UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK PROGRESS AND PROTECTION PAC, Plaintiff, v. JAMES A. WALSH, et al., Defendants.	:	No. 13 Civ. 6769 (PAC)

CORRECTED MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

With only a few weeks left before New York City's 2013 mayoral election, plaintiff New York Progress and Protection PAC ("NYPPP") asks this Court to enjoin New York's long-standing $150,000 annual limit on aggregate political contributions by an individual. If granted, this relief would completely change rules that candidates, political committees, and the voting public have already relied on during months of campaigning for this year's primary and general elections. This relief should be rejected for at least three independent reasons.

First, NYPPP fails to establish that it will suffer irreparable harm absent a preliminary injunction. Its unjustified delay in bringing this challenge, by itself, undercuts the claim of irreparable harm. But even more fundamentally, New York's longstanding individual contribution limit does not prevent NYPPP, a political committee organized by Washington attorney and political insider Craig Engle, from advocating effectively for Republican candidate Joe Lhota in the November 5 mayoral race, as it says it would like to do. Likewise, New York law does not prevent the sole identified putative contributor to NYPPP, Alabama businessman Shaun McCutcheon, from advocating for Lhota's election subject to the applicable contribution limits of the election law. Both NYPPP and McCutcheon are free to spend as much as they would like to advocate for Lhota's election, or for Democratic opponent Bill de Blasio's defeat, so long as they do not coordinate with any candidate or party in doing so and do not violate applicable contribution limits. Nor is there any legal limit on the total amount that NYPPP can raise for its political activities. NYPPP does not even attempt to show that it cannot currently promote its message effectively. Nor could it make that showing, when nothing in New York law is stopping NYPPP from raising money and speaking right now to promote Lhota's election, but NYPPP is seemingly declining to do so.

Second, in addition to the absence of any demonstration of irreparable harm by NYPPP, the serious harm to the public interest that the preliminary injunction would cause at this late moment supports the denial of NYPPP's request. Courts routinely reject requests to alter campaign or election rules made on the eve of an election, particularly when, as here, drastic changes are sought that cannot be implemented fairly before voting begins. This Court should likewise reject NYPPP's eleventh-hour request to erase an important aspect of New York's contributions limit for the purpose of the rapidly approaching 2013 elections. Because of NYPPP's inexplicable delay in requesting relief, the New York State Board of Elections (State Board) cannot adequately inform the public and electoral participants of a significant change to the contribution limit if an injunction issues now. The State Board simply cannot redo all of the informational and training work it has completed for the 2013 cycle. Contributors, political committees, and candidates that have already participated in the electoral process based on long-settled expectations regarding contribution limits will also be placed at a severe disadvantage. These serious disruptions and unfairness to the public weighs strongly in the equitable balance, and tilts that balance decidedly against the grant of the preliminary injunction.

Third, NYPPP's request is also independently barred by its failure to demonstrate a substantial likelihood of success on the merits. The Supreme Court has long upheld reasonable contribution limits, and the aggregate $150,000 limit challenged by NYPPP here constitutes only a moderate restriction on political contributions. NYPPP argues that the logic of the Supreme Court's 2010 decision in *Citizens United v. FEC* mandates rejection of any limit on contributions to political committees that claim to make only independent expenditures that are uncoordinated with any candidate or political party—commonly known as "Super PACS." But *Citizens United* addressed a ban on expenditures, not a limit on contributions, and NYPPP's arguments rely on a

reading of *Citizens United* that the Second Circuit has already rejected in the context of contribution limits. Under this controlling law, New York's contribution limit is justified by the critical governmental interests of preventing actual or apparent corruption—both *quid pro* quo corruption and undue influence—and preventing circumvention of other, concededly valid contribution limits. New York's limits on contributions, as applied to these purportedly independent committees, address all of these corruption concerns because such committees and the political insiders that typically run them are often closely connected to candidates, political parties, and authorized committees, though claiming to act independently of them for the purpose of particular committees and at particular times. Indeed, the appearance of corruption can already be seen in the voting public's belief that officials are more likely to help contributors to nominally independent committees. At the very least, NYPPP is not entitled to a preliminary injunction covering the 2013 election based solely on its proclamations that it has not coordinated and will not coordinate with Lhota, without any discovery into the highly factual question of its own independence and the potential for actual or apparent corruption presented in such a situation.

STATEMENT OF THE CASE

As part of its comprehensive regulation of the financing of elections to prevent actual or apparent corruption, New York law has for more than 35 years provided certain limits on political contributions. McCann Decl. ¶ 9. NYPPP solely challenges the Election Law's $150,000 aggregate limit on individual contributions to state or local candidates or political committees in any calendar year. *Id.* § 14-114(8). The Election Law also places a limit on contributions to candidates or political committees, which vary based on the number of registered voters in the relevant electoral area, and places a limit on contributions to party committees. *See, e.g.*, Election Law § 14-114(1)(b), (10)(a). Although NYPPP's Complaint

alleges that it generally wishes to support conservative candidates in New York City, its registration form identifies only specific candidates for New York City's 2013 mayoral race who NYPPP intends to support or oppose. The declarations submitted by NYPPP further confirm that the specific contributions it hopes to solicit in the immediate term will be dedicated to the mayoral race.

