13-3889-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NEW YORK PROGRESS AND PROTECTION PAC,

Plaintiff-Appellant,

—against—

(*caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

TODD GEREMIA
JONES DAY
222 East 41st Street
New York, New York 10017
(212) 326-3939

MICHAEL A. CARVIN
LOUIS K. FISHER
WARREN POSTMAN
JONES DAY
51 Louisiana Avenue N.W.
Washington, DC 20001
(202) 879-3939

MICHAEL E. ROSMAN
CENTER FOR INDIVIDUAL RIGHTS
1233 20th Street N.W., Suite 300
Washington, DC 20036
(202) 833-8400

Attorneys for Plaintiff-Appellant
New York Progress and
Protection PAC

JAMES A. WALSH, in his official capacity as Co-Chair of the New York State Board of Elections; DOUGLAS A. KELLNER, in his official capacity as Co-Chair of the New York State Board of Elections; EVELYN J. AQUILA, in her official capacity as Commissioner of the New York State Board of Elections; and GREGORY P. PETERSON, in his official capacity as Commissioner of the New York State Board of Elections; THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK; FREDERIC M. UMANE, in his official capacity as President of the Board of Elections in the City of New York; GREGORY C. SOUMAS, in his official capacity as Secretary of the Board of Elections in the City of New York; JOSE MIGUEL ARAUJO, in his official capacity as Commissioner of the Board of Elections in the City of New York; NAOMI BARRERA, in her official capacity as Commissioner of the Board of Elections in the City of New York; JULIE DENT, in her official capacity as Commissioner of the Board of Elections in the City of New York; MARIA R. GUASTELLA, in her official capacity as Commissioner of the Board of Elections in the City of New York; MICHAEL MICHEL, in his official capacity as Commissioner of the Board of Elections in the City of New York; SIMON SHAMOUN, in his official capacity as Commissioner of the Board of Elections in the City of New York; J.P. SIPP, in his official capacity as Commissioner of the Board of Elections in the City of New York,

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant New York Progress and Protection PAC ("NYPPP") states that it is an independent political action committee registered as a political organization under Section 527 of the Internal Revenue Code and a "Type 9" "unauthorized political committee" under New York law. NYPPP has no parent corporation, and no publicly-held corporation holds any stock in it.

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JURISDICTIONAL STATEMENT

The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331, because the complaint asserted only claims under the United States Constitution.

This Court has appellate jurisdiction over the district court's October 17, 2013, order denying a preliminary injunction under 28 U.S.C. § 1292(a)(1). A-256. Appellant filed a timely notice of appeal on October 17, 2013. A-278; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

This appeal involves a First Amendment challenge to a New York election law that unjustifiably curbs core political speech by capping the annual, aggregate amount of money an individual can donate to independent political committees that advocate for or against the election of candidates for public office. These committees are "independent" because none of the expenditures they make go to, or are otherwise coordinated with, any candidate's campaign. For that reason, the Supreme Court has held that restrictions on independent expenditures would not serve the government's interest in preventing corruption or the appearance thereof. Nevertheless, even though the Supreme Court has made clear that restrictions on *expenditures* by independent committees serve no legitimate government purpose, Appellees insist—quite illogically—that New York's restrictions on *contributions*

to independent committees do serve a legitimate purpose. Although this argument had been roundly rejected by every one of the 27 federal judges to have considered it, the district court nevertheless denied Appellant's motion for a preliminarily injunction with no analysis of the merits on the theory that vindicating Appellant's First Amendment rights would not serve the public interest. The issues on appeal are twofold:

1. Whether the district court erred as a matter of law in denying a preliminary injunction without addressing whether Appellant was likely to succeed on the merits of its First Amendment claim.

2. Whether restrictions on contributions to independent committees that neither contribute to nor coordinate with any particular candidate violate the First and Fourteenth Amendments to the United States Constitution.

3. Whether, in light of the district court's erroneous failure to address the merits, the court abused its discretion in holding that Appellant failed to satisfy the remaining factors for preliminary injunctive relief.

STATEMENT OF THE CASE

Plaintiff-Appellant New York Progress and Protection PAC ("NYPPP") is a political committee formed to advocate for conservative candidates in New York elections. NYPPP would like to run political advertisements in support of the Republican candidate for Mayor of New York City, Joe Lhota, and has solicited

funds to support this advocacy. NYPPP has never coordinated any political expenditure with Mr. Lhota, his campaign, or any other political candidate and will not engage in any such coordination in the future. As an "unauthorized political committee" under New York law, NYPPP is prohibited from coordinating with a candidate in any way. *See* N.Y. Elec. Law §§ 14-112, 14-100(9)(3), 14-104(1), 14-126(5). An individual donor, Shaun McCutcheon, has informed NYPPP that he would like to make a donation of at least $200,000 to help pay for NYPPP's advocacy in support of Mr. Lhota.

NYPPP's advocacy and Mr. McCutcheon's support for that advocacy, both of which are completely independent of Mr. Lhota's campaign, are core political expression entitled to full protection under the First and Fourteenth Amendments. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (the uninhibited discussion "of public issues and debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution"). Yet New York law prohibits Mr. McCutcheon, on pain of civil and criminal penalties, from making any donation to NYPPP that exceeds $150,000 and prohibits NYPPP from accepting it. *See* N.Y. Elec. Law §§ 14-114(8), 14-126. Because this prohibition has the purpose and effect of impairing NYPPP's ability to participate in the political debate over who should be New York City's next mayor, it is a blatant violation of NYPPP's First Amendment rights.

For that reason, NYPPP sued state and city election officials, as well as the Board of Elections in the City of New York,[1] to enjoin enforcement of N.Y. Elec. Law §§ 14-114(8) and 14-126(2). The suit was filed on September 25, 2013, approximately two weeks after the Republican primary on September 10. A-4. In light of the impending November 5 mayoral election, NYPPP filed a motion for preliminary injunction the day after filing its complaint. A-5. Without injunctive relief, NYPPP will suffer imminent and irreparable harm, not only because the impairment of its First Amendment rights is irreparable as a matter of law, but also because no remedy could possibly restore NYPPP's constitutional right to participate fully in the election once the election is over. Given the urgency, the district court, Judge Paul A. Crotty presiding, ordered expedited briefing and set oral argument for October 8. A-6.

On October 17, the district court denied NYPPP's motion for preliminary injunction. *See* A-269 ("Op."). In so doing, it dismissed the unanimous judgment of every other court that has addressed this issue, all of which have held that limits

[1] Defendant-Appellees include James A. Walsh, Co-Chair of the New York State Board of Elections ("NYSBOE"); Douglas A. Kellner, Co-Chair of the NYSBOE; Evelyn J. Aquila, Commissioner of the NYSBOE; Gregory P. Peterson, Commissioner of the NYSBOE; The Board of Elections in the City of New York ("BOECNY"); Frederic M. Umane, President of the BOECNY; Gregory C. Soumas, Secretary of the BOECNY; Jose Miguel Araujo, Commissioner of the BOECNY; Naomi Barrera, Commissioner of the BOECNY; Julie Dent, Commissioner of the BOECNY; Maria R. Guastella, Commissioner of the BOACNY; Michael Michel, Commissioner of the BOECNY; Simon Shamoun, Commissioner of the BOECNY; and J.P. Sipp, Commissioner of the BOECNY.

on contributions to political committees that are independent of any candidate or campaign are unconstitutional, reasoning that "[m]ost of these cases . . . did not arise in the context of a motion for preliminary injunction." *See* Op. at 6. The district court then concluded that a preliminary injunction was not warranted because preventing a violation of Appellant's First Amendment rights would not further the public interest. Because of these errors and the urgency of the relief that it seeks, NYPPP promptly filed this appeal within hours of the district court's decision.

