UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK PROGRESS AND PROTECTION PAC,

Plaintiff,

-against-

JAMES A. WALSH, ET AL.,

Defendants.

Index No. 13-CV-6769

MEMORANDUM OF LAW OF AMICUS CURIAE BILL DE BLASIO IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTEREST OF AMICUS CURIAE

Amicus Bill de Blasio is the Public Advocate of the City of New York. Public Advocate de Blasio has been a leading proponent of campaign finance rules designed to preserve citizen-centered public debate and limit the ability of big-money interests to hijack the electoral system. These issues have been at the core of his work as Public Advocate, [1] and his work to shore up New York City's unique public financing system for elections has helped make it a nationwide model. "[D]ubbed the 'Citizens United avenger'" by *Mother Jones* magazine "for his outspoken criticism of the Supreme Court decision allowing unfettered corporate and union spending in elections,"[2] Mr. de Blasio has given speeches and published articles aimed at raising awareness of the pernicious effects of unlimited spending by independent expenditure groups in American politics.[3]

In his role as Public Advocate, Mr. de Blasio has attended hundreds of community meetings, speak-outs and rallies across New York City. The corrupting influence of big money in politics is a constant refrain that Public Advocate de Blasio has heard from New Yorkers from all neighborhoods and every walk of life. As a public official elected to defend the will of New York City residents and a leading voice on the issue of campaign finance reform, Mr. de Blasio

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[1] *See, e.g.*, Michael M. Grynbaum, *De Blasio's Communications Director Leaves*, City Room, N.Y. Times (April 12, 2012), http://cityroom.blogs.nytimes.com/2012/04/12/de-blasios-communications-director-leaves/ ("Mr. de Blasio is a highly vocal opponent of super PACs and Citizens United, the United States Supreme Court opinion that allowed for their creation. He has routinely appeared on national television and at events in Washington to protest the effects of the groups, which can raise and spend unlimited money on candidates' behalf.").

[2] Dana Rubinstein, *De Blasio and Stringer Dislike Bloomberg's Super PAC, Quinn Thinks it Might be Different*, Capital (October 19, 2012), http://www.capitalnewyork.com/article/politics/2012/10/6538480/de-blasio-and-stringer-dislike-bloombergs-super-pac-quinn-thinks-it.

[3] *See, e.g.*, Bill de Blasio and Wendy Greuel, Corporations Hide Election Spending From the Public Eye, The Nation (October 18, 2010), http://www.thenation.com/article/155432/corporations-hide-election-spending-public-eye#sthash.ppVH7VTk.dpuf; Bill de Blasio, Voters Can Shed Daylight on Corporate Spending, The Nation (August 18, 2010), http://www.thenation.com/article/154069/voters-can-shed-daylight-corporate-spending#sthash.KUqC4WYE.dpuf; Bill de Blasio, Transparency Can Curb Corporate Impact on Elections, The Nation (February 2, 2010), http://www.thenation.com/article/transparency-can-curb-corporate-impact-elections#sthash.47vRUxDq.dpuf.

is uniquely positioned to assist the court in understanding the local legal landscape and the potential practical effects of the ruling Plaintiff seeks.[4]

PRELIMINARY STATEMENT

Plaintiff's lawsuit to invalidate state-law contribution limits to independent expenditure committees threatens to drive a final nail into the coffin of sensible, common-sense campaign finance rules. These rules exist to ensure that a few wealthy interests cannot buy political influence by drowning out all other voices in the electoral process. This threat of suffocation is especially problematic in a system of municipal public finance that has proven its vitality, ensuring that the public can hear the voices of candidates who do not possess the immense wealth available to Plaintiff's contributors.

Fundamental American constitutional values recognize "the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." *FEC v. Nat'l Right to Work Committee*, 459 U.S. 197, 208 (1982). Yet Plaintiff seeks a ruling that will benefit *only* persons who wish to give "in excess of one hundred fifty thousand dollars" to help elect the candidate of their choosing. NY Elec. Law § 14-114(8). Such individuals *already* have the ability to expend unlimited funds to express their own views directly; what they now seek is the right to hand over enormous sums of money to shadowy proxies—with anodyne names like the New York Progress and Protection PAC—to speak on their behalf. In essence, Plaintiff seeks to dismantle a system designed to facilitate the "[d]iscussion of public issues and debate on the qualifications of candidates" that the Supreme Court has described as "integral to the operation

[4] Obviously, Mr. de Blasio is the Democratic nominee for Mayor and, as such, would be directly harmed by unlimited spending in support of his Republican opponent. However, the issues raised in this lawsuit go beyond a single election and cut to the core of New York's democratic traditions. As such, while Mr. de Blasio would surely have grounds to appear as an *amicus* in his role as Democratic nominee, he has chosen to appear in his role as Public Advocate to defend this broader point.

of the system of government established by our Constitution," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), and replace it with one in which an elite few set the agenda and curry political favor by bankrolling the agendas of candidates who share their narrow view of the public good.

