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

ILLINOIS LIBERTY PAC and EDGAR BACHRACH,	)	
Plaintiffs,	)	**No. 12-cv-5811**
v.	)	
	)	**Judge Gary Feinerman**
LISA MADIGAN, *et al*.,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND/OR PERMANENT INJUNCTIVE RELIEF

LISA MADIGAN
Illinois Attorney General

MARNI M. MALOWITZ
LAURA M. RAWSKI
Assistant Attorneys General
General Law Bureau
100 West Randolph Street, 13th Floor
Chicago, IL 60601
mmalowitz@atg.state.il.us
lrawski@atg.state.il.us

TABLE OF AUTHORITIES

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Defendants LISA MADIGAN, Attorney General of the State of Illinois, *et al.*, (collectively, "Defendants"), hereby submit their Opposition to Plaintiffs' Motion for Preliminary Injunction and/or Expedited Permanent Injunction.

I. INTRODUCTION

Plaintiffs' most recent memorandum yet again focuses on political rhetoric in asserting that their constitutional rights are violated by Illinois's first comprehensive campaign finance reform, the Disclosure and Regulation of Campaign Contribution and Expenditures Act, 10 ILCS 5/9-1, *et seq.* (the "Act"). Much of the remainder is an irrelevant diatribe about various elected officials and political parties that often lacks accuracy[1] and detracts from the reality of Plaintiffs' complaint – generous contribution limits of ***$5,000, $10,000*** and ***$50,000***. Plaintiffs also criticize provisions of the Act without challenging their constitutionality, including: (1) restrictions on the number of political action committees ("PACs") that a candidate can form; (2) the lack of restrictions on individuals simultaneously directing candidate committees and political parties; (3) sunset provisions on campaign contribution limitations for political parties; and (4) the lifting of contribution limitations in response to high volumes of independent or self-funded expenditures. This brief will focus on the Act's ***challenged*** provisions, the contribution limitations in Sections 5/9-8.5(a)-(d), to the extent that Plaintiffs have standing.

Plaintiffs challenge under the First Amendment the Act's implementation of contribution limitations and under the First and Fourteenth Amendments the purported disparate treatment of non-party speakers as compared with political parties, as well as non-party entities as compared with individuals. Underlying Plaintiffs' challenge is reliance on several fundamental fallacies:

[1] For example, Plaintiffs complain about contributions to Chief Justice Kilbride in the 2009-2010 election cycle, claiming that a political party contributed 29.5 times more than a PAC and 295 times more than an individual could under the Act's contribution limitations. Pl.'s Mem. at 8. This is true of Plaintiffs' Exhibits 3-7, all of which address contributions before the Act was in effect. Plaintiffs' comparison is off-base, as the challenged contribution limits were not yet effective at that time.

first, that Plaintiffs possess a constitutional right to equally impact a campaign in comparison to parties or other groups; second, that this Court should delve into the legislative process and act as a "super legislature"; and third, that the legislature should have restricted more speech, and its choice to restrict less speech renders the Act unconstitutional. When peeling back these distractions, it is clear that the challenged provisions are constitutionally sound because they are closely drawn to serve the state's sufficiently important interest in preventing *quid pro quo* corruption and the appearance thereof. Accordingly, Plaintiffs cannot demonstrate a likelihood of success on the merits of their claims, and their request for injunctive relief should be denied.

II. FACTUAL BACKGROUND

A. The Statute's Enactment in Response to Corruption.

In early 2009, former governor Rod Blagojevich was federally indicted on nineteen counts of corruption, replete with allegations of pay-to-play politics, including soliciting campaign contributions from a racetrack executive in exchange for signing a then-pending bill benefitting the horse racing industry, and perhaps most notoriously, attempting to sell newly-elected President Obama's vacant U.S. Senate seat. *See* Ex. A. Against this backdrop, the Illinois legislature sought to reform its electoral process and restore faith in government. As part of this effort, they enacted campaign finance reform to curb corruption. The Act's adoption in December 2009 made Illinois one of the last states to enact contribution limits in state elections. Only four states – Missouri, Oregon, Utah, and Virginia – currently do not limit campaign contributions. *See* Ex. B.

B. The Statutory Scheme.

Consistent with existing federal law permitting contribution limitations enacted to prevent *quid quo pro* corruption or the appearance of corruption, *see Buckley v. Valeo*, 424 U.S.

