No. 18-3475

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAN PROFT and LIBERTY PRINCIPLES PAC, Plaintiffs-Appellants, v. KWAME RAOUL, Attorney General of Illinois; WILLIAM CADIGAN; JOHN KEITH; ANDREW CARRUTHERS; IAN LINNABARY; WILLIAM McGUFFAGE; KATHERINE O'BRIEN; CHARLES SCHOLZ; and CASANDRA WATSON, Defendants-Appellees.	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 1:18-cv-04947 The Honorable VIRGINIA M. KENDALL, Judge Presiding.

BRIEF OF DEFENDANTS-APPELLEES

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JURISDICTIONAL STATEMENT

The jurisdictional statement of Plaintiffs-Appellants Dan Proft and Liberty Principles PAC is not complete and correct. Defendants-Appellees Illinois Attorney General Kwame Raoul and Illinois State Board of Elections members William Cadigan, John Keith, Andrew Carruthers, Ian Linnabary, William McGuffage, Katherine O'Brien, Charles Scholz, and Casandra Watson provide this statement as required by Circuit Rule 28(b).

Plaintiffs filed an action in district court under 42 U.S.C. § 1983, alleging that one of the campaign contribution limits in the Illinois Election Code violated the First and Fourteenth Amendments to the United States Constitution in certain circumstances. Doc. 1 (A22-36). Plaintiffs sought a declaration that the challenged limit was unconstitutional and an injunction barring defendants from enforcing it in the future. *Id.* at 13 (A34). The district court had subject matter jurisdiction over plaintiffs' action under 28 U.S.C. § 1331 because it raised a federal question. While plaintiffs' claims normally would be moot because the relevant electoral races have concluded, a statement by plaintiffs that they intend to make contributions in excess of the challenged contribution limit in the future is sufficient to overcome mootness, *see Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 149 (7th Cir. 2011), and also establishes that their claims fall within the mootness exception for disputes that are capable of repetition yet evading review, *see FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Because plaintiffs have stated that they intend to make such contributions in the future, *see* AT Br. 22, their claims are not moot.

On October 24, 2018, the district court dismissed plaintiffs' action under Fed. R. Civ. P. 12(b)(6), Doc. 35 (A1-20), thereby disposing of all claims against all parties. A separate judgment order was entered on the district court docket under Fed. R. Civ. P. 58 that same day. Doc. 36 (A21). No motion to alter or amend the judgment was filed. Plaintiffs filed a notice of appeal on November 20, 2018, Doc. 37, which was timely under 28 U.S.C. § 2107(a) and Fed. R. App. P. 4(a)(1)(A) because it was filed within 30 days of the judgment's entry. This court has jurisdiction over plaintiffs' appeal from a final judgment under 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether the provision of the Election Code barring independent expenditure committees from contributing to a candidate's campaign is closely drawn to serve the State's interest in preventing actual and apparent quid pro quo corruption in those races where the general contribution limits have been removed.

STATEMENT OF THE CASE

Statutory Background

Illinois, like most States, sets limits on how much money different types of donors may contribute to a candidate's campaign. *See* 10 ILCS 5/9-8.5; State Limits on Contributions to Candidates 2017-2018 Election Cycle, National Conference of State Legislatures, http://bit.ly/2IbvbYu. Specifically, individuals may contribute $5,000; corporations, unions, and associations may donate $10,000; and political action committees (PACs) may provide $50,000 to a primary or general election candidate. 10 ILCS 5/9-8.5(b). Political parties may give between $50,000 and $200,000 to a primary candidate, depending on the office, and may make unlimited contributions during a general election. *Id.*

The candidate-contribution caps are complemented by limits on the amount of money that may be contributed to a PAC or political party per election cycle. *See* 10 ILCS 5/9-8.5(c-d). In general, those entities may not accept more than $10,000 from an individual; $20,000 from a corporation, union, or association; or $50,000 from a PAC. *Id.*[*]

Independent expenditure committees (IECs) may be formed "for the exclusive purpose of making independent expenditures," 10 ILCS 5/9-3(d-5), which are defined as expenditures that are "not made in connection, consultation, or concert with or at the request or suggestion of" a candidate, 10 ILCS 5/9-1.15. Unlike PACs and

[*] Although the limits on contributions to candidates, PACs, and political parties have been increased to account for inflation, *see* 10 ILCS 5/9-8.5(g) (requiring biennial adjustments), defendants use the pre-adjusted 2011 figures throughout this brief for simplicity's sake.

political parties, which are subject to contribution limits, *see* 10 ILCS 5/9-8.5(c-d), IECs may accept unlimited contributions from any source, "provided that" they do not make any contributions to a candidate, PAC, or political party, 10 ILCS 5/9-3(d-5), 9-8.5(e-5).

