**No. _____**

In The
**Supreme Court of the United States**

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**Tom Ognibene** et al., *Petitioners*

*v.*

**Joseph P. Parkes** et al., *Respondents*

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

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# Petition for a Writ of Certiorari

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## Questions Presented

In 1988, following public corruption scandals, New York City adopted contribution limits for municipal candidates (the "Regular-Limits").[1] In 1998, the City's Charter Revision Commission recommended the adoption of a ban on corporate and other entity's contributions (the "Entity-Ban") to "'level the playing field' in City campaigns," and "to remove the influence of special interests in the election process," despite finding that, since the adoption of the Regular Limits, there is "no evidence that . . . campaign contributions actually influence the award of a particular contract or passage of a bill." (Tr.Doc.47-7, Pines Decl., Ex. F., *Report of the NYC Charter Revision Commission* ("*CRC Report*"), at 10, 19). Likewise, in 2006, the New York City Campaign Finance Board recommended the adoption of new, much lower limits on persons doing business with the City ("Business-Limits"),[2] despite finding that "[t]here is nothing in our data that allows us to conclude that contributions have influenced the awarding (or refusal) of any contract or other benefit." (Tr.Doc. 51-2, Loprest Decl. Ex. A, *Interim Report of the New York City Campaign Finance Board on "Doing Business" Contributions* ("*CFB Report*"), at 7.) In 2007, the City enacted the Business-Limits and the Entity-Ban anyway, and barred matching with public funds the contributions of those subject to the Business-

[1] The Regular-Limits were $4,950 for Mayor, $3,850 for Borough President, and $2,750 for City Council per election in 2007 when the Business Limits were adopted.

[2] The Business-Limits, which are not adjusted by law for inflation, are $400 for Mayor, $320 for Borough President and $250 for City Council per election.

Limits, including their family members, even though everyone else's contributions are matched (the "Matching-Ban").

The questions presented for review are:

1. Whether the Business-Limits violate First and Fourteenth Amendment guarantees of freedom of speech, association and equal protection when

a. Only citizens with "business-dealings" with the City are subject to the Business-Limits, while everyone else is allowed to contribute up to the significantly higher, inflation-adjusted Regular-Limits,

b. there is no evidence of corruption since the Regular-Limits were adopted over nineteen years ago to justify the adoption of the Business-Limits, and

c. similarly situated municipal labor unions and their officers and employees are not subject to the Business-Limits, even though they negotiate collective bargaining agreements with the City.

2. Whether the Matching-Ban violates First and Fourteenth Amendment guarantees of freedom of speech, association and equal protection when

a. everyone else's contribution is matched,

b. there is no evidence of corruption by the persons subject to the Matching-Ban, and

c. the contributions of similarly situated officers and employees of municipal labor unions are matched.

3. Whether the Entity-Ban violates First and Fourteenth Amendment guarantees of freedom of speech, association and equal protection when

a. the Entity-Ban applies to partnerships, limited liability partnerships, and limited liability companies that have chosen to be taxed as partnerships in addition to corporations and

b. the Entity-Ban does not permit them to contribute to candidates through a political action committee.

## Parties to the Proceeding Below

Appellants below were: Tom Ognibene, Yvette Velazquez Bennet, Viviana Vazquez-Hernandez, Martin Dilan, Marlene Tapper, Robert Perez, Fran Reiter, Sheila Andersen-Ricci, Martina Franca Associates, LLC, Reiter/Begun Associates, LLC, Denis Gittens, Oscar Perez, Kings County Committee of the New York State Conservative Party, and New York State Conservative Party (the "Petitioners").[3]

Appellees below were: Joseph P. Parkes, S.J., in his official capacity as Chairman of the New York City Campaign Finance Board; Dale C. Christensen, Jr., Katheryn C. Patterson, and Mark S. Piazza, in their official capacities as Members of the New York City Campaign Finance Board; Mark Davies, Monica Blum, Steven Rosenfeld, Andrew Irving, and Angela M. Freyre, in their official capacities as Members of the New York City Conflicts of Interests Board; and Michael McSweeny, in his official capacity as Acting City Clerk of New York City (together, the "City").

## Corporate Disclosure

Martina Franca Associates, LLC and Reiter/Begun Associates, LLC have no parent corporation. No publicly held company owns 10 percent or more of their stock.

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[3] Michele Russo and Leroy Comrie were dismissed as plaintiffs before the matter was decided in the district court and so were not appellants.

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# Table of Authorities

***Cases***

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## Petition

The Petitioners request review of *Ognibene v. Parkes*, 2012 WL 89358 (2d Cir. January 12, 2012), *superseding* 2011 WL 6382451.

## Opinions Below

The opinion below (App.1a) is at __F.3d__, 2012 WL 89358 (2d Cir. 2011). The district court's Order (App.71a) is at 599 F.Supp.2d 434 (S.D.N.Y 2009).

## Jurisdiction

The decision below and judgment were filed December 21, 2011. No rehearing was sought. Jurisdiction is invoked under 28 U.S.C. 1254(1).

## Constitutions, Statutes & Regulations

Appended are the First (App.124a) and Fourteenth Amendments (App.124a) and NYC Administrative Code ("CODE") Sections 3-702(3) (App.125a), 3-702(20) (App.127a), 3-703(1-a) (App.128a), 3-703(1)(f) (App.130a), 3-703(1)(l) (App.132a), 3-705 (App.133a), and 3-719(2) (App.140a).

## Statement of the Case

This case presents First and Fourteenth Amendment challenges to three provisions of New York City's Campaign Finance Act (the "Act").

### I. Introduction.

On a database at City Hall, and on the World Wide Web for all to see, is a list of nearly 12,000 citizens who, the City says, cannot be trusted. They are 'fingered' much like sex offenders on Megan's List. And they are punished by having their political speech and association reduced. Everyone else may make contribu-

tions to political candidates up to the Regular-Limits. But the blacklisted citizens may only make contributions up to the Business-Limits, which are more than ten times lower. And while everyone else's contributions are matched with public money, the blacklisted citizens' are not.

The City claims these discriminatory measures are needed because the blacklisted citizens are likely to act corruptly. Yet they are not the type normally thought corrupt. They include "civic leaders with positions at museums, universities, hospitals, law firms, nonprofits, churches, yeshivas, and banks."[4] Lee Bollinger, president of Columbia University, is on the list, as is Paul LeClerc, president of the New York Public Library, and Donna Lieberman, director of the New York Civil Liberties Union.[5] The blacklisted citizens have never been accused of political corruption, much less convicted of such. In fact, from 1988 until the Business-Limits were enacted in 2007, they were subject to the Regular-Limits and never violated them. Yet in 2007—in the complete absence of quid-pro-quo corruption—the City singled them out, blacklisted them, and stripped them of First Amendment freedoms everyone else enjoys.

