

No. 16-3585

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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ILLINOIS LIBERTY PAC, Political Action Committee registered with the Illinois State Board of Elections; EDWARD BACHRACH; and KYLE McCARTER,	)	On Appeal from the United
	)	States District Court for the
	)	Northern District of Illinois
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	
LISA MADIGAN, Attorney General of the State of Illinois; CHARLES W. SCHOLZ, Chairman of the Illinois State Board of Elections; ERNEST L. GOWEN, Vice-Chairman of the Illinois State Board of Elections; and WILLIAM McGUFFAGE, JOHN R. KEITH, ANDREW K. CARRUTHERS, WILLIAM J. CADIGAN, BETTY J. COFFRIN and CASANDRA WATSON, members of the Illinois State Board of Elections,	)	No. 12 C 5811
	)	
	)	
	)	
	)	
	)	
	)	The Honorable
	)	GARY FEINERMAN,
Defendants-Appellees.	)	Judge Presiding.

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**BRIEF OF DEFENDANTS-APPELLEES**

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## JURISDICTIONAL STATEMENT

Plaintiffs' Jurisdictional Statement is not complete and correct.

Plaintiff Illinois Liberty PAC, along with a contributor to Plaintiff State Senator Kyle McCarter's political campaign, Plaintiff Edgar Bachrach, filed a second amended complaint in the district court pursuant to 42 U.S.C. § 1983 for declaratory and injunctive relief against (in their official capacities only) Defendants Illinois Attorney General Lisa Madigan and the Illinois State Board of Elections' Chairman, Vice-Chairman, and members.<sup>1</sup> R2093-2112 (AT SApp1-20), 2113-2215, 2216-46 (AT SApp21-51). Plaintiffs alleged that the Illinois Disclosure and Regulation of Campaign Contribution and Expenditures Act (Act) (10 ILCS 5/9-8.5) violates the First and Fourteenth Amendments to the United States Constitution by setting lower limits on their campaign contributions than on contributions from political party committees (including legislative caucus committees) and certain other entities, and by allowing unlimited contributions to self-funded candidates and their opponents. *Id.* The district court had jurisdiction over these federal claims under 28 U.S.C. § 1331.

After dismissing all of Plaintiffs' claims except their challenge to the Act's provision concerning legislative caucus committees (R2443-52 (AT App1-10)), the district court conducted a bench trial on that claim and entered judgment against them (R3911-39 (AT App11-39)). On September 7, 2016, a separate judgment order

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<sup>1</sup> The current holders of these offices were automatically substituted for the originally-named officials whom they succeeded in the district court pursuant to Federal Rule of Civil Procedure 25 and on appeal pursuant to Federal Rule of Appellate Procedure 43.

was entered pursuant to Federal Rule of Civil Procedure 58. R3940 (AT App40).

No post-judgment motion was filed.

On October 3, 2016, Plaintiffs filed a notice of appeal (R3941-42), which was timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A) because it was filed within 30 days of the entry of the judgment. This Court therefore has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

## ISSUES PRESENTED FOR REVIEW

1. Whether Plaintiffs failed to state a plausible claim that the Act's limits on their political contributions violate the First Amendment because they are not closely drawn to advance the State's compelling interest in preventing actual or apparent quid pro quo corruption in relation to

(a) the larger limit on contributions from corporations, unions, and similar entities;

(b) the unlimited contributions allowed to self-funded candidates; or

(c) the larger or unlimited contributions allowed from political party committees.

2. Whether Plaintiffs fail to show that the district court committed clear error in finding that the Act's treatment of legislative caucus committees as political party committees, while limiting contributions from Plaintiffs, is closely drawn to the State's compelling interest in preventing actual or apparent quid pro quo corruption.

## STATEMENT OF THE CASE

### Statutory Framework

The Board enforces the Act (10 ILCS 5/9-1 *et seq.*), which prescribes the maximum contribution amounts that “political committees”<sup>2</sup> may accept (10 ILCS 5/9-8.5(b) (AT SApp90), and the Attorney General may prosecute certain criminal violations of the Act (*see, e.g.*, 10 ILCS 5/9-25.2, 5/9-26). In 2017, for example, a “candidate political committee” may accept up to \$5,600 from an individual, \$11,100 from a corporation, union, or similar entity, and \$55,400 from another “candidate political committee” or a “political action committee” (PAC), and although it may accept unlimited contributions from a “political party committee” during general elections, the contribution limits during primary elections vary depending on the office sought. *Id.* Political party committees may accept contributions from individuals (\$11,100), entities (\$22,200), and PACs (\$55,400), and other political party committees and candidate political committees (unlimited). 10 ILCS 5/9-8.5(c) (AT SApp90-91). These contribution limits are eliminated for all candidates in a race if one candidate in that race (or the candidate’s immediate

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<sup>2</sup> The Act’s definition of “political committees” includes “candidate political committees,” “political action committees” (also known as PACs), and “political party committees.” 10 ILCS 5/9-1.8(a) (AT SApp88). This last sub-group includes “legislative caucus committees,” which are defined as those whose purpose is to elect members of the Illinois General Assembly and which may be formed either by a group of at least 5 state senators or 10 state representatives within a caucus or by the House Speaker, the Senate President, and the minority leader in each chamber. 10 ILCS 5/9-1.8(c). A candidate for the General Assembly may accept contributions from only one legislative caucus committee in each election cycle. 10 ILCS 5/9-8.5(b) (AT SApp90).

family member(s)) contributes or loans the candidate's committee a certain sum, which varies with the office sought, or if an independent expenditure committee expends that amount for a candidate's benefit. 10 ILCS 5/9-8.5(h) (AT SApp92-93).

***Illinois Liberty PAC I***

In July 2012, Illinois Liberty PAC (the PAC) commenced this action against the Attorney General and the Board's officers and members, alleging that a 2009 amendment to the Act violated the First and Fourteenth Amendments. R1-12. It also moved for a preliminary injunction. R17-18, 19-321. Defendants opposed the motion (R348-461), and the PAC replied (R472-590). Just before a hearing on that motion, the PAC and Bachrach filed an amended complaint, alleging that the Act violated the First and Fourteenth Amendments because it (1) allowed unlimited contributions to all candidates in a race if one was "self-funded"; (2) allowed political parties to make unlimited contributions during general elections; and (3) imposed higher limits on contributions from corporations, unions, and other groups than from Bachrach. R591-611. They also moved to withdraw the PAC's preliminary injunction motion (R612-39), which was granted after a hearing (R643).

The PAC and Bachrach then filed a preliminary injunction motion (R644-46), which Defendants opposed (R1484-1627), and they replied (R472-590). The Campaign Legal Center, Chicago Appleseed, and the Illinois Campaign for Political Reform moved for leave to file an amicus brief (R1455-81), which the PAC and Bachrach opposed (R1628-37) unsuccessfully (R1638).

The district court denied the PAC and Bachrach's preliminary injunction

motion because, among things, they were unlikely to prevail on the merits of their claims. R1991-2012 (AT SApp52-73). It reasoned that (1) in isolation, the Act's limits on individuals' and PACs' contributions to candidates are well within the range of limits that courts have upheld in similar challenges; (2) the same was true for those limits in relation to a political party committee's ability to make unlimited contributions, given that United States Supreme Court precedent indicates that the First Amendment requires, or at least permits, allowing political parties to make larger contributions than non-parties may; (3) the challenge to the elimination of contribution limits for all candidates in a race when one candidate is self-funded is foreclosed by the reasoning of *Davis v. FEC*, 554 U.S. 724, 737 (2008); and (4) *Buckley v. Valeo*, 424 U.S. 1, 35-36 (1976) (per curiam), which upheld a \$5,000 limit for PACs and a \$1,000 limit for individuals, implicitly foreclosed Bachrach's challenge to the Act's lower limit for his contributions than on contributions from PACs or corporations and unions. *Id.*

The PAC and Bachrach appealed. R2013-14 (*Ill. Liberty PAC v. Madigan*, No. 12-3305 (7th Cir.) (*Ill. Liberty PAC I*). This Court denied their motion for an injunction pending appeal and summarily affirmed the denial of their preliminary injunction motion, stating that it "agree[d] with the district court that the [PAC and Bachrach] ha[d] not shown that they [we]re likely to succeed on the merits of their challenge to contribution limits in 10 ILCS 5/9-8.5." *Ill. Liberty PAC I*, Doc. 14 (7th Cir. Oct. 24, 2012).

