No. 18-3475

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAN PROFT, *et al.*

Plaintiffs-Appellants,

v.

KWAME RAOUL,
Attorney General of Illinois, in his 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

APPELLANTS' REPLY BRIEF

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JURISDICTIONAL STATEMENT

Defendants allege that Plaintiffs' Jurisdictional Statement is not complete and correct. Defendants raise a potential mootness issue that was never raised or addressed in the proceedings below. However, as Defendants admit, the case is not moot. Plaintiffs accept the other statements in Defendants' Jurisdictional Statement, specifically that this Court has jurisdiction over an appeal from a final judgment under 28 U.S.C. 1291, and that Plaintiffs have appealed both the order on October 24, 2018 (Doc. 35) and the judgment (Doc. 36). All parties agree that the Court has jurisdiction over Plaintiffs' timely appeal of the district court's final judgment.

ARGUMENT

I. The ban on contributions by independent expenditure committees is subject to strict scrutiny because it bans contributions by one type of speaker while allowing every other speaker to make unlimited contributions.

The Illinois Election Code's ban on contributions to candidates by independent expenditure committees when the Code applies no limits on contributions by any other type of donor is subject to strict scrutiny. Defendants point out that the Supreme Court has never held that specific contribution limits that favor some types of donors over others are subject to strict scrutiny. (Appellees Br. at 10.) But this case is not a challenge to specific contribution limits that apply differently to some donors than to others. This case challenges a law that provides *no contribution limits* for all donors except that it completely *bans* contributions to candidates by one type of donor – independent expenditure committees. In other words, the Code

here "distinguish[es] among different speakers, allowing speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Such laws are subject to strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015).

Defendants focus on cases involving contribution limits – where speakers are allowed to make contributions but the law provides different limits on the amount that certain types of speakers can provide to a candidate – such as *Buckley v. Valeo,* 424 U.S. 1 (1976), and this Court's decision in *Illinois Liberty PAC v. Madigan,* 904 F.3d 463, 471 (7th Cir. 2018). (Appellees Br. at 11.) But those cases are inapposite.

In *Illinois Liberty PAC*, this Court found that plaintiffs' First Amendment challenge to the Illinois Election Code's different contribution limits for different donors should be understood as "a contention that the [Election Code] is fatally underinclusive. In other words, Liberty PAC essentially argues that Illinois's 'failure to restrict other speech equally damaging to [its anticorruption interest] undercuts [its] position' that the limits on individual contributions are closely drawn to prevent corruption or its appearance." *Id*. at 470 (*quoting Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015)). This Court, citing *Buckley*, noted that "[t]he Supreme Court's campaign-finance cases plainly foreclose any argument that the [Election Code's] contribution limits for individual donors are too low or that the limits for other donors are too high." *Id*. at 466.

In this case, however, where the Code has removed all contribution limits to candidates for all speakers – except that it prohibits independent expenditure committees from making any contributions to candidates – Plaintiffs are not

challenging contribution limits as too high or underinclusive. Plaintiffs challenge the complete ban of contributions by one type of speaker while the Code provides no limits on contributions by everyone else. The issue in this case is not whether the government can justify different contribution limits for different speakers, but whether the government can justify completely banning one type of speaker from making contributions while placing no limits on anyone else. In situations where a law prohibits some speakers, while allowing others, the Supreme Court has applied strict scrutiny. *Reed*, 135 S. Ct. at 2230.

Therefore, the Court should apply strict scrutiny to the Code's prohibition on contributions to candidates by independent expenditure committees when the Code simultaneously provides no limits on contributions by any other types of donors.

II. The Code's ban on contributions to candidates by independent expenditure committees in races where contribution limits have otherwise been eliminated is not a narrowly tailored or closely drawn means of preventing quid pro quo corruption.

Regardless of the level of scrutiny that this Court applies, the Code's ban on contributions by independent expenditure committees in races where contribution limits have otherwise been eliminated is not closely drawn to serve the government's interest in preventing actual or apparent quid pro quo corruption.

Defendants assert that "the contribution ban prevents IECs from circumventing the base limits through their own spending." (Appellees Br. at 14.) This statement is simply not true. Indeed, it is a *feature* of the Code that the base limits be removed when aggregate independent expenditures in a particular race exceed certain limits. 10 ILCS 5/9-8.5(h-5). "If a[n] . . . independent expenditure committee makes

independent expenditures [in a certain amount] . . . all candidates for that office in that election . . . shall be permitted to accept contributions in excess of any contribution limits imposed by subsection (b).” Defendants attempt to justify the contribution ban on independent expenditure committees by asserting the “ban’s critical role in preventing IECs from being used to eliminate . . . the base limits in the first place” (Appellees Br. at 14-15) is contradicted by the Code itself. Indeed, the Code is set up for the very purpose of eliminating the base limits based on, in part, independent expenditures made by independent expenditure committees.

