

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

ILLINOIS LIBERTY PAC, et al.,)	
)	
Plaintiffs,)	Judge Gary Feinerman
)	
v.)	No. 12 CV 5811
)	
LISA M. MADIGAN, Attorney General of the State of Illinois, et al.,)	
)	
Defendants.)	

**PLAINTIFFS’ REPLY
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

In their response to Plaintiffs’ motion for summary judgment (Doc. 131, hereinafter “Defs.’ Resp.”), Defendants have failed to refute Plaintiffs’ arguments showing that Illinois’ discriminatory campaign contribution limits, which privilege legislative caucus committees over PACs and other political speakers, are not narrowly tailored to limit corruption or the appearance of corruption. Plaintiffs are therefore entitled to summary judgment as a matter of law on their First Amendment claim.

I. Defendants have not met their burden to show that the Act’s treatment of legislative caucus committees is narrowly tailored to prevent corruption.

Defendants do not provide any evidence to support their single-paragraph argument that they have met their burden to show that the Act’s preferential treatment of legislative caucus committees is narrowly tailored to prevent corruption. (Defs.’ Resp. at 2-3.) Instead, Defendants just point to the statute’s statement that legislative caucus committees are “established for the purpose of electing candidates to the General Assembly,” 10 ILCS 5/9-1.8(c), and assert that this – all by itself – means that the government can treat legislative caucus committees just like political parties, which also exist to elect candidates to office. (Defs.’ Resp. at 2-3.) But that

language in the statute provides no information about what matters for this Court's First Amendment analysis: the potential of contributions by parties, legislative caucus committees, and PACs, respectively, to corrupt or create the appearance of corruption. To show narrow tailoring, Defendants must show that the differing contribution limits on the entities are justified by differences in their contributions' respective potential to corrupt, which they have entirely failed to do.

Defendants cannot satisfy their burden by pointing to the "measure of deference" that courts give to legislative judgments referenced in *Davis v. FEC*, 554 U.S. 724, 737 (2008). (Defs.' Resp. at 2.) *Davis* merely cited a line of cases in which the Court has indicated that it will not engage in "fine tuning" to determine whether a contribution limit is optimal because it "has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000." *Buckley v. Valeo*, 424 U.S. 1, 30 (1976); *see also Davis*, 554 U.S. at 737; *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (plurality opinion); *Nixon*, 528 U.S. at 396-97. That is not relevant here because Plaintiffs' First Amendment claim does not call for "fine tuning" or a "scalpel." Their claim is not about whether \$50,000 is the best possible limit for PACs, but about whether it is proper to limit PACs' contributions to that amount while placing much higher limits – or, in general elections, no limits – on legislative caucus committees' contributions.

Moreover, the Supreme Court's recent decision in *McCutcheon v. FEC* makes clear that courts should not simply defer to legislatures' judgments regarding contribution limits but should instead subject them to "rigorous" scrutiny because they "restrict[] political speech." 134 S. Ct. 1434, 1446 (2014). In particular, the courts must ensure that contribution limits do not "allow[] the Government to favor some participants in that process over others," *id.* at 1461, which is exactly what the government has done here with its preferential treatment of legislative

caucus committees.

Finally, Defendants lack any basis in case law – and do not cite any authorities – for their suggestion that the Act’s description of legislative caucus committees somehow shifts the burden to Plaintiffs “to show legislative caucus committees are *not* sufficiently similar to political parties” to justify giving them the same favorable treatment. (Defs.’ Resp. at 2-3.)

II. Defendants have not created a genuine issue of material fact regarding legislative leaders’ ability to use PACs to serve their personal interests rather than party interests.

As Plaintiffs have shown, legislative leaders can use their legislative caucus committees to serve their personal interests rather than their party’s interests; nothing in the statute prevents them from doing so. *See* 10 ILCS 5/9-1.8(c). (Doc. 128, Plaintiffs’ Memorandum in Support of Their Motion for Summary Judgment (“Plfs.’ Memo.”) at 6-7.) Defendants’ attempt to refute this point fails.

