

No. 17-35019

United States Court of Appeals for the Ninth Circuit

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,

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

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

TREG R. TAYLOR
ATTORNEY GENERAL
STATE OF ALASKA

By: Laura Fox
Senior Assistant Attorney General
Alaska Bar No. 0905015
1031 West Fourth Ave., Suite 200
Anchorage, Alaska 99501
(907) 269-5275
laura.fox@alaska.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
ARGUMENT 1

TABLE OF AUTHORITIES

Cases

<i>Thompson v. Dauphinais</i> , 217 F. Supp. 3d 1023 (D. Alaska 2016).....	1
<i>Thompson v. Hebdon</i> , 140 S. Ct. 348 (2019).....	1, 2
<i>Thompson v. Hebdon</i> , 909 F.3d 1027 (9th Cir. 2018).....	1

Constitutional Provisions

AK Const. art. 2, § 1	2
-----------------------------	---

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.¹ On appeal to this Court, the State largely prevailed again, with the panel upholding all but one of the challenged limits.² 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.³ In its order, the Supreme Court expressed concerns about the current limits—specifically, that they are substantially lower

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

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

³ *Thompson v. Hebdon*, 140 S. Ct. 348 (2019).

than those of other states and are not adjusted for inflation.⁴ 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 authority⁵ 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.⁶ They would likely continue to

⁴ *Id.* at 351.

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

⁶ 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.

TREG R. TAYLOR
ATTORNEY GENERAL

By: /s/ Laura Fox

Laura Fox
Senior Assistant Attorney General
Alaska Bar No. 0905015
Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5275
Facsimile: (907) 276-3697
Email: laura.fox@alaska.gov

Attorney for Defendants-Appellees

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 17-35019

I am the attorney or self-represented party.

This brief contains 532 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

- complies with the word limit of Cir. R. 32-1.
- is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):
 - it is a joint brief submitted by separately represented parties;
 - a party or parties are filing a single brief in response to multiple briefs; or
 - a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated 8/20/2021.
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/Laura Fox Date September 10, 2021
(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: September 10, 2021

TREG R. TAYLOR
ATTORNEY GENERAL

By: /s/ Laura Fox
Laura Fox

*Attorney for Defendants-Appellees State of
Alaska*