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

ILLINOIS LIBERTY PAC, a Political Action Committee registered with the Illinois State Board of Elections, and EDGAR BACHRACH, an individual,	)	
Plaintiffs,	)	
v.	)	
LISA M. MADIGAN, Attorney General of the State of Illinois; WILLIAM McGUFFAGE, Chairman of the Illinois State Board of Elections; JESSER. SMART, Vice-Chairman of the Illinois State Board of Elections; HAROLD D. BYERS, Member of the Illinois State Board of Elections; BETTY J. COFFRIN, Member of the Illinois State Board of Elections; ERNEST L. GOWEN, Member of the Illinois State Board of Elections, JUDITH C. RICE, Member of the Illinois State Board of Elections; BRYAN A. SCHNEIDER, Member of the Illinois State Board of Elections; and CHARLES W. SCHOLZ, Member of the Illinois State Board of Elections, all in their official capacities,	)	**Judge Gary Feinerman** **Magistrate Judge Susan E. Cox** **No. 12 CV 5811**
Defendants.	)	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. Introduction

Plaintiff Illinois Liberty PAC ("Illinois Liberty PAC") is a not-for-profit pro-liberty political action committee ("PAC") that supports candidates for public office who embrace public policy rooted in the principles of liberty and free enterprise. (Decl. of Matthew Besler, ¶ 5, attached as Exh. 1.) Plaintiff Edgar Bachrach is an individual who exercises his right to free speech and association by making contributions to PACs and candidates he supports. (Decls. of Edgar Bachrach, Am. Compl. Att. 1; Exh. 10.) Plaintiffs bring this Motion for Preliminary Injunction to enjoin the enforcement of certain portions of the Illinois Disclosure and Regulation of Campaign Contribution and Expenditures Act ("the Act"), 10 ILCS 5/9-8.5(a)-(d), because they violate Plaintiffs' rights to free speech and equal protection of law under the First and Fourteenth Amendments of the United States Constitution.

In January 2009, Illinois enacted its first-ever campaign contribution limits for statewide general and primary elections, which took effect January 1, 2011.[1] 10 ILCS 5/9-8.5. The Act creates a series of campaign contribution limits on what individuals and PACs can contribute to candidates, parties and PACs. This scheme impermissibly burdens Plaintiffs' free speech by conditioning their speech on the volume of speech exercised by third parties. Specifically, Plaintiffs are subject to the Act's contribution limits only if independent expenditures and/or self-funded candidates do not exceed statutorily prescribed amounts in a particular race. However, Plaintiffs' constitutional rights remained burdened when political parties and party leaders exceed these same limits in a race.

Additionally, the Act subjects Plaintiffs to a series of contribution limits that political parties and their leaders (through their candidate committees) are not subjected to, and the Act

[1] Both the bill and its July 2012 amendments were passed on party-line votes. (*See* Exh. 2.)

subjects Plaintiff Bachrach and other individuals to limits that are one-half the amounts of limits placed on similarly-situated others, namely corporations, union organizations and associations. As such, the Act fails to serve the only interest the Supreme Court has recognized for justifying such burdens, the prevention of quid pro quo corruption or the appearance of corruption. *See Wis. Right to Life PAC v. Barland,* 664 F.3d 139, 153 (7th Cir. 2011) ("*WRTL*"). For these reasons, the Act's scheme that tethers Plaintiffs' free speech to the speech of others, and disparate contribution limits that favor political parties and their leaders over all other speakers, is unconstitutional and must be enjoined. In the alternative, the contribution limits on Illinois Liberty PAC (10 ILCS 5/9-8.5 (b) and (d)), and Edgar Bachrach (10 ILCS 5/9-8.5 (b)-(d)), should be enjoined.

II. Statement of Facts

On January 1, 2011, the Act began limiting contributions that individuals, PACs and other nonparty political speakers can make to candidates during a general election – $5,000, $50,000, and $10,000 respectively – while expressly exempting political party contributions to candidates and other political parties. 10 ILCS 5/9-8.5(b)-(d). The Act also places different limits on individuals and corporations, labor organizations and associations, allowing individuals to make $5,000 contributions to candidates and $10,000 contributions to political parties and PACs, while allowing corporations, union organizations and associations to make $10,000 to candidates and $20,000 contributions to parties and PACs. *Id*.

