No. 18-3475

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAN PROFT, *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. 1:18-cv-04947
The Honorable Virginia M. Kendall, Judge Presiding

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFFS-APPELLANTS

Jeffrey M. Schwab
LIBERTY JUSTICE CENTER
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603
(312) 263-7668

Counsel for Plaintiffs-Appellants,
Dan Proft and Liberty Principles PAC

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Appellate Court No: 18-3475

Short Caption: Proft, et al. v. Madigan, et al.

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Dan Proft

Liberty Principles PAC

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

Address: 190 S. LaSalle St., Ste. 1500
Chicago, IL 60603

Phone Number: 312-263-7668 Fax Number: 312-263-7702

E-Mail Address: jschwab@libertyjusticecenter.org

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Dan Proft and Illinois Liberty PAC brought this civil action against the Defendants-Appellees – Illinois Attorney General Lisa Madigan[1] 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 October 24, 2018 order dismissing Plaintiffs' complaint and denying Plaintiffs' motion for preliminary injunction. A-1. Plaintiffs-Appellants filed their timely notice of appeal and docketing statement on November 20, 2018.

STATEMENT OF THE ISSUES

The Illinois Election Code eliminates its normal limits on contributions that individuals and organizations may make to candidates for state elective offices in any race in which a candidate's self-funding, or independent expenditures supporting or opposing a candidate, exceed a threshold amount. However, the Code never allows groups registered as "independent expenditure committees" to contribute to or coordinate with a candidate, even in a race in which the limits have been eliminated for everyone else. Did the district court err in dismissing Plaintiffs'

[1] Since Plaintiffs filed their complaint and this appeal, Kwame Raoul has been sworn in as the Attorney General of Illinois.

complaint challenging the Code's prohibition on contributions to, or coordination with, a candidate by independent expenditure committees in races in which the limits have been eliminated for all other persons and groups as a violation of their free-speech, free-association, and equal protection rights, protected by the First and Fourteenth Amendments of the United States Constitution; and did the district court err in denying Plaintiffs' motion for summary judgment?

STATEMENT OF THE CASE

This case challenges the Illinois Election Code's prohibition of contributions to candidates for state elective offices made by groups registered as "independent expenditure committees" in races in which the Code has eliminated the contribution limits because a candidate's self-funding, or independent expenditures supporting or opposing a candidate, exceed a certain threshold amount. Plaintiffs allege that the prohibition of contributions to candidate by independent expenditure committees in such circumstances violates the First and Fourteenth Amendments to the United States Constitution because such prohibition is not narrowly tailored or closely drawn to serve an interest in preventing *quid pro quo* corruption.

Illinois' Campaign Contribution Limits

In 2009, Illinois amended its Election Code to limit the political contributions that individuals and organizations may make and to require political committees to disclose the contributions they receive and the expenditures they make. *See* Ill. Pub. Act 96-832.

The contribution limits enacted in 2009 restrict the amounts that individuals and organizations may contribute to a candidate's political committee in an election cycle: individuals may give no more than $5,000; political action committees ("PACs")[2] may give $50,000; and corporations, unions, and other associations may give $10,000.[3] 10 ILCS 5/9-8.5(b). The Code does not limit the amount that a political party committee may contribute to a candidate in a general election, but it does limit the amounts a party may give in a primary election: $200,000 to a candidate for statewide office; $125,000 to a candidate for Illinois Senate; and $75,000 to a candidate for the Illinois House of Representatives. 10 ILCS 5/9-8.5(b).

When the General Assembly established those contribution limits, it also made an exception: If a candidate contributes more than a certain amount to his or her own campaign – $250,000 in a race for governor, or $100,000 in any other race – then all candidates in that race may accept unlimited contributions from any donor (*i.e.*, from any individual, PAC, political party committee, candidate committee, corporation, union, or other association). 10 ILCS 5/9-8.5(h).

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[2] The Code defines a PAC to include any person or organization (other than a candidate, a political party, or a candidate or party's committee) "that accepts contributions or makes expenditures during any 12-month period in an aggregate amount exceeding $5,000 on behalf of or in opposition to a candidate or candidates for public office" or "makes electioneering communications during any 12-month period in an aggregate amount exceeding $5,000 related to any candidate or candidates for public office." 10 ILCS 5/9-1.8(d).

[3] These limits, and all of the Code's monetary amounts referenced in this brief, are subject to adjustment for inflation at the beginning of each election cycle. 10 ILCS 5/9-8.5(g). Plaintiffs use the Code's original amounts for simplicity.

In addition to limiting the contributions that candidates can receive from individuals and organizations, the 2009 Code amendments also limit the contributions that other types of political committees may receive. In a given election cycle, an individual may contribute no more than $10,000 to a PAC; a corporation, union, or other association may give no more than $20,000 to a PAC; and PAC may give no more than $50,000 to another PAC. 10 ILCS 5/9-8.5(d). Similarly, 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 give no more than $20,000; and a PAC may give no more than $50,000. 10 ILCS 5/9-8.5(c).

The "contributions" that the Code restricts include not only cash donations to a political committee but also, among other things, expenditures that a political committee makes "in cooperation, consultation, or concert with another political committee," 10 ILCS 5/9-1.4(A)(5), commonly known as "coordinated expenditures."

Illinois' Regulation of Independent Expenditures

The Code's restrictions on PACs originally applied to both PACs that make contributions to candidates and PACs that only make independent expenditures – *i.e.*, expenditures made "to advocate for or against a specific candidate without coordination with any public official, candidate, or political party." *Personal PAC v. McGuffage*, 858 F. Supp. 2d 963, 965 (N.D. Ill. 2012).

In 2012, however, the Northern District of Illinois held that the Code's limits on contributions to PACs, and its rule prohibiting anyone from forming more than one PAC, were unconstitutional as applied to PACs that only make independent

expenditures. *Id.* at 967-69. The Court based that decision on Supreme Court precedent establishing that the First Amendment prohibits restrictions on independent expenditures because such expenditures, unlike contributions to candidates, do not create a risk of *quid pro quo* corruption. *Id.* (citing *Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011)).

After the *Personal PAC* decision, the Illinois General Assembly amended the Illinois Election Code to address independent expenditures specifically. With that amendment, individuals who make independent expenditures of $3,000 or more in a 12-month period must file written disclosures of the expenditures with the Illinois State Board of Elections. 10 ILCS 5/9-8.6(a). Also, the Code now requires any entity (other than a natural person) that makes independent expenditures to register with the Board as a political committee. 10 ILCS 5/9-8.6(b). And if an entity wishes to receive unlimited contributions to support its independent-expenditure advocacy, it must register with the Board as an "independent expenditure committee," and its chairperson must sign a statement verifying that the committee is "for the exclusive purpose of making independent expenditures" and that "the committee may accept unlimited contributions from any source" only if it does not make contributions to any candidate, party committee, or PAC. 10 ILCS 5/9-3(d-5), 9-8.5(e-5). If an independent expenditure committee makes a contribution to a candidate, party, or PAC, then the Board may impose a fine on it "equal to the amount of any contribution received in the preceding 2 years by the committee that exceeded the

limits" that would have applied to the committee if it had registered as an ordinary PAC. 10 ILCS 5/9-8.6(d).

When the General Assembly amended the Code to address independent expenditures, it also added a new exception to the Code's limits on contributions to candidates. Now, the limits in a race are eliminated when either a candidate's self-funding *or* independent expenditures supporting or opposing a candidate exceed (in the aggregate) $250,000 in a race for statewide office or $100,000 in any other race. 10 ILCS 5/9-8.5(h), (h-5).

These limit-lifting provisions can give rise to an anomalous situation. In a race where all limits on contributions to candidates have been eliminated, every person and every type of organization may give candidates unlimited amounts of money and may coordinate with candidates without limitation – except independent expenditure committees, which remain prohibited from coordinating with candidates or otherwise contributing to them.

Injury to Plaintiffs

Plaintiff Dan Proft is a political activist who associates with others to communicate with the public about political ideas and candidates for state elective offices in Illinois. A-29. Mr. Proft founded, and is the chairman and treasurer of Liberty Principles PAC, which is registered with the Illinois State Board of Elections as an "independent expenditure committee." A-29. Liberty Principles PAC raises funds from donors and makes independent expenditures supporting and opposing candidates in many Illinois legislative races, all while complying with the

Code's restrictions, disclosure requirements, and other rules for independent expenditure committees. A-29-30.

In races in which the limits on contributions to candidates have been eliminated for individuals and organizations other than independent expenditure committees under 10 ILCS 5/9-8.5(h) or (h-5), Mr. Proft would like to be able to contribute to, and communicate and coordinate with, the candidates he supports through Liberty Principles PAC – just as the Code allows any individual, PAC, or other association to do. A-30. He cannot do so, however, because, again, the Code prohibits independent expenditure committees from ever making contributions to candidates – even when the contribution limits have been eliminated for individuals and every other type of entity. A-30.

For example, in the 2018 primary election, Liberty Principles PAC made independent expenditures in numerous races in which the limits on contributions to candidates were eliminated under 10 ILCS 5/9-8.5(h-5), including the races for State Representative for the 46th, 49th, 53rd, 56th, 62nd, 82nd, 93rd, 101st, 108th, 109th, 110th, and 115th Districts. A-30. In each of those races, after the contribution limits were eliminated for others, Liberty Principles PAC could have and would have coordinated with, or otherwise made contributions to, a candidate in the race if the Illinois Election Code had not forbidden it. A-30.

Procedural History

Mr. Proft and Liberty Principles PAC therefore filed their complaint on July 20, 2018, challenging Illinois' ban on contributions by independent expenditure

committees in races where limits have otherwise been eliminated under 10 ILCS 5/9-8.5(h) or (h-5) for violating their First Amendment rights to free speech and free association and the Fourteenth Amendment right to equal protection. A-22-38. Plaintiffs filed their motion for preliminary injunction, Defendants filed their motion to dismiss, the parties briefed both motions, and the district court heard oral argument on October 9, 2018. On October 24, 2018, the District Court entered a Memorandum Opinion and Order granting Defendants' motion to dismiss and denying Plaintiffs' motion for preliminary injunction. A-1-20.