The candidate-contribution limits cease to apply to a particular race whenever a candidate's self-funding or independent expenditures in support of or against a candidate exceed certain thresholds. 10 ILCS 5/9-8.5(h), (h-5), (h-10) ($250,000 for statewide offices, $100,000 for other offices). The limits on contributions to PACs and political parties, however, remain in place even when the candidate-contribution caps are lifted. *See id.* (permitting candidates to "accept contributions in excess of any contribution limits imposed by subsection (b)" when self-funding or independent expenditure standards are met).

Procedural Background

Proft, a radio host, political consultant, and political activist, founded Liberty Principles PAC as an IEC and is its chairman and treasurer. Doc. 1 at 2-3 (A23-24). Plaintiffs filed this action in district court under section 1983, alleging that the part of the Election Code barring IECs from making contributions to a candidate, PAC, or political party violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment in those races where the base limits on contributions to candidates have been lifted. *Id.* at 10-12 (A31-33).

Plaintiffs filed a motion for a preliminary injunction to prevent defendants from enforcing the bar on contributions by IECs in races where the candidate

contribution limits are removed. Doc. 13. Plaintiffs argued that they were likely to succeed on the merits of their claims because the State's anti-corruption interests did not justify prohibiting IECs from contributing to candidates when all other entities could make unlimited candidate contributions. *Id.* at 11-13.

Defendants filed a combined motion to dismiss and response to plaintiffs' preliminary injunction request. Doc. 19. Pointing out that IECs, unlike PACs and political parties, could solicit unlimited contributions from any source, defendants contended that plaintiffs could not succeed on their equal protection claim because IECs were not similarly situated to PACs or political parties. *Id.* at 9-11. Defendants also asserted that enforcing the contribution bar against IECs furthered the State's anti-corruption interests, even when the candidate contribution limits have been removed for other donors, because otherwise IECs could circumvent the usual limits by making enough independent expenditures to remove the caps. *Id.* at 12-15. Defendants explained that the State's overall campaign-finance framework depended on ensuring that IECs were, in fact, "independent." *Id.* at 7-10.

Plaintiffs responded that the contribution bar did not serve the State's anti-corruption interests when the usual contribution limits were lifted because, in that circumstance, there were no longer any limits to circumvent. Doc. 25 at 8-10. They also denied that the differences between how IECs, PACs, and political parties are funded was relevant to the constitutional analysis. *Id.* at 11-12.

Defendants replied that IECs were fundamentally different from individuals, PACs, and political parties because they could at all times accept unlimited

contributions from any source. Doc. 31 at 3-4. Defendants also noted this court's observation that claims, like plaintiffs', asserting that a contribution limit is underinclusive – that it restricts too little of another person's speech – "occupy difficult theoretical terrain," and argued that the contribution ban was not deprived of its constitutionality when the base limits were lifted. *Id.* at 5-6 (citing *Ill. Liberty Principles PAC v. Madigan*, 904 F.3d 463, 473 (7th Cir. 2018), *cert denied*, 139 S. Ct. 1544 (Mem.) (Apr. 15, 2019)).

The district court dismissed plaintiffs' action, holding that the contribution ban was closely drawn to serve the State's anti-corruption interests. Doc. 35 (A1-20). The court agreed with defendants that absent the ban an IEC could circumvent the base candidate-contribution limits by raising unlimited funds, making enough independent expenditures to lift the caps, and then contributing directly to a candidate. *Id.* at 13-14 (A13-14). Recognizing that IECs, unlike PACs and political parties, could accept unlimited contributions, the court concluded that the State's campaign-finance system depended on ensuring their independence from candidates. *Id.* at 20 (A20).

Plaintiffs appealed. Doc. 37.

SUMMARY OF ARGUMENT

The contribution ban is constitutional because it is closely drawn to serve the State's interest in preventing actual and apparent quid pro quo corruption. Although plaintiffs urge this court to apply strict scrutiny, the contribution ban, like any other contribution limit, is valid so long as it is closely drawn to the State's anti-corruption interests. The United States Supreme Court, in fact, has never held that the constitutional test changes depending on whether the challenged limits apply equally to all donors or vary by type of contributor. And the same standard governs no matter if a plaintiff brings a claim under the First Amendment or the Equal Protection Clause.

