No. 16-3585

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ILLINOIS LIBERTY PAC, *et al.*,

Plaintiffs-Appellants,

v.

LISA MADIGAN,
Attorney General of Illinois, in her official capacity, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
Case No. 12 C 5811
The Honorable Gary Feinerman, Judge Presiding

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFFS-APPELLANTS

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3585

Short Caption: Illinois Liberty PAC, et al. v. Lisa Madigan, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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Illinois Liberty PAC

Edgar Bachrach

Kyle McCarter

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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None

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None

Attorney's Signature: /s/ Jacob H. Huebert Date: 1/13/2017

Attorney's Printed Name: Jacob H. Huebert

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

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Attorney's Signature: /s/ Jeffrey M. Schwab Date: 1/13/2017

Attorney's Printed Name: Jeffrey M. Schwab

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes _____ No X

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes and Rules

Illinois Statutes and Other Legislative Materials

Other State Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Illinois Liberty PAC, Edgar Bachrach, and Kyle McCarter brought this civil action against the Defendants-Appellees – Illinois Attorney General Lisa Madigan and the members of the Illinois State Board of Elections, all in their official capacities – under 42 U.S.C. § 1983, seeking declaratory and injunctive relief for violations of their rights under the First and Fourteenth Amendments of the United States Constitution. The district court had subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291. This appeal seeks review of the district court's March 3, 2014, order dismissing most facets of Plaintiffs' constitutional claim, R. 2443-2452 (A-1-10); the district court's September 7, 2016 order, following a bench trial, granting judgment against Plaintiffs on the remaining facet of their constitutional claim, R. 3911-3939 (A-11-39); and the district court's September 7, 2016 entry of judgment, R. 3940 (A-40), which was a final judgment disposing of all the parties' claims. Plaintiffs-Appellants filed their timely notice of appeal and docketing statement on October 3, 2016.

STATEMENT OF THE ISSUES

I. Did the district court err in dismissing Plaintiffs' claim that Illinois' scheme of campaign contribution limits is not narrowly tailored to prevent corruption, and therefore violates the First Amendment, because it allows an individual citizen to contribute only half the amounts that a corporation, labor union, or other association may give?

II. Did the district court err in dismissing Plaintiffs' claim that Illinois' scheme of campaign contribution limits is not narrowly tailored to prevent corruption, and therefore violates the First Amendment, because it removes all contribution limits in a race when independent expenditures or a candidate's self-funding exceed a certain amount?

III. Did the district court err in dismissing Plaintiffs' claim that Illinois' scheme of campaign contribution limits is not narrowly tailored to prevent corruption, and therefore violates the First Amendment, because it allows political parties to give candidates unlimited amounts while restricting the amounts others may give?

IV. Did the district court err in holding that Illinois' scheme of campaign contribution limits is narrowly tailored to prevent corruption, and therefore constitutional, even though it allows legislative leaders to give candidates unlimited amounts in general elections, and greater amounts than others in primary elections, despite those contributions' potential to corrupt?

STATEMENT OF THE CASE

This case challenges the campaign contribution limits established by the Illinois Disclosure and Regulation of Campaign Contributions and Expenditures Act (the "Act"). Plaintiffs allege that the limits violate the First and Fourteenth Amendments to the United States Constitution based on their discrimination in favor of certain political contributors, and against others, and on other features of the Act that Plaintiffs allege demonstrate that the limits are not narrowly tailored to prevent corruption.

Illinois' scheme of campaign contribution limits

Limits on contributions to candidates

The Act limits the amounts that individuals and groups may contribute to candidates for office in Illinois. In a given election cycle, an individual may contribute no more than $5,000 to a candidate's campaign committee.[1] 10 ILCS 5/9-8.5(b). A corporation, union, or other association may give a candidate double that amount: no more than $10,000. *Id.* And another candidate's committee or a political action committee ("PAC") may give a candidate no more than $50,000. *Id.*

In contrast, the Act places no limit on the amount that a political party committee may give to a candidate in a general election. *See id.* And in a primary election for a state office, a political party committee may give a candidate larger contributions than any other donor: $200,000 to a candidate for statewide office;

[1] All of the Act's contribution limits are subject to adjustment for inflation at the beginning of each election cycle. 10 ILCS 5/9-8.5(g). For simplicity, Plaintiffs use the Act's original figures throughout this brief.

$125,000 to a candidate for the Illinois Senate; and $75,000 to a candidate for the Illinois House of Representatives. 10 ILCS 5/9-8.5(b).

The Act's definition of "political party committees" includes not only the state and county central committees of a political party and committees formed by a party's ward or township committeemen; it also includes "legislative caucus committees." 10 ILCS 5/9-1.8(c). A legislative caucus committee is a committee established by the Speaker of the House of Representatives, the Senate President, the House Minority Leader, the Senate Minority Leader, five or more members of the same party in the Senate, or 10 or more members of the same party in the House. 10 ILCS 5/9-1.8(c).

Because the Act defines them as political party committees, legislative caucus committees are not limited in the amounts they may contribute to candidates in general elections, and they are subject to the same limits as ordinary party committees in primary elections. 10 ILCS 5/9-8.5(b). The Act prohibits a candidate for the General Assembly from accepting contributions from more than one legislative caucus committee in a given election, though it allows a candidate to accept contributions from multiple political party committees other than legislative caucus committees. *Id.*

Limits on contributions to PACs and parties

The Act also limits the amounts that individuals and groups may contribute to PACs. In a given election cycle, an individual may contribute no more than $10,000 to a PAC; a corporation, union, other association, or political party committee may

contribute no more than $20,000; and a candidate or another PAC may contribute no more than $50,000. 10 ILCS 5/9-8.5(d).

The Act imposes similar limits on contributions to political party committees. In a given election cycle, an individual may contribute no more than $10,000 to a party committee; a corporation, union, or other association may contribute no more than $20,000; and a PAC may contribute no more than $50,000. 10 ILCS 5/9-8.5(c). A candidate or a party committee may contribute unlimited amounts to a party committee, except during a primary election season, when they may not contribute more than $50,000. 10 ILCS 5/9-8.5(c-5).

Removal of the limits in response to self-funding or independent expenditures

The Act removes all limits on contributions to candidates in a particular race when a candidate's self-funding, or independent expenditures supporting or opposing a candidate, exceed certain amounts.

If a candidate's self-funding exceeds $250,000 in a race for statewide office, or $100,000 in any other race, then all candidates in that race may accept unlimited contributions from all types of donors. 10 ILCS 5/9-8.5(h). A candidate's self-funding, for this purpose, includes contributions the candidate makes directly to his or her own campaign committee, contributions the candidate's immediate family members make to the candidate's campaign committee, and contributions the candidate makes to other political committees that either transfer funds to the candidate's campaign committee or make independent expenditures on the candidate's behalf. *Id.*

Similarly, if a person or independent expenditure committee makes independent expenditures supporting or opposing a candidate that, in the aggregate, exceed $250,000 in a race for a statewide office, or $100,000 in any other race, then the candidates in that race may accept unlimited contributions from all types of donors. 10 ILCS 5/9-8.5(h-5). "Independent expenditures" are, in summary, expenditures supporting or opposing a candidate that are "not made in connection, consultation, or concert with or at the request or suggestion of" the candidate, his or her political committee or campaign, or any agent of his or her political committee or campaign. 10 ILCS 5/9-1.15. "Independent expenditure committees" are organizations that make independent expenditures that, in the aggregate, exceed $5,000 during any 12-month period. 10 ILCS 5/9-1.8(f).

Injury to Plaintiffs

Plaintiff Illinois Liberty PAC is a PAC that makes contributions to Illinois legislative candidates who support free-market principles. R. 3915 (A-15). It is injured by the Act's campaign contribution limits because it wishes to give candidates greater contributions than the limits allow and because, without the limits (or under higher limits), it would pursue a different contribution strategy. *Id.*

Plaintiff Edgar Bachrach is a citizen who makes contributions to PACs and legislative candidates. R. 3916 (A-16). He is injured by the Act's scheme of campaign contribution limits because he wishes to make greater contributions to PACs and candidates than the limits allow. *Id.*

Plaintiff Kyle McCarter is a member of the Illinois Senate who runs for office, fundraises for his campaigns, and spends the contributions he receives to support his candidacy. R. 3917 (A-17). He has been injured by the Act's limits because, but for the limits, he would have sought contributions exceeding the limits in the 2010, 2012, and 2014 election cycles. *Id.*

Plaintiffs' expert's testimony

At trial, Plaintiffs presented an expert witness, Dr. Marcus Osborn, who analyzed the structure of Illinois' campaign contribution limits and the incentives and opportunities for corruption it creates.

Dr. Osborn's qualifications

Dr. Osborn earned a Ph.D. in public administration from Arizona State University, where his dissertation analyzed "how interest groups achieve influence through campaign contributions and the importance of both money [and] information, and how those interact together." R. 3634-35, 3918-19 (A-18-19). To prepare his dissertation, Dr. Osborn became familiar with the general body of academic literature, with which he remains familiar, related to "interest group theory and how interest groups get influence at both at the federal and state level, state legislative operations, campaign-related issues, and to a lesser extent, political parties." R. 3636, 3919 (A-19). He particularly studied "how electoral vulnerability and other issues impact the willingness of candidates to be influenced by interest groups." R. 3636. In addition, for more than 20 years, Dr. Osborn has worked in government relations, representing clients before legislative bodies, providing policy

expertise, and advising political campaigns on strategy and other matters. R. 3630-34, 3918-19 (A-18-19). In denying a motion by Defendants to exclude his testimony, the district court concluded that Dr. Osborn's education and experience made him "eminently qualified" to analyze the risks of corruption created by the Act. R. 3458 (SA-83).

Testimony on legislative caucus committees' similarity to PACs

Dr. Osborn testified that legislative caucus committees under the Act resemble "leadership PACs" more than they resemble ordinary political parties and that their contributions to candidates therefore have a greater potential to corrupt than party contributions.

Dr. Osborn testified about the goals and strategies that political parties and PACs respectively pursue, based on the academic literature. He testified that political parties' "primary and overwhelming goal" is to pursue "expansion" strategies designed to increase the number of party members elected to office. R. 3644-45. PACs, on the other hand, tend to pursue "access-driven strategies," through which they try to influence public policy. R. 3646-47. He testified that parties tend to be a "countervailing force" against interest-group (PAC) influence because of the different strategies they pursue. R. 3646.

Dr. Osborn testified that leadership PACs – PACs created by a member of Congress to raise funds and contribute to other candidates within their party – tend to pursue two different goals with their contributions: (1) the "Type I" goal of expanding the party's caucus in the legislature; and (2) the "Type II" goal of

"assisting in a leader achieving their personal objectives," which the leader may do "in subtle ways or even in more significant ways." R. 3666-67. Dr. Osborn noted that a leadership PAC is more likely to pursue a "Type II" strategy when the legislator's party is in the majority because, until the party gains a majority, the legislator cannot attain "the organizational benefits of being in leadership." R. 3667.