Plaintiffs filed their notice of appeal on November 20, 2018.

SUMMARY OF THE ARGUMENT

The United States Supreme Court has recognized only one government interest that can justify campaign-finance restrictions from First Amendment scrutiny: the prevention of actual or apparent *quid pro quo* corruption. See *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 155 (7th Cir. 2011). Therefore, in any First Amendment challenge to campaign-finance restrictions, the government must show, at a minimum, that its restrictions are closely drawn to prevent actual or apparent *quid pro quo* corruption. See *McCutcheon v. FEC*, 134 S.Ct. 1434, 1441, 1456-57 (2014).

In this case, by prohibiting Plaintiffs from contributing to candidates in races in which limits on contributions to candidates have otherwise been eliminated, the Code infringes Plaintiffs' First Amendment rights to free speech and freedom of association and Defendants can provide no anti-corruption rationale that justifies

infringing those rights.[4] Defendants cannot show that in races in which contribution limits have been eliminated under the Code, contributions by independent expenditure committees (which the Code prohibits) would pose a greater threat of corruption than the threat posed by contributions by individuals, PACs, parties, corporations, unions, and other associations (which the Code allows in unlimited amounts).

Because Defendants cannot meet their burden to show that the Code's prohibition on contributions by independent expenditure committees in races in which all other limits on contributions to candidates have been eliminated is closely drawn to prevent corruption, Plaintiffs have a likelihood of success of the merits of their complaint and the district court erred in granting the motion to dismiss and in denying Plaintiffs' motion for preliminary injunction.

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).

[4] The ban also violates the Equal Protection Clause of the Fourteenth Amendment, which follows a similar analysis.

On a motion for preliminary injunction in a First Amendment case, "the analysis begins and ends with the likelihood of success on the merits." *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013). In considering a motion for preliminary injunction, this Court reviews legal conclusions de novo, findings of fact for clear error, and equitable balancing for abuse of discretion. *Id.* at 665.

ARGUMENT

I. The Code's prohibition on independent expenditure committees making contributions to candidates in races in which everyone else may make unlimited contributions violates the First Amendment.

This Court should reverse the district court's order dismissing Plaintiffs' First Amendment claim and denying Plaintiffs' motion for preliminary injunction because Defendants cannot show that banning contributions to candidates by independent expenditure committees at times when all others may make unlimited contributions is a narrowly tailored or closely drawn means of preventing corruption.

A. First Amendment challenges to campaign contribution limits demand, at minimum, rigorous scrutiny.

When considering a First Amendment challenge to limits on campaign contributions, courts generally apply rigorous scrutiny because limits on campaign contributions affect a fundamental right. *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley v. Valeo*, 424 U.S. 1, 29 (1976)). However, when contribution limits discriminate against certain speakers and favor others – as the Code does against independent expenditure committees by prohibiting them from making campaign contributions in races where it allows all others may make unlimited contributions – strict scrutiny is appropriate.

1. The ban on contributions by independent expenditure committees is subject to strict scrutiny.

This Court should subject the ban that Plaintiffs challenge to strict scrutiny because it discriminates against certain political speakers (independent expenditure committees) and in favor of others (individuals and every other type of organization). 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 v. FEC*, 558 U.S. 310, 340 (2010). And the Supreme Court has "insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (quoting *Turner Broadcasting System, Inc. v. Fed. Communications Comm'n*, 512 U.S. 622, 658 (1994)); see also *Buckley*, 424 U.S. at 48 (laws favoring some speakers over others demand strict scrutiny where the legislature's speaker preference reveals a content preference). Here, in certain political races, the Code places no limits on the amount of money anyone may contribute to a political campaign, except that it completely prohibits independent expenditure committees from making *any* campaign contributions to a candidate in such races. Because the Code provides for no contribution limits at all in certain races, while singling out independent expenditure committees by completely banning such groups from making any contributions, the Court should subject that ban to strict scrutiny. *See Austin v. Mich. 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. 1988) (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).

Under strict scrutiny, the government must show that the challenged restriction is narrowly tailored to serve a compelling governmental interest and that it "curtail[s] 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).

2. In the alternative, the ban on contributions by independent expenditure committees is subject to rigorous First Amendment scrutiny.

In the alternative, if the Court does not apply strict scrutiny to the unfair limits placed on independent expenditure committees compared to all other types of donor organizations, it must at least apply rigorous scrutiny that generally applies to limits on campaign contributions. Under that standard, limits on campaign contributions violate the First Amendment unless the government shows that they

are closely drawn to serve a sufficiently important interest. *Wis. Right to Life State PAC*, 664 F.3d at 152 (citing, among other cases, *Buckley*, 424 U.S. at 20-21, 23-25). 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*, 134 S. Ct. at 1445. Although the fit need not be "perfect," it must be "reasonable" and must use a "means narrowly tailored to fit the desired objective." *Id.* at 1456-57. To meet its burden, the government must show that "adequate evidentiary grounds" support its putative justification for the challenged limits. *FEC v. Colo. Republican Fed. Campaign Cmte.*, 533 U.S. 431, 456 (2001); *see also Randall v. Sorrell*, 548 U.S. 230, 261 (2006) (striking limits where government presented no evidence to justify them); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) (government must provide evidence, not just "mere conjecture," to justify contribution limits).

The Supreme Court has held that campaign contribution limits must receive rigorous scrutiny because they "involve a 'significant interference with associational rights.'" *Davis v. FEC*, 554 U.S. 724, 740 n.7 (2008). Rigorous scrutiny is even more important for a complete ban on contributions by particular organizations, such as the one at issue here, because "a ban on contributions causes considerably more constitutional damage, as it wholly extinguishes that 'aspect of the contributor's freedom of political association.'" *Green Party of Conn. v. Garfield*, 616 F.3d 189, 204 (2d Cir. 2010) (quoting *Randall*, 548 U.S. at 246).

B. The Code's ban on contributions by independent expenditure committees in races where contribution limits have otherwise been eliminated cannot survive either strict or rigorous First Amendment scrutiny.

The Supreme Court has stated that "the only legitimate and compelling government interests" that justify restrictions on campaign contributions are the prevention of *quid pro quo* corruption, the prevention of the appearance of such corruption, and the prevention of circumvention of contribution limits that prevent actual or apparent corruption. *Wis. Right to Life*, 664 F.3d at 153 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)).

Under either strict or rigorous scrutiny, the question is whether the restriction on contributions is a narrowly tailored or closely drawn means of preventing *quid pro quo* corruption. Because banning contributions to candidates by independent expenditure committees at times when all others may make unlimited contributions is not a narrowly tailored or closely drawn means of preventing corruption, this Court should reverse the district court's order dismissing Plaintiff's' complaint and denying their motion for preliminary injunction.

1. The Code's ban on contributions by independent expenditure committees is not a narrowly tailored or closely drawn means of preventing *quid pro quo* corruption.

Defendants cannot show that banning contributions to candidates by independent expenditure committees at times when all others may make unlimited contributions serves an anti-corruption purpose. When limits are lifted in a given race under 10 ILCS 5/9-8.5(h) or (h-5), people and groups of every kind may

coordinate with candidates for office and otherwise contribute to candidates without limitation – except independent expenditure committees, for whom those activities remain forbidden. In such races, Defendants could have no basis for believing that an independent expenditure committee's contributions or coordination would pose a greater threat of corruption than contributions or coordination by anyone else – let alone a threat so much greater that it could justify banning independent expenditure committees' contributions while allowing everyone else to make unlimited contributions. If the state does not deem it necessary to limit the contributions that two individuals separately give to a candidate, it can have no justification for limiting the same individuals' ability to contribute to a candidate when they come together to make contributions through an independent expenditure committee. To place no limits on individuals when they act separately, but limit them when they act together, arbitrarily interferes with their First Amendment rights to freedom of association and free speech.

Ordinarily, limits on an entity's coordinated expenditures can be justified by the government's interest in preventing donors from using political committees to circumvent contribution limits. See *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 443; *O'Keefe v. Chisholm*, 769 F.3d 936, 941 (7th Cir. 2014). When *everyone's* contributions to candidates are limited, the Code's special restrictions on independent expenditure committees make sense because they ensure that individuals who form an independent expenditure committee can exercise their right to engage in unlimited independent political speech but cannot use an

independent expenditure committee to circumvent the limits that apply to individuals, ordinary PACs, and other donors. *See O'Keefe*, 769 F.3d at 941. Where, as here, contribution limits for other donors have been eliminated, however, the anti-circumvention justification no longer applies – again, there are no limits to circumvent – and the state no longer has any anti-corruption rationale for restricting independent expenditure committees' coordination and contributions.

Although the district court was concerned with the possibility of the kind of corruption that can occur when an organization engages in independent expenditures as well as campaign contributions,[5] A-11, such corruption is only a concern because an organization making independent expenditures as well as contributions may undermine the government's permitted regulation of coordinated contributions under the First Amendment. See *Wis. Right to Life State PAC*, 664 F.3d at 155. But, when, as here, the government has removed contribution limits entirely – and thus any circumvention threat – there can be no corruption interest. With no anti-corruption rationale to justify it, the ban on contributions by independent expenditure committees in races in which limits on all other have been eliminated under 10 ILCS 5/9-8.5(h) or (h-5) cannot stand. *See Wis. Right to Life*,

[5] The district court appears to premise its opinion on the incorrect notion that Plaintiffs are somehow trying to blur the line between independent expenditures and contributions. A-10. To the contrary, Plaintiffs simply seek the ability to make contributions only in those races where contribution limits have been entirely lifted for everyone else.

664 F.3d at 153. Thus, the district court erred dismissing Plaintiff's First Amendment claim and denying Plaintiffs' motion for preliminary injunction.

2. Defendants do not – and cannot – show "adequate evidentiary grounds" to justify the ban on contributions by independent expenditure committees as a closely drawn means of preventing *quid pro quo* corruption.

