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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

DAVID THOMPSON, AARON DOWNING, JIM CRAWFORD, and DISTRICT 18 of the ALASKA REPUBLICAN PARTY, Plaintiffs, v. PAUL DAUPHINAIS, in His Official Capacity as the Executive Director of the Alaska Public Offices Commission, and MARK FISH, IRENE CATALONE, RON KING, KENNETH KIRK, and VANCE SANDERS, in Their Official Capacities as Member of the Alaska Public Offices Commission, Defendants.	Case No. 3:15-cv-00218 TMB **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

The plaintiffs ask the Court to grant summary judgment on Count Three of their complaint, which challenges the limits on total nonresident campaign contributions that a candidate for office in Alaska may accept, as set forth in AS 15.13.072(a)(2) and (e). Docket 30, 31. The legal standard applicable to these nonresident contribution limits is the one announced in *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085 (9th Cir.2003), and recently reaffirmed in *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015). Under this test, the limits must further an "important" state interest and they must be "closely drawn." *Lair*, 798 F.3d at 748 (quoting *Eddleman*, 343 F.3d at 1092). The limits need not, as the plaintiffs assert, survive strict scrutiny review. Docket 31 at 16-17, 21.

Both prongs of the Ninth Circuit's *Eddleman* test present material factual issues for trial. Under the first prong, the State will argue and present evidence that the nonresident limits further at least two important state interests. First, they help prevent quid pro quo corruption (or the appearance of such corruption) by curtailing opportunities for people to circumvent the base contribution limits through use of out-of-state channels that are beyond the jurisdiction of the Alaska Public Offices Commission (APOC). Second, the limits help protect Alaska's system of self-government as an independent sovereign state within our federal system. Alaska may limit nonresident participation in its political processes for the same reason it may prohibit nonresidents from voting—because they are not members of Alaska's self-governing political community.

Under the second prong of *Eddleman*, the State will argue and present evidence that the nonresident limits are "closely drawn," meaning 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." 343 F.3d at 1092. Nonresidents like Mr. Thompson have ample means of affiliating with candidates even when prevented from making direct monetary contributions—they may take out ads in the media, write letters to the editor, mail leaflets to voters, donate to groups that support their preferred candidates, and volunteer their time to campaigns. And the plaintiffs do not even argue, let alone present evidence, that the nonresident limits prevent Alaskan candidates from amassing the resources to wage effective campaigns.

The Ninth Circuit has expressed a preference for an adequate factual record in a challenge to campaign contribution limits. In *Lair*, the Ninth Circuit remanded to the district court with the instruction that Montana "should have an opportunity to develop a record" in defense of its laws. 798 F.3d 736, 748 n.8 (9th Cir. 2015). The State of Alaska should likewise "have an opportunity to develop a record" in defense of its nonresident contribution limits. The Court should deny summary judgment.

STATEMENT OF UNDISPUTED FACTS

In November 2015, the plaintiffs—several individuals and a political party subdivision—filed this constitutional challenge to the State's campaign finance laws. Specifically, they challenge:

- The $500 annual limit on individual political contributions to a candidate, set forth in AS 15.13.070(b)(1) (Count One);
- The $500 annual limit on individual political contributions to a group that is not a political party, set forth in AS 15.13.070(b)(l) (Count Two);
- The annual limits on total political contributions a candidate may solicit or accept from nonresidents of Alaska, set forth in AS 15.13.072(a)(2) and (e) (Count Three); and
- The annual limits on what a political party (including local subdivisions thereof) may contribute to a candidate in total, set forth in AS 15.13.070(d) and AS 15.13.400(15) (Count Four).

The plaintiffs initially moved for a preliminary injunction and asked the Court to consider their case on an extremely expedited basis, but after a status conference they agreed to an April 2016 trial date and withdrew their motion. *See* Docket 4, 12, 26.

The plaintiffs now ask the Court to grant them partial summary judgment on Count Three of their complaint, which is their challenge to the limits on total nonresident campaign contributions. Docket 30, 31. The plaintiffs have not asked for summary judgment on any of the other counts in their complaint.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The moving

party has the burden of establishing the absence of a genuine dispute of material fact. *City of Pomona v. SQM N. Am. Corp*., 750 F.3d 1036, 1049 (9th Cir. 2014). The court must view the evidence in the light most favorable to the non-moving party. *Clicks Billiards, Inc. v. Sixshooters, Inc*., 251 F.3d 1252, 1257 (9th Cir. 2001). In doing so, the court must draw all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight that evidence is accorded. *See Raad v. Fairbanks N. Star Borough Sch. Dist*., 323 F.3d 1185, 1194 (9th Cir. 2003) (reversing grant of summary judgment where district court "failed to draw all reasonable inferences in favor of . . . the nonmoving party, and impermissibly substituted its judgment concerning the weight of the evidence"). And the Court must assume the version of the material facts asserted by the non-moving party to be correct. *See Aloe Vera of Am., Inc. v. United States*, 699 F.3d 1153, 1165 (9th Cir. 2012) ("[A]t the summary judgment stage, we must . . . where disputed issues of material fact exist, assume the version of the material facts asserted by the non-moving party to be correct.").