The only limits the Act places on political party contributions to candidates apply solely during primary elections. However, in statewide elections these limits are forty times the amount that individuals may contribute – $200,000 versus $5,000 – and four times the amount PACs can make – $200,000 versus $50,000. Currently there are limits on what a party can receive in a

primary election – $50,000 from a candidate and $50,000 from another party – but the Act eliminates these limits entirely effective July 1, 2013. 10 ILCS 5/9-8.5(c). While there are limits on what individuals, PACs and other nonparties can contribute to political parties, parties may receive unlimited contributions from candidates committees and other political parties. § 5/9-8.5 (b), (c).

The Act also contains a provision that eliminates all contribution limits in a race if a self-financed candidate spends more than $250,000 for a statewide race or more than $100,000 for any other elective office. 10 ILCS 5/9-8.5(h). And in July 2012, the Illinois General Assembly amended the Act to eliminate all contribution limits if independent expenditures exceed $250,000 (for a statewide race) or $100,000 (for any other elective office). § 5/9-8.5(h-5). The Act does not, however, eliminate contribution limits when a political party exceeds these same limits in a race.[4]

Political parties are referred to as "political party committees" under the Act and include the state and county central committees of a political party, a legislative caucus committee, and a committee formed by a ward or township committeeman of a political party. 10 ILCS 5/9-1.8(c). A "legislative caucus committee" is a committee established for the purpose of electing candidates to the General Assembly by the President of the Senate, Minority Leader of the Senate, Speaker of the House of Representatives, Minority Leader of the House, or a committee established by 5 or more members of the same caucus of the Senate or by 10 or more members of the same caucus of the House. *Id*. All of these party committees are empowered to give unlimited contributions to candidates (with the limited exception of during primary elections as noted above). *Id*.

[4] The record shows that political party spending in races during the last full election cycle, 2009-2010, far surpassed these limits. (See Exhs. 3-6, party to candidate contributions and Exh. 7, foundational Decl. of Robert T. Isham.)

The Act expressly prohibits individuals and other groups of persons (*e.g.*, committees, associations, corporations), from forming more than one political action committee. 10 ILCS 5/9-2(d). However, the Act does not prohibit a public official or candidate for public office from serving as the officer of both a candidate committee and another committee, such as a party or legislative committee, nor does it prohibit an individual from serving as an officer of multiple party committees. Thus, for example, while the Act prohibits officers of Illinois Liberty PAC from forming another PAC, the Act does not prohibit Speaker Madigan from serving as the Treasurer of his own candidate committee, Friends of Michael J. Madigan, while also serving as the chairman of two party committees, the Democratic Party of Illinois and the Democratic Majority – which, in fact, he does. (*See* Exhs. 3,7.) As such, the Act's statutory scheme expressly provides that party leaders, such as the Speaker, Majority Leader, and minority leaders, can make unlimited contributions from their candidate committees to the party committees they chair, 10/9-8.5(c), and then make unlimited contributions from their political parties to candidates. This not only can happen but it does. *Id*. (*See* Plf.s' Exhs. 3-7.)

Thus, the General Assembly was on notice before the 2009 Act was passed, and again when it was amended in 2012, that political parties were not only contributing well in excess of what the Act imposes on other speakers, but that the party leaders were pouring massive amounts of money into the party committees they chair, which they could then direct in unlimited amounts to the candidate committees of their choice (and which they could not have done directly from their candidate committees, which are subject to contribution limits). (Exhs. 3-7.)

But for the Act, Plaintiffs Illinois Liberty PAC and Bachrach would make contributions that exceed the Act's contribution limits. (Besler Decl. ¶¶ 11-16, Exh. 1; Bachrach Decls., Exh. 10, and Am. Compl. Att. 1.) Further, but for the contribution limits, Illinois Liberty PAC would

have the freedom to direct its in-kind and monetary contributions in a manner that best advances its principles and strategic purposes. (*Id*. at ¶ 14.) Moreover, Illinois Liberty PAC would not be forced, as it now is, to make smaller contributions to candidates than it wishes or decline to contribute at all if Illinois Liberty PAC determines that a smaller contribution would not make an impact in a race. (*Id*. at ¶ 15.) Illinois Liberty PAC is ready, willing and able to make contributions in excess of the Act's limits. (*Id*. at ¶ 12.) In addition, but for the Act, Illinois Liberty PAC would be ready and willing to accept donations in excess of what the Act allows. (*Id*. at ¶ 13.) At present, Illinois Liberty PAC has at least one donor, Plaintiff Bachrach, who has given Illinois Liberty PAC the maximum aggregate contribution of $10,000 for the current election cycle, who would donate more but for the Act. (Exh. 10, ¶¶ 1-7, Bachrach Decl.; Bachrach Decl., Am. Compl. Att. 1.) Bachrach has made a $5,000 contribution to a candidate committee during the current election cycle and would contribute $5,000 ore more but for the Act. (Bachrach Decl., ¶¶ 4-7, Am Compl. Att. 1.)

