Charles Capetanakis
DAVIDOFF HUTCHER & CITRON LLP
605 Third Avenue, 34th Floor
New York, NY 10158
Phone: (212) 557-7200
Fax: (212) 286-1884
Local Counsel for the Plaintiffs

James Bopp, Jr.*
Jeffrey Gallant*
Randy Elf **
Anita Y. Milanovich*
THE BOPP LAW FIRM, P.C.
One National Building
1 South 6th Street
Terre Haute, IN 47807
Phone: (812) 232-2434
Fax: (812) 235-3685
Lead Counsel for the Plaintiffs
* Admitted pro hac vice.
**Admission pro hac vice pending.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OGNIBENE, *et al.*,

***Plaintiffs*,**

-against-

C.A. No. 08 CV 01335 (LTS) (TDK)

PARKES, *et al.*,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

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Introduction

This is a free speech and association case arising under the First and Fourteenth Amendments to the United States Constitution. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment protects not only speech, but also association. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). And the Fourteenth Amendment incorporates the First Amendment, making it applicable to State and local governments. *See, e.g.*, *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925).

The Plaintiffs move this Court for relief from its February 6, 2009, Order, (Doc. 98), as to Counts II, III, IV, VII, VIII and IX of their Amended Complaint insofar as those Counts challenge the constitutionality of New York Administrative Code ("The Code") Sections 3-703(1-a), 3-702(3), and 3-703(1)(1). These provisions reduce contribution levels below the generally-applicable level for lobbyists and those with business dealings with the City (the "Doing Business Contribution Limits"), deny such individuals matching contributions (the "Non-Matching Fund Provision"), and ban contributions by corporate entities, respectively (the "Expanded Corporate Contribution Ban"). These challenged sections of the Code burden and chill the political speech and association of contributors and the candidates they support.

Recently, the United States Supreme Court issued its decision *McCutcheon v. FEC*, 1434 U.S. 134 (2014), which invalidated federal aggregate contribution limits. Similar analysis under *McCutcheon* applied to Sections 3-703(1-a), 3-702(3), and 3-703(1)(1) shows that these provisions fail "closely drawn" scrutiny review and they are unconstitutional. This Court should grant Plaintiff's Rule 60(b) Motion, reevaluate its February 6, 2009, Order under *McCutcheon*,

declare Sections 3-703(1-a), 3-702(3), and 3-703(1)(1) unconstitutional, and enjoin their enforcement.

Factual Background

In 2008, Plaintiffs sought a preliminary and permanent injunction[1] of three distinct contribution regulations established in 2007 under New York City Local Law 34.[2] The law:

> restrict[s] contributions from [] individuals and entities who have business dealings with the City . . . . [It] lowers these donors' contribution limits approximately twelve-fold, to $400 (from the generally-applicable level of $4,950) for three City-wide offices; to $320 (from $3,850) for Borough offices; and to $250 (from $2,750) for City Council. The law also makes these contributions ineligible for public matching, and extends the ban on corporate contributions to LLCs, LLPs, and partnerships.

Ognibene v. Parkes, 671 F.3d 174, 179-180 (2d Cir. 2011); *see* N.Y.C. Admin. Code §§ 3-703(1)(l), 2-803(1-a), 3-719(2)(b). Both this Court and the Second Circuit considered and rejected Plaintiffs' asserted arguments as to the interests served by and the tailoring of these three provisions.

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[1]This Court consolidated Plaintiffs' preliminary injunction motion with a trial on the merits pursuant to Federal Rule of Civil Procedure 65. (Doc. 98 at 4.)

[2]This case raised three distinct categories of issues: contribution restrictions, (Am. Compl., Doc. 7, Counts II-IV, VII-IX); rescue fund provisions, (Am. Compl., Doc. 7, Counts XI-XIV); and Voting Rights Act violations, (Am. Compl., Doc. 7, Counts I, V, VI, X, XV-XX.) This Court addressed the contribution restrictions in its memorandum and opinion on February 6, 2009. (Doc. 98.) It addressed the rescue funds provision in its opinion and order on April 4, 2013. (Doc. 172.) And the remaining claims were voluntarily dismissed by the parties on August 12, 2013. (Doc. 182.) Attorneys' fees were awarded on July 22, 2014, (Doc. 208), with a Motion to Reconsider presently pending, (Doc. 210).