Consequently, NYPPP does not correctly interpret the applicable contribution limits, which also include the $41,100 limit relevant to the mayoral contest. *See* Election Law § 11-114(b); State Board Formal Opinion 1994-3 (Apr. 25, 1994); N.Y. State Board of Elections, Contribution Limits, *available at* http://www.elections.ny.gov/CFContributionLimits.html. Nor does its lawsuit raise any challenge to this contest-specific contribution limit, which will determine the maximum amount it may accept for the 2013 mayoral contest from the sole contributor specifically identified in its papers, Shaun McCutcheon. In any event, all of the arguments herein support the constitutionality of both contribution limits.

Because NYPPP says it wishes to advocate for Lhota's election in the November 5 New York City mayoral contest, the City's campaign finance program, administered by the City Campaign Finance Board (CFB), is also relevant, though not at issue in this lawsuit. The City's program enables a participating candidate for Mayor to receive six-to-one public matching funds, up to a maximum of about $3.5 million for each election (primary and general). *See* New York City 2013 Campaign Finance Handbook ("2013 Handbook") at 85, 90.[1] Both Republican mayoral candidate Lhota and Democratic candidate de Blasio have elected to receive public matching funds. Vale Decl. at Exs. G-H. In exchange for receiving such public funds, the

[1] The Campaign Finance Handbook is available at www.nyccfb.info/candidates/candidates/handbooks/2013_Handbook.pdf

candidate agrees to a spending limit of around $6.4 million for the general election. 2013 Handbook at 34. Both participating and nonparticipating candidates are limited to accepting contributions no greater than $4950. *Id.* at 12; *see McDonald v. N.Y.C. Campaign Finance Bd.*, 40 Misc. 3d 826, 852 (Sup. Ct. N.Y. County 2013).[2] Independent expenditures are not counted toward these limits unless they are found to be coordinated with the candidate, in which case they are considered in-kind contributions subject to the contribution limits. 2013 Handbook at 40.

NYPPP has registered with the New York State Board of Elections as a political committee, Compl. ¶ 6, McCann Decl. ¶¶ 3, 4, though it is unclear whether NYPPP has yet registered with the CFB. NYPPP declares that it wishes to accept individual contributions in excess of $150,000. Engle Decl. ¶¶ 20, 21. NYPPP has said that it intends to spend its money in support of Joe Lhota, a candidate for New York City Mayor, as well as other New York City candidates. Engle Decl. ¶¶ 5, 20. NYPPP has alleged that all of its expenditures in the upcoming mayoral election will be independent of Lhota's campaign. Compl. ¶ 31.

NYPPP's treasurer, Craig Engle, is an attorney and political consultant "with over 20 years experience" advising candidates., campaigns, and political parties. Engle Decl ¶ 6. Among other things, he has served as General Counsel to the National Republican Senate Committee, and as General Counsel to the 2012 presidential campaign of Republican candidate Jon Huntsman. Engle Decl. ¶ 6.

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[2] The court in *McDonald* also determined that the City's contribution and expenditure limits are not pre-empted by State law, which does not address "locally funded publically financed elections for wholly local offices." *McDonald*, 40 Misc. 3d at 851.

On September 25, 2013, NYPPP filed this lawsuit challenging the constitutionality of New York's aggregate contribution limit of $150,000, and seeking, among other things, a preliminary injunction allowing it to accept unlimited individual contributions related to the approaching New York City mayoral election on November 5, 2013. Compl. ¶ 1. The State Board has published extensive informational resources and conducted training seminars regarding the current campaign finance laws, including the contribution limit at issue, and provided updates on recent changes to those rules. McCann Decl. ¶¶ 8, 11-12. To date, there are over 13,000 individuals or entities that actively file reports with the State Board, including about 400 political committees of the same registration type as NYPPP. *Id.* ¶ 18; Compl. ¶ 6.

ARGUMENT

The "extraordinary remedy" of a preliminary injunction is "never awarded as of right." *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 154 (2d Cir. 2010) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). Courts of equity must "pay particular regard" to the "public consequences" of such relief. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). This sensitivity to public harm is particularly acute here when the requested injunction "threatens to interfere with" and "interrupt an ongoing election." *Foley v. State Elections Enforcement Comm'n*, No. 10-cv-1091, 2010 WL 2836722, at *3 (D. Conn. July 16, 2010).

In the Second Circuit, a plaintiff seeking a preliminary injunction must establish "(1) irreparable harm and (2) 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, plus a balance of the hardships tipping decidedly" in plaintiff's favor. *Monserrate*, 599 F.3d at 154. A plaintiff that challenges a "governmental action taken in the public interest pursuant to a statutory or regulatory scheme," as NYPPP does, cannot rely on the "fair ground for litigation" alternative and must establish a likelihood of success on the merits. *Id.*; *see also Dexter 345, Inc.*

v. Cuomo, 663 F.3d 59, 63 (2d Cir. 2011).

