No. 24-503

IN THE

Supreme Court of the United States

UPSTATE JOBS PARTY, et al.,
Petitioners,

v.

PETER S. KOSINSKI, New York State Board of Elections Co-Chair Commissioner, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals properly determined that the record evidence, together with the common-sense implications of that evidence, was sufficient to substantiate New York's anticorruption interest in putting a limit on contributions to political organizations that typically serve as mere alter egos for individual political candidates.

2. Whether, by not raising it in the lower courts, petitioners forfeited their contention that preventing the appearance of corruption is not a legitimate justification for restricting political speech.

3. Whether New York's laws subjecting different types of political organizations to different contribution limits are closely drawn to New York's important state interest in preventing the appearance or reality of political corruption in each of those types of organizations.

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INTRODUCTION

The petition for a writ of certiorari rests on the false premise that the New York Election Law intentionally creates an "asymmetrical" campaign-finance regime (*e.g.*, Pet. i), with one set of rules governing political parties and another set governing independent bodies (*i.e.*, political organizations that do not qualify as political parties). But the provisions at issue delineate rules for political parties only. Other political organizations are regulated by the campaign-finance rules generally applicable to all non-party political participants, whether organizations or individuals.

In fact, the term "independent body" does not even appear in the section of the Election Law governing campaign finance (article 14). An independent body, for New York election-law purposes, is simply an organization that circulates an independent nominating petition in order to get a candidate on the ballot who is unaffiliated with any recognized party. *See generally* N.Y. Election Law § 6-138. In practice, independent bodies are typically small organizations that serve as mere alter egos for the unaffiliated candidate who is trying to get on the ballot. Independent bodies neither receive the benefits nor are subject to the regulatory oversight of the campaign-finance rules that apply to political parties. One of the key benefits that New York law extends to political parties is a higher contribution limit than the limit that applies to individual candidates and non-party entities. In this respect, New York law is consistent with federal law and the laws of most other States.

Petitioner Upstate Jobs Party (UJP) is not a political party. Indeed, the petition does not dispute that UJP is typical of most independent bodies: It was created to serve as an alter ego for its founder, petitioner Martin

Babinec, during his 2016 congressional campaign. Moreover, UJP lacks all the hallmarks of a political party—it lacks broad popular support and a diversified donor base, and has never nominated more than one candidate per election cycle.

Neither does UJP argue that it *should* be recognized as a political party. Thus, this case is not about whether the threshold for attaining party status is too high—a question that has already been decided in New York's favor. *See Libertarian Party of N.Y. v. New York State Bd. of Elections*, No. 22-44, 2022 WL 10763416 (2d Cir. Oct. 19, 2022), *cert. denied*, 144 S. Ct. 72 (2023). Instead, it presents a different question: whether New York has adequately substantiated its interest in subjecting non-party independent bodies, which typically serve as mere alter egos for individual candidates, to the lower contribution limits that apply to individual candidates and non-party entities alike.

The United States Court of Appeals for the Second Circuit properly determined that New York has done so, and that determination does not warrant review by this Court: It is consistent with case law from this Court and from other Circuits; it leaves open the possibility of an as-applied challenge to New York's contribution regime by a differently situated independent body; and, moreover, it is correct. What's more, this case is a poor vehicle for considering the questions presented in the petition, among other reasons because of petitioners' failure to identify any recognized theory of First Amendment harm and to preserve their argument concerning the appearance of corruption.

STATEMENT

A. Statutory Background

1. Under New York law, an organization attains political-party status by demonstrating a minimum threshold of popular support through election results. *See* N.Y. Election Law § 1-104(3). Specifically, in order to qualify as a party, an organization's gubernatorial and presidential candidates in the last preceding election must have received the greater of 130,000 votes or two percent of the total number of votes cast. *Id.* This requirement for obtaining party status has been upheld against constitutional challenge. *See Libertarian Party of N.Y. v. New York State Bd. of Elections*, No. 22-44, 2022 WL 10763416 (2d Cir. Oct. 19, 2022), *cert. denied*, 144 S. Ct. 72 (2023).

New York does not differentiate between so-called "major" and "minor" parties. Under New York law, an organization that nominates electoral candidates but that does not receive enough votes to qualify as a political party is called an "independent body." *See* N.Y. Election Law § 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"). Although some independent bodies in New York may have larger memberships, the vast majority are not large organizations. "Typically," rather, "an independent body functions as the alter ego of a candidate, 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." (Pet. App. 5a (alterations, citation, and quotation marks omitted).)

Although independent bodies are subject to particular rules on topics such as ballot access, *see, e.g.*, N.Y. Election Law § 6-138, there are no rules about campaign finance that are specific to independent bodies. In fact, the term "independent body" does not even appear in the section of the Election Law governing campaign finance (article 14). Independent bodies are simply not regulated as such by New York campaign-finance law. They are regulated only under laws generally applicable to all non-parties.

