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

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

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. Introduction

Illinois has a problem with specific types of corruption. *See, e.g.*, *Gallery of notable Illinois and Chicago federal corruption sentences*, CHICAGO TRIB., http://www.chicagotribune.com/news/nationworld/ct-illinois-political-corruption-sentences-gfc-photogallery.html. The State has witnessed officeholders embezzling money, judges fixing the outcomes of trials, and governors attempting to sell vacated U.S. Senate seats. But it has never encountered corruption scandals connected to medical marijuana.

Amidst this environment, the legislature decided that—not political insiders, not organized crime, not lobbyists—but grassroots growers in the nascent medical marijuana industry are the number one threat to clean government, one of the only industries worth subjecting to an outright ban on political contributions. The law in controversy prohibits certain medical marijuana groups from making campaign contributions to political candidates. The law further bans candidates from accepting that support. The state's attempt to ban meaningful political participation by emerging voices is plainly unconstitutional. *See* U.S. CONST. amend. I.

Plaintiffs Claire Ball and Scott Schluter are Libertarian grassroots candidates for political office in Illinois. Because they represent minority viewpoints in society, they face a steep challenge to secure public support and win elected office. The ability to target voters, produce advertisements, walk door-to-door, appear on television, and engage in the common stuff of political campaigns requires money. Thus, the ability of third-party candidates to associate freely with individuals and groups, to persuade them of their policy positions, and to fundraise to make campaigning viable is of utmost importance.

Rather than focus on combatting real corruption, Illinois decided to ban but one class of political speakers—those favoring marijuana legalization—from engaging in the same sort of

political association that is typically recognized and free from abridgement. This effort does not combat corruption. It only silences emerging voices and hinders competitive campaigns by unorthodox candidates. Under the First Amendment, this cannot stand.

II. Federal Rule of Civil Procedure 56

Plaintiffs have moved this Court for summary judgment pursuant to FED. R. CIV. P. 56. They contend that 10 ILCS 5/9-45, which prohibits medical cannabis organizations from making campaign contributions, is facially unconstitutional in violation of the First Amendment. Plaintiffs further argue that the pleadings and Plaintiffs' Verified Complaint show there is no genuine issue as to any material fact concerning the facial invalidity of 10 ILCS 5/9-45.

Summary judgment is appropriate only "where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Boss v. Castro*, 816 F.3d 910, 916 (7th Cir. 2016) (citing FED. R. CIV. P. 56(a)). Further, if there is no "triable issue of fact on even one essential element of the nonmovant's case, summary judgment is appropriate." *Id.* Where plaintiffs have filed a verified complaint, it is the equivalent of an affidavit for summary judgment purposes. *Devbrow v. Gallegos*, 735 F.3d 584, 587 (7th Cir. 2013).

III. Argument

Illinois' ban on political contributions by medical cannabis organizations violates the First Amendment on its face because it infringes on such organizations' freedom of speech and freedom of association and is not narrowly tailored to serve a governmental interest in preventing *quid pro quo* corruption.

It is proper for Illinois to be concerned about corruption. And the state is constitutionally empowered to take measures to prevent *quid pro quo* corruption. This does not give it license,

however, to masquerade a ban[1] against disfavored speakers as a cure to end corruption. Unlike states such as Connecticut that took precise and calculated measures to eliminate specific examples of corruption—like its contractor scandal—Illinois has simply stopped certain actors from associating in the same way less threatening political actors do. *See Green Party of Conn. v. Garfield*, 616 F.3d 189, 205 (2d Cir. 2010) (detailing Connecticut's specific experience with contractor corruption and upholding a contractor contribution ban because of these findings).

In passing the Compassionate Use of Medical Cannabis Pilot Program Act, the legislature's purpose was to recognize the legitimate medical uses of cannabis and "protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties . . . ." 410 ILCS 130/5(g). Nowhere in the law or in its legislative history is there any concern about medical marijuana organizations corrupting the political process of Illinois. This is understandable. For years, the use of medical marijuana has been criminalized and most sales or transactions have occurred on the black market. During that time, there are no known attempts by underground marijuana entities to unduly influence politicians in Illinois. There has been no ReeferGate. It is only now that an industry attempts to legitimize itself by bringing itself under public scrutiny, oversight, and regulation that Illinois has banned it from participating in the political process

[1] That individuals employed by a medical marijuana organization may make contributions in their individual capacity does nothing to cure the ban on medical marijuana organizations from making campaign contributions. A corporation is different than the separable, distinct individuals that establish it, and it enjoys its own ability to engage in political free speech and association. *See Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 337–38 (2010).