The bar is raised even higher for NYPPP, which requests preliminary relief that would alter the status quo rather than merely preserving it. *Brooklyn Heights Ass'n.*, *v. Nat'l Park Serv.*, 777 F. Supp. 2d 424, 435 (E.D.N.Y. 2011). Under these circumstances, "in addition to demonstrating irreparable harm," NYPPP must show "a *clear* or *substantial* likelihood of success on the merits." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006) (internal quotations omitted) (emphasis added). This higher standard also applies here because a preliminary injunction will give NYPPP nearly all of the ultimate relief it seeks—enjoining the $150,000 aggregate limit for the purpose of the November 5 election—and cannot be undone if the State Defendants ultimately prevail. *See id.*

NYPPP's request for a preliminary injunction fails on all fronts. First, NYPPP has not clearly demonstrated that it will suffer irreparable harm absent an injunction, especially in light of its delay in bringing suit and ability under current law to raise funds and spend such funds, without any limit, on independent expenditures. Second, the balance of the hardships weighs decidedly against NYPPP, given the burdens on the State Board and disruption to the public's paramount interest in a fair election that changing the contribution rules so close to an election would cause. Third, NYPPP fails to establish a substantial likelihood of success on the merits of its constitutional claim because New York's modest contribution limit is closely drawn to address serious corruption and circumvention concerns created by contributions to nominally independent political committees controlled by political insiders.

I. NYPPP Fails To Clearly Establish That It Will Suffer Irreparable Harm Absent a Preliminary Injunction

NYPPP has not clearly shown that it will suffer irreparable harm without an injunction. Because a preliminary injunction is an "extraordinary remedy," NYPPP must show that irreparable harm without the injunction is likely; the mere "possibility" of such harm is insufficient. *Winter,* 555 U.S. at 22. NYPPP's requested relief is particularly extraordinary: weeks before the mayoral election, NYPPP seeks a court-ordered revision of a long-standing contribution limit on which electoral participants have already relied. Moreover, if NYPPP obtains a preliminary injunction, it will essentially receive a substantial portion of the ultimate relief it seeks. Even if New York's contribution limit is ultimately upheld, a final ruling will be meaningless as to the 2013 election because NYPPP will have evaded the rules by receiving the unlimited contributions relating to that election. Such an extraordinary and disruptive remedy requires NYPPP to make a "clear showing" that it will suffer irreparable harm absent the requested relief, which NYPPP has not satisfied here. *Sussman v. Crawford,* 488 F.3d 136, 139-40 (citing *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997)).

NYPPP's delay in seeking relief is alone "fatal to" its "claim of irreparable injury" because the lack of urgency undercuts any claimed need for "drastic, speedy action" to prevent imminent harm. *Wada Mktg. Grp., LLC v. Ven-Co Produce, Inc.*, No. 11-cv-3052, 2011 U.S. Dist. LEXIS 120660, at *12 (S.D.N.Y. Aug. 9, 2011) (Crotty, J.); *see, e.g.*, *Foley*, 2010 WL 2836722, at *5 (stating that plaintiffs' "decision to wait until the last minute . . . to sue the state defendants" undermined the alleged seriousness of any harm and "the conclusion that the plaintiffs will be irreparably injured without an injunction"). As explained more fully below, rather than file its lawsuit appropriately in advance of the 2013 electoral season, NYPPP waited until just a few weeks before the November general election to seek a court-ordered revision of

duly enacted laws designed to safeguard the State's democratic processes. If NYPPP considered equitable relief to be "truly necessary" for it to advocate effectively for conservative New York City candidates, it "would have brought this lawsuit" months, if not years, ago. *Foley*, 2010 WL 2836722, at *5. As a result, NYPPP's "failure to act" negates any suggestion of irreparable harm. *KF v. Monroe Woodbury Cent. Sch. Dist.*, 12-cv-2200, 2012 U.S. Dist. LEXIS 60341, at *17 (S.D.N.Y. Apr. 30, 2012).

Even if its delay in seeking relief could be overlooked (and it cannot be), NYPPP has failed to establish clearly that it or McCutcheon will suffer any irreparable harm because they both have ample opportunity to express themselves. NYPPP cannot establish the requisite harm based on indirect restrictions on or "conjectural chill" of its speech. *Latino Officers Ass'n v. Safir,* 170 F.3d 167, 171 (2d Cir. 1999); *see Bronx Household of Faith v. Bd. of Educ. of City*, 331 F.3d 342, 350 (2d Cir. 2003). Instead, NYPPP must establish that an injunction will actually deprive it of free speech rights. *See Bronx Household of Faith,* 331 F.3d at 350. NYPPP argues that the $150,000 individual aggregate contribution limit is "preventing NYPPP from engaging in political advocacy." Pl. Mem. at 17. But New York's generous limits do not prevent NYPPP from speaking in any way. NYPPP can raise and spend unlimited funds to support any candidate, including Joe Lhota, as long as NYPPP does so independently and in compliance with contribution limits. McCutcheon can similarly spend freely to express himself directly to voters.