Dr. Osborn testified that legislative caucus committees under the Act more closely resemble leadership PACs than political parties because a leader can use a caucus committee not only to expand his or her party's caucus but also to advance his or her personal "legislative or other priorities" by "direct[ing] funds to legislators who are . . . supportive of his effort or [by] withhold[ing] funds [from] those members who are not." R. 3664-65, 3673. And, he testified, a leader could threaten to give or withhold funds to a legislator depending on whether he or she votes for a bill that is important to the leader – i.e., the leader could use the committee to engage in quid pro quo corruption. R.3658-59, 3672-73.

Thus, Dr. Osborn testified, caucus committees' contributions pose a greater risk of corruption than contributions by ordinary political parties, which are "one step removed from the policy-making," with "goals [designed] to promote the party," which "aren't as specific to actual legislating." R. 3673. He explained: "[B]y combining the policy-making function of the [leaders] with extraordinary fundraising power, you've now, in essence, merged policy-making and electoral [fundraising] in a very tight nest together; and that relationship, I think, enhances the potential for corruption. This is compared to a party or a distant external

organization that would be fundraising or supporting the caucuses. By tying that so close, I think you've brought in an enhanced potential for corruption." R. 3662.

Testimony on contributors to legislative caucus committees

Dr. Osborn testified that legislative caucus committees would likely attract "a higher concentration of interest group contributions" than political parties generally do because of legislative leaders' role in the policy-making process, which could "lend itself to increased opportunities for corruption." R. 3661-62, 3674-77. Dr. Osborn testified that political parties generally tend to attract contributions from a "broader mix of contributors," including individuals who give small amounts, "who are interested in the broader electoral goals of the party," which mitigates parties' contributions' potential to corrupt relative to contributions by committees that receive an "intense concentration" of donations from particular industries or interest groups. R. 3645. Dr. Osborn explained that special interests' contributions to legislative caucus committees create, "in essence, a triangle between the donors, the interest groups, the legislative caucus committee; and the policy agenda of each of those groups," creating a "cozy relationship [that] could lend itself to increased opportunities for corruption." R. 3677.

Testimony on legislative caucus committees' exclusivity rule

Dr. Osborn also testified that the Act's rule allowing a candidate to accept contributions from only one legislative caucus committee in an election increases opportunities for quid pro quo corruption by making candidates dependent on the caucus committee from which they receive their first contribution, giving the leader

who controls the caucus committee "power to influence not only the candidate's behavior but [also] their policy-making as well." R. 3662-63, 3674. Dr. Osborn testified that the exclusivity provision appeared designed to serve as "a tool that can enhance the power of the largest caucus committees or the Speaker, President, and minority-leader-managed committees." R. 3692.

Procedural History

Plaintiffs Illinois Liberty PAC and Edgar Bachrach's first amended complaint in this action alleged that the Act's contribution limits violate their First Amendment right to free speech and Fourteenth Amendment right to equal protection. R. 591-606. They alleged that the Act's removal of all limits in races where a candidate's self-funding or independent expenditures exceed certain amounts wrongfully made their own right to speak contingent upon the speech of others, and that this and other constitutional defects demonstrated that the limits do not serve an anticorruption purpose but instead serve the impermissible purpose of favoring political parties and their leaders over other political speakers. R. 602-04. Illinois Liberty PAC and Mr. Bachrach also alleged that the scheme violates their right to equal protection because it imposes lower contribution limits on them than on similarly situated political parties, which, in general elections, face no limits at all. R. 599. Mr. Bachrach also alleged that the Act violated his right to equal protection by allowing him to contribute only half the amounts that corporations, labor unions, and associations may contribute to candidates, PACs, and parties. R. 599-600.

The district court denied Illinois Liberty PAC and Mr. Bachrach's motion for preliminary injunction seeking to enjoin enforcement of the Act's limits before the 2012 general election, concluding that they were not likely to prevail on their claims. R. 1991-2012 (SA-52-73).

Illinois Liberty PAC and Mr. Bachrach then filed a second amended complaint with an additional plaintiff, Sen. McCarter. R. 2093-2246 (SA-1-51.) It alleged that the Act's scheme of contribution limits fails to serve an anticorruption purpose (or is not narrowly tailored to do so) and therefore violates the First Amendment because it: (1) discriminates against individual contributors by allowing them to give only half the amounts that corporations, unions, and other associations may give to candidates, PACs, and parties; (2) removes the limits for candidates in a given race when a candidate's self-funding or independent expenditures exceed certain amounts; (3) creates opportunities for political parties and legislative leaders (through legislative caucus committees) to circumvent the limits; and (4) shows favoritism to legislative leaders by authorizing caucus committees to make unlimited contributions to candidates in general elections. R. 2102-08 (SA-10-16). Plaintiffs also alleged that the Act's discrimination in favor of some political speakers, and against others, violates the Equal Protection Clause. R. 2107 (SA-15).

The district court granted Defendants' motion to dismiss Plaintiffs' second amended complaint under Fed. R. Civ. P. 12(b)(6) with respect to all facets of Plaintiffs' constitutional claim except for "Plaintiffs' challenge to the Act's treatment

of legislative caucus committees." R. 2443-52 (A-1-10). The court then denied the parties' cross-motions for summary judgment. R. 3449-62 (SA-74-87).

After holding a bench trial in January 2016, R. 3562-3845, the court issued a memorandum opinion and order rejecting the remaining facet of Plaintiffs' First Amendment challenge, R. 3911-39 (A-11-39), along with a final judgment against Plaintiffs, R. 3940 (A-40), on September 7, 2016.

Plaintiffs filed their notice of appeal on October 3, 2016. R. 3941.

SUMMARY OF THE ARGUMENT

In any First Amendment challenge to campaign contribution limits, the government bears the burden to show, *with evidence*, that its limits are narrowly tailored to advance its interest in preventing actual or apparent quid pro quo corruption. Rigorous scrutiny is even more important where, as here, citizens challenge contribution limits that treat some political speakers more favorably than others. The district court erred in upholding the Act's scheme of contribution limits because Defendants never even came close to meeting their burden.

The district court erred in dismissing the first basis for Plaintiffs' constitutional claim: that the Act is not narrowly tailored to serve the government's interest in preventing corruption because it limits individuals' contributions to half the amounts that corporations, unions, and other associations may give.

The district court's conclusion that *Buckley v. Valeo*, 424 U.S. 1 (1976), required dismissal of this facet of Plaintiffs' claim is incorrect. *Buckley* did not consider,

much less categorically approve, limits that discriminate against individuals and in favor of corporations, unions, and other associations as Illinois' limits do.

And Defendants did not even attempt to meet their burden to show that the Act's limits are narrowly tailored despite this discrimination. It is hardly obvious – indeed, it is counterintuitive – that contributions from corporations, unions, and associations entail a threat of corruption that is so much less than the threat posed by contributions from individuals as to warrant allowing them to give double the amounts that individuals may give.

The district court also erred in dismissing Plaintiffs' second argument supporting their constitutional claim: that the Act's limits are not narrowly tailored to prevent corruption because the Act removes all limits on contributions to candidates in a race when a candidate's self-funding or independent expenditures in the race exceed certain amounts.

The limit-lifting provisions render the scheme of limits fatally underinclusive. Defendants have not explained how the scheme is narrowly tailored to prevent corruption even though it removes all limits on contributions to candidates – abandoning any concern for their potential to corrupt – in response to a candidate's self-funding or independent expenditures, which are inherently non-corrupting. In fact, the limit-lifting provision was designed serve a purpose the Supreme Court has held to be illegitimate: leveling the electoral playing field.

The district court also erred in dismissing Plaintiffs' argument that the Act's limits are not narrowly tailored to prevent corruption because they place no limits

(or, in primaries, higher limits than others face) on political parties' contributions to candidates for state offices. Contrary to the district court's conclusion, no Supreme Court decision has approved allowing parties to spend unlimited amounts while restricting all other contributors as Illinois has. Here again, Defendants have not even attempted to meet their burden; they have not shown how the Act's different treatment of parties and other contributors is justified by the potential for corruption inherent in their respective contributions.

The district court also erred in concluding, after a trial, that the Act's limits are narrowly tailored to prevent corruption despite their treatment of legislative caucus committees, which, because the Act defines them as political party committees, have no limits on their contributions to candidates in general elections and much higher limits than non-party contributors in primary elections. Defendants presented no evidence regarding the potential for corruption inherent in caucus committee contributions, or in any other type of donor's contributions, and therefore failed to meet their burden to show that the limits are narrowly tailored to prevent corruption.

Moreover, it is apparent that the Act's treatment of legislative caucus committees renders the limits fatally underinclusive. Legislative leaders can use their caucus committees to serve their personal interests, not just their parties' interests, and can make quid pro quo demands on the legislative candidates to whom they contribute. The state apparently considers contributions legislators make to candidates through their candidate committees or through PACs they

control to pose a threat of corruption because the Act limits those to $50,000. 10 ILCS 5/9-8.5(b). But the Act inexplicably puts no limit on contributions a legislator makes through a legislative caucus committee in a general election, treating them as if they have *no* potential to corrupt. That makes no sense: when a legislative leader gives money to a legislative candidate, the leader is in the same position to make quid pro quo demands on the recipient, regardless of which committee the leader uses to make the contribution. Further demonstrating the limits' underinclusiveness, legislators can and do use the caucus committees to circumvent limits they would face if they could only contribute through their candidate committees and PACs.

Even if the state's higher limits for party committees in general were justified (as the district court concluded), it would not follow that the state may accord the same favorable treatment to caucus committees. A legislative leader's caucus committee is not like a party committee because, unlike a state or county party committee, it is inherently under one person's control and can be used to serve that person's interests. It is also unlike an ordinary party committee because a candidate may accept contributions from only one caucus committee in a given primary or general election but may receive contributions from an unlimited number of traditional party committees. 10 ILCS 5/9-8.5(b). The only apparent purpose for this exclusivity rule is to make candidates dependent on the first caucus committee from which they receive contributions and to make it difficult for new caucus committees to arise and compete.

In rejecting the facet of Plaintiffs' claim based on the Act's treatment of caucus committees, the district court relied primarily on problems it perceived in the testimony of Plaintiffs' expert, Dr. Marcus Osborn. But shortcomings in Dr. Osborn's testimony could not provide a basis for rejecting Plaintiffs' claim because Plaintiffs had no burden to present an expert or any other evidence. Defendants bore the burden and failed to meet it.

Besides, the district court lacked any basis for rejecting Dr. Osborn's testimony. It acknowledged that Dr. Osborn was eminently qualified to testify on the subject matter in question, and Defendants presented no evidence to refute his testimony. In rejecting Dr. Osborn's testimony, the district court improperly relied on *its own* opinions, lacking any evidentiary support, about the risks of corruption inherent in various entities' political contributions.

Finally, in the alternative, the district court erred in partially dismissing Plaintiffs' constitutional claim, and in entering judgment against Plaintiffs, because it should have applied strict scrutiny, which the Act's limits cannot withstand.