As stated above, it is the government's burden to show that "adequate evidentiary grounds" support its putative justification for the challenged limits. *Colo. Republican Fed. Campaign Cmte.*, 533 U.S. at 456. Defendants have not only failed to provide any kind of evidentiary basis to justify banning only independent expenditure committees from making contributions in races where the Code eliminates all limits on contributions from anyone else, but have also failed to provide any coherent explanation as to why independent expenditure committees pose a greater threat of corruption in such races than the threat posed by contributions by everyone else, resorting to mere conjecture and theoretical and speculative concerns.

For example, during oral argument on Plaintiff's preliminary injunction motion, Defendants' responded to the court as follows:

> Q: "isn't it your position . . . that they have a likelihood, these independent committees, actually pose greater threat of corruption? Or not?"
>
> A: "It may be." A-38.

If Defendants cannot say that independent expenditure committees pose a greater threat of corruption than other types of political donors, then it cannot justify its ban on independent expenditure committees from making any contributions to

candidates in races where it places no limits on what any other donor can contribute. But Defendants are required to provide more than bare assertions. Defendants must provide *some* evidentiary basis for the position that independent expenditure committees pose a greater threat to corruption than everyone else in races where the Code permits unlimited contributions by everyone except independent expenditure committees. *Colo. Republican Fed. Campaign Cmte.*, 533 U.S. at 456. Defendants failed to meet that burden. As was evident at the oral argument before the district court, Defendants offered no evidence or facts, and instead relied entirely on conjecture and hypotheticals. See e.g. A-39-40 ("I'll give you a couple of scenarios where I think the problem manifests itself . . ."; "We have, let's say, a rich guy"; "Let's do another scenario that's even more, I think, suggestive."). Although Defendants are entitled to use examples or hypotheticals to explain why its Code is constitutional, Defendants cannot (as they did here) rely exclusively on hypotheticals without any evidentiary basis on which to justify the Code's ban.

Further, Defendants don't rely on any legislative findings supporting the ban, nor can Defendants cite *any* case upholding a ban on contribution limits even remotely similar to the one here – where one kind of political committee is completely banned from making any contributions to a candidate in a race while everyone else may make *unlimited* contributions to a candidate in that race. The fact that Defendants failed to provide – and, indeed, could not even bring themselves to assert – an evidentiary basis for the notion that independent

expenditure committees pose a greater threat of corruption than other political donors demonstrates that the district court erred in both dismissing Plaintiffs' First Amendment claim and denying Plaintiffs' motion for preliminary injunction.

Thus, this Court should reverse the district court's order dismissing Plaintiff's First Amendment claim and denying Plaintiffs' motion for preliminary injunction.

II. The Code's unequal treatment of independent expenditure committees violates the Equal Protection Clause.

The Code's prohibition on coordinated expenditures by independent expenditure committees in races where the Code's limits on contributions to candidates have been eliminated violates the Equal Protection Clause of the Fourteenth Amendment.

A. The Code's discriminatory treatment of independent expenditure committees is subject to strict scrutiny because it implicates the fundamental right to free speech.

The Fourteenth Amendment denies states the power to "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Where a classification implicates a fundamental right, including the right to free speech, it is subject to strict scrutiny, and the state must show that it is narrowly tailored to serve a compelling governmental interest. *Plyler v. Doe*, 457 U.S. 202, 217-18 (1982) (classifications that impinge on exercise of a fundamental right subject to strict scrutiny); *Regan v. Taxation With*

Representation of Wash., 461 U.S. 540, 547 (1983) ("freedom of speech" a fundamental right for equal protection analysis).

B. The Code's discriminatory treatment of independent expenditure committees is not justified by the State's interest in preventing *quid pro quo* corruption.

As indicated above, the only government interests the Supreme Court has recognized as sufficiently important to justify restrictions on campaign contributions are the prevention of *quid pro quo* corruption, the prevention of the appearance of such corruption, and the prevention of circumvention of contribution limits that prevent actual or apparent corruption. *Wis. Right to Life*, 664 F.3d at 153. Thus, for the reasons explained in Section I, above, the prohibition on coordinated expenditures by independent expenditure committees in races where the limits on contributions to candidates have been eliminated is not narrowly tailored or closely drawn to serve a governmental interest in the prevention of *quid pro quo* corruption.

Defendants can provide no relevant differences between independent expenditure committees, on the one hand, and individuals, corporations, unions, and PACs, on the other, that justifies restricting the ability of independent expenditure committees from making contributions to and coordinating with candidates in races the contribution limits are removed for individuals, corporations, unions, and PACs. In such races, independent expenditure committees pose no more of a risk of *quid pro quo* corruption than individuals, corporations, unions, and PACs. The fact that PACs have limits on how much they can accept and

independent expenditure committees do not is not a relevant difference. How would the fact that an individual is limited to making contributions to a PAC of no more than $10,000, 10 ILCS 5/9- 8.5(d), prevent against *quid pro quo* corruption when, after the contributions limits are removed, that same individual can give an unlimited amount of money to the candidate directly?

Plaintiffs have adequately alleged an Equal Protection claim and have a likelihood of success on the merits of their Equal Protection claim because the restriction on independent expenditure committees from making contributions to a candidate when the Code allows everyone else to make unlimited contributions is not narrowly tailored or closely drawn to serve the government's interest in preventing *quid pro quo* corruption. Therefore, this Court should reverse the district court's order dismissing Plaintiffs' Equal Protection claim and denying their motion for preliminary injunction, and remand this matter to the district court for further proceedings.

III. The other preliminary injunction factors favor an injunction.

When a plaintiff seeks to enjoin a restriction on First Amendment rights, courts presume the remaining preliminary injunction factors to be satisfied because "[t]he loss of First Amendment freedoms is presumed to constitute an irreparable injury for which damages are not adequate, and injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (citing *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004)).

Nevertheless, additional preliminary injunction factors support granting Plaintiffs' motion for preliminary injunction. Plaintiffs lack an adequate remedy at law and are being irreparably harmed by the restriction they challenge because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "[A]ny post-election remedy would not compensate . . . for [Plaintiffs'] loss of the freedom of speech." *Personal PAC*, 858 F. Supp. 2d at 969 (quoting *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 507 (7th Cir. 1998)).

The balancing of harms also favors an injunction. Defendants cannot suffer harm when they are prevented from enforcing an unconstitutional statute. *Joelner*, 378 F.3d at 620. Plaintiffs, in contrast, will suffer great harm without an injunction because they will be unable to speak and participate as fully in upcoming elections as they would like. *Cf. Personal PAC*, 858 F. Supp. 2d at 969 (balance of harms "particularly" favored an injunction where PAC would otherwise "be limited in how it c[ould] contribute to the free discussion of candidates and government affairs" before an upcoming election); *see also CRG Network v. Barland*, 48 F. Supp. 3d 1191, 1196 (E.D. Wis. 2014) (preliminary injunction against campaign contribution restriction "all the more appropriate" when "clock is ticking toward election day").

Further, the public interest favors granting an injunction because, again, "it is always in the public interest to protect First Amendment liberties." *Joelner*, 378 F.3d at 620; *CRG Network*, 48 F. Supp. 3d at 1196 (preliminary injunction against campaign contribution restriction would "serve the public interest by vindicating

First Amendment freedoms"). Here, an injunction would be especially beneficial to the public interest because the restriction that Plaintiffs challenge discriminates between different speakers in the political arena. By restricting independent expenditure committees alone, the statute favors the speech of other participants in Illinois politics – such as political party committees, which may benefit from restrictions on independent expenditure committees such as Liberty Principles PAC that often oppose party-backed candidates.

CONCLUSION

This Court should therefore reverse the district court's order granting Defendants' motion to dismiss and denying Plaintiffs' motion for a preliminary injunction enjoining Defendants from enforcing Illinois' ban on coordinated expenditures and contributions to candidates by independent expenditure committees in any race where contribution limits have otherwise been eliminated under 10 ILCS 5/9-8.5(h) or (h-5), and remand this matter to the district court for further proceedings.

Respectfully Submitted,

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab
LIBERTY JUSTICE CENTER
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Telephone (312) 263-7668
Facsimile (312) 263-7702
jschwab@libertyjusticecenter.org

Attorneys for Plaintiffs

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 was 5,562 words.

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2019, I served the foregoing brief upon Appellee's counsel by electronically filing it with the appellate CM/ECF system.

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab

REQUIRED SHORT APPENDIX

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CIRCUIT RULE 30(d) STATEMENT

Counsel certifies that this short appendix contains all materials required by parts (a) and (b) of Circuit Rule 30.

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab
Attorney for Plaintiffs-Appellants

Dated: January 31, 2019

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

DAN PROFT and LIBERTY PRINCIPLES PAC, *Plaintiffs*, v. LISA MADIGAN, Attorney General of Illinois, et al. *Defendants*.	)	Case No. 18 C 4947 Judge Virginia M. Kendall

MEMORANDUM OPINION AND ORDER

Dan Proft and the independent expenditure committee he chairs, Liberty Principles PAC, sued Lisa Madigan, the Attorney General of Illinois, and the members of the Illinois State Board of Elections in their official capacities, alleging that a provision of the Illinois Election Code violates the First and Fourteenth Amendments to the Constitution of the United States. (Dkt. 1.)

The Code generally limits contributions that individuals and organizations may make to candidates for office and their campaigns, but it removes those limits in races where a candidate's self-funding, or independent expenditures supporting or opposing a candidate, exceed a threshold amount. That rule, however, has one important exception that is the subject of this litigation: independent expenditure committees can never contribute to candidates even in races where the Code lifts the limits for everyone else. Attorney General Madigan justifies this exception by invoking the prevention-of-corruption rationale that the Supreme Court recognizes. *See*

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 359 (2010). Proft claims that these groups do not pose a unique threat of corruption and it is not fair to ban them from contributing when all others can do so. To do that, in his view, unreasonably restricts the free-speech and free-association rights of the organizations and the individuals who comprise them.

Proft accordingly moved this Court to preliminarily enjoin Attorney General Madigan from enforcing the Code in the 2018 Election so that he and his committee can participate in races where the Code eliminates contribution limits to the same extent as individuals and other groups. (Dkt. 12.) Attorney General Madigan opposed this motion and moved to dismiss the complaint arguing that independent expenditure committees must remain independent. (Dkt. 19.) Because accepting Proft's argument would erase the Supreme Court's 40-year-old distinction between contributions and independent expenditures, the Court denies his motion for a preliminary injunction and grants Attorney General Madigan's motion to dismiss.

