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I. MONTANA'S CAMPAIGN FINANCE REGULATIONS HAVE TRADITIONALLY COMBATTED CORRUPTION

Montana has a long history of political corruption dating back more than a century.[1] The state's citizens have an unusually strong motivation to rein in the power that large donors have over political candidates. Montana's populist political culture developed through the long and eventually successful effort to seize control of the state GOVERNMENT from the grasp of an entrenched oligarchy. To this day, Montana schools pass down the story of how the 'Copper Kings' mining barons were finally evicted from the state legislature through populist election reform. Montana's culture and institutions resonate with the memory of these events, and the state's campaign finance regulations can only be properly understood in this context.[2]

Montana's campaign contribution limits were passed by popular referendum in 1994.[3] The limits were tested in *Montana Right to Life Association v. Eddleman*,[4] when the Ninth Circuit ruled that Montana's laws did not unconstitutionally limit freedom of speech.[5] In *Eddleman*, the Ninth Circuit determined: (1) there was adequate evidence that the regulation furthered a sufficiently important state interest, and (2) the limits were closely drawn—(a) focusing narrowly on the state's interest; (b) leaving the contributor free to affiliate with the candidate; and (c) allowing the candidate to amass sufficient resources to wage an effective campaign.[6] The *Eddleman* court also found that the state interest included "the broader threat from politicians too compliant with the wishes of large contributors."[7]

Less than a decade later in *Citizens United v. Federal Election Commission,*[8] the United States Supreme Court in a 5–4 ruling significantly restricted states' power to regulate campaign finance.[9] *Citizens United* limited the state interest in regulating campaign

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[1] *See*, *e.g.*, C. B. GLASSCOCK, WAR OF THE COPPER KINGS (1971).
[2] *See, e.g.*, W. Tradition P'ship v. AG, 271 P.3d 1, 8 (Mont. 2011).
[3] MONT. CODE ANN. § 13–37–216–218 (2015).
[4] 343 F.3d 1085 (9th Cir. 2003).
[5] *Id.* at 1088.
[6] *Id.* at 1092.
[7] *Id*.
[8] 558 U.S. 310 (2010). (Though *Citizens United* did identify a compelling state interest it did not say that there were no other lawful state interests. Perhaps the Ninth Circuit has left the door open to an analysis of this question by ordering the trial court to identify what the state interest is.)
[9] *Id.* at 359.

contributions to quid pro quo corruption or its appearance.[10] In the aftermath of *Citizens United*, state campaign finance laws across the country are being reexamined. An example is the United States Supreme Court's plurality decision in *Randall v. Sorell*,[11] which applied a different test to Vermont's campaign finance laws than the Ninth Circuit had applied in *Eddleman*.[12] However, in *Randall*, there was no majority opinion since Justice Thomas disagreed with the plurality's reasoning and concurred separately.[13] The focus of this note, *Lair v. Bullock*,[14] provides another example. In *Lair*, the question was whether *Citizens United* had changed the law so much that a different test must apply, such as the one used by the plurality in *Randall*.[15]

II. MONTANA'S CONTRIBUTION LIMITS ARE CHALLENGED

In *Lair v. Murry*,[16] ("*Lair I)* several candidates, contributors, and political organizations (together "the plaintiffs") brought suit to challenge Montana's dollar limits on campaign contributions.[17] Montana's limits differ for contributions by individuals and for contributions by political organizations (*e.g.*, parties and PACs).[18] The plaintiffs challenged the contribution limits on First Amendment grounds, claiming limits on contributions effectively abridge free speech in two ways: limiting contributions curtails a donor's free expression to associate with the candidate, and contribution limits reduce the amount of political speech that the candidate can express.[19] Montana defended the limits as necessary to achieve the compelling state interest of a corruption-free election process.[20] As a result of these laws Montana's elections are some of the most competitive in the country because candidates are funded mainly by small donors.[21]

A. District Court Finds Montana's Contribution Limits Unconstitutional

In a bench trial, the district court held that Montana's campaign finance limits unconstitutionally abridged the plaintiffs' freedom of

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[10] *Id.*
[11] 548 U.S. 230 (2006).
[12] *Id*.
[13] *Id.* at 265–273 (Thomas, J. with Scalia, J., concurring).
[14] 798 F.3d 736 (9th Cir. 2015) [hereinafter *Lair II*].
[15] *Id.*
[16] 903 F.Supp.2d 1077 (D. Mont. 2012) (*Lair I*) *rev'd, sub nom*. *Lair II*. (Defendant Jim Murry was Montana's Commissioner of Political Practices and was replaced by Atty. Gen. Bullock as named defendant on appeal.)
[17] *Id*. at 1078–1079.
[18] MONT. CODE ANN. § 13–37–216.
[19] *Lair I*, 903 F.Supp.2d at 1078.
[20] *Id.* at 1084.
[21] *Id.* at 1083; *see also* Edwin Bender, Symposium Article & Essay, *Evidencing A Republican Form of Government: The Influence of Campaign Money on State-Level Elections*, 74 MONT. L. REV. 165.

speech.[22] The district court did not feel bound by *Eddleman*, but instead looked to the Supreme Court's plurality opinion in *Randall*, reasoning that *Randall* had abrogated *Eddleman*.[23] The district court used the test applied in *Randall* to see if the contribution limits were closely drawn to match a state interest, and concluded they were not.[24] The district court determined that the contribution limits prevented candidates from amassing the resources necessary for effective campaign advocacy.[25] The district court also ruled that even assuming Montana had a sufficiently important interest at stake, the contribution limits were not closely drawn to match that assumed interest.[26] Montana appealed.

