No. 24-___

IN THE

Supreme Court of the United States

UPSTATE JOBS PARTY, MARTIN BABINEC, and JOHN BULLIS,
Petitioners,

v.

PETER S. KOSINSKI, NEW YORK STATE BOARD OF ELECTIONS CO-CHAIR COMMISSIONER, IN HIS OFFICIAL CAPACITY, HENRY T. BERGER, NEW YORK STATE BOARD OF ELECTIONS CO-CHAIR COMMISSIONER, IN HIS OFFICIAL CAPACITY, ESSMA BAGNUOLA, NEW YORK STATE BOARD OF ELECTIONS COMMISSIONER, IN HER OFFICIAL CAPACITY, ANTHONY J. CASALE, NEW YORK STATE BOARD OF ELECTIONS COMMISSIONER, IN HIS OFFICIAL CAPACITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

SHAWN T. SHEEHY
Counsel of Record
JASON B. TORCHINSKY
JONATHAN P. LIENHARD
EDWARD M. WENGER
PHILLIP M. GORDON
CALEB ACKER
OLIVER ROBERTS
HOLTZMAN VOGEL
BARAN TORCHINSKY & JOSEFIAK PLLC
2300 N Street, NW
Suite 643
Washington, DC 20037
(202) 737-8808
ssheehy@holtzmanvogel.com

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Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

When the government restricts political speech, to satisfy the First Amendment, the government must "point to record evidence or legislative findings demonstrating the need to address a special problem." *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 307 (2022) (internal quotation marks omitted). This case presents the first opportunity for this Court to establish the quantum of evidence the government must adduce before it can restrict political speech through asymmetrical campaign contribution limits when it is conceded that the government lacks direct evidence of quid pro quo corruption.

New York has asymmetrical contribution limits for major parties and independent bodies.[1] In fact, major party candidates are allowed to receive, via party transfer, as much as fifteen times the amount that minor party candidates are allowed to receive. The State creates this asymmetry through three interconnected provisions. *First*, major parties may receive individual contributions up to $138,600, while independent bodies may only receive the substantially lower contribution limits for individuals to candidates (in some cases, fifteen times less). *Second*, major parties may contribute unlimited amounts to their candidates, while independent bodies may only transfer an amount equivalent to the contribution limits permitted for individuals for that same race. *Third*, major parties may establish separate bank accounts (called "housekeeping" accounts) where parties can raise and spend unlimited sums of money for ordinary expenses and not for expressly advocating the election or defeat of a candidate. By contrast,

[1] New York's independent bodies are also known as minor parties.

independent bodies are prohibited from establishing such housekeeping accounts. Because the major parties may raise fifteen times more funds than independent campaigns and then may transfer those funds without limitation to their candidates, the de facto contribution limit for major party candidates can be fifteen times more than the limit contribution for independent candidates.

In its opinion below, the U.S. Court of Appeals for the Second Circuit acknowledged that Respondent Commissioners failed to adduce evidence of "actual" quid pro quo corruption. App.30a-31a. Indeed, the Second Circuit found that independent bodies have never been involved in actual corruption and that the Commissioners have never brought an enforcement action against an independent body. App.31a. Nor did New York justify its asymmetrical contribution limits with evidence that minor political parties were vehicles for corruption in other States. See *Ted Cruz for Senate*, 596 U.S. at 307.

The Second Circuit still, however, held that New York's asymmetrical contribution limits that favor major political parties are constitutional under the justification of preventing the "appearance" of quid pro quo corruption. The New York Legislature made no such findings itself. The Second Circuit based its conclusion on specious sources: legislative history that did not discuss independent bodies, App.32a-33a, one hypothetical made in an eight-page affidavit and substantially repeated in an expert report, App.27a-28a, assertions made by the same affiant in a deposition, App.27a, and "common sense," App.40a. Missing was legislative history explaining the need for asymmetrical contribution limits, examples of actual corruption, polls, referenda, newspaper accounts, and

any other evidence demonstrating that the public is aware of "opportunities for abuse inherent in a regime of large financial contributions to particular candidates." *McCutcheon v. FEC*, 572 U.S. 185, 207 (2014); *Ted Cruz for Senate*, 596 U.S. at 305-11; *Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377, 393–94 (2000).

Accordingly, the questions presented are:

1. Whether mere hypothetical assertions from party experts and judge-specific common sense are sufficient to impose asymmetrical restrictions on political speech when there is no evidence of actual quid pro quo corruption, and the government failed to adduce polls, referenda, relevant legislative findings, or any other indicia that the public is concerned about the appearance of corruption.

2. Whether preventing the *appearance* of quid pro quo corruption is a legitimate justification for imposing restrictions on protected political speech when the government lacks any evidence of *actual* quid pro quo corruption.

3. Whether asymmetrical contribution limits for parties and the campaigns and candidates they support who are competing against each other in the same election are closely drawn to an anticorruption interest.

PARTIES TO THE PROCEEDING

Petitioners are the Upstate Jobs Party, a nonprofit corporation registered in New York under the name Vote Upstate Jobs, Inc., and organized under 26 U.S.C. § 501(c)(4), Martin Babinec, and John Bullis (collectively "Petitioners"). All three Petitioners were Plaintiffs in the district court and Appellees-Cross-Appellants before the U.S. Court of Appeals for the Second Circuit.

Respondents are the co-chairs and commissioners of the New York State Board of Elections, all of which were sued in their official capacities: Peter S. Kosinski, Henry T. Berger, Essma Bagnuola, and Anthony J. Casale (collectively "Commissioners" or "Respondents"). Respondents were Defendants and Appellants-Cross-Appellees in the proceedings below. Commissioners Berger, Bagnuola, and Casale were substituted in as successors to the former commissioners and original defendants: Douglass Kellner, Andrew J. Spano, and Gregory P. Peterson. All Commissioners are sued in their official capacities.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, The Upstate Jobs Party does not have a parent corporation, and no publicly owned corporation owns 10% or more of its stock. Martin Babinec and John Bullis are both individuals.

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INTRODUCTION

When the government relies on the "appearance of corruption" to justify the restriction of political speech, this justification is "either [a] useless appendage[] to demonstrated instances of *quid pro quo* corruption, or [it is] rhetorical compensation for their absence." Robert F. Bauer, *The Varieties of Corruption and the Problem of Appearance: A Response to Professor Samaha*, 125 Harv. L. Rev. F. 91, 91 (2012). This case is about the Second Circuit's reliance on an illusory "appearance of corruption," the absence of evidence demonstrating instances of actual quid pro quo corruption, and the absence of evidence demonstrating that the public is aware of "opportunities for abuse inherent in a regime of large financial contributions to particular candidates." *McCutcheon*, 572 U.S. at 207 (plurality op.).

The Second Circuit upheld asymmetrical contribution limits that disadvantage third parties in campaign fundraising. Upholding this fifteen-to-one advantage for major parties, the court justified its decision without any evidence of quid pro quo corruption and without presenting any data or legislative findings on "appearance of corruption." Rather, it reached its conclusion by relying *solely* on an expert's opinion on theoretical risk, a presented hypothetical, and the panel's purported "common sense." In effect, the Second Circuit ruled that, as long as the government invokes the interest of preventing the "appearance of corruption," then the government may impose asymmetrical contribution limits without presenting any supporting evidence of (i) actual corruption; (ii) legislative findings substantiating that interest or evidence of public concerns over the appearance of corruption; (iii) newspaper accounts

about that fear; (iv) polls or referenda substantiating that fear; or (v) scholarly work whatsoever. That approach cannot be squared with this Court's First Amendment jurisprudence on the "most fundamental" right of candidates, campaigns, and parties to engage in political speech. *Ted Cruz for Senate*, 596 U.S. at 310. Rather than relying on evidence, the Second Circuit has relied on "mere conjecture"—which the Supreme Court has "never accepted" as enough. *Id.* at 307.

The Second Circuit's decision sets a chilling precedent that will erode the First Amendment. For example, a State can pass a campaign finance restriction on contributions without any actual evidence that the restriction will prevent corruption; based on the Second Circuit's rationale, that restriction will be upheld if the State can simply hire an expert to produce an affidavit stating that there is risk of corruption based on hypothetical examples. No evidence, and no legislative history or findings demonstrating a legitimate state interest required. The Second Circuit's decision to uphold disparate contribution limits and transfers based on illusory state "interests" flouts this Court's precedent and eliminates any barrier to the government's restriction of constitutional rights. This constitutional violation merits review.

Asymmetrical restrictions, like the ones in this case, burden First Amendment political activity. See *Ted Cruz for Senate*, 596 U.S. at 303 ("[T]he burden on First Amendment expression is 'evident and inherent' in the choice that candidates and their campaigns must confront."). Indeed, this Court has "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing

against each other." *Davis v. FEC*, 554 U.S. 724, 738 (2008). The only other circuit court to have considered asymmetrical contribution limits between major parties and third parties struck them down as not closely drawn to a sufficient government interest. *Riddle v. Hickenlooper*, 742 F.3d 922, 929 (10th Cir. 2014). Thus, the Second Circuit (i) has created a circuit split on this issue, and (ii) in doing so, stands as the outlier in campaign finance jurisprudence. This Court should resolve this circuit split to protect the First Amendment interests implicated by New York's asymmetrical campaign finance laws.

This case also presents an opportunity for this Court to confront a question it has not yet directly addressed: Whether preventing the *appearance* of quid pro quo corruption is a legitimate justification for imposing restrictions on protected political speech when the government lacks any *evidence* of *actual* quid pro quo corruption. Because this Court has persistently undermined the interest underlying the prevention of the appearance of corruption interest—namely, fighting voter cynicism about money in politics and bolstering public perceptionin the fairness of the system—it should now make clear that appearance alone does not cut it for the Constitution.

The ramifications of the Second Circuit's decision are far-reaching and directly impact our fundamental democratic systems. States—in particular, entrenched incumbents—must not have carte blanche to create barriers to electoral entry by burdening First Amendment campaign speech. See *Riddle*, 742 F.3d at 933 (Gorsuch, J., concurring) ("[T]he only reason I can imagine for Colorado's challenged regulatory scheme is a bald desire to help major party candidates at the expense of minor party candidates.").

To resolve this circuit split, remedy existent First Amendment violations, and preserve our democratic electoral systems, this Court should review and reverse the Second Circuit's decision.

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit for case numbers 21-2518 and 21-2557 is reported at *Upstate Jobs Party v. Kosinski*, 106 F.4th 232 (2d Cir. 2024). This opinion is also reprinted in the Appendix. App.1a-52a.

JURISDICTION

The district court issued its corrected opinion on October 8, 2021. This opinion is reported at *Upstate Jobs Party v. Kosinski*, 559 F. Supp. 3d 93 (N.D.N.Y. 2021). The Commissioners timely noticed their appeal on October 14, 2021, and Petitioners then timely noticed their cross-appeal on October 18, 2021. App.55a-56a, App.13a and n.11, 16a, 218a-221a.

The U.S. Court of Appeals for the Second Circuit issued its decision on July 3, 2024. On September 12, 2024, Petitioners submitted to Justice Sotomayor an application to extend time to file this Petition for Certiorari up to and including October 31, 2024. No. 24A266 (Sep. 12, 2024). Five days later, Justice Sotomayor granted the requested extension. No. 24A266 (Sep. 17, 2024).

Accordingly, this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment to the United States Constitution states that "Congress shall make no law

… abridging the freedom of speech…. or the right of the people peaceably to assemble."

The New York state statutes at issue are included at App.197a-217a.

STATEMENT OF THE CASE

A. New York's Campaign Finance Laws

New York has a system of asymmetrical campaign finance laws that places lower contribution limits on third parties and contributions to their candidates vis-a-vis major parties competing in the same elections.

As a preliminary matter, the State distinguishes between "parties" and "independent bodies" by statute. "Parties" are defined as groups whose gubernatorial and presidential candidates, in the last preceding general elections, received votes exceeding a certain percentage threshold, N.Y. Elec. Law §1-104(3), whereas, "independent bodies" are defined as organizations that nominate candidates for office and then put those candidates forward to the public to be voted upon at the general election but do not meet the threshold to qualify as "Parties," (i.e., third parties). N.Y. Elec. Law §1-104(12). New York's campaign finance system then advantages parties over independent bodies by levying asymmetrical restrictions in three areas: individual contribution limits, party-to-candidate contributions (i.e., transfers), and housekeeping accounts.

First, parties can receive more contributions than independent bodies. Parties may receive contributions up to $138,600 from individuals, N.Y. Elec. Law § 14-114(10), 9 N.Y.C.R.R. § 6214.0, while independent bodies can only receive contributions from individuals up to the individual contribution limit (i.e., the same

limit imposed on any typical person donating to a candidate). This limit is significantly lower. *Id*. § 14-114(1). Second, the parties are advantaged because they may then make *unlimited* contributions to their parties' candidates, *id.* § 14-114(3), while independent bodies can only make contributions to their own candidates up to the individual contribution limit. Third, parties are further advantaged because they may establish separate bank accounts called housekeeping accounts where they can raise and spend unlimited amounts of money on ordinary party expenses, e.g., office space and employees and anything else not allocable to a candidate. *Id.* § 14-124(3). Independent bodies are prohibited from establishing housekeeping accounts. *Id.*

The asymmetry is stark and straightforward. Because parties may raise fifteen times as much as the contribution limit vis-à-vis independent candidates and then may make unlimited transfers to their candidates, the de facto contribution limit for party candidates is fifteen times that for independent candidates. For example, a party may receive $138,600 from an individual and then transfer that contribution to the party's gubernatorial candidate; meanwhile, for the very same gubernatorial election, an independent body can only receive $9,000 from an individual contributor and transfer that amount to its gubernatorial candidate. App.8a-9a. The State's draconian and asymmetrical campaign finance laws create stark financial disparities disadvantaging independent bodies. Furthermore, the housekeeping exception—which allows parties (but not independent bodies) to maintain "housekeeping" accounts—frees up all those fungible maintenance funds for the major parties to then transfer to their candidates, thereby exacerbat-

ing the disequilibrium between parties and independent bodies.

B. Procedural History & Decision Below

Bringing suit under the First and Fourteenth Amendments, Petitioners challenged New York's asymmetrical campaign finance laws distinguishing between political parties and independent bodies, including the disparate individual contribution limits, transfer limits, and the "housekeeping account" exception.

The district court issued summary judgment partially in favor of Petitioners-Plaintiffs by striking down the asymmetrical contribution limits as not closely drawn under the First and Fourteenth Amendments. The district court also found for Respondents-Defendants with respect to the constitutionality of the housekeeping account law, which it found closely drawn to New York's anticorruption goals. App.60a-139a. Both parties cross-appealed to the Second Circuit. App.55a-56a.

On July 3, 2024, the Second Circuit rendered its decision, affirming in part and reversing in part but holding against Petitioners on all claims. Finding that the Upstate Jobs Party and parties were not similarly situated, the court upheld the constitutionality of the laws. On the First Amendment claims, the court upheld the asymmetrical contribution and transfer limits for independent bodies because the court believed New York demonstrated an interest in avoiding the appearance of quid pro quo corruption, and the restrictions were closely drawn to that interest. App.23a-40a. For the same reason, the court determined that the housekeeping exception—allowing parties (but not independent bodies) to maintain

housekeeping accounts—did not violate the First Amendment. App.42a-51a.

Concerning contribution and transfer limits, the court relied on extremely limited evidence to hold that the Commissioners satisfied their requirement to prove the asymmetrical contribution limit prevents the appearance of quid pro quo corruption. The court relied on one of the Commissioners' experts who, in an affidavit, opined that independent candidates would have a "strong incentive" to use independent bodies as vehicles to evade contribution limits. App.27a. Jumping from conjecture to hypothetical, the court then cited another expert's hypothetical opinion about a town supervisor candidate who could—theoretically—form an independent body to collect more contributions than the individual limit. App.27a-28a (referring to App.194a-195a "Quail Declaration"). Absent from these opinions and hypotheticals were actual evidence, reliable data, and real-world facts.

In fact, the court, like the Commissioners, conceded that there was no evidence adduced of actual corruption in the independent body context but noted, that under Second Circuit precedent, it is "not necessary to produce evidence of actual corruption to demonstrate the sufficiently important interest in preventing the appearance of corruption." App.30a (quoting *Ognibene v. Parkes*, 671 F.3d 174, 183 (2d Cir. 2011)). Accordingly, the Second Circuit acknowledged—but then disregarded—the fact that the Commissioners had never brought an enforcement action against an independent body for evading a contribution limit and had showed no evidence that an independent body had ever been implicated in a New York corruption scandal. App.31a-32a. Replacing facts with theory, the court dismissed legislative findings and relied on the

two experts' opinions and hypotheticals to justify upholding the campaign finance laws. Removing the State's burden of production *sua sponte*, the Second Circuit helped carry the State's argument: "Exercising this *common sense*, we conclude that, without these limits, real or perceived corruption *could result* from a candidate's knowledge that one donor has provided the lion's share of his campaign cash or a large donor's knowledge that his money will go to a single candidate." App.40a (emphasis added). In response to Petitioners' pointing out the absence of legislative findings or history supporting the asymmetrical limits, the decision below cited that the first contribution limit imposed on major parties in 1992 followed a "series of corruption scandals" on the "heels of a years-long investigation by the New York State Commission on Government Integrity." App.32a-33a. The court even acknowledged that the legislative history did not mention independent bodies because the legislation was not addressed to independent bodies. App.33a ("The absence of specific findings related to scandals involving independent bodies is unsurprising, as the Commissioner's focus was on corruption stemming from New York's under-regulated party system.").

Thus, the Second Circuit relied on "mere conjecture" to ground its decision. See App. 31a (stating that the "previously articulated" evidence, i.e., the expert hypotheticals, were sufficient to justify the restriction). Indeed, the Second Circuit incorrectly determined that the asymmetrical rules were closely drawn to prevent apparent quid pro quo corruption because independent bodies "may" be closely held entities functioning as the alter ego of one candidate, thereby posing a potentially higher risk of corruption than the major parties. App.46a.

As to the housekeeping exception, the court similarly found it sufficiently tailored to advance the government's anticorruption interest. Specifically, the court declared the State's interest to be the "same anticorruption justification as for its contribution limits" and relied solely on "an illustrative hypothetical" about a wealthy donor fielding one candidate and providing the candidate all funds to cover housekeeping expenses, thereby freeing up other funds. App.44a-45a. This was presented as the "alter ego" theory. Despite the fact that this same hypothetical could apply to parties as well,[1] the court brushed aside this real concern because of "democratic controls." App.45a. With the "alter ego" theory driving its analysis, the court concluded: "to the extent independent bodies function as alter egos of their candidates, there *may* be no practical distinction between donating to an independent body's housekeeping account and donating directly to a candidate." App.46a (emphasis added).

Relying on hypotheticals and conjecture, the Second Circuit determined that the "appearance of corruption" serves as a legitimate state interest and that New York's campaign finance system was constitutionally sound.

Challenging the Second Circuit's holdings, Petitioners filed this Petition.

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[1] New York does not require parties to run a minimum number of candidates in an election year. Instead, to obtain and maintain party status, New York requires parties to exceed a certain vote threshold in the presidential and gubernatorial elections only, N.Y. Elec. Law § 1-104(3).

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Decision Conflicts with Decisions of This Court.

This Court has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Ted Cruz for Senate*, 596 U.S. at 307. The Second Circuit relied solely on hypotheticals and "common sense." On this basis alone, the Court should grant certiorari and reverse. Under this Court's precedents, the Second Circuit's decision fails at the threshold because it impermissibly lowered the evidential standard that this Court requires for the government to restrict political speech in the context of regulating contribution limits for independent bodies.

Ted Cruz for Senate set out both this Court's approach to restrictions on political speech and requirements for what evidence must be shown. Whenever a government wishes to restrict political speech, it "must prove at the outset that it is in fact pursuing a legitimate objective[,]" namely, "the prevention of '*quid pro quo*' corruption or its appearance." *Id*. at 305. A government "defending a restriction on speech as necessary to prevent an anticipated harm" must do more than simply regurgitate the existence of the problem the government wishes to address. *Id*. at 307. Rather, there *must* be "actual evidence that the [political speech] limitation was necessary to prevent quid pro quo corruption or its appearance." *Id.* at 305. Governments may proffer legislative findings demonstrating "the need to address a special problem" that transcends "mere conjecture." *Id.* In *McConnell*, this Court noted that "[t]he quantum of empirical evidence needed" to justify a campaign finance restriction "var[ies] up or down with the novelty and plausibility of the [law's] justification." 540 U.S. at 144. Accord-

ingly, in *Ted Cruz for Senate*, this Court laid out that quantum needed in a situation where "the Government is unable to identify a single case of *quid pro quo* corruption in this context." 596 U.S. at 307. Hypotheticals about political influence put forward in a "handful of media reports and anecdotes" laying out potential risks in the loan repayment context did not qualify as direct evidence. *Id*. at 307–08.

"In the absence of direct evidence" of quid pro quo corruption in that context, the Court found the following evidence of "a heightened risk of at least the appearance of corruption" to be insufficient:

- A scholarly article that failed to distinguish between influence and quid pro quo corruption;
- An online poll doing the same; and
- A "few stray floor statements" by individual Members of Congress that did not constitute "legislative findings" of a special problem to be addressed.

Id. at 309–10. The Court dismissed those proffers as "pretty meager" evidence to restrict "the most fundamental First Amendment activities" of campaigning for public office. *Id*. at 310. Types of evidence that the Court has found sufficient in the past are "legislative findings suggesting any special corruption problem in respect to" the campaign finance issue at hand. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996).

This Court next noted that the Government's and dissenting Justices' "common sense" reasoning was insufficient to uphold the legislation. *Ted Cruz for Senate*, 596 U.S. at 311. And the mere fact that Congress had passed the law was insufficient proof of

evidence when the law's proponents had no data supporting the law and where "the legislative act may have been an effort to insulate legislators from effective electoral challenge." *Id*. at 313 (quotation marks omitted and cleaned up).

This case is remarkably similar to *Ted Cruz for Senate*. New York's Board of Elections here "is unable to identify a single case of *quid pro quo* corruption in this context." *Id*. at 307. New York has established asymmetrical restrictions on parties, independent bodies, and their respective candidates, imposing lower contribution limits on independent bodies and the transfers they can make to their candidates. Yet the Second Circuit, citing its own precedent, openly conceded there was no "evidence of actual corruption" in the context of contributions to third parties and candidates and held that such evidence was "not necessary…to demonstrate the sufficiently important interest in preventing the appearance of corruption." App.30a (quoting *Ognibene*, 671 F.3d at 183).

Accordingly, the threshold question before the Second Circuit was whether New York had presented the appropriate type and amount of evidence to demonstrate its interest in preventing the appearance of quid pro quo corruption in the context of contributions to independent bodies. The court found that the following evidence justified asymmetrical contribution limits:

- One affidavit from the Commissioners' expert opining that independent candidates would have a "strong incentive" to use independent bodies as vehicles to evade contribution limits. App.27a (citing App.183a (Wilcox Report)).
- A hypothetical about a town supervisor candidate forming an independent body to collect up

to $138,600 instead of the $1,000 that is the contribution limit for that position. App.27a-28a (referring to 194a-195a (Quail Declaration)).

- The Second Circuit's judicial "common sense" that without these limits, real or perceived corruption *could result* from a candidate's knowledge that one donor has provided the lion's share of his campaign cash or a large donor's knowledge that his money will go to a single candidate. App.40a (emphasis added).
- As to the housekeeping exception, "an illustrative hypothetical" about a wealthy donor fielding one candidate and providing the candidate all funds to cover housekeeping expenses, freeing up other funds for the campaign. App.45a. Importantly, and like the expert in *Ted Cruz for Senate*, this expert did not distinguish between quid pro quo corruption and influence. See App.178a (Wilcox Report) (citing concerns about "special access for and influence by large donors"); App.182a (citing concerns that Senators may "adopt [donors'] position" on legislation).
- The Second Circuit's judicial sense that "to the extent independent bodies function as alter egos of their candidates, there *may* be no practical distinction between donating to an independent body's housekeeping account and donating directly to a candidate." App.46a (emphasis added).
- History about the corruption scandals and Commission on Government Integrity leading

> up to New York's first major party contribution limit in 1992. App.32a-33a.

Both proffered hypotheticals raise a specter of risk that would apply to *both* parties and independent bodies. Both hypotheticals underscore concerns with allowing independent bodies to function as parties, yet neither hypothetical provides any evidence showing how that would create actual or apparent corruption in the context of independent bodies but not in the context of parties. For example, a town supervisor candidate could form a party just to collect up to $138,600 instead of the $1,000 that is the contribution limit for that position. As to the housekeeping exception, a wealthy donor could field a party candidate and provide the candidate all funds to cover housekeeping expenses for a party, freeing up other funds for the campaign. Both hypotheticals apply equally to parties and independent bodies; so even if the actual or apparent corruption were to exist in those hypotheticals, it would exist in the context of both parties and independent bodies. This undercuts the State's purported interest in treating the parties and independent bodies asymmetrically.

The "legislative history" raised by the lower court is not legislative history or findings but rather merely historical context to a law that by its terms has nothing to do with the "special problem to be addressed" allegedly by New York—namely that independent bodies pose a greater risk of corruption necessitating lower contribution limits. See *Ted Cruz for Senate*, 596 U.S. at 310. Rather, the "legislative history" raised by the decision below was about New York's first party contribution limit in 1992 that followed a "series of corruption scandals" on the "heels of a years-long investigation by the New York State

Commission on Government Integrity." App.32a-33a. The court never explained why that was relevant to restrictions reducing funding to independent bodies competing with those historically corrupt major parties. It therefore should not count towards the quantum of evidence whatsoever. See *Progressive Democrats for Soc. Justice v. Bonta*, 73 F.4th 1118, 1125 (9th Cir. 2023) (discounting, in the context of a First Amendment challenge to a political speech restriction, the relevance of documents before the policymakers that did not "explain why" the specific restriction was needed and were therefore irrelevant). At bottom, the Second Circuit grounded its decision in one expert's opinion about *speculative* risks, attenuated hypotheticals, and judicial "common sense." Nothing more. Such mere post hoc rationalizations are not enough. Cf. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (State's justification for restricting constitutional rights "must be genuine, not hypothesized or invented *post hoc*").

The novelty of this approach—restricting campaign speech without any evidence of quid pro quo corruption—cannot be justified by such a meager quantum of evidence. This paltry showing is insufficient under this Court's precedents because the fear of the appearance of corruption "remains a hypothetical possibility and nothing more." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985). Because of the "most fundamental" importance of the First Amendment rights at stake, this Court should grant this Petition to correct the Second Circuit's mistake.

II. The Second Circuit Decision Conflicts With Decisions of Other Circuits.

On both questions—regarding the government's interest in preventing the appearance of quid pro quo

corruption and the tailoring of asymmetrical contribution limits to that interest—the Second Circuit has deepened or created circuit splits.

A. There is a Circuit Split Between the Second and Fifth Circuits, and the Sixth, Eighth, and Ninth Circuits on the Evidentiary Standard for Apparent Quid Pro Quo Corruption in the Context of Permissible Political Speech Restrictions.

To justify restrictions on campaign speech on the theory of preventing merely the appearance of quid pro quo corruption, the Sixth, Eighth, and Ninth Circuits require more than hypothetical reasoning and common sense. On the other hand, the Fifth Circuit and now the Second Circuit uphold restrictions so long as the government proffers an expert's opinion explaining hypothetical risks and the judges use their own common sense to believe the government's logic is valid.

1. The Second and Fifth Circuits allow expert hypotheticals and "common sense" judicial reasoning to justify government restrictions of political speech.

The Second Circuit upheld New York's asymmetrical contribution limits based on mere hypotheticals and "common sense." And under Second Circuit precedent, a State may restrict campaign speech based on fear of corruption as expressed in one expert opinion and hypothetical risks.

The Second Circuit is joined by the Fifth Circuit as the only outliers with evidentiary standards that permit hypothetical evidence to support government

restrictions of political speech. In *Zimmerman v. City of Austin*, the Fifth Circuit addressed contribution and time limitations on candidates and held that "testimony that large contributions created a perception that economic interests were 'corrupting the system' and turning the City Council into a 'pay-to-play system' as well as the fact that 72% of voters voted in favor of the base limit" were "clearly sufficient" to justify the restrictions. 881 F.3d 378, 386 (5th Cir. 2018) (citing *Shrink*, 528 U.S. at 393–94); but see 888 F.3d 163, 166 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing en banc) (explaining that the panel decision's "reliance on *Shrink* is mistaken"). In his dissent, Judge Ho noted that testimony about "perception" ventured "perilously close to 'mere conjecture.'" 888 F.3d at 165 (Ho, J., dissenting).

Thus, in the Fifth Circuit, testimony about public perception of undue influence with a vote in favor of the law—and nothing more—is sufficient evidence to support government restrictions of political speech. The Second Circuit has joined the Fifth Circuit in requiring no more than an equivalent paltry showing, with no evidence of actual quid pro quo corruption.

2. The Sixth, Eighth, and Ninth Circuits require more evidence than expert hypotheticals and "common sense."

The Ninth Circuit has rejected the use of hypothetical examples to support a finding of important state interests for purposes of justifying contribution limits. Faced with a city contribution limit of $250 to city council candidates in signature gathering recall elections, the Ninth Circuit struck down the ordinance on interest grounds. *Citizens for Clean Gov't v. City*

of San Diego, 474 F.3d 647, 647 (9th Cir. 2007). In defense of the ordinance, the city presented "hypotheticals, accompanied by vague allusions to practical experience." *Id*. However, the Ninth Circuit held that such hypotheticals cannot "demonstrate a sufficiently important state interest" for purposes of justifying contribution limits. *Id.* Rather, the Ninth Circuit required evidence akin to "legislative findings made on the basis of a state-commissioned report" or "reasoning from the Supreme Court" specifically addressing the issue at hand. *Id*. Thus, the Ninth Circuit established that absent any evidence of actual corruption, hypotheticals reciting the risk alone are insufficient.

The Sixth Circuit has taken a similar approach. Trying to defend a ban on campaign contributions from Medicaid providers, Ohio's Secretary of State proffered a hypothetical: "If prosecutors are permitted to accept contributions from Medicaid providers, they *might* choose not to prosecute contributor-providers that commit fraud." *Lavin v. Husted*, 689 F.3d 543, 547 (6th Cir. 2012) (emphasis added); cf. App.27a (citing State Board's hypothetical fear that independent parties "could" receive the party contribution limits which might create a "strong incentive" for corruption). In an opinion by Judge Kethledge, the Sixth Circuit rejected this hypothetical, noting that "the Secretary concedes that he has no evidence that prosecutors in Ohio, or any other state for that matter, have abused their discretion in this fashion." *Id*. A hypothetical laying forth the problem envisioned by the State is nothing more than a recitation of the problem, not evidence of the problem: "What *Buckley* requires is a demonstration, not a recitation." *Id*.; accord *Ted Cruz for Senate*, 596 U.S. at 307 (the

government "must do more than simply posit the existence of the disease sought to be cured").

The Eighth Circuit has also taken a similar approach post-*Ted Cruz for Senate*. That court requires far more than the reasoning and hypotheticals permitted by the Fifth and Second Circuits. In *Miller v. Ziegler*, the State of Missouri "candidly admitted" that it did not "possess any evidence (testimonial or documentary) of" the corruption problem it was allegedly addressing. 109 F.4th 1045, 1050–51 (8th Cir. 2024). In "place" of actual evidence, the State of Missouri relied on an "expert report" that merely "'hypothesize[d]' that relationships between former colleagues will lead to corruption." *Id.* at 1051. The report did not contain any "real-world examples of corruption involving" the problem of legislators and staff becoming lobbyists. *Id.*[2] This was, in the view of the Eighth Circuit, insufficient to restrict the First Amendment.

The Second Circuit's decision is simply irreconcilable with the positions of the Sixth, Eighth, and Ninth Circuits. In the Second Circuit's decision, the court simply deferred to the State Board's "straightforward and well-recognized justification" and relied on hypotheticals that, as in *Lavin*, were no more than recitations of the State's concerns about risk. App.32a. The Ninth Circuit similarly has made clear that

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[2] The Eighth Circuit also observed that Missouri's expert explicitly criticized the approach of "[t]he Supreme Court led by Chief Justice John Roberts" to campaign finance law, which the expert believed caused "the problems of quid pro quo corruption and its appearance" to be "bigger than ever." *Miller*, 109 F.4th at 1051; accord App.26a n.15 (citing Judge Calabresi's concurrence questioning of this Court's campaign finance and corruption jurisprudence in *Ognibene*, 671 F.3d at 197–98).

hypotheticals about fears of corruption cannot alone justify contribution limits, a notion the Second Circuit has flatly rejected. And the Eighth Circuit's holding is directly contradicted by the Second Circuit's decision, which held that an expert report hypothesizing how relationships could lead to corruption was sufficient to restrict protected speech. There is a clear circuit split regarding the quantum of evidence needed to impose restrictions on political speech. The Second and Fifth Circuits hold that hypotheticals in expert reports combined with judicial reasoning are sufficient to support political speech restrictions, while the Sixth, Eighth, and Ninth Circuits require actual evidence. Given the pressing and recurring nature of this issue, this Court should resolve the circuit split.

B. The Second Circuit's Decision Creates a Split with the Tenth Circuit on Asymmetrical Contribution Limits for Parties Fielding Candidates in the Same Race.

New York's asymmetrical party contribution limits, combined with asymmetrical transfer limits, mean that, in practice, New York has asymmetrical contribution limits for candidates competing in the same race. See *Davis*, 554 U.S. at 738 ("We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other.").

The Second Circuit's own hypothetical example demonstrates the asymmetry between candidates competing in the same race. In the governor's race example provided by the Second Circuit, a party may receive $138,600 from an individual, and the party may then transfer that full amount to the party's gubernatorial candidate. In the same election, an

independent body may only receive and transfer $9,000 from an individual to its gubernatorial candidate. This establishes an asymmetric contribution structure in which an individual could only give the $9,000 limit to an independent body candidate, while that same individual could give $138,600 to a party and that $138,600 can seamlessly make its way to the party's candidate.

By upholding this asymmetry, the Second Circuit has split from the Tenth Circuit in its *Riddle v. Hickenlooper* decision (and from this Court's warning in *Davis*). *Riddle*, 742 F.3d at 922.

In *Riddle*, the Tenth Circuit invalidated Colorado's asymmetrical campaign contribution limits that treated major and minor parties differently. *Id*. at 924–25. Republicans and Democrats were statutorily required to participate in primary elections and could receive $400 from individuals to be used in either the primary or general election, but independent candidates were allowed to receive no more than $200 from individuals because independent candidates did not participate in primary elections. *Id*. The Tenth Circuit struck down the asymmetrical scheme that "treated contributors differently based on the political affiliation of the candidate being supported." *Id*. at 927. The "discriminatory limits [we]re not closely drawn[3] to the State's interest in battling corruption or the appearance of corruption[]" because Colorado had not shown that minor party candidates "were more corruptible (or appeared more corruptible) than their Republican or

[3] The Tenth Circuit decided *Riddle* on closely drawn tailoring grounds which underlie both First and Fourteenth Amendment scrutiny in campaign finance, making the difference between amendments immaterial for these purposes.

Democratic opponents." *Id*. at 928–29. Then-Judge Gorsuch concurred to further flag "something distinct, different, and more problematic afoot when the government *selectively* infringes on a fundamental right." *Id*. at 932 (Gorsuch, J., concurring) (emphasis in original). The only reason for that selectivity, Judge Gorsuch reasoned, was "a bald desire to help major party candidates at the expense of minor party candidates." *Id*. at 933.

The Tenth Circuit's decision in *Riddle* tracked this Court's jurisprudence, as this Court has "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Davis*, 554 U.S. at 738.

However, the Second Circuit now has created a split by rebuffing this Court's and the Tenth Circuit's precedents. The material facts in this case and in *Riddle* are virtually the same. In both cases, the state failed to proffer any actual evidence demonstrating why independent party candidates were "more corruptible (or appeared more corruptible) than their Republican or Democratic opponents." See *Riddle*, 742 F.3d at 928. But unlike the Tenth Circuit in *Riddle*, the Second Circuit found the asymmetrical restrictions to be sufficiently closely drawn to prevent apparent quid pro quo corruption because independent bodies may be closely held entities functioning as the alter ego of one candidate, thus posing a potentially higher risk of corruption than the major parties. App.32. But this was no more than a recitation of the fear, not evidence of a special problem to be addressed. In other words, the Second Circuit found that the hypothetical risk of corruption of independent candidates meant that asymmetrical contribution

limits were closely drawn to an anticorruption interest.

This Court should resolve this circuit split and clarify that the Tenth Circuit's decision in *Riddle* was correct. Asymmetrical contribution limits discriminating between major and minor parties and their candidates are not closely drawn to any anticorruption interest, and the Second Circuit was incorrect in holding otherwise.

III. This Court Should Resolve Whether The Prevention of the *Appearance* of Quid Pro Quo Corruption is Ever Alone Sufficient to Justify Restricting Political Speech.

The Second Circuit held that a political speech restriction is constitutional even when based *solely* on a State's interest in preventing the *appearance* of quid pro quo corruption. But the Second Circuit's holding is undermined by recent opinions from this Court. Without any limitations or guidance, this new principle leaves courts, policymakers, and candidates to navigate the limits and applicability of the State's seemingly unfettered ability to now cite "appearance of corruption" as a basis to enact *any* speech restriction.

The Court should now and for all time settle that question: Preventing *only* the appearance of quid pro quo corruption—without any accompanying evidence of actual corruption—cannot justify restrictions on the core First Amendment right of political speech. Because "appearances are either useless appendages to demonstrated instances of quid pro quo corruption" or "rhetorical compensation for their absence[,]" they cannot justify restricting campaign speech. Bauer, 125 Harv. L. Rev. F. at 91. Preventing appearances of

corruption is just another way of attempting to bolster voter perceptions of fairness in an even, influence-neutral playing field—an interest this Court has repeatedly rejected. And regulation without evidence of bribery will empower incumbent legislators to insulate themselves from effective electoral challenge.

Preventing actual quid pro quo corruption is a good in itself, capable of justifying certain tailored restrictions of protected political speech. But courts have lent credence to the prevention of the appearance of corruption only when the applicable restriction pursues an *underlying* justification, i.e., strengthening voter confidence in the electoral system by decreasing perceptions of improper influence. The problem of "public awareness" of opportunities for corruption is that it erodes public trust; *Buckley* itself, as reinforced by *Shrink*, suggested one justification for contribution limits was that "the avoidance of the appearance of improper influence is also critical if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Shrink*, 528 U.S. at 38 (quoting *Buckley*, 424 U.S. at 27) (cleaned up); accord *FEC v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982) (preventing appearance of corruption "directly implicate[s] 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process'") (quoting *United States v. Automobile Workers*, 352 U.S. 567, 570 (1957)); *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (noting the government's interest in decreasing public perception of the "influence of political war chests").

In other words, unlike for actual corruption, the interest underlying the prevention of the appearance of corruption is not itself—i.e., preventing the appear-

ance of corruption. See Bauer, 125 Harv. L. Rev. F. at 96 ("One might even consider whether the references to the 'appearance' of corruption have become the means, not explicitly recognized, by which these other concerns with money in electoral politics have come to be expressed."). As Justice Souter wrote for this Court over two decades ago: "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Shrink*, 528 U.S. at 390. That's been the true interest here: fighting cynicism. The interest has been to bolster voter confidence in the electoral system by ensuring that the system is not influenced by too much money.

But the modern decisions of this Court have consistently *rejected* claimed interests in fighting the distastefulness of money in politics. The Court has "consistently rejected attempts to restrict campaign speech based on other legislative aims" such as "attempts to reduce the amount of money in politics, to level electoral opportunities by equalizing candidate resources, and to limit the general influence a contributor may have over an elected official." *Ted Cruz for Senate*, 596 U.S. at 305–06 (internal citations omitted). "Over time, various other justifications for restricting political speech have been offered—equalization of viewpoints, combating distortion, leveling electoral opportunity, encouraging the use of public financing, and reducing the appearance of favoritism and undue political access or influence— but the Court has repudiated them all." *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 153–54 (7th Cir. 2011). This Court rejected its former "antidistortion" interest originally accepted in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) that concerned

"the corrosive and distorting effects of immense aggregations of wealth" that seemed to give "an unfair advantage in the political marketplace." *Citizens United v. FEC*, 558 U.S. 310, 348–50 (2010).

Rebutting this modern approach, the Second Circuit criticized this Court's movement away from crediting such interests. See App.26a n.15 (citing, seemingly favorably, Judge Calabresi's questioning of this Court's jurisprudence, *Ognibene*, 671 F.3d at 197–98). But the movement is undeniable, and these rejected interests have a common theme: the goal of legislatures to create a *perception of fairness* in the democratic process, and to fight perception of "unfair advantage in the political marketplace," as the now-overturned *Austin* case phrased it. But public perception about the influence of money in politics should not be considered a valid justification to restrict political speech. In other words, fighting the perception of an unfair playing field in the political process is not a legitimate justification to regulate protected speech.

