09-0994-cv(L),

09-1432-cv(CON)

United States Court of Appeals

for the

Second Circuit

TOM OGNIBENE, YVETTE VELAZQUEZ BENNET, VIVIANA VAZQUEZ HERNANDEZ, ROBERT PEREZ, FRAN REITNER, SHEILA ANDERSEN-RICCI, MARTINA FRANCA ASSOCIATES, LLC, REITNER/BEGUN ASSOCIATES, LLC, DENIS GITTENS, OSCAR PEREZ, KINGS COUNTY COMMITTEE OF THE NEW YORK STATE CONSERVATIVE PARTY, NEW YORK STATE CONSERVATIVE PARTY, MARTIN DILAN, and MARLENE TAPPER,

Plaintiffs-Appellants,

MICHELE RUSO, and LEROY COMRIE,

Plaintiffs,

– v. –

JOSEPH P. PARKES, S.J., in his official capacity as Chairman of the New York City Campaign Finance Board,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR AMICUS CURIAE CITIZENS UNION IN SUPPORT OF AFFIRMATION OF THE JUDGMENT BELOW

PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036
(212) 969-3000
Counsel for Amici Curiae Citizens Union

DALE C. CHRISTENSEN, JR., in his official capacity as Member of New York City's Campaign Finance Board, KATHERYN C. PATTERSON, in her official capacity as Member of New York City's Campaign Finance Board, MARK S. PIAZZA, in his official capacity as Member of New York City's Campaign Finance Board, MARK DAVIES, in his official capacity as Executive Director of the New York City Conflicts of Interest Board, MONICA BLUM, in her official capacity as Member of New York City's Board of Conflicts of Interest, STEVEN ROSENFELD, in his official capacity as Member of New York City's Board of Conflicts of Interest, ANDREW IRVING, in his official capacity as Member of New York City's Board of Conflicts of Interest, ANGELA M. FREYRE, in her official capacity as Member of New York City's Board of Conflicts of Interest, and MICHAEL MCSWEENY, in his official capacity as Acting City Clerk of New York City,

Defendants-Appellees.

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Citizens Union submits this *amicus* brief in support of affirmation of Judge Swain's ruling below that §§ 3-703(a-1), 702(3)(h), and 703(1)(l) of the New York City Administrative Code are constitutional.[1] (SPA1-47.)

INTEREST OF AMICUS CURIAE

Citizens Union is an independent, nonpartisan organization dedicated to promoting good government and political reform in the city and state of New York. One of America's first good government groups, Citizens Union was founded in 1897 to fight the corruption of Tammany Hall, and in 1901, Citizens Union helped to elect the City's first reform mayor. As a watchdog for the public interest and the common good, Citizens Union has spearheaded efforts for campaign finance reform, historic preservation, improved voting procedures, City Charter revisions, home rule for New York City and proportional representation. By informing the policy debate, Citizens Union works to ensure fair elections, clean campaigns, and open, effective, accountable government. Based on its belief that an informed citizenry is the cornerstone of a thriving local democracy, the Citizens Union Foundation publishes Gotham Gazette, a front row seat to New York City policies and politics. In the last five years, Citizens Union has filed six

[1] Counsel for all parties have consented to Citizens Union filing this *amicus* brief. No counsel for a party authored this brief in whole or in part. No person other than Citizens Union, its members, or its counsel made a monetary contribution to its preparation or submission.

amicus briefs concerning campaign finance and election issues in New York state and federal courts.[2]

PRELIMINARY STATEMENT

This appeal involves a challenge to the constitutionality of two specific types of contribution restrictions contained in New York City's comprehensive campaign finance law (the "Challenged Restrictions"). First, Plaintiffs challenge sections 3-703(a-1) and 3-702(3)(h) of the New York City Administrative Code, which provide that persons having business dealings with the City are subject to lower contribution limits, and that contributions by such persons are not eligible for matching under the City's public finance program (the "Doing Business Limits"). Second, Plaintiffs challenge section 3-703(1)(l), which extends the long-standing ban on corporate campaign contributions to also cover other business entities such as LLCs, LLPs, and partnerships (the "Entity Contribution Ban").