A. The Court Should Apply Strict Scrutiny to the State's Contribution Ban

This Court should subject the contribution ban of 10 ILCS 5/9-45 to strict scrutiny—rather than the rigorous but slightly lower level of scrutiny that generally applies to limits on campaign contributions—for two reasons.

First, the ban acts as a prior restraint against free speech and association by banning particular groups of people—medical cannabis organizations and candidates for political office—from giving and accepting campaign contributions. Any sort of prior restraint comes before a court with a "heavy presumption against its constitutionality." *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 558 (1976) (quoting *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968)). This then triggers strict scrutiny and shifts the burden to Illinois to demonstrate why a prior restraint is necessary. *Id.*

Second, the ban is a content-based restriction on speech, which supports a strict scrutiny standard of review. The Supreme Court has "insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (quoting *Turner Broadcasting System, Inc. v. Fed. Communications Comm'n*, 512 U.S. 622, 658 (1994)); *see also Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (laws favoring some speakers over others demand strict scrutiny where the legislature's speaker preference reveals a content preference). Although Illinois imposes an absolute ban against medical marijuana organizations from making campaign contributions, it allows other regulated industries—tobacco, gaming, and pharmaceuticals, to name a few—to contribute up to $10,800 per election to a candidate running for state office. 10 ILCS 5/9-8.5(b). Thus, Illinois favors political association in the form of corporate campaign contributions if one represents nicotine, roulette, experimental pharmaceuticals, or anything except medical marijuana.

Speakers favoring the liberalization of medical marijuana laws are denied the same right, to associate for political causes through campaign contributions, thus triggering strict scrutiny. *Reed*, 135 S.Ct. at 2230.

Under strict scrutiny, the contribution ban of 10 ILCS 5/9-45 can only stand if the government shows that it is narrowly tailored to serve a compelling state interest. *Reed*, 135 S. Ct. at 2226.

B. Alternatively, If Strict Scrutiny Does Not Apply, Rigorous Scrutiny Must Apply

Alternatively, if the Court does not subject the contribution ban to strict scrutiny, then it must at least apply the rigorous scrutiny that generally applies to limits on campaign contributions. Under that standard, limits on campaign contributions violate the First Amendment and must be struck down unless the government shows that they are closely drawn to serve a sufficiently important interest. *Wis. Right to Life State PAC v. Barland*, 664 F.3 139, 152 (7th Cir. 2011) (citing, among other cases, *Buckley*, 424 U.S. at 20–21, 23–25 (1976)). Under that test, as under strict scrutiny, the Court "must assess the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon v. Fed. Elec. Comm'n* (*FEC*), 134 S. Ct. 1434, 1445 (2014). Although the fit need not be "perfect," it must be "reasonable" and must use a "means narrowly tailored to achieve the desired objective." *Id.* at 1456–57. To meet its burden, the government must show that "adequate evidentiary grounds" support its putative justification for the challenged contribution limits. *FEC v. Colo. Republican Fed. Campaign Cmte.*, 533 U.S. 431, 456 (2001); *see also Randall v. Sorrell*, 548 U.S. 230, 261 (2006) (striking limits where government presented no evidence to justify them); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) (government must provide evidence, not "mere conjecture," to justify contribution limits).

The Supreme Court has held that campaign contribution limits must receive rigorous scrutiny because they "involve a 'significant interference with associational rights.'" *Davis v. FEC*, 554 U.S. 724, 740 n.7 (2008). Rigorous scrutiny is even more important for a complete ban on contributions by particular organizations, such as the one at issue here, because "a ban on contributions causes considerably more constitutional damage, as it wholly extinguishes that 'aspect of the contributor's freedom of political association.'" *Green Party,* 616 F.3d at 204 (quoting *Randall*, 548 U.S. at 246).

C. Illinois Lacks Any Compelling Governmental Interest to Uphold a Contribution Ban

Under either level of scrutiny, Illinois' contribution ban violates the First Amendment and must be struck down because it does not serve the only interest the Supreme Court has recognized as sufficiently important to justify a limit on campaign contributions: the prevention of *quid pro quo* corruption or the appearance of *quid pro quo* corruption. *See McCutcheon*, 134 S. Ct. at 1441.

