

13-3889-cv
New York Progress and Protection PAC v. Walsh, et al.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2013

(Argued: October 18, 2013 Decided: October 24, 2013)

Docket No. 13-3889

- - - - -x

New York Progress and Protection PAC,

Plaintiff-Appellant,

- v.-

James A. Walsh, et al.,

Defendants-Appellees.

- - - - -x

Before: JACOBS and LOHIER, Circuit Judges,
KOELTL,* District Judge.

New York Progress and Protection PAC appeals from an order entered in the United States District Court for the Southern District of New York (Crotty, J.), denying a preliminary injunction. For the following reasons, we reverse.

*Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

1 TODD R. GEREMIA, Jones Day, New
2 York, New York (Michael A.
3 Carvin, Louis K. Fisher, Warren
4 Postman, Jones Day, Washington,
5 DC, and Michael E. Rosman,
6 Center for Individual Rights,
7 Washington, DC, on the brief),
8 for Appellant.
9

10 JUDITH VALE, (Richard P.
11 Dearing, on the brief), for Eric
12 T. Schneiderman, Attorney
13 General of the State of New
14 York, for Appellees.
15

16 DENNIS JACOBS, Circuit Judge:

17 New York Progress and Protection PAC ("NYPPP"), an
18 "unauthorized political committee" formed to advocate in
19 favor of candidates in New York elections, brought suit
20 against election officials in the State and City of New
21 York, as well as the Board of Elections, to enjoin
22 enforcement of New York State Election Law §§ 14-114(8) and
23 14-126(2). Section 14-114(8) imposes a \$150,000 aggregate
24 annual limit on certain political contributions by any
25 person in New York State. Section 14-126(2) makes it a
26 misdemeanor to fail to file required statements or to
27 knowingly and willfully violate any other provision of the
28 Election Law. The effect of these provisions is to prevent
29 NYPPP from receiving more than \$150,000 from any individual
30 contributor in any calendar year. NYPPP is a political

1 committee that engages solely in independent expenditures,
2 that is, expenditures made without prearrangement or
3 coordination with a candidate. NYPPP, which has a donor
4 waiting to contribute \$200,000 to its cause, alleges that,
5 as applied to NYPPP, the cap violates its core First
6 Amendment right to advocate in favor of Joseph Lhota in the
7 upcoming New York mayoral election, and seeks declaratory
8 and injunctive relief.

9 The New York City mayoral Republican primary was held
10 September 10, 2013. NYPPP filed suit two weeks later, on
11 September 25, 2013, and the following day made a motion for
12 a preliminary injunction. The United States District Court
13 for the Southern District of New York (Crotty, J.) ordered
14 briefing and set oral argument for Tuesday, October 8. On
15 Friday, October 11, NYPPP filed a letter reiterating the
16 urgency of the matter in light of the approaching November 5
17 mayoral election. On October 16, NYPPP filed a petition for
18 a writ of mandamus with this Court to compel the district
19 court to rule on the pending motion. Soon after argument on
20 the mandamus petition was scheduled for Friday, October 18,
21 the district court issued an opinion and order denying
22 NYPPP's motion. N.Y. Progress & Prot. PAC v. Walsh, No. 13-

1 cv-6769 (PAC), 2013 WL 5647168 (S.D.N.Y. Oct. 17, 2013)
2 ("Op. & Order"). In quick succession, NYPPP withdrew its
3 mandamus petition and appealed from the district court's
4 order, and we agreed to hear argument as originally
5 scheduled.

6 The appeal was heard on the merits at oral argument on
7 October 18.

8
9 **I**

10 The district court's denial of a preliminary injunction
11 is reviewed for abuse of discretion. WNET, Thirteen v.
12 Aereo, Inc., 712 F.3d 676, 684 (2d Cir. 2013). "Such an
13 abuse occurs when the district court bases its ruling on an
14 incorrect legal standard or on a clearly erroneous
15 assessment of the facts." Bronx Household of Faith v. Bd.
16 of Educ. of City of N.Y., 331 F.3d 342, 348 (2d Cir. 2003).
17 "A finding is 'clearly erroneous' when although there is
18 evidence to support it, the reviewing court on the entire
19 evidence is left with the definite and firm conviction that
20 a mistake has been committed." United States v. U.S. Gypsum
21 Co., 333 U.S. 364, 395 (1948). Although we must defer to
22 the district court's factual findings, in First Amendment

1 cases, "an appellate court has an obligation to 'make an
2 independent examination of the whole record' in order to
3 make sure that 'the judgment does not constitute a forbidden
4 intrusion on the field of free expression.'" Bose Corp. v.
5 Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)
6 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284-286
7 (1964)).