Given the Second Circuit's misguided decision, the lower courts need clarification on this issue. In reaching its decision, the Second Circuit relied on prior Second Circuit precedent stating "[i]t is not necessary to produce evidence of actual corruption to demonstrate the sufficiently important interest in preventing the appearance of corruption. See *McConnell*, 540 U.S. at 150." *Ognibene*, 671 F.3d at 183. But *McConnell*, as cited by the Second Circuit, listed the following interests as legitimate: concerns about "Congress' failure to enact" certain legislation, the concern that contributors might "gain access to high-level government officials," and the "appearance of such influence." *Id*. But as established, this Court has since rejected

these purported state interests because "[t]he appearance of influence or access" is an insufficient state interest. *Citizens United*, 558 U.S. at 360. The *Ognibene* majority opinion—again, the foundation for this opinion below—found a sufficiently important interest in restricting the appearance of "improper or undue influence." 671 F.3d at 201 (Livingston, J., concurring). *McConnell*—and thereby the Second Circuit—relied on *Shrink*'s stale rationale that regulating appearance is necessary to avoid that "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *McConnell*, 540 U.S. at 144 (quoting *Shrink*, 528 U.S. at 390); see also *Deon v. Barasch*, 960 F.3d 152, 159 n.35 (3d Cir. 2020) ("To the extent that *Shrink Missouri* refers to influence-based corruption, it is no longer good law.").

Indeed, the "line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." *Ted Cruz for Senate*, 596 U.S. at 307. That distinction, though, is *impossible* to maintain when it comes to the mere *appearance* of quid pro quo corruption and general influence. For First Amendment purposes, it is not clear—at the very least not to the Second Circuit—what the difference is between the interest in preventing the appearance of quid pro quo corruption and the interest in preventing the appearance of influence and access. This is especially true because "appearance" in any of its iterations is no more than a stand-in for concerns about money in politics. So, "[i]n drawing that line, the First Amendment requires [this Court] to err on the side of protecting political speech rather than suppressing it." *Id*. (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007) (opinion of Roberts, C.

J.)). Money in politics is inevitable, and so too is the public perception that there is too much of it unduly influencing legislators. But that is not enough—alone—to restrict First Amendment political speech.

Furthermore, the Second Circuit's rule allowing regulation based on appearance of corruption alone empowers politicians to entrench themselves with incumbent-protecting political speech restrictions. This case is an exemplar. Here, the major political parties in New York created asymmetrical contribution limits that favor themselves and disfavor new entrants into elections. Without any evidence of bribery or corruption, the major parties weaponized speculation and mere "appearance" of corruption to support the enactment of asymmetrical contribution limits. The purpose was undoubtedly to "insulate[] legislators from effective electoral challenge." *Ted Cruz for Senate*, 596 U.S. at 313. The major parties achieved this end by submitting an expert affidavit about the appearance of corruption, and according to the Second Circuit, that alone is sufficient to regulate protected political speech. "[T]hose who govern should be the *last* people to help decide who *should* govern." *McCutcheon*, 572 U.S. at 192 (plurality op.).

Preventing the appearance of corruption is not a legitimate state interest that can justify the regulation of protected political speech. Therefore, this Court should grant this Petition, reverse the Second Circuit's decision, and clarify that in the absence of any actual evidence of quid pro quo corruption, governments may not restrict political speech based solely on purported prevention of the "appearance" of corruption.

IV. This Case Is An Ideal Vehicle for This Court to Decide These "Most Fundamental" and "Most Urgent" First Amendment Issues.

This case was decided on summary judgment, it does not contain any factual disputes, and it presents straightforward and pressing First Amendment questions.

First, the Second Circuit's decision followed an appeal on summary judgment, and the Second Circuit found no disputes of material fact. See generally App.1a-52a. The First Amendment issues presented are not complicated by any procedural or factual thorns.

Second, unlike cases where the lower court or government disputes whether actual evidence of quid pro quo corruption was presented, the Second Circuit made clear that this case features no evidence of actual corruption. The court conceded that "(1) the State Board has never brought an enforcement action against an independent body for evading a contribution limit, and (2) there is no evidence that an independent body has ever been implicated in a corruption scandal in New York." App.31a. Citing its own precedent, the court openly conceded there was no "evidence of actual corruption" but held that such evidence was "not necessary…to demonstrate the sufficiently important interest in preventing the appearance of corruption." App.30a (quoting *Ognibene*, 671 F.3d at 183). Therefore, this Court can simply analyze the *appearance* justification without having to create any further legal rules on the question of *actual* corruption.

Third, the legal questions at issue in this case are core and fundamental First Amendment inquiries that this Court should decide. The answers to these questions will have far-reaching implications on voters, political parties, political organizations, and candidates. Indeed, "[t]he First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office. It safeguards the ability of a candidate to use personal funds to finance campaign speech, protecting his freedom to speak without legislative limit on behalf of his own candidacy." *Ted Cruz for Senate*, 596 U.S. at 302 (internal citations and quotations omitted). Electoral speech is "the most important (and most perennially threatened) category of speech." *McConnell*, 540 U.S. at 256 (Rehnquist, C.J., dissenting in part); accord *Shrink*, 528 U.S. at 410–11 (Thomas, J., dissenting) ("Political speech is the primary object of First Amendment protection."). Accordingly, "pretty meager" evidence is insufficient to restrict "the most fundamental First Amendment activities" of campaigning for public office. *Ted Cruz for Senate*, 596 U.S. at 310. And that remains true for *any* campaign or party restrictions. This Court, then, in taking and deciding this case, will set forth rules for everyone, not just independent parties. Anything close to a contradiction of this Court's precedents or close to a split among circuits needs to be resolved in order to give guidance to courts, regulators, and candidates.

Fourth, this Court should provide much-needed guidance on the extent to which governments may regulate political speech to prevent corruption, especially in the absence of actual evidence of such corruption. Under the Second Circuit's decision, incumbent legislators now have carte blanche to create asymmetrical rules to violate the First Amendment

rights of aspiring candidates, a concern this Court has articulated in both *Cruz* and *Davis*. See also *Riddle*, 742 F.3d at 933 (Gorsuch, J., concurring) ("[T]he only reason I can imagine for Colorado's challenged regulatory scheme is a bald desire to help major party candidates at the expense of minor party candidates."). States, lower courts, parties, campaigns, candidates, and contributors all need clarity on this standard. Otherwise, asymmetrical laws disadvantaging non-party candidates and campaigns will stand despite having no evidentiary basis, and courts may continue to misapply this Court's precedents, as the Second Circuit did here.

CONCLUSION

For these reasons, the Court should grant this Petition.

Respectfully submitted,

SHAWN T. SHEEHY
Counsel of Record
JASON B. TORCHINSKY
JONATHAN P. LIENHARD
EDWARD M. WENGER
PHILLIP M. GORDON
CALEB ACKER
OLIVER ROBERTS
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
2300 N Street, NW
Suite 643
Washington, DC 20037
(202) 737-8808
ssheehy@holtzmanvogel.com

Counsel for Petitioners

October 31, 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 21-2518, 21-2557

UPSTATE JOBS PARTY, MARTIN BABINEC, JOHN BULLIS,

Plaintiffs-Appellees-Cross-Appellants,

-v.-

PETER S. KOSINSKI, NEW YORK STATE BOARD OF ELECTIONS CO-CHAIR COMMISSIONER, IN HIS OFFICIAL CAPACITY, HENRY T. BERGER, NEW YORK STATE BOARD OF ELECTIONS CO-CHAIR COMMISSIONER, IN HIS OFFICIAL CAPACITY, ESSMA BAGNUOLA, NEW YORK STATE BOARD OF ELECTIONS COMMISSIONER, IN HER OFFICIAL CAPACITY, ANTHONY J. CASALE, NEW YORK STATE BOARD OF ELECTIONS COMMISSIONER, IN HIS OFFICIAL CAPACITY,

Defendants-Appellants-Cross-Appellees.[*]

August Term 2022

(Argued: Wednesday May 10, 2023
Decided: July 3, 2024)

Before: LIVINGSTON, *Chief Judge*, RAGGI, and NARDINI, *Circuit Judges*.

Plaintiffs-Appellees-Cross-Appellants Upstate Jobs Party ("Upstate Jobs") and two of its leaders (collectively, "UJP") sued Defendants-Appellants-Cross-Appellees, Commissioners of the New York State Board of Elections (collectively, the "State Board"), over campaign finance regulations that allow parties—which, by definition,

[*] The Clerk of Court is respectfully directed to amend the caption to conform to the above.

have demonstrated a certain level of statewide support—to accept and transfer campaign contributions in ways that non-party candidate-nominating organizations (*i.e.*, "independent bodies") cannot. Upstate Jobs, an independent body, claims that it is similarly situated to parties because both itself and parties nominate candidates that compete in the same elections. As such, UJP contends that New York's preferential treatment of parties violates the Fourteenth Amendment right to equal protection. Upstate Jobs and Martin Babinec, its founder, also assert First Amendment violations, alleging that New York's campaign finance rules distinguishing between parties and independent bodies are not closely drawn to a sufficient state interest in preventing corruption or the appearance thereof.

On cross-motions for summary judgment, the United States District Court for the Northern District of New York (Suddaby, *C.J.*) determined that differences in contribution limits applicable to parties and independent bodies violate the Fourteenth and the First Amendments. The district court separately determined that allowing parties but not independent bodies to maintain so-called "housekeeping accounts" did not violate either amendment. UJP and the State Board both appealed. Because parties and independent bodies are not similarly situated, we REVERSE in part and AFFIRM in part the district court's judgment as to the Fourteenth Amendment claims. And, because the state's contribution limits and housekeeping account exception are closely drawn to serve the state's anticorruption interests, we REVERSE in part and AFFIRM in part the district court's judgment as to the First Amendment claims.

FOR PLAINTIFFS-APPELLEES-CROSS-APPELLANTS:

SHAWN TOOMEY SHEEHY (Edward Wenger & Phillip Michael Gordon, *on the brief*), Holtzman Vogel Baran Torchinsky & Josefiak, PLLC, Haymarket, VA; Michael Burger, Santiago Burger LLP, Rochester, NY, *on the brief*.

FOR DEFENDANTS-APPELLANTS-CROSS-APPELLEES:

SARAH L. ROSENBLUTH, Assistant Solicitor General (Jeffrey W. Lang, Deputy Solicitor General, *on the brief*), *for* Letitia James, Attorney General of the State of New York, Albany, NY.

DEBRA ANN LIVINGSTON, *Chief Judge*:

In this appeal, a political organization known as Upstate Jobs Party ("Upstate Jobs"), as well as its founder, Martin Babinec, and its Chairman and Executive Director, John Bullis, seek declaratory and injunctive relief, alleging that various New York election campaign finance laws violate the First and Fourteenth Amendments. Specifically, Upstate Jobs and its leaders (collectively, "UJP") challenge New York campaign finance laws that distinguish between political parties, which must demonstrate a particular level of statewide support to qualify as such, and independent bodies, which are defined as all candidate-nominating groups that do not qualify as political parties. Due to this statutory distinction, independent bodies such as Upstate Jobs can neither accept individual contributions as large as those that parties can accept, nor transfer as much money to their candidates as parties can transfer. In addition, New York law provides a "housekeeping account" exception to contribution limits, allowing parties, but not independent bodies, to accept unlimited contributions for maintaining permanent headquarters, employing staff, and other activities that are not for the express purpose of promoting

candidates. According to UJP, such unequal treatment violates the Fourteenth Amendment's Equal Protection Clause, as well as the First Amendment rights of Upstate Jobs and its supporters.

The district court determined that the contribution limit distinctions were supported by New York's legitimate interest in stanching corruption but were neither closely drawn nor the least restrictive means of achieving this aim. Thus, the district court granted UJP's requested relief as to contribution limits under both the First Amendment and the Fourteenth Amendment. However, after determining that the housekeeping exception *was* closely drawn and the least restrictive means of achieving the state's anticorruption goals, the district court denied UJP's requested relief as to housekeeping accounts under both the First Amendment and the Fourteenth Amendment.

The district court erred in multiple respects. First, UJP's Fourteenth Amendment challenges—as to both the contribution limits and the housekeeping exception—falter at the threshold. Political parties and independent bodies are not similarly situated merely because they may both nominate candidates to run in the same election. Accordingly, UJP has not shown an equal protection violation. Second, as to the First Amendment challenges, New York has sufficiently demonstrated that its contribution limits and the absence of a housekeeping account exception for independent bodies are supported by a substantial anticorruption objective and are closely drawn to serve that goal. As a result, the state's campaign finance laws withstand all constitutional challenges raised below, and we AFFIRM in part and REVERSE in part accordingly.

BACKGROUND

I. New York Election Law

Under New York law, a political organization becomes a "party" when its gubernatorial and presidential candidates in the last preceding election received the greater of 130,000 votes or two percent of the total votes cast. N.Y. Elec. Law § 1-104(3).[1] All other organizations that nominate electoral candidates but do not qualify as parties are "independent bodies." *Id.* § 1-104(12) (defining "independent body" as "any organization or group of voters which nominates a candidate or candidates for office to be voted for at an election, and which is not a party as herein provided"). Typically, an independent body functions as the "alter ego of a candidate," App'x 81, existing only because a candidate decided to run as an independent. In other words, independent bodies usually lack "a distinct identity . . . that is separate and apart from the candidate." *Id.* at 82. Thus, in broad terms, New York has enacted a regulatory scheme for political organizations that demonstrate a baseline level of statewide support (*i.e.*, parties) that is distinct from campaign finance rules that apply to all other individuals and

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[1] The definition of "party" reads, in full:

> [A]ny political organization which, excluding blank and void ballots, at the last preceding election for governor received, at least two percent of the total votes cast for its candidate for governor, or one hundred thirty thousand votes, whichever is greater, in the year in which a governor is elected and at least two percent of the total votes cast for its candidate for president, or one hundred thirty thousand votes, whichever is greater, in a year when a president is elected.

N.Y. Elec. Law § 1-104(3).

organizations that nominate candidates for elections (*i.e.*, independent bodies).[2]

Attaining party status unlocks a suite of statutory provisions that confer benefits and impose organizational and administrative obligations. *See SAM Party of N.Y.*, 987 F.3d at 271–72. A "principal privilege[] of party status is a designated ballot line or 'berth.'" *Id.* at 271; *see also* N.Y. Elec. Law § 7-104(4). More relevant here, once an organization qualifies as a party, it may accept larger contributions from individuals, *see* N.Y. Elec. Law §§ 14-114(1), 14-114(10), make uncapped transfers to party candidates, *see id.* §§ 14-100(9)(2), 14-100(10), 14-114(3), and accept unlimited contributions to housekeeping accounts for expenses "on ordinary activities which are not for the express purpose of promoting the candidacy of specific candidates," *see id.* § 14-124(3). These benefits come with associated burdens, including requirements to file rules concerning party governance with the state and county boards of elections, N.Y. Elec. Law § 2-114; to create a state committee composed of enrolled party members elected

[2] As of February 21, 2020—around when the parties filed their cross-motions for summary judgment below—New York recognized eight parties: Democratic, Republican, Conservative, Working Families, Green, Libertarian, Independence, and SAM. *See Upstate Jobs Party v. Kosinski*, 559 F. Supp. 3d 93, 111 (N.D.N.Y. 2021); App'x 241. In April 2020, New York amended its party-qualification requirements, which previously conferred party status on organizations that won at least 50,000 votes, to the current requirement that the organization won the greater of 130,000 votes or two percent of the total vote in the preceding election. *See SAM Party of N.Y. v. Kosinski*, 987 F.3d 267, 272 (2d Cir. 2021). As of May 22, 2024, New York recognizes four parties: Democratic, Republican, Conservative, and Working Families. *See* N.Y. Bd. of Elections in the City of N.Y., Party Affiliation, https://www.vote.nyc/page/party-affiliation.

biannually, *id.* §§ 2-102, 2-106; to form county committees in each of New York's 62 counties, typically by electing two or more party members in each election district within each county, *id.* § 2-104; to file information regarding the officers of state and county committees with the state and county boards of elections, *id.* § 2 112(d); to afford certain due process protections before removing party officers or members, *id.* § 2-116; and to select nominees for election to public or party office through specified procedures, frequently primaries, *id.* §§ 2-106, 6-110. Independent bodies, on the other hand, do not enjoy designated ballot berths; their candidates must obtain a specified number of signatures on an independent nomination petition to gain ballot access. *See id.* § 6-142. Independent bodies also must adhere to the same contribution limits that apply to individuals, *see id.* § 14-114(1), and the exception that permits parties to accept unlimited contributions to housekeeping accounts does not apply to them, *see id.* § 14-124(3). While independent bodies do not benefit from these party-specific regulations, they also do not bear the party-specific organizational and administrative burdens described above. And, like party supporters, the supporters of an independent body can establish campaign finance vehicles such as a political action committee ("PAC") or an independent expenditure committee ("IEC"), which may receive unlimited individual contributions subject to some parameters.[3]

[3] PACs can receive unlimited individual contributions, subject to limitations on the contributions they can make to a candidate based on the limitation applicable to that candidate. N.Y. Elec. Law § 14-114. IECs can also receive unlimited contributions from individuals and make unlimited independent expenditures but may not coordinate with a campaign and are limited in how they can expend funds. *Id.* §§ 14-100(15), 14 107(1)(a), 14-107(4), 14-

At issue in this case are two elements of New York's campaign finance regime that distinguish between parties and independent bodies: contribution limits and the housekeeping account exception to those limits. As to the first, New York law establishes different individual contribution limits for parties and independent bodies. Parties may receive contributions up to $138,600 from an individual annually. 9 N.Y.C.R.R. § 6214.0.[4] By contrast, contribution limits to independent bodies "depend on how the [entity] is organized for campaign finance purposes" and most often track the individual contribution limits for the office the candidate seeks. *See* App'x 158–59. For instance, Upstate Jobs averred in its complaint that it intended to field a gubernatorial candidate, meaning it could only accept individual contributions up to $9,000, consistent with the general individual contribution limit for statewide general elections. *See* N.Y. Elec. Law § 14-114(1).[5] A second component of these contribution limits pertains to the amount of

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107-a. A candidate may also designate a political committee, known as an "authorized committee," "to receive contributions and make expenditures in support of the candidate's campaign for such election." *Id.* § 14-200-a(1).

[4] At the time the parties briefed this case, the individual contribution limit to parties was $117,300. This limit has since been adjusted upward to account for inflation. *See* N.Y. Elec. Law § 14-114(10)(b).

[5] In November 2022, after this case was fully briefed, New York launched a new public campaign financing program that extended public matching funds and lowered individual contribution limits to candidates for statewide office. *See* N.Y. State Pub. Campaign Fin. Bd., Public Campaign Finance Program, https://pcfb.ny.gov/program-overview. Before this new program, the maximum contribution limit to a statewide candidate, such as a gubernatorial candidate, was $47,100. 9 N.Y.C.R.R. § 6214.0; N.Y. Elec. Law § 14-114(1).

money that parties or independent bodies can, in turn, transfer to candidates. Under New York law, parties may transfer unlimited funds to their candidates, whereas independent bodies may transfer funds only up to the same contribution limits generally applicable to a particular office. *See id.* §§ 14-100(9)(2), 14-100(10), 14-114(3).

Second, parties enjoy an exception to contribution limits for donations received and spent "to maintain a permanent headquarters and staff and carry on ordinary activities which are not for the express purpose of promoting the candidacy of specific candidates." *Id.* at § 14-124(3). These so-called "housekeeping" funds must be kept in a segregated bank account. *Id.* The housekeeping exception does not apply to independent bodies, which must abide by generally applicable contribution limits when allocating funds for headquarters and staff. *See id.* (applying the exception only to "party committee[s]").

II. The Upstate Jobs Party

In early 2016, Babinec campaigned for the Republican nomination in New York's 22nd Congressional District. Unable to garner support as a Republican, Babinec launched Upstate Jobs, a new independent body, and ran under its banner in a bid to disrupt the dominance of New York's two-party system. Aided by approximately sixty volunteers, Babinec obtained the requisite 3,500 signatures on independent nominating petitions to have his name added to the ballot as the Upstate Jobs candidate.[6] To assist his candidacy, Babinec lent

[6] For this race, the boards of elections of seven of the eight counties within the 22nd Congressional District chose to consolidate the Upstate Jobs Party ballot line with the Libertarian Party ballot line. As such, Babinec appeared on the Libertarian Party

his campaign $2,990,000 of personal funds. Ultimately, Babinec lost the election, receiving 34,638 votes—12.4% of the total votes cast.

In 2017, Upstate Jobs worked to raise its profile by promoting a platform to revitalize the upstate New York economy through the creation of middle-class private sector jobs. By the end of that year, Upstate Jobs was formally incorporated as Vote Upstate Jobs, Inc., a nonprofit entity organized under § 501(c)(4) of the Internal Revenue Code. Upstate Jobs also formed an independent expenditure committee called the Upstate Jobs Committee, to which Babinec contributed approximately $25,000 in 2017—all the money that the Committee received that year.

Upstate Jobs supported one candidate, Ben Walsh, for Mayor of Syracuse in 2017. Although Upstate Jobs did not make any contributions to Walsh's campaign, its volunteers helped him obtain the requisite number of signatures to appear on the ballot as the Upstate Jobs candidate.[7] The Upstate Jobs Committee, having received $25,000 in contributions that year (all from Babinec), made $22,074 in independent expenditures to support Walsh via digital media advertisements and mailers. Walsh won the election and is now the Mayor of Syracuse.

Upstate Jobs continued its efforts throughout 2018 and 2019, holding several public meetings and endorsing ten candidates from multiple political parties for various

line with a notation in 3.5-point font acknowledging his affiliation with Upstate Jobs.

[7] Walsh appeared under the ballot lines for the Independence Party and the Reform Party. App'x 105. Walsh's affiliation with the Upstate Jobs Party was marked in 3.5-point font next to his name on the Reform Party line. *Id.*

offices. For one candidate, Robert Antonacci, who ran as a Republican for State Senate in 2018, Upstate Jobs circulated enough independent nominating petitions to secure his appearance on an Upstate Jobs ballot line, where he received 347 votes.[8] That year, Upstate Jobs received $88,000 in contributions and spent $48,891 on consultants and other program expenses, leaving it with year-end net assets of $39,109. Over the course of 2018 and 2019, in addition to being Upstate Jobs' largest donor, Mr. Babinec contributed $240,898 to the Upstate Jobs Committee—essentially all of its contributions—which the committee spent on independent expenditures to support the candidates Upstate Jobs had endorsed. UJP contends that, if granted relief in this action, Babinec will contribute the party-level maximum to Upstate Jobs, Upstate Jobs will transfer sums of money to its candidates without regard for individual contribution limits, and Upstate Jobs will fundraise for a housekeeping account to obtain a permanent office space and to hire full-time employees.

Since its inception in 2016, Upstate Jobs' Board of Directors has consisted of three members: Babinec, Bullis, and Paul Allen. From 2017 through August 2019, these same individuals comprised the Board of Directors of the Upstate Jobs Committee. At present, Babinec is the only "overlapping board member, serving on the boards of both Upstate Jobs Party and Upstate Jobs Committee." App'x 228. Notwithstanding the multi-year period during which the entities shared the same board members, Upstate Jobs represents that the entities maintain distinct decision-making processes and that the Upstate Jobs Committee decides on independent expenditures consistent with

[8] Upstate Jobs does not appear to have nominated any candidate since Mr. Antonacci.

a firewall policy that prevents coordination between itself and any Upstate Jobs candidate or campaign.

III. The Proceedings Below

In April 2018, UJP commenced this action against Peter S. Kosinski, Douglas A. Kellner, Andrew J. Spano, and Gregory P. Peterson (collectively, the "State Board"), each of whom was, at the time, a Commissioner of the New York State Board of Elections.[9] In its complaint, UJP claims that the provisions of New York law governing housekeeping accounts and contributions to and transfers from parties and independent bodies violate their First Amendment rights to free speech and free association as well as their Fourteenth Amendment right to equal protection. As relief, UJP seeks a declaration that certain of New York's campaign finance rules are unconstitutional insofar as they (1) permit individuals such as Babinec to contribute $138,600 to parties but only $9,000 to independent bodies when supporting a gubernatorial candidate in a general election; (2) allow parties but not independent bodies to effectuate unlimited transfers of contributions to their candidates; and (3) authorize parties but not independent bodies to establish housekeeping accounts. UJP also seeks a declaration that Upstate Jobs may raise and spend contributions on the same terms as parties and an injunction restraining the State Board from enforcing the

[9] Douglas A. Kellner is no longer a Co-Chair Commissioner and has been replaced by Henry T. Berger. Andrew J. Spano is no longer a Commissioner and has been replaced by Essma Bagnuola. Gregory P. Peterson is no longer a Commissioner and has been replaced by Anthony J. Casale.

challenged provisions of the New York Election Law against UJP.[10]

Along with filing the complaint, UJP moved for a preliminary injunction to permit Upstate Jobs to establish a housekeeping account, solicit contributions, and transfer funds to candidates on the same terms as parties for the then-upcoming 2018 gubernatorial election. The district court denied the preliminary injunction motion after determining that UJP failed to show a substantial likelihood of success on the merits. On appeal, we affirmed the district court's denial of preliminary injunctive relief but noted that UJP's claims "raise serious questions of free expression and equal treatment under the law, as well as the appropriate standard of judicial review." *Upstate Jobs Party v. Kosinski*, 741 F. App'x 838, 839 (2d Cir. 2018) (summary order).

Following discovery, the parties cross-moved for summary judgment. In October 2021, the district court issued an amended decision granting summary judgment in favor of UJP as to the constitutionality of the differential contribution and transfer limitations between parties and independent bodies in general elections and granting summary judgment in favor of the State Board as to the constitutionality of party housekeeping accounts. *Upstate Jobs Party v. Kosinski*, 559 F. Supp. 3d 93, 140-41 (N.D.N.Y. 2021).[11]

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[10] UJP also asserted a claim based on the sums that a party can raise for a primary election and carry over to a general election, further widening the financial disadvantage of independent bodies, which generally do not run in primary elections. UJP abandoned this claim by not seeking review on appeal.

[11] The amended decision is identical to the district court's original decision, except for a footnote explaining why it was issued and a decretal paragraph permanently enjoining defendants from

The district court began its analysis by outlining the applicable legal standards for UJP's constitutional claims. For First Amendment freedom of speech and association challenges to contribution limits, the district court explained that the Supreme Court applies a less-than strict tier of scrutiny that is nevertheless rigorous. *Id.* at 128. Under this intermediate standard, a limitation on campaign contributions may be upheld "if the State demonstrates a sufficiently important interest and employs means *closely drawn* to avoid unnecessary abridgement of associational freedoms." *Id.* (quoting *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 197 (2014)). As to the Fourteenth Amendment equal protection challenge, the district court determined that UJP's equal protection claims warranted a more exacting standard of review—that is, strict scrutiny—because the classification between political parties and independent bodies implicates fundamental rights (*i.e.*, the First Amendment rights to free association and speech). *Id.* at 128-29. Under strict scrutiny review, the district court recognized, a state must show that its regulations are the least restrictive means necessary to serve a compelling interest. *Id.*

Applying these standards to UJP's claims regarding New York's differential contribution limits, the district court determined that the state's interest in preventing *quid pro quo* corruption or the appearance thereof was sufficiently important under both the First and Fourteenth Amendments. *Id.* at 130–32. But the distinction between parties and independent bodies in those contribution limits was not, according to the district court, closely drawn to further that anticorruption

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enforcing the challenged campaign contribution and transfer limits against UJP.

interest. *Id.* at 136. The State Board adduced no evidence of enforcement actions against independent bodies for violating contribution limits and failed to explain why it would be insufficient to adopt UJP's proffered alternative regulations, such as disclosure requirements or antiproliferation rules. *See id.* at 133–35. Accordingly, the district court held that the restrictions violated the First Amendment. *Id.* at 136. The district court separately determined that parties and independent bodies were similarly situated with respect to contribution limits, triggering strict scrutiny as to UJP's Fourteenth Amendment claims. *Id.* at 137. For the same reasons that it held the contribution limits were not closely drawn to New York's anti-corruption interest, the district court also held that the limits were not the least restrictive means necessary to serving that interest and thus violated the Fourteenth Amendment. *Id.* at 137–38.

As to the housekeeping account exception, the district court deemed New York's anticorruption motivation to be a sufficiently important state interest for limiting the exception to parties. *Id.* at 138–39. The district court credited the concern that extending the housekeeping exception to include independent bodies would allow such organizations to raise unlimited funds that could be spent on "lavish perks, bonuses, or even expenditures that indirectly promote the candidacy of specific candidates," without the attendant regulatory infrastructure that governs parties. *Id.* at 139–40. This concern was particularly salient for an independent body like Upstate Jobs, whose founder, Babinec, served as a director of both the independent body and its independent expenditure committee and was "both entities' largest (and frequently only) donor." *Id.* at 139. The district court next found the exception's party-specific application to be closely drawn to

serving the state's interest, in accord with the First Amendment, and to be the least restrictive means of doing so, in accord with the Fourteenth Amendment. *Id.* at 139–40.

Based on the above reasoning, the district court entered a permanent injunction enjoining the State Board from enforcing the asymmetric contribution and transfer limits against Upstate Jobs and Babinec and granted the State Board summary judgment on the housekeeping exception claim. The parties timely appealed.

DISCUSSION

Before this Court, the State Board appeals the portion of the district court's summary judgment decision holding that New York's asymmetric contribution and transfer limits violate the First and Fourteenth Amendments. UJP appeals the part of the district court's judgment upholding New York's housekeeping account exception.

"We review the district court's ruling on cross-motions for summary judgment *de novo*, in each case construing the evidence in the light most favorable to the non-moving party." *Panzella v. Sposato*, 863 F.3d 210, 217 (2d Cir. 2017) (citations omitted). As is well established, summary judgment is warranted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

At the start, we agree with the State Board that UJP's challenges to New York's campaign finance rules are properly construed as facial, not as-applied, challenges. The parties' disagreement on this point is relevant because "a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the [relevant legal provision]

would be valid, *i.e.*, that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (internal alteration, quotation marks, and citation omitted). Here, while Upstate Jobs seeks specific injunctive relief that would permit it to participate in future elections under the campaign finance rules currently applicable to parties, its constitutional arguments sweep beyond its own circumstances and call into question the campaign finance restrictions pertinent to all independent bodies. "The claim therefore seems 'facial' in that it is not limited to plaintiff's particular case, but challenges application of the law more broadly." *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 127 (2d Cir. 2014) (quoting *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 588 (8th Cir. 2013)). As a result, we construe UJP's claims as facial challenges to the pertinent features of the New York Election Law. *See id.* at 126–27 (explaining that a facial challenge involves claims and requested relief that "reach[es] beyond the particular circumstances of these plaintiffs") (citation omitted).

In any event, framing the claims as either facial or as applied is not outcome-determinative in this case. Upstate Jobs is typical of the small, closely held independent bodies that the State Board most often cites as raising legitimate corruption concerns. To this point, UJP does not dispute that Babinec is Upstate Jobs' "largest (and frequently only) donor," *see Upstate Jobs Party v. Kosinski*, 559 F. Supp. 3d at 139, nor that he provided nearly all the contributions ever made to the Upstate Jobs Committee, *see* App'x 219, 221, 223. UJP also does not dispute that Upstate Jobs has successfully nominated only three candidates, including Babinec, to appear on ballots as the organization's designated nominee, has never nominated more than

a single candidate in an election cycle, *see id.* at 214-15, 221, nor that Babinec serves as a director of both Upstate Jobs and its IEC, *id.* at 228. In other words, if the challenged laws are facially constitutional, Upstate Jobs is not the type of independent body that could bring a successful as-applied claim.[12] Thus, regardless of how we construe them, UJP's claims fail for the reasons explained below.

I. Fourteenth Amendment

UJP claims that New York's contribution limits and the related housekeeping account exception violate the Fourteenth Amendment because they establish a two-tiered system favoring political parties that achieve statewide support over other candidate-nominating groups that do not. "To successfully assert an equal protection challenge, petitioners must first establish that the two classes at issue are similarly situated." *Yuen Jin v. Mukasey*, 538 F.3d 143, 158 (2d Cir. 2008); *see also Jankowski-Burczyk v. I.N.S.*, 291 F.3d 172, 176 (2d Cir. 2002) ("Of course, the government can treat persons differently if they are not 'similarly situated.'" (citation omitted)).

Fatal to UJP's equal protection claims, political parties and independent bodies with concentrated donor bases and leadership are not similarly situated with respect to the challenged election laws. Political parties have demonstrated a degree of statewide support that independent bodies, by definition, have

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[12] We express no view here as to whether a different conclusion might obtain for a differently composed and operated independent body, for example, one with numerous donors and more diffuse leadership, which nominated multi-candidate slates in consecutive election cycles.

not.[13] *See* N.Y. Elec. Law § 1-104(3), (12). There are "obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other." *Buckley v. Valeo*, 424 U.S. 1, 97 (1976) (citation omitted). Given their broader base, New York parties must abide by a range of structural and operational requirements. Unrestrained by any such requirements, independent bodies can (and, according to the State Board's election law expert, "overwhelmingly" do) consist of no more than a handful of affiliated individuals banding together in support of a single candidate or issue. App'x 79–82. Indeed, as already noted, this appears to be the case with Upstate Jobs, which has a three-member board, one major donor, no office or employees, and which has never run more than one candidate at a time. *See* App'x 223, 221, 214–15.

The district court deemed parties and independent bodies to be "similarly situated" on the basis that the sole differentiator between the two is "the number of votes cast in a specific election," or, in other words, "their size." *Upstate Jobs Party*, 559 F. Supp. 3d at 137. This framing is incorrect. First, that a distinction between separate groups can be reduced to a single fact does not mean they are similarly situated—quite the contrary. *See, e.g.*, *Jankowski-Burczyk*, 291 F.3d at

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[13] Because we conclude that political parties and independent bodies are not similarly situated, we need not reach the question of "whether it is appropriate to lift what is an admittedly 'fundamental right' found in the First Amendment and analyze its infringement here, in the Fourteenth Amendment context, shorn of what the Court has said about the appropriate level of scrutiny applicable to that right in its native doctrinal environment," *Riddle v. Hickenlooper*, 742 F.3d 922, 931 (10th Cir. 2014) (Gorsuch, *J.*, concurring).

177 (noting that "tax laws may separately classify couples who are married and those who are unmarried" and "treat [those two groups] differently"); *see also Schweiker v. Hogan*, 457 U.S. 569, 590 (1982) ("[I]n terms of their ability to provide for essential medical services, the wealthy and the poor are not similarly situated and need not be treated the same.").

Moreover, other important distinctions flow from a political organization's size under New York law. Organizations with enough support to achieve party status must comply with state requirements to file rules concerning party governance with the state and county board of elections, N.Y. Elec. Law § 2-114; create a state committee composed of enrolled party members elected biannually, *id.* §§ 2-102, 2-106; form county committees in each of New York's counties, typically by electing two or more party members in each election district within each county, *see id.* § 2-104; file information regarding the officers of state and county committees with the state and county boards of elections, *id.* § 2-112(d); afford particular due process protections before removing party officers or members, *see id.* § 2-116; and select nominees for election to public or party office through specified procedures, frequently primaries, *see id.* §§ 2-106, 6-110. To comply with these requirements, political parties—but not independent bodies—must maintain substantial organizational infrastructure throughout the state. Thus, the New York legislature has created "obviously sensible and useful" classifications between political parties and independent bodies within a "ramified statutory scheme," *Jankowski-Burczyk*, 291 F.3d at 176, undermining Upstate Jobs's claim that, despite being a small independent body, it is similarly situated to a political party.

Further undercutting UJP's Fourteenth Amendment challenges, the Supreme Court rejected a similar claim in *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981). As was relevant in that case, the Federal Election Campaign Act ("FECA") allowed corporations and labor unions to create and make unlimited contributions to segregated funds for political purposes. *Id.* at 200. Unincorporated associations, on the other hand, were limited in their "contributions to . . . multicandidate political committee[s]." *Id.* Several unincorporated associations challenged this contribution cap under the Fifth Amendment's equal protection clause, arguing that "because contributions are unlimited in the former situation, they cannot be limited in the latter without violating equal protection." *Id.*

The Supreme Court rejected this argument. In doing so, the Court observed that FECA "as a whole impose[d] far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions." *Id.* This differential treatment of the two groups "reflect[ed] a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *Id.* at 201. The contribution limits here, and the housekeeping account exception, likewise reflect New York's judgment that parties and independent bodies require distinct treatment because they are distinct types of entities. Making that judgment does not itself deny independent bodies equal protection of the law.

UJP heavily relies on *Riddle v. Hickenlooper*, 742 F.3d 922 (10th Cir. 2014), in its argument to the contrary. There, the Tenth Circuit invalidated a

Colorado statute on equal protection grounds because it resulted in a disparity in the contributions that major and minor party candidates could receive in the same election. *See id.* at 924-25, 930. In effect, general election candidates who first ran in primaries could collect up to $400 from a single contributor, which could be spent before or after the primary, while a candidate without a primary was eligible to receive only half that amount from a single contributor. *See id.* at 924–25. The Tenth Circuit determined that contributors to a non-primary candidate were similarly situated to contributors to Republican and Democratic nominees because "no relevant distinctions existed between an individual wanting to donate money to [a write-in candidate] and another individual wanting to donate to [that write-in candidate's] opponent." *Id.* at 926. Focusing on the contributors who brought the claims, the court discerned no difference, aside from political preference, between an individual wishing to donate to a write-in candidate who did not run a primary and another wishing to donate to a Republican or Democrat. *See id.* at 926–27. The court acknowledged that the major party candidates might be differently situated than candidates who did not run in a primary, "for the Republican and Democratic candidates had to run in primaries and [the write-in candidate] did not." *Id.* at 926. However, the court concluded that this argument was unavailing because the contributors—rather than the candidates or parties—had brought the equal protection challenge. *See id.* ("They simply want to contribute to their preferred candidate.").

The logic of *Riddle* is inapposite to this case. Most obviously, the plaintiffs here are the independent body

and its leadership, not would-be contributors.[14] As explained above, independent bodies with concentrated donor bases and leadership that function as the alter ego of a candidate are not similarly situated to parties. Moreover, the challenged New York laws have not created different individual contribution limits for candidates running in the same election. Rather, regardless of party affiliation, all candidates may accept individual contributions up to the statutory cap for the type of election. While parties may separately receive contributions and transfer funds to candidates at higher levels than may independent bodies, New York drew this distinction in light of parties' demonstrated statewide backing and sizeable infrastructure.

At bottom, UJP insists that the Fourteenth Amendment requires treating independent bodies commensurate with the widely-supported organizations New York recognizes as political parties, without the regulations and requirements that come with such recognition. If endorsed, this novel theory would effectively require New York to disregard salient differences between established political parties and small, oftentimes ad hoc organizations that routinely support a single candidate in a single election cycle. These distinctions, however, "serve[] important regulatory interests" and therefore do not violate the Fourteenth Amendment. *SAM Party*, 987 F.3d at 278.

II. First Amendment

As to UJP's First Amendment claims, we recognize at the start that "[t]he judiciary owes special deference to legislative determinations regarding campaign contribution restrictions." *Ognibene v. Parkes*, 671 F.3d

[14] Babinec, while a contributor to Upstate Jobs, did not assert a Fourteenth Amendment claim in that capacity. *See infra* note 21.

174, 182 (2d Cir. 2011) (citing *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 155 (2003), and *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 137 (2003)). At the same time, "[t]he First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 302 (2022) (internal quotation marks and citation omitted). The broad protection the First Amendment affords to political speech "reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* (citation omitted). Thus, "[w]hile paying deference, the judiciary must also protect the fundamental First Amendment interest in political speech." *Ognibene*, 671 F.3d at 182.

Balancing these considerations of democratic governance and constitutional rights, the Supreme Court has instructed that "contribution limitations are permissible as long as the Government demonstrates that the limits are 'closely drawn' to match a 'sufficiently important interest.'" *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (quoting *Buckley*, 424 U.S. at 25). Unlike expenditure limits, which implicate "core First Amendment rights of political expression" and thus require "exacting scrutiny," *McCutcheon*, 572 U.S. at 197 (quoting *Buckley*, 424 U.S. at 44-45), "contribution limits impose a lesser restraint on political speech because they 'permit the symbolic expression of support evidenced by a contribution but do not in any way infringe the contributor's freedom to discuss candidates and issues,'" *id.* (internal alterations omitted) (quoting *Buckley*, 424 U.S. at 21)*; see also Vt. Right to Life*, 758 F.3d at 140 ("Contribution limits are more leniently reviewed because they pose only indirect constraints on speech and associational rights." (internal quotation marks and citation omitted)).

Under this "lesser but still rigorous standard of review," we may sustain "even a significant interference with protected rights of political association . . . if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 572 U.S. at 197 (internal alteration, quotation marks, and citations omitted). At both steps of this analysis, the state "bears the burden of proving the constitutionality of its actions." *Id.* at 210 (citation omitted).

