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

CLAIRE BALL; SCOTT SCHLUTER, Plaintiffs, v. LISA M. MADIGAN, Attorney General of Illinois; CHARLES W. SCHOLZ, Chairman, Illinois Board of Elections; ERNEST L. GOWEN, Vice Chairman, Illinois Board of Elections; BETTY J. COFFRIN, Member, Illinois Board of Elections; CASANDRA B. WATSON, Member, Illinois Board of Elections; WILLIAM J. CADIGAN, Member, Illinois Board of Elections; ANDREW K. CARRUTHERS, Member, Illinois Board of Elections; WILLIAM M. MCGUFFAGE, Member, Illinois Board of Elections; JOHN R. KEITH, Member, Illinois Board of Elections, all in their official capacities, Defendants.	)	Civil Case No. 15-cv-10441 Hon. John Z. Lee ORAL ARGUMENT REQUESTED

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Illinois argues that without legislative findings, without evidence, but with an abundance of speculation that it has the authority to preclude one industry from making campaign contributions. This is the state that banned one of the most fundamental constitutional rights—the right to political free expression and association—but only for licensed medical marijuana organizations. Still, some 25 states have legalized medical marijuana and four states as well as Washington, DC have legalized recreational marijuana. Tom Huddleston, Jr., *How Legalized Marijuana is Sweeping the U.S.—in One Map*, FORTUNE, June 29 2016, *available at* http://fortune.com/2016/06/29/legal-marijuana-states-map/. Of those states, only Illinois decided to run roughshod over the First Amendment, necessitating this Court to declare 10 ILCS 5/9-45 unconstitutional.

Defendants make much ado over the fact that medical marijuana is "new, untested, [and] closely-regulated." Defendants' Memorandum at 11. But the Constitution does not allow the government to suppress political speech simply because the speaker participates in a new or highly regulated industry. "New ideas more often than not create disturbances, yet the very purpose of the First Amendment is to stimulate the creation and dissemination of new concepts." *Landry v. Daley*, 280 F.Supp. 968, 971 (N.D.Ill. 1968). Naturally, government actors have been suspicious of every form of disruptive speech or association throughout history. But under the First Amendment, except in exceptional circumstances, attempts to stifle or mute new ideas, speakers, and industries must fail. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97 (1968) (ban against teaching evolution invalidated); *Cohen v. California*, 403 U.S. 15 (1971) (offensive speech about the

military draft could not be enjoined); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (state law banning membership in Communist Party invalidated).

II. ILLINOIS HAS NOT ESTABLISHED A SUFFICIENT APPEARANCE OF CORRUPTION TO JUSTIFY ITS CONTRIBUTION BAN

a. Defendants Offered Insufficient Evidence to Support a Contribution Ban

The Defendants have not provided sufficient evidence to show that a contribution ban is necessary to address an appearance of corruption inherent in political contributions by medical marijuana licensees. Indeed, Defendants cite no legislative findings but instead rely on five news reports speculating about the possibility influence peddling and cronyism under the Compassionate Use of Medical Cannabis Pilot Program Act. News reports are, of course, inadmissible hearsay, and rightly so: news reports do not necessarily provide complete and accurate information, and it is well-known that media often indulges in "extravagant and sensational headlines to news dispatches which they publish." *Marteney v. United Press Ass'n*, 224 F.2d 714, 715 (10th Cir. 1955). Indeed, it is sometimes the practice of media to put "poison in a headline" and provide a weaker, less sensationalistic story. *Id.*

Defendants argue that the lack of legislative findings to support their case does not matter because the Supreme Court upheld Missouri's contribution limits based on a single affidavit stating that large contributions have the "potential to buy votes." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 384–85, 393 (2000). Defendants' Memo at 10. But *Nixon* is different because it involved ordinary across-the-board limits on contributions—the same kind of contributions the Supreme Court had already approved at the federal level in *Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976). As *Nixon* noted, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny will vary up or down with the *novelty* and plausibility of the justification raised." 528 U.S. at 391 (emphasis added). Here, Illinois' complete ban on medical marijuana licensees is

as novel as possible, as the first restriction of its kind in the country. It is also unusually extreme, as a complete ban. Accordingly, Illinois' evidentiary burden is much greater than Missouri's burden in *Nixon* – and a handful of unverified news reports cannot suffice to meet it.