STATEMENT OF FACTS

A. NYPPP And Its Donors

NYPPP is a political action committee organized to conduct political advocacy in favor of conservative candidates in New York elections, primarily in the form of video, radio, and print advertising. A-10 ¶¶ 3, 5. NYPPP was formed by Craig Engle, an experienced political operative with connections to numerous large donors. *Id.* ¶ 5-6. Mr. Engle formed NYPPP in part because he understands that Mr. Lhota has less name recognition and fewer campaign funds than his Democratic opponent and wanted to help make up for that disparity. *Id.* ¶ 5.

NYPPP is a "political committee" under the broad definition set forth in N.Y. Elec. Law § 14-100(1). NYPPP has submitted a statement with the New York Board of Elections identifying itself as a "Type 9," "unauthorized political

committee" and identifying Joe Lhota as a candidate it will support. A-11 ¶ 13. Under New York law, an unauthorized political committee may engage only in independent expenditures—that is, expenditures that are neither made to nor in coordination with any candidate—*see* N.Y. Elec. Law §§ 14-112, 14-100(9)(3), 14-104(1), and may not accept contributions from individual donors that exceed $150,000 per year, *id.* §§ 14-114(8), 14-126. An "authorized" committee may coordinate its activities with a candidate or campaign, but because contributions to an authorized committee are deemed to be contributions to the candidate, they are subject to the lower cap on contributions to a single candidate. *See* §§ 14-100(9), 14-114(1) & (4). Thus, while New York law allows larger donations to unauthorized committees because their advocacy is independent of any candidate's campaign, authorized committees are subject to much tighter donation limits because these committees are seen as extensions of a candidate's campaign.

As required by New York law, NYPPP does not coordinate, and will not coordinate, any of its fundraising efforts or its independent expenditures with any political candidate, campaign, or party. A-11 ¶¶ 12, 17. Nor has any political candidate, campaign, or party authorized NYPPP to act on its behalf or authorized, requested, suggested, fostered, or cooperated with NYPPP in any way related to NYPPP's solicitation, acceptance, or use of any funds. *Id.* ¶ 17. NYPPP does not, and will not, use any portion of the funds it raises for contributions to any political

candidate, campaign, or party, or their agents or authorized political committees, or any organization or entity controlled by or coordinating with the aforementioned persons or committees. *Id.* ¶ 12. Mr. Engle makes all decisions for NYPPP concerning the solicitation, acceptance, and use of funds independent of any political candidate, campaign, party, or their authorized committees. *Id.* ¶ 11.

Mr. McCutcheon is a longtime supporter of the Republican Party who would like to support Mr. Lhota's candidacy for Mayor. A-14 ¶¶ 3, 5. As an Alabama resident who owns an electrical engineering company that operates in the Southeast, Mr. McCutcheon has no direct pecuniary interest in the New York mayoral race. *Id.* ¶ 9. Rather, his interest in the race is purely ideological. Mr. McCutcheon believes in limited government, lower taxes, and aggressive crime prevention, and frequently supports Republican campaigns throughout the United States because he believes that, over time, a strong Republican Party at the local level helps develop strong Republican leadership and better policies at the national level. *Id.* ¶¶ 3, 4. Mr. McCutcheon became interested in contributing to NYPPP after Mr. Lhota won the Republican primary because, like Mr. Engle, he understands that Mr. Lhota has less name recognition and campaign funds than his rival, and would like to even the playing field. *Id.* ¶ 5. Mr. McCutcheon does not have the time or the expertise to supervise directly the production and distribution of political advertisements. *Id.* ¶ 6.

Mr. McCutcheon has committed to NYPPP that, if allowed by New York law, he would donate at least $200,000 to NYPPP. *Id.* ¶ 7. Moreover, based on his extensive experience and contacts, Mr. Engle is confident that numerous other donors would contribute more than $150,000 to NYPPP if allowed to do so under New York law. A-11 ¶ 21. However, donors cannot make these donations, and Mr. Engle cannot accept them, so long as New York's contribution cap remains in effect.

B. New York's Cap On Contributions

New York law prohibits any individual from making "contributions" in excess of $150,000 in connection with the nomination or election of candidates in any one calendar year. N.Y. Elec. Law § 14-114(8). A violation of this limit is a misdemeanor. *Id.* § 14-126(4). Likewise, a "political committee" such as NYPPP is prohibited from accepting contributions from individuals that exceed the applicable $150,000 annual aggregate limit for that individual. *Id.* §§ 14-114(8), 14-126.[2] If found to have accepted such a donation, a political committee must

[2] Although N.Y. Elec. Law § 14-114(8) imposes a $150,000 limit on any individual contributions to NYPPP, Appellees claimed in the district court that independent expenditure committees like NYPPP are subject to § 14-114(1)(b), which imposes a cap of $41,100 on contributions to committees. That claim is baffling, since § 14-114(1)(b) applies only to committees "working directly or indirectly with any candidate to aid or participate in such candidate's nomination or election," *i.e.*, coordinated committees. Thus, according to Appellees, New York limits Mr. McCutcheon's contribution to roughly 20% of what he wishes to give ($41,100, rather than at least $200,000). But Appellees' interpretation ignores

return the donation and is subject to a civil penalty "equal to the excess amount plus a fine of up to ten thousand dollars." *Id.* § 14-126(2). Moreover, a committee that "accepts or aids or participates in the acceptance of" such a donation commits a misdemeanor. *Id.* § 14-126(4). Appellees are authorized to investigate suspected violations of the New York State Election Law, including through the issuance of subpoenas, and to refer suspected violations for prosecution. *Id.* § 3-104. The New York State Board of Elections ("NYSBOE") routinely enforces violations of its campaign finance restrictions. According to a recent report, the Board has obtained judgments against more than 4,000 entities for violations since 2007.[3]

The term "contribution" is defined generally to include any payment of money made in connection with an election. *Id.* § 14-100(9). Neither the term "contribution" nor the $150,000 aggregate contribution limit applies to "direct expenditures by persons acting independently of the candidate or his or her committee."[4] On the other hand, payments "to independent committees" are not

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the statute's plain language and, in any event, would be unconstitutional for all of the reasons that invalidate New York's actual cap of $150,000.

[3] *See* Casey Seiler, *Panel: Pay Up or Assets Get Frozen: Board of Elections Gets Serious About Scofflaw Committees*, Timesunion.com (Sept. 18, 2012). *available at* http://www.timesunion.com/local/article/Panel-Pay-up-or-assets-get-frozen-4826121.php.

[4] NYSBOE 1994 Opinion No. 3 (Apr. 25, 1994), *available at* http://www.elections.ny.gov/NYSBOE/download/law/Opinions07292013.pdf. Activity is "independent" under this exception if "the candidate or his agents or

excepted from the definition of "contributions" and thus "are limited by the limits imposed under § 14-114 of the Election Law." NYSBOE 1994 Opinion No. 3 (Apr. 25, 1994).

C. The District Court's Decision

On October 17, the district court denied Appellant's motion for a preliminary injunction. Remarkably, the court in no way disagreed with Appellant's argument that it would ultimately prevail on the merits of its First Amendment claim, but instead brushed aside the overwhelming and unanimous authority showing Appellant's clear likelihood of success because "[m]ost of these cases. . . did not arise in the context of a motion for preliminary injunction." Op. at 6. Thus, the court denied Appellant relief *even on the assumption that its First Amendment rights are being violated*, because it reasoned that remedying this violation so close to an election would undermine the public interest. As addressed further below, each of the court's arguments for this conclusion is fundamentally flawed.