As discussed below, the Challenged Restrictions pertain to campaign contributions, not independent expenditures, and therefore the governing test is prescribed by *Buckley v. Valeo*, 424 U.S. 1 (1976) and its progeny. Thus, they should be upheld if the City demonstrates "a sufficiently important interest and

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[2] We refer herein to Plaintiffs-Appellants' Brief dated June 23, 2009 ("Pl. Mem."); Plaintiffs-Appellants' Supplemental Brief dated March 3, 2010 ("Pl. Supp. Mem."); Defendants-Appellees' Brief dated April 2, 2010 ("Def. Mem."); Joint Appendix ("A___"); Special Appendix ("SPA___").

employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id.* at 25. Critically, it is settled that "the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits." *McConnell v. FEC*, 540 U.S. 93, 143 (2003). Application of that basic standard compels the affirmation of Judge Swain's well-reasoned decision below upholding the Challenged Restrictions.

ARGUMENT

I. THE DOING BUSINESS LIMITS ARE CONSTITUTIONAL[3]

Plaintiffs' attacks on the Doing Business Limits are based upon their fanciful (and relentlessly reiterated) insistence that New York City politics are pure and corruption free, and that it would be "preposterous" for any New Yorker to imagine that campaign contributions could actually influence an elected official. (Pl. Mem. at 23, 34.) By Plaintiffs' reckoning, this case represents the final act of a morality play that can be summarized, roughly, as follows:

Act One: in the 1980s there was terrible political corruption in the City. (*Id.* at 4-5.)

Act Two: the Campaign Finance Law was passed in the late 1980s and suddenly politics became pristine – so much so that elected officials not only did

[3] Plaintiffs rely upon the same arguments against both the lower contribution limits and the "non-matching" of contributions, applicable to those "doing business" with the City. Therefore, we address both issues together.

not engage in corruption, but were never even tempted (*id.* at 26); in this "lengthy corruption-free climate" (*id.* at 25) a grateful citizenry soon realized that political corruption was not, and could never again be, a problem. (*Id*. at 5, 6, 16, 20-21, 23-24, 25, 28, 33, 34-35, 37, 39.)

Act Three: ignoring the inherent purity of City politics, in 2007 the City's elected officials adopted the Doing Business Limits, not because those vying for tens of billions in City contracts would ever try to buy influence (or because anyone might reasonably think that), but instead because, apparently, the elected officials dislike City contractors – to the extent of wanting to "blacklist" them – even though the contractors want no more than to elect the best person. (*Id.* at 6.)

While the Plaintiffs would like this Court to uncritically buy into the above narrative, *no one seems to believe it*. The voters did not believe it in 1998 when they demanded, by popular referendum, that the City do something about the problem of "pay-to-play" in City contracting. The City Council (*i.e.*, the people in the best position to know) did not believe it in 2007 when they voted 44-4 to adopt the Doing Business Limits. Not even Tom Ognibene, the lead Plaintiff, believes it; at deposition, Mr. Ognibene admitted that there is a "public perception" that pay-to-play occurs and that politicians are "all a bunch of crooks." (Defs. Mem. at 29.)

As the Defendants-Appellees' brief sets forth in detail, the City had good reasons for responding to public mandate and adopting the Doing Business Limits

(and did so carefully and with considerable deliberation). For instance, in 2006, the Campaign Finance Board published a report, in connection with the NYU Wagner School of Public Service, which highlighted the need for Doing Business Limits. (A835-901.) The Report found that contributors with business dealings with the City contributed ***far in excess*** of their relative numbers. In 2001, "Doing Business" contributors made up 3.8 percent of all contributors, but they accounted for 25.2 percent of dollars contributed. In 2005, they were 5.3 percent of all contributors and accounted for 21.5 percent of dollars. In Borough President races in 2001, Doing Business contributors made up 8 percent of all contributors but accounted for 81.7 percent of dollars. (A853-54.) The record demonstrates that, contrary to Plaintiffs' claim, it is not "preposterous" to believe that pay-to-play has occurred or could occur. (*Cf.* Defs. Mem. at 23, 34.)

A. Courts Should Defer to the Political Process In Evaluating Campaign Contribution Regulations

When the 2007 Doing Business Limits were passed into law, they were not adopted by insular bureaucrats with little first-hand knowledge of the role of money in politics. Rather, they were enacted by the City Council, elected officials who are directly accountable to the voters, and who have vast collective experience with campaigns, fundraising, and the intersection of money and politics. Nor, it should be noted, were the City Council members acting out of political self-preservation. Indeed, as a Campaign Finance Board report on the 2005 elections

found, incumbents tend to benefit more than challengers from large contributions made by those doing business with the City. (A910.)