1, 47 (1976), the Act set limits on contributions from individuals, corporations, and PACs. *See* 10 ILCS 5/9-8.5(a)-(d). "Political committees" under the Act include political party committees, PACs, candidate political committees, ballot initiative committees, and independent expenditure committees. 10 ILCS 5/9-1.8. Under the Act, a candidate may not accept contributions in the aggregate of more than $5,000 from any one individual; $10,000 from any one corporation or association, and $50,000 from any one PAC. 10 ILCS 5/9-8.5(b). Political parties and PACs are limited to accepting an aggregate amount of $10,000 from any one individual, $20,000 from any one corporation or association, and $50,000 from any one PAC in an election cycle. 10 ILCS 5/9-8.5(c)-(d). "Independent expenditures," which are made without coordinating with a candidate, are unlimited under the Act. Overall, the Act tracks common campaign finance reform provisions in the other 45 states, and its contribution limitations are comparable to (and sometimes less restrictive than) those put into place in other states. *See* Ex. B.

C. The Statute's Implementation and Anti-Circumvention.

The Act contains many provisions aimed at preventing circumvention. For example, it regulates how political committees are organized: no public official or candidate may maintain more than one candidate political committee for each office they hold or seek; political parties are limited to one political party committee for each geographic location (*i.e.*, statewide, etc.); and an organization or person may form only one PAC (although one can form unlimited independent expenditure committees).[2] 10 ILCS 5/9-2. All political committees are required to retain for two years detailed financial records, must file required reporting with the Board, are subject to audit by the Board (both random and for cause), and are required to make certain public disclosures. 10 ILCS 5/9-7, 5/9-9, 5/9-9.5, 5/9-10, 5/9-11, 5/9-13; Ex. C. Legislative

[2] Plaintiffs claim that the Act inadequately prevents circumvention. But they also complain that they can only form one PAC, which can serve no purpose other than to prevent circumvention of established limits.

caucuses, a type of political party committee, cannot transfer money to each other. 10 ILCS 5/9-8.5(c). Taken as a whole, the Act aims to increase transparency and integrity in Illinois's campaign finance system by regulating how political committees are organized, how much they may spend and receive during an election, and how they are required to report and disclose their activities. Nevertheless, Plaintiffs offer this Court political arguments and inflammatory rhetoric in a feeble and unsuccessful attempt to obscure the Act's significant reform measures. Specifically, Plaintiffs request that this Court strike down every contribution limitation enacted to effectuate reform in the wake of Illinois's political corruption fallout.

III. ARGUMENT

Plaintiffs seek to enjoin the Act's limitations on campaign contributions, 10 ILCS 5/9-8.5(a)-(d). An injunction is "an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Girl Scouts of Manitou Council, Inc., v. Girl Scouts of the U.S. of Am., Inc.*, 549 F.3d 1079, 1085 (7th Cir. 2008) (quotations omitted). Here, Plaintiffs' request for injunctive relief should be denied because the contribution limitations in the Act do not run afoul of the First and Fourteenth Amendments, as they are closely drawn to serve an anticorruption interest. Plaintiffs have failed to establish a likelihood of success on the merits, and indeed should not succeed on the merits. Plaintiffs assert that they suffer irreparable harm each day that they cannot contribute in excess of the set limits (but waited nearly three years to challenge the 2009 statute). But that purported harm must be balanced against the fact that, if an injunction is granted, the people of Illinois will suffer irreparable harm each day that the limitations are not enforced, leaving the system open in the upcoming elections to a free-for-all, unregulated and susceptible to corruption.

A. Plaintiffs Lack Standing to Facially Challenge the Entire Statutory Scheme.

Courts are discouraged from delving too far into the province of the legislature through the doctrine of standing when confronted with a facial challenge, as they are "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *U.S. v. Raines*, 362 U.S. 17, 21 (1960) (quotations omitted). In order to have standing, a plaintiff must allege an injury fairly traceable to the allegedly unlawful conduct that is likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The injury alleged must be distinct and palpable rather than conjectural. *Id*. Here, Plaintiffs frame their challenge as pertaining to the rights of ***all*** "non-party" groups, but they lack standing to represent such a broad base. The only issues properly before this Court are the limitations that pertain to Plaintiffs. *See Wi. Right to Life State PAC v. Barland*, 664 F.3d 139, 148 (7th Cir. 2011).

Even assuming *arguendo* that Plaintiffs could meet the requirements for a preliminary injunction, their proposed relief is overbroad and would prevent enforcement of the anticorruption elements of the Act's statutory scheme outlined above. After all, "[a]n order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President & Com'rs of Princess Anne*, 393 U.S. 175, 183 (1968); *see also Brockett v. Spokane Arcades, Inc*., 472 U.S. 491, 502 (1985) (holding that a federal court should not extend invalidation of a statute further than necessary to dispose of the case before it). Although Defendants do not believe Plaintiffs are entitled to any relief, if the Court were to issue an injunction, it must be narrowly tailored to enjoin only the contribution limits pertaining to Plaintiffs. *See Raines*, 362 U.S. at 21; *Wi. Right to Life State PAC*, 664 F.3d at 148.