As to what counts as a sufficiently important state interest, the Supreme Court "has recognized only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." *Cruz*, 596 U.S. at 305; *see also McCutcheon*, 572 U.S. at 192 ("Any regulation [limiting campaign contributions] must . . . target what we have called '*quid pro quo*' corruption or its appearance."). However, "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *McCutcheon*, 572 U.S. at 192. In other words, "[i]ngratiation and access . . . are not corruption." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360 (2010); *see also Ognibene*, 671 F.3d at 204 (Livingston, *J.*, concurring in part and concurring in the judgment) ("[F]avoritism and influence, unlike corruption, are unavoidable in representative politics, in which a legitimate and substantial reason for casting a ballot or making a contribution is that the candidate will respond by producing those political outcomes the supporter favors." (internal quotation marks and citations omitted)). To ascertain the line between corruption and influence, we focus on *quid pro*

quo corruption, *i.e.*, the "direct exchange of an official act for money." *McCutcheon*, 572 U.S. at 192.[15]

Once a state demonstrates that a sufficient anti-corruption interest motivated its contribution limit, the state must then show that those limits are "closely drawn" to avoid unnecessary burdens on political speech or associational freedoms. *See McCutcheon*, 572 U.S. at 197 (citations omitted). Closely drawn means "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective." *Id.* at 218 (internal alterations, quotation marks, and citations omitted) .

A. Contribution Limits

UJP claims that New York's campaign finance rules violate the First Amendment by permitting (1) higher individual contributions to parties than to independent bodies and (2) unlimited transfers from parties to candidates but only capped transfers from independent bodies to candidates.[16] The district court determined

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[15] Efforts to restrict campaign speech "based on other legislative aims" have largely failed. *Cruz*, 596 U.S. at 305. For example, the Supreme Court has "denied attempts to reduce the amount of money in politics," "to level electoral opportunities by equalizing candidate resources," and "to limit the general influence a contributor may have over an elected official." *Id. But see Ognibene*, 671 F.3d at 197–98 (Calabresi, *J.*, concurring) (questioning the rejection of a "level playing field" interest).

[16] In its briefing, UJP does not disaggregate its challenge into these two components, instead referring to them jointly as New York's "contribution limits" or "contribution regime." Nor does it argue that the transfer limit is duplicative of the contribution limit. We therefore do not separately consider the merits of a

that these rules were supported by New York's sufficiently important goal of stanching corruption but were not closely drawn to achieving this aim. *Upstate Jobs Party*, 559 F. Supp. 3d at 131–36. We disagree.

1. Anticorruption State Interest

We agree with the district court that New York has sufficiently demonstrated that its interest in anticorruption motivates the distinct contribution limits for parties and independent bodies. In general, the possibility that "large direct contributions" to candidates "could be given to secure a political *quid pro quo*" renders limits on direct contributions permissible "to ensure against the reality or appearance of corruption." *Citizens United*, 558 U.S. at 356–57 (internal quotation marks and citation omitted). As one of the State Board's experts averred, designing contribution limits in accord with an organization's size furthers anticorruption goals; if independent bodies, consisting of only the candidate and possibly a few other individuals, could "receive contributions of the size . . . permitted for political parties," candidates would have a strong incentive to use independent bodies as a vehicle to evade contribution limits. *See* App'x 149. The effect would be most apparent in smaller elections with lower contribution limits, allowing a candidate to amass contributions well beyond the prescribed candidate limits via its independent body.

Another State Board expert provided a hypothetical illustrating these corruption fears. Imagine a candidate running for town supervisor in an election with an individual contribution limit of $1,000. *Id.* at 161. Dissatisfied with this contribution limit, the candidate

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hypothetical distinct challenge to the constitutionality of the transfer limit.

forms an independent body and gathers the requisite petition signatures to appear on the ballot as the body's nominee. *Id.* If UJP has its way, this newly created independent body could collect up to $138,600 from any individual contributor—more than 138 times the individual contribution limit applicable to town supervisor candidates under existing law. *Id.* This would eviscerate New York's prescribed contribution limits, thereby increasing the appearance of and the opportunities for *quid pro quo* corruption that these individual contribution limits were intended to prevent.[17]

The same concern does not apply to New York's political parties, which "have significant democratic controls" that simply "do not exist for independent bodies." App'x 153. Almost by definition, political parties in New York have a relatively lower risk of *quid pro quo* corruption, owing to their substantial measure of statewide support. In addition, political parties can be expected to run many candidates throughout the state in any given election cycle, thereby diffusing the corruptive potential or appearance of any large contribution. *See McCutcheon*, 572 U.S. at 225–26 ("[T]here is a clear, administrable line between money beyond the base limits funneled in an identifiable

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[17] UJP argues that this hypothetical is implausible because the conduct described would violate New York's anticircumvention rules. We do not see how. New York law prohibits any person from making contributions in somebody else's name, N.Y. Elec. Law § 14-120(1), or from making contributions with the intent to evade applicable contribution limits, *id.* § 14-126(5), (6). But, under UJP's desired limits, individuals would be expressly permitted to contribute up to $138,600 to an independent body, and independent bodies would be free to make unlimited transfers to their candidates. Thus, contrary to UJP's claim, New York's anticircumvention rules are not implicated in the State Board's example.

way to a candidate—for which the candidate feels obligated—and money within the base limits given widely to a candidate's party—for which the candidate, like all other members of the party, feels grateful.").

Conversely, independent bodies are not subject to the same regulatory scheme and may be organized without any democratic input. They typically serve as the alter ego of a single candidate or small group of candidates. *See* App'x 81–82, 91–92. Thus, if the contribution limit for independent parties were raised to match that of political parties, the effective result would be increased direct contributions for independent candidates in all races—even small ones with relatively few voters. The State Board has a legitimate concern about an election in which small, closely held independent bodies running as few as one candidate—and not subject to any regulatory constraints—are able to obtain six-figure individual contributions.

As already discussed, Upstate Jobs, itself, underscores this point. It appears to have just a handful of supporters, and its single meaningful donor is also the only meaningful donor to its related IEC, which for years shared the same three-member Board of Directors. Upstate Jobs has only ever nominated three candidates, and never more than one in a given election cycle. Given Upstate Jobs's small size, limited donor pool, and concentrated leadership base, there are simply not enough mechanisms within the organization to ensure that New York's valid anticorruption interests are served.

In arguing to the contrary, UJP relies on *Davis v. Federal Election Commission* for the proposition that "imposing different contribution . . . limits on candidates" competing in the same election "is antithetical to the First Amendment," 554 U.S. 724, 743–44 (2008). At issue in *Davis* was the so-called "Millionaire's

Amendment" of the Bipartisan Campaign Reform Act ("BCRA"), which increased the individual contribution limits applicable to opposition candidates when another candidate expended a certain amount of personal funds. *Id.* at 729. The Supreme Court construed the Millionaire's Amendment as "impos[ing] an unprecedented penalty" on candidates' exercise of their First Amendment rights, by creating a scheme whereby a candidate's "vigorous exercise of the right to use personal funds to finance campaign speech produce[d] fundraising advantages for opponents in the competitive context of electoral politics." *Id.* at 739. "The resulting drag on First Amendment rights" was unconstitutional because it put candidates who wished to self-finance their campaigns in a bind: "abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits." *Id.* at 739-40. Because this substantial burden was not justified by any government interest in "eliminating corruption or the perception of corruption," the Court invalidated the Millionaire's Amendment. *Id.* at 740, 744.

Here, unlike Congress in *Davis*, New York has articulated a satisfactory anticorruption interest animating its individual contribution limits to independent bodies. Although UJP argues that the State Board has produced insufficient evidence to show that the challenged contribution limits serve that interest, "[i]t is not necessary to produce evidence of actual corruption to demonstrate the sufficiently important interest in preventing the appearance of corruption." *Ognibene*, 671 F.3d at 183. This is "because the scope of *quid pro quo* corruption can never be reliably ascertained," entitling legislatures to design and enact measures that safeguard the integrity of our representative democracy. *Id.* at 187; *see id.* at 188 ("There is no

reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures.").

To be sure, "mere conjecture" is inadequate to satisfy the state's "First Amendment burden," *McCutcheon*, 572 U.S. at 210 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000)), and "the threat of corruption cannot be 'illusory,'" *Ognibene*, 671 F.3d at 183 (quoting *Buckley*, 424 U.S. at 27). But, for reasons we previously articulated, the State Board's argument in support of its anticorruption interest is neither "mere conjecture," nor "illusory."

At any rate, the present case contrasts sharply with the examples UJP marshals to support its demand for substantial evidence of New York's anticorruption purpose. For instance, in *McConnell v. Federal Election Commission*, the government argued that it needed to ban political contributions from minors in order to guard against "corruption by conduit"—*i.e.*, parents using "their minor children to circumvent contribution limits applicable to the parents." 540 U.S. at 231–32, *overruled on other grounds by Citizens United*, 558 U.S. 310. The Court rejected this justification because the government "offer[ed] scant evidence of this form of evasion." *Id.* at 232.

In an effort to point out similar deficiencies in the State Board's justification, UJP emphasizes that (1) the State Board has never brought an enforcement action against an independent body for evading a contribution limit, and (2) there is no evidence that an independent body has ever been implicated in a corruption scandal in New York. However, this argument ignores that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny . . . will vary up or down with the novelty and plausibility of the justification

raised." *Shrink Mo.*, 528 U.S. at 391. Here, the State Board has provided a straightforward and well-recognized justification for New York's distinct contribution limits for political parties and independent bodies: in the absence of these limits, donors could bestow large contributions on concentrated independent bodies serving as the alter ego of a single candidate. This justification reflects "[t]he idea that large contributions" can "corrupt or . . . create the appearance of corruption," *McConnell*, 540 U.S. at 144, which the Supreme Court endorsed nearly a half-century ago in *Buckley* and has since repeated, *see McCutcheon*, 572 U.S. at 225 ("[T]he risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself."); *Shrink Mo.*, 528 U.S. at 390 (discussing "the perception of corruption inherent in a regime of large individual financial contributions to candidates for public office" (internal quotation marks and citation omitted)). Thus, the State Board's justification in this case "is neither novel nor implausible," *McConnell*, 540 U.S. at 144, and the State Board has provided the relatively low quantum of evidence required under these circumstances.

In addition, UJP points to a lack of legislative findings in the record concerning the corruption risk posed by independent bodies. In context, however, the relevant legislative history supports rather than undercuts the State Board's rationale. In 1992, following a series of corruption scandals, the legislature enacted New York's first party contribution limit of $62,500, subject to inflation adjustment. 1992 N.Y. Sess. Laws ch. 79 § 25. This measure was adopted on the heels of a years-long investigation by the New York State Commission on Government Integrity, which held dozens of public hearings and conducted interviews of more than 1,000 people before recommending a bevy

of governance reforms. *See* New York State Comm'n on Gov't Integrity, *Integrity and Ethical Standards in New York State Government: Final Report to the Governor*, 18 Fordham Urb. L.J. 251, 252 (1991). As relevant to the challenged contribution limits here, the Commission issued two reports attesting to the existence of a "pay-to-play" dynamic in New York's electoral system and a connection between financial contributions to *parties* and policy outcomes.[18] The absence of specific findings related to scandals involving independent bodies is unsurprising, as the Commissioner's focus was on corruption stemming from New York's under-regulated party system.

This history reveals that UJP is seeking evidence of corruption in independent bodies that, for good reasons, does not exist. Because the status quo ante was *unlimited* contributions to *parties*, the legislature sought ways to reform New York's system for regulating political parties in particular. Thus, the lack of evidence of the nature UJP seeks does not cast doubt on the anticorruption aims of New York's contribution limitations.

In sum, the State Board has demonstrated that asymmetry in New York's contribution limitations is supported by a sufficiently important state interest in combatting actual and apparent *quid pro quo* corruption.

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[18] *See generally* N.Y. State Comm'n on Gov't Integrity, *The Midas Touch: Campaign Finance Practices of Statewide Officeholders* (1989), *available at* https://ir.lawnet.fordham.edu/feerick_integrity_commission_reports/18/; N.Y. State Comm'n on Gov't Integrity, *The Albany Money Machine: Campaign Financing for New York State Legislative Races* (1988), *available at* https://ir.lawnet.fordham.edu/feerick_integrity_commission_reports/21/.

2. Closely Drawn

The district court struck down New York's contribution limits after finding that they were not closely drawn to their anticorruption purpose, in large part because the State Board did not substantively rebut UJP's proffered narrower alternatives to the disparate contribution limits. *See Upstate Jobs Party*, 559 F. Supp. 3d at 133–36.

Contrary to the district court's analysis, the closely drawn test is not a "least restrictive means" test. Properly construed, the closely drawn test allows a state to enact restrictions that are "not necessarily perfect, but reasonable," commensurate with the interest served, and "not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective." *McCutcheon*, 572 U.S. at 218 (internal alteration and citations omitted).

The challenged contribution limits satisfy this standard. "On only one occasion has the Supreme Court held that a contribution limit was not closely drawn to the government's interests." *Green Party of Conn. v. Garfield* ("*Green Party I*"), 616 F.3d 189, 201 (2d Cir. 2010). That was in *Randall v. Sorrell*, where the Supreme Court evaluated several factors before holding unconstitutional a Vermont law limiting individual contributions per election to $400 to a candidate for governor, lieutenant governor, or other statewide office, $300 to a candidate for state senator, and $200 to a candidate for state representative. 548 U.S. at 236, 238; *see also Thompson v. Hebdon*, 589 U.S. 1, 5–6 (2019) (per curiam) (confirming that the *Randall* factors should guide the "closely drawn" analysis for contribution limits). Vermont imposed these same contribution restrictions on political parties, "defined broadly to include 'any subsidiary, branch or local unit'

of a party, as well as any 'national or regional party affiliates' of a party." *Randall*, 548 U.S. at 238 (citation omitted). In striking down Vermont's contribution limits as violative of the First Amendment, Justice Breyer's plurality opinion observed that "contribution limits that are too low can . . . harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Id.* at 248–49. In this way, too-low limits can "prove an obstacle to the very electoral fairness [they] seek[] to promote." *Id.* at 249.

The Court therefore evaluated whether Vermont's contribution limits "prevent[ed] candidates from 'amassing the resources necessary for effective campaign advocacy; . . . [or] magnif[ied] the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they [were] too low and too strict to survive First Amendment scrutiny." *Id.* at 248 (internal alteration omitted) (quoting *Buckley*, 424 U.S. at 21). In the Court's view, Vermont's law exhibited several "danger signs" that warranted close review, *id.* at 249, namely that the state's contribution limits were "substantially lower than both the limits [the Court had] previously upheld and comparable limits in other States," *id.* at 253. In addition to these "danger signs," *id.* at 249, five factors influenced the Court's conclusion that Vermont's contribution limitations were not closely drawn: (1) they stood to "significantly restrict the amount of funding available for challengers to run competitive campaigns," *id.* at 253; (2) the law "insist[ed] that political parties abide by *exactly* the same low contribution limits that apply to other contributors," which "threaten[ed] harm to a particularly important right, the right to associate in a political party," *id.* at 256; (3) the law exempted

volunteer services to a campaign but did not exclude "the expenses those volunteers incur . . . in the course of campaign activities," thereby "aggravat[ing]" the law's constitutional infirmities, *id.* at 259; (4) the contribution limits were not adjusted for inflation, *id.* at 261; and finally (5) the state failed to offer "any special justification that might warrant a contribution limit so low or so restrictive," *id.*

The first, second, and fourth *Randall* factors are particularly salient to this case, and each favors upholding New York's contribution limits. As to the first factor, unlike in *Randall*, New York's $9,000 individual contribution limit to statewide candidates comfortably exceeds limits the Supreme Court has previously upheld. *See Buckley*, 424 U.S. at 29 (upholding $1,000 per election individual contribution limit, which is approximately $5,500 in today's dollars); *see also Shrink Mo.*, 528 U.S. at 382–83, 395–96 (upholding $1,075 per election limit for candidates for statewide office in Missouri). Even after New York's recent decision to lower the individual contribution limits, they remain higher than the national average and median.[19] Furthermore, federal law, like New York law, allows individuals to contribute more to a party ($10,000 to a state, district, or local party; $41,300 to a

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[19] As of February 1, 2023, the national average and median contribution limits for a governor's race were $6,645 and $4,240, respectively (compared to $9,000 in New York). The national average and median contribution limits for a state senate race were $3,062 and $2,250, respectively (compared to $5,000 in New York). Finally, the national average and median contribution limits for a state house seat were $2,708 and $1,900, respectively (compared to $3,000 in New York). *See* Nat'l Conf. of State Legislatures, Campaign Contribution Limits: Overview, https://www.ncsl.org/elections-and-campaigns/campaign-contribution-limits-overview.

national party) than to a candidate ($3,300) or other political committee ($5,000). *See* 52 U.S.C. § 30116(a)(1); 11 C.F.R. § 110.1(b)(1), (c)(1), (d); 88 Fed. Reg. 7088, 7089-90 (Feb. 2, 2023). Nor is New York an outlier among states in authorizing higher contribution limits for parties than for other types of donors, as at least twenty-eight other states (as of the 2021-2022 election cycle) generally permit parties to give more money directly to candidates than individuals, unions, corporations, or PACs can give.[20] Indeed, ten states permit unlimited contributions to candidates from state parties but not from non-party organizations in most general election circumstances.[21]

As to the second factor, the *Randall* Court's concern that Vermont law jeopardized "the particularly important right . . . to associate in a political party" by requiring "political parties [to] abide by *exactly* the same low contribution limits that apply to other contributors," is not present here, where the basis of UJP's challenge is the *higher* contribution limit applicable to parties. *Randall*, 548 U.S. at 256. The Supreme Court has affirmed the centrality of political parties as a locus of First Amendment associational activity on several

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[20] These states are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Montana, New Jersey, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Washington, Wisconsin, and Wyoming. *See* National Conference of State Legislatures, State Limits on Contributions to Candidates, 2021-2022, https://documents.ncsl.org/wwwncsl/Elections/Contribution-Limits/2021-2022.pdf [hereinafter, "NCSL, State Limits on Contributions to Candidates"].

[21] These states are: California, Illinois, Kansas, Kentucky, Louisiana, New Jersey, North Carolina, Vermont, Wisconsin, and Wyoming. *See* NCSL, State Limits on Contributions to Candidates.

occasions. *See, e.g.*, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574–76 (2000) (describing constitutional importance of associating in political parties); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) ("The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas."); *Norman v. Reed*, 502 U.S. 279, 288 (1992) ("For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties."). Congress also appears to appreciate the importance of political parties, given that FECA allows "individuals to contribute more money . . . to a party than to a candidate . . . or to other political committees." *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 616 (1996); *see* 52 U.S.C. § 30116(a)(1). In announcing the judgment of the Court, Justice Breyer highlighted how FECA's differential treatment of parties as compared to non-parties "demonstrate[d] Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections," *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 618. Such reasoning undermines UJP's challenge to New York's analogous provision.

New York's campaign finance regime also does not inhibit Upstate Jobs or other independent bodies "from amassing the resources necessary for effective advocacy." *Randall*, 548 U.S. at 247 (citation omitted). The higher-than-average $9,000 contribution limit applicable to Upstate Jobs's candidates for statewide office is not "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless," *Shrink Mo.*, 528 U.S. at 397. This sort of extreme restriction aside, legislatures are best situated to set

appropriate contribution limits. *See Beaumont*, 539 U.S. at 155 ("[D]eference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption . . . .").

Finally, as to the fourth *Randall* factor, New York's contribution limit, unlike Vermont's, is subject to adjustment for inflation. *See* N.Y. Elec. Law § 14-114(10)(b).

The district court did not undertake the *Randall* analysis in striking down New York's contribution limits. Instead, it faulted the state for failing to explain why alternative laws such as disclosure regulations, anti-proliferation rules, or required segregation of funds could not more narrowly address its anticorruption concerns. *See Upstate Jobs Party*, 559 F. Supp. 3d at 135–36. But, even if these alternatives might also serve anticorruption interests, they fail to account for the reality that independent bodies—as exemplified by Upstate Jobs itself—are typically closely held entities that function as the alter ego of a single candidate. Thus, due to their structure, independent bodies often serve as the sort of "conduits for contributions to candidates" that "pose a perceived threat of actual or potential corruption." *Cal. Med. Ass'n*, 453 U.S. at 203 (Blackmun, *J.*, concurring in part and concurring in the judgment); *see Vt. Right to Life*, 758 F.3d at 145 ("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." (internal quotation marks omitted)).

In sum, we conclude that New York has met its burden to establish that the lower contribution limits

applicable to independent bodies are closely drawn to an important interest in preventing actual and apparent *quid pro quo* corruption. In reaching this conclusion, we are not required to "exhibit a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)). Exercising this common sense, we conclude that, without these limits, real or perceived corruption could result from a candidate's knowledge that one donor has provided the lion's share of his campaign cash or a large donor's knowledge that his money will go to a single candidate.

3. Babinec's First Amendment Claim

The district court separately determined that the challenged contribution limits, which prevent Babinec and similarly situated individuals from donating the same amount to an independent body as they could to a political party, violate Babinec's First Amendment rights. *See Upstate Jobs Party*, 559 F. Supp. 3d at 136.[22] But, as just discussed in the context of UJP's claims, New York's contribution limits are closely drawn to advancing the state's anticorruption objectives, thereby defeating Babinec's First Amendment challenge. Two additional points demonstrate the flaws in Babinec's assertion of his personal First Amendment rights in this context.

First, Babinec argues that New York's contribution limits restrict speech based on the identity of the speaker. In support of this argument, Babinec cites the rule enunciated in *Citizens United* that "the First Amendment stands against attempts to disfavor certain

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[22] The State Board is correct that Babinec asserted only a First Amendment claim in the complaint and has not asserted a Fourteenth Amendment claim.

subjects or viewpoints," prohibiting "restrictions distinguishing among different speakers, allowing speech by some but not others." 558 U.S. at 340. However, the restrictions of which Babinec complains are not speaker-based. New York's contribution limits distinguish between the recipients of the contributions, not the contributors; Babinec, for example, could donate the maximum amount to a political party, if he saw fit, and is not limited to contributing to independent bodies. As such, the contribution limits are not analogous, from a First Amendment perspective, to the total ban on independent expenditures from a corporation's general treasury that was at issue in *Citizens United*. *See id.* at 365 ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity."). To the contrary, the Supreme Court has approved differential contribution limits based on the identity of the recipients. *See Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 616 (recognizing that different contribution limits apply under federal law based on speaker's decision to contribute to a party, candidate, or political committee). Ignoring this distinction, Babinec analogizes his position to that of the contributor-plaintiffs in *Riddle*, arguing that New York's contribution limits unconstitutionally "create[] a class of favored contributors who contribute to Parties and disfavored contributors who contribute to Independent Bodies." Pls.' Final Opening & Resp. Br. at 56. Unlike in *Riddle*, where the relevant statute arbitrarily distinguished between contributors based on the time when their preferred candidate entered the race, 742 F.3d at 924, New York law "sensibl[y]" distinguishes between political parties and independent bodies based on their base of support. *Jankowski-Burczyk*, 291 F.3d at 176. Moreover, the *Riddle* defendants did not argue that the "problem" created by the state—

primary elections—was meant to fight *quid pro quo* corruption. Here, by contrast, requirements forcing parties to implement democratic controls reduce the possibility of individuals controlling parties and, therefore, the attendant appearance of corruption.

Second, while the challenged restrictions limit the amount Babinec may give to his preferred political organization, the burden on his right to engage in political expression is not so substantial as to violate the First Amendment. Babinec remains entitled to spend unlimited sums through an IEC—a right he has exercised to the tune of $265,898 in contributions to the Upstate Jobs Committee. *See* App'x 71–72. We made a similar point in *Corren v. Condos*, 898 F.3d 209 (2d Cir. 2018), a case assessing a Vermont law requiring candidates who accepted public funds to forgo most private contributions, *see id.* at 213-25. In that case, we upheld the restriction on private funds when a candidate voluntarily opted into the state's public financing scheme, in part because "supporters retained a wide range of ways to express their support given . . . [their] ability to make unlimited independent expenditures." *Id.* at 223 (internal quotation marks and citation omitted).

For these reasons, as well as those outlined with respect to the other plaintiffs' challenge, New York's contribution limits do not violate Babinec's First Amendment rights.

B. Housekeeping Accounts

UJP also challenges the housekeeping account exception to New York's contribution limits as violative of the First and Fourteenth Amendments. Under this exception, political parties, but not independent bodies, can maintain unlimited segregated accounts, so long as expenditures from these accounts are made "to

maintain a permanent headquarters and staff and carry on ordinary activities which are not for the express purpose of promoting the candidacy of specific candidates." N.Y. Elec. Law § 14-124(3). The district court's decision to uphold this rule is the subject of UJP's cross-appeal.

The district court upheld the housekeeping account exception against UJP's First and Fourteenth Amendment challenges, determining that it was closely drawn and the least restrictive means necessary to serving New York's anticorruption interests. *Upstate Jobs*, 559 F. Supp. 3d at 139–40. For reasons already discussed, *see supra* at [22], parties and independent bodies are not similarly situated, defeating UJP's Fourteenth Amendment challenge to the housekeeping account exception. As to the First Amendment challenge, we hold that the district court correctly upheld the housekeeping account rule as sufficiently tailored to advancing the government's anticorruption interest. Like New York's differential contribution limits, its housekeeping account exception recognizes meaningful organizational differences between political parties and independent bodies.

1. Speaker-Based Distinction

To start, UJP argues that New York's housekeeping account rule draws an unconstitutional speaker-based distinction, "allowing speech by some but not others," *Citizens United*, 558 U.S. at 340. The First Amendment prohibits such distinctions, as"[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.*

However, the challenged rule is not an attempt to "control content." Whether an entity may create a housekeeping account hinges on whether it has

garnered enough statewide support to become a party, not what it wants to "say" by spending unlimited sums on housekeeping. Party status in New York is fluid, not permanent; any independent body, with any platform or viewpoint, can become a party and enjoy the housekeeping account exception if it garners enough public support. *Cf. Green Party II*, 616 F.3d at 231 (holding that Connecticut could "distinguish between candidates who can, and who cannot, make a preliminary showing of public support" in the provision of public campaign funds); *Buckley*, 424 U.S. at 97–98 (noting the "obvious differences . . . between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other" in explaining that "the Constitution does not require Congress to treat all declared candidates the same for public financing purposes").

Upstate Jobs attempts to distinguish these cases because they involved apportioning public funds to candidates. Even recognizing that the public campaign finance context might implicate unique interests, these considerations do not undercut the permissibility of popularity-based distinctions here. In this context, New York's distinction between parties and independent bodies is based on a transitory status that any independent body, of whatever political persuasion, can overcome via success at the ballot box. UJP's speaker-based challenge to the housekeeping accounts exception therefore fails.

2. Anticorruption State Interest

To justify the application of its housekeeping accounts exception to only political parties, the State Board provides the same anticorruption justification as for its contribution limits. Its concern lies primarily with

permitting unlimited contributions to political organizations that are often small and tightly intertwined with a single candidate or a small handful of candidates.

The State Board offers an illustrative hypothetical. Suppose a wealthy donor makes a significant contribution to the housekeeping account of an independent body fielding just one candidate in a single election. New York Election Law § 14-124(3)'s "express purpose" restriction would prevent the independent body, in theory, from spending that money directly on that candidate's campaign; but in practice, because money is fungible, every dollar contributed to a housekeeping account would free up another dollar for direct candidate support. Indeed, UJP's complaint acknowledges as much. *See* App'x 18 ("Without this [housekeeping] account, the UJP is required to pay for its headquarters and pay UJP staff salaries from donor dollars that are limited to the maximum amount for the candidates the UJP is fielding. This siphons money away from the UJP that it needs to disseminate its message." (citation omitted)). While this threat might appear mitigated, at least in part, by general contribution and transfer limits, there are, nevertheless, myriad ways that housekeeping funds could be spent to benefit a single candidate in keeping with § 14-124(3)'s "express purpose" restriction, such as funding targeted get-out-the-vote efforts or hiring the candidate's inner circle as staff.

Even if parties' housekeeping accounts present similar risks, the critical distinction is parties' larger size and attending democratic controls. *See supra* at [33] Thus, because of the likelihood of an independent body being merely the alter ego of a candidate, there is a greater risk of contributions earmarked for such a body's housekeeping account functionally being direct contributions to the candidate, creating a heightened

opportunity for *quid pro quo* corruption. *Cf. McCutcheon*, 572 U.S. at 210 ("[T]here is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly."). In other words, to the extent independent bodies function as alter egos of their candidates, there may be no practical distinction between donating to an independent body's housekeeping account and donating directly to a candidate. Like the district court, we recognize this as a valid concern supporting the different contribution limits.

As with the contribution limits, Upstate Jobs argues that the legislative history of the housekeeping account rule contains insufficient evidence of corruption in independent bodies to support the state's purported rationale. We disagree. The history reveals a basis for the legislature's concern that corruption could flow from unchecked donations to party housekeeping accounts in ways equally applicable to independent bodies. In 1988, New York amended its election law to require parties to disclose all monies received into, or expended from, housekeeping accounts. App'x 164–65; *see* N.Y. Elec. Law § 14-124. Previously, New York had exempted party housekeeping accounts from financial disclosure requirements, which led to "[r]eported abuses of these accounts," including "concealing contributions exceeding the legal ceiling for giving to an organization's campaign account, or juggling funds to promote a candidate, which is prohibited." *Id.* at 164. These accounts "ha[d] been used as a shield or a novel defense by public officials who [had] been charged with bribery." *Id.* The addition of disclosure requirements for these accounts was designed to "close this loophole that create[d] a breeding ground for corruption," *id.*, "protect[] against the corrupt use of the resources of

political organizations," *id.* at 165, and stem "the corruption . . . eat[ing] away at the credibility of our political system," *id.* at 181–82.[23] Thus, as this history demonstrates, the legislature imposed disclosure requirements for housekeeping accounts *because of corruption concerns*.

In this regard, the district court aptly described the state's corruption concerns surrounding housekeeping accounts, observing that "candidates from these Independent Bodies would be able to easily identify the source of the donation, which could lead to a candidate feeling obligated to take certain positions and contribute to the appearance of *quid pro quo* corruption." *Upstate Jobs Party*, 559 F. Supp. 3d at 139. We conclude that this is a sufficiently important anticorruption interest, reinforced by the legislative history of the most recent amendment to the housekeeping account rule.

3. Closely Drawn

Next, the district court determined that New York's housekeeping account exception was closely drawn to its anticorruption interest. In doing so, the district court recognized the sense in preventing independent bodies from having these unlimited accounts in which "ordinary contribution limits do not apply," thus raising "a significant danger of the appearance of *quid pro quo* corruption in connection with them." *Id.* We agree.

---

[23] In line with our analysis as to the efficacy of § 14-124(3)'s "express purpose" restriction, a letter to Governor Mario Cuomo from John D. Feerick, Chairman of the New York Commission on Government Integrity, opining on the legislation, also explained that "[d]ollars, of course, are fungible and every dollar deposited into a 'housekeeping' account frees another dollar for use in a campaign." App'x 172.

First, affording housekeeping accounts only to parties does not represent the type of redundant "prophylaxis-upon-prophylaxis" regulation of independent bodies upon which the Supreme Court has looked skeptically. *Cruz*, 596 U.S. at 306. As explained above, because money is fungible, even when earmarked as housekeeping contributions, it can create corruption risks in alter ego independent bodies. Thus, a housekeeping exception for such bodies would substantially undermine the general contribution limit, which we have already found is closely drawn to the state's interest in preventing actual and apparent *quid pro quo* corruption. As such, excluding independent bodies from creating unlimited housekeeping accounts is essential to enforcing that contribution limit—the primary prophylaxis against corruption.

Second, Upstate Jobs' own activities illustrate how the lack of a housekeeping account exception for small independent bodies does not cause "unnecessary abridgement of First Amendment rights." *McCutcheon*, 572 U.S. at 199 (internal quotation marks omitted). While Upstate Jobs has held several meetings and focus groups and spent funds on digital media and mailers, the record shows that, given its small size, it has never needed additional housekeeping funds. In 2018, the only year for which the record contains complete financial data—and also the most recent year in which Upstate Jobs nominated a candidate—Upstate Jobs took in $88,000 but spent only $48,891, leaving it with net assets of $39,109. App'x 56, 220. Babinec acknowledged a similar "expense pattern" in 2019. Babinec Depo. at 82–83, Ex. A to Pl.'s Statement of Material Facts, Dist. Ct. Dkt. 56-3. A 2018 tax form also stated that each of Upstate Jobs' three directors only worked an average of one hour per week. App'x 220. The fact that Upstate Jobs did not spend all of its

funds does not necessarily imply that a law limiting its ability to obtain more funding does not burden its First Amendment rights. *See generally Cruz*, 596 U.S. at 318 (Kagan, *J.*, dissenting) ("[E]very contribution regulation has some kind of indirect effect on electoral speech[.]"). Nevertheless, when considered together with the lack of any record evidence of Upstate Jobs's plan to expand, or the expected costs of such expansion, the noted financial surplus substantially undermines Babinec's bare assertion that UJP would have spent more housekeeping funds but for the challenged laws. *See* App'x 105–06.

That does not end the inquiry, however, because even though the state need not use the least restrictive means to serve its anticorruption interest, the question of whether a regulation "unnecessar[ily] abridge[s]" First Amendment rights requires consideration of less restrictive alternatives to ensure that it is "reasonable" and "in proportion to the interest served." *McCutcheon*, 572 U.S. at 218 (internal quotation marks omitted). Arguing that less restrictive alternatives were available here, UJP relies on *Green Party I*, in which we struck down Connecticut's complete ban on contributions by state contractors, lobbyists, and their families on the basis that a total contribution ban "utterly eliminates an individual's right to express his or her support for a candidate by contributing money to the candidate's cause." 616 F.3d at 206. We reasoned in that case that "if the state's interests . . . can be achieved by means of a *limit* on lobbyist contributions, rather than a ban, the ban should be struck down for failing 'to avoid unnecessary abridgement of associational freedoms.'" *Id.* (quoting *Buckley*, 424 U.S. at 25).

This case, in fact, exposes the flaw in UJP's attempt to frame the challenged provision as a ban. The fact

that the housekeeping exception lifts the cap on contributions to parties has no effect on independent bodies' ability to receive donations up to the cap applicable to them. Contributors may give up to $9,000 to independent bodies supporting a candidate for statewide office—which money can be used for various purposes, including housekeeping. As already explained, adopting UJP's suggestion that New York establish a separate, higher limit for housekeeping account contributions to independent bodies would be tantamount to raising the general contribution limits. Determining appropriate contribution limits, however, is an issue best left for state legislatures. *See Randall*, 548 U.S. at 248 ("[W]e have no scalpel to probe each possible contribution level . . . the legislature is better equipped to make such empirical judgments . . . ." (internal quotation marks and citation omitted)).

The other three alternatives UJP proposes to lessen the burden on First Amendment rights while still serving the state's anticorruption interest fare no better. The first—that New York could simply regulate independent bodies as parties—is plainly flawed. Requiring all independent bodies, *inter alia*, to establish committees in every county and election district in the state, to utilize prescribed procedures for filling party leadership positions, and to notify the State Board of changes in committee composition, among other things, would be far more burdensome than the challenged restrictions. Indeed, this proposal could make it impossible for grassroots political organizations to operate, effectively regulating independent bodies out of existence.

Second, UJP suggests that New York could require independent bodies to disclose all funds that go in and out of their housekeeping accounts. This proposal runs

into the same problem as it did in the context of UJP's challenge to the contribution limits. Although disclosure may serve some deterrent effect, it does not cure the corruption risk associated with permitting unlimited individual contributions to exceedingly small political organizations.

UJP's third proposal to establish anti-proliferation statutes, which would "prohibit[] individuals from establishing Independent Bodies when those individuals are connected to either Parties or other Independent Bodies," *Upstate Jobs Party*, 559 F. Supp. 3d. at 113, is likewise insufficient to demonstrate that the housekeeping rule is not closely drawn. Anti-proliferation statutes might prevent corruption among independent bodies from metastasizing. But they would not address the source of the corruption risk inherent in allowing donors to funnel unlimited sums to tightly controlled independent bodies.

In sum, because New York's housekeeping account rule is closely drawn to serve the state's interest in preventing *quid pro quo* corruption or the appearance thereof, it survives First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, we vacate the district court's judgment in part and affirm in part. We VACATE the part of the district court's judgment that granted summary judgment to UJP on its First and Fourteenth Amendment claims relating to New York's contribution limits and REMAND to the district court with the instruction that summary judgment be entered in favor of the State Board as to these claims. We AFFIRM as to the part of the district court's judgment that granted summary judgment to the

State Board on First and Fourteenth Amendment claims concerning New York's housekeeping account rule.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals Second Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 21-2518(L), 21-2557(XAP)

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of July, two thousand twenty-four.

Before: Debra Ann Livingston,
Chief Judge, Reena Raggi,
William J. Nardini, Circuit Judges.

UPSTATE JOBS PARTY, MARTIN BABINEC, JOHN BULLIS,

Plaintiffs-Appellees-Cross-Appellants,

v.

PETER S. KOSINSKI, NEW YORK STATE BOARD OF ELECTIONS CO-CHAIR COMMISSIONER, IN HIS OFFICIAL CAPACITY, HENRY T. BERGER, NEW YORK STATE BOARD OF ELECTIONS CO-CHAIR COMMISSIONER, IN HIS OFFICIAL CAPACITY, ESSMA BAGNUOLA, NEW YORK STATE BOARD OF ELECTIONS COMMISSIONER, IN HER OFFICIAL CAPACITY, ANTHONY J. CASALE, NEW YORK STATE BOARD OF ELECTIONS COMMISSIONER, IN HIS OFFICIAL CAPACITY,

Defendants-Appellants-Cross-Appellees.

JUDGMENT

The appeal and cross-appeal in the above captioned case from a judgment of the United States District Court for the Northern District of New York were argued on the district court's record and the parties' briefs.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the district court's judgment is AFFIRMED in part, VACATED in part, and the case is REMANDED to the district court with instruction to grant summary judgment to the State Board on the First and Fourteenth amendment claims relating to New York's contribution limits.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Case No.: 6:18-cv-00459-GTS-ATB

UPSTATE JOBS PARTY, MARTIN BABINEC, AND JOHN BULLIS,

Plaintiffs,

v.

PETER S. KOSINSKI, New York State Board of Elections Co-Chair Commissioner, DOUGLAS A. KELLNER, New York State Board of Elections Co-Chair Commissioner, ANDREW J. SPANO, New York State Board of Elections Commissioner, and GREGORY P. PETERSON, New York State Board of Elections Commissioner, all in their official capacities,

Defendants.

NOTICE OF APPEAL

Please take notice that Plaintiffs, Upstate Jobs Party, Martin Babinec, and John Bullis, by and through counsel, appeal to the United States Court of Appeals for the Second Circuit from the Decision and Order, entered on September 8, 2021, (Dkt. 72), and Judgment entered pursuant to the Decision and Order (Dkt. 73), insofar as they denied, in part, Plaintiffs' Motion for Summary Judgment of July 8, 2020 (Dkt. 56) and granted, in part, Defendants' Motion for Summary Judgment of August 25, 2020 (Dkt. 57).

DATED: October 6, 2021

Respectfully submitted,

/s/ Shawn Toomey Sheehy
Jason Torchinsky (VA 47481)*
Bar Roll # 517743
Shawn Toomey Sheehy (VA 82630)*
Bar Roll # 107453
Philip Michael Gordon (TX 24096085)*
Bar Roll # 701124
HOLTZMAN VOGEL BARAN TORCHINSKY JOSEFIAK PLLC
15405 John Marshall Hwy.
Haymarket, Virginia 20169 Phone: (540) 341-8808
Fax: (540) 341-8809
jtorchinsky@holtzmanvogel.com
ssheehy@holtzmanvogel.com
pgordon@holtzmanvogel.com

*admitted *pro hac vice*

/s/ Michael Burger
Michael Burger
Bar Roll # 515216
Fernando Santiago
Bar Roll # 517516
SANTIAGO BURGER LLP
2280 East Avenue
Rochester, NY 14610
Phone: (585) 563-2400
Fax: (585) 563-7526
mike@litgrp.com
fernando@litgrp.com

Counsel for Plaintiffs

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

6:18-CV-0459 (GTS/ATB)

UPSTATE JOBS PARTY; MARTIN BABINEC; and JOHN BULLIS;

v.

PETER S. KOSINSKI; New York State Board of Elections Co-Chair Commissioner, in his official capacity; DOUGLAS A. KELLNER, New York State Board of Elections Co-Chair Commissioner, in his official capacity; ANDREW J. SPANO, New York State Board of Elections Commissioner, in his official capacity; and GREGORY P. PETERSON, New York State Board of Elections Commissioner, in his official capacity

---

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, pursuant to the Decision and Order issued on September 8, 2021 (Dkt. No. 72) by the Honorable Glenn T. Suddaby, Plaintiffs' motion to exclude Mr. Brian Quail's declaration and testimony (Dkt. No. [60]) is DENIED in part and GRANTED in part as discussed herein in Part III.A.3. of this Decision and Order. Plaintiffs' motion to exclude Dr. Clyde Wilcox's expert report and testimony

(Dkt. No. [61]) is DENIED. Plaintiffs' motion for summary judgment (Dkt. No. [56]) is GRANTED in part and DENIED in part in the following respects: (1) a Judgment shall be entered as a matter of law in Plaintiffs' favor on their First Amendment claims regarding contribution limits in general elections, and their Fourteenth Amendment claims regarding contribution limits in general elections; and (2) the remainder of Plaintiffs' motion is denied (i.e., the extent to which it seeks summary judgment on their First Amendment claims regarding housekeeping accounts, and their Fourteenth Amendment claims regarding housekeeping accounts). Defendants' motion for summary judgment (Dkt. No. [57]) is GRANTED in part and DENIED in part in the following respects: (1) a Judgment shall be entered as a matter of law in Defendants' favor on Plaintiffs' First Amendment claims regarding contribution limits in primary elections, their Fourteenth Amendment claims regarding contribution limits in primary elections, their First Amendment claims regarding housekeeping accounts, and their Fourteenth Amendment claims regarding housekeeping accounts; and (2) the remainder of Defendants' motion is denied (i.e., the extent to which it seeks summary judgment on Plaintiffs' First Amendment claims regarding contribution limits in general elections, and their Fourteenth Amendment claims regarding contribution limits in general elections). The Clerk of Court shall issue a Judgment in accord with the above-stated rulings and close this action.