Political parties, on the other hand, are directly regulated in a variety of ways. For example, parties must comply with a range of organizational and disclosure requirements. (Pet. App. 6a-7a, 20a.) But, as befitting parties' unique role and responsibility in our system of democracy, parties also receive certain benefits under New York campaign-finance law that no other entity or individual receives. Three of those benefits are relevant here.

First, contributors to a party may give up to $138,600 per election cycle, whereas contributors to candidates for statewide office may give only $18,000 per cycle per candidate.[1] N.Y. Election Law §§ 14-114(1), 114(10)(a); 9 N.Y.C.R.R. § 6214.0. In this respect, New York law is consistent with federal law and the laws of

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[1] Because petitioners averred in their complaint that Upstate Jobs Party intended to field a gubernatorial candidate, the contribution limit for candidates for statewide office is the relevant comparator here. (Pet. App. 8a.)

Further, during the pendency of this litigation, New York adopted a public-financing scheme that extended public matching funds to individual candidates and also lowered contributions limits; before this program was adopted, the contribution limit to a candidate for statewide office was $47,100. (Pet. App. 8a n.5.)

most other States, under which there is also a higher limit for contributions to parties as compared to contributions to candidates. (Pet. App. 36a-37a.)

Second, parties are exempt from these contribution limits when they give money to their own candidates. Thus, there is no limit on the amount of money that parties may transfer to their own candidates. N.Y. Election Law §§ 14-100(9)(2), 14-100(10), 14-114(3). In this respect, New York law is in line with the laws of the majority of other States. (Pet. App. 37a.)

And *third*, parties may maintain accounts known as "housekeeping accounts," which are not subject to any contribution limits, so long as expenditures from these accounts are made only "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. Election Law § 14-124(3).

Because independent bodies are not political parties, they do not receive these benefits. Thus, independent bodies may collect contributions subject to the limits that apply to all other non-party recipients; for contributions to candidates for statewide office, the limit is currently $18,000 per cycle. Independent bodies, like all other non-parties, are subject to these limits even when they transfer money to their own candidates. And independent bodies, like all other non-parties, may not maintain exempt housekeeping accounts.

2. The current campaign-finance regime for political parties has its roots in a series of statutory amendments made following a years-long investigation of the New York State Commission on Government Integrity into a variety of topics pertaining to government ethics. A response to the "scandal-ridden period" of the 1970s and

80s, including scandals involving political parties, the Commission was established in 1987 by executive order and directed to "[i]nvestigate weaknesses in existing laws" pertaining to campaign finance and government ethics and "determine whether such weaknesses create an undue potential for corruption." 9 N.Y.C.R.R. § 4.88; John D. Feerick, *Reflections on Chairing the New York State Commission on Government Integrity*, 18 Fordham Urb. L.J. 157, 157, 160 (1991). Over three-plus years, the Commission conducted more than 25 public hearings and interviewed more than 1,000 individuals. *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). That effort culminated in the submission to the Legislature of more than 20 reports containing specific recommendations for reform. *See id.*

One of those recommendations was to set a cap for contributions to parties, which had previously been unlimited—with significant negative consequences. In two different reports, the Commission exhaustively documented the fundraising practices of candidates for statewide and legislative offices, making a number of observations about the linkage between contributions to parties and subsequent policy outcomes.[2] For example, the Commission found that over 90% of engineers who received contracts from the Department of Transportation or Thruway Authority had made contributions to Governor Mario Cuomo's campaign committee or to the

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[2] *See generally* N.Y. State Comm'n on Gov't Integrity, *The Midas Touch: Campaign Finance Practices of Statewide Officeholders* (1989); N.Y. State Comm'n on Gov't Integrity, *The Albany Money Machine: Campaign Financing for New York State Legislative Races* (1988). (For sources available on the internet, URLs are in the Table of Authorities.)

State Democratic Party campaign committee. *Midas Touch*, *supra*, at 8. And a corporation seeking a zoning variance to build a mall in Poughkeepsie had made substantial contributions to the State Republican Party campaign committee, which funneled the money to local town-council races; the mall was subsequently built. *Id.* at 18 n.37; *see also Albany Money Machine*, *supra*, at 15-17 (documenting interest-group contributions to parties).

In another report, the Commission stated that it was also investigating political parties' use of housekeeping accounts, which, at the time, were not subject to any disclosure requirements. N.Y. State Comm'n on Gov't Integrity, *Campaign Financing: Preliminary Report* 5 (1987). The report noted that the Commission had "found evidence that these political party accounts have been used to hide sensitive contributions." The Legislature responded in 1988 by amending the statute to require disclosure of all monies received into, or expended from, housekeeping accounts. (Pet. App. 46a-47a.)