I. The District Court Order

This Court denied Plaintiffs injunctive relief request as to all three limitations.

A. The Doing Business Contribution Limits Challenge.

In analyzing the lower, "doing business" contribution limits, this Court held that "[c]orruption and corruption-appearance related justifications for restraints that only incidentally affect speech by cabining contributors' efforts to provide candidates with money with which to speak require little scrutiny . . ." *Ognibene v. Parkes*, 599 F. Supp. 2d 434, 444 (S.D.N.Y. 2009) (Doc. 98.). This scrutiny requires a legitimate state interest, which the district court defined as "influence or corruption." *Id.* at 445 (*quoting McConnell v. FEC,* 540 U.S. 93 (2003), which states that "Congress's legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence," and citing *FEC v. Colorado Republicans,* 533 U.S. 431 (2001) for support). This Court held that the evidence needed to support such a justification "var[ies] up or down with the novelty and plausibility" of that justification, *Ognibene v. Parkes*, 599 F. Supp. 2d at 445 (citing *Nixon v. Shrink Missouri PAC,* 528 U.S. 377 (2000)), and that Plaintiffs had offered no evidence of their own to necessitate an evidentiary response from the City to support their justification, *Ognibene v. Parkes*, 599 F. Supp. 2d at 448.

In analyzing the tailoring of the lower limits, this Court reasoned that "contribution limits [do not have] to be invalidated because bribery laws and disclosure requirements were a less restrictive means of addressing proven and suspected *quid pro quo* arrangements," *id.* at 451, and that "[t]he fact that the legislature did not prohibit or limit from making contributions every entity or individual that might have an incentive to curry favor in connection with negotiations

with the City does not render the challenged provisions [unconstitutional]," *id.* at 453. That the limitations apply to lobbyists is justified, the Court said, because lobbyists can exert undue influence and there is a strong perception that to do exert such influence. *Id.* at 454.

Because it reasoned that the limits were justified and adequately tailored, this Court upheld the lower, "doing business" contribution limits.

B. The Non-Matching Fund Provision Challenge.

This Court also determined that the denial of matching funds for "doing business" contributors was akin to a contribution limit and so the same corruption justification supported them as the business dealing limits. *Id.* at 456. This Court reasoned that

> requiring the City to use taxpayer dollars to match contributions that the legislature has determined present a risk of corruption or the appearance of corruption sufficient to require lower limits would be inconsistent with anti-corruption goals.

Id. at 456. And this Court held that the application of the non-matching fund provisions not just to lobbyists but to their spouse, domestic partner, employees and children served an anticircumvention interest of preventing lobbyists from securing matching funds through such family members or employees. *Id.* at 457. So it upheld the non-matching fund provisions.

C. The Expanded Corporate Contribution Ban.

Relying on U.S. Supreme Court decisions *Austin* and *Beaumont*, this Court held that the expanded corporate contribution ban of not just corporations but other entities such as partnerships and LLCs is a marginal speech restriction furthest from core political expression that prevent corporations from being "political war chests" that create or appear to create undue influence with their contributions. *Id.* at 459. This Court also held that the ban prevents circumvention by individuals who might try to contributed through corporations. *Id.* at 459.

The court reasoned that the ban was closely drawn because such entities can be used to obscure the source of a contribution, particularly when such entities as partnerships and LLCs are required to provide very little public information. *Id.* at 461. So it upheld the ban.

II. The Appellate Court Opinion.

The Second Circuit affirmed this Court's decision in 2011, in large part adopting the rationale of this Court, but offering some additional rationales. *See Ognibene v. Parkes,* 671 F.3d 174 (2d Cir. 2011).

The Second Circuit reasoned that while "mere influence or access to elected officials is insufficient . . . *improper* or *undue* influence presumably still qualifies as a form of corruption." *Ognibene,* 671 F.3d at 186. Such "[i]mproper or undue influences includes both traditional *quid pro quo* and more discreet exchanges of money for favorable outcomes." *Id.* at 187. Additionally:

> because the scope of *quid pro quo* corruption can never be reliably ascertained, the legislature may regulate certain indicators of such corruption or its appearance, such as when donors make large contributions because they have business with the City, hope to do business with the City, or are expending money on behalf of others who do business with the City.

Id. at 187. Whether the initial limits have been successful and make the lower limits unnecessary "is a matter of policy better suited for the legislature." *Id.* at 189.