Indeed, there is no reason to believe that the concerns raised in the news articles actually motivated the contribution ban. To the contrary, the Act's lead sponsor has stated an entirely different reason for the ban: to "appease 'conservative' and 'hesitant' colleagues." Brian Mackey, *Illinois Libertarians Sue Over Medical Marijuana Campaign Finance Ban*, NPR ILLINOIS, Nov. 25, 2015, *available at* http://news.wsiu.org/post/illinois-libertarians-sue-over-medical-marijuana-campaign-finance-ban#stream/0. Moreover, to the extent that the public perceives any appearance of corruption in the medical marijuana industry, it is an appearance that the state itself manufactured.

Illinois set an artificially low number of cultivation centers (22) and dispensaries (60) to give "geographic monopolies to licensees." Defendants' Memo. at 12. The media reports on which Defendants rely note the "closed" nature of the scheme as the source of potential corruption. *See Chicago Tonight*, WTTW, Nov. 17, 2014, *available at* http://chicagotonight.wttw.com/2014/11/17/smoke-and-mirrors; Mary Ann Ahern, *Rauner Objects to Illinois Medical Marijuana Bill*, NBC CHICAGO, Sept. 16, 2014, http://www.nbcchicago.com/blogs/ward-room/Rauner-Objects-to-Illinois-Medical-Marijuana-Bill-275386251.html. Illinois could have made the names of applicants for dispensary or cultivation licenses public—like Massachusetts and New York did—or it could have awarded licenses in a less suspect manner, for example, a public lottery—like Arizona did. *See, e.g.*, New York Department of Health Registered Organizations List, https://www.health.ny.gov/regulations/medical_marijuana/application/docs/applicant_list.pdf;

2015 RMD Applicants, Massachusetts Health and Human Services, http://www.mass.gov/eohhs/gov/departments/dph/programs/hcq/medical-marijuana/2015-applicants.html; Howard Fischer, *Bingo! Lottery machine determines Arizona's first medical marijuana licenses*, EAST VALLEY TRIB., Aug. 7, 2012, *available at* http://www.eastvalleytribune.com/local/health/article_a8def08c-e0eb-11e1-baf6-0019bb2963f4.html. Instead, it shrouded its system in secrecy, kept small business entrants away, and generated the public suspicion it now complains about as the very basis to support its ban of campaign contributions by medical marijuana organizations. Government cannot justify banning a whole range of constitutionally protected speech simply by creating a regulatory scheme that arouses some public suspicion. As noted in Plaintiffs' opening brief, at least other states that imposed industry-specific campaign contribution bans had articulable, demonstrated instances of public corruption, or its appearance, not merely a questionable state regulatory scheme. In those instances, states responded to well-demonstrated instances of public corruption illustrated in legislative findings or actual evidence. Their narrow and focused remedies thus sought to cure those limited problems. True enough, Illinois has had more than its fair share of controversies in corruption, but they have been connected to pay-to-play schemes, of which Defendants have presented no evidence in the medical-marijuana industry. Defendants' Memo. at 5. Whatever the cause of historic corruption is in Illinois, there is no serious indication that a new market entrant, medical marijuana businesses, is somehow responsible for it. Nor is the novelty or generalized trepidation about medical marijuana sufficient to ban "participat[ion] in democracy through political contributions. . . ." *McCutcheon v. Fed. Elec. Comm'n* (*FEC*), 134 S.Ct. 1434, 1441 (2014).

It remains undisputed that states have a valid interest in pursuing the eradication of *quid pro quo* corruption. *Id.* at 1459. But Defendants only suggest the most common, and invalid, excuse for banning protected political speech—that it is novel, untested, and dangerous stuff. Any public perception of corruption that might arise is tied to the secretive regulatory program Illinois designed.

b. Existing Case Law Does Not Support a Ban with so Little Evidence

Existing case law does not support Defendants' argument that the peculiar characteristics of the medical marijuana industry justify an absolute ban against any and all campaign contributions by businesses in that industry. Defendants rely on *Schiller Park Colonial Inn, Inc. v. Berz*, 63 Ill.2d 499 (1976), in which Illinois Supreme Court upheld a state-imposed ban on campaign contributions by retail liquor licensees; but that case's reasoning was premised on strong legislative findings that alcohol was related to certain evils in society. *Id.* at 507 (quoting *Daley v. Berzanskis*, 47 Ill.2d 395, 398 (Ill. 1971)). The Defendants have presented no comparable findings about medical marijuana. Moreover, *Berg* predates the modern Supreme Court case law on campaign contribution limits, which emphasizes the need for rigorous scrutiny and the government's burden to justify contribution limits with evidence. *See* Plaintiffs' Memorandum at 6–7.