This should not happen to innocent people in America. But it is happening in New York City.

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[4] Joseph Goldstein, "City Blacklist Limits Giving By 12,000," THE NEW YORK SUN (August 14, 2008), *available at* http://www.nysun.com/new-york/city-blacklist-limits-giving-by-12000/83868/?print=6284719121 (last visited February 13, 2012).

[5] *Id.*

## II. The City's Campaign Finance Scheme.

In the 1980s, New York City had an actual corruption problem tied to unregulated contributions. So in 1988 the City established the Regular-Limits. These Regular-Limits made sense: they applied to everyone, thereby eliminating the large contributions associated with corruption. And they were fair: they allowed all citizens to equally support their chosen candidates.

Best of all, the Regular-Limits worked: since 1988 there have been no instances of quid-pro-quo corruption tied to contributions in New York City. This was conclusively proven by the nearly 1,500 pages of exhibits the City presented to the district court in its attempt to justify its discriminatory Business-Limits. In all those pages, there was not a single example of corruption—even though the City bore the burden to prove it needed the Business-Limits to combat corruption. Instead, there were numerous examples of City officials praising the Regular-Limits for eliminating corruption.

For instance, a 1998 report by the City's Charter Revision Commission stated that since the Regular-Limits were enacted "[g]enerally there is no evidence that . . . campaign contributions actually influence the award of a particular contract or passage of a bill." (*CRC Report*, at 19.) City Council Speaker Christine Quinn likewise praised the Regular-Limits in April 2006, saying, "Thankfully, in the City of New York, we don't have any scandals like the ones they're presently suffering in Washington." (Tr.Doc.48-13, Pines Dec. Ex. BB, *Trans. of the Minutes of the Committee on Governmental Operations*, at 43:22-23.) Meanwhile, the City's Campaign Finance Board published a study in June 2006 that examined contributions for the two previous

election-cycles. It concluded that "[t]here is nothing in our data that allows us to conclude that contributions have influenced the awarding (or refusal) of any contract or other benefit." (*CFB Report* at 7.) And in 2007, before the Business-Limits were enacted, the Governmental Affairs Division ("GAD") noted the City's campaign finance scheme had "proven to be a successful campaign finance program and a model for the nation." (Tr.Doc.47-9, Pines Dec. Ex. H, *Report of the Governmental Affairs Division* ("*GAD Report*"), at 3.)

Despite the Regular-Limits' success, in 2007 the City enacted the Business-Limits, Matching-Ban, and Entity-Ban (the "challenged laws").

**A. The Business-Limits and Matching-Ban.**

The Regular-Limits allow contributions up to $4,950 to mayor candidates, $3,850 to borough president candidates, and $2,750 to city council candidates. (CODE § 3-703(1)(f) n.1.)) The City matches the first $175 at a 6 to 1 ratio, providing an extra $1,050 in public funds. (App136a, CODE § 3-705(7).) This makes the maximum contribution worth $6,000 to mayor candidates, $4,900 to borough president candidates, and $3,800 to city council candidates.

Business-dealing contributors[6] are subject to the

[6] Under the Act, "business dealings with the city" means any relationship with the City or affiliated agencies involving: (1) Contracts for goods, services or construction valued at or above $100,000.00; (2) Acquisitions or dispositions of real property; (3) Applications for approval for certain transactions involving office space, land-use plans, and zoning changes; (4) Concessions and franchises valued at or above $100,000.00; (5) Grants valued at or above

Business-Limits, which are between 10 and 12 times lower than the Regular-Limits. They only allow $400 to mayor candidates, $320 to borough president candidates, and $250 to city council candidates. (App128a, CODE §3-703(1-a)). The Regular-Limits are indexed for inflation; the Business-Limits are not. (CODE § 3-703(7).) The Matching-Ban, meanwhile, prevents these contributions from being matched with public money like everyone else's. (App125a and App.136a, CODE §3-702(3) and 3-705(7).)

But the Business-Limits do not apply to all who have incentive to trade dollars for favors. Unions and their officers, employees, and members may make contributions up to the Regular-Limits, (App.130a, CODE § 3-703(1)(f)), even though they depend on City officials for their collective bargaining agreements, which are quite large. New York City's costs for employees will exceed 37 billion dollars in 2012.[7] The

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$100,000.00; (6) Economic development agreements; (7) Contracts for the investment of pension funds; and (8) Lobbyists. CODE § 3-702(18).

The Business-Limits apply to "an entity that has business dealings with the city, any chief executive officer, chief financial officer and/or chief operating officer of such entity or persons serving in an equivalent capacity, any person employed in a senior managerial capacity regarding such entity, or any person with an interest in such entity which exceeds ten percent of the entity." (App.127a & App.128a, CODE §§ 3-702(20) & 3-703(1-a).)

[7] The City of New York, Office of Management and Budget, *Financial Plan Summary Fiscal Years 2012-2016* (February 2, 2012) at 50, *available at* http://www.nyc.gov/html/omb/downloads/pdf/sum2_12.pdf (*last visited* March 14, 2012).

lion's share—almost 34 billion dollars—will go to uniformed services (including police, fire, corrections, and sanitation), health and welfare, and education,[8] which are heavily unionized agencies. In fact, according to a City University of New York study, sixty-eight percent of the public sector jobs in New York City are union jobs.[9] And these union jobs typically pay higher wages than comparable nonunion ones.[10] They achieve those higher wages as a result of their collective bargaining agreements. And they get those agreements as a result of negotiations with City officials.

As a result, unions and their officers, employees, and members have similar incentive to engage in quid-pro-quo corruption as do business-dealings people. But unlike the business-dealings people, unions and their people may make contributions up to the Regular Limits. And unlike contributions made by business-dealing contributors, contributions made by unions' officers, employees, and members are matched with public funds (App.125a, CODE § 3-702(3).)[11]

The unions freely exercise their First Amendment right to make political contributions up to the Regular-

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[8] *Id.*

[9] Ruth Milkman and Laura Braslow, *State of the Unions 2011* (September 2011) at 6, *available at* http://www.urban-research.org/about/docs/lmis_pubs/state_of_the_unions_2011_release_hires.pdf (*last visited* March 14, 2012).

[10] *Id.* at 7, 9.

[11] The City also exempts neighborhood, community, and similar associations and their officers and members, even when they engage in activities defined as "having business dealings with the city." (App.127a, Code § 3-702(20)).