B. Plaintiffs' Claims Cannot Surmount the Extraordinarily High Burden for a Facial Challenge.

Facial constitutional challenges are disfavored, as they raise the risk of "premature interpretation of statutes on the basis of factually barebones records" and run contrary to the principle of judicial restraint. *Wa. State Grange v. Wa. State Republican Party*, 552 U.S. 442, 450 (2008) (quotations omitted). As the Seventh Circuit recently noted in an unsuccessful challenge to Illinois' Election Code, the standards governing a facial challenge "set a high bar." *Ctr. for Ind. Freedom v. Madigan*, No. 11-3693, 2012 WL 3930437, at *6 (7th Cir. Sept. 10, 2012). When presented with a facial challenge, a court should evaluate a statute without indulging in speculative hypotheticals. *Id*., at *21. Plaintiffs' claims fail to meet this high bar.

C. Plaintiffs Fail to Establish a Violation of the First Amendment.

i. Closely Drawn Remains the Appropriate Standard to Apply.

In a puzzling about-face, Plaintiffs now claim that this Court should apply strict scrutiny to the Act's contribution limits. *See* Pl.'s Mem. at 6 (*citing Az. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011)). The Supreme Court has required a "compelling" state interest to justify public matching funds to candidates opposing a self-funded candidate. *See Bennett*, 131 S. Ct. at 2817. But here, Plaintiffs challenge only the Act's contribution limitations as unconstitutional. "[R]estrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant [intermediate] review under the First Amendment, because contributions lie closer to the edges than to the core of political expression." *FEC v. Beaumont*, 539 U.S. 146, 161 (2003) (upholding ban on contributions under intermediate scrutiny) (*citing FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 455 (2001) (*"Colorado II"*)). Contribution limitations, and even complete bans on contributions,

are constitutional if they are ***closely drawn to serve a sufficiently important interest***. *Randall v. Sorrell*, 548 U.S. 230, 247 (2006); *Beaumont*, 539 U.S. at 162; *Colorado II*, 533 U.S. at 446; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000); *Wi. Right to Life State PAC*, 664 F.3d at 152. Plaintiffs offer no justification for a departure from principles of *stare decisis*, and their request for strict scrutiny review should be rejected. *See Citizens United v. FEC*, 130 S.Ct. 876, 909 (2010) ("Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.").

ii. The Act's $50,000 PAC Contribution Limit and Other Limits Are Closely Drawn.

As most election campaigns are not publicly financed, a candidate lacking immense personal wealth must depend on financial contributions from others to mount a successful campaign. *Buckley*, 424 U.S. at 26. In the absence of limitations on such contributions, "large donors [may] call the tune" in elections, or at a minimum, public skepticism of corruption may arise. *Nixon*, 528 U.S. at 390. For example, before the Act's contribution limits were enacted, Rod Blagojevich received thirty contributions of $100,000 from a litany of wealthy PACs, unions, and corporations. *See* Ex. C. Regardless of whether or not the former governor granted political favors to his largest contributors, the perception of possible corruption is inevitable.

The Supreme Court has held that *quid pro quo* corruption or the appearance thereof is a sufficiently important interest to justify contribution limits under the "closely drawn" standard. *Nixon*, 528 U.S. at 390. When contribution limits are challenged, courts grant "a measure of deference to the judgment of the legislative body that enacted the law." *Davis v. FEC*, 554 U.S. 724, 737 (2008) (citations omitted). In determining whether a challenged contribution limitation is "closely drawn," a court must look to whether it "was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and

render contributions pointless." *Nixon*, 528 U.S. at 397. Thus, the Supreme Court has struck down contribution limits aimed at corruption ***only*** if they are so restrictively low that they disproportionately burden First Amendment interests. *See*, *e.g.*, *Randall*, 548 U.S. at 253.

In this case, Plaintiffs cannot credibly claim that the Act's $50,000 PAC contribution limit, $5,000 and $10,000 individual limits, or any other limits are too restrictively low to pass First Amendment muster. In fact, the limits are significantly higher than campaign contribution limits upheld by the Supreme Court. *Cf. Buckley*, 424 U.S. at 35 (upholding $1,000 group contribution limit) *with Randall*, 548 U.S. at 238, 253 (striking down PAC contribution limit of $400 for statewide offices, among others).

iii. The Act Does Not Condition Speech on the Speech of Others.