Since *Citizens United* overturned *Austin,* the Second Circuit looked solely to *Beaumont* to reason, as did this Court, that the expanded corporate contribution ban was adequately tailored to served both an anti-corruption and anti-circumvention interest.

III. The U.S. Supreme Court

Plaintiffs filed a petition for certiorari from the Second Circuit on March 19, 2012. *See U.S. Supreme Court Docket*, No. 11-1153, http://www.supremecourt.gov/search.aspx?filename=/

docketfiles/11-1153.htm (last visited October 6, 2014). The petition was denied on June 25, 2012. *Id.*

IV. The *McCutcheon* Decision.

On April 2, 2014, in a 5-4 decision, the United States Supreme Court struck down federal aggregate contribution limits to candidates or committees. *McCutcheon v. FEC,* 134 S. Ct. 1434 (2014). These limits supplemented base contribution limits on how much could be given to each candidate or committee. *Id.* at 1442. The decision redefines and clarifies the legal principles surrounding contribution limit challenges in several key ways.

First, the *McCutcheon* decision addressed the free speech nature of contributions:

> The First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. . . . When an individual contributes money to a candidate, he exercises both of those rights: The contribution serves as a general expression of support for the candidate and his views and serves to affiliate a person with a candidate.

Id. at 1448 (internal citations omitted).

Second, the decision expressly identified which state interests are cognizable and which are not. The government cannot adopt contribution limits as a means of "reduc[ing] the amount of money in politics," of "restrict[ing] the political participation of some in order to enhance the relative influence of others," or of mitigating "general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *Id.* at 1441. The government cannot attempt to "level the playing field," "level electoral opportunities," or "equaliz[e] the financial resources of candidates." *Id.* at 1450. Nor may the government "seek to limit the appearance of mere influence or access." *Id.* at 1451 (internal citations omitted). Not only are efforts to "restrict the speech of some elements of our society in order to enhance the relative voices of

others is wholly foreign to the First Amendment," *id.* at 1450 (internal citations omitted), these objectives "impermissibly inject the Government into the debate over who should govern . . . the *last* people [who should] help decide who *should* govern." *Id.* at 1441-42 (internal citations omitted). Such limits penalize "an individual for robustly exercising his First Amendment rights." *Id.* at 1449.[3]

The only cognizable justification for contribution limits is preventing *quid pro quo* corruption, with *quid pro quo* corruption meaning only "a direct exchange of an official act for money," or "dollars for political favors," *id.* at 1441, "an act akin to bribery," *id.* at 1466 (Breyer, J., dissenting). The government "may permissibly seek to rein in large contributions that are given to secure a political *quid pro quo* from current and potential office holders." *Id.* at 1450 (internal citations omitted). And it may limit the "appearance of corruption"—that is, "public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions to particular candidates." *Id.* at 1450 (internal citations omitted). The plurality cautioned, however, that "[s]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not rise to such *quid pro quo* corruption." *Id.* at 1450. Nor do large sums spent to garner influence or access to elected officials or political parties. *Id.* at 1451. "[T]he risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself." *Id.* at 1460.

The government may also justify contribution limits "by demonstrating that they prevent circumvention" of laws designed to prevent *quid pro quo* corruption. *Id.* at 1451. Contribution limits

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[3]"To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process." *Id.* at 1449. Many individuals do not have available to them other effective means of supporting their preferred candidates or causes than contributing money. *Id.* at 1449.

targeting *quid pro quo* corruption through circumvention must guard "against an individual's funneling [of] massive amounts of money to a particular candidate." *Id.* at 1460 (internal citations omitted).

Third, the decision clearly allocates the burden of proof in reviewing contribution limits: "When the [g]overnment restricts speech, the [g]overnment bears the burden of proving the constitutionality of its actions." *Id.* at 1451 (internal citations omitted). This burden applies both to proof of a cognizable interest, *see id.* at 1452-53, as well to proof the limits are closely drawn, *see id.* at 1457. And whether proof of *quid pro quo* corruption, proof of circumvention, or proof the limits are closely drawn, the government's evidence cannot be speculative, *id.* at 1452, "mere conjecture," *id.* at 1452, "highly implausible," *id.* at 1453, irrational, *id.* at 1454, premised on illegal conduct, *id.* at 1455, largely inapplicable, *id.* at 1455, or "divorced from reality," *id.* at 1456.

