No. 18-____

IN THE

Supreme Court of the United States

ILLINOIS LIBERTY PAC, Political Action Committee registered with the Illinois State Board of Elections, EDGAR BACHRACH, and KYLE MCCARTER,

Petitioners,

v.

LISA MADIGAN, Attorney General of the State of Illinois, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 12, 2018

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QUESTIONS PRESENTED

1. Should political contribution limits that favor one type of speaker over another receive strict scrutiny?
2. Should the holding in *Buckley v. Valeo*, 424 U.S. 1 (1976) applying a "closely drawn" test to all political contribution limits be overruled in favor of applying strict scrutiny?

RULE 29.6 STATEMENT

Petitioner Illinois Liberty PAC is a political action committee registered with the Illinois State Board of Elections.

Petitioner Edgar Bachrach is a resident of Illinois and a donor to political candidates and committees.

Petitioner Kyle McCarter is a resident of Illinois and an Illinois state Senator.

Respondents Attorney General Lisa M. Madigan and Members of the Illinois State Board of Elections William McGuffage, Jesse R. Smart, Harold D. Byers, and Betty J. Coffrin are representatives of the State of Illinois, sued in their official capacities.

Because Petitioners are not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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OPINIONS BELOW

The Seventh Circuit's opinion is reported at *Ill. Liberty PAC v. Madigan*, 904 F.3d 463 (7th Cir. 2018). The opinion and judgment are reproduced in the Appendix. App. 3a, 1a. The district court's opinion is reported at *Ill. Liberty PAC v. Madigan*, 212 F. Supp. 3d 753 (N.D. Ill., Sept. 7, 2016) and reproduced at App. 24a. The district court's judgment is reproduced at App. 58a.

JURISDICTION

The Seventh Circuit entered its judgment on September 13, 2018. App. 1a. This Court has Jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

The Statutes of the State of Illinois challenged by this petition are 10 Ill. Comp. Stat. 5/9-8.5(b)–(d), (h), (h-5), (h-10) and 5/9-1.8(c), App. 60a.

STATEMENT OF THE CASE

This case is brought under the Free Speech Clause of the First Amendment against an Illinois statutory scheme on political contribution limits that favors certain speakers over others.

A. The Illinois statutory scheme and how it favors some speakers over others

In particular, the Illinois Disclosure and Regulation of Campaign Contributions and Expenditures Act (the "Act") gives political spending advantages to

legislative caucus committees that it does not give to other political speakers. The most striking advantage is that in general elections a legislative caucus committee, like a political party committee, may make unlimited contributions to a candidate's campaign committee. 10 Ill. Comp. Stat. 5/9-8.5(b). App. 63a. In contrast, donations to a candidate for General Assembly are limited to $5,000 from an individual; $10,000 from a corporation, labor organization, or association; and $50,000 from a political action committee ("PAC") or another candidate committee. *Id.*[1]

Only a small number of speakers, however, may take advantage of the uninhibited free speech given to legislative caucus committees. A legislative caucus committee may be formed by one of only four individuals in the State of Illinois: the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, the President of the Senate, or the Minority Leader of the Senate. *Id.* 5/9-1.8(c), App. 60a. Alternatively, it may be formed by a group of five or more state Senators or ten or more state representatives, and it must be established for the purpose of electing candidates to the General Assembly. *Id.*

Another advantage given to established legislative caucus committees is that once candidates receive a contribution from one legislative caucus committee, they may not receive a contribution from another caucus committee. *Id.* 5/9-8.5(b), App. 64a. This rule

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[1] The contribution limits have been adjusted upward for inflation since the Act was enacted, but the original figures are used herein for simplicity's sake. *See* 10 Ill. Comp. Stat. 5/9-8.5(g).

does not apply to contributions from individuals, PACs, corporations, labor organizations, associations, and other candidate committees. *Id*.

Finally, the Act's differing limits on contributions from different types of speakers are lifted for most speakers when self-funding or independent expenditures hit a certain level in a race. *Id.* 5/9-8.5(h), (h-5), and (h-10), App. 67a-69a.

B. Proceedings below

Petitioners are a PAC, an individual contributor, and a state Senator in Illinois seeking to make and receive political contributions in excess of the discriminatory limits imposed by the Act. On July 24, 2012, Petitioners filed this declaratory judgment action under 42 U.S.C. § 1983 in U.S. District Court for the Northern District of Illinois against the Illinois Attorney General and members of the Illinois State Board of Elections. Petitioners challenged the Act on grounds that favoring one type of speaker over another violated the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

Petitioners filed an initial Motion for Preliminary Injunction, which the district court denied and the Seventh Circuit summarily affirmed. The district court then dismissed most of Petitioners' claims under Federal Rule of Civil Procedure 12(b)(6). The court then held a bench trial on the claim that legislative caucus committees, in particular, are unconstitutionally favored over other types of political committees. On September 7, 2016, the district court ruled in favor of Respondents/Defendants that the Act was constitutional. *Ill. Liberty PAC v. Madigan*, 212 F. Supp. 3d 753 (N.D. Ill., Sept. 7, 2016), App. 24a. Petitioners

appealed the decision to the U.S. Court of Appeals for the Seventh Circuit. On September 13, 2018, the Seventh Circuit affirmed the decision of the district court. *Ill. Liberty PAC v. Madigan,* 904 F.3d 463 (7th Cir. 2018), App. 3a.

In affirming the decision of the district court, the Court of Appeals subjected the Act only to intermediate scrutiny. *Id.*, at 469 n.3, App. 10a.

ARGUMENT

I. THIS COURT SHOULD CLARIFY FOR LOWER COURTS THAT POLITICAL CONTRIBUTION LIMITS THAT FAVOR ONE TYPE OF SPEAKER OVER ANOTHER SHOULD RECEIVE STRICT SCRUTINY.

Lower courts require clarity regarding the level of scrutiny they should apply in First Amendment challenges to statutes that impose different campaign finance contribution limits on different classes of donors. *See Riddle v. Hickenlooper*, 742 F.3d 922, 930 (10th Cir. 2014) (overturning a Colorado contribution limit scheme that doubled the contribution limits to major party candidates versus write-in candidates) (Gorusch, J., concurring) ("I confess some uncertainty about the level of scrutiny the Supreme Court wishes us to apply. . . .").

In the absence of guidance from this Court, some lower courts, including the court below, have given contribution limits that treat some donors less favorably than others only minimal scrutiny. In light of the fundamental First Amendment interests at stake, such limits should receive the highest scrutiny to require the government to justify its discriminatory treatment of different donors.

In this Court's most recent case on political contribution limits, the facts of the case did not require addressing what level of scrutiny should be applied. The Court determined that it "need not parse the differences" between whether strict scrutiny or the "closely drawn" test applies. *McCutcheon v. FEC*, 572 U.S. 175, 199 (2014).

In the present case, Petitioners challenge a legislative contribution limit scheme that strongly favors committees run by Illinois's legislative leaders over other political donors. The case presents an opportunity for the Court to clarify the law and ensure that courts sufficiently protect First Amendment rights.

A. Lower courts have not given meaningful scrutiny to contribution limits that favor some donors over others.

Although the First Amendment generally demands that the government treat all speakers equally, especially when they speak about politics, the court below and other lower courts have given minimal scrutiny to campaign finance schemes that impose lower limits on some donors than on others.

"The First Amendment stands against . . . restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). "[S]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Id.* The First Amendment prohibits efforts by the government to control the "relative ability of individuals and groups to influence the outcome of elections." *Id.* at 350. The Court has stated that campaign contribution limits must be narrowly tailored to serve the government's interest. The only government interest that the Court

has recognized as "compelling" is the interest in preventing actual or apparent *quid pro quo* corruption. *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014). Allowing the government to pursue other interests would "impermissibly inject" the government "'into the debate over who should govern.'" *Id*.

Nonetheless, the lower court's decision showed no concern for the discriminatory nature of Illinois's scheme of campaign contribution limits. Those limits allow select committees to give candidates unlimited amounts at times when all other donors' contributions are limited. Although Petitioners challenged the scheme's apparent favoritism, the lower court analysis focused not on whether the state was justified in treating some donors more favorably than others, but only on whether the limit on any given class of donor was too low. App. 11a. The court concluded that Petitioners could not challenge the state's more favorable treatment of certain donors unless they could "plausibly plead" that the state was motivated by a desire to benefit those donors and not actually "concerned about corruption." App. 14a.

In other words, the lower court held that contribution limits that provide higher contributions for some donors than for others present no First Amendment problem unless a plaintiff can, somehow, show that the legislature had an improper motive.

The Massachusetts Supreme Judicial Court took the same view in a recent decision. It rejected First Amendment and Equal Protection Clause challenges to a Massachusetts statute that bans for-profit business entities from making political contributions, but it does not ban unions and non-profit organizations. *See 1A Auto, Inc. v. Dir. of the Office of Campaign & Political Fin.,* 480 Mass. 423, 425 (2018). In that

case, the Court concluded that a ban on corporate contributions would tend to prevent corruption, and the government's failure to similarly limit union and nonprofit contributions was irrelevant. Like the Seventh Circuit in this case, the Massachusetts court concluded that plaintiffs could not prevail on their First Amendment claim in the absence of evidence that the legislature was actually motivated by a desire to favor some political donors over others rather than a desire to prevent corruption. *Id.* at 438.

The District of Columbia Circuit and the Eighth Circuit have similarly held that if a ban on contributions by a particular class of donors, considered by itself, survives First Amendment scrutiny, then an Equal Protection Clause challenge to the ban, based on the government's more favorable treatment of other donors, can receive no greater scrutiny and can fare no better. *See Wagner v. FEC*, 793 F.3d 1, 32 (D.C. Cir. 2015); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 567, 600-03 & n.11 (8th Cir. 2013).

Some lower courts, however, have required the government to justify its differential treatment of different donors. They have required the government to show that its contribution limits are narrowly tailored to address differences in the potential to corrupt that are inherent in the different classes' respective contributions. *See Riddle*, 742 F.3d at 928-30 (government must justify different contributions limits for different candidates by showing the candidates subject to lower limits "were more corruptible (or appeared more corruptible)" than the favored candidates); *Russell v. Burris*, 146 F.3d 563, 571-72 (8th Cir. 1998) (government must justify different contribution limits for regular PACs and "small-donor" PACs by showing they were based on differences in the potential for corruption); *Protect*

My Check, Inc. v. Dilger, 176 F. Supp. 3d 685, 691-92 (E.D. Ky. 2016) (government required to justify different treatment where statute banned contributions by corporations but not by unions or LLCs).

These conflicting decisions illustrate that courts require guidance on how to analyze First Amendment challenges to campaign finance rules that place lower contribution limits on some speakers than on others. They also show that, in the absence of guidance from this Court, some lower courts will not require the government to justify its decisions to discriminate, despite the potential harm to fundamental First Amendment interests.

B. Courts that take a deferential approach to discriminatory contribution limits insufficiently protect First Amendment rights.

The analysis the lower court in this case and other courts have applied is inadequate to protect First Amendment rights.

To disregard the government's preferential treatment of certain political donors, as these courts have, is to disregard key reasons why the Court subjects contribution limits, in general, to rigorous scrutiny. Those reasons are to ensure that the government does not use limits to indirectly control the content of speech, *Citizens United*, 558 U.S. at 340; to ensure that the public is not "deprive[d] . . . of the right and privilege to determine for itself what speech and speakers are worthy of consideration, *id.* at 341; and to prevent the government from "impermissibly inject[ing] [itself] 'into the debate over who should govern,'" *McCutcheon*, 572 U.S. at 750.

Indeed, discriminatory limits threaten to distort the outcomes of elections. When the government exempts

select donors from contribution limits that apply to others, it "make[s] and implement[s] judgments about which strengths should be permitted to contribute to the outcome of an election." *Davis v. FEC*, 554 U.S. 724, 742 (2008). In Illinois, the state has effectively decided that support from the state's political parties and legislative leaders should be allowed to contribute to a candidate's success much more than support from other classes of donors. That violates the principle, under our system of government, that voters, rather than elected officials, should "evaluate the strengths and weaknesses of candidates competing for office." *Id.* Uniquely empowering the top four members of the legislature to give unlimited or outsized contributions, as Illinois has, directly contradicts the principle that "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon*, 572 U.S. at 192.

Despite discriminatory limits' threat to fundamental First Amendment interests, lower courts have taken a deferential approach that ensures that such limits will virtually never be struck down.

C. Contribution limits that facially discriminate between different classes of donors warrant the highest level of judicial scrutiny.

To ensure that courts adequately protect First Amendment rights, this Court should subject contribution limits that favor some donors over others to strict scrutiny, or at least to rigorous scrutiny that requires the government to justify its differential treatment of different classes of donors.

The Court has stated that even ordinary campaign contribution limits warrant "rigorous" scrutiny, which requires an assessment of "the fit between the stated

governmental objective and the means selected to achieve that objective." Although the fit need not be "perfect," it must be "reasonable" and must use a "means narrowly tailored to achieve the desired objective." *McCutcheon,* 572 U.S. at 218.

In addition to the narrow tailoring requirement, the Court has also said that campaign contribution limits must serve a "compelling" government interest. *Id.* at 199. And the Court has recently clarified that there is only one government interest sufficiently important to justify contribution limits: preventing *quid pro quo* corruption or its appearance. *Id.* at 192.

Thus, when a plaintiff challenges campaign contribution limits under the First Amendment, as Petitioners do here, the government bears the burden to show that those limits are narrowly tailored to prevent corruption. *Id.* at 192, 218. To meet that burden, the government must provide "adequate evidentiary grounds." *FEC v. Colo. Republican Campaign Cmte.*, 533 U.S. 431, 456 (2001). "[M]ere conjecture" will not suffice. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000); *see also Randall v. Sorrell*, 548 U.S. 230, 261 (2006) (striking limits where government presented no evidence to justify them).

Strict scrutiny is especially necessary when campaign contribution limits favor some political speakers over others. "Premised on mistrust of governmental power, the First Amendment stands against . . . restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* In particular, the First Amendment prohibits government attempts

to control the "relative ability of individuals and groups to influence the outcome of elections." *Id.* at 350. The government may not "restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon,* 572 U.S. at 191 (citing *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749-750 (2011)).

This Court, however, has not specifically addressed how courts should analyze contribution limits that impose lower limits on some donors than on others, such as the Illinois limits that Petitioners challenge.

