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

STEVEN SALAITA,

Plaintiff,

v.

CHRISTOPHER KENNEDY, *et al*.,

Defendants.

Case No. 15-cv-00924

Honorable Harry D. Leinenweber

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AMERICAN JEWISH COMMITTEE, *INSTANTER*

Proposed amicus curiae, the American Jewish Committee ("AJC"), by its undersigned counsel, hereby respectfully moves the Court for leave to file *instanter* the accompanying Brief of Amicus Curiae American Jewish Committee (the "Amicus Brief"), a true and authentic copy of which is attached hereto as **Exhibit 1**. In support of its motion, AJC states:

1. This Court has discretion to allow the filing of an amicus curiae brief, and has found such briefs "welcome and helpful" in the past where they "contributed to the clarity of the issues." *United States v. Bd. of Educ. of City of Chicago*, 663 F. Supp.2d 649, 661 (N.D. Ill. 2009). Permitting an amicus brief is discretionary. *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir.2000). Amicus briefs should "assist the judge … by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003). An amicus brief should be permitted in a case in which, among other grounds, "a party is inadequately represented" or "the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide." *Id*.

2. Here, AJC seeks to file its Amicus Brief in support of Defendants "John Doe Unknown Donors to the University of Illinois" (the "Donor Defendants"). For the reasons set forth in this motion, AJC respectfully submits the interests of the Donor Defendants and similarly situated private donors are not, at this stage, adequately represented in these

proceedings. AJC further submits that AJC has a unique perspective that can assist the Court beyond what the parties can provide. The Amicus Brief thus assists the Court by presenting ideas, arguments, theories, and insights not to be found in the parties' briefs.

3. AJC is a national organization with more than 125,000 members and supporters and 22 regional offices nationwide. It was founded in 1906 to protect the civil and religious rights of American Jews. Its mission is to enhance the well-being of Israel and the Jewish people worldwide, and to advance human rights and democratic values in the United States and around the world. AJC frequently speaks out on issues of public concern, including events in the Middle East, Israeli-Palestinian relations, and anti-Semitism. It supports and defends the right of its members and others to do the same.

4. In accordance with its mission and values, AJC is gravely concerned with the claims asserted in this case by Plaintiff Steven Salaita ("Plaintiff") against the Donor Defendants. Plaintiff seeks to hold the Donor Defendants liable for raising their voices in opposition to his statements regarding Israel and the Jewish people, and for allegedly stating that they would not continue supporting the University of Illinois (the "University") if he became a faculty member.

5. AJC is alarmed by Plaintiff's use of litigation to attack private citizens who exercised their constitutionally protected rights under the First Amendment and the Illinois Bill of Rights to disagree with him.

6. Because the Donor Defendants remain unnamed and unserved, they are not represented and do not yet have a voice in these proceedings. Moreover, as discussed in the Amicus Brief, even allowing Plaintiff discovery to learn the identities of the Donor Defendants in order to name them and subject them to litigation endangers their right to freedom of association through compelled disclosure. *See* Amicus Brief § I.C; *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 91 (1982); *Buckley v. Valeo*, 424 U.S.1, 52-53 (1976); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 479-81 (10th Cir.2011); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir.2010); *In re Heartland Inst.*, No. 11 CV 2240, 2011 WL 1839482, *2 (N.D. Ill.

May 13, 2011); *Tree of Life Christian Schools v. City of Upper Arlington*, No. 2:11-cv-00009, 2012 WL 831918, *2-3 (S.D. Ohio 2012).

7. For these reasons, AJC respectfully offers its proposed Amicus Brief in defense of the constitutional rights of the absent Donor Defendants and others like them, including AJC and its members, to petition, speak, associate, and donate in accordance with their views on issues of public concern, without fear of reprisal in the form of retaliatory litigation.

8. AJC believes the proposed Amicus Brief would be helpful to the Court in its review, analysis, and disposition of the pending motion to dismiss filed by the University Defendants (*see* Doc. 32-33), because it seeks to discuss issues particular to Plaintiff's claims against the Donor Defendants alone. Because the Donor Defendants have not been named or served in the case, and thus have not appeared or filed a brief in the case, their specific rights, interests, and defenses are not addressed by the briefing presently before the Court. Nor does the present briefing advise the Court of the potential implications of Plaintiff's claims for organizations like AJC and its members, whose constitutional rights could be restrained, coerced, and chilled if private citizens may be subject to liability—or even to the cost and expense of litigation—merely for voicing their strong disagreement with a plaintiff's views and announcing their charitable intentions in light of their concerns.

9. The Amicus Brief is not duplicative of current briefs, and addresses issues not otherwise presented to the Court. The Amicus Brief argues that Plaintiff's claims against the Donor Defendants are barred by the Donor Defendants' rights of petition, free speech, and association. *See* Amicus Brief § I.A-C. Additionally, it argues that Plaintiff fails to state a claim against the Donor Defendants on several other grounds, including failure to allege the Donor Defendants' agreement on a joint course of action with the University, failure to allege any racial or other class-based discriminatory animus on the part of the Donor Defendants, and preclusion under the Illinois Citizen Participation Act, 735 ILCS 110/5 *et seq*. *See* Amicus Brief § II.

10. No party and no counsel for a party (a) authored the Amicus Brief in whole or in part, (b) requested or solicited AJC's involvement or the Amicus Brief, or (c) made any

monetary contribution intended to fund the preparation or submission of the Amicus Brief.

11. The Amicus Brief is 20 pages long. The length of the brief is necessitated by the importance of the constitutional issues discussed, and the weight of directly applicable and otherwise relevant authority on these issues. AJC sought to be as efficient and concise as possible in discussing each issue, and believes the length of the Amicus Brief properly balances the interests of efficiency with those of informing the Court adequately of the governing and persuasive authorities on these important matters. Accordingly, pursuant to Local Rule 7.1, AJC requests leave to file the Amicus Brief at its current length. As required by Local Rule 7.1, the Amicus Brief includes a table of contents and table of authorities.

12. On March 23, 2015, prior to filing this motion, AJC contacted counsel for Plaintiff and the University Defendants by electronic mail to ask whether the parties object to AJC's filing of the Amicus Brief. Plaintiff's counsel responded he could not take a position until he has reviewed the proposed Amicus Brief. The University Defendants do not object to AJC's filing of the Amicus Brief.

