13-3889-cv

United States Court of Appeals for the Second Circuit

NEW YORK PROGRESS AND PROTECTION PAC,

Plaintiff-Appellant,

v.

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 a 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; NAMOI 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,

OFFICE OF NEW YORK STATE ATTORNEY GENERAL ERIC T. SCHNEIDERMAN,

Intervenor.

On Appeal from the United States District Court
for the Southern District of New York

SUPPLEMENTAL BRIEF FOR STATE DEFENDANTS AND ATTORNEY GENERAL ERIC. T. SCHNEIDERMAN

RICHARD P. DEARING
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Dated: October 18, 2013

PRELIMINARY STATEMENT

The district court's well-reasoned opinion amply demonstrates the soundness of the court's exercise of discretion to deny NYPPP's request for a preliminary injunction that would grant it and its contributors a special exemption from New York's longstanding statutory aggregate contribution limit for the purpose of the rapidly approaching November 5 general election. In response to NYPPP's brief on appeal, filed yesterday evening, we rely primarily on the lower court's opinion and our briefing and argument in the court below. We also submit the following supplemental points to answer certain arguments first made in NYPPP's brief on appeal or in its reply brief before the district court.

ARGUMENT

A. The District Court Had Ample Discretion To Deny The Preliminary Injunction Based on Serious Harm to the Public Interest, Without Addressing Likelihood of Success.

NYPPP argues (App't Br. at 18) that it was "plain error" for the district court to decline to enter a preliminary injunction based on its finding that serious harm to the public interest would result from entering such an injunction so close in time to the election, without determining whether NYPPP has a likelihood of success on the merits

of its underlying claims. But clear Supreme Court authority confirms that a court possesses discretion to deny a preliminary injunction based on the harm such an injunction would cause to the public interest, even assumed that plaintiff would likely succeed on the merits, and indeed even where the merits have already been decided in plaintiff's favor. NYPPP is therefore simply wrong to assert that the district court abused its broad equitable discretion (App't Br. at 11-12, 18-20) in determining that "the magnitude of the harm to the public from an unpredictable and unjust election process" far exceeded any potential hardship to NYPPP and "alone" required denial of injunctive relief. *New York Progress & Protection PAC v. Walsh* (hereinafter "Op."), No. 13-cv-6769, at 14 (S.D.N.Y. Oct. 17, 2013).

NYPPP overlooks the basic tenet that a "preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008); *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 154 (2d Cir. 2010). Entry of any injunction is always "a matter of equitable discretion," and therefore "does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32; The Supreme Court has unequivocally stated that "a federal judge

sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). To the contrary, in exercising its sound discretion, the court "in each case" must "balance the competing claims of injury," *Winter*, 555 U.S. at 24, and "pay particular regard for the public consequences" from the extraordinary remedy of an injunction, *Romero-Barcelo*, 456 U.S. at 312. These principles apply even more powerfully when, as here, the merits have not yet been adjudicated, and no Second Circuit decision to date has addressed the underlying question presented.

In *Winter*, the Supreme Court held that the district court abused its discretion by *granting* an injunction where the harm to the public interest greatly outweighed the harm to the plaintiffs. The Court explicitly so ruled based on the "balance of equities and the public interest," without "address[ing] the underlying merits of plaintiffs' claims." 555 U.S. at 26, 31. The Court moreover said that entry of the injunction was improper "even if plaintiffs are correct on the underlying merits." *Id.* at 31 n.5. *See also Foley v. State Elections Enforcement Comm'n*, No. 10-cv-1091, 2010 WL 2836722, at *3 (D. Conn. July 16,

2010) ("Even if the plaintiffs demonstrate irreparable harm and a likelihood of success on the merits . . . preliminary injunctive relief may still be withheld if equity so requires"). NYPPP is thus flatly incorrect in suggesting that it is reversible error to deny an injunction without determining whether the plaintiff has a likelihood of success.