The Commission also recommended imposing limits on contributions to parties, recognizing that then-prevailing "unlimited conditions foster dependence of the party committees on special moneyed interests." *Albany Money Machine*, *supra*, at 3, 41; *see also Midas Touch*, *supra*, at 20. Additionally, the Commission recommended that limits be imposed on the ability of parties to transfer funds to candidates, though noted that "Senate Republicans have expressed concern that too drastic limits on party committee support for legislative races will impair the important role those committees have in maintaining a two-party or multi-party electoral system." *Midas Touch*, *supra*, at 20.

The Legislature adopted the Commission's first recommendation regarding contribution limits in 1992, enacting a party contribution limit of $62,500, subject to adjustment for inflation. (Pet. App. 32a.) The Legislature, however, opted against limiting party transfers, thereby striking a balance that would reduce parties' dependence on (and corruption by) wealthy donors while preserving the central role of parties in the State's political system.

B. The Upstate Jobs Party

Petitioner Upstate Jobs Party (UJP) was formed in 2016 by petitioner Martin Babinec. Babinec and petitioner John Bullis have served as directors of UJP since its inception. (Pet. App. 11a.) UJP was the independent body that served as a vehicle for Babinec's independent—and ultimately unsuccessful—2016 congressional campaign, to which he lent $2,990,000 of his own funds. (Pet. App. 9a-10a.) Since then, UJP has nominated two candidates (other than Babinec) and endorsed a handful of others. (Pet. App. 10a-11a.)

Babinec has also formed the Upstate Jobs Committee (UJC), an independent-expenditure committee, to which he has contributed at least $265,898. (Pet. App. 42a.) Babinec has accounted for 99.9% of the value of all contributions to UJC over a nearly three-year period. (*See* Pet. App. 10a-11a.)

C. Procedural History

1. In April 2018, petitioners commenced this § 1983 action against the commissioners of the New York State Board of Elections in the United States District Court for the Northern District of New York. As relevant here, their complaint asserted three claims: (i) the contribution limits contained in New York Election Law § 14-

114(1) and § 14-114(10) facially violate the First Amendment because they set higher limits for contributions to political parties than for contributions to independent bodies; (ii) New York Election Law § 14-114(1) and § 14-114(3) facially violate the First Amendment because they allow political parties, but not independent bodies, to make unlimited transfers to their own candidates; and (iii) New York Election Law § 14-124(3) facially violates the First Amendment because it permits political parties, but not independent bodies, to maintain housekeeping accounts.[3] (Pet. App. 12a.) Petitioners sought declaratory and injunctive relief. (Pet. App. 12a-13a.)

Along with filing the complaint, petitioners moved for a preliminary injunction to permit UJP 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. (Pet. App. 13a.) The district court denied the motion and the United States Court of Appeals for the Second Circuit affirmed. *See Upstate Jobs Party v. Kosinski*, 741 F. App'x 838 (2d Cir. 2018); *Upstate Jobs Party v. Kosinski*, No. 18-cv-00459, 2018 WL 10436253 (N.D.N.Y. May 22, 2018).

Following discovery, the parties cross-moved for summary judgment. The district court granted summary judgment in favor of petitioners on the claims related to contribution and transfer limits, and granted summary judgment in favor of the State on the claims related to housekeeping accounts. *See Upstate Jobs Party v. Kosinski*, 559 F. Supp. 3d 93 (N.D.N.Y. 2021). (Pet. App. 60a-139a.)

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[3] The complaint also asserted claims under the Equal Protection Clause of the Fourteenth Amendment that petitioners have abandoned in their petition for a writ of certiorari.

2. The parties cross-appealed to the Second Circuit, which unanimously affirmed in part and reversed in part, thereby ruling entirely for the State. The court held that New York's rules regarding contribution limits, transfer limits, and housekeeping accounts are closely drawn to achieve New York's sufficiently important interest in preventing corruption and the appearance thereof. (Pet. App. 27a, 43a.)

As relevant here, the court recognized 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." (Pet. App. 31a-32a (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) (alterations in original).) Because "the idea that large contributions" can "corrupt or create the appearance of corruption" is "neither novel nor implausible," *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 95 (2003), *overruled on other grounds by Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010), the court found that a "relatively low quantum of evidence [is] required under these circumstances" (Pet. App. 32a).

The court held that the evidence that the State provided—which went beyond mere conjecture—was sufficient. (Pet. App. 31a.) In particular, the court cited evidence in the State's expert report that independent bodies in New York "typically serve as the alter ego of a single candidate or small group of candidates"—as UJP itself does. (Pet. App. 29a.) The court also relied on a hypothetical put forward in the expert report illustrating the potential for corruption that would arise if alter-ego independent bodies could take advantage of party-specific campaign-finance rules: Suppose a candidate runs for town supervisor in an election with an individual contribution limit of $1,000. Dissatisfied with

this contribution limit, the candidate forms an independent body and gathers the requisite signatures to appear on the ballot as the body's nominee. Under UJP's approach, this independent body would then be able to 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. (Pet. App. 27a-28a; *see also* Pet. App. 45a.) Based on the expert's hypothetical, the court drew the common-sense conclusion that petitioners' desired approach "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." (Pet. App. 28a.)