The First Amendment should require strict scrutiny in such instances because such restrictions are "all too often simply a means to control content." *Citizens United*, 558 U.S. at 340. Petitioners' challenge to the Illinois contribution limits implicates not only the First Amendment concerns inherent in any challenge to contribution limits, but also the First Amendment's opposition to discrimination favoring or opposing certain political speakers; therefore, strict scrutiny should apply. *See Austin v. Mich. State Chamber of Comm.*, 494 U.S. 652, 666 (1990) (statute imposing different independent-expenditure limits on different types of associations subject to strict scrutiny), *overruled on other grounds by Citizens United*, 558 U.S. 310; *Riddle*, 742 F.3d at 931-322 (Gorusch, J., concurring) ("[W]hatever level of scrutiny should apply to equal infringements of the right to contribute in the First Amendment context, the strictest degree of scrutiny is warranted under the Fourteenth Amendment equal protection doctrine when the government proceeds to discriminate against some persons in the exercise of that right."); *Russell,* 146 F.3d at 571-72 (applying strict scrutiny in equal protection challenge to statute allowing "small donor" PACs to give candidates as

much as $2,500 while limiting other PACs' contributions to $300 or $100); *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685, 691-92 (E.D. Ky. 2016) (concluding that "strict scrutiny applies to contribution bans with equal protection implications," holding Kentucky statute unconstitutional to the extent that it banned contributions by corporations and their PACs but not union and LLC PACs).

Although the *Austin*, *Russell*, and *Protect My Check* cases addressed claims under the Equal Protection Clause, it would make no sense to apply lesser scrutiny to a First Amendment claim challenging the same type of discrimination. *Cf. Ark. Writers' Project v. Ragland*, 481 U.S. 221, 227 n.3 (1987) (although First Amendment challenge to state's collection of sales tax from one magazine, but not other magazines and newspapers, was "obviously intertwined with interests arising under the Equal Protection Clause," the Court "analyze[d] it primarily in First Amendment terms" because it "directly implicate[d] freedom of the press"); *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 55 n.4 (1986) (Court summarily rejected equal protection claim after analyzing and rejecting First Amendment claim, stating that plaintiffs could "fare no better under the Equal Protection Clause than under the First Amendment itself").

In this case, however, the Seventh Circuit differed from the line of cases above and, instead, applied intermediate scrutiny: "[The] argument that the First Amendment requires strict judicial scrutiny of contribution limits . . . is foreclosed by *Buckley* and its successors. . . . [T]he Supreme Court has adopted a form of intermediate scrutiny for use in First Amendment challenges to contribution limits." *Ill. Liberty*

PAC v. Madigan, 904 F.3d 463, 469 n.3 (7th Cir. 2018), App. 10a.

This Court should grant certiorari in this case to clarify to lower courts that instances of discriminatory contribution limits require strict scrutiny.

D. The Illinois statutory scheme that strongly favors legislative caucus committees and other political contributors over other speakers is not narrowly tailored to prevent corruption and cannot survive strict scrutiny.

The main reason the Act's contribution limits cannot survive strict scrutiny is that Respondents have failed to offer evidence to show that the Act's limits are narrowly tailored to serve a compelling governmental interest. Respondents must show the Act's contribution limits "curtail speech only to the degree necessary to meet the problem at hand," avoiding unnecessary infringement of "speech that does not pose the danger that has prompted the regulation." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986).

Respondents have never argued, much less shown, that the Act's discriminatory limits are the least restrictive means of the preventing any corruption inherent in donors' contributions. Indeed, Respondents have never explained how the Act's different limits on different types of donors relate to the potential for corruption inherent in those donors' contributions.

The most preferential treatment in the Act is given to legislative caucus committees. To show narrow tailoring, Respondents would have had to show why the potential for corruption inherent in legislative caucus committees' contributions to candidates is so much less than the potential for corruption inherent

in contributions by other donors, such as PACs. Only then would the state be justified in allowing caucus committees to make unlimited contributions to candidates while limiting PAC contributions to $50,000 and limiting other donors to lower amounts. But Respondents did not present any evidence regarding the potential for corruption inherent in any type of donor's contributions.

It is evident from the face of the Act that these limits are not narrowly tailored in light of their treatment of legislative caucus committees versus their treatment of all other types of campaign committees. First, while the Act treats legislative caucus committees like political party committees, which are generally allowed to make unlimited contributions to candidates, unlike political party committees, legislative caucus committees are run by legislative leaders, who can use their caucus committees to serve their personal interests. Second, there is no reason to believe that contributions from legislative caucus committees, which the Act does not limit, pose a significantly lesser threat of corruption than contributions from a PAC controlled by a legislator, which the Act limits. Third, a candidate may accept contributions from only one legislative caucus committee during a given primary or general election. This limitation serves no apparent purpose except to "lock in" a candidate to depend on the first legislative caucus committee that gives him or her money and to make it difficult for new legislative caucus committees to arise and compete.

In addition, the Illinois statutory scheme preferences other political speakers. It discriminates against individual citizens and in favor of corporations, unions, and other associations in donation limits. It removes limits in response to self-funding and inde-

pendent expenditures, belying the notion that the limits were designed to prevent corruption. It also places no limits on political party committees. In sum, it is not narrowly tailored to prevent corruption and, therefore, cannot survive strict scrutiny.

If the lower courts had correctly applied strict scrutiny in this case, they would have overturned the Act, as this Court now should do.

II. IN THE ALTERNATIVE, THE COURT SHOULD OVERRULE THE HOLDING IN *BUCKLEY* THAT APPLIED A LESSER STANDARD OF SCRUTINY TO POLITICAL CONTRIBUTION LIMITS THAN STRICT SCRUTINY.

For the reasons explained in Section I, political contribution limits that favor one type of speaker over another should receive strict scrutiny. That specific question was not addressed in *Buckley*, and that is the standard that this Court applies in other First Amendment cases where the government favors some speakers over others. *See Austin v. Mich. State Chamber of Comm.*, 494 U.S. 652, 666 (1990) (statute imposing different independent-expenditure limits on different types of associations subject to strict scrutiny), *overruled on other grounds by Citizens United*, 558 U.S. 310 (2010). In the alternative, all campaign contribution limits should receive strict scrutiny, regardless of whether they favor one type of speaker over another.

Both contributions to political campaigns and direct expenditures, "generate essential political speech" by fostering discussion of public issues and candidate qualifications. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 412 (2000) (Thomas, J., dissent-

ing); *see also id.*, at 410–411. *Buckley* itself recognized that both contribution and expenditure limits "operate in an area of the most fundamental First Amendment activities" and "implicate fundamental First Amendment interests." 424 U.S., at 14, 23. Yet, the *Buckley* decision distinguished between limits on campaign expenditures and limits on campaign contributions. *Buckley,* 424 U.S. at 23. For expenditures, this Court in *Buckley* applied strict scrutiny. *Id.* at 44. For contributions, this Court in *Buckley* applied what this Court in *McCutcheon* later described as the "closely drawn" test, *id.* at 25, and what the Seventh Circuit, below, in this case described as intermediate scrutiny. App. 10a. The "closely drawn" test is a lesser standard of review than strict scrutiny but is still "rigorous." *Id*. at 29. It requires that contribution limits be "closely drawn" to the asserted government interest of preventing corruption. The *Buckley* court held that congressional campaign contribution limits survived the "closely drawn" test, while campaign expenditure limits did not survive strict scrutiny. *Id.* at 58.

In the plurality opinion in *McCutcheon*, this Court ruled that aggregate campaign contribution limits did not survive scrutiny, regardless of whether the "closely drawn" test or strict scrutiny applied. *McCutcheon*, 572 U.S. at 199. The Court did not address the question of whether the lesser standard used in *Buckley* should be abandoned.

"The analytic foundation of *Buckley* . . . was tenuous from the very beginning and has only continued to erode in the intervening years." *Shrink Missouri*, 528 U.S. at 412 (Thomas, J., dissenting). "To justify a lesser standard of review for contribution limits, *Buckley* relied on the premise that contributions are different in kind from direct expenditures. None of the

Court's bases for that premise withstands careful review." *McCutcheon*, 572 U.S. at 229 (Thomas, J, concurring).

The first justification that this Court in *Buckley* gave for applying lesser scrutiny to contribution limits was that "the transformation of contributions into political debate involves speech by someone other than the contributor." 424 U.S., at 21. But the Court has since rejected this approach as affording insufficient First Amendment protection to "the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985); *see Shrink Missouri*, 528 U.S. at 413–414 (Thomas, J., dissenting).

Another justification for lesser scrutiny for contribution limits given in *Buckley* was that restriction on speech by contribution limits is only marginal because "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." 424 U.S. at 20, 21. But this Court has never required a speaker to explain the reasons for his position in order to obtain full First Amendment protection. *McCutcheon*, 572 U.S. at 229 (Thomas, J., concurring). Rather, this Court has consistently held that speech is protected even "when the underlying basis for a position is not given." *Shrink Missouri*, 528 U.S. at 415, n. 3 (Thomas, J., dissenting); *see, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 46 (1994) (sign reading "For Peace in the Gulf"); *Texas v. Johnson*, 491 U.S. 397, 416 (1989) (flag burning); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969) (black armband signifying opposition to

Vietnam War); *see also Colo. Republican Campaign Cmte. v. FEC*, 518 U.S. 604, 640 (1996) (opinion of Thomas, J.) ("Even a pure message of support, unadorned with reasons, is valuable to the democratic process").

A third rationale for lesser scrutiny for contribution limits presented by this Court in *Buckley* was that contribution limits warrant less stringent review because "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution," and "[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." 424 U.S. at 21. But political contributions do increase the quantity of communication by "amplifying the voice of the candidate" and "help[ing] to ensure the dissemination of the messages that the contributor wishes to convey." *Shrink Missouri*, 528 U.S. at 415 (Thomas, J., dissenting). They also serve as a quantifiable metric of the intensity of a particular contributor's support, as demonstrated by the frequent practice of giving different amounts to different candidates.

This Court in *Buckley* also found less scrutiny was warranted for contribution limits on a political contributor because they "involve[] little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." *Buckley*, 424 U.S. at 21. But this Court rejected that justification for aggregate contribution limits, noting that "[i]t is no answer to say that the individual can simply contribute less money to more people" because "[t]o require one person to contribute at lower levels than others because he wants to support more candidates

or causes is to impose a special burden on broader participation in the democratic process." *McCutcheon*, 572 U.S. at 231.

The rationales provided for providing lesser scrutiny to contribution limits in *Buckley* have not stood the test of time. Contributions and expenditures are deserving of the same strict scrutiny because "[c]ontributions and expenditures are simply 'two sides of the same First Amendment coin.'" *Id*. quoting *Buckley*, 424 U.S. at 241, 244 (Burger, C. J., concurring in part and dissenting in part). They both represent political speech and should be deserving of the highest level of protection afforded by the Court. The distinction between contributions and expenditures should be reexamined by the Court, and "the half-way house . . . created in *Buckley* ought to be eliminated." *Shrink Missouri*, 528 U.S. at 410 (Kennedy, J., dissenting).

This Court has "not hesitated to overrule decisions offensive to the First Amendment." *Citizens United*, 558 U.S. at 363 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (opinion of Scalia, J.)). *Stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). This Court has identified factors that it will consider in deciding to revisit a decision. Among the relevant ones here are: the quality of *Buckley*'s reasoning, whether it conflicts with its other precedents, developments since *Buckley*, and reliance on *Buckley*. *See Janus*, 138 S. Ct. at 2478-2479. Here, the rationale for *Buckley* has eroded; this Court's precedents since *Buckley* have conflicted with it as they have recognized the importance of such speech, *see McCutcheon*, 572 U.S. at 231, *Citizens United*, 558

U.S. at 363; developments since *Buckley* have shown that limits on contributions have not limited the amount of money in political races; there is no discernable decrease in corruption or its appearance; and any reliance interest that a government has for imposing restrictions on contributions are outweighed by the First Amendment interests.

This case is a suitable vehicle for this Court to reevaluate *Buckley*'s application of lesser scrutiny to contribution limits in favor of a more consistent approach: applying strict scrutiny to all limits on political contributions.

CONCLUSION

This Court should clarify for lower courts that political contribution limits that facially discriminate against certain types of speakers, like those in Illinois, should receive strict scrutiny. In the alternative, the Court should overrule the holding in *Buckley* and subject all political contribution limits to strict scrutiny. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 12, 2018

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 16-3585

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ILLINOIS LIBERTY PAC, Political Action Committee registered with the Illinois State Board of Elections, EDGAR BACHRACH, and KYLE MCCARTER,

Plaintiffs – Appellants,

v.

LISA MADIGAN, Attorney General of the State of Illinois, *et al.*,

Defendants – Appellees.

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Before: KENNETH F. RIPPLE, Circuit Judge
DIANE S. SYKES, Circuit Judge
DAVID F. HAMILTON, Circuit Judge

Originating Case Information:

District Court No: 1:12-cv-05811
Northern District of Illinois, Eastern Division
District Judge Gary Feinerman

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FINAL JUDGMENT

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 16-3585

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ILLINOIS LIBERTY PAC, Political Action Committee registered with the Illinois State Board of Elections, EDGAR BACHRACH, and KYLE MCCARTER,

Plaintiffs-Appellants,

v.

LISA MADIGAN, Attorney General of the State of Illinois, *et al.*,

Defendants-Appellees.

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12-cv-5811 — Gary Feinerman, *Judge*.

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ARGUED SEPTEMBER 27, 2017 —
DECIDED SEPTEMBER 13, 2018

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Before RIPPLE, SYKES, and HAMILTON, *Circuit Judges*.

SYKES, *Circuit Judge*. Illinois Liberty PAC, Edgar Bachrach, and Kyle McCarter (collectively, "Liberty PAC") sued Illinois officials under 42 U.S.C. § 1983 alleging that certain campaign contribution limits set by the Illinois Disclosure and Regulation of Campaign

Contributions and Expenditures Act ("the Act"), 10 ILL. COMP. STAT. 5/9-1 *et seq.* (2016), violate the First Amendment. Invoking the intermediate-scrutiny framework of *Buckley v. Valeo*, 424 U.S. 1 (1976), Liberty PAC challenges four parts of the Act that it contends are not closely drawn to prevent quid pro quo corruption or its appearance. First, the Act sets lower contribution limits for individuals than for corporations, unions, and other associations. 10 ILL. COMP. STAT. 5/9-8.5(b)–(d). Second, the Act allows political parties to make unlimited contributions to candidates during a general election. *Id.* Third, a waiver provision lifts the contribution limits for all candidates in a race if one candidate's self-funding or support from independent expenditure groups exceeds $250,000 in a statewide race or $100,000 in any other election. *Id.* 5/9-8.5(h). And fourth, certain legislators may form "legislative caucus committees," which, like political party committees, are permitted to make unlimited contributions to candidates during a general election. *Id.* 5/9-1.8(c).