Contrary to Defendants’ argument, the statute’s prohibition on a public official “maintain[ing] more than one candidate committee for each office he or she holds” does not prevent a legislative leader from using a legislative caucus committee to serve their personal interests rather than party interests. *See* 10 ILCS 5/9-2(b). (Defs.’ Resp. at 3.) A “candidate political committee” is a legislator’s personal campaign committee and bears his or her name. *See* 10 ILCS 5/9-2(b). The statute’s prohibition on having more than one candidate political committee does not affect a legislative leader’s ability to establish a legislative caucus committee in addition to his or her campaign political committee or to direct the legislative caucus committee’s funds to the candidates he or she chooses. Although the legislator could not legally use a legislative caucus committee as his or her personal campaign committee, nothing in the statute requires – let alone ensures – that legislative leaders act with pure party-expansion

motives when making contributions from their caucus committees. Such a requirement would be impossible to enforce.

Legislative leaders' need to "maintain the broad-based support of [legislators in] their respective political parties" (Defs.' Resp. at 3-4) likewise does not necessarily prevent leaders from using their caucus committees to advance their personal interests. Legislators who disapprove of a leader's use of caucus committee funds to pursue personal ends might nonetheless vote to retain the leader to avoid organizational punishments, such as inferior committee assignments, that the leader can impose on them if they attempt to replace him or her.¹ The statute's preferential treatment of legislative caucus committees further increases a leader's ability to prevent challenges to his or her leadership because it enables the leader to give or withhold funds that could make or break a legislator's ability to withstand a primary challenge. This puts legislative leaders in a position to make quid pro quo demands of legislators – e.g., to tell them "vote for me as leader or else my caucus committee will fund your challenger instead of you." This is one way that large contributions from legislative leaders can give rise to corruption or the appearance of corruption, just as large PAC contributions can.

III. Defendants have failed to justify the Act's prohibition on candidates accepting contributions from more than one legislative caucus committee.

The Act further enables legislative leaders to make legislators dependent on them for support – and thus empowers leaders to make quid pro quo demands on legislators – by prohibiting legislative candidates from accepting contributions from more than one legislative caucus committee in an election cycle. 10 ILCS 5/9-8.5(b). (*See* Plfs.' Memo. at 10.)

¹ Legislative leaders' willingness and ability to retaliate against members who vote for new leadership is, of course, well known. *See, e.g.*, Jake Sherman & John Bresnahan, Boehner takes revenge, Politico (Jan. 6, 2015), <http://www.politico.com/story/2015/01/boehner-allies-out-for-revenge-114007.html>.

Defendants' rationalization of this exclusivity provision – that it supposedly exists to “prevent[] candidates from circumventing contribution limits during the primary season” (Defs.' Resp. at 7) – has three fatal flaws.

First, a need to prevent circumvention of the limits that apply in *primary* elections cannot justify prohibiting candidates from receiving money from more than one legislative caucus committee in *general* elections, during which there are no contribution limits on legislative caucus committees to circumvent. 10 ILCS 5/9-8.5(b).

Second, Defendants' anti-circumvention argument lacks credibility because nothing prohibits candidates from accepting contributions from multiple political party committees of other types, even though those committees are subject to the same limits as legislative caucus committees. *See id.* If a caucus committee's interests are identical to any other party committee's interests, as Defendants argue (*see* Doc. 125, Defendants' Memorandum in Support of Their Motion for Summary Judgment at 6-7; Defs.' Resp. at 4-5), then there is no reason why the exclusivity provision should only apply to legislative caucus committees and not to other party committees, which are much greater in number and therefore presumably provide more opportunities for circumvention. Defendants try to explain this away by claiming that other party committees are organized by “geography” rather than ideology (Defs.' Resp. at 7), but that makes little sense in light of Defendants' arguments elsewhere that all political party committees, including legislative caucus committees, pursue the same interest.

Third, Defendants' anti-circumvention argument contradicts their position that legislative caucus committee contributions (and all political party contributions) cannot be corrupting. (*See* Defs.' Resp. at 4-5.) If legislative caucus committees' contributions cannot give rise to corruption or the appearance of corruption, then the government can have no interest in limiting

their contributions at all and therefore cannot have any interest in preventing circumvention of limits on them. On the other hand, if Defendants do believe that legislative caucus committee contributions pose some threat of corruption in primary elections, then their burden requires them to provide some explanation (and evidence) of how caucus committee primary contributions threaten to corrupt and why that threat of corruption is so much less than the threat posed by PAC contributions that it justifies their different treatment under the law. But, again, Defendants have not provided any such explanation or evidence and therefore have not satisfied their burden.

