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## A National Model Faces New Challenges: The New York City Campaign Finance System and the 2013 Elections

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# A NATIONAL MODEL FACES NEW CHALLENGES: THE NEW YORK CITY CAMPAIGN FINANCE SYSTEM AND THE 2013 ELECTIONS

*Janos Marton\**

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## INTRODUCTION: NEW YORK CITY AS A NATIONAL MODEL

In the aftermath of *Citizens United v. Federal Election Commission*<sup>1</sup> and other campaign finance decisions that have made the regulation of money in politics more difficult, advocates of campaign finance reform have turned to New York City as a potential model to emulate.<sup>2</sup> New York City's generous public matching fund system allows candidates to compete in elections without raising large sums of money, and strict contribution limits—particularly for those who do business with the City—are designed to prevent donors from having excessive influence.<sup>3</sup> New York City has not held major citywide elections since 2009, however, and campaign finance law has changed considerably since then.

The much-publicized *Citizens United* and its progeny, *McComish v. Bennett*<sup>4</sup> and *SpeechNow.org v. Federal Election Commission*,<sup>5</sup> have been accused of opening the floodgates to unprecedented campaign spending by outside groups. The 2012 presidential election featured “Super PACs,” well-endowed political action committees funded by small groups of individuals.<sup>6</sup> These groups accounted for nearly half of all political advertisements aired during the presidential election, a substantially higher percentage than in past years.<sup>7</sup> As

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1. 558 U.S. 310 (2010).

2. See Alec Hamilton, *Campaign Finance Ruling May Make New York a Model for the Nation*, WNYC (June 21, 2011), <http://www.wnyc.org/articles/its-free-country/2011/jun/21/campaign-finance-ruling-may-make-new-york-model-nation/>.

3. See *Frequently Asked Questions*, N.Y.C. CAMPAIGN FIN. BD., <http://www.nycffb.info/press/info/faq.aspx> (follow “How do New York City residents benefit from the public financing of campaigns?” hyperlink) (last visited Mar. 6, 2013) (“Public financing of campaigns has several important benefits to both candidates and taxpayers. First, it makes candidates and elected officials more responsive to citizens, rather than to special interests, wealthy donors, and corporations. The importance of smaller contributions is enhanced because contributions under \$175 from New York City residents become worth six times more with public matching funds. Public financing also helps credible, often grassroots and insurgent candidates, who may not have access to ‘big money’, run competitive campaigns. Taxpayers are also rewarded with candidates who have more time to reach out to voters and talk about issues, as opposed to spending their time fundraising.”).

4. 131 S. Ct. 2806 (2011).

5. 599 F.3d 686 (D.C. Cir. 2010), *cert. denied sub nom.* Keating v. Fed. Election Comm’n, 131 S. Ct. 553 (2010).

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

7. See Domenico Montanaro, *Outside Groups Make Up Almost Half of All Presidential Campaign Ads*, NBC NEWS (Sept. 17, 2012, 12:13 PM),

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New York City proceeds towards the 2013 municipal elections, it will not only elect a new mayor for the first time since 2001, but will also replace many of its citywide office-holders, borough presidents and local council members because of term limits.<sup>8</sup> Given the stakes, New York City's campaign financing system will likely be tested by the infusion of significant third-party spending.

The New York City Campaign Finance Board's (CFB) reflective report on the 2009 city elections anticipated the different playing field that unlimited independent expenditures would create in 2013, observing that "[i]ndependent expenditures are of particular concern in jurisdictions with public financing programs, because those candidates who agree to limit their spending are faced by independent expenditure committees without limits."<sup>9</sup> Even before *Citizens United*, independent expenditures had increased significantly during the City's previous two election cycles.<sup>10</sup> Campaign finance reformers should watch to see whether such a model can survive in the post-*Citizens United* legal and political landscape. Given the explosion of outside spending during the 2012 Republican presidential nomination, the Scott Walker recall election in

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[http://firstread.nbcnews.com/\\_news/2012/09/17/13917146-outside-groups-make-up-almost-half-of-all-presidential-campaign-ads?lite](http://firstread.nbcnews.com/_news/2012/09/17/13917146-outside-groups-make-up-almost-half-of-all-presidential-campaign-ads?lite); Alina Selyukh, *Study of US Campaign Ads Finds Growing Role of Outside Groups*, REUTERS (Sept. 13, 2012), <http://in.reuters.com/article/2012/09/12/usa-campaign-money-idINL1E8KCE8720120912>.

8. See David Chen, *Some Candidates Get Early Start on Fund-Raising for 2013*, N.Y. TIMES (July 11, 2012), <http://www.nytimes.com/2012/07/12/nyregion/new-york-candidates-get-early-start-on-fund-raising-for-2013.html>. The 2013 election marks a major moment of political transition for New York City. Shortly after the City Charter overhaul of 1989, an independent effort spearheaded by Ronald Lauder led to the passage of term limits. This forced dozens of elected officials from office in 2001. Many of the political generation that replaced them in the City Council and borough president's offices served concurrently with Mayor Bloomberg, who led an effort to alter the City Charter to allow himself a third term in 2009. The 2013 election will likely yield New York City a new mayor, public advocate, comptroller, several new borough presidents, a new council speaker, and usher in at least two dozen councilmembers.

9. N.Y.C. CAMPAIGN FIN. BD., *NEW YORKERS MAKE THEIR VOICES HEARD: A REPORT ON THE 2009 ELECTIONS* 166 (2010) (quoting PAUL RYAN, *A STATUTE OF LIBERTY: HOW NEW YORK CITY'S CAMPAIGN FINANCE LAW IS CHANGING THE FACE OF LOCAL ELECTIONS* 42 (2003)), available at [http://www.nycffb.info/PDF/per/2009\\_PER/2009PostElectionReport.pdf](http://www.nycffb.info/PDF/per/2009_PER/2009PostElectionReport.pdf).

