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## Empowering Small Donors: New York City's Multiple Match Public Financing as a Model for a Post-Citizens United World

Amy Loprest

*New York City Campaign Finance Board*

Bethany Perskie

*New York City Campaign Finance Board*

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# EMPOWERING SMALL DONORS: NEW YORK CITY’S MULTIPLE MATCH PUBLIC FINANCING AS A MODEL FOR A POST- *CITIZENS UNITED* WORLD

*Amy Loprest\* & Bethany Perskie\*\**

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## INTRODUCTION

Recent Supreme Court holdings have opened the door to unprecedented levels of campaign spending by both candidates and third parties.<sup>1</sup> Independent spenders are unrestricted in the amount they spend in support of or in opposition to candidates.<sup>2</sup> Public

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\* Amy Loprest is the Executive Director of the New York City Campaign Finance Board.

\*\* Bethany Perskie is an Associate Counsel at the New York City Campaign Finance Board.

1. *See, e.g.*, *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310(2010); *Davis v. Fed. Election Comm’n*, 554 U.S. 724 (2008); *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010).

2. Candidates are allowed to spend unlimited amounts of their own funds on their own campaigns as well. *See Buckley v. Valeo*, 424 U.S. 1 (1976).

financing systems are not permitted to provide additional financial assistance to publicly financed opponents of highspending, independently financed candidates. To avoid having the entire spectrum of political speech dominated by wealthy individuals and special interest groups, state and local governments must administer public financing programs that maximize the impact of small contributions while avoiding the type of “trigger” system that the Court has deemed an unjustified infringement on First Amendment rights.<sup>3</sup>

The New York City Campaign Finance Program (the “Program”) seeks to achieve this end with its low-dollar multiple match system, which awards public funds at a six-to-one ratio for small contributions to participating candidates, who must adhere to an overall expenditure limit.<sup>4</sup> The multiple match element of the Program provides participants with the ability to challenge candidates who are heavily financed by their own personal funds and/or those of independent spenders. Because the spending of an opposing candidate does not trigger an award of additional matching funds, the Program is compliant with the parameters set forth by the Supreme Court.

This Article will address the evolution of the Court’s jurisprudence on high spending candidates and outside actors; judicial challenges to the Program; New York City’s experience with high spending candidates; the increasing prevalence of independent expenditures in federal and local elections; and how the City’s low-dollar multiple match functions as an effective and constitutional offset to these candidates and outside spenders. The Article concludes that, despite the influx of money from independent spenders and wealthy self-funded candidates, low-dollar multiple match public financing systems can ensure that ordinary citizens have a voice in today’s elections.

## I. BACKGROUND

### A. History of the New York City Campaign Finance Act

In the late 1980s, New York City government was racked by a series of scandals involving city officials soliciting favors from those

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3. See *infra* notes 99–104 and accompanying text.

4. N.Y.C. ADMIN. CODE § 3-705 (2012).

seeking contracts with municipal government.<sup>5</sup> Several officials went to prison and Donald Manes, Queens Borough President and head of the borough's Democratic County Committee, committed suicide.<sup>6</sup> Gene Russianoff, an attorney for the New York Public Interest Research Group, stated that although the investigations did not actually involve campaign money, "there was a sense at the time that the scandals represented something broader . . . it was a concern about the culture."<sup>7</sup>

The Campaign Finance Act (the "Act"), proposed by then-Mayor Ed Koch, was passed by the New York City Council and signed into law on February 29, 1988.<sup>8</sup> Its stated purpose was to bring greater accountability to the political system.<sup>9</sup> On November 8, 1988, the public overwhelmingly approved a city Charter amendment establishing the independent and nonpartisan Campaign Finance Board (the "CFB" or "Board") as a Charter agency.<sup>10</sup> In passing the Act, the City Council found that:

[B]oth the possibility of privilege and favoritism and the appearance of impropriety harm the effective functioning of government. The council further finds that whether or not the reliance of candidates on large private campaign contributions actually results in corruption or improper influence, it has a deleterious effect upon government in that it creates the appearance of such abuses and thereby gives rise to citizen apathy and cynicism.

The council further finds that it is vitally important to democracy in the city of New York to ensure that citizens, regardless of their personal wealth, access to large contributions or other financial connections, are enabled and encouraged to compete effectively for public office by educating the voters as to their qualifications, positions and aspirations for the city.<sup>11</sup>

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5. *See generally* JACK NEWFIELD & WAYNE BARRETT, *CITY FOR SALE: ED KOCH AND THE BETRAYAL OF NEW YORK* (1988).

6. *Id.* at 97–104.

7. Jarrett Murphy, *The Price of Politics: 20 Years of Campaign Finance Reform in New York City*, CITY LIMITS, Fall 2008, at 6.

8. 1988 N.Y.C. Local Law No. 8.

9. *Id.*

10. N.Y.C. CHARTER ch. 46; N.Y.C. CHARTER REVISION COMM'N, DECEMBER 1986–NOVEMBER 1988 REPORT 24 (1989).

11. N.Y.C. ADMIN. CODE § 3-714 Historical Note (2012); 1988 N.Y.C. Local Law No. 8. The U.S. Supreme Court has since shown disfavor for part of this justification for campaign finance reform measures—increased electoral opportunity—as a legitimate government interest. *See, e.g.,* *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825–26 (2011).

The 1989 citywide elections were the first test of the Program. The CFB disbursed \$4.5 million in public funds to thirty-six candidates.<sup>12</sup> The 1989 elections were also historic in that David Dinkins defeated three-term incumbent Koch in the Democratic primary, going on to become the city's first African-American mayor.<sup>13</sup> 1993 brought another citywide election in which a challenger, Rudolph Giuliani, unseated the incumbent mayor, making Giuliani the first Republican mayor in twenty years.<sup>14</sup> Voters also passed a referendum limiting all city office holders to two four-year terms.<sup>15</sup>

The term limits first took effect during the 2001 citywide elections, also the first in which the Program employed a multiple match system for disbursing public funds.<sup>16</sup> In October 1998, the City Council passed an amendment to the Act providing that candidates could receive public matching funds at a rate of \$4-to-\$1 in exchange for agreeing not to accept contributions from corporations.<sup>17</sup> The following month, voters adopted a Charter amendment that prohibited candidates from accepting corporate contributions. The CFB had issued an advisory opinion stating that if the Charter amendment passed, all candidates would be eligible for the \$4-to-\$1 match.<sup>18</sup> The Giuliani administration disagreed with this interpretation and challenged it in court.<sup>19</sup> Before the court challenge

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12. See N.Y.C. CAMPAIGN FIN. BD., EXECUTIVE SUMMARY: DOLLARS AND DISCLOSURE: CAMPAIGN FINANCE REFORM IN NEW YORK CITY 99 (1990), available at <http://www.nycffb.info/press/news/per.htm>.

13. *Id.* at 34–36.

14. See 1 N.Y.C. CAMPAIGN FIN. BD., ON THE ROAD TO REFORM: CAMPAIGN FINANCE IN THE 1993 NEW YORK CITY ELECTIONS 77 (1994), available at <http://www.nycffb.info/press/news/per.htm>.

15. 1993 N.Y.C. Local Law No. 94.

16. See N.Y.C. CAMPAIGN FIN. BD., AN ELECTION INTERRUPTED... ...AN ELECTION TRANSFORMED: THE CAMPAIGN FINANCE PROGRAM AND THE 2001 NEW YORK CITY ELECTIONS (2002) [hereinafter N.Y.C. CAMPAIGN FIN. BD., REPORT ON 2001 ELECTIONS], available at [http://www.nycffb.info/PDF/per/2001\\_PER/2001\\_PER\\_Vol.1.pdf](http://www.nycffb.info/PDF/per/2001_PER/2001_PER_Vol.1.pdf).

17. 1998 N.Y.C. Local Law No. 48; see also, N.Y.C. CAMPAIGN FIN. BD., REPORT ON 2001 ELECTIONS, *supra* note 16, at 2. The matching rate previously was one-to-one for contributions up to \$1,000. The \$4-to-\$1 match was on contributions up to \$250. See *id.* at ix.

18. Advisory Opinion 1998-2 (N.Y.C. Campaign Fin. Bd. Oct. 23, 1998), [http://www.nycffb.info/act-program/ao/AO\\_1998\\_2.htm](http://www.nycffb.info/act-program/ao/AO_1998_2.htm).

19. See ANGELA MIGALLY & SUSAN LISS, BRENNAN CENTER FOR JUSTICE, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 13 (2010), available at [http://brennan.3cdn.net/8116be236784cc923f\\_iam6benvw.pdf](http://brennan.3cdn.net/8116be236784cc923f_iam6benvw.pdf).

was heard, the City Council amended the Act again, over Giuliani's veto, to confirm the \$4-to-\$1 match.<sup>20</sup>

The combination of term limits and the new multiple match system made the 2001 elections the busiest in the CFB's history, with 353 participating candidates and over \$41 million in public funds disbursed.<sup>21</sup> In addition, the terrorist attack on the World Trade Center on September 11, 2001 occurred on primary day. The primary election was postponed and the CFB's offices, located several blocks from the World Trade Center, were evacuated. The CFB continued to operate from temporary offices at Fordham University's Lincoln Center campus.<sup>22</sup> The 2001 election also saw the first time in the Board's history that a nonparticipant was elected mayor. Michael Bloomberg spent over \$73 million on that election, which raised questions about the continued viability of the matching funds program. Mark Green, Bloomberg's opponent in the general election, received public funds and spent \$16 million in total—more than any other mayoral candidate in history aside from Bloomberg himself.<sup>23</sup>

In 2005, the Act's contribution limitations and prohibitions, as well as its disclosure requirements, were extended to all candidates for municipal office, regardless of whether they chose to participate in the voluntary public fund program.<sup>24</sup> In 2007, the matching rate was increased again to \$6-to-\$1, with a maximum match of \$1,050 (or up to a contribution of \$175).<sup>25</sup> That legislation also implemented strict contribution limits on those doing business with the city, in order to curb actual and perceived "pay-to-play" contributions.<sup>26</sup>

One thing that has kept New York City's matching funds program relevant and effective—unlike the presidential public financing system—is that the Program has adapted to changing circumstances (the increase in the matching rate and the new limitations described above provide two examples). The Board is mandated to review how the Act worked in each election and make recommendations for

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20. 2001 N.Y.C. Local Law No. 21; *see also* N.Y.C. CAMPAIGN FIN. BD., *supra* note 16, at 3.