BACKGROUND

Dan Proft is a political activist. (Dkt. 1 ¶¶ 8–9.) He founded a political committee named Liberty Principles PAC. *Id.* More specifically, Liberty Principles is an independent expenditure committee which the Illinois Election Code defines as an organization, corporation, association, or committee "formed for the exclusive purpose of making independent expenditures during any 12-month period in an aggregate amount exceeding $5,000 in support of or in opposition to . . . [the] election . . . of any public official or candidate." 10 ILCS 5/9-1.8(f). An independent expenditure is "any

payment, gift, donation or other expenditure of funds" for "electioneering communications," or other express advocacy urging the election or defeat of a candidate. 10 ILCS 5/9-1.15.

Basically, these committees are independent because they lack the connection to and coordination with a candidate or campaign that their counterparts, political action committees, have. Indeed, an independent expenditure committee's funding of electioneering communications or express advocacy must "not [be] made in connection, consultation, or concert with or at the request or suggestion of the candidate's political committee or campaign." *Id.* Conversely, a coordinated expenditure is just a contribution of the sort that a political action committee ("PAC") would make. Some observers, in fact, refer to independent expenditure committees as "super PACs" because they can raise and spend unlimited money, provided they do not cooperate or consult with a candidate, her committee, or the committee of a political party.

This distinction is consequential. On the one hand, the Code limits the contribution amounts that PACs can receive and make themselves. *See* 10 ILCS 5/9-8.5(d); *see also* Dkt. 1 ¶ 21. On the other hand, independent expenditure committees may raise and spend money in any amount from any source. *See* 10 ILCS 5/9-8.5(e-5); *see also* Dkt. 1 ¶¶ 36–37. There is, however, one significant exception to these contribution caps: if a candidate's self-funding individually exceeds, or independent expenditures supporting or opposing a candidate collectively exceed $250,000 for statewide office, or $100,000 for all other offices, then all candidates in that race may accept contributions more than the otherwise governing limits. *See* 10 ILCS 5/9-8.5(h); *id.*

at (h-5); *see also* Dkt. 1 ¶ 39. The Legislature decided "that it was better to level the playing field and lift the caps than keep the usual contribution limits in place." (Dkt. 19 at 4.) The Legislature also chose to keep the contribution caps for independent expenditure committees in place because the fact that "they cannot spend in coordination with candidates and cannot contribute directly to them" effectively defines their status. *Id.* Independent expenditure committees remain free to raise and spend funds in any amount. *Id.*

Dan Proft, Chairman of Liberty Principles PAC, alleges that there are multiple races in the 2018 Election where the Code will lift the $100,000 cap. (Dkt. 1 ¶¶ 53–54.) Essentially, Proft wants to directly coordinate with the candidates that he supports in those races. *Id.* at ¶¶ 55–56. Because all others can coordinate and contribute when the caps are off, Proft argues independent expenditure committees should be able to do the same; otherwise, this provision violates the First and Fourteenth Amendments. *Id.* at ¶¶ 65, 69. Proft therefore moved for a preliminary injunction to bar Attorney General Madigan from enforcing the Code's prohibition of coordinated expenditures by independent expenditure committees in races where the Code eliminates the contribution limits. (Dkt. 12 at 1.)

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy." *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260 (2018) (citation omitted). To determine whether a

situation warrants such a remedy, district courts analyze the motion in "two distinct phases: a threshold phase and a balancing phase." *Valencia v. City of Springfield, Illinois*, 883 F.3d 959, 965–66 (7th Cir. 2018) (citation omitted). In the threshold phase, the moving party bears the burden of showing that: "(1) without preliminary relief, it will suffer irreparable harm before final resolution of its claims; (2) legal remedies are inadequate; and (3) its claim has some likelihood of success on the merits." *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018) (citation omitted). Only if the moving party satisfies each of these requirements does the court move to the balancing phase, where it must "weigh the harm the plaintiff [or the public] will suffer without an injunction against the harm the defendant [or the public] will suffer with one." *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

Relevant here, "the likelihood of success on the merits is usually the determinative factor when a preliminary injunction is sought on First Amendment grounds." *Higher Soc'y of Indiana v. Tippecanoe Cty., Indiana*, 858 F.3d 1113, 1118 (7th Cir. 2017); *see ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012); *Joelner v. Village of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004). Indeed, the analysis can "begin[ ] and end[ ] with the likelihood of success on the merits of the . . . claim. On the strength of that claim alone, preliminary injunctive relief [may be] warranted," leaving no need for "district courts to weigh the injunction equities." *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013).

ANALYSIS

Proft argues that the ban on independent expenditure committees' contributions in circumstances where all others may contribute without limit is not a narrowly tailored or closely drawn means of preventing corruption. Attorney General Madigan responds that to adopt this rationale would eliminate the distinction between independent expenditure committees and PACs (those political committees tied to a candidate or party), permitting Proft to circumvent the contribution ban and corrupt the election system.

As a threshold matter, Proft asks this Court to subject the ban on contributions by independent expenditure committees to strict scrutiny, wherein the government must show that the legislature narrowly tailored the law to serve a compelling interest. (Dkt. 13 at 9–10.) In the alternative, Proft requests rigorous First Amendment scrutiny, obligating the government to demonstrate that the legislature closely drew the statute to serve a sufficiently important interest. (Dkt. 13 at 10–11.)

True enough, "[m]ost laws that burden political speech are subject to strict scrutiny. For challenges to contribution limits, however, the Supreme Court has adopted a form of intermediate scrutiny: 'Campaign contribution limits are generally permissible if the government can establish that they are 'closely drawn' to serve a 'sufficiently important interest.'" *Illinois Liberty PAC v. Madigan*, No. 16-3585, 2018 WL 4354424, at *4 (7th Cir. Sept. 13, 2018). The only "sufficiently important interest" recognized by the Supreme Court is the prevention of actual or apparent quid pro quo corruption. *See id.*

In this case, the Illinois ban on independent expenditure committees' contributions is just the most significant type of contribution limit: prohibition. *Cf. FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) (applying the intermediate standard of rigorous First Amendment scrutiny to uphold caps on coordinated party expenditures because they function like contributions). The Supreme Court permits states to entirely bar certain kinds of entities from contributing to candidates. *See Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 442–43 (5th Cir. 2014) (citing *FEC v. Beaumont*, 539 U.S. 146, 149 (2003) (recognizing that federal law bars corporations from contributing directly and therefore holding the proscription of nonprofit advocacy corporations' contributions to candidates constitutional)); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 320 (2010) (citing 2 U.S.C. § 441(b) (observing that federal law forbids unions from directly contributing to candidates)).

It follows, then, that Attorney General Madigan must proffer "a sufficiently important interest and employ [ ] means closely drawn" to defend the state's prohibition of Proft's proposed contributions. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 214 (2014); *cf. Catholic Leadership Coal. of Texas*, 764 F.3d at 444. Attorney General Madigan does so here, and even if this Court applied strict scrutiny, it would still hold the ban constitutional.

I. Sufficiently Important Interest

Proft argues that an independent expenditure committee's contributions or coordination would pose no greater threat of corruption than those by any other entity

or individual, let alone a threat so great that justifies the complete ban. Proft also contends that when the Code lifts the caps for everybody except the independent expenditure committees, there are no longer any contribution limits to circumvent.

A. Prevention of Corruption

In modern elections, fundraising is essential because candidates depend on individual financial contributions to run their campaigns. *See Buckley v. Valeo*, 424 U.S. 1, 26 (1976). Large contributions, then, pose the risk of being "given to secure a political quid pro quo from current and potential office holders . . ." *Id.*; *see Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial quid pro quo: dollars for political favors."). Simply put, influencing elected officials to act contrary to the obligations of their offices through the expectation of money flowing to themselves or into their campaigns subverts the democratic process.

Consequently, states may limit and even bar direct contributions to candidates to prevent actual corruption or the appearance thereof to maintain the integrity of and public confidence in American elections. *See Citizens United v. Fed Election Comm'n*, 558 U.S. 310, 344, 356–57, 359 (2010) (citing *Buckley*, 424 U.S. at 25–28, 30, 45–48). Contribution ceilings, however, are distinct from independent expenditure limits because the latter are made independent of the candidate and her campaign, and that absence of prearrangement and coordination alleviates the danger of corruption. *See id.* at 344, 356–57 (citing *Buckley*, 424 U.S. at 25–27, 45, 47).

For over 40 years, the Supreme Court has distinguished "between independent expenditures on behalf of candidates and direct contributions to candidates." *Siefert v. Alexander*, 608 F.3d 974, 988 (7th Cir. 2010) (noting that *Citizens United* reinforced this distinction from the 1976 case *Buckle v. Valeo*). Recognizing this bedrock principle of the Court's campaign-finance jurisprudence is nearly dispositive of this matter. *See Ariz. Free Enterprise Club's Freedom Club Pac v. Bennett*, 564 U.S. 721, 734–35 (2011); *Citizens United*, 558 U.S. at 343–47; *McConnell v. FEC*, 540 U.S. 93, 202–03 (2003), *overruled in part on other grounds by Citizens United*, 558 U.S. at 310; *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 437 (2001); *Buckley v. Valeo*, 424 U.S. 1, 46–47, 78 (1976).

Indeed, this was the fundamental proposition relied on and applied by the Court in *Citizens United* when it prohibited limits on corporate independent expenditures. *See* 558 U.S. at 357 (internal quotation marks omitted); *id.* at 360 ("By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."). So, "although the First Amendment protects *truly* independent expenditures for political speech, the government is entitled to regulate coordination between candidates' campaigns and *purportedly* independent groups." *O'Keefe v. Chisholm*, 769 F.3d 936, 941 (7th Cir. 2014) (emphasis added).