All of the above pursuant to the Decision and Order dated September 8, 2021 issued by the Honorable Glenn T. Suddaby. Dkt. No. 72.

DATED: September 8, 2021

/s/ John [illegible]
Clerk of Court

s/Shely Muler
Shelly Muller
Courtroom Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

———

18-CV-0459 (GTS/ATB)

———

UPSTATE JOBS PARTY; MARTIN BABINEC; and JOHN BULLIS,

Plaintiffs,

v.

PETER S. KOSINSKI, New York State Bd. of Elections Co-Chair Comm'r, in his official capacity; DOUGLAS A. KELLNER, New York State Bd. of Elections Co-Chair Comm'r, in his official capacity; ANDREW J. SPANO, New York State Bd. of Elections Comm'r, in his official capacity; and GREGORY P. PETERSON, New York State Board of Elections Comm'r, in his official capacity,

Defendants.

———

APPEARANCES:

SANTIAGO BURGER, LLP
Counsel for Plaintiffs
2280 East Avenue
Rochester, NY 14610

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY, PLLC
Co-Counsel for Plaintiffs
15405 John Marshall Highway
Haymarket, VA 20169

HON. LETITIA A. JAMES
Attorney General for the State of New York
Counsel for Defendants
The Capitol
Albany, NY 14202

OF COUNSEL:

FERNANDO SANTIAGO, ESQ.
MICHAEL A. BURGER, ESQ.

JASON B. TORCHINSKY, ESQ.
SHAWN T. SHEEHY, ESQ.
PHILLIP M. GORDON, ESQ.

WILLIAM A. SCOTT, ESQ.
Assistant Attorney General

GLENN T. SUDDABY, Chief United States District Judge

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DECISION and ORDER

Currently before the Court, in this civil rights action filed by the Upstate Jobs Party, Martin Babinec, and John Bullis ("Plaintiffs") against the four commissioners of the New York State Board of Elections ("Defendants"), is Plaintiffs' motion for summary judgment, Defendants' cross-motion for summary judgment, and Plaintiffs' two motions to strike the declaration, report and testimony of two of Defendants' experts. (Dkt. No. 56, 57, 60, 61.) For the reasons set forth below, Plaintiffs' motion to strike Brian Quail's declaration and testimony is denied in part and granted in part, Plaintiffs' motion to strike Clyde Wilcox's expert report and testimony is denied, Plaintiffs' motion for summary judgment granted in part and denied in part, and Defendants' cross-motion for summary judgment is granted in part and denied in part.

I. RELEVANT BACKGROUND

A. Plaintiffs' Claims

Generally, liberally construed, Plaintiffs' Complaint alleges that New York State's Election Law improperly distinguishes between statutorily recognized political "parties" (hereafter "Parties") and "constituted committees" (hereafter "Constituted Committees") on the one hand and statutorily recognized "independent bodies" (hereafter "Independent Bodies") such as the United Jobs Party ("UJP") on the other hand with regard to contribution limits and segregated accounts, thereby creating a "tilted playing field" against Independent Bodies. (Dkt. No. 1.)

Generally, based on these allegations, the Complaint asserts six causes of action: (1) a request for a judgment declaring that New York State's so-called "housekeeping account exemption," codified in N.Y.

Elec. Law § 14-124(3), violates both the Free Speech and Association Clauses of the First Amendment; (2) a request for a judgment declaring that the same "housekeeping account exemption" violates the Equal Protection Clause of the Fourteenth Amendment; (3) a request for a judgment declaring that New York State's differing limits for contributions by political organizations to candidates, codified in N.Y. Elec. Law § 14-114(1),(3) violates both the Free Speech and Association Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, by prohibiting Plaintiff UJP from contributing more than $44,000[1] to its gubernatorial candidate, in contrast to the Parties and Constituted Committees which can make unlimited contributions to their candidates, without having a compelling interest for doing so or using a narrowly tailored means to accomplish such an interest; (4) a request for a judgment declaring that the same statute violates Plaintiff Babinec's right to make political contributions to Plaintiff UJP under the First Amendment, by limiting his contribution to $44,000, which is substantially less than he could contribute to any of the Parties or Constituted Committees; (5) a request for a judgment declaring that New York State's differing limits for contributions by individual contributors to political organizations, codified in N.Y. Elec. Law § 14-114(1),(10), violates both the First Speech and Association Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, by prohibiting Plaintiff UJP

[1] The figures that were at issue when Plaintiffs originally filed their Complaint and motion for preliminary injunction were $44,000.00 and $109,6000. 9 N.Y. Comp. Codes R. & Regs tit. 9 § 6214.0 (2019). However, those figures have since changed to $47,100.00 and $117,600.00]. The Court will use the updated figures in the remaining sections of this Decision and Order.

from raising more than $44,000 per contributor for its gubernatorial candidate while permitting Parties and Constituted Committees to raise up to $109,600 per contributor for their gubernatorial candidates, without having an anti-corruption interest to justify the disparity; and (6) a request for a judgment declaring that New York State's statute limiting contributions to candidates, codified in N.Y. Elec. Law § 14-114 and 9 N.Y.C.R.R. § 6214.0, violates both the Free Speech and Association Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, by permitting Party and Constituted Committee candidates for governor to raise money in a primary election while prohibiting Plaintiff UJP's candidate for governor from doing so. (*See generally* Dkt. No. 1 [Plfs.' Compl.].) Familiarity with the factual allegations supporting these claims in Plaintiffs' Complaint is assumed in this Decision and Order, which is intended primarily for review by the parties. (*Id*.)

B. Undisputed Material Facts

Unless otherwise noted, the following facts were asserted and supported with accurate citations by the parties in their Statements of Material Facts and expressly admitted, or denied without appropriate record citations, in their responses thereto. (*Compare* Dkt. No.56, Attach. 2 [Plfs.' Rule 7.1 Statement] *with* Dkt. No. 57, Attach 7, at 1-28 [Defs.' Rule 7.1 Resp.]; *compare* Dkt. No. 57, Attach. 7, at 28-32 [Defs.' Rule 7.1 Statement] *with* Dkt. No. 58, at 58-88 [Plfs.' Rule 7.1 Resp.)[2]

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[2] The Court begins by noting that, although Plaintiffs have attempted to file a "reply" to each of Defendants' denials of various of Plaintiffs' factual assertions, the Court rejects, and will not consider, those replies, because they are not permitted under

1. Plaintiffs' Statement of Material Facts

1. In early 2016, Mr. Martin Babinec decided he wanted to run for the U.S. House of Representatives to replace Republican Congressman Richard Hanna. (Dkt. No. 56, Attach. 2 at ⁋ 1.) Mr. Babinec decided to campaign for Congress under the banner of a new Independent Body, the UJP. (*Id.* at T 2.) The UJP is considered an Independent Body under New York State law. (*Id.* at ⁋ 3.)

2. With the help of approximately 60 volunteers, Mr. Babinec obtained the 3,500 signatures on independent nominating petitions that were required under New York law. (*Id.* at ⁋ 4.) To assist his campaign efforts, Mr. Babinec used his personal money to loan his campaign $2,990,000. (*Id.* at ⁋ 5.)

3. Eventually, Mr. Babinec's UJP line was consolidated with the Libertarian line; instead of appearing on his own line, he appeared on the Libertarian line with a small notation in 3.5-point font stating that he was the UJP nominee. (*Id.* at ⁋ 6.) Mr. Babinec lost the election, receiving 34,638 votes, or 12.4% of the total votes cast. (*Id.*)

4. Desiring to seize on the momentum gained from the 2016 election, the UJP sought to build its visibility in 2017. (*Id.* at ⁋ 7.) In incurring

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either Fed. R. Civ. P. 56 or Local Rule 56 of the Local Rules of Practice for this Court (formerly Local Rule "7.1"). Indeed, Plaintiffs' purported "replies," by containing legal argument, are an attempt to improperly circumvent the Court's page limitation on its reply/opposition memorandum of law. (*Compare* Dkt. No. 58, at 14-57 *with* Dkt. No. 59.)

expenses to increase its visibility, the UJP spent between approximately $50,000 and $100,000. (*Id*. at ¶ 8.) These expenses including the cost of building and maintaining a digital messaging presence, boosting social media, and hosting a few public meetings where speakers from the UJP spread its message. (*Id*. at ¶ 9.)

5. On or about October 26, 2017, the UJP formed the Upstate Jobs Committee, an independent expenditure-only committee. (*Id*. at ¶¶ 12, 21.) The Upstate Jobs Committee is distinct from the UJP, a Section 501(c)(4) organization under the Internal Revenue Code. (*Id*. at ¶ 22.)[3] The Upstate Jobs Committee obtained a separate EIN and opened a bank account separate from the account with the UJP. (*Id*.)

6. The UJP identified one candidate to support in 2017, Ben Walsh, an independent candidate for

[3] Although Defendants deny an implication of the facts asserted by Plaintiff (specifically, that the entries are anything more than "legally" distinct, and that the admitted legal distinction is anything more than an "academic question"), such a denial of an implication is inappropriate under Fed. R. Civ. P. 56 and the District's Local Rules of Practice. *See* N.D.N.Y. L.R. 7.1(a)(3) ("The non-movant's responses shall . . . admit[] and/or deny[] each of the movant's *assertions* in matching numbered paragraphs.") (emphasis added); *Yetman v. Capital Dis. Trans. Auth.*, 12-CV1670, 2015 WL 4508362, at *10 (N.D.N.Y. July 23, 2015) (citing authority for the point of law that the summary judgment procedure involves the disputation of asserted facts, not the disputation of implied facts); *cf. Goldstick v. The Hartford, Inc.*, 00-CV-8577, 2002 WL 1906029, at *1 (S.D.N.Y. Aug. 19, 2002) (striking plaintiff's Rule 56.1 Statement, in part, because plaintiff added "argumentative and often lengthy narrative in almost every case the object of which is to 'spin' the impact of the admissions plaintiff has been compelled to make").

Mayor of Syracuse. (*Id*. at ⁋ 10.) The UJP did not make any contributions to Mr. Walsh's campaign.

7. The UJP volunteers circulated independent nominating petitions seeking to include Mr. Walsh's name on the UJP line on the ballot. (*Id*. at ⁋ 11.) Mr. Walsh obtained a sufficient number of signatures to appear on the UJP line. (*Id*.)

8. The Upstate Jobs Committee made $22,074 in independent expenditures in support of Mr. Walsh; specifically, this money was spent on digital media advertisements and mailers to support Mr. Walsh's campaign. (*Id*. at ⁋⁋ 12, 26, 27.) Mr. Walsh won his election for Mayor of Syracuse in 2017. (*Id.* at ¶ 28.)

9. On December 27, 2017, the UJP was formally incorporated as Vote Upstate Jobs, Inc. (*Id*. at ⁋ 13.) Vote Upstate Jobs, Inc., is a non-profit corporation organized under Section 501(c)(4) of the Internal Revenue Code. (*Id*. at ⁋ 14.)

10. The initial board of directors of the UJP ("the UJP Board") consisted of John Bullis (Chairman and Executive Director), Martin Babinec (Secretary and Director), and Paul Allen (Director). (*Id*. at ⁋⁋ 15, 52.) These three individuals have served as directors of the UJP since 2016. (*Id*. at ⁋ 52.)

11. The duties of the UJP Board include developing strategy and collectively deciding the future direction of UJP. (*Id*. at ⁋ 53.) The UJP Board also decides which candidates the UJP should support, and the Board has the final say in decisions for the UJP. (*Id.*)

12. The UJP is managed and run by its Board. (*Id*. at ⁋ 63.)
13. The UJP received donations to cover its expenses in 2017.[4] (*Id*. at ⁋ 18.)
14. In 2017, the UJP did not have an office; however, the UJP had approximately ten volunteers. (*Id*. at ⁋ 19-20.)
15. In 2017, the Upstate Jobs Committee received approximately $25,000 in contributions; all of this money was donated by Mr. Babinec. (*Id*. at ⁋ 25.)
16. In 2018, the UJP had more public meetings and endorsed more candidates. (*Id*. at ⁋ 30.) Specifically, the UJP had more than six public meetings during which speakers from it spoke about its message. (*Id*. at ⁋ 31.) The UJP

[4] Despite the fact that Plaintiffs contend it is not speculation that Plaintiff UJP would have spent more money to increase its visibility with a higher contribution limit, the statement itself, as well as the testimony cited in support of the statement, are indeed speculation, unsupported by any admissible evidence. (Dkt. No. 8, at ⁋ 18.) Furthermore, contrary to Plaintiffs' argument, the remaining assertions in this paragraph of Plaintiffs' Statement of Material Facts are founded upon a condition precedent that never happened. Finally, the testimony cited by Plaintiffs in their "reply" to Defendants' response to Plaintiffs' Statement of Material Facts was not originally cited by Plaintiffs in their original Statement. (Dkt. No. 56, Attach. 2, at ⁋ 18; Dkt. No. 57, Attach. 7, at ⁋ 18; Dkt. No. 58, at ⁋ 18.) In this District, a "reply" to a response to a statement of material facts is not permitted because, among other reasons, the party responding to the statement of material facts has had no opportunity to file a sur-reply to the reply; thus Plaintiffs' "reply" will be disregarded. N.D.N.Y. L.R. 56.1(b). Accordingly, Defendants have successfully controverted the remaining assertions in this paragraph of Plaintiffs' Statement of Material Facts.

endorsed Carrie Woerner, Daphne Jordan, Bob Antonacci, and Keith Wofford. (*Id*. at ¶ 34.)

17. In addition to endorsing Mr. Antonacci, the UJP assisted in circulating petitions on behalf of the Antonacci campaign so that Mr. Antonacci could obtain sufficient independent nominating petition signatures to run on the UJP ballot line. (*Id.* at ¶ 35.) Unlike Mr. Babinec in 2016 and Mr. Walsh in 2017, Mr. Antonacci appeared on the UJP line. (*Id.* at ¶ 36.) Mr. Antonacci received 347 votes on the UJP line. (*Id*.)

18. In 2018, the UJP received $88,000 in contributions, had $48,891 in program expenses, and paid $42,204 to consultants.[5] (*Id*. at ¶ 32.) The UJP spent $6,577 in media fees; in particular, these payments were for social media fees across all platforms and for digital advertising promoting the UJP.[6] (*Id*. at ¶ 33.)

19. In 2018, the Upstate Jobs Committee received $110,135 in contributions; $110,000 of these contributions came from Mr. Babinec. (*Id*. at ¶ 37.) The Upstate Jobs Committee spent $74,060.85 on digital media and mailers to promote the UJP message and promote the candidacies of Carrie Woerner, Democrat for State Assembly, Bob Antonacci, Republican for

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[5] Defendants' denial of Plaintiffs' asserted statement of material fact fails to specifically controvert the fact that Plaintiff UJP had $48,891 in program expenses and within the program expenses, $42,204 was paid to consultants. (Dkt. No. 57, Attach. 7, at ¶ 32.)

[6] Defendants' denial of Plaintiffs' asserted statement of material fact fails to specifically controvert the fact that Plaintiff UJP had $6,577 in media fees. (Dkt. No. 57, Attach. 7, at ¶ 33.)

State Senate, and Daphne Jordan, Republican for State Senate. (*Id*. at ⁋ 38.) Each candidate won his or her respective election. (*Id*. at ⁋ 40.)

20. These digital and mail ads promoted not only the candidates that the UJP endorsed but also the UJP's platform of bringing "innovation economy jobs" to Upstate New York. (*Id*. at ⁋ 39.)

21. In 2018, the UJP did not have an office space or employees. (*Id*. at ⁋ 41.) During the first half of 2019, the UJP held two events. (*Id.* at ¶ 42.) These events were public forums for the purpose of promoting the UJP platform and to engage local officials to discuss with the public the approach to creating jobs and retaining talent. (*Id*.) The UJP also continued with its expenses of promoting its message and platform to the public. (*Id.* at ¶ 43.) Some of the events included focus group meetings, which were held in Utica, Albany, and Syracuse and had approximately twelve to twenty millennial voters per meeting. (*Id.* at ¶ 44.) The purpose of these meetings was to both promote the UJP's message and tailor its message by gauging the attendee's responses. (*Id*.)

22. In 2019, the UJP endorsed six candidates: Lynne Dixon, Republican candidate for Erie County Executive; Ryan McMahon, Republican candidate for Onondaga County Executive; Kevin Tollisen, Republic candidate for Saratoga Board of Supervisors/Halfmoon Supervisor; Michele Madigan, Working Families, Independence Party, and Serve America Movement party candidate for Saratoga Springs Commissioner of Finance; Mark Blask, Democratic party candidate for Mayor of Little Falls; Robert Palmeri, Democratic party candidate for Mayor of Utica; and

Tony Picente, Republican party candidate for Oneida County Executive. (*Id*. at ⁋ 45.)

23. In 2019, the Upstate Jobs Committee received $130,898 in contributions from Mr. Babinec. (*Id*. at ⁋ 46.) The Upstate Jobs Committee spent $60,398.23 in digital advertising and independent expenditure mail-pieces. (*Id*. at ⁋ 47.) Of this sum, $38,964.48 was spent on independent expenditures supporting the candidacies of Lynne Dixon for Erie County Executive and Ryan McMahon for Onondaga County Executive. (*Id*.)

24. The UJP does not currently have an office or employees. (*Id*. at ⁋ 48.)

25. The Upstate Jobs Committee is also run by a board of directors ("the Upstate Jobs Committee Board"). (*Id*. at ⁋ 64.) The Upstate Jobs Committee Board makes final decisions on what expenditures to make in support of candidates. (*Id*.) From 2017 through August 2019, the Upstate Jobs Committee Board of Directors was the same as the UJP Board of Directors: John Bullis, Martin Babinec, and Paul Allen. (*Id*.)

26. On August 30, 2019, the Upstate Jobs Committee voted Daniel Reardon and Anthony DeLuca as the new members of the Board of Directors. (*Id*. at ⁋ 65.) The current composition of the Upstate Jobs Committee Board is Daniel Reardon, Anthony DeLuca, and Martin Babinec. (*Id*.)

27. Tim Dunn and Dan O'Sullivan also serve on the leadership team of the UJP; Mr. Dunn is the UJP's communications director and Mr. O'Sullivan is a volunteer. (*Id.* at 54-55.)

28. Since 2016, Mary Lou Herringshaw has served the UJP as a volunteer treasurer, and currently serves the UJP as a bookkeeper. (*Id*. at ⁋ 60-61.)

29. Decisions made by the UJP and the Upstate Jobs Committee, including budget decisions, are separate and distinct from one another (although any knowledge of where the UJP has decided to put its resources would be considered by the Upstate Jobs Committee when deciding where to put its resources).[7] (*Id*. at T 69.)

30. The Upstate Jobs Committee's decisions concerning independent expenditures are made

[7] Although Defendants deny this fact, they fail to support their denial with a citation to admissible record evidence that actually creates a genuine dispute of material fact. (Dkt. No. 57, Attach. 7, at T 69.) Rather, Defendants appear to (conclusorily) argue that a member of a board of directors cannot possibly serve on two boards and fulfill his or her fiduciary duty to each. They offer no authority for that argument. In any event, the only record citation offered by Defendants in support of their denial is to pages 36 and 37 of the deposition testimony of Mr. Babinec. However, the mere fact that certain information received by the directors of the UJP may also be used by those individuals as directors of the Upstate Jobs Committee (i.e., what candidates the UJP will be backing, which incidentally appears to be public information) does not controvert the assertion that the *decisions* made both those entities (by their boards of directors acting in their capacities as fiduciaries) are separate and distinct from one another. (Dkt. No. 56, Attach. 3, at 37-38 [attaching pages "36" and "37" of the deposition testimony of Mr. Babinec].) The Court notes that Defendants' challenge to Plaintiffs' ability to comply with their firewall policy (which is implicit it their response to the above-asserted fact and explicit in their response to the next asserted fact) is more appropriate for trial, because it goes to the weight, not admissibility, of evidence of Plaintiffs' ability to make separate and distinct decisions in their capacities at the Upstate Jobs Committee and UJP. (Dkt. No. 57, Attach. 7, at T 69.)

consistent through use of a firewall policy.[8] (*Id*. at ¶ 70.)

31. The Upstate Jobs Committee, its board members, agents, and volunteers have never crafted or disseminated an independent expenditure at the suggestion, encouragement, or assistance of any candidate, candidate's committee, or any officer, staff, or agent of a candidate or candidate's committee. (*Id*. at ¶ 71.)

32. None of the content appearing in any Upstate Jobs Committee independent expenditure has contained information obtained from the candidate, or candidate's officer, employee, or agent, concerning that candidate's electoral campaign plans, projects, or activities that were not otherwise publicly available. (*Id*. at ¶ 72.)

33. Every principal, employee, vendor, and independent contractor from both the UJP and the Upstate Jobs Committee has reviewed, approved, and executed a Firewall Compliance Policy to further prevent the use of private information obtained from meetings between Upstate Jobs Party officials and candidates in the crafting and disseminating of independent expenditures by the Upstate Jobs Committee. (*Id*. at ¶ 73.)

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[8] Although Defendants partially deny this fact, their denial is ineffective. More specifically, Defendants deny that "that there is any practical method of complying with that policy." (Dkt. No. 57, Attach. 7, at 70.) However, Plaintiffs never assert that "there is a practical method of complying with the policy." In this sense, Defendants are denying an implication of Plaintiffs' asserted fact, which is not permissible under Local Rule 56.1(b). *See, supra,* note 3 of this Decision and Order. In any event, Defendants fail to cite to any evidence in the record in support of their partial denial.

34. The firewall policy establishes a two-part structure to prevent "coordination" under either the federal or the New York State definition of that term. (*Id*. at ¶ 74.) The first part of the firewall policy requires the Upstate Jobs Committee to take steps to prevent itself from obtaining strategy information, i.e., information obtained within two years of an election about the candidate's electoral campaign plans, projects, or activities, that is not obtained from a publicly available source. (*Id*.) Any Upstate Jobs Committee principal, employee, vendor, or independent contractor who obtains any private information about a particular candidate's campaign plans, projects or activities must not share or discuss, in any way, that information with any other Upstate Jobs Committee principal, employee, or independent contractor. (*Id*.) Furthermore, any principal, employee, vendor, or independent contractor who does obtain this information will play no role in connection with any specific independent expenditure in support of that candidate. (*Id*.)

35. The second part of the firewall policy requires that the Upstate Jobs Committee's decisions about whether to make an independent expenditure in support of a candidate be based solely on publicly available information. (*Id*. at ¶ 75.) This policy is enforced. (*Id*. at ¶ 76.) For example, during a fall 2019 board meeting during which the Upstate Jobs Committee made decisions to endorse candidates, the Upstate Jobs Committee made those decisions based solely on publicly available information. (*Id*.) In an abundance of caution, when the Board discussed Mark Blask's endorsement and

budget for independent expenditures, the Board asked that fellow board member Tony DeLuca leave the room because he may have had strategic information. (*Id.*)

36. The UJP has enacted a similar firewall policy. (*Id.* at T 77.) UJP recognizes that, in the course of carrying out their duties, UJP principals, employees, vendors, and independent contractors may engage in discussions with candidates, and that these discussions may include strategic information about the candidate's campaign plans, projects, or activities and is not information that is publicly available. (*Id.*) To prevent coordination, the UJP prohibits its principals, employees, vendors, and independent contractors who have engaged in discussions with candidates from having any involvement with independent expenditures made in support of that candidate through the Upstate Jobs Committee. (*Id.*) UJP principals, employees, vendors, and independent contractors who have obtained strategic information through discussions with candidates are also prohibited from sharing this information with Upstate Jobs Committee principals, employees, vendors, and independent contractors in connection with an independent expenditure in support of that particular candidate. (*Id.*) Maintaining this prohibition also prevents impermissible corporate contributions that may jeopardize the UJP's tax-exempt status. (*Id.*)

37. The UJP Board has unanimously approved and adopted the UJP's firewall policy. (*Id.* at ⁋ 78.) John Bullis, Martin Babinec, and Timothy Dunn have also executed the UJP firewall policy. (*Id.*)

Similarly, the Upstate Jobs Committee Board of Directors has adopted the Upstate Jobs Committee's firewall policy. (*Id*. at ⁋ 79.) Martin Babinec, Timothy Dunn, Daniel Reardon, and Anthony DeLuca have also executed the Upstate Jobs Committee firewall policy. (*Id*.)

38. The UJP (which again is a Section 501[c][4] organization under the Internal Revenue Code) has never received funds from the Upstate Jobs Committee (an independent expenditure-only committee); similarly, the Upstate Jobs Committee has never received funds from the UJP. (*Id*. at ⁋ 80.)

39. The State Board of Elections has no record of any enforcement action brought against Independent Bodies for violations of (a) the limit on contributions from individuals to Independent Bodies, (b) the limit on contributions from Independent Bodies to candidates, or (c) the limits on Independent Bodies establishing a housekeeping account. (*Id*. at ⁋ 90.)

2. Defendants' Statement of Material Facts

1. New York Election Law creates classifications of political entities. (Dkt. No. 57, Attach. 7, at 28, ⁋ 1.)

2. A "Party" is formed under New York's Election Law if a candidate for any political organization receives two percent of the total votes cast for its candidate for governor, or one hundred thirty thousand votes, whichever is greater, in the year in which a governor is elected and at least two percent of the total votes cast for its candidate for president, or one hundred thirty thousand

votes, whichever is greater, in a year when a president is elected. (*Id.* at ⁋ 2.)

3. Parties must comply with organizational requirements of the Election Law. (*Id.* at ⁋ 3.)

4. New York Election Law does not distinguish between Parties based on their size. (*Id*. at ⁋ 4.)

5. New York Election Law does not recognize "start-up political parties." (*Id.* at ⁋ 5.)

6. As of February 21, 2020, New York State recognized eight separate Parties (i.e., Democrat, Republican, Conservative, Working Families, Green, Libertarian, Independence and SAM). (*Id.* at ⁋ 6.) The eight Parties recognized by New York State at that time had a total of 8,909,542 enrollees, which represented approximately 76% of the enrolled voters in the State. (*Id*. at ⁋ 6.)

7. Plaintiffs do not challenge New York State's mechanism for creating Parties, nor do they seek to change New York Election Law to create any new political entity. (Dkt. No. 57, Attach. 7, at ⁋ 8-9.) Instead, Plaintiffs challenge the two-tiered contribution limit that places Independent Bodies like Plaintiff UJP at a disadvantage. (Dkt. No. 58, at 79.)

8. Plaintiff UJP is an Independent Body and is not one of the eight Parties recognized by New York State. (*Id.* at ⁋⁋ 10-11.)

9. The New York State Legislature has not established organization requirements for "Independent Bodies," which do not have the same reporting requirements as Parties. (*Id.* at ⁋⁋ 12-13.)

10. Independent Bodies normally serve as an alter ego of a particular candidate to get a ballot label.[9] (*Id.* at ¶ 14.)

11. New York Law sets no maximum number of members for an entity to be considered an Independent Body. (*Id.* at ¶ 16.)

12. Parties occupy a unique position in our democracy. (*Id.* at ¶ 17.)

13. Large, direct contributions to political candidates presents a risk of quid pro quo corruption and/or the appearance thereof. (*Id.* at ¶ 20.)

14. Generally, people try to hide quid pro quo corruption. (*Id.* at ¶ 21.)

15. New York State allows some of the highest individual contributions in the country. (*Id.* at ¶ 24.)

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[9] Although Plaintiffs deny this fact, their denial is ineffective. In this case, Mr. Quail is referring to the general nature of Independent Bodies, not the nature of the UJP. (Dkt. No. 56, Attach. 3, at 377.) Despite Plaintiffs' citation to record evidence disputing that the UJP is serving as an alter ego of a candidate, this evidence does not contradict Mr. Quail's statement regarding the general nature of Independent Bodies. Moreover, Plaintiffs argue that, generally, Independent Bodies are not "overwhelmingly" the alter ego of a candidate. However, Plaintiffs fail to cite to any record evidence establishing the general or "overwhelming" nature of Independent Bodies. (Dkt. No. 58, at 65-66.) Finally, Plaintiffs argue the Court should not consider Mr. Quail's testimony because Defendants proffer him as an expert in New York election law. (*Id*. at 66.) For the reasons more fully explained in Part III.A of this Decision and Order, the Court considers Mr. Quail's testimony concerning the general nature of Independent Bodies.

16. Plaintiff Babinec has never donated the maximum allowable amount to Plaintiff UJP. (*Id.* at ⁋ 30.)
17. Plaintiff Bullis has never donated the maximum allowable amount to Plaintiff UJP. (*Id.* at ⁋ 31.)
18. Plaintiff UJP has never donated the maximum allowable amount to any candidate for political office. (*Id.* at ⁋ 32.)

Finally, the Court notes that, in determining the above-listed undisputed material facts, the Court has relied on the point of law that, when deciding motions for summary judgment, district courts can consider supporting and opposing declarations or affidavits that set forth evidence that would be admissible at trial. Fed. R. Civ. P. 56(e). However, "[w]here a declaration is used to support or oppose the motion, it 'must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the . . . declarant is competent to testify on the matters stated." *Ostreicher v. Chase Bank USA, N.A.*, 19-CV-8175, 2020 WL 6809059, at *2 (S.D.N.Y. Nov. 19, 2020) (quoting Fed. R. Civ. P. 56[c][4]). "If a party fails to properly support an assertion of fact . . . the court may: (1) give an opportunity to properly support . . . the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials . . . show that the movant is entitled to it; or (4) issue any other appropriate order." Fed. R. Civ. P. 56(e).

C. Parties' Briefing on Their Cross-Motions for Summary Judgment

1. Plaintiffs' Memorandum of Law in Chief

Generally, in support of their motion for summary judgment, Plaintiffs assert five arguments. (Dkt. No. 56, Attach. 1.) First, Plaintiffs argue, New York State's two-tiered contribution-limit regime is subject to, and does not survive, rigorous and closely drawn scrutiny for the following reasons: (a) because the making and receiving of campaign contributions is included within the First Amendment's free speech and associational rights, New York State may limit campaign contributions only to prevent *quid pro quo* corruption or its appearance; (b) Defendants have failed to adduce evidence that New York State's two-tiered contribution-limit regime is necessary to address a problem of actual or apparent *quid pro quo* corruption, particularly such corruption or its appearance related to Independent Bodies, (c) even if the contribution limit at issue in this action is shown to prevent actual or apparent *quid pro quo* corruption, Defendants must show that it is closely drawn and does not unnecessarily infringe constitutional rights; and (d) moreover, even if this contribution limit survives scrutiny under the First Amendment, it fails strict scrutiny under the Fourteenth Amendment's Equal Protection Clause because New York State's selective infringement of Independent Bodies' political speech neither serves a compelling interest nor is narrowly tailored to further that interest. (*Id.*)

Second, Plaintiffs argue, New York State's housekeeping account exemption for Parties violates the First and Fourteenth Amendments for two reasons: (1) the housekeeping account exemption does not advance a sufficiently compelling state interest in that

(a) a prohibition already exists on contributions from housekeeping accounts flowing to candidates and therefore no need exists (or has been shown) to prevent the housekeeping account exemption from being extended to Independent Bodies in order to prevent actual or apparent *quid pro quo* corruption, and (b) even if a need exists to prevent actual or apparent *quid pro quo* corruption, Defendants have not provided any evidence that Independent Bodies are uniquely susceptible to such corruption so as to justify a complete ban on them having housekeeping accounts (especially when Parties with housekeeping accounts can receive unlimited contributions), because there is no meaningful distinction between the needs of the two kinds of organizations (and indeed there are actual examples of corruption in Parties and none in Independent Bodies); and (2) the housekeeping account exemption is not closely drawn or narrowly tailored in that (a) the New York State legislature needs but does not have evidence of actual or apparent *quid pro quo* corruption involving Independent Bodies, and (b) in any event, there are more closely drawn means than a complete ban to achieve New York State's anti-corruption interest (for example, the imposition on Independent Bodies of the same disclosure requirements that are imposed on Parties, the enactment of "anti-proliferation statutes" prohibiting individuals from establishing Independent Bodies when those individuals are connected to either Parties or other Independent Bodies, or the imposition of a housekeeping-account contribution limit). (*Id.*)

Third, Plaintiffs argue, New York State's unequal contribution and coordination limits between Parties and Independent Bodies violate the First and Fourteenth Amendments for two reasons: (1) the unequal contribution and coordination limits do not advance a

sufficiently compelling state interest, because (a) New York State does not have an anti-corruption interest in limiting contributions from a party to a party's candidate, and (b) even if party transfers to its candidates do trigger an anti-corruption interest, the New York State legislature did not possess evidence of a special actual or apparent *quid pro quo* corruption problem posed by Independent Bodies warranting disparate treatment as compared to Parties; and (2) in any event, the unequal contribution and coordination limits are not closely drawn or narrowly tailored to further an anti-corruption interest, because the Tenth and Eighth Circuits have declared unconstitutional lesser disparities in analogous contribution limits (between major and minor parties, and some political action committees and others). (*Id.*)

Fourth, Plaintiffs argue, New York State's inequitable contribution limits as applied to Plaintiff Babinec's desire to contribute to Plaintiff UJP violates the First and Fourteenth Amendments for two reasons: (1) the inequitable contributions limits as applied to Plaintiff Babinec's desire to contribute to Plaintiff UJP do not advance a sufficiently compelling state interest of combatting actual or apparent *quid pro quo* corruption, because (a) an individual can contribute $117,300 to a Party such as the New York State Republican State Committee but is prohibited from making the same contribution to an Independent Body such as Plaintiff UJP, and (b) the New York State legislature has adduced no evidence of actual or apparent *quid pro quo* corruption to substantiate its divergent limits on the contributions an individual can make to a Party and those the individual can make to an Independent Body; and (2) the inequitable contribution limits as applied to Plaintiff Babinec's desire to contribute to Plaintiff UJP are not closely drawn or

narrowly tailored, because New York State can achieve its goals through less-intrusive means (for example, again, the imposition on Independent Bodies of the same disclosure requirements that are imposed on Parties, the enactment of "anti-proliferation statutes" prohibiting individuals from establishing Independent Bodies when those individuals are connected to either Parties or other Independent Bodies, or the enactment of statutes requiring that contributions to Independent Bodies from individuals who have contributed the maximum amount to candidates be placed in a separate bank account and spent on activities in which the money is not directly flowing to the candidate such as "Get Out the Vote" efforts and signature gathering). (*Id.*)

Fifth, and finally, Plaintiffs argue, Defendants lack, and are unable to produce, evidence of actual or apparent *quid pro quo* corruption in Plaintiff UJP and the Upstate Jobs Committee for three reasons: (1) the two entities have separate and distinct boards of directors; (2) the two entities have separate and distinct bank accounts, budgets and budget-spending decision-making processes; and (3) the two entities have two-part firewall policies to prevent coordination, and both policies are enforced. (*Id.*)

2. Defendants' Combined Opposition Memorandum of Law and Memorandum of Law in Chief

Generally, in opposition to Plaintiffs' motion and in support of their own cross-motion for summary judgment, Defendants assert four arguments. (Dkt. No. 57, Attach. 8.) First, Defendants argue, the nature of Plaintiffs' challenge triggers two different legal standards: (1) because Plaintiffs' claims challenge only contribution limits and not also expenditure limits,

those claims are subject to intermediate scrutiny (requiring that the limits be closely drawn to address a sufficiently important state interest, specifically, actual or apparent *quid pro quo* corruption); and (2) because Plaintiffs' claims challenge only the relevant statutes' facial validity, and not also the statutes' application to Plaintiffs, Plaintiffs must meet a strict standard to upset these laws. (*Id.*)

Second, Defendants argue, Plaintiffs' claims challenging New York State's laws regarding housekeeping accounts must be dismissed for two reasons: (1) the Court has already ruled that New York State's election laws regarding housekeeping accounts serve to prevent, at a minimum, the appearance of *quid pro quo* corruption, and that those laws are narrowly tailored to prevent the appearance of *quid pro quo* corruption; and (2) far from constituting new evidence warranting reconsideration of the Court's prior ruling, the evidence adduced by Plaintiffs in support of their motion actually shows (a) the potential for *quid quo pro* corruption if their request for relief is granted, and (b) the fact that Plaintiffs have been fully able to carry out their desired activities within the election laws' current framework. (*Id.*)

Third, Defendants argue, Plaintiffs' claims challenging New York State's laws regarding contribution limits must be dismissed for two reasons: (1) Plaintiffs have failed to establish their First Amendment claims with respect to the contribution limits, because (a) the First Amendment claims turn on whether there has been a showing that the limits are so low as to impede the ability of the candidates to amass the resources necessary for effective advocacy, (b) Plaintiffs have not made such a showing here and, indeed, Plaintiff Babinec has not donated the current maximum

allowable amount to Plaintiff UJP, and (c) if Plaintiffs' requested relief were granted, any individual with sufficient resources could use an Independent Body as a mask for his or her own donations to a candidate, thereby sidestepping the current limitations on an individual's donations to a candidate; and (2) Plaintiffs have failed to establish their Fourteenth Amendment equal protection claims with respect to the contribution limits, because they have presented no evidence or authority establishing that Independent Bodies are similarly situated to Parties, which the Supreme Court has recognized occupy a unique position in our democracy, particularly for the purpose of preventing actual or apparent *quid pro quo* corruption. (*Id.*)

Fourth, and finally, Defendants argue, to the extent that Plaintiffs still pursue a claim regarding their challenge to contribution limits in a primary election (which they do not discuss in their motion papers), that claim should be dismissed, because (a) Independent Bodies are not required to conduct primary elections, and (b) in any event, Parties do not receive an additional contribution limit for primary elections. (*Id.*)

3. Plaintiffs' Combined Reply Memorandum of Law and Opposition Memorandum of Law

Generally, in reply to Defendants' opposition and in opposition to Defendants' motion, Plaintiffs assert four arguments. (Dkt. No. 59.) First, Plaintiffs argue, notwithstanding Defendants' persistent attempt to advance a less-exacting standard of scrutiny, New York State's two-tiered contribution-limit regime must survive (and yet fails to survive) rigorous and closely drawn scrutiny under the First Amendment (demonstrating a sufficiently important interest to justify its

restrictions, and the employment of closely drawn means to avoid unnecessary abridgement of associational freedoms), for four reasons: (1) the Supreme Court has clearly stated that this is the appropriate standard in cases challenging a state's discriminatory contribution limits, and the Second Circuit has recognized that this the proper standard to apply in this case; (2) contrary to Defendants' characterization of Plaintiffs' claims, Plaintiffs' claim that New York State's unequal contribution limits regime is analytically distinct from a claim that New York State's contribution limits are too low; (3) not only have Defendants failed to demonstrate that New York State is acting to further its interest in preventing actual or apparent *quid pro quo* corruption, they have failed to supply evidence to prove that the means it has chosen does not unnecessary abridge First Amendment rights; and (4) contrary to Defendants' characterization, Plaintiffs' claims challenge the relevant statutes' application to Plaintiffs. (*Id*.)