The contribution ban is closely drawn to serve the State's anti-corruption interests because it prevents IECs from being used as a tool to circumvent the usual candidate contribution limits and protects the limits on contributions to PACs and political parties as well. The ban prevents circumvention of the base candidate-contribution limits by ensuring that IECs do not lift those limits through their own spending. Moreover, allowing IECs to contribute to candidates would provide a path for circumventing the limits on contributions to PACs and political parties because IECs may accept unlimited donations by virtue of their purported independence.

ARGUMENT

A district court may grant a Rule 12(b)(6) motion to dismiss if the plaintiff's complaint "fail[s] to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). To state a claim on which relief may be granted, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell At. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This court reviews the dismissal of a claim *de novo*, construing all well-pleaded facts and all reasonable inferences therefrom in the light most favorable to the plaintiff. *Huri v. Office of the Chief Judge of the Circuit Court of Cook Cty.*, 804 F.3d 826, 829 (7th Cir. 2015). The district court correctly dismissed plaintiffs' action because the contribution ban is closely drawn to serve the State's interest in preventing actual and apparent quid pro quo corruption.

I. Contribution limits are permissible so long as they are closely drawn to serve the State's anti-corruption interests.

Campaign contributions and independent expenditures in support of a candidate or position both implicate First Amendment freedoms of speech and association. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). But unlike expenditure limits, which "necessarily reduce[ ] the quantity of expression," a contribution limit places "only a marginal restriction" on the contributor's ability to communicate and "does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* at 20-21. Reflecting the differing burdens those two types of laws impose on political speech, the Supreme Court has held that expenditure limits receive strict scrutiny while contribution limits are permissible so long as they are "closely drawn" to serve a sufficiently important government interest. *McCutcheon v. FEC*, 572 U.S.

185, 197 (2014) (plurality opinion). The government's interest in preventing actual and apparent quid pro quo corruption is sufficiently weighty to justify contribution limits that are closely drawn to achieve that objective. *Id.* at 206-07.

The closely drawn standard is a form of intermediate scrutiny under which contribution limits are "generally permissible" if they are closely drawn to serve a sufficiently important interest. *Wis. Right to Life*, 664 F.3d at 152; *see also Buckley*, 424 U.S. at 25 ("Even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.") (internal quotation omitted). That standard accords due deference to legislative choices about campaign contributions in light of the threat that corruption poses to democratic integrity. *FEC v. Beaumont*, 539 U.S. 146, 155 (2003). The contribution ban for IECs, like any other contribution limit, is valid so long as it is closely drawn to the State's interest in preventing actual and apparent quid pro quo corruption. *See id.* at 161-63 (holding bans are subject to same closely drawn standard as other limits).

Plaintiffs argue, however, that the contribution limit at issue here should receive strict scrutiny because it treats IECs differently from other prospective donors. AT Br. 11-12. But the Supreme Court has never held that the constitutional standard changes depending on whether a contribution limit applies across the board or sets different caps for different types of donors. To the contrary, the Court upheld a system of contribution limits that set higher caps for some types of entities than

others when it adopted the closely drawn standard in *Buckley*. *See* 424 U.S. at 35-36. And this court recently reviewed Illinois's base contribution limits under the closely drawn test despite the plaintiffs' claim that strict scrutiny was appropriate, *see Ill. Liberty PAC*, 904 F.3d at 469 n.3, and held that the limits met that standard, *see id.* at 471.

To the extent that plaintiffs argue that strict scrutiny applies because they alleged a violation of the Equal Protection Clause, *see* AT Br. 11-12, their decision to reframe their First Amendment claim as an equal protection challenge does not alter the legal standard. Rather, those courts that have addressed the issue have held that strict scrutiny is appropriate to review the equal protection claim "only when a First Amendment analysis would itself have required such scrutiny." *Wagner v. FEC*, 793 F.3d 1, 32 (D.C. Cir. 2015); *see also id.* ("We reject this doctrinal gambit, which would require strict scrutiny notwithstanding the Supreme Court's determination that the 'closely drawn' standard is the appropriate one under the First Amendment."); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 601-03 (8th Cir. 2013) (declining to apply strict scrutiny in context of equal protection challenge to ban on contributions by corporations); *1A Auto, Inc. v. Dir. of Office of Campaign & Political Fin.*, 105 N.E.3d 1175, 1191 (Mass. 2018), *cert denied*, 2019 WL 2166408 (May 20, 2019) ("In essence, the plaintiffs seek, by reframing their First Amendment challenge, to effect an end run around the Supreme Court's well-established distinction between independent expenditure limits, which trigger strict scrutiny, and contribution limits, which do not.").