The district judge dismissed the first three claims at the pleadings stage, reasoning that Supreme Court precedent foreclosed them. The judge then held a bench trial to determine if the Act's more lenient regulation of legislative caucus committees—classifying them with political party committees—shows that the Act is not closely drawn to prevent quid pro quo corruption or its appearance. The judge ruled for the defendants, finding that legislative caucus committees are sufficiently similar to political party committees to justify their identical treatment under the Act.

We affirm across the board. The Supreme Court's campaign-finance cases plainly foreclose any argument that the Act's contribution limits for individual

donors are too low or that the limits for other donors are too high. To overcome this impediment, Liberty PAC argues that the Act is fatally underinclusive by favoring certain classes of donors over others. But the Court has repeatedly upheld a similar federal campaign-finance scheme setting lower contribution limits for individuals than for other categories of donors, including political parties. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 187–88 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310, 319 (2010); *FEC v. Colo. Republican Federal Campaign Comm.*, 533 U.S. 431, 455–56 (2001); *Buckley*, 424 U.S. at 35–36. The Court has also said that a waiver provision like the one Illinois has adopted would not be unconstitutional. *See Davis v. FEC*, 554 U.S. 724, 737 (2008). Finally, on the record before us, we see no basis to disturb the judge's factual findings that legislative caucus committees are sufficiently akin to political party committees to justify Illinois's decision to treat them alike.

I. Background

Illinois Liberty PAC is a political action committee that makes contributions to Illinois legislative candidates who support free-market principles. Bachrach, an individual donor, contributes to Illinois legislative candidates and political action committees. McCarter is an Illinois state senator. But for Illinois's regulatory regime governing contribution limits for elections to state offices, Liberty PAC and Bachrach would contribute more to candidates, Bachrach would contribute more to political action committees, and McCarter would solicit and accept larger contributions from donors. Together they filed this § 1983 lawsuit against Illinois Attorney General Lisa Madigan and members

of the Illinois State Board of Elections to challenge certain of the Act's contribution limits.

The Act groups political donors into three broad categories: (1) individuals; (2) political committees; and (3) corporations, labor unions, and other associations. 10 ILL. COMP. STAT. 5/9-8.5(b). There are several types of political committees: political party committees, candidate political committees, political action committees, and legislative caucus committees. *Id.* 5/9-1.8(a). A political party committee is the state, county, or ward committee of a political party. *Id.* 5/9 1.8(c). Each candidate for public office may have one candidate political committee, which is composed of the candidate himself or the group that accepts contributions on his behalf. *Id.* 5/9-2(b). A political action committee or "PAC" is a group of people or an organizational association that accepts contributions, makes expenditures, and makes electioneering communications related to a political race exceeding $3,000 in a 12-month period. *Id.* 5/9-1.8(d). Finally, a legislative caucus committee is "established for the purpose of electing candidates to the General Assembly." *Id.* 5/9-1.8(c). A legislative caucus committee may be formed by the majority and minority leaders of the Senate and House, or by a group of five state senators or ten state representatives in the same partisan caucus. *Id.*

The Act sets different base contribution limits depending on the identity of the donor and recipient. An individual may contribute $5,000 to a single candidate in a given election cycle; $10,000 to a political action committee; and $10,000 to a political

party committee.[1] § 5/9-8.5(b)–(d). A corporation, labor union, or other association may contribute twice as much as an individual: $10,000 to candidates; $20,000 to political action committees; and $20,000 to political party committees. *Id.* A political action committee may contribute $50,000 to candidates, other political action committees, and party committees. *Id.* A political party committee may contribute up to $200,000 for a statewide candidate during a primary election and an unlimited amount during a general election. *Id.*

The Act has two additional features at issue in this case. First, if a candidate's self-funding or independent spending in support of the candidate exceeds $250,000 in a statewide race or $100,000 in any other election, then the contribution limits are waived for all candidates in that race. § 5/9-8.5(h). Second, as we've noted, the Act authorizes certain legislative leaders and groups of legislators to create legislative caucus committees. These are powerful political tools: legislative caucus committees are subject to the same generous contribution limits as political parties, but a candidate may not accept contributions from more than one legislative caucus committee in a given election cycle. § 5/9-8.5(b).

Liberty PAC's original complaint alleged that the Act violates the First Amendment because it is not closely drawn to prevent quid pro quo corruption or its appearance.[2] The complaint challenged three aspects

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[1] The contribution limits have been adjusted upward for inflation since the Act was enacted. *See* 10 ILL. COMP. STAT. 5/9-8.5(g). We use the original figures throughout the opinion for simplicity's sake.

[2] McCarter was added as a plaintiff when Liberty PAC filed its amended complaint.

of the regulatory regime: (1) the provision setting higher contribution limits for corporations, unions, and other associations than for individuals; (2) the provision allowing political parties to make unlimited contributions to candidates in general elections; and (3) the waiver provision eliminating all contribution limits if one candidate's self-funding or independent spending in support of the candidate exceeds the thresholds mentioned above. The complaint also alleged that the Equal Protection Clause of the Fourteenth Amendment requires strict judicial scrutiny of classifications among donors. Soon after filing its complaint, Liberty PAC moved for a preliminary injunction.

In a comprehensive opinion, the judge denied the motion, reasoning that Liberty PAC was unlikely to succeed on any of its claims in light of adverse Supreme Court precedent. *Ill. Liberty PAC v. Madigan*, 902 F. Supp. 2d 1113 (N.D. Ill. 2012). Specifically, the judge explained that the Court has (1) routinely upheld similar gradations of contribution limits for different classes of donors; (2) implied that political parties *must* be treated more favorably than other groups given the unique relationship between parties and candidates; and (3) endorsed a materially similar waiver provision. *Id.* at 1118–25. The judge also ruled that Liberty PAC's argument for strict scrutiny under the Equal Protection Clause was unlikely to succeed because the Court consistently applies intermediate scrutiny to contribution limits. *Id.* at 1126. We summarily affirmed that order.

In an amended complaint, Liberty PAC reasserted its earlier claims and added a claim challenging the Act's treatment of legislative caucus committees. Liberty PAC alleged that the legislative caucus committees present an outsized risk of quid pro quo

corruption given their special fundraising abilities and their leaders' roles in the policymaking process, yet the Act treats them more favorably than political action committees, other organizational associations (including corporations and unions), and individuals.

The defendants moved to dismiss the second complaint for failure to state a claim. *See* FED. R. CIV. P. 12(b)(6). The judge granted the motion with respect to Liberty PAC's original claims, incorporating the reasoning in his earlier order denying preliminary injunctive relief. The judge declined to dismiss the new claim pertaining to legislative caucus committees, giving the parties an opportunity to develop a more complete record. The parties filed cross-motions for summary judgment on that claim, but the judge denied both motions and held a bench trial.

Liberty PAC presented testimony from Dr. Marcus Osborn, who offered three reasons why legislative caucus committees should be classified as political action committees rather than political party committees: (1) the structure of legislative caucus committees amplifies the risk of quid pro quo corruption; (2) legislative caucus committees use different strategies to fund candidates than political parties; and (3) legislative caucus committees are more susceptible to the influence of interest groups. The defendants presented limited testimony from an official at the State Board of Elections, who told the court that the Board has never made a negative audit finding against a legislative caucus committee.

Following trial, the judge issued a Rule 52(a) order explaining his findings of fact and conclusions of law and entering judgment for the defendants. The judge found Dr. Osborn's opinion testimony unconvincing and rejected as implausible Liberty PAC's contention

that legislative caucus committees "give legislative leaders materially *more* power over their respective caucuses." *Ill. Liberty PAC v. Madigan*, 212 F. Supp. 3d 753, 760 (N.D. Ill. 2016). He found that the substantial overlap between legislative caucus committees and the political parties to which they are linked was far more compelling: legislative leaders participate in party activities as well as caucus, committee, and other legislative work, and the parties and caucus committees share the same general goals. The judge concluded that any difference between legislative caucus committees and political parties does not materially affect the risk of quid pro quo corruption or its appearance, so Illinois's decision to treat them alike survived intermediate scrutiny.

II. Discussion

Liberty PAC challenges the judge's rulings rejecting its four First Amendment claims.[3] Three of those claims come to us from a Rule 12(b)(6) dismissal; the remaining claim is before us on a Rule 52(a) order after a bench trial. We review a dismissal order de novo. *Tagami v. City of Chicago*, 875 F.3d 375, 377 (7th Cir. 2017). A claim to relief must be "plausible on its face" to survive a Rule 12(b)(6) motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). We review the judge's factual findings following a bench trial for clear error and his conclusions of law de novo. *Winforge, Inc. v. Coachmen Indus.*, 691 F.3d 856, 868

[3] Liberty PAC did not appeal the dismissal of its equal-protection claim. It does, however, advance an argument that the First Amendment requires strict judicial scrutiny of contribution limits. This argument is foreclosed by *Buckley* and its successors. As we explain in the text, the Supreme Court has adopted a form of intermediate scrutiny for use in First Amendment challenges to contribution limits.

(7th Cir. 2012). A finding is clearly erroneous if we are "left with the definite and firm conviction that a mistake has been committed." *Id.*

Most laws that burden political speech are subject to strict scrutiny. *Citizens United*, 558 U.S. at 340. For challenges to contribution limits, however, the Supreme Court has adopted a form of intermediate scrutiny: "Campaign contribution limits are generally permissible if the government can establish that they are 'closely drawn' to serve a 'sufficiently important interest.'" *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 152 (7th Cir. 2011) (quoting *Buckley*, 424 U.S. at 25). The prevention of "actual or apparent quid pro quo corruption is the *only* interest the Supreme Court has recognized as sufficient to justify campaign-finance restrictions." *Id.* at 153.

A. Individual Contribution Limits

Illinois allows corporations, labor unions, and other associations to contribute $10,000 to candidates in a given election cycle but limits individual contributions to $5,000. Liberty PAC does not argue that these limits are unconstitutional when considered independently. The Supreme Court has routinely upheld similar base contribution limits as "serving the permissible objective of combatting corruption," *McCutcheon v. FEC*, 572 U.S. 185, 192–93 (2014), so long as those limits do not restrict too much political speech, *see Buckley*, 424 U.S. at 21. Using this framework, the Court has invalidated individual contribution limits ranging from $200 to $400 as too low, *Randall v. Sorrell*, 548 U.S. 230, 249–53 (2006) (plurality opinion), but upheld individual contribution limits at or just above $1,000, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 395–97 (2000); *Buckley*, 424 U.S. at 21. Illinois's limits on contributions to candidates—$5,000 for individual

donors and $10,000 for corporations, unions, and other associations—easily survive scrutiny under this precedent. Liberty PAC concedes as much.

Liberty PAC nonetheless contends that the contribution limits impermissibly discriminate against individual donors relative to corporations, unions, and other associations. It maintains that the defendants have the burden to show that "a contribution from an individual to a candidate that ranges from $5,001 to $10,000 presents an intolerable threat of corruption, while a contribution from a corporation, union, or association to a candidate in that same range does not." Relatedly, Liberty PAC complains that the judge wrongly dismissed this claim on the pleadings without putting the defendants to this evidentiary burden.

This cluster of arguments misunderstands the government's burden in a campaign-finance challenge like this one. The focus of the "closely drawn" inquiry in this context is whether the contribution limits for individual donors are above the "lower bound" at which "the constitutional risks to the democratic electoral process become too great." *Randall*, 548 U.S. at 248 (plurality opinion). As long as the challenged contribution caps exceed that lower boundary, the Supreme Court has "extended a measure of deference to the judgment of the legislative body that enacted the law." *Davis*, 554 U.S. at 737; *see also Randall*, 548 U.S. at 248 (plurality opinion) ("We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives."). That's because "a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well

as $1,000." *Buckley*, 424 U.S. at 30 (quotation marks omitted).[4]

Liberty PAC's claim is better understood as a contention that the Act is fatally underinclusive. In other words, Liberty PAC essentially argues that Illinois's "failure to restrict other speech equally damaging to [its anticorruption interest] undercuts [its] position" that the limits on individual contributions are closely drawn to prevent corruption or its appearance. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015). This is a difficult argument to make because "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Id.* (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992)). To state a cognizable First Amendment claim, Liberty PAC must do more than allege that a law restricts too little of *another person's* speech, *Davis*, 554 U.S. at 737, or that Illinois could have better served its anticorruption interest by adjusting certain contribution limits up or down, *see Williams-Yulee*, 135 S. Ct. at 1671 (rejecting the argument that different campaign-solicitation restrictions would have better targeted the interest in avoiding corruption or its appearance). Liberty PAC

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[4] The Court has also deferred to legislative judgments setting contribution limits when the challenge proceeds under the Equal Protection Clause. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981) (stating that differing restrictions placed on different types of donors "reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the election process"); *McConnell v. FEC*, 540 U.S. 93, 188 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (stating that "Congress is fully entitled to consider the real-world differences" between donor groups). As we've noted, Liberty PAC does not challenge the dismissal of its equal-protection claim.

must instead plausibly plead that Illinois was not *actually* concerned about corruption when it promulgated the individual contribution limits. It has not done so.

Buckley is instructive on this point. That iconic case resolved a broad-spectrum challenge to the Federal Election Campaign Act of 1971 ("FECA"). Relevant here is the Court's rejection of a challenge to a provision setting the contribution limit for political action committees five times higher ($5,000) than the limit for ad hoc organizations and individual donors ($1,000). 424 U.S. at 35–36. The Court brushed aside the contention that this difference in treatment undermined the regulatory aim of the limit on individual donors and ad hoc organizations, saying it was "without merit" because the higher limits for political action committees simply "enhance[d] the opportunity for bona fide groups to participate in the election process." *Id.*

Similarly here, Illinois could set higher limits for contributions from corporations, unions, and associations without fatally undermining the anticorruption interest served by the somewhat lower limits on contributions from individual donors. Indeed, the Court rejected a similar challenge in *Buckley* despite a much larger disparity between the limits on donor categories than is at issue here. Liberty PAC has not pointed to any case that would authorize us to invalidate Illinois's $5,000 contribution limit for individual donors merely because unions, corporations, and other associations can contribute twice that amount. In light of *Buckley*, and considering the limited nature of the underinclusiveness inquiry and the utter lack of support for Liberty PAC's position, the judge correctly dismissed this claim on the pleadings.