WHEREFORE, AJC respectfully requests that the Court (1) grant AJC leave to file the Amicus Brief, *instanter*; and (2) grant such other and further relief as the Court deems necessary or appropriate.

Dated: March 24, 2015

Respectfully submitted,

By: s/ Gregory E. Ostfeld
One of Its Attorneys

Gregory E. Ostfeld
GREENBERG TRAURIG, LLP
77 West Wacker Drive
Suite 3100
Chicago, IL 60601
Phone: (312) 456-8400
Fax: (312) 456-8435

Counsel for Amicus Curiae
American Jewish Committee

EXHIBIT 1

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

STEVEN SALAITA,

Plaintiff,

v.

CHRISTOPHER KENNEDY, Chairman of the Board of Trustees of the University of Illinois; RICARDO ESTRADA, Trustee of the University of Illinois; PATRICK J. FITZGERALD, Trustee of the University of Illinois; KAREN HASARA, Trustee of the University of Illinois; PATRICIA BROWN HOLMES, Trustee of the University of Illinois; TIMOTHY KORITZ, Trustee of the University of Illinois; EDWARD L. MCMILLAN, Trustee of the University of Illinois; PAMELA STROBEL, Trustee of the University of Illinois; ROBERT EASTER, President of the University of Illinois; CHRISTOPHE PIERRE, Vice President of the University of Illinois; PHYLLIS WISE, Chancellor of the University of Illinois at Urbana-Champaign; THE BOARD OF TRUSTEES OF ILLINOIS; and JOHN DOE UNKNOWN DONORS TO THE UNIVERSITY OF ILLINOIS,

Defendants.

Case No. 15-cv-00924

Honorable Harry D. Leinenweber

BRIEF OF AMICUS CURIAE AMERICAN JEWISH COMMITTEE

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INTEREST OF THE *AMICUS*

The American Jewish Committee ("AJC") is a national organization with more than 125,000 members and supporters and 22 regional offices nationwide. It was founded in 1906 to protect the civil and religious rights of American Jews. Its mission is to enhance the well-being of Israel and the Jewish people worldwide, and to advance human rights and democratic values in the United States and around the world. AJC frequently speaks out on issues of public concern, including events in the Middle East, Israeli-Palestinian relations, and anti-Semitism. It supports and defends the right of its members and others to do the same.

In accordance with its mission and values, AJC is gravely concerned with the claims asserted in this case by Plaintiff Steven Salaita ("Plaintiff") against "John Doe Unknown Donors to the University of Illinois" (the "Donor Defendants"). Plaintiff seeks to hold the Donor Defendants liable for raising their voices in opposition to his offensive and inflammatory statements attacking Israel and the Jewish people, and for allegedly stating that they would not continue supporting the University of Illinois (the "University") if he became a faculty member. AJC is alarmed by Plaintiff's use of litigation to attack private citizens who exercise their constitutionally protected rights of petition, free speech, and association to disagree with him. Moreover, because the Donor Defendants remain unnamed, they do not have a voice in these proceedings. AJC therefore respectfully submits this *amicus* brief in defense of the constitutional rights of the Donor Defendants and others like them, including AJC and its members, to petition, speak, associate, and donate in accordance with their views on issues of public concern, without fear of reprisal in the form of retaliatory litigation.

INTRODUCTION

Plaintiff and the Donor Defendants have profoundly different views on important public issues concerning the State of Israel and Israeli-Palestinian relations. Rather than mediate these differences in the marketplace of ideas, Plaintiff seeks to drag them into the courtroom. More than that, Plaintiff asks the Court to take sides, granting a preference to his disparaging remarks at the expense of the Donor Defendants' coequal rights of petition, free speech, and association.

AJC opposes the misuse in this manner of federal and state remedies to attack the constitutional rights of private citizens.

Plaintiff seeks injunctive and monetary relief arising from the University's withdrawal of his conditional recommendation for appointment to its faculty, which he alleges was done in response to his expressions of opinion regarding Israeli policy. Plaintiff has sued the University and individual University trustees and officials (the "University Defendants") for the loss of his appointment. Yet he does not stop there. He also sues the Donor Defendants—private citizens who are not trustees, officers, or employees of the University—for speaking to University officials in opposition to Plaintiff's opinions, and for allegedly pressuring the University to withdraw his appointment. Plaintiff asserts claims against the Donor Defendants for conspiracy in violation of 42 U.S.C. §§ 1983 and 1985, tortious interference with contractual and business relations, and intentional infliction of emotional distress. (Compl. ¶¶ 113-18, 131-41).

The allegations of Plaintiff's own Complaint squarely present his case against the Donor Defendants as a clash of beliefs. Plaintiff posted a series of incendiary, offensive, and profanity-laden "Tweets" condemning Israel and the Jewish community through his Twitter account in June and July 2014.[1] When these "Tweets" came to light, they provoked an uproar. The Donor Defendants allegedly contacted the University, expressed their strong disagreement with Plaintiff's views, and said they would "withhold financial contributions to the University" if Plaintiff's then-pending appointment were not withdrawn. (Compl. ¶ 15). Plaintiff alleges the Donor Defendants and others wrote to the University Chancellor and "made clear that they disagreed with [Plaintiff's] views critical of Israeli policy." (*Id*. ¶ 77). Several "openly stated that they would withdraw financial support from the University if it did not terminate [Plaintiff's] appointment." (*Id*. ¶ 78). One "multiple 6 figure donor" stated that his and his wife's "support is

[1] The University's motion to dismiss lists many of these "Tweets." *See* Doc. 33 at 3-4. Among other offensive and inflammatory remarks, Plaintiff expressed his wish that "all the f**cking West Bank settlers would go missing," described defenders of Israel as "awful human being[s]," defined "Zionist uplift in America" as "every little Jewish boy and girl can grow up to be the leader of a murderous colonial regime," described "Zionism" as "transforming 'antisemitism' from something horrible into something honorable since 1948," equated Israel to "what it would look like if the KKK had F-16s and access to a surplus population of ethnic minorities," and repeatedly accused Zionists and Israel for "dead children," "the slaughter of children," and "the murder of children." *Id*.

ending as we vehemently disagree" with Plaintiff. (*Id*.). Another stated she and her husband would cease contributing, would "let our fellow alumni know why we are doing so," and "will encourage others to join us in this protest, as perhaps financial consequences will sway you[.]" (*Id*.). Another said he was reconsidering his "generous financial support" based on his "strong disagreement" with Plaintiff's views. (*Id*.). Plaintiff also alleges several meetings between the University Chancellor and certain Donor Defendants, including one with a named donor and one with an unknown donor "who gave her a two-page memo about [Plaintiff] and urged the University Administration to terminate his appointment." (*Id*. ¶¶ 79-80).

