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

JOHN MATTHEW CHANCEY, FAIR COURTS AMERICA, and RESTORATION PAC Plaintiffs, v. THE ILLINOIS STATE BOARD OF ELECTIONS; IAN LINNABARY, *in his official capacity as Chair of the Illinois State Board of Elections*; CASANDRA B. WATSON, WILLIAM J. CADIGAN, LAURA K. DONAHUE, TONYA L. GENOVESE, CATHERINE S. MCCRORY; WILLIAM M. MCGUFFAGE, *and* RICK S. TERVEN, SR., *in their official capacities as members of the Illinois State Board of Elections*; KWAME RAOUL, *in his official capacity as Illinois Attorney General*, Defendants.	Case No. 22-04043 Honorable John J. Tharp, Jr. **Plaintiffs' Consolidated Reply in Support of Their Motion for Preliminary Injunction and Opposition to Motion to Dismiss**

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INTRODUCTION

Plaintiffs submit this consolidated reply in support of their motion for preliminary injunction and brief in opposition to the motion to dismiss because Defendant's arguments for granting the motion to dismiss overlap with his arguments that Plaintiffs lack a likelihood of success on the merits for purposes of the preliminary injunction. For the reasons stated herein, and in their motion for preliminary injunction, this Court should grant Plaintiff's motion for preliminary injunction and deny the motion to dismiss.[1]

ARGUMENT

I. Plaintiffs are likely to succeed on the merits of their claims and have stated claims which entitle them to relief.

Defendant's primary argument on the merits of Plaintiffs' claims is that judicial elections are different. Indeed, Defendant does not even attempt to justify the ban on contributions to judicial candidates by out-of-state donors or the $500,000

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[1] Defendant's Memorandum notes that "The Board of Elections defendants take no position in this lawsuit other than the Plaintiffs' claims against the Board are barred by the Eleventh Amendment." AG Mem. n.1. Plaintiffs maintain that their claims against the Board of Elections are not barred by the Eleventh Amendment. Nonetheless, after discussions between counsel, Plaintiffs agree to allow the Board to be voluntarily dismissed from this case so long as the members of the Board remain defendants to this lawsuit. The Board members are necessary defendants because the Board is responsible for enforcement of the challenged provisions. *See* Compl. ¶ 30. Plaintiffs agree to Defendants' forthcoming motion to allow the Board defendants to not be required to file an answer or otherwise continue to actively participate in the litigation since they are not taking a position so long as the Board members remain as defendants and abide by any judgments or orders issued by the court.

contribution limit to independent expenditure committees involved in judicial races under the traditional government interest in the prevention of quid pro quo or its appearance. *See* AG Mem. 8, 14. Rather, Defendant asserts that it may justify these restrictions with an interest in preserving the confidence in the integrity of the judiciary. AG Mem. 4.

It is true that the Supreme Court in *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 477 (2015), recognized the importance of judicial integrity, and the public perception thereof, as a valid state interest in the context of judicial elections. *See* PI Mem. 7. But it cannot be the case that the judicial campaign regulation exists free of First Amendment constraint. The people of Illinois felt that an elected judiciary would best serve the purposes of the State, and "the First Amendment does not permit [a state] to achieve [that] goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about." *Republican Party v. White*, 536 U.S. 765, 768 (2002).

Moreover, all the cases Defendant cites to support its interest in judicial integrity—*Williams-Yulee*, *White*, and *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993)—concerned restrictions on the conduct of judicial *candidates*, not on persons wishing to make contributions either to judicial candidates or independent expenditure committees, as Defendant acknowledges. AG Mem. 8. In *White*, Minnesota had banned candidates from speaking on controversial issues; in *Buckley*, the plaintiffs challenged an Illinois Supreme Court Rule prohibiting judicial candidates from announcing their views on disputed legal

or political issues; and in *Williams-Yulee*, the state had banned candidates from directly soliciting donations, requiring that solicitations be made to a candidate's committee. None of these cases involved a challenge to the conduct of the *donors* to a judicial candidate's committee—let alone of donors to an independent expenditure committee. This is important because the basis for restricting the speech of judicial candidates is the state's interest in preserving judicial integrity through judicial canons of ethics that apply to judges. Such canons of ethics do not apply to individuals seeking to make political contributions. Although Defendant admits that cases justifying restrictions on speech in the judicial election context have only applied to judicial candidates themselves, AG Mem. 8, Defendant attempts to justify the state's restrictions on speech of individuals who are not seeking judicial office but merely seek to make contributions to judicial candidates or contributions to independent expenditure committees. Defendant cites no case that justifies restricting the First Amendment rights of individuals with no special nexus to the conduct of the judiciary simply because they wish to make contributions related to a judicial election.