### The Dismissal Order

The PAC and Bachrach, now joined by McCarter, a state senator who intended to run for re-election in 2014, filed a second amended complaint for injunctive and declaratory relief. R2093-2122 (AT SApp1-20). To that complaint, they attached exhibits that included a 2013 report by Dr. Marcus Osborn entitled “Review of Illinois Campaign Finance System: Electoral Gaming and Insider Influence” (R2217-2246 (AT SApp22-51)), along with excerpts from the legislative debates on the Act’s 2009 amendment (R2114-51), newspaper articles, and similar documents (R2152-64). In addition to their three other claims, Plaintiffs alleged that the Act’s treatment of legislative caucus committees as political party committees, which are allowed to make unlimited (or, during primary elections, significantly higher) contributions than Plaintiff may make, violates the First and Fourteenth Amendments. R2106-07 (AT SApp14-15).

Defendants moved to dismiss, arguing (among other things) that their claims were not subject to strict scrutiny and were not cognizable under the First or Fourteenth Amendment. R2266-81. Plaintiffs opposed the motion (R2396-2419), and Defendants replied (R2423-37). After being granted leave (R2346), the Campaign Legal Center, Chicago Appleseed, and the Illinois Campaign for Political Reform filed an amicus memorandum in support of dismissal (R2347-67).

Noting that Plaintiffs’ second amended complaint “largely reassert[ed]” the three constitutional claims that *Illinois Liberty PAC I* had summarily concluded were unlikely to succeed on the merits, the district court granted Defendants’

motion in part and dismissed those claims. R2443-52 (AT App1-10). The court first found that Plaintiffs had standing to challenge the Act only with regard to its limits on contributions (1) from individuals and PACs and (2) to and from candidates, such as McCarter. R2445 (AT App3). The court then reexamined and adopted its conclusion at the preliminary injunction phase that there was no merit to Plaintiffs' challenges to (1) allowing unlimited (or much higher) contributions from political party committees than from PACs and individuals; (2) allowing unlimited contributions to all candidates in a race if one candidate is self-funded; and (3) allowing PACs to make higher contributions than corporations, labor unions, and other organizations. R2446 (AT App4). It also rejected Plaintiffs' arguments that it should (1) not follow Supreme Court precedent under which the Act was not subject to strict scrutiny; (2) not rely on a passage from *Davis*, which Plaintiffs had characterized as dicta; and (3) deny Defendants' motion because they were obliged to present evidence that the above limits are closely drawn to serve the State's purpose of preventing actual or apparent quid pro quo corruption. R2446-48 (AT App4-6).

The court then addressed Plaintiffs' new claim, *i.e.*, the Act has no valid basis for including legislative caucus committees in its definition of political party committees, which allows them to be treated more favorably than PACs, corporations, and individuals. R2448-51 (AT App6-9). Noting that the Supreme Court has recognized that federal congressional campaign committees have structural ties to their respective political parties, the court found "little reason to

doubt that these observations almost certainly apply with equal force to legislative caucus committees at the state level.” R2451-52 (AT App9-10). Because the record was insufficient to assess the merits of this claim, however, the court declined to dismiss it. *Id.*

After Defendants filed their answer (R2459-77), the parties filed cross-motions for summary judgment on the legislative caucus committee claim (R2822-2967 (Defendants), 2968-3305 (Plaintiffs)). Defendants opposed Plaintiffs’ motion (R3317-46) and filed a reply for their motion (R3394-3404), and Plaintiffs did likewise (R3347-93, 3394-3413). The district court denied both motions and ordered that the case “proceed to trial on Plaintiffs’ First Amendment challenge to the Act’s treatment of legislative caucus committees as compared to political party committees, on the one hand, and to PACs, corporations, and individuals, on the other.” R3449-62 (AT SApp74-87). In that order, the court denied Defendants’ motion to exclude Dr. Osborn’s report as expert evidence under Federal Rule of Evidence 702, reasoning that even though Dr. Osborn’s “education and experience give him the foundation necessary to opine about the incentives and power structure inherent in any American campaign financing scheme” and his methods “were appropriate for his qualitative inquiry into (what he, rightly or wrongly, views as) the risk [for actual or apparent quid pro quo corruption] created by” allowing unlimited contributions from legislative caucus committees. R3454-59 (AT SApp79-84).

### The Bench Trial

At the trial, Plaintiffs presented four witnesses: Bachrach (R3580-89); Matthew Besler, the PAC's chairman (R3611-29); McCarter, chairman of Common Sense Caucus PAC, which he had unsuccessfully tried to set up as a legislative caucus committee, and of Citizens for Kyle McCarter (R3590-3610); and Dr. Osborn (R3629-3747). Bachrach makes contributions based on a candidate's position on an issue, not because of the candidate's party (R3584-86), and Besler testified that the PAC contributes to candidates who support its free-market interest, regardless of party affiliation (R3618). Besler also testified that the PAC has no interest in expanding any party's caucus (R3618-24) or role in determining legislative leadership or committee assignments (R3621). Besler does not require voter support to be its leader (R3616-17), and he and McCarter testified that they could not be voted out from leadership of their respective PACs (R3596 (McCarter), 3621 (Besler)).

Besler was unaware of any time a legislative caucus committee used rewards or punishments or withheld electoral support to entrench the party's leader. R3624. Neither he nor Bachrach had factual support for the proposition that legislative leaders use their respective legislative caucus committees to entrench themselves in power. R3588-89, 3624. McCarter, who had received contributions from individuals and PACs in the 2012 and 2014 elections (R3591), votes for his party's caucus leader because he believes that person will be the best leader, not because of contributions from his party's legislative caucus committee (R3598-3600). He has

“no idea” why his colleagues vote for a particular caucus leader, and he knew of no colleagues from either party whose primary opponents were funded by their respective legislative caucus committees after opposing leadership. R3600, 3609-10.

Dr. Osborn has worked in the “government relations field” since the early 1900s, was awarded a doctorate in public administration in 2003, and provided expert witness testimony for the plaintiffs in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), a successful challenge to Arizona’s matching fund provision. R3630-37. To Dr. Osborn, providing contributions and other resources to candidates who agree with the contributor’s views is not quid pro quo corruption, which he defined as an exchange for a change in a vote. R3717-18. In his opinion, contributions from legislative caucus committees have a greater potential for quid pro quo corruption than contributions from political party committees due to differences between the two in structure (R3686), contribution strategy (R3683-84), and donor pool (R3645).

According to Dr. Osborn, the structure of legislative caucus committee system enhances the potential for quid pro quo corruption because it “links a policy-making authority directly with a fundraising system” (R3686-87, 3639), though he agreed that political parties also seek to shape policy (R3722). Although legislative caucus committees are tied to the legislature’s party leaders, whose “significant institutional power puts them in the best position to influence public policy” and the caucus’s legislative agenda (R3655-56), he found no instance of this type of corruption in Illinois (R3743). Dr. Osborn also agreed that all party leaders in state

and federal legislatures have “an extraordinary amount of both carrot and stick regardless of [their] position[s] as the chair[s] of a legislative caucus committee” (R3718-20), such as coveted committee assignments and assistance in enacting legislation (R3657-58). And he agreed that caucus leaders can be ousted, not only by voters but also in “intra-party uprisings” (R3738, 3709-10), so to keep their positions, they must be supported by their party’s caucus members, maintain its numbers, and have its members’ respect as an effective public policy leader (R3567). He further agreed that any 5 state senators or 10 state representatives in a caucus can form a legislative caucus committee to focus on and advance a policy (R3710-11) and observed that legislative caucus committees’ contributions “potentially can create some dependency between the [caucus’s] members and the [caucus’s] legislative leaders,” in both directions (R3659-60).

To form his opinion that differences in contribution strategy between political parties and legislative caucus committees can place candidates to whom the latter contribute at greater risk of quid pro quo corruption, Dr. Osborn conducted no interviews with Illinois legislators, reviewed none of their voting records for a connection to a legislative caucus committee’s contribution or to a legislator’s pre-contribution position on an issue, and analyzed no federal or other States legislative campaign committees for comparison. R3689, 3699-3701, 3725-26. He was aware of only four of the six legislative caucus committees in Illinois and reviewed only the 2014 contributions by the majority party’s Senate Victory Fund and the Democratic Majority (together, Committees) due to their party’s “institutional control of the

body.” R3712-13, 3678. He did not examine contributions by the minority party’s legislative caucus committees given that they were more likely to show a purely expansionist strategy (R3712-13, 3675, 3743, 3667) or those by any other political party committees in Illinois (R3703-07).