Second, Plaintiffs argue, Defendants have failed to carry their burden to justify New York State's prohibition on Independent Bodies obtaining a housekeeping account for four reasons: (1) extending New York State's housekeeping accounts to Independent Bodies would not trigger an anti-corruption interest, because, as argued in Plaintiffs' memorandum of law in chief, a prohibition already exists on contributions from housekeeping accounts flowing to candidates; (2) even if Defendants had demonstrated the triggering of such an anti-corruption interest, again as Plaintiffs have previously argued, Defendants have not adduced evidence that Plaintiff UJP or Independent Bodies present a unique threat of *quid pro quo* corruption to justify a complete ban; (3) in any event, New York State's ban on Independent Bodies establishing house-

keeping accounts is not closely drawn, because, as Plaintiffs have previously argued, (a) Defendants have produced no evidence of actual or apparent *quid pro quo* corruption involving Independent Bodies that would enable the Court to assess whether the complete ban is narrowly tailored, and (b) New York State can achieve its goals through less-intrusive means, none of which Defendants have even bothered to address in their opposition memorandum of law; and (4) Defendants' arguments to the contrary are unavailing because (a) the fact that this Court denied Plaintiffs' motion for a preliminary injunction (based on not-fully-developed record evidence) is irrelevant, (b) Defendants' fears about permitting housekeeping accounts for Independent Bodies are overstated and speculative in that the housekeeping account provision (which already prohibits contributions from housekeeping accounts from flowing to specific candidates) is further buttressed by its disclosure provision, (c) Defendants' argument that Plaintiffs have carried out similar functions without a housekeeping account is not evidence that the statute's prohibition is closely drawn, given that a donor need not max out on his or her current contribution limit in order to challenge the constitutionality of that limit (and in any event Defendants' argument actually undermines their position that eliminating the two-tiered system would pose a threat of actual or apparent *quid pro quo* corruption), and (d) the fact that Parties need housekeeping accounts (given their increased costs) does not constitute the advancement a permissible interest, the only one of which is the prevention of actual or apparent *quid pro quo* corruption. (*Id.*)

Third, Plaintiffs argue, Defendants have failed to adduce evidence to justify New York State's differential contribution limits as applied to Plaintiff Babinec

for four reasons: (1) the Supreme Court has already ruled that imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment, and Defendants have adduced no legislative history or other evidence to justify this disparity on the grounds of preventing actual or apparent *quid pro quo* corruption; (2) as they did with regard to the limit on housekeeping accounts, Defendants have failed to adduce evidence that would permit the Court to assess the differing contribution limits' fit to ensure that Plaintiffs' First Amendment rights were not being unnecessarily abridged (and indeed Defendants do not even address Plaintiffs' proposed closely drawn alternatives); (3) Plaintiff Babinec's contribution history to Plaintiff UJP, and his position at Plaintiff UJP, is not relevant to determining whether New York State's contribution limit imposed on his contributions to Plaintiff UJP is constitutional because (a) Defendants' hypothetical scenarios if the difference in contribution limits was abolished (e.g., the making of contributions to evade the contributions limits) are already illegal and thus may not be used to justify contribution limits, (b) Defendants have neither presented evidence that Plaintiff UJP has abused the contribution limits nor presented evidence that people use Independent Bodies to abuse the contribution limits, and (c) any concerns about using an Independent Body to evade contribution limits are alleviated by the fact for Independent Bodies to get their candidate's name on a ballot, they must endure the independent-nominating-petition process, which is both costly and arduous; and (4) Independent Bodies are similarly situated to Parties for purposes of Plaintiffs' Fourteenth Amendment equal protection claim, because (a) according to their definitions under New York State law, both groups

compete for votes from the public for their nominated candidates in a general election, (b) there is nothing unique about Parties other than their size, and (c) Defendants misread the cases they rely on, and fail to distinguish controlling cases. (*Id.*)

Fourth, Plaintiffs argue, Defendants have failed to adduce evidence justifying New York State's differential contribution limits in general for two reasons: (1) as a threshold matter, Defendants have failed to adduce evidence establishing that New York State's differing contribution limits further its interest in preventing actual or apparent *quid pro quo* corruption; and (2) in any event, Defendants have failed to adduce evidence that New York State's differing contribution limits are closely drawn so as to not unnecessarily abridge First Amendment freedoms. (*Id.*)

4. Defendants' Reply Memorandum of Law

Generally, in reply to Plaintiffs' opposition, Defendants assert four arguments. (Dkt. No. 67.) First, Defendants argue, Plaintiffs mischaracterize the nature of their claims and the legal standard governing them for two reasons: (1) contrary to Plaintiffs' argument that they do not "quibble with the precise limits imposed on Independent Bodies or Political Parties in New York," Plaintiffs' Complaint repeatedly claims that the sufficiency of New York State's contribution limits on Plaintiffs UJP and Babinec are insufficient; and (2) contrary to Plaintiffs' argument that Defendants must prove (but have not proven) that Plaintiff UJP or Independent Bodies are actually corrupt, Defendants need only show that the challenged laws serve to prevent the *appearance* of *quid pro quo* corruption, which Defendants have done by showing that an Independent Body (such as Plaintiff UJP) that is operated by an individual who is less scrupulous than

Plaintiff Babinc could create the risk of *quid pro quo* corruption (e.g., where that individual is a director and the largest donor of both that Independent Body and its independent expenditure-only committee). (*Id.*)

Second, Defendants argue, the laws at issue are narrowly tailored for two reasons: (1) it does not matter that three other means of enforcement could have equally prevented *quid pro quo* corruption, but whether the challenged laws unnecessarily abridge associational freedoms; and (2) here, the evidence demonstrates that the challenged laws do not unnecessarily abridge Plaintiff UJP's and Plaintiff Babinec's rights (Plaintiff Bullis' rights no longer apparently being at issue, due to Plaintiffs' failure to assert arguments regarding them), for example, the evidence that Plaintiff UJP has been able to enlist employees, hold informational gatherings and support candidates. (*Id.*)

Third, Defendants argue, the Court should reject Plaintiffs' reliance on the fact that the law already prohibits housekeeping accounts from being used for the direct benefit of candidates (and their resulting argument that extending those housekeeping accounts to Independent Bodies would not trigger an anti-corruption interest) for three reasons: (1) Plaintiffs confuse whether housekeeping accounts *should* be so used with whether they *will* be so used; and (2) if Plaintiffs' request for relief were granted, a group as small as two individuals with only a single candidate would be allowed to fundraise for a housekeeping account (and it would be possible, if not probable, that the money in that account would be used for the benefit of a single candidate); and (3) although Plaintiffs argue that the aforementioned risk could be eliminated by the Board of Elections devoting more

manpower to enforcement, that increase in cost must be balanced against the fact that the current law has not significantly restricted Plaintiffs' rights (or the rights of any other Independent Body). (*Id.*)

Fourth, Defendants argue, contrary to Plaintiffs' argument that Defendants have offered no explanation as to why Independent Bodies and Parties are not similarly situated, Defendants have explained that (1) Plaintiff UJP is not a Party but an Independent Body under New York State law, (2) the Supreme Court has specifically recognized that Parties occupy a unique place in our democracy, and (3) Parties are more tightly organized than Independent Bodies. (*Id.*)

D. Parties' Briefing on Plaintiffs' Motions to Exclude

1. Plaintiffs' Motion to Exclude the Declaration and Testimony of Brian Quail

Generally, in support of their motion to exclude the declaration and testimony of Brian Quail, Plaintiffs assert the following three arguments: (1) Mr. Quail is not qualified to serve as an expert in this case because (a) he has never published a law review article or any peer-reviewed articles about New York Election Law, (b) he has never before served as an expert witness and (c) he is not a non-partisan answerable to his profession in that he has previously served only for Democratic commissions; (2) legal conclusions pervade Mr. Quail's declaration and testimony because (a) Paragraph 6 of his declaration instructs the Court on how New York Election Law categorizes political entities (which does not require specialized knowledge), (b) Paragraphs 8, 10, 11 and 14 discuss the legal duties and obligations of parties and the contribution limits for various entities under New York Election Law (thus invading

the Court's exclusive province to say what the law is), (c) Paragraphs 15, 16 and 17 restate New York State's housekeeping account exception statute and state what types of entities have legal obligations under state law, and (d) Paragraphs 18 and 19 attempt to divine legislative intent, misstate the relief sought and couch a legal opinion in terms of art; and (3) Mr. Quail's declaration and testimony are not reliable, because (a) Paragraphs 9, 11 and 17 through 21 contain conclusory assertions that are not supported by sufficient facts and data and are the product of unreliable methods, and (b) those paragraphs provide only unadorned conclusions unsupported by facts. (Dkt. No. 60, Attach. 1.)

Generally, in opposition to Plaintiffs' motion, Defendants assert the following two arguments: (1) Mr. Quail's qualifications allow him to offer an expert opinion on this matter because, although he has not published any articles or previously appeared as an expert, he has nineteen years of experience as a practicing attorney, fourteen years of experience working with New York Election Law, and eight years of experience as an Election Commissioner (thus giving him unique insight into the potentially complicated scenarios presented by New York Election Law); (2) Plaintiffs' arguments are insufficient to disqualify Mr. Quail as an expert because (a) his opinions are supported by a substantial body of material that has been provided to Plaintiffs, (b) although some his opinions may touch on an ultimate issue to be decided in this complicated and nuanced field of law, they do not tell the trier of fact what result it should reach, and (c) his opinions thus affect the weight to be given to Mr. Quail's opinion, not his qualifications as an expert. (Dkt. No. 63.)

Generally, in reply to Defendants' opposition, Plaintiffs assert the following three arguments: (1) the First Amendment to the U.S. Constitution, and its applications to campaign finance statutes, is not a particularly complicated or nuanced field such that a legal expert is necessary to assist the trier of fact; (2) Defendants' proffer of Mr. Quail as an expert to explain the relevant laws is impermissible because it is the role of the Court (which comes already equipped with a legal expert, i.e., a judge) to say what the law is, and Mr. Quail, as an attorney representing two of the Defendants, is far from a non-lawyer expert witness testifying about facts; and (3) and even if the Court were to permit Mr. Quail to testify as an expert, the Court should afford his testimony little, if any, weight because Mr. Quail is not a non-partisan expert answerable to his profession. (Dkt. No. 66.)

2. Plaintiffs' Motion to Exclude the Expert Report of Dr. Clyde Wilcox

Generally, in support of their' motion to exclude the expert report of Dr. Clyde Wilcox, Plaintiffs assert the following three arguments: (1) Dr. Wilcox's report is irrelevant and unhelpful because (a) to justify unequal treatment of different groups, Defendants must adduce evidence that the New York State legislature sought to solve a problem at the time the law was enacted, (b) other than pointing to the statutes themselves, the State of New York has never offered such evidence, (c) instead, Defendants attempt to use Dr. Wilcox to create a post hoc legislative reasoning to buttress the election laws' infirmities, and (d) Dr. Wilcox's report is not relevant to the question of what evidence the legislature considered when passing the challenged statutes in that there is no evidence the legislature considered anything to justify its ban on Independent

Bodies' housekeeping accounts and unequal contribution and coordination limits; (2) Dr. Wilcox's report is not based on reliable principles and methods, and the methods used have not been reliably applied to the facts, because (a) Dr. Wilcox habitually copied material from his reports in unrelated and factually distinct cases for use in this case, and (b) Dr. Wilcox's extensive use of anecdotal evidence is a departure from academic norms; and (3) Dr. Wilcox is not qualified to be an expert on the subject matter in his report (and therefore his report is not helpful) because (a) Dr. Wilcox is not an expert regarding political parties (especially in New York State) and was unable to even articulate, as a political scientist, what would make one group a political party and another collection of people a mere group, (b) Dr. Wilcox is not an expert on housekeeping accounts nor does he even have a firm understanding of New York Election Law, and (c) indeed his report confuses the purported corrupting influence of money on independent bodies with the corrupting influence of money on political parties. (Dkt. No. 62.)

Generally, in opposition to Plaintiffs' motion to exclude Dr. Wilcox, Defendants assert the following three arguments: (1) Dr. Wilcox's qualifications allow him to offer an expert opinion in this matter because courts have qualified experts in election matters with far fewer credentials than Dr. Wilcox (who has taught political science in college since 1986, has published widely on the subject on campaign finance, and has previously served as an expert witness on campaign finance); (2) Plaintiffs' remaining arguments are insufficient to disqualify Dr. Wilcox as an expert because (a) an expert can provide information to buttress legislative decision making, which Dr. Wilcox has done here, (b) Dr. Wilcox's copying of material from

other reports occurred in only a handful of sentences, (c) the evidence relied on by Dr. Wilcox was not "anecdotal" but directly at issue in this case, (d) courts recognize that, in disciplines such as political science, an expert's experience and relevant publications on the topic are sufficient bases for the expert's opinion (and Dr. Wilcox has provided substantial citations to publications to support his opinions), and (e) thus Plaintiffs' arguments go to the weight, not admissibility, of Dr. Wilcox's report. (Dkt. No. 63, at 1-9.)

Generally, in their reply to Defendants' opposition, Plaintiffs focus solely on responding to Defendants' opposition to Mr. Quail's declaration and testimony. (*See generally* Dkt. No. 66.)

II. RELEVANT LEGAL STANDARDS

A. Legal Standard Governing Motions for Summary Judgment

Under Fed. R. Civ. P. 56, summary judgment is warranted if "the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute of fact is "genuine" if "the [record] evidence is such that a reasonable jury could return a verdict for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).[10] As for the materiality requirement, a dispute of fact is "material" if it "might affect the outcome of the suit

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[10] As a result, "[c]onclusory allegations, conjecture and speculation . . . are insufficient to create a genuine issue of fact." *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998) [citation omitted]. As the Supreme Court has explained, "[The non-movant] must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986).

under the governing law . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

In determining whether a genuine issue of material fact exists, the Court must resolve all ambiguities and draw all reasonable inferences against the movant. *Anderson*, 477 U.S. at 255. In addition, "[the movant] bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the . . . [record] which it believes demonstrate[s] the absence of any genuine issue of material fact." *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986). However, when the movant has met its initial burden, the non-movant must come forward with specific facts showing a genuine issue of material fact for trial. Fed. R. Civ. P. 56(a), (c), (e).[11]

Implied in the above-stated burden-shifting standard is the fact that, where a non-movant willfully fails to respond to a motion for summary judgment, a district court has no duty to perform an independent review of the record to find proof of a factual dispute. Of course, when a nonmovant willfully fails to respond to a motion for summary judgment, "[t]he fact that there has been no [such] response . . . does not . . . [by itself] mean that the motion is to be granted automatically." *Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir. 1996). Rather, as indicated above, the Court must assure itself that, based on the undisputed material facts, the law indeed warrants judgment for the movant.

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[11] Among other things, Local Rule 56.1 (previously Local Rule 7.1[a][3]) requires that the non-movant file a response to the movant's Statement of Material Facts, which admits or denies each of the movant's factual assertions in matching number paragraphs, and supports any denials with a specific citation to the record where the factual issue arises. N.D.N.Y. L. R. 56.1.

Champion, 76 F.3d at 486; *Allen v. Comprehensive Analytical Group, Inc.*, 140 F. Supp. 2d 229, 232 (N.D.N.Y. 2001) (Scullin, C.J.); N.D.N.Y. L.R. 7.1(b)(3). What the non-movant's failure to respond to the motion does is lighten the movant's burden.

For these reasons, this Court has often enforced Local Rule 56.1 (previously Local Rule 7.1[a][3]) by deeming facts set forth in a movant's statement of material facts to be admitted, where (1) those facts are supported by evidence in the record, and (2) the non-movant has willfully failed to properly respond to that statement.[12]

Similarly, in this District, where a non-movant has willfully failed to respond to a movant's properly filed and facially meritorious memorandum of law, the non-movant is deemed to have "consented" to the legal arguments contained in that memorandum of law under Local Rule 7.1(b)(3).[13] Stated another way, when a non-movant fails to oppose a legal argument asserted by a movant, the movant may succeed on the argument by showing that the argument possess facial merit, which has appropriately been characterized as

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[12] *Cusamano*, 604 F. Supp. 2d at 427 & n.6 (citing cases).

[13] *See*, *e.g.*, *Beers v. GMC*, 97-CV-0482, 1999 U.S. Dist. LEXIS 12285, at *27-31 (N.D.N.Y. March 17, 1999) (McCurn, J.) (deeming plaintiff's failure, in his opposition papers, to oppose several arguments by defendants in their motion for summary judgment as consent by plaintiff to the granting of summary judgment for defendants with regard to the claims that the arguments regarded, under Local Rule 7.1[b][3]); *Devito v. Smithkline Beecham Corp.*, 02-CV-0745, 2004 WL 3691343, at *3 (N.D.N.Y. Nov. 29, 2004) (McCurn, J.) (deeming plaintiff's failure to respond to "aspect" of defendant's motion to exclude expert testimony as "a concession by plaintiff that the court should exclude [the expert's] testimony" on that ground).

a "modest" burden. *See* N.D.N.Y. L.R. 7.1(b)(3) ("Where a properly filed motion is unopposed and the Court determines that the moving party has met its burden to demonstrate entitlement to the relief requested therein, the non-moving party's failure to file or serve any papers as this Rule requires shall be deemed as consent to the granting or denial of the motion, as the case may be, unless good cause is shown."); *Rusyniak v. Gensini*, 07-CV-0279, 2009 WL 3672105, at *1, n.1 (N.D.N.Y. Oct. 30, 2009) (Suddaby, J.) (collecting cases); *Este-Green v. Astrue*, 09-CV-0722, 2009 WL 2473509, at *2 & n.3 (N.D.N.Y. Aug. 7, 2009) (Suddaby, J.) (collecting cases).

B. Legal Standard Governing Motions to Preclude Expert Evidence

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony. Specifically, Fed. R. Evid. 702 provides as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based upon sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

From this rule, the Supreme Court and Second Circuit have derived the following legal standard. As an initial matter, generally, the trial judge is to act as a "gatekeeper," charged with determining whether the proffered testimony satisfies a number of standards, including, among other things, that "the expert's scientific, technical, or other specialized knowledge will help the trier of fact understand the evidence or to determine a fact in issue." *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 135 (2d Cir. 2013) (quoting Fed. R. Evid. 702[a]). "In other words, '[e]xpert testimony must be helpful to the [trier of fact] in comprehending and deciding issues beyond the understanding of a layperson.'" *Marvel Characters, Inc.*, F.3d at 135 (quoting *DiBella v. Hopkins*, 403 F.3d 102, 121 [2d Cir. 2005]).

Additionally, the proposed expert must be "qualified" to give the proffered opinion. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-90 & nn.7, 10 (1992). "To determine whether a witness qualifies as an expert, courts compare the area in which the witness has superior knowledge, education, experience, or skill with the subject matter of the proffered testimony." *U.S. v. Tin Yat Chin*, 371 F.3d 31, 40 (2d Cir. 2004). In assessing whether a proposed expert is "qualified," the trial judge should remember the "liberal[ ] purpose" of Fed. R. Evid. 702, and remain "flexibl[e]" in evaluating the proposed expert's qualifications. *See U.S. v. Brown*, 776 F.2d 397, 400 (2d Cir. 1985) (holding that Fed. R. Evid. 702 "must be read in light of the liberalizing purpose of the rule"); *Lappe v. Am. Honda Motor Co., Inc.*, 857 F. Supp. 222, 227 (N.D.N.Y. 1994) (Hurd, M.J.) ("[L]iberality and flexibility in evaluating qualifications should be the rule; the proposed expert should not be required to satisfy an overly narrow test of his

own qualifications."), *aff'd without opinion*, 101 F.3d 682 (2d Cir. 1996). Having said that, of course, "a district court may properly conclude that witnesses are insufficiently qualified . . . [where] their expertise is too general or too deficient." *Stagl v. Delta Air Lines, Inc.*, 117 F.3d 76, 81 (2d Cir. 1997), *accord*, *Dreyer v. Ryder Auto. Carrier Grp., Inc.*, 367 F. Supp. 2d 413, 425-26 (W.D.N.Y. 2005); *Byrne v. Liquid Asphalt Sys., Inc.*, 238 F. Supp. 2d 491, 494 (E.D.N.Y. 2002); *Trumps v. Toastmaster, Inc.*, 969 F. Supp. 247, 252 (S.D.N.Y. 1997); *see, e.g.*, *McCullock v. H.B. Fuller Co.*, 981 F.2d 656, 657-58 (2d Cir. 1992) (affirming district court's ruling that plaintiff's proffered expert did not possess the required qualifications to testify as an expert on the subject of warning labels for hot melt glue).

Finally, a witness qualified as an expert will be permitted to testify if his or her testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." *U.S. v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) (quoting Fed. R. Evid. 702). Of course, "the court's review of the record is limited to facts that would be admissible at trial." *Melini v. 71st Lexington Corp.*, 07-CV-0701, 2009 WL 413608, at *3 (S.D.N.Y. Feb. 13, 2009). "To be admissible, expert testimony must be both relevant and reliable." *Melini*, 2009 WL 413608, at *4 (citing *Daubert*, 509 U.S. at 589 [1993].) Regarding this requirement of reliability, "expert opinion testimony must be (1) 'based on sufficient facts or data,' (2) 'the product of reliable principles and methods,' and (3) the result of applying those principles and methods to the facts of the case in a reliable manner." *Id*. at *4 (quoting Fed. R. Evid. 702). "The proponent of expert testimony must establish its admissibility by a preponderance of the evidence." *Id*. (citing *Astra Aktiebolag v. Andrx Pharm., Inc.*, 222 F.

Supp. 2d 423, 487 (S.D.N.Y. 2002) [citing Fed. R. Evid. 104(a)].)

In *Daubert*, the Supreme Court set forth a non-exclusive list of factors for a trial court to use when assessing the reliability of expert testimony: (1) whether the expert's technique or theory can be, or has been, tested–that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. *Daubert*, 509 U.S. at 593-94; *see also* Fed. R. Evid. 702, Advisory Committee Notes: 2000 Amendments.

In addition, [c]ourts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact." Fed. R. Evid. 702, Advisory Committee Notes: 2000 Amendments. These factors include the following: (1) whether the expert is "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purposes of testifying"; (2) whether the expert has unjustly extrapolated from an accepted premise to an unfounded conclusion; (3) whether the expert has adequately accounted for obvious alternative explanations for the plaintiff's condition; and (4) whether the field of expertise claimed by the expert is

known to reach reliable results for the type of opinion the expert would give.

In sum, the Second Circuit has explained the trial court's duties when evaluating expert testimony in the following manner:

> First, . . . *Daubert* reinforces the idea that there should be a presumption of admissibility of evidence. Second, it emphasizes the need for flexibility in assessing whether evidence is admissible. Rather than using rigid 'safeguards' for determining whether testimony should be admitted, the Court's approach is to permit the trial judge to weigh the various considerations pertinent to the issue in question. Third, *Daubert* allows for the admissibility of scientific evidence, even if not generally accepted in the scientific community, provided its reliability has independent support. Finally, the Court expressed its faith in the power of the adversary system to test 'shaky but admissible' evidence, and advanced a bias in favor of admitting evidence short of that solidly and indisputably proven to be reliable.

Borawick v. Shay, 68 F.3d 597, 610 (2d Cir. 1995) (internal citations omitted). "A minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method will not render an expert's opinion per se inadmissible." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002). Instead, "the rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702, Advisory Committee's Note; *see also E.E.O.C. v. Morgan Stanley & Co.*, 324 F. Supp. 2d 451, 456 (S.D.N.Y. 2004); *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union*, 313 F. Supp.

2d 213, 226 (S.D.N.Y. 2004). "This principle is based on the recognition that 'our adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony.'" *Melini*, 2009 WL 413608, at *5 (quoting *Amorgianos*, 303 F.3d at 267).

However, "when an expert opinion is based on data, methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony." *Amorgianos*, 303 F.3d at 266; *accord*, *Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 253 (2d Cir. 2005). Furthermore, "it is critical that an expert's analysis be reliable at every step." *Amorgianos*, 303 F.3d at 267. Of course, "the district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions." *Id*. at 266 (citing *Daubert*, 509 U.S. at 595). Nevertheless, "conclusions and methodology are not entirely distinct from one another." *Gen. Elec. Co., v. Joiner*, 522 U.S. 136, 146 (1997). Accordingly, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Joiner*, 522 U.S. at 146.

III. ANALYSIS

A. Whether Brian Quail's Declaration and Testimony and Dr. Clyde Wilcox's Expert Report and Testimony Should Be Stricken

As a threshold matter, the Court must determine whether Brian Quail's declaration and testimony and Dr. Clyde Wilcox's expert report and testimony should be stricken for purpose of the parties' cross-motions for summary judgment (and trial). (Dkt. No. 30, Attach. 27.) After carefully considering the matter, the Court

answers this question in the affirmative in part and the negative in part with respect to the declaration and testimony of Mr. Quail, and in the negative with respect to the expert report and testimony of Dr. Wilcox, mainly for the reasons stated in Defendants' memoranda of law. To those reasons, the Court adds the following analysis, which is intended to supplement, and not supplant, Defendants' reasons.

1. Qualifications

As Defendants argue, Mr. Quail has been a practicing attorney in the State of New York for approximately nineteen years. (Dkt. No. 63, Attach. 5, at 15.) During Mr. Quail's tenure as an attorney, he has acquired approximately fourteen years' experience working in election law, having previously served as an Election Commissioner for Schenectady County for eight years and serving as co-counsel of the New York State Board of Elections since 2014. (Dkt. No. 57, Attach. 4, at ¶¶ 2-3.) Although Mr. Quail has not published any articles or previously appeared as an expert, his proposed expertise is based upon his professional and personal experience with New York Election Law. (Dkt. No. 57, Attach. 4; Dkt. No. 63, Attach. 5.) Given Mr. Quail's experience as an attorney who specializes in New York State election law, the Court finds that he is qualified to testify as an expert on New York Election Law.

As Defendants also argue, Dr. Wilcox has been teaching in the field of political science since 1986. (Dkt. No. 57, Attach. 3, at 14.) Furthermore, in reviewing Dr. Wilcox's thirty-page resume, the Court notes that he has written extensively on campaign finance and has co-authored multiple books on issues related to this case, including, but not limited to: (1) *Serious Money: Fundraising and Contributing in*

Presidential Nomination Campaigns, (2) *Interest Groups in American Campaigns: The New Face of Electioneering*, and (3) *The Interest Group Society*. (*Id.* at 15-16.) Although not an expert on New York State election law, New York State Campaign Finance law, or political parties, Dr. Wilcox has previously served as an expert witness on campaign finance and interest group cases for the Federal Election Commission, the Justice Department, and the Attorney General for the State of New York, in addition to serving as a background consultant in other federal cases. (*Id*. at 2-3.) Given Dr. Wilcox's education, experience, and publication history in the areas of political contributions and *quid pro quo* corruption, the Court finds that he is sufficiently qualified as an expert in the general field of political science and the general field of campaign finance.

2. Reliability of Expert Opinions

As indicated above in Part II.B. of this Decision and Order, "[o]nce the proposed expert has 'crossed the foundational threshold of establishing his personal background qualifications as an expert, he must then provide further foundational testimony as to the validity and reliability of his theories.'" *Hilaire v. DeWalt Indus. Tool Co.*, 54 F. Supp. 3d 223, 242 (E.D.N.Y. 2014) (quoting *Berry v. Crown Equip. Corp.*, 108 F. Supp. 2d 743, 749 [E.D. Mich. 2000]). Under Fed. R. Evid. 702, "an expert with 'specialized knowledge [that] will help the trier of fact' may testify so long as that testimony is 'based on sufficient facts or data' and 'is the product of reliable principles and methods' that the witness has 'reliably applied . . . to the facts of the case." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 253 (2d Cir. 2016) (quoting Fed. R. Evid. 702). "[T]he reliability analysis applies to all aspects of an expert's testimony:

the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion, *et alia*." *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 155 (3d Cir. 1999); *Amorgianos*, 303 F.3d at 267. Again, "[t]he proponent of the expert testimony bears the burden of establishing these admissibility requirements, and the district court acts as a 'gatekeeper' to ensure that the 'expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" *In re Vivendi*, 838 F.3d 253 (quoting *United States v. Williams*, 506 F.3d 151, 160 [2d Cir. 2007]). "The district court has broad discretion to carry out this gatekeeping function," and "[i]ts inquiry is necessarily a 'flexible one.'" *In re Pfizer Inc. Sec. Litig.*, 819 F.3d 642, 658 (2d Cir. 2016) (quoting *Daubert*, 509 U.S. at 594). Expert opinions must be excluded where district courts "conclude that there is simply too great of an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Here, Mr. Quail's declaration and testimony present a close call. In his declaration, Mr. Quail stated that his opinions therein were "based on . . . [his] [twelve years of] [professional] experience with . . . campaign finance and election administration" in New York State. (Dkt. No. 57, Attach. 4, at ¶¶ 1-2.) Similarly, in his deposition, Mr. Quail testified that, in drafting his declaration and/or in preparing his testimony, he relied on his professional experience, as well as 328 documents produced by Defendants during discovery (which include legislative history, a law review article, and material from the National Conference of State Legislators, among other things). (Dkt. No. 56, Attach. 3, at 399-404, 445-47, 455-63.) Granted, "[a]n expert opinion requires some explanation as to how the expert came to his conclusion and what methodologies or evidence substantiate that conclusion." *Riegel v.*

Medtronic, Inc., 451 F.3d 104, 127 (2d Cir. 2006). "Expert testimony must rest on 'more than subjective believe or unsupported speculation." *Washington v. Kellwood Co.*, 105 F. Supp. 3d 293, 307 (S.D.N.Y. 2015) (quoting *Daubert*, 509 U.S. at 599). Furthermore, Mr. Quail does not appear to have relied on many (if any) of the 328 documents in drafting his declaration. However, the Court finds that Defendants have, albeit barely, produced enough information to permit Plaintiffs to adequately challenge Mr. Quail's opinions, as evidenced by Plaintiffs' lengthy examination of him on the subject of the bases for his expert opinion during his deposition (despite their choice to not explore the nature of Mr. Quail's professional experience). (Dkt. No. 56, Attach. 3, at 455-75.) Simply stated, Plaintiffs' challenges affect the weight, not admissibility, of Mr. Quail's declaration and testimony. Accordingly, the Court concludes that, except to the extent his opinions are not based on his professional experience, Mr. Quail's declaration and testimony are sufficiently reliable.

Turning to Dr. Wilcox's expert report and testimony, Plaintiffs argue, in part, that Dr. Wilcox's expert report and testimony are not based on reliable principles and methodology because he habitually copied material from his reports in unrelated and factually distinct cases, in addition to departing from academic norms by providing extensive anecdotal evidence. (Dkt. No. 62, at 10-12.) Plaintiffs argument is misplaced in that it again goes to the weight, not admissibility, of Dr. Wilcox's expert report and testimony. *See Cedar Petrochemicals, Inc. v. Dongbu Hannon Chem. Co., Ltd.*, 769 F. Supp. 2d 269, 285 (S.D.N.Y. 2011) ("Questions over whether there is a sufficient factual basis for an expert's testimony may go to weight, not admissibility.") (internal quotation marks omitted).

"Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky, but admissible evidence." *Daubert*, 508 U.S. at 596. Plaintiffs are free to cross-examine Dr. Wilcox about his "extensive anecdotal evidence" and the extent to which he copied material from his previous reports in factually distinct cases. Having analyzed Dr. Wilcox's principles and methodology (namely the reliance on his expertise in campaign finance and the expertise of other political scientists), the Court concludes that Dr. Wilcox's expert report and testimony are reliable.

3. Whether Expert Opinions Assist the Trier of Fact

When evaluating the third and final prong of the legal standard set forth in Fed. R. Evid. 702 (i.e., whether the proposed expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue), courts often analyze whether the proposed expert testimony is, in addition to being admissible, relevant under Fed. R. Evid. 401 and not unfairly prejudicial or confusing under Fed. R. Evid. 403. *Kellwood Co.*, 105 F. Supp. 3d at 308.

In this case, Mr. Quail's declaration ranges from testifying about the number of Parties recognized by New York State, to describing the nature of New York State election law, to opining about the compliance requirements created in various hypothetical scenarios, to opining about an increase of the risk of *quid pro quo* corruption. (*See generally* Dk. No. 57, Attach. 4.) Granted, the declaration is improperly sprinkled with legal conclusions. *See Jones v. Midland Funding, LLC*, 616 F. Supp. 2d 224, 227 (D. Conn. 2009) ("'[A]n expert

should not be permitted to express an opinion that is merely an interpretation of . . . statutes or regulations, as that is the sole province of the Court.'") (quoting *DeGregorio v. Metro-North R. Co.*, 05-CV-0533, 2006 WL 3462554, at *3 [D. Conn. Nov. 1, 2006]). However, the Court finds that, except to the extent that it offers legal conclusions, Mr. Quail's declaration and testimony would indeed assist the Court in navigating New York Election Law.

Turning to Dr. Wilcox's expert report and intended testimony, the Court finds it is limited to a discussion of campaign finance, *quid pro quo* corruption and its appearance, and housekeeping accounts; he has conceded that he is not an expert in New York Election Law or New York State campaign finance law. (Dkt. No. 57, Attach. 2, at 28-29.) The Court further finds that Dr. Wilcox's expert report and testimony will help the trier of fact to understand the benefits of limiting *quid pro quo* corruption, as well as the appearance of *quid pro quo* corruption, with regard to housekeeping accounts and campaign finance generally. This understanding will help the trier of fact to discern the difference (if any) between the danger of *quid pro quo* corruption (and its appearance) in Parties and the danger in Independent Bodies. Again, simply stated, the Court finds that Plaintiffs' challenges to Dr. Wilcox's expert report and intended testimony again affect the weight, not admissibility, of Dr. Wilcox's expert conclusions. (Dkt. No. 62.)

For all of these reasons, the Court denies Plaintiffs' motion to exclude Mr. Quail's declaration and testimony to the extent they are based on his professional experience, and grants the motion to the extent Mr. Quail's declaration and testimony are not based on his professional experience or offer legal conclusions; and

the Court denies Plaintiffs' motion to exclude Dr. Wilcox's expert report and testimony.

B. Whether Plaintiffs or Defendants Are Entitled to Summary Judgment on Plaintiffs' Claims

1. Substantive Legal Standard

a. Plaintiffs' Claims Under the First Amendment

As the Second Circuit has acknowledged, the merits of Plaintiffs' challenge "raise serious questions" regarding the appropriate standard of judicial review. *Upstate Jobs Party v. Kosinski*, 741 App'x 838, 839 (2d Cir. 2018). For the benefit of the parties (and for the purpose of any appeal), the Court explains below the standard of review it has applied throughout this Decision and Order.

In *McCutcheon v. Fed. Election Comm'n*, the Supreme Court stated that "[t]he right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute," and that legislative bodies "may regulate campaign contributions to protect against corruption or the appearance of corruption." 572 U.S. 185, 191 (2014) (citing *Buckley v. Valeo*, 424 U.S. 1, 26-27 [1976]). One type of corruption that the Supreme Court has extensively addressed is financial *quid pro quo* corruption and the appearance thereof. *See Fed. Election Comm'n v. Nat'l. Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors."). The phrase *quid pro quo* "captures the notion of a direct exchange of an official act for money." *McCutcheon*, 572 U.S. at 192.

In *Buckley*, "the Court concluded that contribution limits impose a lesser restraint on political speech [than do expenditure limits] because they 'permit[] the symbolic expression of support evidenced by a contribution but do[] not in any way infringe on the contributor's freedom to discuss the candidates and issues.'" *McCutcheon*, 572 U.S. at 197 (quoting *Buckley*, 424 U.S. at 21). As a result, the Supreme Court "applied a lesser but still 'rigorous standard of review'" with regard to contribution limits than with regard to expenditure limits. *Id.* (quoting *Buckely*, 424 U.S. at 29). Under this lesser-but-still-rigorous standard, a "significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means *closely drawn* to avoid unnecessary abridgement of associational freedoms." *Id.* (quoting *Buckley*, 424 U.S. at 25) (internal quotation marks omitted and emphasis added). Accordingly, courts "must assess the fit between the stated government objective and the means selected to achieve that objective." *Id.* at 199. Although the Supreme Court does not require strict scrutiny, it still requires a "'fit that is not necessarily perfect, but reasonable . . . [,] [a fit] that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' . . . [and a fit] that employs not necessarily the least restrictive means but . . . a means *narrowly tailored* to achieve the desired objective.'" *McCutcheon*, 572 U.S. at 218 (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 [1989]) (emphasis added).

> In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it neces-

> sary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). Of course, protecting political parties from "external competition cannot justify the virtual exclusion of other political aspirants from the political arena." *Anderson*, 460 U.S. at 802 (citing *Williams v. Rhodes*, 393 U.S. 23, 23, 31-32 [1968]).

Finally, it is important to note that, "[w]hen the government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon*, 572 U.S. at 210 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 US. 803, 816 2000]). The Supreme Court has "never accepted mere conjecture as adequate to carry a First Amendment burden," when analyzing this fit between the objective and the means chosen to achieve that objective. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000); *McCutcheon*, 572 U.S. at 210.

b. Plaintiff's Claims Under the Fourteenth Amendment

The Equal Protection Clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 [1982]); *Lanning v. City of Glens Falls*, 908 F.3d 19, 29 (2d Cir. 2018). Although the "Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution," *Williams*, 393 U.S. at 29,

"the equal protection guarantee . . . extends to individuals who allege no specific class membership but are nonetheless subjected to invidious discrimination at the hands of government officials." *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001); *Williams*, 393 U.S. at 30. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440. Where, as here, however, Plaintiffs claim the classification infringes on a fundamental right, courts apply the strict scrutiny standard of review, requiring the classification to be necessary to serve a compelling state interest. *See Ill. St. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("The freedom to associate as a political party [is] a right we have recognized as fundamental . . . . When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest."); *cf. Anderson*, 460 U.S. at 786 ("The impact of candidate eligibility requirements on voters implicates basic constitutional rights."). This "necessity" requirement means that the classification must be the "least restrictive" means of serving the compelling interest (which the Supreme Court has also called a "precisely tailored" means). *See, e.g., Ill. St. Bd. of Elections*, 440 U.S. at 186 ("The signature requirements for independent candidates and new political parties seeking offices in Chicago are plainly not the *least restrictive* means of protecting the State's objectives.") (emphasis added); *Plyler v. Doe,* 457 U.S. 202, 217 (1982) ("With respect to such classifications [that infringe on a fundamental right], it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been *precisely*

tailored to serve a compelling governmental interest.") (emphasis added).

Where a plaintiff is not a member of a constitutionally protected class, "he [or she] may bring an equal protection claim pursuant to one of two theories: (1) selective enforcement, or (2) 'class of one.'" *AYDM Associates, LLC v. Town of Pamelia*, 205 F. Supp. 3d 252, 265 (N.D.N.Y. 2016) (D'Agostino, J.) (citation omitted). To succeed under a selective enforcement theory, a plaintiff must establish that (1) he or she, "compared with others similarly situated, was selectively treated," and (2) "the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, . . . to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person." *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995) (citation omitted); *Jordan v. New York City Bd. of Elections*, 816 F. App'x 599, 603-04 (2d Cir. 2020). A plaintiff must identify comparators that "'a reasonably prudent person would think were roughly equivalent'" to the plaintiff, though the plaintiff does not need to show an "exact correlation" between himself or herself and that similarly situated person. *AYDM Assoc.*, 205 F. Supp. 3d at 265 (quoting *Mosdos Chofetz Chaim, Inc. v. Vill. of Wesley Hills*, 815 F. Supp. 2d 679, 696 [S.D.N.Y. 2011]).

To succeed under a class-of-one theory, a plaintiff must establish that he or she was "intentionally treated differently from others similarly situated and 'there is no rational basis for the difference in treatment.'" *Id.* (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 [2000]). Class-of-one plaintiffs "must show an extremely high degree of similarity between themselves and the persons [with] whom they compare themselves." *Clubside v. Valentin*, 468 F.3d 144, 159 (2d

Cir. 2006). A plaintiff is not required to prove "a defendant's subjective ill-will towards a plaintiff," and can prevail on a class-of-one claim based on similarity alone. *Hu v. City of New York*, 927 F.3d 81, 93 (2d Cir. 2019). To prevail on similarity alone, a plaintiff must prove as follows: "'(i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake.'" *Hu*, 927 F.3d at 94 (quoting *Neilson v. D'Angelis*, 409 F.3d, 100, 104-05 [2d Cir. 2005]).

2. Whether Plaintiffs or Defendants Are Entitled to Summary Judgment on Plaintiffs' Contribution-Limit Claims

After carefully considering the matter, the Court answers the first question (i.e., whether Plaintiffs are entitled to summary judgment on their contribution-limit claims) in the affirmative with regard to contribution limits in general elections and the second question (i.e., whether Defendants are entitled to summary judgment on Plaintiff's contribution-limit claims) in the negative to the extent the claims regard contribution limits in general elections for the reasons stated in Plaintiffs' memoranda of law; but the Court answers the second question (i.e., whether Defendants are entitled to summary judgment) in the affirmative and the first question (i.e., whether Plaintiffs are entitled to summary judgment) in the negative to the extent the claims regard contribution limits in primary elections for the reasons stated in Defendants' memoranda of law. *See, supra,* Part I.C. of this Decision and Order. To those reasons, the Court adds the

following analysis, which is intended to supplement, not supplant, the parties' reasons.

a. Whether Defendants Have Established a Sufficiently Important Interest for Purposes of Plaintiffs' Contribution-Limit Claims

The Supreme Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption, specifically *quid pro quo* corruption, or its appearance. *McCutcheon*, 572 U.S. at 207. In fact, the Supreme Court has defined the government's interest in preventing *quid pro quo* corruption or its appearance not only as "sufficiently important" but as "compelling." *Id*. at 199 (citing *Buckley*, 424 U.S. at 26-27, and *Nat'l. Conservative Political Action Comm.*, 470 U.S. at 496-97). However, the Supreme Court has also observed, "the [mere] possibility that an individual who spends large sums [of money in connection with elections] may garner 'influence over or access to' elected officials or political parties [does not give rise to such an interest of preventing *quid pro quo* corruption or its appearance]" *Id.* at 208 (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 297 [2003] [Kennedy, J. concurring in judgment in part and dissenting in part]). "In drawing [the] line [between protecting political speech and suppressing it], the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007). Recognizing this balance, the Second Circuit has observed that, while paying "special deference to legislative determinations regarding campaign contribution restrictions," the judiciary "must also protect the fundamental First

Amendment interest in political speech." *Ognibene v. Parkes*, 671 F.3d 174, 182 (2d Cir. 2011).

Despite the Supreme Court's observation of the general insufficiency of "the possibility" of influence, the Second Circuit has found that, "because the scope of *quid pro quo* corruption can never be reliably ascertained, the legislature may regulate certain indicators of such corruption or its appearance, such as when donors make large contributions because they have business with the City, hope to do business with the City, or are expending money on behalf of others who do business with the City." *Ognibene*, 671 F.3d at 187. "[S]uch donations certainly feed the public perception of *quid pro quo* corruption, and this alone justifies limitations . . . ." *Id*.