In general, the Code’s ban on independent expenditure committees making contributions to candidates does serve to prevent independent expenditure committees from circumventing the contribution limits to candidates in races where the Code has *not* eliminated the ordinary contribution limits by other kinds of donors. But that justification does not apply where those contribution limits are eliminated. In those circumstances, the contribution ban on independent expenditure committees *does not* serve to prevent such committees from circumventing the contribution limits because the Code has eliminated such limits.

Defendants appear to worry about an independent expenditure committee “tak[ing] advantage of its capability to accept unlimited contributions . . . then spend[ing] enough money in support of or against a particular candidate to eliminate the base limits.” (Appellees Br. at 14.) Defendants assert: “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." *Id.* But Defendants fail to explain how this situation would result in actual or apparent quid pro quo corruption.

First, the concern that the provision would create an incentive to use independent expenditure committees to circumvent the normal limits is not realistic. Independent expenditure committees cannot coordinate with candidates (10 ILCS 5/9-1.15; 10 ILCS 5/9-3(d-5)), so the fear that an independent expenditure committee would coordinate to circumvent the normal limits with a candidate would violate the Code even if Plaintiffs are successful in this case.

In contrast, individuals, corporations, unions, and PAC *can* coordinate with candidates. Defendants ignore the fact that a candidate's self-funding can also result in removing the contribution limits. So while an independent expenditure committee cannot coordinate with a candidate to remove the contribution limits, individuals, corporations, unions, and PACs can coordinate with a candidate to have that candidate self-fund to eliminate the contribution limits and allow individuals, corporations, unions, and PACs to make unlimited contributions to that candidate. Thus, under the law as it currently stands, an individual donor could say to a candidate: "if you self-fund your campaign for only $100,000 [or $250,000 for a statewide office], then I can provide you with way more than the $5,000 I'm currently limited to."

In addition, Defendants' concern ignores the obvious incentive that independent expenditure committees have *not* to lift the contribution limits, since doing so allows

everyone – including donors to a candidate that the committee opposes – to make unlimited contributions to the candidates in a race. Even if Plaintiffs are successful and Plaintiffs could make contributions directly to candidates once the contribution limits are lifted, independent expenditure committees would still likely prefer to make unlimited non-coordinated spending,[1] while competing donors making direct contributions remain subject to the contribution limits.

Indeed, the facts clearly show that the obvious intention of the lifting of the contribution limits when independent expenditures or a candidate's self-funding reached a certain threshold was to intentionally lessen the influence that independent expenditures or a rich self-funded candidate could have on a race. The Code originally applied the contribution limits to all donors, including PACs that only made independent expenditures. But the limits as applied to independent expenditures were held unconstitutional in *Personal PAC v. McGuffage*, 858 F. Supp. 2d 963 (N.D. Ill. 2012). It was only after the *Personal PAC* decision that the General Assembly amended the Code to provide that the contribution limits to candidates on all donors (except independent expenditure committees) were completely eliminated in a race where independent expenditures exceeded a certain aggregate amount. Defendants now claim that the provision of law obviously

[1] Defendants' assertion that Plaintiffs admitted that they "intended" to lift the contribution limits due to their own independent expenditures implied that Plaintiffs were seeking some advantage. (Appellees Br. at 14.) But the statement Defendants cite for this assertion simply describes a fact – that in one race Plaintiffs' independent expenditures exceeded the amount necessary to eliminate the contribution limits in that case. There is nothing in the record that explicitly or implicitly states that Plaintiffs plan to eliminate the contribution limits or believe that there is some advantage to doing so. On the contrary, as explained, even if Plaintiffs are successful in this case, there is no advantage to Plaintiffs in doing so.

intended to specifically disadvantage independent expenditure committees was set up to benefit independent expenditure committees. The reality is that independent expenditure committees do not benefit when the contribution limits for everyone are eliminated. And independent expenditure committees would not unfairly benefit from eliminating the ban on those committees making contributions to candidates when the Code permits every other kind of donor to make unlimited contributions.

Finally, Defendants fail to explain how this situation would result in actual or apparent quid pro quo corruption. Defendants assert that, if successful, Plaintiffs would be allowed to remove the contribution limits and then make unlimited contributions to candidates. (Appellees Br. at 14.) But Defendants ignore that the Code already allows everyone else to make unlimited contributions to candidates in that situation. Defendants only response is that because independent expenditure committees can make contributions that could in fact eliminate the contribution limits for everyone, that somehow that gives independent expenditure committees an advantage that could result in quid pro quo corruption. (Appellees Br. at 14.) But Defendants never explain how. And Defendants ignore the fact that, even if Plaintiffs are successful, that before the contribution limits are removed, independent expenditure committees would be prohibited from coordinating with candidates. So there's no way that a candidate and an independent expenditure committee could coordinate to remove the contribution limits to somehow provide a candidate an advantage.