ARGUMENT

I. The plaintiffs' motion contains several legal flaws.

Before considering whether the plaintiffs have met their summary judgment burden, the Court should first wipe away some of the legal fog created by their motion. This case does not involve the Privileges and Immunities Clause, which is not mentioned in the complaint. This case does not call into question the $20,000 and $5,000 nonresident contribution limits set forth in AS 15.13.070(e)(1) and AS 15.13.070(e)(2),

which the plaintiffs do not have standing to challenge. *McCutcheon* does not, as the plaintiffs assert, prohibit all "aggregate limits" of any sort. And finally, the nonresident limits are not, as the plaintiffs contend, subject to strict scrutiny.

The legal standard applicable to the nonresident limits is the one announced in *Montana Right to Life Association v. Eddleman* and recently reaffirmed in *Lair*—the limits must further an "important" state interest and they must be "closely drawn." *See Lair v. Bullock*, 798 F.3d 736, 748 (9th Cir. 2015). This is the legal standard the Court must use in assessing whether issues of material fact preclude summary judgment.

A. The Privileges and Immunities Clause is not at issue in this case.

The plaintiffs' motion invokes the Privileges and Immunities Clause of the Fourteenth Amendment, Docket 31 at 7, 17, 21, but their complaint does not mention that constitutional provision nor have they raised any claims based on it. *See* Docket 1. The Court should disregard the plaintiffs' arguments and case citations about the Privileges and Immunities Clause because it is simply not at issue here.

B. The plaintiffs lack standing to challenge two of the nonresident limits.

The plaintiffs ask the Court to strike down AS 15.13.072(e), which provides nonresident contribution limits. Docket 1 at 12-13. But because their complaint only alleges standing to challenge one of the three limits set forth in that statute, the Court only has jurisdiction to consider that one limit, not the other two. Docket 1 at 4-5.

Alaska Statute 15.13.070(e) lists three separate limits on how much a candidate may accept in total from out-of-state contributors—(1) $20,000 a calendar year, if the

candidate is seeking the office of governor or lieutenant governor; (2) $5,000 a calendar year, if the candidate is seeking the office of state senator; and (3) $3,000 a calendar year, if the candidate is seeking the office of state representative or municipal or other office.

Plaintiff David Thompson, a Wisconsin resident, alleges that the $3,000 limit prevented him from making a contribution to his brother-in-law, state house candidate Wes Keller, in 2015 because Rep. Keller had already received the limit in nonresident contributions. Docket 1 at 4-5. He also alleges that he would like to contribute to Rep. Keller in 2016. *Id*. But he does not allege that he has attempted, or ever intends in the future, to contribute to the campaign of any Alaska candidate for state senator, governor, or lieutenant governor, nor that he has ever been prevented from doing so by the separate $5,000 and $20,000 limits applicable to those offices. Nor do any of the plaintiffs purport to be aspiring candidates for state senator, governor, or lieutenant governor who wish to accept contributions from nonresidents exceeding the $5,000 or $20,000 limit.

The $5,000 and $20,000 contribution limits substantively differ from the $3,000 limit in amount and applicability and are set forth in separate statutory subsections. These statutory provisions are certainly similar to the $3,000 limit in some ways, but they are distinct and severable and thus must be considered separately. *See State v. Alaska Civil Liberties Union (AkCLU)*, 978 P.2d 597, 633-34 & n.209 (Alaska 1999) (noting that the 1996 campaign finance legislation included a severability clause and holding that invalidated provisions were severable); *see also* AS 01.10.030 (general severability provision for Alaska statutes); *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d

183, 214 (Alaska 2007) ("We have consistently severed laws rather than invalidating them when construing this general severability clause."). The plaintiffs acknowledge that Alaska's statutes "have set varying levels and types of limits and restrictions on campaign and political contributions." Docket 31 at 3. They cannot challenge Alaska's campaign finance statutes as a whole; they can only challenge those limits and restrictions that they have Article III standing to challenge.