Instead, Dr. Osborn reviewed “academic literature,” none of which addressed Illinois in particular (R3688), that provided “generalizations” about how political parties and PACs operate at all levels of government, which he admitted do not necessarily apply (R3649-50, 3737). According to those generalizations, political parties pursue an “expansion strategy,” *i.e.*, their “primary and overwhelming goal” is to increase (or at least maintain) their caucus in the legislature. R3644-45, 3722. The academic literature also stated that “scholars tend to believe that parties are a countervailing force against” the influence of interest groups, such as PACs, which (from his review of that literature and his experience) pursue “access-driven strategies” to influence public policy decisions and are “a little bit more transactional,” which in turn creates the higher risk of quid pro quo corruption for their contributions than for those from political parties. R3646-49. In Dr. Osborn’s opinion, legislative caucus committees’ characteristics are “somewhat in between” those of political parties and PACs because, according to the academic literature, they have caucus- and party-building goals but also have a secondary purpose of assisting a leader’s achievement of personal goals, though these two goals “commonly . . . will be very aligned, where the leader wants to do the best for the caucus . . . .” R3664-67.

From his examination of data about the Committees' contributions during the 2012 primary and general elections, as collected by Plaintiffs' counsel, Dr. Osborn determined that their contributions in both elections had been consistent with an expansion strategy. R3677-80, 3702, 3682, 3723. Some of the Democratic Majority's "top contributions" in those elections indicated an additional strategy: (1) it made large contributions to two candidates in the primary election, whose "very narrow" primary wins "suggested that there were competitive candidates in that race and the caucus committee took sides in that election"; and (2) it contributed in the general election to many candidates whose wide victory margins suggested they had not been electorally vulnerable, as well as to an independent. R3679-81, 3724. On this point, Dr. Osborn did not take into account any differences between the platforms of those two candidates and their primary election opponents, or their general election opponents' views, and although earlier contributions may be treated differently from later contributions, he did not take into account the timing of the contributions these two candidates received. R3698. Dr. Osborn also stated that competition among a party's primary candidates does not necessarily mean electability in the general election. R3699. And he noted that contributions reduce candidates' need to fundraise for themselves and allow them to build a war chest for future races, for all candidates always need money, even in non-competitive races, until they retire. R3684.

In answering a question from the court, Dr. Osborn stated that the money a party contributed to a candidate who then wins by a large margin is "not

necessarily” wasted, given that a candidate can misjudge how competitive a race will be, “things change during the campaign,” and other factors, such as high-profile and high-risk down-ballot races or the need to increase voter turnout, may be at play. R3730-33, 3741. Dr. Osborn stated that his opinion would be the same if the Committees’ 2012 contributions had revealed that they had only an expansionist strategy, for his view was that “it’s the structure that is the problem,” given that their contribution strategy may change. R3686.

According to Dr. Osborn, differences in contributors to legislative caucus committees and political party committees “potentially” could “lend itself to increased opportunities for” quid pro quo corruption of candidates to whom the former contribute, describing “a triangle between the donors, the interest groups, the legislative caucus committee[,] and the policy agenda of each of those groups.” R3675-77. According to the academic literature that he reviewed, political parties “tend to get” a “broader mix of contributions,” from individuals as well as corporations and “allied interest groups,” which “are interested in the broader electoral goals of the party.” R3645. His examination of data about the Committees’ 2014 contributors showed that they “heavily relied on interest group[s],” which are “access-seeking organizations” and thus “looking to influence the public policy process,” and their contributors were mostly corporations or PACs associated with organized labor and building trade associations. R3675-76. He believes that having “one select group of industries or one select group of interests” as contributors to legislative caucus committees enhances the potential for quid pro

quo corruption from their contributions to candidates because having fewer donors means the committees “become heavily favored.” R3645. In Dr. Osborn’s view, “[i]f you have a diverse series of contributions, that mitigates the potential for corruption because you have a diverse cross section of contributors.” R3645.

At the close of Plaintiffs’ case in chief, Defendants moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 52, on which the court reserved ruling. R3747-48. Defendants then presented two witnesses. The Board’s executive director, Steven Sandvoss, who testified about (among other things) independent expenditure committees (R3785-96), and the deputy director of the Board’s campaign disclosure division, Andrew Nauman (R3754-81). Nauman stated that as of January 2016, Illinois had 3,668 registered political committees, of which there were 1,001 PACs, 2,209 candidate committees (about which the Board receives the most complaints), 379 political party committees, 48 ballot initiative committees, and 28 independent expenditure committees, in addition to the six legislative caucus committees, about which the Board had received no complaints. R3754-81.

Following the trial, the parties filed their proposed findings of fact and conclusions of law. R3846-67 (Plaintiffs), 3868-3901 (Defendants).

### **The District Court’s Findings and Conclusions**

The district court found against Plaintiffs on their challenge to the Act’s treatment of legislative caucus committees as political party committees. R3911-39 (AT App11-39). It began its findings of fact by summarizing the Act’s provisions

(R3912-15 (AT App12-15)) and the testimony by Besler, Bachrach, and McCarter (R3915-18 (AT App15-18)). After reviewing Dr. Osborn's credentials and methodology, the court reviewed his testimony about his three reasons for classifying legislative caucus committees as PACs rather than as political parties — differences in their structure, their contribution strategy, and their donor pool — and found it “unpersuasive” on all three. R3918-20 (AT App18-20).

The court first addressed Dr. Osborn's opinion that “Illinois has created novel opportunities for corruption” by combining legislative caucus committees' “extraordinary fundraising power” with legislative leaders' policymaking function. R3920-23 (AT App20-23). Emphasizing that Dr. Osborn admitted that political party committees seek to shape policy, it did “not find persuasive Dr. Osborn's testimony that legislative caucus committees are materially closer to the policymaking process than are political parties,” reasoning that the latter's principal purpose is to “wield significant influence over legislative agendas.” R3921 (AT App21). The court also found that the frequent overlap between state party officials and legislative leaders, *e.g.*, the Speaker of the Illinois House also chairs both the Illinois Democratic Party and that party's legislative caucus committee in the House, “undermine[d] Dr. Osborn's assertion that legislative caucus committees” are “closer' to the legislative process” than, and thus are materially different from, political parties. *Id.* The court also stressed that the electorate and the leaders' respective caucuses can oust them if they act contrary to the party's interests by, for example, pursuing a personal policy agenda or financially coercing

legislators' votes. R3922 (AT App22). Moreover, as Dr. Osborn had admitted, legislative leaders “have access to numerous institutional controls to keep their caucus in check, including other means of fundraising assistance” in addition to legislative caucus committees. *Id.* Lastly, noting that candidates have multiple contribution sources that include political parties' unlimited contributions, the court rejected Dr. Osborn's opinion that limiting a candidate to accepting contributions from one legislative committee for each election could make a candidate exclusively dependent on that committee. R3922-23 (AT App22-23).

Next, the court found “unpersuasive” Dr. Osborn's opinion that legislative caucus committees use contribution strategies that are different from those of political parties, which in turn makes them more susceptible to quid pro quo corruption than the latter. R3923-28 (AT App23-28). It first noted that Dr. Osborn's generalization — that political parties use a purely “expansionist strategy” when making contributions — was based on “trends and themes' in the academic literature” rather than on data. R3923 (AT App23). The court also observed that Dr. Osborn had examined only the majority's legislative caucus committees' contributions before concluding that, in addition to an expansionist strategy, legislative caucus committees have a “secondary interest in managing the legislative operations on a partisan basis,” even though one of those two committees had not pursued that other strategy. R3924 (AT App24). Because Dr. Osborn “never investigated whether the state's political parties *actually* followed an expansion strategy” to test his premise about political parties' purely expansionist

strategy, the court found, it was impossible to determine the extent to which the two committee types were in fact pursuing an expansionist contribution strategy. R3927-28 (emphasis in original) (AT App27-28). Stressing Dr. Osborn's admission that electability in a general election is different from electability in a primary, the court found that contributions to only one candidate in a primary election are "entirely consistent with an expansion strategy" and not just enhancing the leader's influence over a candidate. R3925 (AT App25).

The court then turned to Dr. Osborn's opinion that contributions to legislative caucus committees are primarily from "access-seeking" special interest groups, which then makes their contributions to candidates more susceptible to quid pro quo corruption than contributions by political party committees, which have different and more donors. R3928-30 (AT App28-30). According to Dr. Osborn, his review of the academic literature indicates that political committees "tend to receive contributions from a broad cross section of donors," while his review of contributions to the Committees in 2014 showed "heavy reliance" on "access-seeking" PACs and corporations. R3928-29 (AT App28-29). The court found this opinion "unpersuasive" for two reasons: (1) Dr. Osborn compared actual contributions to the Committees with only theoretical contributions to political party committees, even though a "cursory review" of data about actual contributions to actual political party committees, which were available from the same source he cited for his data about legislative caucus committees' donors, "reveal[ed] that many corporations and PACs contribute to" the Committees' political party; and (2) he

failed to establish that (or why) “having a ‘less diversified’ donor portfolio makes legislative caucus committees more likely to exert undue financial influence on legislators.” R3929 (AT App29).