Courts across the Country acknowledge and appreciate this tenet of free speech law. *See Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 617 (1996) (calling it the "constitutionally significant fact"); *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)

(describing it as the "fundamental constitutional difference"); *see, e.g.*, *Stop This Insanity, Inc. Employee Leadership Fund v. Fed. Election Comm'n*, 902 F. Supp. 2d 23, 38 (D.D.C. 2012), *aff'd*, 761 F.3d 10 (D.C. Cir. 2014) (emphasizing it as an "essential counterweight," and explaining that "there can be little doubt that the *independence* of independent expenditures is the lynchpin that holds together the principle," and "if express advocacy for particular federal candidates were to lose its independence (either in reality or appearance), it stands to reason that the doctrine carefully crafted in *Citizens United* and *SpeechNow* would begin to tumble back to Earth.") (emphasis in original); *Vermont Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 405–06 (D. Vt. 2012), *aff'd*, 758 F.3d 118 (2d Cir. 2014) (referring to this issue as the "touchstone" of the constitutional analysis).

Proft's argument fails to take into account this important distinction regarding independent expenditures—that they must be truly independent. This is, after all, the basic premise of the Supreme Court's campaign-finance law. In fact, "[a] number of the courts that have struck down limits on contributions applied to independent-expenditure-only PACs have made clear their reasoning would not hold to the extent the assumption of independence were undermined." *Vermont Right to Life Comm., Inc.*, 875 F. Supp. 2d at 405–06 (citing *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 155 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696–97 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 392 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010); *N.C. Right to Life, Inc. v.*

Leake, 525 F.3d 274, 295 (4th Cir. 2008); *Yamada*, 872 F. Supp. 2d 1023, 1041 (D. Haw. 2012), *aff'd sub nom.*, *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015)).

Similarly, when that independence is eliminated, the very concerns of corruption enter the picture. *See Alabama Democratic Conference v. Broussard*, 541 F. App'x 931, 935–36 (11th Cir. 2013) ("When an organization engages in independent expenditures as well as campaign contributions . . . its independence may be called into question and concerns of corruption may reappear."). The Seventh Circuit identified this issue in *Wisconsin Right to Life State PAC*. There, the court rejected an allegation of an indirect appearance of corruption, however it posited that if an "independent committee is not truly independent . . . the committee would not qualify for the free-speech safe harbor for independent expenditures; the First Amendment permits the government to regulate *coordinated* expenditures." 664 F.3d at 155 (citing *Colo. Republican*, 533 U.S. at 465).

The Seventh Circuit reiterated that collusion between a candidate and an independent committee contravenes their division in *O'Keefe v. Chisholm*. In that case, the court recognized that the government may constitutionally regulate supposed independent organizations because "[i]f campaigns tell potential contributors to divert money to nominally independent groups that have agreed to do the campaigns' bidding, these contribution limits become porous, and the requirement that politicians' campaign committees disclose the donors and amounts becomes useless." 769 F.3d at 941.

In Proft's case, Liberty Principles would maintain an "otherwise indistinguishable candidate contribution account." *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 143 (2d Cir. 2014). When an independent expenditure committee is "enmeshed financially and organizationally" by directly contributing to candidates, there is no longer a lack of prearrangement and coordination. *Id.* at 141. Without any kind of organizational separation, Liberty Principles could coordinate at-will with candidates and campaigns, making it no longer "functionally distinct" as an independent expenditure committee. *Id.* at 142.

A single entity such as that, which conducts both activities, appears corrupt on its face. *See, e.g.*, *Stop This Insanity, Inc. Employee Leadership Fund*, 902 F. Supp. 2d at 43 (noting that the entity would look like it was "in cahoots with the candidates and parties that it coordinates with and supports"). Direct contributions made by independent expenditure committees compromise their independence. With no bulwark in place, a group like Liberty Principles would be free to coordinate with candidates and political parties, making the potential for corruption quite real and apparent. *Cf. Republican Party of New Mexico v. King*, 741 F.3d 1089, 1101 (10th Cir. 2013). To the unsophisticated voter, all the organization's spending (expenditures and contributions alike) would appear to come from the same source. *See, e.g.*, *Stop This Insanity, Inc. Employee Leadership Fund*, 902 F. Supp. 2d at 43; *Vt. Right to Life Comm., Inc.*, 875 F. Supp. 2d at 408 (indicating that "the structural melding" between an independent expenditure committee and a PAC "leaves no significant functional

divide between them for purposes of campaign finance law," and their "nearly complete organizational identity poses serious questions").

Citizens United further supports this proposition. There, the independence and uncoordinated nature of the expenditures alleviated the Supreme Court's concerns about corruption. *See* 558 U.S. at 357. Without that foundation, however, the "danger that expenditures will be given as a quid pro quo for improper commitments from the candidate" is very real. *Id.* The existence of prearrangement with the candidate or her agent provide leverage. Indeed, expenditures made after a "wink or nod" often will be "as useful to the candidate as cash." *Colo. Republican*, 533 U.S. at 446. Therefore, Attorney General Madigan has a sufficiently important interest in preventing corruption or the appearance thereof.

B. Anti-Circumvention

Proft's circumvention argument puts the cart before the horse. Properly understood, the Illinois ban on independent expenditure committees' contributions is indeed a contribution limit. The distinction is one of degree and not of kind. A ban is, in fact, the most severe limitation of contributions possible. So treated, Attorney General Madigan has a sufficiently important interest in combatting the grave risk that Liberty Principles will circumvent this limit by spending enough on its own to lift the caps, freeing it to coordinate and directly contribute to candidates. *Cf. FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) (holding that a state may restrict a party's coordinated expenditures, unlike truly independent expenditures, to minimize the circumvention of constitutional caps).

Proft would have this Court abolish the Supreme Court's carefully crafted contribution-or-expenditure litmus test so he can "raise unlimited funds," "spend unlimited amounts," "make unlimited contributions to the candidates he supports," and "communicate and coordinate freely with those candidates." (Dkt. 13 at 5 (citing Dkt. 1 at ¶¶ 42–43).) It appears, then, that what Proft would really like is to have his cake and eat it too. *Cf. Stop This Insanity, Inc. Employee Leadership Fund*, 902 F. Supp. 2d at 50. Proft wants to enjoy the benefits of an independent expenditure committee (unlimited fundraising and spending abilities), while also enjoying the benefits of a PAC (capacity to directly contribute, communicate, and coordinate with candidates). *See, e.g.*, *id.* "Choices have consequences," however, and Proft must live with the limitations of the entity he chose to establish. *See, e.g.*, *id.*

Moreover, to the extent that Proft insists on maintaining a "hybrid PAC" that could independently expend and directly contribute as much money as it wanted to in races where the Code lifts the caps, other courts expressly disavow of a similar practice. At least three circuits hold that keeping separate bank accounts for independent expenditures and campaign contributions inadequately eliminates corruption or its appearance and therefore the states may constitutionally limit contributions to the independent expenditure accounts. *See Alabama Democratic Conference v. Attorney Gen. of Alabama*, 838 F.3d 1057, 1066 (11th Cir. 2016), *cert. denied sub nom. Alabama Democratic Conference v. Marshall*, 137 S. Ct. 1837 (2017); *see Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 143 (2d Cir. 2014); *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 443 (5th Cir. 2014). One circuit holds

that separate bank accounts are sufficient to alleviate corruption concerns where an organization makes both direct contributions and independent expenditures. *See Republican Party of N.M. v. King*, 741 F.3d 1089, 1097 (10th Cir. 2013).

The Eleventh Circuit was the most recent court to pass on the issue. In *Alabama Democratic Conference*, the court asserted that an "account set up for independent expenditures can pass muster under a state's interest in anti-corruption only when it is truly independent from any coordination with a candidate." 838 F.3d at 1068. The Eleventh Circuit, agreeing with the Second and Fifth Circuits and disagreeing with the Tenth Circuit, reasoned that these separate bank accounts must have all of the indicia of true independence in order to be supported:

> To create the necessary independence, an organization must do more than merely establish separate bank accounts for candidate contributions and independent expenditures. There must be safeguards to be sure that the funds raised for making independent expenditures are really used only for that purpose. There must be adequate account-management procedures to guarantee that no money contributed to the organization for the purpose of independent expenditures will ever be placed in the wrong account or used to contribute to a candidate.

Id. The court continued:

> Beyond sufficient structural separations within the organization, it is also necessary that the same people controlling the contributions to candidates are not also dictating how the independent expenditure money is spent. . . . Different people must functionally control the spending decisions for the different accounts. Having the same person in control of both accounts threatens the perceived "independence" of the independent expenditure-only account. How could a person simply "forget," for example, everything she knows about coordinated spending efforts or contributions to candidates when turning her focus to the independent expenditure-only account?

Id. at 1069 (citation omitted).

The prevention of the commingling of funds (expenditures and contributions) is the very essence of a valid anti-circumvention interest: money raised for independent expenditures must be used only for that purpose. Those funds may never be used to contribute to a candidate. In addition to the accounts being structurally separate, different people must control them. Otherwise, the independent committee stands to lose its independence, washing away otherwise prophylactic measures such as disclosure requirements. This interest permits states to "undertake some reasonable measures to ensure that any contribution limits are not circumvented." *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 444 (5th Cir. 2014).

In Proft's case, he alleges no safeguards such as separate bank accounts or different money managers. Quite to the contrary, it seems that the staff and resources handling both expenditures and contributions would overlap, there would be little to no financial independence, and the committee would coordinate activities and share information with candidates and their campaigns. *See Alabama Democratic Conference*, 838 F.3d at 1068. Essentially Proft wants to run an independent expenditure committee without having to adhere to any of the limitations that define such a committee. Moreover, the defining characteristic of an independent expenditure committee does not change simply because the Code lifts the contribution limits for entities *already permitted to contribute*. Proft would have this Court approve of Liberty Principles' ability to "pass along the donors' funds to candidates or coordinate with candidates in making expenditures . . ." *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1102 (10th Cir. 2013). Indeed, even the Tenth Circuit, the one court that

validated separate bank accounts in hybrid PACs, reasoned that this would lead to a "possibility that unlimited contributions for independent expenditures will enable donors to skirt otherwise valid contribution limits." *Id.* Accordingly, Attorney General Madigan also has a sufficiently important interest in anti-circumvention.