SUMMARY OF THE ARGUMENT

I. The District Court Fundamentally Erred In Failing To Reach the Merits.

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authorized political committees did not authorize, request, suggest, foster or cooperate" in the activity. N.Y. Elec. Law § 14-100(9).

In a First Amendment case, the availability of a preliminary injunction turns fundamentally on the likelihood of success on the merits. That is because, if the plaintiff is likely to succeed on the merits, the remaining factors affecting the availability of a preliminary injunction follow virtually automatically. "'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). And no public interest can possibly be served "in the enforcement of an unconstitutional law." *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) (internal quotation marks and citation omitted), *aff'd*, 542 U.S. 656 (2004). In short, because "the likelihood of success on the merits is the linchpin of the preliminary injunction analysis" in the First Amendment context, it is "incumbent upon the district court to engage with the merits before moving on to the remaining prongs of its analysis." *Sindicato Puertorriqueno De Trabajadores, Seiu Local 1996 v. Fortuno*, 699 F.3d 1, 10-11 (1st Cir. 2012). These principles are supported by a legion of cases in all federal circuits. *See infra* at 23-24.

In denying Appellant's motion for a preliminary injunction, the district court entirely ignored these principles. The district court did not dispute that Appellant was likely—indeed certain—to prevail on the merits, but simply concluded that the public interest in avoiding confusion precluded a preliminary injunction, even on

the assumption that Appellant's First Amendment rights are being violated. As the authorities above show, that is plainly wrong—continued enforcement of an unconstitutional law, even for a moment, causes irreparable harm, and is never consistent with the public interest. For this reason alone, the district court fundamentally erred, its discussion of the remaining factors governing a preliminary injunction is irrelevant, and the denial of Appellant's request for a preliminary injunction should be reversed.

The above principles are even more clearly dispositive, and the district court's error was even more grave, given that Appellant's success on the merits in this case is not only likely, but virtually certain, and that there is no plausible basis to conclude that a preliminary injunction would cause confusion or disruption.

II. NYPPP's First Amendment claim is likely to succeed on the merits.

A. The Supreme Court has drawn an important constitutional distinction between, on one hand, money that is given to or spent in coordination with candidates and, on the other hand, so-called "independent expenditures"—that is, money that is not given to or spent in coordination with candidates. Contributions to independent expenditure committees, like independent expenditures made directly, are distinguishable from contributions to candidates and their campaigns. Thus, restrictions on contributions to independent expenditure committees should

be subject to strict scrutiny and, in all events, fail any level of scrutiny because they serve no cognizable government interest.

Contributions to independent expenditure committees are like independent expenditures because the purpose of such contributions is not to associate with the independent expenditure committee, but to fund speech with a specific message. That is precisely what Mr. McCutcheon intends to do with his donation to NYPPP. His goal is not to associate with NYPPP but instead to fund advocacy for Mr. Lhota's election.

Furthermore, because contributions to (and expenditures by) independent committees are independent of any candidate, there is no cognizable risk that such contributions will result in actual or apparent quid pro quo corruption. The Supreme Court has held that any risk of gratitude or other forms of influence is an insufficient basis for restricting independent expenditures. And, in any case, contributions to an independent expenditure committee certainly create no greater risk than the independent expenditures themselves. Since it is settled that Appellees cannot restrict NYPPP's or Mr. McCutcheon's independent expenditures, it necessarily follows that Appellees cannot restrict Mr. McCutcheon's donations to NYPPP. For that reason, all courts—indeed, all 27 judges—to have previously addressed the issue have held that contributions to

independent expenditure committees like NYPPP cannot be restricted. *See infra* at 23-24.

B. Even if contributions to independent expenditure committees somehow created a risk of corruption or undue influence, the cap imposed by New York would still violate the First Amendment because it is overbroad. Its blanket ban on large contributions applies even where, as here, corruption and undue influence are particularly unlikely.

III. The remaining preliminary injunction factors also support NYPPP's entitlement to relief.

A. As described above, because New York's cap on contributions clearly violates the First Amendment, NYPPP should prevail on the other preliminary injunction factors virtually automatically. In all events, however, the remaining factors governing the issuance of a preliminary injunction—the effect of a preliminary injunction on Appellees and the public interest—also tip decisively in NYPPP's favor. Appellees cannot possibly show that they will be harmed by a preliminary injunction because, as a matter of both law and fact, Mr. McCutcheon's donation creates no meaningful chance of quid pro quo corruption. Nor will the State be harmed simply because a preliminary injunction would allow NYPPP to contribute additional speech to the public debate. Under the First Amendment, more political speech is never an injury. By the same token, no

public interest can possibly be served "in the enforcement of an unconstitutional law." *Am. Civil Liberties Union*, 322 F.3d at 247.

B. Unable to prevail on the merits, Appellees raised several arguments in the district court for why the court should not exercise its discretion to issue a preliminary injunction. Each argument is wrong as a matter of law and fact.

First, contrary to Appellees' position throughout this litigation, a $150,000 cap on contributions does indeed harm NYPPP by impairing its ability to raise money that it can use to communicate to the public. Although Appellees might believe that $150,000 is enough, it is the speaker, not the government, who determines how much speech is necessary. *See Buckley*, 424 U.S. at 57. Underscoring its failure to even consider the merits, the district court did not dispute that Appellant will suffer irreparable harm.

Second, an injunction that eliminated New York's contribution cap would not disrupt or otherwise undermine the honesty and fairness of the election. Everyone who wants to give larger donations may now do so. And for those who do not, the injunction will have no effect. At bottom, all independent expenditure committees will operate under the same rules with or without an injunction.

Third, neither Appellees nor the district court have identified any relevant discovery that could justify denying Appellant's request relief. Appellees overreach by arguing that the contribution cap should remain in place, at least until

Appellees can conduct discovery, because NYPPP might misuse its unlimited contributions by coordinating its future expenditures with Mr. Lhota. The government cannot prohibit presumptively protected speech based solely on rank speculation that such speech may become unprotected in the future. Although speech can be penalized after the fact, it cannot be prohibited before the fact on mere suspicion that it might be illegal. The district court rightfully did not suggest that Appellees' requested discovery would be warranted, but suggested no alternative discovery that would be relevant other than discovery into the legally irrelevant question of whether NYPPP's independent expenditures might support only one candidate.

Fourth, contrary to the assertions of Appellees and the district court, NYPPP did not delay invoking its rights. NYPPP had no reason to bring suit until Mr. Lhota won the Republican primary. Not until then did NYPPP even exist or know who the Republican and Democratic candidates would be.

ARGUMENT

I. APPLICABLE STANDARDS.

A preliminary injunction should issue where a plaintiff can show (1) "either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation"; (2) "irreparable harm"; (3) "a balance of the hardships tipping decidedly in favor of the moving

party"; and (4) a preliminary injunction would be "in the public interest." *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011) (internal quotation marks omitted).[5]

This Court reviews "a district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011). "An abuse of discretion occurs if the district court (1) based its ruling on an erroneous view of the law, (2) made a clearly erroneous assessment of the evidence, or (3) rendered a decision that cannot be located within the range of permissible decisions." *Id.* (internal quotation marks omitted). "Under abuse of discretion review, the factual findings and legal conclusions underlying the district court's decision are evaluated under the clearly erroneous and *de novo* standards, respectively." *Id.* (internal quotation marks omitted).

For the following reasons, the district court's denial of NYPPP's motion for preliminary injunction is legally erroneous and therefore an abuse of discretion.

[5] Because NYPPP is clearly entitled to prevail on the merits, it is not particularly important whether NYPPP is required to show a "likelihood of success on the merits" or is instead required—as Appellees argued below—to show a "clear or substantial" likelihood of success. However, the higher standard does not apply since "a prohibitory preliminary injunction staying 'government action'" like that requested here, need only be based on "a likelihood" of success. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006).