Fourth, the decision discards the argument that organizational contributions corrupt more than individuals: "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *Id.* at 1452. An individual cedes control over his contribution when he gives to an independent actor, and "if funds are subsequently rerouted to a particular candidate, such actions occur[] at the initial recipient's discretion—not the donor's." *Id.* at 1452. This creates an ever growing chain of attribution, with credit "shared among the various actors along the way." *Id.* at 1452. Such contributions are thus diluted by all the other contributions from others to the same independent actors. *Id.* at 1452.

Last, the decision shows the analysis required under the "closely drawn" test to assess whether contribution limits were adequately tailored. The court evaluated whether "a substantial

mismatch" existed "between the [g]overnment's stated objective and the means selected to achieve it," *id.* at 1446, whether there was a "reasonable fit" to serve that objective, *id.* at 1457. This reasonable fit, while "not necessarily the least restrictive means," must still be "a means narrowly tailored to achieve the desired objective." *Id.* at 1457-58 (internal citations omitted). The availability of better, more reasonable alternatives belie a "closely drawn" claim. *Id.* at 1458 (internal citations omitted). The "closely drawn" test is applied especially rigorously where a limit is part of "prophylaxis-on-prophylaxis" regulation, that is, layers of regulation ostensibly designed to address the same corruption interest. *Id.* at 1458.

For the reasons discussed below, the application of these five principles to the three provisions challenged in this case justify reconsideration by this Court. The Doing Business Contribution Limit, the Non-Matching Fund Provision, and the Expanded Corporate Contribution Ban are unconstitutional under *McCutcheon*.

Argument

Standard of Review

Federal Rule of Civil Procedure 60(b) affords parties an opportunity to seek relief from a judgment or order provided specific criteria are met: "To prevail on a Rule 60(b) motion, a movant must show that one of the six bases outlined in the Rule, such as an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error, applies." *Word v. Croce*, No. 00-cv-6496, 2001 WL 755394 at *3 (S.D.N.Y. July 5, 2001). Of the six possible bases, Rule 60(b)(5) and Rule 60(b)(6) are applicable here. A motion made pursuant to these two bases must be made within a reasonable time. Fed. R. Civ. P. 60(c).

"Relief provided under Rule 60(b) in general is equitable in nature and is to be guided by equitable principles." *Velez v. Vassallo,* 203 F. Supp. 2d 312, 333 (S.D.N.Y. 2002) (*citing* 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2857, at 255 (2d ed. 1995)). In other words, "[p]roperly applied Rule 60(b) strikes a balance between serving the ends of justice and preserving the finality of judgments . . . yet final judgments should not be lightly reopened." *Nemaizer v. Baker,* 793 F.2d 58, 61 (2d Cir. 1986) (internal quotation marks omitted) (citations omitted). It is subject to "abuse of discretion" review on appeal. *Word,* 2001 WL 755394 at *3.

I. Plaintiffs Satisfy The Requirements for Rule 60(b) Relief.

Generally, a Rule 60(b) Motion must satisfy the Second Circuit's three-prong test:

> First, the moving party must present highly convincing evidence that it is entitled to relief. Second, the moving party must show good cause for failing to act sooner. Finally, the moving party must show that granting the motion will not impose any undue hardship on the other party.

Skinner v. Chapman, 680 F. Supp. 2d 470, 478-79 (W.D.N.Y. 2010) *aff'd*, 412 F. App'x 387 (2d Cir. 2011) (citations omitted). These criteria can be readily met. As demonstrated below, *infra* Part I.C, *McCutcheon* alters not only the analysis but the outcome of the three contribution regulations' constitutional review. Plaintiffs could not seek relief until now because *McCutcheon* was only decided in April 2014—five months ago. The City, who is obligated to defend the regulations, will not be subject to any more hardship than if a new, independent challenge were brought. And reconsideration of this matter when no elections are immediately underway allows this Court to issue a decision with minimal impact on candidates mid-campaign.

A. Rule 60(b)(5) Relief Is Appropriate.

Federal Rule of Civil Procedure 60(b) allows a court to "relieve a party or its legal representative from a final judgment, order, or proceeding" if "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). The applicable portion here is the last phrase, that applying the judgment is no longer equitable.