B. The Ninth Circuit Reverses the District Court

On appeal, now as *Lair v. Bullock,* ("*Lair II*") the Ninth Circuit reversed the district court's decision and remanded the case, ruling that *Randall* was not the controlling opinion.[27] Instead, it ruled *Randall*'s plurality did not abrogate *Eddleman* and its analysis remained good law.[28] *Citizens United* had only refined the compelling state interest to quid pro quo corruption or its appearance, but *Eddleman* showed how limits on campaign contributions can be closely drawn: the state must have (1) a compelling state interest; and (2) the interest must be narrowly tailored by leaving (a) contributors free to affiliate with candidates, and (b) candidates capable of raising sufficient funds to run an effective campaign.[29] The Ninth Circuit concluded the district court also erred when it did not identify the state's interest: it should not have assumed the state interest existed in considering whether the regulations were closely drawn.[30] The Ninth Circuit remanded the case to the district court with instructions to determine whether there was a compelling state interest of quid pro quo corruption or its appearance as defined by *Citizens United*.[31] Alternatively, if the district court again assumes there is a state interest, it must at least identify what that interest is.[32] After making that determination, the district court must then consider whether the regulation was closely drawn—but this time under *Eddleman* rather than *Randall*.[33]

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[22] *Lair I*, 903 F.Supp.2d at 1093.
[23] *Id*. at 1087.
[24] *Id*. at 1089.
[25] *Id*. at 1091–1092.
[26] *Id*. at 32–33.
[27] *Lair II*, 798 F.3d 736.
[28] *Id*. at 747.
[29] *Id*.
[30] *Id*. at 748.
[31] *Id*.
[32] *Id*. at 748–749.
[33] *Lair II*, 798 F.3d at 478–749.

III. MONTANA'S CONTRIBUTION LIMITS ARE CONSTITUTIONALLY SOUND

The district court should uphold Montana's limits because under the *Eddleman* analysis Montana has compelling state interest and the contribution limits are closely drawn. The campaign contribution limits combat corruption. Additionally, Montana's campaign contribution limits are not too low to allow donors to freely associate with the candidate. Candidates continue to have sufficient resources to wage effective campaigns, and the limits are narrowly tailored. Therefore, the limits do not unconstitutionally abridge the donors' freedom of speech.

A. Montana Still Has a Compelling State Interest

Montana's compelling state interest in campaign finance regulation is restricted to quid pro quo corruption or its appearance.[34] Quid pro quo corruption is not limited to criminal bribery; it also includes other types of corruption that are something less than criminal, such as dollars-for-votes transactions or even the appearance of such corruption.[35] This definition excludes 'mere influence' over politicians, but does include trading votes for contributions.[36] The risk of quid pro quo corruption is generally applicable only to money directed to a candidate or officeholder.[37]

Montana has a demonstrated interest in combating quid pro quo corruption. Although the *Eddleman* opinion defined the state interest more broadly than would be allowed now, the facts of that case supported a narrower holding consistent with *Citizen's United*.[38] In *Eddleman*, a 30-year veteran of the Montana legislature testified that special interest groups targeted contributions when particular issues approached a vote "because it gets results."[39] A state senator exposed dollars-for-votes contributions by the insurance industry.[40] This quid pro quo activity goes beyond 'mere influence' into the territory of quid pro quo corruption. Montana's compelling state interest has sufficient evidentiary support to pass constitutional muster.

B. Citizens Can Freely Affiliate with Candidates

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[34] *Id.* at 742.
[35] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1451 (2014) (citing *Citizens United*, 558 U.S. at 360).
[36] *Id.*
[37] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 103 (2003).
[38] *Id.*
[39] *Eddleman*, 343 F.3d at 1093.
[40] *Id.*

Montana's campaign contribution limits do not significantly limit citizens' ability to affiliate with candidates. In *Eddleman*, the Ninth Circuit ruled that Montana's campaign finance laws allowed contributors to freely associate with the candidates.[41] Since *Eddleman* was decided, there has not been any change to citizen's freedom to affiliate with candidates. Citizens are free to volunteer and participate in campaigns. Citizens may continue to donate to candidates within the limits. They can also use social media and other electronic platforms to associate with candidates. The freedom to associate is not implicated in Montana's campaign contribution limits.