Limits. During the 2009 election cycle (the last City-wide one prior to the current election cycle), unions made contributions totaling at least $1,106,451.00.[12] Unions have already made contributions totaling at least $435,882.00 this election cycle,[13] for an election that will not occur until November 2013. Those totals do not include contributions made by union officers and employees, whose contributions are matched with public funds at a 6 to 1 ratio. For example, Stuart Applebaum, the President of the Retail, Wholesale, and Department Store Union (RWDSU), made a contribution to a candidate for comptroller during the 2009 election cycle.[14] Similarly, Lillian Roberts, the Executive Director of District Council of Carpenters 37, made a contribution to a candidate for mayor in 2009.[15] So did Michael Fishman, President of SEIU Local 32BJ.[16] By law, the City had to match the first $175 of their contributions with $1,050.00 in public funds.

These union leaders may make contributions up to the Regular-Limits, even though they negotiate collective bargaining contracts with the City. And the first $175 of their contributions are matched with $1,050 of public money. But Petitioners like Robert Perez, who bids on city construction contracts, and Fran Reiter, who is a lobbyist, and Sheila Andersen-Ricci, who does no business with the City but is merely married to a

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[12] *Summary of Union Contributions and Supporting Documentation* (App141a.)

[13] *Id.* (App.149a.)

[14] *Id.* (App.148a.)

[15] *Id.* (App.148a.)

[16] *Id.* (App.148a.)

lobbyist, are restricted to the Business-Limits. And their contributions are not matched.

**B. The Entity-Ban.**

The Entity-Ban prohibits contributions from corporations, partnerships, limited liability partnerships, and limited liability companies, including those choosing to be taxed as partnerships. (App.132a, CODE § 3-703(1)(l).) They may not even make contributions through a political committee ("PAC"). So while unions may contribute up to the Regular-Limits, and made contributions of at least $1,106,451.00 during the last Citywide election cycle and at least $435,882.00 so far this election cycle, business organizations are not allowed to make any contributions—not even a symbolic dollar of support.

## III. The Challenged Laws Were Passed to Curb Influence and Level the Playing Field.

The City repeatedly admitted it passed the challenged laws to curb the perception of influence and level the playing field, not to curb corruption. For instance, GAD's 2007 report acknowledged the purpose was to "reduce the appearance of undue influence associated with contributions from those doing business with the City[,]" (*GAD Report* at 2), as well as the "perception" that those with business dealings "have a higher level of access to the City's elected officials[,]" (*id*. at 24-25). GAD stated that "[i]t is important to eradicate this perception [of access] and reduce the appearance of undue influence associated with contributions from individuals doing business with the City." (*Id*. at 25.) GAD also explained that the matching funds program, with its Matching-Ban, was an "attempt[] to eliminate the appearance of undue influence associated with contributions from 'doing business'

persons, and to equalize the voice of everyday New Yorkers in the political process[] . . . ." (*Id*. at 9-10.)

The Campaign Finance Board also acknowledged the challenged laws were not proposed because of quid-pro-quo corruption but rather "to 'level the playing field' in City campaigns" and "to remove the influence of special interests in the election process." (*CRC Report* at 10.) And Council Speaker Quinn said that passing the challenged laws would "limit the influence of those who do business with the City . . . " (Tr.Doc.47-16, Pines Decl. Ex. O, *Transcript of the Minutes of the Recessed Stated Meeting of June 15, 2007 Held on June 27, 2007*, at 10:10-11), and also "limit the perception of influence by those who are trying—who do or are trying to do business with the City of New York[,]" (Tr.Doc.47-17, Pines Decl. Ex. P, *Public Hearings on Proposed Local Laws*, at 3 (0006):9-12). Mayor Bloomberg said the goal was to place "strict restrictions" on those with business dealings with the City to "diminish the influence that special interests wield in city government." (*Id*. at 1 (0002):10-21.)

## IV. Procedural History.

Some Petitioners are subject to the Business-Limits. They want to make contributions up to the Regular-Limits and have their contributions matched with public dollars like everyone else's. Other Petitioners are candidates who want to accept contributions from business-dealings contributors up to the Regular-Limits and have those contributions matched. Still other Petitioners are LLCs that have chosen to be taxed as partnerships. They want to make contributions, like unions are allowed to do.

Because the law prevents the Petitioners from

engaging in their desired speech and association, in February 2008 they filed suit, seeking declaratory and injunctive relief. They subsequently moved for preliminary injunction as to the Business-Limits, Matching-Ban, and Entity-Ban, and the district court consolidated their motion with the merits trial. The City cross-moved for partial summary judgment as to the challenges the Petitioners raised in their injunctive relief motion.[17] The district court denied injunctive relief and granted the City's motion for partial summary judgment. The Petitioners appealed the denial of injunctive relief and, pursuant to 28 U.S.C. § 1292(b), received certification to appeal the grant of partial summary judgment. On appeal, the Second Circuit affirmed the district court. The Petitioners did not seek rehearing.

The district court had jurisdiction. 28 U.S.C. §§ 1331 and 1343(a). The appellate court had jurisdiction. 28 U.S.C. §§ 1292(a)(1), 1292(b).

## Reasons to Grant the Petition

This Court should grant this Petition because the Second Circuit's decision conflicts with this Court's precedent and also with a decision of the Colorado

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[17] The Petitioners' complaint raised other challenges to the Act that were not at issue in the cross-motions. The district court has already resolved some of these matters in the Petitioners' favor. (*See* Tr.Doc.131, *Stipulation and Order* (December 16, 2011) (ordering that New York Administrative Code Sections 3-706(3)(a)(ii)-(iii) and 3-706(3)(b)(ii) (iii), which provide extra, "rescue funds" for publicly financed candidates when their self-financing opponents spend above a certain amount, are unconstitutional).)

Supreme Court. These conflicts present important questions of federal law that should be settled by this Court.

## I. The Second Circuit's Decision Upholding the Business-Limits Conflicts With Decisions of This Court and the Colorado Supreme Court.

The Second Circuit's decision to uphold the Business-Limits conflicts with this Court's precedent, as well as a decision of a state court of last resort. Because it concerns important federal questions implicating First and Fourteenth Amendment guarantees, this Court should review it.

### A. Upholding the Business-Limits Defies This Court's Precedent.

"The central purpose of the Speech . . . Clause[] was to assure a society in which uninhibited, robust, and wide-open public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." *Buckley v. Valeo*, 424 U.S. 1, 93 n.27 (1976) (quotation omitted). Therefore "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United v. FEC*, 130 S.Ct. 876, 911 (2010). The *Buckley* Court unanimously agreed that "money is essential for effective communication in a political campaign." 424 U.S. at 288 (Marshall, J., concurring in part and dissenting in part) (noting that "all members of the Court agree" with the point). Or, as the Ninth Circuit put it, "'[m]ore speech'" often means 'more money.'" *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 686 (9th Cir. 2010).