Without a single case or statutory citation, Plaintiffs claim that their speech is chilled because the Act renders it "contingent upon events that are unrelated to the Plaintiffs' actions and not within their control." Pl.'s Mem. at 7. The Act lifts contribution limitations for everyone in two particular instances: (1) where self-funded candidates' expenditures exceed $250,000 in a state-wide race or $100,000 in another race; and (2) where independent expenditures exceed those same limits, 10 ILCS 5/9-8.5(h) and (h-5). Plaintiffs' claim that these limit-lifting provisions condition their speech on the speech of others misapprehends the statute.

The Act's contribution limits restrict only how much Plaintiffs may give directly to a candidate or through coordinated expenditures with a candidate. 10 ILCS 5/8.5. Absolutely no limit exists on their overall campaign spending. Plaintiffs are free to make unlimited independent expenditures so long as they follow the Act's disclosure and other requirements. 10 ILCS 5/9-8.6. They may purchase every commercial slot to favor their preferred candidate so long as those expenditures are not coordinated with that candidate. Further, if Plaintiff Liberty PAC would like

to increase the amount it can accept in donations, it may accept unlimited independent expenditure contributions if it forms a separate committee that will not suggest corruption. 10 ILCS 5/9-2(a), 5/9-8.5(e-5). Plaintiffs could even make sufficient independent expenditures to lift everyone's contribution limits in a particular race. Plaintiffs' claim that their speech is limited and conditioned on others is simply untrue.

iv. Any Disparate Treatment under the Act is Constitutional.

Plaintiffs complain of two types of disparate treatment under the Act: (1) contribution limits on non-party groups but not parties; and (2) different contribution limits on each non-party group. Both claims lack merit and disregard the basic notion that: "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United,* 130 S.Ct. at 911.

a. The Post-Primary Exemption of Political Parties from the Act's Limits Does Not Violate the First Amendment.

Plaintiffs are correct that contribution limits implicate important First Amendment rights, and it is for precisely this reason that their complaints are unwarranted. The Act treats parties differently for the simple reason that a statute should seek the least restrictive means possible. *See Lavin v. Husted,* 689 F.3d 543 (6th Cir. 2012) (striking down a ban on campaign contributions when a less restrictive ban would have sufficed). The record could not be clearer that the legislature was primarily concerned with special interests – ***not*** contributions from parties. This concern is evident in the circumstances surrounding the corruption faced by Illinois in 2009 and affirmed by Representative Lang's statement during legislative debates on the Act,

> Well, Ladies and Gentlemen, political parties are not special interests. We are all members of a political party…To lump political parties with the kind of special interests that campaign finance laws were designed to control in the first place is wrong-headed from the beginning…Campaign finance laws are to protect us from those outside this chamber, not to protect us from those inside this chamber.

96th Ill. Gen. Assemb., H.R. Deb., 81st Legis. Day, Oct. 29, 2009, at 178, Rep. Lang. (Ex. D).

The Supreme Court has often acknowledged that political parties may be more favorably treated than other speakers. In the First Amendment challenge in *Colorado II*, the Court acknowledged that the challenged statute treated parties more favorably. 533 U.S. at 455. Two years later, in *McConnell v. FEC*, the Court rejected an equal protection challenge by a political party concerning disparate treatment between interest groups and parties, noting, "Congress is fully entitled to consider the salient, real-world differences between parties and interest groups when crafting a campaign finance regulation system[.]" 540 U.S. 93, 188 (2003), *overruled on other grounds, Citizens United*, 130 S.Ct. 876. Most recently, the Supreme Court has distinguished political parties by noting that "the basic object of a political party" is "to help elect whichever candidates the party believes would best advance its ideals and interest." *Randall*, 548 U.S. at 257-258. The Court in *Randall* took *Colorado II* a step further, striking a statute that placed identical limits on parties and individuals, emphasizing that any limits placed on parties required consideration of their unique "fund-allocating" function. *Id.* at 256-259 ("[I]nsistence that political parties abide by *exactly* the same low contribution limits…threatens harm to a particularly important political right, the right to associate in a political party.").

Plaintiffs' argument that the Act provides an "uneven playing field" defies the fundamental purpose behind campaign finance – to regulate improper influence of third parties on campaigns. The First Amendment protects the symbolic act of making the contribution, not the freedom to have the largest impact on the campaign. *See Buckley*, 424 U.S. at 21. The First Amendment certainly does not vest Plaintiffs with a right to "compete" with parties. *See* Pl.'s

Mem. at 8, 11. Plaintiffs' dramatic declaration of "self-censorship," is similarly baseless.[3] To be clear, nothing is stopping Plaintiffs from publicly supporting a candidate by way of contributions, unlimited independent expenditures, and unfettered non-monetary speech. Plaintiffs' desire to have a larger impact is simply not the concern of this Court.

