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## *Lair v. Motl*: A Step Back in Montana's Fight Against Corruption

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## CASENOTE; *Lair v. Motl*: A Step Back in Montana's Fight Against Corruption

Dillon Haskell

### I. INTRODUCTION

States that wish to limit campaign contributions may do so only by showing an important state interest in combating actual quid pro quo corruption or its appearance.<sup>1</sup> For many years, courts gave actual and apparent corruption a broad definition, but the last decade of Supreme Court rulings have narrowed it.<sup>2</sup> In *Lair v. Motl*,<sup>3</sup> the United State District Court for the State of Montana was presented with the question of whether Montana had an important state interest in combating quid pro quo corruption and whether its campaign contribution limits were closely drawn to that end.<sup>4</sup> The court had already answered this question before.<sup>5</sup> But here, the district court had the challenging task of distinguishing acceptable state interests in a post-*Citizens United v. FEC*<sup>6</sup> world.

### II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Doug Lair, Steve Dogiakos, John Milanovich, American Tradition Partnership, and multiple other political committees and political party organizations brought the action.<sup>7</sup> They alleged that several of Montana's campaign finance and election laws were unconstitutional, and they named James Murry, Steve Bullock, and Leo Gallagher as defendants.<sup>8</sup>

Doug Lair and Steve Dogiakos each hoped to give financial contributions in excess of the statutory limitations to Montana candidates running for political office.<sup>9</sup> John Milanovich, a Bozeman businessman who had run for state office in the past, alleged the contribution limits had

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<sup>1</sup> *McCutcheon v. Fed. Election Comm'n.*, 134 S. Ct. 1434, 1441 (2014).

<sup>2</sup> *Compare, e.g., id. to Nixon v. Shrink Missouri Govt. PAC*, 528 U.S. 377 (2000).

<sup>3</sup> 189 F. Supp. 3d 1024 (D. Mont. 2016) [hereinafter *Lair III*].

<sup>4</sup> *Id.*

<sup>5</sup> *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003) (an appeal affirming the district court's decision).

<sup>6</sup> 558 U.S. 310 (2010).

<sup>7</sup> *Lair v. Murry*, 903 F. Supp. 2d 1077, 1078 (D. Mont. 2012), *rev'd and remanded sub nom. Lair v. Bullock*, 787 F.3d 989 (9th Cir. 2015), and *rev'd and remanded sub nom. Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015) [hereinafter *Lair I*].

<sup>8</sup> *Id.* at 1079.

<sup>9</sup> *Id.* at 1078. Lair is also a Montana director for American Tradition Partnership. Associated Press, *ATP Directors Reveal Identities in Court Filing*, BILLINGS GAZETTE, Apr. 15, 2013, available at [http://billingsgazette.com/news/state-and-regional/montana/atp-directors-reveal-identities-in-court-filing/article\\_10206efa-b558-52fe-b906-737e6a3d56bb.html](http://billingsgazette.com/news/state-and-regional/montana/atp-directors-reveal-identities-in-court-filing/article_10206efa-b558-52fe-b906-737e6a3d56bb.html).

been an obstacle when running for office.<sup>10</sup> American Tradition Partnership is a political committee that had previously brought challenges to Montana's campaign finance laws.<sup>11</sup> It also alleged here, as it had before, that Montana's campaign contribution limits violated its right to free speech.<sup>12</sup>

Defendant James Murry was the Commissioner of Political Practices at the time of the initial complaint, Steve Bullock was the Attorney General for the State of Montana, and Leo Gallagher was the Lewis and Clark County Attorney.<sup>13</sup> Murry was replaced by Jonathan Motl, the current Commissioner of Political Practices, by the time the district court handed down its May 2016 ruling.<sup>14</sup> Bullock was also replaced by Tim Fox, the current Attorney General.<sup>15</sup> Gallagher has remained the Lewis and Clark County Attorney.<sup>16</sup>

Plaintiffs initially brought their suit on September 6, 2011, in the Billings Division of the District of Montana, but the case was later transferred to the Helena Division upon Defendants' motion for a change in venue.<sup>17</sup> Almost immediately in the case Plaintiffs moved for a preliminary injunction to prevent enforcement of five Montana statutes regulating political campaigns.<sup>18</sup> Ultimately, the court granted Plaintiffs' motion as to three of the five statutes.<sup>19</sup> The parties agreed to resolve the controversy surrounding the individual and political committee contribution limits and the political party contribution limits in a bench trial, which was held from September 12, 2012, to September 14, 2012.<sup>20</sup>

At trial, Plaintiffs supplied the court with testimony from witnesses representing multiple political committees alongside testimony from would-be donors and candidates for political offices.<sup>21</sup> The general consensus among Plaintiffs' witnesses was that the contribution limits prevented many donors from giving more to candidates and prevented

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<sup>10</sup> *Lair I*, 903 F. Supp. 2d at 1082.