Because none of the plaintiffs have been injured by—or face any threat of injury from—the $5,000 and $20,000 contribution limits, they lack standing to challenge those limits. The "irreducible constitutional minimum" of Article III standing consists of (1) an "injury in fact" that is "concrete and particularized" and "actual or imminent," (2) "a causal connection between the injury and the conduct complained of," and (3) a likelihood "that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* And "[a] federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990). None of the plaintiffs has alleged an "injury in fact" that has any "causal connection" to the $5,000 or $20,000 contribution limit. Plaintiff David Thompson has alleged only an "injury in fact" from the $3,000 limit; he has never been affected by the $5,000 and $20,000 limits nor does he allege a desire to make future contributions that would make such injury "imminent."

The Court should deny summary judgment on the plaintiffs' challenges to the $20,000 and $5,000 contribution limits set forth in AS 15.13.070(e)(1) and AS 15.13.070(e)(2) based on lack of standing.

C. *McCutcheon* does not create a blanket ban on "aggregate" limits.

The plaintiffs cite *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), for the proposition that "[a]ggregate contribution limits" are unconstitutional as a rule. Docket 31 at 16, 18. But Alaska's nonresident limits—despite being "aggregate"—are so dissimilar from the limits considered in *McCutcheon* that *McCutcheon*'s analysis and holding are not controlling here. *McCutcheon* did not create a blanket ban on any contribution limit that can be characterized as "aggregate."

In *McCutcheon*, the Supreme Court considered a challenge to a statutory limit on how much money one individual donor may contribute in total to all candidates to whom he or she contributes. 134 S. Ct. at 1442. But Alaska's nonresident contribution limits are not aggregate limits on how much money one individual donor can contribute to candidates in total—Alaska has no such aggregate limits.

Not only do the limits at issue here differ from the limits struck down in *McCutcheon*, but the government rationales put forward in defense of the limits are much stronger here than in *McCutcheon*. In *McCutcheon*, the government defended its aggregate limits as a way of preventing donors from circumventing the base contribution limits by channeling money to a candidate through other entities. *Id*. at 1452. The Court rejected this rationale, but it did not hold that preventing circumvention of base limits

could never be a compelling government interest—instead, the Court simply found the kind of channeling discussed by the government in that case to be implausible, noting the many ways in which the Federal Election Commission (FEC) could prevent it. *Id*. at 1452-56. Here, by contrast, the APOC's jurisdiction and resources are dwarfed by the FEC's, and circumvention of the base limits through nonresident channels that are beyond APOC's reach is a real possibility, as discussed below in subsection II(A).

Moreover, the nonresident limits are justified by an additional state interest not considered in *McCutcheon*—the interest in preserving Alaska's system of self-government. *See infra* subsection II(B).

Because the contribution limits and supporting rationales at issue here are different from those at issue in *McCutcheon*, *McCutcheon* is not dispositive.

D. The nonresident limits need not survive strict scrutiny.

The plaintiffs have acknowledged that "the Ninth Circuit, based upon its reading of the United States Supreme Court's recent decisions, continues to apply a form of intermediate scrutiny to contribution limits." Docket 5 at 2 n.1; *see Lair v. Bullock*, 798 F.3d 736, 742 (9th Cir. 2015). But the plaintiffs nonetheless argue that strict scrutiny should apply to the nonresident contribution limits. Docket 31 at 16-17, 21. The Court should follow Ninth Circuit precedent and apply intermediate scrutiny.

In *Lair*, the Ninth Circuit held that *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085 (9th Cir.2003), continues to provide the proper legal test for determining whether contribution limits are constitutional, even after *Randall v. Sorrell*,

548 U.S. 230 (2006), *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014). *See Lair*, 798 F.3d at 748. Under the *Eddleman* 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.

Lair, 798 F.3d at 748 (quoting *Eddleman*, 343 F.3d at 1092). In *Lair*, the Ninth Circuit reversed the district court for failing to apply this test. *See id.* at 748. This Court should not make the same mistake as the *Lair* district court, and should analyze the nonresident limits under the Ninth Circuit's chosen test rather than applying strict scrutiny.

The plaintiffs cannot obtain strict scrutiny by invoking equal protection in addition to the First Amendment. The D.C. Circuit rejected this "doctrinal gambit" in *Wagner v. Federal Election Commission*, explaining that it would lead to anomalous results:

> We reject this doctrinal gambit, which would require strict scrutiny notwithstanding the Supreme Court's determination that the "closely drawn" standard is the appropriate one under the First Amendment. Although the Court has on occasion applied strict scrutiny in examining equal protection challenges in cases involving First Amendment rights, it has done so only when a First Amendment analysis would itself have required such scrutiny. There is consequently no case in which the Supreme Court has employed strict scrutiny to analyze a contribution restriction under equal protection principles.