And not all courts have found *Berz*'s reasoning persuasive. In Pennsylvania, the state supreme court departed from *Berz* and invalidated a ban on campaign contributions by those holding interests in gaming businesses. *DePaul v. Commw.,* 969 A.2d 536 (Pa. 2009). The Court explained that while Pennsylvania had an undisputed interest in preventing corruption, it could achieve that interest in a manner far better tailored to protect First Amendment interests. *Id.* at 552–53. As that court stated, "A statute that limited the size of contributions, rather than absolutely

prohibiting any contributions, would be more narrowly drawn to accomplish the stated goal. Banning *all* contributions is not a narrowly drawn means of furthering a policy of negating the corrupting effect and appearance of *large* contributions." *Id.* at 553.

In reaching its decision, the *DePaul* court examined the legislative purposes behind the state's gaming campaign contribution ban. Among these were interests to: (1) protect the public from the evils of gaming, (2) maintain the integrity of regulatory oversight of the gaming industry, and (3) prevent the appearance of corruption from large contributions. *Id.* at 552. Problematically, and in contrast with other cases upholding industry-wide bans, Illinois lacks any legislative findings suggesting inherent corruption in the nascent medical marijuana industry.

To be certain, the developing medical marijuana market is not like casino gambling or other industries associated with well-documented instances of corruption. It was important for the Superior Court of New Jersey in upholding that state's gaming contribution ban that "there has been a *longstanding* and strong sensitivity to the evils *traditionally* associated with casino gambling when it is unregulated." *In re Petition of* Soto, 565 A.2d 1088, 1093 (N.J. 1989) (emphasis added). The State of New Jersey also specifically found that "Gambling is an activity rife with evil." *Id.* Similarly, the Louisiana Supreme Court upheld a gaming campaign contribution ban because of the well-documented connection between the gaming industry and corruption: "Given the *history* of the gaming industry and its *connection to public corruption* and the appearance of public corruption, it is completely plausible, and *not at all novel*, for the Louisiana legislature to have concluded that it was necessary to distance gaming interests from the ability to contribute to candidates and political committees which support candidates." *Casino*

Ass'n of Louisiana v. Foster, 820 So.2d 494, 508 (2002) (emphasis added).[1] Illinois simply cannot point to a similar history of corruption and public malfeasance associated with the budding medical marijuana industry because it does not exist, and its ban on contributions by participants in that industry is indeed novel.

In the past ten years, the legitimization of marijuana for medical and recreational uses has been at the forefront of national debate and discussion. Many have rallied around the cause as an issue of social justice and civil rights. Others have highlighted its dangers. Slowly, state-by-state, jurisdictions have liberalized marijuana laws, recognizing their disparate penalizing effect against minorities, the impracticality of prohibition, or even the positive effects of the drug. Likewise, those involved in the marijuana trade have voluntarily come into public scrutiny to publicly offer and trade their goods and services. Unlike the era of alcohol prohibition, there has been no documentation of a Mary Jane Capone operating in Chicago. Unlike the unique characteristics of the professional gaming industry, there has been no longstanding history of the undue influence of the marijuana industry in legislative affairs. And unlike other states that faced considerable corruption scandals or had a history of particular industries corrupting the political process, the Defendants can point to no such record here. All they can amass are generalized fears, news clippings, and conjecture to support the state's desire to ban political campaign contributions by medical marijuana organizations.

If Illinois' constitutional reasoning were correct, it would have troubling, far-reaching implications. Under the Defendants' theory, any new group with disruptive ideas or services

[1] Cases such as *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) are inapposite here since they involve situations like *U.S. Civil Service Commission v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), which implicate employees or contractors embedded in government functions where First Amendment rights are traditionally more limited.

would be left at the "mercy of *noblesse oblige*"—where Illinois would decide the scope and breadth of First Amendment rights retained by these thought-agitators. *U.S. v. Stevens*, 559 U.S. 460, 479 (2010). There would be no burden for the state to make accurate legislative findings to remove a particular industry from the political process. There would be no need to produce evidence supporting claims that particular speakers are so inherently dangerous that the state may ban them from making campaign contributions. Participation in the political process would be a luxury left to the bureaucratic whim of the state.

III. ANY INTEREST IN PREVENTING CORRUPTION OR ITS APPEARANCE COULD BE ACHIEVED IN CONSTITUTIONALLY APPROPRIATE WAYS

Even if Illinois had legitimate concerns about the appearance of corruption in the medical marijuana industry – which it has not established – it retains a plentitude of options to address those concerns that would involve less damage to the First Amendment rights of medical marijuana groups and political candidates than an absolute ban.

First, as the Supreme Court of Pennsylvania noted, a campaign contribution *limit* instead of a *ban* would be better tailored to any interest in preventing corruption. *DePaul*, 969 A.2d at 552–53. Illinois enjoys greater latitude to impose contribution limits, which are the most frequent and commonly upheld way to combat corruption or its appearance. *See Nixon*, 528 U.S. at 391–96 (discussing how limiting *large* contributions easily satisfies constitutional scrutiny).