Strict scrutiny applies to laws, such as the Act, that impose different speech restrictions on different speakers. Also, in the alternative, strict scrutiny should apply because the Supreme Court erred in subjecting limits on campaign contributions to less-than-strict scrutiny in *Buckley v. Valeo*, 424 U.S. 1 (an argument Plaintiffs present here only to preserve it).

The limits cannot survive strict scrutiny because the Defendants have never argued, much less shown, that the Act's discriminatory limits are the least

restrictive means of preventing any corruption inherent in donors' political contributions.

For all of these reasons, this Court should reverse the district court's partial dismissal of Plaintiffs' claim and its judgment against Plaintiffs.

STANDARD OF REVIEW

This Court reviews the district court's order granting Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) de novo, construing the complaint in the light most favorable to the plaintiffs, "accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [the plaintiffs'] favor." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). Dismissal under Rule 12(b)(6) is proper only where the plaintiff can prove no set of facts that would entitle him to relief. *Marshall-Mosby v. Corp. Receivables, Inc.*, 205 F.3d 323, 326 (7th Cir. 2000).

This Court reviews the district court's findings of fact following a bench trial, and its applications of law to those findings of fact, for clear error. *Winforge, Inc. v. Coachmen Indus.,* 691 F.3d 856, 868 (7th Cir. 2012). The Court reviews the district court's conclusions of law de novo. *Id.*

ARGUMENT

I. First Amendment challenges to campaign contribution limits that treat some political contributors more favorably than others demand rigorous scrutiny.

Limits on campaign contributions – especially limits that favor some political speakers over others – implicate the fundamental First Amendment right to free political speech and therefore demand rigorous scrutiny.[2]

In general, limits on campaign contributions violate the First Amendment unless the government can show that they are closely drawn to serve a sufficiently important government interest. *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 152 (7th Cir. 2011) (citing, inter alia, *Buckley v. Valeo*, 424 U.S. 1, 20-21, 23-25 (1976)). Under that test, as under strict scrutiny, the Court "must assess the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon v. FEC*, 134 S.Ct. 1434, 1445 (2014). Although the fit need not be "perfect," it must be "reasonable" and must use a "means narrowly tailored to achieve the desired objective." *Id.* at 1456-57. The only interests the Supreme Court has recognized as sufficiently important to justify contribution limits are the prevention of quid pro corruption, prevention of the appearance of quid pro quo corruption, and prevention of circumvention of contribution limits that prevent actual or apparent quid pro quo corruption. *See Id.* at 1441, 1446. (For simplicity, this brief will refer to these interests collectively as "prevention of corruption.")

[2] Plaintiffs alleged that the Act's limits violate both the First Amendment and the Equal Protection Clause. R. 2102-08 (SA-10-16). Because the district court concluded that the same First Amendment principles control both aspects of Plaintiffs' constitutional claim, Plaintiffs only refer to the First Amendment in Sections I through III of their Argument. Plaintiffs address the equal protection component further in Section IV.

Thus, when a plaintiff challenges campaign contribution limits under the First Amendment, as Plaintiffs do here, the government bears the burden to show that those limits are narrowly tailored to prevent corruption. *Id.* at 1441, 1456-57. To meet that burden, the government must provide "adequate evidentiary grounds." *FEC v. Colo. Republican Campaign Cmte.*, 533 U.S. 431, 456 (2001) ("*Colorado II*"). "[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).

Rigorous 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 by 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.

These principles apply to limits on campaign contributions, which affect the First Amendment rights to political expression and political association. *McCutcheon*, 134 S.Ct. at 1448 (citing *Buckley*, 424 U.S. at 15, 21-22). Accordingly, the government "may not regulate contributions simply to . . . restrict the political participation of some in order to enhance the relative influence of others." *Id.* at 1441. This principle reflects the belief, enshrined in the First Amendment, that

"those who govern should be the *last* people to help decide who *should* govern." *Id.* at 1441-42.

II. This Court should reverse the partial dismissal of Plaintiffs' claim because Defendants did not meet their burden to show that the Act's contribution limits are narrowly tailored to prevent corruption.

The district court erred in "dismissing" certain bases for Plaintiffs' First Amendment claim because, in doing so, it disregarded Defendants' burden to show that the limits are narrowly tailored – which Defendants did not, in fact, meet or even attempt to meet.

A. This Court should reverse the dismissal of Plaintiffs' challenge to the Act's discrimination against individual citizens and in favor of corporations, unions, and other associations.

The district court erred in dismissing the first basis for Plaintiffs' First Amendment claim: that the Act does not serve, or is not narrowly tailored to serve, the government's interest in preventing corruption because it limits individuals' contributions to half the amounts that corporations, unions, and other associations may give. Again, the Act allows an individual to contribute $5,000 to a candidate and $10,000 to a PAC or political party committee; but it allows a corporation, labor union, or other association to contribute $10,000 to a candidate and $20,000 to a PAC or party committee. 10 ILCS 5/9-8.5(b), (c), (d).

In its order denying Plaintiffs' motion for preliminary injunction, the district court addressed this aspect of Plaintiffs' First Amendment claim in a single paragraph, concluding that the differing contribution limits were constitutional because the Supreme Court upheld federal "provisions that imposed a $1,000

contribution limit on individuals and a $5,000 limit on PACs" and thus (supposedly) "approved the imposition of lower contribution limits on individuals than on entities" in *Buckley*, 424 U.S. at 35-36. R. 2008 (SA-69). When the district court later dismissed this facet of Plaintiffs' claim under Rule 12(b)(6), it adopted the reasoning of its earlier opinion by reference without discussing the issue further, except to state that "[t]here would be no point in the parties developing and [the] court considering evidence" on this aspect of Plaintiffs' First Amendment claim because Supreme Court precedent controls. R. 2448 (A-6).

The district court's conclusion that Supreme Court precedent required it to dismiss this aspect of Plaintiffs' claim was incorrect, and its analysis of Plaintiffs' claim fell far short of the rigorous scrutiny that Supreme Court precedent does require.

As an initial matter, the district court erred in concluding that *Buckley* required it to reject this basis for Plaintiffs' claim. *Buckley* did not hold that any scheme whatsoever that imposes "lower contribution limits on individuals than on entities" is *per se* constitutional. Indeed, *Buckley* considered the constitutionality of a federal campaign finance statute that treated corporations and unions *less* favorably than individual contributors: it limited contributions to candidates by individuals and most entities to $1,000 but *banned* corporations and unions from contributing directly to candidates. *See Buckley*, 424 U.S. at 23, 196. The rules at issue in *Buckley* placed a higher $5,000 limit only on one specific type of entity: a PAC that had been registered for at least six months, had received contributions from more

than 50 persons, and (except for state political party organizations) had contributed to five or more candidates for federal office. *See id.* at 35. The Court rejected arguments that the $1,000 limit for individuals and most entities was unconstitutionally low. *Id.* at 23-35. Separately, the Court concluded that the $5,000 limit for certain PACs did not unconstitutionally discriminate against "ad hoc organizations" that did not satisfy the criteria for the higher limit, noting that the statute's conditions "serve[d] the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees." *Id.* at 35-36.

Buckley did not address the constitutionality of – much less categorically approve – the imposition of a lower limit on individuals than on corporations, unions, and other associations because it had no reason to do so: again, the limits in question treated corporations and unions *less favorably* than individuals. *See id.* at 23, 196; *see also Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 200-01 (1981) (concluding that the same statute "as a whole impose[d] far *fewer* restrictions on individuals and unincorporated associations than . . . on corporations and unions"). Thus, *Buckley* did not imply, let alone hold, that a scheme such as Illinois' that allows an individual to give a candidate only half the amount that a corporation, union, or other association may give necessarily complies with the First Amendment.

The government's burden in this case required it to show, with evidence, that its contribution limits are narrowly tailored to advance the government's interest in limiting corruption or the appearance of corruption. *See McCutcheon*, 134 S.Ct. at

1441, 1456-57. In a motion to dismiss under Rule 12(b)(6), however, Defendants could not present evidence: the court could only grant their motion if the complaint, on its face, showed that Plaintiffs could not prevail on their claim. *See Alioto v. Marshall Field's & Co.*, 77 F.3d 934, 936 (7th Cir. 1996).

Defendants' motion to dismiss did not show that the allegations in Plaintiffs' complaint established that the Act's limits discriminating against individuals and in favor of corporations, et al., are narrowly tailored to prevent corruption. Indeed, Defendants' motion did not even begin to explain how allowing individuals to contribute only half the amounts that corporations, unions, or other associations may give to political committees serves the state's interest in preventing corruption. Defendants did not explain how 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.

And it is hardly obvious that individuals' contributions are more potentially corrupting than corporate and union contributions. In fact, *no* state other than Illinois places a lower limit on individual citizens' direct contributions to candidates than it places on corporations and unions' direct contributions to candidates. *See* National Conference of State Legislatures, *State Limits on Contributions to Candidates, 2015-2016 Election Cycle*, https://goo.gl/aH4tW9. Indeed, the public might think that corporate and union contributions pose the greater threat – which presumably is a reason why many other states have imposed lower campaign

contribution limits on corporations and unions than on individuals and why some states and the federal government have banned direct corporate and union contributions to candidates entirely.[3] *Cf. FEC v. Nat'l Right to Work Cmte.*, 459 U.S. 197, 207-12 (1982) (federal restrictions on corporations' political fundraising and contributions served purpose of preventing corporations from using "substantial aggregations of wealth amassed by special advantages that go with the corporate form" as "political 'war chests' which could be used to incur political debts from legislators who are aided by [corporate] contributions").

Of course, the Constitution does not necessarily require Illinois to adopt the same limits as other states; but it does require Illinois to show that its discriminatory limits are narrowly tailored to prevent corruption. Because Defendants entirely failed to do so in their motion to dismiss, the district court erred in dismissing Plaintiffs' argument that the Act's limits that discriminate in favor of corporations, unions, and other associations, and against individual

[3] *See* Ind. Code § 3-9-2-4 *et seq.* (individuals can make unlimited contributions; unions and corporations limited to $5,000 in the aggregate to statewide candidates, $2,000 in the aggregate to Senate candidates, and $2,000 in the aggregate to House candidates per year); A.L.M. G.L. Ch. 55, §§ 6, 6A, 7A & 8 (individuals limited to $1,000 per candidate per year and a yearly aggregate limit of $12,500; unions limited to $500 per candidate per year; corporation contributions banned); Miss. Code § 97-13-15 (individuals and unions can make unlimited contributions; corporate contributions limited to $1,000 per candidate per year); N.Y. C.L.S. Elec. §§ 14-114 & 14-116 (individuals and unions have an aggregate yearly limit of $150,000, while corporations have an aggregate yearly limit of $5,000); 52 U.S.C. § 30118 (corporate and union contributions banned); Alaska Stat. § 15.13.074(f) (same); Conn. Gen. State. § 9-613 (same); M.C.L.S. § 169.254 (same); 13-35-227, M.C.A. (same); N.C. Gen. Stat. §§ 163-278.15 & 163-278.19 (same); N.D. Cent. Code, § 16.1-08.1.-03.3 (same); O.R.C. Ann. 3599.03 (same); 21 Okl. St. § 187.2 (same); 25 P.S. § 3253 (same); R.I. Gen. Laws § 17-25-10.1 (same); S.D. Codified Laws § 12-27-18(same); Tex. Elec. Code § 253.094 (same); Wis. Stat. § 11.1112 (same); Wyo. Stat. § 22-25-102 (same).; R.S.A. 664:4 (union contributions banned); K.R.S. § 121.035 (corporate contributions banned); Minn. Stat. § 211B.15 (same); W.Va. Code § 3-8-8 (same).

citizens, violate the First Amendment. This Court should therefore reverse the district court's dismissal of this facet of Plaintiffs' claim.