Next, Defendants argue that "the prohibition also serves the purpose of combatting circumvention of the limits on contributions to PACs and political parties." (Appellees Br. at 15-16.) Defendants assert that, even after the contribution limits are removed, PACs are still limited in how much they can *receive*, whereas independent expenditure committees are not. But this argument is irrelevant. All of the money that gets spent during an election cycle comes from political donors; some goes directly to candidates, some goes to PACs, and some goes to independent expenditure committees. When the contribution limits are removed, individual donors can contribute an unlimited amount directly to their candidate of choice. When an individual donor is limited in the total contribution he or she may make to a candidate, that donor might make contributions to a PAC or a political party, which in turn may contribute to the candidate. Thus, the restrictions on contributions to a PAC or a political party prevent additional circumvention on the contribution limits to candidates. But when an individual, corporation, union, or anyone else can make unlimited contributions to a candidate, the reason for those limits, as well as the reason why someone would contribute money to a PAC or political party rather than directly to a candidate, is eliminated. An individual has no limits to circumvent when he or she can contribute unlimited amounts directly to a candidate. In a situation where the Code removes the limits on contributions to a candidate, it doesn't matter that an independent expenditure committee can raise unlimited funds because individual donors will be more inclined to spend their money directly on the candidate, not via a third party. In other words, the argument

that the prohibition on contributions to candidates by independent expenditure committees is justified to prevent the circumvention of the limits on contributions to PACs and political parties does not serve to prevent actual or apparently quid pro quo corruption.

III. Defendants failed to provide adequate evidentiary grounds to justify the ban on contributions to candidates by independent expenditure committees.

As shown above, none of Defendants' arguments attempting to justify the Code's prohibition on contributions to candidates by independent expenditure committees at the time the Code allows all other donors unlimited contributions satisfy the Supreme Court's closely drawn analysis. For that reason, this Court should reverse the district court's opinion denying Plaintiffs' motion for preliminary injunction and granting Defendants' motion to dismiss.

In addition, Defendants have failed to provide any evidentiary grounds to support these justifications. For this additional reason, the Court should reverse the district court.

Under the Supreme Court's closely drawn test, 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 v. Barland*, 664 F.3d 139, 152 (7th Cir. 2011). 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). Here, not only did Defendants fail to provide any evidentiary grounds at all, but, as explained above, Defendants 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.

Defendants assert that the validity of the ban was apparent from the pleadings and required no further factual development and cite *Illinois Liberty PAC v. Madigan,* 904 F.3d at 474-75 as an example of a case dismissing a claim under the closely drawn standard. But as this Court explained in *Illinois Liberty PAC*, "[t]he focus of the 'closely drawn' inquiry in this context is whether the contribution limits for individual donors are above the 'lower bound' at which 'the constitutional risks to the democratic electoral process become too great.'" *Id*. at 470 (*quoting Randall v. Sorrell*, 548 U.S. 230, 248 (2006)). This Court further explained, "[a]s long as the challenged contribution caps exceed that lower boundary, the Supreme Court has 'extended a measure of deference to the judgment of the legislative body that enacted the law.'" *Id*. (*quoting Davis v. FEC*, 554 U.S. 724, 737 (2008)).

But this case does not challenge specific contribution limits that apply differently to some donors versus others. Rather this case challenges a complete prohibition on contributions, while the Code allows unlimited contributions by every other type of donor. In other words, the contribution ban *does not* "exceed that lower boundary," *id*., that entitles Defendants to deference. Indeed, the Supreme Court has found that limits on contributions below $200 for individuals to a candidate were too low to justify deference to the legislative body and required that Court examine the evidentiary basis for such limit. *Randall*, 548 U.S. at 249-50. Here, the Code provides a complete ban on contributions to a candidate by a specific donor

while it allows every other kind of donor unlimited contributions. Thus, to the extent that the Code provides a limit on contributions, that limit is $0, which is well below the $200 that the Supreme Court has indicated is outside of the bounds of contribution limits that receive judicial deference. The Supreme Court requires that Defendants provide some evidentiary basis to justify the ban. Because Defendants admit that they did not provide any such evidentiary basis (Appellees Br. at 16) this Court must reverse the district court's opinion denying Plaintiffs' motion for preliminary injunction and granting Defendants' motion to dismiss.

CONCLUSION

The limit-lifting provisions in 10 ILCS 5/9-8.5(h) and (h-5) unfairly restrict the First Amendment rights of independent expenditure committees by prohibiting them from making the same contributions to candidates allowed by all other types of donors once the contribution limits are lifted. When those limits are lifted, Defendants have no closely drawn basis for banning contributions to candidates by independent expenditure committees. Plaintiffs respectfully request that this Court reverse the judgment of the district court and remand for further proceedings.

Dated: July 24, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the type-volume limitations imposed by Fed. R. App. P. 32 and Circuit Rule 32 for a brief produced using the following font: Proportional Century Schoolbook Font 12 pt body text, 11 pt for footnotes. Microsoft Word 2013 was used. The length of this brief was 2841 words.

/s/ Jeffrey M. Schwab
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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2019, I served the foregoing brief upon Appellee's counsel by electronically filing it with the appellate CM/ECF system.

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