<sup>11</sup> *See* *Am. Tradition P'ship., Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

<sup>12</sup> *See id.*

<sup>13</sup> *Lair I*, 903 F. Supp. 2d at 1079.

<sup>14</sup> *Lair III*, 189 F. Supp. 3d at 1024.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1026.

<sup>18</sup> *Id.* at 1027. The statutes at issue were: MONT. CODE ANN. § 13-35-225(3)(a) (2011), which required authors of campaign materials about another candidate's voting record to disclose the candidate's full voting record for the bill at issue; § 13-37-131, which made it "unlawful for a person to misrepresent a candidate's public voting record with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false"; § 13-37-216(1), (5), which limited individual and political committee campaign contributions; § 13-37-216(3), (5), which limited aggregate contribution amounts for all political parties; and § 13-35-227, which prevented direct contributions to campaigns or independent campaign expenditures by corporations.

<sup>19</sup> *Id.* Defendants were enjoined from enforcing the disclosure requirements of candidate voting records, the political civil-libel statute, and the statute barring corporate contributions and expenditures. § 13-37-216(1), (3), (5) remained at issue for the Court's bench trial.

<sup>20</sup> *Id.*

<sup>21</sup> *Lair I*, 903 F. Supp. 2d at 1082-83.

candidates from effectively promulgating their messages.<sup>22</sup> Witnesses for Defendants testified that much more than monetary contributions go into running an effective campaign, like eliciting help from volunteers.<sup>23</sup> They also testified that Montana's limits did not prevent effective campaigning.<sup>24</sup>

An expert for Plaintiffs, Clark Benson, testified about his analysis of campaign spending in Montana elections from 2004 to 2010.<sup>25</sup> Benson found that nearly a third of campaign contributions were at the maximum level allowable by statute and 40% of candidates received the maximum allowable aggregate limit from their parties.<sup>26</sup> He also found that the average campaign spends 7% more funds than it raises, concluding that campaigns struggle to meet their financial needs and communicate effectively with voters.<sup>27</sup>

Following the bench trial, on October 3, 2012, the court issued an order declaring the contribution limits unconstitutional.<sup>28</sup> In reaching this first decision, the court relied heavily on the United States Supreme Court's plurality opinion in *Randall v. Sorrell*.<sup>29</sup> Although the Ninth Circuit had previously upheld Montana's contribution limits in *Montana Right to Life Association v. Eddleman*,<sup>30</sup> the district court believed that *Eddleman* was no longer binding because of the intervening decision in *Randall*.<sup>31</sup>

After the order, Defendants filed a notice of appeal and a motion to stay pending appeal.<sup>32</sup> On October 16, 2012, the Ninth Circuit granted Defendant's motion to stay for the duration of the appeal, believing Defendants were likely to succeed because *Eddleman* was not abrogated in full by *Randall*.<sup>33</sup> On May 26, 2015, the Ninth Circuit issued its opinion.<sup>34</sup> The Ninth Circuit reversed and remanded the decision, holding that "the district court applied neither *Citizens United's* new formulation of what constitutes an important state interest nor the correct formulation of whether the state's contribution limits are 'closely drawn' to the state's goal of preventing quid pro quo corruption or its appearance."<sup>35</sup> The Ninth

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1084.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1080.

<sup>26</sup> *Id.* Defendants' expert witness, Edwin Bender, found similar campaign contribution statistics to Benson's. *Id.* at 1083–84.

<sup>27</sup> *Id.* at 1081.

<sup>28</sup> *Lair III*, 189 F. Supp. 3d at 1027.

<sup>29</sup> *Lair I*, 903 F. Supp. 2d at 1087–94 (citing *Randall v. Sorrell*, 548 U.S. 230 (2006)).

<sup>30</sup> 343 F.3d 1085 (9th Cir. 2003).