NYPPP is also incorrect in asserting (App't Br. at 18) that the analysis is categorically different because NYPPP brings a First Amendment challenge, and that for this reason the district court lacked discretion to deny the preliminary injunction. NYPPP sought an exemption from a long-standing election law only weeks before voters go to the polls and the relief sought would cause serious disruption and unfairness in the electoral process. The only Second Circuit case that NYPPP cites, *International Dairy Foods Association v. Amestoy*, does not stand, as NYPPP suggests, for the principle that "a plaintiff's right to a preliminary injunction follows directly from a showing of a likely violation of First Amendment rights." App't Br. at 18 (citing *Int'l Dairy Foods Ass'n*, 92 F.3d 67, 73 (2d Cir. 1996)). That case held, unremarkably, that a preliminary injunction should be granted as to a milk labeling statute that compelled certain speech, where the plaintiff

established a likelihood of success of the merits and irreparable harm, and the State identified no real harm to the public that the statute guarded against. *Id.* The case did not involve the integrity of the electoral process, and it did not remotely hold that serious harm to the public interest can never be a sufficient ground to warrant denial of a preliminary injunction in the First Amendment context.

Moreover, the Supreme Court has stressed that the public interest weighs heavily in the equitable balance in election cases, including when vitally important constitutional principles are at stake. In *Reynolds v. Sims*, which addressed claims raising the core constitutional principle of one person-one vote, the Supreme Court stated that when "an impending election is imminent" and the State's "election machinery is already in progress," "equitable considerations" may justify a court's denial of injunctive relief, even where the electoral scheme has already been "found invalid." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *see also Foley*, 2010 WL 2836722, at *2-5 (denying preliminary injunction in First Amendment case because of disruption to election and unfairness to electoral participants even when the law had been "found . . . unconstitutional").

Because a court possesses discretion to reject equitable relief as contrary to the public interest when the plaintiff's merits claim has *already* succeeded, it also follows that a likelihood of success on the merits cannot disable the court from denying an injunction based on harm to the public interest "in the extraordinary context of an election in progress." *McComish v. Brewer*, No. 08-CV-1550, 2008 WL 4629337, at *12 (D. Ariz. Oct. 17, 2008) (denying preliminary injunction, though the plaintiff established a "high likelihood of success on the merits" and irreparable harm). The district court properly exercised its broad discretion here in concluding that the "chaos," "confusion," "uncertainty," and unfairness that would result from upending long-standing campaign finance laws at the eleventh hour set the balance of equities decidedly against NYPPP. Op. at 8, 10-11. Numerous courts have denied preliminary injunctions as to campaign finance laws in close proximity to elections based on precisely such concerns. *See Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010); *Hispanic Leadership Fund, Inc. v. Walsh*, No. 12-cv-1337, Dkt. No. 1337, at 22-29 (A. 125-32); *Foley*, 2010 WL 2836722, at *5-6; *Worley v. Roberts*, 749 F. Supp. 2d 1321, 1325 (N.D. Fla. 2010); *Conservative Party of N.Y. State*

v. N.Y. State Bd. of Elections, No. 10-cv-6923, 2010 U.S. Dist. LEXIS 114155, at *6-7 (S.D.N.Y. Oct. 15, 2010); *McComish*, 2008 WL 4629337, at *10-12; *see also Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012) (granting stay of permanent injunction). NYPPP has never addressed these cases, and its brief on appeal again fails to do so.

Instead, NYPPP cites several out-of-circuit cases that do not involve elections or campaign finance laws (App't Br. at 18 & n.6),[1] most of which simply hold that irreparable harm may be presumed in First Amendment cases challenging direct restrictions on speech or religious exercise. This Court has made clear, however, that irreparable harm is presumed in First Amendment cases only when the challenged law

[1] *See Hobby Lobby Stores, Inc. v. Sebelius*, 303 F.3d 507 (4th Cir. 2013) (law requiring businesses to provide contraceptive coverage in their health care plans); *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (law criminalizing eavesdropping); *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996 (8th Cir. 2012) (restriction on religious group's receipt of school district services); *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012) (law banning state courts from considering Sharia [Islamic] law); *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2011) (law regulating Internet pornography); *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (public university's decision to revoke student organization status of religious group); *Giovanni Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002) (restrictions on nude dancing); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000) (licensing of nude dancing clubs).