21. *See* N.Y.C. CAMPAIGN FIN. BD., *supra* note 16, at 3.

22. *Id.* at ix.

23. *Id.* at 5.

24. 2005 N.Y.C. Local Law No. 105. These limits were recently challenged and upheld by the state Supreme Court. *See* McDonald v. N.Y.C. Campaign Fin. Bd., No. 100038/2013, 2013 WL 1925022 (N.Y. Sup. Ct. May 1, 2013).

25. 2007 N.Y.C. Local Law No. 34.

26. *Id.*

changes.<sup>27</sup> As a result, the Act has been amended twenty-one times since it first passed.<sup>28</sup>

### B. Provisions of the New York City Campaign Finance Act

The CFB is a nonpartisan, independent board comprised of five members.<sup>29</sup> The mayor appoints two of the members, not more than one of whom may be enrolled in any one political party.<sup>30</sup> Likewise, the speaker of the City Council appoints two members, not more than one of whom may be enrolled in any one political party.<sup>31</sup> The mayor appoints the chair in consultation with the Council speaker.<sup>32</sup> The Board has a tradition of independence that has served it well.<sup>33</sup> In addition to regulating campaign finance, the CFB oversees several different voter education initiatives. For example, the CFB long has published the voter guide, which is a pamphlet that contains profiles of municipal candidates and voter education material.<sup>34</sup> It is distributed to every household with a registered voter before both the primary and general elections.<sup>35</sup> The voter guide is currently printed in English and Spanish citywide and in Chinese and Korean in Brooklyn, Queens, and Manhattan, pursuant to the Voting Rights Act.<sup>36</sup> Additionally, since the 1997 elections, the CFB has sponsored debates among citywide candidates.<sup>37</sup> All citywide candidates participating in the public matching funds program must appear in the

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27. N.Y.C. ADMIN. CODE § 3-713 (2012); *see also* Murphy, *supra* note 7, at 8–9.

28. *See* 2007 N.Y.C. Local Law No. 23; 2007 N.Y.C. Local Law No. 34; 2007 N.Y.C. Local Law No. 67; 2006 N.Y.C. Local Law No. 17; 2005 N.Y.C. Local Law No. 105; 2004 N.Y.C. Local Law No. 58; 2004 N.Y.C. Local Law No. 59; 2004 N.Y.C. Local Law No. 60; 2003 N.Y.C. Local Law No. 12; 2003 N.Y.C. Local Law No. 13; 2003 N.Y.C. Local Law No. 43; 2001 N.Y.C. Local Law No. 21; 1998 N.Y.C. Local Law No. 27; 1998 N.Y.C. Local Law No. 39; 1998 N.Y.C. Local Law No. 48; 1996 N.Y.C. Local Law No. 90; 1994 N.Y.C. Local Law No. 37; 1993 N.Y.C. Local Law No. 68; 1990 N.Y.C. Local Law No. 69; 1989 N.Y.C. Local Law No. 4.

29. N.Y.C. CHARTER § 1052(a)(1) (2009).

30. *Id.*; N.Y.C. ADMIN. CODE § 3-708(1).

31. N.Y.C. CHARTER § 1052(a)(1); N.Y.C. ADMIN. CODE § 3-708(1).

32. N.Y.C. CHARTER § 1052(a)(1); N.Y.C. ADMIN. CODE § 3-708(1).

33. *See* Murphy, *supra* note 7, at 13–15.

34. *See* N.Y.C. CAMPAIGN FIN. BD. R. 10-02(a) (2010).

35. N.Y.C. CHARTER § 1053.

36. 42 U.S.C. § 1973. For the 2013 elections, the guide will also be published in Bengali in certain areas of Queens. BD. OF ELECTIONS IN THE CITY OF N.Y., REGISTRATION & VOTING, *available at* <http://vote.nyc.ny.us/downloads/pdf/documents/boe/fourlanguages/registrationandvotingenglish.pdf>.

37. *Debate Program*, N.Y.C. CAMPAIGN FIN. BD., <http://www.nycffb.info/debates/overview.htm> (last visited Jan. 15, 2013).

debates.<sup>38</sup> Since January 2011, the CFB has also assumed responsibility for citywide voter engagement initiatives in conjunction with its Voter Assistance Advisory Committee.<sup>39</sup>

The Act covers five municipal offices: three citywide (mayor, public advocate, and comptroller); borough president, for each of the five boroughs; and City Council, for each of the fifty-one districts.<sup>40</sup> All candidates for those offices, even those who choose not to participate in the Program, must provide comprehensive disclosure to the CFB.<sup>41</sup> This disclosure is filed electronically and posted on the CFB's website in both searchable and summary form.<sup>42</sup>

All candidates must adhere to the Act's strict contribution limits.<sup>43</sup> Citywide candidates, for example, may not accept aggregate contributions from a single source exceeding \$4,950.<sup>44</sup> These contribution limits apply throughout the primary and general elections.<sup>45</sup> All candidates are subject to a post-election audit by the CFB and may be penalized for accepting over-the-limit contributions.<sup>46</sup> Non-participating candidates may spend as much as they wish on their own campaigns,<sup>47</sup> while participating candidates may spend up to three times the otherwise applicable contribution limit.<sup>48</sup> There is a third class of candidate: limited participants. These candidates agree to subject themselves to the spending limit, entirely self-fund their campaigns, and are ineligible to receive public funds.<sup>49</sup>

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38. N.Y.C. ADMIN. CODE § 3-709.5 (2012).

39. N.Y.C. CHARTER § 1054(b).

40. N.Y.C. ADMIN. CODE §§ 3-702(1), (13), (14).

41. See N.Y.C. CHARTER § 1052(a)(8); N.Y.C. ADMIN. CODE § 3-703(6).

42. *Searchable Database*, N.Y.C. CAMPAIGN FIN. BD., <http://www.nycffb.info/searchabledb> (last visited Jan. 15, 2013); *Campaign Finance Summary*, N.Y.C. CAMPAIGN FIN. BD., [http://www.nycffb.info/VSAppls/WebForm\\_Finance\\_Summary.aspx?as\\_election\\_cycle=2009&sm=press\\_12](http://www.nycffb.info/VSAppls/WebForm_Finance_Summary.aspx?as_election_cycle=2009&sm=press_12) (last visited Jan. 15, 2013).

43. N.Y.C. ADMIN. CODE § 3-703(1)(f) (adjusted for inflation pursuant to N.Y.C. ADMIN. CODE § 3-703(7)). The contribution limits for borough president and City Council are \$3,850 and \$2,750, respectively. N.Y.C. ADMIN. CODE § 3-703(7); *2013 Limits, Requirements, and Public Funds*, N.Y.C. CAMPAIGN FIN. BD., <http://www.nycffb.info/candidates/candidates/limits/2013.htm> (last visited Feb. 3, 2013).

44. N.Y.C. ADMIN. CODE § 3-703(1)(f) (adjusted for inflation pursuant to § 3-703(7)).

45. N.Y.C. ADMIN. CODE § 3-703(1)(a).

46. See N.Y.C. ADMIN. CODE §§ 3-710, 3-711.

47. N.Y.C. ADMIN. CODE § 3-719(2)(b).

48. N.Y.C. ADMIN. CODE § 3-703(1)(h).

49. N.Y.C. ADMIN. CODE § 3-718.

Contributions from individuals or entities doing business with the city are subject to stricter limits. For example, the “doing business” contribution limit for citywide office is \$400.<sup>50</sup> “Doing business with the city” is defined broadly for these purposes. It includes those associated with entities seeking or holding contracts, franchises, or concessions; entities which obtain grants, pension investment agreements, or economic development agreements; entities which are parties to real property transactions or land use actions; and registered lobbyists.<sup>51</sup> Further, all candidates are prohibited from accepting contributions from corporations, limited liability companies, and partnerships.<sup>52</sup> Finally, all candidates are subject to comprehensive audits by the CFB to ensure compliance with these limits and prohibitions and to ensure that the disclosure is accurate.<sup>53</sup>

More relevant to this Article are the requirements of those who choose to opt into the voluntary public financing program. Candidates join the Program by filing a certification on or before June 10 in the year of the election.<sup>54</sup> In the certification, among other things, the candidates agree to adhere to strict expenditure limits. These expenditure limits are divided into three periods: there is a spending limit for the period before the election year, for the primary election, and for the general election. The primary and general election expenditure limit for mayoral candidates, for example, is \$6,426,000.<sup>55</sup>

In order to be eligible for public financing, candidates must be in compliance with the Act and Board Rules, appear on the ballot, be opposed on the ballot, and meet a two-part threshold, which is structured to guarantee that only candidates who achieve a certain

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50. N.Y.C. ADMIN. CODE § 3-703(1)(a). Contributions from these individuals are also not eligible to be matched with public funds. N.Y.C. ADMIN. CODE § 3-702(3)(h). The doing business contribution limits for borough president and City Council are \$320 and \$250, respectively. N.Y.C. ADMIN. CODE § 3-703(1-a); *2013 Limits, Requirements, and Public Funds*, N.Y.C. CAMPAIGN FIN. BD., <http://www.nycffb.info/candidates/candidates/limits/2013.htm> (last visited Mar. 24, 2013).