II. THE DISTRICT COURT COMMITTED REVERSIBLE LEGAL ERROR BY FAILING TO ADDRESS LIKELIHOOD OF SUCCESS OF THE MERITS.

The district court failed to even address the merits of Plaintiffs' First Amendment challenge and instead ruled that the public interest in avoiding confusion precluded a preliminary injunction, *even assuming that Appellant's First Amendment rights are violated*. This is plain error. The public interest can never justify continued enforcement of an unconstitutional law. Indeed, a legion of cases hold that establishing a First Amendment violation essentially satisfies the remaining factors for a preliminary injunction, and that denying an injunction in these circumstances would be an abuse of discretion. *See, e.g.*, *Int'l Dairy Foods Assn. v. Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996) (finding that a plaintiff's right to a preliminary injunction follows directly from a showing of a likely violation of First Amendment rights); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) ("[I]n First Amendment cases, the likelihood of success on the merits will often be the determinative factor." (internal quotation marks and citation omitted)).[6] Since

[6] *See also Child Evangelism Fellowship of Minnesota v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1004 (8th Cir. 2012) ("The likely First Amendment violation further means that the public interest and the balance of harms . . . favor granting the injunction."); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 888 (6th Cir. 2000) ("In cases involving the First Amendment, the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits."); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002); *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012); *ACLU v. Ashcroft*, 322 F.3d

likelihood of success on the merits is the virtually dispositive factor in whether a preliminary injunction should issue in a First Amendment case, the district court plainly erred by deciding this question without resolving this critical issue, particularly because resolving all of the three non-merits factors *depends upon* whether a First Amendment violation is likely. Because "the likelihood of success on the merits is the linchpin of the preliminary injunction analysis" in the First Amendment context, it is "incumbent upon the district court to engage with the merits before moving on to the remaining prongs of its analysis." *Sindicato Puertorriqueno De Trabajadores*, 699 F.3d at 10-11.

This principle is even more clearly dispositive, and the district court's failure to observe it is even more clearly erroneous, given that Appellant's success on the merits in this case is not only likely, but virtually certain. Indeed, Appellant's certain success on the merits is so clear that district court could not even articulate a basis for avoiding *Citizens United* or disagreeing with the unanimous 27 judges who have held that contribution caps like the one in this case are a First Amendment violation. Instead, the district court simply ignored the overwhelming and unanimous authority showing Appellant's clear likelihood of success because "[m]ost of these cases. . . did not arise in the context of a motion for preliminary

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240, 251 n.11 (3d Cir. 2003); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006).

injunction." Op. at 6. But that is a *non-sequitur* at best. When a court assesses whether a plaintiff is likely to succeed on merits, it must ask *precisely* whether the plaintiff will succeed *outside* "the context of a motion for preliminary injunction." Moreover, if everyone agrees that Appellant will *conclusively* establish its success on the merits at the permanent injunction stage, it follows *a fortiori* that Appellant has established a *likelihood* of success.

For this reason alone, the district court fundamentally erred, its discussion of the remaining factors governing a preliminary injunction is irrelevant, and the denial of Appellant's request for a preliminary injunction should be reversed. In any event, each of the district court's arguments regarding the remaining preliminary injunction factors is also fundamentally flawed.

III. NYPPP CLEARLY PREVAILS ON THE MERITS.

A. Like Independent Expenditures, Contributions To Fund Independent Expenditures Differ From Contributions To Candidates And Cannot Be Restricted.

1. There is a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *FEC v. Nat'l Conservative PAC (NCPAC)*, 470 U.S. 480, 497 (1985). Where a State limits "the amount that any one person or group may contribute *to a candidate or political committee*," it must show that the restriction is "closely drawn" to address a

"sufficiently important interest." *Buckley*, 424 U.S. at 21, 25 (emphasis added). Specifically, a restriction on this type of campaign financing may serve the interest of preventing actual or apparent *quid pro quo* corruption, since there is a cognizable risk that such contributions are payment for political favors. *Id.* at 26-27.

On the other hand, a State's restrictions on independent expenditures are subject to strict scrutiny, requiring that the restriction be narrowly tailored to further a compelling state interest. *See Buckley*, 424 U.S. at 44-45; *Citizens United v. Federal Election Commission*, 558 U.S. 310, 340 (2010). In all events, such restrictions fail to survive *any* level of scrutiny because they serve *no* cognizable interest.

"[P]reventing actual or apparent *quid pro quo* corruption is the *only* interest the Supreme Court has recognized as sufficient to justify campaign-finance restrictions." *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 153 (7th Cir. 2011) (emphasis in original). "Ingratiation and access . . . are not corruption." *Citizens United*, 558 U.S. at 360. Therefore, ingratiation and access are not "undue" influence, and their prevention is not a valid justification under the First Amendment for restricting campaign finance activity. *See id.* at 359 ("Reliance on a 'generic favoritism or influence theory is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting

principle.'" (quoting *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 96 (2003) (opinion of Kennedy J.))).

Furthermore, the Supreme Court has repeatedly and categorically held that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" because, "[b]y definition," independent expenditures are "political speech presented to the electorate that is not coordinated with a candidate." *Citizens United*, 558 U.S. at 357, 360. The "'absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.'" *Id.* at 345 (quoting *Buckley*, 424 U.S. at 47). Accordingly, independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. *Id.* at 357; *see also Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826-27 (2011) ("The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in . . . *quid pro quo* corruption.").

Because independent expenditures do not give rise to the only concern that can justify campaign finance restrictions, any restrictions on such expenditures are unconstitutional.

2. Contributions *to fund independent expenditures*, like the independent expenditures themselves, cannot be restricted under either strict scrutiny applied to direct independent expenditures or "closely drawn" heightened scrutiny applied to contributions. A donor pays money to an independent expenditure committee in order to fund speech that is independent of candidates. Such a payment, therefore, is no different than a "direct" independent expenditure where the donor himself purchases media advertisements or other forms of political speech (and does not coordinate in any way with the candidate or his campaign). The role of an intermediary in the transaction, such as a media buyer or political consultant, does not make a difference. Nor is any difference made by the role of an independent expenditure committee, which essentially is just a mechanism for converting donors' money into the independent political speech that they desire. The fundamental character of the transaction remains the same: The donor is spending his money to fund political speech that is independent of the candidate, his campaign, and his political party.

Thus, every single one of the 27 federal judges to have addressed the issue in the wake of *Citizens United*—including a unanimous *en banc* panel of the D.C. Circuit—has invalidated any limits on contributions to independent expenditure committees. *See Texans for Free Enterprise v. Texas Ethics Commission*, No. 13-50014, slip op. (5th Cir. Oct. 16, 2013) (A-270); *SpeechNow.org v. FEC*, 599 F.3d

686, 694-96 (D.C. Cir. 2010) (en banc); *Wis. Right to Life State Political Action Comm.*, 664 F.3d at 154; *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 292-93 (2008); *Vermont Right to Life Committee, Inc. v. Sorrell*, 875 F. Supp. 2d 376, 403-404 (D. Vt. 2012); *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1042-43 (D. Haw. 2012); *Lair v. Murry*, 871 F. Supp. 2d 1058, 1068 (D. Mont. 2012); *Personal PAC v. McGuffage*, 858 F. Supp. 2d 963, 968-69 (N.D. Ill. 2012); *Republican Party of N.M. v. King*, 850 F. Supp. 2d 1206, 1215 (D.N.M. 2012); *Texans for Free Enterprise v. Tex. Ethics Comm'n*, No. A-12-CA-0845-LY, slip op. at 10-11 (W.D. Tex. Dec. 6, 2012) (A-188); *Stay the Course W. Va. v. Tennant*, No. 1:12-cv-01658, 2012 WL 3263623, *6 (S.D. W. Va. Aug. 9, 2012). *Cf. Fund for Jobs, Growth, & Security v. New Jersey Election Law Enforcement Commission*, No. 3:13-CV-02177-MAS-LHG (D.N.J. July 11, 2013) (A-202) (consent order permanently enjoining the New Jersey Election Law Enforcement Commission from enforcing New Jersey's contribution limits so long as expenditures are not coordinated with candidates or political party committees).

a. As a threshold matter, the rationale for giving slightly lessened scrutiny to restrictions on money given to candidates (or those who coordinate with candidates) does not apply to money given for independent expenditures.