Wagner v. FEC, 793 F.3d 1, 32 (D.C. Cir. 2015); *see also Wagner v. FEC*, 854 F. Supp. 2d 83, 95 (D.D.C. 2012) ("Any First Amendment claim that could be reframed as an equal-protection challenge would thus be entitled to strict scrutiny and would consequently stand a much greater chance of prevailing."), *vacated on other grounds*, 717 F.3d 1007 (D.C. Cir. 2013); *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001) (holding that an equal protection claim was "no more than a First Amendment claim dressed in equal protection clothing" and was therefore "subsumed by, and co-extensive with" the former). The First Amendment is the heart of this case and the nonresident limits must be scrutinized under the Ninth Circuit test applicable to such challenges.

II. Whether the nonresident limits further a sufficiently important state interest is a disputed issue of material fact, precluding summary judgment.

As explained above, the applicable legal standard is the one announced in *Eddleman* and recently reaffirmed in *Lair*—the nonresident limits must further an "important" state interest and they must be "closely drawn." Both prongs of this test present factual issues on which the State should be allowed to present evidence at trial.

A. The nonresident limits further the important state interest in preventing quid pro quo corruption or its appearance.

Summary judgment is precluded by material factual disputes about whether the nonresident limits help prevent circumvention of the $500 base limit on individual contributions, thereby furthering the compelling state interest in preventing quid pro quo corruption or its appearance.

The plaintiffs recognize, as they must, that preventing quid pro quo corruption or its appearance is not only an important state interest, but a compelling one. Docket 31 at 17. And they have not moved for summary judgment on their challenge to the $500 base limit. In *Buckley v. Valeo*, the Supreme Court upheld base contribution limits as a permissible means of preventing quid pro quo corruption or its appearance, and noted that courts have "no scalpel to probe" the precise dollar value that is appropriate for such base limits. *Buckley v. Valeo*, 424 U.S. 1, 30 (1976). Because the plaintiffs' motion for partial summary judgment does not challenge the $500 base limit, the Court should assume—for purposes of considering the motion—that the base limit is justified as a means of preventing quid pro quo corruption or its appearance.

If the $500 base limit furthers a compelling state interest, then measures that help prevent circumvention of the $500 base limit likewise further that compelling state interest. The plaintiffs are wrong in asserting that *McCutcheon* bans any "prophylaxis-upon-prophylaxis approach" under which one restriction is justified as a means of enforcing another restriction. Docket 31 at 16. Rather, *McCutcheon* says only that a "prophylaxis-upon-prophylaxis approach" requires courts to "be particularly diligent in scrutinizing the law's fit"—which is the second prong of the inquiry. 134 S. Ct. at 1458. It would be odd if states could enact laws to further compelling state interests, but could not also take measures to ensure that those laws are not easily circumvented.

The nonresident limits help discourage the kind of large-scale circumvention of the base limits that could be accomplished by donors funneling money through

nonresident channels. APOC, the agency responsible for enforcing Alaska's campaign finance laws, does not have the jurisdiction or resources to police the activities of nonresidents. If APOC suspects that an Alaska resident is serving as a conduit for another contributor's funds—allowing that person to circumvent the base limits—APOC can subpoena bank records and dispel or verify its suspicions. Affidavit of Paul Dauphinais at ¶ 6. But unlike the FEC's jurisdiction, APOC's jurisdiction is limited to the State of Alaska. *Id*. So if APOC were to suspect circumvention involving nonresidents, enforcement would be difficult or impossible. *Id*. at 6-8. At the very least, enforcement would be delayed such that APOC might be unable to detect circumvention before an election—meaning that Alaskans would have to vote without complete information about candidates, supporters, and violations. *Id*.

The plaintiffs contend that "[t]here is no nexus between residency and the risk of quid pro quo corruption or its appearance," Docket 31 at 17, asserting that "[i]f the base-contribution limit does not risk corruption or the appearance of corruption when it is given to a candidate by an Alaska resident, it is inconceivable how it could do so simply because it is a nonresident who donates the base amount." Docket 31 at 18. But, as explained above, such an explanation is easily conceived of. A $500 nonresident contribution is a more likely source of corruption because APOC has no way to verify that it is truly only a single person's contribution of $500, as opposed to a piece of a much larger contribution in circumvention of the $500 base limit. Thus, a nonresident

contribution—even if $500 or less—poses a higher risk of quid pro quo corruption than a resident contribution simply because it is effectively untraceable and unverifiable.