8 "A plaintiff seeking a preliminary injunction must
9 establish that he is likely to succeed on the merits, that
10 he is likely to suffer irreparable harm in the absence of
11 preliminary relief, that the balance of equities tips in his
12 favor, and that an injunction is in the public interest."
13 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20
14 (2008). A plaintiff who seeks a preliminary injunction that
15 will alter the status quo must demonstrate a "substantial"
16 likelihood of success on the merits. Sunward Elecs., Inc.
17 v. McDonald, 362 F.3d 17, 24 (2d Cir. 2004).

18
19 **II**

20 "The loss of First Amendment freedoms, even for minimal
21 periods of time, unquestionably constitutes irreparable
22 injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). "The

1 harm is particularly irreparable where, as here, a plaintiff
2 seeks to engage in political speech, as timing is of the
3 essence in politics and a delay of even a day or two may be
4 intolerable." Klein v. City of San Clemente, 584 F.3d 1196,
5 1208 (9th Cir. 2009) (internal quotation marks and
6 alterations omitted). The State argues that injury is not
7 presumed in First Amendment cases unless the challenged law
8 "directly limits speech," Bronx Household, 331 F.3d at 349,
9 and that no such presumption arises in this case because the
10 limits are imposed indirectly. But Bronx Household
11 identified a category of indirect limits on speech by
12 reference to Latino Officers Ass'n v. Safir, 170 F.3d 167,
13 171 (2d Cir. 1999), which dealt with a policy requiring
14 police officers to notify their department about their
15 speaking engagements and to provide a written summary of the
16 speech the day after the engagement. See Bronx Household,
17 331 F.3d at 350 (discussing Latino Officers). There we
18 "found the theoretical possibility of a chilling effect on
19 officers' speech too conjectural and insufficient to
20 establish irreparable harm." Id. The policy at issue in
21 Latino Officers bears no resemblance to the direct
22 restriction on political expression at issue here.

1 Although we express no opinion on the ultimate outcome,
2 the plaintiff here has a substantial likelihood of success
3 on the merits. The Supreme Court held in Citizens United v.
4 FEC that the government has no anti-corruption interest in
5 limiting independent expenditures. 558 U.S. 310, 357-61
6 (2010). It follows that a donor to an independent
7 expenditure committee such as NYPPP is even further removed
8 from political candidates and may not be limited in his
9 ability to contribute to such committees.¹ All federal
10 circuit courts that have addressed this issue have so held.

¹ This result obtains regardless of the standard of review. After Buckley v. Valeo, political contribution limits are subject to heightened scrutiny, which requires that they be "closely drawn" to match a "sufficiently important interest." 424 U.S. 1, 25 (1976). Expenditure limits are subject to even higher scrutiny, requiring that they be narrowly tailored to meet a compelling government interest. See Citizens United, 558 U.S. at 340. In this case, the effect of the restrictions is to limit contributions that can be made to a committee that seeks to make independent expenditures. It is unnecessary to decide which level of scrutiny should apply, because preventing quid pro quo corruption is the only government interest strong enough to justify restrictions on political speech, see id. at 357-61, and the threat of quid pro quo corruption does not arise when individuals make contributions to groups that engage in independent spending on political speech, see Wis. Right to Life State Political Action Comm. v. Barland, 664 F.3d 139, 154 (7th Cir. 2011). See also SpeechNow.org v. FEC, 599 F.3d 686, 694 (D.C. Cir. 2010); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 696 (9th Cir. 2010).