51. N.Y.C. ADMIN. CODE § 3-702(18).

52. N.Y.C. ADMIN. CODE § 3-703(1)(l).

53. N.Y.C. ADMIN. CODE § 3-710.

54. N.Y.C. ADMIN. CODE § 3-703(1)(c).

55. *See generally* N.Y.C. ADMIN. CODE § 3-706. These are adjusted for inflation. *Id.* § 3-706(1)(e). The spending limit for public advocate and comptroller is \$4,018,000. *Id.* The spending limit for borough president is \$1,446,000 and for City Council \$168,000. *Id.* The pre-election year limits are: \$303,000 for citywide offices, \$135,000 for borough president, and \$45,000 for City Council. *Id.*

level of viability within their communities receive public funds.<sup>56</sup> The first component of the threshold is a dollar threshold: candidates must raise a certain dollar amount in matchable contributions from New York City residents.<sup>57</sup> The second component is the number threshold, which requires that candidates raise a certain number of contributions of at least \$10 from contributors in the geographic area they seek to represent.<sup>58</sup> For example, a City Council candidate must raise at least \$5,000, including at least seventy-five contributions of \$10 or more, from contributors within his or her Council district in order to receive public funds.<sup>59</sup> Once a candidate has demonstrated eligibility, he or she is eligible to receive six dollars for every dollar in contributions he or she receives from New York City residents, up to \$175.<sup>60</sup> Thus, a \$175 contribution from a New York City resident is worth \$1,050 in public matching funds. Public funds payments are capped at fifty-five percent of the applicable spending limit.<sup>61</sup>

Participants who run against high spending nonparticipants are eligible to have their spending limit raised, and if the nonparticipating opponent's spending reaches three times the applicable spending limit, the participant's spending limit is lifted entirely.<sup>62</sup> Prior to the Supreme Court's decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,<sup>63</sup> participants facing high spending nonparticipants were eligible to receive increased matching funds at a higher matching rate.<sup>64</sup>

In November 2010, voters in New York City passed a Charter amendment requiring the CFB to promulgate rules regulating the

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56. See N.Y.C. ADMIN. CODE § 3-703(1)–(2), (5).

57. *Id.*

58. *Id.*

59. *Id.* The threshold for mayor is \$250,000 and 1,000 contributions from city residents. For public advocate and comptroller, the threshold is \$125,000 and 500 contributions from city residents. For borough president, the threshold is contributions from 100 borough residents. The threshold dollar amount is based upon the number of persons living in each borough. The dollar amount (based on the 2010 census) for each borough is: Bronx, \$27,702; Brooklyn, \$50,094; Manhattan, \$31,717; Queens, \$44,614; and Staten Island, \$10,000. *Id.*

60. N.Y.C. ADMIN. CODE § 3-703(2).

61. N.Y.C. ADMIN. CODE § 3-705(2)(b). The maximum public funds are \$3,534,300 for mayor, \$2,209,900 for public advocate and comptroller, \$795,300 for borough president, and \$92,400 for City Council. *Id.*

62. N.Y.C. ADMIN. CODE § 3-706(3).

63. 131 S. Ct. 2806 (2011).

64. See *infra* notes 138–37 and accompanying text.

disclosure of expenditures by independent entities.<sup>65</sup> The Board enacted those rules in March 2012.<sup>66</sup> The rules require those who make independent expenditures above a certain threshold for an election to any office covered by the Act to file regular disclosure reports, which include identifying information about the spender, the amount that was spent, what was purchased, and which candidate or candidates were mentioned in the materials financed by the expenditure.<sup>67</sup> In addition, entities making independent expenditures of \$5,000 or more must report the names of their contributors.<sup>68</sup>

As addressed below, the increasingly narrow views espoused by modern courts with regard to what types of campaign finance regulation are permissible under the First Amendment threaten to diminish the efficacy of the Program's restrictions and requirements. The next section will recount the relevant jurisprudence, both at the Supreme Court level and as pertains to New York City's program.

## II. EVOLVING JURISPRUDENCE

### A. Supreme Court

The origins of modern campaign finance jurisprudence lie in *Buckley v. Valeo*,<sup>69</sup> a challenge to certain provisions of the Federal Election Campaign Act (FECA) of 1971, as amended in 1974.<sup>70</sup> The 1974 amendments, passed by Congress after the Watergate scandal revealed pervasive financial corruption during the 1972 presidential campaign, imposed limits on contributions by individuals, political parties, and PACs; limited spending by candidates and parties for national conventions; closed a loophole that had allowed candidates to use an unlimited number of political committees for fundraising purposes; required reporting and disclosure of contributions and expenditures above a certain threshold; and established the Federal Election Commission (FEC) to enforce the law and oversee disclosure and public financing.<sup>71</sup>

In *Buckley*, the Supreme Court upheld the provisions of FECA that limited individual contributions to campaigns and required

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65. N.Y.C. CHARTER § 1052(a)(12), (15).

66. R.C.N.Y. tit. 52, ch. 13 (N.Y. Leg. Publ'g Co. 2012).

67. N.Y.C. CHARTER § 1052(a)(12), (15).

68. *Id.*

69. 424 U.S. 1 (1976).

70. *Id.* at 6.

71. *See* *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 118–19 (2003).

reporting and disclosure of contributions and expenditures above a certain level, but struck down its limitations on expenditures by candidates, campaigns, and independent spenders.<sup>72</sup> Regarding the contribution limit provisions, the Court held that a “contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support,”<sup>73</sup> and that accordingly, limitations thereon impose “only a marginal restriction upon the contributor’s ability to engage in free communication”<sup>74</sup> and “do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.”<sup>75</sup> The Court further stated that Congress had justifiably concluded that large monetary contributions to campaigns must be eliminated in pursuit of the interest in preventing the appearance of impropriety.<sup>76</sup>

The Court, however, viewed expenditures in a different light than contributions. Noting that “[t]he First Amendment affords the broadest protection to . . . political expression in order ‘to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people,’”<sup>77</sup> the Court effectively equated the expenditure of funds for political communications with the underlying communications themselves.<sup>78</sup> Finding that FECA’s limitations on expenditures by candidates, campaigns, and independent spenders constituted “substantial rather than merely theoretical restraints on the quality and diversity of political speech,” the Court applied strict scrutiny and ultimately held that the

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72. *Buckley v. Valeo*, 424 U.S. 1, 3 (1976).

73. *Id.* at 21.

74. *Id.* at 20.

75. *Id.* at 29.

76. *Id.* at 30.

77. *Id.* at 14 (quoting *Roth v. U.S.*, 354 U.S. 476, 484 (1957)).

78. *Id.* at 19 (“A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”); *see also id.* at 52–53 (“The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital public issues before choosing among them on election day.”).

restrictions were sufficiently burdensome that they could not be justified by the government interest in preventing corruption or the appearance thereof.<sup>79</sup> Going further, the Court declared, “The use of personal funds reduces the candidate’s dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act’s contribution limits are directed.”<sup>80</sup> The alternative government interest in “equalizing the relative financial resources of candidates competing for elective office” was deemed insufficient as well.<sup>81</sup> The Court did, however, uphold the imposition of expenditure limits on candidates as a condition of acceptance of public funds.<sup>82</sup>

*Buckley’s* conflation of campaign spending with political speech, and the implication that self-financing and independent spending provide immunity from corrupt influences, laid the groundwork for several holdings by the Roberts Court, each of which has made it more difficult for public financing systems to counteract the advantages held by self-financed candidates or those with wealthy independent supporters.<sup>83</sup> Moreover, since *Buckley*, the Court has rejected all proposed justifications for campaign finance restrictions other than prevention of *quid pro quo* corruption or the appearance thereof, purportedly because such prevention is the only justification recognized by the Court.<sup>84</sup> This presumption overlooks the particular circumstances underlying *Buckley*, wherein the anticorruption interest was the only one that existed. That the 1974 FECA amendments were specifically addressed at targeting corruption does not mean that no other government interest could be sufficient to necessitate similar restrictions, and the Court in *Buckley* never stated or implied so. The Roberts Court, however, has repeatedly adopted and applied that interpretation.<sup>85</sup>

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79. *Id.* at 19, 44–58.

80. *Id.* at 53.

81. *Id.* at 54.

82. *Id.* at 57, n.65.

83. *See, e.g.,* *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *Davis v. Fed. Election Comm’n*, 554 U.S. 724 (2008).

84. *See, e.g., Bennett*, 131 S. Ct. at 2826–29; *Citizens United*, 130 S. Ct. at 911; *Davis*, 554 U.S. at 726.

85. *See generally* DANIEL R. ORTIZ, *THE NEW CAMPAIGN FINANCE SOURCEBOOK* ch. 3 (2005); *IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS*, (E. Joshua Rosenkranz ed., 1999).

First, *Davis v. Federal Election Commission* struck down a provision of the Bipartisan Campaign Reform Act (BCRA) that relaxed contribution limits on candidates whose opponents' expenditure of personal funds exceeded a threshold amount, regarding this asymmetrical scheme as a penalty against high spending candidates that impermissibly burdened their First Amendment right to political speech.<sup>86</sup> Relying on what it called the "fundamental nature of the right to spend personal funds for campaign speech" established in *Buckley*,<sup>87</sup> the Court stated that the provision would impose "an unprecedented penalty" on candidates who "robustly exercise[d]" that right.<sup>88</sup> Under strict scrutiny, the existence or appearance of corruption was held insufficient to justify the burden, based on the Court's reasoning in *Buckley* that reliance on personal funds reduces the threat of corruption.<sup>89</sup> The Court further declined to acknowledge "level[ing] electoral opportunities for candidates of different personal wealth" as a legitimate government objective.<sup>90</sup> The Court noted that if the increased contribution limits were applied "across the board," there would be no basis for a challenge; the asymmetry of the scheme as applied, however, was deemed an impermissible burden on a self-financing candidate's "First Amendment right to spend his own money for campaign speech."<sup>91</sup>

Two years later, in *Citizens United v. Federal Election Commission*, the Court held that the BCRA's restriction on independent spending by corporations was an infringement upon corporations' First Amendment rights, and that the burden was not justified by the governmental interest in preventing the existence or

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86. 554 U.S. 724, 738–39 (2008).