Higher contribution limits do not pose the same risk of corruption in political parties, the court reasoned, because 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."[4] (Pet. App. 28a.) Indeed, as the court explained, "Upstate Jobs, itself, underscores this point": Unlike political parties, it appears to have just a handful of supporters and a single meaningful donor, and has only ever nominated three candidates (and never more than one in a given election cycle). (Pet. App. 29a.) "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

[4] For this and other reasons, the court also held that political parties and independent bodies are not similarly situated and therefore rejected petitioners' equal-protection claims. (Pet. App. 18a-23a.) The petition does not challenge that holding.

served." (Pet. App. 29a.) The court, however, left open the possibility that "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." (Pet. App. 18a n.12.)

Finally, the court rejected petitioners' argument that the State's anticorruption interest was deficient because the Legislature never made any findings concerning the risk of corruption in independent bodies in particular. "In context," the court explained, "the relevant legislative history supports rather than undercuts the State Board's rationale." (Pet. App. 32a.) The court cited the work of the New York State Commission on Government Integrity, including the two reports that it issued "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." (Pet. App. 33a.) "The absence of specific findings related to scandals involving independent bodies is unsurprising," the court observed, "as the Commissioner's [sic] focus was on corruption stemming from New York's underregulated party system." (Pet. App. 33a.) "This history reveals that UJP is seeking evidence of corruption in independent bodies, that, for good reasons, does not exist"—because New York never sought to regulate independent bodies through its campaign-finance laws in the first instance. (Pet. App. 33a.)

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS.

A. The Second Circuit's Decision Is Consistent with This Court's Decisions in *Cruz* and *Davis*.

Petitioners primarily assert that the Second Circuit's decision is inconsistent with this Court's decision in *Federal Election Commission v. Cruz*, 596 U.S. 289 (2022), in which the Court invalidated a provision of federal law barring campaigns from using more than $250,000 of funds raised after Election Day to repay candidates' personal loans. (Pet. 11.) According to petitioners, while this Court reiterated in *Cruz* that the Court has "never accepted mere conjecture as adequate to carry a First Amendment burden" (Pet. 11 (quoting *Cruz*, 596 U.S. at 307)), the Second Circuit effectively accepted such conjecture in support of New York's contribution regime, upholding it based "solely on hypotheticals and 'common sense.'" (Pet. 11.)

But petitioners are doubly wrong. First, as discussed above, the Second Circuit did not rely merely on hypotheticals and common sense; it additionally relied on evidence in the State's expert reports concerning the typical structure of independent bodies, and how that structure lends itself to a risk of corruption.

Second, nothing in *Cruz* nor any other case from this Court prohibits reliance on common sense in assessing the validity of a campaign-finance restriction, and petitioners are incorrect in suggesting otherwise. True, in *Cruz*, 596 U.S. at 311-12, the Court rejected the Government's reliance on common sense—but not because it is categorically inappropriate to invoke common sense in

justifying a campaign-finance restriction. Rather, the Court simply believed that, in that case, common sense cut in the other direction. *Id.* And the Court has relied on its own common-sense intuitions in other campaign-finance cases as well. *See, e.g.*, *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 216 (2014); *McConnell*, 540 U.S. at 145. Indeed, Judge Ho of the United States Court of Appeals for the Fifth Circuit, in an opinion cited approvingly by petitioners (Pet. 18), noted "Justice Thomas's common-sense observation" about the lack of a substantial risk of corruption arising from contributions over the limit was dispositive of the case before the court. *Zimmerman v. City of Austin, Tex.*, 888 F.3d 163, 165 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing en banc) (citing *Randall v. Sorrell*, 548 U.S. 230, 272-73 (2006) (Thomas, J., concurring)).

Moreover, the Court in *Cruz* required the government to satisfy a high evidentiary standard because the rule was "yet another in a long line of prophylaxis-upon-prophylaxis approaches to regulating campaign finance," an approach that the Court has greeted "with a measure of skepticism." 596 U.S. at 306 (quotation marks omitted). The Court called the rule a "prophylaxis-upon-prophylaxis" because contribution limits targeting corruption were already in place, and thus the multi-layered approach was a "significant indicator that the regulation may not be necessary for the interest it seeks to protect." *Id.* Specific evidence was therefore needed to show that a measure over and above contribution limits was necessary to serve the government's anticorruption interest. *Id.* However, when it comes to familiar single-layered prophylactic measures like contribution limits—at issue here—the evidentiary threshold needed to sustain them is lower, as "there is little reason to doubt that sometimes large contribu-

tions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 395 (2000).