1 See Texans for Free Enterprise v. Tx. Ethics Comm'n, No. 13-
2 50014, 2013 WL 5639542, at *2 (5th Cir. Oct. 16, 2013) ("We
3 adopt the reasoning of our sister courts and hold that the
4 challenged law is incompatible with the First Amendment.");
5 Wis. Right to Life State Political Action Comm. v. Barland,
6 664 F.3d 139, 143 (7th Cir. 2011) ("On the merits, after
7 Citizens United ..., [the Wisconsin campaign finance law] is
8 unconstitutional to the extent that it limits contributions
9 to committees engaged solely in independent spending for
10 political speech."); Long Beach Area Chamber of Commerce v.
11 City of Long Beach, 603 F.3d 684, 696 (9th Cir. 2010) ("Nor
12 has the City shown that contributions to the Chamber PACs
13 for use as independent expenditures raise the specter of
14 corruption or the appearance thereof."); SpeechNow.org v.
15 FEC, 599 F.3d 686, 695 (D.C. Cir. 2010) (en banc) ("Given
16 this analysis from Citizens United, we must conclude that
17 the government has no anti-corruption interest in limiting
18 contributions to an independent expenditure group");
19 N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 293 (4th
20 Cir. 2008) (declaring unconstitutional, pre-Citizens United,
21 contribution limit to independent expenditure political
22 committees because no anti-corruption interest was

1 furthered). The D.C. Circuit appeal, taken from the denial
2 of a motion for a preliminary injunction, was heard en banc
3 in the first instance and was decided unanimously. Numerous
4 federal district courts across the country have struck down
5 analogous laws.²

6 Few contested legal questions are answered so
7 consistently by so many courts and judges. The district
8 court, however, conducted no analysis of NYPPP's likelihood

² See, e.g., Stay the Course W. Va. v. Tennant, No. 12-cv-01658, 2012 WL 3263623, *6 (S.D. W. Va. Aug. 9, 2012) ("The government has no interest in maintaining the contribution limit as applied to [independent expenditure groups]"); Lair v. Murry, 871 F. Supp. 2d 1058, 1068 (D. Mont. 2012) ("[U]nder Citizens United ... governments cannot ban corporate contributions to political committees that the committees then use for independent expenditures"); Yamada v. Weaver, 872 F. Supp. 2d 1023, 1041 (D. Haw. 2012) ("[C]ontribution limitations to [independent expenditure] organizations violate the First Amendment"); Pers. PAC v. McGuffage, 858 F. Supp. 2d 963, 969 (N.D. Ill. 2012) ("[R]egulations imposing limits on fundraising by independent expenditure organizations cannot be justified"); Republican Party of N.M. v. King, 850 F. Supp. 2d 1206, 1215 (D.N.M. 2012) ("New Mexico does not have an anti-corruption interest capable of justifying contribution limits if those contributions are to be used exclusively for independent expenditures"); Fund for Jobs, Growth, & Sec. v. N.J. Election Law Enforcement Comm'n, No. 13-CV-02177-MAS-LHG (D.N.J. July 11, 2013) (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).

1 of success.³ See Op. & Order at *14 (“[T]he Court need not
2 address whether NYPPP can establish a substantial likelihood
3 of success on the merits or irreparable harm.”).
4 Consideration of the merits is virtually indispensable in
5 the First Amendment context, where the likelihood of success
6 on the merits is the dominant, if not the dispositive,
7 factor. See, e.g., Joelner v. Vill. of Wash. Park, 378 F.3d
8 613, 620 (7th Cir. 2004) (“When a party seeks a preliminary
9 injunction on the basis of a potential First Amendment
10 violation, the likelihood of success on the merits will
11 often be the determinative factor.” (citing Connection
12 Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998))).
13 This was reversible error.

15 III

16 The district court combines its analysis of the balance

³ The district court posits 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. & Order at *9. Not so. Under Buckley and Citizens United, “absence of prearrangement and coordination” with a candidate are the hallmarks of committee independence. See Citizens United, 558 U.S. at 345; Buckley, 424 U.S. at 47. An independent committee’s choice to advocate on behalf of a single candidate, and its formation after that candidate is nominated, are irrelevant.

