

United States District Court
Southern District of Indiana

**Indiana Right to Life Victory Fund, Sarkes
Tarzian, Inc.,**

Plaintiffs,

v.

Holli Sullivan, in her official capacity as Secretary of State, **Indiana Election Commission, Paul Okeson**, in his official capacity as Chair and member of the Indiana Election Commission, **Suzannah Wilson Overholt**, in her official capacity as Vice-chair and member of the Indiana Election Commission, **Karen Celestino-Horseman**, in her official capacity as member of the Indiana Election Commission, **J. Bradley King**, in his official capacity as co-director of the Indiana Election Division, **Angela M. Nussmeyer**, in her official capacity as co-director of the Indiana Election Division, **Theodore E. Rokita**, in his official capacity as Indiana Attorney General, **Ryan Mears and Erika Oliphant**, in their official capacities as prosecuting attorneys,

Defendants.

Civ. No. 1:21-cv-2796

Verified Complaint for Declaratory and Injunctive Relief

Verified Complaint for Declaratory and Injunctive Relief

Plaintiffs Indiana Right to Life Victory Fund and Sarkes Tarzian, Inc. complain against Defendants as follows:

Introduction

1. This is a civil action for declaratory and injunctive relief arising under the First and Fourteenth Amendments of the Constitution of the United States, as well as 42 U.S.C. Section 1983. It concerns the constitutionality of contribution limits contained in Indiana’s Election Code (the “**Election Code**”). Ind. Code (“**IC**”) § 3, et seq. Specifically, Plaintiffs challenge the

constitutionality of the Election Code’s prohibition on corporate contributions to political action committees (“PACs”) for purposes of independent expenditures.

Jurisdiction and Venue

2. This action arises under 42 U.S.C. Section 1983 and the First and Fourteenth Amendments to the Constitution of the United States.

3. This Court has jurisdiction over all claims pursuant to 28 U.S.C. Sections 1331 and 1343(a). It also has jurisdiction pursuant to the Declaratory Judgment Act as codified at 28 U.S.C. Sections 2201 and 2202.

4. Venue is proper under 28 U.S.C. Section 1391(b) because the events giving rise to this action occurred, and Defendants reside, in this District.

Parties

5. Plaintiff Indiana Right to Life Victory Fund (“**IRTL Victory Fund**”) is registered with the Indiana Election Division as a political action committee headquartered in Indianapolis, Indiana.

6. Plaintiff Sarkes Tarzian, Inc. is registered with the Indiana Secretary of State as a domestic for-profit corporation, with its principal office in Bloomington, Indiana.

7. Defendant Holli Sullivan, in her official capacity as Indiana Secretary of State, is Indiana’s chief election official. IC § 3-6-3.7-1. She is responsible for, *inter alia*, performing all ministerial duties related to the administration the Election Code. IC § 3-6-4.2-2. If, upon investigation, Secretary Sullivan and the co-directors of the election division “determine[] that a criminal violation . . . may have occurred, [they] shall refer the facts drawn from the investigation

to the prosecuting attorney of the judicial circuit in which the crime may have been committed.”

IC § 3-6-3.7-6(a). “The secretary of state and election division may assist the prosecuting attorney in prosecuting an action under this section[.]” IC § 3-6-3.7-6(b).

8. Defendant the Indiana Election Commission (“**Commission**”) is responsible for, *inter alia*, administering Indiana’s election laws, adopting rules governing elections and campaign finance, and investigating violations. IC § 3-6-4.1-14. If the Commission “determines that there is substantial reason to believe an election law violation has occurred, it shall expeditiously make an investigation.” IC § 3-6-4.1-21(b). If the Commission determines, “after affording due notice and an opportunity for a hearing, a person has engaged or is about to engage in an act or practice that constitutes or will constitute a violation . . . ,” the Commission shall refer the matter to the attorney general or appropriate prosecuting attorney. IC § 3-6-4.1-21(c). The Commission also has a duty to “report a violation . . . as a felony or misdemeanor to the appropriate prosecuting attorney and the alleged violator.” IC § 3-14-5-3.