III. Standard of Review

In order to prevail on a motion for preliminary injunction, Plaintiffs must demonstrate: 1) some likelihood of success on the merits; 2) no adequate remedy at law exists; and 3) irreparable harm if the injunction is not granted. *Ty, Inc. v. Jones Group, Inc*., 237 F.3d 891, 895 (7th Cir. 2001). If these conditions are met, the Court must then balance the hardships the moving parties will suffer in the absence of relief against those the nonmoving parties will suffer if the injunction is granted. *Id*. Finally, the Court considers the interests of nonparties in deciding whether to grant injunctive relief. *Id*. The Court weighs all these factors "sitting as would a chancellor in equity," using a "'sliding scale' approach: the more likely it is the plaintiff[s] will succeed on the merits, the less the balance of irreparable harms need weigh towards [their] side;

the less likely it is the plaintiff[s] will succeed, the more the balance need weigh towards [their] side." *Abbott Labs v. Mead Johnson & Co*., 971 F.2d 6, 11 (7th Cir. 1992).

IV. Argument

A. The Act Violates Plaintiffs' First Amendment right to free speech

A state law that substantially burdens political speech, as does the Illinois campaign finance scheme, is subject to strict scrutiny and cannot stand unless it is justified by a compelling state interest. *See Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2817 (2011) ("*Bennett*") (public matching funds triggered by privately financed campaign spending or independent expenditures above specified amounts placed "special and potentially significant burden" on speech, served no compelling interest). The Supreme Court has recognized only one state interest compelling enough to justify restrictions on campaign contributions: preventing quid pro quo corruption or the appearance of quid pro quo corruption. *WRTL,* 664 F.3d at 153. Because the Act fails to advance this purpose, it cannot withstand strict, exacting or intermediate scrutiny.

The Act imposes two substantial burdens on both Illinois Liberty PAC and Bachrach: it conditions their ability to speak upon whether third parties engage in noncorrupting speech, and it discriminates against nonparty political speakers in favor of political parties. Neither of these burdens serves the government's interest in preventing actual or apparent corruption, and either one is enough to render the Act's contribution-limit scheme unconstitutional.

1. The Act Imposes Substantial Burdens on Plaintiffs' Free Speech Rights

a. The Act substantially burdens Plaintiffs' speech by conditioning it on the speech of others

As described above, the Act limits contributions by nonparty political speakers, including Plaintiffs Illinois Liberty PAC and Bachrach, during a general election cycle *unless and until*

either self-funded candidate spending or independent expenditures in a race exceed certain amounts, at which time all limits are removed for that race. *See* 10 ILCS 5/9-8.5 (h), (h-5). That is, Plaintiffs' right to speak freely through political contributions is contingent upon events that are unrelated to the Plaintiffs' actions and not within their control.

Thus, Plaintiffs are held hostage to whether and when third parties decide to speak. If third parties never speak, Plaintiffs remain subject to the contribution limits. If third parties decide to begin making independent expenditures in a given race, Plaintiffs may be chilled from making contributions in other races while waiting to see if they will be freed from limits and thus be able to allocate their resources differently. Or, the third parties could purposely wait until the closing months and weeks to exceed the limits to keep the competition muzzled until their money is spent, or it is too late.

b. The Act substantially burdens Plaintiffs' speech by favoring the speech of political parties over the speech of Plaintiffs and other nonparty political speakers.

The Act also significantly burdens Plaintiffs' speech by favoring the speech of political parties over the speech of nonparty political speakers such as Plaintiffs. Again, the Act limits the amounts that PACs, individuals, and other nonparty political speakers can contribute to candidates, PACs, and parties, and it limits the donations that PACs may accept – unless a candidate's self-funding or independent expenditures trigger the Act's contribution-cap-lifting provisions. *See* 10 ILCS 5/9-8.5 (b), (c), (d). Parties, on the other hand, face no preconditions on their ability to contribute *unlimited* amounts to candidates and to other party committees. *See* 10 ILCS 5/9-8.5 (b), (c).

This scheme of discriminatory contribution limits significantly burdens the political speech of nonparty political speakers such as Plaintiffs. In *Davis*, the Supreme Court held that

when a candidate for an office faces a "scheme of discriminatory contributions limits" that gives his opponent "fundraising advantages," this creates a "special and significant burden" on the disadvantaged candidate's political speech. *Davis v. FEC*, 554 U.S. 724, 739-40 (2008). If contribution limits that favor one candidate over another significantly burden speech, as in *Davis*, then so do contribution limits that favor *any* political speaker over another.[5] After all, PACs and individuals often make contributions in races where political parties also make contributions; and nonparty speakers thus compete with parties to have their voices heard as they support their preferred candidates, just as the candidates compete with each other. The Act gives parties an enormous advantage in this competition, however, by allowing them to contribute to candidates in gross disproportion to the amounts that PACs and individuals may contribute. Indeed, in some cases, the parties do just that. For example, in the 2009-2010 election cycle, the Democratic Party of Illinois contributed $1,475,000 to [Thomas] Kilbride for Supreme Court Judge – 29.5 times more than a PAC could have contributed and *295 times more* than an individual could have contributed. (Exh. 3.)

Facing such an uneven playing field, some PACs and individuals may decide not to participate at all in races where a party has spent large sums or is expected to do so – and the Act thus chills even the limited speech that it allows PACs and individuals to engage in. In fact, because of the Act's limits, Illinois Liberty PAC "sometimes decline[s] to contribute at all if a smaller contribution [constrained by the Act's limits] would not make an impact in a race." (Besler Decl. ¶ 15, Exh. 1.) This chilling effect and the resulting "self-censorship" by nonparty political speakers "infringes on [Plaintiffs'] protected speech . . . and is no less a burden on speech . . . than is direct governmental censorship." *Day v. Holahan*, 34 F.3d 1356, 1360 (8th

[5] *Davis* is not factually identical to this case because it involved disparate treatment of opposing candidates, not of different types of entities. The effect of the disparate treatment here, however, is much the same: contribution limits have been used in a way that will benefit some candidates and harm others that serve impermissible purposes.

Cir. 1994) (striking matching-funds provision that chilled independent expenditures) (citing *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988)). The possible injuries to Plaintiffs are not fully knowable, but are certainly not justified by a proper, compelling or substantial interest.

Also, the disparate limits will particularly burden non-incumbents challenging incumbents in primary races (once the limits on parties in primaries are lifted in 2013, 10 ILCS 5/9-8.5(c)), as the party-favored incumbent will have a source of funds in the party, but the challenger will have to find support, if anywhere, from a large number of PACs or individuals. Independent candidates, who have no party to support them, are also particularly burdened. The Supreme Court has identified limits that hinder outsiders' ability to challenge incumbents' as "danger signs" that contribution limits are unconstitutional. *See Randall v. Sorrell*, 548 U.S. 230, 258-59 (2006).

c. The Act's substantial burdens on Plaintiffs' speech serve no anticorruption interest.

The substantial burdens that the Act's contribution-limit scheme places on Plaintiffs' speech serve no anticorruption interest, and the limits therefore must be struck down. The Act serves no anticorruption interest because it is underinclusive. "[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J. concurring) (internal marks and citation omitted). A regulatory scheme, such as the Act here, is not narrowly tailored if it is underinclusive. *See, e.g., Rubin v. Coors Brewing Co*., 514 U.S. 476, 489 (1995) ("exemptions and inconsistencies in labeling ban [brought its purpose] into question" and "ensure[d] that [it would] fail to achieve that end.") Indeed, the Act's cap-lifting, exemptions, and loopholes

evince that it is so "woefully underinclusive as to render the belief [that the Act or its limits serve an anticorruption interest] a challenge to the credulous." *See Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002).

i. Conditioning Plaintiffs' speech on others' noncorrupting speech serves no anticorruption interest.

Tethering Plaintiffs' rights to free speech to whether and how much noncorrupting speech enters a race – lifting limits only when independent expenditures or self-funded candidates exceed certain state-prescribed limits – triggers strict scrutiny because it poses a special and significant burden on the exercise of core speech rights (*see Bennett*, 131 S.Ct. at 2818), and it fails to serve any compelling or sufficiently important government interest. This scheme places a "special and potentially significant burden" on Plaintiffs' First Amendment rights, and its impermissible purpose is evinced by the fact that contribution limits are placed on Plaintiffs unless per se noncorrupting speech enters a race that exceeds a state-determined amount. *See Buckley v. Valeo*, 424 U.S. 1, 53 (1976) (anticorruption interest cannot support limits on self-funded candidates' expenditures); *Citizens United v. FEC*, 130 S.Ct. 876, 909 (2010) ("[I]ndependent expenditures do not lead to, or create the appearance of, quid pro quo corruption.").