10. See Joseph P. Parkes, *Disclosing Independent Expenditures*, GOTHAM GAZETTE (Feb. 6, 2012, 4:35 PM), <http://www.gothamgazette.com/index.php/archives/853-disclosing-independent-expenditures->

Wisconsin, and the 2012 presidential election, they have reason to be nervous.<sup>11</sup>

If the New York City model is to be the standard-bearer for the nation, then there are issues beyond whether it can properly withstand the influence of outside spending. Even though the public matching fund system is credited with increasing and diversifying small donor participation, special interest groups like the real estate lobby and unions play outsized roles in funding local campaigns, and are already significantly impacting the 2013 election. There are questions concerning whether candidates are sufficiently deterred from coordinating with outside parties, whether public matching funds are used properly, and whether a sophisticated campaign finance program has significantly altered the quality or even the composition of individuals holding elected office in New York City.

This Article will focus on the strengths and weaknesses of the New York City campaign finance system as it enters its first post-*Citizens United* election cycle. Part I of the Article recounts the origin and evolution of New York City's CFB, which has regulated elections in New York City since 1989, and discusses early developments in New York City's campaign finance law. Part II analyzes *Citizens United* and other significant campaign finance reform cases that have been decided since New York City's 2009 elections, with an emphasis on the decisions' potential impacts on New York City and the measures that New York City has taken in response. Part III takes a look at the major players in the 2013 election and determines whether these candidates have benefitted from the recent developments in campaign finance law. Finally, Part IV addresses whether the system is properly regulated, and to what extent its shortcomings can be remedied. If New York City is to serve as a model campaign finance reform system, advocates seeking to adopt it elsewhere should consider the strengths of the system worth emulating, the shortcomings that need correcting, and the challenges inherent to the intersection of money and politics.

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11. See generally R. Sam Garrett, "Super PACs" in *Federal Elections: Overview and Issues for Congress*, CONG. RESEARCH SERV. (Dec. 2, 2011), <http://www.fas.org/sgp/crs/misc/R42042.pdf>; Andy Kroll, *10 Numbers You Need to Know on Scott Walker Recall Day*, MOTHER JONES, (June 5, 2012), <http://www.motherjones.com/politics/2012/06/top-10-wisconsin-scott-walker-recall>; *Mad Money: TV Ads in the 2012 Presidential Campaign*, WASH. POST (Nov. 14, 2012), <http://www.washingtonpost.com/wp-srv/special/politics/track-presidential-campaign-ads-2012/>; Montanaro, *supra* note 7.

### I. THE RULES OF THE GAME: THE ORIGINS OF THE NEW YORK CITY PUBLIC MATCHING FUND SYSTEM<sup>12</sup>

During the 1980s, New York City became embroiled in a political scandal that shook the City's ruling class. Donald Manes, the powerful Queens Borough President, was investigated by the FBI for selling Parking Violations Bureau contracts to companies in exchange for kickbacks.<sup>13</sup> Manes committed suicide as the charges against him mounted, but there was also sufficient evidence to charge one of his accomplices, Bronx Borough President Stanley Friedman.<sup>14</sup> At the same time, Brooklyn Borough President Meade Esposito resigned over charges concerning illegal influence peddling, including illegal benefits conferred upon Bronx Congressman Mario Biaggi.<sup>15</sup> Although Mayor Ed Koch was not accused of wrongdoing, he was politically embarrassed when officials he had appointed as a political favor to Esposito were brought down in the scandal.<sup>16</sup> Finally, the vehicle for the Borough Presidents' power, the Board of Estimate, was struck down in court.<sup>17</sup>

The Board of Estimate had represented a unique governing structure for a large city like New York. The eight members of the Board included the five borough presidents, each of whom had one vote, along with the mayor, city council president, and comptroller, who each had two votes.<sup>18</sup> The Board of Estimate had enormous zoning, contracting, and budgeting powers, which meant an alliance of borough presidents could effectively control which companies had access to the City. Staten Island had as much clout on the Board as the far more populous Brooklyn.<sup>19</sup> The structure was challenged on

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12. For an extremely thorough summary of New York City's campaign finance laws, see JERRY GOLDFEDER, *MONEY AND POLITICS* (2012). This short book is a step-by-step guide for candidates to navigate New York City's campaign finance system, though it concludes that hiring counsel might be a sound investment.

13. Seth Faison, *80s Scandal Unraveled in a Suicide Note*, N.Y. TIMES, Aug. 19, 1993, <http://www.nytimes.com/1993/08/19/nyregion/80-s-scandal-unraveled-in-a-suicide.html>. A more detailed account of the scandal is covered in WAYNE BARRETT & JACK NEWFIELD, *CITY FOR SALE: ED KOCH AND THE BETRAYAL OF NEW YORK* (1988).

14. Faison, *supra* note 13.

15. Richard Lyons, *Meade Esposito, 86, Former Power in Politics, Is Dead*, N.Y. TIMES, Sept. 4, 1993, <http://www.nytimes.com/1993/09/04/obituaries/meade-esposito-86-former-power-in-politics-is-dead.html>.

16. *Id.*

17. *Bd. of Estimate v. Morris*, 489 U.S. 688, 690–91 (1989).

18. *Id.* at 694.

19. *Id.* at 702 (citing *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)).

the grounds that it violated the “one person, one vote” principle established in *Reynolds v. Sims*. The United States Supreme Court’s unanimous decision declaring the Board of Estimate unconstitutional on the heels of the Manes, Friedman, and Esposito scandals gave reformers an opportunity to restructure local governance. In 1989, voters approved the largest overhaul of the City Charter since 1898, when New York became the five boroughs it is today.<sup>20</sup>

The new City Charter addressed the corruption scandals of the 1980s by all but eliminating the power of borough presidents, who retained minimal zoning powers, and significantly expanding the power of the mayor and city council; the latter expanded to its present-day 51 members to increase the potential for racial diversity. The new charter also created the nebulous position of public advocate, which joined the mayor and comptroller as a citywide elected position.

