In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1562

INDIANA RIGHT TO LIFE VICTORY FUND and SARKES TARZIAN, INC.,

Plaintiffs-Appellants,

v.

DIEGO MORALES, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:21-cv-2796 — **Sarah Evans Barker**, *Judge*.

ARGUED DECEMBER 2, 2022 — DECIDED APRIL 26, 2023

Before EASTERBROOK, SCUDDER, and LEE, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Political action committees play a large role in today's political campaigns. PACs accept campaign contributions from donors and spend that money to support or oppose political candidates, parties, or ballot initiatives. An independent-expenditure PAC—commonly called a "super PAC"—is a special kind of PAC that spends its money a little differently than most PACs. Unlike the others,

independent-expenditure PACs do not give money directly to candidates, party committees, or ballot-initiative movements. Rather, they spend the money themselves to advocate for or against candidates, parties, or initiatives.

Indiana Right to Life Victory Fund wants to operate as an independent-expenditure PAC in Indiana, but it fears that the state's Election Code does not allow it to accept donations from corporations (or perhaps that there would be a cap on how much those corporations could donate). The Fund believes this restriction violates its First Amendment rights, so it and a private company have come to federal court seeking to prevent Indiana from enforcing its campaign-finance laws to limit or ban corporate contributions to independent-expenditure PACs. The wrinkle is that Indiana's election officials say they have no intent to enforce their laws that way and, more to the point, do not even think their laws could be enforced that way either under the plain text of the Election Code or without violating the First Amendment.

We cannot decide whether the Fund has standing to challenge the Indiana Election Code without first determining the Code's meaning. But that inquiry entails its own complexity, as Indiana courts have not yet interpreted the provisions at issue, and the parties have both advanced credible arguments in support of their positions. In these circumstances, the most prudent course is to invite the opinion of the only body that can definitively construe the Indiana Election Code—the Indiana Supreme Court. Doing so respects important principles of federalism and ensures an authoritative answer to this unsettled, important, and likely dispositive issue. So we certify the question set forth in this opinion to the Indiana Supreme Court.

I

A

Indiana's campaign-finance laws allow corporations to "make a contribution to aid in the election or defeat of a candidate or the success or defeat of a political party or a public question." Ind. Code § 3-9-2-3(a). But corporate contributions "are limited to those authorized by sections 4, 5, and 6 of this chapter." § 3-9-2-3(b). The Fund challenges sections 4 and 5.

Section 4 imposes annual limits on direct corporate contributions to candidates and party committees. A corporation, for example, may not make annual contributions "in excess of" $5,000 to candidates for statewide elected office. § 3-9-2-4(1). But section 4 is silent on other kinds of political expenditures. It imposes no cap on corporate contributions to committees unaffiliated with a political party, such as PACs. See *id.*; see also § 3-5-2-37(3) (distinguishing party committees from PACs). It also does not limit how much corporations can spend on their own to advocate for or against a candidate or political party.

Section 5 ensures that corporations cannot use PACs as a loophole to avoid contribution caps. It does this by requiring corporations to designate their contributions to PACs "for disbursement to a specific candidate or committee listed under section 4." § 3-9-2-5(c)(2). These contributions, in turn, must abide by the annual limits established in section 4. See § 3-9-2-5(a), (c)(1). Yet section 5 does not address how or whether a corporation could earmark a contribution for a PAC to spend itself (as an independent expenditure) for or against a candidate or party.

Section 6 provides limited exceptions to the restrictions in sections 4 and 5 for certain nonpartisan registration and get-out-the-vote campaigns, contributions made by nonpartisan PACs, and contributions regarding public questions. See § 3-9-2-6. The Fund does not challenge section 6.

Notice what is missing. No provision of Indiana's campaign-finance laws purports to regulate corporations' independent expenditures. Nor does any provision describe how PACs that engage in independent expenditures are regulated—if they are regulated at all. Indeed, the very concept of independent expenditures, whether by a corporation or by a PAC, seems absent from the plain text of the Indiana Election Code.

B

The Fund asserts that the Election Code prohibits corporate contributions to independent-expenditure PACs. It gets there through the statutory admonition that corporate contributions "are limited to those authorized by sections 4, 5, and 6." § 3-9-2-3(b). Section 4 only addresses contributions to specific candidates or committees, section 5 only addresses contributions to PACs that are earmarked for disbursement, and section 6 does not provide any relevant exceptions. Synthesizing these three provisions, the Fund contends that Indiana law disallows corporate contributions to independent-expenditure PACs.