B. Political Party Committees

Liberty PAC next contends that the Act violates the First Amendment by exempting political parties from the limits on contributions to candidates in a general election. As before, Liberty PAC does not challenge the exemption standing alone. *See Davis*, 554 U.S. at 737 ("There is . . . no constitutional basis for attacking contribution limits on the ground that they are too high."). Again, Liberty PAC argues that treating political parties more favorably renders the limits on individuals and PACs fatally underinclusive.

Our analysis begins with *FEC v. Colorado Republican Federal Campaign Committee* ("*Colorado II*"), 533 U.S. 431 (2001). There the Court upheld federal limits on expenditures by political parties in coordination with their candidates, which were deemed to be the equivalent of contributions. *Id.* at 455–56. Applying the same intermediate-scrutiny test that applies to limits on contributions to candidates by individuals and nonparty organizations, the Court accepted the government's argument that the coordinated expenditure limits were closely drawn to serve the important interest of preventing "the risk of corruption (and its appearance) through circumvention of valid contribution limits." *Id.* at 456.

It does not follow from *Colorado II*, however, that the First Amendment forbids regulation that treats political parties more favorably when it comes to contribution limits, as Liberty PAC appears to argue. Indeed, the coordinated expenditure limits at issue in *Colorado II*—ranging from $67,560 to $1,636,438 for U.S. Senate candidates, depending on state population—were vastly higher than the $1,000 limit on individual contributions to a candidate and the $5,000 limit on PACs. *Id.* at 439 n.3, 442 n.7.

And the four dissenters in *Colorado II* expressed their view that a political party's contributions to its candidates cannot be limited *at all*. *See id.* at 473–82 (Thomas, J., dissenting). The dissenters explained that "[t]he very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes." *Id.* at 476 (quotation marks omitted). That, the dissent said, "is the very essence of our Nation's party system of government." *Id.* at 477. So while it's possible to "speak of an individual citizen or a political action committee corrupting or coercing a candidate, . . . [w]hat could it mean for a party to 'corrupt' its candidate or to exercise 'coercive' influence over him?" *Id.* (internal quotation marks omitted).

Two years later in *McConnell v. FEC*, the Court rejected an argument that the Bipartisan Campaign Reform Act of 2002 ("BCRA") unconstitutionally discriminates against political parties as compared to special-interest groups like the National Rifle Association and American Civil Liberties Union. 540 U.S. 93, 187–88. The Court explained that Congress may set different rules for political parties than other groups:

> BCRA actually favors political parties in many ways. Most obviously, party committees are entitled to receive individual contributions that substantially exceed FECA's limits on contributions to nonparty political committees; individuals can give $25,000 to political party committees whereas they can give a maximum of $5,000 to nonparty political committees. *In addition, party committees are entitled in effect to contribute to candidates by making coordinated expenditures, and those*

> *expenditures may greatly exceed the contribution limits that apply to other donors.*
>
> More importantly, however, *Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation.* Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the Legislature that vastly exceeds that of any interest group. As a result, it is hardly surprising that party affiliation is the primary way by which voters identify candidates, or that parties in turn have special access to and relationships with federal officeholders. *Congress'*[*s*] *efforts at campaign finance regulation may account for these salient differences.*

Id. at 188 (emphases added) (citations omitted).

Colorado II and *McConnell* establish the principle that campaign-finance laws may draw distinctions between political parties and other political donors—indeed, may substantially favor them in setting contribution limits—without running afoul of the First Amendment. Accordingly, Illinois's choice to allow political parties to provide unlimited support to their candidates in a general election does not "raise[] a red flag" that the state is not *actually* concerned about corruption or its appearance elsewhere in the Act. *Williams-Yulee*, 135 S. Ct. at 1668.

C. Waiver Provision

Liberty PAC next contends that the Act's waiver provision—lifting contribution limits for all candidates in a race if one candidate's self-funding or support from independent expenditure groups exceeds certain ceilings—fatally undermines Illinois's anticorruption rationale for the limits on individual and PAC donations. As Liberty PAC sees it, the waiver rule was designed to level the playing field, an impermissible justification for campaign-finance restrictions. *See generally Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749–50 (2011) (rejecting equalization of resources as a compelling governmental interest). Liberty PAC also argues that the provision impermissibly favors incumbents. *See, e.g.*, *Randall*, 548 U.S. at 268 (Thomas, J., concurring) (reasoning that contribution limits that advantage incumbents may not be closely drawn to prevent corruption or its appearance).

The Court considered the constitutionality of a waiver provision in *Davis v. FEC*, 554 U.S. 724. At issue there was BCRA's "so-called Millionaire's Amendment," which increased the contribution limits for one candidate if his opponent's self-funding plus expenditures exceeded $350,000. *Id.* at 729. The Court held that the "asymmetric" waiver was unconstitutional because it "impose[d] an unprecedented penalty on any candidate who robustly exercises" the First Amendment right to engage in political speech. *Id.* at 739.

Importantly, however, the Court reasoned that if the "elevated contribution limits applied across the board, [the self-funded candidate] would not have any basis for challenging those limits." *Id.* at 737. So "if [the Millionaire's Amendment] simply raised the contribution limits for all candidates," then a First

Amendment challenge "would plainly fail." *Id.* As the Court explained: "[A] candidate who wishes to restrict an opponent's fundraising cannot argue that the Constitution demands that contributions be regulated more strictly." *Id.* Put somewhat more directly, there is "no constitutional basis for attacking contribution limits on the ground that they are too high." *Id.*

Though the Court was speaking hypothetically, this passage bears directly on Liberty PAC's challenge to the Illinois waiver provision, which lifts contribution limits "across the board"—that is, "for all candidates"—when one candidate's self-funding exceeds a certain threshold. As the Court's reasoning in *Davis* makes clear, a symmetrical waiver provision like this one survives constitutional scrutiny.

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, is also instructive. *Bennett* was a challenge to a state campaign-finance law that provided public funding to candidates who agreed to adopt certain self-funding and expenditure limits. *Id.* at 728–29. Those candidates also received matching funds if a privately financed opponent's expenditures exceeded a certain threshold. *Id.* The Court held that the matching-funds provision violated the First Amendment because it "impermissibly burden[s] (and thus reduc[es]) the speech of privately financed candidates and independent expenditure groups." *Id.* at 741. Here, in contrast, Illinois's waiver provision does not restrict or tether the speech of some candidates to the spending of others. Each dollar spent by a candidate in excess of the spending threshold does not "generate[] . . . adversarial dollars in response." *Id.* at 738.

Finally, it's worth repeating that underinclusiveness claims occupy difficult theoretical terrain. *See*

Williams-Yulee, 135 S. Ct. at 1668. When contribution limits are *equally* raised for all speakers, *no* speakers or viewpoints are favored or disfavored. The judge properly dismissed this claim.

D. Legislative Caucus Committees

Finally, Liberty PAC challenges the judge's factual findings that legislative caucus committees are sufficiently similar to political party committees to justify their similar treatment under the Act. Liberty PAC argues that legislative caucus committees create unique opportunities for legislative leaders to engage in corruption.

Before proceeding, we note that Liberty PAC's challenge to the limits on legislative caucus committees essentially mirrors its attack on the exemption for political parties. As before, however, Illinois's decision to treat legislative caucus committees like political party committees cannot be challenged on the ground that the contribution limits are too high. *See Davis*, 554 U.S. at 737. So once again, Liberty PAC is left to argue that Illinois's more generous treatment of legislative caucus committees fatally undermines the anticorruption rationale for its limits on contributions from PACs.

Taking his cue from *McConnell*'s discussion of the "real-world differences" between political parties and other interest groups, 540 U.S. at 188, the judge found that legislative caucus committees "are most akin to political parties" for purposes of campaign-finance regulation, *Ill. Liberty PAC*, 212 F. Supp. 3d at 767. The Supreme Court has said that congressional caucus committees—the federal analog to legislative caucus committees—are "identifiable as part of their respective party." *Id.* (quoting *FEC v. Democratic Senatorial*

Campaign Comm., 454 U.S. 27, 40 n.20 (1981)). Legislative caucus committees align with their respective parties and have similar influence over their members, and in that sense are more closely analogous to party committees than to political action committees. Given the ties and structural similarities between legislative caucus committees and political parties, the judge found that Illinois's decision to treat them the same for purposes of contribution limits cast no doubt on the anticorruption justification for the limits on individuals, PACs, and other donors.

Liberty PAC maintains that the judge overlooked meaningful structural differences between the legislative caucus committees and political parties, the most significant of which is that legislative leaders have exclusive control over their legislative caucus committees, which allows them to use their committees to serve their own personal interests. A legislative leader may use his legislative caucus committee to consolidate power, maintain his position at the head of his caucus, and promote his personal policy agenda. Liberty PAC also points to Illinois's treatment of different types of legislator-to-legislator contributions. While the leader of a legislative caucus committee may make unlimited contributions during a general election (just like the political parties to which they are tied), a candidate's committee may contribute a maximum of $50,000.

The judge rejected these arguments largely because a legislative leader's role in the statehouse is a de facto leadership position in the political party itself. The goal of the party and the legislative leader alike is to wield influence over the legislative policymaking process. We find no error in this reasoning.

Second, Liberty PAC asserts that the judge "lacked any basis" to reject Dr. Osborn's testimony because the defendants presented no evidence at trial to rebut his testimony. But the judge was not required to accept Dr. Osborn's opinions at face value. As the fact-finder, he was entitled to reject testimony that he found to be unpersuasive, even if its source was an expert witness. And the judge here reasonably rejected Dr. Osborn's testimony as insufficient to undermine Illinois's decision to treat legislative caucus committees as political party committees for purposes of setting contribution limits.

To start, Dr. Osborn testified that legislative leaders can use their control over their caucuses to wield influence over individual legislators, and the Act's exclusivity requirement—prohibiting a candidate from accepting contributions from more than one caucus committee—can make legislators beholden to their caucus leaders. The judge reasoned that these institutional controls do not make legislative caucus committees meaningfully different from the political parties with which they are aligned. And he viewed the exclusivity requirement as largely a red herring because candidates do not solicit or receive contributions from the other party's caucus.

Next, Dr. Osborn testified that legislative caucus committees are more susceptible than political parties to outside influence because their donors are less diverse. For support he provided the donor profile for legislative caucus committees and compared it with a *theoretical* donor profile for political parties. The judge rightly found the comparison between actual and theoretical data flawed. The data on actual donations to Illinois political parties is readily available, and Dr.

Osborn's failure to use it in his comparison suggests that it would have undermined his theory.

Finally, Dr. Osborn testified that political parties typically pursue an "expansion" strategy, deploying their contributions to enhance the number of their officeholders. Political action committees, in contrast, pursue an "access" strategy to influence legislators' votes. *Ill. Liberty PAC*, 212 F. Supp. 3d at 761. Legislative caucus committees, he said, use access strategies because they contribute to candidates in primary races and to candidates who win the general election by wide margins. But as the judge recognized, these actions are equally consistent with an expansion strategy. Political parties sometimes take sides in primary races to assist candidates they deem more electable.

In short, the judge reasonably declined to accept Dr. Osborn's testimony and adequately explained his reasons for doing so. The clear-error standard for factual findings entered after a bench trial is "highly deferential." *Morisch v. United States*, 653 F.3d 522, 528 (7th Cir. 2011). "[I]f a factual finding is plausible in light of the record viewed in its entirety, we may not reverse that finding even if we would have decided the matter differently had we been the trier of fact." *Id.* (quotation marks omitted). The judge's findings here easily surpass this deferential standard, and we have no warrant to substitute our own.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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12 C 5811

ILLINOIS LIBERTY PAC, EDGAR BACHRACH,
and KYLE MCCARTER,

Plaintiffs,

vs.

LISA M. MADIGAN, Attorney General of Illinois,
WILLIAM MCGUFFAGE, Chairman of the Illinois
State Board of Elections, JESSE R. SMART,
Vice-Chairman of the Illinois State Board of
Elections, HAROLD D. BYERS, Member of the Illinois
State Board of Elections, BETTY J. COFFRIN,
Member of the Illinois State Board of Elections,
ERNEST L. GOWEN, Member of the Illinois State
Board of Elections, JUDITH C. RICE, Member of the
Illinois State Board of Elections, BRYAN A.
SCHNEIDER, Member of the Illinois State Board
of Elections, and CHARLES W. SCHOLZ, Member
of the Illinois State Board of Elections,
all in their official capacities,

Defendants.

Judge Gary Feinerman

MEMORANDUM OPINION AND ORDER

Illinois Liberty PAC, Edgar Bachrach, and Kyle McCarter brought this declaratory judgment action under 42 U.S.C. § 1983 against the Attorney General of Illinois and the Chairman, Vice-Chairman, and other members of the Illinois State Board of Elections, all in their official capacities, alleging that certain contribution limits imposed by the Illinois Election Code violate the First Amendment and the Fourteenth Amendment's Equal Protection Clause. Doc. 65. Early in the litigation, the court denied Plaintiffs' motion for a preliminary injunction due to a low likelihood of success on the merits. Docs. 43-44 (reported at 902 F. Supp. 2d 1113 (N.D. Ill. 2012)). The Seventh Circuit summarily affirmed, stating: "We agree with the district court that [Plaintiffs] have not shown that they are likely to succeed on the merits of their challenge to contribution limits in 10 ILCS 5/9-8.5." 2012 WL 5259036 (7th Cir. Oct. 24, 2012). This court then dismissed most of Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6), except for the claim—which Plaintiffs added after preliminary injunctive relief was denied—that the Illinois Election Code is unconstitutional to the extent it classifies legislative caucus committees as political party committees and thereby treats them more favorably than political action committees ("PACs"), corporations, and individuals. Docs. 95-96 (reported at 2014 WL 859325 (N.D. Ill. Mar. 3, 2014)). After discovery devoted to that claim, the court denied the parties' cross-motions for summary judgment and Defendants' motion to bar the expert opinions of Plaintiffs' expert, Dr. Marcus Osborn. Docs. 162-163 (reported at 2015 WL 5589630 (N.D. Ill. Sept. 21, 2015)). The court held a bench trial on that claim. Docs. 182-183.