The plaintiffs further contend, without support, that nonresident contributions are *less* likely to risk corruption or its appearance than resident contributions. Docket 31 at 18 ("[T]he risk of *quid pro quo* corruption or its appearance is greater when contributions to Alaskan candidates come from residents of Alaska, those for whom the candidates will most directly act if they are elected, than when the contribution comes from nonresidents."). But they provide no evidence to support this assertion. And it is just as easy to hypothesize that nonresident contributions pose a *greater* risk of quid pro quo corruption or its appearance because a nonresident's motive to contribute is more likely to be a specific political favor—for instance, a vote on a natural resource bill important to an out-of-state company—than a generalized interest in Alaska's government. Indeed, Alaska's history is replete with examples of attempts to exert influence and control over Alaskan politics to promote outside interests—from the Alaska Syndicate owners of the Kennecott-Bonanza mine through the Seattle fishing industry's opposition to statehood to recent oil industry promotion of production tax cuts. Affidavit of Gerald McBeath at ¶¶ 8-26. At best, whether nonresident contributions are more or less likely to pose a risk of quid pro quo corruption or its appearance is a disputed factual issue that cannot be resolved on the current record.

The Court should deny summary judgment, giving the defendants the opportunity to put on evidence that the nonresident limits further the State's compelling interest in preventing quid pro quo corruption or its appearance.

B. The nonresident limits further the important state interest in self-government.

Not only do the nonresident limits further the interest in preventing quid pro quo corruption or its appearance, but they also further the important state interest in protecting Alaska's system of self-government from outside control.

As a preliminary matter, precedent does not preclude the State from relying on important state interests besides preventing quid pro quo corruption. In *Lair*, the Ninth Circuit said that "the prevention of quid pro quo corruption, or its appearance, is the only sufficiently important state interest to justify limits on campaign contributions." 798 F.3d at 740. But *Lair* and the cases it relied on, like *Citizens United* and *McCutcheon*, did not involve nonresident contribution limits. Because those cases did not involve nonresident limits, they naturally did not consider or reject important state interests that are specific to nonresident limits, such as the interest in self-government. To the extent that the Ninth Circuit's statement, quoted above, can be read as a rejection of arguments that were not before the court in defense of types of contribution limits that were not before the court, it is non-binding dicta. *See Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) ("A statement is dictum when it is made during the course of delivering a judicial

opinion, but is unnecessary to the decision of the case and is therefore not precedential.") (internal citation, alterations, and quotation marks omitted).

Alaska's interest in self-government is not illegitimate, as the plaintiffs contend, Docket 31 at 2; rather, it finds support from several sources and is rooted in bedrock principles of federalism. The U.S. Constitution "established a system of 'dual sovereignty'" that "contemplates that a State's government will represent and remain accountable to *its own citizens*." *Printz v. United States*, 521 U.S. 898, 919-20 (1997) (emphasis added). This dual sovereignty "is one of the Constitution's structural protections of liberty." *Id.* at 921. And "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Id.* at 928. As one commentator explains, our country's federalist structure "presupposes borders between insiders and outsiders *within* the nation, among the states as well as between the states and the national government" because the reservation of powers to the states "is a guarantee against certain outside influence in a state by the federal government representing the (other) People of the United States." Anthony Johnstone, *Outside Influence*, 13 Election L.J. 117, 122-23 (2014) (emphasis in original). Thus, "[n]o form of federalism, and therefore no form of government under the Constitution, works without limits on outside influence in the states." *Id.* This is particularly crucial for states like Alaska with small populations that could easily become dominated by outside forces. America's constitutional structure recognizes the independent sovereignty and importance of even the smallest states by, for example,

affording them the same number of U.S. Senate seats as the largest states. The Constitution also guarantees the states "a Republican Form of Government," U.S. Const., art. IV, § 4. "If state political outcomes do not generally reflect the state's own political balance, weighed in terms not only of voting but all the political factors that influence politics, the state falls short of a republican form of government." Johnstone, 13 Election L.J. at 122-23; *see also* Patrick M. Garry et. al., *Raising the Question of Whether Out-of-State Political Contributions May Affect A Small State's Political Autonomy: A Case Study of the South Dakota Voter Referendum on Abortion*, 55 S.D. L. Rev. 35, 36 (2010) ("[T]he federalism structure inherent in the American political system presumes not only that states occupy a separate level of authority from that of the federal government, but also that each state retains its own independence and autonomy from every other state.").

Alaska may limit nonresident participation in its political processes for the same reason it may prohibit nonresidents from voting—because they are not members of Alaska's self-governing political community. In *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68-69 (1978), a case involving the right to vote in local elections, the Supreme Court observed that "our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." And in *Ambach v. Norwick*, 441 U.S. 68 (1979), a case involving legal distinctions based on alienage, the Supreme Court similarly recognized "the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all

persons who have not become part of the process of self-government." 441 U.S. at 73-74. A political community can thus permissibly decide that its government should be controlled by its members, even when this may involve restricting the fundamental rights of non-members such as the right to vote. *Cf. Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 383 (1978) ("Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State.").