B. This Court should reverse the dismissal of Plaintiffs' challenge to Illinois' contribution limits based on the Act's removal of the limits in response to self-funding and independent expenditures.

The district court also erred in dismissing Plaintiffs' second argument supporting their First Amendment claim: that the Act's limits are not narrowly tailored to prevent corruption because the Act removes all limits on contributions to candidates when a candidate's self-financing or independent expenditures in a race exceed certain amounts.

As discussed above, the Act removes all limits on contributions to candidates in a race for a given office when a candidate's self-funding, or independent expenditures supporting or opposing a candidate in the race, exceed $250,000 in a race for statewide office or $100,000 in any other race. 10 ILCS 5/9-8.5(h), (h-5). In their complaint, Plaintiffs alleged that the Act's lifting of the limits under these circumstances wrongfully tethers Plaintiffs' free speech to the actions of others and demonstrates that the limits are not actually designed to prevent corruption. R. 2105-06 (SA-13-14).

This is an argument that the Act's limits are underinclusive – i.e., that the Act's exceptions to its limits demonstrate that the limits do not actually serve, or are not narrowly tailored to serve, a legitimate state interest. "[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon . . . speech, when it leaves appreciable damage to that supposedly vital

interest unprohibited." *Fla. Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring). "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994) (exemptions from restrictions on speech "diminish the credibility of the government's rationale for restricting speech" and could reflect "a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the public" or to "select the permissible subjects for public debate and thereby to control the search for political truth") (internal marks and citations omitted). The Supreme Court has therefore struck down restrictions on speech that were so "woefully underinclusive as to render the belief [that they serve a legitimate state interest] a challenge to the credulous." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) ("exemptions and inconsistencies" in ban on labeling beverages' alcohol content "br[ought] into question the purpose of the labeling ban" and "ensure[d] that the labeling ban [would] fail to achieve [its purported purpose]"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 (1993) (ordinance violated First Amendment because, among other reasons, news racks it prohibited were "no greater an eyesore than the newsracks permitted to remain on [the city's] sidewalks"); *Joelner v. Village of Washington Park*, 508 F.3d 427, 433 (7th Cir. 2007) (ordinance banning alcohol at some adult businesses but not others fatally underinclusive). By

definition, "[a]n underinclusive regulatory scheme is not narrowly tailored." *Joelner*, 508 F.3d at 433.

With their motion to dismiss, Defendants did not even attempt to explain how the Act's scheme of limits is narrowly tailored to prevent corruption even though it removes all limits on contributions to candidates in a given race – abandoning any ostensible concern for their potential to corrupt – when a candidate's self-funding or independent expenditures reach a certain amount. The removal of the limits in response to self-funding or independent expenditures has no connection to the prevention of corruption because independent expenditures and self-financing – *per se*, as a matter of law – have no potential to corrupt. *See Citizens United*, 558 U.S. at 348-65 (First Amendment prohibits limits on independent expenditures because they present no threat of corruption); *Buckley*, 424 U.S. at 52-53 (First Amendment prohibits limits on self-funding because it presents no threat of corruption).

The limit-lifting provisions' actual purpose – unrelated to the prevention of corruption – is to create a "level playing field" for candidates faced with a self-financing opponent or an opponent supported by independent expenditure groups. The Illinois General Assembly passed a bill adding the provision regarding independent expenditures in July 2012, shortly after a court struck down the Act's limits, as applied to independent-expenditure PACs, for violating the First Amendment in *Personal PAC v. McGuffage*, 858 F. Supp. 2d 963 (N.D. Ill. 2012). Ill. Public Act 97-0766. The bill's lead House sponsor stated its purpose explicitly: "[N]ow that the Federal Court has said that in Illinois contribution caps cannot be

imposed on a Super PAC, an independent expenditure committee that is not connected to a candidate. I think it would be an outrage not to help the other candidates not so benefited by the Super PAC . . . to try to level the playing field." 97th Ill. Gen. Assembly, House Proceedings, May 30, 2012, at 63 (Statement of Rep. Currie). She also indicated that this was the purpose of the provision lifting limits in response to self-funding. *Id* at 63-64.

But the Supreme Court has specifically rejected leveling the playing field as a valid purpose for campaign finance rules. *See Ariz. Free Enterprise Club v. Bennett*, 564 U.S. 721, 749-50 (2011); *see also Wis. Right to Life State PAC*, 664 F.3d at 153 (noting that the Supreme Court has rejected "equalization of viewpoints, combating distortion, [and] leveling electoral opportunity" as justifications for campaign-finance restrictions). The state may not turn citizens' First Amendment rights off and on based on what it believes would be "fair" to certain candidates. *See Bennett*, 564 U.S. at 750.

More specifically, the limit-lifting provisions appear designed to create a "level playing field" when doing so would tend to benefit incumbent officeholders. As jurists and scholars have observed, contribution limits in general serve to protect incumbents against challengers. Even statutes that equally limit contributions to all candidates tend to benefit incumbents because they enjoy certain advantages for which they do not have to spend any money, such as name recognition, a database of contributors, an existing campaign committee, press coverage of their official activities, the ability to communicate with constituents at taxpayer expense (e.g.,

through "newsletters"), and the ability to engage in patronage. *See, e.g., Randall*, 548 U.S. at 268-71 (Thomas, J., concurring) (citing B. Smith, Unfree Speech: The Folly of Campaign Finance Reform 50-51, 66-70 (2001)); R. Beard, Note, *Whacking the Political Money "Mole" Without Whacking Free Speech*, 2008 U. Ill. L. Rev. 731, 764-68 (2008); B. Smith, *Faulty Assumptions & Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L. J. 1049, 1072-74 (1996). Contribution limits might work to an incumbent's disadvantage, however, where the incumbent faces a self-funded challenger or a challenger who receives a high level of support from independent-expenditure groups. Under either of those circumstances, it is better for incumbents if they can raise funds beyond the usual limits to defend themselves.

It is therefore highly convenient for incumbents that the Act removes contribution limits under just those circumstances: it keeps the limits in place when limits serve incumbents' interests, and it removes the limits when removing limits serves incumbents' interests. Any suggestion that this is coincidental – given the tendency of incumbents generally to use the law to protect their own interests – does indeed present a "challenge to the credulous." In sum, the Act's combination of limits and limit-lifting provisions look exactly as they would if the scheme were designed to protect incumbents from competition – not as they would if legislators actually believed that limiting contributions was essential to prevent corruption.

Again, Defendants have not even attempted to explain any of this away. Instead of showing how the Act is narrowly tailored to prevent corruption, despite its elimination of the limits under circumstances that have nothing to do with

corruption, Defendants argued that this facet of Plaintiffs' claim is "[i]n essence, . . . [a] claim that the Act should have placed *more* restrictions on campaign contributions by excluding the limit lifting provisions" and is therefore barred in light of the Supreme Court's statement that "[t]here is . . . no constitutional basis for attacking contribution limits on the ground that they are too high" in *Davis v. FEC*, 554 U.S. 724, 737 (2008). R. 2276. The district court accepted this argument in denying Plaintiffs' motion for preliminary injunction and in dismissing this facet of Plaintiffs' First Amendment claim. R. 2006-08 (SA-67-69); R. 2447 (A-5).

But Plaintiffs do not "claim that the Act should have placed *more* restrictions on campaign contributions." A First Amendment underinclusiveness argument is not an argument that the government should have restricted more speech than it did; it is an argument that the government's failure to restrict more speech of the same kind demonstrates that the restrictions it has imposed do not actually serve their purported purpose.

Supreme Court cases that have applied the concept illustrate the point.

In *Republican Party of Minnesota*, a rule that prevented judicial candidates from stating their views on legal issues during their campaigns, supposedly for the purpose of keeping them open-minded, was held to be fatally underinclusive because candidates could still state their views on those issues immediately before announcing their candidacies and immediately after being elected, which presumably could just as easily affect their open-mindedness when deciding cases. 536 U.S. at 779-80. The Court did not suggest, however, that the law should have –

or could have – restricted more speech by prohibiting judicial candidates from stating their views on issues for a longer period of time before or after their campaigns. Presumably broader restrictions on judicial candidates' speech would give rise to additional First Amendment concerns, but the Court had no reason to address those.

In *Brown v. Entertainment Merchants Association*, the Court held that a statute restricting the sale of violent video games to minors was fatally underinclusive because some minors could nonetheless acquire the games lawfully and all minors still had unlimited access to media found to have the same effects on children, such as "Saturday morning cartoons, . . . games for young children, [and] . . . pictures of guns." 131 S.Ct. at 2740. But the Court could not have intended to imply that the statute would have been constitutional if it had restricted access to those other things. Presumably a statute that banned "Saturday morning cartoons" and "pictures of guns" along with games that have similar effects on children would have difficulty surviving First Amendment scrutiny – or at least would not *automatically* survive it based on *Brown* – even if it could no longer be challenged as underinclusive.

As for *Davis*, it does not foreclose Plaintiffs' argument. In that case, the Court struck down a federal provision that removed contribution limits for a self-funded candidate's opponent, but not for the self-funded candidate, when the self-funder's self-funding exceeded a certain amount. 554 U.S. at 738-44. In dicta, the Court stated that the plaintiff's claim would have failed if the statute lifted caps for all

candidates because there is "no constitutional basis for attacking contribution limits on the ground that they are too high." *Id.* at 737. Here, Plaintiffs have not alleged that the Act's limits are "too high"; they have alleged that the limits are not narrowly tailored to prevent corruption because the limit-lifting provisions make them underinclusive. *Davis* did not consider an underinclusiveness argument and cannot reasonably be read to foreclose any First Amendment challenge to contribution limits that is based on underinclusiveness.

Thus, the district court erred when it concluded that *Davis* required it to reject Plaintiffs' argument that the Act's limit-lifting provisions render its scheme of limits underinclusive. Because *Davis* does not control – and Defendants failed to show that the Act's limits are narrowly tailored to prevent corruption despite the limit-lifting provision – the district court erred in dismissing this argument supporting Plaintiffs' First Amendment claim.

C. This Court should reverse the dismissal of Plaintiffs' challenge to Illinois' contribution limits based on the Act's lack of limits on political party committees.