87. *Id.* at 738.

88. *Id.* at 739 ("[The provision] requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations. Many candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite [the provision], but they must shoulder a special and potentially significant burden if they make that choice.").

89. *Id.* at 740–41.

90. *Id.* at 741; *see also id.* ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." (quoting *Nixon v. Shrink Miss. Gov't PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting)) (internal quotation marks omitted)); *id.* ("noting 'the interests the Court has recognized as compelling, *i.e.*, the prevention of corruption or the appearance thereof'" (quoting *Randall v. Sorrell*, 548 U.S. 230, 268 (2006) (Thomas, J., concurring in judgment))).

91. *Id.* at 737–38 (2008).

appearance of corruption.<sup>92</sup> The Court relied on *Buckley*'s distinction between contribution limits and expenditure limits, noting that the former "have been an accepted means to prevent *quid pro quo* corruption[.]" and opined that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."<sup>93</sup> The Court found that, "[a]s a 'restriction on the amount of money a person or group can spend on political communication during a campaign,' [the BCRA] 'necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'"<sup>94</sup> After determining that Citizens United, as a corporation, was entitled to First Amendment protection of its expenditures,<sup>95</sup> the Court applied strict scrutiny and found that the "chilling effect" of limits on independent expenditures "extend[s] well beyond the Government's interest in preventing *quid pro quo* corruption."<sup>96</sup> Overruling *McConnell v. Federal Election Commission*, which had described limiting the government's interest in this manner as a "crabbed view of corruption" which "ignores precedent, common sense, and the realities of political fundraising,"<sup>97</sup> the Court held that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."<sup>98</sup>

Most recently, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* struck down the "trigger" provisions of Arizona's public financing program, which granted supplemental matching funds to candidates whose self-financed opponents' spending, combined with that of independent groups in support of the self-financed candidates

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92. 558 U.S. 310 (2010).

93. *Id.* at 357 ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)) (internal quotation marks omitted)); *see also id.* ("[I]ndependent expenditures have a 'substantially diminished potential for abuse.'" (quoting *Buckley*, 424 U.S. at 47)).

94. *Id.* at 339 (quoting *Buckley*, 424 U.S. at 19).

95. *Id.* at 342–43 ("[P]olitical speech does not lose First Amendment protection 'simply because its source is a corporation.' . . . The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" (internal citations omitted)).

96. *Id.* at 357.

97. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 152 (2003).

98. *Citizens United*, 558 U.S. at 359.

or in opposition to their opponents, exceeded the amount of public funds initially allotted to publicly financed candidates.<sup>99</sup> Relying on *Davis*, the Court found that although such provisions do not prohibit self-financed candidates from spending at a high level, they force such candidates to “shoulder a special and potentially significant burden if they make that choice.”<sup>100</sup> A public financing scheme may not punish candidates for the “vigorous exercise of the right to use personal funds to finance campaign speech.”<sup>101</sup> The Court acknowledged that, as stated in the dissenting opinion, it has never held a “viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another”; it noted, however, that none of the previously upheld subsidies had been “given in direct response to the political speech of another, to allow the recipient to counter that speech.”<sup>102</sup> The Court further emphasized that it was this trigger component of the system, rather than the amount of money provided to publicly financed candidates, that made the program problematic.<sup>103</sup> Rejecting the state’s argument that the provision ultimately created more speech rather than hindering it, the Court responded that any resulting increase in speech by publicly financed candidates would come “at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups.”<sup>104</sup>

Having ruled that the trigger provisions constituted an undue burden under the First Amendment, the Court turned to the question of whether the burden was justified by a compelling state interest.<sup>105</sup> “Leveling the playing field” was, again, dismissed as such a justification.<sup>106</sup> Reiterating the conclusions reached in *Buckley* and *Davis*, the Court also rejected the concept of limiting expenditures by candidates or independent entities as a way to reduce the existence or appearance of corruption.<sup>107</sup> Finally, the Court rejected the state’s

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99. 131 S. Ct. 2806, 2813 (2011).

100. *Id.* at 2823 (quoting *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 739 (2008)).

101. *Id.* at 2818 (quoting *Davis*, 554 U.S. at 739).

102. *Id.* at 2822.

103. *Id.* at 2824.

104. *Id.* at 2820–21.

105. *Id.* at 2825–28.

106. *Id.* at 2825 (“We have repeatedly rejected the argument that the government has a compelling state interest in ‘leveling the playing field’ that can justify undue burdens on political speech.”).

107. “Burdening a candidate’s expenditure of his own funds on his own campaign does not further the State’s anticorruption interest. Indeed, we have said that

suggestion that the provisions could reduce corruption or the appearance thereof by encouraging candidates to participate in the public financing program.<sup>108</sup> The Court did acknowledge that public financing of campaigns could further “‘significant governmental interest[s],’ such as the state interest in preventing corruption,” but reiterated that public financing schemes must be administered “in a manner consistent with the First Amendment.”<sup>109</sup>

Opponents of campaign finance regulation have relied upon these recent court rulings in challenging existing public financing schemes, including, as discussed in the next section, that of New York City.

### B. Judicial Challenges to the New York City Program

In 2009, several candidates for New York City office, lobbyists, and other interested parties sought a judgment declaring certain provisions of the Act to be unconstitutional.<sup>110</sup> Specifically, the plaintiffs objected to the Act’s “pay to play” rules, pursuant to which no candidate for New York City office may receive contributions from a corporation, limited liability company (LLC), or partnership.<sup>111</sup> The “pay to play” rules also subject contributions from individuals or entities doing business with the city to a reduced per-contributor limit and prohibit those contributions from being matched with public funds.<sup>112</sup> Following the Supreme Court’s ruling in *Bennett*, the parties entered into an agreement stipulating that the Act’s “bonus provisions,” which had provided for additional public funds to be awarded to participating candidates opposed by non-participants who

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‘reliance on personal funds *reduces* the threat of corruption’ and that ‘discouraging [the] use of personal funds[ ] deserves the anticorruption interest.’” *Id.* at 2826 (quoting *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 740–41 (2008)). “That is because ‘the use of personal funds reduces the candidate’s dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse’ of money in politics.” *Id.* (quoting *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 740–41 (2008); *Buckley v. Valeo*, 424 U.S. 1, 53 (1976)). “The matching funds provision counts a candidate’s expenditures of his own money on his own campaign as contributions, and to that extent cannot be supported by any anticorruption interest.” *Id.*

108. *Id.* at 2827 (“[T]he fact that burdening constitutionally protected speech might indirectly serve the State’s anticorruption interest, by encouraging candidates to take public financing, does not establish the constitutionality of the matching funds provision.”).

109. *Id.* at 2828 (quoting *Buckley*, 424 U.S. at 57 n.65).

110. *Ognibene v. Parkes*, 599 F. Supp. 2d 434 (S.D.N.Y. 2009).

111. *Id.* at 437–38; *see also* N.Y.C. ADMIN. CODE §§ 3-702(3), 3-703(1)(a)–(b), (*J*) (2012).

112. N.Y.C. ADMIN. CODE §§ 3-702(3), 3-703(1)(a)–(b), (*J*).

spent above a certain threshold, were unconstitutional and would not be enforced.<sup>113</sup> However, the Second Circuit upheld the pay to play rules when it determined that the rules were “closely drawn to address the significant governmental interest in reducing corruption or the appearance thereof.”<sup>114</sup> A petition for certiorari was filed in the Supreme Court on March 19, 2012, but the Court declined to hear the case, allowing the circuit court’s ruling to stand.<sup>115</sup>

The Second Circuit cited *Buckley* and *Davis* for the proposition that contribution limits and prohibitions are acceptable provided that they are “closely drawn to address a sufficient state interest,” while noting the Supreme Court’s consistent acknowledgement of “preventing actual and perceived corruption” as a sufficient interest.<sup>116</sup> The court found that the Act’s “doing business” limits fell outside the scope of *Citizens United* because they concern contributions rather than expenditures; they are limits rather than prohibitions; and they address the appearance of corruption, rather than the appearance of influence.<sup>117</sup> Because the “doing business” limits “are only indirect constraints on protected speech and associational rights,” the court subjected them to the “closely drawn” standard of review rather than strict scrutiny<sup>118</sup> and held that the limits were properly designed to prevent the perception of corruption.<sup>119</sup> With regard to the prohibition on matching funds for contributions from individuals or entities doing business with the city, the court found the provision more analogous to a limit than a ban, noting that “[n]on-matching does not prevent someone from making a

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113. Order Pursuant to Fed. R. Civ. P. 54(b) Regarding New York City Administrative Code §§ 3-706(3)(a)(ii), 3-706(3)(a)(iii), 3-706(3)(b)(ii), & 3-706(3)(b)(iii), *Ognibene v. Parkes*, No. 08-CV-1335(LTS)(THK) (S.D.N.Y. Dec. 16, 2011).

114. *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 28 (2012).

115. *Ognibene v. Parkes*, 133 S. Ct. 28 (2012) (mem.).

116. *Ognibene*, 671 F.3d at 183 (“It is not necessary to produce evidence of actual corruption to demonstrate the sufficiently important interest in preventing the appearance of corruption.” (citations omitted)).

117. *Id.* at 185–86.