Another legislative response to the 1980s scandals was the 1988 adoption of the Campaign Finance Act.<sup>21</sup> The legislation created the New York City CFB, an independent and nonpartisan entity charged with generating local campaign finance laws and regulating compliance with them.<sup>22</sup> The CFB oversees a campaign finance system that imposes disclosure requirements and individual contribution limits on all candidates, and limitations on total contributions and spending for candidates seeking public matching funds.<sup>23</sup> Originally, “the city’s primary goal for the public finance system [was] to limit the influence of money in citywide elections,” a position the CFB no longer holds in light of *Citizens United*, discussed *infra*.<sup>24</sup>

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20. See Alan Finder, *The 1989 Elections: Charter; Overhaul of New York City Charter Is Approved, Polls Show*, N.Y. TIMES, Nov. 8, 1989, <http://www.nytimes.com/1989/11/08/nyregion/1989-elections-charter-overhaul-new-york-city-charter-approved-polls-show.html>.

21. See generally N.Y.C. ADMIN. CODE § 3-701 (2012).

22. The first Campaign Finance Board was chaired by Fordham University President Father Joseph O’Hare, and included among its five board members an attorney from the law firm of Pavia and Harcourt, Sonia Sotomayor. N.Y.C. CAMPAIGN FIN. BD., WINDOWS OF OPPORTUNITY: CAMPAIGN FINANCE AND THE NEW CITY COUNCIL (1992), available at [http://www.nyccfb.info/PDF/per/92\\_PER-intro-ch.2.pdf](http://www.nyccfb.info/PDF/per/92_PER-intro-ch.2.pdf).

23. N.Y.C. ADMIN. CODE § 3-718 (2012). Interestingly, state law theoretically preempts the New York City laws as they apply to the voluntary system’s non-participants. See GOLDFEDER, *supra* note 12, at 13 n.2.

24. Larry Levy & Andrew Rafalaf, *High Court’s Recent Decision on Public Matching Funds Renders New York City’s Campaign Finance System Ripe for Constitutional Attack*, ALBANY GOV’T L. REV. ONLINE (July 11, 2011),

The public matching fund program was the centerpiece of the voluntary program. Initially, the city matched contributions at a 1:1 ratio for the first \$1,000 contributed by each New York City resident.<sup>25</sup> Eligibility was contingent on raising a certain number of donations and donors from the district where the election was taking place, and total matching funds were capped at 50% of the total expenditure limits.<sup>26</sup> The eligibility requirements and cap have remained largely intact, but during the 2001, 2003, and 2005 elections, the first \$250 were matched at a ratio of 4:1.<sup>27</sup> The 1998 law that expanded the matching ratio to 4:1 also introduced the “bonus” matching funds, which increased the ratio of matching funds for participating candidates who faced well-financed opponents who spent beyond the CFB voluntary limit.<sup>28</sup> During the 2009 election the ratio was changed to 6:1 for the first \$175 of a contribution, and that ratio remains in effect for the 2013 election.<sup>29</sup>

By lowering the amount of money that is matched and increasing the degree to which it is matched, the system is designed to encourage more small donor participation.<sup>30</sup> One analysis suggests, “the incentive for candidates to recruit small donors has increased the

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<http://www.aglr.wordpress.com/2011/07/11/high-courts-recent-decision-on-public-matching-funds-renders-new-york-citys-campaign-finance-system-ripe-for-constitutional-attack>. Today, the CFB’s mission is described as follows: “The CFB’s mission is to increase voter participation and awareness, provide campaign finance information to the public, enable more citizens to run for office, strengthen the role of small contributors, and reduce the potential for actual or perceived corruption.” *Welcome to the Campaign Finance Board*, N.Y.C. CAMPAIGN FIN. BD., <http://www.nycffb.info> (last visited Mar. 6, 2013).

25. 2 N.Y.C. CAMPAIGN FIN. BD., ON THE ROAD TO REFORM: CAMPAIGN FINANCE IN THE 1993 NEW YORK CITY ELECTIONS, EXECUTIVE SUMMARY 2 (1994), *available at* [http://www.nycffb.info/PDF/per/94\\_PER\\_execsumm.pdf](http://www.nycffb.info/PDF/per/94_PER_execsumm.pdf). Interestingly, the CFB report highlighted the municipal unions, the United Federation of Teachers union and the Real Estate Board of New York as the three largest donors to 1993 candidates. *Id.* at 7 tbl.2. Twenty years later, all three entities retain prominent roles in the landscape of local campaign spending.

26. *See id.* at 3.

27. Michael J. Malbin, Peter W. Brusoe & Brendan Glavin, *Small Donors, Big Democracy: New York City’s Matching Funds as a Model for the Nation and States*, 11 ELECTION L.J. 3, 9 (2012), *available at* [http://www.cfinst.org/pdf/state/NYC-as-a-Model\\_ELJ\\_As-Published\\_March2012.pdf](http://www.cfinst.org/pdf/state/NYC-as-a-Model_ELJ_As-Published_March2012.pdf).

28. 1998 N.Y.C. Local Law No. 48 (codified as amended at N.Y.C. ADMIN. CODE § 3-703 (2012)).

29. *Id.*

30. *See* Malbin et al., *supra* note 27, at 19. The CFB’s auditing of the matching fund process is rigorous; during the 2009 election cycle the CFB denied almost twenty percent of matching fund requests on the grounds that they violated a condition of eligibility. GOLDFEDER, *supra* note 12, at 26.



number of donors who give, as well as the diversity of the census block groups in which they reside.”<sup>31</sup> Another report explained, “What differentiates New York’s program is that it looks to level the playing field less between candidates and more between donors.”<sup>32</sup> With the demise of “trigger-fund” public financing systems following the Supreme Court’s ruling in *McComish v. Bennett*, New York City’s campaign financing system is increasingly being discussed as a model for jurisdictions across the country.<sup>33</sup> Recently, good government groups and other advocates have pushed for the New York City model to be adopted at the state level.<sup>34</sup>

## II. CAMPAIGN FINANCE JURISPRUDENCE AND NEW YORK CITY

### A. *Citizens United* and New York City’s Response

Few cases in recent years, and certainly no campaign finance reform case, have garnered as much attention as *Citizens United v. Federal Election Commission*.<sup>35</sup> What began as an innocuous case about whether a “documentary” about Hillary Clinton, *Hillary: The Movie*, could be aired on television within thirty days of a Democratic presidential primary election, morphed into the definitive case on the limits of First Amendment speech in the campaign context.<sup>36</sup> Overruling *Austin v. Michigan Chamber of Commerce* and invalidating sections of the Bipartisan Campaign Reform Act of 2002 (BCRA),<sup>37</sup> the Court, in an opinion written by Justice Anthony Kennedy, held that “[g]overnment may not suppress political speech on the basis of the speaker’s corporate identity,”<sup>38</sup> and that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”<sup>39</sup> Detailed analysis of the holding in *Citizens United* and debate over whether the case was

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31. Malbin et al., *supra* note 27, at 17.