The court then announced its conclusions of law. R3930-39 (AT App30-39). It began by reviewing its reasons for finding at the preliminary injunction stage that Plaintiffs were unlikely to prevail on their challenge to permitting political party committees to make unlimited contributions. R3931-32 (AT App31-32). The court reiterated that the First Amendment requires, or at least permits, that political parties be treated more favorably than other contributors when setting contribution limits, and concluded that Defendants had met their burden of establishing that the Act’s treatment of contribution limits for legislative caucus committees is closely drawn to advance the government anti-corruption interest even though it imposes lower limits on Plaintiffs. R3932-33 (AT App32-33).

The court rejected Plaintiffs’ argument that legislative caucus committees more closely resemble PACs than political parties based on their contribution strategy, stating that it was “not persuaded that” the evidence of the contributions by the Committees was “indicative of anything other than an expansion strategy.” R3933 (AT App33). Alternatively, the court found, Dr. Osborn had not explained how not having a purely expansionist strategy made legislative caucus committees more like access-seeking PACs than like political parties. *Id.* Next, the court rejected Plaintiffs’ argument that legislative caucus committees’ donor pool was so much less diverse than that of political parties that the former cannot be treated

like the latter. R3933-34 (AT App33-34). It again emphasized Plaintiffs' lack of evidence about actual 2014 contributions to any political party in Illinois, which the data reveal receive contributions from PACs and corporations just as legislative caucus committees do, and so Dr. Osborn could not establish that such contributions made legislative caucus committees more susceptible to corruption than political parties that accepted contributions from the same sources. R3934 (AT App34). Last, the court rejected Plaintiffs' argument that differences in structure between legislative caucus committees and political parties enhanced opportunities for the former to engage in corruption. R3934-35 (AT App34-35).

Plaintiffs appealed. R3941-42.

## SUMMARY OF ARGUMENT

In *Illinois Liberty PAC I*, this Court summarily affirmed the order denying Plaintiffs' motion for a preliminary injunction, agreeing with the district court that they were unlikely to succeed on the merits of their three First Amendment challenges to the Act's contribution limits. Adopting its prior reasoning, the district court dismissed those claims, and this Court should affirm that order.

Plaintiffs' attack on the Act's contribution limits for corporations and unions, which are higher than those for individuals, is a non-starter. *Buckley* and its progeny have upheld reasonable limits on individuals' contributions because they are closely drawn to advance the government's compelling anti-corruption interest, and the Court has held that individuals and groups need not be treated identically. Likewise, Plaintiffs' attack on the Act as underinclusive because it allows everyone to make unlimited contributions to self-funded candidates and their opponents is foreclosed by the Supreme Court's reasoning in *Davis*. And their challenge to the Act for treating them less favorably than political parties is equally meritless: at least five Justices agree that political parties must be treated more favorably.

This Court also should affirm the judgment against Plaintiffs on their claim that differences between political party committees and legislative caucus committees make the latter more susceptible to corruption and thus do not justify treating them like the former. The district court rejected Dr. Osborn's expert testimony as unpersuasive only after finding that his opinion's factual basis, data, and methods were questionable, so its credibility finding was not clearly erroneous.

## ARGUMENT

### I. This Court Should Affirm the Judgment Against Plaintiffs in Its Entirety.

#### A. Reasonable Limits on Campaign Contributions Are Routinely Upheld Because They Are Closely Drawn to Serve the Government's Compelling Interest in Preventing Actual or Apparent Quid Pro Quo Corruption.

Although Plaintiffs urge strict scrutiny of the Act's contribution limits (AT Brf. at 19, 51-55), they concede that the Supreme Court has rejected that stringent test for contribution limits (*id.* at 51-53). Over 40 years ago, *Buckley* held that such limits pass constitutional muster because they are "closely drawn" to serve the government's significant interest in preventing actual or apparent quid pro quo corruption. 424 U.S. at 35-36. The Supreme Court has deemed this anti-corruption interest "compelling." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

Since *Buckley*, the Supreme Court and this Court have repeatedly upheld campaign contribution limits under the "closely drawn" test. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 137-39 & n.40 (2003) (listing cases); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000); *Siefert v. Alexander*, 608 F.3d 974, 988 (7th Cir. 2010) (noting that *Citizens United v. FEC*, 558 U.S. 310 (2010), reinforced the distinction between independent expenditures and direct contributions). As *Buckley* reasoned, contribution limits "entail[ ] only a marginal restriction upon the contributor's ability to engage in free communication" and "involve[ ] little direct restraint on [the contributor's] political communication" without "in any way

infring[ing on] the contributor's freedom to discuss candidates and issues," for "the expression [of support for a candidate] rests solely on the undifferentiated, symbolic act of contributing." 424 U.S. at 20-21. And Davis teaches that the First Amendment neither requires a legislature to impose contributions limits to prevent actual or apparent corruption nor, if it decides they are needed for that purpose, requires it to impose the same limits on all contributors. 554 U.S. at 737-38. Indeed, the Supreme Court has warned that courts should not second-guess legislative determinations "as to the need for prophylactic measures where corruption is the evil feared." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982).

As explained below, application of these principles to Plaintiffs' second amended complaint warrants affirmance of the district court's dismissal of three of their claims. As this Court predicted in *Illinois Liberty PAC I*, Plaintiffs cannot succeed on the merits of any of these three claims. Likewise, application of these principles to the evidence adduced at the bench trial warrants affirmance of the judgment against them on their fourth claim.

**B. Plaintiffs Failed to State a Plausible First Amendment Challenge to the Act's Limits on Contributions From PACs, Corporations, and Political Party Committees, or to Self-Funded Candidates and Their Opponents, Which Are Higher Than the Limits on Plaintiffs' Contributions.**

At the preliminary injunction stage, the district court found that Plaintiffs were unlikely to succeed on the merits of their then-three claims (R1991-2012 (AT SApp52-73), which this Court summarily affirmed in *Illinois Liberty PAC I*. The

district court then dismissed those claims, adopting the reasoning of its earlier order. R2443-52 (AT App1-10). It was right both times.

**1. Only Plausible Claims for Relief May Proceed.**

Dismissal orders are reviewed de novo (*Perez v. Fenoglio*, 792 F.3d 768, 776 (7th Cir. 2015)) and thus may be affirmed on any ground supported by the record (*Nelson v. Welch*, 684 F.3d 684, 687 (7th Cir. 2012)). To avoid dismissal, a complaint must allege “enough facts to state a claim to relief that is plausible on its face” and “raise a reasonable expectation that discovery will reveal evidence” satisfying the materiality requirement. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 556 (2007). Federal Rule of Civil Procedure 8 “does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Therefore, neither a “pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action,” nor one that “tenders naked assertion[s] devoid of further factual enhancement,” will suffice. *Id.* (alteration in original). Accordingly, although a complaint’s factual allegations must be taken as true, its legal conclusions must be supported by factual allegations. *Id.* at 679-79; *Tierney v. Advocate Health & Hosps. Corp.*, 797 F.3d 449, 451 (7th Cir. 2015) (holding that plaintiffs’ well-pled facts must be accepted as true and all reasonable inferences must be drawn in their favor). Nor are courts required to accept as true a complaint’s legal conclusions or unsupported factual conclusions. *County of McHenry v. Ins. Co. of the West*, 438 F.3d 813, 818

(7th Cir. 2006).

These principles require affirmance of the dismissal order.

**2. Plaintiffs Failed to State a Plausible First Amendment Challenge to the Act's Limits on Contributions From Corporations, Unions, and Other Associations.**

Citing *Citizens United*, Plaintiffs alleged that the Act's limits on Bachrach's and other individuals' contributions to candidates and parties violate the First Amendment because they are half the limits for contributions from corporations, unions, and other associations. R2106-07 (AT SApp14-15). When denying Plaintiffs' preliminary injunction motion, the district court found they were unlikely to succeed on the merits of this claim, reasoning that *Buckley* had rejected First Amendment challenges to a \$1,000 contribution limit for individuals and a \$5,000 limit for those by PACs. R2008-11 (AT SApp69-72). Adopting that rationale, the district court later dismissed this claim. R2446 (AT App4). ultimately Plaintiffs disagree (AT Brf. at 21-26), but they are wrong.