"directly limits speech." *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 331 F.3d 342, 349 (2d Cir. 2003). The Supreme Court in *Buckley v. Valeo* held that contribution limits, unlike direct limits on expenditures for advocacy, create only "marginal" restrictions on expression. *Buckley v. Valeo*, 424 U.S. 1, 20 (1976). As a result, unlike direct restrictions on speech, New York's $150,000 aggregate contribution limit does not irreparably harm NYPPP unless the limit is deemed so low as to prevent NYPPP "from amassing the resources necessary for effective advocacy." *Id.* at 21. As we explained below, NYPPP has not and cannot make this requisite showing for establishing irreparable harm. In any event, the court denied the preliminary injunction not for lack of irreparable harm to plaintiffs, but because any such harm is outweighed by the fact that granting the preliminary injunction would cause serious disruption to the electoral process and grave harm to the public interest.

The sole election case on which NYPPP relies is the First Circuit's decision in *Sindicato Puertorriqueno De Trabajadores, Seui Local 1996 v. Fortuno*, 699 F.3d 1 (1st Cir. 2012). *See* App't Br. at 11, 19. But that case presented facts far different from those here. Among other things,

(1) the plaintiffs there sought a preliminary injunction a full four months before the election, and only seven months after the law in question was passed; (2) the district court declined to rule on the preliminary injunction request despite "months of procedural wrangling, including two writs of mandamus"; and (3) the government never offered *any* defense of the statute on the merits. *Sindicato Puertorriqueno*, 699 F.3d at 4-6, 13. Here, by contrast, NYPPP filed suit less than six weeks before the election; the district court expedited briefing and oral argument, and promptly issued a well-reasoned and thorough opinion denying the preliminary injunction; and defendants presented a substantial defense on the merits in the short time afforded for briefing.

Nor does *Sindicato Puertorriqueno* support NYPPP's remarkable suggestion that its contentions regarding success on the merits entitle it to a preliminary injunction "virtually automatically" (App't Br. at 11), irrespective of its unreasonable delay in filing suit or the "magnitude of the harm to the public from an unpredictable and unjust election process," Op. at 14. To the contrary, the court in *Sindicato Puertorriqueno* considered the question of public harm and determined

that enjoining a law that had been in place for only "seven-and-a-half months" would not cause much disruption. *Sindicato Puertorriqueno*, 699 F.3d at 16. The First Circuit explicitly contrasted such circumstances with facts like those presented here, where upending a law "in place for more than a decade" immediately before an election would cause "significant and chaotic" disruption to the election process and "alter[] rules that candidates and the public had rightfully relied upon for years." *Id.*

At bottom, the notion that NYPPP is entitled to a preliminary injunction here as "a matter of right," without regard to the public interest, is contrary to "several hundred years of history." *Romero-Barcelo*, 456 U.S. at 312-13. And the argument has no limiting principle: under NYPPP's reasoning, even if it delayed until one week or one day before the election, the district court could not exercise its equitable discretion to deny an injunction if NYPPP had a likelihood of success on the merits, regardless of the degree of disruption and unfairness that such an order would cause. That is not the law.

B. NYPPP Provides No Basis To Overturn the District Court's Factual Finding That a Preliminary Injunction Would Seriously Harm the Public Interest in a Fair and Predictable Election Process.

NYPPP identifies no basis to overturn the district court's "find[ing] that a preliminary injunction would seriously undermine the public's interest in a fair and predictable election process." Op. at 12. The court found that a grant of preliminary relief to NYPPP so close to the election would (1) upset settled expectations that had informed others' past decisions, which could not easily be undone; and (2) lead to serious and continuing confusion and unfairness in the short time remaining before the election for other political committees and contributors that lack the protection of a preliminary injunction. *Id.* at 10-12.

First, the district court reasonably concluded that granting NYPPP a preliminary injunction so late would have disrupted settled expectations for numerous members of the public. The court found as follows:

> "[Political candidates in primary elections across the State have already won or lost, in part, based on fundraising under the current campaign finance scheme. Furthermore, contributors may have completed their planned donations to

> political committees for this cycle and therefore may not have funds available to make last minute donations. For many donors and political committees, 'starting again is not an option.'"

Id. at 9-10 (quoting Defs.' Mem. of Law in Opp. to Pls.' Mot. for Preliminary Injunction, at 15).