32. Hamilton, *supra* note 2.

33. *Id.*

34. Thomas Kaplan, *Wealthy Group Seeks to Reform Election Giving in New York*, N.Y. TIMES, Apr. 11, 2012, <http://www.nytimes.com/2012/04/12/nyregion/coalition-urges-public-financing-in-new-york-state-elections.html>.

35. 558 U.S. 310 (2010).

36. *Id.*

37. Pub. L. No. 107-155, 116 Stat. 81 (2002). This legislation was also commonly known as “McCain-Feingold” for its sponsors in the United States Senate, John McCain (R-Arizona) and Russ Feingold (D-Wisconsin).

38. *Citizens United*, 558 U.S. at 365.

39. *Id.*

correctly decided would merit its own law review article, and indeed has,<sup>40</sup> but its main implications were two-fold.

Legally, the decision established that the government could not articulate an anti-corruption principle with respect to non-coordinated independent expenditures.<sup>41</sup> Because the Court rejected the anti-distortion principle used to justify limiting independent corporate expenditures in *Austin v. Michigan Chamber of Commerce*, corruption or the appearance of corruption were the only grounds under which the government could restrict First Amendment political speech. The Court could not, however, identify a sufficient government interest in reducing corruption or the appearance of corruption absent a *quid pro quo* exchange. While such an exchange could be inferred by a direct contribution to a candidate, the Court did not recognize the danger of a *quid pro quo* exchange by independent spending.<sup>42</sup> The Court's sweeping view of the First Amendment and the rights it conferred on corporations and unions opened the door to challenges against many federal and local campaign finance reform laws. Importantly, however, the Court pointedly did not apply this expansive reasoning to direct contributions.<sup>43</sup> The Court also upheld the constitutionality of disclosure requirements, even for independent expenditures.<sup>44</sup>

The second major implication of *Citizens United* was its cultural impact, as the decision became a quasi-partisan political flashpoint. To some, *Citizens United* "opened the floodgates" to corporations buying elections, thereby undermining democracy.<sup>45</sup> The trouble with

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40. See, e.g., Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance after Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643 (2011); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497 (2010); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365 (2010); Monica Youn, *First Amendment Fault Lines and the Citizens United Decision*, 5 HARV. L. & POL'Y REV. 135 (2011).

41. *Citizens United*, 558 U.S. 359–60.

42. *Id.*

43. *Id.* at 359 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.").

44. *Id.* at 366 ("Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities' . . . ." (citation omitted)).

45. See Anjeanette Damon, *Citizens United Didn't Just Open Up Money Floodgates for Corporations*, LAS VEGAS SUN, July 15, 2012, <http://www.lasvegassun.com/news/2012/jul/15/citizens-united-didnt-just-open-money-flood-gates-/>; Sean Siperstein, *Citizens United v. We the People*, HUFFINGTON POST

this rhetoric is that wealthy donors, corporations and unions had little difficulty spending large sums of money in prior elections, however easier the *Citizens United* decision made it. To the persons who sought to spend large amounts of money in elections and their supporters, *Citizens United* was a First Amendment triumph that validated their behavior.<sup>46</sup> From this point of view, big money in politics was no longer sleazy—it was justified under the Constitution. The emergence of Charles and David Koch,<sup>47</sup> Foster Friess,<sup>48</sup> and Sheldon Adelson,<sup>49</sup> billionaires who spent lavishly during the 2012 presidential elections, may have been in part due to their assurance that the act of spending millions of dollars on electoral politics was legal under a recent Supreme Court decision. Such legitimized meddling has also come to the New York area; in a 2012 Long Island Congressional race, a Super PAC bankrolled by a hedge fund focused on rolling back Dodd-Frank financial regulations spent almost \$300,000 in an unsuccessful effort to defeat the incumbent Democrat.<sup>50</sup>

In a metropolis like New York City, full of wealthy individuals and powerful corporations, any cultural shift toward a politics more permissive of unfettered campaign spending could be dangerous. As then-mayoral candidate Rudy Giuliani testified at a Campaign Finance Board hearing in 1991, “[I]t is demonstrable that . . . very, very often over the last ten to fifteen years . . . public officials in New York City were incapable of making decisions in the public interest because of the effects of money and the huge amounts donated by

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(Jan. 20, 2012, 12:35 PM), [http://www.huffingtonpost.com/sean-siperstein/citizens-united-v-we-the-b\\_1219221.html](http://www.huffingtonpost.com/sean-siperstein/citizens-united-v-we-the-b_1219221.html); Jules Witcover, *Supreme Court Contempt*, CHI. TRIB., June 27, 2012, [http://articles.chicagotribune.com/2012-06-27/news/sns-201206261500--tms--poltodayctnyq-a20120627-20120627\\_1\\_montana-supreme-court-pacs-campaigns](http://articles.chicagotribune.com/2012-06-27/news/sns-201206261500--tms--poltodayctnyq-a20120627-20120627_1_montana-supreme-court-pacs-campaigns).

46. See John Nolte, *Why the Media Hates and Fears Super PACs*, BREITBART (June 12, 2012), <http://www.breitbart.com/Big-Journalism/2012/06/12/Why-MSM-Hates-SuperPACs>.

47. Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. TIMES, July 17, 2012, <http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html>.

48. Jim Rutenberg & Nicholas Confessore, *A Wealthy Backer Likes the Odds on Santorum*, N.Y. TIMES (Feb. 8, 2012), <http://www.nytimes.com/2012/02/09/us/politics/foster-friess-a-deep-pocketed-santorum-super-pac-backer.html>.

49. Editorial, *In Thrall to Sheldon Adelson*, N.Y. TIMES, Aug. 16, 2012, <http://www.nytimes.com/2012/08/17/opinion/in-thrall-to-sheldon-adelson.html>.