<sup>31</sup> *Lair I*, 903 F. Supp. 2d at 1087.

<sup>32</sup> *Lair III*, 189 F. Supp. 3d at 1027.

<sup>33</sup> *Id.* at 1027–28.

<sup>34</sup> *Id.* at 1028. The opinion was later reissued and amended on September 1, 2015. Any references to *Lair II* in this note reference the amended opinion.

<sup>35</sup> *Lair v. Bullock*, 798 F.3d 736, 740 (9th Cir. 2015) (footnote omitted) [hereinafter *Lair III*]. The Ninth Circuit explained that the closely drawn test used in this quote is a test that "ensures the state's

Circuit reasoned that Montana’s campaign contribution limits needed to be “tested under the new and more restrictive standard of *Citizens United*, and the correct ‘closely drawn’ test [from *Eddleman*].”<sup>36</sup>

After the case returned to the district court, the court held a status conference on November 10, 2015, where it agreed to additional time for discovery to show whether there was an important state interest behind the contribution limits.<sup>37</sup> Each party filed cross-motions for summary judgment, and on May 17, 2016, the court issued its opinion.<sup>38</sup> It held that (1) the state failed to show that the campaign contribution limits furthered the important state interest of combating quid pro quo corruption, (2) the campaign contribution limits did not narrowly focus on that important state interest, and (3) the campaign contribution limits prevented candidates from acquiring the resources necessary to fund effective campaigns.<sup>39</sup> Therefore, under this new standard, the court held Montana’s campaign contribution limits to be unconstitutional.<sup>40</sup>

### III. HOLDING

While in *Eddleman* the court held Montana’s campaign contribution laws to be constitutional, the Ninth Circuit instructed the district court to use the *Citizens United* standard for what constitutes an important state interest for campaign contribution limitations.<sup>41</sup> Therefore, the court’s analysis followed the framework from *Eddleman*, but it was also guided by the *Citizens United* standard. The court would uphold Montana’s campaign contribution limits if:

(1) there is adequate evidence that the limits further the sufficiently important state interest of combating quid pro quo corruption or its appearance, and (2) if the limits are closely drawn, meaning they (a) focus narrowly on the above 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.<sup>42</sup>

Plaintiffs and Defendants disagreed about what qualified as quid pro quo corruption or its appearance. Plaintiffs argued that quid pro quo corruption only occurs when there is an actual exchange of value for an

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contribution limits are not lower than needed to accomplish the state’s goal of preventing quid pro quo corruption or its appearance.” *Id.* at 740 n.4.

<sup>36</sup> *Lair II*, 798 F.3d at 740.

<sup>37</sup> *Lair III*, 189 F. Supp. 3d at 1028. Note that the text of the opinion states that a status conference was held on November 10, 2016. The date has been corrected to match the timeline of the case.

<sup>38</sup> *Id.* at 1024.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1031.

<sup>42</sup> *Id.*

official's improper promise or commitment.<sup>43</sup> Defendants argued that Plaintiffs failed to acknowledge the standard also covers the *appearance* of quid pro quo corruption.<sup>44</sup> They maintained quid pro quo corruption or its appearance is a “know it when you see it” inquiry.<sup>45</sup> Therefore, Defendants stressed that their evidentiary burden was low.<sup>46</sup>

While the district court rejected Plaintiffs' definition of quid pro quo corruption or its appearance, it also rejected Defendants' contention that the campaign contribution limits further the important state interest of combating corruption.<sup>47</sup> The court found that in each instance of corruption submitted by Defendants, legislators either rejected offers that would have amounted to corruption, or they pledged to align themselves with corporate agendas they would have likely been aligned with anyway.<sup>48</sup> In fact, the court went so far as to state, “[I]f anything, the evidence shows that Montana politicians are relatively incorruptible.”<sup>49</sup>

In the second part of its analysis, the court held that Montana's campaign contribution limits failed the “closely drawn” portion of the *Eddleman* test for two reasons: first, the statutes were not narrowly focused on an anti-corruption interest,<sup>50</sup> and second, the statutes “prevent candidates from amassing sufficient resources to wage effective campaigns.”<sup>51</sup> To determine how narrowly focused the statutes were, the court looked to the Montana's voter information pamphlet describing the original arguments in support of the contribution limit measures.<sup>52</sup> According to the court, the pamphlet emphasized the “*impermissible* interests of reducing influence and leveling the playing field”—justifications for contribution limits that were soundly rejected by the Supreme Court in *McCutcheon v. Federal Election Commission*.<sup>53</sup> The court also found, based on the original testimony from experts from both parties, that the average competitive campaign spends 7% more money than it raises.<sup>54</sup> Therefore, the court reasoned that the contribution limits prevented adequate funding for campaigns and gave incumbents an unfair