Pursuant to Federal Rule of Civil Procedure 52(a), the court enters the following findings of fact, which

are found by a preponderance of the evidence, and conclusions of law. To the extent that any findings of fact may be considered conclusions of law, they shall be deemed conclusions of law, and to the extent that any conclusions of law may be considered findings of fact, they shall be deemed findings of fact. After considering the admissible evidence and the parties' stipulations, and upon assessing the witnesses' credibility, the court finds that the Code's contribution limits do not violate the First Amendment or the Equal Protection Clause.

Findings of Fact

A. Illinois Campaign Finance Law

1. The Illinois Disclosure and Regulation of Campaign Contributions and Expenditures Act ("the Act"), 10 ILCS 5/9-1 *et seq.*, which is codified as part of the Illinois Election Code, recognizes three classes of political contributors: (1) individuals; (2) political committees; and (3) corporations, labor unions, and other associations. 10 ILCS 5/9-8.5(b).

2. There are several different types of political committees, including candidate political committees, political party committees, and PACs. 10 ILCS 5/9-1.8(a).

3. Individuals may contribute $5,000 to a candidate in a given election cycle. 10 ILCS 5/9-8.5(b).

4. Individuals may contribute $10,000 to a PAC per election cycle; the same limit applies to an individual's contributions to a political party committee per election cycle. 10 ILCS 5/9-8.5(c)-(d).

5. A PAC, defined as a group of people or an organization "that accepts contributions or makes expenditures during any 12-month period in an aggregate

amount exceeding $5,000 on behalf of or in opposition to a candidate," 10 ILCS 5/9-1.8(d), may contribute $50,000 to a candidate during an election cycle. 10 ILCS 5/9-8.5(b).

6. A political party committee is the state, county, or ward/township committee of a political party, or a legislative caucus committee. 10 ILCS 5/9-1.8(c).

7. In contrast to individuals and PACs, political party committees may contribute unlimited amounts to a candidate during a general election. 10 ILCS 5/9-8.5(b).

8. During a primary election, political party committees are subject to a $200,000 contribution limit to a candidate for statewide office; a $125,000 limit for state senate elections and certain judicial and county elections; a $75,000 limit for state representative elections and certain judicial and county elections; and $50,000 for all other elections. *Ibid*.

9. Political party committees may contribute $20,000 to a PAC in a given election cycle. 10 ILCS 5/9-8.5(d).

10. The foregoing amounts are adjusted regularly for inflation. 10 ILCS 5/9-8.5(g).

11. It is a Class A misdemeanor for a candidate to accept a contribution exceeding the applicable limit. 10 ILCS 5/9-25.2.

12. As noted, one type of political party committee is a legislative caucus committee. 10 ILCS 5/9-1.8(c).

13. A legislative caucus committee is "a committee established for the purpose of electing candidates to the General Assembly." *Ibid*.

14. A legislative caucus committee may be formed by each of the majority and minority leaders of the state House and Senate—*i.e.*, the Speaker and Minority Leader of the House, and the President and Minority Leader of the Senate—or by a committee of five state senators or ten state representatives of the same caucus. *Ibid*.

15. The contribution limits on legislative caucus committees are the same as those imposed on other political party committees. 10 ILCS 5/9-8.5(b). A candidate may accept contributions from only one legislative caucus committee per election cycle. *Ibid*. There is no similar limitation on a candidate's receipt of contributions from other political party committees.

16. An "election cycle" consists of either a primary election or a general election. 1/26/16 Tr. at 207:3-6. Therefore, a political candidate may receive contributions from one legislative caucus committee during the primary election and from another legislative caucus committee in the general election. *Id*. at 209:21-24.

17. For ease of reference, the court uses the term "political party" to refer to a political party and its affiliated committees other than a legislative caucus committee, and the term "candidate" to refer to a candidate and his or her affiliated campaign committee.

18. Plaintiffs claim that the Act's treatment of legislative caucus committees as political party committees, and its favorable treatment of legislative caucus committees as compared to PACs, individuals, and corporations, are unconstitutional. 1/25/16 Tr. at 7:17-24. They argue that legislative caucus committees, though regulated as political parties, actually have little in common with political parties and are far more similar to PACs. *Id*. at 9:11-22; *see also* Pl. Exh. 1

at 13 ("The benefits provided to Legislative Caucus Committees are unwarranted because they operate more like political action committees than party committees."). Because legislative caucus committees have the potential to corrupt, the argument goes, their classification as political parties undermines the Act's anti-corruption justification for limiting contributions from individuals and PACs and renders the law fatally underinclusive. 1/25/16 Tr. at 11:3-9.

B. Illinois Liberty PAC

19. Illinois Liberty PAC is a political action committee that donates funds to candidates running for election to the Illinois General Assembly. Doc. 178 at p. 17, ¶ 1; 1/25/16 Tr. at 51:14-21. The PAC provides financial contributions to candidates who support free market principles. 1/25/16 Tr. at 51:14-17.

20. Illinois Liberty PAC wishes to contribute larger amounts of money to candidates for state office than the Illinois Election Code currently allows. *Id*. at 54:12-15.

21. If there were no contribution limits (or, presumably, if there were more generous ones), Illinois Liberty PAC would adopt a different contribution strategy. *Id*. at 56:6-9.

22. Illinois Liberty PAC is not aligned with any political party and would support any candidate that subscribed to a free market philosophy. *Id*. at 59:13-17.

23. Illinois Liberty PAC does not advocate for a slate of candidates, and nor does it determine who sits on legislative committees or who obtains legislative leadership positions. *Id*. at 59:18-60:20.

24. As a PAC, Illinois Liberty PAC is not beholden to the electorate and may not be voted into or out of office. *Id*. at 60:21-25.

25. The contribution limits placed on Illinois Liberty PAC apply regardless of its viewpoint or the candidates to whom it contributes. *Id*. at 61:1-25.

C. Edgar Bachrach

26. Edgar Bachrach is an individual who makes contributions to PACs and political candidates. Doc. 178 at p. 17, ¶ 2; 1/25/16 Tr. at 19:15-21:19.

27. In the 2012 election cycle, Bachrach contributed $5,000 to Citizens for Babcock, a campaign committee for Michael Babcock, but he would have contributed more had the Act not prevented him from doing so. 1/25/16 Tr. at 19:18-21:8.

28. In the 2014 election cycle, Bachrach contributed $10,500 to Illinois Liberty PAC, but he would have contributed more if not for the Act's limits. *Id*. at 21:15-22:3.

29. In the current election cycle, Bachrach wants to contribute larger amounts to Illinois Liberty PAC and to Jeanne Ives, a candidate for the Illinois House of Representatives, than the Act allows. *Id*. at 22:4-23:1.

30. Bachrach is not a "straight ticket voter"—that is, he contributes to candidates based on the issues they champion, not because he is supporting a particular political party or because he intends to speak on behalf of a political party. *Id*. at 23:13-24:3.

31. Bachrach does not (1) select slates of candidates, (2) determine who sits on legislative committees, (3) advocate for a particular slate of candidates, or (4) advocate for any particular candidate to be designated as a legislative leader. *Id*. at 24:9-25:11.

32. As a private donor, Bachrach is not voted into or out of office and is not beholden to the electorate. *Id*. at 25:17-20.

33. The contribution limits placed on Bachrach are the same regardless of his political affiliation, the political affiliation(s) of the candidate(s) to whom he contributes, or the issue(s) for which he advocates. *Id*. at 26:5-27:3.

D. Kyle McCarter

34. Kyle McCarter is an Illinois state senator who runs for elected office as a Republican, fundraises for his campaigns, and spends the contributions he receives to support his candidacy. Doc. 178 at p. 17, ¶ 3; 1/25/16 Tr. at 29:16-19, 39:24-40:25.

35. In the 2010, 2012, and 2014 election cycles, McCarter received contributions from both individuals and PACs, but he would have sought greater contributions from them had the Act allowed. *Id*. at 30:6-32:1.

36. If permitted, McCarter's current campaign committee would accept contributions from individuals and PACs in amounts above the current limits. *Id*. at 32:2-9.

37. McCarter is the chair of the Common Sense Caucus PAC. *Id*. at 32:10-17.

38. McCarter initially testified that he wanted to establish his PAC as a legislative caucus committee, but that he "could not meet the qualifications" and therefore a legislative caucus committee "could not be put together." *Id*. at 43:23-44:8. He then testified that he simply elected "not to form [his PAC] as a legislative caucus committee." *Id*. at 44:9-45:13.

39. McCarter testified at trial that he believes that he stopped receiving campaign contributions from the

Republican Illinois Senate leaders (through their legislative caucus committees) because he opposed them on certain issues. *Id*. at 39:17-42:1. At his deposition, McCarter admitted that he could not judge the intentions of the legislative leaders' actions. *Id*. at 42:7-43:5.

40. McCarter was not aware of any instance in which the Senate leadership used a legislative caucus committee to fund a senator's primary opponent because that senator had previously opposed the leadership. *Id*. at 48:10-49:16.

41. McCarter agreed that if an Illinois legislator's constituents do not approve of who contributes to him or her, they can vote that legislator out of office. *Id*. at 35:10-13. But if McCarter were ever voted out of office, he would retain his position as chair of the Common Sense Caucus PAC because voters cannot vote him out of his PAC. *Id*. at 35:16-21.

42. McCarter characterized a legislative caucus committee as "essentially a PAC" composed of state legislators. *Id*. at 33:17-18. For the reasons provided below, the court does not agree with that assertion.

E. Illinois Legislative Leaders

43. The House Speaker, House Minority Leader, Senate President, and Senate Majority Leader are elected by members of their respective caucuses. Ill. Const. art. IV, §§ 6(b)-(d); 1/25/16 at 147:15-24. They may be removed from their leadership positions by members of their caucus, or be removed from office by the electorate. *Id*. at 148:3-149:2.

F. Dr. Marcus Osborn

44. Dr. Marcus Osborn, Plaintiffs' expert witness, provides government relations services through the law firm Kutak Rock. *Id*. at 69:2-70:7.

45. Dr. Osborn represents clients before legislative bodies, assists them in developing political policy strategies, drafts and reviews legislation, and provides policy expertise. *Id*. at 69:4-11.

46. Dr. Osborn has worked in this field since the early 1990s after receiving a master's degree and a Ph.D. in public administration from Arizona State University. *Id*. at 73:14-18; Pl. Exh. 1 at 15.

47. Dr. Osborn's dissertation focused on interest groups and how they achieve influence through campaign contributions. 1/25/16 Tr. at 74:9-15.

48. Through writing his dissertation, Dr. Osborn became familiar with an extensive body of academic literature pertaining to interest groups and state legislative and political operations. *Id*. at 74:16-25.

49. Dr. Osborn has served as an expert witness in two cases concerning Arizona campaign finance law, *Arizona Free Enterprise Club v. Bennett* and *Citizens Clean Elections Commission v. Bennett*. *Id*. at 70:12-71:4, 76:5-25; Pl. Exh. 1 at 15.

50. Dr. Osborn's analysis in this case relied principally on themes and trends in the academic literature. 1/25/16 Tr. at 127:5-19.

51. Dr. Osborn's expert report and testimony do not address any conduct of political party committees (other than legislative caucus committees) at the state, county, or township level, including how leaders are selected within those committees or how they contribute to candidates. *Id*. at 141:19-146:10. He examined only the legislative caucus committees of the majority party in Illinois (the Democratic Party) and only those formed by Democratic legislative leaders

(the House Speaker and the Senate President). *Id*. at 182:7-10.

52. Dr. Osborn offered three main reasons why classifying legislative caucus committees as political parties, and not as PACs, is inappropriate: (1) the structure of legislative caucus committees, unlike that of political parties, amplifies the risk of *quid pro quo* corruption in the Illinois legislature; (2) legislative caucus committees employ different candidate financing strategies than do political parties; and (3) legislative caucus committees are more susceptible to interest-group influence than political parties because the donors who contribute to legislative caucus committees are concentrated more heavily in certain industries than are those who donate to political parties. For the reasons discussed below, the court finds these points unpersuasive.

G. Dr. Osborn's Testimony Regarding the Structure of Legislative Caucus Committees

53. Dr. Osborn opined that legislative caucus committees create new opportunities for corruption because they are "structured to manage the operations of a legislative body." Pl. Exh. 1 at 2; *see also* 1/25/16 Tr. at 89:22-90:16.

54. Osborn opined that this design "enhances the potential for corruption because it links a policy-making authority directly with a fundraising system." 1/25/16 Tr. at 78:3-8. He claimed that, even if there were no evidence that legislative caucus committees actually allowed for corruption, he would still believe that they were dangerous because "it's the structure that is the problem." *Id*. at 124:23-125:7.

55. Dr. Osborn opined that, by contrast to legislative caucus committees, political parties are "one step

removed from the policy-making process, meaning . . . they are . . . not actively involved in the day-to-day legislating or policy-making as a legislator or a governor would be." *Id*. at 84:25-85:4.

56. Dr. Osborn testified that the legislative leaders have "carrots and sticks" that enable them to maintain their positions, such as providing caucus members with "plum committee assignments" or fast-tracking their legislation. *Id*. at 96:19-25. In his view, legislative caucus committees provide an additional carrot by allowing legislative leaders to use campaign contributions to advance their own policy agendas. *Id*. at 97:18-25.

57. Dr. Osborn opined that this structure creates opportunities for *quid pro quo* corruption, as a legislative leader theoretically could say, "Unless you vote for this bill, you will not receive contributions." *Id*. at 98:1-15. Therefore, by combining the policy-making function of the legislative leaders with the extraordinary fundraising power of the legislative caucus committees, Illinois has created novel opportunities for corruption. *Id*. at 101:9-14.