Plaintiffs' reliance on *Davis* is similarly misplaced. The Court in *Davis* addressed disparate limit-lifting among ***competing candidates*** in a race. 554 U.S. at 729. *Davis* reaffirmed the notion in *Buckley* that a candidate should not be limited in spending to advocate for one's own election because use of personal funds does not create the danger of corruption that exists when a candidate becomes dependent on an ***outside group***.[4] *Id*. at 738. As political parties may receive more favorable treatment than non-parties, *Davis* should not be extended to Plaintiffs.

b. Different Limits for Non-Party Groups Do Not Violate the First Amendment.

Plaintiffs next complain that the Act places lower contribution limits on individuals than other non-party groups. To be certain, there can only be disparate treatment where the statutory scheme as a whole imposes more restrictions on one group than another. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 200 (1981). To the contrary, here, the limits placed on non-party groups are correlated to the extent they are regulated by other means. Individual limits are the lowest, but they are also the least regulated. Corporations are subject to the next highest limit, but their contributions are further regulated, even banned at times, when conducting business with the state. 30 ILCS 500/50-37. All corporations, unions, and associations are also subject to internal record keeping requirements under the Election Code. 10 ILCS 5/9-8.5(i). PACs have the highest limit and are the only group regulated under the Election Code as a political committee, subject

[3] Plaintiffs cite *Day v. Holahan* in claiming they are subject to "self-censorship." *Day* addressed a statute that triggered an asymmetrical scheme of public funding and limits in response to *any* independent expenditure, 34 F.3d 1356 (8th Cir. 1994), and is clearly factually distinguishable.

[4] Plaintiffs also allude to disparate treatment among candidates, but have no standing to do so.

to the reporting and disclosure requirements therein. Taken as a whole, the statutory scheme does not impose more restrictions on one group and does not unconstitutionally discriminate. *See Cal. Med. Ass'n*, 453 U.S. at 200 ("The differing restrictions…reflect[s] a judgment by Congress that these entities have differing structures and purposes, and…may require different forms of regulation…to protect the integrity of the electoral process.").

Even if this Court were to find disparate treatment, Plaintiffs fail to provide a valid reason why it is unjustified. Plaintiffs yet again rely on a single case, this one examining different contribution limits for two types of PACs. *See Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998). Plaintiffs fail to explain (nor can they) why the Act's differing limits fall outside of the legislature's clear discretion to regulate different groups differently and restrict as little speech as possible. *See Davis* 554 U.S. at 737; *Ognibene v. Parkes*, 671 F.3d 174, 182 (2d Cir. 2012). The Court's admonition in *Citizens United* about favoring certain speakers addressed a very different situation – categorically ***banning*** speech in the context of ***expenditures***. 130 S.Ct. at 898.

Plaintiffs cite *Buckley* for the notion that contribution limits are not discriminatory when they impose "evenhanded restrictions[,]" suggesting that although *Buckley* upheld "uniform contribution limits[,]" the Act before this Court contains "uneven limitations." Pl.'s Mem. at 17. Plaintiffs' reading of *Buckley* is incorrect. The Court proclaimed that the limits were evenhanded because they were applied to all ***candidates*** equally, as they are here. 424 U.S. at 31 n.33 ("Since an incumbent is subject to these limitations to the same degree as his opponent, the Act, on its face, appears to be evenhanded."). The Court did not, however, note an equality of the dollar amount of the limitations for good reason – the statute at issue in *Buckley* did not provide for uniform limitations – individuals and groups were subject to a $1,000 contribution limit to a candidate while political committees were subject to a $5,000 contribution limit. *Id*. at 637, 642.

v. Plaintiffs' Under-inclusiveness Challenge Fails, as the Act Serves an Anticorruption Purpose.

Plaintiffs claim that the Act violates the First Amendment because it is under-inclusive. The purpose of an under-inclusiveness analysis is to ensure that the proffered state interest (and not a desire to stifle particular content or speakers) actually underlies the challenged law. *Brown v. Ent. Merchants Ass'n*, 131 S.Ct. 2729, 2740 (2011) (citations omitted). A law may be struck down only if it is so wildly under-inclusive that it cannot fairly be said to advance the governmental interest. *Id.* Notably, neither the Supreme Court nor the Seventh Circuit has ever applied an under-inclusive analysis under the "closely drawn" standard. But logically, an intermediate scrutiny test cannot require as tight of a fit between means and ends as strict scrutiny. Thus, even if this Court were to find that the Act's contribution limits are under-inclusive in some respects, the Act may nevertheless be upheld because it serves some anticorruption purpose as written.

a. Limit-Lifting Provisions Do Not Render the Act Fatally Under-Inclusive.