The district court also erred in dismissing Plaintiffs' argument that the Act's limits are not narrowly tailored to prevent corruption, and thus violate the First Amendment, because they place no limits (or, in primaries, higher limits than others face) on political parties' contributions to candidates for state offices.

Again, Plaintiffs' complaint alleged that the limits are not narrowly tailored to prevent corruption because (among other reasons) they limit the contributions of all individuals and organizations, except political parties, which may make unlimited

contributions to candidates in a general election and much larger contributions than others in a primary election. R. 2105, 2107-08 (SA-13, 15-16). Plaintiffs alleged that the lack of limits on parties showed improper favoritism toward parties' political speech and rendered the Act's scheme of limits underinclusive. *See id.*[4]

The district court dismissed this facet of Plaintiffs' claim (adopting by reference the reasoning of its opinion denying Plaintiffs' motion for preliminary injunction), concluding that it was foreclosed by Supreme Court precedent. R. 2001-05 (SA-62-66); R. 2446 (A-4). But the Supreme Court cases the district court relied on do not control here.

One of the cases the district court relied on, *Colorado II*, held that political parties may be subject to limits on their coordinated expenditures (expenditures made in coordination with a candidate), which the Court deemed to be the functional equivalent of contributions to a candidate. 533 U.S. at 445-65. Although the limits on parties' coordinated expenditures that the Court upheld were much higher than the contribution limits that federal law placed on individuals and other donors, the Court did not address the constitutionality of that disparity – let alone the disparity at issue in this case, where parties face *no* limits while all others are restricted – because it was not an issue in the case. *See id.* at 456-65. *Colorado II* therefore does not foreclose Plaintiffs' argument.

[4] The district court dismissed Plaintiffs' First Amendment claim to the extent that it was premised on the Act's treatment of political parties generally, but it allowed the claim to proceed to trial to the extent that it was premised on the statute's treatment of legislative caucus committees in particular. Plaintiffs address the court's judgment against them on the portion of their claim related to legislative caucus committees below in Section III.

Another case the district court relied on, *McConnell v. FEC*, likewise does not control here. 540 U.S. 93 (2003), *overruled on other grounds by Citizens United*, 558 U.S. 310. *McConnell* addressed an argument that federal law unconstitutionally discriminated *against* political parties by prohibiting them from engaging in "soft money" fundraising activities while allowing PACs to do so. *Id.* at 187-88. In holding that this differential treatment was not unconstitutional, the Court observed that parties had certain offsetting advantages over PACs, including their ability to receive substantially higher contributions. *Id.* at 188. The Court concluded that Congress could impose differing restrictions on PACs and parties that account for their "real-world differences." *Id.* The Court did not, however, endorse *any and all* campaign finance rules that treat parties differently from others, and it did not consider, let alone approve, a scheme such as Illinois' that places no limits on parties while restricting all other political speakers.

In arguing for dismissal of this facet of Plaintiffs' claim, Defendants argued that the First Amendment does not require the government to treat political parties and other contributors "identically." R. 2274-76. But this case is not about whether the state must treat political parties and other donors identically. Rather, this case presents the question of whether Illinois' scheme of campaign contribution limits is narrowly tailored to prevent corruption, particularly in light of its lack of limits on political parties in general elections and its much higher limits for political parties in primary elections. If "real-world differences" between parties and other donors justify this difference in treatment, Defendants bear the burden to show, with

evidence, that the Act's limits are narrowly tailored to address those differences. *See McCutcheon*, 134 S.Ct. at 1441, 1456-57. But Defendants presented the district court with no evidence, or even argument, to meet that burden.

Accordingly, the district court erred when it dismissed Plaintiffs' First Amendment claim to the extent that it was premised on the Act's treatment of political parties.

III. The district court erred in holding that the Act's limits are narrowly tailored to prevent corruption despite their favoritism toward legislative caucus committees.

The district court also erred in concluding, after a bench trial, that Illinois' scheme of contribution limits is narrowly tailored to prevent corruption despite its preferential treatment of legislative caucus committees.

Again, the Act uniquely empowers the Speaker of the House, Senate President, and two minority leaders to establish their own legislative caucus committees, through which they may give candidates unlimited amounts in general elections and much greater amounts than others in primary elections. 10 ILCS 5/9-1.8(c), 9-8.5(b). Plaintiffs alleged that the Act is not narrowly tailored to prevent corruption because, by giving the leaders this ability, it shows undue favoritism toward them and creates opportunities for them to circumvent the Act's limits. R. 2004-08 (SA-65-69).

At trial, Defendants presented no evidence to meet their burden to show that the Act's limits are narrowly tailored despite their treatment of legislative caucus

committees. And it is evident from the face of the Act – as well as the testimony of Plaintiffs' expert – that the limits are *not* narrowly tailored to prevent corruption.

A. Defendants failed to meet their burden at trial.

The district court erred in granting judgment in favor of Defendants because Defendants presented *no evidence* to meet their burden to show that the Act's scheme of contribution limits is narrowly tailored to prevent corruption despite its preferential treatment of legislative caucus committees. To show narrow tailoring, Defendants 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, that the state was justified in allowing caucus committees to make unlimited (or outsize) contributions to candidates while limiting PACs' contributions to $50,000 and limiting other donors to lower amounts. But Defendants did not present any evidence regarding the potential for corruption inherent in any type of donor's contributions.

Defendants called just two witnesses at trial, neither of whom shed any light on the potential for corruption inherent in contributions by legislative caucus committees or any other type of donor. Both witnesses simply described some of the state's campaign finance rules and how the Board administers them (R. 3754-95), and the district court's opinion following the trial did not cite anything in their testimony as evidence that the limits are narrowly tailored.

These witnesses' testimony (and related exhibits) constituted Defendants' *entire case*. Thus, Defendants failed to meet their burden to show narrow tailoring, which, by itself, warrants reversal of the district court's judgment against Plaintiffs.

B. It is apparent from the Act's face that its preferential treatment of legislative caucus committees does not reflect narrow tailoring to prevent corruption.

Moreover, it is evident from the face of the Act that the limits are *not* narrowly tailored in light of their treatment of legislative caucus committees. There is no apparent reason why contributions that a legislative leader makes through a caucus committee would not pose a threat of corruption that is similar to the threat of corruption inherent in contributions by PACs, and therefore there is no apparent reason why caucus committees should be allowed to make unlimited contributions while PACs are limited. Even if the state may allow party committees generally to make unlimited or outsize contributions (as the district court held – incorrectly, as discussed above), it still is not justified in giving that advantage to caucus committees in particular because legislative leaders can use those committees to serve their personal interests, not just their party's interests. By allowing leaders' potentially corrupting contributions to go unchecked, while limiting all other individuals and groups (other than parties), the Act gives the leaders an unfair advantage over other political contributors and reveals that its limits are not narrowly tailored to prevent corruption as the First Amendment requires.

1. Legislative leaders can use caucus committees to serve their personal interests.

The Act allows Illinois' legislative leaders to use their caucus committees to serve their personal interests, not just their party's broader interests. The Act defines "legislative caucus committees" to include four committees respectively established by the state's four legislative leaders: the Speaker of the House, the Senate President, and the two minority leaders. 10 ILCS 5/9-1.8(c). The Act only requires that legislative leaders establish their respective caucus committees "for the purpose of electing candidates to the General Assembly"; it does not require them to use their committees to advance their party's interests rather than their personal interests. *Id.* Accordingly, legislative leaders are free to use their caucus committees to advance their personal interests in keeping their leadership positions and promoting their own policy agendas among their fellow legislators.

2. Contributions by legislative caucus committees and PACs have a similar potential to corrupt.

Because legislative leaders can use their caucus committees to serve their personal interests rather than party interests alone, there is no reason to believe that contributions from those committees pose a significantly lesser threat of corruption than contributions from a PAC controlled by a legislator – let alone a threat so low that they should not be limited at all, even as all contributions from all others (except parties) are limited. A legislative leader donating money through a caucus committee can make quid pro quo demands on a candidate to whom he or she donates, just as a PAC can. For example, a legislative leader could contribute to

a legislator's campaign committee in exchange for that legislator's vote on a bill, or in exchange for that legislator's promise to continue to vote for the leader to remain the leader.

Indeed, the state assumes that contributions from one legislator's candidate committee to another legislator's candidate committee pose the same threat of corruption as a PAC's contributions to a candidate because the Act limits both to $50,000. 10 ILCS 5/9-8.5(b). It also apparently assumes that PACs controlled by legislators pose a threat of corruption when they give to candidates because legislators' PACs are subject to the same $50,000 limit as any other PAC. *See* 10 ILCS 5/9-1.8(d), 5/9-8.5(b). Thus, in general, the Act considers contributions from a legislator to another candidate to be potentially corrupting to the same extent as any PAC's contribution to a candidate – as long as the legislator makes the contributions from his or her candidate committee or PAC. But the Act inexplicably makes an exception for contributions that a legislator makes through a legislative caucus committee, treating them as though they have *no* potential to corrupt in a general election and much less potential to corrupt in a primary election.

3. The Act's inconsistent treatment of legislator-to-candidate contributions renders it underinclusive.

The Act's inconsistent treatment of legislator-to-candidate contributions makes its limits "so woefully underinclusive as to render" the notion that the limits are narrowly tailored to prevent corruption "a challenge to the credulous." *Republican Party of Minn.*, 536 U.S. at 780. Defendants presented no evidence at trial establishing any reason to believe that a candidate who would be (actually or

apparently) corrupted by contributions exceeding $50,000 from a legislative leader's candidate committee or PAC would not be corrupted to the same extent by contributions exceeding $50,000 from the same leader's caucus committee. Regardless of which committee gives the contribution, the recipient knows who is giving it: the leader. And regardless of which committee gives the contribution, the leader is in the same position to make a quid pro quo demand on the recipient.

Further demonstrating that the limits are underinclusive, legislative leaders can and do use the Act to circumvent the limits they would face if they could only contribute through their candidate committees and ordinary PACs. For example, in the 2012 general election cycle, Senate President John Cullerton's candidate committee, Citizens for John Cullerton, gave $41,000 to the Dan Kotowski for State Senate campaign committee and also gave $850,000 to Cullerton's legislative caucus committee, the Senate Democratic Victory Fund, which, in turn, gave $229,339.99 to the Kotowski campaign committee. R. 3015, 3019-22. Thus, Senator Cullerton was able to direct 5.4 times the amount to Kotowski that he could have given through his candidate committee and 2.7 times the amount that he could have given through his candidate committee and an ordinary PAC combined.

4. Legislative caucus committees are different from other political party committees.

Even if the district court was correct in concluding that the state was justified in allowing political party committees to give candidates unlimited (or outsize) contributions (which it was not), it would not follow that the state may accord the same favorable treatment to legislative caucus committees simply because it has

labeled them "party committees." There are several important differences between a legislative caucus committee, particularly one controlled by a legislative leader, and an ordinary political party committee, which affect their respective contributions' potential to corrupt.