9. Defendant Paul Okeson, in his official capacity as the Chair and a member of the Commission, has the same responsibilities as the Commission. *See supra* ¶ 8.

10. Defendant Suzannah Wilson Overholt, in her official capacity as the Vice-chair and a member of the Commission, has the same responsibilities as the Commission. *See supra* ¶ 8.

11. Defendant Karen Celestino-Horseman, in her official capacity as a member of the Commission, has the same responsibilities as the Commission. *See supra* ¶ 8.

12. Defendants J. Bradley King and Angela M. Nussmeyer are co-directors of the Indiana Election Division (“**Election Division**”), and are sued in their official capacities. The Election Division is within the office of the Indiana Secretary of State and is responsible for assisting the

Secretary of State and the Commission with administration of the Election Code. IC

§§ 3-6-4.2-1, 3-6-4.2-2. If, upon investigation, Secretary Sullivan and the co-directors of the election division “determine[] that a criminal violation . . . may have occurred, [they] shall refer the facts drawn from the investigation to the prosecuting attorney of the judicial circuit in which the crime may have been committed.” IC § 3-6-3.7-6(a). “The secretary of state and election division may assist the prosecuting attorney in prosecuting an action under this section[.]” IC § 3-6-3.7-6(b). The co-directors of the Election Division are also responsible for “carry[ing] out the policies, decisions, and recommendations of the commission.” IC § 3-6-4.2-3.

13. Defendant Theodore E. Rokita, in his official capacity as Indiana Attorney General, is responsible for instituting civil actions for relief, on behalf of the state, if a violation is referred by the Commission. IC §§ 3-6-4.1-21(b), 3-6-4.1-22.

14. Defendants Ryan Mears and Erika Oliphant, in their official capacities as prosecuting attorneys for Marion and Monroe Counties, respectively, are responsible for prosecuting violations of the campaign finance laws. IC § 3-14-5-4; *see also* IC §§ 3-6-3.7-6, 3-6-4.1-21.

15. Defendants are sued in their official capacities.

Facts

16. Indiana’s Election Code can be found at IC § 3, et seq.

17. A political action committee is:

an organization located within or outside Indiana that satisfies all of the following:

- (1) The organization proposes to influence:
 - (A) the election of a candidate for state, legislative, local, or school board office; or
 - (B) the outcome of a public question.
- (2) The organization accepts contributions or makes expenditures during a calendar year:
 - (A) to influence the election of a candidate for state, legislative, local, or school board office or the outcome of a public question that will appear on the ballot in Indiana; and

(B) that in the aggregate exceed one hundred dollars (\$100).

IC § 3-5-2-37.

18. A corporation is permitted to make a “make a contribution¹ to aid in the: (1) election or defeat of a candidate; or (2) the success or defeat of: (A) a political party; or (B) a public question submitted to a vote in an election.” IC § 3-9-2-3.

19. During a year a corporation may not make total contributions in excess of:

- (1) an aggregate of five thousand dollars (\$5,000) apportioned in any manner among all candidates for state offices (including a judge of the court of appeals whose retention in office is voted on by a district that does not include all of Indiana);
- (2) an aggregate of five thousand dollars (\$5,000) apportioned in any manner among all state committees of political parties;
- (3) an aggregate of two thousand dollars (\$2,000) apportioned in any manner among all candidates for the senate of the general assembly;
- (4) an aggregate of two thousand dollars (\$2,000) apportioned in any manner among all candidates for the house of representatives of the general assembly;
- (5) an aggregate of two thousand dollars (\$2,000) apportioned in any manner among

¹ Contribution means:

a donation (whether characterized as an advance, a deposit, a gift, a loan, a subscription, or a contract or promise to make a donation) of property (as defined in IC 35-31.5-2-253) that satisfies both of the following:

- (1) The donation is made for the purpose of influencing any of the following:
 - (A) The nomination or election to office of a candidate.
 - (B) The election of delegates to a state constitutional convention.
 - (C) The outcome of a public question.
- (2) The donation is accepted by any of the following:
 - (A) A candidate.
 - (B) A candidate’s committee.
 - (C) A regular party committee.
 - (D) A political action committee.
 - (E) A legislative caucus committee.