Here, although the relevant legislative history from 1988 only four times mentions "corruption," it does so with regard to the risk of corruption caused by "excessive cash contributions" (made possible by the anonymity of the contributors, who may have "already reached their legal limit") that could "buy influence with a political party" and "be laundered through . . . housekeeping accounts," and the resulting "eat[ing] away at the credibility of our political system." (Dkt. No. 57, Attach. 5, at 1-2, 18-19.)[14] The linking of these two facts (i.e., the occurrence of excessive contributions and the eating away at the credibility of our

[14] The Court acknowledges that, in response to Defendants' argument that the legislative history of N.Y. Elec. Law § 14-124(3), N.Y. Elec. Law § 14-114(1), (3), and (10) shows the risk of *quid pro quo* corruption and its appearance (Dkt. No. 57, Attach. 7, at 24; *cf.* Dkt. No. 57, Attach. 8, at 10-12), Plaintiffs argue that Defendants' reliance on it is a post-hoc justification in response to litigation. (Dkt. No. 59, at 15, 28.) However, the Court finds the legislative history to be of at least some relevance here.

political system) sufficiently demonstrates New York State's interest in preventing the appearance of *quid pro quo* corruption. Moreover, the Court finds that it is logical to conclude that the appearance of *quid pro quo* corruption has at least a tendency to occur when an Independent Body has only a handful of individuals contributing financially to it, and the Independent Body participates in only a handful of elections.[15] Indeed, commentators (whether correctly or incorrectly) appear to often hold a perception that a positive correlation exists between the likelihood of corruption stemming from campaign contributions and the smaller the size of a political party (and thus, generally, the smaller number of that party's donors and candidates).[16] More importantly, the Supreme Court

[15] The Court notes the stark contrast between the size of New York State's recognized Parties and the apparent size of Plaintiff UJP, approximately only five members of which have been identified. (Dkt. No. 56, Attach. 2, at ¶¶ 15, 54.) Data compiled by the parties indicates that as of November 1, 2020, the New York State's recognized Parties have the following number of active enrollees: the Democratic Party has 6,189,227 active enrollees; the Republican Party has 2,744,859 active enrollees; the Conservative Party has 151,012 active enrollees; the Working Families Party has active 40,367 enrollees; the Green Party has 24,972 active enrollees; the Libertarian Party has active 20,298 enrollees; the Independence Party has 434,501 active enrollees; and SAM has 647 active enrollees.

[16] *See*, *e.g.*, Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 Cornell L. Rev. 531, 569 (March 2016) ("Group-level corruption does not require the wholesale corruption of a major party. Wholesale capture of a major party would be quite difficult, if not impossible, because of the size and internal diversity of the major party coalitions."); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 Yale L.J. 804, 839 (2014) ("Parties, after all, are constituted by numerous interests and many donors, including large donors; parties dilute the role of

has recognized that the effect of an individual's contribution to a candidate is "diluted" when that contribution comes as part of a larger donation from a party encompassing the donations of many individuals, suggesting that the effect of the contribution is concentrated in the opposite scenario. *See Upstate Jobs Party v. Kosinski*, 18-CV-0459, 2018 WL 10436253, at *9 (N.D.N.Y. May 22, 2018) (Suddaby, C.J.) (citing *McCutcheon*, 572 U.S. at 212 ["When [a donor turns to other PACs that are likely to give to Representative Smith], however, he discovers that his contribution will be significantly diluted by all the contributions from others to the same PACs. . . . His salience as a Smith supporter has been diminished, and with it the potential for corruption."]).

b. Whether Defendants Have Established a Compelling State Interest for Purposes of Plaintiffs' Contribution-Limit Claims

As the Court stated in Part III.b.2.a of this Decision and Order, the Supreme Court has defined the government's interest in preventing *quid pro quo* corruption

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money by pooling so many interests and donors."); Nicholas Bamman, *Campaign Finance: Public Funding After Bennett*, 27 J.L. & Pol. 323, 347 (Winter 2012) ("The fewer private funds the parties receive, the less opportunity for corruption. But even if Parties receive some private funding, considering relatively low contribution limits, and the sheer size of Parties, there would be little likelihood of corruption stemming from any single private individual contribution."); Frank J. Favia, Jr., *Enforcing the Goals of the Bipartisan Campaign Reform Act: Silencing Nonprofit Groups and Stealth PACs in Federal Elections*, 2006 U. Ill. L.Rev. 1081, 1096 (2006) ("[B]ecause the goal of parties is to elect a wide array of candidates, a contribution to that party does not ensure that a specific candidate will be grateful to the donor.") (internal quotation marks omitted).

or its appearance not only as "sufficiently important" but as "compelling." *McCutcheon*, 572 U.S. at 199 (citing *Buckley*, 424 U.S. at 26-27, and *Nat'l. Conservative Political Action Comm.*, 470 U.S. at 496-97).

For all of these reasons, the Court finds that Defendants have established a sufficiently important and compelling State interest in combatting the appearance of *quid pro quo* corruption in this context for purposes of Plaintiffs' claims under both the First Amendment and Fourteenth Amendment. *See*, *supra*, Part III.B.2.a of this Decision and Order. Because Defendants have done so, the Court will turn its analysis to whether the challenged statutes are "closely drawn" (though not necessarily the "least restrictive" means of serving the State's important interest) for purposes of Plaintiffs' First Amendment claims, and the "least restrictive" means of serving the State's compelling interest for purposes of Plaintiffs' Equal Protection claims (assuming that Independent Bodies are found to be similarly situated to Parties).

c. Whether the Laws Regarding Contribution-Limits Are Closely Drawn for Purposes of Plaintiffs' Claims Under the First Amendment

The Court begins its analysis of this issue by again observing that Defendants bear the burden of proving the constitutionality of their actions because, acting on behalf of the State of New York, they are restricting the speech and association of Independent Bodies on the ground that the contribution limits further the permitted objective of preventing *quid pro quo* corruption or its appearance. *See, supra,* Part III.B.1.a. of this Decision and Order. (Dkt. No. 57, Attach. 8, at 10-12.)

Contribution limits that are too low can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent office-holders, thereby reducing democratic accountability. *Randall v. Sorrell*, 548 U.S. 230, 248-49 (2006). Courts "must review the record independently and carefully with an eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of the restrictions." *Randall*, 548 U.S. at 249.

The *Randall* Court identified five factors that weigh in favor of a finding that a statute's contribution limits are too restrictive: (1) whether the record suggests that the statute's contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns; (2) whether the statute's insistence that political parties abide by *exactly* the same low contribution limits that apply to other contributors threatens to harm the right to associate in a political party, which is "a particularly important political right;" (3) whether the statute fails to exclude expenses that individuals volunteering their time on behalf a candidate incur, such as travel expenses, in the course of campaign activities; (4) whether the statute fails to adjust its contribution limits for inflation; and (5) whether anywhere in the record a special justification exists that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems at issue. *Randall*, 548 U.S. at 253-61. Although these five factors were established four years before the famous *Citizens United* decision, the Court finds them at least somewhat instructive, particularly in light of the fact that Plaintiffs' challenges concern New York

State's electoral system as a whole.[17] *Cf. Green Party of Ct. v. Garfield*, 616 F.3d 189, 201 (2d Cir. 2010) (rejecting the strict application of the *Randall* factors after the issuance of *Citizens United* because contributions by lobbyists and contractors made up a fraction of campaign contributions and "did not focus on the *electoral* process") (emphasis in original).

i. Laws Regarding Contribution Limits in General Elections

The Court first addresses Defendants' argument that it should grant their summary judgment motion because Plaintiff Babinec has not donated the maximum amount to Plaintiff UJP as of the writing of this Decision and Order. (Dkt. No. 57, Attach. 8, at 22-24.) Defendants' argument is unavailing. Were the Court to adopt such a requirement, that adoption would essentially burden Plaintiffs with an additional standing requirement. Moreover, such a precedent could discourage future plaintiffs from challenging New York State election laws.

Equally unavailing is Defendants' argument that New York State election laws are closely drawn to address actual *quid pro quo* corruption. As conceded by Defendants in their response to Plaintiffs' Statement of Material Facts (*see*, *supra*, Part I.B. of this Decision and Order), the State Board of Elections has no record of any enforcement action brought against Independent Bodies for violations of the contribution limit from individuals or contributions from Independent Bodies to candidates. *See Ted Cruz for Senate v. FEC*, 19-CV-0908, 2021 WL 2269415, at *7 (D. D.C.

[17] The Court notes that the Supreme Court's recent decision in *Brnovich v. Democratic National Committee*, does not impact its analysis. -- S. Ct. ---, 2021 WL 2690267 (2021)

June 3, 2021) ("[I]t is not sufficient for the FEC merely to *assert* an interest in preventing quid pro quo corruption. The government must demonstrate the validity of its interest by more than 'mere conjecture.'") (emphasis in original) (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 [2000]). Although Dr. Wilcox argues that the danger of corruption cannot be rooted out through disclosure, his argument not only focuses on large direct contributions to candidates but is conclusory. (Dkt. No. 57, Attach. 3, at 4-5.) In particular, Dr. Wilcox does not elaborate on how disclosure is ineffective in the remainder of his report. (*Id.*) Dr. Wilcox's anecdotal evidence of actual *quid pro quo* corruption occurring in Missouri and Montana involved State Representatives who were members of established Parties. (*Id.* at 5.) In the Court's view, the mere fact that Parties are more regulated than Independent Bodies in New York State does not transform these anecdotes into evidence establishing that these statutes are closely drawn to address *quid pro quo* corruption. N.Y. Elec. Law §§ 2-102, 2-104, 2-114, 2-114, 2-116, 2-118, 14-100 et seq.

The Court next addresses whether New York State election laws are closely drawn to address the *appearance* of *quid pro quo* corruption.[18] Defendants argue that, if Plaintiffs' requested relief is granted, any individual with sufficient resources could use an Independent Body as a mask for their own donations to a candidate, thereby sidestepping the current and unchallenged limitations on an individual's donations

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[18] Because Defendants have not adduced evidence of actual *quid pro quo* corruption in Independent Bodies, the Court need not, and does not, reach the issue of whether New York State's election laws are closely drawn to address actual *quid pro quo* corruption.

to a candidate. (Dkt. No. 57, Attach. 8.) However, Defendants' argument is flawed in that it fails to address the fact that an individual, under New York State's current contribution limits, is already prohibited from engaging in the described conduct.

For example, Plaintiff Babinec, who serves on the board of Plaintiff UJP, can contribute $47,100.00 to Plaintiff UJP, as compared to $11,800.00 to a candidate in the general election for New York State Senate, and $4,700.00 to a candidate in the general election for the New York State Assembly.[19] 9 N.Y. Comp. Codes R. & Regs tit. 9 § 6214.0 (2019). Therefore, despite Defendants' argument that increasing Plaintiff Babinec's ability to contribute $117,600.00 to Plaintiff UJP highlights the potential for the appearance of *quid pro quo* corruption, they fail to establish how this potential for the appearance of *quid pro quo* corruption is not already present in the system. Aside from the commonsense argument that the larger the contribution, the greater potential for the appearance of *quid pro quo* corruption, Defendants fail to justify how the disparate contribution limits combat the appearance of *quid pro quo* corruption; as stated above, the mere fact that Parties are more regulated than Independent Bodies does not establish that the statutes at issue are closely drawn to address the appearance of *quid pro quo* corruption. (Dkt. No. 57, Attach. 8, at 23; Dkt. No. 57, Attach. 2, at 109-13; Dkt. No. 57, Attach. 3, at 4-5.)

Moreover, Defendants fail to substantively rebut Plaintiffs' argument that disclosure (specifically, the

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[19] As stated above in note 1 of this Decision and Order, for purposes of its analysis, the Court uses the most up-to-date figures, and not the figures that were at issue when Plaintiffs filed their motion for preliminary injunction, which were $109,600.00, and $44,000.00. 9 N.Y. Comp. Codes R. & Regs tit. 9 § 6214.0 (2019).

imposition on Independent Bodies of the same disclosure requirements that are imposed on Parties) is less intrusive than a disparate contribution limit between Parties and Independent Bodies as a method of monitoring or controlling contributions to an entity. More specifically, Defendants have failed to produce admissible evidence that disclosure is not feasible.[20] Even if the Court were to rely on evidence that Defendants adduced in opposition to Plaintiffs' prior motion for a preliminary injunction, the Court would find that Defendants have also conspicuously failed to substantively rebut either of the other two alternatives that Plaintiffs have offered (i.e., the enactment of "anti-proliferation statutes" prohibiting individuals from establishing Independent Bodies when those individuals are connected to either Parties or other Independent Bodies, or the enactment of statutes requiring that contributions to Independent Bodies

[20] The Court acknowledges that it came to the opposite conclusion when deciding Plaintiffs' motion for a preliminary injunction. *Upstate Jobs Party v. Kosinski*, 18-CV-0459, 2018 WL 10436253, at *9 (N.D.N.Y. May 22, 2018) (Suddaby, C.J.). However, "the Court's findings of fact and conclusions of law made on motion for preliminary injunction are not binding on the Court when deciding a motion for summary judgment." *Malletier v. Dooney & Bourke, Inc.*, 561 F. Supp. 2d 368, 382 (S.D.N.Y. 2008). "This is because the 'parties are held to different standards of proof in preliminary injunction hearings than in motions for summary judgment and because findings of fact at the preliminary injunction stage are not as fully fleshed out as at the summary judgment stage'" (i.e., they are often based on different groups of evidence). *Malletier*, 561 F. Supp. 2d at 382 (quoting *DeSmeth v. Samsung Am.*, 92-CV-3710, 1998 WL 315469, at *2 [S.D.N.Y. June 16, 1998]). Here, Defendants' opposition to this aspect of Plaintiffs' motion for summary judgment is actually based on less evidence that was its opposition to the analogous aspect of Plaintiffs' motion for a preliminary injunction.

from individuals who have contributed the maximum amount to candidates be placed in a separate bank account and spent on activities in which the money is not directly flowing to the candidate such as "Get Out the Vote" efforts and signature gathering). As a result, Defendants have implicitly conceded the merit of these alternatives.

Although the Court is aware of its responsibilities to resolve all ambiguities and draw all reasonable inferences against the movant, *Anderson,* 477 U.S. at 255, as the Court stated earlier, Defendants maintain the burden of demonstrating that the laws at issue are closely drawn to combatting *quid pro quo* corruption or its appearance. *See McCutcheon*, 572 U.S. at 210 (quoting *Playboy*, 529 US. at 816) ("When the government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). Moreover, the Supreme Court has "never accepted mere conjecture as adequate to carry a First Amendment burden," when analyzing this fit between the objective and the means chosen to achieve that objective. *Nixon*, 528 U.S. at 392; *McCutcheon*, 572 U.S. at 210.

Rather than attempt to substantively rebut Plaintiffs' proposed alternatives, Defendants again argue that an increase in the contribution limits to Independent Bodies would increase *quid pro quo* corruption or its appearance. However, setting aside the non-responsiveness of this argument, as the Court has stated, Defendants have failed to explain (or adduce evidence establishing) how this increase warrants a contribution limit to Parties that is *more than double* (i.e., disproportionate to) the contribution limit to Independent Bodies. (Dkt. No. 57, Attach. 8; Dkt. No. 67.) Indeed, as the Supreme Court has observed, "[T]here is not the same risk of *quid pro quo* corruption or its appearance

when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *McCutcheon*, 572 U.S. at 210. Simply stated, although Defendants need not show that they have employed the least-restrictive means of achieving the desired objective, the Court finds that they have not even shown that they have employed a means that is closely drawn to achieve the desired objective.

For all of these reasons, the Court grants Plaintiffs' motion for summary judgment on their First Amendment claims regarding the disparate contribution limits in general elections between Parties and Independent Bodies (and denies Defendants' cross-motion for summary judgment on those First Amendment claims).

ii. Laws Regarding Contribution Limits in Primary Elections

In their cross-motion for summary judgment, Defendants argue that Plaintiffs' claims regarding the disparity in contribution limits by Independent Bodies and Parties in primary elections are unsupported by the record and must therefore be dismissed. (Dkt. No. 57, Attach. 8, at 26.) In their combined reply to Defendants' opposition and opposition to Defendants' motion, Plaintiffs fail to respond to Defendants' argument. (Dkt. No. 59.) In fact, Plaintiffs mention primary elections only in their discussion of *Riddle,* 742 F.3d at 924, 926, in another context (i.e., with regard to whether Independent Bodies are similarity situated to Parties). (*Id.* at 27.) As stated above in Part II.A. of this Decision and Order, where a non-movant fails to oppose a legal argument asserted by a movant, the movant may succeed on the argument by showing that the argument possesses facial merit, which has been appropriately characterized as a "modest" burden.

Under the circumstances, the Court must find that Defendants have met their lightened burden on this unopposed aspect of their cross-motion for summary judgment. Based on the record before the Court, it appears that Plaintiff UJP does not hold, and has not held, primary elections when determining the candidates that it wishes to support. (*See generally* Dkt. No. 56, Attach. 2 [Plfs.' Statement of Material Facts, omitting any reference to primary elections]; Dkt. No. 59 [Plfs.' Response to Defs.' Cross-Motion, omitting any citation to record evidence regarding primary elections].) Moreover, as Defendants argue, Parties are subject to one aggregate contribution limit for spending on all elections together (i.e., they do not receive additional contribution limit for primary elections). 9 N.Y. Comp. Codes R. & Regs tit. 9 § 6214.0. Finally, as Defendants also argue, contribution limits in primary elections apply only to candidates participating in a contested primary and/or to their authorized committees (and Independent Bodies are not required to conduct primary elections). N.Y. Elec. Law § 14-114.

For all of these reasons, the Court grants Defendants' motion for summary judgment on Plaintiffs' First Amendment claims regarding contribution limits in primary elections.[21]

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[21] The Court notes that it need not "deny" this aspect of Plaintiffs' motion for summary judgment because that motion did not differentiate between contribution limits in general elections and those in primary elections. In any event, even if Plaintiffs' motion could somehow be liberally construed as having done so, the Court would deny that motion with respect to Plaintiffs' First Amendment claims regarding contribution limits in primary elections for the reasons set forth above.

d. Whether the Laws Regarding Contribution-Limits Are the Least-Restrictive Means for Purposes of Plaintiffs' Claims Under the Fourteenth Amendment

As the Court has previously explained, because Plaintiffs claim that New York State Election laws burdens a fundamental right, the Court must determine whether those laws are the least-restrictive means of serving the State's compelling interest.

Because the Court has already concluded that the State interest is compelling, it next addresses whether New York State's laws concerning housekeeping accounts satisfy the least-restrictive means standard for purposes of Plaintiff's Fourteenth Amendment Equal Protection claims. To do so, the Court must first determine whether Plaintiff UJP, as an Independent Body, is similarly situated to Parties with regard to contribution-limits. *See Marcello v. Currey*, 364 F. Supp. 3d 155, 159 (D. Conn. 2019) ("[T]he Equal Protection Clause's similarly situated requirement applies even when a law discriminates on the basis of a suspect class or exercise of a fundamental right."). "As a general rule, whether items are similarly situated is a factual issue that should be submitted to the jury." *Harlan Assocs. v. Inc. Vill of Mineola*, 273 F.3d 494, 499 n.2 (2d Cir. 2001) (citing *Graham v. Long Island R.R.*, 230 F.3d 34, 39 [2d Cir. 2000]). However, "a court can properly grant summary judgment where it is clear that no reasonable jury could find the similarly situated prong met." *Harlan Assocs.*, 273 F.3d at 499 n.2 (citing *Cruz v. Coach Stores*, 202 F.3d 560, 568 [2d Cir. 2000]).

In this case, the Court finds that Parties and Independent Bodies are similarly situated with regard to the contribution-limits outlined by New York State.

New York State defines an Independent Body as "any organization or group of voters who nominates a candidate or candidates for office to be voted for at an election, and which is not a party. . . ." N.Y. Elec. Law § 1-104(12). Meanwhile, a party is simply an organization whose gubernatorial and presidential candidates received a certain number of votes in the last preceding election. *Id.* at § 1-104(3). Therefore, New York State differentiates a Party and an Independent Body solely on the number of votes cast in a specific election; both compete for the same votes in the general election. Because monetary contributions are an expression of speech, the different contribution-limits among the two groups infringes on Independent Bodies' political associations. *Corren v. Condos*, 898 F.3d 209, 218 (2d Cir. 2018) (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 [2001]). Although Defendants are correct that Parties occupy a unique position in our democracy, *McCutcheon*, 572 U.S. at 210-11, New York State cannot stifle and/or limit the voices or messages from Independent Bodies based solely on their size. Accordingly, the Court finds that Independent Bodies are similarly situated to Parties with regard to contribution limits.

As discussed in Part III.B.2.b.i. of this Decision and Order, the Court has found that the laws regarding contribution limits in general elections fail to meet the closely drawn standard as a matter of law. Because the closely drawn standard is easier to meet than is the least-restrictivemeans standard, the Court has no choice but to find that the laws regarding contribution limits in general elections also fail to meet the least-restrictive-means standard, and to grant Plaintiffs' motion for summary judgment with respect to their

Fourteenth Amendment claim. *Ted Cruz for Senate v. FEC*, 2021 WL 2269415, at *6.

The Court reaches a different conclusion, however, with respect to Plaintiffs' Fourteenth Amendment Equal Protection claims regarding contribution limits in primary elections for the reasons set forth above in Part III.B.2.a.ii. of this Decision and Order: based on the record before the Court, it appears that Plaintiff UJP does not hold, and has not held, primary elections when determining the candidates that it wishes to support. (*See generally* Dkt. No. 56, Attach. 2 [Plfs.' Statement of Material Facts, omitting any reference to primary elections]; Dkt. No. 59 [Plfs.' Response to Defs.' Cross-Motion, omitting any citation to record evidence regarding primary elections].)[22]

For all of these reasons, the Court grants Plaintiffs' motion for summary judgment on their First Amendment claims regarding contribution limits in general elections, denies Defendants' motion for summary judgment on those claims, grants Defendants' motion for summary judgment on Plaintiff's First Amendment claims regarding contribution limits in primary elections, grants Plaintiff's motion for summary judgment on Plaintiff's Fourteenth Amendment Equal Protection claims regarding contribution limits in general elections, and grants Defendants' motion for summary judgment on Plaintiff's Fourteenth Amend-

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[22] The Court notes again that Plaintiffs' motion for summary judgment has not differentiated between contribution limits in general elections and those in primary elections. In any event, even if the motion could be liberally construed as having done so, the Court would deny that motion with respect to Plaintiffs' Fourteenth Amendment claims regarding contribution limits in primary elections for the reasons set forth above.

ment Equal Protection claims regarding contribution limits in primary elections.

3. Whether Plaintiffs or Defendants Are Entitled to Summary Judgment on Plaintiffs' Housekeeping-Account Claims

After carefully considering the questions, the Court answers the first question (i.e., whether Plaintiffs are entitled to summary judgment on their housekeeping-account claims) in the negative and the second question (i.e., whether Defendants are entitled to summary judgment on Plaintiffs' housekeeping-account claims) in the affirmative to the extent the claims arise under the First Amendment for the reasons stated in Defendants' memorandum of law; and the Court answers the first question (i.e., whether Plaintiffs are entitled to summary judgment on their housekeeping-account claims) in the negative and the second question (i.e. whether Defendants are entitled to summary judgment on Plaintiffs' housekeeping-account claims) in the affirmative to the extent the claims arise under the Fourteenth Amendment for the reasons stated below. *See, supra,* Part I.C. of this Decision and Order.

a. Whether the Laws Regarding Housekeeping Accounts Are Closely Drawn for Purposes of Plaintiffs' Claims Under the First Amendment

The Court has already found that Defendants have established, as a matter of law, a sufficiently important (and indeed a compelling) State interest for purposes of Plaintiffs' contribution-limit claims under the First Amendment. *See, supra,* Part III.B.2.a. of this Decision and Order. The Court finds no reason that its analysis of that issue should not also apply to whether

Defendants have established a sufficiently important (and indeed a compelling) State interest for purposes of Plaintiffs' housekeeping-account claims under the First Amendment. As a result, the Court will turn its attention to whether the laws regarding housekeeping accounts are closely drawn under the First Amendment.[23]

"Parties, under the New York Election Law, are entitled to certain benefits, and are subject to certain requirements, which independent [bodies] are not." *SAM Party v. Kosinski*, 483 F. Supp. 3d 245, 250 (S.D.N.Y. 2020). "For example, parties are permitted to maintain a segregated account, often called a 'housekeeping account,' to pay for the maintenance of its headquarters and party staff, to which ordinary contribution limits do not apply." *SAM Party,* 483 F. Supp.3d at 251 (citing N.Y. Elec. Law § 14-124[3]).

Because ordinary contribution limits do not apply to housekeeping accounts, there is a significant danger of the appearance of *quid pro quo* corruption in connection with them. As Dr. Wilcox has opined, generally, the larger the contribution, the greater the threat of corruption. (Dkt. No. 57, Attach. 3, at 9.) Mr. Quail also testified that there would be an "endemic [of] quid pro quo corruption," were Independent Bodies able to "proliferate essentially in an unlimited manner." (Dkt. No. 56, Attach. 3, at 382-83.) Although Plaintiffs do not seek to change New York Election Law to somehow

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[23] The Court utilizes the traditional equal protection analysis under the Fourteenth Amendment instead of the *Anderson-Burdwick* standard. *See Libertarian Party of Conn. v. Lamont*, 977 F.3d 173, 177 (2d Cir. 2020) ("Challenges to state action restricting ballot access are evaluated under the Anderson-Burdick framework.") Here, Plaintiffs do not challenge their ballot access (or lack thereof), thereby rendering this standard inapplicable to the facts of this case.

transform Independent Bodies into Parties, were Independent Bodies permitted to maintain housekeeping accounts, they would have almost unfettered discretion to spend the donations on anything except things "for the express purpose of promoting the candidacy of specific candidates," which could include lavish perks, bonuses, or even expenditures that indirectly promote the candidacy of specific candidates. N.Y. Elec. Law. § 14-124(3). This potential for *quid pro quo* corruption would be exacerbated by the fact that Independent Bodies are not subject to the same regulations as Parties, which would be further exacerbated where, as here, the Independent Body's founder is one of its directors, the director of the associated Independent Expenditure Committee, and both entities' largest (and frequently only) donor. (Dkt. No. 56, Attach. 3 at 126-29, 236-54.) With limited donors and candidates, candidates from these Independent Bodies would be able to easily identify the source of the donation, which could lead to a candidate feeling obligated to take certain positions and contribute to the appearance of *quid pro quo* corruption. Although in this case there is a firewall policy between the Independent Expenditure Committee and Independent Body, the Court is skeptical whether other Independent Bodies would have, and abide by, such a policy.

Simply stated, after carefully considering the unlimited nature of donations and the disparity in regulation between Parties and Independent Bodies, the Court finds that, based on the record evidence before it, the laws at issue satisfy the closely drawn standard of the First Amendment to address the appearance of *quid pro quo* corruption with respect to housekeeping accounts, as a matter of law. Accordingly, the Court concludes that Defendants are entitled to summary judgment on Plaintiffs' First Amendment

claims regarding housekeeping accounts and that Plaintiffs' motion for summary judgment be denied with respect to those claims.

b. Whether the Laws Regarding Housekeeping Accounts Are the Least-Restrictive Means for Purposes of Plaintiffs' Claims Under the Fourteenth Amendment

Because the Court has already concluded that the State's interest in combatting the appearance of *quid pro quo* corruption in this context is compelling, it next addresses whether Independent Bodies are similarly situated to Parties with regard to housekeeping accounts, and (if so) whether New York State's laws concerning housekeeping accounts satisfy the least-restrictive means standard for Plaintiff's Fourteenth Amendment Equal Protection claims.

Plaintiffs have argued and adduced evidence that Independent Bodies are similarly situated to Parties in New York State. (Dkt. No. 59, at 24-28.) Although the question of whether two groups are similarly situated is generally a threshold factual question, *see Reynolds v. Quiros*, 990 F.3d 286, 300 (2d Cir. 2021) ("To prevail on an equal protection claim, 'a plaintiff must demonstrate that he was treated differently than others similarly situated as a result of intentional or purposeful discrimination."), the Court finds it unnecessary to answer this question here because, even if it were to find as a matter of law that Independent Bodies are similarly situated to Parties in New York State with regard to housekeeping accounts, the Court would find, for the same reasons that the Court has found that Defendants have satisfied the closely drawn standard, that as a matter of law Defendants have demonstrated that the laws

concerning housekeeping-accounts are the least restrictive means of regulation.

For all of these reasons, the Court denies Plaintiffs' motion for summary judgment on their First Amendment claims regarding housekeeping accounts and grants Defendants' motion for summary judgment on those claims, and denies Plaintiffs' motion for summary judgment on their Fourteenth Equal Protection claims regarding housekeeping accounts and grants Defendants' motion for summary judgment on those claims.

ACCORDINGLY, it is

ORDERED that Plaintiffs' motion to exclude Mr. Brian Quail's declaration and testimony is DENIED in part and GRANTED in part as discussed above in Part III.A.3. of this Decision and Order; and it is further

ORDERED that Plaintiffs' motion to exclude Dr. Clyde Wilcox's expert report and testimony is DENIED; and it is further

ORDERED that Plaintiffs' motion for summary judgment (Dkt. No. 56) is GRANTED in part and DENIED in part in the following respects:

(1) a Judgment shall be entered as a matter of law in Plaintiffs' favor on their First Amendment claims regarding contribution limits in general elections, and their Fourteenth Amendment claims regarding contribution limits in general elections; and

(2) the remainder of Plaintiffs' motion is denied (i.e., the extent to which it seeks summary judgment on their First Amendment claims regarding housekeeping accounts, and their Fourteenth Amendment claims regarding housekeeping accounts); and it is further

ORDERED that Defendants' motion for summary judgment is GRANTED in part and DENIED in part in the following respects:

(1) a Judgment shall be entered as a matter of law in Defendants' favor on Plaintiffs' First Amendment claims regarding contribution limits in primary elections, their Fourteenth Amendment claims regarding contribution limits in primary elections, their First Amendment claims regarding housekeeping accounts, and their Fourteenth Amendment claims regarding housekeeping accounts; and

(2) the remainder of Defendants' motion is denied (i.e., the extent to which it seeks summary judgment on Plaintiffs' First Amendment claims regarding contribution limits in general elections, and their Fourteenth Amendment claims regarding contribution limits in general elections); and it is further

ORDERED that the Clerk of Court shall issue a Judgment in accord with the above-stated rulings and close this action.

Dated: September 8, 2021 Syracuse, New York

/s/ Glenn T. Suddaby
Hon. Glenn T. Suddaby
Chief U.S. District Judge

APPENDIX F

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 18-1586-cv

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of July, two thousand eighteen.

PRESENT: REENA RAGGI,
PETER W. HALL,
DEBRA ANN LIVINGSTON,
Circuit Judges.

UPSTATE JOBS PARTY, MARTIN BABINEC, JOHN BULLIS,

Plaintiffs-Appellants,

v.

PETER S. KOSINSKI, New York State Board of Elections Co-Chair Commissioner, in his official capacity, DOUGLAS A. KELLNER, New York State Board of Elections Co-Chair Commissioner, in his official capacity, ANDREW J. SPANO, New York State Board of Elections Commissioner, in his official capacity, GREGORY P. PETERSOn, New York State Board of Elections Commissioner, in his official capacity,

Defendants-Appellees.

FOR APPELLANTS: Shawn Sheehy, Jason B. Torchinsky, Holtzman Vogel Josefiak Torchinsky, PLLC, Warrenton, Virginia; Michael Burger, Santiago Burger, LLP, Pittsford, New York.

FOR APPELLEES: Andrea Oser, Deputy Solicitor General, Jennifer L. Clark, Assistant Solicitor General, *for* Barbara D. Underwood, Attorney General of the State of New York, Albany, New York.

Appeal from an order of the United States District Court for the Northern District of New York (Glenn T. Suddaby, *Chief Judge*) denying a preliminary injunction.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order entered on May 22, 2018, is AFFIRMED.

Plaintiffs Upstate Jobs Party, its founder, Martin Babinec, and its Chairman and Executive Director, John Bullis (together, "UJP"), appeal from the denial of their motion preliminarily to enjoin commissioners of the New York State Board of Elections ("Board") from enforcing certain state election laws that restrict campaign contributions to and from "Independent Bodies" such as UJP in ways that do not apply to political "Parties."[1] Arguing that the disparate treatment violates constitutional rights of free speech and equal protection, *see* U.S. Const. amend. I & XIV, UJP seeks to enjoin enforcement of (1) N.Y. Elec. Law § 14-114(1) and 9 N.Y.C.R.R. § 6214.0, which prohibit individual contributions to UJP greater than $44,000 and UJP contributions to its own gubernatorial candidate greater than $44,000, but which allow individual contributions to Parties up to $109,600 and Party contributions to their own candidates in unlimited amounts; and (2) N.Y. Elec. Law § 14-124(3), which permits Parties, but not UJP, to establish "Housekeeping Accounts" for which Parties may raise funds in any amount for "ordinary activities . . . not for the express purpose of promoting the candidacy of specific candidates," *id.*

We review the denial of a preliminary injunction for abuse of discretion, which we will identify only where the challenged decision rests on an error of law or a clearly erroneous finding of fact. *See New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015). In doing so, we are mindful that where, as here, a preliminary injunction would alter the status

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[1] *See* N.Y. Elec. Law § 1-104(3), (12) (defining Parties as organizations whose gubernatorial candidates received at least 50,000 votes in most recent election and Independent Bodies as organizations not Parties).

quo and stay government action taken in the public interest pursuant to a statutory scheme, the movant must show not only (1) likely success on the merits and (2) likely irreparable harm absent preliminary relief, but also (3) equities tipping in its favor and (4) the public interest in such an injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 n.4 (2d Cir. 2010). In conducting our review, we assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

At the outset, we observe that the merits of UJP's challenge raise serious questions of free expression and equal treatment under the law, as well as the appropriate standard of judicial review. *See McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014) (recognizing government authority to "regulate campaign contributions to protect against corruption or the appearance of corruption," but not "to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others"); *see id.* at 1444 (stating that "even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms" (internal quotation marks and alteration omitted)); *accord Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 140 (2d Cir. 2014) ("Contribution limits are more leniently reviewed because they pose only indirect constraints on speech and associational rights." (internal quotation marks omitted)); *compare Riddle v. Hickenlooper*, 742 F.3d 922, 931–32 (10th Cir. 2014) (Gorsuch, *J.*, concurring)

("[W]hatever level of scrutiny should apply to *equal* infringements of the right to contribute in the First Amendment context, the strictest degree of scrutiny is warranted under Fourteenth Amendment equal protection doctrine when the government proceeds to *discriminate* against some persons in the exercise of that right." (emphasis in original)); *with Wagner v. Fed. Election Comm'n*, 793 F.3d 1, 32–33 (D.C. Cir. 2015) (*en Banc*) (observing that in "no case" has Supreme Court "employed strict scrutiny to analyze a contribution restriction under equal protection principles," and applying same level of scrutiny to equal protection challenge in case involving First Amendment right as to underlying First Amendment challenge).

The Board defends the challenged laws as protecting against corruption (or the appearance thereof), but the existing record raises questions as to whether the challenged statutes "employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. at 1444. While we think more record development is needed on the matter, even if we assume *arguendo*, contrary to the district court, that UJP is likely to prevail on the merits of its claim, we nevertheless would not identify abuse of discretion in the denial of a preliminary injunction in the particular circumstances presented. *See generally Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. at 32 ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course.").

As the district court correctly observed, (1) UJP could have challenged the instant statutes as early as 2016, but delayed doing so without explanation; (2) UJP claims the challenged laws will impede its ability to promote its candidate for governor in the

November 2018 election, but it has named no such candidate; and (3) the Board has a demonstrated interest in preventing election corruption, even though it is obliged to tailor its preventive means to avoid constitutional intrusions.

These circumstances indicate that, despite the serious questions raised, UJP has not shown that without a preliminary injunction in place for the remaining four months of the election cycle, it is likely to suffer irreparable harm in promoting a gubernatorial candidate it has not yet named; or that the equities tip in favor of such an injunction despite UJP's lack of a candidate and the ensuing confusion in administering the upcoming election; or that the public interest requires an injunction now rather than at the conclusion of full discovery and litigation.

In affirming denial of a preliminary injunction, we express no opinion on the appropriate resolution of UJP's challenge after discovery and further proceedings. We hold only that, on the present record, we cannot conclude that it was an abuse of discretion to deny preliminary injunctive relief.

Accordingly, we AFFIRM the order denying preliminary injunctive relief.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Case No.: 6:18-cv-00459-GTS-ATB

UPSTATE JOBS PARTY, MARTIN BABINEC, AND
JOHN BULLIS

Plaintiffs,

v.

PETER S. KOSINSKI, New York State Board of Elections Co-Chair Commissioner, DOUGLAS A. KELLNER, New York State Board of Elections Co-Chair Commissioner, ANDREW J. SPANO, New York State Board of Elections Commissioner, and GREGORY P. PETERSON, New York State Board of Elections Commissioner, all in their official capacities,

Defendants.

PLAINTIFFS' NOTICE OF APPEAL

Pursuant to Fed. R. App. P. 3 and 4, notice is hereby timely given that Upstate Jobs Party, Martin Babinec, and John Bullis, Plaintiffs in the above named case, appeal to the United States Court of Appeals for the Second Circuit from this Court's denial of Plaintiffs' Motion for a Preliminary Injunction. (Dkt. No. 19).

Respectfully submitted, May 23, 2018

/S/ Shawn Toomey Sheehy
Jason Torchinsky (VA 47481) *admitted pro hac vice*
Shawn Toomey Sheehy (VA 82630) *admitted pro hac vice*
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Fax: 540-341-8809
jtorchinsky@hvjt.law
ssheehy@hvjt.law

/s/ Michael Burger
Michael Burger
Fernando Santiago
SANTIAGO BURGER LLP
Attorneys for Plaintiffs
1250 Pittsford-Victor Road
Building 100, Suite 190
Pittsford, NY 14534
Phone: 585-563-2400
Fax: 585-563-7526
mike@litgrp.com
fernando@litgrp.com

Counsel to Plaintiffs

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

6:18-CV-0459 (GTS/ATB)

UPSTATE JOBS PARTY; MARTIN BABINEC; and JOHN BULLIS,

Plaintiffs,

v.

PETER S. KOSINSKI, New York State Bd. of Elections Co-Chair Comm'r; DOUGLAS A. KELLNER, New York State Bd. of Elections Co-Chair Comm'r; ANDREW J. SPANO, New York State Bd. of Elections Comm'r; and GREGORY P. PETERSON, New York State Bd. of Elections Comm'r,

Defendants.

APPEARANCES:

SANTIAGO BURGER LLP
Counsel for Plaintiffs
693 East Avenue, Suite 101
Rochester, NY 14607

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY, PLLC
Co-Counsel for Plaintiffs
45 N Hill Drive, Suite 100
Warrington, VA 20186

HON. BARBARA UNDERWOOD
Acting Attorney General for the State of New York
Counsel for Defendants
The Capitol
Albany, NY 12224

OF COUNSEL:

FERNANDO SANTIAGO, ESQ.
MICHAEL A. BURGER, ESQ.

JASON B. TORCHINSKY, ESQ.
SHAWN T. SHEEHY, ESQ.

WILLIAM A. SCOTT, ESQ.
Assistant Attorney General

GLENN T. SUDDABY, Chief United States District Judge

DECISION and ORDER

Currently pending before the Court, in this civil rights action filed by the Upstate Jobs Party, its founder and its chairman/director ("Plaintiffs") against the four commissioners of the New York State Board of Elections ("Defendants"), is Plaintiffs' motion for preliminarily injunction pursuant to Fed. R. Civ. P. 65. (Dkt. No. 2.) Defendants have opposed Plaintiffs' motion; Plaintiffs' have replied to Defendants' opposition; the Court has held a hearing on Plaintiffs' motion; and Plaintiffs have filed a supplemental letter-brief. (Dkt. Nos. 16, 17; Text Minute Entry filed May 7, 2018; Dkt. No. 18.) For the reasons set forth below, Plaintiffs' motion for a preliminary injunction is denied.

I. RELEVANT BACKGROUND

A. Plaintiffs' Claims

Generally, liberally construed, Plaintiffs' Complaint alleges that New York State's Election Law improperly

distinguishes between statutorily recognized "parties" (hereafter "Parties") and "constituted committees" (hereafter "Constituted Committees") on the one hand and statutorily recognized "independent bodies" (hereafter "Independent Bodies") such as the United Jobs Party ("UJP") on the one other hand with regard to contribution limits and segregated accounts, thereby creating a "tilted playing field" against the latter. (Dkt. No. 1.)