Consequently, contribution limits "implicate fundamental First Amendment interests, namely, the freedoms of political expression and political association." *Randall v. Sorrell*, 548 U.S. 230, 246 (2006). To be constitutional, they must survive "closely drawn" scrutiny, which means they must be"closely drawn" to match a "sufficiently important interest." *Id.* at 247.[18]

Because "the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech," *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2828 (2011) ("*Bennett*"), this Court established a number of speech protective rules. For instance, Government may only restrict contributions when it needs to curb real or

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[18] Contribution limits are traditionally evaluated under "closely drawn" scrutiny. But this Court held in *Citizens*, 130 S.Ct. 876, that laws burdening speech are subject to strict scrutiny, requiring Government to prove the restrictions are "narrowly tailored" to a "compelling interest." *Id.* at 898. This Court has repeatedly held that contributions are speech. *See, e.g.*, *Buckley*, 424 U.S. at 20 (contribution limit "entails only a marginal restriction upon the contributor's ability to engage in free communication"); *id.* at 21 ("contribution serves as a general expression of support for the candidate and his views" and are "symbolic expressions of support"); *FEC v. Beaumont*, 539 U.S. 146, 147-48 (2003) (contributions are "marginal speech" lying "closer to the edges than to the core of political expression"); *McConnell v. FEC*, 540 U.S. 93, 135 (2003) (contributions have "communicative value"); *Randall*, 548 U.S. at 246 (contribution limits implicate the freedom of political expression). Because contribution limits burden *speech*, Petitioners assert that under *Citizens*' rule strict scrutiny should apply.

apparent quid-pro-quo corruption,[19] and it must demonstrate its interest is real, not conjectural.[20] Also, when Government acknowledges that contributions up to a particular limit are noncorrupting, it may not impose an even lower limit on only some of its citizens.[21] And severely low limits are unconstitutional.[22]

The Second Circuit defied each of these rules when it upheld the Business-Limits.

**1. The Second Circuit Defied This Court's Rule That Curbing Quid-Pro-Quo Corruption Is the Only Interest In Restricting Contributions.**

The *Citizens* Court clarified that "[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption." *Id*. at 909. *Citizens* further explained that the *Buckley* passages to which it referred are those found at pages 26-28, 30, and 46-48 of the *Buckley* decision. *Id*. The first two of those concerned *contribution* limits, while the final one concerned expenditure limits. Thus, *Citizens* expressly ruled the only interest in restricting either expenditures *or* contributions is the interest in preventing quid-pro-quo corruption. *See also Davis v. FEC*, 554 U.S 724 at 740 n.7 and 741 (2008) (explaining that the only interest sufficiently important to justify restricting contributions is the

[19] *See infra*, Part I.A.1., at 13.

[20] *See infra*, Part I.A.2., at 15.

[21] *See infra*, Part I.A.3., at 17.

[22] *See infra*, Part I.A.4., at 19.

interest in preventing quid-pro-quo corruption).

*Citizens* considered and rejected other possible interests in limiting political speech and association, including the anti-influence interest. 130 S.Ct. at 910. The Court ruled influence is not corruption. *Id*. Rather, the desire to influence candidates is a legitimate reason to make contributions to them. *Id*. This Court explained that "a substantial and legitimate reason, if not the only reason," "to make a contribution to[] one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors." And "[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy." *Id*. Consequently, an anti-influence interest cannot support restricting First Amendment freedoms. *Id*.

Nor can an antidistortion interest that seeks to 'level the playing field' by limiting the political activity of the 'wealthy.' This Court explained that "[t]he rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." *Id*. at 905. The *Davis* Court previously recognized this when it held that discriminatory contribution limits meant to "level electoral opportunities for candidates of different personal wealth" did not serve "a legitimate government objective." 554 U.S. at 741. *See also id*. at 740 n.7 (2008) (explaining that in the contribution context, "leveling electoral opportunities cannot justify the infringement of First Amendment interests."). The *Buckley* Court likewise held that "the concept that government may restrict the speech of some elements of our society in order to enhance the

relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49. *See also id.* at 56-57 (desire to level the playing field is not constitutionally cognizable interest for speech restrictions).

This Court's rule, expressed in *Buckley*, *Davis*, and *Citizens United*, is that preventing real or apparent corruption is the only constitutionally cognizable interest in limiting contributions. The City, however, did not enact the Business-Limits for this purpose. It could not have: the Regular-Limits had eliminated corruption.[23] Rather, the City enacted the Business-Limits to reduce influence and level the playing field,[24] the very interests this Court rejected. Had the lower court followed this Court's rule it would have struck the Business-Limits. Instead, it defiantly held that "*improper* or *undue* influence presumably still qualifies as a form of corruption[,]" App.22a, even though *Citizens* ruled otherwise, and found it sufficient to restrict contributions, App.20a-33a.[25]

Judge Calabresi's concurrence goes farther: he would revive the rejected antidistortion interest in leveling the playing field as a reason to restrict First

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[23] *See supra* at 3-4.

[24] *See supra* at 8-9.

[25] The lower court did not explain what "improper" or "undue" influence is or how the Petitioners were guilty of it. But if the court was attempting to equate these terms with the more precise "quid-pro-quo corruption," its attempt must fail. The testimony in the City's exhibits reveals that the City enacted the Business-Limits to limit influence and access, not quid-pro-quo corruption.

Amendment activity. App.44a-53a. In *Citizens*, this Court considered and rejected this interest. 130 S.Ct. at 905. Judge Calabresi called the *Citizens* decision "flawed[,]" App.53a, and found it constitutionally permissible to restrict contributions based on people's wealth, App.44a-53a.

**2. The Second Circuit Defied This Court's Rule That Government Must Prove Its Interest in Contribution Limits.**

Government must prove its interest in contribution limits. *See, e.g.*, *Buckley*, 424 U.S. at 25 (contribution limits "may be sustained if the State demonstrates a sufficiently important interest"); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 387 (2000) (same); *Randall*, 548 U.S. at 247 (same). "Mere conjecture" is not sufficient. *Nixon*, 528 U.S. at 392. Government must prove that a quid-pro-quo corruption problem exists. As this Court ruled in *Turner Broadcasting System, Inc. v. FEC*, 512 U.S. 622 (1994):

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

*Id*. at 664 (internal quotation and citation omitted).

This Court explained that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon*, 528 U.S. at 378. The City posits that

$275 corrupts when contributed by business-dealings contributors, but $2,750, which is 10 times more, does not corrupt when contributed by anybody else. This is a novel justification with questionable plausibility. Under *Nixon*, the City's evidentiary burden is high. Curbing quid-pro-quo corruption is the only constitutionally cognizable interest in limiting contributions,[26] yet the City presented *no* evidence of quid-pro-quo corruption in its nearly 1,500 pages of exhibits.[27]

Had the lower court followed this Court, it would have held the Business-Limits unconstitutional. But the lower court defied this Court, holding that "[c]ontributions to candidates for City office from persons with a particularly direct financial interest in these officials' policy decisions pose a heightened risk of actual and apparent corruption, and merit heightened government regulation," App.25a, even though (1) this Court has explained it has never upheld disparate contribution limits, *Davis*, 554 U.S. at 738; (2) the record below was devoid of even one example of corruption necessary to support the "heightened government regulation"; and (3) the record instead demonstrated the Regular-Limits had eliminated corruption. But the lower court assumed a problem where none existed, and upheld a solution—disparate limits—this Court rejected. In doing so, the lower court defied this Court's rule that Government must prove its interest in contribution limits, as well as the Court's rule that conjectural harms are insufficient to support restrictions on speech.