118. *Id.*

119. *Id.* at 187 (“When those who do business with the government or lobby for various interests give disproportionately large contributions to incumbents, regardless of their ideological positions, it is no wonder that the perception arises that the contributions are made with the hope or expectation that the donors will receive contracts and other favors in exchange for these contributions. The threat of *quid pro quo* corruption in such cases is common sense and far from illusory.”).

contribution, but it does minimize the value of the contribution.”<sup>120</sup> The court thus applied the less stringent standard of review and held that the non-matching provision was also closely drawn to address a sufficiently important government interest.<sup>121</sup>

The corporation provision, however, is a prohibition rather than a limit and is therefore subject to a stricter standard.<sup>122</sup> The court referred to the four justifications that the Supreme Court recognized for the federal ban on corporate contributions, including “the anti-corruption interest already discussed,”<sup>123</sup> which the court found to apply to LLCs, limited liability partnerships (LLPs), and partnerships, just as it did to corporations, noting that “the organizational form of an LLC, LLP, and partnership, like a corporation, creates the opportunity for an individual donor to circumvent valid contribution limits.”<sup>124</sup> The court thus held that the extension of the entity ban to cover LLCs and partnerships in addition to corporations was closely drawn because “the legal distinctions between [LLCs, LLPs, and partnerships] and corporations do not make them less of a threat of corruption or circumvention.”<sup>125</sup>

The plaintiffs in *Ognibene* also challenged the Act’s so-called “sure winner” and “expenditure limit relief” provisions in a motion for partial summary judgment.<sup>126</sup> The sure winner provision reduces the maximum amount of matching funds available to participants unless their opponents have either raised, spent, or contracted to spend, more than twenty percent of the applicable expenditure limit.<sup>127</sup> A participant who wishes to receive a full payment of public funds may also submit a Statement of Need with accompanying documentation verifying that his or her opponent satisfies at least one of seven indicia that the opponent will constitute a legitimate challenge.<sup>128</sup> The

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120. *Id.* at 193.

121. *Id.*

122. *Id.* at 194–95.

123. *Id.* at 194–95 (quoting *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 154 (2003)).

124. *Id.* at 195 (citations omitted).

125. *Id.* at 195–97.

126. Plaintiffs’ Memorandum of Law in Support of Plaintiffs’ Motion for Partial Summary Judgment, *Ognibene v. Parkes*, No. 08 Civ. 1335(LTS)(FM), 2013 WL 1348462 (S.D.N.Y. Apr. 4, 2013).

127. See N.Y.C. ADMIN. CODE § 3-705(7)(a) (2012); *Ognibene v. Parkes*, No. 08 Civ. 1335(LTS)(FM), 2013 WL 1348462, at \*7–8 (S.D.N.Y. Apr. 4, 2013).]

128. The conditions include: (1) a non-participating candidate or a limited participating candidate who has the ability to self-finance; (2) a candidate who has received endorsements from specified high-profile individuals or entities; (3) a

purpose of this provision is to conserve taxpayer dollars by preventing the award of maximum public funds to candidates who face minimal opposition.<sup>129</sup> The expenditure limit relief provision increases the spending limit for participating candidates opposed by non-participants who have raised or spent more than half the applicable expenditure limit; if a non-participant raises or spends more than three times the expenditure limit, the limit on his or her participating opponent's spending is removed entirely.<sup>130</sup> This provision was intended to reduce the burden imposed by the Program's expenditure limits on participants whose opponents are not bound by such limits.

The plaintiffs likened the sure winner and expenditure limit relief provisions to the trigger provisions struck down in *Davis* and *Bennett*.<sup>131</sup> The defendants filed a cross-motion for partial summary judgment, arguing that rather than awarding additional funds to a candidate in response to spending by his or her opponent or creating an asymmetrical funding scheme, the sure winner provision "simply preserves the public fisc by minimizing public financing of participating candidates in non-competitive races," and the expenditure limit relief provision, "if anything, *restores* symmetry by first raising, and then removing, expenditure limits asymmetrically imposed by the Program upon participating candidates but not upon their nonparticipating opponents."<sup>132</sup>

On April 4, 2013, the court upheld the expenditure limit relief provisions because, unlike the scheme struck down in *Bennett*, they

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candidate who has had significant media exposure in the twelve months preceding the election; (4) a candidate who has received 25 percent or more of the vote in an election within the last eight years for an office in an area that overlaps with the area that is the subject of the current election; (5) a candidate whose name is substantially similar to the candidate's so as to result in confusion among voters; (6) a candidate who is a chairman, president, or district manager of a community board (city council or borough-wide races only); and (7) a candidate whose immediate family member holds or has held elective office in all or part of the covered area in the past ten years. See N.Y.C. ADMIN. CODE §3-705(7)(b).

129. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment & in Support of Defendants' Cross-Motion for Summary Judgment at 5, *Ognibene v. Parkes*, No. 08 Civ. 1335(LTS)(FM), 2013 WL 1348462 (S.D.N.Y. Apr. 4, 2013).

130. See N.Y.C. ADMIN. CODE § 3-706(3)(b)(i).

131. Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment, *Ognibene v. Parkes*, No. 08 Civ. 1335(LTS)(FM), 2013 WL 1348462 (S.D.N.Y. Apr. 4, 2013).

132. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment & in Support of Defendants' Cross-Motion for Summary Judgment at 2, *Ognibene v. Parkes*, No. 08 Civ. 1335(LTS)(FM), 2013 WL 1348462 (S.D.N.Y. Apr. 4, 2013).

“do not put non-participating candidates to the choice of refraining from speech or causing their participating opponents to receive direct infusions of public money.”<sup>133</sup> With regard to the “circumstantial trigger” component of the sure winner provisions, which increases a participant’s eligibility for public funds upon the submission of a Statement of Need identifying indicia that the participant’s opponent constitutes a legitimate challenge,<sup>134</sup> the court held that no substantial First Amendment burden existed.<sup>135</sup> The court held, however, that the “monetary triggering” component of the sure winner provisions was an undue burden on the First Amendment rights of candidates, and that the provisions could not be justified by the government’s interest in preventing corruption or the appearance thereof.<sup>136</sup> Accordingly, for all elections beginning in 2013, the Board will require a Statement of Need from any participant seeking to be eligible for the maximum amount of public funds, regardless of the level of spending and fundraising by that candidate’s opponent or opponents.<sup>137</sup>

As discussed below, these holdings by the Supreme Court and by lower courts have created barriers to the enforcement of restrictions on campaign finance, thus enabling wealthy candidates and independent spenders to influence elections more than ever before.

### III. IMPACT OF SUPREME COURT HOLDINGS ON CAMPAIGN FINANCE

#### A. High Spending Candidates

Wealthy individuals who run for office have always enjoyed a built-in advantage, which was magnified when spending limits were

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133. *Ognibene v. Parkes*, No. 08 Civ. 1335(LTS)(FM), 2013 WL 1348462, at \*6 (S.D.N.Y. Apr. 4, 2013).

134. See *infra* note 170 and accompanying text.

135. *Ognibene*, 2013 WL 1348462, at \*10–11.

136. *Id.* at \*8–10; see also *id.* at \*10 (“[T]he fact that burdening constitutionally protected speech might indirectly serve the State’s anticorruption interest, by encouraging candidates to take public financing, does not establish the constitutionality of the matching funds provision.” (quoting *Bennett*, 131 S. Ct. at 2827); *id.* (“[T]he fact that the State may feel that the matching funds provision is necessary to allow it to ‘find[ ] the sweet-spot’ and ‘fine-tun[e]’ its public funding system, to achieve its desired level of participation without an undue drain on public resources, is not a sufficient justification for the burden.” (quoting *Bennett*, 131 S. Ct. at 2827))).

137. N.Y.C. ADMIN. CODE § 3-705(7)(b) (2012).

deemed impermissible. As Justice Stevens wrote in his dissent in *Randall v. Sorrell*,

When campaign costs are so high that only the rich have the reach to throw their hats into the ring, we fail to protect the political process from undue influence of large aggregations of capital and to promote individual responsibility for democratic government. States have recognized this problem, but *Buckley's* perceived ban on expenditure limits severely limits their options in dealing with it.<sup>138</sup>

Despite widespread and well-publicized concerns over *Citizens United*, high spending by independently wealthy candidates is nothing new. Candidates in every election since the CFB's first election in 1989<sup>139</sup> have run against high spending non-participants. However, over the course of the CFB's history, high spending non-participants have run in fewer than ten percent of covered elections.<sup>140</sup> Most of these have been City Council races, and most involved an incumbent (whether participant or non-participant) who was reelected.<sup>141</sup>

The goal of the Program is not to match non-participants' spending with public funds, but rather to provide participating candidates with sufficient resources to get their message out to the voters. The clearest example of this has been the past three mayoral elections. Michael Bloomberg, the billionaire founder and chief executive officer of Bloomberg L.P., has spent approximately \$266 million on his three campaigns for mayor.<sup>142</sup> Each of his general election

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138. *Randall v. Sorrell*, 548 U.S. 230, 278 (2006) (Stevens, J., dissenting) (internal quotation marks omitted).

139. In 1989, Ronald Lauder ran as a nonparticipant in the Republican primary against Rudolph Giuliani and was defeated although Lauder spent approximately \$13 million of his own money. See N.Y.C. CAMPAIGN FIN. BD., *THE IMPACT OF HIGH-SPENDING NON-PARTICIPANTS ON THE CAMPAIGN FINANCE PROGRAM 3* (2006), available at [http://www.nycffb.info/PDF/issue\\_reports/High-Spending-White-Paper.pdf](http://www.nycffb.info/PDF/issue_reports/High-Spending-White-Paper.pdf).