Generally, based on these allegations, the Complaint asserts six causes of action: (1) a request for a judgment declaring that New York State's so-called "Housekeeping Account Exemption," codified in N.Y. Elec. Law § 14-124(3), violates both the Free Speech and Association Clauses of the First Amendment; (2) a request for a judgment declaring that the same Housekeeping Account Exemption violates the Equal Protection Clause of the Fourteenth Amendment; (3) a request for a judgment declaring that New York State's differing limits for contributions for political organizations to candidates, codified in N.Y. Elec. Law § 14-114(1),(3) violates both the Free Speech and Association Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, by prohibiting the UJP from contributing more than $44,000 to its gubernatorial candidate, in contrast to the Parties and Constituted Committees which can make unlimited contributions to their candidates, without having a compelling interest for doing so or using a narrowly tailored means to accomplish that interest; (4) a request for a judgment declaring that the same statute violates Plaintiff Babinec's right to make political contributions to the UJP under the First Amendment, by limiting his contribution to $44,000, which is substantially less than he could contribute to any of the Parties or Constituted Committees; (5) a request for a judgment declaring that New York State's

differing limits for contributions by individual contributors to political organizations, codified in N.Y. Elec. Law § 14-114(1),(10), violates both the Free Speech and Association Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, by prohibiting the UJP from raising more than $44,000 per contributor for its gubernatorial candidate while permitting Parties and Constituted Committees to raise up to $109,600 per contributor for their gubernatorial candidates, without having an anti-corruption interest to justify the disparity; and (6) a request for a judgment declaring that New York State's statute limiting contributions to candidates, codified in N.Y. Elec. Law § 14-114 and 9 N.Y.C.R.R. § 6214.0, violates both the Free Speech and Association Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, by permitting Party and Constituted Committee candidates for governor to raise money in a primary election while prohibiting the UJP candidate for governor from doing so. (*See generally* Dkt. No. 1 [Plfs.' Compl.].)

Familiarity with the factual allegations supporting these claims in Plaintiffs' Complaint is assumed in this Decision and Order, which is intended primarily for review by the parties. (*Id.*)

B. Parties' Briefing on Plaintiffs' Motion

1. Plaintiffs' Memorandum of Law-in-Chief

Generally, in support of their motion for preliminary injunction, Plaintiffs assert four arguments. (*See generally* Dkt. No. 2, Attach. 3 [Plfs.' Memo. of Law].)

First, Plaintiffs argue, there exists a *substantial* likelihood they will succeed on the merits of their claims (which is the governing standard given that Plaintiffs seek to alter rather than maintain the *status*

quo) for five reasons: (1) the identity-based portion of the Housekeeping Account Exemption for Party Committees and Constituted Committees violates the First Amendment, because (a) the First Amendment protects contributions and thus contributions can be limited only to prevent corruption and the appearance thereof, pursuant to *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014), which here they are not, and (b) the Housekeeping Account Exemption permits Party Committees and Constituted Committees to raise unlimited funds to pay for their headquarters, employees' salaries and ordinary expenses (so long as the funds are not used for the express purpose of supporting specific candidates) but does not extend this benefit to Independent Bodies, thereby impermissibly basing the exemption on the identity of the speaker without using a closely drawn means of advancing a sufficiently important government interest; (2) the Housekeeping Account Exemption for Party Committees and Constituted Committees violates the Fourteenth Amendment, because (a) free speech rights during a political campaign are fundamental rights, and (b) here, the statute makes a classification that affects fundamental rights without being narrowly tailored to serve a compelling state interest; (3) New York State's differing contribution limits for individual contributors to Parties and Constituted Committees (in the amount of $109,600) and for individual contributors to Independent Bodies such as the UJP (in the amount of $44,000) violates both the First and Fourteenth Amendments, because (a) the difference is not supported by a sufficiently important state interest and does not use a closely drawn means of advancing that interest, and (b) the difference infringes fundamental rights without being narrowly tailored to serve a compelling state interest; (4) New York State's differing contribution limits for

political organizations to candidates competing in the same election (i.e., an unlimited amount for contributions from Parties and Constituted Committees and the amount of $44,000 for Independent Bodies) violate the First and Fourteenth Amendments, for the same reasons as stated above; and (5) New York State's two-track campaign finance system is further compounded by the fact that only Parties and Constituted Committees can raise funds for both a primary election and a general election. (*Id.*)

Second, Plaintiffs argue, absent an injunction, they will suffer irreparable harm, because (1) irreparable harm is presumed where, as here, the plaintiffs have alleged a violation of their First Amendment rights, and (2) in any event, Plaintiffs have adduced evidence that (a) the Housekeeping Account Exemption will hinder them during the independent nominating petition period of July 10 to August 21, 2018, (b) the differing contribution limits for individual contributors will deprive Plaintiff Babinec of the ability to contribute more than $44,000 to the UJP, and (c) the different contribution limits for political organizations will deprive the UJP of the ability to contribute more than $44,000 to its candidate. (*Id.*)

Third, Plaintiffs argue, the balance of equities tips decidedly in their favor, because (1) on one side of the scale, New York State's selective Housekeeping Account Exemption and differing contribution limits prohibit Plaintiffs from competing on a level playing field, thereby causing them substantial harm, and (2) on the other side of the scale, New York State has not shown that extending the exemption and contribution limits to the UJP would cause the state any harm, or disrupt or interfere with the election machinery in a

manner that outweighs the substantial harm to Plaintiffs. (*Id.*)

Fourth, and finally, Plaintiffs argue, an injunction is in the public interest, because the public has an interest in not having to forgo constitutionally protected speech rather than risk the consequences of being punished for such speech. (*Id.*)

2. Defendants' Opposition Memorandum of Law

Generally, in their response, Defendants assert two arguments. (*See generally* Dkt. No. 16 [Defs.' Opp'n Memo. of Law].)

First, Defendants argue, Plaintiffs have failed to demonstrate a substantial likelihood of success on the merits for five reasons: (1) as a threshold matter, although Plaintiffs have cast their arguments as "as applied" challenges to the statutes in question, in fact their arguments are *facial* challenges to the statutes, which clearly fail under the "no set of circumstances" standard governing such challenges; (2) in any event, New York State's Housekeeping Account Exemption is a closely drawn means of advancing a sufficiently important government interest for purposes of the First Amendment, and either is a rationally related means to serving a legitimate government interest or is a narrowly tailored means of serving a compelling state interest for purposes of the Fourteenth Amendment, because (a) due to their large sizes, Parties and Constituted Committees have a need to maintain permanent headquarters and staff and carry on ordinary activities other than for the express purpose of promoting the candidacy of specific candidates, (b) the Exemption prevents quid pro quo corruption by Parties and Constituted Committees by preventing

the use of the funds in the Housekeeping Account for the express purpose of promoting the candidacy of specific candidates, and by containing a disclosure requirement, (c) as compared to Parties and Constituted Committees, Independent Bodies have a lesser need to maintain permanent headquarters and staff and carry on ordinary activities that are not for the express purpose of promoting the candidacy of specific candidates (and thus they would have a greater reason to improperly use the funds in such an account for the purpose of promoting the candidacy of specific candidates), and (d) Independent Bodies have other mechanisms to achieve many of the benefits of using a Housekeeping Account (such as a Political Action Committee, a multi-candidate authorized committee, an Independent Expenditure Committee, and a "sub-entity"); (3) New York State's differing contribution limits for individual contributors to Parties and Constituted Committees on the one hand and for individual contributors to Independent Bodies on the other hand are a closely drawn means of advancing a sufficiently important government interest for purposes of the First Amendment, and either are a rationally related means to serving a legitimate government interest or are a narrowly tailored means of serving a compelling state interest for purposes of the Fourteenth Amendment, because (a) as a threshold matter, no equal protection analysis is required because Parties and Constituted Committees are simply not similarly situated to Independent Bodies in that the political organizations are defined by statute differently and permitted by the U.S. Constitution to be treated in different ways, and (b) in any event, the limits are supported by a sufficiently important government interest for purposes of the First Amendment and a compelling state interest for purposes of the Fourteenth

Amendment (i.e., to prevent quid pro quo corruption in Independent Bodies which are smaller than Parties and Constituted Committees and thus less likely to dilute the effect of an individual's contribution on a candidate, pursuant to the Supreme Court's reasoning *McCutcheon*); (4) New York State's differing contribution limits for political organizations to candidates competing in the same election are a closely drawn means of advancing a sufficiently important government interest for purposes of the First Amendment, and either are a rationally related means to serving a legitimate government interest or are a narrowly tailored means of serving a compelling state interest for purposes of the Fourteenth Amendment, for the same reasons as stated above; and (5) Plaintiffs' argument that the above three problems are compounded by the fact that New York State prohibits Independent Bodies from raising funds in a primary election ignores the fact that (a) Independent Bodies are not required to conduct, and indeed are prohibited from conducting, primary elections, and (b) in any event, Parties and Constituted Committees do not receive an additional limit for primary elections but one annual aggregate contribution limit for spending on all elections together. (*Id.*)[1]

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[1] Defendants also argue that Plaintiffs have no First Amendment right to an individual contribution limit to an Independent Body of more than $44,000 because that limit is not "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless," under the Supreme Court's decision in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000). (Dkt. No. 16, at 19 [attaching page "15" of Defs.' Opp'n Memo. of Law].) Plaintiffs reply that this argument is an attempt to change the subject, which properly regards not a First Amendment claim that the $44,000 limit in question is too low

Second, Defendants argue, the balancing of the equities weighs in favor of maintaining the status quo, and granting the motion would be against the public interest, because (1) in balancing the equities the Court may also consider whether the purported emergency is one of the plaintiff's own creation, (2) here, Plaintiffs could have challenged the statutes in question since at least 2016 and offer no explanation for failing to do so, and (3) contrary to Plaintiffs' argument, granting their request would throw the election process into disarray less than six months before the election, requiring significant alterations to Board of Election forms, guidance documents, training materials and regulations, and opening the floodgates to other individuals seeking to form Independent Bodies in order to avoid the strictures of campaign finance laws. (*Id*.)

3. Plaintiffs' Reply Memorandum of Law

Generally in their reply, Plaintiffs assert three arguments. (*See generally* Dkt. No. 17 [Plfs.' Reply Memo. of Law].)

First, Plaintiffs argue, there exists a substantial likelihood they will succeed on the merits of their claims for five reasons: (1) Plaintiffs' Fourteenth Amendment claims are meritorious because (a) Independent Bodies are similarly situated to Parties and Constituted Committees because the former competes for the same status as the latter every four years, and (b) by creating the very distinction in

(for Plaintiffs to exercise their First Amendment rights) but a First Amendment claim that the $44,000 limit in question lacks an anticorruption interest to justify the disparity between it and the $109,6000 limit. (Dkt. No. 17, at 11 [attaching page "7" of Plfs.' Reply Memo. of Law].)

question (between Independent Bodies on the one hand and Parties and Constituted Committees on the other hand), New York State is attempting to use the distinction as both a sword and a shield, and thus impermissibly protect all statutory classifications from equal protection challenges; (2) Defendants have failed to satisfy their burden of showing that the selective identity-based Housekeeping Account Exemption is constitutional, because (a) as a threshold matter, the U.S. Supreme Court has rejected the argument that an entity's First Amendment rights are not harmed if the entity can just form another entity and the second entity speaks, (b) the other mechanisms suggested by Defendants (i.e., a Political Action Committee, a multi-candidate authorized committee, an Independent Expenditure Committee, and a nebulous "sub-entity") would not permit the UJP to achieve all of its goals, and (c) Defendants provide no evidence that Independent Bodies are more susceptible to corruption than are Parties and Constituted Committees; (3) New York State's differing contribution limits violate the First Amendment by favoring the established Parties over other political organizations, because New York State is without an anti-corruption interest (or an anti-circumvention interest) to justify permitting Plaintiff Babinec to contribute $109,600 to a Party but prohibiting him from contributing more than $44,000 to the UJP; (4) to assist its gubernatorial candidate in achieving access to the ballot, the UJP must be permitted to make unlimited contributions to its candidates in the same manner as Parties with whom the UJP competes for votes; and (5) the Court must permit UJP candidates to raise funds for both the primary election and the general election, because there is *effectively* a primary election for UJP candidates, consisting of having to

engage in the petitioning process in order to get their name on the general election ballot. (*Id.*)

Second, Plaintiffs argue, they will suffer irreparable harm because (a) by failing to oppose Plaintiffs' irreparable-harm argument, Defendants have effectively lightened the burden that Plaintiffs must meet with regard to that argument (to one of facial merit), and (b) here, Plaintiffs have, at the very least, met that burden. (*Id.*)

Third, Plaintiffs argue, Defendants' equities argument is alarmist and unpersuasive because (a) accepting Defendants' argument that Plaintiffs have waited too long to seek relief, the Court would have to make an impermissible distinction between speech that it found to be urgent and that which it found to be non-urgent, (b) the relevance of speech is typically not apparent until the heat of a political campaign, and (c) Defendants' "disarray" argument is well worn and has never proven to be true in the past. (*Id.*)

4. Plaintiffs' Supplemental Letter-Brief

Generally, in their supplemental letter-brief (filed without prior leave but accepted by the Court out of special solicitude to Plaintiffs as civil rights litigants), Plaintiffs argue that the Eastern District of New York's recent decision in *Free Libertarian Party, Inc. v. Spano*, 16-CV3054, 2018 WL 2277834 (E.D.N.Y. May 18, 2018) (Gold, M.J.), supports Plaintiffs' arguments in this action because, *inter alia*, in that case, the court applied strict scrutiny to the plaintiff's challenge (to New York State's witness-residency requirement for independent nominating petitions) under the First Amendment's Free Speech Clause, and sustained that challenge because New York State could use more narrowly tailored means to achieve its compelling

interest of preventing fraud. (Dkt. No. 18 [Plfs.' Suppl. Letter-Brief].)

C. Hearing on Plaintiffs' Motion

On May 7, 2018, the Court held a hearing on Plaintiffs' motion. (Text Minute Entry filed May 7, 2018.) At the hearing, counsel submitted oral arguments but did not call any witnesses. (*Id.*)

II. GOVERNING LEGAL STANDARD

"A preliminary injunction is an 'extraordinary and drastic remedy' . . . ; it is never awarded as of right . . . ." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (internal citations omitted). Generally, in the Second Circuit, a party seeking a preliminary injunction must establish the following three elements: (1) that there is either (a) a likelihood of success on the merits and a balance of equities tipping in the party's favor or (b) a sufficiently serious question as to the merits of the case to make it a fair ground for litigation and a balance of hardships tipping decidedly in the party's favor; (2) that the party will likely experience irreparable harm if the preliminary injunction is not issued; and (3) that the public interest would not be disserved by the relief. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (reciting standard limited to first part of second above-stated element and using word "equities" without the word "decidedly"); *accord, Glossip v. Gross*, 135 S. Ct. 2726, 2736-37 (2015); *see also Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 825 (2d Cir. 2015) (reciting standard including second part of second above-stated element and using words "hardships" and "decidedly"); *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 38 (2d Cir. 2010) (holding that "our venerable standard for assessing a

movant's probability of success on the merits remains valid [after the Supreme Court's decision in *Winter*]").

With regard to the first part of the first element, a "likelihood of success" requires a demonstration of a "better than fifty percent" probability of success. *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985), *disapproved on other grounds, O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, n.2 (1987). "A balance of equities tipping in favor of the party requesting a preliminary injunction" means a balance of the hardships against the benefits. *See, e.g., Ligon v. City of New York,* 925 F. Supp.2d 478, 539 (S.D.N.Y. 2013) (characterizing the balancing "hardship imposed on one party" and "benefit to the other" as a "balanc[ing] [of] the equities"); *Jones v. Nat'l Conference of Bar Examiners,* 801 F. Supp. 2d 270, 291 (D. Vt. 2011) (considering the harm to plaintiff and any "countervailing benefit" to plaintiff in balancing the equities); *Smithkline Beecham Consumer Healthcare, L.P. v. Watson Pharm., Inc.,* 99-CV-9214, 1999 WL 34981557, at *4-5 (S.D.N.Y. Sept. 13, 1999) (considering the harm to defendant and the "benefit" to consumers in balancing the equities); *Arthur v. Assoc. Musicians of Greater New York*, 278 F. Supp. 400, 404 (S.D.N.Y. 1968) (characterizing "balancing the equities" as "requiring plaintiffs to show that the benefit to them if an injunction issues will outweigh the harm to other parties"); *Rosenstiel v. Rosenstiel*, 278 F. Supp. 794, 801-02 (S.D.N.Y.1967) (explaining that, in order to "balance the equities," the court "will consider the hardship to the plaintiff . . . , the benefit to [the] plaintiff . . . , and the relative hardship to which a

defendant will be subjected") [internal quotation marks omitted].[2]

With regard to the second part of the first element, "[a] sufficiently serious question as to the merits of the case to make it a fair ground for litigation" means a question that is so "substantial, difficult and doubtful" as to require "a more deliberate investigation." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953); *accord, Semmes Motors, Inc. v. Ford Motor Co.,* 429 F.2d 1197, 1205-06 (2d Cir. 1970).[3] "A balance of hardships tipping decidedly toward the party requesting a preliminary injunction" means that, as compared to the hardship suffered by other party if the preliminary injunction is granted, the hardship suffered by the moving party if the preliminary injunction is denied will be so much greater that it may be characterized as a "real hardship," such as being "driven out of business . . . before a trial could be held." *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 58 (2d Cir. 1979); *Int'l Bus. Mach. v. Johnson*, 629 F. Supp.2d 321, 333-34 (S.D.N.Y. 2009); *see also Semmes Motors, Inc.,* 429 F.2d at 1205 (concluding that the balance of hardships tipped decidedly in favor of the movant where it had demonstrated that, without an injunctive

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[2] *See also Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12, n.2 (7th Cir. 1992) ("Weighing the equities as a whole favors X, making preliminary relief appropriate, even though the *undiscounted* balance of harms favors Y.") [emphasis added].

[3] *See also Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997); *Rep. of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988); *City of Chanute v. Kansas Gas and Elec. Co.,* 754 F.2d 310, 314 (10th Cir. 1985); *R.R. Yardmasters of Am. v. Penn. R.R. Co.*, 224 F.2d 226, 229 (3d Cir. 1955).

order, it would have been forced out of business as a Ford distributor).[4]

With regard to the second element, "irreparable harm" is "certain and imminent harm for which a monetary award does not adequately compensate." *Wisdom Import Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 113 (2d Cir. 2003). Irreparable harm exists "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Brenntag Int'l Chem., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999).

With regard to the third element, the "public interest" is defined as "[t]he general welfare of the public that warrants recognition and protection," and/or "[s]omething in which the public as a whole has a stake[,] esp[ecially], an interest that justifies

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[4] The Court notes that, under the Second Circuit's formulation of this standard, the requirement of a balance of *hardships* tipping *decidedly* in the movant's favor is added only to the second part of the first element (i.e., the existence of a sufficiently serious question as to the merits of the case to make it a fair ground for litigation), and not also to the first part of the first element (i.e., the existence of a likelihood of success on the merits), which (again) requires merely a balance of *equities* (i.e., hardships and benefits) tipping in the movant's favor. *See Citigroup Global Markets, Inc.*, 598 F.3d at 36 ("Because the moving party must not only show that there are 'serious questions' going to the merits, but must additionally establish that 'the balance of hardships tips decidedly' in its favor . . . , its overall burden is no lighter than the one it bears under the 'likelihood of success' standard.") (internal citation omitted); *cf. Golden Krust Patties, Inc. v. Bullock*, 957 F. Supp.2d 186, 192 (E.D.N.Y. 2013) ("[T]he *Winter* standard . . . requires the balance of equities to tip in the movant's favor, though not necessarily 'decidedly' so, even where the movant is found likely to succeed on the merits.").

governmental regulation." *Black's Law Dictionary* at 1350 (9th ed. 2009).

The Second Circuit recognizes three limited exceptions to the above-stated general standard. *Citigroup Global Markets, Inc.*, 598 F.3d at 35, n.4.

First, where the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous "serious questions" standard but should grant the injunction only if the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim. *Id*. (citing *Able v. United States*, 44 F.3d 128, 131 [2d Cir. 1995]); *see also Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014) ("A plaintiff cannot rely on the 'fair-ground-for-litigation' alternative to challenge governmental action taken in the public interest pursuant to a statutory or regulatory scheme.") (internal quotation marks omitted). This is because "governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Able,* 44 F.3d at 131.

Second, a heightened standard–requiring both a "clear or substantial" likelihood of success and a "strong" showing of irreparable harm"–is required when the requested injunction (1) would provide the movant with all the relief that is sought and (2) could not be undone by a judgment favorable to non-movant on the merits at trial. *Citigroup Global Markets, Inc.*, 598 F.3d at 35, n.4 (citing *Mastrovincenzo v. City of New York*, 435 F.3d 78, 90 [2d Cir. 2006]); *New York v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) ("When

either condition is met, the movant must show [both] a 'clear' or 'substantial' likelihood of success on the merits . . . *and* make a 'strong showing" of irreparable harm' . . . .") (emphasis added).

Third, the above-described heightened standard may also be required when the preliminary injunction is "mandatory" in that it would "alter the status quo by commanding some positive act," as opposed to being "prohibitory" by seeking only to maintain the *status quo*. *Citigroup Global Markets, Inc.*, 598 F.3d at 35, n.4 (citing *Tom Doherty Assocs. v. Saban Entm't*, 60 F.3d 27, 34 [2d Cir. 1995]).[5] As for the point in time that serves as the *status quo*, the Second Circuit has defined this point in time as "the last actual, peaceable uncontested status which preceded the pending controversy." *LaRouche v. Kezer*, 20 F.3d 68, 74, n.7 (2d Cir. 1994); *accord, Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014); *Actavis PLC*, 787 F.3d at 650.

Because the parties have demonstrated in the memoranda of law an adequate understanding of this legal standard, the Court need not, and does not, further elaborate on this legal standard in this Decision and Order, which is intended primarily for the review of the parties.

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[5] Alternatively, in such a circumstance, the "clear or substantial likelihood of success" requirement may be dispensed with if the movant shows that "extreme or very serious damage will result from a denial of preliminary relief." *Citigroup Global Markets, Inc.*, 598 F.3d at 35, n.4 (citing *Tom Doherty Assocs. v. Saban Entm't*, 60 F.3d 27, 34 [2d Cir. 1995]).

III. ANALYSIS

A. Whether Plaintiffs Have Made a Strong Showing of Irreparable Harm

After carefully considering the matter, the Court answers this question in the affirmative for the reasons stated by Plaintiffs in their memoranda of law. *See, supra,* Parts I.B.1. and I.B.3. of this Decision and Order. The Court would add only that, in this District, when a non-movant fails to oppose a legal argument asserted by a movant, the movant's burden with regard to that argument is lightened, such that, in order to succeed on that argument, the movant need only show that the argument possess facial merit, which has appropriately been characterized as a "modest" burden. *See* N.D.N.Y. L.R. 7.1(b)(3) ("Where a properly filed motion is unopposed and the Court determined that the moving party has met to demonstrate entitlement to the relief requested therein . . . ."); *Rusyniak v. Gensini*, 07-CV-0279, 2009 WL 3672105, at *1, n.1 (N.D.N.Y. Oct. 30, 2009) (Suddaby, J.) (collecting cases); *Este-Green v. Astrue*, 09-CV-0722, 2009 WL2473509, at *2 & nn.2, 3 (N.D.N.Y. Aug. 7, 2009) (Suddaby, J.) (collecting cases). Here, the Court finds that Plaintiffs have met that burden, regardless of whether the standard governing this part of their motion is a showing of irreparable harm (which is generally applicable to a motion for a preliminary injunction) or a *strong* showing of irreparable harm (which is applicable to a motion for a *mandatory* preliminary injunction). *See, supra,* Part II of this Decision and Order.

B. Whether Plaintiffs Have Shown a Substantial Likelihood of Success on the Merits of Their Claims

After carefully considering the matter, the Court answers this question in the negative for the reasons stated by Defendants in their opposition memorandum of law (and during their oral argument in the hearing). *See, supra,* Part I.B.2. of this Decision and Order. To those reasons, the Court would add the following analysis (which is intended to supplement, and not supplant, Defendants' reasons).

A linchpin of Plaintiffs' motion (whether that motion regards the merits of their First Amendment claims or the merits of their Fourteenth Amendment claims) is their argument that Defendants have adduced no evidence that the purpose of the statutes in question is to prevent quid pro quo corruption or the appearance thereof, or that Independent Bodies are more susceptible to such corruption than are Parties and Constituted Committees. Plaintiffs assert this argument at least nine times in their memoranda of law and three times during oral argument at the hearing. (Dkt. No. 2, Attach. 3, at 17, 20, 22 [attaching pages "13," "16" and "18" of Plfs.' Memo. of Law]; Dkt. No. 17, at 5, 7, 9, 10, 11, 12 [attaching pages "1," "3," "5," "6," "7" and "8" of Plfs.' Reply Memo. of Law].)

However, Defendants have adduced admissible evidence that, as of April 1, 2018, New York State's eight recognized Parties have the following active enrollees: (1) the Democratic Party, 5,621,811; (2) the Republican Party, 2,632,341; (3) the Independence Party, 436,312; (4) the Conservative Party, 145,421; (5) the Working Families Party, 41,019; (6) the Green Party, 26,462; (7) the Women's Equality Party, 4,374; and (8) the Reform Party, 1,802. (Dkt. No. 16, Attach.

1, at ¶¶ 1-3 [Decl. of Brian Quail].)[6] Defendants have also adduced admissible evidence that granting Plaintiffs the relief they request would, by permitting any person who has secured an independent nomination for office to effectively claim Party status, rapidly proliferate the number of "Parties" qualifying for the $109,600 contribution limit and thereby "greatly increase the risk of quid pro quo corruption." (*Id*. at ¶ 18.)

Plaintiffs apparently demand further evidence from Defendants: perhaps testimony stating that Defendants' declarant has conducted a statistically significant survey of the cases of qui pro quo corruption involving campaign contributions in New York State and concluded that there is a negative correlation between the occurrence of such corruption and an increase in size of the political party. If so, such a demand ignores the fact that all that is needed, under the circumstances, is a showing that the statutes in question target the *appearance* of quid pro quo corruption. *See,*

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[6] The Court notes that, in determining whether to award a preliminary injunction, it is entitled to rely on declarations and affidavits. *See Mitsubishi Motors N. Am. Inc. v. Grand Auto, Inc.*, 18-CV-0814, 2018 WL 2012875, at *1 (E.D.N.Y. Apr. 30, 2018) (holding that in adjudicating a motion seeking preliminary injunctive relief, courts may rely on affidavits and declarations); *360Heros, Inc. v. Mainstreet Am. Assurance Co.*, 17-CV-0549, 2018 WL 1033283, at *3-4 (N.D.N.Y. Feb, 21, 2018) (D'Agostino, J.) (holding that courts may rely on affidavits and have wide discretion to assess the affidavit's credibility in the decision of whether to award preliminary injunctive relief); 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2949 (2d ed. 1995) ("[I]t is not surprising that in practice affidavits are usually accepted on a preliminary injunction motion without regard to the strict standards of Rule 56(c)(4), and that hearsay evidence also may be considered."). This is especially the case where, as here, the parties chose not to adduce testimony at the hearing.

e.g., McCutcheon v. FEC, 134 S. Ct. 1434, 1445, 1450 (2014) ("*Buckley* held that the Government's interest in preventing quid pro quo corruption *or its appearance* was sufficiently important . . . ; we have elsewhere stated that the same interest may properly be labeled 'compelling' . . . . This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing [quid pro quo] corruption *or the appearance of corruption*.") (internal quotation marks and citations omitted; emphasis added).

Such a demand would also ignore the fact that "[i]t is not necessary to produce evidence of actual corruption to demonstrate the sufficiently important interest in preventing the appearance of corruption." *Ognibene v. Parkes*, 671 F.3d 174, 183 (2d Cir. 2011) (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 143 [2003]; *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 [2000]; *Buckley v. Valeo*, 424 U.S. 1, 27 [1976]). Rather, "because the scope of *quid pro quo* corruption can never be reliably ascertained, the legislature may regulate certain indicators of such corruption or its appearance . . . ." *Ognibene*, 671 F.3d at 187.

Here, the Court finds that Defendants have made the required showing (i.e., that the statutes in question target the *appearance* of quid pro quo corruption). In rendering this finding, the Court relies on the size of New York State's recognized Parties as compared to the apparent size of the UJP, only two members of which have been identified. (*Compare* Dkt. No. 16, Attach. 1, at ¶ 3 [Decl. of Brian Quail] *with* Dkt. No. 1, at ¶¶ 12, 18 [Plfs.' Compl.].)[7] The Court also

[7] The Court notes that, during the hearing, Plaintiffs' counsel acknowledged that Independent Bodies may have as few as three members. *See also* N.Y. Elec. Law § 1-104(12) (defining an "Independent Body" as an organization that is not a Party but is

relies on the fact that, currently, the UJP is in the process of fielding only one candidate (for Governor in the 2018 election), and the fact that the UJP's fielding of additional candidates for other offices is merely speculative. (Dkt. No. 2, Attach. 2, at ¶¶ 5-6 [Decl. of John Bullis].) Finally, the Court relies on the *perception* (whether correct or incorrect) that a positive correlation exists between the likelihood of corruption stemming from campaign contributions and the smaller the size of a political party (and thus, generally, the smaller number of that party's donors and candidates). The Co-Counsel of the New York State Board of Elections holds his perception. (Dkt. No. 16, Attach. 1, at ¶ 21 [Decl. of Brian Quail, stating that giving an Independent Body such as the UJB the benefits of a "Party" would "greatly increase the risk of quid pro quo corruption"].) Several commentators appear to hold this perception.[8] Indeed, in *McCutcheon* the Supreme

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a "group of voters which nominates a candidate or candidates for office to be voted for at an election . . . .").

[8] *See, e.g.*, Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 Yale L.J. 804, 839 (2014) ("Parties, after all, are constituted by numerous interests and many donors, including large donors; parties dilute the role of money by pooling so many interests and donors."); Nicholas Bamman, *Campaign Finance: Public Funding After Bennett*, 27 J.L. & Pol. 323, 347 (Winter 2012) ("The fewer private funds the parties receive, the less opportunity for corruption. But even if political parties receive some private funding, considering relatively low contribution limits, and the sheer size of political parties, there would be little likelihood of corruption stemming from any single private individual contribution."); Frank J. Favia, Jr., *Enforcing the Goals of the Bipartisan Campaign Reform Act: Silencing Nonprofit Groups and Stealth PACs in Federal Elections*, 2006 U. Ill. L. Rev. 1081, 1096 (2006) ("[B]ecause the goal of parties is to elect a wide array of candidates, a contribution to that party does not ensure that a

Court recognized that the effect of an individual's contribution to a candidate is "diluted" when that contribution comes as part of a larger donation from a party and encompasses the donations of many individuals. *See McCutcheon*, 134 S. Ct. 1453 ("When [a donor turns to other PACs that are likely to give to Representative Smith], however, he discovers that his contribution will be significantly diluted by all the contributions from others to the same PACs. . . . His salience as a Smith supporter has been diminished, and with it the potential for corruption.").

With regard to the "narrowly tailored" and "closely drawn" requirements, Plaintiffs argued at the hearing that disclosure is a less-intrusive way (than is a ban) to regulative contributions to an entity or candidate. However, Defendants argued that disclosure would not work because (1) Independent Bodies are not subjected to as much oversight as are Parties and Constituted Committees, (2) a large number of individuals would likely suddenly form Independent Bodies seeking to obtain Party status (not by challenging New York State's statutory method of creating Parties but through a "back door" of obtaining all of the rights and benefits of a Party), and (3) confusion would ensue at the Board of Election. In support of this argument, Defendants have adduced admissible evidence that (1) Independent Bodies are not as regulated as are Parties, (2) granting Plaintiffs the relief they request would cause the rapid proliferation of Independent Bodies claiming Party status, and (3) granting Plaintiffs the relief they request (without amending the other relevant portions of New York State's Election Law) would suddenly overwhelm, and bring

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specific candidate will be grateful to the donor.") (internal quotation marks omitted).

confusion to, the State Board of Elections. (Dkt. No. 16, Attach. 1, at ¶¶ 13, 14, 17, 18, 21 [Decl. of Brian Quail].) The Court is persuaded by Defendants' argument and evidence.

For all of these reasons, the Court finds that Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their claims.

C. Whether the Balance of Equities Tips in Plaintiffs' Favor

Because the Court has already obtained sufficient reason to deny Plaintiffs' motion, it need not answer this question. However, it will answer the question in the interest of thoroughness (and for purposes of appellate review). After carefully considering the matter, the Court answers the question in the negative for the reasons stated by Defendants in their opposition memoranda of law. *See, supra,* Part I.B.2. of this Decision and Order. To those reasons, the Court adds the following analysis.

Plaintiffs are certainly correct that, on one side of the scale, denying their requested preliminary injunction would leave undisturbed the difficult row they have to hoe to reap the fruits of their labor on Election Day. However, Plaintiffs are incorrect that New York State has not shown that extending the exemption and contribution limits to the UJP would cause the state any harm. Rather, the Court finds that Defendants have shown that doing so would (1) thwart the state's efforts to prevent quid pro quo corruption in small political organizations (that are less likely than large ones to dilute the effect of an individual's contribution on a candidate), (2) increase the State Board of Election's administrative burden (in terms of altering forms, guidance documents, training materials and

regulations) less than six months before Election Day, and (3) open the floodgates to other individuals (perhaps with motives less altruistic than those of Plaintiffs) seeking to form Independent Bodies less than six months before Election Day. (Dkt. No. 16, Attach. 1, at ¶¶ 3, 18, 21 [Decl. of Brian Quail].)

Balancing these equities, the Court finds that they weigh against granting Plaintiffs' motion.

D. Whether the Public Interest Would Be Disserved by Granting the Motion

Again, because the Court has already obtained sufficient reason to deny Plaintiffs' motion, it need not answer this question but will do so in the interest of thoroughness. After carefully considering the matter, the Court answers the question in the affirmative for the reasons stated by Defendants in their opposition memoranda of law. *See, supra,* Part I.B.2. of this Decision and Order. To those reasons, the Court adds the following analysis.

Of course, the Court concedes that the public has an interest in not having to forgo constitutionally protected speech or risk the consequences of being punished for such speech. However, under the circumstances, the public has a strong interest in (1) preventing quid pro quo corruption in small political organizations (which are less likely that large ones to dilute the effect of an individual's contribution on a candidate), (2) not throwing open the floodgates to individuals seeking to form Independent Bodies seeking the status of Parties less than six months before Election Day, and (3) keeping under reasonable control the State Board of Election's administrative burden (in terms of having to alter forms, guidance documents, training materials and regulations) less

than six months before Election Day. As a result, the Court finds that the public interest would be disserved by granting Plaintiffs' motion.

For each of these three alternative reasons (i.e., the consideration of the merits, the balancing of the equities, and the service of the public interest), the Court denies Plaintiffs' motion for a preliminary injunction.

ACCORDINGLY, it is

ORDERED that Plaintiffs' motion for a preliminary injunction (Dkt. No. 2) is DENIED; and it is further

ORDERED that Defendants are directed to file an answer to the Complaint by June 5, 2018; and it is further

ORDERED that the parties are directed to file a proposed briefing schedule with regard to discovery, if any, and dispositive motions as discussed at the hearing on the motion for preliminary injunction by June 5, 2018.

Dated: May 22, 2018 Syracuse, NY

/s/ Glenn T. Suddaby
Hon. Glenn T. Suddaby
Chief U.S. District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
ALBANY DIVISION

No. 12-cv-1337 (MAD) (TWD)

UPSTATE JOBS PARTY, MARTIN BABINEC, and JOHN BULLIS,

Plaintiffs,

-against-

PETER S. KOSINSKI, New York State Board of Elections Co-Chair Commissioner, DOUGLAS A. KELLNER, New York State Board of Elections Co-Chair Commissioner, ANDREW J. SPANO, New York State Board of Elections Commissioner, and GREGORY P. PETERSON, New York State Board of Elections Commissioner, all in their official capacities.

Defendants.

EXPERT REPORT OF CLYDE WILCOX

CLYDE WILCOX declares as follows under penalty of perjury:

I. Overview and Summary of Findings

1. In this report I provide an expert opinion for the Attorney General of the State of New York for the case *Upstate Jobs Party v. Kosinsk, et al.i.* I have been asked to answer two questions:

    a. If independent bodies were granted the same contribution limits as political parties and access to housekeeping

accounts, would this increase the risk of corruption and the appearance of corruption?

b. Is there an important value in allowing political parties a higher contribution limit than independent bodies?

2. In preparing this report I have reviewed the relevant professional literature in political science, as well as reports from non-profits and state regulatory agencies. I have considered a range of opinions and findings. I have consulted with political scientists who are the leading experts on campaign finance, and reviewed other relevant materials. I also draw on my own experience in studying campaign finance, including many interviews over 35 years with campaign professionals, candidates, and others, surveys of donors to presidential and congressional campaigns, and other research.

3. I am a professor of government at Georgetown University where I have taught for 32 years. I have studied interest groups and campaign finance for more than 35 years. I have coauthored two books on individual donors to presidential and congressional elections, a leading textbook on interest groups in elections, now in its 3rd edition, and a leading textbook on interest groups that covers elections, now in its 6th edition. I have co-edited more than a dozen books that deal in some way with interest groups in elections, and have written many book chapters and journal articles on interest groups and campaign finance. I delivered

invited lectures on campaign finance, interest groups, and corruption in a number of countries, and have taught courses on the topic recently in Japan, Spain, and Qatar. I have served as an expert witness on campaign finance and interest group cases for the Federal Election Commission, the Justice Department, and the Attorney General for the State of New York, and have served as a background consultant in other federal cases. I was an expert witness in *The Christian Coalition International v. United States of America*, *SpeechNow.org v FEC*, and *Hispanic Leadership Fund, Inc; Freedom New York v New York Board of Elections and the Attorney General of the State of New York*. I also have consulted in various capacities in *Colorado Republican Federal Campaign Committee v. FEC*, and *McConnell v. FEC*. I am being paid $350 per hour to prepare this declaration. Attached hereto as Exhibit 1 is a true and correct copy of my current curriculum vitae. 4. I offer the following conclusions:

a. Allowing independent bodies to have the same contribution limit as political parties and to have housekeeping accounts would substantially increase the risk of corruption.

b. Allowing independent bodies to have the same contribution limit as political parties and to have housekeeping accounts would substantially increase the risk of the appearance of corruption.

c. The crucial role of political parties in American democracy justifies allowing

parties both higher contribution limits and housekeeping accounts

II. Allowing Independent Bodies to Have the Same Contribution Limits as Political Parties and to Operate Housekeeping Accounts would Substantially Increase the Risk of Corruption

5. The danger of corruption associated with large direct contributions to candidates is well established in political science. As Yale Political Scientist Donald Green noted in his deposition for *McConnell*, "Scholars who study corruption have emphasized three such conditions: (1) large payoffs to those involved, (2) small probabilities of detection and punishment, and (3) enduring relationships between donors and politicians so that informal deals can be monitored and enforced." Green was speaking of large soft money contributions in that case, but the logic is even stronger with large contributions to candidates.

In western democracies, including the U.S., large contributions to candidates have been frequently associated with special access and particularistic policy favors for donors. Large direct contributions have been associated with explicit and implicit quid-pro-quo relationships, and with special access for and influence by large donors. Political theorists have argued that these contributions have more pervasively undermined democratic processes (Warren 2004; Thompson 1995).

When large contributions are permitted, policymakers have pressured potential donors to give large sums if they wanted their issues to be addressed by government.

Political scientist Michael Malbin notes that these efforts might be thought of as harassment or "rent seeking" by politicians, but "whatever the language, the record is replete with fully documented examples from 1972 onward. This is not about appearances. The problem is real, it cannot possibly be rooted out with disclosure, and it is stimulated by unlimited contributions" (Malbin 2008).

6. The dangers of quid pro quo corruption in state and local governments have been demonstrated in a variety of states. In *Nixon v Shriek*, the majority opinion identified several cases of quid pro quo corruption in Missouri. Most recently, the appellate court decision in *Lair v Motl* cited evidence in Montana of interest groups offering money for policy, and of policymakers suggesting policy for money. The court noted 'State Representative Hal Harper testified groups "funnel more money into campaigns when certain special interests know an issue is coming up, because it gets results." State Senator Mike Anderson sent a "destroy after reading" letter to his party colleagues, urging them to vote for a bill so a PAC would continue to funnel contributions to the party: "Dear Fellow Republicans. Please destroy this after reading. Why? Because the Life Underwriters Association in Montana is one of the larger Political Action Committees in the state, and I don't want the Demo's to know about it! In the last election they gave $8,000 to state candidates. . . . Of this $8,000 – Republicans got $7,000 – you probably got something from them. This bill is

important to the underwriters and I have been able to keep the contributions coming our way. In 1983, the PAC will be $15,000. Let's keep it in our camp." State Senator Bruce Tutvedt stated in a declaration that during the 2009 legislative session the National Right to Work group promised to contribute at least $100,000 to elect Republican majorities in the next election if he and his colleagues introduced and voted for a right-to-work bill in the 2011 legislative session.