III. Closely Drawn Means

In this context, the focus of the "closely drawn" inquiry is "whether the contribution limits . . . are above the 'lower bound' at which 'the constitutional risks to the democratic electoral process become too great.'" *Illinois Liberty PAC v. Madigan*, No. 16-3585, 2018 WL 4354424, at *5 (7th Cir. Sept. 13, 2018) (citing *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (plurality opinion)). Courts defer to the legislature so long as "the challenged contribution caps exceed that lower boundary." *Id.* (citing *Davis v. FEC*, 554 U.S. 724, 737 (2008); *Randall*, 548 U.S. at 248 (plurality opinion) ("We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives.")); *see Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (stating that "a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.").

Here, the Illinois Legislature lifted contribution caps in races where spending exceeds the requisite threshold for all parties that could contribute in the first place. The fact that the Legislature did not recognize independent expenditure committees' right to contribute is unsurprising considering those groups did not previously have that right. There is a critical difference in organizational structure and purpose germane to this case: independent expenditure committees can raise and spend as much

money as they want, which would swallow all other limitations and nullify the purpose of the committee.

Furthermore, states are not left only to disclosure regulations and a committee's good faith to prevent corruption and its appearance; they may, in addition, impose contribution caps. *See Catholic Leadership Coal. of Texas*, 764 F.3d at 444 (citing *Buckley*, 424 U.S. at 27–28 (explaining that Congress was within its rights to conclude that "disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.")). Illinois' suppression of independent expenditure committee's contributions to candidates is a closely drawn means of preventing corruption or its appearance. Consequently, it is constitutional under the First Amendment.

IV. Equal Protection

Proft complains of the same injuries under the Equal Protection Clause of the Fourteenth Amendment that he did under the free-speech and association clauses of the First Amendment. But "it makes no difference whether a challenge to the disparate treatment of speakers or speech is framed under the First Amendment or the Equal Protection Clause." *See, e.g.*, *Illinois Liberty PAC v. Madigan*, 902 F. Supp. 2d 1113, 1126 (N.D. Ill. 2012), *aff'd*, No. 12-3305, 2012 WL 5259036 (7th Cir. Oct. 24, 2012) (internal citations omitted). Because the First Amendment claim failed, so, too, does the Fourteenth Amendment claim. *Cf. Illinois Liberty PAC v. Madigan*, No. 16-

3585, 2018 WL 4354424, at *5 n.4 (7th Cir. Sept. 13, 2018) (explaining that the "Court has also deferred to legislative judgments setting contribution limits when the challenge proceeds under the Equal Protection Clause.").

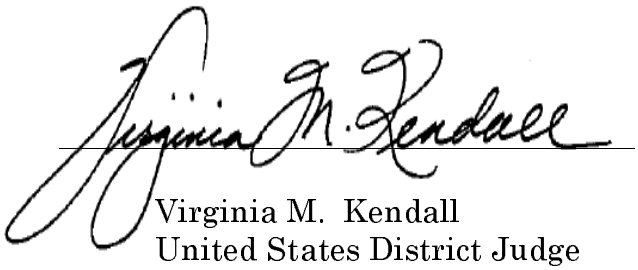
V. Other Preliminary Injunction Factors

Proft's inability to succeed on the merits of his claims is reason enough to deny his preliminary injunction motion. Further consideration of the balance of harms and the public interest, however, confirms that relief should be denied because "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *See Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, C.J., in chambers)).

If this Court were to grant a preliminary injunction, there would be nothing stopping independent expenditure committees from contributing to and coordinating with candidates and their campaigns in the weeks leading up to the 2018 Election. This would potentially lead to actual or apparent corruption, irreparably harming the people of Illinois and the public interest in maintaining the integrity of the electoral process. That harm far outweighs any harm that the challenged provision imposes on Proft and his committee: they may still raise and spend unlimited funds *independent* of the candidates. But the Constitution does not demand that they be able to contribute.

CONCLUSION

Because the Supreme Court's campaign-finance jurisprudence depends on the underlying rule that independent expenditure committees remain independent of candidates and campaigns by not directly contributing to or coordinating with them, the Court must deny Proft's motion for preliminary injunction and grant Attorney General Madigan's motion to dismiss.



Virginia M. Kendall
United States District Judge

Date: October 24, 2018

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

Dan Proft and Liberty Principles,

Plaintiff(s),

v.

Lisa Madigan, William Cadigan, John R. Keith, Andrew Carruthers, Ian Linnabary, William McGuffage, Katherine O'Brien, Charles Scholz and Cassandra Watson,

Defendant(s).

Case No. 18 C 4947
Judge Virginia M. Kendall

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:

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Virginia M. Kendall on a motion to dismiss

Date: 10/24/2018

Thomas G. Bruton, Clerk of Court

/s/ Lynn Kandziora , Deputy Clerk

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

DAN PROFT and LIBERTY PRINCIPLES PAC, Plaintiffs, v. LISA MADIGAN, Attorney General of Illinois; WILLIAM J. CADIGAN, Chairman, Illinois State Board of Elections; JOHN R. KEITH, Vice Chairman, Illinois State Board of Elections; ANDREW K. CARRUTHERS, Member, Illinois State Board of Elections; IAN K. LINNABARY, Member, Illinois State Board of Elections; WILLIAM M. MCGUFFAGE, Member, Illinois State Board of Elections; KATHERINE S. O'BRIEN, Member, Illinois State Board of Elections; CHARLES W. SCHOLZ, Member, Illinois State Board of Elections CASANDRA B. WATSON, Member, Illinois State Board of Elections, all in their official capacities., Defendants.	)	Case No.

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. The Illinois Election Code limits the contributions that individuals and organizations may make to candidates for state elective offices.

2. The Code eliminates all such limits, however, in any race in which a candidate's self-funding, or independent expenditures supporting or opposing a candidate, exceed a threshold amount: $250,000 in a race for statewide office, or $100,000 in any other race.

3. There is, however, one exception to that rule: the Code *never* allows groups registered as "independent expenditure committees" to contribute to, or even coordinate with, a candidate, even in a race in which the limits have been eliminated for everyone else.

4. This exception is not justified. Groups registered as independent expenditure committees do not pose a unique threat of corruption that could justify banning them from contributing to candidates at times when all others, including ordinary political action committees, may do so without limitation.

5. The Code therefore unfairly, unreasonably restricts the free-speech and free-association rights of independent expenditure committees and the citizens who form those committees to engage in political speech. This lawsuit therefore seeks an injunction that would allow Plaintiffs and other independent expenditure committees to participate in races in which the limits that apply to others have been eliminated to the same extent as individuals and other organizations.

JURISDICTION AND VENUE

6. Plaintiffs bring this suit under 42 U.S.C. §§ 1983 and 1988 to seek relief for state violations of their constitutional rights. This Court therefore has jurisdiction under 28 U.S.C. §§ 1331, 1343 (a)(3) and (4), 2201 and 2202.

7. Venue is proper under 28 U.S.C. § 1391(b).

PARTIES

8. Plaintiff Dan Proft is a radio host, political consultant, and political activist who associates with others to engage in speech to promote free-market principles, support candidates for state elective offices in Illinois who share those principles, and oppose candidates for state elective offices in Illinois who do not share those principles.

9. Plaintiff Liberty Principles PAC is an entity Mr. Proft founded for the purpose of associating with others to make communications supporting or opposing candidates based on whether they support free-market principles. Mr. Proft is the entity's chairman and treasurer, and he has registered the entity with the Illinois State Board of Elections as an "independent expenditure committee."

10. Defendant Lisa Madigan is the Attorney General of the State of Illinois and maintains an office in Cook County, Illinois. She has the power to prosecute violations of the Illinois Election Code's provisions restricting campaign contributions under 10 ILCS 5/9-25.2.

11. Defendant William J. Cadigan is the Chairman and a member of the Illinois State Board of Elections (the "Board"), which maintains an office in Cook County. The Illinois Election Code authorizes the Board to assess a fine against any independent expenditure committee that makes an unauthorized contribution to another political committee. 10 ILCS 5/9-8.6(d).

12. Defendant John R. Keith is Vice Chairman and member of the Board.

13. Defendant Andrew K. Carruthers is a member of the Board.

14. Defendant Ian K. Linnabary is a member of the Board.

15. Defendant William M. McGuffage is a member of the Board.

16. Defendant Katherine S. O'Brien is a member of the Board.

17. Defendant Charles W. Scholz is a member of the Board.

18. Defendant Casandra B. Watson is a member of the Board.

19. All Defendants are sued in their official capacities.

FACTS

Illinois' Campaign Contribution Limits

20. In 2009, Illinois amended its Election Code to limit the contributions that individuals and organizations may make to candidates for state elective offices, limit the contributions that various types of political committees may receive, and require political committees of all kinds to disclose the contributions they receive and the expenditures they make. *See* Ill. Public Act 96-832.

21. The contribution limits enacted in 2009 restrict the amounts that individuals and organizations may contribute to a candidate's political committee in an election cycle: individuals may give no more than $5,000; political action committees ("PACs") may give $50,000; and corporations, unions, and other associations may give $10,000. 10 ILCS 5/9-8.5(b). (These limits, and all monetary amounts from the Illinois Election Code referenced below, are subject to adjustment for inflation at the beginning of every election cycle. 10 ILCS 5/9-8.5(g).)

22. The General Assembly did not limit the amount that a political party committee may contribute to a candidate in a general election, but it did limit the amounts a party could give in a primary election: $200,000 to a candidate for statewide office; $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).

23. When the Illinois General Assembly enacted the above contribution limits, it also made an exception: if, in a particular race, a candidate contributes more than a certain amount to his or her own campaign – $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 any donor – *i.e.*, from

any individual, PAC, political party committee, candidate committee, corporation, union, or other association. 10 ILCS 5/9-8.5(h).

24. In addition to limiting the contributions that candidates can receive from individuals and organizations, the 2009 Code amendments also limited the contributions that other types of political committees may receive.