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[26] *See supra*, Part I.A.1, at 13.

[27] *See supra* at 3-4.

### 3. The Second Circuit Defied This Court's Rule That When Government Concludes A Limit Curbs Corruption, It May Not Impose Lower Limits for Some Contributors.

This Court explained that legislatures should raise or eliminate contribution limits that are lower than necessary to curb corruption. *Davis*, 554 U.S. at 743. Indeed, when legislatures conclude that allowing contributions of certain amounts does not create a corruption risk, lower limits are unwarranted. *Id.* at 737. Similarly, in *Dallman v. Ritter*, 225 P.3d 610 (Col. 2010), the Colorado Supreme Court ruled that when contribution limits already exist to eliminate large contributions, "the focus" of lower limits cannot be the elimination of large contributions that give rise to quid-pro-quo corruption. *Id.* at 623. And in *California Prolife Council PAC v. Scully*, 989 F.Supp. 1282, (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999), a federal district court ruled that when Government "has manifested its judgment that the higher limitations are not unacceptably corrupting . . . . [i]t follows that the lower limits are not closely drawn to achieve the only governmental purposes sufficient to justify regulation." *Id.* at 1296.

The rule of this Court (as well as the *Dallman* and *Scully* courts) is clear: when contributions are already sufficiently limited to curb corruption, lower limits cannot constitutionally be imposed. Yet that is what the City did with its Business-Limits. Nineteen years earlier, the City enacted its Regular-Limits to curb corruption. It thereby manifested its judgment that contributions up to the Regular-Limits were noncorrupting. The lower, Business-Limits are therefore unnecessary and unconstitutional under this Court's

precedent as well as the rule of the *Dallman* and *Scully* courts.

Instead of following this Court, the Second Circuit hid behind this Court's statement that courts have no "scalpel to probe each possible contribution level." (App.27a) (*quoting Randall*, 548 U.S. at 248). Yet no probing scalpel was necessary: by enacting and retaining the higher, Regular-Limits, the City declared its judgment that contributions up to the higher limits are not unacceptably corrupting. The lower, Business-Limits therefore cannot be needed. The Second Circuit should have followed this Court's rule and struck them.

**4. The Second Circuit Ignored This Court's Rule That Limits That Are Too Low And Severe Are Unconstitutional.**

*Randall*, 548 U.S. 230, held that limits that are "too low" or "too strict" impermissibly infringe the First Amendment and so are impermissible. *Id*. at 248 and 262. *Randall* considered Vermont's contribution limits of $400 for governor and other state-wide offices, $300 for state senator, and $200 for state representatives. *Id*. at 238. This Court held that limits this severe were "inconsistent with the First Amendment." *Id*. at 236. In addition, the Court was troubled by a number of other factors, including Vermont's failure to index its limits for inflation. The Court noted that "failure to index limits means that limits which are already suspiciously low . . . will almost inevitably become too low over time[,]" because they "decline in real value each year." *Id*. at 261.

The Business-Limits of $400, $320, and $250 are similarly low. As in *Randall*, they are not indexed for inflation. But the Regular-Limits are. Thus, not only will the Business-Limits become too low over time,

they will also become more discriminatory as compared to the Regular-Limits. Rather than find the Business-Limits impermissible under *Randall*, the Second Circuit failed to address these concerns.

The Second Circuit's decision to uphold the Business-Limits thus defied this Court's rules that curbing quid-pro-quo corruption is the only interest in restricting contributions; Government must prove its interest in contribution limits; when Government concludes a limit curbs corruption, it may not impose lower limits for some contributors; and limits that are too low and severe are unconstitutional. This Court should grant review to correct the Second Circuit's errors.

### B. Upholding the Business-Limits Conflicts With the Colorado Supreme Court's Decision That Unions and Corporations Are Similarly Situated for Campaign Finance Purposes.

The lower court's decision upholding the Business-Limits under less-rigorous scrutiny conflicts with the Colorado Supreme Court's decision in *Dallman*, 225 P.3d 610,[28] that corporations and labor unions are similarly situated for campaign finance purposes. *Id.* at 634. Disparate limits on corporate and union contributions therefore violate equal protection guarantees and must survive strict scrutiny. *Id.* (*citing Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) (holding that "[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives.").

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[28] *See infra*, Part III.B, at 35 for a more detailed analysis of *Dalmann*.

Businesses competing for contracts with the City, and municipal unions negotiating collective bargaining agreements with the City, each have similar interests in electing officials sympathetic to their concerns. The *Dalmann* court was correct: they are similarly situated for campaign finance purposes. But the Business-Limits apply only to the officers and senior management of business-dealing organizations, as well as some of their family members. They do not apply to the officers and senior management of municipal unions. As such, the Business-Limits implicate Fourteenth Amendment equal protection guarantees and should have been subjected to strict scrutiny, as in *Dallman*. The Second Circuit, however, subjected the Business-Limits only to the closely-drawn scrutiny to which generally-applicable contribution limits are subjected. App.19a. This conflict regarding the proper scrutiny for contribution limits that discriminate against one set of similarly situated actors should be settled by this Court.

## II. The Second Circuit's Decision Upholding the Matching-Ban Conflicts With Decisions of This Court.

The constitutionality of public financing systems for candidates, along with the matching of contributions they raise with public-money, was first upheld by this Court in *Buckley*, 424 U.S. at 85-108. The Court recognized that Government may constitutionally regulate elections; so, if the legislature determines that public financing is a means to reform the electoral process, it may institute a public financing scheme. *Id.* at 90. But the scheme chosen must comport with the First Amendment, *Bennett*, 131 S.Ct. at 2828, which

requires it to survive strict scrutiny review if it burdens speech rights, *id*. at 2824. Those surviving strict scrutiny are constitutional. *See Buckley*, 424 U.S. at 85-108 (upholding public financing of presidential elections). But those that fail review are unconstitutional. *See Bennett*, 131 U.S. 2806 (invalidating public financing of Arizona's elections).