Defendants can produce no evidence that the contribution ban serves any anti-corruption purpose. Defendants' discovery responses reveal that the State has no legislative record or other evidence indicating that medical cannabis organizations were or are corrupting the political process of Illinois. *See, e.g.*, Defendants' Responses to Plaintiffs' First Set of Interrogatories ("Interrogatory Response") 4 (reciting verbatim the law as the purpose for the law); Statement of Material Facts ¶14. Instead, Defendants only state theoretical and speculative concerns with no evidentiary basis, claiming, for example, that "medical cannabis cultivation centers and dispensary organizations give rises (sic) to threat of actual or apparent corruption greater than other businesses because the medical cannabis pilot program is new and untested"). *See, e.g.,* Interrogatory Response 5; Statement of Material Facts ¶15. Such speculation fails to satisfy the government's burden and cannot justify the complete denial of the First Amendment right to support candidates

through campaign contributions. *Cf. Lamar Outdoor Advertising, Inc. v. Miss. State Tax Comm'n*, 701 F.2d 314, 332–33 (5th Cir. 1983) (citing *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 95–96 (1977)) (although ban on alcohol advertising law might be remotely tied into concerns about health and safety, the "state is required to establish this relationship by record evidence" to justify infringement of First Amendment rights).

The State also cannot deprive medical cannabis organizations of their right to make political contributions simply because they are part of a regulated industry. *See* Interrogatory Response 5; Statement of Material Facts at ¶15. This argument amounts to nothing more than Illinois classifying these groups as among dozens, if not hundreds, of similarly situated actors—the rest of which enjoy their constitutional freedoms. Simply noting the regulated nature of a particular group is hardly sufficient to address how limiting its First Amendment freedoms will help prevent corruption – or to explain why the medical cannabis industry is the *only* one of Illinois' many regulated industries on which Illinois has imposed a contribution ban. Illinois has no shortage of regulated industries. From public utilities to the natural resources sector, all groups enjoy the right to participate in politics by means of campaign contributions except, inexplicably, medical marijuana organizations.

By means of contrast, consider the coal industry in Illinois. The Illinois Pollution Control Board is currently considering a proposed rule that addresses new measures for coal combustion waste surface impoundments at power generating facilities and corrective remedies for this industry. The rule hopes to address the risk that mercury, arsenic, and other health-threatening pollutants may have on the residents of Illinois. *See In re Coal Combustion Waste Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841*, Ill. Pollution Control Bd., *available at* http://www.ipcb.state.il.us/documents/dsweb/Get/Document-82136.

While pollution from coal combustion undoubtedly impacts the health and safety of Illinois residents—and coal companies could theoretically attempt to corrupt public officials through campaign contributions—coal companies are nonetheless free to contribute up to the corporate maximum under the law, as they should be.

The State's suggestion that it can ban contributions from legal medical cannabis organizations because their industry is "new and untested" is likewise without merit. *See* Interrogatory Response 5. There is no reason to believe that the newness of an industry—even a controversial one—makes its members more likely to engage in corruption through political contributions. If Illinois wished to prevent corruption stemming from the nascent medical marijuana industry, it would need to assemble a legislative record of serious wrongdoing. Uber, Lyft, and Airbnb are all "new and untested." Each has had stinging criticism of purported dangers related to their disruptive services. *See, e.g., Who's Driving You?*, http://www.whosdrivingyou.org/rideshare-incidents (last visited May 25, 2016). But groups do not forego their First Amendment rights upon entering Illinois because they are "new and untested." The First Amendment protects both the boisterous and the boring. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)

Illinois also attempts to make appeals to the "health and safety" of its residents to marshal support for its campaign contribution ban. *See* Interrogatory Response 5; Statement of Material Facts ¶15. But protecting health and safety is not a recognized governmental interest sufficiently important to uphold abridgements of political free speech and association; only the prevention of *quid pro quo* corruption may serve as a valid government interest to do so. *See McCutcheon*, 134 S. Ct. at 1462. Moreover, the State has no evidence to show that its ban protects the public's health

or safety; its mere speculation that a campaign contribution ban might help promote health and safety does nothing to salvage the constitutionality of 10 ILCS 5/9-45.