Given the special expertise of elected officials in the campaign finance area, there is wisdom in Supreme Court's traditional reluctance to tinker with reasonable judgments made by the political branches of government concerning limits on campaign contributions. Elected officials are in a better position than the Courts to to understand the evolving role of money in politics, and the practicalities of implementing regulations. *McConnell,* 540 U.S. at 137 (courts apply a less rigorous standard of review of campaign contribution limits, out of "proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."); *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments").

Judicial restraint is particularly warranted in cases, like this one, where the issue is not limits on independent expenditures, but rather campaign contributions. The latter, it has been held repeatedly, do not endanger core First Amendment rights, and thus, the Courts have less need to police the political decision making process in this area. *See, e.g., Buckley*, 424 U.S. at 20 (in contrast to expenditure limits, a contribution limit "entails only a marginal restriction upon the

contributor's ability to engage in free communication."). Further recommending judicial restraint in this area is the time-honored maxim that "money in politics, like water, will always find an outlet."[4] Recognizing the ingenuity of influence seekers, the Court has recognized that the political branches need "sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *McConnell*, 540 U.S. at 137.

B. The Doing Business Limits Should Be Accorded the Deference Traditionally Given to Contribution Limits

Given the Courts' traditional deference to the political branches in crafting campaign contribution limits, it is not surprising that examples of courts striking down a campaign contribution limit are few and far between. One of those rare examples is *Randall v. Sorrell*, 548 U.S. 230 (2006), which struck down an across-the-board contribution limit of $400 (or less, depending on the office) for statewide races in Vermont. Naturally, Plaintiffs seize upon the *Randall* case, but their reliance is misplaced.

What the *Randall* Court actually found objectionable about the contribution limits in that case was that they threatened to become effectively an "incumbent protection act." *Id.* at 248-49 ("contribution limits that are too low can . . . harm

[4] While Plaintiffs may sincerely believe that in 1988, New Yorkers soliciting government favors suddenly stopped trying to convert money into influence, it is not unduly cynical to suggest that, if it were so, it would probably be a first in human history.

the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders. . . ."). In New York City, while incumbency remains a formidable advantage,[5] the Doing Business Limits actually have a pro-competitive impact. As the Campaign Finance Board noted following the 2005 elections, "incumbents – who can exert influence on particular city decisions as elected officials – have much greater access to these large donations [from those Doing Business with the City] than do non-incumbent candidates." (A910.) That makes sense. In the City, it remains the case that incumbents nearly always win; there would be little reason for an influence-seeking contractor to throw away money supporting a challenger who is all but assured of losing. Thus, the Doing Business limits are pro-competitive, unlike in *Randall*, where the evidence suggested the opposite.[6] While Plaintiffs contend that the Doing Business Limits are defective under *Randall* because they are not indexed to inflation, nothing in *Randall* suggests a *per se* rule that contributions must, in all cases, be indexed to inflation to survive constitutional scrutiny. Rather, in *Randall*, the non-indexing of the contribution limits was but one of five factors that the Court considered.

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[5] *See* Rachael Fauss, "New York City Council Races Get More Competitive," Gotham Gazette (Dec. 2009), at: *http://www.gothamgazette.com/article/governing-/20091216/17/3127* (last accessed 4/2/10).

[6] In a similar vein, the Entity Contribution ban will have a similar pro-competitive effect. In the 2005 elections, the average incumbent for a Council seat collected 78 contributions from organizations, totaling $43,500. The average challenger gathered only two contributions from organizations, totaling $1,800. (A908.)