New York City instituted a system of public financing that matches, at a 6 to 1 ratio, the first $175 most contributors give to candidates who choose to participate in the system. However, the Matching-Ban prohibits matching contributions made by business-dealing contributors. The Second Circuit upheld the Matching-Ban but did so only by defying several of this Court's rules. First, the lower court only applied a "less stringent standard of review" to the Matching-Ban, App.36a, instead of the required strict scrutiny review.[29] Second, it upheld a restriction that discriminates on the basis of the speaker's identity, despite this Court's rule that such discriminatory restrictions are unconstitutional.[30] Third, it defied this Court's rule that matching funds cannot be made contingent on third-party activity.[31] This Court should grant review to correct the Second Circuit's errors.

### A. The Second Circuit Defied This Court's Rule That Public Financing Schemes Infringing Speech Are Subject to Strict Scrutiny.

Matching fund schemes that burden speech are subject to strict scrutiny, requiring Government to

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[29] *See infra*, Part II.A, at 22.

[30] *See infra*, Part II.B., at 23.

[31] *See infra*, Part II.C., at 25.

prove the scheme is "narrowly tailored" to a "compelling interest." *Bennett*, 131 S.Ct. at 2817, 2824. The Second Circuit, however, subjected the Matching-Ban only to "less stringent" review. App.36a. It did so because it erroneously viewed the Matching-Ban as "similar to a [contribution] limit . . . ." But this is wrong: the Matching-Ban does not limit anyone's contribution. Rather, it amplifies the speech of some while hushing that of others.

When Government matches contributions, it amplifies their communicative-value. So a $175 contribution is amplified by Government, which adds $1,050 to the contribution, making its communicative-value worth $1,225. The candidate who receives that extra $1,050 of public money therefore has extra money to spend for candidate-speech. Conversely, the Matching-Ban's prohibition on matching certain contributors' contributions burdens speech. It does this in two ways. First, it impermissibly "enhances the relative voice" of some and, by doing so, hushes the voice of others by comparison. *See Buckley*, 424 U.S. at 48-49. Second, it reduces the funds available for candidate-speech. This is through no fault of the candidates, but rather because of who their contributors are.

Under this Court's rule, the Matching-Ban should have been subjected to strict scrutiny, which it would fail. The lower court, however, refused to follow this Court.

### B. The Second Circuit Defied This Court's Rule That First Amendment Restrictions May Not Discriminate Based on the Speakers' Identity.

This Court has always held that Government cannot restrict speech because of the speaker's identity. In *Buckley*, 424 U.S. 1, the Court ruled that Govern-

ment is constitutionally forbidden to "restrict the speech of some elements of our society in order to enhance the relative voice of others[,]" or censor First Amendment activity because of the speaker's wealth. *Id*. at 48-49. The Court called such government censorship "wholly foreign to the First Amendment[.]" *Id*. at 49. Because democracy depends on informed citizens, Government cannot discriminate against disfavored speakers. *Id*.

In *Citizens*, 130 S.Ct. 876, the Court reaffirmed this principle by explaining that Government is constitutionally prohibited from "distinguishing among different speakers, allowing speech by some but not others." *Id*. at 898. Speech regulations based on the speaker's identity are too often thinly-veiled content-based regulations of speech. *Id*. at 899. Such restrictions are presumptively unconstitutional, for "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago*, 408 U.S. at 95 (1972). Therefore, regulations differentiating among speakers are subject to strict scrutiny. *Citizens*, 130 S.Ct. at 898.

The Matching-Ban discriminates among speakers based on their identity. Had the Second Circuit evaluated the Matching-Ban under this Court's rule, it would have subjected it to strict scrutiny and found it an impermissible regulation of First Amendment activity based solely on the identity of the speaker. Instead, the lower court defiantly "subject[ed] it to the less stringent standard of review." App.36a. The lower court concluded that the scheme was constitutional, because "the legislature has merely decided not to amplify their contributions with tax dollars." *Id*. But

because the matching scheme amplifies *everyone else's* contributions with tax dollars, the effect is to "restrict the speech of some elements of our society in order to enhance the relative voice of others[,]" which *Buckley* expressly forbade. 424 U.S. at 48-49. The City does this solely because of the identity of those subject to the Matching-Ban, which *Citizens* expressly forbade. 130 S.Ct. at 898-99. The lower court's refusal to follow this Court's rule led to the wrong result.

### C. The Second Circuit Defied This Court's Rule that Matching Funds Cannot be Contingent On Non-Candidate Activity.

The lower court's decision upholding the Matching-Ban also defies the rule of *Bennett*, 131 S.Ct. 2806, that the availability of matching funds cannot be conditioned on third-party activity.

In the public financing scheme found constitutional by the *Buckley* Court, the *candidates themselves* determined whether they would get funding by electing to participate in the system. 424 U.S. at 88-89. The Court noted the "voluntary" nature of the system: candidates could choose whether to participate in public financing, and therefore choose whether public dollars would fund their campaigns. *Id*. at 95. Because public-financing, with its contribution limitations, furthered the interest in curbing quid-pro-quo corruption, *id*. at 96, the Court upheld the matching funds scheme, *id*. at 108.

In *Bennett*, this Court reached the opposite result when it considered the constitutionality of a matching funds scheme that awarded candidates extra funds based on the independent spending of third-party organizations. When such organizations spent in support of a candidate above a certain threshold, the

candidate's publicly-funded opponents received extra matching funds. 130 S.Ct. at 2814. This took the eligibility for funds out of candidates' hands, placing it instead in the hands of third parties. *Id*. at 2819. The Court ruled that interests in "leveling the playing field," *id*. at 2826, and increasing participation in public financing, *id*. at 2827, cannot support a matching funds regime. Because Arizona's scheme did not further the anticorruption interest, *id* at 2826-27, it was unconstitutional, *id*. at 2829.

The City's Matching-Ban is like the law invalidated in *Bennett*: it takes the eligibility for receiving funds out of the hands of candidates and places it in the hands of third parties, in this case the contributors themselves. Candidates choose to participate in New York City's public financing system, submitting to the resulting expenditure limits, with the expectation that contributions made to them will be matched with public funds. But under the Matching-Ban, contributions from those with business-dealings are not matched. The candidates have no control over whether their contributors choose to engage in business with the City. They therefore have no control over whether they will receive matching funds, even though they participate in public funding. As in *Bennett*, no constitutionally cognizable interest supports this regime.

Had the Second Circuit followed this Court's rule that that the availability of matching funds cannot be conditioned on third-party activity, it would have held the Matching-Ban unconstitutional. Instead it defied this Court and upheld it. App.36a-38a. To do so it wrongly distinguished *Bennett* by noting that the provision in *Bennett* burdened nonparticipating candidates, while the Matching-Ban burdens participating

candidates. App.37a. True, but burdens imposed by matching fund schemes must be supported by the anticorruption interest. *Buckley*, 424 U.S. at 96; *Bennett*, 130 S.Ct. at 2826-27. Besides, this is a distinction without a difference: *Bennett* ruled that availability of matching funds cannot be conditioned on third-party activity, not merely that *only* nonparticipating candidates cannot be burdened by matching fund schemes.