Since Illinois has failed to produce a legislative record indicating that medical marijuana groups had a history of corruption and wrongdoing or that their operation would plausibly lead to corruption scandals, 10 ILCS 5/9-45 does not promote any compelling government interest in preventing corruption. Because it does not, this ban must be stricken. *McCutcheon*, 134 S. Ct. at 1462.

D. Banning New Voices and Market Entrants is Not a Properly Tailored Method to Combat Corruption

Moreover, even if the State could show that its contribution ban serves to prevent corruption—which it cannot—it still could not meet its burden to show that the ban is narrowly tailored to do so, and the ban would therefore still fail First Amendment scrutiny.

In *Randall v. Sorrell*, the Supreme Court identified five factors that supported its conclusion that Vermont's campaign contribution limits were not narrowly tailored to prevent corruption. *Randall*, 548 U.S. at 253–61. Under the first *Randall* factor, courts consider whether "contribution limits are so low that they may pose a significant obstacle to candidates in competitive elections." *Id.* at 256. More specifically, it is recognized that challengers, especially third-party candidates, face higher costs to overcome the name recognition typically enjoyed by incumbents. This concern is an echo of *Buckley*'s caution that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. at 21.

As third-party candidates, Plaintiffs face considerable obstacles against well-known candidates for office including name recognition, media bias, and considerable financial disparities between major and minor parties. *See* Keith Darren Eisner, *Non-Major-Party Candidates and*

Televised Presidential Debates: The Merits of Legislative Inclusion, 141 U. PA. L. REV. 973, 990–95 (1993). Stated differently, every dollar that can be raised by third-party candidates is tremendously important to enable them to engage in effective advocacy. Cutting off a particularly helpful mode of fundraising with allies in the medical marijuana industry only impairs Plaintiffs' abilities to run effective and meaningful campaigns. As stated in their Verified Complaint, at the time this suit was filed Plaintiff Claire Ball had received $1,450.00 in contributions and Plaintiff Scott Schluter had received just $172.22. Docket #24, Verified Amended Compl. ¶26. Thus, for example, if Mr. Schluter received just one contribution of $10,800 from a medical cannabis organization, he would enjoy 62 times his ability to engage in political advocacy. Because of this, the first factor favors invalidating 10 ILCS 5/9-45.

The second *Randall* factor asks whether political parties must abide by the same contribution limits affecting candidates. 548 U.S. at 256–57. Where contribution limits, or bans, affect political parties, this "threatens harm to a particularly important political right, the right to associate in a political party." *Id.* at 256; *see also California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). Under 10 ILCS 5/9-1.8(a) a "political committee" includes a "political party committee." Thus, 10 ILCS 5/9-45 bans medical marijuana groups from contributing to political party committees as well. As a third party, the Libertarian Party has a significant financial disadvantage relative to other organized political parties. Limiting its ability to seek political support and funding from new voices in the political spectrum also damages its rights to political association and effective advocacy. Because of this, the second factor favors invalidating 10 ILCS 5/9-45.

Third, just as in *Randall*, the law's treatment of volunteer services does further damage to would-be contributors' First Amendment rights. *See Randall*, 548 U.S. at 259. The Illinois Election

Code considers volunteer services on behalf of a candidate to be "contributions," with a limited exception for "personal services on [an] individual's residential premises for candidate-related activities" that "do[] not exceed an aggregate of $150 in a reporting period." *See* 10 ILCS 5/9-1.4(A), (B)(a). Where contribution limits are very low, or where a ban is in place, failure to include sufficient volunteer exemptions matters. *Randall*, 548 U.S. at 260. As the *Randall* Court noted, "[t]hat combination, low limits and no exceptions, means that a gubernatorial campaign volunteer who makes four or five round trips driving across the State performing volunteer activities coordinated with the campaign can find that he or she is near, or has surpassed, the contribution limit." *Id.*

Just the same, in Illinois, a medical marijuana organization wishing to drive around the state with a van promoting both medical marijuana legalization and candidates who support it would be denied that right. It would also be denied the right to engage in a wide variety of low-cost activities like donating small amounts of food or hosting dinner events for candidates or hosting a corporate public picnic that educates the public about drug legalization and candidates advancing that issue. Thus, the third *Randall* factor favors invalidation of the statute Plaintiffs challenge even more than it favored invalidation of the law at issue in *Randall*.

Fourth, because this is a contribution ban, and not a limit, the fourth *Randall* factor, failure to index the contribution limit for inflation, cannot apply here. *See Randall*, 548 U.S. at 261.