C. The Two-Tier Contribution Limits Are Hallmarks of a Closely Drawn Restriction

In adopting the two-tier contribution limits (*i.e.*, lower limits for those Doing Business than for other contributors), the City clearly intended to address the problem of pay-to-play while minimizing the burden on the vast majority of contributors who create little or no risk of engaging in pay-to-play. This is a textbook example of a closely drawn contribution limit – targeting the problem while minimizing collateral damage. Paradoxically, Plaintiffs seize upon this two-tier feature as yet another reason for striking down the Doing Business Limits, implicitly urging the Court to hold that two-tier contribution limits are *per se* unconstitutional. This argument is wholly without merit, and in fact it undermines the very values Plaintiffs profess to support by making it more difficult to craft closely drawn campaign finance laws. In any event, two-tier contribution limits are routinely upheld when they are aimed at limiting contributions by classes of contributors who pose special risks of making contributions as a means of buying influence.[7]

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[7] *See Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995) (upholding SEC rule limiting contributions by municipal bond underwriters, where the underwriter does business with the municipality); *In re Earle Asphalt Co.*, 950 A.2d 918, 926-27 (N.J. App. Div. 2008), *aff'd,* 966 A.2d 460 (2009) (contribution limit for government contractors); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 718 (4th Cir. 1999) (sessional ban on lobbyist contributions); *Kimbell v. Hooper*, 164 Vt. 80, 85-86 (1995) (same); *Inst. of Governmental Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183, 1192 (E.D. Cal. 2001) (ban on contributions by

II. THE ENTITY CONTRIBUTION BAN IS CONSTITUTIONAL

Plaintiffs also seek to invalidate the Entity Contribution Ban, pursuing two principal lines of attack. First, they claim in their Supplemental Brief (at 5-7) that *Citizens United* forbids restrictions on corporate (or business entity) contributions, which that decision simply did not hold. Second, they contend, based upon a fundamental misunderstanding of corporate law, that there is a meaningful (for present purposes) distinction between LLCs, LLPs, and partnerships, on the one hand, and corporations on the other. (Pl. Mem. at 55-62.) Neither contention has any merit or supports a finding that the Entity Contribution Ban is invalid.

A. *Citizens United* Does Not Affect Restrictions on Business Entity *Contributions*

Nothing in the *Citizens United* decision supports a holding that corporations or other business entities may not be prohibited from making direct contributions to candidates. Rather, *Citizens United* addressed the very different question of whether corporations may be precluded from making *independent political expenditures*. *Citizens United v. FEC*, __ U.S. __, 130 S. Ct. 876, 913, 917 (2010) (invalidating statutory "restrictions on corporate independent expenditures."); *see*

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lobbyists to offices lobbied); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 619-20 (Alaska 1999) (ban on out-of-district contribution by lobbyists); *Wachsman v. City of Dallas*, 704 F.2d 160, 173 (5th Cir. 1983) (ban on contributions by city employees); *Casino Ass'n of La. v. State ex rel. Foster*, 820 So. 2d 494, 509 (La. 2002) (ban on contributions by casinos).

also id. at 910-11 ("[t]his case . . . is about independent expenditures . . ."). Here, of course, none of the Challenged Restrictions limit independent expenditures.

Nor did the *Citizens United* decision disturb the Court's holding in *FEC v. Beaumont*, 539 U.S. 146 (2003), where the Court upheld the validity of a ban on corporate contributions, which has been in place at the federal level since 1907. In *Beaumont*, the specific question was whether the ban could be applied to nonprofit advocacy corporations; the Court held that it could. In so holding, the *Beaumont* Court noted that

> Within the realm of contributions generally, corporate contributions are furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members. A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information.

Id. at 162 n.8 (citations omitted). Thus, while *Citizens United* changed the legal landscape when it comes to corporate independent expenditures, nothing in *Citizens United* calls into question the continued validity of corporate contribution bans.

B. The Corporate Contribution Ban May Be Extended To Other Business Entities

Plaintiffs also contend that the corporate contribution ban, which was not challenged below, cannot be validly extended to LLCs, LLPs, and partnerships.

1. Deference Is Given to Measures to Prevent Circumvention of Contribution Limits.

As a threshold matter, extending the corporate contribution ban to other types of business entities was clearly intended to prevent circumvention of contribution limits, as the legislative history demonstrates:

> Although contributions from these entities are not matchable with public funds, permitting these business entities to contribute has been a way to subvert the contribution limits because the Board rules only require that organizational contributions be attributed to the partner or owners where the contribution is greater than two thousand five hundred dollars.[8]

Even to the limited extent that corporate contributions implicate free speech rights (*cf. Beaumont*, 539 U.S. at 162 n.8 ("corporate contributions are furthest from the core of political expression")), the Entity Contribution Ban does not impinge upon anyone's rights because the members/partners of LLCs, LLPs, and partnerships are fully able to contribute as individuals. Moreover, prophylactic measures to prevent circumvention of contributions limits, which was the driving force behind extending the corporate contribution ban to other business entities, are entitled to great deference. *See, e.g., FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985) (recognizing the "proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential

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[8] Report, Committee on Governmental Operations, at § V(B) (June 12, 2007) (citing 52 RCNY 1-04 (2007)), at A411.

corruption had long been recognized"); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."). The extension of the corporate contribution ban to other business entities is a reasonable response to concern over circumvention, and should be upheld.