58. The court does not find persuasive Dr. Osborn's testimony that legislative caucus committees are materially closer to the policymaking process than are political parties. It is naïve to think that political parties do not wield significant influence over legislative agendas—in fact, that is a principal purpose of political parties. *See FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 476 (2001) (Thomas, J., dissenting) ("The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes.") (internal quotation marks omitted); *id*. at 477 (Thomas, J., dissenting) ("[A party's influence with candidates]

is simply the essence of our Nation's party system of government. One can speak of an individual citizen or a political action committee corrupting or coercing a candidate, but [w]hat could it mean for a party to 'corrupt' its candidate or to exercise 'coercive' influence over him?") (internal quotation marks omitted). Even Dr. Osborn admitted that political parties seek to shape policy, albeit only at "a very high level." 1/25/16 Tr. at 161:11-18. As a practical matter, there is often overlap between state party officials and legislative leaders. For example, Michael Madigan serves as Speaker of the House, chair of the Democratic Majority legislative caucus committee, and chair of the Illinois Democratic Party. 1/26/16 Tr. at 259:2-12. This fact further undermines Dr. Osborn's assertion that legislative caucus committees are materially different from political parties because they are "closer" to the legislative process.

59. The court further finds that the features of legislative caucus committees do not create enhanced opportunities for corruption. Unlike PACs and individuals, legislative leaders owe their legislative seats to the primary and general electorates and their legislative leadership positions to their respective caucuses. If they abused their positions as legislative caucus committee chairs by pursuing personal policy agendas—as opposed to agendas favored by their constituents and/or their respective parties—or by financially coercing legislators for votes, they could be removed from their leadership positions by their caucuses or from their seats by the electorate. 1/25/16 Tr. at 97:1-5 (Dr. Osborn testifying that a leader's "carrots and sticks . . . have to be judiciously handled to make sure that the caucus as a whole is content with their leadership"). Plaintiffs agree that a legislative leader who behaves in a self-aggrandizing manner inconsistent

with the party's interests could be removed from his or her post, but claim that "already being in that position gives the leader a lot of control so that a challenge to that leader is risky, because if you challenge the leader and you fail, he can punish you . . . by giving you bad committee assignments [or] by disfavoring your legislation." *Id*. at 253:15-20. This concern is greatly overstated. As Osborn admitted, even without the legislative caucus committees, majority and minority leaders in the Illinois General Assembly have access to numerous institutional controls to keep their caucus in check, including other means of fundraising assistance. *Id*. at 158:6-159:11. For these reasons, it is difficult to imagine that heading a legislative caucus committee would give legislative leaders materially *more* power over their respective caucuses than they already have by virtue of their legislative leadership positions.

60. Dr. Osborn also opined that the potential for corruption is further enhanced because the Act allows a candidate to receive contributions from only one legislative caucus committee per election cycle. *Id*. at 101:19-102:6. According to Dr. Osborn, this could lead a candidate to be exclusively dependent on a legislative caucus committee for campaign contributions. *Id*. at 102:7-103:10.

61. This testimony is unpersuasive. Legislative caucus committees are far from a candidate's only source of campaign funds; for example, candidates may accept large contributions from political party committees during a primary election and unlimited contributions from such committees during a general election. 10 ILCS 5/9-8.5(b). Thus, it is highly unlikely that a candidate would be exclusively dependent on a

legislative caucus committee for campaign contributions; in fact, Dr. Osborne pointed to no such instances.

H. Dr. Osborn's Testimony Regarding Legislative Caucus Committees' Contribution Strategies

62. Dr. Osborn opined that political parties and legislative caucus committees employ different contribution strategies and that, because of these differences, legislative caucus committees are more susceptible to corruption than political parties.

63. According to Dr. Osborn, political parties typically pursue "an expansion strategy," meaning that their "primary and overwhelming goal" of making financial contributions is to "enhance their numbers, either their numbers of registered voters or the number of officeholders that they can get elected." 1/25/16 Tr. at 83:11-84:5.

64. Also according to Dr. Osborn, the goal of a PAC, by contrast to the goal of a political party, "is to help set the environment so that [the PAC] can influence a public policy decision." *Id*. at 86:1-3. As such, PACs generally pursue an "access strategy where they're trying to supplement their on-the-ground lobbying or influence strategies on public policy with campaign contributions." *Id*. at 86:4-11.

65. Dr. Osborn's views pertaining to the strategies of political parties and PACs are "generalizations" based on "trends and themes" in the academic literature. *Id*. at 88:4-89:21.

66. Dr. Osborn testified that, like political parties, legislative caucus committees have an electoral interest in maintaining a political party's numbers in the

legislature. *Id*. at 93:15-22. But he added that legislative caucus committees have a secondary interest in "managing the legislative operations on a partisan basis." *Ibid*. That secondary interest, according to Dr. Osborn, can result in "protectionist behavior by a legislative leader [who is] endowed with certain fundraising advantages and the ability to exclusively finance campaigns." Pl. Exh. 1 at 5.

67. To buttress his argument, Dr. Osborn examined the contribution strategies for the 2012 election cycle of two legislative caucus committees: the Senate Democratic Victory Fund, which is led by the Senate President; and the Democratic Majority committee, which is led by the House Speaker. *Id*. at 116:8-19. The Liberty Justice Center, the legal organization that represents Plaintiffs in this case, compiled the data for his analysis. *Id*. at 116:20-117:10. Dr. Osborn chose to examine only those two legislative caucus committees because, as the majority party, Democrats retain institutional control over the House and the Senate. *Id*. at 117:14-21.

68. Dr. Osborn opined that the Senate Democratic Victory Fund's contributions were entirely consistent with an expansion strategy because the largest contributions were made to candidates in close electoral races (as determined by Dr. Osborn based on the ultimate margin of victory). *Id*. at 118:13-22.

69. But the Democratic Majority committee, according to Osborn, engaged in both an electoral expansion strategy and a "strategy designed to enhance the legislative influence of the Caucus Committee operators." Pl. Exh. 1 at 6. Dr. Osborne arrived at this conclusion for two reasons, neither of which is persuasive.

70. First, the Democratic Majority committee made financial contributions to candidates during the primary election cycle, some of whom went on to win the general election by wide margins. 1/25/16 Tr. at 119:6-120:8. Dr. Osborn testified that those contributions would not have been made if the committee's sole concern was increasing the number of Democrats in the Illinois legislature; rather, the contributions indicate that the legislative leader, through his legislative caucus committee, was "trying to hand-select" a particular Democratic candidate for the general election. *Id*. at 120:9-16. Dr. Osborn's theory is that this financial support is designed to enhance the influence of the legislative leader over the candidate once the candidate takes her seat in the legislature. Pl. Exh. 1 at 5. The problem with this theory is that supporting a particular candidate in a primary election is entirely consistent with an expansion strategy. If the favored candidate's primary opponent is likely to turn off a majority of the general electorate—for example, by being too far "Left" or "Right"—or is simply an unpredictable loose cannon, the party's chances of winning the seat would be enhanced by defeating the opponent. The fact that the favored candidate went on to win the general election by a wide margin does not mean that the primary opponent would have done the same. Indeed, Dr. Osborn agreed that the electability of a Democratic candidate in a primary election differs from his or her electability in a general election because "electability in the general election also frequently depends upon either candidate being able to pull voters from the middle, independent voters, centrist voters, left-leaning Republicans, right-leaning Democrats." *Id*. at 138:6-15.

71. Second, Dr. Osborn explained that the Democratic Majority committee contributed to candidates in

the general election who ultimately won with margins of victory greater than five percentage points. *Id*. at 121:21-122:5. Because those elections were obvious wins, according to Osborn, contributions to those candidates did not further an expansion strategy, as those Democrats were not "electorally vulnerable." *Id*. at 122:16-123:2; *see also ibid*. ("If you're pursuing a more expansion strategy, you would dedicate high resources into either high-risk districts or districts in which you . . . have the ability to pick up a seat."). Essentially, Dr. Osborn asserted that the Democratic Majority did not engage in an expansion strategy because candidates who won the general election by more than five percentage points were "safe" and therefore did not need contributions. That assertion is highly unpersuasive. It is easy to say *ex post*, with the benefit of hindsight, that those candidates may not have needed financial support in the general election. But dark horses win elections on occasion, and pre-election polls have significant margins of error. When pressed, Dr. Osborn essentially conceded this point. He was asked if, according to his analytic methods, Senator McCain's fourteen-percentage-point defeat by then-Senator Obama in Wisconsin in 2008 meant "that all the money that Senator Obama and the National Democratic Party spent in Wisconsin on the presidential campaign was wasted money?" *Id*. at 168:19-169:7. Dr. Osborn responded that pre-election information probably indicated that the Wisconsin race was going to be close but that, in hindsight, the party realized that its candidate could have won without additional spending. *Id*. at 170:7-18.

72. In an effort to buttress his position, Dr. Osborn later discussed how legislative leaders would likely draw districts to prevent close elections for their party's candidates—thereby providing another reason

why the Democratic Majority should have known that those candidates did not need contributions to win their general elections. *Id*. at 174:5-14.

73. This submission also crumbled on further examination. When asked if the fact that the Republicans took two United States House seats in Illinois away from the Democrats in the 2014 elections suggested to him "that just because you draw the lines doesn't mean that you know how it's going to come out, and you haven't really rigged it completely in your favor," Dr. Osborn said it would not surprise him if that occurred. *Id*. at 184:15-185:21.

74. There is another defect in Dr. Osborn's analysis: He never investigated whether the state's political parties *actually* followed an expansionist strategy. Doing so would have been prudent for at least two reasons. First, it is not at all clear that political parties abide by a *pure* expansionist strategy. Defendants claim that political parties "do not blindly pursue maximization of the representation in the General Assembly; rather, they seek and promote candidates who, as a general matter, will advance their goals and be loyal team players." Doc. 178 at p. 46, ¶ 10. This comports with the understanding set forth by the plurality in *Randall v. Sorrell*, 548 U.S. 230 (2006), which explained that the "basic object" of a political party is to "help elect whichever candidates the party believes would best advance its ideals and interests." *Id*. at 257-58 (plurality opinion). To be sure, securing and maintaining a majority in a legislative body is an important step in advancing a political party's interests. But widening a majority provides little value if the additional legislators do not actually subscribe to the party's policy agenda. Dr. Osborn did not explore whether Illinois political party expenditures were

consistent with a pure expansionist strategy, and therefore did not test this premise of his opinion. Second, and more importantly, because he failed to examine how the Illinois Democratic Party contributed to candidates, Dr. Osborn could not compare the contributions of legislative caucus committees to those of political parties to determine the respective degrees to which those entities pursued an expansionist strategy. Dr. Osborn's main argument is that because the Democratic Majority financed candidates in primary elections, and because it financed general election candidates who were not vulnerable, the legislative caucus committee was not behaving as would a political party. But Dr. Osborn never examined whether the Illinois Democratic Party also contributed to primary candidates and to "safe" general election candidates. If the party made such contributions, that fact would undermine Dr. Osborn's position regarding the distinction between parties and legislative caucus committees. The fact that Dr. Osborn opted not to make this obvious comparison suggests that, if he had, the results would be inconsistent with his theory; at a minimum, it severely detracts from the persuasiveness of his opinions.

I. Osborn's Testimony Regarding Donors to Legislative Caucus Committees

75. Dr. Osborn next discussed the campaign finance reports of the Democratic Majority and the Senate Victory Fund from the 2014 election cycle. 1/25/16 Tr. at 114:2-19.

76. Dr. Osborn determined that both legislative caucus committees have "a very high reliance on PAC contributions and corporate contributions." *Id*. at 114:20-115:7; *see also* Pl. Exh. 1 at 10 (Osborn's expert report stating that donations to legislative caucus

committees come from "a concentrated group of special interests . . . by PACs associated with organized labor and business trade associations").

77. In Dr. Osborn's view, this means that legislative caucus committees have greater potential for corruption because they "are access-seeking organizations, and they're looking to influence the public policy process, and so heavy reliance on those contributions kind of mirrors the policy-making process along with the electoral process." 1/25/16 Tr. at 115:8-25. He opined that this is dangerous because "[t]hese are the very interests that are the most likely to have issues before the Legislature," Pl. Exh. 1 at 10, and that the increased opportunities for corruption derive from the "cozy relationship" between "the donors, the interest groups, [and] the legislative caucus committee," 1/25/16 Tr. at 116:2-6.

78. Dr. Osborn contrasted those donors with the donors who donate to political parties.

79. Based on his review of the academic literature, Dr. Osborn testified that political parties tend to receive contributions from a broad cross section of donors. Pl. Exh. 1 at 4. He claimed that donor-base composition provides another distinction between legislative caucus committees and political parties. Dr. Osborn testified that receiving donations from a "broad cross section of donors" mitigates the danger of corruption from political parties because the contributions are not "from one select group of industries or one select group of interests." 1/25/16 at 84:6-24; *see also* Pl. Exh. 1 at 4 (Osborn opining that political parties are less likely to be an agent or principal of corruption because "subclasses of the political party donors are unable to amass a concentration of the contributions to create undue influence over the party").

80. This point is unpersuasive. First, it is not apparent that having a "less diversified" donor portfolio makes legislative caucus committees more likely to exert undue financial influence on legislators, or why that would be so. It is incumbent on the expert to establish why that would be the case, and Dr. Osborn failed to do so here. Second, Dr. Osborn once again compared the *actual* donor profile of legislative caucus committees only to a *theoretical* donor profile of political parties. The identity of donors to the Illinois Democratic Party is publically available on the same website from which Plaintiffs obtained the information on the Senate Victory Fund and the Democratic Majority. *See* https://www.elections.il.gov/campaigndisclosure/contributionssearchbycommittees.aspx ("Democratic Party of Illinois" in the "Committee Name" field). A cursory review of this data reveals that many corporations and PACs contribute to the Illinois Democratic Party. Yet Dr. Osborn chose not to examine who actually contributed to the state political parties, and instead relied on a generalized, academic concept when concluding that legislative caucus committees and political parties receive contributions from different types of donors. This again suggests that, if Dr. Osborn had made the appropriate comparison, the results would have undermined his theory.

J. Testimony of Andrew Nauman

81. Andrew Nauman is the Deputy Director of the Division of Campaign Disclosure at the Illinois State Board of Elections. 1/26/16 Tr. at 193:22-194:1.

82. The State Board of Elections reviews political committees' financial disclosures to ensure that the state's contribution limits are followed. *Id*. at 194:4-6. The Board consists of four Democrats and four Republicans. *Id*. at 194:19-21.

83. Nauman testified that the Board has never made a negative audit finding against any legislative caucus committee. *Id*. at 204:23-205:25. He could not say whether the audit process analyzes the motives behind any contribution that any donor made. *Id*. at 214:24-215:4.