NYPPP's contention that any limit on the size of individual contributions is a "quintessential form of irreparable harm" (Pl. Mem. at 17) is contradicted by Supreme Court precedent. As the Court first explained in *Buckley*, a contribution, unlike expenditures for direct advocacy, is not the contributor's own speech but rather expresses only general support for and association with the recipient. *Buckley v. Valeo,* 424 U.S. 1, 21 (1976). Because the level of this

symbolic communication "does not increase perceptibly with the size" of the contribution, limiting donations does not decrease the amount of the donor's expression. *Id.* And contribution restrictions do not meaningfully affect the political activity of contribution recipients unless they are prevented "from amassing the resources necessary for effective advocacy." *Id.*

NYPPP does not even attempt to argue that the aggregate limit of $150,000 per individual contributor (or any other applicable limit) prevents it from receiving the funds necessary to advocate effectively. Any such contention would, in any event, be belied by *Buckley*, which found that considerably lower contribution limits ($1000 for individual contributions and $25,000 aggregate limits) created "no indication" of "any dramatic adverse effect on the funding of campaigns and political associations." *Id.* New York's high limits also distinguish this from *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 299 (1981), a case cited by NYPPP, which struck contribution limits of only $250 to committees that supported or opposed ballot measures. Indeed, NYPPP could already have begun "raising funds and making independent expenditures . . . to meaningfully participate" in the election by collecting donations from McCutcheon and all of the other large donors that NYPPP claims to have identified as a potential sources of funds. Engle Decl. ¶ 23. Yet NYPPP has seemingly not yet accepted contributions within statutory limits from McCutcheon or anyone else, and thus has not yet begun to advocate for Lhota's election (or de Blasio's defeat). McCann Decl. ¶ 5. Because nothing except NYPPP's own actions prevents it from amassing and spending resources to effectively advocate its political views, NYPPP cannot clearly establish the irreparable harm essential to support any grant of preliminary injunctive relief.

II. The Requested Preliminary Injunction Should Also Be Denied Because Changing New York's Contribution Rules at this Late Date Would Impair the Fairness and Integrity of the Fast-Approaching Election.

NYPPP's delay and lack of irreparable harm also weigh heavily against an injunction when compared to the substantial public harm and unfairness to electoral participants from a suspension of the challenged contribution limit. If an injunction issues now, the State Board cannot ensure a fair election because it will be unable to disseminate information and educate the public about a significant alteration to campaign finance rules. As a result, NYPPP will gain an unfair advantage when other fundraisers relied on existing rules during months of campaigning. These disruptions alone merit denial of the injunction.

1. NYPPP's Undue Delay in Requesting Injunctive Relief Bars the Relief Sought.

Though NYPPP contends (incorrectly) that the relief it seeks follows directly from the logic of the 2010 *Citizens United* decision, NYPPP has sought this emergency relief more than three years after that decision, and only about five weeks before the November 5 election. This extreme delay in requesting extraordinary relief not only negates NYPPP's assertion of irreparable harm, see *supra* at 7-10, but is also fatal to its request for preliminary relief under the balancing of the equities. *Wada Marketing Grp.,* 2011 U.S. Dist. LEXIS 120660, at *12; *see Hessel v. Christie's Inc.*, 399 F. Supp. 2d 506, 520-21 (S.D.N.Y. 2005) (denying preliminary injunction because "the balance of hardships does not tip decisively in" favor of a movant that could have filed its "application two months ago").

Despite their stated desire to engage in "express advocacy for the election of conservative candidates in New York City" (Compl. ¶ 26), neither NYPPP nor its organizer, Engle, ever challenged New York's contribution limits until just weeks before Election Day. The challenged

$150,000 cap on aggregate individual contributions has been law for more than thirty-five years (McCann Decl. ¶ 9), and the legal precedents on which NYPPP relies—such as *Citizens United*—are "not new." *Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010). Campaigning for the 2013 citywide elections has itself been in full swing for many months. The equities do not favor NYPPP or Engle when they delayed seeking relief for years despite being "[w]ell aware of the requirements of the election laws" and their desire to advocate for conservative candidates. *Id.* Just last year, a court in the Northern District of New York rejected an almost identical preliminary injunction motion brought by another purportedly independent committee—which also identified Shaun McCutcheon as a putative contributor—because that committee unreasonably delayed in bringing suit until two months before the 2012 election. *See Hispanic Leadership Fund*, 12-cv-1337, Dkt. No. 32 at 28 (Vale Decl. Ex. I).

The only excuse NYPPP provides is that its need to advocate did not arise "until Mr. Lhota won an upset victory" in the September 2013 Republican primary over John Catsimatidis, who would have been a self-funded candidate. Letter from Todd R. Geremia to Hon. Paul A. Crotty, dated Sept. 16, 2013 (Vale Decl. Ex. A). This claim is belied not only by NYPPP's stated purpose of supporting conservative candidates more generally, but also by the historical record. Polls and newspaper articles show that Lhota led the primary race by a wide margin throughout the campaign. *See* Vale Decl. Exs. B-D (polls and newspaper article showing Lhota leading in primary from January to September 2013). NYPPP has provided no justification for its failure to do seek injunctive relief before "the eleventh hour," and its request must therefore be rejected. *Foley*, 2010 WL 2836722, at *5.

While delay is especially incompatible with a claim to emergency equitable relief in election cases, NYPPP's undue delay, coupled with the resulting prejudice to the State

Defendants and the public, also bars its request for preliminary relief under general principles of laches. Well-established principles of equity have long held that laches bars relief where "a plaintiff unreasonably and inexcusably delays in seeking an injunction, and the defendant is prejudiced by that delay." *Bray v. City of N.Y.*, 346 F. Supp. 2d 480, 491 (S.D.N.Y. 2004); *see also Tri-Star Pictures, Inc. v. Leisure Time Prods., B.V.*, 17 F.3d 38, 44 (2d Cir. 1994)). Moreover, when, as here, "the non-movant raises a potentially meritorious laches defense, it is appropriate to consider that issue in the preliminary injunction context." *Bray*, 346 F. Supp. 2d at 491-92.