Relief under 60(b)(5) is appropriate if the party can show a significant change in either facts or the law, and indeed, "a court errs when it refuses to modify an injunction or consent decree in light of such changes." *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (vacating a 12 year old injunction); *see also Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990) ("It is true that the trial court has discretion, but the exercise of discretion cannot be permitted to stand if we find it rests upon a legal principle that can no longer be sustained.").

As demonstrate *infra* Part I.C, the *McCutcheon* ruling is just such a change that makes the district court's order inequitable if left on the books. *See Huk-A-Poo Sportswear, Inc. v. Little Lisa, Ltd.*, 74 F.R.D. 621, 623 (S.D.N.Y. 1977) ("The term 'changed circumstances' refers to events which occurred subsequent to entrance of the order and which make it unfair to continue the injunction."). Plaintiffs are not seeking to relitigate a decision they disagree with, but instead seek to have new Supreme Court jurisprudence that is directly on point applied and the judgment reversed on that ground. *See American Optical Company v. Rayex Corp.*, 394 F.2d 155, 155 (2d Cir. 1968) (admonishing against attempts "to relitigate on a fuller record preliminary injunction issues already decided"). Allowing unconstitutional regulations to remain in force—regulations that restrict or even ban Plaintiffs' rights of expression and association (*see, e.g.,* Tapper Decl., attached as Ex. 1)—

is irreparable harm. *Elrod v. Burns,* 427 U.S. 347, 374 (1976). So allowing the judgment to remain in force is inequitable. Rule 60(b)(5) requirements are met.

B. Rule 60(b)(6) Relief Is Appropriate.

Alternatively, if the Court finds that 60(b)(5) is inapplicable, Plaintiffs seek relief under Federal Rule of Civil Procedure 60(b)(6), which provides that a court "may relieve a party or its legal representative from a final judgment, order, or proceeding" for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Specifically:

> As [Rule 60](b)(6) applies only when no other subsection is available, grounds for relief may not be mistake, inadvertence, surprise or excusable neglect." *Nemaizer,* 793 F.2d at 63. Rule 60(b)(6) "confers broad discretion on the trial court to grant relief when appropriate to accomplish justice; it constitutes a grand reservoir of equitable power to do justice in a particular case." *Matarese,* 801 F.2d at 106 (quoting *Int'l Controls Corp. v. Vesco,* 556 F.2d 665, 668 n. 2 (2d Cir. 1977); *Radack v. Norwegian Am. Line Agency, Inc.,* 318 F.2d 538, 542 (2d Cir. 1963)) (internal quotation marks omitted) (citations omitted).

Prince of Peace Enterprises, Inc. v. Top Quality Food Mkt., LLC, No. 07-CV-0349 LAP FM, 2012 WL 4471267 (S.D.N.Y. Sept. 21, 2012). The district court must seek "a balance between serving the ends of justice and preserving the finality of judgments." *Nemaizer*, 793 F.2d at 61.

To successfully assert relief under Rule 60(b)(6), plaintiffs must show "extraordinary circumstances" justify reopening the final judgment. *Winslow v. Portuondo*, 599 F. Supp. 2d 337, 341 (E.D.N.Y. 2009) (vacating a 2003 judgment in 2009). Reviewing U.S. Supreme Court precedent, the *Winslow* court observed that changes in the law in themselves do not constitute "extraordinary circumstances," particularly when claims were not raised in the first instance or were not timely appealed. *Id.* Instead, as the Second Circuit has held, Rule 60(b)(6) is "properly invoked where there are extraordinary circumstances or where the judgment may work an extreme and undue hardship." *DeWeerth v. Baldinger,* 38 F.3d 1266, 1272 (2d Cir. 1994) (internal citation omitted).

Here, Plaintiffs filed a suit in equity seeking injunctive relief from unconstitutional contribution regulations. Without such relief, they have suffered and will continue to suffer the deprivation of their expressive and associational rights (*see, e.g.,* Tapper Decl., attached as Ex. 1), a deprivation that constitutes irreparable harm. *Elrod,* 427 U.S. at 374. While they previously failed to convince this Court and the appellate court of the unconstitutionality of these contribution regulations, *McCutcheon* now presents a significant change in the law that would change the outcome Plaintiffs' claims and remedy that inevitable irreparable harm. Without review under *McCutcheon*, Plaintiffs will continue to suffer undue hardship because so long as the three contribution regulations are in force, Plaintiffs are deprived of their constitutional rights. (*See, e.g.,* Tapper Decl. ¶¶ 8, 9, attached as Ex. 1) ("Because sections 3-703(1)(1), 3-703(1-a), and 3-702(3) cripple my ability to mount an effective campaign, I will not run for city council member so long as they remain in force. . . . . [They] unconstitutionally chill me from entering the political debate as a candidate and so deprive me of my constitutional rights under the First and Fourteenth Amendments to the United States Constitution. I will suffer irreparable harm if their enforcement is not enjoined."). Rule 60(b)(6) requirements are met.

