

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-2450
LAA.Legal@akleg.gov
120 4th Street, Room 3


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

February 10, 2022

SUBJECT: Constitutionality of HB 234 contribution limits
(CSHB 234()); Work order No. 32-LS1197\I)

TO: Representative Calvin Schrage
Attn: Erik Gunderson

FROM: Alpheus Bullard 
Legislative Counsel

You asked about the constitutionality of certain campaign contribution limits in CSHB 234() (HB 234).¹

Thompson v. Hebdon

The campaign contribution limits that are amended by HB 234 were found unconstitutional by the Ninth Circuit Court in *Thompson v. Hebdon (Hebdon)*.² In this case, on remand from the United States Supreme Court,³ a panel of three judges of the Ninth Circuit Court of Appeals reversed a lower court's judgment upholding Alaska's individual-to-candidate limit, individual-to-group limit, and nonresident aggregate limit on candidate contributions.

The decision invalidated the \$500 limit of AS 15.13.070(b)(1), which applies to individual-to-candidate, individual-to-group (that is not a political party), and individual-

¹ The bill specifically changes the state's individual-to-candidate, individual-to-group, and individual-to-nongroup entity contribution limits, makes a conforming change to the contribution limit for an individual contributing to a joint campaign for governor and lieutenant governor, exempts groups and nongroup entities that only make independent expenditures from otherwise applicable contribution limits, and indexes all contribution limits under AS 15.13.070 for inflation.

² 7 F.4th 811 (9th Cir. 2021).

³ See *Thompson v. Hebdon*, 140 S. Ct. 348 (2019) (remanding case back to Ninth Circuit with instructions for the court to revisit whether Alaska's individual-to-candidate and individual-to-group campaign contribution limits were consistent with the Supreme Court's First Amendment jurisprudence, specifically *Randall v. Sorrell*, 548 U.S. 230 (2006)); *Hebdon*, 7 F.4th at 816 (citing *Thompson*, 140 S. Ct. 348).

to-nongroup entity (for the purpose of influencing the nomination or election of a candidate) contributions.⁴

Individual-to-candidate limits of AS 15.13.070(b)(1)⁵

In Randall v. Sorrell (Randall),⁶ the U.S. Supreme Court "invalidated a Vermont law that limited individual contributions on a per-election basis to \$400 to a candidate for Governor, Lieutenant Governor, or other statewide office; \$300 to a candidate for state senator; and \$200 to a candidate for state representative."⁷ In *Hebdon*, the Ninth Circuit Court of Appeals summarized how the Supreme Court directed application of *Randall*:

Randall "identified several 'danger signs' about Vermont's law that warranted closer review." In remanding this matter, the Supreme Court found that "Alaska's limit on campaign contributions shares some of those characteristics" in three ways. "First, Alaska's \$500 individual-to-candidate contribution limit is 'substantially lower than . . . the limits [the Supreme Court has] previously upheld.'" "Second, Alaska's individual-to-candidate contribution limit is 'substantially lower than . . . comparable limits in other States.'" Third, Alaska's contribution limit is not adjusted for inflation."

The *Randall* Court, after finding several danger signs, considered "five sets of considerations" or "factors" to determine whether Vermont's limits were constitutional: (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. The remand here specifically noted the "special justification" factor for our consideration.

⁴ This memorandum addresses only those portions of the *Hebdon* decision applicable to the provisions amended by HB 234.

⁵ AS 15.13.070(b) provides:

(b) An individual may contribute not more than

(1) \$500 per year to a nongroup entity for the purpose of influencing the nomination or election of a candidate, to a candidate, to an individual who conducts a write-in campaign as a candidate, or to a group that is not a political party;

(2) \$5,000 per year to a political party.

⁶ 548 U.S. 230 (2006).

⁷ *Hebdon*, 7 F.4th at 818 (quoting *Thompson*, 140 S. Ct. at 350).

...

For the \$500 individual-to-candidate limit on remand, [the court must] "examine the record independently," and apply the five-factor test outlined in *Randall* with an emphasis on the "special justification" factor.⁸

In applying the *Randall* five-factor test to Alaska's individual-to-candidate limit, the *Hebdon* court found that while AS 15.13.070(b)(1) does not offend the second and third *Randall* factors,⁹ the limit was unconstitutional when all the *Randall* factors were considered.¹⁰

In evaluating the \$500 limit of AS 15.13.070(b)(1), the *Hebdon* court held that the first *Randall* factor disfavored the state as the record "at least 'suggests' that [AS 15.13.070(b)(1)] 'significantly restrict[s] the amount of funding available for challengers to run competitive campaigns.'"¹¹ The court concluded that the statute's low limits in concert with its annual limits, made it difficult for challengers to mount effective campaigns and thus favored incumbents.¹² Similarly, because the state's contribution limits are not indexed for inflation, and any low limit will "almost inevitably become too low over time[,]"¹³ the statute's low limit was constitutionally suspect under the fourth *Randall* factor. Lastly, in considering (under the fifth *Randall* factor) whether there was any special justification for the challenged contribution limits, the court found that the record contained no indication that corruption or its appearance¹⁴ presented a more serious issue in Alaska than in other states.¹⁵

⁸ *Id.* at 818-819 (internal citations omitted).

⁹ *Id.* at 821.

¹⁰ *Id.* at 822.

¹¹ *Id.* at 821 (quoting *Randall*, 548 U.S. at 253).

¹² *Id.* at 819.

¹³ *Id.* at 821 (quoting *Randall*, 548 U.S. at 261).

¹⁴ The prevention of quid pro quo corruption, or its appearance, is the only state interest that can support limits on campaign contributions. See *Hebdon*, 4 F.4th at 811 (citing *Thompson v. Hebdon* 217 F.Supp. 3d 1023 at 1028 (citing *Citizens United*, 558 U.S. at 359, and *McCutcheon v Federal Election Commission*, 572 U.S. 185, 221 (2014))).