The Second Circuit's decision to uphold the Matching-Ban thus defied this Court's rules that public financing schemes burdening speech are subject to strict scrutiny review; First Amendment restrictions may not discriminate on the basis of the speaker's identity; and matching funds cannot be contingent on non-candidate activity. This Court should grant review to correct the Second Circuit's errors.

## III. The Second Circuit's Decision Upholding the Entity-Ban Conflicts With Decisions of This Court and the Colorado Supreme Court.

This Court has upheld various *limits* on corporate political speech. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1989), *overruled by Citizens*, 130 S.Ct. 876, the Court found a law prohibiting the use of corporate general-treasury funds to make independent expenditures was constitutional when the law allowed corporations to make those expenditures through PACs. Thus, the Court saw the law as a speech limit, not a ban. Similarly, in *Beaumont*, 539 U.S. 146, the Court ruled that nonprofit advocacy corporations need not be exempted from generally-applicable general-fund corporate contribution bans

when the law allowed those corporations to make contributions through PACs. Again, the Court saw the law as a limit, not a ban.

This Court has never upheld a complete ban on corporate political speech and indeed never would; for, as the Court ruled in *Citizens*, "[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy." 130 S.Ct. at 911. New York City, however, instituted an "outright ban" on corporate political speech. In fact, it goes even farther, banning not only corporate speech but also speech by partnerships, limited liability partnerships ("LLPs") and limited liability corporations ("LLCs"), something not even the federal government has done. And the Second Circuit, instead of following this Court, defiantly upheld this radical expansion of the ban *Citizens* said was impermissible. Doing so conflicted with a number of this Court's decisions, as well as the decision of a state court of last resort.

### A. Upholding the Entity-Ban Defies This Court's Precedent.

Upholding the Entity-Ban defied this Court's rules that speech bans are unconstitutional;[32] speech restrictions based on the speaker's corporate identity are impermissible;[33] and Government must prove its interest in contribution limits.[34] Additionally, the lower court relied on the anticircumvention interest, which has been discredited by this Court.[35]

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[32] *See infra*, Part III.A.1., at 28.

[33] *See infra*, Part III.A.2., at 31.

[34] *See infra*, Part III.A.3., at 32.

[35] *See infra*, Part III.A.4., at 33.

### 1. The Second Circuit Defied This Court's Rule That Speech Bans Are Unconstitutional.

In *Buckley*, this Court ruled that contribution limits are constitutional, assuming they are properly tailored to the anticorruption interest, precisely because they only *limit* speech: they do not ban it. 424 U.S. at 21 (explaining that limits still "permit[] the symbolic expression of support evidenced by a contribution."). Speech *bans*, on the other hand, are not constitutional. No matter the problem Government seeks to address, a complete ban on First Amendment activity during the pre-election period "is not a permissible remedy[,]" because it is "assymetrical" to the anticorruption interest. *Citizens*, 130 S.Ct. at 911.

This is true even for corporations, *id.*: there is no inherent danger in the corporate form that would justify extra-severe restrictions on corporate speech, *id.* at 904-08. The Court explained that "if the First Amendment has any force," it must prohibit Government "ban[ning] political speech simply because the speaker is an association that has taken on the corporate form." *Id.* at 904. This followed the rule of *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), that if political speech cannot be restricted when an individual is the speaker, it cannot be restricted simply because the speaker is a corporation. *Id.* at 776.

The Entity-Ban bans corporate contributions to candidates, thereby banning corporate speech and association. But it goes farther, banning not only corporate contributions but also those from partnerships, LLPs, and LLCs. By upholding the Entity-Ban, the lower court defiantly expanded the corporate

speech ban that *Citizens* said was impermissible. To do so, the Second Circuit relied on this Court's decision in *Beaumont*, 539 U.S. 146, which the lower court assumed stood for the proposition that the federal ban on corporate general-fund contributions was permissible. App.39a.

This reliance is misplaced for two reasons. First, *Beaumont* does not stand for that proposition, because the constitutionality of the federal ban was not at issue. Rather, the only issue before the *Beaumont* Court was whether nonprofit advocacy corporations must be exempted from generally-applicable corporate contribution bans. 539 U.S. at 149, 151. The Court assumed, without deciding, the constitutionality of the federal ban. But that assumption is dicta.

Second, the generally-applicable ban in *Beaumont*'s dicta included a PAC-option, allowing corporations to make contributions through PACs. *Id.* at 162-63. The challenged law was thus not "a complete ban," *id.* at 162, because "[t]he PAC option allows corporate political participation[,]" *id.* at 163.[36] *Beaumont* is

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[36] *Citizens* casts doubt on the continuing vitality of *Beaumont*. *Citizens* held that PACs cannot speak for corporations, so the PAC-option cannot allow corporate speech. 130 S.Ct. at 897. Further, *Beaumont*'s ruling rested on three interests, two of which were invalidated and the other discredited by *Citizens*. *Compare Beaumont*, 539 U.S. at 154 (antidistortion and shareholder-protection interests), *with Citizens*, 130 S.Ct. at 903-08 (invalidating antidistortion interest), 911 (invalidating shareholder-protection interest). *Compare also Beaumont*, 539 U.S. at 155 (anticircumvention interest), *with Citizens*, 130 S.Ct. at 912 (regulations are always underinclusive to the anticircumvention interest). *Beaumont* thus rests on a

consistent with the Court's rule that political speech may be limited but not banned. The Entity-Ban, however, does not contain a PAC-option. It is a complete ban on protected speech and association. *Beaumont* is not on point with the City's complete ban on entity speech, and the lower court's reliance on it for approval of a complete ban is misplaced. *Citizens*, however, *is* on point. It emphatically declared that bans on corporate political speech are not permissible during the critical pre-election period. *Citizens*, 130 S.Ct. at 911. The Second Circuit's decision to uphold the Entity-Ban is inconsistent with the Court's rule.

**2. The Second Circuit Defied This Court's Rule That Speech Restrictions Based on The Speaker's Corporate Identity Are Impermissible.**

The Second Circuit's decision to uphold the Entity-Ban also defied this Court's rule that speech restrictions cannot be based on the speaker's corporate identity. The First Amendment protects speech, *Bellotti*, 435 U.S. at 776, so speech that would otherwise be unregulable cannot be regulated simply because the speaker is a corporation, *id*. at 784. *Citizens* explained that this is because "[t]he First Amendment protects speech and speaker, and the ideas that flow from each." 130 S.Ct. at 899. There is simply "no basis" for the proposition that Government may limit the political speech of disfavored speakers, *id*., including "those that have taken on the corporate form[,]" *id*.