"Speaking broadly, what is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society." *United States v. UAW-CIO*, 352 U.S. 567, 570 (1957). The court should reject NYPPP's attempt to jettison New York's chosen system for ensuring that every voice can be heard in our elections, and should hold that a six-figure contribution is more than enough speech.

ARGUMENT

I. GIVEN THE WELL-DEMONSTRATED CORRUPTING INFLUENCE OF BIG MONEY IN POLITICS, A PRELIMINARY INJUNCTION THAT CLEARS THE WAY FOR INDIVIDUALS TO MAKE UNLIMITED CONTRIBUTIONS TO ORGANIZATIONS THAT SUPPORT SPECIFIC CANDIDATES IS NOT IN THE PUBLIC INTEREST.

Money buys political influence in modern American elections. Independent expenditure groups like NYPPP cynically use large contributions both to buy favorable policies and to drown out views contrary to their own. As the complaint in this case amply demonstrates, such groups are largely funded by wealthy individuals whose express goal is to co-opt the democratic system and exert outsize control over political outcomes.

The federal system's experience with unlimited contributions to independent expenditure groups is instructive. According to DEMOS and U.S. PIRG, in 2011 super PACs raised 65% of their itemized funds from individuals, and the average itemized contribution from an individual

was $21,380.[5] That is more than 40% of the national median household income.[6] "Of all itemized contributions from individuals to Super PACs 93% came in contributions of at least $10,000. Only 726 individuals, or 23 hundred thousandths of 1% (0.000232%) of the American population, made a contribution this large to a Super PAC."[7] In the 2012 presidential election, the top 32 donors to super PACs contributed a staggering $9.9 million dollars on average.[8] This "matched the $313.0 million that President Obama and Mitt Romney raised from all of their small donors combined—that's at least 3.7 million people giving less than $200."[9] As these data show, without rules like those Plaintiff seeks to eliminate, a few super-wealthy PAC contributors are free to use their money to dominate the political discourse.

These groups also use their wealth to distort public debate and promote negative, polarizing election tactics over constructive dialogue. "[N]egativity has been on the rise this decade, and the evidence points toward an electoral environment dominated by interest groups with negative messages in the future." Lili Levi, *Plan B for Campaign Finance Reform: Can the FCC Help Save American Politics After* Citizens United?, 61 Cath. U. L. Rev. 97, 114 (2011). Further amplifying the voices of independent expenditure groups over those of citizens and candidates will only exacerbate this trend. This is because "groups that engage in independent

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[5]Blair Bowie and Adam Lioz, Auctioning Democracy: The Rise of Super PACs and the 2012 Election 7 (2012), http://www.demos.org/sites/default/files/publications/AuctioningDemocracy-withAppendix.pdf [hereinafter Bowie and Lioz, Auctioning Democracy].

[6]U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2012 5 (2013), http://www.census.gov/prod/2013pubs/p60-245.pdf.

[7]Bowie and Lioz, Auctioning Democracy, *supra* note 5 at 7 ("More than half of itemized Super PAC money came from just 37 people giving at least $500,000.").

[8]Blair Bowie and Adam Lioz, Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections 9 (2013), http://www.demos.org/sites/default/files/publications/BillionDollarDemocracy_0.pdf [hereinafter Bowie and Lioz, Billion-Dollar Democracy].

[9]*Id.*

advocacy have strong incentives to stress one issue around which to mobilize supporters and contributors as opposed to the range of programmatic positions that candidates must take. Such single issue advocacy further accentuates the one objectionable feature most often cited in support of reform: the polarizing, attack orientation of contemporary political advertising." Samuel Issacharoff and Pamela S. Karlan, *The Hydraulic of Campaign Finance Reform*, 77 Tex. L. Rev. 1705, 1714-15 (1999). The result is the now all-too-familiar onslaught of negative advertising and "wedge issue" politics, drowning out the thoughtful and spirited public debate that the First Amendment was intended to preserve.

