**No. 16-3585**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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ILLINOIS LIBERTY PAC, *et al.*,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

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# REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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## ARGUMENT

### I. The district court erred in partially granting Defendants' motion to dismiss because Defendants did not meet their burden to show that the limits Plaintiffs challenge are narrowly tailored to prevent corruption.

The First Amendment requires Defendants to justify the campaign contribution limits Plaintiffs challenge by showing, with evidence, that the limits are narrowly tailored to serve the government's interest in preventing quid pro quo corruption. *See McCutcheon v. FEC*, 134 S.Ct. 1434, 1441, 1456-57 (2014); *FEC v. Colo. Republican Campaign Cmte.*, 533 U.S. 431, 456 (2001). (*See* Appellants' Br. 19-21.) As Plaintiffs have shown in their primary brief, Defendants did not even attempt to satisfy that burden when they moved to dismiss Plaintiffs' challenge to Illinois' discriminatory campaign contribution limits, and the district court therefore erred in dismissing all but one facet of Plaintiffs' claim. (*See* Appellants' Br. 21-36.)

On appeal, as in the district court, Defendants incorrectly argue as though their burden is minimal or non-existent, or as though *Plaintiffs* bear the burden to establish that the limits they challenge are *not* narrowly tailored to prevent corruption. As a result, Defendants' arguments are fundamentally flawed and fail.

#### A. Defendants fail to justify the Act's discriminatory limits.

Defendants fail to justify Illinois' contribution limits favoring corporations, unions, and others associations over individual donors and favoring political parties over all other donors.

Defendants argue as though Plaintiffs' position would require the government to always treat all political donors "identically" and never impose different limits on

different types of donors based on "real-world differences" between them. For example, Defendants state that Plaintiffs "pretend that the differences between individuals and others do not exist" when they challenge the Act for allowing individuals to give only half the amounts that corporations, unions, and other associations may give. (Appellees' Br. 28.) And Defendants address Plaintiffs' challenge to the Act's treatment of political parties by stating that "Plaintiffs provide no authority for the notion that there are no 'real-world differences' between them and political parties." (*Id.* at 38.)

Defendants attack a straw man. Plaintiffs do not dispute that a state may impose different restrictions on different types of contributors, based on "real-world differences" between them, under Supreme Court decisions such as *McConnell v. FEC*, 540 U.S. 93, 188 (2003), *overruled on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010). And Plaintiffs do not allege that there are no differences between the different types of donors that the Act regulates. (*See* Appellants' Br. 35.)[1]

But Defendants are not entitled – as they seem to believe – to a rebuttable presumption that the state's differing contribution limits for different donors are, in fact, based on material differences between the types of donors. Rather, Defendants' burden requires them to show that the limits are narrowly tailored to address any such differences – *i.e.*, that the limits are narrowly tailored to address the potential for corruption inherent in different types of donors' contributions. *See McCutcheon*,

[1] In fairness, Defendants do acknowledge, after attacking the straw man, that Plaintiffs have stated that they are "not asking to be treated identically to political parties." (Appellees' Br. 39.)

134 S.Ct. at 1441, 1456-57. Again, Defendants' motion to dismiss did not present (and, as a motion to dismiss under Rule 12(b)(6), could not have presented) any evidence to satisfy that burden. Defendants did not explain – and still have not explained, much less proven – how the state's different treatment of different donors is narrowly tailored to address the potential for corruption inherent in those donors' respective contributions.

Defendants cannot meet their burden by simply citing, as they do, another case in which the Supreme Court upheld a statute that imposed higher contribution limits on some donors than on others. (*See* Appellees' Br. 29.) Cases upholding similar limits might reduce the amount of evidence the government must present to justify contribution limits, but they could not entirely eliminate the government's burden to present some evidence to justify its particular scheme. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). Case-specific evidence is necessary because circumstances that justify a particular scheme of limits in one jurisdiction might not exist, and therefore might not justify imposing those same limits, in another jurisdiction. Defendants implicitly acknowledge this in stating that "what works in other States may not work in Illinois." (Appellees' Br. 28-29.)

Besides, the Supreme Court has *not* upheld a scheme of limits similar to the Illinois scheme Plaintiffs challenge. The Court has never considered, let alone rejected, a First Amendment challenge to statute allowing an individual to give only the half contributions that corporations, unions, and other associations may give (indeed, no other jurisdiction imposes such a restriction), nor has it considered a

statute treating political parties as favorably, relative to other donors, as Illinois' statute does. (*See* Appellants' Br. 22-23, 33-34.)