25. In a given election cycle, an individual may contribute no more than $10,000 to a PAC; a corporation, union, political party, or other association may give no more than $20,000; and another PAC may give no more than $50,000 to another PAC. 10 ILCS 5/9-8.5(d).

26. Similarly, 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 give no more than $20,000; and a PAC may contribute no more than $50,000. 10 ILCS 5/9-8.5(c).

27. The "contributions" the Code restricts include not only cash payments to a political committee but also, among other things, expenditures that a political committee makes "in cooperation, consultation, or concert with another political committee," 10 ILCS 5/9-1.4(A)(5), which are commonly referred to as "coordinated expenditures."

28. The Code prohibits any individual or organization from forming more than one PAC. 10 ILCS 5/9-2(d).

29. The Code defines a PAC to include any person or organization (other than a candidate, a political party, or a candidate or party's committee) "that accepts contributions or makes expenditures during any 12-month period in an aggregate amount exceeding $5,000 on behalf of or in opposition to a candidate or candidates for public office" or "makes electioneering communications during any 12-month period in an aggregate amount exceeding $5,000 related to any candidate or candidates for public office." 10 ILCS 5/9-1.8(d).

Illinois' Regulation of Independent Expenditures

30. The Code's restrictions on PACs originally applied to both PACs that make contributions to candidates and PACs that only make independent expenditures – *i.e.*, PACs that only make expenditures "to advocate for or against a specific candidate without coordination with any public official, candidate, or political party." *Personal PAC v. McGuffage*, 858 F. Supp. 2d 963 (N.D. Ill. 2012).

31. In 2012, however, this Court held that the Code's limits on contributions to PACs, and its rule prohibiting anyone from forming more than one PAC, were unconstitutional as applied to PACs that only make independent expenditures. *Id.* at 967-69.

32. The Court based that decision on Supreme Court precedent establishing that the First Amendment prohibits restrictions on independent expenditures because such expenditures do not create a risk of *quid pro quo* corruption. *Personal PAC*, 858 F. Supp. 2d at 967-69 (citing *Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011)).

33. After the *Personal PAC* decision, the Illinois General Assembly amended the Illinois Election Code to address independent expenditures specifically.

34. Under that amendment, individuals who make independent expenditures of $3,000 or more in a 12-month period must file written disclosures of their expenditures with the Board. 10 ILCS 5/9-8.6(a).

35. Any entity (other than a natural person) that makes independent expenditures must register with the Board as a political committee. 10 ILCS 5/9-8.6(b).

36. If an entity wishes to receive unlimited contributions to support its independent-expenditure advocacy, it must register with the Board as an "independent expenditure committee,"

and its chairperson must sign a statement verifying that the committee is "for the exclusive purpose of making independent expenditures" and that "the committee may accept unlimited contributions from any source" only if it does not make contributions to any candidate, party committee, or PAC. 10 ILCS 5/9-3(d-5), 9-8.5(e-5).

37. If an independent expenditure committee makes a contribution to a candidate committee, political party, or PAC, the Board may impose a fine on the committee "equal to the amount of any contribution received in the preceding 2 years by the committee that exceeded the limits" that would have applied to the committee if it had registered as an ordinary PAC. 10 ILCS 5/9-8.6(d).

38. The Code requires an independent expenditure committee to follow the same rules for disclosure of contributions and expenditures that PACs and other political committees must follow. 10 ILCS 9-8.5(e-5), 9-10, 9-11.

39. When the General Assembly amended the Code to address independent expenditures, it added a new exception to the Code's limits on contribution to candidates: Now, the limits in a race are eliminated when either a candidate's self-funding *or* independent expenditures supporting or opposing a candidate (in the aggregate) 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).

40. The Code's limit-lifting provisions can give rise to an anomalous situation: In a race where all limits on contributions to candidates have been eliminated, every person and organization may give a candidate unlimited amounts and may coordinate with a candidate when making expenditures without limitation – except independent expenditure committees, which remain prohibited from coordinating with candidates or otherwise contributing to them.

Injury to Plaintiffs

41. Plaintiff Dan Proft is a political activist who associates with others for the purpose of communicating with the public about political ideas and candidates for state elective office in Illinois.

42. Mr. Proft would like to raise unlimited funds from like-minded individuals and organizations and, in turn, spend unlimited amounts on communications (such as television and radio advertisements and literature) supporting and opposing candidates for state elective offices.

43. Mr. Proft also would like to be able to communicate and coordinate freely with the candidates he supports because he believes that doing so would make his communications (and the candidates' communications) to the public more effective.

44. The Code, however, does not allow Mr. Proft to do all these things he wishes to do.

45. To associate with others to speak about candidates for office, Mr. Proft must choose between two imperfect alternatives. Under Illinois law, he may either: (1) form a PAC and be subject to limits on the funds he can raise and, except in races where the limits have been lifted, on the contributions and coordinated expenditures he can make; or (2) form an independent expenditure committee and be totally, permanently prohibited from making contributions and coordinated expenditures.

46. Faced with this choice, Mr. Proft elected in 2012 to form Liberty Principles PAC as an independent expenditure committee.

47. Since then, Liberty Principles PAC has raised funds from donors and made independent expenditures in many Illinois legislative races while complying with all of the

Code's restrictions, disclosure requirements, and other rules for independent expenditure committees.

48. In races in which the limits on contributions to candidates have been eliminated under 10 ILCS 5/9-8.5(h) or (h-5), Mr. Proft would like to contribute to, and communicate and coordinate with, the candidates he supports through Liberty Principles PAC.

49. He cannot do so, however, because the Code prohibits independent expenditure committees from making contributions to candidates even when the contribution limits have been eliminated for individuals and every other type of entity.

50. For example, in the 2018 primary election, Liberty Principles PAC made independent expenditures in numerous races in which the limits on contributions to candidates were eliminated under 10 ILCS 5/9-8.5(h-5), including the races for State Representative for the 46th, 49th, 53rd, 56th, 62nd, 82nd, 93rd, 101st, 108th, 109th, 110th, and 115th Districts.

51. In each of those races, after the contribution limits were eliminated for others, Liberty Principles PAC could have and would have coordinated with, or otherwise made contributions to, a candidate in the race if the Illinois Election Code had not forbidden it.

52. Currently, Liberty Principles PAC is planning to make independent expenditures supporting and opposing candidates in numerous state legislative races in the 2018 general election, including the races for State Representative for the 19th, 46th, 55th, 56th, 62nd, 111th, and 112th Districts.

53. Mr. Proft anticipates that, in some or all of those races, the limits on contributions to candidates will be eliminated under 10 ILCS 5/9-8.5(h-5) due to independent expenditures exceeding the (inflation-adjusted) $100,000 threshold.

54. Mr. Proft is certain that the limits on contributions to candidates will be eliminated under 10 ILCS 5/9-8.5(h-5) in at least one of those races due to Liberty Principles PAC's own independent expenditures exceeding the threshold.

55. When the limits on contributions to candidates are inevitably eliminated in some or all of the 2018 general election races in which Liberty Principles PAC participates, Mr. Proft and Liberty Principles PAC would like to begin coordinating with or otherwise contributing to candidates, just as individuals and other types of organizations will be allowed to do.

56. The Election Code will not allow them to do so, however, and they will not do so unless this Court grants them injunctive relief.

57. Mr. Proft has not made coordinated contributions in that race or any race where contribution limits have been lifted, but he would do so if the Code did not prohibit it.

COUNT I

FIRST AMENDMENT

The Illinois Election Code's ban on contributions to candidates by independent expenditure committees in races in which all other limits on contributions to candidates have been eliminated violates Plaintiffs' First Amendment rights to freedom of speech and freedom of association.

58. Plaintiffs incorporate the allegations of all of the above paragraphs in this Count by reference.

59. The United States Supreme Court has recognized only one government interest that can justify campaign-finance restrictions: the prevention of actual or apparent *quid pro quo* corruption. *See Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 155 (7th Cir. 2011).

60. Therefore, in any challenge to campaign-finance restrictions, the government must show, at a minimum, that its restrictions are narrowly tailored to prevent actual or apparent *quid pro quo* corruption. *See McCutcheon v. FEC*, 134 S.Ct. 1434, 1441, 1456-57 (2014).

61. By prohibiting Plaintiffs from contributing to candidates in races in which limits on contributions to candidates have otherwise been eliminated, the Code infringes Plaintiffs' First Amendment rights to free speech and freedom of association because it prohibits them from contributing money to candidates they wish to support, prohibits them from speaking to candidates for public office (and their respective committees) about political issues, and prohibits them from communicating with the public about political issues in the manner they consider to be most effective.

62. No anti-corruption rationale justifies prohibiting Liberty Principles PAC and other independent expenditure committees from making contributions in races in which all other individuals and organizations are allowed to give candidates unlimited contributions under 10 ILCS 5/9-8.5(h) or (h-5).

63. The state cannot show that, in races in which contribution limits have been eliminated under 10 ILCS 5/9-8.5(h) or (h-5), contributions by independent expenditure committees (which the Code prohibits) would pose a greater threat of corruption than the threat posed by contributions by individuals, PACs, parties, corporations, unions, and other associations (which the Code allows in unlimited amounts).

64. Therefore, the state cannot meet its burden to show that the Code's prohibition on contributions by independent expenditure committees in races in which all other limits on contributions to candidates have been eliminated is narrowly tailored to prevent corruption.

65. Therefore, the Code's prohibition on coordinated expenditures by independent expenditure committees in races where the Code's limits on contributions to candidates have been eliminated under 10 ILCS 5/9-8.5(h) or (h-5) violates the First Amendment.

COUNT II

EQUAL PROTECTION

The Illinois Election Code's ban on contributions to candidates by independent expenditure committees in races where all other limits on contributions to candidates have been eliminated violates the Equal Protection Clause of the Fourteenth Amendment.

66. Plaintiffs incorporate the allegations of all of the above paragraphs in this Count by reference.

67. In a race in which contribution limits to candidates have been eliminated under 10 ILCS 5/9-8.5(h) or (h-5), independent expenditure committees and the political donors who are allowed to give candidates unlimited amounts are similarly situated with respect to their contributions' potential to corrupt: Coordinated expenditures or other contributions by an independent expenditure committee would not pose a greater threat of corruption than the unlimited coordinated expenditures and contributions that individuals, ordinary PACs, and other donors may make.