The recent case of *Bluman v. Federal Election Commission*, 800 F. Supp. 2d 281 (D.D.C. 2011), demonstrates that this self-government principle naturally extends to participation in political campaigns. In *Bluman*, a three-judge district court upheld federal laws that prevented foreign nationals from contributing to candidates or even making independent expenditures advocating for candidates in federal elections. 800 F. Supp. 2d at 283. The court observed 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*. Such activities that are "directly targeted at influencing the outcome of an election" are "both speech and participation in democratic self-government." *Id*. at 289. The court recognized that "the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process." *Id*. at 288. Given that "it is undisputed that the government may bar foreign citizens from voting and serving as elected officers," the court reasoned, "[i]t follows that the government may bar

foreign citizens (at least those who are not lawful permanent residents of the United States) from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections." *Id*. The laws at issue in *Bluman* were even more restrictive than the nonresident limits at issue here; they prohibited even independent expenditures, which nonresidents like Mr. Thompson are free to make. But the three-judge district court nonetheless upheld the restrictions, and the Supreme Court summarily affirmed. *Bluman v. FEC*, 132 S. Ct. 1087 (2012).

Although the measures at issue in *Bluman* were limitations on foreign participation in federal elections, the analogy to nonresident participation in state elections is direct and apt. The *Bluman* court reasoned that "it follows" from the fact that the federal government may "may bar foreign citizens from voting and serving as elected officers" that it may also bar them from "participating in the campaign process that seeks to influence how voters will cast their ballots." Likewise, it follows from the fact that the Alaska state government may bar nonresidents from voting and running for Alaska state office that it may also restrict nonresident participation in the Alaska state campaign process. Just as a Canadian citizen is not part of the political community governed by the U.S. federal government, a Florida resident is not part of the political community governed by the Alaska state government. And just as the federal government has a "compelling interest" in limiting the participation of Canadian citizens in U.S. government, the Alaska state government has a compelling—or at least important—interest in limiting the participation of Floridians in Alaska state government.

This reasoning applies to candidates for state government offices even if perhaps not to state candidates for federal government offices. A state's U.S. senators and representatives represent only that state's citizens, but the U.S. Senate governs the entire country, including all of the other states in the Union. Thus, a nonresident may not be a constituent of Alaska's U.S. senators, but he or she is still part of the same political community governed by the U.S. Senate. The same cannot be said for nonresidents with respect to state officers—a nonresident is neither a constituent of any Alaska state senator nor part of the political community governed by the Alaska Senate.

The cases cited by the plaintiffs do not foreclose the self-government rationale as a justification for nonresident contribution limits. Docket 31 at 19. In *VanNatta v. Keisling*, the Ninth Circuit, over a strong dissent, struck down an Oregon ballot measure that prohibited candidates for state office from using contributions from outside their own electoral districts within the state. 151 F.3d 1215 (9th Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999). But the Ninth Circuit has said that its decision in *VanNatta* was superseded by the Supreme Court's later decision in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000). *See Eddleman*, 343 F.3d at 1091 n.2. In any event, as the Alaska Supreme Court observed in *AkCLU*, "*VanNatta* is distinguishable on its facts" because "Oregon's out-of-district restrictions applied to both nonresidents and residents of Oregon," whereas "Alaska's challenged provisions apply only to nonresidents of Alaska, and do not limit speech of those most likely to be directly affected by the outcome of a campaign for state office—Alaska residents regardless of what district they live in." 978

P.2d at 616. In *AkCLU*, the Alaska Supreme Court upheld Alaska's nonresident limits, finding the self-government rationale to be "intriguing," *Id.* at 616, but instead relying on an anti-distortion rationale: "Without restraints, Alaska's elected officials can be subjected to purchased or coerced influence which is grossly disproportionate to the support nonresidents' views have among the Alaska electorate." *Id*. at 617.