A legislative leader's caucus committee is not like a political party committee because it is under the leader's individual control, which means that the leader can use it to serve his or her personal interests, as discussed above. Unlike the leaders' caucus committees, the state and county central committees of political party are not established or controlled by any one person; on the contrary, the law requires that those committees consist of a body of many elected members. *See* 10 ILCS 5/7-8(a), (d). Accordingly, there is no inherent reason why state and county central committees would pursue any given individual's personal interests rather than the party's broader interests.[5] The Act does allow ward and township committeemen to create their own party committees, but it is not apparent that those committeemen, at the bottom of the party hierarchy and representing a small geographical area, are in a position to raise funds and thus to exert influence over legislative candidates to the same extent that legislative leaders can.

Another difference: a candidate may only accept contributions from one legislative caucus committee during a given primary or general election but may receive contributions from an unlimited number of traditional party committees. 10

[5] It is not impossible, however, that a traditional political party committee would be heavily influenced or controlled by one person, and Plaintiffs alleged in their complaint that House Speaker Michael Madigan uses the Democratic Party of Illinois to advance his own interests. R. 2101-02 (SA-9-10). But this is not an *inherent* feature of political parties as it is for legislative leaders' caucus committees.

ILCS 5/9-8.5(b). A caucus committee's unique right to be a candidate's exclusive donor serves no apparent purpose except to "lock in" a candidate to depend on the first caucus committee that gives him or her money and to make it difficult for new legislative caucus committees to arise and compete. If, in the middle of an election cycle, a candidate who has taken money from a leader's caucus committee decides that he or she no longer wants to support the leader's agenda, the candidate cannot turn to another legislative caucus committee for support. The candidate could seek support from other types of committees, but the Act limits how much other committees (except parties) may give. Thus, legislative leaders can use their caucus committees to make legislators dependent on them for support, which makes it easier for them to use the committees to make quid pro quo demands on legislators, requiring that they obey the leader to avoid losing financial support not only from the leader's committee but also from *any* caucus committee. In this way, the Act gives legislative leaders a tool for engaging in corruption that traditional political parties lack.

Legislative caucus committees also differ from Congressional campaign committees in the federal system, to which Defendants and the district court have compared them, and which the Supreme Court assumed to be equivalent to political party committees in *FEC v. Democratic Senatorial Campaign Cmte.*, 454 U.S. 27, 40 n.20 (1981). R. 3895-96, 3935-36 (A-35-36). No federal law places any Congressional campaign committee under the control of one person, much less under the control of the parties' leaders within the two Houses of Congress. Accordingly, there is no

reason to expect Congressional campaign committees to pursue the personal interests of any particular legislator as there is with Illinois legislative leaders' caucus committees.

For all of these reasons, caucus committees are not like other Illinois party committees. So considerations that might arguably justify treating other types of party committees more favorably than PACs and other contributors do not warrant treating caucus committees more favorably than other contributors. Again, caucus committees more closely resemble PACs because they can be used to pursue a leader's own interests rather than party interests, and their contributions therefore give rise to actual or apparent corruption to a greater extent than contributions by typical party committees. The Act's failure to account for these differences shows that it is not narrowly tailored to prevent corruption.

C. The district court committed clear error in rejecting Plaintiffs' expert's testimony that the Act's treatment of legislative caucus creates and enhances opportunities for corruption.

Although the Act's lack of narrow tailoring is evident on its face, Plaintiffs presented an expert witness, Dr. Osborn, who testified that legislative caucus committees are indeed similar to PACs and that the Act's treatment of caucus committees creates and enhances opportunities for quid pro quo corruption. The district court's opinion rejecting Plaintiffs' claim relied heavily on the court's conclusion that Dr. Osborn's testimony was not persuasive. R. 3918-3929, 3933-37 (A-18-29, 33-37).

As an initial matter, any shortcomings in Dr. Osborn's testimony could not provide a basis for rejecting Plaintiffs' claim. Again, Defendants bore, and failed to meet, the burden to present evidence showing that the Act's limits are narrowly tailored to prevent corruption. Plaintiffs had no burden to affirmatively show, through expert testimony or any evidence, that the limits are not narrowly tailored. Therefore, by rejecting Plaintiffs' claim based on problems it found in Dr. Osborn's testimony, the district court incorrectly placed the burden on Plaintiffs, which, by itself, warrants reversal of the district court's judgment.[6]

Putting that aside, the district court lacked any basis for rejecting Dr. Osborn's expert testimony. When Defendants moved to exclude Dr. Osborn's report and testimony, the district court denied the motion, concluding that Dr. Osborn's education and experience made him "eminently qualified" to analyze the risks of corruption arising out of Illinois' scheme of campaign contribution limits. R. 3456-58 (SA-81-83). It also concluded that Dr. Osborn applied an appropriate methodology to analyze the risks of corruption created by the Act. R. 3458 (SA-83). And Defendants presented no evidence at trial to refute Dr. Osborn's conclusions about the opportunities for corruption that the Act's treatment of caucus committees creates. Yet the district court rejected Dr. Osborn's testimony based on *its own* opinions about the risks of corruption inherent in various entities' political contributions.

[6] Although supposed shortcomings in Dr. Osborn's testimony could not eliminate Defendants' burden to show narrow tailoring, his testimony could (and should) have *increased* the amount of evidence Defendants were required to present to show that the limits are narrowly tailored. *See Nixon*, 528 U.S. at 394 (evidence from plaintiffs casting doubt on alleged justification for contribution limits could require government to provide "more extensive evidentiary documentation" to meet its burden).

This was improper: on questions calling for expert testimony, a district court may not make findings that are contrary to an expert's testimony, and not otherwise supported by record evidence, based on the judge's own opinion. *United States v. Modjewski*, 783 F.3d 645, 653 (7th Cir. 2015).

The district court therefore committed clear error in rejecting Dr. Osborn's testimony.

1. The district court committed clear error in rejecting Dr. Osborn's testimony that legislative caucus committees resemble "leadership PACs" more than they resemble ordinary party committees.

The district court had no basis for rejecting Dr. Osborn's testimony that legislative caucus committees resemble "leadership PACs" more than they resemble ordinary political parties and that caucus committee contributions therefore have greater potential to corrupt than party contributions.

The district court rejected Dr. Osborn's testimony on this point because it did not accept his premise that a legislative leader could use a caucus committees to serve his or her personal agenda rather than his or her party's agenda. The court found that leaders were not likely to do this because, if they did, they "could be removed from their leadership by their caucuses or from their seats by the electorate." R. 3922. But the district court had no basis for rejecting Dr. Osborn's testimony on this point, which was based on his undisputed expertise and knowledge of the relevant academic literature, and which Defendants did not refute with evidence to the contrary. The district court could not rely on its own non-expert opinion on this question over Dr. Osborn's expert opinion. Moreover, Dr. Osborn acknowledged that

leaders must use their ability to use their caucus committees "judiciously," but added that the committees nonetheless give them "carrots and potential sticks" to influence legislators. R. 3663.

Further, there are obvious reasons why members of the legislature could not easily remove a leader who used a caucus committee to advance his or her personal interests. Once an individual is the House Speaker or Senate President, he or she has considerable control over the legislative process – for example, the leader can decide whether certain bills are called to a vote and whether members get desirable committee assignments.[7] R. 3656. Attempting to remove a leader is therefore risky: the leader can punish a member who unsuccessfully tries to challenge the leader by, for example, giving the member undesirable committee assignments or disfavoring legislation the member supports. R. 3656-57. The leader could also punish an unsuccessful challenger by cutting off caucus committee funds. R. 3658-59.

Thus, the district court had no basis for concluding that the possibility that a leader could be voted out of leadership, or out office, eliminates the potential for leaders to use the caucus committees for personal ends and thus to engage in corruption.

The district court also lacked any basis for rejecting Dr. Osborn's testimony that caucus committees' contributions have a greater potential to corrupt because they

[7] In fact, the Speaker of the Illinois House of Representatives might have more power in this respect than any leader in any state legislature in the country. *See* T. Dabrowski & J. Tabor, Illinois Policy, Madigan's Rules: How Illinois Gives Its House Speaker Power to Manipulate and Control the Legislative Process (2017), https://goo.gl/VXymYc..And the power to appoint committee leaders is especially significant in Illinois because it is one of only nine states where the chair of every standing legislative committee receives extra compensation – even if the committee rarely or never actually meets. *See id.* at 5-7.

are closer to the policymaking process than parties. R. 3921 (A-21). A dissenting Supreme Court opinion noting that political parties try to influence candidates' stances on issues (*Colorado II*, 533 U.S. at 476 (Thomas, J., dissenting)) hardly suffices; it does not refute Dr. Osborn's testimony that parties, unlike legislative leaders, only seek to shape policy at "a very high level." R. 3921 (A-21).

Also, the district court had no basis for concluding that "it is difficult to imagine that heading a legislative caucus committee would give legislative leaders materially *more* power over their respective caucuses" – putting them in a position to make quid pro quo demands – "than they already have by virtue of their legislative leadership positions." R. 3922 (A-22). To the contrary, leaders' control over caucus committee funds puts them in a position to threaten to prevent a member's reelection (by withdrawing support and supporting another candidate), which the use of institutional rewards and punishments alone cannot so readily accomplish.

2. The district court committed clear error in rejecting Dr. Osborn's testimony that the likely combination of donors to legislative caucus committees would increase their contributions' potential to corrupt.

The district court also lacked any basis for rejecting Dr. Osborn's testimony that legislative caucus committees' likely greater reliance on interest group contributions could make their contributions to candidates more potentially corrupting than those of ordinary political parties. The district court simply stated that it was "not apparent" that caucus committees' "less diversified" donor portfolio would make caucus committees more likely to exert undue influence over the

candidates to whom they donate. R. 3929 (A-29). But Dr. Osborn explained in his testimony that donations from special interests to legislative caucus committees created, "in essence, a triangle between the donors, the interest groups, the legislative caucus committee; and the policy agenda of each of those groups," creating a "cozy relationship [that] could lend itself to increased opportunities to corruption." R. 3677. This makes sense: special interests may give contributions to a leader's caucus committee with the understanding that the leader will, in turn, urge legislators to support the donor's agenda – which the leader could do with quid pro quo demands tied to the leader's caucus committee's contributions to legislators. *Cf. McConnell*, 540 U.S. 93, 144-45 (2003) (noting potential for corruption when wealthy donors give money to parties, which then give money to candidates and thus "serve as 'agents for spending on behalf of those who seek to produce obligated officeholders'") (quoting *Colorado II*, 533 U.S. at 452). Again, it was improper for the district court to credit its own opinion over Dr. Osborn's expert opinion.

3. The district court committed clear error in rejecting Dr. Osborn's testimony that the prohibition on accepting contributions from more than one legislative caucus committee increases opportunities for quid pro quo corruption.

The district court also erred in rejecting Dr. Osborn's testimony that the statute's prohibition on candidates accepting contributions from more than one legislative caucus committee in an election increases opportunities for quid pro quo corruption. As discussed above, this could make a candidate dependent on the caucus committee from which he or she received a contribution, giving the leader

who controls the caucus committee "power to influence not only the candidate's behavior but influence their policy-making as well." R. 3662-63, 3674.