Petitioners further assert that the Second Circuit's decision "split" from "this Court's warning in *Davis* [*v. Federal Election Commission*, 554 U.S. 724 (2008)]," that the Court has "'never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other.'" (Pet. 22-23 (quoting 554 U.S. at 738).) But the challenged laws do no such thing. Under New York's contribution regime, all individuals are subject to the same contribution limit; thus, a candidate running on the Democratic Party ticket, a candidate running on the Republican Party ticket, and a candidate running on the Upstate Jobs Party ticket would all be subject to the same limit. And in any event, *Davis* is distinguishable. The Court in *Davis* invalidated a statute that imposed an unconstitutional penalty on speech by providing that a self-funded candidate's spending above a certain level triggered a higher contribution limit for his opponent, while his own contribution limit remained the same. *Id.* at 738. Thus, the Court did not hold that asymmetrical contribution limits are per se unconstitutional—just that asymmetrical limits *that are imposed as a penalty on speech* are. *See* 554 U.S. at 738-40. As explained in further detail below (at 23-26), there is no penalty on speech here.

B. Petitioners Have Not Identified Any Circuit Split.

1. Petitioners purport to identify a circuit split (Pet. 17-21), but the purported split is wholly illusory and does not warrant this Court's review. In fact, the four cases cited on either side of the purported split, as well as the

Second Circuit's decision in this case, can all be easily reconciled with one another: Restrictions on political speech are upheld when there is record evidence or governmental findings to support them, and are invalidated when there is not.

Like the Second Circuit here, the Fifth Circuit in *Zimmerman v. City of Austin, Texas* (Pet. 17-18), held that the need for the restriction at issue—a limit on contributions to candidates for city council—was supported by record evidence, namely "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.'" 881 F.3d at 386. It is unclear why petitioners characterize this trial testimony as amounting to "hypotheticals in expert reports combined with judicial reasoning." (Pet. 21.) And contrary to petitioners' assertion (Pet. 18), testimony about a perception of corruption constitutes actual evidence—not just conjecture—that such a perception in fact exists (even if the perception might turn out to be inaccurate). Petitioners are thus wrong in suggesting that the Fifth Circuit in *Zimmerman* upheld a restriction on political speech in the absence of actual evidence to justify it.

Where such evidence has indeed been absent, however, courts have invalidated similar restrictions. In *Lavin v. Husted* (Pet. 19-20), the Sixth Circuit considered an Ohio statute that made it a crime for candidates for county prosecutor to accept campaign contributions from Medicaid providers. 689 F.3d 543 (6th Cir. 2012). While the State hypothesized that prosecutors who receive such contributions "might choose not to prosecute contributor-providers that commit fraud," the State conceded that it had "no evidence at all in support of [its] theory that [the statute] prevents actual or perceived

corruption among prosecutors in Ohio." *Id.* at 547. In *Miller v. Ziegler* (Pet. 20), the State of Missouri similarly admitted during discovery that it did not "possess any evidence (testimonial or documentary) of its compelling/substantial interest" in its two-year ban on lobbying by former legislators. 109 F.4th 1045, 1050 (8th Cir. 2024). The Eighth Circuit declined to permit an expert report to stand in for such evidence, particularly given the report's factual inaccuracies and legally erroneous understanding of the concept of corruption. *Id.* at 1051. So too in *Citizens for Clean Government v. City of San Diego* (Pet. 18-19), the Ninth Circuit held unconstitutional San Diego's contribution limit as applied to the signature-gathering phase of a recall election. 474 F.3d 647 (9th Cir. 2007). The city "conceded that there is no evidence in the record of any corruption, or the potential for corruption in the recall context," and the district court's speculation about how corruption might arise in the process of gathering signatures in support of a recall effort was inadequate. *Id.* at 653-54.

In all these cases, the lower courts faithfully applied this Court's precedent to the facts and circumstances before them. There is no split among these circuits on any legal principle, and no need for the Court to weigh in on these case-specific evidentiary issues.

2. Nor does the Second Circuit's decision create a split with the Tenth Circuit's decision in *Riddle v. Hickenlooper*, 742 F.3d 922 (10th Cir. 2014). (*See* Pet. 21-24.) In *Riddle*, the court invalidated a Colorado campaign-finance rule that effectively prescribed one contribution limit for candidates who ran in primaries and one contribution limit for candidates who did not. *Riddle*, 742 F.3d at 924-25. This rule privileged Republican and Democratic candidates—who were always

required to run in primaries—over independent and minor-party candidates, who were not. *Id.*

As the Second Circuit found (Pet. App. 22a-23a), *Riddle* is distinguishable from this case and does not conflict with it. First, *Riddle* decided an equal-protection claim, whereas petitioners here assert only a First Amendment claim (having abandoned their equal-protection claim asserted below). Second, *Riddle* acknowledged that "[t]he statutory classification might advance the State's asserted interest if write-ins, unaffiliated candidates, or minor-party nominees were more corruptible (or appeared more corruptible) than their Republican or Democratic opponents," but rejected that justification because the state defendants "have never made such a suggestion." *Id.* at 928. Here, by contrast, the State submitted expert evidence that independent bodies are indeed more corruptible than political parties, because, unlike parties, they typically serve as mere alter egos for individual candidates, have very few donors, and rarely run more than one candidate per election cycle. (Pet. App. 5a, 19a.)