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<sup>43</sup> *Id.* at 1032.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Defendants also cited multiple examples of actual or apparent quid pro quo corruption in Montana politics. These included: a letter from a senator to other senators encouraging them to support a bill favored by a PAC so the PAC would continue to give campaign contributions; an offer of \$100,000 to a group of legislators in exchange for pushing forward a right-to-work bill; candidates pledging “100% support” for corporate groups' legislative agendas in exchange for campaign assistance from the groups; and two state district court decisions that found candidates to have engaged in quid pro quo corruption and a third decision where a candidate allegedly accepted an illegal contribution as part of quid pro quo. *Id.* at 1033–34.

<sup>47</sup> *Id.* at 1034.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1035.

<sup>51</sup> *Id.* at 1035–36.

<sup>52</sup> *Id.* at 1035.

<sup>53</sup> *Id.* (citing *McCutcheon*, 134 S. Ct. at 1450–51) (emphasis in original).

<sup>54</sup> *Id.* at 1036.

advantage.<sup>55</sup> Altogether, even if the court had found the existence of an important state interest, it concluded the limits would have still failed the *Eddleman* closely-drawn analysis.<sup>56</sup> Accordingly, the court granted Plaintiffs' motion for summary judgment and found the contribution limits unconstitutional.<sup>57</sup>

#### IV. ANALYSIS

The Ninth Circuit instructed the district court to apply the new standard for important state interests for contribution limits from *Citizens United*. The only important state interest for a contribution limit after *Citizens United* is the prevention of actual quid pro quo corruption or its appearance. The district court, however, applied a heightened standard, requiring Montana to show actual quid pro quo corruption. Then, the court applied an erroneous standard for determining whether the limits are narrowly focused to Montana's interest. Finally, the court reached the inaccurate conclusion that candidates are unable to "amass sufficient resources to wage an effective campaign."

##### A. Evolution of "Corruption"

The key difference between this case and prior decisions about contribution limits is the United States Supreme Court's evolving—or rather, *devolving*—definition of corruption. The starting point for any campaign finance case is the Supreme Court's decision in *Buckley v. Valeo*.<sup>58</sup> There, campaign contribution limits were held to be constitutional so long as they were enacted to prevent actual corruption or the appearance of corruption that can result from contributions made in excess of the limits.<sup>59</sup> While preventing corruption was a valid important state interest, the Court never clearly defined corruption. For many years, the Court saw corruption as "not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."<sup>60</sup>

In 2003, the Ninth Circuit first evaluated Montana's contribution limits under the *Buckley* and *Nixon v. Shrink Missouri Government PAC*<sup>61</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1038. It is also worth noting that Rick Hill, a former candidate for governor, became a plaintiff-intervenor in the case after the court first ruled the campaign contribution limits unconstitutional in October 2012. Between the court's ruling and the stay issued by the Ninth Circuit just a few days later, Rick Hill accepted a \$500,000 donation for his campaign. Although he had been threatened with an enforcement action for treble damages, the court's ruling here also eliminated any possibility of a judgment against him. *Id.*

<sup>58</sup> 424 U.S. 1 (1976).

<sup>59</sup> *Id.* at 26.

<sup>60</sup> *Shrink*, 528 U.S. at 389.

<sup>61</sup> 528 U.S. 377 (2000).

standards.<sup>62</sup> In *Eddleman*, the Ninth Circuit synthesized *Buckley* and *Shrink* into a uniform test:

[S]tate campaign contribution limits will be upheld if (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and (2) if the limits are “closely drawn”—i.e., if they (a) focus narrowly on the state’s interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign.<sup>63</sup>

Ultimately, the Ninth Circuit found that Montana had shown an important state interest in preventing corruption or its appearance in Montana’s electoral system.<sup>64</sup> The Ninth Circuit also found that Montana’s contribution limit statutes were closely tailored to achieve its purpose.<sup>65</sup>