Indiana's election officials disagree. They assert that corporations' independent expenditures—whether made directly or through PACs—"fall outside" the campaign-finance regulations. So they contend that the Election Code simply "does not regulate" independent expenditures. The upshot of

this position would be that anyone can make independent expenditures *or* donate to an organization that does so without running afoul of state law. As further support for their position, Indiana's election officials contend that their interpretation of the Election Code is consistent with the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), and our decision in *Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139 (7th Cir. 2011) (*Barland I*)—two decisions that addressed how the First Amendment protects corporate speech related to political campaigns.

C

The Fund and its coplaintiff, a company called Sarkes Tarzian, do not buy Indiana's position. Sarkes worries that the Election Code prohibits it from contributing to independent-expenditure PACs, so it has not contributed anything. For its part, the Fund fears that contributions will dry up (or never materialize in the first place). The Fund further insists that the First Amendment protects a corporation's right to make unlimited contributions to independent-expenditure PACs. That is why it and Sarkes invoked 42 U.S.C. § 1983 and sued Indiana state officials tasked with enforcing the Election Code—including Secretary of State Diego Morales, Attorney General Todd Rokita, and members of the Indiana Election Commission—for violating their constitutional rights.

Indiana has not yet enforced its Election Code against the Fund or any of its donors, though, making this lawsuit a preenforcement challenge. A plaintiff may bring such a challenge only if they can allege a "credible threat" that the law will be enforced against them. See *Sweeney v. Raoul*, 990 F.3d 555, 559 (7th Cir. 2021) (quoting *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979)). Because the Fund

reads the Election Code to prohibit corporate contributions to independent-expenditure PACs, it contends the very text of the statute establishes a credible threat that Indiana will enforce the statute against it and its donors. Indiana's election officials disagree. In addition to their interpretation of the statute, which would allow the activity the Fund is worried about, they highlight that several election officials have publicly disavowed any intent to enforce the Election Code against corporate contributions to independent-expenditure PACs. So they say there is no credible threat.

The district court found that the Fund had not alleged a credible threat. Two considerations were particularly important to its conclusion. The district court first stressed that *Citizens United* interpreted the First Amendment to forbid limits on independent expenditures, and so the court viewed the Fund's desired activity as falling under the First Amendment protection recognized by the Supreme Court. From there the district court observed that every Indiana election official on the record has stated that the Election Code does not regulate independent expenditures or prohibit corporate contributions to independent-expenditure PACs—and indeed has disavowed any intent to enforce the statute in any way inconsistent with that interpretation. Crediting the state officials' position, the district court dismissed the lawsuit for lack of standing.

The Fund and Sarkes now appeal.

II

Take a moment to observe how the table is set here. The Fund has come into federal court requesting that we declare Indiana's limits on corporate campaign contributions

unconstitutional as applied to independent-expenditure PACs. But Indiana's election officials insist the Election Code does not restrict corporate contributions to independent-expenditure PACs—and, even if it did, the officials say they would not enforce it in that manner because they believe doing so would be unconstitutional under *Citizens United* and *Barland I*. They therefore see no real conflict with the Fund's wishes and think there is nothing for us to do here.

That sounded alarm bells for the district court, and it does for us too. Article III "limits federal courts to resolving concrete disputes between adverse parties." *Sweeney*, 990 F.3d at 559. A plaintiff challenging a statute must "assert an injury that is the result of a statute's actual or threatened *enforcement*, whether today or in the future." *California v. Texas*, 141 S. Ct. 2104, 2114 (2021) (emphasis in original). For a preenforcement challenge like this one, the touchstone is whether the plaintiff has alleged "a credible threat of prosecution" under the statute. *Babbitt*, 442 U.S. at 298. If they have not, federal courts lack subject-matter jurisdiction—the authority to hear the case—no matter how strong the merits position may be on either side. See *Sweeney*, 990 F.3d at 559 (explaining that a justiciable case is one that presents an "actual controvers[y] between someone who has experienced (or imminently faces) an injury and another whose action or inaction caused (or risks causing) that injury"). We must address these jurisdictional questions before we can even consider the merits. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998).

A

The election officials' first reason why the Fund has failed to allege a credible threat of enforcement is that the Election Code does not cover corporate contributions to independent-

expenditure PACs—the very conduct Sarkes and the Fund wish to engage in. If true, that would indeed mean the Fund lacks standing to bring its preenforcement challenge. It is a threshold requirement to establish a credible threat of enforcement that the statute actually cover the plaintiff's desired conduct. See *Babbitt*, 442 U.S. at 298 (explaining a plaintiff must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, *but proscribed by a statute*" (emphasis added)). Even in the First Amendment context, where courts are wary of the "chilling effect" that unduly vague statutes can have, a plaintiff must show that the statute at least "arguably" covers their desired conduct. *Shirmer v. Nagode*, 621 F.3d 581, 586–87 (7th Cir. 2010).