Defendants argue that Plaintiffs and courts may not "second-guess" the Illinois General Assembly's judgments as to the appropriate contribution limits for different donors (Appellees' Br. 24, 40), but that is incorrect. Although less-than-strict First Amendment scrutiny does not require a court to determine whether a given contribution limit is the "perfect" means by which the government could serve its interest in preventing corruption, courts nonetheless must scrutinize contribution limits to ensure that they are narrowly tailored to prevent corruption and do not excessively restrict participation in the political process. *McCutcheon*, 134 S. Ct. at 1445-46, 1456-57.

A recent district court decision striking down a provision of the Illinois Election Code that banned campaign contributions by medical-marijuana businesses provides an example of how courts should scrutinize discriminatory contribution limits (assuming strict scrutiny does not apply). *See Ball v. Madigan*, No. 15 C 10441, 2017 U.S. Dist. LEXIS 42995 (N.D. Ill. Mar. 24, 2017), *appeal dismissed*, No. 17-1896 (7th Cir. May 30, 2017).[2] In that case, although Defendants[3] presented evidence showing that the challenged contribution ban served the state's interest in preventing corruption, *id.* at *10-15, the court nonetheless struck the ban down

[2] The court declined to address whether strict scrutiny should apply to discriminatory contribution limits "that target political contributions from a particular category of speakers" because it concluded that the challenged provision failed even under lesser First Amendment scrutiny. *Ball*, 2017 U.S. Dist. LEXIS 42995 at *10.

[3] Defendants in this case were also the defendants in *Ball*.

because Defendants failed to show that the restriction was closely drawn to serve the state's interest in preventing corruption. Specifically, the court struck the ban down because Defendants failed to present evidence to show that the targeted donors "in fact pose a greater risk of corruption than other donors" that could justify treating them differently. *Id.* at *15-23.

Unlike the *Ball* decision, the district court's order partially granting Defendants' motion to dismiss in this case did not apply the required rigorous scrutiny: the court did not require Defendants to explain, much less provide evidence to show, how the state's discrimination against certain categories of donors was justified by those donors' contributions' relative potential to corrupt. For that reason, the partial dismissal should be reversed.

**B. Defendants fail to justify the Act's limit-lifting provisions.**

Defendants also fail to meet their burden in their attempt to justify the Act's provisions eliminating all contribution limits in response to a candidate's self-funding or independent expenditures exceeding a threshold amount. In addressing Plaintiffs' challenge to this aspect of the Act, Defendants fail to address two key questions:

- How can the state claim that its contribution limits are necessary to prevent quid pro quo corruption when it is willing to eliminate those limits entirely – abandoning any concern for their potential to corrupt – in response to a candidate's self-funding or independent expenditures supporting or opposing a candidate?

- How can the state justify the Act's limit-lifting provisions, except by reference to its supposed interest in leveling the electoral playing field – an interest the Supreme Court held to be illegitimate in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011)?

(*See* Appellants' Br. 26-30.)

Defendants do not deny that the limit-lifting provisions' true purpose is to level the electoral playing field, as the legislative history shows. (*See* Appellants' Br. 28-29.) And Defendants cannot deny that leveling the electoral playing field is not a legitimate government purpose. (*See id.* at 29.) *Bennett* did not merely hold that leveling the playing field is not a "compelling" governmental interest, as Defendants put it. (Appellees' Br. 34.) Rather, *Bennett* stated that leveling the playing field is not even a "'legitimate government objective,' let alone a compelling one." 564 U.S. at 750 (quoting *Davis v. FEC*, 554 U.S. 724, 741 (2008)). This means that leveling the electoral playing field cannot justify a restriction contribution limits under any level of scrutiny.

In light of this, it is difficult to see how Defendants could meet their burden to show that the limits are narrowly tailored to prevent corruption despite the limit-lifting provision. In any event, they have not done so at this stage.