Second, instead of restricting medical marijuana organizations' contributions to candidates for *any and all* offices, it could restrict their contributions to candidates for *particular* offices that have some connection to the State's regulation of the medical marijuana industry. Defendants have not explained how a medical marijuana organization's contribution to a candidate for state comptroller such as Plaintiff Claire Ball could create an appearance of corruption when the

comptroller has no involvement in legislation, regulation, or licensing decisions that affect the industry.

Third, while Illinois elected to create a closed, high-cost licensing system for its medical marijuana pilot program, it could also impose any variety of screening programs to protect against corruption. For example, Illinois could cross-check the business interests of licensees for suspicious dealings or check for conflicts of interest. It could employ a third-party accountability audit to review the propriety of the licensing system.

Fourth, Illinois could require an enhanced disclosure regime for contributions related to medical marijuana operations, which would offer the public better insight into the political operations of such organizations and candidates they support. For example, Illinois imposes additional disclosure requirements for riverboat gaming licensees which includes revealing contributions, loans, or donations made to candidates or officeholders. *See* 230 ILCS 10/5.1(a)(9).

Any of these alternatives would help promote transparency and limit corruption while preserving vital First Amendment interests. Instead of opting for the constitutionally supportable regulation of campaign contributions, however, Illinois decided to ban all contributions medical marijuana groups might make. In doing so, it failed to properly tailor its approach in combatting corruption and damaged the competitive ability of third-party candidates to mount successful campaigns. This alone supports the invalidation of 5 ILCS 5/9-45.

IV. THE UNSUNG HEROES: CONTRIBUTIONS ARE A LIFE LINE FOR THIRD PARTY CANDIDATES TO MOUNT EFFECTIVE CAMPAIGNS

Largely missed in the Defendants' Memorandum is the fact that Illinois' campaign contribution ban damages not only medical marijuana groups but also third-party candidates struggling to gain financial support to run competitive campaigns. *Randall v. Sorrell*, 548 U.S. 230 (2006), provides a helpful lens to analyze the constitutionality of contribution limits as it

borrows upon the constitutional framework of *Buckley*, 424 U.S. 1 (1976), and *Nixon*. In particular, *Randall* stands for the simple proposition that while the Court has frequently upheld contribution limits—$1,075 limit on contributions to state auditors in *Nixon*, $5,000 limit on contributions to multicandidate political committees in *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981)—"contribution limits might sometimes work more harm to protected First Amendment interests than their anticorruption objectives could justify." *Randall*, 548 U.S. at 247–48. Justices Breyer and Ginsburg, who have generally looked favorably on contribution limits, have lamented that limits that are too stringent magnify the "reputation-related or media-related advantages of incumbency and thereby insulat[e] legislators from effective electoral challenge." *Id.* at 248 (quoting *Nixon*, 528 U.S. at 403–04 (Breyer, J., joined by Ginsburg, J., concurring)).

The *Randall* analysis remains relevant since it provides a helpful framework for determining the tailoring of a given contribution restriction. In doing so, it repeats what was made clear in *Buckley* and *Nixon*: that limits on large contributions are easily defensible but low limits—or here, a ban—may cause serious harm to the First Amendment rights of challengers. Whether low limits exist across the board or in particular targeted areas, the reasoning of *Buckley*, *Nixon* and *Randall* remains viable.

Plaintiffs are new entrants to politics in Illinois. Both are running as candidates under the Libertarian Party ticket. And both are the precise sort of individuals Justices Breyer and Ginsburg were concerned about in *Nixon*: challengers to the status quo who rely on contributions as their lifeline to mount effective campaigns. Libertarian candidates on a national level regularly compete for one percent of the vote. *See* Garret Quinn, *Can the Libertarian Party Get 1 Percent of the Vote?*, REASON, Dec. 2012, *available at* http://reason.com/archives/2012/11/15/can-the-libertarian-party-get-1-percent. As stated in their Verified Complaint, at the time this suit was

filed Plaintiff Claire Ball had received $1,450.00 in contributions and Plaintiff Scott Schluter had received just $172.22. Verified Amended Compl. (Doc. No. 24) ¶ 26. To put it mildly, both plaintiffs require access to any and all opportunities for funding to spread their third-party message.