A. The ban on contributions from out-of-state persons to judicial candidates violates the First Amendment.

Defendant asserts that the ban on contributions to judicial candidates by out-of-state persons is not a "ban" because it does not prohibit donations to political parties or independent expenditure committees. AG Mem. 10. The fact that Chancey can give money to some other set of actors for some other purposes does

not satisfy his right to speak regarding the specific candidates whom he knows and believes in based on longstanding personal and professional ties. Giving money directly to a candidate is *not* the equivalent of giving money to a party or an independent group—indeed, four and a half decades of campaign finance law are *premised* on the substantive difference between direct and independent spending.

Chancey's ability to make contributions to political parties or independent expenditure committees does not insulate the ban on contributions to judicial candidates from judicial scrutiny, nor does it suggest that the ban is somehow narrowly tailored. For example, in *S.D. Voice v. Noem*, 380 F. Supp. 3d 939, 951 (D.S.D. 2019), a district court held that a prohibition on receipt of out-of-state contributions to ballot question committees was unconstitutional. It did not matter that the restriction on contributions only applied to ballot question committees and that "[n]o restriction on out-of-state contributions applies to candidates or candidate committees, political action committees, or political parties." *Id.* at 945. The fact that the restriction was not a total ban on out-of-state contributions did not save the statute. Indeed, in that case the fact that the out-of-state restriction only applied to ballot question committees and not to candidates or candidate committees, political action committees, or political parties was a reason why the court found that the restriction was *not* narrowly tailored or closely tailored to the purported government interests, since it was severely underinclusive. *Id.* at 950.

Defendant asserts that the out-of-state ban is justified by the state's interest in preventing "a situation where outside donors dominate and control another state's

judiciary." AG Mem. 11. But this interest is not a legitimate interest in preserving judicial integrity. *See Landell v. Sorrell*, 382 F.3d 91, 148 (2d Cir. 2002) ("the government does not have a permissible interest in disproportionately curtailing the voices of some, while giving others free rein, because it questions the value of what they have to say."). Further, as explained above, the state's interest in judicial integrity has only ever applied to actions taken by judicial candidates based on the judiciary's ethical duties.

Even assuming that this is a legitimate interest it cannot be closely drawn. First, Defendant fails to explain why the state's interest in donors dominating or controlling the state's judiciary only applies to out-of-state donors. Presumably, given Defendant's extremely broad definition of judicial integrity, the state would also be concerned with in-state donors dominating or controlling the state's judiciary, yet the Election Code does not prohibit donations by in-state persons. Further, a complete ban on out-of-state contributions cannot be closely drawn when contribution limits would be just as effective at preventing out-of-state donors from dominating a state's judiciary while infringing less on individual's free speech rights.

B. The limit on contributions to independent expenditure committees that make expenditures in judicial races violates the First Amendment.

Defendant asserts that the $500,000 limit on contributions by a person or entity to an independent expenditure committee that makes independent expenditures in a judicial race is justified by the state's interest in the public's confidence in the

integrity and independence of the judiciary because such contributions could "exert outsized influence on the judge's elected as a result of a committee's efforts." AG Mem. 13. Again, no court has ever held that a state's interest in judicial integrity extends to an interest in preventing persons who are not themselves judicial candidates from exercising their First Amendment rights.

In any event, the state's purported interest in preventing "outsized influence" on a judge does not justify the limit on contributions by a person or entity to an independent expenditure committee that makes contributions in a judicial race. The contributions to an independent expenditure committee occur entirely independently of any judicial candidate. The state must confront the long line of cases explaining that independent expenditures *cannot* corrupt in the relevant sense, because "the anticorruption rationale cannot serve as a justification for limiting fundraising by groups that engage in independent spending on political speech." *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011). Defendant asserts that in the judicial context the state is justified in having broader interest than set forth in *Barland*, AG Mem. 13. That the anti-corruption rationale is heightened in the judicial context is meaningless when applied to activities that are not capable of corrupting in the first place. Defendant never explains how contributions to an independent expenditure committee that makes independent expenditures in a judicial race could result in an outsized influence over a judicial candidate. A judicial candidate is unlikely to even know who the donor to an independent expenditure committee is—since candidates cannot coordinate with

independent expenditure committees—unless that judicial candidate proactively reads the independent expenditure committee's filings with the Board of Elections to find out its donors.

Even if Defendant's "outsized influence" interest could support the state's $500,000 contribution limit to independent expenditures—which it cannot—the Election Code is not closely drawn to serve that interest. As Plaintiffs explained in their Memorandum, the Election Code lifts *all limits on direct contributions to candidates* when independent expenditures are made in excess of $100,000. PI Mem. 13. That completely undermines whatever interest Defendant may have in preventing the perception of a judicial candidate being subject to outsized influence. *See White*, 536 U.S. at 780. The state certainly cannot be concerned with the outsized influence a person may have by making contributions to an independent expenditure committee that happens to make independent expenditures in a judicial race when the Election Code elsewhere permits unlimited direct contributions to a judicial candidate.

