

**No. 17-35019**

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United States Court of Appeals for the Ninth Circuit

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DAVID THOMPSON, AARON DOWNING, JIM CRAWFORD,  
*Appellants,*

v.

HEATHER HEBDON, in Her Official Capacity as the Executive Director of the  
Alaska Public Offices Commission, and ANNE HELZER, ROBERT CLIFT,  
RICHARD STILLIE, SUZANNE HANCOCK, AND VAN LAWRENCE, in  
Their Official Capacities as Members of the Alaska Public Offices Commission,  
*Appellees,*

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Appeal from U.S. District Court, District of Alaska, Anchorage  
Honorable Timothy M. Burgess  
No. 3:15-cv-00218 TMB

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**APPELLEES' BRIEF ON WHETHER THIS CASE SHOULD BE  
REHEARD EN BANC**

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## ARGUMENT

The Alaska Public Offices Commission has defended Alaska’s campaign contribution limits against constitutional challenge for the last six years as explained in its briefing before the panel. But the Commission did not petition for rehearing en banc, and does not favor it, because the history of this case makes it seem like an unwise use of resources that could ultimately result in more harm than good for the State’s interests.

The State expended enormous effort defending these contribution limits all the way up to the U.S. Supreme Court and back again. This case began nearly six years ago. In the district court, the State created a compelling factual record in a seven-day trial and successfully defended all of the challenged limits.<sup>1</sup> On appeal to this Court, the State largely prevailed again, with the panel upholding all but one of the challenged limits.<sup>2</sup> But the plaintiffs then successfully petitioned for certiorari, and the Supreme Court—rather than adding the case to its merits docket for full briefing and argument—simply vacated the panel decision in the State’s favor and remanded for another look.<sup>3</sup> In its order, the Supreme Court expressed concerns about the current limits—specifically, that they are substantially lower

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<sup>1</sup> *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023 (D. Alaska 2016).

<sup>2</sup> *Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018).

<sup>3</sup> *Thompson v. Hebdon*, 140 S. Ct. 348 (2019).

than those of other states and are not adjusted for inflation.<sup>4</sup> On remand, the State continued to vigorously defend the limits, but was unsuccessful in the end.

Although the State stands by its voluminous briefing and arguments in this case, the State's only way to further defend the current limits was to seek discretionary review in this Court or the Supreme Court. Not only would that prolong this case and consume the State's resources for yet more months—or years—with no certainty of success, but it would carry a risk of an even worse outcome for the State. As things now stand, the State, through its duly elected legislature, could address the Supreme Court's and the panel's expressed concerns by raising its contribution limits and perhaps adding an inflation adjustment or by getting rid of contribution limits altogether as several other states have done. But if the State instead pursues further review in defense of its current low limits, it runs the risk of ending up with a Supreme Court opinion that could force the legislature's hand and take away their rightful authority<sup>5</sup> to consider all factors, including the decisions in this case, and pass legislation. Indeed, the plaintiffs' original petition for certiorari suggested that the Supreme Court should adopt a much stricter test for reviewing contribution limits.<sup>6</sup> They would likely continue to

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<sup>4</sup> *Id.* at 351.

<sup>5</sup> The power to enact laws belongs to the legislature. AK Const. art. 2, § 1.

<sup>6</sup> Petition for Writ of Certiorari at 8 n.1, *Thompson v. Hebdon*, 140 S. Ct. 348 (2019) (No. 19-122) 2019 WL 3380422, at \*8 n.1.

advance this extreme position in the Supreme Court if the State were to prevail after en banc rehearing before this Court.

For these pragmatic reasons, the State does not favor rehearing en banc.

DATED: September 10, 2021.

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

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