In 2010, the Supreme Court revisited *Buckley* and *Shrink*’s definition of corruption in *Citizens United*.<sup>66</sup> Its decision reined in the broad terms by which a state could show a sufficiently important government interest in preventing corruption.<sup>67</sup> In *Citizens United*, the Court held that only the prevention of actual or apparent quid pro quo corruption could satisfy the requirement for an important state interest for campaign contribution limits.<sup>68</sup> Where *Citizens United* left any remaining doubt, *McCutcheon* solidified the Court’s intent: “Any regulation must instead target what we have called ‘quid pro quo’ corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money.”<sup>69</sup>

When the district court first approached *Lair I*, it faced a difficult task. While each case presented challenges to different statutes, *Lair I* and *Eddleman* were nearly identical challenges to the same individual contribution limits.<sup>70</sup> However, major Supreme Court decisions had drastically changed the way the district court was to analyze Montana’s interest in maintaining contribution limits. The district court assumed Montana still had an important state interest for the limits because of *Eddleman*, but it believed the Supreme Court’s decision in *Randall v. Sorrell* abrogated *Eddleman*’s closely-drawn test.<sup>71</sup>

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<sup>62</sup> *Eddleman*, 343 F.3d 1085 (citing *Buckley*, 424 U.S. 1; *Shrink*, 528 U.S. 377).

<sup>63</sup> *Id.* at 1092.

<sup>64</sup> *Id.* at 1098.

<sup>65</sup> *Id.*

<sup>66</sup> *Citizens United*, 558 U.S. 310.

<sup>67</sup> *Id.* at 359.

<sup>68</sup> *Id.*

<sup>69</sup> *McCutcheon*, 134 S. Ct. at 1441 (emphasis in original; internal citations omitted).

<sup>70</sup> Compare *Lair I*, 903 F. Supp. 2d 1077, to *Eddleman*, 343 F.3d 1085.

<sup>71</sup> *Lair I*, 903 F. Supp. 2d at 1089.



On appeal, the Ninth Circuit reversed, stating that *Randall* had not abrogated the test from *Eddleman* because *Randall*'s closely-drawn test came from a Supreme Court plurality opinion, making it nonbinding.<sup>72</sup> Instead, on remand, the Ninth Circuit directed the district court to reuse the *Eddleman* closely-drawn test.<sup>73</sup> This time, however, the district court was to use the more limited important state interest from *Citizens United* and *McCutcheon*.<sup>74</sup> The broad definition from *Shrink* could no longer apply, so the district court was given a challenging task once more: distinguish whether the state's interest, which had already met the standard from *Shrink*, could also meet the quid pro quo standard from *Citizens United*. Effectively, the district court had to decide where the state's evidence fell on the spectrum of corruption.

### B. Montana's "Relatively Incorruptible" Politicians

President George Washington once wrote, "Few men have virtue to withstand the highest bidder."<sup>75</sup> The principles underlying President Washington's quote, while profound, are not exceedingly complex or convoluted; history is riddled with examples of corruption, and one does not have to look far to ascertain President Washington's meaning. However, contrary to this concept, the district court made the peculiar statement that Montana politicians seem "relatively incorruptible."<sup>76</sup>

That statement, made in regards to Defendants' examples of alleged quid pro quo corruption, is dubious at best. The court argued that Defendants' evidence of corruption only proved that Montana politicians were either rejecting external attempts to influence them or the external attempts came from groups whose agendas they would have aligned with anyway.<sup>77</sup> While the legislators' refusal to engage in corruption certainly speaks to their virtuous characters, the court failed to recognize that the very existence of these opportunities amounts to the appearance of quid pro quo corruption—something Montana's campaign finance limits are meant to curtail.<sup>78</sup> The court even conceded that Montana had shown opportunities for corruption exist: "[T]he evidence shows that *despite a hand-full of opportunities*, legislators chose to keep their noses clean."<sup>79</sup>

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<sup>72</sup> *Lair II*, 798 F.3d at 747.

<sup>73</sup> *Id.* at 747–48.

<sup>74</sup> *Id.*

<sup>75</sup> GEORGE WASHINGTON, *Letter from George Washington to Major-General Robert Howe*, in 7 THE WRITINGS OF GEORGE WASHINGTON, (Worthington Chauncey Ford & New York and London: G. P. Putnam's Sons eds., 1890), available at <http://oll.libertyfund.org/titles/washington-the-writings-of-george-washington-vol-vii-1778-1779>.

