Regulations for subsistence halibut fishing in Alaska are adopted by the federal National Marine Fisheries Service based on recommendations from the federal North Pacific Fishery Management Council.

Under these regulations, you must be a resident of one a specifically-designated rural Alaska community or a member of a specifically-designated Alaska Native tribe. You must also obtain a Subsistence Halibut Registration Certificate (SHARC) from the Restricted Access Management (RAM) division of the National Marine Fisheries Service before fishing.

For more information, contact the National Marine Fisheries Service [Restricted Access Management Program](#).



*cited in Thompson v. Hebdon
No. 17-35019 archived on November 20, 2018*

[Accessibility](#) [Terms of Use](#) [Contact ADF&G](#)

Alaska Department of Fish and Game
P.O. Box 115526
1255 W. 8th Street
Juneau, AK 99811-5526
[Office Locations](#)

[State of Alaska](#) [myAlaska](#) [Departments](#) [State Employees](#)

Copyright © State of Alaska · Department of Fish and Game · [Email Us](#)

[Top of page](#)

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Answering Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Reply Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Other**	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
TOTAL:				\$ <input type="text"/>	TOTAL: \$ <input type="text"/>			

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk