No. 16-3585

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ILLINOIS LIBERTY PAC, *et al.*,

Plaintiffs-Appellants,

v.

LISA MADIGAN,
Attorney General of Illinois, in her official capacity, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Case No. 12 C 5811
The Honorable Gary Feinerman, Judge Presiding

BRIEF OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER, CHICAGO APPLESEED FUND FOR JUSTICE, CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS, COMMON CAUSE ILLINOIS, ILLINOIS CAMPAIGN FOR POLITICAL REFORM, AND LEAGUE OF WOMEN VOTERS OF ILLINOIS IN SUPPORT OF DEFENDANTS-APPELLEES

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3585

Short Caption: Illinois Liberty PAC, et al. v. Madigan et al.

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Attorney's Signature: /s/ Paul M. Smith Date: 5/23/2017
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Attorney's Signature: /s/ Tara Malloy Date: 5/23/2017
Attorney's Printed Name: Tara Malloy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ___ No_X__

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Attorney's Signature: /s/ Megan P. McAllen Date: 5/23/2017
Attorney's Printed Name: Megan P. McAllen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ___ No X

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Attorney's Signature: /s/ Noah B. Lindell Date: 5/23/2017
Attorney's Printed Name: Noah B. Lindell

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Attorney's Signature: /s/ Ami Gandhi Date: 5/23/2017
Attorney's Printed Name: Ami Gandhi

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Attorney's Signature: /s/ Ryan Cortazar Date: 5/23/2017
Attorney's Printed Name: Ryan Cortazar

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STATEMENT OF INTEREST[1]

Amici curiae Campaign Legal Center ("CLC"), Chicago Lawyers' Committee for Civil Rights, Common Cause Illinois, Chicago Appleseed Fund for Justice, Illinois Campaign for Political Reform ("ICPR"), and League of Women Voters of Illinois ("LWV") are nonpartisan, nonprofit organizations that work in the areas of campaign finance and election law.[2]

All *amici* have a demonstrated interest in the contribution limits in the Illinois Disclosure and Regulation of Campaign Contributions and Expenditures Act ("Act") challenged here. *Amicus curiae* CLC participates in state and federal court litigation on contribution limits, political disclosure, and other campaign finance and voting matters, including in *Citizens United v. FEC*, 558 U.S. 310 (2010), *Randall v. Sorrell*, 548 U.S. 230 (2006), and *McConnell v. FEC*, 540 U.S. 93 (2003). *Amici curiae* CLC, ICPR and Chicago Appleseed participated in earlier stages of this case, including before this Court, and Chicago Lawyers' Committee, Common Cause Illinois, and LWV are Illinois-based organizations with a longstanding interest in the integrity of Illinois elections and government.

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[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party's counsel authored the brief in whole or in part, or contributed money that was intended to fund the brief; and no person—other than the *amici curiae* or their counsel—contributed money that was intended to fund preparing or submitting the brief.

[2] Full descriptions of each *amicus curiae* are included in the motion accompanying this proposed brief.

INTRODUCTION & SUMMARY OF ARGUMENT

This is a simple case. But Liberty PAC, Edgar Bachrach, and Kyle McCarter (collectively, "Liberty PAC" or "appellants") have unnecessarily complicated it, asserting convoluted arguments in an attempt to avoid the decades-old legal framework for evaluating contribution limits. Time and time again, the Supreme Court has held that laws such as Illinois' contribution limits are subject only to intermediate, "closely drawn" scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 20-23, 25 (1976) (per curiam); *see FEC v. Beaumont*, 539 U.S. 146, 161 (2003) (contribution limits subject only to "relatively complaisant review"). And without exception, the Supreme Court has found that "base" contribution limits are a constitutionally permissible means of advancing the government's vital interests in preventing corruption and the appearance of corruption—so long as the limits are not so low as to prevent candidates from amassing the resources necessary for effective advocacy. *See, e.g.*, *Randall*, 548 U.S. at 238-69; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 381-98 (2000); *Cal. Med. Ass'n. v. FEC*, 453 U.S. 182, 194-99 (1981) ("*CalMed*").

The legal question this case presents is straightforward: whether Illinois may constitutionally set a $5,000 limit on individual contributions to candidates, a $10,000 limit on individual contributions to PACs, and a $50,000 limit on PAC contributions to candidates. 10 Ill. Comp. Stat. 5/9-8.5(b), (d). Appellants make no attempt to deny that limiting individual and PAC contributions has been found to advance the government's important interest in preventing corruption and its appearance. Nor do appellants allege that these limits are so low as to prevent effective advocacy. Indeed, both of these arguments would be unsustainable, given

that the Supreme Court has upheld much lower contribution limits on grounds that they prevent corruption and the appearance of corruption. *Shrink Mo.*, 528 U.S. at 395-397; *Buckley*, 424 U.S. at 23-29.

Instead of attacking Illinois' individual and PACs contribution limits on their own merits, appellants focus almost exclusively on what Illinois law *does not do*. Specifically, they object that:

- The Act allows a corporation, labor union, or other association to contribute $10,000 to a candidate and $20,000 to a political commitee, double the amounts that individuals may contribute. 10 Ill. Comp. Stat. 5/9-8.5(b)-(d).
- The Act imposes no limit on contributions from political parties to candidates in the general election. *Id.* at 5/9-8.5(b).
- The Act deems a legislative caucus committee to be a type of party committee for purposes of the contribution limits. *Id.* at 5/9-1.8(c).[3]

Thus, the heart of appellants' case is not that the Act regulates too much, but that it regulates too little, and that in its restraint, the Act has the effect of discriminating against some political speakers in favor of others. But "[i]t is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging too little speech," *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015), and unsurprisingly, Liberty PAC's arguments do not succeed.

In their First Amendment claims, appellants argue that the Act is unconstitutional because the government failed to demonstrate "with evidence" that the legislature furthered the state's anti-corruption interest by deciding *not* to impose

[3] *Amici* will not address in this submission appellants' challenge to the waiver provisions, 10 Ill. Comp. Stat. 5/9-8.5(h), because waivers of contribution limits for *all* candidates are clearly constitutional under *Davis v. FEC*, 554 U.S. 724, 737 (2008).

limits on contributions from party committees, including legislative caucus committees, and to set relatively high limits on corporate and union contributions. Appellants' Br. 23. But this argument turns the First Amendment analysis on its head. The legislature need not justify its decision *not* to limit contributions; its burden is only to show that whatever limits it *does* enact are closely drawn to a sufficiently important state interest—namely, preventing corruption.

What appellants are really arguing is that the legislature's decision not to strictly limit contributions from these sources renders the law unconstitutionally underinclusive. Their reluctance to properly frame their argument is understandable given that the bar for demonstrating underinclusivity is high: they must show that Illinois' system of contribution limits cannot "fairly be said to advance any genuinely substantial governmental interest" because it provides only "ineffective or remote" support for its asserted goals. *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984). Appellants have not even attempted to make such a showing.

Furthermore, appellants' argument ignores that "rigorous scrutiny" is not appropriate when reviewing of legislative choices about the relative contribution thresholds of differently situated entities. The Supreme Court has made clear that, as long as contribution limits are not so low that they prevent effective advocacy, the judiciary must defer to legislatures' choices about how to structure those limits. *See, e.g.*, *Buckley*, 424 U.S. at 30.

In addition to their First Amendment argument, appellants have also formulated their challenge as an equal protection claim throughout the course of this

litigation. *Illinois Liberty PAC v. Madigan*, 902 F. Supp. 2d 1113, 1116 (N.D. Ill. 2012), *aff'd*, No. 12-3305, 2012 WL 5259036 (7th Cir. Oct. 24, 2012). Perhaps recognizing its weakness, they have deemphasized it in their briefing before this Court. The apparent purpose behind bringing an equal protection claim appears to be appellants' hope that it would provide a "hook" for strict scrutiny review. Appellants' Br. 51-53. But the Supreme Court has established that closely drawn scrutiny applies to contribution limits, and appellants "can fare no better under the Equal Protection Clause than under the First Amendment itself." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 55 n.4 (1986).

Lastly, equal protection claims require challengers to identify similarly situated comparators to show that they have been treated unequally. But appellants have not shown that an individual or PAC is the equivalent of a corporation or party committee. Quite the contrary, Liberty PAC has all but conceded that the Supreme Court has recognized that party committees are uniquely situated and unlike other political players. Appellants' Br. 35. The Equal Protection Clause "embodies the general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). It provides appellants no support here.

ARGUMENT

I. The Act Does Not Violate the First Amendment.

A. Appellants Have Not—and Cannot—Show that the Act is Unconstitutionally Underinclusive.

As the lower court recognized, the Act imposes a range of monetary limits similar to those the Supreme Court has previously upheld: "The contribution limits challenged here well exceed the limits invalidated in *Randall*, and even . . . the limits upheld in *Shrink*, [*CalMed*], *Beaumont*, and *Buckley*." 902 F. Supp. 2d at 1120; *see also, e.g.*, *Shrink Mo.*, 528 U.S. at 395-397 (upholding $1,075 limit on individual and PAC contributions to statewide candidates in Missouri); *Buckley*, 424 U.S. at 23-29 (upholding $1,000 limit on individual and PAC contributions to candidates for federal office).

Because base contribution limits serve well-established anticorruption interests—as four decades of Supreme Court case law has consistently recognized—they are generally deemed constitutional so long as they do not prevent candidates from obtaining the resources necessary for effective advocacy. *Buckley*, at 20-29; *Randall*, 548 U.S. at 248-61. Appellants have not claimed that Illinois' limits are so low as to prevent candidates from amassing sufficient resources to run a competitive campaign. And even if they had, Illinois' limits on contributions to candidates—$50,000 for PACs, and $5,000 for individuals—are not radically different from the $1,000 contribution limit upheld in *Buckley*, or the $1,075 limit upheld in *Shrink Missouri*. It would take far lower limits to "transform differences in degree into difference in kind." *Randall*, 548 U.S. at 260; *see also Buckley*, 424 U.S. at 30.

Instead, the gravamen of appellants' case is that Illinois' system of contribution limits treats corporations, unions, and political parties too leniently, and thereby effectively favors some political speakers over others. But complaining that the law fails to restrict enough of *someone else's* speech does not state a cognizable First Amendment claim. It is only when a law is so inadequate as to advance no "substantial governmental interest" that it might be deemed unconstitutionally underinclusive. *League of Women Voters*, 468 U.S. at 396.

As the Supreme Court has recognized, "[a]lthough a law's underinclusivity raises a red flag, the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee*, 135 S. Ct. at 1668. "A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Id*. Thus, it was well within the prerogative of Illinois legislators to address the concerns they deemed "most pressing" in terms of campaign contributions.

First, the legislature's view that parties are differently situated from individuals and PACs is perfectly consistent with Supreme Court precedent, which makes clear that lawmakers are "fully entitled to consider the real-world differences between political parties and [PACs] when crafting a system of campaign finance regulation." *McConnell*, 540 U.S. at 188. The Supreme Court has repeatedly upheld the federal campaign finance limits that allow political parties to contribute far more generously to candidates than can individuals or other outside groups. *See id.*; *see also, e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 439 n.2, 442 n.7 (2001) ("*Colorado II*"). Liberty PAC's claim here—that Illinois law is

unconstitutionally underinclusive because it accounts for the special status of political parties—cannot be squared with this case law.

Nor does Illinois' decision to treat legislative caucus committees as party committees render the Act fatally underinclusive. The district court's opinion lays out why legislative caucus committees are closer to party committees for corruption purposes than they are to PACs. Appellants' Br. A-35–A-36. And although Liberty PAC speculates that the Act's failure to regulate these committees may create the *risk* of corruption, it has provided no evidence that legislative leaders have *in fact* procured *quid pro quos* by making large contributions from such committees.

Even less tenable is Liberty PAC's argument that the Act's $10,000 limit on corporate and union contributions to candidates renders the entire system unconstitutional—not on its own terms, but because of the disparity between the limit on individual contributions and those on corporate contributions. Indeed, as a policy matter, *amici* would prefer for Illinois to prohibit all corporate and union contributions to candidates and party committees, as Supreme Court precedent would permit it to do. *Beaumont*, 539 U.S. at 163. But again, the Constitution does not require Illinois to treat every contributor identically, and Liberty PAC never explains why the disparity between the individual and the corporate/union limits renders the Act so ineffective that it advances no "substantial governmental interest."

Given Illinois' goal of preventing corruption and its appearance, the decision not to limit contributions from parties to candidates reflects a permissible legislative judgment that the risk of improper influence from political parties is less acute.

Similarly, a $10,000 limit on corporate contributions can only further anti-corruption goals; the enactment of a lower $5,000 limit on individual contributions does nothing to change this. As the Supreme Court has emphasized, court do not strike down laws because they "conceivably could have restricted even greater amounts of speech in service of their stated interests." *Williams-Yulee*, 135 S. Ct. at 1668. This Court should not do so here.

B. Courts Owe Deference to Legislatures Regarding Their Choices About the Relative Contribution Thresholds Of Differently Situated Entities.

At base, Liberty PAC's First Amendment argument is a demand that this Court second-guess Illinois' judgment on how to structure the relative dollar amounts of its contribution limits. Appellants' Br. 20-21, 51-55. That demand is at odds with four decades of Supreme Court precedent, which has consistently counseled deference to legislative judgments about the appropriate way to structure a system of campaign contribution limits. *See Randall*, 548 U.S. at 248; *McConnell*, 540 U.S. at 136-37; *Beaumont*, 539 U.S. at 155; *Shrink Mo.*, 528 U.S. at 391, 397; *id.* at 402-03 (Breyer, J., concurring); *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 500 (1985); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209-10 (1982); *CalMed*, 453 U.S. at 201; *Buckley*, 424 U.S. at 30.

Since *Buckley*, the Supreme Court has recognized that the legislature should determine the details of contribution regulation. "[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe" the legislature's choice of dollar amount. 424 U.S. at 30. The same principle applies to judgments about the structuring of contribution limits. A law must be not "perfect, but reasonable"; the

legislature must adopt, not "the single best disposition[,] but one whose scope is 'in proportion to the interest served.'" *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456 (2014) (plurality opinion) (citation omitted).

This is so for at least three reasons. First, deference is appropriate because of "the limited burdens [contribution restrictions] impose on First Amendment freedoms." *McConnell*, 540 U.S. at 136. Contributions act only as "a general expression of support for the candidate and his views," and "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Buckley*, 424 U.S. at 21. This is why, "[g]oing back to *Buckley*," contribution limits have received lesser scrutiny than expenditure limits. *Beaumont*, 539 U.S. at 161.

Second, deference is necessary because of "the importance of the interests that underlie contribution limits." *McConnell*, 540 U.S. at 136. Corruption and the appearance of corruption are toxic to our system of self-government. Regulations on political contributions help deter these threats, and are thereby "designed to protect the integrity of the political process." *Id.* at 137. As the Supreme Court has continually affirmed, this is a governmental interest of the highest order. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1450 (acknowledging "the compelling nature of the 'collective' interest in preventing corruption in the electoral process").

Third, deference recognizes that the legislature "is far better equipped than the judiciary" to make decisions "concerning regulatory schemes of inherent

complexity." *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 195-96 (1997). This is doubly true in regard to campaign finance law. "[L]egislators have 'particular expertise' in matters related to the costs and nature of running for office." *Randall*, 548 U.S. at 248 (quoting *McConnell*, 540 U.S. at 137). The judiciary, by contrast, "has no scalpel to probe" whether a $10,000 contribution from corporations corrupts less than a $5,000 one from an individual, or whether either has the same corrupting effect as a $50,000 PAC contribution. *Buckley*, 424 U.S. at 30. Therefore, when it comes to the details of designing contribution limits, deference is the general rule.

II. The Act Does Not Violate the Equal Protection Clause.

Invoking the language on speaker-based speech restrictions from *Citizens United*, Liberty PAC asks this Court to apply strict scrutiny to the review of its claims under the Equal Protection Clause. Appellants' Br. 51-53. This demand has no basis. As the U.S. District Court for the District of Columbia explained in *McConnell v. FEC*:

> It is generally unnecessary to analyze laws which burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the strongest protection against the limitation of these rights. . . . If the Court . . . finds that the classification does not violate any First Amendment right, the Court is unlikely to invalidate that classification under equal protection principles.

251 F. Supp. 2d 176, 709 n.180 (D.D.C. 2003) (opinion of Kollar-Kotelly, J.) (quoting 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law—Substance & Procedure* § 18.40 (3d ed. 1999)).

A. Appellants Cannot Evade Established First Amendment Doctrine By Casting the Same Claims in the Language of Equal Protection.

Appellants can fare no better under the Equal Protection Clause than they do

under the First Amendment. Simply put: challengers cannot use the Equal Protection Clause to ratchet up the level of scrutiny already used to analyze contribution limits.

The usual standard for examining legislative classifications is rational basis review. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam). The sole exceptions are when "a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions." *Id.* Since appellants do not assert that they are members of a suspect class, they must base their claim on the "fundamental rights" strand of the Equal Protection Clause. This strand "recognizes established constitutional rights and makes certain that those rights receive 'no less protection than the Constitution itself demands.'" *Smith ex rel. Smith v. Severn*, 129 F.3d 419, 429 (7th Cir. 1997) (citation omitted). But by the same token, it does not guarantee any greater protection than the Constitution itself provides.

The Supreme Court has already generated substantive tests for the review of alleged infringements of specific fundamental rights, many of which require less-than-strict scrutiny. And it has never used equal protection to apply strict scrutiny to claims that it has determined merit less scrutiny within their substantive doctrinal homes. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citation omitted) (holding that "reasonable, nondiscriminatory restrictions" concerning fundamental rights of voting and political association must be justified by "the State's important regulatory interests"); *Zablocki v. Redhail*, 434 U.S. 374, 386, 388 (1978) (holding that "statutory classification[s]" that "significantly interfere[] with" the right to marry must be "supported by sufficiently important state interests" and "closely

tailored to effectuate only those interests").

The general rule from these decisions is clear: when the Court has already formulated a specific test for the review of an alleged violation of a substantive fundamental right, this test governs any equal protection challenge as well. A court, therefore, will not examine a fundamental-rights equal protection claim "shorn of what the [Supreme] Court has said about the appropriate level of scrutiny applicable to that right in its native doctrinal environment." *Riddle v. Hickenlooper*, 742 F.3d 922, 931 (10th Cir. 2014) (Gorsuch, J., concurring). Appellants cannot obtain a level of scrutiny under the Equal Protection Clause that their claims could not receive under the First Amendment itself.

Instead, when a court reviewing a First Amendment challenge to a campaign finance law also conducts a separate equal protection analysis, it employs the same level of review that it already applied to the substantive First Amendment claim. *See, e.g.*, *Wagner v. FEC*, 793 F.3d 1, 32-33 (D.C. Cir. 2015) (en banc). "There is . . . no case in which the Supreme Court has employed strict scrutiny to analyze a contribution restriction under equal protection principles." *Id.* at 32. Lower courts have likewise refused to sidestep the traditional First Amendment analysis by using the Equal Protection Clause.[4] Therefore, because the challenged provisions survive First

[4] *See O'Toole v. O'Connor*, 802 F.3d 783, 791-92 (6th Cir. 2015); *Wagner*, 793 F.3d at 33; *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 717 (4th Cir. 1999); *Int'l Ass'n of Machinists & Aerospace Workers v. FEC*, 678 F.2d 1092, 1105 (D.C. Cir.), *aff'd*, 459 U.S. 983 (1982); *Thompson v. Dauphinais*, No. 3:15-cv-218, 2016 WL 6602419, at *9 (D. Alaska Nov. 7, 2016), *appeal docketed sub nom. Thompson v. Hebdon*, No. 17-35019 (9th Cir. Jan. 10, 2017); *A.N.S.W.E.R. Coal. v. Jewell*, 153 F. Supp. 3d 395, 413 n.12 (D.D.C. 2016), *aff'd in part sub nom. A.N.S.W.E.R. Coal.*

Amendment review under closely drawn scrutiny, they would likewise survive review at the same level of scrutiny under the Equal Protection Clause.

Indeed, if anything, this is a maximum for the level of review such equal protection claims receive. In many cases, if the court has determined that the law at issue does not violate the substantive constitutional right claimed, it subjects the related equal protection claim to only "the traditional rational-basis test."[5]

And there is no reason to fear that either of these approaches would give short shrift to equal protection concerns. This is because the standard First Amendment analysis applicable to campaign finance laws already protects the speech and

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(Act Now to Stop War & End Racism) v. Basham, 845 F.3d 1199 (D.C. Cir. 2017); *Woodhouse v. Me. Comm'n on Governmental Ethics & Election Practices*, 40 F. Supp. 3d 186, 195 (D. Me. 2014); *see also Riddle*, 742 F.3d at 928 (Gorsuch, J., concurring) (assuming that closely drawn scrutiny applies to equal protection challenge).

Even those courts that have subjected equal protection claims to strict scrutiny have done so because they had already subjected the related First Amendment claim to strict scrutiny. *See, e.g.*, *Austin v. Mich. Chamber of Comm.*, 492 U.S. 652, 666 (1990), *overruled in part by Citizens United*, 558 U.S. 310; *Barr v. Lafon*, 538 F.3d 554, 575-76 (6th Cir. 2008); *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 409-10 (6th Cir. 1999); *Dallman v. Ritter*, 225 P.3d 610, 632-35 (Colo. 2010) (en banc). The Eighth Circuit has been the lone dissenter. *See Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879-80 (8th Cir. 2012); *see also Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685, 691 (E.D. Ky. 2016).

[5] *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). *See Locke v. Davey*, 540 U.S. 712, 721 n.3 (2004) (religion); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007) (same); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 99 n.11 (3d Cir. 2009) (speech), *as amended* (June 5, 2009); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002) (same); *McGuire v. Reilly*, 260 F.3d 36, 49-50 (1st Cir. 2001) (same); *Kwong v. Bloomberg*, 723 F.3d 160, 170 n.19 (2d Cir. 2013) (Second Amendment) (collecting cases); *Nordyke v. King*, 681 F.3d 1041, 1043 n.2 (9th Cir. 2012) (expressive conduct and Second Amendment); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir. 2000) (abortion).

associational rights appellants seek to vindicate. In *Buckley*, the Supreme Court determined that campaign contribution and expenditure regulations affect political speech and association. 424 U.S. at 19-23. For this reason, campaign finance laws *already* receive heightened scrutiny under the First Amendment. *Id.* at 24-25, 44-45. Indeed, Appellants acknowledge that their First Amendment and equal protection claims are "challenging the same type of discrimination." Appellants' Br. 53.

First Amendment doctrine thus takes into account any equal protection concerns that campaign finance laws might raise. Laws that regulate speech on the basis of its viewpoint are already subject to strict scrutiny. *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014). The same goes for laws that ban the speech of some speakers and allow the speech of others, *Citizens United*, 558 U.S. at 340—at least "when they reflect the Government's preference for the substance of what the favored speakers have to say." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994). These cases recognize that the First Amendment already incorporates considerations of equal protection. *See, e.g.*, *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1296 (7th Cir. 1981) ("[T]he [F]irst [A]mendment's proscription against censorship is itself simply a specialized equal protection guarantee."), *rev'd on other grounds sub nom. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Thus, even when the Court has "fused the First Amendment into the Equal Protection Clause," it has done so "with the acknowledgment . . . that *the First Amendment* underlies its analysis." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 n.4 (1992) (emphasis added).

In short, the Court's decisions make clear that it is "the nature and quality of

the legislative action at issue"—not which constitutional amendment challengers invoke—that "determine the intensity of judicial review of intertwined equal protection, First Amendment claims." *Int'l Ass'n of Machinists & Aerospace Workers v. FEC*, 678 F.2d 1092, 1105-06 (D.C. Cir.), *aff'd*, 459 U.S. 983 (1982). This is exactly the approach the Court took in *Buckley*. Because restrictions on expenditures impose severe burdens on speech and association, they are subject to strict scrutiny. But restrictions on contributions do *not* impose such significant restrictions, and therefore receive "relatively complaisant review." *Beaumont*, 539 U.S. at 161. Appellants cannot escape this distinction by dressing a First Amendment claim in equal protection garb.[6]

B. Equal Protection Requires Only That Similarly Situated Entities Be Treated Alike, Not That *Differently* Situated Entities Be Treated The Same.

Regardless of the standard of review applied, appellants' equal protection claim also fails for a more fundamental reason: Illinois does not classify similar entities differently. Whether or not two classes are truly alike constitutes a "threshold

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[6] Illinois' distinctions would survive even under strict scrutiny. First, the Supreme Court has long sought "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995), and has upheld several provisions under strict scrutiny in recent years. *See, e.g.*, *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2208, 2214 (2016); *Williams-Yulee*, 135 S. Ct. at 1666. Second, Illinois' interest in preventing corruption and its appearance "may properly be labeled 'compelling,' . . . so that the interest would satisfy even strict scrutiny." *McCutcheon*, 134 S. Ct. at 1445. And third, even under strict scrutiny, the First Amendment and the Equal Protection Clause "require[] that [a statute] be narrowly tailored, not that it be 'perfectly tailored.' . . . The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as" preventing the appearance of corruption. *Williams-Yulee*, 135 S. Ct. at 1671 (citation omitted). Illinois' statute is properly tailored to its corruption concerns.

issue" for equal protection claims. *Riddle*, 742 F.3d at 926. "Demonstrating that they are similarly situated to another group consequently is essential to the success of the [appellants'] claims." *Harvey v. Town of Merrillville*, 649 F.3d 526, 531 (7th Cir. 2011).

Appellants cannot make such a showing. "To be similarly-situated, persons must be alike 'in all relevant respects.'" *Marcavage v. City of Chicago*, 659 F.3d 626, 632 (7th Cir. 2011) (citation omitted). In this case, that means that corporate or union contributions must be shown to have similar corruptive potential to individuals' donations, and party committees' contributions to its own candidates must be deemed as corruptive as PAC donations. Yet, if anything, appellants suggest that individuals and corporations are *differently* situated when it comes to their donations' corruptive potential. Appellants' Br. 24-25. Appellants simply do not like the conclusion Illinois has reached about how to balance their relative risks. However, this complaint overlooks the deference that legislatures receive on the details of their contribution limit schemes. *See supra* Part I.B.

And, in fact, Illinois has good reason to set different contribution limits for individuals, corporations, PACs, and party committees. First, as between individuals and corporations, appellants are correct that "the public *might* think that corporate and union contributions pose the greater threat." Appellants' Br. 24 (emphasis added). But the people of Illinois are entitled to determine otherwise, especially since corporations and unions tend to represent the views of multiple people. Second, as between corporations and PACs, the Supreme Court has determined that a higher limit on PAC contributions "enhances the opportunity of bona fide groups to

participate in the election process," *Buckley*, 424 U.S. at 35, and that the ability to form a PAC can temper some of the corruption pressures inherent in direct corporate and union contributions, *Beaumont*, 539 U.S. at 163. As for differentiating between PACs and party committees, the Illinois legislature is entitled to determine that its limits on donations to parties suffice to prevent the corruption that might form when the parties then contribute to their own candidates. *See supra* Part I.A.

"Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike," *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)—and Liberty PAC's equal protection claim attempts to do just that. Illinois' decision to place different contribution limits on individuals versus corporations, and on PACs versus party committees, "reflect[s] a judgment . . . that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *CalMed*, 453 U.S. at 201. This case is therefore distinct from situations in which states apply different limits among individuals donating to candidates for the same office, *Riddle*, 742 F.3d at 926-27; *Woodhouse v. Me. Comm'n on Governmental Ethics & Election Practices*, 40 F. Supp. 3d 186, 194 (D. Me. 2014); among corporate entities, *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685, 691 (E.D. Ky. 2016); *Dallman v. Ritter*, 225 P.3d 610, 634 (Colo. 2010) (en banc); or among PACs, *Russell v. Burris*, 146 F.3d 563, 571-72 (8th Cir. 1998). Unlike in those cases, Illinois' classes are *not* similarly situated.

III. Invalidating Illinois' Contribution Limits Would Imperil State and Local Contribution Limits Across the Country.

Appellants' arguments not only threaten the administration of Illinois' contribution limits; it also has the potential to upend other states' campaign finance regimes, as well as federal campaign finance law. As courts have recognized, when passing on campaign contribution restrictions, "[t]he experience of states with and without similar laws is also relevant." *Wagner*, 793 F.3d at 14. *See McCutcheon*, 134 S. Ct. at 1451 n.7; *Citizens United*, 558 U.S. at 357. And only a handful of states employ the contribution structure that appellants seek.

States use a variety of contribution limits in their campaign finance laws, in keeping with their legitimate power to regulate the electoral process. Forty-five states impose some limits on contributions to candidates in state elections.[7] Of these, the

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[7] Alaska Stat. § 15.13.070; Ariz. Rev. Stat. § 16-905(A)-(B); Ark. Const. art. XIX, § 28; Ark. Code Ann. § 7-6-203; Cal. Gov't Code §§ 82047, 85301-303; Colo. Const. art. XXVIII, § 3(1); Conn. Gen. Stat. § 9-611, -613, -615, -617; Del. Code Ann. tit. 15, §§ 8002(17), 8010; Fla. Stat. §§ 106.011(14), -.08(1)-(2); Ga. Code Ann. § 21-5-41(a)-(b); Haw. Rev. Stat. §§ 11-302 ("person"), -357; Idaho Code Ann. § 67-6610A(1)-(2); 10 Ill. Comp. Stat. 5/9-1.9(1)-(2), 5/9-8.5(b); Ind. Code § 3-9-2-4; Iowa Code § 68A.503; Kan. Stat. Ann. § 25-4143(j), -4153(a), (g); Ky. Rev. Stat. Ann. §§ 121.025, -.150 (6); La. Stat. Ann. § 18:1505.2(H); Me. Rev. Stat. tit. 21-A, § 1015; Md. Code Ann., Elec. Law § 13-226; Mass. Gen. Laws ch. 55, §§ 6, 6A, 7A, 8; Mich. Comp. Laws §§ 169.252(1)-(4), -254; Minn. Stat. §§ 10A.27 subd. 1-2, 211B.15; Miss. Code § 97-13-15; Mo. Const. art. VIII, § 23(3); Mont. Code Ann. § 13-37-216(1)-(2); Nev. Rev. Stat. §§ 294A.009, 294A.100; N.H. Rev. Stat. Ann. § 664:4; N.J. Stat. Ann. § 19:44A-11.3; N.M. Stat. Ann. §§ 1-19-26(L), 34.7(A); N.Y. Elec. Law §§ 14-114 to -116; N.C. Gen. Stat. §§ 163-278.13(a), -278.15(a); N.D. Cent. Code § 16.1-08.1-03.5; Ohio Rev. Code §§ 3517.102(B), 3599.03(A); Okla. Stat. tit. 74, ch. 62, app. 1, Rules 2.23, 2.32-34, 2.37; 25 Pa. Stat. § 3253(a); 17 R.I. Gen. Laws § 17-25-10.1(a), (e), (h); S.C. Code Ann. §§ 8-13-1300(25), -1314 to -1316; S.D. Codified Laws §§ 12-27-7 to -8; Tenn. Code Ann. §§ 2-10-102(12), -302(a); Tex. Elec. Code Ann. § 253.094; Vt. Stat. Ann. tit. 17, §§ 2901(16), 2941(a)(1)-(3); Wash. Rev. Code Ann. § 42.17A.405(2), (5), (12); W. Va.

vast majority—forty—employ at least some differentiation between the limits applied to different entities.[8] The federal government likewise distinguishes between individuals, corporations, PACs, and parties. 52 U.S.C. §§ 30116, 30118. Illinois is one of 28 states that impose lower limits on PACs than on parties,[9] and one of eleven states that impose limits on individuals' contributions to candidates but not on party contributions to candidates (in the general election).[10] Illinois is one of fifteen states that place limits on individuals that are at least as stringent as those on

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Code Ann. § 3-8-8, -12(f); Wis. Stat. §§ 11.1101(1), -.1104(5), -.1112; Wyo. Stat. Ann. § 22-25-102.

[8] These states are Alaska, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See* Nat'l Conf. of State Legislatures (NCSL), *State Limits on Contributions to Candidates 2015-2016 Election Cycle* (last updated May 2016), http://www.ncsl.org/Portals/1/documents/legismgt/elect/ContributionLimitstoCandidates2015-2016.pdf. For updated information on Arkansas and Missouri, see sources cited *supra* note 7.

Montana's per-election limits have been the subject of ongoing litigation, although the differential aspect of the limits is not at issue. *See Lair v. Motl*, 189 F. Supp. 3d 1024 (D. Mont. 2016), *appeal filed*, No. 16-35424 (9th Cir. argued Mar. 21, 2017). Montana has temporarily reinstated its previous limits pending appeal. Mont. Comm'r of Pol. Practices, *Amended Office Mgmt. Policy 2.4* (May 26, 2016), http://politicalpractices.mt.gov/content/ContributionPolicyasofMay27th2016.

[9] The others are Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Vermont, Washington, Wisconsin, and Wyoming. *See supra* note 8.

[10] The other states are California, Kansas, Louisiana, New Jersey, New York, North Carolina, Oklahoma, South Dakota, Vermont, and Wyoming. *See id*.

corporations.[11] Only five states impose the same limits on all regulated entities.[12]

Municipalities likewise employ different methods of structuring contribution limits. Austin, for example, has higher limits for small-donor PACs than for other PACs, and imposes aggregate limits on the amount candidates can accept "from sources other than natural persons." *See* Austin, Tex., Charter, art. III, § 8. Houston sets the same limits for individuals and corporations, but allows PACs and party committees to give double that amount. Houston, Tex., Code of Ordinances, ch. 18, art. IV, §§ 18-2 ("person"), 18-38(a). San Francisco bans corporate contributions but uses flat limits for other entities. S.F., Cal., Campaign and Governmental Conduct Code, art. I, ch. 1, §§ 1.104 ("person"), 1.114(a)-(b). And Denver employs totally uniform contribution limits. *See* Denver, Colo., Code of Ordinances, ch. 15, art. III, §§ 15-32 ("person"), 37.

As this variety makes clear, state legislatures and city councils have chosen those methods of campaign finance administration that they determine best fit their local situations, and their "considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance." *Williams-Yulee*, 135 S. Ct. at 1671. Liberty PAC's underinclusiveness

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[11] California, Delaware, Florida, Idaho, Kansas, Louisiana, New Hampshire, New Jersey, New Mexico, South Carolina, South Dakota, Vermont, and Washington impose the same limits on corporations and individuals. *Id.*; *see* 2017 S.D. Laws ch. 71 §§ 3(15) (to be codified at S.D. Codified Laws § 12-27-1(15)), 4 (repealing S.D. Codified Laws § 12-27-4). Contrary to Appellants' claim that no state besides Illinois grants corporations higher limits than individuals, Appellants' Br. 24, at least one does: Tennessee. NCSL, *supra* note 8.

[12] These states are Georgia, Hawaii, Maine, Maryland, and Nevada. NCSL, *supra* note 8.

and equal protection arguments would invite judicial second-guessing of every technical distinction legislatures make throughout their campaign finance regimes. This threatens the contribution limits of every state—except for those of the five states currently employing uniform limits for all entities.

IV. Unraveling Illinois Campaign Finance Laws Would Strike a Blow to Already Shaky Public Confidence in the State.

Illinois' battle with public corruption make the 2009 contribution limits especially important for advancing the constitutional aims of reducing actual corruption and the appearance of corruption—both of which serve to increase public confidence in government. Striking down campaign finance laws designed to reassure the public after the notorious scandal involving former Governor Rod Blagojevich would not only shake Illinoisans' confidence in their government.[13] It would also cost the state and its citizens money, leave Illinois as an outlier among the states, and reopen avenues for *quid pro quo* corruption.