IC § 3-5-2-15. For a PAC, “[a] contribution is any donation accepted by a political action committee governed by Indiana’s election laws. A ‘contribution’ includes cash, checks, gifts of property or services, loans, in-kind contributions, or any other things received by the committee that have value.” *2022 Indiana Campaign Finance Manual*, Indiana Election Division, p. 37, available at <https://www.in.gov/sos/elections/files/2022-Campaign-Finance-Manual.FINAL.v1.pdf>.

regular party committees organized by a legislative caucus of the senate of the general assembly;

(6) an aggregate of two thousand dollars (\$2,000) apportioned in any manner among regular party committees organized by a legislative caucus of the house of representatives of the general assembly;

(7) an aggregate of two thousand dollars (\$2,000) apportioned in any manner among all candidates for school board offices and local offices; and

(8) an aggregate of two thousand dollars (\$2,000) apportioned in any manner among all central committees other than state committees.

IC § 3-9-2-4.²

20. IC § 3-9-2-4 *only* allows for contributions to candidates or parties. As a result, since independent expenditures are not listed as a permitted contribution, the Indiana Code acts as a complete prohibition on corporate contributions to PACs for independent expenditures.

21. Rather than allowing corporate contributions to PACs for independent expenditures, the Indiana Code requires that all contributions to PACs be to candidates or political parties.

22. Indeed, a corporation may contribute to a PAC only if the contribution (1) does not exceed the contribution limits and (2) “is designated for disbursement to a specific candidate or committee³[.]” IC § 3-9-2-5(c).

23. This section means that corporations are prohibited from contributing to PACs for independent expenditures because, as a matter of law, independent expenditures cannot be designated for disbursement to a specific candidate or committee. *See infra* ¶¶ 34–35.

24. The Election Division makes this even more clear by requiring that “corporation . . .

² All committees referenced in this section are committees of political parties. In addition to the “committees of political parties” referred to directly in subsection (2), a “regular party committee” (subsections (5) and (6)) is a “national committee of a political party,” IC § 3-5-2-42(2), and a “central committee” (subsection 8) is a “state committee, congressional district committee, county committee, city committee, or town committee of a political party,” IC § 3-5-2-8.

³ *See* n. 2 for relevant permitted “committees.”

contributions to political action committees must be ‘earmarked,’ meaning designated by the corporation or labor organization to go to one or more of the above categories and is subject to the limitations of each category.” *2022 Indiana Campaign Finance Manual*, Indiana Election Division, p. 61, available at <https://www.in.gov/sos/elections/files/2022-Campaign-Finance-Manual.FINAL.v1.pdf> (“above categories” refers to the list of contribution limits found on p. 60 and IC § 3-9-2-4).

25. While “a corporation . . . is not required to designate a *specific* candidate or party when making its contribution[,]” it must designate “a specific subcategory listed in IC 3-9-2-4.” *Id.* (emphasis in original).

26. Again, contributions for independent expenditures, as a matter of law, cannot be earmarked for a specific candidate. *See infra* ¶¶ 34-35. Accordingly, any such requirement acts as a complete prohibition on corporate contributions to PACs for independent expenditures.

27. A corporation “may contribute a total of \$22,000 per calendar year.” *Id.*; *see also* IC § 3-9-2-4.

28. A contribution by a corporation to a PAC and designated “for disbursement to a specific candidate, central committee, or other regular party committee” is subject to the contribution limits. IC § 3-9-2-5(a).

29. These sections make clear that no contributions, outside those listed in IC § 3-9-2-4 (which require the contributions to go to a candidate or party), are permitted—prohibiting corporate contributions to PACs for independent expenditures.