For these reasons, the Second Circuit here correctly concluded that, unlike the major and minor parties at issue in *Riddle*, New York political parties and New York independent bodies are not similarly situated to one another. (Pet. App. 22a-23a.)

II. The Second Circuit Correctly Decided the Questions Presented in the Petition, to the Extent Those Questions Were Before It.

Only two of the three questions presented in the petition were pressed before the Second Circuit, and the court decided those two questions correctly.

1. The Second Circuit correctly concluded that evidence in the record, including the common-sense implications of petitioners' preferred rule, was sufficient to substantiate the anti-corruption interest served by New York's contribution regime.

It bears repeating that the contribution limit applicable to independent bodies in New York is the standard contribution limit that applies to all individual candidates and non-party entities. When it comes to plain-vanilla contribution limits like this one, this Court has accepted—as a matter of law—that large contributions can create the appearance (or reality) of corruption, and that States accordingly have an interest in preventing such an eventuality. Indeed, in *Citizens United v. Federal Election Commission*, this Court said explicitly that because there is a substantial risk that "large direct contributions" to candidates "could be given to secure a political *quid pro quo,*" contribution limits are justified so as "to ensure against the reality or appearance of corruption." 558 U.S. 310, 356-57 (2010) (quotation marks omitted).

The record in any event substantiates, as a factual matter, New York's interest in applying the individual contribution limit to independent bodies. The record contains an expert report explaining that independent bodies in New York typically serve as the alter ego of a single candidate or small group of candidates, as UJP itself does. (Pet. App. 29a.) As the Second Circuit found,

allowing an individual candidate to use its alter ego to take advantage of contribution limits applicable to political parties "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." (Pet. App. 28a.)

Petitioners fault the Second Circuit for upholding New York's contribution regime in the absence of "evidence of 'actual' quid pro quo corruption" (Pet. ii), but they overlook well-settled precedent from this Court holding that a legislature may enact a standard contribution limit as a "broad prophylactic rule," "[i]n light of the historical role of contributions in the corruption of the electoral process." *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 260 (1986) (citing *Federal Election Comm'n v. National Right to Work Cmte.*, 459 U.S. 197, 210 (1982)); *see also, e.g.*, *Citizens United*, 558 U.S. at 357 (characterizing restrictions on large direct contributions as "preventative" in nature).

The Second Circuit properly concluded that there is a real need for such a prophylactic rule to be applied to independent bodies in light of the record evidence regarding the typical structure of those organizations. That structure gives rise to a "legitimate concern" about possible corruption in "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." (Pet. App. 29a.)

Petitioners also criticize the Second Circuit for upholding New York's contribution regime even as it acknowledged that the State has never brought an

enforcement action against an independent body, and that there is no record evidence of an independent body's involvement in a "corruption scandal." (Pet. 8.) But the absence of such evidence is consistent with the preventative nature of the rules in question: "There is no reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures." *Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011) (citing *Citizens United*, 558 U.S. at 356).

2. The Second Circuit did not have the opportunity to address the second question presented in the petition—namely, whether the prevention of the appearance of corruption is sufficient on its own to justify a restriction on political speech—because, as discussed below (at 27-28), petitioners did not make such an argument in the lower courts.

3. Finally, the Second Circuit correctly decided the third question presented in the petition, concluding that the purportedly "asymmetrical" contribution limits applicable to political parties and independent bodies are indeed closely drawn to serve New York's important interest in preventing political corruption.

A restriction satisfies the "closely drawn" test if it is "reasonable," is "in proportion to the interest served," and "avoid[s] unnecessary abridgement of associational freedoms." *McCutcheon*, 572 U.S. at 197, 218 (quotation marks omitted). A restriction unnecessarily abridges such First Amendment rights, in turn, by "infringing on speech that does not pose the danger that has prompted the regulation." *Massachusetts Citizens for Life*, 479 U.S. at 265.

As discussed below (at 23-26), Petitioners have not demonstrated that New York's contribution limits burden *any* protected speech—let alone an unnecessary

amount of speech. In any event, subjecting independent bodies to the contribution limit applicable to individual candidates is a reasonable and proportionate response to the fact that independent bodies typically serve as mere alter egos for individual candidates.