NYPPP shows no error in these findings. NYPPP speculates (App't Br. at 40) that a preliminary injunction lifting the aggregate contribution cap for itself would be "welcome news" to all political committees across the State, because they would easily be able to solicit immediate additional contributions from any past contributors who were wealthy enough and willing to contribute more than $150,000. But this argument ignores the key point that primary elections have already been completed under the existing rule, with the result that many candidates are already out of contests, and their supporters already disappointed. NYPPP's argument also vastly oversimplifies the nature and diversity of past decisions that have been made on the understanding that the $150,000 aggregate limit would govern, and greatly understates the difficulties in revisiting those decisions at this late date if the rules were changed. Although NYPPP discusses only the

potential for confusing "wealthy donors" (App't Br. at 39), the reality is much more complicated.

For example, persons supporting certain candidates may have declined to form political committees at all based on the understanding that any contributors supporting the opposing candidate would be limited to $150,000 in aggregate contributions. Other persons may have declined to contribute to their favored candidate, his or her party, or supportive political committees based on a similar understanding. These persons likely could not be effectively mobilized at this point. NYPPP does not attempt to address these situations or the many other similar situations, though its organizer Engle has acknowledged that persons considering whether to form or contribute to political committees take into account whether the candidate they support is likely to be outspent without their help. *See* A. 10 (Engle asserting that he formed NYPPP in part because Lhota would be outspent by his Democratic opponent); A. 54 (counsel representing that Engle intended to support Lhota in the general election, but would not have supported primary challenger John Catsimatidis, because Lhota was likely to be

outspent by a democratic opponent, but Catsimatidis, who is independently wealthy, would not have been).

Second, the district court further reasonably found that granting relief to NYPPP would have led to confusion "over whether an injunction would apply to other political committees," Op. at 10, and accordingly was troubled by "the distinct possibility that an injunction would amplify NYPPP's voice over the voices of other political committees," *id.* at 11. This is not a class action, and NYPPP's complaint requests a preliminary injunction that specifically bars enforcement of New York's aggregate contribution limit "against individual donors to Plaintiff NYPPP and/or against Plaintiff NYPPP." Compl. at 16 (A. 31). NYPPP even argues that particular facts it has alleged here—such as that putative contributor Shaun McCutcheon "has never met Mr. Lhota and has no pecuniary interest in any policy that Mr. Lhota could affect"—bear on its constitutional claim. App't Br. at 32. The district court correctly found that granting preliminary relief to NYPPP would leave other political committees to act at their own risk as to whether they could safely accept contributions over New York's $150,000 aggregate limit before the November 5 election.

The district court cited Supreme Court authority for the proposition that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinance *except with respect to the particular federal plaintiffs*." Op. at 10 (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (emphasis in district court opinion). NYPPP responds with a case that is wholly inapposite, quoting the statement in *Franklin v. Massachusetts* that "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.'" App't Br. at 41 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)).

But the question addressed in *Franklin* was whether the plaintiff's injury from the allegedly unlawful reapportionment of seats in Congress between the several States was redressable for the purpose of standing, where there was serious doubt whether an injunction could appropriately be entered against the President, who was responsible for the reapportionment. The Court held that the injury was redressable, even assuming that an injunction could not issue, because the President and other high executive officials could be expected to comply with a

final declaratory judgment ruling the reapportionment to be unlawful. *See* 505 U.S. at 803.

This case is radically different from *Franklin*: it does not involve a unitary decision, like reapportionment, that is performed on a nationwide or statewide basis, but rather involves the individualized question whether a New York statute may be enforced against a particular political committee or its putative contributors for their own conduct during the two-plus weeks before the November 5 election. And this case, at this point, presents no occasion for entry of any "authoritative" ruling as to the constitutionality of New York's aggregate contribution limit. We are only at the preliminary injunction stage, and, as the district court recognized (Op. at 8-9, 14), the highly abbreviated briefing schedule and limited factual record available up to this point are inadequate to permit any definitive resolution of the serious and important constitutional question presented in the underlying action.

C. The District Court Did Not Abuse Its Discretion in Determining that NYPPP's Inexcusable Delay in Filing Suit Weighed Against Injunctive Relief

In carefully weighing the above described "hardships" to the public and electoral participants against any "hardships facing NYPPP," the district court reasonably concluded that NYPPP itself created the "artificial urgency" upon which it has based its demand for emergency relief. Op. at 12. As the court explained, NYPPP delayed for months if not years in requesting preliminary injunctive relief, even though New York's $150,000 aggregate contribution limit "is more than 30 years old" and NYPPP's challenge is "based on a four-year-old Supreme Court decision." *Id.* NYPPP provides no reason to second-guess the district court's equitable determination that NYPPP's extreme delay outweighs its claimed hardships.