Because the Act's contribution limits are lifted when self-funded candidate spending or independent expenditures exceed certain amounts, the scheme is underinclusive and thus does not serve an anticorruption interest. Here, not only does the 2012 amendment that treats contribution limits as expendable in the face of noncorrupting independent speech belie any proper purpose of the Act, its selective failure to eliminate limits in the face of the same or greater political party expenditures underscores that the law's purpose was to empower political parties over all other political speakers. Indeed, "[t]he law's exception . . . is an all but

admission of the invalidity of the [alleged anticorruption] rationale." *See Citizens United*, 130 S.Ct. at 906.

The state can provide no compelling justification for placing limits on Plaintiffs at all if the limits are expendable in the face of noncorrupting speech. If the state's "interest in alleviating the corrupting influence of large contributions is served by . . . contribution limits," *Buckley*, 424 U.S. at 55, then this purpose is belied by the elimination of these limits in the face of noncorrupting speech. Instead, through the imposition of this scheme, the State is attempting to equalize and/or control the "relative ability of individuals and groups to influence the outcome of elections." *Citizens United*, 130 S.Ct. at 904 (citing *Buckley*, 424 U.S. at 48-49). And while it is unlike the schemes at issue in *Bennett* (where matching fund provision unconstitutionally penalizes speech), and *Davis* (that permitted the opponent of a candidate who spent over $350,000 of personal funds to collect triple the normal contribution amount while subjecting the candidates who spent personal funds to remain at original contribution limit), conditioning the right to speak on whether and how much others speak imposes an unprecedented condition on Plaintiffs' and all nonparties' free exercise of First Amendment rights. *See Bennett*, 131 S.Ct. at 2818.

ii. The Act's disparate treatment of political parties and nonparties belies an anticorruption purpose

Burdening Plaintiffs' speech by allowing political parties to make unlimited contributions to candidates and party committees, while restricting Plaintiffs' ability to do the same, serves no anticorruption interest – and instead serves only to enhance the power of political parties and their leaders. As the Supreme Court has recognized, political party contributions to candidates have the same potential to corrupt as nonparty contributions. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 452 (2001) ("*Colorado II*"). The Court found that parties, like

PACs, can "act as agents for spending on behalf of those who seek to produce obligated officeholders." *Id.* The Court concluded that "[t]his party role . . . provides good reason to view limits on coordinated spending by parties through the same lens applied to spending by donors, like PACs, which can use parties as conduits for contributions meant to place candidates under obligation." *Id.*

Placing contribution limits on nonparty political speakers such as Plaintiffs while allowing parties – despite their potential to corrupt – to contribute to candidates and other party committees without limitation renders the contribution scheme underinclusive. Indeed, the large disparity that results can only serve to *increase* the appearance of corruption in Illinois politics. In *Russell v. Burris*, the Eight Circuit struck down Arkansas contribution limits that allowed "small donor" PACs to contribute $2,500 to candidates but allowed ordinary PACs and "most others" to contribute just $1,000, stating that "[i]f any contribution is likely to give rise to a reasonable perception of undue influence or corruption, it would be one from an entity permitted to contribute two and a half times the amount that others are allowed to contribute." 146 F.3d 563, 572 (8th Cir. 1998).

Here, the Act establishes an even more lopsided scheme: because parties face no limits at all, they can – and do – contribute many times more to candidates than nonparties can contribute. For example, in the 2009-2010 election cycle, the Democratic Party contributed $1,475,000 to [Thomas] Kilbride for Supreme Court Judge – 29.5 times more than a PAC could have contributed and *295 times more* than an individual could have contributed. (Plfs'. Exh. 3.) Because parties face no limits, they and/or their leaders can and sometimes do provide the majority or near-majority of a candidate's funding. For example, in the 2009-2010 election cycle, the Democratic Party provided 54% of contributions to Kilbride for Supreme Court Judge;

a combination of Minority Leader Tom Cross's candidate committee, the House Republican Organization, and the Illinois Republican Party combined provided 63.7% of contributions to Citizens for [State Representative candidate Michael] Unes; and Senate Minority Leader Christine Radogno's candidate committee and the Republican State Senate Committee, which Senator Radogno controls, contributed 45.9% of contributions to Sam McCann for State Senate Committee. (*Id.*)

iii. The Act's opportunities for circumvention belie an anticorruption purpose.