C. *McCutcheon* Changes The Outcome of Plaintiffs' Claims.

1. The Standard of Review Is More Rigorous Than Was Applied.

The *McCutcheon* decision reinforces that the City, not the Plaintiffs, bears the burden of defending both the justification and the tailoring of the contribution regulations challenged. *See id.* at 1452. And it made clear that deference is not afforded to lawmakers. *Id.* at 1451. *See also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 361 (2010) ("When Congress finds that a problem

exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy.").

While the Second Circuit was willing to allow the City to "regulate certain indicators of . . . corruption or its appearance" because "the scope of *quid pro quo* corruption can never be reliably ascertained," *Ognibene,* 671 F.3d at 187, *McCutcheon* clearly states that though '[t]he line between *quid pro quo* corruption and general influence may seem vague at times, . . . the distinction must be respected in order to safeguard basic First Amendment rights," with the line drawing "err[ing] on the side of protecting political speech rather than suppressing it." *McCutcheon,* 134 S. Ct. at 1451 (*quoting WRTL v. FEC,* 551 U.S. 449, 457 (2007)). The City was afforded too much deference in defending the contribution regulations.

2. The "Doing Business" Contribution Limits Fail Scrutiny Under *McCutcheon*.

a. The Limits Serve No Cognizable Interest.

As discussed above, the district and circuit court accepted the City's justification for the "doing business" contribution limits as preventing undue influence or its appearance. Under *McCutcheon,* such a justification is not recognized. *McCutcheon*, 1434 S.Ct. at 1451. *McCutcheon* completely undercuts the courts' analysis.

Moreover, the evidence the City offered suggests that the real objective of the "doing business" contribution limits is to level the playing field by offsetting access with a lower contribution amount. In a report on which the district court relied, the City Council states:

> [w]hile there is nothing intrinsically wrong with contributions from those doing business with the City, the ability of such individuals to contribute could create a perception, regardless of whether such perception is accurate, that such individuals have a higher level of access to the City's elected officials. It is important to eradicate this perception and reduce the appearance of undue influence associated with contributions from individuals doing business with the City.

Ognibene, 599 F. Supp. at 441. Access and efforts to mitigate the benefits that access gives is not a proper interest. And that it "could" create a perception is speculative. The limits should be struck down on this ground alone. *See, e.g., McCutcheon*, 1434 S.Ct. at 1452 (discussing how fears of what might occur are "too speculative" to justify a First Amendment burden); *id.* at 1456 (discussing how scenarios offered by the government to justify aggregate contribution limits are "divorced from reality").

b. The "Doing Business" Contribution Limits Are Not Closely Drawn.

Additionally, the limits fail *McCutcheon*'s "closely drawn" test. The "doing business" contribution limits are what *McCutcheon* refers to as "prophylaxis-on-prophylaxis" regulations. Base limits already exist establishing a contribution baseline at which the City has presumably determined that its officials cannot be corrupted. So to justify the lower limits for business dealing donors, the fit of the limits is subject to especially rigorous review, something the district court and appellate courts failed to do. *See Ognibene,* 671 F.3d at 187 (deferring to the City on the proper way to regulate *quid pro quo* corruption given its nebulous scope).

Nowhere in the City's evidence is it demonstrated that while a $4,951 contribution in a city-wide campaign can corrupt or appear to corrupt an incumbent candidate, anything larger than $400 from a business dealing donor results in bribery or would appear to be a bribe.