Conclusions of Law

"The free flow of political speech 'is central to the meaning and purpose of the First Amendment.'" *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 152 (7th Cir. 2011) ("*WRTL*") (quoting *Citizens United v. FEC*, 558 U.S. 310, 329 (2010)). Given the integral role political speech plays in a democratic society, most laws that burden political speech "are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at 340 (internal quotation marks omitted). But the Supreme Court has held that, because campaign contribution limits do not burden political expression and political association rights to the same degree as other speech restrictions, "this kind of campaign-finance regulation need only satisfy a form of intermediate scrutiny." *WRTL*, 664 F.3d at 152 (citing *Buckley v. Valeo*, 424 U.S. 1, 23-25 (1976)). As such, "contribution limits are generally permissible if the government can establish that they are 'closely drawn' to serve a 'sufficiently important interest.'" *Ibid*. (quoting *Buckley*, 424 U.S. at 25); *see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 735 (2011); *Davis v. FEC*, 554 U.S. 724, 737 (2008); *Randall*, 548 U.S. at 247. Settled precedent holds that one such "sufficiently important interest" is the State's interest in preventing *quid pro quo* corruption or its appearance. *See Citizens United*, 558

U.S. at 357; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390-93, 397 (2000); *WRTL*, 664 F.3d at 152.

As noted, only one of Plaintiffs' claims has survived dismissal—the claim that the Act impermissibly treats legislative caucus committees like political party committees and more favorably than PACs, individuals, and corporations. To place that claim in context, it is instructive to review Plaintiffs' arguments over the course of this suit. In seeking a preliminary injunction at the outset of this suit, Plaintiffs argued that the Act was not "closely drawn" to the State's anti-corruption rationale because the law "exempt[ed] political parties, but not individuals and PACs, from the limits on contributions to candidates." 902 F. Supp. 2d at 1120. This court recognized that "[s]peech restrictions that are valid when considered in isolation may nonetheless be found unconstitutional if they impermissibly disfavor certain content, viewpoints, or speakers," and that "exemptions from a speech restriction can render it fatally underinclusive and . . . cast doubt on the government's justification therefor." *Id*. at 1120-21. Nonetheless, the court ruled that prevailing campaign finance precedents defeated Plaintiffs' submission that the Act's favorable treatment of political parties rendered the law invalid. *Id*. at 1121-25 (holding that "there are at most two schools of thought on the Supreme Court"—one that "the First Amendment *requires* that political parties be treated more favorably than non-party contributors," and the other "that the First Amendment *allows but does not require* jurisdictions with contribution limits to treat parties more favorably than non-party contributors").

With the court having held at the preliminary injunction stage that the Constitution allows Illinois to favor political parties, Plaintiffs amended their complaint to add a claim that the Act is unconstitutional because it defines political party committees to include "legislative caucus committees." Doc. 65 at ¶¶ 31-37, 51-54, 66. As noted, a legislative caucus committee is "a committee established for the purpose of electing candidates to the General Assembly" that may be formed by each of the majority and minority leader of the state House and Senate or by a committee of five state senators or ten state representatives of the same caucus. 10 ILCS 5/9-1.8(c). In a general election, legislative caucus committees (like political parties) can contribute unlimited amounts to candidates. 10 ILCS 5/9-8.5(b). Plaintiffs submit that legislative caucus committees more closely resemble PACs than political parties and that, regardless of how similar they are to any other regulated campaign entity, legislative caucus committees have the potential to engage in corruption. If Plaintiffs were right, the contribution limits imposed on Plaintiffs, and particularly on Illinois Liberty PAC, could hardly be considered "closely drawn" to the interest of preventing corruption, and the State would effectively be favoring certain political speakers (legislative leaders) over others (PACs, individuals, and corporations) without any adequate justification for doing so. Because the First Amendment does not tolerate such preferential treatment, *see First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978), the contribution limits on Plaintiffs would be invalid.

As a threshold matter, the parties dispute which side bears the burden of proof. Plaintiffs submit that it is Defendants' burden to show that the limits are

closely drawn to a sufficiently important government interest. 1/26/16 Tr. at 276:5-10. Defendants respond that they need only offer a sufficiently important interest to justify the law's contribution limits and that Plaintiffs must establish that the law is under-inclusive. *Id*. at 278:2-15. Plaintiffs are correct. *See Nixon*, 528 U.S. at 387-88 ("[U]nder *Buckley*'s standard of scrutiny, a contribution limit . . . could survive *if the Government demonstrated* that contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'") (emphasis added); *WRTL*, 664 F.3d at 152 ("Campaign contribution limits are generally permissible if the *government can establish* that they are 'closely drawn' to serve a 'sufficiently important interest.'") (emphasis added); *Riddle v. Hickenlooper*, 742 F.3d 922, 928 (10th Cir. 2014) ("Even under [*Buckley*'s] form of intermediate scrutiny . . . state officials . . . bear the burden of proof."). Still, Defendants have satisfied their burden of showing that contribution limits challenged by Plaintiffs are closely drawn to the interest of preventing *quid pro quo* corruption (or the appearance thereof).

Plaintiffs raise three main arguments for why legislative caucus committees more closely resemble PACs than political parties, all based on Dr. Osborn's testimony. First, they assert that legislative caucus committees contribute to election campaigns in a different manner than do political parties. Dr. Osborn testified that political parties theoretically make expenditures to further an expansion strategy while interest groups pursue an access-seeking strategy. Findings of Fact ("FOF") ¶¶ 63-64. After analyzing the campaign contributions of only two legislative caucus committees, the Senate Victory Fund and the Democratic Majority, he determined that both of them pursued an expansion strategy—just like political parties.

FOF ¶¶ 67-69. But he also found that the Democratic Majority exhibited some behavior inconsistent with an expansion strategy. FOF ¶ 69. For the reasons discussed above, the court is not persuaded that those expenditures are indicative of anything other than an expansion strategy. FOF ¶¶ 70-74. And even if they were, Dr. Osborn never showed how that strategy makes legislative caucus committees more like PACs. After all, what would it even mean for a legislative leader—to whom *others* seek access—to *pursue* an access-seeking strategy?

Second, Plaintiffs argue that the types of donors who contribute to legislative caucus committees are substantially different from those who donate to political parties. This difference, according to Plaintiffs, creates an elevated risk that legislative caucus committees will engage in *quid pro quo* corruption. Based on his review of academic literature, Dr. Osborn posited that political parties receive contributions from a broad cross section of donors, and that because of this they are less susceptible to corruption. FOF ¶ 79. His examination of *actual* contributions to legislative caucus committees, by contrast, revealed that the overwhelming majority of donations came from political action committees and corporations. FOF ¶ 76. But, as discussed above, Osborn never explained why this matters. FOF ¶ 80. He testified that receiving donations from "a concentrated group of special interests" is dangerous because "[t]hese are the very interests that are the most likely to have issues before the Legislature." FOF ¶ 77. But virtually any interest could come before a legislature. And in any event, as explained above, Dr. Osborn does not show how accepting donations from PACs and corporations

makes legislative caucus committees more likely to be corrupt than political parties, which accept donations from the same sources. FOF ¶ 79.

Third, Plaintiffs argue that the structure of legislative caucus committees is dangerous because it directly connects a policymaking body with a source of significant campaign funding. Osborn focused on two aspects of legislative caucus committees: (1) that legislative leaders, who have significant policymaking authority, can singlehandedly create their own legislative caucus committees; and (2) that candidates can receive contributions from only one legislative caucus committee per election cycle, potentially making legislators financially dependent on them and thus easier to corrupt. FOF ¶¶ 56-57, 60. He opined that this design flaw is unique to legislative caucus committees because political parties are further removed from the policymaking process. FOF ¶ 55. For the reasons set out above, the court disagrees that these features of legislative caucus committees create enhanced opportunities for corruption or that it makes them materially different than political parties. FOF ¶¶ 58-59, 61.

Contrary to Plaintiffs' position, legislative caucus committees are most akin to political parties. In *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United*, 558 U.S. 310, the Supreme Court highlighted the differences between interest groups and political parties: "Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses." 540 U.S. at 188. Although the Court drew those distinctions in discussing whether political parties could be treated *less favorably* than

interest groups, the takeaway remains the same: legislatures are "fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation." *Ibid*. Here, the record shows that neither private individuals nor PACs select slates of candidates for elections, serve on legislative committees, elect legislative leadership, or organize legislative caucuses. FOF ¶¶ 22-24, 31-32. The legislative leaders and groups of legislators empowered to form legislative caucus committees, by contrast, do participate in caucus, committee, and legislative activities. By their nature, then, legislative caucus committees more closely resemble political parties than do PACs because they are organized around and created by legislative leaders, who are chosen by their respective caucuses, or by groups of legislators from the same caucus.

Like Illinois law, federal law treats congressional campaign committees, the federal analog to legislative caucus committees, as political parties. *See* 52 U.S.C. § 30116(d)(4)(B) (imposing on "all congressional campaign committees" the same expenditure limitations imposed on "political committees established and maintained by a national political party"); 52 U.S.C. § 30125 (same for soft money restrictions); 52 U.S.C. § 30104(e) (same for reporting requirements). The Supreme Court has recognized that congressional campaign committees have structural ties to their respective parties. *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 40 n.20 (1981) (noting that "senatorial campaign committees are identifiable as part of their respective party"). Plaintiffs submit that federal congressional campaign committees are unlike Illinois legislative caucus committees because "no federal law places any congressional campaign

committee under the control of one person, let alone under the control of the parties' leaders within the two houses of Congress." Doc. 178 at p. 60, ¶ 27. Given this distinction, according to Plaintiffs, "there is no reason to expect Congressional campaign committees to pursue the personal interests of any particular legislator as there is with Illinois legislative caucus committees." *Ibid*. This argument is unpersuasive. Whether a committee is controlled by a single legislative leader or a group of several likeminded legislators, it could still (under Plaintiffs' theory) use its superior fundraising position to make *quid pro quo* demands. The Supreme Court's observation that federal campaign committees "are identifiable as part of their respective party" applies with equal force to legislative caucus committees and their respective state parties—and because the Supreme Court has cast no suspicion on the constitutional validity of treating federal campaign committees like political parties, the same holds for legislative caucus committees and state parties.

For these reasons, the court rejects the proposition that legislative caucus committees are essentially PACs in disguise or that they resemble PACs more than political parties. To the contrary, legislative caucus committees are quite similar to political parties, and to the extent the two are different, those differences do not materially affect legislative caucus committees' potential to engage in *quid pro quo* corruption. Accordingly, Defendants have shown that treating legislative caucus committees as political parties, thereby exempting legislative caucus committees from the restrictions on other political contributors, does not cast doubt on Illinois's justification for limiting contributions from PACs and other contributors.

This outcome finds support in recent precedent expounding on the nature of the underinclusiveness inquiry. In *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), a candidate for state judicial office challenged an ethics canon prohibiting her from personally soliciting campaign contributions. Although the State had a compelling interest in "protecting the integrity of the judiciary" and "maintaining the public's confidence in an impartial judiciary," the challenger claimed the law was underinclusive because the State "fail[ed] to restrict other speech equally damaging to judicial integrity and its appearance." *Id*. at 1666, 1668. More specifically, the challenger claimed the canon was not narrowly tailored because it still allowed judges' campaign committees to solicit money on the judges' behalf and permitted judges to send thank you letters to campaign donors. *Id*. at 1668. In assessing whether the law survived strict scrutiny under the First Amendment—a more demanding standard than *Buckley*'s "closely drawn" test—the Court explained:

> It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging too little speech. We have recognized, however, that underinclusiveness can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.
>
> . . .
>
> Underinclusiveness can also reveal that a law does not actually advance a compelling interest.
>
> . . .

> Although a law's underinclusivity raises a red flag, the First Amendment imposes no freestanding "underinclusiveness limitation." A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests.

Id. at 1668 (citation omitted) (internal quotation marks omitted). The Court held that Florida had "reasonably concluded that solicitation by the candidate personally creates a categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee." *Id*. at 1669. Accordingly "Florida's choice to allow solicitation by campaign committees does not undermine its decision to ban solicitation by judges." *Ibid*.

The same result obtains here. Plaintiffs have challenged the contribution limits placed on individuals and PACs. It is beyond dispute that contribution limits may be imposed on these entities to further the government's anti-corruption interest. Yet Plaintiffs argue that because legislative caucus committees—which they believe create a serious risk of corruption—are less strictly regulated, Illinois in fact is not concerned about corruption in politics, but instead is trying to selectively silence individuals and PACs. As in *Williams-Yulee*, the fact that Illinois chose not to place similar contribution limits on legislative caucus committees *could* raise a red flag. But for all the reasons provided above, legislative caucus committees have very little in common with PACs or individual contributors, and function largely as political parties

do. Therefore, there is no basis to conclude that the Act's true purpose is to provide preferential treatment to certain political speakers.

Again, *Williams-Yulee* explains that a "State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns," adding that a law could still be considered narrowly tailored even if it "conceivably could have restricted even greater amounts of speech in service of [its] stated interests." *Id*. at 1668. That is especially true here, where the quality and degree of potential corruption arising from contributions by individuals and PACs, on one hand, and by legislative caucus committees, on the other, are so different. Illinois reasonably concluded that corruption (or the appearance thereof) by private individuals and non-legislative entities poses a far more serious risk to the democratic process than does a legislative leader contributing to another legislator or electoral candidate in that leader's own caucus. Accordingly, the Act's contribution limits do not run afoul of the First Amendment.

Plaintiffs also argue that the Act violates the Equal Protection Clause. Doc. 65 at ¶ 63. But as the court previously held in this case, "whether a challenge to the disparate treatment of speakers or speech is framed under the First Amendment or the Equal Protection Clause," the same standard applies. 902 F. Supp. 2d at 1125-26. As such, Plaintiffs' equal protection challenge fails for the same reasons as their First Amendment challenge.

Conclusion

For the foregoing reasons, the Illinois Disclosure and Regulation of Campaign Contributions and Expenditures Act does not violate the Constitution in

in subjecting PACS, corporations, and individuals to contribution limits from which legislative caucus committees are exempt. With all claims resolved, judgment will be entered in favor of Defendants and against Plaintiffs.

September 7, 2016

/s/ Gary Feinerman
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Case No. 12 C 5811

ILLINOIS LIBERTY PAC,

Plaintiff(s),

v.