50. Rachael Marcus & Michael Beckel, *House Candidates Fear Super PACs*, CTR. FOR PUB. INTEGRITY (Sept. 13, 2012), <http://www.publicintegrity.org/2012/09/13/10859/house-candidates-fear-super-pacs>.

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some.”<sup>51</sup> The *Citizens United* Court likely would respond that Giuliani’s concerns were properly addressed by the Court’s decision to maintain the distinction between contributions and independent expenditures drawn in *Buckley v. Valeo*.<sup>52</sup> To Justice Kennedy, a “huge” contribution to a campaign account might leave open the possibility of corruption, but a “huge” independent expenditure could not, because it lacked a “quid pro quo” element.<sup>53</sup>

The CFB wasted no time in responding to the *Citizens United* decision. The same day the decision was handed down, CFB Executive Director Amy Loprest issued a statement noting that the decision involved independent expenditures, and did not change the law with respect to direct contributions.<sup>54</sup> In a nod to a part of the *Citizens United* decision that expounded on disclosure requirements,<sup>55</sup> the statement also vowed to enhance disclosure requirements through the New York Campaign Finance Act.<sup>56</sup>

The ensuing political dialogue led the City Charter Revision Commission to place an amendment to the City Charter on the 2010 ballot.<sup>57</sup> New Yorkers would vote on requiring the “public disclosure of independent expenditures made ‘to influence the outcome of a city election or referendum.’”<sup>58</sup> The CFB backed this “Independent Expenditure Amendment.” The issue was bundled with several others as a single referendum on revising the City Charter. Despite its complexity, the amendment passed easily, eighty-three to

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51. Nicole A. Gordon & Hyla Pottharst Wagner, *The New York City Campaign Finance Program: A Reform That Is Working*, 19 FORDHAM URB. L.J. 605, 607 (1991), available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1553&context=ulj>.

52. 424 U.S. 1 (1976).

53. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 359 (2010) (citing *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 296–98 (2003) (Kennedy, J., concurring in part and dissenting in part)).

54. Press Release, N.Y.C. Campaign Fin. Bd., Statement of CFB Executive Director Amy Loprest on the U.S. Supreme Court Ruling in *Citizens United v. FEC* (Jan. 21, 2010), available at [http://www.nycffb.info/press/news/press\\_releases/2010-01-21.pdf](http://www.nycffb.info/press/news/press_releases/2010-01-21.pdf).

55. *Citizens United*, 558 U.S. at 366 (“Disclaimer and disclosure requirements may burden the ability to speak, but they ‘impose no ceiling on campaign-related activities’ . . . .” (citation omitted)).

56. Press Release, *supra* note 54.

57. *Charter Revision Ballot Questions*, N.Y.C. CAMPAIGN FIN. BD., [http://www.nycffb.info/public/voter-guide/general\\_2010/ballotProposal.aspx](http://www.nycffb.info/public/voter-guide/general_2010/ballotProposal.aspx) (last visited Mar. 6, 2013).

58. Parkes, *supra* note 10.

seventeen percent.<sup>59</sup> CFB Spokesman Eric Friedman explained that the purpose of the new law was to close the “disclosure gap” and allow voters to identify candidates’ supporters.<sup>60</sup>

In March 2011, the CFB began hearings on how to draft effective regulations under the Independent Expenditure Amendment. In their testimony before the CFB’s hearing on “Promulgating Rules for the Disclosure of Independent Expenditures,” Ciara Torres-Spelliscy and Mark Ladov highlighted the Supreme Court’s strong defense of disclosure in recommending that the CFB adopt an expansive disclosure policy:

In fact, while invalidating longstanding restrictions on corporate political spending, the Court’s recent *Citizens United* decision reaffirmed that disclosure and disclaimer requirements for political advertisements are presumptively valid. In doing so, eight Justices agreed that “[d]isclaimer and disclosure requirements . . . impose no ceiling on campaign-related activities, and do not prevent anyone from speaking.” And, the Court went on to praise transparency of money in politics, explaining: “The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” This holding in *Citizens United* echoes the holding in the earlier *McConnell* decision where eight of nine Justices also embraced robust disclosure for electioneering communications.<sup>61</sup>

As the disclosure amendment wound its way through the rule-making process, the CFB and other reform proponents sought to make it as robust as possible. That meant crafting a rule broad enough to require disclosure from third parties participating in the election, whether or not they explicitly used specific terms to advocate for or against certain candidates. CFB Chairman Father Joseph Parkes wrote,

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59. Javier Hernandez, *Once Again, Voters Approve Term Limits*, N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/03/nyregion/03limits.html>.

60. Nathaniel Herz, *Campaign Finance Board Clamps Down on Super PAC-Style Spending*, N.Y. WORLD (Mar. 26, 2012), <http://www.thenewyorkworld.com/2012/03/26/city-campaign-finance-board-clamps-down-on-super-pac-style-spending/>.

61. Testimony of Ciara Torres-Spelliscy & Mark Ladov, Counsel, Brennan Ctr.’s Democracy Program, to N.Y.C. Campaign Fin. Bd., Hearing on Promulgating Rules for the Disclosure of Independent Expenditures (Mar. 10, 2011) (footnotes omitted) (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366, 371 (2010)), available at <http://www.brennancenter.org/sites/default/files/legacy/NYC%20CFB%20Testimony%20Torres-Spelliscy%20and%20Ladov%20March%2010%202011.pdf>.

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For disclosure to be meaningful, it should be as inclusive as possible. Voters who pay attention during election season know that most campaign messages do not rely on straightforward words like “vote for” or “defeat.” Disclosure requirements limited only to expenditures for messages like these that constitute “express advocacy” would keep most independent political spending in the dark.