Plaintiffs cite no case that struck down a similar, reasonable limit on an individual's political contributions. This is not surprising. *Buckley* rejected as "without merit" an almost identical challenge to a \$1,000 limit for an individual's contribution — as discriminatory and an impermissible burden on free association — that was one-fifth the limit for a PAC's contribution. 424 U.S. at 35-36. *Buckley* reasoned that "the basic provision enhances the opportunity of [PACs] to participate in the election process, and the . . . contribution . . . condition[ ] serve[s] the permissible purpose of preventing individuals from evading the applicable

contribution limitations by labeling themselves committees.” *Id.* As the Supreme Court more recently explained, “*Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate.” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (citing 424 U.S. at 26-27). And *Buckley* observed that there are “opportunities for abuse inherent in a regime of large individual financial contributions” to particular candidates for quid pro quo benefit and that individuals have other ways to exercise their associational rights that do not risk undermining the integrity of the political system, such as volunteering for their candidate(s) and otherwise engaging in robust and effective political activities (424 U.S. at 27, 29-30), and they also can vote.

Nor do Plaintiffs cite any cases that found a similarly reasonable limit on individuals’ contributions unconstitutional because limits on corporations’ or associations’ contribution are higher. This is not surprising either. In effect, Plaintiffs attack the limits on contributions from such groups as too high, yet *Davis* explained that there is “no constitutional basis for attacking contribution limits on the ground that they are too high.” 554 U.S. at 737. And to the extent that Plaintiffs believe that the First Amendment requires treating all contributors identically, they are mistaken. The Supreme Court has explained that campaign finance restrictions on individuals may differ from those imposed on groups, given that such groups’ structures and purposes “may require different forms of regulation in order to protect the integrity of the electoral process.” *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 201 (1981). Nor have Plaintiffs ever explained how Bachrach

is similarly situated to corporations and unions. Indeed, they pretend that the differences between individuals and others do not exist.

Plaintiffs say *Buckley* is irrelevant to their unequal treatment claim because, unlike the Act, federal law treated corporations and unions less favorably than it treated individuals.<sup>3</sup> AT Brf. at 23. But *Buckley*'s rejection of the discrimination claim there stands for the more general proposition that the Constitution does not require that all contributors be treated identically. Indeed, Plaintiffs seem to agree with this principle, for they do not challenge the Act's much higher limits on the PAC's contributions (see <http://www.elections.il.gov/DocDisplay.aspx?Doc=Downloads/CampaignDisclosure/PDF/ContributionLimitsJan2017.pdf> (last visited May 8, 2017)). Plaintiffs relatedly complain that only Illinois places a lower limit on contributions by individuals than by corporations and unions,<sup>4</sup> yet they also admit that Illinois is not constitutionally required to follow other States' contribution limits. AT Brf. at 24-26. As this Court has remarked, what works in

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<sup>3</sup> Federal law forbids corporations and unions from using general treasury funds to make direct contributions to candidates. *Citizens United*, 558 U.S. at 320 (citing 2 U.S.C. § 441b, which has been transferred to 52 U.S.C. § 30118).

<sup>4</sup> According to the National Conference of State Legislatures, however, Iowa permits individuals and unions to make unlimited contributions (Iowa Code § 68A.503), as does Mississippi (Miss. Code § 97-13-15), and five States permit unlimited contributions from both of them as well as from corporations (<http://www.ncsl.org/research/elections-and-campaigns/state-limits-on-contributions-to-candidates.aspx> (2015-2016 Election Cycle: Limits on Contributions to Candidates) (citing Mo. Rev. State § 130.031; N.R.S. § 32-1604 and 32-1608; O.R.S. § 260-160 to 174; Utah Code § 20A-11-101; Va. Code § 24.2-945) (last visited May 8, 2017)). Plaintiffs do not mention these laws or some States that prohibit direct contributions from corporations and unions also permit contributions from those groups' PACs, whose contributions are not necessarily limited. *See id.* at n.(d).

other States may not work in Illinois. *Nader v. Keith*, 385 F.3d 729, 733-34 (7th Cir. 2003).

Plaintiffs also quarrel with the district court's rejection of their argument that dismissal was improper given that a State must show that a contribution limit is closely drawn to advance its compelling anti-corruption interest, yet dismissal motions do not permit evidentiary presentations. AT Brf. at 22. As the district court observed when rejecting that argument, "[t]here would be no point" in conducting an evidentiary hearing on this claim because Supreme Court precedent has conclusively foreclosed this argument. R2447-48 (citing *Citizens United*, 558 U.S. at 357; *Nixon*, 528 U.S. at 390-97; and *Buckley*, 424 U.S. at 26-27) (AT App5-6). And again, Plaintiffs identify no case that struck down contribution limits for individuals in amounts similar to the Act's, which are easily distinguished from the far lower limits struck down in *Randall v. Sorrell*, 548 U.S. 230, 253-62 (2006) (plurality op.). *Randall* held that Vermont's limits, which also were lower than any limit that the Court had upheld, were so low that they substantially restricted (1) "the ability of candidates to raise the funds necessary to run a competitive election," especially for challengers; (2) "the ability of political parties to help their candidates get elected" through coordinated expenditures; and (3) "the ability of individual citizens to volunteer their time to campaigns" by including volunteers' expenses as contributions. *Id.* at 246-47. Thus, those exceptionally low limits "burden[ed] First Amendment interests in a manner that [wa]s disproportionate to" their purposes, including corruption prevention. *Id.* at 236.

Here, Plaintiffs' second amended complaint contained no such allegations. R2106-08 (AT SApp14-16).

In sum, for the same reasons that Illinois Liberty PAC I concluded that Plaintiffs were unlikely to succeed on their claim that the Act's limits on Bachrach's contributions are unconstitutional because corporations, unions, and other associations have higher limits, this claim was subject to dismissal.

**3. Plaintiffs Failed to State a Plausible First Amendment Challenge to Allowing Unlimited Contributions to All Candidates for an Office When One Is Self-Funding.**

At the preliminary injunction stage, the district court rejected, as foreclosed by *Davis*, Plaintiffs' argument that the State's anti-corruption interest is undermined by the Act's elimination of all contribution limits for all candidates running for an office if one of those candidates contributes or loans, or an independent expenditure committee spends, a certain threshold amount. R2006-08 (AT SApp67-69). It reasoned that *Davis* had made clear that the First Amendment permits eliminating all contribution limits for all candidates in a race when one is self-funded, adding that *Davis* would not have reached that conclusion if (as Plaintiffs contend) such a policy were "fatally underinclusive" or impermissibly conditioned one candidate's speech on the choices by another." R2007-08 (SApp68-69). On Defendants' motion to dismiss, the court rejected Plaintiffs' sole rebuttal — that *Davis's* discussion was dicta — but alternatively concluded that even if it were, *Davis's* reasonable dicta is entitled to deference. R2447 (AT App5).

On appeal, Plaintiffs raise the same arguments (AT Brf. at 26-33), which are

still unpersuasive. For example, they again insist that *Davis's* two-paragraph, almost 400-word discussion of this issue is irrelevant as dicta and, in any event, states only that raising contribution limits for all candidates does not violate the First Amendment (*see* 554 U.S. at 737), whereas their argument is that eliminating limits for self-funded candidates and their opponents necessarily means that no limit can be sufficiently closely drawn to serve the State's anti-corruption purpose (AT Brf. at 32-33). Under Plaintiffs' "underinclusiveness" theory, however, all contributors must be treated the same way because the risk of quid pro quo corruption is the same for all of them. In fact, although exemptions from campaign laws may render such laws unconstitutionally underinclusive (*Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)), the Supreme Court has held that "there is no reason why [the government's anti-corruption interest] may not . . . be accomplished by treating unions, corporations, and similar organizations differently from individuals" (Nat'l Right to Work Comm., 459 U.S. at 210 (citing *Cal. Med. Ass'n*, 453 U.S. at 201)).

Laws that are "underinclusive," that is, that "abridg[e] too little speech," may "raise[ ] a red flag" under the First Amendment, for such laws "can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668-69 (2015) (internal quotation marks omitted). But *Williams-Yulee* also observed that "the First Amendment imposes no freestanding underinclusiveness limitation," so a "State need not address all aspects of a problem

in one fell swoop; policymakers may focus on their most pressing concerns.” *Id.* (internal quotation marks omitted). *Williams-Yulee* thus upheld a ban on personal solicitation by judicial candidates, reasoning that it was aimed squarely at the conduct most likely to undermine public confidence in the judiciary’s integrity, applied evenhandedly to all judicial candidates, and had no exceptions. *Id.*

Here, the same result should obtain. The First Amendment allows the General Assembly to determine that certain contributions pose a less pressing concern of actual or apparent quid pro quo corruption than other contributions. *Buckley* prohibits limiting candidates’ expenditures for themselves (424 U.S. at 51-54), and when such candidates reach a certain level, *Davis* permits eliminating contribution limits for that candidate’s opponents as well (554 U.S. at 737). Thus, under *Buckley*, *Davis*, and *Williams-Yulee*, eliminating contribution limits for self-funding candidates and their opponents cannot “fatally undermine” the State’s advancement of its compelling interest in preventing quid pro quo corruption by capping contributions to *non*-self-funding candidates and their opponents. Indeed, Plaintiffs concede that candidates who are self-funded (or who have large independent expenditures made for their benefit) pose no risk of quid pro quo corruption as a matter of law under *Citizens United* and *Buckley*. AT Brf. at 28.