Since 1970, there have been more than 1,900 public corruption convictions in Illinois, including high-profile cases against four former governors. Thomas J. Gradel & Dick Simpson, *Corrupt Illinois: Patronage, Cronyism, and Criminality* 1, 88 (2015). This makes Illinois the third-most corrupt state in the nation by some metrics. *Id.* at 50 tbl.3.1. Pervasive corruption has a real impact on the state and local communities.

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[13] A recent poll found that only 25% of Illinoisans had confidence in their government—the lowest of any state by nearly 10%—and postulated that this originated in part from Illinois' long history of political corruption. *Illinois Residents Least Confident in Their State Government*, Gallup (Feb. 17, 2016), http://www.gallup.com/poll/189281/illinois-residents-least-confident-state-government.aspx.

From a financial perspective, public corruption costs the state an estimated five million dollars per year and discourages businesses from coming to Illinois, hampering economic development. *Id.* at 195-96. Perhaps even more concerning, public corruption has the intangible cost of diminishing public faith in government, which undermines democracy by driving disillusioned voters to stay home on Election Day and normalizing corruption enough to reduce incentives to report those abusing the public trust. *Id.* at 50, 196. As the Supreme Court recognized in *Shrink Missouri*, "[d]emocracy works only if the people have faith in those who govern." 528 U.S. at 390 (citation omitted).

Of the many forms of public corruption plaguing Illinois, instances of *quid pro quo* corruption stemming directly from campaign contributions are of particular relevance here. The most obvious concern is that large campaign donors will be able to dictate an officeholder's votes or other public decisions in ways that advance the donors' interests. For example, Governor George Ryan was implicated in a bribery scheme that provided driver's licenses to unqualified truck drivers in exchange for campaign contributions, leading to serious and fatal motor vehicle accidents. *Id.* at 13, 45, 194. Moreover, prior to a 2008 law banning the practice, government and private contractors were permitted to donate to public officials responsible for government procurement. 70 Ill. Comp. Stat. 210/25.5.

Hence, in the wake of the most explosive example of gubernatorial corruption in recent memory—former Governor Blagojevich's efforts to sell or exchange for personal gain the U.S. Senate seat vacated by former President Barack Obama—

Illinois passed the law currently under challenge. In the scandal's immediate aftermath, then-Governor Patrick Quinn created a commission to provide recommendations for reform to restore public trust in state government. Ill. Reform Comm'n, *100-Day Report*, at 1-2 (Apr. 28, 2009).[14] Among other reforms, the commission recommended contribution limits to bring Illinois in line with the forty-six other states that restrict contributions in some fashion. *Id.* at 13. As the state legislature worked to turn some of the commission's recommendations into law, support for contribution limits of various types reached 72% among the people of Illinois. Paul Simon Pub. Pol'y Inst., *The Simon Poll, 2009. Illinois Statewide*, at 11 (2009), http://opensiuc.lib.siu.edu/ppi_statepolls/7. Ultimately, Illinois passed the contribution limits at issue here.

Eliminating the challenged contribution limitations would frustrate the constitutional aims of reducing both the actuality and the appearance of public corruption. The public's overwhelming support for contribution limits in 2009 indicates that Illinoisans—already weary from decades of corruption—saw the limitations as a way to combat the scourge infecting state politics. Under *Buckley* and its progeny, this alone is constitutionally sufficient to justify the challenged provisions.[15] *Buckley*, 424 U.S. at 27 (observing that contribution limits reduce the "appearance of corruption stemming from public awareness of the opportunities for

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[14] Available at https://pols.uic.edu/docs/default-source/chicago_politics/anti-corruption_reports/irc_100dayreport_2009.pdf.

[15] The Supreme Court has made clear that evidence of public opinion favoring contribution limits attests to a perception that the limits are needed to combat corruption. *Shrink Mo.*, 528 U.S. at 394.

abuse inherent in a regime of large . . . financial contributions," and have the critical function of bolstering "confidence in the system of representative Government [that might otherwise] be eroded to a disastrous extent") (citations and internal quotation marks omitted)). The reduction of actual *quid pro quo* public corruption is equally sufficient to uphold the challenged provisions. *Id.* at 26-27 (observing that curtailing the use of "large contributions . . . to secure a political *quid pro quo* from current and potential office holders" is a "constitutionally sufficient justification" for contribution limits).

In short, the people of Illinois benefit from the challenged contribution limitations—though both in the form of increased confidence in government and the actual effect such limits have on the prevalence of public corruption. Illinois' unique history of pervasive corruption makes it all the more important that the state's constitutionally sufficient rationales for enacting such limits be respected.

CONCLUSION

The district court's decision to grant defendants'-appellees' motion to dismiss should be affirmed.

Dated: May 23, 2017

Respectfully Submitted,

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This brief complies with the type-volume limitation of Circuit Rule 29 because this brief contains 6,935 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: May 23, 2017

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on May 23, 2017, I electronically filed the foregoing Motion with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system, which will accomplish electronic notice and service for all counsel of record.

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