2. A Preliminary Injunction Would Seriously Impair the Fairness of the Election and Thereby Cause Substantial Harm to the State Defendants and the Public Interest.

Even if NYPPP were able to explain its delay in seeking relief, the timing of the suit would nonetheless mean that any preliminary injunction would seriously harm the public interest in a fair campaign and election and impair the Board's administration of the State's campaign finance system in this 2013 election cycle. NYPPP baldly asserts that "Defendants cannot point to any harm to themselves or the public that would result from" enjoining enforcement of a thirty-five-year-old contribution limit on the eve of voting. Pl. Mem. At 18. But to the contrary, there would be considerable harm "to the public interest from the chaos that will ensue" if a long-standing limit is invalidated by this Court "in the crucial final weeks before an election." *Respect Maine PAC*, 622 F.3d at 16 (denying preliminary injunction when plaintiff "chose not to bring" their suit until three months before the election); *see Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (stating that courts considering immediate relief "should consider the proximity of" the election and the "mechanics and complexities of state election laws"). An injunction requiring a significant change to the rules now would frustrate the State Board's ability to ensure compliance

with statewide elections because it cannot provide adequate information and training to the public and electoral participants about the modified rules in advance of the election. McCann Decl. ¶¶ 10, 17. And, candidates, contributors, and political committees that relied on the existing aggregate limit in their activities and planning will be irreparably disadvantaged. This extreme disruption to the election alone would justify a denial of preliminary injunctive relief even if NYPPP had clearly established irreparable injury and demonstrated a substantial likelihood of success on the merits. *See Reynolds*, 377 U.S. at 585; *Favors*, 881 F. Supp. 2d at 371; *McComish v. Brewer*, No. cv-08-1550, 2008 U.S. Dist. LEXIS 83307, at *29, 35-36 (D. Ariz. Oct. 17, 2008), *aff'd* 653 F.3d 1106 (9th Cir. 2011).

The "obvious potential for confusion created by a change" to election laws on "short notice and without adequate training of personnel" weighs heavily against injunctive relief. *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); *see e.g.*, *Foley* WL 2836722, at *6; *Worley v. Roberts*, 749 F. Supp. 2d 1321, 1325 (N.D. Fla. 2010). That is exactly the situation here. As the district court in *Hispanic Leadership Fund* aptly explained, enjoining enforcement of the individual contribution limit will require the State Board "to make substantial changes to the implementation of New York's Election Law" with "insufficient time for" "the public and candidates" to be fully informed. *Hispanic Leadership Fund*, 12-cv-1337, Dkt. No. 32 at 28 (Vale Decl. Ex. I.) The State Board has already expended significant time and resources on distributing information and giving training programs regarding the current campaign finance rules. McCann Decl. ¶ 11. For example, the State Board has published a Campaign Finance Handbook, related brochures, updates on recent changes to the campaign finance laws, and extensive internet content on election law and contribution limits. *Id.* ¶¶ 11. The State Board

has also conducted statewide training and Continuing Legal Education (CLE) seminars for over seven-hundred attendees and workshops for about two-hundred employees of the County Boards of Elections. *Id.* ¶¶ 13-14. In order to adequately prepare electoral participants, the State Board generally provided this information and training in the winter and spring of 2013, well before election day. *Id.* ¶¶ 12-14. A significant change in the contribution limit now that directly contradicts all of this information and training in a critically important respect will create an "onerous" and very "confusing" situation. *Conservative Party of N.Y.*, 2010 U.S. Dist. LEXIS 114155, at *6-7. Indeed, with only four weeks left to go until election day, the State Board cannot redo in any meaningful way all of the information and training seminars, leaving electoral participants without resources to help them understand the rules applying to political contributions. McCann Decl. ¶ 18.

Moreover, a preliminary injunction will "disrupt the justifiable expectations of the individuals and entities that have and continue to comply" with the current contribution restriction. *Hispanic Leadership Fund*, 12-cv-1337, Dkt. No. 32 at 28 (Vale Decl. Ex. I). Relying on a limit in place since 1978, many contributors have likely completed their planned donations to political committees. And, because many candidates and political committees have already solicited funds and deployed resources under the existing rule, starting again is not an option. In fact, purportedly independent committees have already raised and spent at least $13 million in New York City races during this election cycle.[3] A sudden change at this late hour before a general election, and *after* primary elections have already been won and lost throughout

[3] *See* Celeste Katz, *Campaign Finance Board Protests Pro-Joe Lhota Group's Lawsuit; Bill de Blasio Fundraises Off It*, The Daily News (Sept. 27, 2013), *available at* www.nydailynews.com/blogs/dailypolitics/2013/09/campaign-finance-board-protests-pro-joe-lhota-groups-lawsuit-bill-de-blasio-fu.

the State, would be extremely unfair to actors who "relied on the" current contribution limit and to the voting public. *Respect Maine PAC*, 622 F.3d at 16; *see also McComish*, 2008 U.S. Dist. LEXIS 83307, at *35-36 (denying injunction considering "countervailing harm" that would ensue "to candidates that relied" on existing election laws "and the significant interest the public has in the smooth functioning of an election"). This harm to the electoral participants and public tips the balance of the equities decidedly against NYPPP.