Plaintiffs also cite a slew of First Amendment underinclusiveness cases, none of which is helpful: none addressed contribution limits, and most concerned content-based restrictions and thus were assessed under strict scrutiny. AT Brf. at 27, 31-32. For example, *Republican Party of Minnesota* applied strict scrutiny to

strike down Minnesota's ban on judicial candidates' speaking out on legal and political issues as not narrowly tailored to its purpose of demonstrating to voters that those candidate would be unbiased, reasoning that its "woeful[ ] underinclusiveness" rendered belief in that purpose "a challenge to the credulous" because those candidate were not prohibited from speaking out on those issue both before they declared their candidacy and after they were elected. 536 U.S. at 780.

Likewise, *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011), struck down California's content-based ban on selling violent video games to children under strict scrutiny, for the State was unable to "specifically identify an actual problem in need of solving" that the ban was "actually necessary" to solve. *See also Joelner v. Village of Washington Park*, 508 F.3d 427, 432-33 (7th Cir. 2007), *as amended on denial of reh'g* (Apr. 3, 2008) (holding that local ban on alcohol sales in adult cabaret only if it was not already licensed was facially invalid, reasoning that anti-competition purpose both warranted strict scrutiny and did not constitute compelling government interest). *Brown* also undermines Plaintiffs' insistence that dismissal was improper before Defendants presented evidence of a risk of corruption from contributions to non-self-funded candidates: *Brown* distinguished the asserted "direct causal link between violent video games and harm to minors," which under strict scrutiny required evidentiary support, and a legislature's predictive judgment of a causal link between a regulation and the harm at issue, which under lesser scrutiny did not require such evidence. 564 U.S. at 799.

Plaintiffs' other two commercial speech cases are no help either. *City of*

*Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993), struck down Cincinnati's ban on commercial (but not non-commercial) news racks on sidewalks on public property because the content-based "distinction bears no relationship whatsoever to the" city's "admittedly legitimate interests" in safety and aesthetics. Similarly, the Court struck down a beer labeling ban because the "irrationality of this unique and puzzling regulatory framework ensure[d] that the labeling ban will fail to achieve" the government's "valid" interest in combating beer strength wars, while "other provisions of the same Act directly undermine and counteract its effects." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995). These content-based restrictions are far from typical contribution limits that contain an exception for self-funded candidates and their opponents.

Plaintiffs also argue, again, that the Act's elimination of limits on contributions to self-funded candidates and their opponents violates the First Amendment because its purpose is to "level the playing field," which they say the Court has explicitly rejected as a "valid purpose for campaign finance rules." AT Brf. at 28-29 (citing *Bennett*, 564 U.S. at 749-50, and *Wisc. Right to Life State PAC v. Barland*, 664 F.3d 130, 153 (7th Cir. 2011)). But *Bennett* held that a matching funds provision imposed a "substantial" burden on independent expenditure committees by requiring them to change their message or not speak at all to avoid triggering it. 564 U.S. at 748-49. That substantial burden warranted strict scrutiny, which the matching funds provision did not pass because its "level the playing field" purpose was not compelling, though "[l]imiting contributions, of

course, is the primary means [the Court has] upheld to combat corruption.” *Id.* Similarly, *Citizens United* held that the “level playing field” purpose did not justify restricting corporations’ independent expenditures. 558 U.S. at 357-61. And Plaintiffs provide no authority for their apparent belief that imposing no contribution limits violates the First Amendment under any level of scrutiny.

Citing two law journal articles and Justice Thomas’s concurring opinion in *Randall*, which cited a third article, Plaintiffs next contend that the self-funded-candidate provision violates the First Amendment because (1) eliminating contribution limits “would tend to benefit incumbent officeholders”; (2) “contribution limits in general serve to protect incumbents” because they “enjoy certain [cost-free] advantages,” including patronage; and (3) “[c]ontribution limits might work to an incumbent’s disadvantage” if a challenger is self-funded or is supported by an independent expenditure committee. AT Brf. at 29-30. Plaintiffs then posit that the Act’s reason for eliminating contribution limits for self-funded candidates and their opponents is “to protect incumbents from competition” rather than preventing quid pro quo corruption. *Id.* But again, the First Amendment permits the States to have no contribution limits, it prohibits the States from imposing limits on self-funding, and it prohibits treating candidates differently. Thus, Plaintiffs’ argument that the Act “do[es] not actually serve [its anti-corruption] purpose” because the Act does not “restrict more speech of the same kind” (AT Brf. at 31) is meritless: under their view, the First Amendment would require imposing the same contribution limits on everyone, including self-funders.

Moreover, *Buckley* teaches that the quantity of Plaintiffs' speech is not increased by increasing their contributions, which are transformed into political speech when others expend those contributions. 424 U.S. at 21. And although *Bennett* struck down a matching-fund provision that candidates triggered to their detriment with their own contributions, *Bennett* is irrelevant when analyzing the Act's elimination of limits on contributions to self-funded candidates and their opponents: it held that Arizona's matching funds requirement had to be assessed with strict scrutiny because it posed a direct burden on political speech (*i.e.*, expenditures by candidates and independent expenditure committees), a burden that was not justified by the government's interest in equalizing electoral funding or even by its "compelling" anti-corruption interest. 131 S. Ct. at 2817-28. And unlike the matching funds provision in *Bennett*, which by operation of law directly "result[ed] in a cash windfall" for a self-funded candidate's opponents (*id.* at 2822), the Act's elimination of contribution limits for self-funded candidates and their opponents has no such legal effect.

In sum, for the same reasons that this Court concluded in *Illinois Liberty PAC I* that Plaintiffs were unlikely to succeed on the merits of their challenge to the Act's elimination of limits on contributions *to* self-funded candidates, but not for contributions *from* Plaintiffs to other candidates, the dismissal of this claim should be affirmed.

4. **Plaintiffs Failed to State a Plausible First Amendment Challenge to the Act's More Favorable Treatment for Contributions From Political Party Committees.**

When the district court granted Defendants' motion to dismiss Plaintiffs' challenge to the Act's different treatment of their contributions and those of political parties, it adopted its reasoning for denying their preliminary injunction motion (R2446 (AT App4)), in which it had rejected this claim as unlikely to succeed on the merits (R2000-06 (AT SApp61-67)). It was correct.

In its preliminary injunction order, the court first observed that a speech restriction may pass constitutional muster standing alone yet nevertheless may violate the First Amendment if it impermissibly favors certain speakers or is so underinclusive as to cast doubt on its stated purpose. R2000-01 (AT SApp61-62). But the court rejected Plaintiffs' premise that because a federal limit on political parties' coordinated expenditures was upheld in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*), the First Amendment prohibits treating political parties better than Plaintiffs and that the expenditure limits at issue there were "orders of magnitude higher than" the federal limits on contributions from individuals and PACs. R2001-02 (AT SApp62-63). In doing so, the district court reviewed each Supreme Court justice's views, as articulated in *Colorado II* and other opinions, before concluding that six justices (Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito) agree that "the First Amendment *requires* that political parties be treated more favorably than non-party contributors" such as Plaintiffs, while "[n]o Justice has espoused [Plaintiffs']

view . . . that the First Amendment *prohibits*” such different treatment. R2002-05 (emphases in original) (AT SApp63-66). The court then rejected Plaintiffs’ arguments that Illinois poses special dangers of political party corruption that warrant a stricter analytical framework or that individual Illinois legislators’ comments establish the Act’s unconstitutional purpose. R2005-06 (citing *Am. Traditional P’ship v. Bullock*, 567 U.S. 516 (2012) (per curiam) (AT SApp66-67)).

Plaintiffs make a few rebuttal arguments (AT Brf. at 33-36), but none persuades. For example, even though they cited *Colorado II* as support at the preliminary injunction stage (*see* R2001 (AT SApp62)) and did so again in opposing Defendants’ motion to dismiss (R2411), they now say *Colorado II* has no bearing here because the disparity between the limits on contributions from political parties and from other contributors was not at issue there (AT Brf. at 34). Similarly, even though Plaintiffs relied on *McConnell* at the dismissal stage (R2411), they now fault the district court for relying on *McConnell* (AT Brf. at 35 (citing R2003-04 (AT SApp64-65))). But they misread the district court’s rationale, which merely stressed *McConnell*’s explicit recognition of “the real-world differences” between political parties and nonparty interest groups, which in turn meant that Congress did not violate the First Amendment by permitting political parties to accept larger contributions and to make larger expenditures than can nonparty committees, such as the PAC. R2003-04 (AT SApp64-65). Plaintiffs provide no authority for the notion that there are no “real-world differences” between them and political parties. Only political parties (unlike Plaintiffs) “determine who will serve on legislative

committees, elect [legislative] leadership, or organize legislative caucuses,” so only they (unlike Plaintiffs) “in turn have special access to and relationships with” General Assembly members. *McConnell*, 540 U.S. at 188. Indeed, as Justice Kennedy observed, there is a “practical identity of interests between [political parties and their candidates] during an election.” *Colo. Repub. Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 630 (1996) (*Colorado I*) (Kennedy, J., concurring in part and dissenting in part). Given these real-world differences between political parties and all others for campaign contribution purposes, the First Amendment plainly permits, and may even require, treating the former better.