¹⁵ *Hebdon*, 7 F.4th at 822 (quoting *Randall*, 548 U.S. at 261, in finding "[t]he small size of [Alaska's] legislature and the influence of the oil industry are risk factors, but Alaska's anecdotal evidence is insufficient to establish that 'corruption (or its appearance) in [Alaska] is significantly more serious a matter than elsewhere.'").

The court held that, under the *Randall* factors, the state's individual-to-candidate contribution limit magnifies the advantage of incumbency to the point where it puts challengers at a significant disadvantage, noting the "danger signs" identified by the Supreme Court that the limit is substantially lower than any similar campaign contribution limit previously upheld by the Supreme Court, is substantially lower than comparable limits in other states, is not indexed for inflation, and applies a low ceiling uniformly to all offices "making Alaska's law the most restrictive in the country in this regard."¹⁶ The court held that the limit, and its imposition on the First Amendment rights of would-be contributors, could not be sustained because the state failed to meet its burden under the *Randall* factors of showing the limit was closely drawn to meet the state's objectives.¹⁷

Individual-to-group limits of AS 15.13.070(b)(1)

The *Hebdon* court also held that the state did not meet its burden in demonstrating that the \$500 individual-to-group limit of AS 15.13.070(b)(1) was closely drawn to restrict contributions from circumventing the individual-to-candidate limit.¹⁸ The court found that, like the individual-to-candidate limit, this limit was also not indexed for inflation and was lower than comparable limits in other states.¹⁹

The court held that individuals channeling money to candidates through groups was not a concern because of the state's already low \$1,000 group-to-candidate limit,²⁰ because the record did not show that "the individual donor will necessarily have access to a sufficient number of [groups] to effect such a scheme[.]" and because it was the opinion of the court that it was "more likely that a donor would opt to spend unlimited funds on independent expenditures on behalf of [the donor's] favored candidate."²¹

Accordingly, because the statute was not sufficiently tailored to the state's interest in preventing circumvention of its individual-to-candidate contribution limits, the panel found AS 15.13.070(b)(1) "impermissibly restricted participation [of individuals desiring to donate to groups] in the political process."²²

¹⁶ *Hebdon*, 7 F.4th at 822 (quoting *Thompson*, 140 S. Ct. at 351).

¹⁷ *Id.* at 822 (citing *Randall*, 548 U.S. at 253).

¹⁸ *Id.* at 823.

¹⁹ *Id.*

²⁰ AS 15.13.070(c).

²¹ *Hebdon*, 7 F.4th at 823 (citing *McCutcheon*, 572 U.S. at 213-214).

²² *Id.* at 823 (citing *McCutcheon*, 572 U.S. at 218).

Alaska Public Offices Commission v. Patrick

On September 3, 2021, the Alaska Supreme Court held that "[i]n light of *Citizens United's* [²³] holding that independent expenditures 'do not give rise to corruption or the appearance of corruption,' contribution limits [applicable to groups that make only independent expenditures] would not withstand even the lower level of scrutiny applied to contribution limits."²⁴ Accordingly, the state contribution limits applicable to groups under AS 15.13.070(b) (individual-to-group) and (c) (group-to-group) are unconstitutional if applied to a group that only makes independent expenditures.²⁵ Under this decision, contributions to groups that make only independent expenditures may not be limited.

Does HB 234 address the constitutional issues identified by *Hebdon* and *Patrick*?

As described above, Alaska's individual-to-candidate and individual-to group campaign limits were invalidated by the *Hebdon* court under the *Randall* "considerations" or "factors." The factors that the court found against the state's limits included that (1) they significantly restricted the amount of funding available for challengers to run competitive campaigns; (2) were not indexed for inflation; and (3) there was no "special justification" for the low limits.²⁶ Accordingly, addressing any of these factors would, under the logic of *Randall*, put the state in a better position to support its contribution limits.

HB 234 doubles the individual and group contribution limits and indexes them for inflation. Doubling the contribution limits likely increases "the amount of funding available for challengers to run competitive campaigns"²⁷ and indexing the limits for inflation prevents the limits from becoming too low over time. Because HB 234 doubles the applicable contribution limits and indexes them for inflation, the state is less likely to require any special justification for how the individual-to-candidate and individual-to-group limits of HB 234 combat corruption and its appearance.

²³ 558 U.S. 310 (2010).

²⁴ *Alaska Pub. Offs. Comm'n v. Patrick*, 494 P.3d 53, 58 (Alaska 2021) (quoting *Citizens United*, 558 U.S. at 357-59).

²⁵ For purposes of AS 15.13, "independent expenditure" is defined at AS 15.13.400(11):

"independent expenditure" means an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate[.]

²⁶ *Id.* at 823.

²⁷ *Id.* at 821 (quoting *Randall*, 548 U.S. at 253).

Representative Calvin Schrage

February 10, 2022

Page 6

However, to best protect HB 234 against legal challenge, I recommend articulating for the record how the bill's amended contribution limits are narrowly tailored to the state's compelling interest in preventing corruption and the appearance of corruption, including prevention of circumvention of the [individual-to-candidate limit,]" without unduly "restrict[ing] participation in the political process."²⁸

When it comes to addressing *Alaska Public Offices Commission v. Patrick*, HB 234 conforms with the decision by exempting contributions to groups and nongroup entities that make only independent expenditures from the otherwise applicable limitations of AS 15.13.070.

If you have specific questions, please do not hesitate to contact me.

ALB:lme

22-053.lme

²⁸ *Hebdon*, 7 F.4th at 823 (quoting *McCutcheon*, 572 U.S. at 218).