As these allegations make clear, Plaintiff proposes to hold private, voluntary donors liable for expressing to University officials—in the strongest terms available to them, including financial support—their disagreement with Plaintiff's derogatory views on Israel and the Jewish people. These claims are in direct conflict with the Donor Defendants' constitutional rights. Neither the United States Constitution nor the Illinois Constitution countenances the application of federal or state law to restrain, coerce, or penalize private persons for speaking out on issues of public concern or expressing their charitable intentions in light of their views. The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). "The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 341 (2003), *overruled in part on other grounds by Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 339 (2010). If these principles are to have any meaning, courts must continue to immunize free expression from the coercive threat and corrupting influence of retaliatory lawsuits by parties alleged to be injured by the exercise of one's First Amendment rights.

Plaintiff's claims against the Donor Defendants suffer from other material defects in addition to their constitutional failings. Many are addressed in the University's motion to dismiss and need not be repeated here, but there are additional grounds for dismissal specific to the Donor Defendants. Plaintiff has not alleged with respect to his 42 U.S.C. §§ 1983 and 1985

conspiracy claim that the Donor Defendants reached an agreement of joint action with the University Defendants to deprive him of a constitutional right, or had a racial or class-based discriminatory animus towards him. Furthermore, his state law claims are barred by the Illinois Citizen Participation Act (the "ICPA"), which grants immunity from liability for acts in furtherance of a party's "constitutional rights to petition, speech, association, and participation in government[.]" 735 ILCS 110/15. For each of these reasons, AJC respectfully submits Plaintiff's claims against the Donor Defendants cannot stand and should be dismissed with prejudice.

ARGUMENT

I. Plaintiff's Claims against the Donor Defendants Are Barred Because Plaintiff Seeks to Subject Them to Liability for Engaging in Constitutionally Protected Activity

Each of Plaintiff's claims against the Donor Defendants impermissibly seeks to employ federal or state law to infringe, coerce, and silence the Donor Defendants' exercise of their constitutional rights of petition, free speech, and association. The First Amendment states, "Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I. These First Amendment rights are applicable to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV § 1. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n. 1 (1995); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 749 n. 1 (1976).

The Illinois Bill of Rights contains similar protections. It provides, "All persons may speak, write and publish freely, being responsible for the abuse of that liberty." Ill. Const. art. I § 4. This right is at least on par with the First Amendment, and "may provide greater protection to free speech than does its federal counterpart."[2] *City of Chicago v. Pooh Bar Enterprises, Inc.*, 224 Ill.2d 390, 865 N.E.2d 133, 168 (2006) (*citing People v. DeGuida*, 152 Ill.2d 104, 604 N.E.2d 336, 343-44 (1992)). The Bill of Rights further states, "The people have the right to

[2] Because the Donor Defendants' First Amendment rights are clearly sufficient to preclude Plaintiff's claims, the Court need not decide whether this case presents one of the circumstances in which the Illinois Constitution affords greater protection to free speech than the First Amendment.

assemble in a peaceable manner, to consult for the common good, to make known their opinions to their representatives and to apply for redress of grievances." Ill. Const. art. I § 5. These rights are comparable to the First Amendment rights of petition, assembly, and association. *See City of Chicago v. Youkhana*, 277 Ill.App.3d 101, 660 N.E.2d 34, 39 (Ill. App. 1st Dist. 1995); *Zientara v. Long Creek Tp.*, 211 Ill.App.3d 226, 569 N.E.2d 1299, 1305-07 (Ill. App. 4th Dist. 1991).

The Donor Defendants are privileged to exercise these constitutional rights, and both federal and state law claims restraining or penalizing their exercise are barred. Myriad federal and state authorities establish this privilege with respect to Plaintiff's claims under 42 U.S.C. §§ 1983 and 1985, as well as Plaintiff's state law tort claims. *See, e.g., Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011) (*citing Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988)) (holding that the First Amendment "can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress"); *Stachura v. Truszkowski*, 763 F.2d 211, 213 (6th Cir. 1985), *rev'd on other grounds*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986) (holding that private citizen was immunized from suit under 42 U.S.C. § 1983 for exercising First Amendment rights); *Evers v. Custer County*, 745 F.2d 1196, 1204 (9th Cir. 1984) (same); *Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329, 1343-44 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977) (holding that § 1985 complaint is insufficient to state an actionable federal claim insofar as it only alleges injury resulting from defendant's exercise of its First Amendment rights); *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill.2d 145, 545 N.E.2d 672, 677 (Ill. 1989) ("Courts will recognize a privilege in intentional interference with contract cases where the defendant was acting to protect an interest which the law deems to be of equal or greater value than the plaintiff's contractual rights."); *Arlington Heights Nat'l Bank v. Arlington Heights Federal Savings & Loan Ass'n*, 37 Ill.2d 546, 229 N.E.2d 514, 517-18 (Ill. 1967) (recognizing First Amendment privilege in tortious interference with contract actions).[3]

[3] *See also Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075 (5th Cir. 1988), *cert denied*, 491 U.S. 906 (1989); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 650 (7th Cir. 1983); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980); *Stevens v. Tillman*, 661 F. Supp. 702, 705 (N.D. Ill. 1986); *Village of Lake Barrington v. Hogan*, 272 Ill.App.3d 225, 649 N.E.2d 1366, 1374 (Ill. App. 2d Dist. 1995); *King v. Levin*, 184 Ill.App.3d 557, 540 N.E.2d 492, 494-95 (Ill. App. 1st Dist. 1989).