The Act's contribution limits are also underinclusive – and thus serve no anticorruption interest – because they are easily circumvented.

A candidate may circumvent the limit on what he or she may contribute to another candidate by giving unlimited amounts to a party committee (as the Act allows), which can in turn give unlimited amounts to another candidate's committee. *See* 10 ILCS 5/9-8.5 (b), (c). This is particularly easy for party leaders who control one or more party committees themselves, which is common. For example, in the 2009-2010 general election cycle, Friends of Michael J. Madigan gave the Democratic Party of Illinois $2,350,000. (Exh. 3.) The Democratic Party, which Speaker Madigan also chairs, then made contributions to candidate committees ranging from $234,321 to State Senator Deanna Demuzio's candidate committee (4.68 times the amount Madigan could lawfully contribute directly from his campaign committee), to $1,475,000 to [Thomas] Kilbride for Supreme Court Judge (29.5 times the amount Madigan could lawfully contribute directly from his campaign committee). (*Id*.) On the Republican side, Senate Minority Leader Christine Radogno's candidate committee contributed $23,875 to the Sam McCann for State Senate candidate committee and also contributed $1,130,000 to the Republican State Senate Campaign Committee, which Senator Radogno chairs, which in turn gave $428,352

to Senator McCann's campaign committee. (Exh. 6.) By combining contributions from her own campaign committee and the party committee she controls, Senator Radogno was able to direct more than eight times what she could lawfully contribute directly from her campaign committee to the McCann campaign. *Id*.

iv. The legislature knew and ignored the threat of corruption that parties and their leaders posed

The legislature was surely aware of – and disregarded – the specific threat of actual or apparent corruption posed by state political parties and their leaders because several legislators made this threat clear in statements on the state House and Senate floors (Exh. 9); as did the very commission instituted to recommend reforms to the legislature, the Illinois Reform Commission ("IRC") (Exh. 11); and as did media coverage of the legislation (Exh. 13). The Act's legislative history shows that the legislature repeatedly willfully ignored ample evidence that PACs and parties are similarly situated and entail similar potential for corruption. The state has had at least two chances to treat parties as it does nonparties, when the Act was passed in 2009 and when it was amended in 2012, but it has refused to do so. In 2009, the House would not even allow *consideration* of an amendment that would have limited party contributions to candidates in general elections. *See* Ill. H.R., 96th Gen Assemb. 81st Legis. Day, at 131-145) (Oct. 29, 2009); and amendment 4 (Exh. 9). Further, this refusal came despite floor debate on the Act that was replete with calls for the Act to limit party and party leaders' contributions. For example:

- Leader Cross: "The State Republican Party [in] the Primary cycle spent [$400,000]. In the General Election, they spent five times that amount . . . The Democrat Party in the Primary season back then spent [$108,000]. In the General Election, they spent 40 times that amount. . . Friends of Michael Madigan spent [$660,000] in the Primary. In the General, that was up three times . . . Citizens for Cross spent [$250,000] in the Primary season, and the General went up to 2.1 . . . to say we're going to regulate Primaries really does not get to the crux of the problem, does nothing to change the status quo . . . [E]verybody else is regulated with the exception of the four Legislative Leaders." Ill. H.R., 96th Gen Assemb. 81st Legis. Day, at 128-129 (Oct. 29, 2009). (Exh. 9.)

- Rep. Coulson: "[W]e should not accept a reform Bill that does not impose caps on political Parties and Legislative Leaders during both the Primary and the General Election . . . It gives those without caps a huge advantage. . . . [I]t is not reform." *Id*. at 146-147 (quotations omitted).[6]

The legislature has also ignored the recommendations of the very commission instituted to recommend reforms to it in the first place, the IRC, which then-Lieutenant Governor Quinn established in 2009 in the wake of the arrest of then-Governor Blagojevich. (IRC Report, pp.1, 17-18, Exh. 11.) The IRC recommended limits on contributions from parties and nonparties alike because a "holistic approach was necessary to achieve real reform," noting, "we cannot endorse efforts to selectively implement some reforms while ignoring other key proposals" and that "[h]alf-measures will not suffice to repair our State's troubled infrastructure or our citizens' broken confidence." (*Id*. at 2, 17-18.) Specifically, the IRC's report urged that reform be "comprehensively addressed" (*id.* at 2) and include limitations on contributions from state parties to candidates in general, legislative, state and local elections – $50,000, $30,000 and, $10,000 respectively – and limit party contributions in the aggregate, so that multiple committees of a political party are treated as a single committee for contribution-limit purposes. (*Id.* at 17-18.)