This disruption to the electoral process and resulting injury to the public interest merits denial of the injunction. Particularly in light of NYPPP's continuing ability to "vigorously participate in the election," "the deep public interest in honest and fair elections" must take precedence. *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012); s*ee also Favors*, 881 F. Supp. 2d at 371 (noting "paramount importance" of the public in fair elections). Indeed, "once the election is over, it cannot be reversed, and any consequences flowing from the disruption in equilibrium in the campaign contribution laws would . . . be irreversible." *Lair*, 697 F.3d at 1215. The balance of the equities and the strong public interest in fair and orderly campaigns and elections thus point strongly against a preliminary injunction.

III. The Preliminary Injunction Should Be Denied for the Independent Reason that NYPPP Fails To Demonstrate a Substantial Likelihood of Success on the Merits

1. NYPPP Challenges a Contribution Limit That Receives Less Rigorous Constitutional Scrutiny Than Laws Limiting Spending on Political Campaigns.

In arguing that strict scrutiny applies to its constitutional claims, NYPPP fundamentally ignores the critical and longstanding distinction drawn in campaign finance cases between restrictions on campaign *expenditures* and restrictions on political *contributions*. This suit unmistakably challenges the latter, and so proceeds under "relatively complaisant" review. *FEC*

v. Beaumont, 539 U.S. 146, 161 (2003) (internal quotations omitted); *see Buckley v. Valeo*, 424 U.S. 1, 20 (1976).

Contribution limits are scrutinized less closely than spending limits because they create only "marginal speech restrictions." *Beaumont*, 539 U.S. at 161; *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."). By definition, "the transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley*, 4245 U.S. at 21. The contribution of funds, unlike expenditures for direct advocacy, is essentially a symbolic form of associational expression. *See Buckley*, 424 U.S. at 21; *see Ognibene v. Parkes*, 671 F.3d 174, 182-83 (2d Cir.), *cert. denied*, 133 S. Ct. 28 (2012). Instead of speaking directly, a contributor cedes control over the message and allows the recipient to engage in political debate. *Buckley*, 424 U.S. at 21. And the symbolic expressive act of contributing is not significantly impacted by contribution limits set at reasonable levels that allow recipients to raise enough money to advocate effectively. *Id.*

Consequently, contribution limits are not subject to strict scrutiny, which demands that a law be necessary to serve a compelling government objective. Rather, contribution limits will be upheld so long as they are "closely drawn to address a sufficiently important state interest." *Ognibene*, 671 F.3d at 183; *see Beaumont*, 539 U.S. at 162. Applying this less rigorous scrutiny, the Supreme Court has upheld base limits on contributions to particular candidates, parties, or authorized committees, along with aggregate limits on total contributions. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 397 (2000); *Buckley*, 424 U.S. at 23-39.

Ignoring forty years of Supreme Court authority, NYPPP argues that strict scrutiny applies here because *Buckley*'s discussion of the degree of scrutiny is limited to contributions to

a candidate or party committee, and does not apply to contributions to an independent-expenditure-only committee. Pl. Mem. 9-10. This fundamentally misreads *Buckley*: the Court's analysis there focused on the fact that all contributions, regardless of the recipient's identity, fund speech that is not the contributor's own, and thus constitute at most a symbolic form of expression. *See Buckley*, 539 U.S. at 20-21; *see also Beaumont*, 539 U.S. at 162 (recognizing that the "degree of scrutiny turns on the nature of the activity regulated"). To the extent NYPPP claims that strict scrutiny applies because NYPPP will use the contributions it receives only for independent expenditures (Pl.'s Mem. 10), this argument is also foreclosed by *Buckley*, which upheld contribution limits regardless of whether the funds were ultimately used for candidate contributions or non-coordinated expenditures. *See McConnell v. FEC*, 540 U.S. 93, 152 n.48 (2003); *see also Ognibene*, 671 F.3d at 182-82 (applying lenient scrutiny to contribution limits). New York's contribution limit is therefore constitutional as applied to independent-expenditure-only committees so long as it is closely drawn to serve important state interests—a standard that is easily met here.

2. New York's Contribution Limit Is Closely Drawn To Address the Important State Interest of Preventing Actual or Apparent Corruption.

There is no doubt that preventing real or perceived corruption is a sufficiently important state interest to justify contribution limits. *See Ognibene*, 671 F.3d at 186-87. NYPPP claims, however, that following *Citizens United*, New York's corruption interest must be viewed narrowly to include only *quid pro quo* dealings. Pl.'s Mem. 12-13. It then reasons that because *Citizens United* held that corporate independent expenditures do not raise *quid pro quo* corruption concerns, the state necessarily lacks a valid anticorruption interest in limiting contributions to allegedly independent political committees. *Id.* 13-14. All of the out-of-circuit

cases cited by NYPPP as rejecting contribution limits on independent expenditure-only committees are premised on the exact same argument. *Id.* 14. But that is simply not the law in this Circuit, and so the cases cited by NYPPP do not apply here.