1 of hardships and the public interest, and assumes that by
2 definition the interests of the State are aligned with those
3 of the public. Op. & Order at *7 (“Since the State
4 Defendants represent the public, there are important public
5 interests at stake, which must be weighed against the
6 hardships suffered by NYPPP if an injunction is not
7 granted.”). However, securing First Amendment rights is in
8 the public interest. See Am. Civil Liberties Union v.
9 Ashcroft, 322 F.3d 240, 247 (3d Cir. 2003) (“[T]he
10 Government does not have an interest in the enforcement of
11 an unconstitutional law.” (internal quotation marks
12 omitted)).

13 The hardship faced by NYPPP and its donors from the
14 denial of relief is significant. Every sum that a donor is
15 forbidden to contribute to NYPPP because of this statute
16 reduces constitutionally protected political speech. Much
17 of the district court’s analysis of hardship focuses on
18 hardship to the election system arising from the timing of
19 this suit and this motion for a preliminary injunction. But
20 as the Supreme Court has emphasized, the value of political
21 speech is at its zenith at election time:

22 It is well known that the public begins to concentrate
23 on elections only in the weeks immediately before they

1 are held. There are short timeframes in which speech
2 can have influence. The need or relevance of the
3 speech will often first be apparent at this stage in
4 the campaign. The decision to speak is made in the
5 heat of political campaigns, when speakers react to
6 messages conveyed by others. A speaker's ability to
7 engage in political speech that could have a chance of
8 persuading voters is stifled if the speaker must first
9 commence a protracted lawsuit.

10
11 Citizens United, 558 U.S. at 334.

12 The district court found that granting NYPPP a
13 preliminary injunction would create "confusion" over whether
14 other committees were covered by the injunction and, "[e]ven
15 more troubling," that an injunction "would amplify NYPPP's
16 voice over the voices of other political committees" because
17 the State would still be "free to prosecute others who may
18 violate the statute." Op. & Order at *10-11 (internal
19 quotation marks omitted). True, the preliminary injunction
20 that we direct be entered frees only NYPPP. But as
21 described by the district court, these concerns are neither
22 sufficiently severe disruptions to the election process
23 itself nor sufficiently particularized to outweigh the
24 irreparable harm that stems from restrictions on political
25 speech.

26 The State relies on cases such as Reynolds v. Sims, 377
27 U.S. 533 (1964), for the proposition that denial of the

1 preliminary injunction should be affirmed because of the
2 disruption the preliminary injunction would cause to the
3 election process. But Reynolds involved the complicated
4 process of legislative reapportionment, and there is no
5 comparable showing of what burdens would be imposed on the
6 State by freeing NYPPP from the limit on individual
7 contributions that it can receive in connection with the
8 upcoming election.

10 IV

11 The district court thought that the plaintiff created
12 an "artificial urgency" by waiting until "forty-one days
13 before the ... election" before filing suit. Op. & Order at
14 *12. Although the district court cited insufficient time
15 for "fair consideration ... before deciding a constitutional
16 issue of such importance," Op. & Order at *9, we should not
17 "mak[e] unnecessary distinctions ... between speech that we
18 find to be urgent and that which we think can bide its
19 time," Tunick v. Safir, 209 F.3d 67, 95 (2d Cir. 2000)
20 (Sack, J., concurring). "We ought not to be determining
21 what speech is pressing and what can suffer the law's delay.
22 That, like deciding what speech is important and what

1 unimportant, is not for the courts.” Id. Tunick treated as
2 pressing a public display of nudity; political speech is not
3 a lesser order of expression.

4
5 **CONCLUSION**

6 For the foregoing reasons, the order denying the
7 preliminary injunction is reversed, and the district court
8 shall forthwith enter a preliminary injunction enjoining the
9 application and enforcement of N.Y. Elec. Law §§ 14-114(8)
10 and 14-126 against NYPPP and its individual donors for the
11 use of the contributions of those donors only for
12 independent expenditures. The mandate shall issue
13 immediately.