Defendants' assertion that Plaintiffs are impermissibly seeking to challenge a lack of limits cannot suffice. (*See id.* at 35.) Plaintiffs do not challenge a lack of limits; they challenge the Act's *imposition* of limits only when certain circumstances unrelated to the prevention of corruption – the absence of self-funding or independent expenditures meeting a threshold amount in a race – exist. In other words, as they stated in their complaint, Plaintiffs challenge the Act's tethering of

their free speech rights to the unrelated actions of others and argue that this renders the limits on their contributions unconstitutionally underinclusive. R. 2105-06 (SA-13-14.)[4]

Defendants respond to Plaintiffs' underinclusiveness point by arguing that "[t]he First Amendment allows the General Assembly to determine that certain contributions pose a less pressing concern of . . . corruption than other contributions." (Appellees' Br. 32.) But that does not explain the Act's limit-lifting provisions; it does not explain why contributions that exceed the usual limits suddenly pose a "less pressing" corruption concern simply because a self-funding candidate or independent expenditures have entered a race. Because Defendants have not explained this, they have not met their burden to show that the limits are narrowly tailored despite the limit-lifting provision, and the district court erred in dismissing this aspect of Plaintiffs' claim.

## II. Defendants failed to meet their burden at trial.

As Plaintiffs argued in their primary brief, the district court erred in granting judgment in Defendants' favor after trial because Defendants presented no evidence to meet their burden to show that the scheme of limits Plaintiffs challenge is

[4] The brief of amici curiae Campaign Legal Center, et al., misstates the law governing Plaintiffs' challenge by asserting that a statute is only unconstitutionally underinclusive if it "is so inadequate as to advance no 'substantial government interest,'" citing *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1986). (Amici Br. 7.) The decision the amici cite did not establish that rule; it just concluded that the statute at issue in that case was underinclusive because it "seem[ed] doubtful" that it "advance[d] any genuinely substantial governmental interest." *League of Women Voters*, 468 U.S. at 396. And contribution limits in particular cannot be justified by just any "substantial" government interest; they can only be justified by the government's interest in preventing actual or apparent quid pro quo corruption. *See McCutcheon*, 134 S.Ct. at 1441, 1446.

narrowly tailored to prevent corruption despite its preferential treatment of legislative caucus committees. (Appellants' Br. 37-38.)

In response to this argument, Defendants assert that they did not have to present evidence of narrow tailoring at trial because, they say, the trial only concerned "[t]he narrow threshold factual question" of "whether legislative caucus committees are sufficiently similar to political parties that the First Amendment requires (or at least permits) allowing them to make unlimited contributions, or whether they are so like PACs in their potential for corruption that treating them differently makes the Act fatally underinclusive." (Appellees' Br. 43-44.)

But that "threshold" factual question is just part of the narrow-tailoring analysis – so Defendants, not Plaintiffs, bear the burden of proof on it. Again, to show that the Act's limits comport with the First Amendment, Defendants must show that the different limits for different types of donors are based on differences between those donors that are related to their respective contributions' potential to corrupt. Again, Defendants were not entitled to a rebuttable presumption that the groups are materially different from each other and that the limits are narrowly tailored to account for their differences; to the contrary, that is exactly what Defendants' burden required them to prove to prevail. And because they did not even attempt to do so, they were not entitled to judgment in their favor.

## III. The district court lacked any sufficient basis for rejecting Plaintiffs' expert's testimony.

Because Defendants failed to meet their burden, Plaintiffs were not required to present any evidence to prevail on their claim. Nonetheless, Plaintiffs did present

testimony supporting their claim from an expert, Dr. Marcus Osborn, and, contrary to Defendants' arguments, the trial court erred in rejecting it.

### A. The district court did not find that Dr. Osborn's testimony was not credible.

Defendants' suggestion that the trial court rejected Dr. Osborn's testimony based on an adverse finding about his credibility is incorrect. (*See* Appellees' Br. 41.)

A finding about a witness's credibility typically concerns whether a witness was telling the truth in his or her testimony. Appellate courts give great deference to a fact-finder's credibility determinations because those determinations are commonly based on things one can only effectively observe in person, such as a witness's "variations in demeanor and tone of voice." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

Here, nothing in the district court's opinion or the record suggests that the court doubted that Dr. Osborn testified honestly. The court did not conclude that Dr. Osborn was being anything less than fully honest when he testified about his qualifications, the methodology he applied, or the conclusions he reached. And nothing in the district court's opinion indicates that it rejected Dr. Osborn's testimony based on his demeanor, his tone of voice, or any similar factor that would bear on a witness's credibility. Rather, as discussed below, the court rejected Dr. Osborn's testimony because it simply disagreed with his conclusions.