Defendant asserts that the exception is justified because "independent expenditure committees can more easily conceal information about their donors." AG Mem. 15. But Defendant does not explain how this is relevant to Defendant's stated interested in preventing "the perception of a judiciary subject to the whims of major donors." AG Mem. 14. A judicial candidate can hardly be at the whims of a concealed donor to a committee that makes independent expenditures in that candidate's race, especially compared to a disclosed donor that can make unlimited

direct donations to that candidate. Indeed, assuming that Defendant is correct that donors to independent expenditure committees are more easily concealed, that fact *cuts against* Defendant's argument. How can a donor exert influence over a judicial candidate who does not know who the donor is and who has no contact with the donor? The Election Code provision lifting the direct contribution limits thus undermines the Defendant's interest in preventing the perception of a judicial subject to the whims of major donors. For this reason, the limit on contributions to independent expenditure committees is not closely drawn to serve the state's interest in preventing outsized influence over the judiciary.

II. Plaintiffs brought this action in a timely manner, and enjoining these campaign finance rules will not disrupt the upcoming general election.

Defendant argues that Plaintiffs unjustifiably delayed filing this case until the eve of the election, but that is simply not true. *See* AG Mem. 19. It certainly is not the case as to the $500,000 dollar limit in 10 ILCS 5/9-8.5(b-5)(1.2): that limit was enacted May 27, 2022, *see* 2021 Ill. HB 716, and Plaintiffs filed their Complaint on August 3, 2022. That's slightly over two months for a party to go from discovering this new law has been passed to filing a complaint and motion for preliminary injunction.

Nor does the somewhat longer period regarding the out-of-state ban undermine that claim. 10 ILCS 5/9-8.5(b-5)(1)(B) was added to the code on November 15, 2021. AG Mem. 2. The eight-and-a-half months between that date and this case is reasonable under the circumstances because the out-of-state ban operates not just

on sophisticated actors like parties, candidates, or committees, who have professional reasons to keep abreast of changes to Illinois' law. Rather, it operates on private citizens like Chancey, a retired lawyer who worked for the Lake County State's Attorney's Office, who may not know in the fall or winter of 2021 that they intend to donate to candidates in the 2022 election—many of those candidates may not even be candidates yet. This is compounded by the specific nature of the ban, in that it applies only to out-of-state donors, who have even less reason to keep abreast of what Illinois' legislature is up to. It is entirely reasonable that such a person may not even learn of the ban until the spring or summer, when campaigns have begun and donations are solicited.

Defendant relies extensively on the *Purcell v. Gonzalez*, 549 U.S. 1 (2006), line of cases for the well understood principle that federal courts should avoid tinkering unnecessarily with state election rules too close to an election. *See* AG Mem. 1-2, 20. But "Purcell and its progeny relate to the actual voting process (e.g., absentee voter laws, restoration of voting rights) and related election administration issues, not to campaign finance." *Make Liberty Win v. Ziegler*, 499 F. Supp. 3d 635, 645 (W.D. Mo. 2020). The Supreme Court has never applied the principle in the campaign finance context. *Id*. Defendant's only citation applying *Purcell* to campaign finance rules is a district court case from New York, in which the plaintiffs waited more than two years to bring suit and challenged registration and reporting requirements for political action committees, which is far closer to the election administration concerns that *Purcell* contemplates. No such concerns attach to Plaintiffs' challenge

to two limitations on donations. Issuing a preliminary injunction in this case will cause no confusion: it will simply mean that Plaintiffs—and everyone else similarly situated—are free to make certain donations they otherwise could not.

III. The denial of Plaintiffs' First Amendment right to participate in Illinois' upcoming election constitutes irreparable harm.

Defendant asserts that there is a lack of irreparable harm, AG Mem. 18-19, but never addresses the well-established principle that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" *Backpage.com, LLC v. Dart*, 807 F.3d 229, 239 (7th Cir. 2015) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)), and that money damages are therefore inadequate, *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004). Thus, irreparable harm in First Amendment cases is generally presumed. *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013). Defendant cites nothing to overcome this presumption. In the Complaint, Chancey plead that he seeks to make contributions to multiple specific candidates for elective office with whom he has had personal relationships. Compl. ¶ 33.

CONCLUSION

Plaintiffs respectfully requests that their Motion for Preliminary Injunction be granted, and the Attorney General's Motion to Dismiss be denied.

Dated: September 2, 2022

Respectfully Submitted,

John Matthew Chancey, Fair Courts America, and Restoration PAC

By: /s/ Jeffrey M. Schwab
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Certificate of Service

I, Jeffrey M. Schwab, an attorney, certify that on September 2, 2022, I filed Plaintiffs' Consolidated Reply in support of Preliminary Injunction and Opposition to Motion to Dismiss on Defendants' counsel through the Court's electronic case filing system.

/s/ Jeffrey M. Schwab