<sup>76</sup> *Lair III*, 189 F. Supp. 3d at 1034.

<sup>77</sup> *Id.*

<sup>78</sup> See *Eddleman*, 343 F.3d at 1092 (stating "Montana asserts that the campaign contribution limitation on individuals and PACs is necessary to avoid corruption or the appearance of corruption in Montana politics.").

<sup>79</sup> *Lair III*, 189 F. Supp. 3d at 1034 (emphasis added).

However, the court still concluded Montana had failed to show it had an important state interest.<sup>80</sup>

Although the court noted earlier in its analysis that the state did not need to show actual corruption was taking place to prove an important state interest,<sup>81</sup> the court's indifference to Defendants' evidence is wholly contradictory to that. If these examples are not evidence of the appearance of quid pro quo corruption, then it is unclear what would satisfy the court's test. The court seems to indicate that so long as politicians "keep their noses clean"<sup>82</sup> when they have the opportunity to engage in illegal transactions, the state has no interest in preventing the opportunity itself. But the fact that these types of deals are being offered *in the first place* must certainly be the appearance of quid pro quo corruption. Whether the politicians acquiesce to the deal should not be relevant to the analysis of the state's interest. The fact that the offer is made should be enough to satisfy this issue.

Instead, the court has required a heightened standard of proof for the state's interest. On remand, the Ninth Circuit directed the district court to look for the state's interest in preventing quid pro quo corruption *or its appearance*. The district court, however, interpreted the Ninth Circuit's directive to require Defendants to show a "real harm to the election process or to the public's interest in that process."<sup>83</sup> This interpretation was simply incorrect. While the state's important interest could have been to prevent actual quid pro quo corruption, it could also have been to prevent its appearance.<sup>84</sup>

### C. Narrowly Focused

To begin its closely-drawn *Eddleman* analysis, the court assumed for argument's sake that there was an important state interest for Montana's contribution limits.<sup>85</sup> Even assuming there was an important state interest, the court concluded that the contribution limits were not narrowly focused and did not allow a candidate to wage an effective campaign.<sup>86</sup> The only change in the legal test between this case and *Eddleman* was *McCutcheon*'s narrowing of the state's important interest, so the court's analysis of narrowly focused should have been very similar.<sup>87</sup> Because *Eddleman* and the case here share similar facts, holding constant an affirmative important state interest should have yielded a similar conclusion. Instead, by excluding precedent set by the Ninth

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1032.

<sup>82</sup> *Id.* at 1034.

<sup>83</sup> *Id.*

<sup>84</sup> *Lair II*, 798 F.3d at 740.

<sup>85</sup> *Lair III*, 189 F. Supp. 3d at 1034–35.

<sup>86</sup> *Id.*

<sup>87</sup> *Lair II*, 798 F.3d at 747–49.

Circuit and Supreme Court and disregarding Montana's important state interest, it seems the court subjected Montana's interest to a higher level of scrutiny than required.

The Ninth Circuit and the Supreme Court have both held that direct contributions are most closely linked to quid pro quo corruption. In *Buckley*, the Supreme Court reasoned that contribution limits focus “precisely on the problem of large campaign contributions, the narrow aspect of political association where the actuality and potential for corruption have been identified. . . .”<sup>88</sup> Even as the Court reeled in the broad definition of corruption in *McCutcheon*, it still recognized the strong link between the potential for corruption and direct contributions: “[T]he risk of quid pro quo corruption is generally applicable only to ‘the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder.’”<sup>89</sup> The Ninth Circuit has viewed contribution limits the same way, holding that a Hawaii contribution limit law was “closely drawn because it target[ed] direct contributions . . . to officeholders and candidates, the contributions most closely linked to actual and perceived quid pro quo corruption.”<sup>90</sup>

In *Lair III*, the district court did not consider the long-established link between contribution limits and a state's important interest in preventing quid pro quo corruption or its appearance. It assumed Montana's only interest in the laws was to “level the playing field,” and it subjected the state to a heightened standard of scrutiny by finding that no law could ever be narrowly tailored to such an interest.<sup>91</sup> The court asserted: “Simply put, the contribution limits at issue here could never be said to focus narrowly on a constitutionally-permissible anti-corruption interest because they were expressly enacted to combat the impermissible interests of reducing influence and leveling the playing field.”<sup>92</sup> The court based this conclusion off of statements made in a voter pamphlet explaining the original ballot initiative before voters approved the law.<sup>93</sup>

This assumption is unfounded. Even if part of the original law's purpose in 1994 was to rein in the growth of contributions overall, courts have regularly found contribution laws have been enacted to combat quid pro quo corruption or its appearance. Although part of the law's original purpose may no longer qualify as an important state interest, its dominant purpose does. Therefore, because of the state's interest in preventing corruption and legal precedents set by the Ninth Circuit and Supreme Court, the district court should have found the contribution limits to be narrowly tailored to Montana's interest.