The Second Circuit has made clear that a broader view of corruption, not limited to *quid pro quo* corruption alone, applies to the constitutional review of contribution limits. In *Ognibene*, the court explained that *Citizens United* dealt *only* "with independent corporate expenditures, not with" restrictions on contributions. 671 F.3d at 184 n.10. As a result, although prevention of actual or apparent quid pro quo corruption alone qualifies as a compelling interest for the purpose of an expenditure ban such as that involved in *Citizens United*, the Second Circuit holds that "more discreet" forms of corruption may be considered in the more lenient review of contribution limits. *Id.* at 187. The Circuit has specifically held that, after *Citizens United*, "improper or undue influence" "still qualifies as a form of corruption" for the purpose of assessing the constitutionality of contribution limits.[4] *Id.* at 186 (emphasis omitted); *see FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (defining corruption "not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment"). NYPPP's exclusive focus on *quid pro quo* corruption, and disregard of the obvious potential for undue influence that would be raised by unlimited contributions to nominally independent political committees when contributors' identities would be known to candidates and party committees, is therefore entirely misplaced.

[4] Indeed, *Ognibene* leaves open that "additional interests," such as the "distortional impact" of political committees' involvement in elections, can also support contribution limits. *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 402 n.21 (D. Vt. 2012).

New York's contribution limit, as applied to independent-expenditure-only committees, is closely drawn to address the State's important interest in preventing corruption and the appearance of corruption—in both the *quid pro quo* and improper influence forms. Contributions to entities "inextricably intertwined" with candidates, campaigns, or parties raise the specter of actual or apparent corruption. For example, the Supreme Court in *McConnell* upheld contribution limits for political parties based on the "close connection and alignment of interests" between parties and candidates. *McConnell*, 540 U.S. at 155. Considering the close "nexus" between these two groups, the Court thought it unsurprising that "candidates would feel grateful for" donations to parties and provide favors to the contributors in return. *Id.* at 145.

Political committees, including those claiming to spend independently, are similarly intertwined with candidates, authorized committees, political parties, and their agents. As a result, unlimited contributions to nominally independent committees raise serious *quid pro quo* and improper influence concerns, as well as concerns about circumvention of other valid contribution limits. The political insiders who typically control these committees may be prior campaign advisers of the candidates supported or they may end up working for or advising those candidates after they win election. *See* Richard Briffault, *Coordination* Reconsidered, 113 Columbia L. Rev. 88, 90-92 (2013). As a result, even if these political insiders run political committees that maintain technical independence during the election, they can easily help candidates thank donors with favors once they take office. *Cf. Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 459 (describing "tally" system in which parties informally tracked contributions as sourced from particular candidates). Indeed, contributors may be willing to cede control of their message to political committees precisely because the committee's organizers can connect donors to grateful officials or parties. And the presence of coordination between the

purportedly independent committee and the candidate or party during the campaign itself may be difficult to detect or prove, raising the serious risk that limits to contributions to candidates or parties may effectively be circumvented through the structuring or nesting of political committees that are in existence for only a short time. *See McConnell*, 540 U.S. at 164, 224 (explaining that the "hard lesson of circumvention" from "the entire history of campaign finance regulation" is that "[m]oney, like water, will always find an outlet").

The idea that insiders running "independent" committees can be closely tied to candidates and parties is borne out by the facts here. Craig Engle, NYPPP's treasurer, has "over 20 years [of] experience advising candidates, campaigns, and political parties," including serving as General Counsel for the National Republican Senate Committee. Engel Decl. ¶ 6. He is also currently involved with several other political committees, at least one of which is not considered independent. (Vale Decl. Ex. E (noting Engle's role as treasurer for a leadership committee, a type of PAC through which federal politicians raise money to fund other candidates' campaigns).) And, Engle's multiple roles in the presidential bid of Jon Huntsman demonstrate that committee independence is often a fluid concept. Engle acknowledges that he served as General Counsel for Jon Huntsman's 2012 political campaign. Engel Decl. ¶ 6. Yet in connection with the same election, Engle had also served as general counsel to a political committee supporting Huntsman, which purportedly was entirely independent of Huntsman. *See* Vale Decl. Ex. F (news reports noting Engle's multiple roles). Such line-blurring belies NYPPP's assertion that contributors to committees are too far removed from candidates to raise any concerns. *See* Pl. Mem. at 15.

Even if contributions to purportedly independent committees did not actually cause corruption, they create an appearance of corruption that by itself is sufficient to sustain New

York's limits. Preventing perceived corruption is a separate and legitimate state interest "due to the difficulty of detecting actual corruption and the equal importance" of maintaining voter faith in elections. *Ognibene*, 671 F.3d at 188; *see also Buckley*, 424 U.S. at 27. Substantial evidence 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), *available at* http://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-demoncracy. In light of this voter disillusionment, New York has a valid interest in capping contributions to independent committees. *See id.* (stating that many voters are less likely to vote because of perceived influence of contributors to independent committee).

For several reasons, New York's generous contribution limit is closely drawn to address these important interests. First, nothing in the law restricts anyone's ability to spend freely on independent expenditures. Second, the limit as challenged by NYPPP applies only to a small number of committees independently promoting the election or defeat of candidates or ballot proposals.[5] *See* Election Law § 14-100(9)(1). These are precisely the entities most likely run by political insiders with close connections to candidates or political parties. Finally, the challenged limit for aggregate individual contributions is extremely large—$150,000 per year. NYPPP does not explain how this high ceiling is preventing it "from amassing the resources necessary for

[5] According to the State Board's data, there are currently about 417 "type 9" political committees in the State, which includes authorized and independent committees. McCann Decl. ¶ 18. Such a small number of entities is a far cry from the millions of small businesses affected by the corporate-expenditure ban in *Citizens United*.

effective advocacy." *Buckley*, 424 U.S. at 21. Indeed, NYPPP can start expressing itself right now by collecting large sums of money (subject to relevant contribution limits) from McCutcheon and any other willing contributors, though it inexplicably is not doing so. Engle Decl. ¶¶ 19-21; *see* State Board Formal Opinion 1994-3.