Just as *VanNatta* is distinguishable, the Ninth Circuit's earlier decision in *Whitmore v. Federal Election Commission*, 68 F.3d 1212 (9th Cir.1995), likewise does not foreclose the self-government rationale. In *Whitmore*, a candidate and a voter sought an injunction to prohibit candidates from accepting nonresident contributions, asserting that such contributions violated their rights to free association, equal protection, and a republican form of government. 68 F.3d at 1214. In other words, the question before the court was not whether a limit on nonresident contributions is constitutionally *permissible*, but rather whether a total ban on such contributions is constitutionally *required*. The court concluded that it is not; indeed, the court held that the plaintiffs lacked standing and that their novel claim—that the Federal Election Campaign Act is unconstitutional because it *fails to ban* nonresident contributions—was frivolous. *Id*. at 1215-16. The Ninth Circuit's quick rejection of this oddly formulated claim has little bearing here. The *Whitmore* court speculated that banning nonresident contributions to enhance the weight of in-state opinions "may violate the rights of the out-of-state contributors," *Id*. at 1216, but that was not the question the court faced—rather, the court was only faced with deciding whether any source of law *required* the ban the plaintiffs sought. *Cf. VanNatta*,

151 F.3d at 1225 (Brunetti, J., dissenting) (explaining that the *Whitmore* court "did not intend to resolve the First Amendment rights of the contributors").

The plaintiffs rely on two out-of-circuit cases as well. In *Krislov v. Rednour*, 226 F.3d 851, 866 (7th Cir. 2000), the Seventh Circuit invalidated an Illinois statute requiring a person circulating a candidate nominating petition to be a voter registered in the political subdivision in which the candidate was seeking office. 226 F.3d at 855. But such petition circulation laws are quite different from campaign contribution limits; indeed, the court applied strict rather than intermediate scrutiny to the challenged law. *Id.* at 863. The court considered several state interests supporting the law, questioning the legitimacy of a potential state interest in "preventing citizens of other States from having any influence on Illinois elections." *Id*. at 866. The plaintiffs quote this part of *Krislov* in arguing that "allowing residents of other states to engage in political free speech related to a specific state's elections 'might entail the introduction of ideas which are novel to a particular geographic area, or which are unpopular'"—the kind of activity protected by the First Amendment. Docket 31 at 20 (quoting *Krislov*, 226 F.3d at 866). But nothing in Alaska's nonresident contribution limits in any way curtails the "introduction of ideas" by nonresidents. The limits only curtail nonresidents' ability to give money directly to candidates. They are thus subject to a different kind of analysis than that in *Krislov*.

Finally, the plaintiffs rely on *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004) (which became *Randall v. Sorrell*, 548 U.S. 230 (2006)), in which the Second Circuit rejected the anti-distortion rationale for nonresident limits adopted by the Alaska Supreme Court

in *AkCLU*. The court was "unpersuaded that the First Amendment permits state governments to preserve their systems from the influence, exercised only through speech-related activities, of non-residents." 382 F.3d at 148. But the anti-distortion rationale rejected in *Landell* is somewhat different from the self-government rationale the defendants put forward here. Alaska does not limit nonresident contributions "because it questions the value of what they have to say"—the rationale rejected in *Landell*, *id*.—but rather because nonresidents are not part of Alaska's system of self-government. Just as this was a permissible rationale for limiting the contributions of foreign nationals in *Bluman*, 800 F. Supp. 2d at 288, it is a permissible rationale for limiting the contribution of nonresidents here. And more importantly, the decisions of the Second and Seventh Circuits are simply not binding on this Court. This Court thus remains free to entertain, as a justification for the nonresident limits, Alaska's interest in self-government.

Disputes of material fact may exist that are relevant to the State's interest in self-government. As the Alaska Supreme Court observed in *AkCLU*, "Alaska has a long history of both support from and exploitation by nonresident interests. Its beauty and resources have long been lightning rods for social, developmental, and environmental interests." 978 P.2d at 617. In that case, "two former Alaska governors submitted affidavits in which they affied that contributions from outside the state create serious loyalty problems." 978 P.2d at 615. As former Governor Walter Hickel explained, "whenever a candidate has to seek donations from outside the state, the candidate is buying a potential conflict of interest." *Id*. Historian Gerald McBeath explains that

outside groups have consistently been interested in Alaskan politics, especially natural resource development policy. For example, the North Slope corruption scandal in the early1980s involved a Seattle construction management company receiving a lucrative contract in exchange for bribing borough consultants and contributing to various Democratic campaigns in Alaska. Affidavit of Gerald McBeath at ¶ 15. The evidence at trial will show that, given its history, Alaska has reason to worry about outside control, and thus has a compelling—or at least important—interest in protecting its ability to self-govern. *See* Anthony Johnstone, *Outside Influence*, 13 Election L.J. 117, 133 (2014) ("In some states, calibrating contribution limits to regulate but not exclude outside influence in campaign contributions may be substantially related to an important state interest in preserving the basic conception of a political community.").

The Court should deny summary judgment, giving the defendants the opportunity to put on evidence that the nonresident limits further the State's important interest in protecting its system of self-government from outside control.