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now-rejected premise (that PACs can engage in expressive activity for their connected organization) and discredited reasoning. Petitioners assert that *Beaumont* was wrongly decided and should be reconsidered and overruled.

at 908. Consequently, Government may not allow speech by individuals while banning the same speech by corporations. *Id*. at 899. *See also id*. at 903 (explaining that *Bellotti* "rested on the principle that the Government lacks the power to ban corporations from speaking."). Government must treat individual and corporate speakers the same. *Id*. at 898-99.

The Entity-Ban, however, treats individual and corporate speakers very differently. Nearly all individuals (as well as labor unions) may contribute up to the Regular-Limits, while the business-dealing contributors may contribute up to the Business-Limits. But corporations, partnerships, LLPs, and LLCs may not contribute at all. They are banned only because of their identity as entities. Under this Court's rule, the Entity-Ban is therefore unconstitutional.

At least one court has recognized this principle, holding that the "logic" of *Citizens* demands that corporate contribution bans fail review. *U.S. v. Danielczyk*, 788 F.Supp.2d 472, 494 (E.D. Vir. 2011), *pet. rh'g denied*, 791 F.Supp.2d 513 (E.D. Vir. 2011), *appeal docketed*, 11-4667 (4th Cir. June 29, 2011). The court explained that if humans can make contributions up to the permitted contribution limit without risking quid-pro-quo corruption or its appearance, then corporations must be allowed to contribute up to the permitted limits because *Citizens* and *Bellotti* stand for the proposition that speech restrictions based solely on the corporate form are impermissible. *Id*. The *Danielczyk* court followed this Court's rule. By upholding the Entity-Ban, which bans speech solely because of the corporate identity of the speaker, the Second Circuit defied it.

### 3. The Second Circuit Defied This Court's Rule That Government Must Prove Its Interest In Contribution Regulations.

This Court's rule is that Government must prove its interest in contribution restrictions.[37] The Second Circuit disregarded this rule. Instead, it assumed an anticorruption interest in the Entity-Ban, App.39a-40a, even though the City offered no proof of any corruption since the enactment of the Regular-Limits nineteen years earlier.[38] The lower court sought to remedy this defect by finding corruption in the fact that, prior to the Enity-Ban, entity contributions accounted for 6.2% of all contributions in the 2005 election, and many of those went to incumbents. App.41a. The court did not explain, however, why such a small amount of contributions was corrupting or created the appearance of corruption. Nor did it explain how entity contributions up to the already-limited Regular-Limits—which the City determined was sufficient to curb corruption—could be the quid for a corresponding quo. It simply assumed corruption. This assumption, with no proof, defied this Court's rule that Government must prove its interest in contribution limits.

### 4. The Second Circuit Relied on the Anti-circumvention Interest, Which Has Been Discredited by This Court.

The Second Circuit also relied on an anticircumvention theory to uphold the Entity-Ban, reasoning that "the organizational form of an LLC, LLP, and

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[37] *See supra*, Part I.A.2., at 15.

[38] *See supra* at 3-4 for a discussion of the complete absence of any evidence of corruption.

partnership. like a corporation, creates the opportunity for an individual donor to circumvent valid contribution limits." App.41a. This reliance on the anti-circumvention theory is unwise. While this Court once recognized circumvention as "a valid theory of corruption," *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 456 (2001), more recent rulings indicate the circumvention theory is discredited, if not dead.

In *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), Government asked the Court to adopt an expansive definition of express advocacy. Otherwise, Government argued, speakers might circumvent express advocacy regulations by couching their speech as issue advocacy, which in turn might circumvent valid contribution regulations. 551 U.S. at 479. In response, the Chief Justice thundered, "Enough is enough." *Id.* at 478 (Roberts, C.J.) (controlling opinion).[39] Such anticircumvention efforts constitute an impermissible "prophylaxis-upon-prophylaxis," which cannot survive scrutiny. *Id.* at 479. Similarly, in *Citizens* the Court noted that campaign finance laws are always underinclusive to the anticircumvention interest, because speakers find ways to circumvent them. 130 S.Ct. at 912. And laws that are under-

[39] The cited opinion is by Chief Justice Roberts, joined by Justice Alito. As the controlling opinion, it states the holding of the Court. See *Marks v. U.S.*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (citation omitted)).

inclusive fail scrutiny and so are unconstitutional. *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 and 788 (2002).

Thus, while this Court has never declared the anticircumvention interest dead, it has hinted of its demise and has expressly indicated it is discredited as a theory to undergird First Amendment restrictions.

The Second Circuit's decision to uphold the Entity-Ban thus defied this Court's rules that speech bans are not permissible; speech restrictions based on a speaker's corporate identity are not allowed; and Government must prove its interest in contribution limits. The lower court also relied on a discredited anticircumvention interest, and defiantly expanded the very ban that was struck in *Citizens*. This Court should grant review to correct the Second Circuit's errors.

### B. Upholding the Entity-Ban Conflicts With the Colorado Supreme Court's Decision That Unions and Corporations Are Similarly Situated for Campaign Finance Purposes.

In *Dallman*, 225 P.3d 610, the Colorado Supreme Court ruled that corporations and labor unions are similarly situated for campaign-finance purposes, so laws that prohibit contributions from one, but not the other, violate Fourteenth Amendment equal protection guarantees. *Id*. at 634. The Colorado law challenged in *Dallman* had the opposite effect of the City's law: corporations were allowed to make contributions (albeit only through PACs), while labor unions were completely prohibited. *Id*. at 634. The court noted that this "completely strips unions of any political voice, while still allowing corporations to participate through their own PACs." *Id*. This disparate treatment "implicat[es] the freedoms guaranteed by the Equal Protec-

tion Clause of the Fourteenth Amendment" because corporations and labor unions, though "structurally dissimilar," are nevertheless "similarly situated" for purposes of campaign-finance regulations. *Id*.

The *Dallman* court properly applied strict scrutiny because "[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Id*. (*quoting Police Dep't. of Chicago*, 408 U.S. at 101). Because the government had not articulated a compelling interest in restricting contributions from labor unions but not corporations, the court held the restriction an unconstitutional violation of Equal Protection. *Dallman*, 225 P.3d at 635.

As in *Dallman*, the City has no interest supporting its disparate treatment of corporations, LLCs, LLPs, and partnerships on one hand and unions on the other. They each compete for City dollars, and so have the same incentive to engage in corruption. Yet the Second Circuit upheld the Entity-Ban. This conflicts with *Dallman*. Whether corporations and labor organizations are similarly situated for campaign finance law purposes is an important question of federal law that should be settled by this Court.

## Conclusion

The issues presented for review are important for this Court to decide since they go to the heart of this Court's protection of core political speech. For the reasons stated, this Court should grant this petition.

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