Contributions to candidates are subject to a different level of scrutiny for two related reasons. First, a contribution to a candidate "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Buckley*, 424 U.S. at 21. Second, "[a] limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication, for it . . . does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.*

Neither rationale for a lower standard of scrutiny applies to limits on contributions *to an independent expenditure committee*. The purpose of a contribution to an independent expenditure committee, like an independent expenditure itself, is not to associate with a candidate or to offer a general expression of support. Nor is a contribution to an independent expenditure committee made for the purpose of associating with the independent expenditure committee. Rather, the purpose of such a contribution is to fund speech with a specific message. That is precisely the purpose of Mr. McCutcheon's intended donation to the NYPPP. It is facially absurd to suggest, as Appellees did below, that the purpose of Mr. McCutcheon's speech is to associate with NYPPP, rather than to fund advocacy for Mr. Lhota's election.

Nor, in many cases, would a prospective donor have a meaningful alternative avenue for engaging in speech about an election outside of contributing to an independent expenditure committee. Many donors, like Mr. McCutcheon, lack the time and ability to produce political advocacy themselves and therefore rely instead on donations to like-minded political advocacy groups who will help convey the donor's message most effectively. *See Buckley*, 424 U.S. at 15 (noting that "effective advocacy of both public and private points of view" is "undeniably enhanced by group association" (internal quotation marks and citation omitted)). Restricting contributions to independent expenditure committees therefore strikes at the very heart of the rationale for protecting independent expenditures in the first place—to avoid "necessarily reduc[ing] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19.[7]

[7] Contrary to Appellees' argument below, nothing in *Buckley*'s reasoning turned on the fact that certain spending was labeled a "contribution" under federal law. Indeed, the very independent expenditures at issue in Buckley likely fell within the statutory definition of "contributions." *See* 2 U.S.C. § 431(8)(A). When *Buckley* and its progeny have applied a different standard to restrictions on campaign "contributions," they have uniformly been referring to contributions that are coordinated, directly or indirectly, with candidates or their parties, and they have been drawing a distinction between election spending that is coordinated with a campaign and election spending that is not. *See, e.g.*, *Buckley*, 424 U.S. at 23-38 (upholding limits on contributions by individuals and political committees to candidates as well as an aggregate limit on contributions "to political committees likely to contribute to that candidate, or . . . to the candidate's political party"); *Ognibene v. Parkes*, 671 F.3d 174, 183-84 (2d Cir. 2011) (noting that "the

b. Also, like restrictions on independent expenditures themselves, restrictions on contributions for independent expenditures serve no cognizable interest at all. They prevent neither the "appearance of corruption" nor "undue influence." Accordingly, "[n]o matter which standard of review governs . . . , the limits on contributions to [independent expenditure committees] cannot stand." *SpeechNow.org*, 599 F.3d at 696.

Because independent expenditures raise no cognizable concerns about appearance of corruption and undue influence, *see supra*, the same concerns are equally invalid as grounds for restricting independent expenditures indirectly, through limits on contributions to independent expenditure committees. There is no legitimate reason to restrict Mr. McCutcheon's contributions to NYPPP when the law leaves him perfectly free to bypass NYPPP and instead spend that money directly on advocacy supporting Mr. Lhota. Similarly, there is no legitimate reason to prevent NYPPP from making independent expenditures with $200,000 received from one donor when the law leaves it perfectly free to make the same

(continued…)

Supreme Court preserved the distinction between expenditures and contributions" in *Citizens United* because the plaintiff "ha[d] not made direct contributions to candidates, and it ha[d] not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny" (quoting *Citizens United*, 558 U.S. at 358)); *SpeechNow.org*, 599 F.3d at 695 ("[A]s *Citizens United* emphasized, the limits upheld in *Buckley* were limits on contributions made directly to candidates." (emphasis in original)).

expenditures with $200,000 received from two donors.[8] Mr. McCutcheon's contributions to NYPPP certainly pose no *greater* threat to the government's interests than do the independent expenditures themselves—whether made by Mr. McCutcheon directly or by NYPPP using his contribution.

Again, the role of an independent expenditure committee as an intermediary between the donor and the independent expenditure is irrelevant. Nobody suggests any concern that a donor will have a *quid pro quo* arrangement with, or some other "undue influence" over, *the independent expenditure committee*. The committee itself is not a candidate (or affiliated with one) and thus will never have an opportunity to perform the public duties that could theoretically be "unduly influenced."

As to the candidate, *contributions for* independent expenditures are even less problematic than the expenditures themselves. Independent expenditures cannot be restricted because "separation between candidates and [donors] negates the possibility that independent expenditures will result in . . . *quid pro quo*

[8] Notwithstanding the absence of *legal* obstacles to these alternatives for Mr. McCutcheon and NYPPP, the challenged law severely restricts their speech. Mr. McCutcheon does not have the time or experience to make independent expenditures directly, and therefore contributions to groups such as NYPPP are his only practical means to effectively disseminate his political viewpoint. A-14 ¶ 6. And even if NYPPP could raise $200,000 from two donors contributing $100,000 each, it obviously would be able to raise *more* money from the same number of donors—allowing it to engage in *more* speech—without the $150,000 limit. The legal availability of these alternatives demonstrates that the State has no valid interest in the restrictions that the law imposes.

corruption" or undue influence, *Arizona Free Enterprise Club*, 131 S. Ct. at 2826-27, and the presence of a *separate* political committee as an intermediary only further "negates the possibility."

Moreover, any potential for "gratitude" or similar "influence" is no *smaller* when a person directly makes independent expenditures in support of a candidate than when the person donates to a committee that makes the same independent expenditures. In both cases, any gratitude or other influence arises from the fact that the donor is spending his money to support independent advocacy for the candidate's election. Since it is only the actual or anticipated expenditure that can potentially give rise to gratitude or influence, Appellees' purported interest is furthered only if it reduces independent expenditures.

It therefore is dispositive that restrictions on independent expenditures cannot be justified by an interest in preventing gratitude or similar influence. Rather, the notion that a State may limit political speech because candidates may be too grateful to the speaker is the very argument rejected in *Buckley* and *Citizens United*. *See Citizens United*, 558 U.S. at 359 ("The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."). Because contributions to independent expenditure committees present no greater possibility of gratitude or similar influence, they likewise cannot be restricted. The district court's denial of relief arises not from any principled

distinction between independent expenditures and donations to independent expenditure committees, but rather from the district court's disagreement with the Supreme Court's clear holdings that any potential for influence is an insufficient basis for restricting independent expenditures. *See* A-241, Oct. 8, 2013 Prelim. Inj. Hearing, at 37:3-7 (stating that the Supreme Court's reasoning "may be convincing to the Supreme Court" but "most Americans looking at this, they don't recognize th[e] distinction" between the type of influence arising from candidate contributions and the type of influence arising from independent expenditures).