III. Whether the nonresident limits are sufficiently "closely drawn" is a disputed issue of material fact, precluding summary judgment.

The second prong of the *Eddleman* inquiry asks whether the nonresident limits are "closely drawn," meaning that 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." *Eddleman*, 343 F.3d at 1092

The nonresident limits "focus narrowly" on the interests described above, because they only apply to nonresident contributions, which are the only contributions that trigger the above-described concerns about the limited reach of APOC's enforcement jurisdiction and about self-government by Alaskans. And the limits are not necessarily so low as to be unduly burdensome. It may be that not many nonresidents wish to contribute large amounts to candidates for office in a state government that they are not part of. Indeed, in the last election cycle, only five out of the many candidates for Alaska State House reached the annual limit for nonresident contributions and none did so in both 2013 and 2014. Affidavit of Angie White at ¶ 5, Exhibit A. Thus, no Alaskan candidate's outside supporters were unable to make a contribution to their favored candidate at some point during the cycle. Affidavit of Angie White at ¶ 5. The fact that few nonresidents are actually burdened by the nonresident limits supports a finding that the limits are narrowly drawn.

The limits also leave nonresidents "free to affiliate with a candidate." First, many nonresidents may affiliate with a candidate by making contributions before the nonresident limit is reached. Second, the few nonresidents who, like Mr. Thompson, are prevented from contributing money to a candidate will nonetheless have many alternative means by which to affiliate with that candidate. Mr. Thompson can speak freely and without limitation, in any forum, in support of his brother-in-law Rep. Keller's candidacy. He can spend as much of his money as he would like in doing so. He can support Rep. Keller by taking out ads in the Alaska Dispatch News, on the radio, and on

television. He can write letters to the editor and call into Alaskan talk shows to express his support. He can mail leaflets to all residents of the relevant district. He can donate to groups that support Rep. Keller's candidacy. And he can volunteer for Rep. Keller's campaign and make phone calls and knock on doors. *See* Affidavit of Paul Dauphinais at ¶ 11 (explaining that APOC does not cap the amount of personal services an individual can contribute to a campaign). Thus, Alaska's nonresident limits leave many avenues of affiliation open to Mr. Thompson—more than were available to foreign nationals under the stricter laws upheld in *Bluman*, 800 F. Supp. 2d at 283—thereby balancing the state's interest in self-government against the First Amendment rights of nonresidents. The only avenue of affiliation that has been cut off for Mr. Thompson is a direct, personal financial contribution.

Finally, the nonresident limits allow candidates "to amass sufficient resources to wage an effective campaign." *Eddleman*, 343 F.3d at 1092. Candidates for office in Alaska can, and do, wage effective campaigns despite the nonresident limits. Indeed, most candidates in Alaska do not max out their nonresident contributions, but nevertheless run successful campaigns, which demonstrates that the nonresident limits are not an impediment to effective fundraising and campaigning. *See* Affidavit of Angie White at ¶ 5. Summary judgment is precluded by the plaintiffs' failure to even assert—let alone come forward with any evidence—that the nonresident limits prevent effective campaigning in Alaska. At the very least, the Court should defer ruling on their motion to allow time for discovery under Federal Rule of Civil Procedure 56(d). Both parties have

retained experts to analyze campaign data from Alaskan elections; neither expert has yet disclosed a report or been deposed. *See* Docket 32, 34. In *Lair*, the Ninth Circuit expressed a preference for an adequate factual record when it gave the instruction that Montana "should have an opportunity to develop a record" aimed at meeting the appropriate legal standard. 798 F.3d at 748 n.8. The Court should allow time for development of a factual record here.

In sum, the defendants should have the opportunity to put on evidence that the nonresident limits strike an appropriate balance and are sufficiently "closely drawn."

CONCLUSION

Whether the nonresident limits further important state interests and whether they are "closely drawn" are disputed questions of fact for trial, not issues that the Court should decide on summary judgment without an adequate factual record. And as a practical matter, granting summary judgment on Count Three would not advance judicial economy because this case must proceed to trial anyway. If the Court were to grant the motion and eliminate Count Three, a new trial could be necessary after an appeal if the Ninth Circuit were to perceive an unresolved factual issue. The Court can avoid such duplication by allowing the defendants to make a record in defense of the nonresident limits now. If the Court ultimately agrees with the plaintiffs that the evidence makes no difference, the Court can rule in their favor after trial.

For the foregoing reasons, the Court should deny the plaintiffs' Motion for Partial Summary Judgment.

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Certificate of Service

I hereby certify that on February 1, 2016, a copy of the foregoing **Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment** was served electronically & by U.S. Mail on:

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