30. And even assuming *arguendo* that contributions to PACs for independent expenditures were permitted, which they are not, this section would prohibit any corporate contributions over

\$22,000, establishing an unconstitutional aggregate limit on contributions.

31. If a PAC receives a contribution from a corporation which violates State law (i.e., is either not designated for disbursement to a candidate or committee or is in excess of the limits), the PAC may return the contribution to the corporation or refund the contribution, depending upon the circumstances. *2022 Indiana Campaign Finance Manual*, Indiana Election Division, p. 37–38, available at <https://www.in.gov/sos/elections/files/2022-Campaign-Finance-Manual.FIN.AL.v1.pdf>.

32. The contribution limits do not apply to:

(1) Nonpartisan registration and get-out-the-vote campaigns: (A) by a corporation aimed at its stockholders and employees; or (B) by a trade association or labor organization aimed at its members. (2) A contribution or transfer by an incorporated nonpartisan political action committee to any other committee. (3) A contribution supporting or opposing the approval of a public question submitted to the electorate of the entire state or a local public question.

IC § 3-9-2-6.

33. No similar exceptions apply for contributions for independent expenditures, meaning that corporations are prohibited from making contributions to PACs for independent expenditures. *See generally* IC § 3-9-2, et seq.

34. While Indiana does not define “independent expenditures,” it may classify such expenditures as made “on behalf of a candidate.” IC § 3-9-5-15 provides that “an expenditure is considered to be on behalf of a candidate if either of the following applies: (1) The expenditure is made in support of the candidate who is specifically identifiable [or] (2) The expenditure is made in opposition to an opponent (A) of the candidate; and (B) who is specifically identifiable.”⁴

⁴ The phrase “independent expenditure” only appears in the 2022 Campaign Finance Manual one time and only in reference to the federal reports required by the FEC. *See 2022*

35. For reference, federal law defines “independent expenditures” as

an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party committee or its agents.

11 CFR § 100.16.

36. A violation of the Act results in civil penalties. IC § 3-9-4-16.

37. “[A] corporation . . . that exceeds any of the limitations on contributions . . . ” may be assessed a penalty, by the Commission, “of not more than three (3) times the amount of the contribution in excess of the limit prescribed by IC 3-9-2-4, plus any investigative costs incurred and documented by the election division.” IC §§ 3-9-4-16(a)(5), (e).

38. A person who “[f]ails to designate a contribution as required by IC 3-9-2-5(c)”⁵ may be assessed a civil penalty, by the election commission, equal to the greater of (1) two times the amount of the undesignated contribution or (2) \$1,000; “plus any investigative costs incurred and documented by the election division[.]” IC § 3-9-4-16(g).⁶

39. Violations may also result in criminal penalties. “A corporation . . . that recklessly exceeds any of the limitations on contributions prescribed by IC § 3-9-2-4 commits a Class B misdemeanor.” IC § 3-14-1-10.

40. Defendants are responsible for instituting investigations and seeking/enforcing these

Indiana Campaign Finance Manual, Indiana Election Division, p. 7, available at <https://www.in.gov/sos/elections/files/2022-Campaign-Finance-Manual.FINAL.v1.pdf>.

⁵ IC § 3-9-2-5(c) states, “A corporation or labor organization may make a contribution to a political action committee if the contribution: (1) does not exceed any of the limits prescribed under section 4 of this chapter; and (2) is designated for disbursement to a specific candidate or committee[.]”

⁶ Civil penalties may also be imposed by county election boards. IC § 3-9-4-17.

penalties. *Supra* ¶¶ 7–15 (detailing the roles, responsibilities, and requirements for the foregoing persons).

41. The IRTL Victory Fund is an Indiana independent-expenditure-only political action committee.

42. The only purpose of the IRTL Victory Fund is to receive, administer, and expend funds in connection with independent expenditures regarding candidates for Indiana offices.