Plaintiff "bears the affirmative burden of pleading and proving the absence of the [constitutional] privilege." *King v. Levin*, 184 Ill.App.3d 557, 540 N.E.2d 492, 495 (Ill. App. 1st Dist. 1989). *See also HPI Health Care*, 545 N.E.2d at 676-77. Here, not only has Plaintiff failed meet his burden, but the allegations of his Complaint affirmatively demonstrate that he is seeking to hold the Donor Defendants' liable solely for the proper exercise of their constitutional rights.

A. The Donor Defendants Cannot Be Held Liable for Exercising Their Right to Petition for a Redress of Grievances

Plaintiff's claims against the Donor Defendants specifically seek to penalize them for contacting University officials to communicate their concerns regarding Plaintiff's views, and to ask the University not to associate itself with Plaintiff and his offensive statements. This is a clear attempt to retaliate against private parties for exercising their First Amendment right to petition the government for a redress of grievances, and to chill future attempts to do the same.

The right to petition is "integral to the democratic process," as it "allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives[.]" *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011). The benefits of petition "may not accrue if one class of knowledgeable and motivated citizens is prevented from engaging in petitioning activity." *Id*. at 2500 (*quoting BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 523 (2002)). Thus, "all citizens, regardless of the content of their ideas, have the right to petition their government." *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196 (2003). This right "extends to all departments of the Government[.]" *BE & K Constr.*, 536 U.S. at 525 (*quoting California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972)).

In this case, Plaintiff alleges the Donor Defendants reached out to the University and its Chancellor by letters, emails, and personal meetings, to express their "strong" and "vehement[]" disagreement with Plaintiff's views, and to ask the University to withdraw or terminate Plaintiff's appointment. (Compl. ¶¶ 15, 77-80). This was, unequivocally, an exercise of the Donor Defendants' right to petition. The University is a "body corporate and politic" under

Illinois law, and as such is "an arm of the state[.]" *Sullivan v. Univ. of Illinois at Chicago*, No. 00 C 7898, 2001 WL 855433, at *1 (N.D. Ill. July 27, 2001) (*quoting* 110 ILCS 305/1; *Kroll v. Bd. of Trustees of the Univ. of Illinois*, 934 F.2d 904, 908 (7th Cir.1991)). The Donor Defendants' letters, emails, and meetings with the University, in turn, are all protected forms of petition. *See, e.g., McDonald v. Smith*, 472 U.S. 479, 480-85(1985) (recognizing that letters to the President opposing plaintiff's appointment as United States Attorney were petitions subject to qualified First Amendment immunity); *Ferrone v. Onorato*, 439 F. Supp.2d 442, 450 (W.D. Pa. 2006), *aff'd*, 298 F. App'x 190 (3d Cir. 2008) (concluding that letters and emails to government officials seeking to influence government action are petitions under the Petition Clause).[4]

A claim seeking monetary damages from private persons for the consequences of exercising their right to petition—even in a manner the plaintiff finds unfair or distasteful—cannot survive constitutional scrutiny. The Sixth Circuit addressed precisely this question in *Stachura v. v. Truszkowski*, *supra*, in which the plaintiff, a teacher, asserted claims under 42 U.S.C. § 1983 alleging that a school district, school board, and board members, as well as two private citizens, conspired to cause his termination in violation of his First and Fourteenth Amendment rights. 763 F.2d at 212. A jury entered a verdict against most of the defendants, including one of the private citizens, who "was responsible for starting the sequence of events," including through complaints to the school board and by organizing other parents in the community "in vehement and continuing protests, based on unfounded rumors, leading directly to [plaintiff's] removal." *Id*. at 213. The district court vacated the jury's verdict and directed a verdict in favor of the private defendant, and the Sixth Circuit affirmed. Though acknowledging that the defendant's role in the events was "pivotal" in initiating the protests and "not a pretty one," the Sixth Circuit held that it was a protected exercise of the defendant's right of petition. *Id*. Accordingly, her actions were "immunized from this suit by her First Amendment rights." *Id*. *See also State of Missouri v. Nat'l Organization for Women*, 620 F.2d 1301, 1317-19 (8th Cir.

[4] *See also Schneider v. Amador Cnty.*, No. 2:10-CV-3242-GEB-EFB, 2013 WL 898054, at *11 (E.D. Cal. Mar. 8, 2013); *Martyr v. Bachik*, 755 F. Supp. 325, 329 (D. Or. 1991).

1980) (holding that right to petition "is of such importance that it is not an improper interference even when exercised by way of a boycott," and "no common law tort claim" exists for exercising "overriding First Amendment freedoms such as the right to petition").

The same result applies here. By Plaintiff's own allegations, the Donor Defendants petitioned the University to express their intense disagreement with Plaintiff's views, and sought a redress of their grievances by asking the University not to associate itself with Plaintiff and to withdraw Plaintiff's appointment. Though Plaintiff may feel (and alleges) that his views were taken out of context and his treatment was unfair (*see* Compl. ¶¶ 76-77), this does not diminish the Donor Defendants' constitutional protections. The Donor Defendants' right to petition does not turn on whether the relief they sought was fair or even lawful (though AJC does not believe the Donor Defendants sought any unlawful relief). "It is important to emphasize that a person's speech or petitioning activity is not removed from the ambit of First Amendment protection simply because it advocates an unlawful act. * * * Were this not the case, the right of Americans to speak out peacefully on issues and to petition their government would be sharply circumscribed." *White v. Lee*, 227 F.3d 1214, 1227-28 (9th Cir. 2000) (holding that private citizens' speech, protest, and petitioning activities in opposition to conversion of motel into multi-family housing unit were protected by the First Amendment, even where their objectives would have violated the Fair Housing Act). "A citizen's right to petition is not limited to goals that are deemed worthy, and the citizen's right to speak freely is not limited to fair comments." *Eaton v. Newport Board of Education,* 975 F.2d 292, 298 (6th Cir.1992). Plaintiff's claims against the Donor Defendants are barred by the right to petition.