Fifth, where states seek to impose severe contribution limits that create "serious associational and expressive problems," the government must provide a "special justification" for the limits that is supported by a record of legislative evidence. *See id.* In Vermont's case, the "record contain[ed] no indication that, for example, corruption (or its appearance) in Vermont is significantly more serious a matter than elsewhere." *Id.* In the few instances where courts have

upheld complete bans on political contributions by members of particular industries, the courts relied on record evidence showing a genuine threat of corruption from such contributions. *See Green Party*, 616 F.3d at 200 (upholding ban on contributions by government contractors in light of contract "scandals [that] reached the highest state offices, leading to the resignation and eventual criminal conviction of the state's governor"); *Casino Ass'n of Louisiana v. State*, 820 So.2d 494, 508 (2002) (contributions from gaming industry banned based upon evidence including affidavits outlining the "public perception that gaming is associated with political corruption [and] information that within the last ten years, nine states (including Louisiana) have prosecuted governmental officials in gaming cases"); *North Carolina Right to Life v. Bartlett*, 168 F.3d 705, 716 (4th Cir. 1999) (lobbyist contributions banned because of well-documented instances of corruption and public perception of that corruption). Illinois, unlike the states in those cases, has produced no comparable evidence to justify that ban at issue in this case

Nor did Illinois even attempt to build such evidence through legislative findings. Rather, it appears—as revealed by Representative Lou Lang, lead sponsor of the bill—that the contribution ban was added to the medical cannabis legalization bill to "appease 'conservative' and 'hesitant' colleagues." Brian Mackey, *Illinois Libertarians Sue Over Medical Marijuana Campaign Finance Ban*, NPR ILLINOIS, Nov. 25, 2015, *available at* http://wuis.org/post/illinois-libertarians-sue-over-medical-marijuana-campaign-finance-ban#stream/0. Regarding the contribution ban, Representative Lang further commented, "I'm not sure that it's great public policy to pick out one particular industry or two particular industries, and single them out for a clouding of their free speech rights, and not do it to all (industries)." *Id.* Plaintiffs agree.

The totality of *Randall*'s factors points toward a finding that 10 ILCS 5/9-45 should be stricken as facially unconstitutional. The *Randall* Court summarizes this reasoning perfectly:

> [T]he Act burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers; its contribution limits mute the voice of political parties; they hamper participation in campaigns through volunteer activities; and they are not indexed for inflation. Vermont does not point to a legitimate statutory objective that might justify these special burdens.

548 U.S. at 262.

Lastly, as discussed throughout this memorandum, Illinois does not find itself in a position where the medical marijuana industry has been tied to public scandals and corruption. Nor is there a plausible perception that the medical marijuana industry is any more corrupting than conglomerate pharmaceutical or tobacco interests. Some legislators simply seem scared about marijuana and its effect on Illinois residents. But that fear bears no relationship to the potential for corruption inherent in campaign contributions by medical cannabis organizations and is therefore an insufficient governmental interest to uphold a ban against protected First Amendment freedoms. Illinois has failed to demonstrate why its ban of campaign contributions is properly tailored to an interest in preventing corruption. This drastic measure further fails review because there is no legislative or evidentiary record supporting the need to ban one class of speakers from making campaign contributions. Speculation and fear are a poor substitute for evidence.

IV. Conclusion

Illinois has allowed a previously underground market—the medical marijuana industry—to legitimize itself and deal openly and aboveboard in the state. This nascent industry must also be allowed to speak and associate freely under the First Amendment. At this point, no one knows whether medical marijuana will be a lasting success or failure for Illinois. But the First Amendment presupposes that a free people, candidates for office, and even controversial groups enjoy the unfettered right to associate together and to discuss this issue without interference from frightened legislators. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("advocacy

of a politically controversial viewpoint—is the essence of First Amendment expression"); *Terminiello*, 337 U.S. at 4 (free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger"). This Court should grant the Plaintiffs' motion for summary judgment and rule that 10 ILCS 5/9-45 is facially unconstitutional.

Dated June 1, 2016.

Respectfully submitted,

/s/ Benjamin Barr

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CERTIFICATE OF SERVICE

I, Benjamin Barr, certify that the foregoing Memorandum for Summary Judgment was served upon Defendants on June 1, 2016, using the Court's CM/ECF system.

/s/ Benjamin Barr