NYPPP's excuse for waiting until the eve of election continues to be that it had no reason to exist or to file suit until Joseph Lhota won the Republican primary (App't Br. at 45-56). Before the district court, NYPPP represented that its delay was attributable to the fact that Lhota's primary win was an "upset":

> [A]s described in the Declaration of Craig Engle, submitted with Plaintiff's motion, Mr. Engle did not know Plaintiff's advocacy

> would be necessary until Mr. Lhota won an upset victory in the Republican Primary on September 10, 2013. Before then, Mr. Engle reasonably believed that John Catsimatidis was likely to win the primary, and that Mr. Catsimatidis, who is independently wealthy, would be able to match the spending of his Democratic opponent without the help of NYPPP.

(A. 54). The lower court rightly found that this "made-up explanation" is belied by "what actually occurred" in the primary season, during which Lhota was ahead in the polls the entire time. Op. at 13; *see also* A. 57-88. And, NYPPP's "claimed immediacy" is "even less compelling" where "the experienced political operative and his large donor" "could have initiated [this] action much sooner." *Id.*

Although NYPPP now tries to disavow its statement to the district court about the reason for the delay on the ground that it was made by "outside counsel" and did not contain "any client representations" (App't Br. 47-48 n.10), NYPPP said below that the statement was supported by the "Declaration of Craig Engle," submitted under penalties of perjury (A. 10, 54). Moreover, the representation was made by NYPPP's own counsel (A. 54-55), the same counsel who signed the brief on appeal, and the representation was not retracted when discussed at oral argument (A. 250-251), nor at any other time during proceedings before the district court. Regardless, NYPPP again claims on appeal that it could

not have filed suit until being certain about the winner of "a closely contested primary election" (App't Br. at 47), even though the primary was never close.

NYPPP's only other explanation for its belated filing is that until Lhota actually won the primary, the district court might have concluded that NYPPP could not demonstrated actual injury or ripeness. App't Br. at 46; A. 216. NYPPP provides no support for the notion that waiting until six weeks before the election to seek extraordinary preliminary relief was justified because Lhota might lose. Nor does NYPPP provide any excuse for delaying a full two weeks *after* Lhota won the primary to complete the simple acts of registering as a political committee and filing its bare-bones complaint. App't Br. at 47. In any event, NYPPP's claimed fear of the ripeness or standing doctrines is contradicted by the very cases on which NYPPP relied to bring suit.

NYPPP's own cases say that in pre-enforcement challenges, a plaintiff's "intention to engage in a course of conduct" even "arguably affected with a constitutional interest" is sufficient to establish a "credible threat" of injury. *Sindicato Puertorriqueno*, 699 F.31 at 9 (quoting *Babbitt v. United Farm Workers Nat'l. Union*, 442 U.S. 289,

298 (1979)). These same courts have held that even the indirect "chill" from a contribution limit's effect on associational speech merits "a relaxation of the ripeness requirements." *Id.*; *see also Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 148 (7th Cir. 2011). NYPPP's extreme delay in filing suit cannot be explained credibly by ripeness concerns when it has consistently relied on these to support its claims on the merits. Indeed, although NYPPP suggests that it could not have brought its challenge until it identified one specific candidate who won the primary, the court in *Sindicato Puertorriqueno* found ripeness and actual injury satisfied when the plaintiffs had yet to "create political action committees" or "identify and agree on candidates" to support. *Sindicato Puertorriqueno*, 699 F.31 at 8.