The district court deemed Dr. Osborn's testimony on this point "unpersuasive" because, it stated, candidates may also accept contributions from other types of donors, making it "highly unlikely that a candidate would be exclusively dependent on a legislative caucus committee for campaign contributions." R. 3923. But Dr. Osborn's testimony was not premised on any candidate being *exclusively* dependent on caucus committee contributions. It was premised on the obvious fact that a legislative caucus committee's ability to give much larger contributions than all other donors (except parties) puts it in a position to exert greater influence, and to make greater quid pro quo demands, than most other donors – specifically, those subject to lower contribution limits, such as PACs.

Thus, the district court had no basis for rejecting Dr. Osborn's testimony on this point as "unpersuasive," and it committed clear error in doing so.

4. The district court erred in focusing on contribution data Dr. Osborn reviewed.

The district court also erred to the extent that it rejected Dr. Osborn's conclusions based on his testimony regarding certain data he reviewed. Dr. Osborn testified that he analyzed the contributions of two Democratic legislative caucus committees in the 2012 election cycle and found that one of them made contributions that did not appear to be consistent with the pure "expansion" strategy one would expect a party committee to follow. R. 3678-84. The district court concluded that the contributions Dr. Osborn analyzed were not necessarily

inconsistent with an expansionist strategy and criticized Dr. Osborn for not analyzing whether party committees actually followed an expansionist strategy. R. 3925 (A-25), 3927-28 (A-27-28).

But the alleged shortcoming in Dr. Osborn's testimony are irrelevant. Dr. Osborn made clear that he reached his conclusions based on the structure of the Act and his knowledge of the academic literature, not on the data he analyzed, which merely provided "examples where a purely expansionist strategy may have been used." R. 3685. He stated that his conclusions would not have been different even if the data he reviewed had not shown anything that appeared to be inconsistent with an expansionist strategy. R. 3686.

Because Dr. Osborn's review of contribution data did not form the basis of Dr. Osborn's conclusions, it could not provide a basis for the district court to reject his conclusions.

IV. In the alternative, the district court's judgment should be reversed because the court should have applied strict scrutiny.

Finally, in the alternative, the district court erred in partially granting Defendants' motion to dismiss, and in granting judgment against Plaintiffs, because it should have subjected the Act's limits to strict scrutiny, which they cannot survive.

A. The district court should have applied strict scrutiny because Plaintiffs challenge discrimination against particular speakers.

The district court should have applied strict scrutiny because the limits in this case are discriminatory. This is not a typical challenge to campaign contribution

limits where the question is simply whether a contribution limit is unconstitutionally low. *See, e.g., Buckley*, 424 U.S. at 23-25. Rather, this case is about whether the government has improperly discriminated in favor of some political speakers, and against others, by imposing different limits on different types of contributors. The First Amendment "stands against restrictions distinguishing among different speakers, allowing speech by some but not others," because such restrictions are "all too often simply a means to control content." *Citizens United*, 558 U.S. at 340. Because Plaintiffs' challenge to the Act's 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, 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; *Russell v. Burris*, 146 F.3d 563, 571-72 (8th Cir. 1998) (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," 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"). And, in any event, although Plaintiffs have framed their arguments primarily in terms of the First Amendment, Plaintiffs also alleged that the Act's discrimination violated the Equal Protection Clause, and the district court held the same analysis should apply to both claims. R. 2107, 2446, 3939.

B. In the alternative, the district court should have applied strict scrutiny because strict scrutiny should apply to all challenges to contribution limits.

In the alternative, the district court should have applied strict scrutiny because the Supreme Court erred when it held that less-than-strict scrutiny was appropriate for contribution limits in *Buckley*.[8]

[8] Plaintiffs acknowledge that this Court is bound by *Buckley* but present this alternative argument to preserve it.

"When an individual donates money to a candidate or partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself." *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 636 (1996) (Thomas, J., dissenting in part). Further, restricting contributions infringes on "basic associational rights under the First Amendment" by limiting citizens' ability to pool their resources to engage in advocacy. *Id.* at 637. For these reasons, "contribution limits infringe as directly and as seriously upon freedom of political expression as do expenditure limits" and should be subject to the same strict scrutiny. *Id.* at 640.

C. The Act's contribution limits fail strict scrutiny.

The Act's contribution limits cannot survive strict scrutiny, which requires Defendants to show that the Act's limits are narrowly tailored to serve a compelling governmental interest and that they "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).

Defendants 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. As discussed throughout this brief, Defendants have never explained how (if at all) the Act's different limits on different types of donors relate to the potential for corruption inherent in those donors' contributions.

Because the district court did not apply strict scrutiny, and Defendants did not meet their burden under strict scrutiny, the district court's order partially granting Defendants' motion to dismiss, and its judgment against Plaintiffs, should be reversed.

Conclusion

The district court's order dismissing most facets of Plaintiffs' constitutional claim, and its order granting judgment against Plaintiffs on the remainder of their claim, should be reversed.

Dated: January 13, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the type-volume limitations imposed by Fed. R. App. P. 32 and Circuit Rule 32 for a brief produced using the following font: Proportional Century Schoolbook Font 12 pt body text, 11 pt for footnotes. Microsoft Word 2013 was used. The length of this brief is 13,904 words.

/s/ Jacob H. Huebert
Jacob H. Huebert

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2017, I served the foregoing brief upon Appellee's counsel by electronically filing it with the appellate CM/ECF system.

/s/ Jacob H. Huebert
Jacob H. Huebert

REQUIRED SHORT APPENDIX

TABLE OF CONTENTS

CIRCUIT RULE 30(d) STATEMENT

Counsel certifies that this short appendix and Plaintiffs-Appellants' separate appendix contain all materials required by parts (a) and (b) of Circuit Rule 30.

/s/ Jacob H. Huebert
Jacob H. Huebert
Attorney for Plaintiffs-Appellants

Dated: January 13, 2017

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

ILLINOIS LIBERTY PAC, a political action committee registered with the Illinois State Board of Elections, EDGAR BACHRACH, and KYLE McCARTER,	)	12 C 5811
Plaintiffs,	)	Judge Feinerman
vs.	)	
LISA M. MADIGAN, Attorney General of the State 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.	)	

MEMORANDUM OPINION AND ORDER

Illinois Liberty PAC, Edgar Bachrach, and Kyle McCarter bring this suit under 42 U.S.C. § 1983 against the Attorney General of Illinois and the Chairman, Vice-Chairman, and members of the Illinois State Board of Elections, all in their official capacities, alleging that certain contribution limits imposed by the Illinois Disclosure and Regulation of Campaign Contribution and Expenditures Act, 10 ILCS 5/9-1 *et seq.*, violate the First Amendment and the Fourteenth Amendment's Equal Protection Clause. Doc. 65. Shortly after suit was filed, Illinois Liberty and Bachrach, the only plaintiffs at the time, moved for a preliminary injunction on their first amended complaint. Doc. 32. The court denied the motion, reasoning that Plaintiffs had 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).

Plaintiffs sought and were granted leave to file a second amended complaint, Doc. 61, and several months later one was filed, Doc. 65. The second amended complaint has three "counts," but it actually sets forth only a single claim—that certain contribution limits in the Act are unconstitutional under the First and Fourteenth Amendments—and seeks a declaratory judgment to that effect and an injunction against the enforcement of those limits. *See NAACP v. Am. Fam. Mut. Ins. Co.*, 978 F.2d 287, 292 (7th Cir. 1992) ("different legal theories … do not multiply the number of claims for relief"); *Kauffman v. Pa. Soc'y for the Prevention of Cruelty to Animals*, 766 F. Supp. 2d 555, 560 (E.D. Pa. 2011) ("The relief a plaintiff seeks, and the claims he asserts, are thus conceptually distinct components of a complaint, and there is no need for a plaintiff to devote a separate count of a complaint to a request for a certain type of relief, as Kauffman does in seeking a declaratory judgment under Count I."); *Walker v. City of Detroit*, 2010 WL 4259835, at *1 (E.D. Mich. Oct. 25, 2010) ("While the court, technically, does not "dismiss" Counts XI and XII—for "punitive damages" and "attorney's fees"—those counts are not separate causes of action, as they are forms of potential relief to the other six counts."). Defendants have moved to dismiss the suit under Federal Rule of Civil Procedure 12(b)(6). Doc. 77. For the following reasons, the motion is granted in part and denied in part.

Background

In considering the motion to dismiss, the court assumes the truth of the second amended complaint's factual allegations, though not its legal conclusions. *See Munson v. Gaetz*, 673 F.3d

630, 632 (7th Cir. 2012). The court must also consider "documents attached to the [second amended] complaint, documents that are critical to the [second amended] complaint and referred to in it, and information that is subject to proper judicial notice," along with additional facts set forth in Plaintiffs' brief opposing dismissal, so long as those facts "are consistent with the pleadings." *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012). The facts are viewed as favorably to Plaintiffs as those materials allow. *See Gomez v. Randle*, 680 F.3d 859, 864 (7th Cir. 2012).

Most of the relevant background is set forth the court's prior opinion, 902 F. Supp. 2d at 1116-19, familiarity with which is assumed. A third plaintiff newly named in the second amended complaint, Kyle McCarter, serves in the Illinois State Senate and will run for reelection in the 2013-2014 election cycle. Doc. 65 at ¶ 8. As of January 1, 2013, the Act's contribution limits were adjusted slightly upward to account for inflation. Doc. 78 at 2 n.1; *see* State Board of Elections, State of Illinois, Contribution Limits Per Election Cycle (2013), *available at* http://www.elections.il.gov/Downloads/CampaignDisclosure/PDF/ContributionSummary.pdf. If the contribution limits were not in place, Illinois Liberty and Bachrach would contribute more to particular candidates than the allowable limits ($52,600 and $5,300, respectively), Bachrach would contribute more to Illinois Liberty than the allowable limit ($10,500), and McCarter would seek to raise funds and accept contributions in excess of those limits. Doc. 65 at ¶¶ 8, 38-46. The parties agree, Doc. 90 at 4, and the court concurs, that Plaintiffs have standing to challenge the Act's limits on contributions to political action committees ("PACs") and candidates and contributions from PACs, individuals, and candidates. *See Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 146-48 (7th Cir. 2011).

Discussion

The second amended complaint largely reasserts the constitutional challenges previously held by the court to have a low chance of success. 902 F. Supp. 2d at 1118-26. Specifically, Plaintiffs again claim that the Act violates the First Amendment and the Equal Protection Clause by exempting political parties from the contribution limits that apply to PACs and individuals, by lifting contribution limits in races where a self-funding candidate or independent expenditure committee spends over a particular threshold, and by imposing lower contribution limits on PACs than are imposed on corporations, labor unions, and other organizations. *Compare* Doc. 65 at ¶¶ 20-71 *with* Doc. 27 at ¶¶ 17-68. The court's assessment of those claims at the preliminary injunction stage was interlocutory and susceptible to revision. *See AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 573-74 (7th Cir. 1999). That said, having reviewed once again the challenged provisions and the governing precedents, the court adheres to and adopts its previously expressed view that the First Amendment and equal protection claims expressly considered at the preliminary injunction stage are without merit.