This Court therefore does not owe the district court's conclusions about Dr. Osborn's testimony the high deference that it would owe to a finding about a witness's credibility.

### B. The district court did not reject Dr. Osborn's testimony for lacking a reliable basis under *Daubert* and *Kumho*.

Defendants also miss the mark in arguing that the district court rejected Dr. Osborn's testimony for being insufficiently reliable under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). (Appellees' Br. 42-43, 47.) *Daubert* and *Kumho* were about the admissibility of expert testimony – specifically, about how courts should determine whether a particular expert's testimony is so lacking in any reliable foundation that it should not be admitted at all. *See Kumho*, 526 U.S. at 141-42 (citing *Daubert*, 509 U.S. at 593-94, 597). The rule those cases established serves to ensure "that an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152.

Here, the district court did not exclude Dr. Osborn's testimony for lacking a reliable basis under *Daubert* and *Kumho.* To the contrary, when Defendants moved to exclude Dr. Osborn's testimony under *Daubert* on the grounds that he (allegedly) was not qualified and applied an inappropriate methodology – both at the summary-judgment stage and at trial – the court denied the motions, concluding that Dr. Osborn was "eminently qualified" to analyze the "possibilities and incentives for corruption in Illinois's campaign finance structure" and that the methods he used to conduct his analysis were "appropriate." R. 3457-58, 3629.

Nothing in the district court's post-trial opinion and order indicates that the court reversed its findings that Dr. Osborn was qualified, that he applied an

appropriate methodology, and that his testimony therefore satisfied the *Daubert*/*Kumho* standard. The court would have had no basis for doing so because nothing in Dr. Osborn's trial testimony contradicted or cast any doubt on the facts the court relied on in denying Defendants' motions to exclude his testimony.

Defendants' argument that the district court rejected Dr. Osborn's opinion because he derived his conclusions "from academic literature, not from data" – *i.e.*, based on the qualitative methodology he applied – is incorrect. (*See* Appellees' Br. 47.) The page in the district court's opinion that Defendants cite to support this assertion, R. 3923, only notes that Dr. Osborn based his opinion on academic literature; it does not cite that as a reason to reject his conclusions.[5] And, again, there is no apparent reason why the district court – after concluding that it *was* appropriate for Dr. Osborn to use a qualitative methodology rather than a quantitative methodology in denying Defendants' motions to exclude his testimony, R. 3456-57 – would have concluded after trial that this methodology was not appropriate after all. Dr. Osborn's testimony was substantially the same at trial as it was at the summary-judgment stage, as were the Defendants' arguments for why the court should reject it. If the court had intended to reverse its previous finding on

[5] Defendants misrepresent the district court's decision in an additional way. They state that the court rejected "Dr. Osborn's generalization that political parties pursue *only* an 'expansion strategy' when making contributions" because it "came from academic literature, not from data." (Appellees' Br. 47, emphasis added.) But Dr. Osborn did not testify that political parties "only" pursue an expansion strategy, which might indeed seem like an overbroad generalization. Rather, he testified that expansion is parties' "primary and overwhelming goal." R. 3645. Though it rejected his conclusions, the district court correctly characterized Dr. Osborn's testimony as stating that parties "typically" pursue expansion. R. 3923.

this question, presumably it would have done so explicitly and given a reason. It did not.

True, as Defendants observe, the district court did find fault with Dr. Osborn's analysis of certain data and his decision not to review certain other data that the court believed would be relevant. (*See* Appellees' Br. 47-50.) But, as Plaintiffs have shown in their primary brief, these criticisms could not provide a basis for rejecting Dr. Osborn's conclusions because Dr. Osborn did not rely on data in reaching his conclusions; he testified that his conclusions would have been the same regardless of what the data showed. R. 3685-86. (*See* Appellants' Br. 50-51.) The district court recognized this in denying Defendants' motion to exclude Dr. Osborn's testimony: it noted that, although Dr. Osborn's analysis included "some contributions as examples," its "fundamental character" was non-quantitative; and it stated that his testimony "'[was] not unreliable simply because it [was] founded on experience rather than on data . . . .'" R. 3457, quoting *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 761 (7th Cir. 2010).

### C. The district court improperly rejected Dr. Osborn's opinion based on the trial judge's own contrary opinion that was not based on record evidence.