Nor does the *Hispanic Leadership* case remotely justify NYPPP's extreme delay. App't Br. at 46. Noting the "somewhat relaxed standing and ripeness rules" applicable to "pre-enforcement First Amendment claims," the court in that case recently determined that the plaintiff described a credible threat of injury by registering as an independent-expenditure-only committee and expressing its desire to accept contributions in excess of New York's aggregate limit. *Hispanic*

Leadership Fund, Inc. v. Walsh, No. 12-cv-1337, 2013 WL 5423855, at *12 (N.D.N.Y. Sept. 26, 2013). In the earlier preliminary injunction context, the *Hispanic Leadership* court expressed concern that plaintiffs had not provided "any evidence" that they might support any candidate or that they had "individuals ready to make" contributions over the limits. *Hispanic Leadership Fund v. Walsh*, Op. & Order, at 7, 26 (A. 110, 129). If NYPPP thought it had to satisfy such requirements, it should have been confident it could do so with its allegations that (1) it intends to support "conservative candidates in New York City elections" (A. 22) and (2) Engle knows "numerous individuals who regularly make large donations to support political advocacy" (A. 10).

NYPPP's reliance on *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (*see* App't Br. at 46-47), is entirely misplaced. In that case, the Supreme Court found that the plaintiffs lacked standing to challenge provisions of the Foreign Intelligence Surveillance Act (FISA) because they relied on an overly speculative chain of inferences to support their claim of impending injury. The plaintiffs' claim of impending injury in *Clapper* relied on the following inferences: (1) the government would target the communications of non-United States; (2)

the government would do so using its authority under a particular provision of FISA rather than an alternative means of surveillance; (3) the FISA court would approve that hypothetical surveillance; (4) the government would then succeed in intercepting communications; and (5) the United-States-citizen plaintiffs would be parties to those potentially intercepted communications. *Clapper*, 133 S. Ct. at 1147-48. In this case, by contrast, NYPPP did not rely on any such attenuated and speculative chain of inferences, particularly since Lhota led in the polls throughout the entire primary season.

D. NYPPP Wrongly Asserts that It Will Certainly Prevail on the Merits of Its Claims.

Though NYPPP contends that it "clearly prevails on the merits" of its constitutional claims (App't Br. at 19), NYPPP does not dispute that neither the Supreme Court nor this Court has yet addressed whether generally applicable contribution limits may constitutionally be enforced against contributions to political committees that claim to make only independent expenditures—commonly known as "Super PACs." The issue has been briefed in an appeal in this Court that was argued in March 2013 and awaits

decision. *See Vermont Right to Life Committee, Inc. v. Sorrell*, No. 12-2904-cv. The continued pendency of that appeal confirms the reasonableness of the district court's observation that the highly compressed schedule on the preliminary injunction application in this action does not afford adequate time to analyze the important and difficult constitutional question that NYPPP's underlying claim presents.[2] *See* Op. 8-9. NYPPP cites a number of out-of-circuit decisions, but this Court is entitled to give independent, reasoned consideration before deciding the question.

Our brief below sets forth our principal arguments supporting the constitutionality of New York's aggregate contribution limit, as applied to contributions to NYPPP. Here we amplify two points in response to NYPPP's merits arguments in its brief on appeal. First, NYPPP is

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[2] This Court may not reach the constitutional issue in the *Vermont Right to Life* appeal. Instead it could affirm the district court's determination that even if Vermont's $2000 limit on contributions to political committees were unconstitutional as applied to independent expenditure-only committees, the plaintiff in that case was not in fact independent. *See Vermont Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 405-08 (D. Vt. 2012). The possibility of similar facts emerging here further reinforces the correctness of the denial of the preliminary injunction.

incorrect in arguing that the basis on which the Supreme Court has held that contribution limits constitute only marginal restrictions on speech do not apply to contributions to NYPPP. Second, plaintiff ignores the fact that the Supreme Court has repeatedly upheld generally applicable contribution limits that serve prophylactic purposes and guard against the potential for circumvention of other valid restrictions. Both points strongly support the constitutionality of New York's aggregate contribution limit, as applied to contributions to NYPPP.

1. The Supreme Court Has Made Clear that Contribution Limits Constitute Only Marginal Restrictions on Speech.

The Supreme Court's campaign finance precedents distinguish sharply between limits on political contributions, which are routinely upheld, and restrictions on independent expenditures, which are frequently struck down. NYPPP fails to come to terms with this longstanding distinction between "contributions" *to* a speaker and "independent expenditures" *by* a speaker. A person does not "speak" by making contributions, except to the extent that giving money has symbolic value. Rather, "the transformation of contributions into political debate involves speech by someone other than the contributor."