The controlling force of *Citizens United* is confirmed by the unanimity of judges across the country in holding that limits on contributions to independent expenditure committees are unconstitutional. *See supra* at 23-24. Contrary to Appellees' argument below, this Court's decision in *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011), which upheld limits on contributions to *candidates* and their campaigns, is in full accord with these uniform decisions. *Ognibene* makes crystal clear that the decision turned on the connection between the donor and the candidate:

> While *independent* corporate campaign expenditures may influence a candidate, or facilitate access that non-speakers may not enjoy, *Citizens United* emphasized the right to speech and its independence from the candidate. *Direct giving to the candidate,* or the candidate's campaign committee*, stands on a different footing*. Since neither candidate nor contributor is likely to announce a *quid pro quo*, the appearance of corruption has always been an accepted justification for [] campaign contribution limitations.

671 F.3d at 187 (emphasis added). As this Court further explained, political speech itself could not be limited due to "mere influence or access," because "we presume that legislators are influenced by the ideological views of their constituents"; however, "[i]t is entirely different to seek to influence a *legislator with money* in the hope of receiving a *contract*; such influence is de facto improper and corrupting." *Id.* at 187 n.14 (emphasis added). *Ognibene* thus adopts, rather than departs from, the rationale employed by the other courts that have addressed this issue: a State may reduce the flow of *money* directly to a *candidate* for fear that the money could be perceived as creating "undue" or "*corrupting*" influence, *id.* at 186 (emphasis in original), but it may not reduce the flow of *speech* to the public for fear that it could make a candidate grateful.[9]

In short, because limits on contributions to independent expenditure committees do not advance any cognizable government interest, New York's ban

[9] The only other argument—that the cap will prevent wealthy interests from buying political influence by drowning out all other voices in the electoral process—is dead on arrival. *See Citizens United*, 558 U.S. at 349-50 ("'[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.'") (quoting *Buckley*, 424 U.S. at 48-49). In any event, it is implausible, to say the least, that a pro-Republican independent expenditure committee could prevent the far more well-funded and well-known Democratic candidate from delivering his message to the City's overwhelmingly Democratic voters.

on contributions above $150,000 to independent expenditure committees cannot survive First Amendment scrutiny.

B. New York's Cap On Contributions To Independent Expenditure Committees Is Not Closely Drawn, Let Alone Narrowly Tailored.

Section 14-114(8) violates the First Amendment for an additional and independent reason: even assuming that contributions to fund independent expenditures could create a risk of corruption or undue influence in some cases, the blanket ban imposed by § 14-114(8) would still be dramatically overbroad.

Under § 14-114(8), large contributions are banned in numerous situations in which *quid pro quo* corruption is particularly implausible. Mr. McCutcheon's desired donation to NYPPP illustrates that overbreadth. It is difficult to fathom, after all, how his contribution could possibly create a *quid pro quo* exchange with, or otherwise have undue influence on, Mr. Lhota when Mr. McCutcheon has never even met Mr. Lhota and has no pecuniary interest in any policy that Mr. Lhota could affect. Yet New York has made no effort to craft more tailored restrictions that address more specifically its supposed interest in preventing corruption or undue influence. Accordingly, § 14-114(8) is not closely drawn, let alone narrowly tailored.

IV. THE REMAINING FACTORS PROVIDE NO BASIS TO DENY A PRELIMINARY INJUNCTION.

A. Because NYPPP Prevails On The Merits, It Automatically Prevails On The Remaining Preliminary Injunction Factors As Well.

As described above, given the obvious unconstitutionality of New York's contributions cap, NYPPP satisfies the remaining factors for a preliminary injunction automatically. *See supra* at 18-20.

1. Absent A Preliminary Injunction, NYPPP Will Suffer Immediate And Irreparable Harm.

By denying NYPPP the ability to solicit and accept funds that it would use for political speech, Appellees are preventing NYPPP from engaging in political advocacy during the 2013 New York mayoral election. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981) ("Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression."). That is a quintessential form of irreparable harm. "'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). While the right to participate in the political process is always present, it gains importance during an election, when "the ability of the citizenry to make informed choices among candidates for office" is most essential, "for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley*, 424 U.S. at

14-15; *see also Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) ("The harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics and a delay of even a day or two may be intolerable." (internal quotation marks and citation omitted)). With the New York Mayor's election rapidly approaching, any delay in NYPPP's ability to disseminate its message is an irreparable infringement of its First Amendment rights, as well as an irreparable harm to the political process.

By the same token, NYPPP's constitutional injury could not be compensated with post-election relief or after-the-fact money damages. Absent a preliminary injunction, NYPPP will have been deprived of its right to urge New Yorkers to vote for Mr. Lhota in the 2013 mayoral election. And once the mayoral election is over, the opportunity to influence the 2013 election can never be restored. As this Court has held, there simply is "no means to make up for the irretrievable loss of that which would have been expressed." *414 Theater Corp. v. Murphy*, 499 F.2d 1155, 1160 (2d Cir. 1974).

2. A Preliminary Injunction Will Not Harm Appellees Or The Public Interest.

As an initial matter, the State "does not have an interest in the enforcement of an unconstitutional law." *Am. Civil Liberties Union*, 322 F.3d at 247 (internal quotation marks and citation omitted). Rather, the public interest "always strongly favors the vindication of constitutional rights and the invalidation of any state

action which infringes on those rights or chills their confident and unfettered exercise." *Michigan Chamber of Commerce v. Land*, 725 F. Supp. 2d 665, 698 (W.D. Mich. 2010); *see also Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (explaining that "enforcement of an unconstitutional law is always contrary to the public interest"); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) (per curiam) ("[T]he public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression.").

Even if a preliminary injunction were issued but later vacated on the merits, neither Appellees nor the public would suffer any actual harm. As discussed above, just as independent expenditures create no risk or appearance of corruption or undue influence, neither would contributions to pay for independent expenditures create any such a risk. *See supra* at 23-32. That is particularly true in this case as Mr. McCutcheon has no pecuniary interest in New York City policies and has never even met Mr. Lhota.

Nor can Appellees claim that they or the public would be harmed simply by the additional speech that would result if NYPPP were allowed to accept additional contributions. The citizens of New York City would not be injured by the presence of additional political advocacy providing more information from more viewpoints. "[T]he concept that government may restrict the speech of some

elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources." *Buckley*, 424 U.S. at 48-49. Moreover, even if Appellees could have an interest in suppressing NYPPP's speech to "enhance the relative voice of others"—which it does not—there is simply no basis to believe that such suppression is necessary here to prevent Mr. McCutcheon and NYPPP from drowning out the supporters of Mr. Lhota's well-funded and well-known opponent. In short, there is no basis to believe Appellees or the public will be harmed in any way from allowing Mr. McCutcheon and NYPPP to engage in additional political speech.

B. The District Court's and Appellees' Grounds For Denying An Injunction Do Not Withstand Scrutiny.

Appellees argued below that a preliminary injunction is not warranted even if NYPPP is likely to prevail on the merits. Appellees offered the following four arguments for perpetuating New York's unconstitutional cap on contributions to NYPPP during the short time remaining before the election, precisely when election speech matters the most. *First*, NYPPP's founder might coordinate future political speech with Mr. Lhota, thereby subjecting himself to severe criminal sanctions by committing perjury about NYPPP's purpose. *Second*, NYPPP has failed to "show" that the amount of unconstitutionally limited speech allowed by New York is not "enough." *Third*, NYPPP should have formed an organization to

support Mr. Lhota's general election efforts and brought a court challenge to New York's limits on such organizations *before* Mr. Lhota was a general election candidate. *Finally*, vindicating NYPPP's right to speak will disrupt the alleged expectations of similar independent organizations to have their speech so limited, thus providing NYPPP an unfair advantage over these other, newly-liberated independent expenditure committees. The district court rightfully did not rely on the first two of these, but relied in part on the latter two. These arguments are erroneous as a matter of law and wrong as a matter of fact and the district court's decision to deny NYPPP's motion for preliminary injunction is an abuse of discretion.