7. Because quid pro quo exchanges are illegal, participants do their best to hide them. Such exchanges are easy to hide, so it is useful to look at statistical evidence as well. Statistical studies of the impact of PAC contribution on federal lawmaking have had mixed results, which is precisely what PAC contribution limits were designed to produce. But studies of other ways that groups can effectively make large indirect contributions show that these contributions make an impact on the content of legislation. Lobbyists frequently hold fundraisers for candidates, which enables the lobbyist to be responsible for channeling very large sums to incumbent politicians. A recent study by Amy McCay (2018) shows that when lobbyists give a proposed amendment to a Senator for whom they have held a fundraising event, the amendment is more likely to be offered and adopted without any change in language than if they have not held a fundraiser. This results holds after statistical controls for party, ideology, lobbying expenditures,

and home-state connections.[1] This result fits previous research by Hall and Wayman (1990) and Hall (1996) that contributions have an impact on committee markups and deliberations, rather than final roll-call votes after the deliberations on wording have concluded.[2]

8. Large individual contributions to members of Congress have been banned since the comprehensive amendments to FECA in 1974, but for a time individuals and groups could make unlimited sized contributions to parties. This "soft money" was in many cases earmarked to specific candidates. In 1996 for example, Bill Clinton held many soft money fundraising events in the White House and benefitted enormously from targeted party spending before the campaign began in states that his campaign would target.[3] Donors also earmarked contributions to aid specific congressional candidates, and made the candidates aware of their generosity.[4] When Congress moved to ban large soft money contributions to political

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[1] Amy Melissa McCay, 2018. "Fundraising for Favors? Linking Lobbyist-Hosted Fundraisers to Legislative Benefits." *Political Research Quarterly*, 71: 869-880.

[2] Hall, Richard L. 1996. Participation in Congress. New Haven: Yale University Press. Hall, Richard L. and Frank W. Wayman. 1990. "Buying Time: Moneyed Interests and The Mobilization of Bias in Congressional Committees." American Political Science Review 84(3):797–820.

[3] Clyde Wilcox, "Follow the Money: Clinton, Campaign Finance, and Reform," in *Understanding the Presidency*, eds. James P. Pfiffner and Roger Davidson (2nd edition 2000).

[4] Brooks Jackson, *Honest Graft* (Knopf, 1988).

parties, the motivation of sponsors in the House and Senate was to limit corruption.

Soft money donors complained that invitations to give large sums were offers they could not refuse. Gerald Greenwald, chairman emeritus of United Airlines, reported that corporations and unions gave soft money because "experience has taught that the consequences of failing to contribute (or to contribute enough) may be very negative" (Greenwald 2003). The negative consequences of not giving, cited also by Malbin above, is a form of corruption.

It was also evident that these large contributions led to legislative favors. Senator Warren Rudman declared in a declaration for McConnell that "Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. In these meetings, these special interests, often accompanied by lobbyists, press elected officials—Senators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party—to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to

amend legislation, to block legislation, and to vote on legislation in a certain way."[5]

9. If independent bodies are permitted to receive contributions of the size that are permitted for political parties, this will effectively dramatically increase the allowable size of contribution limits to candidates. A candidate for state legislature, where the individual contribution limit is $4,700 could form an independent body and accept contributions of well over $100,000. Candidates for local offices would follow suit, and effectively New York would allow very large contributions to all candidates. Candidates would benefit greatly by creating an independent body, thereby collecting contributions of a size that are likely to lead to an increase in quid pro quo corruption.

10. Contribution limits to state and local candidates in New York are already higher than comparable national limits and those of most states. An individual can contribute $47,100 to a general election candidate for governor, $11,800 to a candidate for state senate, and $4,700 to a candidate for the general assembly. In contrast, an individual may contribute only $2,800 to a general election candidate for the U.S. House or Senate.

11. Allowing independent bodies to have housekeeping accounts would provide donors with an additional route to increase the size of their aggregate contributions,

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[5] Declaration of Senator Warren Rudman, at 3 n.7, McConnell, 251 F. Supp. 2d 176 (No. 02-0582).

and serve no obvious purpose. Housekeeping accounts have no contribution limits, but are to be used to offset the substantial costs of operating a political party, and complying with the regulations on parties. Independent bodies operate in a far less regulated environment, and their operational costs are minor compared to those of political parties. Parties operate over a wide range of statewide and local elections, and have a vastly larger task than independent bodies.

III. Allowing Independent Bodies to Have the Same Contribution Limits as Political Parties and to Maintain Housekeeping Accounts would Substantially Increase the Risk of the Perception of Corruption

12. Large contributions also lead to increased public perceptions of corruption, which can itself have harmful effects on democracy (Warren 2006; Shapiro 2003).

13. Surveys have repeatedly shown that the public believes that large contributions to candidates lead to corruption. These results have been consistent for decades. Most recently, the Pew Research Center asked respondents whether "people who give a lot of money to elected officials do not have more influence than others" describes the country very well, somewhat well, not too well, or not at all. It is important to note that the negative phrasing of the statement would reduce agreement. The survey reported that 72% responded that it did not describe the country well, and of those the largest group – 43% said it did not describe the country at all. Yet 74% said that it was

very important that large donors do not have more influence than others, and an additional 16% said that it was somewhat important.

IV. The Crucial Role of Political Parties in American Democracy Justifies a Higher Contribution Limit for Parties, and Allowing them Housekeeping Accounts

14. Political scientists believe that political parties play a vital role in democracy. This belief is near universal. Below are a small sampling of opinions by leading academic experts.

One of the very most important of early political scientists E. E. Schattschneider wrote on page 1 of his book *Party Government* that "political parties created democracy, and . . . democracy is unthinkable save in terms of parties."

Testifying before the Senate Committee on Rules and Administration in April, 2000, Prof. Michael Munger, chair designate of the political science department at Duke stated that "[I]t is no exaggeration to say that there is an emerging consensus among professional political scientists that party is the most fundamental of all democratic institutions."

Morris P. Fiorina wrote in 1980 in an essay on collective responsibility that "the only way collective responsibility has ever existed, and can exist, given our institutions, is through the agency of the political party; in American politics, responsibility requires cohesive parties."

Raymond La Raja and Brian Schaffner write in their recent book *Campaign*

Finance and Political Polarization that "We start with the premise that political parties are key institutions in a democracy because they help mediate between citizens and governing elites. In theory and practice, parties help link government to citizens by recruiting candidates, waging campaigns that inform and mobilize voters, and ultimately organizing the government to implement broadly supported policies. Voters generally comprehend what the major American parties stand for with respect to principles about the role of government, and they have the opportunity during elections to hold party candidates accountable for campaign promises and policy outputs. Because the party wants to control government, it is motivated to tailor policies that will attract votes and win elections. Moreover, parties typically serve as interest aggregators that pull together various factions into a coalition that pursues broader public purposes than any single faction. In this way, parties help to overcome the inherent fragmentation of interests in a diverse country by forging alliances among constituent groups; this gives the parties legitimacy in claiming to govern for the common good. (p6).

15. Incumbent politicians who value reelection have repeatedly voted to allow higher contribution limits to political parties than to their own reelection committees. Congress voted to ban unlimited contribution to political parties, but it allows very large contributions to parties but not to interest groups (PACs) or candidates. The state legislature of New York and other states have also voted to allow

larger contributions to parties than to their own reelection campaigns or to interest groups. By this action, legislators who work within parties have demonstrated their perception of their worth.

16. Political parties perform the valuable work of organizing and structuring political debates by aggregating interests of more particularistic political groups. They nominate candidates, which in some cases means recruitment and training, and do so through democratic processes of primary elections or caucuses. Elections without political parties would be chaotic. They develop party platforms, and help organize government. They must rent facilities in numerous locales, buy computers, hire staff, coordinate volunteers, prepare election materials. These substantial tasks justify a higher contribution limit and the existence of a housekeeping fund.

17. Although political scientists differ in their details of their analysis, most believe that parties are different from interest groups and therefore merit higher contribution limits. Michael Malbin, a campaign finance specialist at the University of New York in Albany, notes that the question

"is whether it is OK to prohibit a donor from giving unlimited amounts to a political campaign. Is it reasonable and constitutional to think that tens of millions of dollars from, say, a real estate developer might create the appearance of corruption if given to a candidate who is in the middle of deciding a zoning rule that will directly

affect the donor? Would this smell bad? It would. It looks corrupt. It has the appearance of corruption. And because it has that appearance, the Supreme Court has consistently said it is OK for a legislature to enact contribution limits. Once you cross that First Amendment threshold, it is up to the legislature to decide the fine points, as long as it does not discriminate unconstitutionally in doing so. It is permissible for a legislature to decide how high the limits should be. It is also up to the legislature to decide whether political parties are different from special interest groups and therefore deserve higher contribution limits. A very few states have set the same limits for parties and interest groups. I think that is bad policy, but it is fully within the legislature's constitutional authority. But most states say that parties and interest groups are different and therefore should have different limits. As a matter of policy, I agree with this. More importantly, the distinction is reasonable and constitutionally defensible. Unlimited contributions are potentially corrupting. Once you have limits, it is up to the legislature to make reasonable distinctions."

18. Political parties in New York have significant democratic controls, which do not exist for independent bodies. They form county committees, which are chosen through a primary election if contested. They appoint precinct committeepersons. They adopt and file a set of rules for the state party committee and the county party committees, and choose members of the state committee typically by intra-party election. The

structure of the party, the way it constitutes itself, and the way it chooses its candidates are governed by state law. Party officials are prohibited from certain jobs, and there are other significant regulations on parties. These democratic controls make parties preferable to a proliferation of independent bodies with little regulatory controls or oversight

V. Conclusion

19. In sum, the New York statutes at issue are appropriately designed to prevent quid pro quo corruption or the appearance of quid pro quo corruption. The statutes operate to prevent potential instances of quid pro quo corruption, as set forth above, and also recognize the unique position political parties occupy in this country.

Meanwhile, independent bodies have more than sufficient avenues to carry out their more limited activities, while limiting the risk of quid pro corruption.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Doha, Qatar
June 13, 2019

/s/ Clyde Wilcox
Clyde Wilcox

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

18-cv-459 (GTS/ATB)

UPSTATE JOBS PARTY, MARTIN BABINEC, and JOHN BULLIS,

Plaintiffs,

-against-

PETER S. KOSINSKI, New York State Board of Elections Co-Chair Commissioner, DOUGLAS A. KELLNER, New York State Board of Elections Co-Chair Commissioner, ANDREW J. SPANO, New York State Board of Elections Commissioner, and GREGORY P. PETERSON, New York State Board of Elections Commissioner, all in their official capacities.

Defendants.

DECLARATION OF BRIAN L. QUAIL

BRIAN L. QUAIL declares the following to be true and correct under penalty of perjury, pursuant to 28 U.S.C. § 1746:

1. I serve as Co-Counsel of the New York State Board of Elections, and I have been employed by the State Board since 2014. I previously served as an Election Commissioner for Schenectady County for eight years.

2. I am familiar with the facts and circumstances of the above captioned case, and I make this Declaration

based on such knowledge and my experience with New York Election Law, campaign finance and election administration.

3. New York currently recognizes eight separate Parties, each of which has met the empirical standard set in New York for a group to be recognized as a Party. As of April 1, 2018, the Democratic Party has 5,621,811 active enrollees; the Republican Party, 2,632,341 enrollees; the Conservative Party, 145,421 enrollees; Green Party, 26,462 enrollees; the Working Families Party, 41,019 enrollees; the Independence Party 436,312 enrollees; Reform Party, 1,802 enrollees; Women's Equality Party, 4,374 enrollees.

4. New York is a fusion voting state. A candidate can be supported by one or more Parties and Independent Bodies, and this is typical. Fusion voting is the process whereby a candidate runs on multiple separate ballot lines, political Party and Independent Bodies, but the candidate's vote totals are added or "fused" together for a single vote tally for that candidate.

5. For example, the candidate nominated by UJP referenced in Complaint Paragraph 17, Ben Walsh for Mayor of Syracuse, was also on the ballot as the Party candidate of both the Reform Party[1] and the Independence Party. As such he was able to be supported by two Parties and an Independent Body. See EXHIBIT "A".

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[1] On the ballot Mr. Walsh's name appeared in space reserved for the Reform Party and the UJP label was in the same ballot square. The vote totals for the Reform Party and UJP, therefore, are indistinguishable. Mr. Walsh received 12,351 votes ion the Independence Party line and 1,233 votes on the combined Reform Party/UJP line.

6. As relevant to the current matter, New York State's Election Law creates classifications of political entities for ballot access purposes of Parties and Independent Bodies. N.Y. Election Law §1-104(3); §1-104(6); and §1-104(12).

7. Plaintiff UJP claims to be an Independent Body which was formed in 2016 when Mr. Babinec chose to run for Congress.

8. Specifically, a Party is formed if a candidate for any Independent Body receives at least 50,000 votes on its independent nominating line at a gubernatorial election. N.Y. Election Law §1-104(3). Once an organization obtains Party status it may, as relevant to the current matter, fundraise for elections, create a housekeeping account for Party related expenses, and make uncapped transfers to Party candidates. Additionally, individuals who wish to contribute to a Party may do so up to $109,600.00.

9. Contribution limits to an Independent Body depend on how the Independent Body is organized for campaign finance purposes. Notably an Independent Body for ballot access purposes is not the same as an "independent expenditure committee" which is an entity that raises and spends money in a manner that is independent from and not coordinated with any candidate the entity supports. An Independent Body thus would be treated like any other campaign finance entity in accordance with its manner of organization — such as a Political Action Committee (PAC) or a candidate/multi-candidate authorized committee.

10. A PAC can receive significant contributions (subject to the provisions of N.Y. Election Law §14-100 (16), §14-107-a and §14-116 (2)) but may only make

contributions subject to the contribution limit of the recipient candidate or committee.

11. If an Independent Body organizes itself for campaign finance purposes as an authorized committee, its contribution limit would be equal to the aggregate of all of the candidate limits for the candidates authorizing the committee. For example, if an Independent Body was the authorized committee for three candidates for Statewide Office (Governor, Comptroller, Attorney General) the aggregate limit for the Independent Body would be $132,000 ($44,000 x 3).

12. The Plaintiffs in this case appear to have already created an independent expenditure committee (see Exhibit "B") which under New York Law has unlimited in-coming contribution limits (with a few exceptions) and is also unlimited in how much it can spend. However, an independent expenditure committee cannot coordinate with candidates.

13. Entities that do not engage in activities related to an election have no obligation to make disclosures pursuant to the Election Law.

14. Political parties must comply with the organizational requirements of the Election Law (Article 2), select their nominees through the procedures specified by law, most typically primary elections (Article 6). Many of these requirements specified by law are outlined in the accompanying Memorandum of Law.

15. Political parties may have housekeeping accounts for purposes of maintaining Party infrastructure and non-election related expenses. These funds must be maintained in a segregated bank account, as provided by Election§ 14-124 (3).

16. Housekeeping funds, expressly not for election purposes, assist a Party in meeting its statutory organizational obligations. Housekeeping accounts are available to all Parties.

17. Organizations engaging exclusively in activities that are not election related generally have no obligations under Article 14 of the Election Law related to campaign finance rules. Persons wishing to engage in such activities can organize their election-related and non-election related activities separately. Contributions and expenditures related to the former would not be subject to limits or disclosure under the election law.

18. If the Court granted relief to the Plaintiffs herein, the well-considered statutory process that provides regulatory burdens and benefits to Parties (New York Election Law Art. 2) along with a Party committee contribution limit of $109,600 to Party committees, would be nullified. In its place, any persons who secure an independent nomination for any candidate for any office would be able to claim Party status, along with a $109,600 contribution limit, unlimited ability to spend on candidates and Party housekeeping accounts. This overnight proliferation of "Parties" qualifying for the $109,600 contribution limit, in a context that is unregulated by Article 2 of the Election Law and other provisions of law, would greatly increase the risk of *quid pro quo* corruption.

19. By way of example, let us assume that a Candidate in a Town of 20,000 voters with a contribution limit of $1,000 (N.Y. Election Law § 14-114) is running for Town Supervisor. The Candidate is unsatisfied with the statutory contribution limit. Accordingly, he and a friend form an Independent Body, circulate an Independent nominating petition

and by collecting the requisite signatures (at least 5% of the number votes cast for governor in the town in the last gubernatorial election (N.Y. Election Law § 6-142 (2)), thereby secures an independent nominating line for the November ballot. This is in addition to the Party line the Candidate in this hypothetical already appears on. If Independent Bodies suddenly qualify as a matter of course as "Parties," the Candidate will then file Party registration documents with the New York State Board of Elections and thus creates an ad-hoc Party committee which the Candidate controls and which is capable of supporting his campaign with a Contribution limit over 109 times that which would otherwise apply under the existing law.

20. While parties serve the purposes of aggregating associational interests and providing meaningful context to ballot access and ballot organization, the remedy that plaintiffs seek would merely eviscerate all candidate contribution limits.

21. A ruling in plaintiffs favor would bring confusion to the settled law of Parties and contribution limits. The State Board of Elections would face potentially many hundreds of new Party filings to process. How Independent Bodies would fit into a new framework where Parties and Independent Bodies are conflated would be confusing to Boards of Elections, contributors, Parties and Independent Bodies. The State Board's registration forms, guidance documents, training materials and regulations would need to be amended, but it would be unclear in what manner because the relief the plaintiffs' seek would so muddle New York's campaign finance system. The Supreme Court has held there is a compelling state interest in the integrity of an unfolding election process, and courts should avoid throwing the election process into

disarray by granting preliminary injunctions (Purcell v. Gonzalez, 549 U.S. 1 (2006). This caution should apply in this case.

Dated: April 30, 2018

/s/ Brian L. Quail
Brian L. Quail

APPENDIX K

9 NYCRR § 6214.0

This document reflects those changes received from the NY Bill Drafting Commission through October 4, 2024

NY - New York Codes, Rules and Regulations > TITLE 9. EXECUTIVE DEPARTMENT > SUBTITLE V. STATE BOARD OF ELECTIONS > PART 6214. CAMPAIGN CONTRIBUTION LIMIT CONSUMER PRICE INDEX ADJUSTMENT

§ 6214.0 Campaign contribution limit consumer price index adjustment

Pursuant to Election Law section 14-114(1)(a), the New York State Board of Elections is required to adjust the annual contribution limit for political party committees in accordance with changes in the consumer price index. The following limit will apply to political party committee campaign contributions until such time as the State Board of Elections adjusts the limits to reflect changes in the consumer price index in accordance with the Election Law:

Previous Limit: $ 117,300.00

Current Limit: $ 138,600.00

NY CLS Elec § 14-100

Current through 2024 released Chapters 1-432

New York Consolidated Laws Service > Election Law (Arts. 1 — 17) > Article 14 Campaign Receipts and Expenditures; Public Financing (Titles I — II) > Title I Campaign Receipts and Expenditures (§§ 14-100 — 14-132)

§ 14-100. Definitions

As used in this article:

1. "political committee" means any corporation aiding or promoting and any committee, political club or combination of one or more persons operating or co-operating to aid or to promote the success or defeat of a political party or principle, or of any ballot proposal; or to aid or take part in the election or defeat of a candidate for public office or to aid or take part in the election or defeat of a candidate for nomination at a primary election or convention, including all proceedings prior to such primary election, or of a candidate for any party position voted for at a primary election, or to aid or defeat the nomination by petition of an independent candidate for public office; but nothing in this article shall apply to any committee or organization for the discussion or advancement of political questions or principles without connection with any vote or to a national committee organized for the election of presidential or vice-presidential candidates; provided, however, that a person or corporation making a contribution or contributions to a candidate or a political committee which has filed pursuant to section 14-118 shall not, by that fact alone, be deemed to be a political committee as herein defined.

2. ”party committee” means any committee provided for in the rules of the political party in accordance with section two-one hundred of this chapter, other than a constituted committee.

3. ”constituted committee” means a state committee, a county committee or a duly constituted subcommittee of a county committee;

4. ”duly constituted subcommittee of a county committee” means, outside the city of New York, a city, town or village committee, and, within the city of New York, an assembly district committee, which consists of all county committee members from the city, town, village or assembly district, as the case may be, and only such members;

5. ”non-candidate expenditures” means expenditures made by a party committee or a constituted committee to maintain a permanent headquarters and staff and carry on ordinary party activities not promoting the candidacy of specific candidates;

6. ”district” means the entire state or any part thereof, as the case may be;

7. ”candidate” means an individual who seeks nomination for election, or election, to any public office or party position to be voted for at a primary, general or special or New York city community school district election or election for trustee of the Long Island Power Authority, whether or not the public office or party position has been specifically identified at such time and whether or not such individual is nominated or elected, and, for purposes of this subdivision, an individual shall be deemed to seek nomination for election, or election, to an office or position, if he has (1) taken the action necessary to qualify himself for nomination for election, or

election, or (2) received contributions or made expenditures, given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to any office or position at any time whether in the year in which such contributions or expenditures are made or at any other time; and

8. ”legislative leader” means any of the following: the speaker of the assembly; the minority leader of the assembly; the temporary president of the senate and the minority leader of the senate.

9. ”contribution” means:

(1) any gift, subscription, outstanding loan (to the extent provided for in section 14-114 of this chapter), advance, or deposit of money or any thing of value, made in connection with the nomination for election, or election, of any candidate, or made to promote the success or defeat of a political party or principle, or of any ballot proposal,

(2) any funds received by a political committee from another political committee to the extent such funds do not constitute a transfer,

(3) any payment, by any person other than a candidate or a political committee authorized by the candidate, made in connection with the nomination for election or election of any candidate, including any payment or expenditure where coordination has occurred as defined in *section 14-107* of this article, or any payment made to promote the success or defeat of a political party or principle, or of any ballot proposal including but not limited to compensation for the personal services of any individual which are

rendered in connection with a candidate's election or nomination without charge; provided however, that none of the foregoing shall be deemed a contribution if it is made, taken or performed by a candidate or his spouse or by a person or a political committee independent of the candidate or his agents or authorized political committees. For purposes of this article, the term "independent of the candidate or his agents or authorized political committees" shall mean that the candidate or his agents or authorized political committees did not authorize, request, suggest, foster or cooperate in any such activity; and provided further, that the term contribution shall not include:

(A) the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee,

(B) the use of real or personal property and the cost of invitations, food and beverages voluntarily provided by an individual to a candidate or political committee on the individual's residential premises for candidate-related activities to the extent such services do not exceed five hundred dollars in value, and

(C) the travel expenses of any individual who on his own behalf volunteers his personal services to any candidate or political committee to the extent such expenses are unreimbursed and do not exceed five hundred dollars in value.

10. "transfer" means any exchange of funds or any thing of value between political committees authorized by the same candidate and taking part solely in his campaign, or any exchange of funds between a

party or constituted committee and a candidate or any of his authorized political committees.

11. ”election” means all general, special and primary elections, but shall not include elections provided for pursuant to the education law, special district elections, fire district elections or library district elections.

12. ”clearly identified candidate” means that:

(a) the name of the candidate involved appears;

(b) a photograph or drawing of the candidate appears; or

(c) the identity of the candidate is apparent by unambiguous reference.

13. ”general public audience” means an audience composed of members of the public, including a targeted subgroup of members of the public; provided, however, it does not mean an audience solely comprised of members, retirees and staff of a labor organization or members of their households or an audience solely comprised of employees of a corporation, unincorporated business entity or members of a business, trade or professional association or organization.

14. ”labor organization” means any organization of any kind which exists for the purpose, in whole or in part, of representing employees employed within the state of New York in dealing with employers or employer organizations or with a state government, or any political or civil subdivision or other agency thereof, concerning terms and conditions of employment, grievances, labor disputes, or other matters incidental to the employment relationship. For the purposes of this article, each local, parent

national or parent international organization of a statewide labor organization, and each statewide federation receiving dues from subsidiary labor organizations, shall be considered a separate labor organization.

15. "independent expenditure committee" means a political committee, that makes only independent expenditures as defined in this article, and does not coordinate with a candidate, candidate's authorized committees or an agent of the candidate as defined in paragraph (g) of subdivision one of *section 14-107* of this article.

For purposes of this section, an independent expenditure committee may be created by a person, group of persons, corporation, unincorporated business entity, labor organization or business, trade or professional association, or organization, or political committee.

16. "political action committee" means a political committee which makes no expenditures to aid or take part in the election or defeat of a candidate, or to promote the success or defeat of a ballot proposal, other than in the form of contributions, including in-kind contributions, to candidates, candidate's authorized committees, party committees, constituted committees, or independent expenditure committees provided there is no common operational control between the political action committee and the independent expenditure committee; or in the form of communications that are not distributed to a general public audience as described in subdivision thirteen of this section.

For purposes of this paragraph, "common operational control" means that (i) the same individual or

individuals exercise actual and strategic control over the day-to-day affairs of both the political action committee and the independent expenditure committee, or (ii) employees of the political action committee and the independent expenditure committee engage in communications related to the strategic operations of either committee.

17. ”foreign national” means foreign national as such term is defined by subsection (b) of section 30121 of title 52 of the United States code.

N.Y. Elec. Law § 14-114

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Current through 2024 NY Law Chapter 432

Section 14-114 - Contribution and receipt limitations

1. The following limitations apply to all contributions to candidates for election to any public office or for nomination for any such office, or for election to any party positions, and to all contributions to political committees working directly or indirectly with any candidate to aid or participate in such candidate's nomination or election, other than any contributions to any party committee or constituted committee:

a. In any election for a public office to be voted on by the voters of the entire state, or for nomination to any such office, no contributor may make a contribution to any candidate or political committee, participating in the state's public campaign financing system pursuant to title two of this article and no such candidate or political committee may accept any contribution from any contributor, which is in the aggregate amount greater than eighteen thousand dollars divided equally among the primary and general election in an election cycle; provided however, that the maximum amount which may be so contributed or accepted, in the aggregate, from any candidate's party in the state, excluding voters in inactive status, multiplied by $.025, and in the case of any election for a public office, an amount equivalent to the product of the number of registered voters in the state excluding voters in inactive status, multiplied by $.025.

b. In any nomination or election of a candidate participating in the state's public campaign

financing system pursuant to title two of this article, no such candidate or political committee may accept any contribution from any contributor, which is in the aggregate amount greater than :

(i) in the case of a nomination or election for state senator, ten thousand dollars, divided equally among the primary and general election in an election cycle; and

(ii) in the case of a nomination or election for member of the assembly, six thousand dollars, divided equally among the primary and general election in an election cycle; provided however, that the maximum amount which may be so contributed or accepted, in the aggregate, from such candidate's child, parent, grandparent, brother and sister, and the spouse of any such persons, shall not exceed in the case of any nomination for state senator or member of the assembly an amount equivalent to the number of enrolled voters in the candidate's party in the district in which he or she is a candidate, excluding voters in inactive status, multiplied by $25 and in the case of any election for state senator or member of the assembly, an amount equivalent to the number of registered voters in the district, excluding voters in inactive status, multiplied by $.25; provided, however, in the case of a nomination or election of a state senator, twenty thousand dollars, whichever is greater, or in the case of a

(c) In any election for a public office to be voted on by the voters of the entire state, or for nomination to any such office, no contributor may make a contribution to any candidate or political committee in connection with a candidate who is not a participat-

ing candidate as defined in subdivision fourteen of section 14-200-a of this article, and no such candidate or political committee may accept any contribution from any contributor, which is in the aggregate amount greater than eighteen thousand dollars, divided equally among the primary and general election in an election cycle; provided however, that the maximum amount which may be so contributed or accepted, in the aggregate, from any candidate's child, parent, grandparent, brother and sister, and the spouse of any such persons, shall not exceed in the case of any nomination to public office an amount equivalent to the product of the number of enrolled voters in the candidate's party in the state, excluding voters in inactive status, multiplied by $.025, and in the case of any election for a public office, an amount equivalent to the product of the number of registered voters in the state, excluding voters in inactive status, multiplied by $.25.

d. In any nomination or election of a candidate who is not a participating candidate for state senator, ten thousand dollars, divided equally among the primary and general election in an election cycle; in the case of a nomination or election for member of the assembly, six thousand dollars, divided equally among the primary and general election in an election cycle.

e. In any other election for party position or for election to a public office or for nomination for any such office, no contributor may make a contribution to any candidate or political committee and no candidate or political committee of

* * *

enrolled voters in the candidate's party in the district in which he or she is a candidate, excluding voters in inactive status, multiplied by $.o5, and

(ii) in the case of any election for a public office, the product of the total number of registered voters in the district, excluding voters in inactive status, multiplied by $.o5, however in the case of a nomination within the city of New York for the office of mayor, public advocate or comptroller, such amount shall be not less than four thousand dollars nor more than twelve thousand dollars as increased or decreased by the cost of living adjustment described in paragraph f of this subdivision; in the case of an election within the city of New York for the office of mayor, public advocate or comptroller, twenty-five thousand dollars as increased or decreased by the cost of living adjustment described in paragraph f of this subdivision but in no event shall any such maximum exceed fifty thousand dollars or be less than one thousand dollars; provided however, that the maximum amount which may be so contributed or accepted, in the aggregate, from any candidate's child, parent, grandparent, brother and sister, and the spouse of any such persons, shall not exceed in the case of any election for party position or nomination for public office an amount equivalent to the number of enrolled voters in the candidate's party in the district in which he or she is a candidate, excluding voters in inactive status, multiplied by $.25 and in the case of any election to public office, an amount equivalent to the number of registered voters in the district, excluding voters in inactive status, multiplied by $.25; or twelve hundred fifty dollars,

whichever is greater, but in no event shall any such maximum exceed one hundred thousand dollars.

* * *

most recent available monthly consumer price index for all urban consumers published by the United States bureau of labor statistics and such consumer price index published for the same month four years previously. The amount of each contribution limit fixed in this subdivision shall be adjusted by the amount of such percentage difference to the closest one hundred dollars by the state board which, not later than the first day of February in each such year, shall issue a regulation publishing the amount of each such contribution limit. Each contribution limit as so adjusted shall be the contribution limit in effect for any election held before the next such adjustment.

(2) Provided, however, that such adjustments shall not occur for candidates seeking statewide office, or the position of state senator or member of the assembly, whether such candidate does or does not participate in the public finance program established pursuant to title two of this article.

g. Notwithstanding any other contribution limit in this section, participating candidates as defined in subdivision fourteen of section 14-200-a of this article may contribute, out of their own money, three times the applicable contribution limit to their own authorized committee.

2. For purposes of this section, contributions other than of money shall be evaluated at their fair market value. The state board of elections shall promulgate

regulations, consistent with law, governing the manner of computing fair market value.

3. As used in this section the term “contributor” shall not include a party committee supporting the candidate of such party or a constituted committee supporting the candidate of such party.

* * *

be deemed contributed to every candidate supported by such committee. That portion shall be determined by allocating the contributions received by the committee among all the candidates supported by the committee in accordance with any formula based upon reasonable standards established by the committee. The statements filed by such committee in accordance with this article shall set forth, in addition to the other information required to be set forth, the total amount received by the committee from each contributor on behalf of all such candidates and the amount of each such contribution allocated to each candidate by dollar amount and percentage. Nothing in this subdivision shall require allocating contributions expended on non-candidate expenditures to candidates.

5. No constituted committee may expend, in any twelve month period terminating on the day of a general election, other than as non-candidate expenditures, any portion of any individual contribution which exceeds, in the case of a state committee, one-half of one cent for each registered voter in the state, or, in the case of any other constituted committee, the greater of one cent for each registered voter in the district in which the committee is organized or five hundred dollars. The number of such voters shall be determined as of the date of such general election or as of the date

of the general election in whichever of the preceding four years shall result in the greatest number.

6.

a. A loan made to a candidate or political committee, other than a constituted committee, by any person, firm, association or corporation other than in the regular course of the lender's business shall be deemed, to the extent not repaid by the date of the primary, general or special election, as the case may be, a contribution by such person, firm, association or corporation.

* * *

general or special election, as the case may be, a contribution by the obligor on the loan and by any other person endorsing, cosigning, guaranteeing, collateralizing or otherwise providing security for the loan.

c. Lobbyists, as defined by subdivision (a) of section one-c of the legislative law or by subdivision (a) of section 3-211 of the administrative code of the city of New York, political action committees, labor unions, and any person who has registered with the state board of elections as an independent expenditure committee pursuant to subdivision three of section 14-107 of this article are prohibited from making loans to candidates or political committees; provided, however, that a lobbyist shall not be prohibited from making a loan to himself or herself or to his or her own political committee when such lobbyist is a candidate for office.

7. For the purposes of this section, the number of registered or enrolled voters shall be determined as of the date of the general, special or primary election, as

the case may be or as of the date of the general election in any of the preceding four years, whichever date shall result in the greatest number and candidates running jointly for the offices of governor and lieutenant governor in a general or special election shall be deemed to be one candidate.

8. Except as may otherwise be provided for a candidate and his family, no person may contribute, loan or guarantee in excess of one hundred fifty thousand dollars within the state in connection with the nomination or election of persons to state and local public offices and party positions within the state of New York in any one calendar year. For the purposes of this subdivision "loan" or "guarantee" shall mean a loan or guarantee which is not repaid or discharged in the calendar year in which it is made.

10.

* * *

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b. At the beginning of each fourth calendar year, commencing in nineteen hundred ninety-five, the state board shall determine the percentage of the difference between the most recent available monthly consumer price index for all urban consumers published by the United States bureau of labor statistics and such consumer price index published for the same month four years previously. The amount of such contribution limit fixed in paragraph a of this subdivision shall be adjusted by the amount of such percentage difference to the closest one hundred dollars by the state board which, not later than the first day of February in each such year, shall issue a regulation publishing the amount of such contribution limit. Such contribution limit as

so adjusted shall be the contribution limit in effect for any election held before the next such adjustment.

11. A board of elections, as defined in subdivision twenty-six of section 1-104 of this chapter, shall calculate and publish on its website, on or before the fifteenth day of April, all contribution limits established pursuant to this section for the county, town, city and village offices on the ballot in that year, and within the same time period provide such calculated contribution limits to the state board of elections in the format required by such board.

N.Y. Elec. Law §14-114

Amended by New York Laws 2023, ch. 105,Sec. 1, eff. 3/24/2023. Amended by New York Laws 2020, ch. 58, Sec. ZZZ-3, eff. 11/9/2022.
Amended by New York Laws 2019, ch. 412, Sec. 1, eff. 12/15/2019.
Amended by New York Laws 2019, ch. *55,* Sec. AAA-1, eff. 4/12/2019.

NY CLS Elec § 14-124

Current through 2024 released Chapters 1-432

New York Consolidated Laws Service > Election Law (Arts. 1 — 17) > Article 14 Campaign Receipts and Expenditures; Public Financing (Titles I — II) > Title I Campaign Receipts and Expenditures (§§ 14-100 — 14-132)

§ 14-124. Exceptions

1. This article shall not apply to any person, association or corporation engaged in the publication or distribution of any newspaper or other publication issued at regular intervals in respect to the ordinary conduct of such business.

2. The filing requirements and the expenditure, contribution and receipt limits of this article shall not apply to any candidate or committee who or which engages exclusively in activities on account of which, pursuant to the laws of the United States, there is required to be filed a statement or report of the campaign receipts, expenditures and liabilities of such candidate or committee with an office or officers of the government of the United States, provided a copy of each such statement or report is filed in the office of the state board of elections.

2-a. The provisions of sections 14-102, 14-112 and subdivision one of *section 14-118* of this article shall not apply to a political committee supporting or opposing candidates for state or local office which, pursuant to the laws of the United States, is required to file a statement or report of the campaign receipts, expenditures and liabilities of such committee with an office or officer of the government of the United States, provided that such committee makes no expenditures

to aid or take part in the election or defeat of a candidate for state or local office other than in the form of contributions which do not exceed in the aggregate one thousand dollars in any calendar year, and provided further, that a copy of the federal report which lists such contributions is filed with the appropriate board of elections at the same time that it is filed with the federal filing office or officer.

3. The contribution and receipt limits of this article shall not apply to monies received and expenditures made by a party committee or constituted committee to maintain a permanent headquarters and staff and carry on ordinary activities which are not for the express purpose of promoting the candidacy of specific candidates; provided that such monies described in this subdivision shall be deposited in a segregated account.

4. No candidate and no political committee taking part solely in his campaign and authorized to do so by him in accordance with this article and no committee involved solely in promoting the success or defeat of a ballot proposal shall be required to file a statement required by sections 14-102 and 14-104 of this article if at the close of the reporting period for which such statement would be required neither the aggregate receipts nor the aggregate expenditures by and on behalf of such candidate or to promote the success or defeat of such proposal, by such candidate or such political committee or committees exceed one thousand dollars and such candidate or such committee files, on the filing date otherwise provided, a statement, sworn or subscribed and bearing a form notice that false statements made therein are punishable as a class A misdemeanor pursuant to *section 210.45 of the penal law*, stating that each of such aggregate receipts and

aggregate expenditures does not exceed one thousand dollars.

5. The provisions of sections 14-104 and 14-112, and subdivision a [1][*] of section 14-118 shall not apply to any candidate for member of a county committee of a political party or any candidate for delegate or alternate delegate to a judicial district convention if the campaign expenditures made by or on behalf of such candidate do not exceed fifty dollars.

6. The provisions of sections 14-102, 14-104 and 14-118 respectively, of this article shall not apply to a candidate or a committee taking part solely in his campaign and authorized to do so by him in accordance with the provisions of this article in a campaign for election to public office or to a committee involved solely in promoting the success or defeat of a ballot proposal in a city, town or village having a population of less than ten thousand, as shown by the latest federal or state census or enumeration, unless the aggregate receipts of said candidate and his authorized committees or the committees promoting the success or defeat of a proposal or the aggregate expenditures made by such candidate and his authorized committees or the committees promoting the success or defeat of a proposal exceed one thousand dollars.

7. No candidate who is unopposed in a primary election and no political committee authorized by him pursuant to the provisions of this article and taking part solely in his campaign shall be required to file the two statements of receipts, expenditures and contributions required by this article to be filed immediately prior to such uncontested primary election, provided that all the information which would be required to be

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[*] Bracketed language inserted by the Publisher.

filed in such statements for a candidate for election to public office shall be contained in the first statement required to be filed in connection with the ensuing general election.

8. A political committee formed solely to promote the success or defeat of any ballot proposal submitted to vote at a public election is exempt from filing statements required by this article until that committee has received or expended an amount in excess of one hundred dollars.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Case No.: 6:18-cv-00459-GTS-ATB

UPSTATE JOBS PARTY, MARTIN BABINEC, AND JOHN BULLIS,

Plaintiffs,

v.

PETER S. KOSINSKI, New York State Board of Elections Co-Chair Commissioner, DOUGLAS A. KELLNER, New York State Board of Elections Co-Chair Commissioner, ANDREW J. SPANO, New York State Board of Elections Commissioner, and GREGORY P. PETERSON, New York State Board of Elections Commissioner, all in their official capacities,

Defendants.

AMENDED NOTICE OF CROSS APPEAL

Please take notice that Plaintiffs, Upstate Jobs Party, Martin Babinec, and John Bullis, by and through counsel, cross appeal to the United States Court of Appeals for the Second Circuit from the Amended Decision and Order, entered on October 8, 2021, (Dkt. 82), and Amended Judgment entered pursuant to the Amended Decision and Order (Dkt. 83), insofar as they denied, in part, Plaintiffs' Motion for Summary Judgment of July 8, 2020 (Dkt. 56) and granted, in part, Defendants' Motion for Summary Judgment of August 25, 2020 (Dkt. 57).

DATED: October 18, 2021

Respectfully submitted,

/s/ Shawn Toomey Sheehy
Jason Torchinsky (VA 47481)*
Shawn Toomey Sheehy (VA 82630)*
Philip Michael Gordon (TX 24096085)*
HOLTZMAN VOGEL BARAN TORCHINSKY
JOSEFIAK PLLC
15405 John Marshall Hwy.
Haymarket, Virginia 20169
Phone: (540) 341-8808
Fax: (540) 341-8809
jtorchinsky@holtzmanvogel.com
ssheehy@holtzmanvogel.com
pgordon@holtzmanvogel.com

*admitted *pro hac vice*

/s/ Michael Burger
Michael Burger
Fernando Santiago
SANTIAGO BURGER LLP
Attorneys for Plaintiffs
2280 East Avenue
Rochester, NY 14610
Phone: (585) 563-2400
Fax: (585) 563-7526
mike@litgrp.com fernando@litgrp.com

Counsel for Plaintiffs

APPENDIX M

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

18-cv-459 (GTS/ATB)

UPSTATE JOBS PARTY, MARTIN BABINEC, and JOHN BULLIS,

Plaintiffs,

-against-

PETER S. KOSINSKI, New York State Board of Elections Co-Chair Commissioner, DOUGLAS A. KELLNER, New York State Board of Elections Co-Chair Commissioner, ANDREW J. SPANO, New York State Board of Elections Commissioner, and GREGORY P. PETERSON, New York State Board of Elections Commissioner, all in their official capacities.

Defendants.

AMENDED NOTICE OF APPEAL

Please take notice that defendants Peter S. Kosinski, Douglas A. Kellner, Andrew J. Spano, and Gregory P. Peterson, by and through their attorney, Letitia James, Attorney General of the State of New York, appeal to the United States Court of Appeals for the Second Circuit from the Amended Decision and Order, entered October 8, 2021 (Dkt. 82), and Amended Judgement entered pursuant to the Decision and Order (Dkt. 83), insofar as they denied, in part, defendants' August 25, 2020, motion for summary judgment (Dkt. 57) and granted, in part, plaintiffs' motion for summary judgment of July 8, 2020 (Dkt. 56).

Dated: Albany, New York
October 14, 2021

LETITIA JAMES
Attorney General of the State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224-0341
By: s/ William A. Scott
William A. Scott
Assistant Attorney General, of Counsel
Bar Roll No. 512434
Telephone: (518) 776-2255
Email: William.Scott@ag.ny.gov

TO: All Counsel of Record via ECF