43. The IRTL Victory Fund is prohibited from making contributions to any candidate or political party. *See Amended Resolution for the Board of Directors of Indiana Right to Life Incorporated Establishing an Independent-Expenditure-Only Political Action Committee*, Ex. 1.

44. IRTL Victory Fund wants to solicit and accept unlimited contributions for the purpose of making independent expenditures. However, corporations are prohibited from making a contribution to IRTL Victory Fund unless the contribution (1) does not exceed the contribution limits and (2) “is designated for disbursement to a specific candidate or committee[.]” IC § 3-9-2-5(c).

45. IRTL Victory Fund has established a bank account into which contributions for the designated purpose of making independent expenditures will be deposited. This account is maintained solely for the purpose of making independent expenditures. No monies will be accepted for making contributions to any candidate or any political party.

46. IRTL Victory Fund wants to make independent expenditures in the upcoming 2022 primary and general elections. In order to fund these independent expenditures, IRTL Victory Fund wants to solicit and accept unlimited contributions for the designated purpose of making independent expenditures. It would do so, but for the Election Code’s prohibition of corporate

contributions to PACs for independent expenditures and the penalties it imposes.

47. Sarkes Tarzian, Inc. is an Indiana corporation. It wants to make a \$10,000 contribution to IRTL Victory Fund, earmarked for the purpose of independent expenditures.

48. Sarkes Tarzian, Inc. is ready, willing, and able to do so. However, Sarkes Tarzian, Inc. will only make such contribution and IRTL Victory Fund will only accept it so long as neither is subject to the prohibition on corporate contributions to PACs for independent expenditures and the penalties under the Election Code.

49. In addition to the planned activity recited herein, Plaintiffs intend to do materially similar future activity.

50. Plaintiffs have no adequate remedy at law.

51. Plaintiffs are irreparably harmed by Indiana's prohibition on corporate contributions to PACs for independent expenditures.

Count I

Indiana's Prohibition on Corporate Contributions to PACs for Independent Expenditures is Unconstitutional.

52. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

53. The Election Code prohibits corporate contributions to PACs for independent expenditures.

54. The Election Code provides that a corporation may contribute to a political action committee ("PAC") only if the contribution (1) does not exceed the contribution limits and (2) "is designated for disbursement to a specific candidate or committee[.]" IC § 3-9-2-5(c).

55. Such contributions are subject to the limits in IC § 3-9-2-4. *See* IC § 3-9-2-5(a).

56. Accordingly, a corporation “may contribute a total of \$22,000 per calendar year.” 2022 *Indiana Campaign Finance Manual*, Indiana Election Division, p. 61, available at <https://www.in.gov/sos/elections/files/2022-Campaign-Finance-Manual.FINAL.v1.pdf>; *see also* IC § 3-9-2-4.

57. The Elections Code *only* allows for contributions to candidates or parties. It makes clear that any contributions not specifically authorized are prohibited.

58. Accordingly, corporations are prohibited from making contributions to PACs for independent expenditures.

59. Additionally, the Election Code requires that contributions be “designated for disbursement to a specific candidate or committee.” IC § 3-9-2-5(c).

60. However, as a matter of law, independent expenditures cannot be earmarked for or designated for disbursement to a specific candidate. Accordingly, such requirements also act as a complete prohibition on corporate contributions to PACs for independent expenditures.

61. The 7th Circuit has held that the only legal justification for contribution limits is to combat quid pro quo corruption or its appearance. Contribution limits serving any other purpose are unconstitutional. *Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139, 143, 153 (7th Cir. 2011). The *Barland* court also held that independent expenditures do not create a “threat of quid pro quo corruption” or its appearance. *Id.* (citing *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)). And because independent expenditures do not give rise to quid pro quo corruption or its appearance, contributions to groups to be used exclusively for independent expenditures also can not give rise to quid pro quo corruption or its appearance. *See, e.g., id.* at 155; *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1103 (10th Cir. 2013);

SpeechNow.org v. FEC, 599 F.3d 686, 694 (D.C. Cir. 2010).