B. The Donor Defendants Cannot Be Held Liable for Exercising Their Right to Free Speech

The Donor Defendants' communications with the University are also protected speech. The freedom of speech "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Meyer v. Grant*, 486 U.S. 414, 420-21 (1988) (*quoting Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)).

These protections apply to private communications as well as public declarations. *See Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-16 (1979) ("The First Amendment forbids abridgment of the 'freedom of speech.' Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."). *See also Cromley v. Bd. of Educ. of Lockport Twp. High Sch. Dist. 205*, 699 F. Supp. 1283, 1288 n. 3 (N.D. Ill. 1988) (*citing Givhan*) ("Private communications are also afforded constitutional protection.").[5] "Private statements are particularly amenable to First Amendment protection when they are made to a public official in his official capacity." *Belk v. City of Eldon*, 228 F.3d 872, 879-80 (8th Cir. 2000).

Plaintiff's claims against the Donor Defendants specifically allege the substance of their communications as potential bases for liability, including their expressions of "vehement[]" and "strong" disagreement with his views, the statement that they would "encourage others to join us in this protest," and an alleged written memorandum about him. (Compl. ¶¶ 77-80). Plaintiff admits these communications, made in response to his own alleged "political speech," involve "American foreign policy in the Middle East and the issues surrounding the conflict between Israel and Palestine." (*Id*. ¶¶ 3, 61-67, 87-89). Indeed, the crux of Plaintiff's claim under 42 U.S.C. § 1983 is that his comments—and as a necessary corollary the Donor Defendants' responses to his comments—address a subject of "public concern" and "were made in an effort to contribute to the public debate." (*Id*. ¶ 103). This necessarily affords the highest level of protection to the Donor Defendants' communications. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted).

Having himself alleged that the subject of his ideological clash with the Donor Defendants is free speech on issues of public concern, Plaintiff cannot with the turn of a page seek to sue the Donor Defendants for exercising their own free speech rights on the same issues.

[5] *See also Rankin v. McPherson*, 483 U.S. 376, 386 n. 11 (1987) (noting that the "private nature" of a statement does not "vitiate the status of the statement as addressing a matter of public concern").

Whether the First Amendment prohibits a state tort suit predicated on the exercise of speech "turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case." *Snyder*, 131 S.Ct. at 1215. "[S]peech on 'matters of public concern' … is 'at the heart of the First Amendment's protection.'" *Id*. (*quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759 (1985) (internal citation omitted)). Speech deals with a matter of public concern "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" *Id*. at 1216 (*quoting Connick v. Myers*, 461 U.S. 138, 146 (1983)). Aside from Plaintiff's own admissions, it is obvious that the "conflict in the Middle East" and "debate about America's role in resolving the conflict" is an "issue of public concern." *Davis v. Cox*, 325 P.3d 255, 265 (Wash. App. 2014).

The fact that the Donor Defendants' speech allegedly resulted in Plaintiff's termination does not diminish its status as protected expression. Non-defamatory speech involving an issue of public concern "is the kind of speech that the First Amendment is designed to protect," and cannot form the basis for liability regardless of its impact on a plaintiff's employment. *Moore v. Hoff*, 821 N.W.2d 591, 598 (Minn. App. 2012) (*citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985)) (holding state law claims, including for tortious interference, were barred by the First Amendment where the defendant blogger's non-defamatory posts allegedly caused the termination of a university employee). "Attaching liability to this speech would infringe on [defendant's] First Amendment rights." *Id*. at 598-99. The fact that a defendant's "underlying goal in conveying this information was to get [plaintiff] fired does nothing to disentangle the protected statement from any tortious conduct." *Id*. at 599.

Nor is the Donor Defendants' immunity from suit impacted by Plaintiff's allegation that the Donor Defendants spoke in response to Plaintiff's own free speech. The law does not, and cannot, prefer one party's speech over another's. Plaintiff's right to speak his mind on Israeli policy does not diminish the Donor Defendants' equal right to voice their intense disagreement with and disapproval of Plaintiff's views. The First Circuit considered the perils of having courts mediate between different private parties' free expression rights in *Redgrave v. Boston*

Symphony Orchestra, Inc., 855 F.2d 888, 900-12 (1st Cir. 1988). There, plaintiff Vanessa Redgrave sued the defendant orchestra for cancelling a contract with her, allegedly in response to calls and community protests arising from her political support of the Palestine Liberation Organization and her public expressions regarding Israel. *Id*. at 890-91. She prevailed on a breach of contract theory, but also attempted to assert a civil rights claim under the Massachusetts counterpart to 42 U.S.C. § 1983, for interference with her rights of free speech and free association. *Id*. at 900-01. The First Circuit rejected this claim, holding the defendant could not be held liable "for exercising its free speech right not to perform." *Id*. at 903.

In evaluating the parties' "[c]onflict of [r]ights," the First Circuit noted that, "unlike in the typical discrimination case," in this instance "there are free speech interests on the defendant's side of the balance as well." *Id*. at 904. It observed that "all private speech is formally on equal footing as a legal matter," and in the traditional context, "various private actors can, without state interference, battle it out in the marketplace of ideas." *Id*. To allow a civil rights claim in this context of conflicting speech, "the state would be entering the marketplace of ideas in order to restrict speech that may have the effect of 'coercing' other speech." *Id*. The court noted its "grave concerns" about the implications of this type of conflict:

> If constitutional protections are effectively to protect private expression, they must do so, to some extent, even when the expression (or lack thereof) of one private person threatens to interfere with the expression of another. * * * The freedom of mediating institutions, newspapers, universities, political associations, and artistic organizations and individuals themselves to pick and choose among ideas, to winnow, to criticize, to investigate, to elaborate, to protest, to support, to boycott, and even to reject is essential if "free speech" is to prove meaningful. The courts, noting that free speech guarantees protect citizens against ***governmental*** restraints upon expression, have hesitated to permit governments to referee disputes between speakers lest such mediation, even when it flies the banner of "protecting speech," interfere with the very type of interest it seeks to protect.

Id. at 904 (emphasis in original).