The officials advance some valid arguments in favor of their interpretation of the Election Code. They explain that the Code's silence on independent expenditures means it does not regulate them at all, regardless of whether they are made by a corporation directly or through a PAC. That interpretation appears consistent with the Supreme Court's admonitions that courts should not overread statutory silence, especially when doing so would impose criminal or regulatory penalties. See, *e.g.*, *Concepcion v. United States*, 142 S. Ct. 2389, 2402 (2022) (sentencing context); *Samantar v. Yousuf*, 560 U.S. 305, 317 (2010) (sovereign immunity context); *Toibb v. Radloff*, 501 U.S. 157, 161 (1991) (bankruptcy context).

Yet the Fund—arguing, seemingly against its self-interest, that the Election Code *does* restrict corporate contributions to independent-expenditure PACs—presses some sound points of its own. The Election Code's plain text states that corporate contributions "are limited to those authorized by sections 4, 5, and 6." § 3-9-2-3(b). But sections 4, 5, and 6 do not authorize

independent expenditures (at least, not in express terms). And the Fund reminds us that we cannot "adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 833 (7th Cir. 2014) (*Barland II*) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000)). We are therefore hesitant to constrain state law too quickly—even at the behest of state officials.

B

For now, then, we put a pin in this unresolved question of statutory interpretation and turn to the election officials' second reason why the Fund has failed to allege a credible threat of enforcement. Relying on our decision in *Lawson v. Hill*, they assert that if a statute is "clearly unconstitutional, either entirely so or as applied to the plaintiff's conduct," there can be no credible threat that the statute will be enforced in the unconstitutional manner. 368 F.3d 955, 957 (7th Cir. 2004).

But that inquiry is not so straightforward either. In *Lawson* the plaintiff sued to enjoin enforcement of a statute criminalizing the desecration of the U.S. flag, something the Supreme Court specifically addressed in *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990). We are not so sure that *Citizens United* and *Barland I* address corporate contributions to independent-expenditure PACs with a similar level of specificity. Nor is it apparent how clearly unconstitutional a statute must be to eliminate a credible threat that it will be enforced.

That Indiana's election officials have disclaimed any intent to enforce the Election Code to regulate corporate contributions to independent-expenditure PACs does not change

our analysis. State officials' affirmative expressions of intent to enforce a statute may certainly give rise to a credible threat. See, *e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). So would state officials' refusals to disavow enforcement when given the opportunity to do so. See, *e.g.*, *Holder v. Humanitarian L. Project*, 561 U.S. 1, 16 (2010) ("The Government has not argued … that plaintiffs will not be prosecuted if they do what they say they wish to do."); *Babbitt*, 442 U.S. at 302 ("[T]he State has not disavowed any intention of invoking the criminal penalty provision against unions [like the plaintiffs].").

But state officials' promises *not* to enforce a statute receive less weight, especially when they cannot bind their successors in office. See *Trustees of Indiana Univ. v. Curry*, 918 F.3d 537, 540 (7th Cir. 2019). It is only "when a state agency acknowledges that it will not enforce a statute because it is *plainly* unconstitutional" that such statements might mean anything at all. *Wisconsin Right to Life, Inc. v. Schober*, 366 F.3d 485, 492 (7th Cir. 2004) (emphasis added). That comes full circle to whether the statute is "plainly"—or "clearly," to use *Lawson*'s terminology—unconstitutional.

C

What all this means is that the Fund's standing to bring this case is in serious question. On the one hand, Indiana's Election Code may not even regulate the Fund's desired conduct, meaning the Fund would face no credible threat of an injury. But resolving this question would require us to interpret an Indiana state statute where both sides have advanced credible positions. On the other hand, Indiana officials say they will not enforce the Election Code in the way that concerns the Fund. But whether we credit those representations depends on a fine-grained constitutional analysis of the

holdings of *Citizens United* and *Barland I*, for only then can we know whether the Fund faces a credible threat of enforcement. See *Lawson*, 368 F.3d at 957; *Schober*, 366 F.3d at 492. In short, there is no easy answer.

The Supreme Court has instructed that, in situations like this one, federal courts must "ensure that any conflict … between state law and the First Amendment is not purely hypothetical." *Mckesson v. Doe*, 141 S. Ct. 48, 51 (2020) (per curiam). To that end, when we are faced with *both* statutory *and* constitutional questions, we must prioritize resolving the statutory issues if doing so would prevent us from engaging in unnecessary constitutional analysis. See *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (observing that, as a general rule, "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter"). This course of action is more, not less, important when the statute at issue is a state statute. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) (recognizing the need for "respect for the place of the States in our federal system"). So the Supreme Court has offered the following observation: "[W]e think it much better to decide [a case] with regard to the question of a local nature … rather than to unnecessarily decide the various constitutional questions appearing in the record." *Hagans v. Lavine*, 415 U.S. 528, 546 (1974) (quoting *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909)).