68. No corruption-related difference between independent expenditure committees and other donors justifies banning coordinated expenditures by independent expenditure committees while allowing unlimited coordinated expenditures (and contributions) by the others.

69. Therefore, the Code's prohibition on coordinated expenditures by independent expenditure committees in races where the Code's limits on contributions to candidates have been eliminated violates the Equal Protection Clause of the Fourteenth Amendment.

PRAYER FOR RELIEF

Plaintiffs request that this Court enter judgment in their favor and against Defendants and:

A. Declare that the Illinois Election Code's prohibition against contributions by independent expenditure committees in races in which the Code's other limits on contributions to candidates have been eliminated under 10 ILCS 5/9-8.5(h) or (h-5) violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment on its face and as applied to Plaintiffs;

B. Enter a preliminary injunction and a permanent injunction preventing Defendants from enforcing the Illinois Election Code's prohibition on contributions by independent expenditure committees against Plaintiffs and any other independent expenditure committee with respect to any contributions they make in any race in which limits on contributions to candidates have been eliminated under 10 ILCS 5/9-8.5(h) or (h-5);

C. Award Plaintiffs their reasonable attorneys' fees and costs under 42 U.S.C. § 1988(b); and

D. Award Plaintiffs any other relief the Court deems just and proper.

Dated: July 18, 2018

Respectfully Submitted,

DAN PROFT and
LIBERTY PRINCIPLES PAC

By: /s/ Patrick Hughes

Patrick J. Hughes (#6225212)
Jeffrey M. Schwab (#6290710)
James J. McQuaid (#6321108)
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
Telephone (312) 263-7668
Facsimile (312) 263-7702
phughes@libertyjusticecenter.org
jschwab@libertyjusticecenter.org
jmcquaid@libertyjusticecenter.org

Attorneys for Plaintiffs

VERIFICATION

I, Dan Proft, declare under penalty of perjury, on behalf of myself and Liberty Principles PAC, that the allegations in this Complaint are true and correct to the best of my knowledge, except as to matters stated to be on information and belief, and as to such matters I certify that I verily believe the same to be true.

/s/ 
Dan Proft

Dated: 7/12/2018

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

DAN PROFT, et al.,	)	Docket No. 18 C 04947
	)	
Plaintiffs,	)	Chicago, Illinois
	)	October 9, 2018
v.	)	2:03 p.m.
	)	
LISA MADIGAN, et al.,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS - Hearing
BEFORE THE HONORABLE VIRGINIA M. KENDALL

APPEARANCES:

For the Plaintiffs: LIBERTY JUSTICE CENTER by
MR. JEFFREY M. SCHWAB
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603

For the Defendants: ILLINOIS ATTORNEY GENERAL'S OFFICE by
MR. THOMAS A. IOPPOLO
MS. SARAH HUGHES NEWMAN
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601

Court Reporter: GAYLE A. McGUIGAN, CSR, RMR, CRR
Federal Official Court Reporter
219 South Dearborn, Room 2318-A
Chicago, Illinois 60604
(312) 435-6047
Gayle_McGuigan@ilnd.uscourts.gov

THE COURT: I'm just so glad I don't have to do an election.

MR. IOPPOLO: Right. You might say it's bad enough, but the Court said there is a distinction between, you know, Judge X directly putting it on somebody and his committee or a committee doing it --

THE COURT: So isn't it your position --

MR. IOPPOLO: So that's the underinclusiveness part. Yes.

THE COURT: Isn't it that they have a likelihood, these independent committees, actually pose greater threat of corruption? Or not?

MR. IOPPOLO: It may be. And, you know, I don't have --

THE COURT: Because they don't have the restriction?

MR. IOPPOLO: Here's what I -- I would say they can amass more money than a PAC --

THE COURT: Now, why is that? He --

MR. IOPPOLO: They have unlimited -- they have unlimited --

THE COURT: Do we know that to be the case in reality?

MR. IOPPOLO: Empirically?

THE COURT: Yes. Not really?

MR. IOPPOLO: All I -- all I know is, from their complaint, that when Mr. Proft's organization lists about eight

or ten state representative districts that he says the caps are going to be blown and he -- his group personally will do it, just on his own resources, I got to think they have some money.

THE COURT: Okay.

MR. IOPPOLO: So, in any event, I'll give you a couple of scenarios where I think the problem manifests itself or why the state still has an interest in maintaining the fact that independent expenditure committees, we should remain independent and should not coordinate free of government regulation, even in this situation where everybody else is free of government regulation because the caps have been lifted.

I think defendants are starting from the perspective of let's assume the caps are -- have been lifted, and now justify why one group can't participate in that. That's the wrong perspective.

You have to start from the perspective of let's look at reality before they're lifted and see where the potential for harm is.

The econ -- the law and economists talk about the distinction between looking at something ex-ante and ex-post, all right? So let's look at it ex-ante. They're looking at it ex-post.

Ex-ante. We have that baseline. We have, let's say, a rich guy. He wants to -- he wants to give a ton of money to Candidate A who is running for governor. He would like to give

him a million dollars. He can only give 10,000 in the normal course of events.

So how about I'll give 150,000 -- I'll give 250,000 to an independent -- I won't say Mr. Proft's organization, I'll just keep it hypothetical -- he wants to give $250,000 to an independent expenditure committee. Okay? He does that. He can give -- he can give 20 million. He gives 250. The independent expenditure committee spends it. That lifts the cap. Now everybody can give whatever they want. The rich guy can now give another $750,000 directly to the candidate. It's legal. That's legal. Okay?

But -- but we still have one restraint left. That independent expenditure committee, as much as it might want to jump into the fray and give money directly to the candidate, because of its independence, because it's not -- because the nature of it is it doesn't coordinate generally, that's the baseline that it had when we went into this, and it keeps that baseline in this situation.

Let's do another scenario that's even more, I think, suggestive.

Let's suppose that that -- let's suppose the independent expenditure committee -- or let's say this rich guy, this rich guy sees a novice first-term state rep running for election. Okay? And he wants to influence him or her or wants to support him or her. Let's say he has one issue that's

really important to him. Pick an issue: Second Amendment rights, property taxes, medicaid expansion, whatever it is. Okay? He gives -- he would love to give that state rep a lot of money. He can't. He could on his own. He could on his own spend more than $100,000 on electioneering communications on his own. He could go buy an ad in the *Chicago Tribune* for $100,000. That would lift the cap. Okay?

But suppose he doesn't want to do that. He's not sophisticated about media. He doesn't want his name out there that much. So he does this: He takes that 100,000 and gives it to an organization like Mr. Proft, okay? Mr. Proft spends it. And that lifts the cap.

But suppose the rich guy -- suppose the rich guy is not just a -- he's not a disinterested vessel of policy wonkiness. Suppose he really wants Mr. Proft to develop a relationship with that candidate -- I hate to use Mr. Proft's name -- hypothetically, the independent expenditure person, to develop a relationship with that candidate on Second Amendment rights or whatever it is.

The money is important. But he thinks to himself, look, that independent expenditure committee guy, he's got media contacts, he's sophisticated, he knows how to work the system. Let's have him get a relationship with that novice candidate.

And because I can do that with $100,000 and it lifts

the cap, now that supposedly disinterested vessel of policy wonkiness, call it the independent expenditure committee, gets to involve itself in Representative A's campaign, not just this time, but two years from now or four years from now or whatever.

Now, I think Illinois can say in that scenario the rich guy can do a lot of things with his own money, the independent campaign committee can do a lot with its own money, and has a First Amendment right to do a lot with its own money; but when it crosses the line of that sort of money going over to directly communicate and coordinate with Candidate A's campaign, the government has a right to regulate that and to supervise that.

So when plaintiffs say that, well, everybody else is doing it, there's no potential for -- the same corruption potential exists for everybody and, therefore, let's just -- let's just have free rein, you can't -- you have to look at it sort of in the way a manipulative, shrewd person might look at it ex-ante, not ex-post. Okay?

So, you know, the Seventh Circuit has said -- has said in *Liberty PAC*, you know, the fact that you increase somebody else's constitutional rights doesn't necessarily mean you have an automatic claim to have an increase in your First Amendment rights. That broad principle applies here as well.

And I think -- as I think of the scenarios, you know,

you might -- I mean, I can think of other -- suppose the candidate himself is really rich and wants to self-fund. And by doing that, that rich candidate gets sort of a false multiplier by getting the advantages of the services of that independent expenditure committee that he would otherwise be shut out from. Not necessarily illegal, but, again, the legislature might say that is, you know, it's one step beyond.

And unless we have an absolute -- unless we have to -- you know, are we faced with the situation that it's an all-or-nothing proposition, when we lift the lid up partway to level the playing field, we have to, you know, dynamite the lid all the way to the roof so that everybody can do it? So that's the justification for this. And --

THE COURT: And what level of scrutiny are you applying to your analysis?

MR. IOPPOLO: I think the intermediate that the Seventh Circuit said, that, you know, it's sort of a narrow -- it's -- I don't have the --

THE COURT: It's okay.

MR. IOPPOLO: It's in there. It's in there. Campaign con -- page -- this is a slip opinion.

Campaign contribution limits are generally permissible if the government can establish that they are, quote, closely drawn to serve a, quote, sufficiently important interest, and the prevention of actual or apparent *quid pro quo* corruption is

issues in this case.

THE COURT: Okay. Any jumping in? Do you want to say anything else?

MR. IOPPOLO: I think I've --

THE COURT: All right. Well, it was very helpful. Thank you. I appreciate it. I appreciate the hypotheticals, especially because it's nice to put it into context. I appreciate that. And I'll rule soon by mail. Okay?

Have a great afternoon. Thanks.

LAW CLERK: All rise. Court is adjourned.

(Proceedings concluded at 2:58 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ GAYLE A. McGUIGAN *December 17, 2018*

Gayle A. McGuigan, CSR, RMR, CRR Date
Official Court Reporter