The outcome Plaintiff seeks is perfectly illustrative. In New York City, mayoral candidates participating in the optional public financing system—as both major-party candidates have elected to do in the current campaign—are prohibited from spending more than $6,426,000. N.Y.C. Admin. Code § 3-706(a) & n.2. They are prohibited from accepting contributions of more than $4,950 from any individual donor. *Id.* § 3-703(f) & n.1. In contrast, NYPPP seeks to accept contributions of more than $150,000 from individual donors. If NYPPP prevails, the result will be a process in which 43 super-rich individuals will be able to combine their resources to outspend a candidate's entire mayoral campaign operation—obliterating the City and State's painstakingly designed system for curbing the power of big-money interests. "For all the influence that money may claim in the political process, votes are still channelled through candidates and political parties that have strong incentives to appeal more broadly than to a single issue or the desires of a single constituency." Issacharoff and Karlan, *The Hydraulics of Campaign Finance Reform* at 1714. But unlimited contributions to independent expenditure groups will mean that candidates and parties can be drowned out by certain wealthy elites who are not even New York residents and who care only about their own personal issues,

undermining "the give and take of candidates who must stake out positions across a variety of issues." *Id.* Instead of hearing what the candidates think about issues that are important to them, voters will hear only the views of a few wealthy outsized spenders. Such a result is plainly contrary to the public interest.

Indeed, the perception that independent-expenditure groups have a corrupting influence on politics "has given rise to a large, bipartisan consensus that such outsized spending is dangerous for our democracy."[10] Seven in ten Americans think that spending by super PACs leads to corruption.[11] Those with the least access to wealth and education are the most likely to tell opinion polls that they trust government less and are less likely to vote in elections because of the influence of groups like NYPPP.[12]

The court is not powerless to stem the tide of influence-peddling and money-driven politics. "Although *Citizens United* stated that mere influence or access to elected officials is insufficient to justify a ban on independent corporate expenditures, *improper* or *undue* influence presumably still qualifies as a form of corruption." *Ognibene v. Parkes*, 671 F.3d 174, 186 (2d Cir. 2011). Plaintiff seeks a ruling that would enhance the power of a wealthy few at the expense of all other New Yorkers. The disproportionate influence NYPPP's intended donors seek to amass is contrary to the spirit of representative democracy. The people and elected government of New York State do not want independent-expenditure groups to be able to raise unlimited funds from single wealthy individuals. The court should recognize the ubiquitous "popular feeling that aggregated capital [has] unduly influenced politics, an influence not stopping short of

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[10]Brennan Center for Justice, National Survey: Super PACs, Corruption, and Democracy (April 24, 2012), http://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy.

[11]*Id.*

[12]*Id.*

corruption," *UAW-CIO*, 352 U.S. at 570, and deny the motion for a preliminary injunction as contrary to the public interest.

II. PLAINTIFF HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE IT HAS NOT SHOWN THAT IT IS ACTUALLY "INDEPENDENT" OF JOE LHOTA'S MAYORAL CAMPAIGN.

"[W]hen, as here, the moving party seeks a preliminary injunction that will affect 'government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard.'" *Wright v. Giuliani*, 230 F.3d 543, 547 (2d Cir. 2000) (quoting *Beal v. Stern*, 184 F.3d 117, 122 (2d Cir. 1999)). Even under its own legal theory, to demonstrate a likelihood of success on the merits, NYPPP must show that New York law prevents it from maximizing expenditures that are truly made independently of any candidate's campaign. Because the allegations of Plaintiff's complaint are insufficient to demonstrate this independence, NYPPP has not shown a likelihood of success on the merits.

Citizens United held "that independent expenditures . . . do not give rise to corruption or the appearance of corruption." *Citizens United v. FEC*, 558 U.S. 310, 357 (2010). However, the Court did not disturb the decades-old principle that *non-independent* expenditures do pose the risk of a corrupting influence. That proposition has been firmly established since *Buckley*, which recognized that, "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." 424 U.S. at 26-27; *see also Citizens United*, 558 U.S. at 345 ("The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures."). *Buckley* thus held that the governmental interest in combating corruption and "the appearance of corruption stemming from

public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions," 424 U.S. at 27, justified a dollar maximum on direct contributions to candidates.

Thus, even after *Citizens United*, the government may limit contributions to groups that are not truly independent of candidates and their campaigns. For this reason, "[a] number of the courts that have struck down limits on contributions applied to independent-expenditure-only PACs have made clear their reasoning would not hold to the extent the assumption of independence were undermined." *Vermont Right to Life Committee, Inc. v. Sorrell*, 875 F. Supp. 2d 376, 405 (D. Vt. 2012). *See, e.g.*, *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 155 (7th Cir. 2011) (observing that if an "independent committee is not truly independent," then "the committee would not qualify for the free-speech safe harbor for independent expenditures"); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010) ("The Supreme Court has upheld limitations on contributions to entities whose relationships with candidates are sufficiently close to justify concerns about corruption or the appearance thereof."); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 295 (4th Cir. 2008) ("If independent expenditure committees are not in fact independent, they risk forfeiting their exemption from North Carolina's contribution limits. In such instances, North Carolina is free to apply in a constitutional manner its contribution limits against these purportedly 'independent' expenditure committees.").