Buckley, 424 U.S. at 21. Consequently, contribution limits create only "marginal speech restrictions." *FEC v. Beaumont*, 539 U.S. 146, 161 (2003); *see also Buckley*, 424 U.S. at 23 ("[E]xpenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions.")

Contrary to NYPPP's contentions, the Court's rationale for affording "relatively complaisant" constitutional review to contribution limits, *FEC v. Beaumont*, 539 U.S. 146, 161 (2003) (internal quotations omitted), does not turn on the identity of the contribution's recipient. It does not matter if the contribution is given to a candidate, to a party committee, or to a political committee that claims to make only independent expenditures. In all these cases, the contribution does not represent political debate by the contributor.

NYPPP argues that "the purpose of [a contribution to an independent expenditure only committee] is to fund speech with a specific message." (App't Br. at 24). The relevance of this assertion is unclear, but in any event it is inaccurate. In his declaration below, for example, putative NYPPP contributor Shaun McCutcheon said that he

regularly contributes to campaigns throughout the United States because he believes that "developing strong conservative leaders at the local level ultimately helps strengthen the Republican Party and produces more conservative policies at the national level." A. 14. McCutcheon thus wishes to contribute to NYPPP because he desires a particular *outcome* in the NYC mayoral contest—Joe Lhota's victory—and believes that this outcome would strengthen the Republican Party.

But it is NYPPP, and not McCutcheon, that will control the content of any message it disseminates using any contributed funds. That message may not discuss strengthening the Republican Party or conservative policies at all, and may not even mention Lhota. NYPPP could decide to spend its money on negative advertising attacking Lhota's opponent. *Buckley*'s observation that "the transformation of contributions into political debate involves speech by someone other than the contributor" applies to contributions to Super PACs, just as it does to contributions to candidates. 424 U.S. at 21.

Nor is there any merit to NYPPP's suggestion that the Supreme Court has upheld limits on contributions only when those contributions are made directly to candidates. *Buckley* upheld a federal statute

limiting aggregate contributions to both candidates and political committees to $25,000, even though "[t]he overall $ 25,000 ceiling . . . impose[d] an ultimate restriction upon the number of candidates and *committees* with which an individual may associate himself by means of financial support." 424 U.S. at 38 (emphasis added). And *McConnell v. FEC* upheld a limit on contributions to national party committees. *See* 540 U.S. 93, 145–54 (2003) (upholding ban on "soft money" contributions to national political party committees); *see also Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 195–201 (1981) (upholding limits on contributions to political committees). There is no basis for NYPPP's contention that the line of precedent consistently upholding contribution limits pertains solely to contributions to candidates.

2. NYPPP Ignores the Fundamentally Prophylactic Purpose of Contribution Limits.

NYPPP is also mistaken in arguing that contribution limits are afforded only "slightly lessened scrutiny" as compared with expenditure limits. App't Br. at 24. In practice, the difference in scrutiny is pronounced: broadly applicable contribution limits have been routinely upheld, whereas restrictions on expenditures have been routinely

struck down. Moreover, the Supreme Court has consistently sustained contribution limits that serve a prophylactic purpose, but has not done the same as to expenditure restrictions subject to strict scrutiny. In *Buckley*, for example, the Court upheld the challenged contribution limits after assuming, for the sake of argument, that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court has also held that contribution limits may be enacted to guard against circumvention of other valid limits, stressing that such circumvention is often "very hard to trace" and hard to "identify[]" and "directly combat[]." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 461 (2001). The government therefore is given latitude to enact generally applicable contribution limits to protect against the risk of corruption or the appearance of corruption.

NYPPP fails to grapple with these distinct constitutional standards applicable to contribution limits. Plaintiff simply claims that limits on contributions to committees that purport to make only independent expenditures cannot be sustained after the Supreme Court's 2010 decision in *Citizens United*. But this Court has already

made clear that *Citizens United* dealt *only* "with independent corporate expenditures, not with" contribution limits. *Ognibene v. Parkes*, 671 F.3d 174, 184 n.10 (2d Cir.), *cert. denied*, 133 S. Ct. 28 (2012). This Court has also held that "improper or undue influence" still "qualifies as a form of corruption" for the more lenient review of contribution limits, *Id.* at 186 (emphasis omitted), whereas, under *Citizens United*, only *quid pro quo* corruption is relevant in assessing the constitutionality of restrictions on expenditures. *See also FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001).