NYPPP seems to argue that the contribution limit sweeps too broadly as applied to nominally independent committees, and that the above concerns should be addressed solely by directly enforcing rules against coordination between committees claiming independence and political candidates or parties. But this ignores the relevance of undue influence corruption under Second Circuit law—undue influence concerns are presented even where coordination during the campaign itself does not occur. NYPPP also ignores the fact that coordination cannot necessarily or easily be detected or proved where it is present. NYPPP's argument is also out of step with *Buckley*, which rejected arguments that the contribution limits upheld there did not qualify as "closely drawn" because laws directly prohibiting bribery and laws mandating disclosure of contributions were sufficient to protect the government's interests. The Court also upheld the contribution limits in *Buckley* 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." *Buckley*, 424 U.S. at 29. The question, therefore, is not whether direct enforcement of coordination rules can prevent some or most corruption or circumvention of other limits. Nor is the question whether most independent-expenditure-only committees are genuinely independent of candidates or parties, or lead to actual or apparent corruption. The question is whether serious risks of actual or apparent corruption, *quid pro quo* or undue influence, nonetheless remain as to contributions to nominally independent committees—and they do.

At a minimum, discovery is needed to explore the fact-specific questions of the real or apparent corruption concerns created by supposedly independent political committees. *See, e.g.*, *McConnell*, 540 U.S. at 146-54 (relying on record evidence to uphold contribution limits for political parties). By contrast, the courts on which NYPPP relies (Pl. Mem. at 15) did not consider factual discovery, *see, e.g.*, *Speechnow.org v. FEC*, 599 F.3d 686, 690-91 (D.C. Cir. 2010) (answering certified questions), or found contribution limits unconstitutional based on an absence of record evidence, *see, e.g.*, *Emily's List v. FEC*, 581 F.3d 1, 13-15 (D.C. Cir. 2009). This Court should not invalidate a presumptively constitutional law or grant NYPPP relief without the benefit of discovery.

3. Even if the Law Were Unconstitutional As Applied to Contributions to Independent-Expenditure Committees, NYPPP's Self-Serving Claims of Independence Would Be Insufficient To Warrant a Preliminary Injunction.

NYPPP also cannot demonstrate a substantial likelihood of success on the merits based merely on self-serving claims of independence. Its merits arguments hinge on the assertion that NYPPP is truly independent of Lhota and any relevant party committee, but this a highly factual inquiry that cannot be resolved without discovery and factual development. If NYPPP could simply proclaim its independence and receive a preliminary injunction immunizing its receipt of unlimited contributions to support Lhota just weeks before the election, it would be able evade the rules for the upcoming election, even if it were to ultimately lose this case.

NYPPP declares in a bare-bones affidavit that it will not coordinate with Lhota, any of his agents, or any other entity working with Lhota's campaign. Engle Decl. ¶¶ 8-11. But the pivotal inquiries into the "character" of NYPPP's "political involvement" and the "details of its activities" are not as simple as NYPPP suggests. *Vt. Right to Life Comm.*, 875 F. Supp. 2d at

406. Evaluating coordination is a highly factual inquiry into such factors as the type and content of communications between purportedly independent committees and candidates, parties, or authorized committees; overlapping staff amongst such entities; and communications with the same third parties. *See, e.g.*, *id.* at 407-08 (upholding contribution limit when committee lacked independence based on overlapping fund use and staff with an authorized committee). Moreover, courts have concluded based on a developed factual record that certain political committees did not qualify as independent because they engaged in campaign contributions through a separate bank account or transferred funds to other committees. *See, e.g.*, *Ala. Democratic Conference v. Broussard*, No. 11-16040, 2013 WL 5273304, at *2 (11th Cir. Sept. 19, 2013) (transfers); *Stop This Insanity, Inc. Employee Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 40 (D. D.C. 2012) (hybrid committees).

Put simply, because "facts are vital" to determining whether NYPPP is actually independent, discovery is needed. *Vt. Right to Life Comm.*, 875 F. Supp. 2d at 405. Otherwise, relying on NYPPP's purely self-serving statements "would grant [it] an explicit green light . . . to circumvent" New York's regulations. *Id.* at 406 (quotation marks omitted). Such a result is particularly troubling here considering the impending election. A preliminary injunction would give NYPPP all of the relief it needs—unlimited contributions during the next few weeks—without meaningful discovery. *See Hispanic Leadership Fund*, Dkt. No. 32, at 28 (Vale Decl. Ex. I). NYPPP would, as a result, gain an unfair advantage in an election that cannot be undone. Accordingly, the Court should deny the preliminary injunction motion because NYPPP has not established a likelihood of success.

CONCLUSION

For the reasons stated herein, the request for a preliminary injunction should be denied.

Dated: October 4, 2013
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