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Memo

To: PDC Commissioners
From: Sean Flynn, General Counsel
Date: April 22, 2022
Re: Recent Federal Case Law on Contribution Limits

The following is a summary of recent case law applying a framework to analyze the constitutionality of state campaign contribution limits. This memo does not constitute legal advice as to Washington law but is intended to review what courts have considered in challenges to contribution limits.

Background

A campaign contribution is a form of political expression protected under the First Amendment right to free speech. The U.S. Supreme Court has long recognized that the government may impose reasonable limits on such a right to the extent necessary to promote the important governmental interest in preventing *quid pro quo* corruption and the appearance of such corruption. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *and see McCutcheon v. FEC*, 572 U.S. 185 (2014). Courts balance the permissible extent to which contribution limits may be imposed without violating the First Amendment by enquiring whether the restrictions are "closely drawn" to achieve the government's interest (known as the "intermediate scrutiny" standard).

Factors To Measure Permissible Limits

While there is no rigid formula for measuring the constitutionality of contribution limits, and courts generally defer to legislative expertise to set limits, the Supreme Court has looked to certain "danger signs" as a threshold to trigger an examination whether limits may be so restrictive as to undermine the integrity of the electoral process by preventing effective campaigning or challenges to incumbent opponents. *Randall v. Sorrell*, 548 U.S. 230 at 248 (2006). These danger signs include whether the restrictions are substantially lower than limits the Court has previously upheld or comparable limits in other states, and whether the limits are adjustable for inflation.

In *Randall*, the Court, after identifying such danger signs in a Vermont statute that included a $400 individual limit on contributions for statewide offices and a $200-$300 limit for state

legislative offices, went on to consider five factors to determine whether the constitutional risks were founded. The factors include:

> (1) whether the limits would significantly restrict the amount of funding available for challengers to run competitive campaigns; (2) whether political parties must abide by the same low limits that apply to individual contributors; (3) whether volunteer services or expenses are considered contributions that would count toward the limit; (4) whether the limits are indexed for inflation; and (5) whether there is any 'special justification' that might warrant such low limits.

Thompson v. Hebdon, 7 F.4d 811 at 818 (2021), *citing Randall* at 244-62. In applying these factors, the Court found that the state's limits were unconstitutionally low.

Factors Recently Applied to Alaska

The *Randall* factors were most recently invoked in *Thompson v. Hebdon*, challenging Alaska's 2006 campaign finance ballot initiative, which limited individual contributions to $500 (lowered from $1000) for a candidate, and to $1000 for a non-political party group (PAC). The law also limited the amount a political party could give to a candidate, as well as capped the annual total aggregate ($3000) of what a candidate could accept from non-state residents.

The federal trial court and the Ninth Circuit initially upheld each of the limitations in the Alaska law. However, the Supreme Court subsequently determined that the "danger signs" were present in the individual contribution limits and therefore warranted consideration of the *Randall* factors. *Thompson v. Hebdon*, 140 S.Ct. 348 (2019). Specifically, the Court noted that the Alaska's $500 limit was below the lowest limit the Court had ever upheld ($1075 per a two-year election cycle in 1998). Furthermore, Alaska's law was out-of-step with other states, as only five other states had contribution limits of $500, and only Alaska applied such a low amount to gubernatorial elections. Finally, the Alaska law did not include inflationary adjustments, and the Court noted that the $500 limit was the same as it had been in 1996.

Having identified the existence of the danger signs, the Court remanded the case back to the Ninth Circuit for consideration of the *Randall* factors. On remand, the circuit court applied the *Randall* factors and determined the contribution limits were unconstitutional. Regarding the first factor, whether the limits would significantly restrict the amount of funding available for challengers to run competitive campaigns, the court identified several institutional advantages in the election system that incumbents enjoy and require additional funding by challengers to overcome. Such advantages include name recognition, the ability to run multi-year campaigns as opposed to challengers who often register the same year of the election, and the lack of primary challengers.

The court went on to find that the second and third factors favored Alaska. Political parties were subject to more lenient contribution limits, and a volunteer's expenses did not count against the volunteer's contribution limits. The fourth weighed against Alaska, as the limits were not

indexed for inflation. In *Randall*, the Court had warned that failing to index limits would leave the responsibility up to legislatures comprised of incumbents "'who may not diligently police the need for changes . . . to ensure the adequate financing of electoral challenges.'" *Thompson*, 7 F.4th at 822-23 *(quoting Randall*, 548 U.S. at 261 (Breyer, J. plurality). In fact, Alaska's limits had been lowered in the 2006 initiative.

The consideration of whether Alaska's low contribution limits had any special justification under the final factor, led the court to examine whether the risk of corruption was increased particularly in Alaska by the small size of the state legislature and reliance on the energy sector for most of the state's revenue. The court determined that there was insufficient evidence to show that such an increased risk of corruption justified the lower limits.

Having weighed two of the factors against the state, and finding no special justification for it, the court concluded that the contribution limits were not closely drawn to meet the state's objectives and therefore were unconstitutional. The court went on to determine that the comparable limits on contributions to PACs shared the same danger signs as with the limits to candidates, and moreover the interest in *quid pro quo* corruption was more attenuated than with direct contributions to candidates.

Limits on Contributions by Nonresidents

Finally, the *Thompson* Court struck down the $3000 aggregate limit for nonresident contributions as failing to serve the purpose of reducing corruption. Here, the court relied on Supreme Court precedent to distinguish between the permissible governmental interest in preventing *quid pro quo* corruption from the impermissible objective of limiting undue influence over elected officials. In *Citizens United* and *McCutcheon*, the Supreme Court affirmed that restrictions on certain political expression can only be permitted to the extent necessary to protect against corruption as opposed to limiting undue influence. The *Thompson* court also distinguished the Alaska law from the federal prohibition of contributions from noncitizens on the basis that noncitizens are outside of the American political community.

Washington Law

Most states apply limits on contributions from individuals or groups.[1] Washington first instituted contribution limits under the Fair Campaign Practices Act through passage of Initiative 134 (1992), in a major expansion of the original 1972 initiative. The limits initially applied only to state office elections, but later were amended to include local and judicial offices.

Washington's contribution limits are above the limits imposed under the Alaska law. For example, individuals and PAC's can contribute up to $2000 and $1000 respectively for statewide and legislative candidates. *See* RCW 42.17A.405. Washington law requires the PDC to consider

[1] *See State Limits on Contributions to Candidates (2021-2022 Election Cycle)*, National Conference of State Legislatures, available at https://www.ncsl.org/research/elections-and-campaigns/state-limits-on-contributions-to-candidates.aspx.

making inflationary adjustments for contribution limits every two-to-five years. RCW 42.17A.125. The last adjustments were made by rule in 2016. *See* WAC 390-05-400.

Washington's contribution limit regime has been challenged, but largely have remained intact. In one successful challenge, the Ninth Circuit limited the application of limits upon a PAC organized to support the recall election of a public official. *See Farris v. Seabrook*, 677 F.3d 858 (9th Cir. 2012). In *Farris*, the court held that limits could not be imposed upon a recall committee without evidence of coordination with any candidate that would support the state's interest in protecting against *quid pro quo* corruption. Washington does not impose limits on contributions to ballot measure campaigns.