140. *Id.*

141. *Id.* at 8–9. From 1997 to 2005, there were twenty-eight races with a high-spending non-participant. Of these, twenty-four were City Council races. Incumbents won in fifteen out sixteen of these races. In the other eight, four participants won and four non-participants won. *Id.*

142. In 2001, Bloomberg spent \$73.9 million; in 2005, he spent \$84.6 million. See *id.* at 10. In 2009, he spent \$108 million. See N.Y.C. CAMPAIGN FIN. BD., *NEW YORKERS MAKE THEIR VOICES HEARD: A REPORT ON THE 2009 ELECTIONS 8* (2010) [hereinafter N.Y.C. CAMPAIGN FIN. BD., *REPORT ON 2009 ELECTIONS*], available at [http://www.nycffb.info/PDF/per/2009\\_PER/2009PostElectionReport.pdf](http://www.nycffb.info/PDF/per/2009_PER/2009PostElectionReport.pdf).

opponents was a participant in the Program.<sup>143</sup> After the 2001 election, many believed that the Program was in trouble based on the wide discrepancy in campaign spending by the mayoral candidates (Bloomberg spent \$73.9 million to Mark Green's \$16.2 million).<sup>144</sup> The margin of victory, however, was very small—only 35,000 votes.<sup>145</sup> Former CFB Chairman Father Joseph A. O'Hare, S.J. commented, “in [the Green campaign's] view, a swing of only 35,000 votes, presumably, would have spelled success for the Program.”<sup>146</sup> In subsequent elections, the spending disparity grew, but the margins of victory demonstrate that, due to the Program, the participating candidate continued to be able to get his message out. In 2009, Bill Thompson was outspent by almost \$100 million (Thompson spent \$9.3 million, Bloomberg \$108.3 million), but lost the election by only about 50,000 votes, or five percent.<sup>147</sup> Tom Robbins of *The Village Voice* stated that the election was “an absolutely amazing failure of big money in a campaign.”<sup>148</sup>

However, both Green and Thompson received significant additional public funds when facing Bloomberg—additional public funds that are no longer available after the Supreme Court's ruling in *Bennett* because they were received pursuant to the Act's “trigger” provisions.<sup>149</sup> Further, the runaway spending at the federal level by independent actors creates cause for alarm about the potential for elections to become the purview of only the richest or those with the richest friends. The Supreme Court has declared that providing

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143. See N.Y.C. CAMPAIGN FIN. BD., REPORT ON 2009 ELECTIONS, *supra* note 142, at 8; N.Y.C. CAMPAIGN FIN. BD., PUBLIC DOLLARS FOR THE PUBLIC GOOD: A REPORT ON THE 2005 ELECTIONS 13–17 (2006), available at [http://www.nycffb.info/PDF/per/2005\\_PER/2005\\_Post\\_Election\\_Report.pdf](http://www.nycffb.info/PDF/per/2005_PER/2005_Post_Election_Report.pdf); N.Y.C. CAMPAIGN FIN. BD., REPORT ON 2001 ELECTIONS, *supra* note 16, at 25–29.

144. See N.Y.C. CAMPAIGN FIN. BD., REPORT ON 2001 ELECTIONS, *supra* note 16, at xiii, 5.

145. N.Y.C. CAMPAIGN FIN. BD., REPORT ON 2009 ELECTIONS, *supra* note 142, at 11.

146. See N.Y.C. CAMPAIGN FIN. BD., REPORT ON 2001 ELECTIONS, *supra* note 16, at xiii.

147. N.Y.C. CAMPAIGN FIN. BD., REPORT ON 2009 ELECTIONS, *supra* note 142, at 8.

148. *Election Day 2009: GOPers Sweep Governor Races; Bloomberg Wins Tight NYC Mayoral Race; Dems Take House Seats; Maine Repeals Gay Marriage*, DEMOCRACY NOW! (Nov. 4, 2009), [http://www.democracynow.org/2009/11/4/election\\_day\\_2009\\_gopers\\_sweep\\_governor](http://www.democracynow.org/2009/11/4/election_day_2009_gopers_sweep_governor).

149. See Order Pursuant to Fed. R. Civ. P. 54(b) Regarding New York City Administrative Code §§ 3-706(3)(a)(ii), 3-706(3)(a)(iii), 3-706(3)(b)(ii), & 3-706(3)(b)(iii), *Ognibene v. Parkes*, No. 08-CV-1335(LTS)(THK) (S.D.N.Y. Dec. 16, 2011).

electoral opportunity is not a sufficient justification for limiting the free speech rights of other candidates.<sup>150</sup> At some point, however, Justice Stevens's concerns ring true, and there is a need for balance.

### B. Independent Expenditures

In addition to exacerbating the dichotomy between rich and poor candidates, the evolution of campaign finance jurisprudence has vastly increased the degree to which high spending independent groups can attempt to influence the outcome of elections. The impact of *Citizens United* has been immediate and tangible, with independent groups and their often anonymous donors poised to dominate the field of political speech.

Shortly after *Citizens United* was decided, the D.C. Circuit Court heard a case brought by SpeechNow, an advocacy group funded in part by unaffiliated donors, which planned to produce and broadcast political advertisements during the 2010 election cycle.<sup>151</sup> SpeechNow had requested an advisory opinion from the FEC to determine whether it must register as a political committee and whether donations it received would be considered "contributions" and thus be subject to federal limits.<sup>152</sup> The FEC issued a draft advisory opinion answering both questions in the affirmative, which prompted SpeechNow, along with five individual plaintiffs, to seek an injunction barring the FEC from enforcing contribution limits with respect to donations given to SpeechNow.<sup>153</sup> After eliminating all the government interests previously rejected by the Supreme Court as insufficient to justify restrictions on political contributions, the court reiterated that only "the government's anticorruption interest" could provide such a justification, and, relying on *Citizens United*, held that "the government has *no* anticorruption interest in limiting independent expenditures."<sup>154</sup> Applying that logic, the court concluded, "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of

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150. See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011).

151. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 689–90 (D.C. Cir. 2010).

152. *Id.* at 689.

153. *Id.*

154. *Id.* at 692–93 (emphasis in original).

corruption.”<sup>155</sup> Accordingly, donations made to independent spenders were held not to be subject to contribution limits.

In the wake of *Citizens United* and *SpeechNow*, independent groups, including so-called “super PACs,” can both raise and spend money in unlimited quantities. In 2010, independent expenditures for candidates in the federal midterm elections quadrupled the amount spent by outside groups in 2006.<sup>156</sup> Moreover, the percentage of spending by groups that were not required to disclose their donors, such as 501(c)(4) nonprofit organizations, increased from 1% in 2006 to 47% four years later.<sup>157</sup> Independent spending in the Republican presidential primaries from January 1 to 25, 2012, increased more than 1600% from the same period in 2008, and 44% of all ads aired during that time were funded by outside interest groups, compared with 3% in the 2008 primaries.<sup>158</sup> The groups making these expenditures rely heavily on large donations; 93% of super PAC funds raised in 2011 came from contributions of \$10,000 or more.<sup>159</sup>

State and local elections have likewise seen a drastic increase in independent expenditures. In Arizona, which provides public financing to candidates for state office, outside spending on state elections more than doubled between 2006 and 2010.<sup>160</sup> During the same period, independent spending in North Carolina rose 468%,<sup>161</sup> and in Iowa, it increased by a factor of twenty-eight.<sup>162</sup> In San Francisco, a city with a public financing program similar to New

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155. *Id.* at 694.

156. Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, OPEN SECRETS BLOG (May 5, 2011, 11:16 AM), <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>.

157. *See id.*

158. Erika Franklin Fowler, *Outside Group Involvement in GOP Contest Skyrockets Compared to 2008*, WESLEYAN MEDIA PROJECT BLOG (Jan. 30, 2012), <http://mediaproject.wesleyan.edu/2012/01/30/group-involvement-skyrockets>.

159. Blair Bowie & Adam Lioz, *Auctioning Democracy: The Rise of Super PACs and the 2012 Election*, WESLEYAN MEDIA PROJECT BLOG (Feb. 8, 2012), <http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election>.

160. *Independent Spending in Arizona, 2006–2010*, NAT’L INST. ON MONEY ST. POL. (Aug. 12, 2011), <http://www.followthemoney.org/press/ReportView.phtml?r=456>.

161. *Independent Spending in North Carolina, 2006–2010*, NAT’L INST. ON MONEY ST. POL. (Dec. 20, 2011), <http://www.followthemoney.org/press/ReportView.phtml?r=472>.

162. *Independent Spending in Iowa, 2006–2010*, NAT’L INST. ON MONEY ST. POL. (Oct. 27, 2011), <http://www.followthemoney.org/press/ReportView.phtml?r=464>.

York's, independent spending in the 2011 mayoral election totaled nearly \$2.6 million,<sup>163</sup> compared with less than \$30,000 four years earlier.<sup>164</sup> This level of outside spending dramatically increases the potential for the appearance of undue influence. One news report stated that the independent spenders in San Francisco's mayoral election included "[b]usinesspeople with financial stakes in city contracts, real-estate professionals involved in major development projects, and investors in San Francisco companies who stand to benefit from specialized tax breaks."<sup>165</sup>

In addition to a lack of financial regulation, interest groups seeking to influence federal elections have benefited from the FEC's lenient interpretation of the concept of coordination, allowing campaigns and outside groups to engage in cooperated efforts disguised as independent spending in order to circumvent contribution limits.<sup>166</sup> The founder of one super PAC aimed at defeating Suzan DelBene's 2012 congressional campaign was the mother of DelBene's opponent, Laura Ruderman.<sup>167</sup> When asked about the super PAC, Ruderman claimed that she was "just as surprised as everyone else" to learn of its origins, as well as the \$115,000 expenditure her mother's organization had made on her behalf.<sup>168</sup>

Pursuant to FEC regulations, a "communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication . . . [i]s paid for, in whole or in part, by a person other than that candidate, authorized committee, or political party committee," and satisfies certain standards of content and conduct.<sup>169</sup> The conduct standards, used to determine whether there is "agreement or formal collaboration" between a campaign and an independent spender, include a "[r]equest or suggestion" made by a

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163. CAMPAIGN FIN. BD., DISCLOSURE OF INDEPENDENT EXPENDITURES IN NEW YORK CITY ELECTIONS 5 (2012).