Logically, such an assertion does not make sense. Suppose an incumbent candidate meets with a non-business dealing donor who offers to donate the maximum, noncorrupting contribution amount of $4,950 to that candidate's campaign in the hopes of swaying him away from funding a project or perhaps even from awarding the project to a particular business, i.e., influence that public official's decision. It is difficult to see how a subsequent business-dealing donor, who desires to hold

one of "19,578 contracts worth approximately $55.4 billion," *see Ognibene,* 599 F. Supp.2d at 442, can bribe or even appear to bribe that same candidate with a contribution of $401. Even if just the base limits were in place, any risk of bribery—which the base limits presumably prevent from causing—would be the same since the value of the bribe is identical. So with the base limits already in place, the need for lower, business dealing limits to also combat corruption is simply not credible and indeed, is "divorced from reality." The limits are "a mismatch" to an anticorruption interest and are unreasonable under *McCutcheon*.

Indeed, this "reasonable fit" analysis underscores that the limits serve an interest in leveling the playing field and equalizing voices. The only credible reason a "doing business" donor's contribution might have more impact dollar for dollar than another, non-business dealing donor is that she may already have access to and a relationship with public officials—things beyond the contribution itself—that can influence a public official. Attempts to equalize influence by offsetting access with contribution limits are expressly disapproved of in *McCutcheon*.

Additionally, both this Court and the Second Circuit acknowledged in their opinions that more narrow regulations—bribery laws and disclosure—are more narrow options. While the government need not choose the least restrict means of regulating contribution limits, it must show that other alternatives are a less reasonable fit so as to avoid unnnecessarily burdening protected speech. *McCutcheon,* 134 S.Ct. at 1457-58. Neither this Court nor the Second Circuit assessed why these were not more reasonable options as *McCutcheon* requires.

Such regulations would afford a better, more reasonable fit. Since the only recognized interest for regulating contribution limits is *quid pro quo* corruption, imposing uniform limits with disclosure

requirements and a bribery prohibition with strict penalties for incumbents would more reasonably address *quid pro quo* corruption without unduly restricting protected expression and association.

3. The Non-Matching Funds Provisions Fail Under *McCutcheon*.

a. The Non-Matching Funds Provisions Do Not Serve A Cognizable Interest.

Both the district court and appellate court hold that the same justification exists for the Non-Matching Funds Provisions as for the Doing Business Contribution Limits. So the non-matching fund provisions should also fail under *McCutcheon* for the same reasons described above in Part I.C.2.a.

Moreover, under a *quid pro quo* corruption analysis, it is unclear how government funds can corrupt a candidate. The money provided is not from the business dealing contributor. With the lower limits in place, that matching at most is $400. And even if only the base limits were in place, the contributions matched mirror those of any other contributor. A business dealing contributor can offer nothing financially, either through contributions or triggered matching funds, that a non-business dealing contributor can offer.

Neither *quid pro quo* corruption or its appearance is implicated. So the limits do not serve an anti *quid pro quo* corruption interest. *See McCutcheon*, 1434 S.Ct. at 1450.

b. The Non-Matching Funds Provisions Are Not Closely Drawn.

Like the Doing Business Contribution Limits," the Non-Matching Funds Provisions constitute prophylaxis-on-prophylaxis regulation. Their tailoring is subject to more rigorous review.

And there is a mismatch. With base limits underlying the matching fund, the City's anticorruption interest in avoiding "us[ing] taxpayer dollars to match contributions that the legislature has determined present a risk of corruption or the appearance of corruption," *Ognibene,*

599 F. Supp.2d at 456, is nonexistent. Contributions up to that limit have already been determined to be noncorrupting. Matching those contributions cannot exacerbate perceptions of corruption that have already been determined not to be in play at all under the base limits.

A mismatch also exists in denying matching funds for a lobbyist's spouse, domestic partner, employees, and children. The City has determined these individuals can contribute at the higher base rate. That their contribution should not be matched because their noncorrupting contribution might be a lobbyist's effort to circumvent and secure matching funds misses the mark. Insofar as circumvention risks are present, the City is already permitting circumvention up to the base limits for family and employees. To assert an anticircumvention interest with this prophylaxis measure when it presumably equally true of but unaddressed in the base limits makes the non-matching funds provisions unreasonable and irrational. Such an interest would be better and more reasonably addressed in the base limits themselves or through disclosure of sources for such contributions with strict bribery laws.

Under *McCutcheon*'s more rigorous review, the non-matching funds provisions are unconstitutional. *McCutcheon*, 1434 S.Ct. at 1458.

4. The Entity Contribution Ban Fails Under *McCutcheon*.

a. The Entity Contribution Ban Serves No Anticorruption Interest.