Plaintiffs claim that the Act's regulatory scheme is under-inclusive because it conditions Plaintiffs' speech on the speech of others by lifting contribution limits in response to large volumes of *per se* noncorrupting speech. Pl.'s Mem. at 10. As already described, the Act does ***not*** condition speech on the speech of others. *See* disc. *supra* at 8-9. As to Plaintiffs' claim that limit-lifting means the Act's entire scheme "does not serve an anticorruption interest[,]" that is an incredible hyperbole. *See* Pl.'s Mem. at 10. The limit-lifting provisions are rarely invoked and certainly do not suggest that limits are ineffective when they remain in place.

Nevertheless, the limit-lifting provisions warrant some discussion. Even if Plaintiffs had mounted a constitutional challenge to the limit-lifting provisions (which they did not) and had

standing to do so (which they do not), that claim would fail, as the provisions are perfectly constitutional. In *Davis*, the Supreme Court considered a campaign finance provision that relaxed requirements for opponents of self-funded candidates to raise money. 554 U.S. at 729. Although that provision was struck down due to its disparate treatment of ***candidates***, the Court held that the legislature has no constitutional obligation to limit contributions whatsoever, and if the legislature concludes that allowing contributions of a certain amount does not create an undue risk of corruption, a candidate cannot argue that the Constitution demands that contributions be regulated more strictly. *Id.* at 737. Significantly, the Supreme Court proclaimed that if the statutory provision had "elevated contribution limits applied across the board, [plaintiff] would not have any basis for challenging those limits." *Id.* at 737. The Act's limit-lifting provisions, which remove limits for everyone in response to *per se* uncorrupted expenditures, are precisely the type of limit-lifting that is proper under *Davis*.

b. The Act's Alleged Disparate Treatment Does Not Belie an Anticorruption Purpose

As discussed previously, *supra* at 9-12, the Act's treatment of different groups is entirely sound. The same cannot be said for Plaintiffs' under-inclusiveness claim. Plaintiffs claim that the Act's regulatory scheme should have done ***more*** by limiting ***more*** speech – that of political parties – and its purported failure to do so calls into question the statute's anticorruption purpose. A statute is not, however, invalid under the Constitution because it might have gone farther than it did. *Buckley*, 424 U.S. at 105 (quotations omitted). Indeed, "a regulation is not fatally under-inclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective. The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals." *Blount v. SEC*, 61

F.3d 938, 946 (D.C. Cir. 1995). Indeed, the concept of tiered contribution limits began with federal campaign finance law. *See* 2 U.S.C. § 441a-1.

Plaintiffs' reliance on *Colorado II* is misguided. The Court in *Colorado II* addressed a First Amendment challenge brought by a political party, and rejected the argument that political parties are so unique that their speech is entitled to a heightened standard all its own. 533 U.S. 431. *Colorado II,* however, certainly did not hold that political party contributions have the same potential to corrupt as non-party contributions. In fact, the Supreme Court has several times acknowledged that parties may be more favorably treated in the campaign finance context. *See*, *e.g*., *Randall,* 548 U.S. at 257-258; *McConnell*, 540 U.S. at 188. As addressed above, Plaintiffs' reliance on *Russell* is also inapposite.

c. The Act Sufficiently Prevents Circumvention.

In political campaigns, "[m]oney, like water, will always find an outlet." *McConnell*, 540 U.S. at 224. The potential for circumvention is a reality in campaign finance law that does not and cannot serve to invalidate every attempt to safeguard the electoral process on the basis of constitutionality. A risk of under-inclusiveness arises only if the regulation leaves open so many loopholes that the limits are rendered meaningless. *See Buckley*, 442 U.S. at 253. Here, the Act is a comprehensive attack on pay to play politics. For example, the Act's disclosure system works to reduce the risk of circumvention as recognized by the Seventh Circuit earlier this week. *See Ctr. for Ind. Freedom*, 2002 WL 3930437. The disclosure system not only provides full transparency to the public, but also to one's opponents, who have every interest in assuring their opponent's compliance with the Act. *See* Ex. C. With respect to contribution limits, coordinated expenditures count against a contributor's respective limit in a given race. A committee may not accept a contribution on another's behalf, and thus, under the Act, a self-funded candidate could

not launder his money through his political party to donate in excess of the limits to a certain candidate. *See* 10 ILCS 5/9-25. Any insinuation that one may ***break the law*** is outside of the realm of a ***facial*** determination. In this comprehensive system, certainly the legislature's decision to exempt political parties from post-primary contribution limitations does not render the statutory scheme meaningless.