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<sup>88</sup> *Buckley*, 424 U.S. at 28.

<sup>89</sup> *McCutcheon*, 134 S. Ct. at 1452.

<sup>90</sup> *Yamada v. Snipes*, 786 F.3d 1182, 1206 (9th Cir. 2015), cert. denied sub nom. *Yamada v. Shoda*, 136 S. Ct. 569 (2015).

<sup>91</sup> *Lair III*, 189 F. Supp. 3d at 1035.

<sup>92</sup> *Lair III*, 189 F. Supp. 3d at 1035.

<sup>93</sup> *Id.*

*D. Amassing Sufficient Resources to Effectively Campaign*

The court found that, under the current contribution limits, candidates could not “amass sufficient resources to wage an effective campaign.”<sup>94</sup> However, by again disregarding precedent and pertinent factors, its analysis did not adequately support that conclusion.

The sufficient resources analysis, like the narrow tailoring analysis, had already been made in *Eddleman*, so barring external changes like sudden cost increases for campaigns, this part should have largely stayed the same. In *Eddleman*, the Ninth Circuit found that even though Montana’s contribution limits were low, campaign costs were also significantly low, largely because of Montana’s small districts. At the time, Montana’s small constituencies could be reached via simple door-to-door campaigning and the necessity for advertisement in media was rare.<sup>95</sup> By 2016, Montana’s population had not grown substantially,<sup>96</sup> and if anything, the internet and social media had made communication even easier, so the district court’s contrary conclusion is strange.

Rather than considering the evidence the Ninth Circuit found persuasive in *Eddleman*, the court based much of its opinion about the inadequacy of campaign finances on a statistic provided by Plaintiffs’ expert that the average competitive campaign spends 7% more money than it raises.<sup>97</sup> While this statistic certainly could suggest a lack of resources, the court failed to consider any alternative explanations for it. First, one must ask if the statistic includes funds given by the candidate themselves. Both experts indicated that portions of campaigns are self-financed.<sup>98</sup> If self-made contributions are not included in funds *raised*, then they could account for the difference. Second, Montana laws do not allow incumbents to hold over surplus funds to use for future campaigns or personal use.<sup>99</sup> Because of that, there is a strong incentive to *spend* each dollar raised; campaigns that raised more than they spent would simply be inefficient. Third, Plaintiffs, and the court for that matter, offered no explanation for

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<sup>94</sup> *Lair II*, 798 F.3d at 748; *Eddleman*, 343 F.3d at 1092.

<sup>95</sup> See *Eddleman*, 343 F.3d at 1094 (stating “The evidence before the district court showed that the State of Montana remains one of the least expensive states in the nation in which to run a political campaign. Montana’s 100 house districts average only 7,991 people, its 50 senate districts 15,981 people. Legislative candidates in Montana campaign primarily door-to-door, and only occasionally advertise on radio and television.”).

<sup>96</sup> The 2016 census estimate places Montana’s population at 1,042,520. Therefore, on average, each house district has approximately 10,425 residents and each senate district has approximately 20,850 residents. *QuickFacts Montana*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045216/30> (last visited Feb. 2, 2017). Note that while this change *does* seem large compared to the figures from *Eddleman*, *Eddleman*’s figures appear to have been based on the 1990 census even though *Eddleman* was decided in 2003. *Id.* In reality, Montana has experienced less than 13% population growth between the two cases. *Id.* (comparing 2000 census data to 2016 estimates).

<sup>97</sup> *Lair III*, 189 F. Supp. 3d at 1036.

<sup>98</sup> *Lair I*, 903 F. Supp. 2d at 1080, 1083.