1. New York's Contribution Limits Impair NYPPP's Ability To Engage In Political Speech.

Even though it is undisputed that the contribution cap reduces NYPPP's funds, Appellees have nevertheless contended throughout this litigation that NYPPP is not injured because a $150,000 limit is sufficient to raise the money necessary to engage in effective advocacy. But it is self-evident that every dollar NYPPP does not have for speech reduces the speech it can purchase in New York. *See Buckley*, 424 U.S. at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression."). To the extent Appellees believe that they,

rather than the speaker, determine how much speech is "effective," their argument was squarely rejected by *Buckley*. *Id.* at 57.

Appellees also *must* agree that contribution limits reduce "effective advocacy," because New York's limit would not otherwise reduce NYPPP's alleged undue influence. If additional contributions would not allow NYPPP to ingratiate itself with Mr. Lhota by effectively advocating his election, New York has no interest in stopping them.

Remarkably, and consistent with its fundamental failure to consider the merits, the district court also failed to even dispute the NYPPP will be irreparably injured absent a preliminary injunction. Op. at 12. Instead, it held that the clear and irreparable violation of NYPPP's First Amendment rights was outweighed by the public interest in avoiding confusion and disruption in advance of the election. As described above, that is fundamental legal error, and as explained below, no confusion or disruption will occur in any event.

2. Eliminating New York's Contribution Limits Will Not Cause Disruption, Confusion, Or Otherwise Undermine The Honesty And Fairness Of The Election.

The district court's primary basis for refusing to vindicate Appellant's First Amendment rights was the conclusion that doing so would not further the public interest, because it would cause confusion and disruption in close proximity to an election. Op. at 7-13. But, contrary to the arguments of Appellees and the district

court, there is nothing confusing, disruptive, or unfair about striking down an unconstitutional restriction on speech, particularly one as clear as the provision challenged in this case.

The district court invoked the principle that "[a] court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." Op. at 7 (quoting *Reynolds v. Sims*, 377 U.S. 553, 585 (1964)). But, *Reynolds* was a case about last-minute changes to *voting districts*. Obviously a court should take account of the risk that voters will be confused about where to go to exercise their fundamental right to vote.

An injunction eliminating a restriction on speech, by contrast, will not deprive anyone of their right to vote, their right to speak, or anything else. The wealthy donors who are capable of providing more than $150,000 will surely be apprised that they can now give more by the independent expenditure committees to whom they had previously "maxed out." And if this (implausibly) does not occur, they are in the same situation they were in prior to any injunction. If Appellees choose to revise their prior guidance on contribution caps, such enhanced information about constitutional rights is a *positive* development. And, of course, Appellees' prior briefings *should have* flagged the fact that all laws

analogous to New York's cap had been struck down by all courts to reach the merits.

For the same reason, the district court's conclusion that other political committees have detrimentally "relied on the existing aggregate limit in their planning and therefore will be irreparably disadvantaged," (Op. at 9) does not withstand scrutiny. If, once freed from the unconstitutional restraint imposed by New York law, other political committees are unable to raise additional funds, they are not *harmed*; they are in the same position they occupied before a preliminary injunction. And if political committees are able to raise additional funds, they of course benefit. An injunction will not adversely affect *anyone* or disrupt anyone's expectations. For those independent expenditure committees and donors satisfied with the $150,000 cap, the injunction will have *no* effect. And for those desirous of larger contributions, it will be welcome news.

Moreover, there is simply no basis for the suggestions of Appellees and the district court that enforcing the First Amendment will somehow favor NYPPP over other independent expenditure committees. Despite asserting that additional contributions would not allow NYPPP to enhance the effectiveness of its speech, *see infra* at 37-38, Appellees also argued—with no apparent sense of irony—that such contributions would produce an avalanche of political speech by NYPPP that would disrupt and otherwise undermine the honesty and fairness of the election.

Likewise, the district court also found "troubling" "the distinct possibility that an injunction would amplify NYPPP's voice over the voices of other political committees." Op. at 11. But political committees will operate under the same rules with or without an injunction specifically mentioning the particular committees, since parties "may assume it is substantially likely that the President and other executive . . . officials would abide by an authoritative interpretation of [a] statute and constitutional provision by the District Court." *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). If there were any doubt in this regard, the district court can and should eliminate it by enjoining enforcement by Appellees of this unconstitutional law against *anyone*. Finally, there is no reason to believe that NYPPP has some special ability to obtain donations at this time. In fact, the well-funded committees that have already solicited maximum contributions from their donors are in a far better position to re-contact their existing, wealthy donors than is a brand-new start-up like NYPPP.

3. No Discovery Is Warranted That Could Justify Depriving NYPPP Of Its Right To Engage In Protected Speech Now.

Appellees insisted in the district court that, even if the contribution cap violates the First Amendment, it should remain in place because it is "plausible" that NYPPP will *misuse* the contributions by coordinating its future *expenditures* with Mr. Lhota. Based on this rank speculation, Appellees claimed to be entitled to "discovery" concerning the plausibility of this future felony. The district court

correctly rejected this hypothetical future coordination as a basis for authorizing discovery, but then pointed an even more meritless reason for such discovery.

Appellees' argument fundamentally misconceives the respective roles of the speaker and the government under the First Amendment. The government cannot engage in "prior restraints" of protected speech (uncoordinated contributions) based on *speculation* that the speech will be unlawfully converted into unprotected speech (coordinated spending). Because "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand," *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975), a prior restraint is "the most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Neither a court nor, as here, a legislature can prospectively enjoin all people from engaging in political speech because a few people may exceed the constitutionally-protected sphere. That is why the government cannot deny licenses for a peaceful assembly based on speculation that it may descend into regulable "fighting words." *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Nor could the government ban donations to Islamic organizations until it had "discovery" into whether the funds might support terrorism.

Likewise, Appellees obviously could not ban Mr. McCutcheon from engaging in his own independent expenditures until they have advance "discovery"

into whether he will coordinate with Mr. Lhota. Yet his coordination is just as "[im]plausible" as NYPPP's. Under the First Amendment, the government may only limit speech *after* it has met *its* daunting burden of showing that the protected speech is somehow unprotected. And that can only happen after the speech has occurred. *See Ognibene*, 671 F.3d at 183 (emphasizing that "mere conjecture" is an insufficient basis to restrict speech); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) ("[T]he burden is on the government to show the existence of [a compelling] interest.").

Appellees have already had all the "discovery" into NYPPP's speech that the Constitution permits. They have required NYPPP to register as an independent expenditure committee, and they have conditioned its freedom to speak on keeping its speech separate from candidates and their committees. *See* A-10 ¶¶ 3, 5. Moreover, because of this lawsuit, Appellees have *more* information on NYPPP than other independent expenditure committees. NYPPP has submitted a sworn affidavit that it has not coordinated, and will not coordinate in any way, with any candidate. And although Appellees asserted below that "[e]valuating coordination is a highly factual inquiry" and that NYPPP relies on a "bare bones" affidavit, every factor suggested by Appellees is already addressed in Mr. Engle's declaration. *See id.* ¶ 9 (no direct or indirect communication between NYPPP and any candidate or staff regarding a campaign or election); A-11 ¶ 11 (Mr. Engle is

sole individual involved in running NYPPP); *id.* ¶ 12 (no funds used or will be used for contributions or coordinated expenditures); *id.* ¶ 14 (maintains separate accounts from any other organization). NYPPP has done all it can possibly do to prove a negative, and has clearly distinguished its suit from cases that involved obvious reasons to infer coordination. *See, e.g.*, *Vermont Right to Life Comm. v. Sorrell*, 875 F. Supp. 2d 376, 409 (D. Vt. 2012) (concluding that plaintiff was not sufficiently independent because it had co-mingled funds with a non-independent committee, but suggesting that it might have been independent had it kept separate accounts).