Plaintiffs' other circumvention claims wither. Their claim that a political party can "pool" money falls squarely within the legitimate "fund-allocating" purpose of a political party. *See Randall*, 548 U.S. at 258. Plaintiffs also misguidedly claim that if a candidate is the head of both his own committee and a political party committee, he can shift money from his committee to his party, and then direct unlimited funds to another candidate. This narrow hypothetical is a far cry from rendering the limits meaningless, and indeed is inevitable. The only way to avoid this is to force a candidate to choose between heading up his or her own candidate committee or the party committee. This result runs afoul of a candidate's First Amendment right to associate while zealously advocating for one's own election. Nonetheless, even in this narrow instance, there is not a circumvention of the individual limit where the candidate is transferring ***other peoples' contributions*** from one's respective candidate committee to the party.

d. Plaintiffs' Attempts to Second-Guess the Policy Decisions of the Legislature Are Improper.

Plaintiffs' criticism of the Act's legislative debate brings to mind Chancellor Bismarck's remark that no one should wish to know too much about the making of laws or sausages. Pl.'s Mem. at 14-16; *Danielson Food Prods., Inc. v. Poly-Clip Sys.*, 120 F.Supp.2d 1142, 1142 (N.D. Ill. 2000). In deliberating legislation, some proposals become law, and others fall to the proverbial chopping block. In the instant case, although certain General Assembly members wanted to impose additional restrictions, they were overruled by a majority vote. Fortunately, it

is not the job of the Court to sit as a super-legislature questioning the legislature's policy decisions and priorities, nor are states required to convince the courts of the correctness of their legislative judgments. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). The Act's contribution limits serve a constitutional purpose, as they limit PACs and other non-party speakers from corruptly influencing candidates with the sort of six-figure donations that Rod Blagojevich received just a few years ago. And that should end this Court's inquiry.

Even if the legislature's policy decision to focus on certain types of corruption is within the proper scope of this Court's review, it is well-established that legislatures rarely resolve massive problems in one fell regulatory swoop. *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007). The legislature may address reform "one step at a time," targeting a problem in phases based on governmental priorities. *Buckley*, 424 U.S. at 105 (quotations omitted). In the campaign finance reform context, it is entirely proper for a legislature "to focus on one aspect of *quid pro quo* corruption, rather than every conceivable instance," even if other types of reform could also curtail corruption. *Ognibene*, 671 F.3d at 191 (*citing Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)). Undoubtedly, the improper influence of special interest groups like Plaintiff Illinois Liberty PAC was a major concern in formulating the Act. Thus, it was within the legislature's discretion to target corruption involving PACs (and other non-party speakers) while tabling further regulation. In fact, the Act required the formation of a task force to investigate the possibility of additional reform. 10 ILCS 5/9-40. The Illinois legislature may or may not eventually find that it would serve some anticorruption interest to place permanent contribution limitations on political parties, but the fact that the legislature has not yet done so does not render the reform already implemented unconstitutional.

vi. Narrow Tailoring is Irrelevant.

Plaintiffs claim that the limit-lifting provisions and means by which the statute treats PACs and parties differently are not narrowly tailored. As to the limit-lifting provisions, Plaintiffs have not challenged, and lack standing to challenge, the provisions, which are permissible under *Davis*. *See* disc. *supra* at 13-14. As to the different treatment of parties under the Act, strict scrutiny analysis does not apply, *supra* at 6-7, and the Supreme Court has repeatedly held that distinguishing political parties from other speakers is entirely proper, *supra* at 10. Thus, Plaintiffs' narrow tailoring claims are irrelevant to the First Amendment analysis. As the Act's contribution limits are closely drawn to serve the government's important interest in preventing corruption and the appearance thereof, Plaintiff's First Amendment challenge fails.

D. Plaintiffs Fail to Establish a Violation of the Equal Protection Clause.

i. "Closely Drawn" Is the Appropriate Standard for this Court to Apply.

Plaintiffs erroneously ask this Court to apply strict scrutiny to its equal protection claim. Where an equal protection challenge implicates a First Amendment right, a court should apply the scrutiny level that would apply if the law were being challenged under the First Amendment. *See Green Party of Ct. v. Garfield*, 616 F.3d 213, 229 (2d Cir. 2010); *Wagner v. FEC*, No. 11-CV-1841, 2012 WL 1255145, at *11-12 (D.D.C. Apr. 16, 2012) (*citing Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972)). If the Court were to apply strict scrutiny to equal protection challenges of contribution limits, "it would lead to the anomalous result that a statutory provision could survive closely drawn scrutiny…but nevertheless be found to violate equal protection guarantees because of its impingement upon the very same rights." *Wagner*, 2012 WL 1255145, at *11. Such an approach would result in every First Amendment claim recast as an equal protection challenge, when the substantive guarantee of the First Amendment itself should be the strongest form of protection. *Id*. (citations omitted).

ii. Plaintiffs Fail to Establish that They Are Similarly Situated to Other Campaign Contributors.