IV. Defendants have failed to create a genuine issue of material fact with respect to any of Dr. Osborn's findings.

Defendants have failed to create a genuine issue of material fact with respect to any finding or conclusion of Plaintiffs' expert witness, Dr. Marcus Osborn. Instead, as they did in their previous attacks on Dr. Osborn's report and testimony,² Defendants just assert that Dr. Osborn should have conducted his analysis differently and should have considered additional data, without citing any expert testimony or other evidence. Such unsupported assertions cannot create a genuine issue of material fact. *See Threlkeld v. White Castle Sys.*, 201 F. Supp. 2d 834, 843 (N.D. Ill. 2002) ("Conclusory assertions unsupported by evidence in the record cannot be used to create a genuine issue of material fact.").

Moreover, Dr. Osborn has refuted Defendants' criticisms of his analysis. He has explained his reasons for performing a qualitative analysis rather than a quantitative analysis, for relying on the literature he cited, and for reviewing the data he selected. (*See* Doc. 132, Plaintiffs' Response to Defendants' Motion for Summary Judgment ("Plfs.' Resp.") at 9-13.) Defendants have provided no evidence to contradict Dr. Osborn's testimony on any of these

² *See* Doc. 116, Defendants' Motion to Exclude Plaintiffs' Expert; Defs.' Memo at 8-13.

points and therefore have failed to create a genuine issue of material fact with respect to them. (*See id.*)

Plaintiffs will not repeat their refutation of Defendants' attacks on Dr. Osborn's work³ but will address two points Defendants have made in their response brief that Plaintiffs have not previously addressed.

Defendants argue that Dr. Osborn's analysis is deficient because "[d]ata comparing [legislative caucus committees and political parties] is necessary" to determine "the ultimate issue before this court," which "is whether legislative caucus committees are sufficiently similar to political parties" to treat them like parties and not like PACs. (Defs.' Resp. at 9.) If Defendants were correct that data is necessary to compare the different entities, then it would follow that the Court must enter judgment *against Defendants* because they bear the legal and evidentiary burden to justify the contribution limits but have presented no data comparing the entities. Defendants are not correct about the need for data, however, because, as Dr. Osborn has explained, data was not necessary for him to analyze the structure, incentives, and opportunities for corruption that the Act creates. (*See Plfs.' Resp.* at 10.)

Defendants attempt to dismiss Dr. Osborn's two examples of contributions by the Democrat Majority legislative caucus committee that did not appear to advance a party-expansion strategy by asserting that "[t]wo contribution examples are hardly indicative of a widespread pattern, and certainly not evidence that the Democratic Majority did not exclusively pursue a party maximization strategy." (Defs.' Resp. at 10.) But Defendants ignore a critical fact: in the 2012 primary election cycle, the Democrat Majority legislative caucus committee made only three contributions that exceeded the \$50,000 limit that applies to PACs, and two of those

³ *See* Doc. 119, Plaintiffs' Response in Opposition to Defendants' Motion to Exclude Plaintiffs' Expert at 13-19; Plfs.' Resp. at 9-13

three contributions are the examples that Dr. Osborn highlighted – i.e., they are contributions that appear to reflect a strategy more comparable to that of a leadership PAC than that of a political party. (*See* Doc. 128-9, Plfs.’ Memo. Exh. H-1 at 7.) To determine whether the limit that applies to PACs should also apply to legislative caucus committees, it only makes sense to look at whether legislative caucus committee contributions above the \$50,000 PAC limit have a potential to corrupt or to create the appearance of corruption that is similar to the potential for corruption associated with PAC contributions above that amount. The contributions that Dr. Osborn highlighted are consistent with the conclusion that they do indeed pose a similar threat of actual or apparent corruption.

V. Conclusion

Because Defendants have failed to show that Illinois’ discriminatory contribution limits are narrowly tailored to prevent corruption – and because, as Plaintiffs have shown, the limits are not narrowly tailored – Plaintiffs respectfully ask this Court to grant summary judgment in favor of the Plaintiffs on their First Amendment claim.

Dated: January 30, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jacob H. Huebert, an attorney, hereby certify that on January 30, 2014, I served Plaintiffs' Reply in Support of Their Motion for Summary Judgment on Defendants' counsel by filing it through the Court's electronic case filing system.

/s/ Jacob H. Huebert