Our proposed rules take a more realistic view. Though it may mention a public policy issue, a mailing sent before an election declaring that “Candidate X is extremely out of touch with New York City” or “Candidate Y is wrong for Brooklyn” may have no reasonable interpretation other than as an attempt to influence the outcome. These are effective campaign messages. In many cases, they are written to evade the express advocacy standard and escape scrutiny. Any meaningful disclosure requirement would allow the public to see which interests are paying to broadcast them.<sup>62</sup>

The effectiveness of such a broad definition of campaign advocacy is clear. The federal courts have struggled over “magic words” that made a message cross the line from educational to express advocacy.<sup>63</sup> Under the new CFB rules, any campaign message with the intent or effect of helping or hurting a candidate would fall within the disclosure requirement. Parkes continued by explaining,

Any voter will be able to go online and view financial information for city candidates and the independent groups who support or oppose them in a single place. In the next mayoral election, New Yorkers can trust that all spending by *and* for the candidates will happen in public view.<sup>64</sup>

Indeed, spending a mere \$100 puts an outside entity into this disclosure regime,<sup>65</sup> so the CFB is unlikely to let any significant outside group slip through the cracks. As with any disclosure regime, its effectiveness will be based on whether the public utilizes the vast wealth of information these disclosures will provide. Given the extensive political coverage of New York City politics through its

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62. Parkes, *supra* note 10.

63. Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976) (per curiam) (“This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”).

64. Parkes, *supra* note 10.

65. See N.Y.C. CAMPAIGN FIN. BD., GUIDE TO THE CFB INDEPENDENT EXPENDITURE DISCLOSURE RULES 2 (2010), *available at* <http://www.nyccfb.info/PDF/rulemaking/Independent-Expenditures-Guidance.pdf>.

newspapers, blogs, and good government groups, one can expect that any significant independent political spending in the 2013 election cycle will come to light.

The specific guidelines regulating the CFB's disclosure goals are laid out in Board Rule 1-08(f).<sup>66</sup> The new rules require disclosure of whether a third party has any relationship with the candidate's campaign, or whether an expenditure was made in coordination with the candidate's campaign.<sup>67</sup> The CFB's definition of coordination is itself quite extensive, a response to the ever-graying area in federal law. The rule even specifically requires disclosure of whether rental space is shared, perhaps made explicit in light of the Working Families Party and Service Employees International Union (SEIU) previously having been found to conduct campaign activities at the same address as City Council campaigns.<sup>68</sup>

At the federal level, the line between lawmakers and the PACs that spend "independently" on their behalf is already incredibly blurred.<sup>69</sup> The CFB's commitment to rigorously preventing sham independent groups from skirting campaign finance laws is particularly important given the track record of federal coordination laws. A recent Fifth Circuit decision, *Federal Election Commission v. Cao*, defined coordination so narrowly that any sophisticated political actor could avoid running afoul of the law with the slightest bit of foresight.<sup>70</sup> During the 2012 presidential election campaign, surrogates and fundraisers from the candidates' campaigns and outside groups mingled and spoke at each other's events.<sup>71</sup> The CFB

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66. N.Y.C. CAMPAIGN FIN. BD. R. 1-08(f) (2010).

67. N.Y.C. CAMPAIGN FIN. BD. R. 1-08(f)(i)-(vi) (2010).

68. N.Y.C. CAMPAIGN FIN. BD. R. 1-08(f)(vi) (2010); see N.Y.C. CAMPAIGN FIN. BD., CAMPAIGN FINANCE BOARD FINAL AUDIT REPORT OF FRIENDS OF ANNABEL PALMA (2007) [hereinafter ANNABEL PALMA FINAL AUDIT], available at [http://www.nycffb.info/reports/FA\\_pdf/FA-2003-apalma-767.pdf](http://www.nycffb.info/reports/FA_pdf/FA-2003-apalma-767.pdf).

69. Jake Sherman, John Bresnahan & Kenneth Vogel, *A Super PAC-Politician Firewall? Not Quite*, POLITICO (Aug. 23, 2012), <http://www.politico.com/news/stories/0812/79854.html>.

70. See *In re Cao*, 619 F.3d 410 (5th Cir. 2010); see also Evan Palenschat, *Campaign Finance Reform in the Post-Citizens United Era (Part 1)*, N.Y. CIVIC (Apr. 10, 2012), <http://nycivic.org/story/campaign-finance-reform-post-citizens-united-era>. The easiest way for candidates to circumvent the federal policy is to have trusted proxies, such as former chiefs of staff, leave their campaigns shortly before elections to run parallel campaign operations under liberated PAC guidelines.

71. Eliza Newlin Carney, *The Super PAC Paradox*, ROLL CALL (Mar. 12, 2012), [http://www.rollcall.com/issues/57\\_107/Super-PAC-Paradox-213021-1.html](http://www.rollcall.com/issues/57_107/Super-PAC-Paradox-213021-1.html); David Dayen, *Super PAC Organizer Rove to Speak at Candidate Romney's Donor Event*,

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hoped to have records of independent expenditures made by third parties available by the fall of 2012.<sup>72</sup> A special election for Bronx City Council District Twelve in November 2012 was the first election for which the disclosure rules applied.<sup>73</sup> A relatively small expenditure from the SEIU on behalf of the eventual winner, Andy King, became the first expenditure disclosed under the CFB's new system.<sup>74</sup>

### B. *SpeechNow.org v. F.E.C.* and the Rise of Super PACs

*Citizens United's* legal impact was immediate. *SpeechNow.org v. Federal Election Commission*, which the United States Court of Appeals for the District of Columbia Circuit decided less than two months after *Citizens United*, truly opened the floodgates to unlimited spending by independent parties.<sup>75</sup> *SpeechNow.org* is a front group for the conservative anti-tax organization Club for Growth.<sup>76</sup> Claiming its purpose was solely to make independent expenditures, not direct contributions to campaigns, in 2007 *SpeechNow.org* sought to retain nonprofit status and receive unlimited contributions from individuals without filing as a political action committee.<sup>77</sup> The Federal Election Commission (FEC) was unable to provide *SpeechNow.org* with an advisory opinion, as it lacked the number of members to issue advisory opinions at the time.<sup>78</sup> In 2008, *SpeechNow.org* filed in the District Court for the District of Columbia, claiming that it was a violation of its First Amendment rights and the rights of its donors to be subjected to

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FIREDOGLAKE (June 21, 2012, 1:41 PM), <http://news.firedoglake.com/2012/06/21/superpac-organizer-rove-to-speak-at-candidate-romneys-donor-event/>.