The decisions plaintiffs cite in favor of strict scrutiny, *see* AT Br. 11-12, do not support departing from the closely drawn standard. First, the Supreme Court applied strict scrutiny in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010), because it was reviewing independent expenditure limits, which are always subject to strict scrutiny. Second, while the Eighth Circuit applied strict scrutiny to contribution limits in *Russell v. Burris*, 146 F.3d 563, 571-72 (8th Cir. 1998), it did so under the First Amendment and pursuant to that circuit's mistaken interpretation of *Buckley*, which the Supreme Court later corrected in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 384-88 (2000) (granting certiorari to review Eighth Circuit's reading of *Buckley* as requiring strict scrutiny and clarifying closely drawn standard governs). Third, the district court in *Protect my Check, Inc. v. Dilger*, 176 F. Supp. 3d 685, 691 (E.D. Ky. 2016), subjected a contribution limit to strict scrutiny only after the parties had stipulated to that standard. Thus, *Austin* did not deal with contribution limits, *Russell*'s error has since been corrected, and the district court's use of strict scrutiny in *Protect My Check* rested on a misguided stipulation by the parties. Plaintiffs' argument in favor of strict scrutiny therefore lacks any persuasive support, and this court should continue to adhere to Supreme Court precedent holding that contribution limits are permissible so long as they are closely drawn to serve the State's anti-corruption interests.

II. The contribution bar is closely drawn to serve the State's anti-corruption interests because it prevents circumvention of valid contribution limits.

The government's interest in preventing actual and apparent quid pro quo corruption is sufficiently weighty to justify contribution limits that are closely drawn to achieve that goal. *See McCutcheon*, 572 U.S. at 206-07 (plurality opinion). To that end, a State may enact complementary laws that are closely drawn to combat circumvention of its valid contribution limits. *See FEC v. Col. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) (party's coordinated expenditures "may be restricted to minimize circumvention of contribution limits"); *see also Ill. Liberty PAC*, 904 F.3d at 471 (noting validity of anti-circumvention rationale). Plaintiffs, moreover, agree that the State has a substantial interest in preventing circumvention of its valid contribution limits. AT Br. 14.

As explained, Illinois has set base limits on the amount of money that different entities may contribute to a candidate, 10 ILCS 5/9-8.5(b), and complemented them with caps on contributions to PACs and political parties, 10 ILCS 5/9-8.5(c-d), and the option to form an IEC, which may accept unlimited contributions from any source so long as it does not make any contributions to a candidate, PAC, or political party, 10 ILCS 5/9-3(d-5), 9-8.5(e-5). Plaintiffs do not challenge the constitutionality of the base limits, which have been upheld by this court, *see Ill. Liberty PAC*, 904 F.3d at 471, or the limits on contributions to PACs and political parties. In fact, plaintiffs concede that barring IECs from contributing to candidates is a valid way to combat circumvention of the base limits in most circumstances. AT Br. 15-16.

Plaintiffs, however, maintain that the anti-corruption interests supporting the contribution ban evaporate when the base limits are removed because there are no longer any limits to circumvent. *Id.* at 16. But plaintiffs are mistaken because the contribution ban ensures that IECs are not used as a vehicle for removing the base limits and protects the contribution limits applicable to PACs and political parties.

To begin, the contribution ban prevents IECs from circumventing the base limits through their own spending. As the district court recognized, *see* Doc. 35 at 13-14 (A13-14), an IEC could take advantage of its capability to accept unlimited contributions, which was conferred based on its declaration that it was formed to make independent expenditures, *see* 10 ILCS 5/9-3(d-5), then spend enough money in support of or against a particular candidate to eliminate the base limits, *see* 10 ILCS 5/9-8.5(h-5), (h-10). If IECs were allowed to contribute to candidates after the base limits were eliminated, the cap-lifting provision would create an incentive to use IECs to circumvent those limits by harnessing the fundraising advantages they enjoy by virtue of their independent status. *See Wis. Right to Life*, 664 F.3d at 154 (States may not limit "fundraising by groups that engage in independent spending on political speech"). Indeed, that is exactly what plaintiffs intended to do had a preliminary injunction been granted by the district court. *See* Doc. 13 at 7 (stating plaintiffs are "certain" contribution limits would be lifted "due to Liberty Principles PAC's own independent expenditures exceeding the threshold"). Plaintiffs' claim that no anti-corruption interests are furthered by enforcing the contribution ban after the base limits have been lifted, *see* AT Br. 14-16, thus overlooks the ban's

critical role in preventing IECs from being used to eliminate, and circumvent, the base limits in the first place.