As the media reported after the Act's passage, though the law's purported intent is to "prevent people and interest groups from trying to buy influence in state government . . . the . . . law has a loophole: It only caps what political parties and the four legislative leaders can give to candidates in primaries but not in general elections, leading to criticism that it simply concentrates power in the hands of a few well-entrenched legislative leaders." Jim Suhr, "New Illinois laws include ethics, stop-light reforms," State Journal Register, Dec. 30, 2009. (Exh. 12.)

The potentially corrupting influence of political parties and their leaders was thus well known by the general public, expert observers and the legislators who passed the Act. The

[6] More excerpts from the Act's legislative history are attached as Plaintiffs' Exhibit 9.

General Assembly's decision not to place any limits on party contributions to candidates and party commission despite this knowledge – combined with the manner in which the Act operates to favor parties and their leaders at the expense of all others – evinces the underinclusiveness of the statute and the improper purpose it serves. Indeed, the Act's limits on all speakers but the State's political parties and leaders, and its overall scheme that favors parties, *create* rather than combat the appearance of corruption.

d. Even if the limit-lifting provisions and disparate treatment serve a proper purpose, they are not narrowly tailored to serve that purpose.

In addition and in the alternative, even if the state could show a compelling or sufficient interest to treat PACs and parties differently, the statute is neither narrowly tailored nor closely drawn to serve this purpose. The Act's failure to lift contribution limits in the face of party spending (rather than just self-funded candidate spending and independent expenditures), its exclusion of contributions by political parties from its limits, and its failure to properly safeguard against the dangers of circumvention through unlimited candidate-to-party contributions and party-to-candidate contributions demonstrate that the Act is not narrowly tailored or closely drawn to advance a compelling or sufficiently important government interest.

2. There Is No Compelling Reason to Treat Individuals such as Plaintiff Bachrach differently from Corporations, Labor Organizations and Associations

In addition to placing the above burdens on all Plaintiffs, the Act also burdens Plaintiff Bachrach by limiting individual contributions to candidates and PACs to only half the amounts that corporations, labor organizations, and associations may contribute.

"Quite apart from the purpose or effect of regulating content . . . the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." *Citizens United*, 130 S.Ct. at 899. The Act not only prefers party and party leaders' speech over all

others, it also favors corporate, labor and associational speech over those of individuals. Laws that burden political speech are "subject to strict scrutiny," which requires the state to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *Id*. at 898.

Absent record evidence of discrimination, a court "should generally be hesitant to invalidate legislation which on its face imposes *evenhanded* restrictions." *Buckley*, 424 U.S. at 31 (emphasis added). There is an emphasis on *evenhanded* because *Buckley* upheld *uniform* contribution limits against a claim that they discriminated against non-major party candidates by subjecting them to the same contribution limits as major-party candidates. *Id*. Here, however, the Act contains *uneven* limitations: would-be contributors are not treated equally. Candidates are not treated equally, either: those whose support derives from corporations or unions will be relatively advantaged, and those whose support derives from individuals will be relatively disadvantaged.

This discriminatory treatment of individual contributors can serve no anticorruption interest. To the contrary, by allowing some groups to make much larger contributions than others, they *disserve* that interest. *See Russell*, 146 F.3d at 572 ("If any contribution is likely to give rise to a reasonable perception of corruption, it would be from an entity permitted to contribute two and a half times the amount that others are allowed to contribute.").

B. The Act violates Plaintiffs' right to Equal Protection of Law

The Act's discriminatory contribution limits – favoring parties over nonparties and corporations, labor organizations, and associations over individuals – also violate the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment denies states the power to "legislate that different treatment be accorded to persons placed by a statute into

different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). A classification that implicates a fundamental right, including the right to free speech, is subject to strict scrutiny and must therefore be narrowly tailored to serve a compelling governmental interest. *Plyler v. Doe*, 457 U.S. 202, 217-18 (1982) (classifications that impinge on exercise of a fundamental right subject to strict scrutiny); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983) ("freedom of speech" a fundamental right for equal protection analysis).