Accordingly, the State cannot prospectively deny NYPPP's constitutionally-protected speech on the theory that NYPPP must convince government officials (including those in the judiciary) that it will not misuse the contributions to which it is constitutionally entitled. As Judge D'Agostino recently concluded in denying a similar request for discovery by Appellees in another case:

> [T]he Supreme Court has repeatedly admonished against extensive discovery in election law cases. *See Fed. Elec. Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007). Further, most of the information that Defendants seek is entirely irrelevant to the present matter . . . [and] is more appropriately sought in an enforcement action if a complaint is ever lodged against Plaintiffs . . . .

A-186, *The Hispanic Leadership Fund, Inc. v. Walsh,* Civ. No. 12-1337, slip op. at 23 (N.D.N.Y. Sept. 26, 2013).

The district court rightfully did not rely on Appellees claim that discovery was needed to investigate the possibility of a future crime by NYPPP. However, the it nonetheless denied a preliminary injunction in part because "[d]evelopment of a factual record may be necessary." Op. at 9. But Appellees have not served any requests for or otherwise suggested any relevant discovery, and the Court did not identify any either. The only conceivable basis for discovery posited by the district court was that "development of the factual record could demonstrate that so-called independent expenditure only committees that have only one purpose—advancing a single candidacy at a single point in time—are not truly independent as a matter of law." Op. at 12. Yet the suggestion that independent expenditures pertaining to only one candidate can somehow be deemed not independent "as a matter of law" is so squarely foreclosed by binding precedent that not even Appellees made this argument. *See, e.g.*, *Citizens United*, 558 U.S. at 357, 360 (invalidating restriction on independent expenditures targeting single candidate). Thus, there is simply no relevant discovery to be had, let alone discovery that could justify the continued denial of Appellant's First Amendment rights.

4. NYPPP Did Not Delay The Filing Of This Lawsuit.

The district court also faulted NYPPP for "attempt[ing] to create an artificial urgency" by waiting until after the primary election to file this suit. Op. at 12. But NYPPP did not sit on its rights. NYPPP had no reason to bring this suit until Mr.

Lhota won the Republican primary. Before then, NYPPP did not even exist and could not have known who the Republican nominee would be or whether he would need outside support, unlike one of the candidates, Mr. Catsimatidis, who is wealthy. Nor could NYPPP have known who the Democratic opponent would be or the degree to which conservative donors would oppose him.

Thus, if it had sued prior to the primary election, it would not have satisfied the injury requirements set forth in the Northern District's recent decision denying a preliminary injunction in similar circumstances. *See* A-110, A-129, *The Hispanic Leadership Fund, Inc. v. Walsh*, No. Civ. No. 12-1337, slip op. at 7, 26 (N.D.N.Y. Oct. 23, 2012); *see also* A-158-59, Mem. of Law of Defs. in Opp'n to Pls.' Mot. for Prelim. Inj., *The Hispanic Leadership Fund, Inc. v. N.Y. State Bd. of Elections*, Civ. No. 12-1337, 20-21 (N.D.N.Y. Sept. 10, 2012) (memorandum of NYSBOE members arguing that plaintiffs failed to show injury when they alleged that they "want to 'contribute to the political debate in New York'" but "fail[ed] to advise the Court how, when, or where they intend[ed] to speak, or what they plan[ned] to say"). There, the court denied a preliminary injunction concerning the law at issue here principally because the plaintiffs failed to identify the candidate they wished to support or "individuals ready to make such contributions that would trigger the challenged provisions." A-110, A-129. Before the primary election, NYPPP's injury was not "certainly impending," *Clapper v. Amnesty*

Intern. USA, 133 S. Ct. 1138, 1143 (2013), because it was far from certain that a Republican candidate needing support would win.

In contrast to the plaintiffs in *HLF*, NYPPP identified the specific candidate, election, and opponent that would be the focus of its speech, and brought this suit less than two weeks after it learned that information. NYPPP's suit could not be barred by laches the moment it became ripe. That is particularly true in the election context:

> It is well known that the public [and hence donors] begin[] to concentrate on elections only in the weeks immediately before they are held. . . . The need or relevance of the speech will often first be apparent at this stage in the campaign. . . . A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit.

Citizens United, 558 U.S. at 334.

The district court blithely asserted that Mr. Engle should have "expected [Mr. Lhota] to win" the primary, formed NYPPP, and brought suit before the primary. Op. at 12. But there is no basis for the Court's suggestion that it could have or would have found standing for NYPPP based on its own prediction about who would win a closely contested primary election.[10] Similarly, the district court

[10] Thus, the relevant point is that NYPPP could not have *known* who the Republican nominee (or the Democrat nominee) would be until the primaries actually occurred, regardless of any predictions about the outcomes. The language quoted by the District Court regarding NYPPP's belief as to who would win the primary was an inadvertent error in a letter seeking an expedited briefing schedule.

noted that "New York has experienced four elections since *Citizens United*" and asserted that Mr. Engle could therefore have formed NYPPP and "the lawsuit could have been brought at any time." Op. at 13. But the idea that Mr. Engle lost his First Amendment right to support Mr. Lhota because he did not want to support *other* candidates (in different elections for different offices) is simply absurd. The First Amendment gives Mr. Engle and NYPPP, not Appellees or the district court, the right to decide which candidates they wish to support.[11]

CONCLUSION

The district court's decision denying NYPPP's motion for preliminary injunction is an abuse of discretion and should be reversed.

(continued…)

That letter was sent by outside counsel on an emergency basis. Since the language relating to which candidate might prevail and why was neither approved by the client's representative nor contained any client representations to the District Court, it cannot—contrary to the District Court's assertion—bear on any assessment of the accuracy of the declaration submitted by NYPPP.

[11] The district court also suggested that NYPPP's consent to Appellees' request for an extension to file their answer somehow demonstrates a lack of urgency. Op. at 14. But this simply reflects the obvious fact—understood by all—that the district court was not going to issue a *permanent* injunction until after the election. That hardly shows that a *preliminary* injunction is not urgently needed; indeed, the time needed for a permanent injunction is the very reason NYPPP needs a preliminary injunction.

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New York, New York

Respectfully submitted,

Todd R. Geremia
JONES DAY
222 East 41st St.
New York, NY 10017
(212) 326-3939

Michael A. Carvin
Louis K. Fisher
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001
(202) 879-3939

Michael E. Rosman
General Counsel
Center for Individual Rights
1233 20th St. N.W., Suite 300
Washington, DC 20036
(202) 833-8400

Attorneys for Plaintiff–Appellant New York Progress and Protection PAC

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29. It contains 11,448 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type.

Todd R. Geremia

Dated: October 17, 2013

CERTIFICATE OF SERVICE

I, Todd R. Geremia, hereby certify that on October 17, 2013, I caused a true copy of the foregoing BRIEF FOR PLAINTIFF-APPELLANT to be served by overnight mail and email to the following lead counsel of record for Defendant-Appellee,

Richard P. Dearing
Deputy Solicitor General
New York State Office of the Attorney General
Division of Appeals & Opinions
120 Broadway
New York, New York 10271
Tel: (212) 416-6274
Email: Richard.Dearing@ag.ny.gov

Michael A. Cardozo
Corporation Counsel of the City of New York
Stephen E. Kitzinger
100 Church St., Room 2-126
New York, New York 10007
Tel: (212) 356-2087
Email: skitzing@law.nyc.gov

Todd R. Geremia

Dated: October 17, 2013