The First Circuit further observed that even activities which "are ***intended to coerce*** the exercise of others' speech by means of public approbation and economic pressure" share these First Amendment protections. *Id*. at 905 (emphasis in original). Thus, the court concluded that Massachusetts would not recognize liability under its state civil rights statute where a defendant

exercises its own "free speech right" not to speak or perform. *Id*. at 907-12 (*citing Redgrave v. Boston Symphony Orchestra*, 502 N.E.2d 1375, 1377, 1380, 1382, 1385 (Mass. 1987)).

Lastly, the Donor Defendants' free speech rights are not impacted by Plaintiff's allegation that certain Donor Defendants "threatened" to halt financial contributions to the University if it did not terminate Plaintiff's appointment. It is part and parcel of the Donor Defendants' free speech rights to inform the University of their charitable intentions. To hold otherwise leaves the Donor Defendants with one of two options, neither of which is constitutionally viable: Either they may exercise their free speech rights yet be compelled to continue giving money to the University, or they may cease giving money to the University but must be silent and cannot tell the University why they are doing so. A person cannot be forced to restrain or exchange his or her constitutional rights in this manner.

The Supreme Court has repeatedly recognized in the context of political campaigns and campaign contributions that the right of free speech includes the right to expend one's personal funds in the exercise of such speech. *See, e.g., Buckley v. Valeo*, 424 U.S.1, 52-53 (1976) (holding that a cap on a candidate's personal funds imposes a "substantial," "clea[r]" and "direc[t]" restraint on his "First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election"); *Davis v. Federal Election Comm'n*, 554 U.S. 724, 738-39 (2008) (striking down law which relaxed limits on the ability of opponents of self-financed congressional candidates to raise money, holding that it "imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right" of unfettered political speech); *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1448 (2014) (*quoting Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985)) (invalidating statutory aggregate limits on political contributions).[6]

The same logic governs here, where the Donor Defendants allegedly used charitable contributions to the University, rather than campaign contributions to a candidate, as the

[6] *See also Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 615-16 (1996); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818 (2011).

instrument of their speech on an issue of public concern. The Donor Defendants, no less than a political contributor, have the right to use their charitable contributions to associate themselves with, or disassociate themselves from, the University as an expression of their viewpoint and conscience. *See McCutcheon*, 134 S. Ct. at 1448. And their decision to do so should not force them to choose between "the First Amendment right to engage in unfettered political speech" and "subjection to" federal or state liability for the alleged economic consequences of their speech. *Davis*, 554 U.S. at 738-39; *see also id*. at 740. Put simply, protecting Plaintiff's speech at the expense of the Donor Defendants' speech is an impermissible trade-off. "This sort of 'beggar thy neighbor' approach to free speech—'restricting the speech of some elements of our society in order to enhance the relative voice of others—is 'wholly foreign to the First Amendment.'" *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2821 (2011) (*quoting Buckley*, 424 U.S. at 48-49).[7] "The Government may not … deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340-41 (2010) (*citing First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

Equally compelling is the Supreme Court's recognition in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), of the free speech rights of citizens or groups of citizens under the First Amendment to engage in nonviolent boycotts in furtherance of their goals. The Court held that a nonviolent boycott "is a form of speech or conduct that is ordinarily entitled to protection" under the First Amendment, involving "speech in its most direct form," including "personal solicitation" to nonparticipants to urge them to "join the common cause," and "does not lose its protected character … simply because it may embarrass others or coerce them into action." *Id*. at 907-10. Following this rule, in *Davis v. Cox*, 325 P.3d 255 (Wash. App. 2014), the court struck a derivative claim for breach of fiduciary duty against the directors of a food cooperative, who adopted a resolution approving a boycott of Israeli-made products and

[7] *See also The Fund for Louisiana's Future v. Louisiana Bd. of Ethics*, 17 F. Supp.2d 562, 572-73 (E.D. La. 2014) (citation omitted); *Seaton v. Wiener*, 22 F. Supp.2d 945, 949-50 (D. Minn. 2014).

divestment from Israeli companies. The court held the claim was barred by Washington's anti-SLAPP statute, because it involved conduct "in furtherance of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." *Id*. at 262, 264-65 (*citing* RCW 4.24.525(2)(e), 4.24.525(4)(b); *Claiborne Hardware*, 458 U.S. at 915). The same reasoning supports the same result here. Indeed, Plaintiff's Complaint alleges that such a boycott has arisen ***against*** the University in connection with its withdrawal of Plaintiff's appointment. (Compl. ¶ 86). The Donor Defendants, no less than Plaintiff's defenders, have the right to provide or withhold their support from the University as an expression of their views, values, and conscience.

C. The Donor Defendants Cannot Be Held Liable for Exercising Their Right of Association, Nor Subject to Invasion of Their Privacy for Doing So

In choosing to associate—or not associate—with the University, and encouraging others to do the same, the Donor Defendants' actions are also a protected exercise of their freedom under the First and Fourteenth Amendments "to engage in association for the advancement of beliefs and ideas[.]" *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). This right of association includes a right ***not*** to associate. "Among the rights protected by the First Amendment is that to freedom of association … and its corollary, the freedom [n]ot to be required to associate with groups holding views which an individual regards as obnoxious." *Gavett v. Alexander*, 477 F. Supp. 1035, 1045 (D.D.C. 1979) (*citing Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960); *NAACP*, 357 U.S. at 460). "[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP,* 347 U.S. at 460-61.

The decision to contribute—or not contribute—to an organization based on the dictates of one's conscience is inextricably intertwined with this freedom of association. The First Amendment protects the "right to contribute money to the groups of one's choice." *Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO , Political Action and Education Fund v. Waterfront Comm'n of N.Y. Harbor*, 667 F.2d 267, 272 (2d Cir. 1981) (citations omitted). "For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and

that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced[.]" *Id*. (*quoting Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977)). Thus, "contributing to an organization for the purpose of spreading a political message is protected by the First Amendment," as is its corollary, "the right not to contribute to the spreading of a political message[.]" *Libertarian Party of Indiana v. Packard*, 741 F.2d 981, 988 (7th Cir. 1984) (*quoting Abood*, 431 U.S. at 234).[8] Government "cannot compel persons to support financially the dissemination of ideas that they oppose." *Libertarian Party of Indiana*, 741 F.2d at 989 (*citing Abood*). "Coerced contributions can be as violative of First Amendment values as abridgment of the right to contribute." *Local 1814*, 667 F.2d at 272.[9]

Here, faced with the University's proposed appointment of a faculty member whose views the Donor Defendants found offensive and deeply antithetical to their core values, the Donor Defendants exercised their First Amendment right to inform the University that they would terminate their contributions to and association with the University if it chose to add Plaintiff as a tenured member of its faculty. No matter how disagreeable Plaintiff may find this decision, the law cannot coerce the Donor Defendants to continue their association with the University if they no longer view it as reflecting their values or beliefs, nor can it require them to refrain from telling the University their reasons for ending the association.