62. *Barland*'s decision is consistent with the Supreme Court. See *McCutcheon v. FEC*, 572 U.S. 185 (2014) (the only legal justification for contribution limits is to combat quid pro quo corruption or its appearance; contribution limits serving any other purpose are unconstitutional); *Citizens United*, 558 U.S. at 360 (holding that “independent expenditures do not lead to, or create the appearance of, quid pro quo corruption”). Furthermore, other circuits have agreed that independent expenditures present no danger of quid pro quo corruption or its appearance. *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 n.1, 487–488 (2d Cir. 2013) (ordering district court to enjoin enforcement of law limiting, *inter alia*, contributions to independent-expenditure-only PACs: “[A] donor to an independent expenditure committee . . . may not be limited in his ability to contribute to such committees. All federal circuit courts that have addressed this issue have so held,” and, “[R]egardless of the standard of review, . . . the threat of quid pro quo corruption does not arise when individuals make contributions to groups that engage in independent spending on political speech”); *N. Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 308 (4th Cir. 2008) (finding application of “\$4,000 contribution limit to independent expenditure political committees” unconstitutional); *Cath. Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 428, 445 (5th Cir. 2014) (finding unconstitutional statute that limited independent expenditures because “as a matter of law, independent expenditures do not give rise to corruption or the appearance of corruption”); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118 (9th Cir. 2011) (upholding injunction of statute limiting “the spending and fundraising of independent committees,” because defendant city’s “anti-corruption” justification for it was unavailing “in the context of restrictions on independent expenditures, . . . [per] *Citizens*

United"); *Republican Party of New Mexico*, 741 F.3d at 1103 (affirming district court's preliminary injunction enjoining enforcement of law prohibiting contributions of any kind, thus including those for independent expenditures, greater than \$5,000, from individuals to political committees); *Emily's List v. FEC*, 581 F.3d 1, 9 (D.C. Cir. 2009) (because "contributions to a committee that makes only independent expenditures pose no . . . threat of actual or potential corruption," law that effectively capped independent expenditures by certain political committees at \$5,000 was unconstitutional); *SpeechNow.org*, 599 F.3d at 695 (vacating order denying injunctive relief against statute "limiting contributions to an independent expenditure group," because "the government has no anti-corruption interest" in such limitation).

63. Under this legal framework, Indiana has no constitutionally cognizable interest in limiting contributions to independent expenditure committees, or to other political action committees when those contributions are earmarked for independent expenditures. The contribution limits are therefore unconstitutional when applied to contributions from corporations to PACs when those contributions are earmarked for independent expenditures. *See, e.g., McCutcheon*, 572 U.S. 185; *Citizens United*, 558 U.S. 310; *Buckley v. Valeo*, 424 U.S. 1 (1976); *Barland*, 664 F.3d 139; *New York Progress & Prot. PAC*, 733 F.3d 483; *N. Carolina Right to Life, Inc.*, 525 F.3d 274; *Cath. Leadership Coal. of Texas*, 764 F.3d 409; *Thalheimer*, 645 F.3d 1109; *Republican Party of New Mexico*, 741 F.3d 1089; *SpeechNow.org*, 599 F.3d 686; *Emily's List*, 581 F.3d 1.

Prayer for Relief

Wherefore, Plaintiffs request the following relief:

64. Declare IC §§ 3-9-2-4, 3-9-2-5 unconstitutional as applied to corporate contributions for independent expenditures made to IRTL Victory Funds and all others similarly situated, and enjoin their enforcement;

65. Grant Plaintiffs their costs and attorneys fees under 42 U.S.C. Section 1988 and any other applicable authority, and

66. Grant any and all other such relief as this Court deems just and equitable.

Dated: November 4, 2021

Respectfully Submitted,

/s/ Courtney Turner Milbank

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**Pro hac vice application forthcoming*