Plaintiffs counter that they are not asking to be treated identically to political parties; rather, they object that *McConnell* did not “endorse any and all campaign finance rules that treat parties differently from others,” and Defendants had to present evidence that having no (or, in primaries, much higher) contribution limits is closely drawn to serve the State’s anti-corruption purpose. AT Brf. at 35-37 (emphasis omitted). As a matter of law, however, the First Amendment permits the States to (1) decide that the possibility of corruption does not necessarily require contribution limits; (2) impose reasonable contribution limits, which its compelling anti-corruption interest alone is sufficient to justify; and (3) impose no (or higher limits) on political parties’ contributions than on contributions from all others, given the “real world differences” between the two, as explained above. Thus, Supreme Court precedent forecloses Plaintiffs’ claim that the Act violates the First Amendment because it allows political parties to make larger contributions than

they may.

Treating political parties better than non-party contributors also makes sense, as the Supreme Court suggested in *Randall*. For example, voters who do not know the candidates personally nevertheless may want to help elect candidates their party believes would best advance its ideals and interests in the legislature, which is “the basic object of a political party,” and thus will contribute to the party to help it control their state legislature. 548 U.S. at 257-58 (internal quotation marks omitted). And as the district court stressed, *Randall*’s plurality opinion also expressed concern about the “special party-related harm” of placing identical contribution limits on parties and individuals, which reduces parties’ political speech. R2004 (citing 548 U.S. at 259) (AT SApp65). And just as courts may not “second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared” (*Nat’l Right to Work Comm.*, 459 U.S. at 210), so too are Plaintiffs forbidden from second-guessing the General Assembly’s determination that political parties’ contributions do not warrant the prophylactic measures that non-parties’ contributions do, given the “real-world differences” between the two.

In sum, Plaintiffs failed to state a First Amendment challenge to the Act’s more favorable treatment of political party committees as compared to their contributions. Thus, just as this Court summarily affirmed the denial of a preliminary injunction based on this claim in *Illinois Liberty PAC I*, it should affirm dismissal of this claim as well.

**C. Plaintiffs Fail to Show That the District Court Committed Clear Error in Finding Against Them on Their First Amendment Challenge to the Act's Treatment of Legislative Caucus Committees As Political Party Committees.**

Following the bench trial, the district court found against Plaintiffs on their challenge to the Act's treatment of legislative caucus committees as political party committees. R3911-39 (AT App11-39). Given the evidence in this record, it was right to do so.

**1. To Obtain Reversal of a Judgment Following a Bench Trial Is a Daunting Task.**

The Federal Rules of Civil Procedure set a high bar for reversing judgment following a bench trial: "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). Clear error review is significantly deferential: so long as "a factual finding is plausible in light of the record viewed in its entirety, [a reviewing court] may not reverse that finding even if [it] would have decided the matter differently had [it] been the trier of fact." *Morisch v. United States*, 653 F.3d 522, 528 (7th Cir. 2011). And in a bench trial, the district court's assessment of an expert witness's credibility is a finding of fact that is reviewed for clear error. *Dual-Temp of Ill., Inc. v. Hench Control, Inc.*, 821 F.3d 866, 870 (7th Cir. 2016). Thus, a district court's evaluation of witness credibility may not be disturbed unless "the court has credited patently improbable testimony or its credibility assessments conflict with its other factual findings." *Morisch*, 653 F.3d at 529. This Court has indicated that

a similarly deferential standard applies when reviewing a district court's application of legal principles to its factual finding following a bench trial. *Lurie v. C.I.R.*, 425 F.3d 1021, 1025 (7th Cir. 2005). Thus, only the district court's legal determinations are reviewed de novo. *Morisch*, 653 F.3d at 528.

Plaintiffs appear to believe that the district court was obliged to accept at face value Dr. Osborn's opinion testimony because it had determined on summary judgment that he qualified as an expert witness under Federal Rule of Evidence 702. AT Brf. at 44-50 (citing R3456-58). They also accuse the district court of relying instead on its own opinion to make findings that were contrary to Dr. Osborn's expert testimony and not otherwise supported by evidence. *Id.* They are mistaken. The district court simply weighed Dr. Osborn's expert testimony, as it was obliged to do, and found it "unpersuasive." These findings of fact are not clearly erroneous.

Plaintiffs' sole authority is inapposite: there, this Court rejected a district court judge's personal opinion that a criminal defendant exhibited a pedophilic identification, which was contrary to the expert's opinion on a question for experts to decide. *United States v. Modjewski*, 783 F.3d 645, 653 (7th Cir.), *cert. denied*, 136 S. Ct. 183 (2015). Here, the district court offered no opinion, much less one that was contrary to Dr. Osborn's expert opinion; rather, it simply found that Dr. Osborn's expert opinion was unpersuasive. The court not only had the right to make such an assessment for each of Dr. Osborn's reasons for forming his opinion, it was obliged to do so: "where [an expert's] testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, . . . the trial judge *must*

determine whether the testimony has ‘a reliable basis in the knowledge and experience of [the relevant] discipline.’” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993) (emphasis added)). Moreover, “the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.” *Id.* at 142 (emphasis in original). Here, on cross-examination, Dr. Osborn’s testimony crumbled for lack of a reliable basis for any of his opinion’s three grounds.

Application of these principles to the district court’s findings and conclusions warrants summary affirmance against Plaintiffs on this claim: they fail to show that any of the court’s factual findings are implausible when viewing the record in its entirety or that its evaluation of Dr. Osborn’s credibility credits patently improbable testimony or conflicts with its other factual findings, as *Morisch* requires for reversal. 653 F.3d at 528-29.

**2. Plaintiffs Fail to Show That the District Court’s Findings on the Threshold Factual Question — Whether Legislative Caucus Committees Are Sufficiently Similar to Political Party Committees — Are Clearly Erroneous.**

Plaintiffs first seek reversal on the ground that Defendants presented no evidence to establish that the Act’s limits on their contributions are “narrowly tailored” to the State’s compelling anti-corruption interest. AT Brf. at 37-38. But their premise is wrong. The narrow threshold factual question for trial was whether legislative caucus committees are sufficiently similar to political party committees that the First Amendment requires (or at least permits) allowing them to make

unlimited contributions, or whether they are so like PACs in their potential for corruption (*see* R3459-62 (AT SApp84-87)) that treating them differently makes the Act fatally underinclusive (R3932-33 (AT App32-33)). The district court's factual finding that legislative caucus committees are more like the former than the latter is unassailable. And because it is, Plaintiffs' argument that reversal is warranted because Defendants did not present evidence that to allow larger contributions from legislative caucus committees is "closely drawn" to advance a compelling anti-corruption interest (AT Brf. at 44-45) is unavailing.

Plaintiffs also summarily insist that the Act's contribution limits are not closely drawn to serve its compelling anti-corruption interest, apparently as a matter of law, for they rely on none of the evidence adduced at trial to establish clear error.<sup>5</sup> AT Brf. at 38-44. They posit several notions: (1) by not requiring legislative leaders to use legislative caucus committees' contributions for the caucus's interests, the Act permits their use for the leaders' personal interests, which in turn means that "there is no reason to believe" those committees' contributions pose a "significantly lesser

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<sup>5</sup> For this argument, Plaintiffs rely on documents attached to their memorandum of law on summary judgment (AT Brf. at 41 (citing R3015, 3019-22)) and unsworn allegations in their second amended complaint (*id.* at 42 n.5 (citing R2101-02 (AT SApp9-10)). Elsewhere, they cite an article published after the trial (*id.* at 47 n.7 (citing <https://www.illinoispolicy.org/reports/madigans-rules-how-illinois-gives-its-house-speaker-power-to-manipulate-and-control-the-legislative-process/> (last visited May 11, 2017))) by an entity that Wikipedia calls "a non-profit think tank based in Chicago [that] supports limited government and free-market principles" ([https://en.wikipedia.org/wiki/Illinois\\_Policy\\_Institute](https://en.wikipedia.org/wiki/Illinois_Policy_Institute) (last visited May 11, 2017)) and for which Bachrach is a board member (*see* <https://www.illinoispolicy.org/our-story/> (last visited May 11, 2017)). Plaintiffs offer no authority, however, for considering evidence (and allegations) on appeal that they did (or could) not ask the district court to take into account at trial.

threat of corruption” than contributions from a leader’s own PAC; (2) the Act’s more favorable treatment of legislative caucus committees than PACs renders the Act “woefully underinclusive”; and (3) “[l]egislative caucus committees are different from other political party committees” in several ways. *Id.* If Plaintiffs were correct, however, the district court would have had to enter summary judgment in their favor. And in effect, this argument attacks the denial of their summary judgment motion rather than showing clear error following the bench trial.