Illinois ensures that challengers of the status quo—those who favor the liberalization of medical marijuana laws—are cut off from one of the most effective means to fund their campaigns. Meanwhile, politicians supporting tobacco interests remain free to receive up to $10,800 from players in that highly regulated industry. 10 ILCS 5/9-8.5(b). And candidates favoring innovative pharmaceutical research (that does not involve marijuana), also part of a highly regulated industry, may receive the same amount. But candidates who espouse a more unorthodox platform are cut off from associating with likeminded allies and raising funds necessary to run effective campaigns.

Political candidates espousing mainstream, status quo views will tend to enjoy broad sources of funding and support for their campaigns. They need not be concerned if medical marijuana industries are cut off from participating in funding political campaigns because they can turn elsewhere for support. But struggling, third party candidates rely on much more particular niches for funding—by political allies and those sharing similar, unconventional views. By cutting off this important way third party candidates fundraise and amass the necessary resources to run effective campaigns, Illinois does damage to their First Amendment rights.

V. MEANINGFUL SCRUTINY IS WARRANTED WHERE GOVERNMENT MANIPULATES THE MARKETPLACE OF IDEAS

While the Defendants would ask that this court adopt a "relatively complaisant" standard of review, more meaningful scrutiny is appropriate. Defendants' Memo. at 6. The ban in question, 10 ILCS 5/9-45, subjects but one category of campaign contributions—those distributed by medical marijuana groups—to a ban. Properly understood, the law is a speaker-based ban.

The Supreme Court has traditionally been suspicious when laws target disfavored speakers, thus triggering heightened scrutiny. Because speech restrictions "based on the identity of the speaker are all too often simply a means to control content," strict scrutiny should be invoked here. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *see also Grossjean v. American Press Co.*, 297 U.S. 233 (1936) (regulations discriminating among different speakers in the media require strict scrutiny); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (same); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (tax schemes that applied to some magazines, but exempted others, properly called for strict scrutiny). The First Amendment requires rigorous scrutiny whenever the government creates "a regulation of speech because of disagreement with the message it conveys." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565 (2011) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Illinois has selectively picked one highly-regulated industry and subjected it alone to a complete ban on campaign contributions. The purported evils the state describes—novelty, scope of regulation, health and safety concerns—are present in abundance in other industries that remain free to make campaign contributions under the law. Uber, the coal industry, tobacco, and other interests freely participate in this way, even though they may pose similar risks. And generalized concerns about the corrupting nature of a regulatory system Illinois itself created are insufficient to invoke complaisant review. Were it otherwise, Illinois would be free to design regulatory regimes that abridged First Amendment rights but evaded meaningful review.

Illinois may disagree with the merits of medical marijuana. It may be properly concerned about its health effects and about reasonable efforts to control corruption. But when it singles out a disfavored industry to handicap its participation in the political process while similarly situated industries remain free, strict scrutiny must be the appropriate level of review.

VI. THE ATTORNEY GENERAL IS A PROPERLY NAMED DEFENDANT

The Defendants argue that the Plaintiffs failed to establish a "traceable injury or that the relief sought would provide them with any redress" related to the Illinois Attorney General. Defendants' Memo. at 18. Under 10 ILCS 5/9-26, a "prosecution for *any offense designated by this Article* shall be commenced no later than 18 months after the commission of the offense. The appropriate State's Attorney *or the Attorney Genera*l shall bring such actions in the name of the people of the State of Illinois." (emphasis added). Since a violation of 10 ILCS 5/9-45 is part of "this Article" referenced in 10 ILCS 5/9-26, the Attorney General is a properly named defendant. Also, 10 ILCS 5/29-12 explains that any violation of the election code is a misdemeanor. Thus, under 10 ILCS 5/9-23, the Illinois Elections Board may report violations of the law to the Attorney General, which also makes her a properly named defendant.

VII. CONCLUSION

Trepidation over new ideas conjured up by thought-agitators and disruptive social agents is nothing new. Illinois cannot dress up its anxiety over medical marijuana in the cloth of concern of curing corruption. It has presented no evidence or legislative findings that its all-encompassing campaign contribution ban helps reduce corruption. Its radical approach—imposing a ban against campaign contributions by medical marijuana organizations and cutting off third-party candidates from receiving their support—is not supported under First Amendment precedent. This Court is simply left with another instance of government removing politically unpopular speakers from the marketplace of ideas. This supports the grant of Plaintiffs' Motion for Summary Judgment and the denial of Defendants' Cross-Motion for Summary Judgment.

Respectfully submitted,

/s/ Benjamin Barr

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CERTIFICATE OF SERVICE

I, Benjamin Barr, certify that the foregoing Memorandum in Opposition to Defendants' Motion for Summary Judgment was served upon Defendants on July 27, 2016, using the Court's CM/ECF system.

/s/ Benjamin Barr