Plaintiff's suit also raises a separate concern arising from the freedom of association—the privacy of the Donor Defendants. Allowing Plaintiff to take discovery in order to compel disclosure of the Donor Defendants' identities endangers their right of association. The Supreme Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64. *See also Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 91 (1982) (same). "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in

[8] *see also Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1251, 1253 (6th Cir. 1997) (recognizing that individuals have a right "not to contribute to the advocacy of a political message," which is "as central a First Amendment right as is the right to solicit funds"); *Gavett*, 477 F. Supp. at 1045.
[9] *See also Elrod v. Burns*, 427 U.S. 347, 359-60 (1976); *Abood*, 431 U.S. at 227, 234.

advocacy" may constitute "a restraint on freedom of association," and as such the Supreme Court "has recognized the vital relationship between freedom to associate and privacy in one's associations." *NAACP*, 357 U.S. at 462. "Disclosure of the identities of a group's members or contributors may have the practical effect of discouraging the exercise of these constitutionally protected rights." *Local 1814*, 667 F.2d at 270 (*citing NAACP*, 357 U.S. at 462). Accordingly, "governmental attempts to compel such disclosures have been subjected to exacting scrutiny," and are not permitted unless they are "substantially related to a compelling governmental interest." *Id*. at 270-71 (citations omitted).

Based on these principles, federal courts recognize a First Amendment privilege applicable to discovery requests seeking to compel disclosure of private members and donors. *See, e.g., In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 479-81 (10th Cir.2011); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir.2010); *In re Heartland Inst.*, No. 11 CV 2240, 2011 WL 1839482, at *2 (N.D. Ill. May 13, 2011). The privilege applies where the risk to the associational interests of the party opposing disclosure—including membership withdrawal, discouragement of new members, and violation of desired anonymity—outweigh the interests of the party seeking discovery. *Tree of Life Christian Schools v. City of Upper Arlington*, No. 2:11-cv-00009, 2012 WL 831918, at *2-3 (S.D. Ohio 2012).

This is such a case, as Plaintiff seeks to compel the disclosure of unknown donors in order to retaliate against them for exercising their constitutional rights of petition, free speech, and association. The impact on the associational rights of the University and its donors would be enormous. In *Tree of Life*, the court held that the defendant's efforts to compel disclosure and deposition of one of the plaintiff's largest donors "will have a chilling effect" on its First Amendment associational rights. *Id*. at *3. The court explained: "Should it become public knowledge that Plaintiff disclosed the identity of one of its donors, it is highly possible, if not probable, that this could hinder Plaintiff's ability to receive donations in the future. Even assuming that a protective order would prevent public disclosure, revelation of the donor's identity will still adversely impact the associational rights of Plaintiff and its donor." *Id*. If

anything, the same effect is more likely here, where Plaintiff seeks the identity of the Donor Defendants not just to depose them, but to sue them.

II. Plaintiff Fails to State a Claim against the Donor Defendants

In addition to their fatal constitutional shortcomings, Plaintiff's claims against the Donor Defendants fail in other material respects as well. The University Defendants' motion to dismiss addresses many of these deficiencies, which need not be repeated here. *See* Doc. 33 at 23-28. But there are also several fatal defects particular to the Donor Defendants.

A. Plaintiff's Federal Civil Rights Conspiracy Claim under 42 U.S.C. §§ 1983 and 1985 Fails to Allege Agreement on a Joint Course of Action and Racial or Other Class-Based Discriminatory Animus

With respect to Plaintiff's 42 U.S.C. §§ 1983 and 1985 conspiracy claim (Count III), at the outset, Plaintiff has not adequately alleged that the Donor Defendants and the University Defendants reached "agreement on a joint course of action in which the private party and the state have a common goal." *Hughes v. Meyer*, 880 F.2d 967, 972 (7th Cir. 1989) (*quoting Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 435 (7th Cir.1986)). A private party cannot be sued under § 1983 unless "he is a willful participant in joint action with the State or its agents." *Gramenos*, 797 F.2d at 435 (*quoting Dennis v. Sparks*, 449 U.S. 24, 28 (1980)). Thus, an allegation of conspiracy must include a "charge of joint action alleging some agreement between private and public actors to violate a constitutional right of the plaintiff." *Cunningham v. Southlake Center For Mental Health, Inc.*, 924 F.2d 106, 107 (7th Cir.1991). Here, Plaintiff alleges only that the Donor Defendants made negative statements about him to the University and threatened to withhold financial support if the University did not withdraw or terminate Plaintiff's appointment. (Compl. ¶¶ 15, 77-80). Such statements do not constitute an agreement or joint action. "Providing information (false or otherwise) and encouraging a state actor to act in a certain way, without more, does not constitute joint action." *Naguib v. Illinois Dep't of Prof'l Regulation*, 986 F. Supp. 1082, 1095 (N.D. Ill. 1997) (*quoting Howard v. Bd. of Educ. of Sycamore Community Unit School Dist. No. 427*, 876 F. Supp. 959, 968 (N.D. Ill.1995)).

Moreover, Plaintiff has not adequately alleged—or indeed alleged at all—that the Donor

Defendants acted out of racial or class-based animus towards him. To state a civil rights conspiracy claim under § 1985(3), Plaintiff "must demonstrate [a] racial, ethnic, or other class-based 'invidiously discriminatory animus behind the conspirators' actions.'" *Xiong v. Wagner*, 700 F.3d 282, 297 (7th Cir. 2012) (*quoting Brokaw v. Mercer Cnty.*,235 F.3d 1000, 1024 (7th Cir.2000)).[10] This "class-based animus" requirement prevents the law from being applied improperly to provide a federal remedy for "all tortious, conspiratorial interferences with the rights of others." *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971); *see also Silkwood v. Kerr–McGee Corp.*, 637 F.2d 743, 748 (10th Cir.1980). Plaintiff does not and cannot allege that the Donor Defendants' actions were motivated by his race or any other invidious discriminatory animus relating to some class-based characteristic. To the contrary, the Complaint clearly alleges that the Donor Defendants' actions were motivated by his specific and individualized expressions of opinion. (Compl. ¶¶ 15, 77-80).