And the premise that New York imposes "asymmetrical" contribution limits on different "parties" (Pet. iii) is incorrect, as independent bodies are *not* similarly situated to political parties, and petitioners do not argue otherwise. It is reasonable to subject different types of organizations to different regulations. Indeed, this Court has recognized that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.'" *Federal Election Comm'n v. National Right to Work Cmte.*, 459 U.S. 197, 210 (1982) (quoting *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 201 (1982)) (upholding restriction on corporation's ability to solicit funds for political action committee that made direct contributions to candidates). And the Court has specifically recognized that "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) (quoting *Jenness v. Fortson*, 403 U.S. 431, 441 (1971)). These "obvious differences" justify any asymmetry in the treatment of political parties and independent bodies under New York law.

III. This Case Is a Poor Vehicle for Resolving the Questions Presented in the Petition.

A. Petitioners' Claims Do Not in Fact Implicate the First Amendment.

Although the Second Circuit did not address the argument, the State contended below that petitioners failed to identify any way in which New York's contribution regime burdens their First Amendment rights. In the absence of any cognizable First Amendment harms, the questions presented in the petition are academic.[5]

Case law has recognized two different theories that may support a First Amendment challenge to campaign-finance rules: what may be thought of as a "cap" theory on the one hand and a "penalty" theory on the other. *See Cruz*, 596 U.S. at 303. Under the "cap" theory, a limit on contributions or expenditures is alleged to be too low and thus an impediment either to a candidate's ability to "amass[] the resources necessary for effective advocacy," *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (quoting *Buckley*, 424 U.S. at 21), or to a speaker's ability to engage in a sufficient quantity of expression, *Citizens United*, 558 U.S. at 339; *see also McCutcheon*, 572 U.S. at 204; *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 615-16 (1996).

The "penalty" theory, by contrast, addresses provisions that impose some sort of adverse consequence on engaging in political speech. An example is the Arizona statute that was invalidated in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011). That statute allocated public matching

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[5] As noted above, petitioners have abandoned their equal-protection claims.

funds to publicly funded candidates running against high-spending, privately funded candidates. *Id.* at 728-29. The Court found that the statute burdened the First Amendment rights of privately funded candidates by imposing a dollar-for-dollar penalty on their campaign expenditures above a certain level: each additional dollar that such a candidate spent on his campaign resulted in the award of nearly an additional dollar to his opponent. *Id.* at 737.

Here, petitioners have expressly disavowed any reliance on the cap theory—stating in their brief below that they "do not claim that New York's contribution limits are too low" (CA2 Opening Br. 53, ECF No. 109)—and are thus left with the penalty theory. However, while they rely on a case embracing the penalty theory, *Davis v. Federal Election Commission*, 554 U.S. 724 (2008), that case shows that the theory is a poor fit for petitioners' claim. *Davis*, like *Arizona Free Enterprise*, involved a statutory provision that awarded benefits to candidates when the expenditures of their privately funded (in this case, self-funded) opponents reached a certain threshold. *Id.* at 729-30. The statute provided that the self-funded candidate's spending above a certain level triggered a higher contribution limit for his opponent, while his own contribution limit remained the same. *Id.* at 738. This Court invalidated the provision on First Amendment grounds, holding that it put self-funded candidates to an unconstitutional choice: "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 740.

The Court recently invalidated another statute that put self-funding candidates in a similar bind. In *Cruz*, the Court invalidated a provision barring campaigns

from using more than $250,000 of funds raised after Election Day to repay candidates' personal loans to their campaigns. 596 U.S. at 293. In so doing, the Court characterized the risk that a candidate will not be repaid as an unconstitutional penalty imposed on the candidate's decision to loan his campaign more than $250,000. *Id.* at 303-04.

Petitioners do not claim to face any comparable dilemma. Unlike in *Arizona Free Enterprise*, *Davis*, and *Cruz*, the limits at issue do not attach any consequences or disincentives to contributing to an independent body over a political party. Someone who wants to make the maximum allowable contribution to an independent body (currently $18,000 when the independent body fields a candidate for statewide office) may do so penalty-free.[6] True, an individual who chooses to make that contribution may not give at the same level that would be permitted to a party. But petitioners do not claim that the contribution limit is too low or that it otherwise hampers their ability to speak freely in support of their preferred candidate or policies. There is accordingly no "drag" on rights protected by the First Amendment. *Cruz*, 596 U.S. at 304 (quoting *Davis*, 554 U.S. at 739).

Rather than rest on any recognized theory of First Amendment harm, petitioners instead assert a novel premise: that unequal contribution limits, with no attendant impact on one's ability to engage in core political speech, violate the First Amendment. To be sure, this Court arguably recognized an inequality-based theory of First Amendment harm when it held, in *Citizens United*, 558 U.S. at 341, that the imposition of restric-

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[6] Similarly, independent bodies are able to make the maximum allowable contribution to their candidates without consequence.

tions on certain disfavored speakers violates the First Amendment. However, the Court so held in the context of invalidating a *total ban* on election-related expenditures by corporations, which, unlike the contribution limits at issue here, plainly burdened the plaintiff's ability to engage in core political speech. Moreover, the petition does not even explicitly present the question whether to extend *Citizens United*'s inequality theory to the facts presented.