Heeding this guidance, we decline at this time to resolve the constitutional debate over how to best interpret *Citizens United* and *Barland I*. Instead, we return to the statutory

question whether the Indiana Election Code restricts corporate contributions to independent-expenditure PACs.

III

The Supreme Court has further explained that sometimes the best way to resolve a difficult question of state law is through certification to the state's highest court, which alone can give an authoritative interpretation of state law. See *Mckesson*, 141 S. Ct. at 51; *Arizonans for Official English*, 520 U.S. at 78–79. Indiana permits "any federal circuit court of appeals" to certify any "question of Indiana law … that is determinative of the case and on which there is no clear controlling Indiana precedent." Ind. R. App. P. 64(a). We have concluded that certification to the Indiana Supreme Court is the best course of action here.

A

The question we certify—whether the Indiana Election Code prohibits or otherwise limits corporate contributions to independent-expenditure PACs—satisfies Indiana's requirements for certification:

First, interpreting an Indiana statute is without a doubt a question of Indiana law. See *In re Hernandez*, 918 F.3d 563, 569 (7th Cir. 2019).

Second, answering the question will likely resolve the case. If the Election Code does not regulate the kind of activity the Fund and Sarkes wish to engage in, they lack a credible threat of enforcement, and we must affirm the district court's dismissal for lack of standing. Of course, we acknowledge that we have not yet resolved the constitutional dimension to the officials' challenge to the Fund's standing. Indiana's arguments on that front—that *Citizens United* and *Barland I*

eliminate any credible threat of enforcement—may still prevail. But the U.S. Supreme Court's guidance remains: in cases like this one, "certification is advisable before addressing a constitutional issue." *Mckesson*, 141 S. Ct. at 51. Answering the statutory question is therefore "key to a correct disposition of the case" regardless of the remaining constitutional issues. *Lyon Fin. Servs., Inc. v. Illinois Paper & Copier Co.*, 732 F.3d 755, 766 (7th Cir. 2013).

Third, there is no controlling Indiana precedent resolving the statutory question. Indeed, it does not appear that any state court has addressed this issue. There are sound arguments on both sides. These realities make the Indiana Supreme Court best situated to interpret the Election Code and itself apply the "cardinal principle" that the statute should be construed "within constitutional bounds" if possible. *Arizonans for Official English*, 520 U.S. at 78.

B

Certification presents other advantages as well. The dispute "concerns an important issue of public concern" that is "likely to recur," increasing the value of certification. *Cutchin v. Robertson*, 986 F.3d 1012, 1028 (7th Cir. 2021). Independent-expenditure PACs have become increasingly common since *Citizens United*, see Michael S. Kang, *The Year of the Super PAC*, 81 Geo. Wash. L. Rev. 1902, 1904–08 (2013), and there is every reason to think they will continue to grow in number and importance. When deciding whether to certify a question "[w]e also take into account the state supreme court's particular interest in the development of state law and the likelihood that the result of the decision in a particular case will exclusively affect the citizens of that state." *Cutchin*, 986 F.3d at 1028–29. Indiana's election officials and its citizens would uniquely

benefit from an authoritative statement from its supreme court proscribing how state law regulates these PACs.

Atop everything else, the procedural posture of this appeal—a preenforcement challenge to a state statute—only bolsters our choice. "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans for Official English*, 520 U.S. at 79; see also *Lawson*, 368 F.3d at 960 (observing that unnecessary preenforcement relief "would place humiliating and potentially paralyzing restrictions" on state actors). That is why the Supreme Court has instructed federal courts to certify questions when doing so "would ensure that any conflict … between state law and the First Amendment is not purely hypothetical." *Mckesson*, 141 S. Ct. at 51. We should not invalidate a statute as unconstitutional unless we can be sure what the statute means in the first place.

C

For these reasons, we respectfully request that the Indiana Supreme Court exercise its discretion to answer the following certified question:

> Does the Indiana Election Code—in particular, §§ 3-9-2-3 to -6—prohibit or otherwise limit corporate contributions to PACs or other entities that engage in independent campaign-related expenditures?

Nothing in this opinion should be construed to limit the Indiana Supreme Court's inquiry, and we welcome the Justices reformulating the question to suit their review.

The question is CERTIFIED. All further proceedings in this Court are STAYED while the Indiana Supreme Court considers this matter.