72. Email from Eric Friedman, Dir. of External Affairs, N.Y.C. Campaign Fin. Bd., to author (Aug. 3, 2012, 3:36 PM EST).

73. *Id.* The election is to fill the vacancy left by Councilmember Larry Seabrook, who was convicted of fraud. See Aaron Edwards, *Possible Candidates for Seabrook's City Council Seat Emerge*, N.Y. TIMES, July 27, 2012, <http://www.nytimes.com/2012/07/28/nyregion/challengers-to-succeed-seabrook-on-city-council-emerge.html>.

74. Celeste Katz, *Race to Replace Larry Seabrook a Test Case for New Outside-Spending Report Rules*, N.Y. DAILY NEWS, Oct. 26, 2012, <http://www.nydailynews.com/blogs/dailypolitics/2012/10/race-to-replace-larry-seabrook-a-test-case-for-new-outside-spending-report-rul>.

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

76. Lisa Graves & Brendan Fischer, *Millionaire Insiders Hide Behind Group Attacking Feingold*, CTR. FOR MEDIA & DEMOCRACY (Oct. 26, 2010), <http://www.prwatch.org/node/9559>.

77. *SpeechNow.org v. Fed. Election Comm'n*, 567 F. Supp. 2d 70 (D.D.C. 2008).

78. *SpeechNow.org*, 599 F.3d at 690.



registration, reporting requirements, and contribution limits.<sup>79</sup> Applying intermediate scrutiny, the District Court upheld the contribution and reporting requirements for non-profits, holding that such organizations were “uniquely positioned to serve as conduits for corruption both in terms of the sale of access and the circumvention of the soft money ban.”<sup>80</sup>

While the case was on appeal to the D.C. Circuit, however, the Supreme Court handed down *Citizens United*. In light of that decision, SpeechNow.org argued that the FEC could no longer argue that independent expenditures raised corruption or appearance of corruption concerns. It stood to follow that contributions to organizations making independent expenditures could not do so, either. The D.C. Circuit largely agreed, holding that contribution limits on entities making contributions to organizations engaged only in independent expenditures was unconstitutional.<sup>81</sup> Thus, individuals, corporations, unions, and other entities were able to give unlimited amounts to PACs, creating so-called “Super PACs.”<sup>82</sup>

More nefariously, in the view of campaign finance reformers, nonprofit 501(c)(4) groups that were not subject to reporting requirements could also raise funds through anonymous donors and then donate them to PACs, creating a subterfuge that defeated the purpose of PAC reporting requirements.<sup>83</sup> The D.C. Circuit did, however, uphold disclosure requirements, finding that “the public has an interest in knowing who is speaking about a candidate and who is funding that speech,” and that disclosure requirements “deter[] and help[] expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.”<sup>84</sup>

The close relationship between 501(c)(4)s, PACs, and candidates could prove problematic for those seeking to limit special interest influences in New York City. Even though the CFB has moved to

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79. *SpeechNow.org*, 567 F. Supp. 2d at 73.

80. *Id.* at 79 (internal quotation marks omitted).

81. *SpeechNow.org*, 599 F.3d at 690.

82. The Court’s decision was clarified by the Federal Election Commission. See Carol A. Laham, AO 2010-09, 2010 WL 3184267 (Fed. Election Comm’n July 22, 2010).

83. Diane Freda, *Anonymous Donations Can Remain Secret Despite IRS Requirement to Disclose*, BLOOMBERG (July 26, 2012), <http://go.bloomberg.com/political-capital/2012-07-26/anonymous-donations-can-remain-secret-despite-irs-requirement-to-disclose/>.

84. *SpeechNow.org*, 599 F.3d at 698.

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institute new disclosure laws that would prevent money from being anonymously funneled through nonprofits to political action committees, the special interests that routinely contribute large amounts to candidates can now contribute far larger sums to PACs. For example, real estate developers currently are limited to \$4,950 in individual contributions to candidates and maximize their impacts by having multiple partners or employees contribute at that level, or by bundling legal contributions for a candidate. Now a developer could just as easily take one million dollars to set up a PAC with similar electoral and policy goals. Other interest groups, like unions, already have sophisticated campaign infrastructures, and would have less to benefit from *SpeechNow.Org*, though the decision certainly does not hurt them. The impact of potential New York City “Super PACs” is discussed at greater length in Part III.

### C. *McComish v. Bennett* and Trigger Funds

In the meantime, another set of campaign finance reform cases weaved its way through the federal courts. The Arizona public financing system, established by referendum following a series of scandals in the late 1990s that engulfed numerous state legislators, was challenged as an unconstitutional infringement of the First Amendment.<sup>85</sup> A similar “clean elections” system was challenged concurrently in Connecticut.<sup>86</sup> Like the New York City system, Arizona encouraged voluntary participation into a system in which candidates could receive public matching funds in return for a pledge to limiting the amount they raised and spent. Non-participating candidates were free to raise and spend as they wished, but if they spent above the amount of public funding given to participating candidates by the state, they “triggered” the state to award their opponents a dollar for dollar match of any amount above that threshold. In verbiage that would come back to haunt Arizona, this provision was designed “to level the political playing field” between well-financed candidates and their publicly financed opponents.<sup>87</sup>

This “trigger” provision became the subject of the legal challenge against Arizona’s system. Candidates such as State Senator John

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85. *McComish v. Brewer*, No. CV-08-1550-PHX-ROS, 2010 WL 2292213 (D. Ariz. Jan. 20, 2010).

86. *Green Party of Conn. v. Garfield*, 616 F.3d 213, 241 (2d Cir. 2010) (affirming District Court’s holding that the trigger funds unconstitutionally infringed on First Amendment rights, citing *Citizens United*).

87. *McComish v. Bennett*, 131 S. Ct. 2806, 2825–26 (2011).

McComish claimed that the provision infringed on his right to free speech because he was less inclined to spend money knowing that doing so would automatically result in his opponent spending more money to defeat him.<sup>88</sup> Even more unfair, McComish claimed, was that this law included any amount spent on his behalf, even by an independent outside party, such that an uncoordinated advertising campaign in his favor would trigger funds that his opponent could use to defeat him.<sup>89</sup> In the aftermath of *Citizens United*, it was clear that this provision would be scrutinized.