2. Contributions From Corporations and Other Business Entities Should Be Treated the Same

Plaintiffs identify no meaningful difference between corporations and non-corporate entities (such as LLCs, LLPs, and partnerships) that justifies treating bans on contributions by one differently from the other. Bans on corporate contributions have traditionally found their justification in the "special characteristics of the corporate structure" that threaten the integrity of the political process, *Beaumont*, 539 U.S. at 153-54, including "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." These characteristics are also present in LLCs, LLPs, and partnerships; they are not unique to corporations.

Just as shareholders of corporations are not subject to unlimited personal liability for debts of the corporation, under the New York LLC Law, LLC members have the benefit of limited liability, as do limited partners in New York partnerships. N.Y. LLC Law § 609(a) (McKinney's 1994); N.Y. Partnership Law § 121-303 (McKinney's 1994).

Likewise, New York law permits limited partnerships to structure themselves so that they continue even after the death of a general partner, making them capable of perpetual life. N.Y. Partnership Law § 121-801 (McKinney's 1999). And New York LLCs continue to exist irrespective of the death of a member, unless the operating agreement specifies otherwise. N.Y. LLC Law § 701 (McKinney's 1999).

Finally, while managers of LLCs and partnerships often elect to be taxed as partnerships under the Internal Revenue Code, the distinction is hardly meaningful. If anything, the availability of "partnership" tax treatment for LLCs and partnerships is an added advantage, because, with partnership taxation, taxable income is "passed through" the entity and only taxed at the investor level; whereas, with C-corporations, a corporate tax is paid, and then the same profits are taxed again as dividends at the shareholder level. Further, most S-corporations (like LLCs) are taxed as partnerships. Subjecting an S-corporation to a contribution ban, but exempting LLCs, makes little sense.

While the FEC has apparently taken the approach of banning campaign contributions by corporations, but allowing contributions by partnerships and LLCs that elect partnership tax treatment, *see Treatment of Limited Liability Companies Under the Federal Election Campaign Act,* 64 Fed. Reg. 37,397 (July 12, 1999), there is little logical justification for the FEC rule, and no *constitutional*

reason why New York City should not be able to adopt a different, better reasoned rule.

CONCLUSION

For the reasons set forth above, Amicus Citizens Union respectfully submits that the Court should affirm the judgment below and hold that the Challenged Restrictions comport with the First and Fourteenth Amendments.

Dated: New York, New York
April 9, 2010

PROSKAUER ROSE LLP

John H. Snyder
1585 Broadway
New York, NY 10036
Tel: (212) 969-3000
Fax: (212) 969-2900
jsnyder@proskauer.com
Counsel for Amicus Curiae Citizens Union

CERTIFICATE OF SERVICE

I, JOHN H. SNYDER, an attorney admitted to practice in the Courts of the State of New York and before this Court, hereby certify that on the 9th day of April, 2010, I served by email pdf and U.S. Mail copies of the Brief For Amicus Curiae Citizens Union In Support of Affirmation of the Judgment Below, and the Notice of Appearance of John H. Snyder, Esq., as follows:

Jonathan Pines, Esq.
Jane Gordon, Esq.
Law Department
City of New York
100 Church Street
New York, NY 10007
Attorneys for Defendants-Appellees
jpines@law.nyc.gov
jgordon@law.nyc.gov

James Bopp, Jr.
Joe La Rue
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
Attorneys for Plaintiffs-Appellants
jboppjr@aol.com
jlarue@bopplaw.com

Dated: New York, New York
April 9, 2010

PROSKAUER ROSE LLP

John H. Snyder
1585 Broadway
New York, NY 10036
Tel: (212) 969-3000
Fax: (212) 969-2900
jsnyder@proskauer.com
Counsel for Amicus Curiae Citizens Union