As set forth above, the State must meet its burden to show that the Act's contribution limits are narrowly tailored to serve a compelling interest. But as discussed above, the limits must fall because they do not serve a compelling or sufficient government interest in preventing actual or apparent corruption. Moreover, discrimination in favor of or against a corporation engaged in political speech because of its entity status is improper. *See Citizens United*, 130 S.Ct. at 898. "Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Id*. at 900 (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)). "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United*, 130 S.Ct. at 899.

If discrimination against corporate political speech is unconstitutional, so discrimination in favor of corporate speech against individuals. Accordingly, the Act violates the Equal Protection Clause and must be struck down.

V. The Court Should Enjoin Enforcement of the Act

As set forth above, Illinois Liberty PAC has shown a likelihood of success on the merits. Without a preliminary injunction, Plaintiff will suffer irreparable harm because "'any post-

election remedy would not compensate . . . for the loss of the freedom of speech.'" *Personal PAC v. McGuffage*, 2012 WL 850744 *4 (N.D. Ill. Mar. 13, 2012) (quoting *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 507 (7th Cir. 1998)). Indeed, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Joelner v. Village of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004).

Illinois Liberty PAC is seeking to make donations to candidates in amounts greater than the Act's limits allow. (Besler Decl., ¶¶ 11-16, Exh. 1.) Campaign season for the November 2012 general election is underway and it is critical that the Act's unconstitutional provisions be enjoined so that Illinois Liberty PAC can be free to exercise its right to support through contributions the candidates of its choice in a manner that most effectively advances its mission. *See Citizens United*, 130 S.Ct. at 895 (noting importance of speech "in the weeks immediately before" an election and that a "speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit").

While Illinois Liberty PAC will suffer irreparable harm from the loss of its First Amendment freedoms in the absence of an injunction, the government cannot suffer harm from being prevented from enforcing an unconstitutional statute. *Joelner*, 378 F.3d at 619. In fact, the State has essentially conceded this point because of the Act's provisions that eliminate all the limits in response to third party speech. 10 ILCS 5/9-8.5 (h), (h)(5). Moreover, "it is always in the public interest to protect First Amendment liberties." *Id.* (internal marks and citations omitted).

VI. The Court Should Waive The Bond Requirement Under F.R.C.P. 65(c).

It is within the Court's discretion to waive Rule 65(c)'s security requirement where it finds such a waiver to be appropriate in the circumstances. See *Scherr v. Volpe*, 466 F.2d 1027,

1035 (7th Cir. 1972); *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d 692, 701 (7th Cir. 1977). In non-commercial cases, courts often waive the bond requirement where the likelihood of harm to the non-moving party is slight and the bond requirements would impose a significant burden on the moving party. *See, e.g., Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991). Waiver of the bond requirement is particularly appropriate in cases involving constitutional rights. See *Smith v. Bd. of Election Comm'rs*, 591 F. Supp. 70, 71 (N.D. Ill. 1984).

VII. Severability

The Court should enjoin all limits because the individual and PAC limits are not severable from the remainder of the Act. "Whether invalid provisions in a state law can be severed from the whole to preserve the rest is a question of state law," *Burlington N. & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 804 (7th Cir. 1999), and under Illinois law, a provision is not severable from the remainder of a statute if "the valid and invalid provisions of the Act are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and the legislature would not pass the residue independently," *People ex rel. Chicago Bar Ass'n v. State Bd. of Elections*, 558 N.E.2d 89, 98 (Ill. 1990).

As in *Randall v. Sorrell* – where the Supreme Court refused to sever an unconstitutional limit on political-party contributions from the rest of a contribution-limit scheme – striking the limits on only one type of speaker would "leave gaping loopholes" in the Act, and there is no way for the Court to "foresee which of many different possible ways" the legislature might amend the Act in the absence of those limits. 548 U.S. 230, 262 (2006).

VIII. Conclusion

Wherefore, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Preliminary Injunction and enjoin the enforcement of 10 ILCS 5/9-8-5(b)-(d), or, in the alternative, enjoin the Act's contribution limits imposed on Plaintiffs in those sections.

DATED: AUGUST 30, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Diane S. Cohen, an attorney, hereby certify that Plaintiffs' First Amended Complaint was filed on August 30, 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.

By:
/s/ Diane S. Cohen