B. The Second Circuit's Decision Left Open the Possibility of a Successful As-Applied Challenge Under Different Facts.

To the extent the petition implicitly asks the Court to extend *Citizens United*'s inequality theory of First Amendment harm, this case is a poor vehicle for extending current doctrine. That is because, as the Second Circuit concluded, UJP is not in fact similarly situated to a political party, and petitioners do not argue otherwise.

Of particular relevance to the Second Circuit's decision were idiosyncratic facts about UJP's structure and donor base, including that it has only one meaningful donor and has never nominated more than a single candidate in an election cycle. (Pet. App. 17a, 29a.) The court thus expressly left open the possibility that a more sophisticated organization—such as "one with numerous donors and more diffuse leadership, which nominated multi-candidate slates in consecutive election cycles," *i.e.*, one that more closely resembles a political party rather than a mere alter ego for one candidate—might be able to bring a successful as-applied challenge to New York's contribution regime. (Pet. App. 18a n.12.) Thus, if the Court wishes to consider whether there is a constitutional flaw in a regime that differentiates

between political parties and other arguably similarly situated entities, the Court may take up that question in a future case involving facts that, unlike those here, actually present that issue.

C. Petitioners' Claim That the Appearance of Corruption Cannot Independently Justify a Campaign-Finance Law Is Raised for the First Time in the Petition, and Is in Any Event Mistaken.

Petitioners contend that the appearance of corruption cannot independently justify a campaign-finance law. (Pet. 24.) Petitioners, however, never made such a claim in either the district court or the court of appeals, and instead raise it for the first time in their petition for a writ of certiorari. Because no such claim was raised below, review of that claim by this Court would be inappropriate. *See, e.g., Howell v. Mississippi*, 543 U.S. 440, 445-46 (2005); *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). And it would be especially inappropriate to consider a claim seeking to expand existing doctrine in a case where the parties have not had "the opportunity to test and refine their positions before reaching this Court." *Adams v. Robertson*, 520 U.S. 83, 91 (1997).

In any event, this Court has recently reiterated that "the prevention of 'quid pro quo' corruption *or its appearance*" is a permissible ground—indeed, the only permissible ground—for restricting political speech. *Cruz*, 596 U.S. at 305 (emphasis added); *see also, e.g.*, *McCutcheon*, 572 U.S. at 192. Petitioners provide no basis to question this well-settled precedent. To the extent that petitioners ask this Court to review not whether preventing the appearance of corruption can *ever* be a permis-

sible ground for restricting political speech, but rather whether it is a permissible ground "without any accompanying evidence of actual corruption" (Pet. 24)—the record here does in fact contain the requisite evidence of the risk of actual corruption.

D. The Petition Rests on Mistaken Premises.

1. Finally, this case is a poor vehicle for resolving the questions presented in the petition because the entire case is built on a fiction: the idea that the "special problem" addressed by the challenged campaign-finance laws is that "independent bodies pose a greater risk of corruption necessitating lower contribution limits." (Pet. 15; *see also, e.g.*, Pet. ii.) Having defined the problem in this way, petitioners then complain about the lack of legislative findings supporting the existence of such a problem.

But such findings do not exist because New York has never undertaken to directly regulate independent bodies through its campaign-finance law. Indeed, as noted above, New York's campaign-finance law does not even mention independent bodies at all; independent bodies are regulated only by campaign-finance laws generally applicable to all non-party political participants, whether entities or individuals. It is therefore "unsurprising," as the Second Circuit noted, that there are no legislative findings regarding corruption in independent bodies in particular, given that New York's campaign-finance law never set out to regulate independent bodies in the first instance. (Pet. App. 33a.)

2. Another key premise of the petition is that New York law creates an "asymmetry" between "major" parties on the one hand and "minor" parties (or "third" parties) on the other. (*E.g.*, Pet. i, 1.) But New York law

does not distinguish between major and minor parties. Under New York law, when it comes to party status, an organization is either a party—with all the benefits as well as regulatory burdens that that entails—or it is not a party. Petitioners are accordingly wrong to state that independent bodies are "also known as minor parties." (Pet. i n.1.) Petitioners are similarly wrong to state that New York's regime creates "asymmetrical contribution limits for parties and the campaigns and candidates they support" (Pet. iii), as New York law treats all political parties alike. There is asymmetry in the law only to the extent that the law treats political parties differently from non-parties (including independent bodies), and petitioners do not ask this Court to review the Second Circuit's holding that political parties and independent bodies are indeed different types of organizations that are not similarly situated to one another.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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January 2025

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