<sup>99</sup> MONT. CODE ANN. § 13–37–240 (2016).

how a change in contribution limits would change whether campaigns spend 7% more than they raise. Relaxed limits could potentially reduce the proportion of funds spent to funds raised. However, the proportion could also stay the same as candidates continue to spend slightly more money than they raise, just as they are already incentivized to do.

The district court also emphasized Plaintiffs' expert's testimony that many contributors give to candidates at the maximum level and greater funds would be available without the contribution limits.<sup>100</sup> Common sense indicates this to be true; some contributors would likely give more than the current limits allow if they could and greater funds would be available to the candidates. However, the court, through this line of reasoning and its reasoning above, made the wrong inquiry. Whether competitive campaigns spend more than they earn and whether contributors would like to give more than the limits allow are irrelevant. The question before the court was whether candidates could "amass sufficient resources to wage an effective campaign."<sup>101</sup> To that effect, the court's opinion does not answer the correct inquiry.

## V. FUTURE IMPLICATIONS

Following the court's decision, the current Commissioner of Political Practices, Jonathan Motl, made a press release stating that the contribution limits would revert to their previous limits because of the Montana Supreme Court's holding in *State ex. rel. Woodahl v. District Court*.<sup>102</sup> In *Woodahl*, the Montana Supreme Court held that when an amendment to a Montana law is held to be unconstitutional, the remaining part of the law remains intact as it had been before the amendment.<sup>103</sup> The limits struck down here were enacted by ballot initiative in 1995.<sup>104</sup> Following this logic, the state enforced the pre-1995 limits for the 2016 election.<sup>105</sup> Pre-1995 limits still set a maximum contribution amount, but they were much more relaxed.<sup>106</sup> Montana legislators will convene this year and may determine the fate of campaign contribution limits.

Defendants have since filed for an appeal to the Ninth Circuit, and oral arguments are slated for March 20, 2017.<sup>107</sup> In their brief for appeal,

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<sup>100</sup> *Lair III*, 189 F. Supp. 3d at 1035.

<sup>101</sup> *Eddleman*, 343 F.3d at 1092.

<sup>102</sup> P.2d 318, 322 (Mont. 1973); Holly Michels, *3 Weeks Before Primary, Federal Judge Strikes down Montana Campaign Contribution Limits*, BILLINGS GAZETTE (May 17, 2016), available at [http://billingsgazette.com/news/government-and-politics/weeks-before-primary-federal-judge-strikes-down-montana-campaign-contribution/article\\_4746df28-2a06-597e-b27c-4aebbeba8558.html](http://billingsgazette.com/news/government-and-politics/weeks-before-primary-federal-judge-strikes-down-montana-campaign-contribution/article_4746df28-2a06-597e-b27c-4aebbeba8558.html).

<sup>103</sup> *Woodahl*, P.2d at 322.

<sup>104</sup> Michels, *supra* note 102.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Calendar for James R. Browning U.S. Courthouse, San Francisco*, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, <http://www.ca9.uscourts.gov/calendar/view.php?caseno=16-35424> (last visited Feb. 3, 2017).

Defendants argue that the district court erred in requiring them to show evidence of actual corruption to support a legitimate state interest.<sup>108</sup> They also argue that the district court ignored key facts and applied the incorrect legal standard when assessing whether the campaign contribution limits were closely drawn, so they urge the Ninth Circuit to reverse.<sup>109</sup>

## VI. CONCLUSION

When Montana enacts laws to set campaign contribution limits in order to combat actual quid pro quo corruption or its appearance, and the laws are closely drawn to that purpose, courts should uphold those laws. Here, the district court held the state to a heightened standard when it required the state to prove actual corruption and discarded evidence of apparent quid pro quo corruption. The court also ignored decades of jurisprudence indicating a strong link between contribution limits and preventing quid pro quo corruption. Finally, the court made the wrong inquiries in its analysis of whether candidates could amass sufficient funds to wage an effective campaign under the contribution limits. The court found that contributors may have given more and candidates may have preferred greater contributions, but it failed to consider whether their campaigns are effective nonetheless. The court placed an unduly heightened burden on Montana throughout its analysis, and its decision has disarmed Montana in its fight against campaign corruption.

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<sup>108</sup> Appellants' Opening Brief, \*16–18, *Lair v. Motl*, 2016 WL 5846101, (9th Cir. 2016) (No. 16-35424).

<sup>109</sup> Appellants' Opening Brief, *supra* note 108, at \*16–18.