**3. Plaintiffs Fail to Show That the District Court’s Findings Are Clearly Erroneous.**

Plaintiffs’ only other ground for reversal of the judgment on this claim is that the district court committed clear error in rejecting, as “unpersuasive” (R3820 (AT App20)), Dr. Osborn’s testimony on all three of his reasons for classifying legislative caucus committees as political party committees: (1) the structure of legislative caucus committees, unlike that of political parties, amplifies the risk of quid pro quo corruption; (2) political party committees exclusively follow an expansionist contribution strategy, unlike legislative caucus committees, which may have a personal agenda, while PACs have an “access” agenda; and (3) legislative caucus committees’ donors are concentrated in “access-seeking” interest groups, and political parties have a broader donor base, which makes them less susceptible to corruption (AT Brf. at 44-51). Plaintiffs, however, fail to meet their burden of showing that any of these three factual and credibility determinations is clearly erroneous.

a. **The District Court Committed No Clear Error in Rejecting, as Unpersuasive, Dr. Osborn’s View that Legislative Caucus Committees’ Fundraising Power, Combined With Legislative Leaders’ Policymaking Function, Enhances the Risk of Corruption.**

The district court rejected this basis for Dr. Osborn’s opinion for several reasons. R3920-23 (AT App20-23). One was Dr. Osborn’s admission that political committees seek to shape policy, just as legislators and their leaders do, which in turn “undermine[d] Dr. Osborn’s assertion that legislative caucus committees are materially different from political parties because they are ‘closer’ to the legislative process.” R3921 (AT App21). The court also noted the frequent overlap between state party officials and legislative leaders, adding that unlike PACs’ leaders, legislative leaders can be ousted by their respective caucuses if they pursue a personal policy agenda or financially coerce legislators’ votes instead of pursuing the caucus’s agenda. R3922 (AT App22). Likewise, Dr. Osborn admitted that legislative leaders “have access to numerous institutional controls to keep their caucus in check, including other means of fundraising assistance” in addition to legislative caucus committees. *Id.* Furthermore, the court also rejected Dr. Osborn’s opinion that limiting a candidate to accepting contributions from one legislative committee for each election could make a candidate exclusively dependent on that committee, reasoning that candidates have many sources for contributions, including political parties’ unlimited ones. R3922-23 (AT App22-23).

Plaintiffs contend that the district court “had no basis” for rejecting Dr. Osborn’s testimony on this point, again arguing that he is an expert and Defendants presented no evidence to refute his opinion. AT Brf. at 46-48. In particular, they

object to the district court's rejection as unpersuasive Dr. Osborn's view that permitting candidates to accept contributions from only one legislative caucus committee during each election cycle increases opportunities for quid pro quo corruption, yet they admit that Dr. Osborn was unable to identify a single candidate who depended exclusively on a legislative caucus committee. *Id.* at 49-50 (citing R3923 (AT App23)). And McCarter's testimony about the effect of legislative caucus committee contributions to himself and his colleagues also undermined Dr. Osborn's view. *See* R3591-3610. Moreover, the district court plainly found that Dr. Osborn's testimony called into question his factual basis, data, principles, methods, and their application, so the district court was then obliged to determine whether his testimony had a sufficiently reliable basis. *Kumho Tire Co.*, 526 U.S. at 149. It concluded that the "structure" basis for his opinion was not sufficiently reliable to be persuasive.

**b. The District Court Committed No Clear Error in Rejecting, as Unpersuasive, Dr. Osborn's Opinion That Legislative Caucus Committees Have an Additional Contribution Strategy That Enhances the Risk of Corruption.**

The district court gave several reasons for rejecting Dr. Osborn's testimony on this point as unpersuasive. R3923-28 (AT App23-28). The first was that Dr. Osborn's generalization that political parties pursue only an "expansion strategy" when making contributions came from academic literature, not from data. R3923 (AT App23). The court also questioned Dr. Osborn's methodology: he examined only the majority's two legislative caucus committees' contributions, and not any of the

other four (or any other contributors) before concluding that legislative caucus committees have not only a primary interest in maintaining and increasing the caucus's membership but also a "secondary interest" in managing legislative operations, an interest reflected by only one of the two committees he examined. R3924 (AT App24). In addition, the court questioned Dr. Osborn's methodology, which did not examine any political party committee's actual contributions to test his generalization about such committees' purely expansionist strategy. R3927-28 (emphasis in original) (AT App27-28). Citing Dr. Osborn's admission that electability in a general election is different from electability in a primary, the court further found that, like contributions in general elections, contributions to a candidate in a primary election are "entirely consistent with an expansion strategy." R3925 (AT App25). And based in part on Dr. Osborn's concession that a party may realize only after the votes are cast that it could have won even if it had spent less, the court deemed "highly unpersuasive" Dr. Osborn's view that one of the two Committees was not pursuing a expansion strategy because it contributed to candidates who later won the general election by a comfortable margin. R3926 (AT App26).

Plaintiffs object to the district court's findings on the contribution strategy issue, arguing that "the alleged shortcoming in Dr. Osborn's testimony are [sic] irrelevant" because he testified that his opinion was not based on the data he examined and would not change even if all the data had reflected an expansionist strategy, so his review of that data "could not provide a basis for the district court to reject" Dr. Osborn's opinion on this issue. AT Brf. at 50-51 (citing R3685-86). Not

so. Again, it was Dr. Osborn's admission that he relied on generalizations from academic literature rather than testing his premise by examining readily available data that called into question his methodology and the factual basis for his opinion and thus its reliability. The district court's finding on this point was not clear error.

**c. The District Court Committee No Clear Error in Rejecting, as Unpersuasive, of Dr. Osborn's Opinion That Legislative Caucus Committees Have a Less Diverse Donor Base or That It Would Enhance the Risk of Corruption.**

The district court gave several grounds for rejecting this reason as well. R3928-30 (AT App28-30). Dr. Osborn's basis for this reason was again the academic literature indicating that political committees "tend to receive contributions from a broad cross section of donors." R3928-29 (AT App28-29). The court then found fault with his attempt to compare actual contributions to the two Committees with merely theoretical contributions to merely theoretical political parties, given that the readily available data about actual contributions to political party committees in Illinois conflicted with his generalizations about political parties' donor base. R3929 (AT App29). It also found significant that Dr. Osborn provided no support for his view that a less diversified donor base was more likely to exert financial influence on legislators. *Id.*

Plaintiffs quarrel with this assessment of Dr. Osborn's testimony, which they insist the district court "lacked any basis for rejecting." AT Brf. at 48-49. But again, the court found Dr. Osborn's testimony unpersuasive because his methodology called into question his opinion's factual basis. Moreover, his reasoning was circular: "If you have a diverse series of contributions, that mitigates the potential for corruption

because you have a diverse cross section of contributors.” R3645. As the district court found, he provided no factual basis for his view that there was a difference between the donor bases of political parties and those of legislative committees — the data showed they both received contributions from the same sources — nor any factual basis for his view that any such difference would make legislative caucus committees’ contributions more likely to have corruptive effect. R3933-34 (AT App33-34).

In sum, none of the three reasons that Dr. Osborn gave for forming his opinion that legislative caucus committees are not sufficiently like political party committees to treat the two the same way was persuasive, so the district court’s rejection of his opinion on this ground is not clear error.

**CONCLUSION**

For the foregoing reasons, Defendants-Appellees request that this Court affirm the district court's judgment in their favor in its entirety.

May 16, 2017

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,  
TYPEFACE REQUIREMENTS, and TYPE STYLE REQUIREMENTS**

The undersigned attorney hereby certifies that the attached brief complies with

1. the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because the brief contains, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), 12,244 words, from the Jurisdictional Statement through the Conclusion; and

2. the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because the brief has been prepared in a proportionally spaced typeface using WordPerfect X4, in 12-point Century Schoolbook.

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on May 16, 2017, 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 participants in the case are CM/ECF users and will be served via the CM/ECF system:

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