When the appropriate standards are considered, New York's contribution limit, as applied to contributions made to independent-expenditure-only committees, guards against serious risks of actual and apparent corruption—in both the *quid pro quo* and improper influence forms. By their nature, such political committees are "inextricably intertwined" with candidates, campaigns, or parties, so as raise the specter of corruption. *See McConnell v. FEC*, 540 U.S. 93, 155 (2003). Very large contributions to independent expenditure-only committees give rise to corruption or the appearance of corruption for reasons that are specific to their particular nature.

By definition, Super PACs exist for the sole purpose of political advocacy—often supporting a single candidate in a single election—making them quite different from the corporations at issue in *Citizens United*. This single political purpose means that political committees will almost always be run by political operatives with long histories of campaign involvement and close ties to candidates. Indeed, Craig Engle, the treasurer of NYPPP, is a quintessential political insider. *See* A. 10, 90-98. Such operatives are ideally positioned to channel funds into ads that aid a candidate, to advise a candidate before, after, or even during a campaign despite claiming independence, and to help candidates thank donors with favors later.

Experience with Super PACs during recent election seasons has demonstrated that there are often revolving doors between campaign staffs and single-candidate Super PACs, use of common consultants by campaigns and such Super PACs, and other indications of potential coordination. *See* Richard Briffault, *Coordination Reconsidered*, 113 Columbia L. Rev. 88, 89-91 (2013) (providing examples and observing that, "[i]n virtually all respects . . . , these single-candidate Super PACs

were alter egos for the official campaign committees of the candidates whom they existed to serve").

Substantial evidence also shows that the public already believes that unlimited contributions to independent political committees cause corruption and undue influence. *See e.g.*, Brennan Ctr. for Justice, *National Survey: Super PACs, Corruption, and Democracy* (2012) (reporting that large "majorities of Americans believe" that officials "favor the interests of those who donate" to "nominally independent" committees).[3] In light of this voter disillusionment, New York has a valid interest in capping contributions to independent committees to combat the appearance of corruption. *See id.* (stating that many voters are less likely to vote because of perceived influence of contributors to independent committee).

Thus, as the district court observed, "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."

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[3] *available at* http://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy.

Op. & Order at 9. On this basis, the court reasonably concluded that defendants "should be afforded the opportunity to develop this factual basis and this Court should be permitted to give fair consideration of such facts as may be developed, before deciding a constitutional issue of such importance." *Id.*

NYPPP's response seems to be that New York is relegated to proving coordination on a case-by-case basis in individual enforcement proceedings against specific committees (App't Br. at 44), and that New York cannot rely on a prophylactic rule to guard against the risk that political committees which are nominally independent from candidates may in fact be coordinating with candidates. But coordination is notoriously difficult for government enforcers to prove, and NYPPP's contentions ignore consistent precedent upholding generally applicable contribution limits as prophylactic measures to protect against the potential for corruption and the appearance thereof, and to prevent circumvention of other valid rules.

In addition, the aggregate contribution limit challenged by NYPPP here is orders of magnitude higher than the contribution limits that have been invalidated, as applied to independent-expenditure

committees, in the out-of-circuit decisions on which NYPPP relies. For all of these reasons, New York's generally applicable aggregate contribution limit may constitutionally be enforced against NYPPP.

Finally, NYPPP should not be given "an explicit green light . . . to circumvent" New York's statutory limit through a preliminary injunction, based solely on Engle's four-page declaration promising that NYPPP will maintain independence from Lhota's campaign if and when it ever begins to engage in advocacy. *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 406 (D. Vt. 2012). Rather, "facts are vital" to understanding whether NYPPP is truly independent. *Id.* at 405-07 (upholding contribution limit when committee lacked independence based on overlapping fund use and staff with an authorized committee). NYPPP's spare and untested factual submission regarding its independence does not entitle it to a special exemption from New York's aggregate contribution limit for the purpose of the November 5 general election, now only eighteen days away.

CONCLUSION

For the reasons stated in this brief and in our brief to the district court, this Court should uphold the district court's reasonable exercise of discretion to deny NYPPP's motion for preliminary injunctive relief.

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October 18, 2013

Respectfully submitted,

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