164. SAN FRANCISCO ETHICS COMMISSION, 2007 MAYORAL PUBLIC FINANCING PROGRAM AND A FEASIBILITY AND COSTS STUDY OF A FULL PUBLIC FINANCING PROGRAM 6 (2008).

165. Rebecca Bowe, *The Billionaire's Mayor*, S.F. BAY GUARDIAN (Oct. 18, 2011).

166. See, e.g., *UPDATE: Anti-Suzan DelBene PAC Funded by Mother of Opponent Laura Ruderman*, SEATTLE TIMES (July 15, 2012, 11:05 AM), <http://blogs.seattletimes.com/politicsnorthwest/2012/07/15/anti-suzan-delbene-pac-funded-by-mother-of-opponent-laura-ruderman/>.

167. *Id.*

168. *Id.*

169. 11 C.F.R. § 109.21(a) (2013).

candidate or his or her authorized committee or political party committee regarding the communication in question; “material involvement” by the candidate or his or her committees in decisions regarding certain aspects of the communication; “[s]ubstantial discussion” between the individual or entity sponsoring the communication, or his or her employees or agents, and the candidate who is clearly identified in the committee or his or her committees or opponent; a “[c]ommon vendor” shared by the candidate and the independent spender, where such vendor is contracted or employed for the creation, production, or distribution of the communication; and a “[f]ormer employee or independent contractor” of the candidate or his or her committees who either pays for the communication or conveys certain types of information to the communication’s sponsor.<sup>170</sup>

The practical application of these regulations by the FEC has created massive loopholes in terms of what constitutes coordination of purportedly independent expenditures.<sup>171</sup> In one high-profile example, the Commission deadlocked 3-3 on the decision of whether a series of advertisements sponsored by American Crossroads advocating for the reelection of certain incumbent members of Congress would constitute coordinated communications.<sup>172</sup> Incredibly, American Crossroads’ own acknowledgment that the advertisements in question “would be fully coordinated with incumbent Members of Congress . . . insofar as each Member would be consulted on the advertisement script and would then appear in the advertisement”<sup>173</sup> did not, in the estimation of three of the FEC commissioners, resolve the issue of whether the ads were coordinated.

New York City has also begun to see an increase in independent spending. In the weeks before the 2009 elections, the Communications Workers of America, Local 1180 ran a television commercial opposing Michael Bloomberg.<sup>174</sup> Although the ad did not mention Bloomberg’s opponent, Bill Thompson, or even directly urge

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170. 11 C.F.R. § 109.21(d) (2013).

171. *See, e.g.*, Advisory Opinion Request from Am. Crossroads to Fed. Election Comm’n, AOR 2011-23 (Oct. 28, 2011).

172. Certification, American Crossroads, AO 2011-23 (F.E.C. Dec. 5, 2011).

173. Advisory Opinion Request from Am. Crossroads to Fed. Election Comm’n, AOR 2011-23 (Oct. 28, 2011).

174. N.Y.C. CAMPAIGN FIN. BD., DISCLOSURE OF INDEPENDENT EXPENDITURES IN NEW YORK CITY ELECTIONS 9 (2012), *available at* [http://www.nyccfb.info/pdf/issue\\_reports/disclosure-of-independent-expenditures-in-nyc-elections.pdf](http://www.nyccfb.info/pdf/issue_reports/disclosure-of-independent-expenditures-in-nyc-elections.pdf).

a vote against Bloomberg, its electioneering tagline was clear: “Tell Republican Michael Bloomberg: NYC is not for sale.”<sup>175</sup> Further, in the 2009 elections, the Independence Party, with funding from real estate interests, spent significant amounts in four City Council races in which the progressive Working Families Party supported Bloomberg’s opponents.<sup>176</sup> These examples and others were the fuel that led to the Board’s recommendation that disclosure be required of independent spenders in New York City elections, and to the passage of the Charter amendment authorizing the Board to require such disclosure.<sup>177</sup>

#### IV. SMALL DONOR DEMOCRACY

Presuming that we don’t want to be left with the specter raised by Justice Stevens—a system in which only a limited number of people have the wherewithal to run for even the lowest elected office—what can be done to combat the increase in spending by self-financed candidates and outside actors? The Supreme Court has cut off permissible methods for governments to assist candidates faced with either high spending opponents or independent spenders. Therefore, there needs to be a new way to solve these problems. As stated by the Campaign Finance Institute (“CFI”) in a 2001 report,

[t]he requirement is to use policy methods [that] do not restrict or inhibit speech. It is both constitutional and perfectly appropriate to promote participation by building up instead of squeezing down—to dilute the power of the few by increasing the number and importance of low-dollar donors and volunteers.<sup>178</sup>

After the 2008 presidential election, it was widely believed that the use of technology to mobilize small donors could be sufficient to elicit campaign participation in large numbers.<sup>179</sup> The Internet eliminates many of the barriers to reaching potential contributors and voters in a

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175. *Id.*

176. See N.Y.C. CAMPAIGN FIN. BD., REPORT ON 2009 ELECTIONS, *supra* note 142, at 170–71.

177. See *id.* at 180–81.

178. MICHAEL J. MALBIN ET AL., CAMPAIGN FIN. INST., CHANGING THE GAME BY EXPANDING THE PLAYING FIELD: PUBLIC FINANCING OF ELECTIONS AFTER *CITIZENS UNITED* AND *ARIZONA FREE ENTERPRISE 1* (2011) (emphasis omitted), available at [http://www.cfinst.org/pdf/state/CFI\\_Report\\_Small-Donors-in-Six-Midwestern-States-2July2011.pdf](http://www.cfinst.org/pdf/state/CFI_Report_Small-Donors-in-Six-Midwestern-States-2July2011.pdf).

179. See, e.g., MIGALLY & LISS, *supra* note 19, at 24.

cost-effective fashion.<sup>180</sup> The success of President Obama's 2008 campaign in using the Internet to reach contributors was inspiring.<sup>181</sup> Even Obama's 2008 campaign, however, raised most of its funds through larger donations.<sup>182</sup> Hence, relying on the Internet as a sole method of increasing participation may not be sustainable.

One way to increase participation by individuals is through the use of small donor matching funds programs, like New York City's. The Program, with its multiple match of six dollars for every dollar contributed by a New York City resident up to a maximum amount, is viewed as a model to encourage this type of participation.<sup>183</sup> The Supreme Court has endorsed public financing as a method of building public participation in the political process.<sup>184</sup> As New York State has considered adopting its own public financing system, the City's program has been lauded as an example for the state to follow.<sup>185</sup>

One of the primary objectives of the small dollar multiple match program is to empower New York City voters to be more engaged in

180. ANTHONY J. CORRADO ET AL., JOINT PROJECT CAMPAIGN FIN. INST., AM. ENTER. INST., BROOKINGS INST., REFORM IN AN AGE OF NETWORKED CAMPAIGNS: HOW TO FOSTER CITIZEN PARTICIPATION THROUGH SMALL DONORS AND VOLUNTEERS 10 (2010), available at [http://www.cfinst.org/books\\_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf](http://www.cfinst.org/books_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf).

181. See *id.* at 12.

182. CAMPAIGN FIN. INST., CFI ANALYSIS OF PRESIDENTIAL CANDIDATES' DONOR REPORTS (2008), available at [http://www.cfinst.org/press/preleases/08-11-24/Realty\\_Check\\_-\\_Obama\\_Small\\_Donors.aspx](http://www.cfinst.org/press/preleases/08-11-24/Realty_Check_-_Obama_Small_Donors.aspx).

183. See, e.g., Editorial, *Give Small Political Donors a Voice*, N.Y. TIMES, Aug. 23, 2012, at A24; Alec Hamilton, *Campaign Finance Ruling May Make NYC a Model for the Nation*, WNYC (June 21, 2011), <http://www.wnyc.org/articles/its-free-country/2011/jun/21/campaign-finance-ruling-may-make-new-york-model-nation>.

184. *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (“[Public financing] is a congressional effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”).

185. See, e.g., Thomas Kaplan, *Wealthy Group Seeks to Reform Election Giving in New York*, N.Y. TIMES, Apr. 11, 2012, <http://www.nytimes.com/2012/04/12/nyregion/coalition-urges-public-financing-in-new-york-state-elections.html>; Bill Mahoney, *Campaign Finance Reform: What's Needed Besides Public Financing?*, GOTHAM GAZETTE (Aug. 9, 2012), <http://www.gothamgazette.com/index.php/component/content/article/86-elections/1431-campaign-finance-reform-whats-needed-besides-public-financing>; Sundeep Iyer & Michael Malbic, *Reform Campaign Finance, Give All Residents a Voice*, J. NEWS, July 17, 2012, available at <http://nylead.org/2012/07/25/journal-news-opinion-reform-campaign-finance-give-all-residents-a-voice>; Press Release, N.Y. Leadership for Accountable Gov't, NY LEAD Calls for Campaign Finance Reform for NYS to Restore Fairness in Elections (Feb. 15, 2012), available at <http://nylead.org/2012/02/15/ny-lead-calls-for-campaign-finance-reform-for-nys-to-restore-fairness-in-elections>.

the political system.<sup>186</sup> Among the Program's goals is encouraging New Yorkers to become more engaged by giving small contributions, while also incentivizing candidates to seek those small contributions from the voters. As stated in the CFB's 2009 post-election report:

Raising funds from a broad range of small donors, rather than a narrow band of wealthy donors, gives candidates access to a wider range of perspectives on city issues. At the same time, candidates who work to cultivate small contributors are helping to create a more active class of supporters . . . .<sup>187</sup>

By these measures, the multiple match program has been very successful. In the 2009 elections, 68.9% of all contributors gave \$175 or less, compared with 58.5% in 2001 and 56.5% in 2005.<sup>188</sup> Although the total amount of money coming from small donations remains low, the percentage of total dollar contributions in small amounts has also increased over time. In 2009, 14.8% of all funds raised came from contributions of \$175 or less, compared with 10% in 2001 and 8.5% in 2005.<sup>189</sup> Even more encouraging is that many of these small donors are new contributors, having given for the first time in the 2009 election. More than half of all the New York City contributors in the past three citywide elections have been first-time donors. These first-time donors are also likely to be small contributors; 80% of new donors in 2009 contributed \$175 or less.<sup>190</sup>

After conducting a study of the small donor issue in New York City for the 2005 and 2009 elections, the CFI found that "multiple matching funds sharply increase the *proportional* role of small donors; . . . increase[] the *number* of people who contribute; and . . . shift[] the *demographic and class profile* of those who give, making the system more representative of the population as a whole."<sup>191</sup> The study found that 37% of the funds that City Council candidates received in 2005 and 2009 came from individuals whose contributions aggregated to less than \$251.<sup>192</sup> When the public funds associated

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186. See, e.g., MIGALLY & LISS, *supra* note 19, at 11–13.