While preventing IECs from circumventing the base contribution limits through their own spending is by itself a sufficient justification for holding that the contribution ban is closely drawn to serve the State's anti-corruption interests, the prohibition also serves the purpose of combatting circumvention of the limits on contributions to PACs and political parties. Unlike IECs, PACs and political parties are subject to limits on the contributions they may accept, *see* 10 ILCS 5/9-8.5(c-d), and those limits remain in place after the base limits on candidate contributions are removed, *see* 10 ILCS 5/9-8.5(h), (h-5), (h-10). There is no exception to the limits on contributions to PACs and political parties for donations that are made with the express purpose of being used in races where the candidate contribution limits have been lifted. And that is for good reason, because it would be difficult to ensure that a PAC actually used a donation for that purpose. *See Ala. Democratic Conference v. Attorney Gen. of Ala.*, 838 F.3d 1057, 1064-65 (11th Cir. 2016) (holding that keeping separate bank accounts for contributions and expenditures is insufficient to protect against actual and apparent quid pro quo corruption); *see also Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 444 (5th Cir. 2014); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 143 (2d Cir. 2014); *but see Republican Party of N.M. v. King*, 741 F.3d 1089, 1097 (10th Cir. 2013).

In any event, plaintiffs do not challenge the validity of the contribution limits to PACs and political parties, and it is now well settled that States may place limits

on contributions to groups that, in turn, contribute to candidates, *see Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981) (upholding contribution limits to PACs); *Ala. Democratic Conference*, 838 F.3d at 1064-65 (State's anti-corruption interests "justify its decision to regulate political contributions and those transactions, including donations to PACs, that relate to or appear to relate to such contributions"). If IECs were allowed to contribute to candidates after the base limits were removed, then the contribution limits that apply to PACs and political parties could be circumvented through IECs, which are exempted from any such limits due to their declared independence. The contribution ban thus serves the additional purpose of preventing circumvention of the contribution limits applicable to PACs and political parties.

Although plaintiffs argue that defendants did not present enough evidence to establish that the contribution ban was closely drawn to support its anti-corruption interests, *see* AT Br. 17-19, the validity of the ban was apparent from the pleadings and required no further factual development. Indeed, the closely drawn standard imposes no barrier to a district court's ability to dismiss a claim. *See, e.g.*, *Ill. Liberty PAC*, 904 F.3d at 466 (affirming dismissal of challenges to base contribution limits under Fed. R. Civ. P. 12(b)(6)). Plaintiffs, moreover, admitted in their preliminary injunction motion that they intended to circumvent the base limits in at least one race by spending enough money to lift the caps and then contribute directly to a candidate if the contribution ban were eliminated. *See* Doc. 13 at 7. And it is clear from the Election Code's structure that such an outcome could follow if IECs were allowed to contribute to candidates after the base limits were eliminated.

In sum, Illinois has enacted a campaign-finance system that is closely drawn to serve its interest in preventing actual and apparent quid pro quo corruption and that reflects the basic distinction between contributions and expenditures. The State has placed limits on the amount of money that donors may contribute to a candidate and on how much they may contribute to a PAC or political party. At the same time, the Code provides for IECs, which allow groups to raise and expend unlimited funds on political speech, "provided that" those communications are made independently from a candidate, PAC, or political party. The contribution ban is an integral part of that system because it enforces the limits on contributions applicable to candidates, PACs, and political parties, and ensures that IECs are, in fact, independent.

CONCLUSION

For the foregoing reasons, Defendants-Appellees ask this court to affirm the district court's judgment.

Respectfully submitted,

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July 2, 2019

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2013, in 12-point Century Schoolbook BT font, and complies with Federal Rule of Appellate Procedure 32(a)(7)(A) in that the brief is 18 pages.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 2, 2019, I electronically filed the foregoing **Brief of Defendants-Appellees** with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

I further certify that the other participant in this appeal is a CM/ECF user and will be served by the CM/ECF system:

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