C. Candidates Can Wage Effective Campaigns

Montana's contribution limits do not prevent candidates from having sufficient resources for an effective campaign. Although the district court's first analysis was done under *Randall*, the sufficient resources test is also an *Eddleman* factor. In the *Randall* analysis, the district court held that Montana's limits were unconstitutionally low because they were below the 'lower bound' of limits acceptable.[42] However, under *Eddleman* the test is simply whether candidates have enough resources to mount an effective campaign.[43] The resources requirement is not limited to individual campaign contributions—resources can come from many donors; including political parties, PACs, and volunteers. The Ninth Circuit determined in *Eddleman* that Montana's limits did allow campaigns to raise adequate resources.[44] It observed that 90% of donors do not contribute up to the limits.[45] Political parties and PACs can still accept large contributions, which can then be spent supporting campaigns.[46] These organizations are subject to enhanced disclosure requirements, which serves the state's interest in monitoring potential quid pro quo corruption while also allowing campaigns to amass sufficient resources to wage effective campaigns.

D. Montana's Limits Are Narrowly Tailored

Montana's laws remain narrowly tailored because contribution limits differ depending on the contributor, which is a structure that directly addresses the corruption interest. Narrow tailoring does not require the exhaustion of every conceivable alternative, as long as the laws are closely drawn to a state interest.[47] Contributions by individuals

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[41] *Id.* at 1098.
[42] *Lair I*, 903 F.Supp.2d at 31, 44.
[43] *Eddleman*, 343 F.3d at 1092.
[44] *Id*. at 1096.
[45] *Id.* at 1094.
[46] MONT. CODE ANN. § 13–37–229.
[47] *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

are capped at a lower level than those made by political organizations. The lower individual contributions are large enough to allow free association with a candidate but small enough to prevent quid pro quo 'dollars for votes' contributions. The higher cap on contributions by organizations like parties and PACs allows candidates to amass sufficient resources. Put together, the structure is narrowly tailored to the state's interest in curbing corruption or its appearance.[48]

Disclosure requirements also support the narrow tailoring requirement. The plaintiffs contend the laws are not closely drawn because the political party limit is under-inclusive—exceptions for personal expenses allowed under the individual contribution limits render contribution limits moot.[49] A private donor can pay for personal services to a candidate, but if the donor gives that money to a party and the party gives it to the candidate, then the law is violated.[50] The individual limits are too low for any serious allegations of corruption, but at the same time donors can give unlimited amounts under the personal expenses exception. However, personal services contribution are subject to enhanced disclosure requirements under Mont. Code Ann. § 13–37–229, which allows the public to scrutinize donors and candidates who attempt to evade contribution limits. The contribution limits together with the disclosure requirements are narrowly tailored to limit or publicize individuals' financial involvements with candidates.

Montana's limits are still narrowly tailored—*Citizens United* did not change this part of the analysis. In *Eddleman*, the Ninth Circuit determined that Montana's limits were closely drawn to prevent undue influence, and quid pro quo corruption is a subset of undue influence.[51] The laws were not too restrictive using the looser definition of the state interest, and they likely are not too restrictive using *Citizens United's* narrower definition. Montana's campaign contribution limits are narrowly tailored to the state interest.

IV. MONTANA'S CONTRIBUTION LIMITS SHOULD BE UPHELD

Montana's campaign contribution limits directly address the anti-corruption state interest. While the minimum standard for corruption applied in *Eddleman* was much broader, the facts of that case also meet the definition of quid pro quo corruption or its appearance. Even if the contribution limits were originally conceived to prohibit a broader range of activity, they are still sufficiently tailored to pass muster under the

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[48] *Id.*
[49] James Bopp, Jr., Counsel for the Appellee, Oral Arguments re: Lair v. Bullock (Feb. 5, 2015), *available at* https://youtu.be/2xxMyJ3dzzs.
[50] *Id.*
[51] *Eddleman*, 343 F.3d at 1092–93.

narrower *Citizens United* standard. Montana's long history of combatting corruption demonstrates that there is a compelling state interest.

Montana's contribution limits are also closely drawn to that anti-corruption interest. There is a freedom to affiliate that has been unchanged since *Eddleman* was decided. While Montana's individual contribution limits are low by national standards, candidates still are capable of amassing sufficient resources to mount effective campaigns. Under an *Eddleman* analysis, the contribution limits are not so stifling as to render campaigns ineffective. Montanans wanted low contribution limits specifically to combat the type of quid pro quo corruption experienced in the age of the Copper Kings by requiring candidates to obtain broad-based contribution support.[52] The limits are narrowly tailored given Montana's history of political corruption. Because Montana has a compelling state interest and its campaign contribution limits are narrowly tailored to that interest, the limits should be upheld in the next hearing before the district court.

[52] *See* MONT. CODE ANN. § 13–35–504 (mandating Montana's congressional delegation work to amend the U.S. Constitution to abrogate *Citizen's United*'s restrictions).