The court will briefly consider three arguments that Plaintiffs make in connection with those previously addressed claims. First, Plaintiffs contend that *Buckley v. Valeo*, 424 U.S. 1 (1976), erred in applying "less-than-strict scrutiny" to First Amendment challenges to contribution limits. Doc. 87 at 10. As Plaintiffs recognize, however, Supreme Court precedent holds that the "closely drawn" standard, not strict scrutiny, governs such challenges. *See FEC v. Beaumont*, 539 U.S. 146, 162 (2003); *Buckley*, 424 U.S. at 25. And Plaintiffs further recognize, correctly, that this court is bound by Supreme Court precedent. *See Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996) ("the Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the

Court; we are to leave the overruling to the Court itself"), *vacated on other grounds*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("it is this Court's prerogative alone to overrule one of its precedents"). Plaintiffs' challenge to governing precedent is preserved for purposes of appellate review.

Second, Plaintiffs argue that the passage from *Davis v. FEC*, 554 U.S. 724 (2008), cited and quoted by this court in rejecting at the preliminary injunction stage Plaintiffs' challenge to the Act's waiver provisions, 902 F. Supp. 2d at 1124-25, was "dicta" unnecessary to the holding of *Davis*. Doc. 87 at 16-17. It is not at all clear that the pertinent passage from *Davis*—which is two paragraphs long and definitively concludes, with a reasoned explanation, that a waiver provision materially identical to the waiver provision challenged here would survive constitutional attack—was dicta. But even if it were dicta, this court would follow it. *See Barber v. City of Chicago*, 725 F.3d 702, 710 (7th Cir. 2013) ("While [the Supreme Court's] explanation was dicta, it was dicta of the strongest kind, as it came from the Supreme Court and was firmly rooted in logic."); *McBride v. CSX Transp., Inc.*, 598 F.3d 388, 405 (7th Cir. 2010) ("we must treat with great respect the prior pronouncements of the Supreme Court, even if those pronouncements are technically dicta").

Third, Plaintiffs argue that the motion to dismiss should be denied because it "does not … and could not [] present any evidence to show that the Act's limits serve a legitimate purpose" or "that the limits are … closely drawn to limit actual or apparent corruption." Doc. 87 at 5, 12. The court need not take evidence to resolve the challenges considered at the preliminary injunction stage. Supreme Court precedent conclusively establishes that appropriate limitations on campaign contributions advance the government's interest in preventing *quid pro quo* corruption or the appearance thereof. *See Citizens United v. FEC*, 558 U.S. 310, 357 (2010);

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390-93, 397 (2000); *Buckley*, 424 U.S. at 26-27. And Supreme Court precedent likewise establishes that the challenges considered at the preliminary injunction stage and renewed here are without merit because the limitations in question are closely drawn to advance that interest. 902 F. Supp. 2d at 1120-26. There would be no point to the parties developing and court considering evidence on those matters.

The second amended complaint does present a challenge that the first amended complaint did not press, that the preliminary injunction motion did not mention, and therefore that the court's preliminary injunction ruling did not consider—that the Act is unconstitutional because it classifies legislative caucus committees as political party committees and thereby treats them more favorably than PACs, corporations, and individuals, when in fact there is no valid basis for giving them favorable treatment. Doc. 65 at ¶¶ 31-37, 51-54, 66. The Act defines a "legislative caucus committee" as "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." 10 ILCS 5/9-1.8(c). The Senate President and the House Speaker are elected by the membership of the Senate and House, respectively, and the two Minority Leaders are "member[s] of the numerically strongest political party other than the party to which the Speaker or the President belongs" and are elected by such membership. ILL. CONST. art. IV, §§ 6(b)-(d). The Act classifies legislative caucus committees as a type of political party committee, 10 ILCS 5/9-1.8(c), and subjects legislative caucus committees to the same restrictions as those imposed on political party committees, 10 ILCS 5/9-8.5.

The second amended complaint alleges that the Act's favorable treatment of legislative caucus committees is improper because "unlike political party committees, whose primary purpose is to simply elect candidates to office, legislative caucus committees manage the institutional authority provided to the legislative leaders who create them and also play a crucial role in the legislative policymaking process." Doc. 65 at ¶ 32. According to Plaintiffs, legislative caucus committees allow legislative leaders to access "special fundraising channels and advantages over other speakers … in contravention of the limits that apply to others, including Plaintiffs." *Id*. at ¶ 33. As an exhibit to the second amended complaint, Plaintiffs attach a lengthy expert report by Dr. Marcus Osborn. Doc. 65-6. Dr. Osborn's report opines, among other things, that legislative caucus committees are unlike political party committees, "whose exclusive purpose is to simply elect candidates to office," that legislative caucus committees constitute "personalized political action committees" that are "designed to enhance [] the influence of their leaders as policymakers inside of the legislative body," and therefore that legislative caucus committees "should be treated differently than political party committees." *Id*. at 3, 6. The fact that legislative caucus committees are treated more favorably than PACs, Plaintiffs submit, violates Illinois Liberty PAC's rights because it can contribute less to candidates than legislative caucus committees may contribute, and also McCarter's rights because he wishes not to be dependent on legislative caucus committees and instead would prefer to receive money from individuals and groups independent of legislative caucus committees and political parties. Doc. 65 at ¶¶ 39, 41-43, 45; Doc. 87 at 3-5.

It is far from clear that Plaintiffs' challenge to the Act's favorable treatment of legislative caucus committees will succeed. Because they are elected and supported by their respective caucuses, which in turn are clearly identified with their political parties, the four legislative

caucus leaders—the House Speaker, the Senate President, and the two Minority Leaders—must maintain the broad-based support of their respective political parties. This almost certainly means that the legislative caucus committees headed by those four leaders are institutionally designed to advance their respective political parties' candidates. The other legislative caucus committees—those established by five or ten members of the same caucus of the Senate or House, respectively—likewise almost certainly, if not invariably, would support candidates of their members' political parties. *See* S. 96-71, Reg. Sess. No. 71, at 46 (Ill. 2009) (statement of Sen. Harmon) (observing in defense of the Act's treatment of legislative caucus committees: "I don't think anyone on your [Republican] side of the aisle is going to throw over one of your own Members in favor of a Democrat. I think the same is true for us.").

Like the Act, federal campaign finance law treats congressional campaign committees, the federal analog to legislative caucus committees, as political party committees. *See* 2 U.S.C. § 441a(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"); 2 U.S.C. § 441i (same for soft money restrictions); 2 U.S.C. § 434(e) (same for reporting requirements). The District Court for the District of Columbia has observed that "[t]he primary purpose of the congressional committees is to ensure the election of candidates from their respective parties to their respective legislative body and otherwise support the goals of their party." *McConnell v. FEC*, 251 F. Supp. 2d 176, 468 (D.D.C. 2003), *aff'd in part and rev'd in part on other grounds*, 540 U.S. 93 (2003), *overruled in part on other grounds*, *Citizens United*, 558 U.S. 310. The Supreme Court has likewise recognized the structural ties that congressional campaign committees have to their respective political parties. *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 40 n.20 (1981) (finding "minimal" doubt that 2

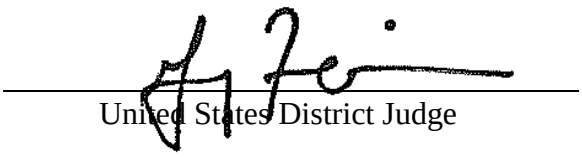
U.S.C. § 441a(a)(4), which applies to "political committees which are national, state, district or local committees (including any subordinate committee thereof) of the same political party," encompasses congressional committees, in part because of "the fact that senatorial campaign committees are identifiable as part of their respective party"). There is little reason to doubt that these observations almost certainly apply with equal force to legislative caucus committees at the state level. *See* CONN. GOV'T, ADMIN. AND ELECTIONS COMM. TRANSCRIPT (Mar. 11, 2002) (statement of Jeffrey Garfield, Executive Director and General Counsel for the State Elections Enforcement Commission) (analogizing between state legislative caucus committees in Connecticut and "the four Congressional campaign committees").

Although the court strongly suspects that legislative caucus committees are sufficiently similar to political party committees for purposes of constitutional analysis, and therefore that the Act's treatment of legislative caucus committees is permissible, the court is not in a position to definitively reach that conclusion at this point. The reason is that the considerations set forth in the prior two paragraphs were not presented in Defendants' briefs, except at the most general level and in passing, which means that Plaintiffs have not had a fair opportunity to provide a contrary view. *See United States v. Cronic*, 466 U.S. 648, 655 (1984) ("'[T]ruth,' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.'") (alteration in original); *Burdett v. Miller*, 957 F.2d 1375, 1380 (7th Cir. 1992) (noting the importance of the district judge giving a party the ability to address a line of argument raised by the judge and not presented by the other side). Nor do Defendants address whether and, if so, how Dr. Osborn's report affects the Rule 12(b)(6) analysis. For now, then, Plaintiffs' challenge to the Act's treatment of legislative caucus committees survives and awaits consideration on a more complete record and with the benefit of a focused presentation from both sides.

Conclusion

For the foregoing reasons, Defendants' motion to dismiss is granted in part and denied in part. The motion is denied with respect to Plaintiffs' challenge to the Act's treatment of legislative caucus committees. The motion is granted with respect to Plaintiffs' other challenges. The dismissal of those other challenges is with prejudice for two reasons. First, repleading would be futile because those challenges, however they might be pleaded, are foreclosed by binding precedent. *See Tribble v. Evangelides*, 670 F.3d 753, 761 (7th Cir. 2012) ("District courts have broad discretion to deny leave to amend … where the amendment would be futile."); *Estrada v. Reed*, 346 F. App'x 87, 89-90 (7th Cir. 2009) (affirming the district court's denial of "a futile amendment" where the plaintiff could not state a viable constitutional claim). Second, Plaintiffs did not request an opportunity to replead in the event the court dismissed any of their challenges. *See James Cape & Sons Co. v. PCC Constr. Co.*, 453 F.3d 396, 400-01 (7th Cir. 2006) (rejecting the plaintiff's argument that the district court erred in dismissing its complaint with prejudice, rather than without prejudice and with leave to amend, where the plaintiff did not request leave to amend). Defendants shall answer the surviving portions of the complaint by March 24, 2014.

March 3, 2014



United States District Judge

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

ILLINOIS LIBERTY PAC, EDGAR BACHRACH, and KYLE McCARTER,	)	
	)	12 C 5811
Plaintiffs,	)	
	)	Judge Gary Feinerman
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.	)	

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 underinclusive. *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

United States District Judge

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

Illinois Liberty PAC,

Plaintiff(s),

v.

Madigan, et.al.,

Defendant(s).

Case No. 12 C 5811
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 defendant(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