B. Plaintiff's State Law Claims against the Donor Defendants Should Be Dismissed under the Illinois Citizen Participation Act

As for Plaintiff's state law claims for tortious interference (Counts VI and VII) and intentional infliction of emotional distress (Count VIII), the Donor Defendants not only enjoy direct constitutional immunity from these claims, but statutory immunity as well. When Illinois adopted the ICPA in 2007, it joined at least 24 other states in enacting anti-SLAPP legislation and declaring that Illinois law will not tolerate lawsuits "aimed at preventing citizens from exercising their political rights or punishing those who have done so." *Sandholm v. Kuecker*, 2012 IL 111443, 962 N.E.2d 418, 427 (Ill. 2012); *Wright Development Group, LLC v. Walsh*, 238 Ill.2d 620, 939 N.E.2d 389, 395 (Ill. 2010). "SLAPPs 'masquerade as ordinary lawsuits' and may include myriad causes of action[.]" *Intercon Solutions, Inc. v. Basel Action Network*, 969 F. Supp.2d 1026, 1033 (N.D. Ill. 2013) (*citing* Kathryn W. Tate, *California's Anti–SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 Loy. L.A. L. Rev.

[10] *See also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993) (*quoting Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)); *Smith v. Gomez*, 550 F.3d 613, 617 (7th Cir. 2008).

801, 804-05 (2000)). The purpose of a SLAPP "is not to win but rather to chill the defendant's speech or protest activity and discourage opposition by others through delay, expense, and distraction." *Id*. (*citing* John C. Barker, *Common–Law and Statutory Solutions to the Problem of SLAPPs*, 26 Loy. L.A. L. Rev. 395, 403-05 (1993)). By forcing defendants to undertake the expense of litigation, "the SLAPP plaintiff's goal of discouraging the defendant's protest activities are achieved through the ancillary effects of the lawsuit, not through an adjudication on the merits." *Id*. In short, a SLAPP suit uses "the threat of money damages or the prospect of the cost of defending against the suits to silence citizen participation." *Wright*, 939 N.E.2d at 395.

The ICPA declares "the public policy of the State of Illinois that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence[.]" 735 ILCS 110/5. To that end, the courts "must provide the utmost protection for the free exercise of these rights of petition, speech, association, and government participation." *Id*. The threat of SLAPPs "significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights[.]" *Id*. To counteract these pernicious effects, the ICPA "provides for expedited judicial review, summary dismissal, and recovery of attorney fees for the party who has been 'SLAPPed.'" *Sandholm*, 962 N.E.2d at 428 (citations omitted).

The ICPA applies to any claim that "is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." 735 ILCS 110/15. It immunizes "[a]cts in furtherance" of these constitutional rights from liability, "regardless of intent or purposes, except when not genuinely aimed at procuring favorable government action, result, or outcome." *Id*.[11] It "shall be construed liberally to effectuate its purposes and intent fully." 735 ILCS 110/30. The statutory immunity is "substantive and thus applicable in federal court," because its

[11] A "claim" includes "any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing alleging injury." 735 ILCS 110/10. "Government" includes "a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, a subdivision of a state, or another public authority including the electorate." *Id*.

operative provisions "created a new category of conditional legal immunity premised on a person's '[a]cts in furtherance of' his First Amendment rights," and because it "provides for a mandatory award of reasonable attorney's fees and costs to a 'moving party who prevails in a motion under th[e] Act.'" *Chi v. Loyola Univ. Med. Cntr.*, 787 F. Supp.2d 797, 808 (N.D. Ill. 2011) (*citing Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *quoting* 735 ILCS 110/15, 115/25).

The ICPA "protects from liability all constitutional forms of expression and participation in pursuit of favorable government action." *Shoreline Towers Condominium Ass'n v. Gassman*, 404 Ill.App.3d 1013, 1022 (1st Dist. 2010). Applicable causes of action "are myriad," and include "business torts (such as interference with contractual rights or with prospective economic advantage), anti-trust, intentional infliction of emotional distress, invasion of privacy, civil rights violations, constitutional rights violations, conspiracy, nuisance, judicial process abuse, and malicious prosecution[.]" *Id*. (*quoting* Tate, 33 Loy. L.A. L. Rev. at 804-05). The initial burden is on the defendants to show the suit against them is "based on, relates to, or is in response to" their acts "in furtherance" of their "rights of petition, speech, association, or to otherwise participate in government." *Wright*, 939 N.E.2d at 397 (*quoting* 735 ILCS 110/15). Once this showing has been made, the burden shifts to the plaintiff to produce "clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability[.]'" 735 ILCS 110/20(c); *Sandholm*, 962 N.E.2d at 434.

Here, Plaintiff's claims against the Donor Defendants are, as already explained, clearly "based on, relate[] to, or [are] in response to" their acts "in furtherance" of their "rights of petition, speech, association, or to otherwise participate in government." *See* Section I, *supra*. *See also Wright*, 939 N.E.2d at 398. Plaintiff cannot meet his burden of showing that the Donor Defendants' acts are not immunized from or are in furtherance of acts immunized from liability. Accordingly, Plaintiff's state law claims should be dismissed under the ICPA.

CONCLUSION

For each of these reasons, AJC respectfully submits the Court should grant Defendants' pending motion to dismiss as pertains to the Donor Defendants.

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Respectfully submitted,

By: s/ Gregory E. Ostfeld
One of Its Attorneys

Gregory E. Ostfeld
GREENBERG TRAURIG, LLP
77 West Wacker Drive
Suite 3100
Chicago, IL 60601
Phone: (312) 456-8400
Fax: (312) 456-8435

Counsel for Amicus Curiae
American Jewish Committee