MADIGAN, *et.al.*,

Defendant(s).

Judge Gary Feinerman

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.

☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of plaintiff(s)
and against plaintiff(s)

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Judgment is entered in favor of Defendants and against Plaintiffs.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.

☒ tried by Judge Gary Feinerman without a jury and the above decision was reached.

☐ decided by Judge on a motion

Date: 9/7/2016 Thomas G. Bruton, Clerk of Court

/s/ Jackie Deanes , Deputy Clerk

APPENDIX E

10 Ill. Comp. Stat. 5/9-1.8, 8.5
1.8. Political committees.

(a) "Political committee" includes a candidate political committee, a political party committee, a political action committee, a ballot initiative committee, and an independent expenditure committee.

(b) "Candidate political committee" means the candidate himself or herself or any natural person, trust, partnership, corporation, or other organization or group of persons designated by the candidate that accepts contributions or makes expenditures during any 12-month period in an aggregate amount exceeding $5,000 on behalf of the candidate.

(c) "Political party committee" means the State central committee of a political party, a county central committee of a political party, a legislative caucus committee, or a committee formed by a ward or township committeeman of a political party. For purposes of this Article, a "legislative caucus committee" means a committee established for the purpose of electing candidates to the General Assembly by the person elected President of the Senate, Minority Leader of the Senate, Speaker of the House of Representatives, Minority Leader of the House of Representatives, or a committee established by 5 or more members of the same caucus of the Senate or 10 or more members of the same caucus of the House of Representatives.

(d) "Political action committee" means any natural person, trust, partnership, committee, association, corporation, or other organization or group of persons, other than a candidate, political party, candidate political committee, or political party committee, that accepts contributions or makes expenditures during

any 12-month period in an aggregate amount exceeding $5,000 on behalf of or in opposition to a candidate or candidates for public office. "Political action committee" includes any natural person, trust, partnership, committee, association, corporation, or other organization or group of persons, other than a candidate, political party, candidate political committee, or political party committee, that makes electioneering communications during any 12-month period in an aggregate amount exceeding $5,000 related to any candidate or candidates for public office.

(e) "Ballot initiative committee" means any natural person, trust, partnership, committee, association, corporation, or other organization or group of persons that accepts contributions or makes expenditures during any 12-month period in an aggregate amount exceeding $5,000 in support of or in opposition to any question of public policy to be submitted to the electors. "Ballot initiative committee" includes any natural person, trust, partnership, committee, association, corporation, or other organization or group of persons that makes electioneering communications during any 12-month period in an aggregate amount exceeding $5,000 related to any question of public policy to be submitted to the voters. The $5,000 threshold applies to any contributions or expenditures received or made with the purpose of securing a place on the ballot for, advocating the defeat or passage of, or engaging in electioneering communication regarding the question of public policy, regardless of the method of initiation of the question of public policy and regardless of whether petitions have been circulated or filed with the appropriate office or whether the question has been adopted and certified by the governing body.

(f) "Independent expenditure committee" means any trust, partnership, committee, association, corporation, or other organization or group of persons formed for the exclusive purpose of making independent expenditures during any 12-month period in an aggregate amount exceeding $5,000 in support of or in opposition to (i) the nomination for election, election, retention, or defeat of any public official or candidate or (ii) any question of public policy to be submitted to the electors. "Independent expenditure committee" also includes any trust, partnership, committee, association, corporation, or other organization or group of persons that makes electioneering communications that are not made in connection, consultation, or concert with or at the request or suggestion of a public official or candidate, a public official's or candidate's designated political committee or campaign, or an agent or agents of the public official, candidate, or political committee or campaign during any 12-month period in an aggregate amount exceeding $5,000 related to (i) the nomination for election, election, retention, or defeat of any public official or candidate or (ii) any question of public policy to be submitted to the voters.

8.5. Limitations on campaign contributions.

(a) It is unlawful for a political committee to accept contributions except as provided in this Section.

(b) During an election cycle, a candidate political committee may not accept contributions with an aggregate value over the following: (i) $5,000 from any individual, (ii) $10,000 from any corporation, labor organization, or association, or (iii) $50,000 from a candidate political committee or political action committee. A candidate political committee may accept contributions in any amount from a political party committee except during an election cycle in which the candidate seeks nomination at a primary election. During an election cycle in which the candidate seeks nomination at a primary election, a candidate political committee may not accept contributions from political party committees with an aggregate value over the following: (i) $200,000 for a candidate political committee established to support a candidate seeking nomination to statewide office, (ii) $125,000 for a candidate political committee established to support a candidate seeking nomination to the Senate, the Supreme Court or Appellate Court in the First Judicial District, or an office elected by all voters in a county with 1,000,000 or more residents, (iii) $75,000 for a candidate political committee established to support a candidate seeking nomination to the House of Representatives, the Supreme Court or Appellate Court for a Judicial District other than the First Judicial District, an office elected by all voters of a county of fewer than 1,000,000 residents, and municipal and county offices in Cook County other than those elected by all voters of Cook County, and (iv) $50,000 for a candidate political committee established to support the nomination of a candidate to any other

office. A candidate political committee established to elect a candidate to the General Assembly may accept contributions from only one legislative caucus committee. A candidate political committee may not accept contributions from a ballot initiative committee or from an independent expenditure committee.

(c) During an election cycle, a political party committee may not accept contributions with an aggregate value over the following: (i) $10,000 from any individual, (ii) $20,000 from any corporation, labor organization, or association, or (iii) $50,000 from a political action committee. A political party committee may accept contributions in any amount from another political party committee or a candidate political committee, except as provided in subsection (c-5). Nothing in this Section shall limit the amounts that may be transferred between a political party committee established under subsection (a) of Section 7-8 of this Code and an affiliated federal political committee established under the Federal Election Code by the same political party. A political party committee may not accept contributions from a ballot initiative committee or from an independent expenditure committee. A political party committee established by a legislative caucus may not accept contributions from another political party committee established by a legislative caucus.

(c-5) During the period beginning on the date candidates may begin circulating petitions for a primary election and ending on the day of the primary election, a political party committee may not accept contributions with an aggregate value over $50,000 from a candidate political committee or political party committee. A political party committee may accept contributions in any amount from a candidate political committee or political party committee if the political

party committee receiving the contribution filed a statement of nonparticipation in the primary as provided in subsection (c-10). The Task Force on Campaign Finance Reform shall study and make recommendations on the provisions of this subsection to the Governor and General Assembly by September 30, 2012. This subsection becomes inoperative on July 1, 2013 and thereafter no longer applies.

(c-10) A political party committee that does not intend to make contributions to candidates to be nominated at a general primary election or consolidated primary election may file a Statement of Nonparticipation in a Primary Election with the Board. The Statement of Nonparticipation shall include a verification signed by the chairperson and treasurer of the committee that (i) the committee will not make contributions or coordinated expenditures in support of or opposition to a candidate or candidates to be nominated at the general primary election or consolidated primary election (select one) to be held on (insert date), (ii) the political party committee may accept unlimited contributions from candidate political committees and political party committees, provided that the political party committee does not make contributions to a candidate or candidates to be nominated at the primary election, and (iii) failure to abide by these requirements shall deem the political party committee in violation of this Article and subject the committee to a fine of no more than 150% of the total contributions or coordinated expenditures made by the committee in violation of this Article. This subsection becomes inoperative on July 1, 2013 and thereafter no longer applies.

(d) During an election cycle, a political action committee may not accept contributions with an

aggregate value over the following: (i) $10,000 from any individual, (ii) $20,000 from any corporation, labor organization, political party committee, or association, or (iii) $50,000 from a political action committee or candidate political committee. A political action committee may not accept contributions from a ballot initiative committee or from an independent expenditure committee.

(e) A ballot initiative committee may accept contributions in any amount from any source, provided that the committee files the document required by Section 9-3 of this Article and files the disclosure reports required by the provisions of this Article.

(e-5) An independent expenditure committee may accept contributions in any amount from any source, provided that the committee files the document required by Section 9-3 of this Article and files the disclosure reports required by the provisions of this Article.

(f) Nothing in this Section shall prohibit a political committee from dividing the proceeds of joint fundraising efforts; provided that no political committee may receive more than the limit from any one contributor, and provided that an independent expenditure committee may not conduct joint fundraising efforts with a candidate political committee or a political party committee.

(g) On January 1 of each odd-numbered year, the State Board of Elections shall adjust the amounts of the contribution limitations established in this Section for inflation as determined by the Consumer Price Index for All Urban Consumers as issued by the United States Department of Labor and rounded to

the nearest $100. The State Board shall publish this information on its official website.

(h) Self-funding candidates. If a public official, a candidate, or the public official's or candidate's immediate family contributes or loans to the public official's or candidate's political committee or to other political committees that transfer funds to the public official's or candidate's political committee or makes independent expenditures for the benefit of the public official's or candidate's campaign during the 12 months prior to an election in an aggregate amount of more than (i) $250,000 for statewide office or (ii) $100,000 for all other elective offices, then the public official or candidate shall file with the State Board of Elections, within one day, a Notification of Self-funding that shall detail each contribution or loan made by the public official, the candidate, or the public official's or candidate's immediate family. Within 2 business days after the filing of a Notification of Self-funding, the notification shall be posted on the Board's website and the Board shall give official notice of the filing to each candidate for the same office as the public official or candidate making the filing, including the public official or candidate filing the Notification of Self-funding. Notice shall be sent via first class mail to the candidate and the treasurer of the candidate's committee. Notice shall also be sent by e-mail to the candidate and the treasurer of the candidate's committee if the candidate and the treasurer, as applicable, have provided the Board with an e-mail address. Upon posting of the notice on the Board's website, all candidates for that office, including the public official or candidate who filed a Notification of Self-funding, shall be permitted to accept contributions in excess of any contribution limits imposed by subsection (b). If a public official or candidate filed a Notification of Self-

funding during an election cycle that includes a general primary election or consolidated primary election and that public official or candidate is nominated, all candidates for that office, including the nominee who filed the notification of self-funding, shall be permitted to accept contributions in excess of any contribution limit imposed by subsection (b) for the subsequent election cycle. For the purposes of this subsection, "immediate family" means the spouse, parent, or child of a public official or candidate.

(h-5) If a natural person or independent expenditure committee makes independent expenditures in support of or in opposition to the campaign of a particular public official or candidate in an aggregate amount of more than (i) $250,000 for statewide office or (ii) $100,000 for all other elective offices in an election cycle, as reported in a written disclosure filed under subsection (a) of Section 9-8.6 or subsection (e-5) of Section 9-10, then the State Board of Elections shall, within 2 business days after the filing of the disclosure, post the disclosure on the Board's website and give official notice of the disclosure to each candidate for the same office as the public official or candidate for whose benefit or detriment the natural person or independent expenditure committee made independent expenditures. Upon posting of the notice on the Board's website, all candidates for that office in that election, including the public official or candidate for whose benefit or detriment the natural person or independent expenditure committee made independent expenditures, shall be permitted to accept contributions in excess of any contribution limits imposed by subsection (b).

(h-10) If the State Board of Elections receives notification or determines that a natural person or persons,

an independent expenditure committee or committees, or combination thereof has made independent expenditures in support of or in opposition to the campaign of a particular public official or candidate in an aggregate amount of more than (i) $250,000 for statewide office or (ii) $100,000 for all other elective offices in an election cycle, then the Board shall, within 2 business days after discovering the independent expenditures that, in the aggregate, exceed the threshold set forth in (i) and (ii) of this subsection, post notice of this fact on the Board's website and give official notice to each candidate for the same office as the public official or candidate for whose benefit or detriment the independent expenditures were made. Notice shall be sent via first class mail to the candidate and the treasurer of the candidate's committee. Notice shall also be sent by e-mail to the candidate and the treasurer of the candidate's committee if the candidate and the treasurer, as applicable, have provided the Board with an e-mail address. Upon posting of the notice on the Board's website, all candidates of that office in that election, including the public official or candidate for whose benefit or detriment the independent expenditures were made, may accept contributions in excess of any contribution limits imposed by subsection (b).

(i) For the purposes of this Section, a corporation, labor organization, association, or a political action committee established by a corporation, labor organization, or association may act as a conduit in facilitating the delivery to a political action committee of contributions made through dues, levies, or similar assessments and the political action committee may report the contributions in the aggregate, provided that: (i) contributions made through dues, levies, or similar assessments paid by any natural person, corporation, labor organization, or association in a calendar

year may not exceed the limits set forth in this Section; (ii) the corporation, labor organization, association, or a political action committee established by a corporation, labor organization, or association facilitating the delivery of contributions maintains a list of natural persons, corporations, labor organizations, and associations that paid the dues, levies, or similar assessments from which the contributions comprising the aggregate amount derive; and (iii) contributions made through dues, levies, or similar assessments paid by any natural person, corporation, labor organization, or association that exceed $500 in a quarterly reporting period shall be itemized on the committee's quarterly report and may not be reported in the aggregate. A political action committee facilitating the delivery of contributions or receiving contributions shall disclose the amount of contributions made through dues delivered or received and the name of the corporation, labor organization, association, or political action committee delivering the contributions, if applicable. On January 1 of each odd-numbered year, the State Board of Elections shall adjust the amounts of the contribution limitations established in this subsection for inflation as determined by the Consumer Price Index for All Urban Consumers as issued by the United States Department of Labor and rounded to the nearest $100. The State Board shall publish this information on its official website.

(j) A political committee that receives a contribution or transfer in violation of this Section shall dispose of the contribution or transfer by returning the contribution or transfer, or an amount equal to the contribution or transfer, to the contributor or transferor or donating the contribution or transfer, or an amount equal to the contribution or transfer, to a charity. A contribution or transfer received in violation of this Section that is not

disposed of as provided in this subsection within 30 days after the Board sends notification to the political committee of the excess contribution by certified mail shall escheat to the General Revenue Fund and the political committee shall be deemed in violation of this Section and subject to a civil penalty not to exceed 150% of the total amount of the contribution.

(k) For the purposes of this Section, "statewide office" means the Governor, Lieutenant Governor, Attorney General, Secretary of State, Comptroller, and Treasurer.

(l) This Section is repealed if and when the United States Supreme Court invalidates contribution limits on committees formed to assist candidates, political parties, corporations, associations, or labor organizations established by or pursuant to federal law.

(Source: P.A. 97-766, eff. 7-6-12; 98-115, eff. 7-29-13.)