Under New York City campaign finance rules, even subtle forms of coordination may render a group's campaign spending non-independent. New York City Campaign Finance Board Rule 1-08(f)(1) lists several factors that the Board considers in determining whether an expenditure is independent. As the Board has explained:

> The determination of whether a particular expenditure is independent or non-independent is necessarily fact-specific . . . . [I]t is very difficult in the abstract to

> say whether a particular activity would or would not lead to a conclusion that activity is non-independent. Evidence of non-independent activity is usually largely circumstantial and must be evaluated based on the totality of the circumstances.

New York Campaign Finance Board, Advisory Opinion 2009-7 (August 6, 2009), http://www.nyccfb.info/act-program/ao/AO_2009_7.htm#_ednref6. The Board has observed that numerous factors could militate toward a finding of non-independence, including the use of common vendors; the use of identical text and images in campaign and "independent" literature; the sharing of office space or staff by a campaign and an "independent" group; or attendance by officials from the campaign and "independent" groups at the same strategy meeting. *Id.*

Given the nuanced inquiry required under New York City campaign finance rules to determine whether a group's expenditures are truly independent, Plaintiff has not borne its burden of demonstrating that the government lacks any anti-corruption interest in regulating its contributions. It merely makes the boilerplate representation that no "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." Compl. ¶ 31. Even if the court were prepared to take NYPPP at its word, it has made no representations about the use of common vendors, staff, or office space, attendance at common strategy meetings, or other factors that might lead to a finding of coordination under New York City law. Moreover, in a city-wide race heavily covered in the media, public statements by candidates and their supposedly independent supporters raise the specter of "coordination" in plain sight. For example, individual millionaires and billionaires have used the media's coverage of this case to identify themselves as the benefactors of pro-Lhota PACs.[13]

[13] *See, e.g.,* David W. Chen, *Lhota Backers Challenge Cap on Spending*, N.Y. Times (September 25, 2013), *http://www.nytimes.com/2013/09/26/nyregion/lhota-backers-challenge-cap-on-spending.html.*

Mr. Lhota subsequently expressed support for their efforts through the press.[14] In this context, it simply defies common sense to deny the reality that Plaintiff's efforts are in some basic sense "coordinated" with those of Mr. Lhota's campaign. At the very least, the court should require additional fact-finding before granting an injunction premised on such an implausible assumption.

The court should "decline[] to accept [NYPPP] as an independent-expenditure-only PAC without resort to the factual record." *Vermont Right to Life Comm.*, 875 F. Supp. 2d at 405 (noting "the Second Circuit's view that the factual basis for [a group's] assertion [of independence] was crucial"). Instead, it should require additional fact discovery to determine whether NYPPP is in fact sufficiently independent to destroy the City's interest in regulating its contributions. "Otherwise, funds raised in unlimited quantities by [NYPPP] may support coordinated spending or candidate contributions." *Id.* at 410 ("It would also provide an outlet for unlimited contributions from donors otherwise subject to valid limits on direct contributions to candidates.").

"In this as-applied challenge, the facts are vital." *Id.* at 405. "Conceivably, a more complete record will assist the district court in . . . making findings that decide the open questions." *Wright*, 230 F.3d at 548. But the record is not sufficiently complete at this stage to warrant preliminary injunctive relief. Because Plaintiff has not met its burden to show a

[14] *See, e.g.*, Rich Calder, Beth De Falco and Carl Campanile, *State Tries To Thrwart Lhota PAC Bid*, N.Y. Post (September 27, 2013), http://nypost.com/2013/09/27/state-tries-to-thwart-lhota-pac-bid/ ("Lhota defended the effort, which would represent an independent expenditure on his behalf. 'I don't understand why anyone would want to limit an American's First Amendment rights . . . Freedom of speech is in my view the most important part of our Constitution,' he said."); Erin Durkin, Mara Gay and Annie Karni, *Joe Lhota Says It's "Difficult . . . For a Bald, White, Fat Guy' to Comment on Crime in Minority Communities As He Defends Stop and Frisk*, N.Y. Daily News (September 26, 2013), http://www.nydailynews.com/news/election/lhota-comments-stop-frisk-de-blasio-sets-fund-raiser-article-1.1469060 ("'I believe that this is a First Amendment issue,' Lhota said at a campaign appearance in Corona, Queens. 'It's about freedom of speech.'").

likelihood of success on the merits, the court should deny the motion for a preliminary injunction.

CONCLUSION

For all the above reasons and those set forth in Defendants' submissions, it is respectfully submitted that the court should deny Plaintiff's motion for a preliminary injunction.

Dated: October 2, 2013
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