Plaintiffs now (incredibly) are on both sides of an equal protection argument – they claim PACs and individuals are disfavored as compared to political parties, but PACs (including Illinois Liberty PAC) and corporations are treated more favorably than individuals such as Plaintiff Bachrach. In order to prove their equal protection claim, Plaintiffs have the burden to establish that: (1) non-party groups (particularly individuals and PACs) are similarly situated with political parties; (2) all non-party contributors are similarly situated; and (3) they are unjustifiably being treated differently. *Wagner*, 2012 WL 1255145, at *13 (upholding contributions ban and rejecting similarly situated argument). In determining whether two groups are similarly situated, the Court should evaluate their similarities "with respect to their history of corruption[,]" structures, and risks of corruption. *Id*.; *see also Cal. Med. Ass'n,* 453 U.S. at 201.

Plaintiffs fail to claim that any of the groups are similarly situated. *See Iowa Right to Life Comm., Inc. v. Tooker*, 795 F.Supp.2d 852, 873 (S.D. Iowa 2011) (unsuccessful equal protection claim failed to "identify any relevant similarities between corporations and…other associations."). Indeed, political parties are not similarly situated to non-party groups, which each carry their own risk of corruption and are regulated to various degrees under the law, as discussed above. *Wagner*, 2012 WL 1255145, at *14. Each group is far from similarly situated.

The corruption that inspired the Act concerned pay-to-play politics involving special interest groups, political appointments, and awarding of government contracts for significant contributions, ***not*** corruption of political parties. Further, special interest groups have an issue-driven agenda and seek to elect those who will advocate within the legislature on their behalf. Among the risks with special interest groups is that an elected official will be more concerned with fulfilling donors' interests than that of his constituents. Corporations and individuals carry a

separate risk that their contributions will result in government contracts following the election. Political parties, on the other hand, are composed of candidates and officeholders. They facilitate primary elections and nominate candidates. By virtue of their membership, candidates have already adopted their party's agenda. As a result, regardless of the contributions they receive from the political party, the candidate is already aligned the party's positions, and, consequently, the contributions carry a significantly reduced appearance or reality of *quid pro quo* corruption. Accordingly, Plaintiffs fail to meet their burden. Dissimilar treatment of dissimilar groups does not violate equal protection. *U.S. v. Whiton,* 48 F.3d 356, 358 (8th Cir. 1995) (citations omitted).

Even if this Court were to find that any of these groups were similarly situated, it should defer to the legislature's conclusion that each group requires its own regulation. *See Cal. Med. Ass'n,* 453 U.S. at 201; *Ognibene*, 671 F.3d at 182; *Bread PAC v. FEC*, 635 F.2d 621, 630 (7th Cir. 1980), *rev'd on other grounds, Nat'l Right to Work Comm., Inc. v. FEC,* 455 U.S. 577 (1982) (all citations omitted). Furthermore, as discussed above, each non-party group is regulated in different ways, and taken as a whole, no one group is significantly restricted as compared to others. *See Cal. Med. Ass'n,* 453 U.S. at 200. Plaintiffs essentially ask this Court to "level the playing field" under the guise of an equal protection challenge. Plaintiffs' request turns Equal Protection on its head. Accordingly, Plaintiffs' equal protection claim should be rejected.

IV. CONCLUSION

As set forth above, Plaintiffs' request for injunctive relief should be denied because it has no likelihood of success on the merits. The Act is closely drawn to serve the government's sufficiently important interest in preventing *quid pro quo* corruption and the appearance thereof. Plaintiffs' challenges are unprecedented and lack any meaningful case support. Alternatively, any relief in this case should be narrowly tailored to the parameters of this case and existing law.

Respectfully submitted,

/s/ Laura M. Rawski

LISA MADIGAN
Illinois Attorney General

Marni M. Malowitz
Laura M. Rawski
Assistant Attorneys General
General Law Bureau
100 West Randolph Street, 13th Floor
Chicago, IL 60601
(312) 814-3700/6534

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the aforementioned document was filed on Friday, September 14, 2012, through the Court's CM/ECF system. Parties of record may obtain a copy of the paper through the Court's CM/ECF system.

/s/ Laura M. Rawski