Although the district court found Dr. Osborn to be qualified and found the methodology he applied to be appropriate, it nonetheless credited its own opinions about the risks of corruption inherent in certain political contributions over Dr. Osborn's conclusions, in the same way that a fact-finder might credit one expert's opinion over another's. That was error: a district court may not put itself in the

position of an expert, crediting its own opinion over that of a qualified expert who gave admissible, uncontradicted testimony. *See United States v. Modjewski*, 783 F.3d 645, 653 (7th Cir. 2015). This is for good reasons: a trial court judge ordinarily lacks the specialized knowledge of an expert and, in any event, is not admitted as an expert or subject to a *Daubert* hearing or cross-examination. *See id.*

Defendants mischaracterize Plaintiffs' argument on this point as one that a court must accept a qualified expert's testimony "at face value," without question. (Appellees' Br. 42.) That misses the point: a finder of fact may reject an expert's conclusions, but it must have a valid basis for doing so. For example, a court might reject a qualified expert's conclusions because based on the conflicting testimony of another expert, the expert's reliance on facts or assumptions that are proven to be incorrect, or logical contradictions within the expert's testimony. *Cf. Wipf v. Kowalski*, 519 F.3d 380, 385 (7th Cir. 2008) (fact-finder presented with contradictory testimony from two experts may decide which one to credit); *United States v. Vest*, 116 F.3d 1179, 1184 (7th Cir. 1997) (party could attack expert's conclusions by showing that assumptions underlying them were incorrect). But here the district court had no such basis for rejecting Dr. Osborn's conclusions; it did so simply because the judge held a different opinion on the questions on which Dr. Osborn opined.

Defendants argue that the district court actually "offered no opinion" of its own, "much less one that was contrary to Dr. Osborn's expert opinion," and instead just found Dr. Osborn's testimony "unpersuasive." (Appellees' Br. 42.) But the district

court's post-trial opinion refutes that assertion. On the critical factual question before the court – whether legislative caucus committees are more like political parties than PACs, particularly with respect to their contributions' potential to corrupt – the court not only stated that it found Dr. Osborn's testimony unpersuasive but also affirmatively found, contrary to Dr. Osborn's testimony, that legislative caucus committees are "most akin to" and "quite similar to" political parties and that, "to the extent that the two are different, those differences do not materially affect legislative caucus committees' potential to engage in *quid pro quo* corruption." R. 3935-36. (Defendants even acknowledge this (Appellees' Br. 44), which makes their assertion that the court "offered no opinion" (*id.* at 42) puzzling.)

To review, the district court concluded that the subject matter of Dr. Osborn's testimony – "opportunities and incentives in the structure of a campaign finance law" – was an appropriate subject for expert testimony. R. 3454-59. It concluded that Dr. Osborn "easily" qualified as an expert who could testify on that subject. R. 3458. It concluded that Dr. Osborn applied an appropriate methodology when he analyzed the limits Plaintiffs challenge by relying on the academic literature and his decades of experience with "legislative advocacy, campaigns, ballot measures, campaign fundraising, and studying campaign strategies, methods, and competitiveness." R. 3456-59. And Defendants presented no evidence at trial that contradicted Dr. Osborn's testimony – for example, they presented no evidence that the academic literature and Dr. Osborn's experience did not actually support his conclusions about the similarities and differences between PACs, political parties,

and legislative caucus committees. Yet the court nonetheless rejected Dr. Osborn's conclusions, apparently based on nothing but the judge's own intuitions, which presumably were not informed, as Dr. Osborn's conclusions were, by extensive knowledge of the relevant academic literature or decades of experience in the relevant field. Therefore, in finding that political parties and legislative caucus committees are similar in their contributions' potential to corruption, the court made a factual finding that was not supported by any record evidence, did exactly what this Court held, in *Modjewski*, that a trial court may not do, and committed clear error.

## CONCLUSION

In moving to dismiss Plaintiffs' constitutional claims, and at trial, Defendants fell far short of satisfying their burden to show that the contribution limits Plaintiffs challenge are narrowly tailored to serve the state's interest in preventing corruption. The district court's judgment against Plaintiffs therefore was in error, and this Court should reverse it.

Dated: June 26, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 26, 2017, I served the foregoing reply brief on Appellees' counsel by electronically filing it with the appellate CM/ECF system.

/s/ Jacob H. Huebert
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