187. N.Y.C. CAMPAIGN FIN. BD., REPORT ON 2009 ELECTIONS, *supra* note 142, at 103.

188. *Id.*

189. *Id.*

190. *Id.* at 102–05.

191. Michael J. Malbin et al., *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 ELECTION L.J. 3, 4 (2012).

192. *Id.* at 8 tbl.1.

with those contributions were added, the percentage jumped to 64%.<sup>193</sup>

The CFI further concluded that only 9% of contributions to non-participants in 2005 were in the amount of \$250 or less; in 2009, it was only 15%. Both figures were much lower than the percentage of small donors to participants in the Program.<sup>194</sup> Anecdotally, City Councilmember Mark Weprin, who spent fifteen years as a state assemblyman and was a participant in the Program in 2009, recounts that he focused his fundraising on small donors, and attributes that focus to the multiple match program, unlike his previous campaign for state office. His average contribution was just \$240, despite his ability to raise much larger contributions.<sup>195</sup>

The CFI also found that although some of the increase in small donors could be explained by large donors spreading their money around, there also was an empirically measurable increase in participation.<sup>196</sup> “The 2009 election . . . saw a 55 percent increase in the number of donor-to-candidate pairs below \$175. This clearly was a substantial increase in participation and not simply reshuffling of old money.”<sup>197</sup> This increase can certainly be explained by the legislative change between 2005 and 2009, which raised the matching factor from four to six; this effect on participation was the exact purpose of the matching rate increase. The increase in contributor participation occurred notwithstanding a decline in voter turnout during the same period, from 33% in 2005 to 26% in 2009.<sup>198</sup>

Further, these increasing numbers of small donors have made the donor pool more diverse, both geographically and demographically.<sup>199</sup> In 2009, 89% of the City’s census bloc groups had at least one

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193. *Id.*

194. *Id.* at 10.

195. MIGALLY & LISS, *supra* note 19, at 14.

196. Malbin et al., *supra* note 191, at 10. CFI tested the “reshuffling” theory by looking at contributions given at exactly the largest contribution eligible for matching funds. In 2005, this was \$250 and in 2009, it was \$175. The surmise was that strategic donors would give exactly at that maximum. *See id.*

197. *Id.* at 12.

198. *Id.*

199. *See generally* ELISABETH GENN ET AL., BRENNAN CTR. FOR JUSTICE & CAMPAIGN FIN. INST., DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS (2012), available at [http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport\\_WEB.PDF](http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF).

donor.<sup>200</sup> Most of the donations of \$1,000 or more to both city and state candidates came from the Upper East Side and Upper West Side of Manhattan.<sup>201</sup> Research shows that “candidates for City Council are searching for and finding small donors in every corner of the city.”<sup>202</sup> These contributors are also more demographically representative of the entire city, in terms of both racial and economic characteristics.<sup>203</sup>

Another benefit of this increase in small donors is that candidates are connecting with their constituents, using fundraising to build volunteer and voter outreach.<sup>204</sup> One candidate commented: “Under the NYC system, candidates are incentivized to build networks of small donors who become networks of organizers. The most cost-effective fundraising and the most persuasive organizing takes place at the same spot: in supporters’ living rooms.”<sup>205</sup>

Some opponents of public financing argue that contribution and expenditure limits “are unlikely to effectively restrain candidates and parties involved in competitive elections for high stakes.”<sup>206</sup> According to a report published by the Cato Institute, the public’s trust in government has continued to decline since public financing was first instituted for the presidential elections in 1976, thus undermining the theory that public financing systems counteract the appearance of corruption that can result from large campaign contributions.<sup>207</sup> The author of the report, John Samples, further argues that the government should not be in the business of easing the burden associated with fundraising for a political campaign, which is fundamentally a private problem.<sup>208</sup> Samples has also argued that nearly all campaign finance law, at least on the federal level, is an intrusion upon citizens’ First Amendment rights.<sup>209</sup> He contends that

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200. Malbin et al., *supra* note 191, at 6. New York City has 5,733 census block groups that each have between 600 and 3,000 people. CFI found that 5,128 of these block groups were home to at least one donor-to-candidate pair. *Id.*

201. GENNET AL., *supra* note 199, at 10.

202. *Id.* at 13.

203. *Id.* at 14–15.

204. MIGALLY & LISS, *supra* note 19, at 14.

205. *Id.* at 18 (quoting David Yassky).

206. John Samples, *The Failures of Taxpayer Financing of Presidential Campaigns*, CATO INST. 3 (Nov. 25, 2003), <http://www.cato.org/doc-download/sites/cato.org/files/pubs/pdf/pa500.pdf>.

207. *Id.* at 5–6.

208. *Id.* at 13–14.

209. JOHN SAMPLES, *THE FALLACY OF CAMPAIGN FINANCE REFORM 1* (2006); *see also* Bradley Smith, *The Myth of Campaign Finance Reform*, NAT’L AFF., Winter

on the whole, contribution limits will reduce the amount of political speech, while having no measurable impact on the existence or appearance of corruption.<sup>210</sup> Similarly, in an article published by *National Affairs* in 2010, Bradley Smith maintains that contributions do not corrupt politicians.<sup>211</sup>

The Supreme Court has rejected the theory that large contributions have no relationship to corruption.<sup>212</sup> Indeed, the potential for such corruption is widely accepted as the primary justification for the First Amendment burden that results from restrictions on the amount of money spent on political speech.<sup>213</sup> Moreover, the notion that the difficulties associated with campaign fundraising are fundamentally a private issue overlooks the fact that fair and clean elections, in which candidates have the ability to share their beliefs and ideas regardless of their financial means, are in the best interest of the government and its citizens. Finally, both Samples and Smith focused their analyses on the presidential public financing system, which faces different challenges than New York City's system. The presidential system, as detailed by Samples's report for the Cato Institute, has declined in efficacy in recent years, culminating in President Obama's decision to opt out of the program as a candidate in 2008.<sup>214</sup> Conversely, as demonstrated by the CFI report described above, the New York City Program has been increasingly successful at encouraging small donations from a diverse pool of contributors and has maintained a high percentage of candidate participation.

Others argue that there is no problem to cure; that in holding that corporations can spend unlimited amounts on elections, the Supreme

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2010, at 75, 88, available at [http://www.nationalaffairs.com/doclib/20091228\\_Smith.pdf](http://www.nationalaffairs.com/doclib/20091228_Smith.pdf) ("Restrictions on campaign contributions and spending affect core First Amendment freedoms of speech, press, and assembly.").

210. SAMPLES, *supra* note 209, at 256–57.

211. Smith, *supra* note 209.

212. See generally *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 356–57 (2010); *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.").

213. See, e.g., *Buckley*, 424 U.S. at 29.

214. Adam Nagourney & Jeff Zeleny, *Obama Forgoes Public Funds in First for Major Candidate*, N.Y. TIMES, June 20, 2008, <http://www.nytimes.com/2008/06/20/us/politics/20obamacnd.html>.

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Court has done nothing more than protect the First Amendment.<sup>215</sup> They contend that more spending merely leads to more political discourse, which is the highest form of speech.<sup>216</sup> This argument fails to recognize the corrupting influence of this unfettered spending in modern day campaigning.<sup>217</sup> First Amendment considerations must be balanced by protections against such corruption for ordinary citizens, as both candidates and contributors, to be a relevant part of the political process.

### CONCLUSION

The Supreme Court's jurisprudence has ushered in an era in which self-financed candidates and wealthy individuals and organizations can spend independently on elections in unprecedented amounts, while simultaneously limiting the options for combating this effect. In order to avoid the hijacking of our elections by this flood of money, elections must be returned to the ordinary citizen.<sup>218</sup> One way to achieve this goal is to encourage these citizens to participate through a small donor multiple match system. New York City's landmark program has proven effective at increasing participation and is viewed as a model for other public financing systems on the local, state, and federal level.

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215. See generally Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. ONLINE 77 (2010), <http://yalelawjournal.org/2010/9/29/abrams.html>; Floyd Abrams & Burt Neuborne, *Debating Citizens United*, NATION, Jan. 31, 2011, <http://www.thenation.com/article/157720/debating-citizens-united>.

216. See Abrams, *supra* note 215; Abrams & Neuborne, *supra* note 215.

217. See generally Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United v. Federal Election Commission*, 42 LOY. U. CHI. L.J. 295 (2010).

218. The non-partisan Center for Responsive Politics predicts that the 2012 federal elections will cost \$5.8 billion, of which at least \$750 million will be spending by outside groups. See *2012 Election Will Be Costliest Yet, With Outside Spending a Wild Card*, OPENSECRETS (Aug. 1, 2012), <http://www.opensecrets.org/news/2012/08/2012-election-will-be-costliest-yet.html>.