As with the other two limitations, the courts' rationale for regulating the Entity Contribution Ban is that it prevents undue influence. *Ognibene,* 599 F. Supp.2d at 459; *Ognibene,* 671 F.3d at 195. This is not a cognizable interest under *McCutcheon*.

b. The Entity Contribution Ban Is Not Closely Drawn to Prevent Circumvention.

As with the other two contribution regulations, the Entity Contribution Ban is a prophylaxis-on-prophylaxis measure. So under *McCutcheon,* its tailoring is subject to more rigorous review, which the district and appellate courts failed to adequately do. *See Ognibene,* 671 F.3d at 196-97 (addressing tailoring in one sentence).

First, this Court and the appellate court ascribe too much weight to contributors attempting to engage in *quid pro quo* corruption through corporate structure and similar entities. "[T]here is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *McCutcheon*, 134 S.Ct. at 1452. Since an individual cedes control over his contribution when he gives to an independent actor, "if funds are subsequently rerouted to a particular candidate, such actions occur[] at the initial recipient's discretion—not the donor's." *Id.* at 1452. *McCutcheon* undermines the courts' general assertion of corruption effectuated through corporate entities.

Second, insofar as anticircumvention does occur, rigorous review as required under *McCutcheon* reveals a mismatch. The City allows spouses, domestic partners, children, and employees to give the base amount. Presumably anticircumvention was contemplated in that context and yet left unregulated up to the base limits. With the same donor and the same money implicated, logic dictates that the same regulation in each circumstance would be necessary. Yet the laws do not mirror each other. And the City offered no evidence justifying restricting even $1 of corporate contributions while such a restriction is triggered at $4951 for spouses, domestic partners, employees, and children. A "reasonable fit" issue exists.

Last, even assuming circumvention concerns are triggered with the first penny of contribution from a business entity, more reasonable regulations would be to ban earmarking of contributions to corporate entities for candidates, and to impose disclosure requirements, the lack of which both this Court and Second Circuit held justified the ban. *Ognibene,* 599 F. Supp.2d at 461; *Ognibene,* 671 F.3d at 196.

For the above reasons, the three contribution limits Plaintiffs challenge are unconstitutional under *McCutcheon*.

Conclusion

For the foregoing reasons, the plaintiffs respectfully request that this Court grant their Rule 60(b) motion for relief.

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Respectfully Submitted,

/s/ Anita Y. Milanovich

James Bopp, Jr.*
Jeffrey Gallant*
Randy Elf**
Anita Y. Milanovich*
THE BOPP LAW FIRM, P.C.
One National Building
1 South 6th Street
Terre Haute, IN 47807
Phone: (812) 232-2434
Fax: (812) 235-3685
Email: jboppjr@aol.com
relf@bopplaw.com
aymilanovich@bopplaw.com
Lead Counsel for the Plaintiffs
* Admitted pro hac vice.
**Admission pro hac vice pending.

Charles Capetanakis
DAVIDOFF HUTCHER & CITRON LLP
605 Third Avenue, 34th Floor
New York, NY 10158
Phone: (212) 557-7200
Fax: (212) 286-1884
Local Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on Defendants' counsel in the way described:

SERVED BY ECF:

Jonathan Pines, Esq.
The City of New York
Law Department
100 Church Street
New York, NY 10007
jpines@law.nyc.gov
Counsel for Defendants

John H. Snyder
Snyder Law
jsnyder@proskauer.com
Counsel for Amici Citizens Union, Common Cause/NY and New York Public Interest Research Group

Michael W. Ross
Jenner & Block LLP
919 Third Avenue
38th Floor
New York, NY 10022-3908
mross@jenner.com
Counsel for Amici Brad Lander and Mark Winston Griffith

SERVED BY ECF:

Randall T. Adams
Jenner & Block LLP
919 Third Avenue, 38th Floor
New York, NY 10022
radams@jenner.com
Counsel for Amici Brad Lander and Mark Winston Griffith

SERVED BY EMAIL (as agreed to by all counsel):

Peter J. W. Sherwin
Proskauer
Eleven Times Square
New York, NY 10036-8299
Psherwin@proskauer.com
Counsel for Amici Citizens Union, Common Cause/NY and New York Public Interest Research Group

Dated: New York, New York
October 10, 2014

/s/ Anita Y. Milanovich
Anita Y. Milanovich