The District Court ruled in favor of the plaintiffs,<sup>90</sup> but the Ninth Circuit reversed, holding that the trigger funds, rather than restricting First Amendment speech, led to the infusion of more speech.<sup>91</sup> The court pointed to a “scattered” and “vague” factual record that displayed only “a minimal burden on First Amendment rights” due to candidate or donor concerns over trigger fund repercussions.<sup>92</sup> The case was argued before the Supreme Court in early 2011, with *Citizens United* still fresh on the minds of a public that again conferred more attention than usual to the campaign finance reform decision. Only a few months earlier, at his State of the Union address, President Barack Obama’s condemnation of *Citizens United* had created a political firestorm.<sup>93</sup>

The Supreme Court once again decided by a 5-4 margin that the campaign finance regulations before them did not survive First Amendment scrutiny.<sup>94</sup> The dissenters argued that Arizona was merely injecting “more speech” into the political arena, but the majority held that trigger funds improperly “leveled the playing field” and disincentivized speech by requiring a candidate spending money on his campaign to “help disseminate hostile views” by triggering state funds to flow to his opponent.<sup>95</sup> The Court’s ruling was not a death-blow to public financing, but in finding trigger funds

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88. See Brief for Petitioners at 30–31, *McComish v. Bennett*, 131 S. Ct. 2806 (2011) (Nos. 10-238, 10-239).

89. See *id.* at 32.

90. *Brewer*, 2010 WL 2292213.

91. *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010).

92. *Id.* at 513, 517–18.

93. Steve Padilla, *Obama’s State of the Union Address: Criticism of the Supreme Court Campaign Finance Ruling*, L.A. TIMES (Jan. 27, 2010), <http://latimesblogs.latimes.com/washington/2010/01/obamas-state-of-the-union-address-criticism-of-the-supreme-court-campaign-finance-ruling.html>.

94. *McComish v. Bennett*, 131 S. Ct. 2806 (2011).

95. *Id.* at 2821 n.8.

unconstitutional and once again demonstrating a strong preference for unfettered First Amendment campaign speech, the ruling wiped out the “clean elections” laws operating to various degrees in nine different states. This cast an even brighter spotlight on New York City’s system.

Trigger funds were not a prominent feature of the New York City system, but they did exist. Under the 2009 CFB guidelines, participating candidates received public matching funds at a rate of 6:1.<sup>96</sup> Those funds increased to a matching rate 8.57:1 when a nonparticipating opponent spent three times over the voluntary contribution limit.<sup>97</sup> Thus one could argue that the New York City system was penalizing certain levels of fundraising by rewarding candidates with higher matching fund rates. The CFB distinguished the Arizona law from New York City’s in a statement issued by CFB Executive Director Amy Loprest immediately following the Supreme Court’s decision.<sup>98</sup> The statement laid out two main differences between the Arizona and New York City laws. First, the Arizona law provided grants from the state once a nonparticipating candidate breached the trigger threshold, whereas in New York City candidates received higher matching fund rates for money privately raised.<sup>99</sup> Second, the Arizona provision was triggered by the amount spent by non-participating candidates and independent groups spending on their behalf, while the New York law did not consider independent actors at all.<sup>100</sup> The statement also pledged to study the matter further.<sup>101</sup>

Loprest was not alone in defending the viability of the New York City system in the wake of *McComish*. Fordham Law Professor Zephyr Teachout expressed optimism that the decision did not, as feared, “touch public financing generally, and did not touch

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96. Morgan Pehme & Janos Marton, *Pulling the Trigger: U.S. Supreme Court Threatens Campaign Finance Reform in NYC*, HUFFINGTON POST (June 24, 2011), [http://www.huffingtonpost.com/morgan-pehme/pulling-the-trigger-us-su\\_b\\_883387.html](http://www.huffingtonpost.com/morgan-pehme/pulling-the-trigger-us-su_b_883387.html).

97. *Id.*; see also *The Bonus Situation-2009 Citywide Elections*, N.Y.C. CAMPAIGN FIN. BD., <http://www.nycfb.info/candidates/candidates/bonusSituation.aspx> (last visited Mar. 6, 2013). There was also an intermediary bonus if a non-participating candidate breached the voluntary spending limit, but spent less than three times the limit. *Id.*

98. Press Release, *supra* note 54.

99. *Id.*

100. *Id.*

101. *Id.*

automatic matching funds.”<sup>102</sup> Teachout trumpeted the Fair Elections Now Act, which would provide a federal matching fund system akin to the New York City model.<sup>103</sup> Loyola Law Professor Richard Hasen, who also runs ElectionLawBlog.com, wrote after *McComish* that the New York City system “works differently” than the struck-down Arizona system, and suggestively titled his article, “New York City as a Model?”<sup>104</sup>

Even if the ruling left New York City as a possible national model, it did not leave New York City’s trigger provision untouched. In April 2012, approximately nine months after the *McComish* decision, the CFB began drafting rules “drawn up to keep as much fairness in the system as possible, while complying with the Supreme Court decision.”<sup>105</sup> According to New York Civic, a good government group, the CFB had “recently scrubbed any mention of this mechanism of leveling the playing field from their website and literature.”<sup>106</sup> Given the hostile reaction of certain Supreme Court justices to “leveling the playing field,” in *McComish*, this was a prudent decision. The new rules developed since *McComish* no longer provide a higher matching fund rate contingent on opponent spending, but participating candidates are permitted to exceed CFB spending limits if their nonparticipating opponents do the same, though only with privately-raised funds.<sup>107</sup>

#### D. *Ognibene v. Parkes*: “Pay to Play” on Trial

On the heels of *Citizens United* and *McComish*, supporters of campaign finance reform had to be concerned when New York City faced an inevitable legal challenge in *Ognibene v. Parkes*.<sup>108</sup> The suit was brought by James Bopp, the legendary architect of the movement

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102. Zephyr Teachout, *What the Court Did and Didn't Do*, N.Y. TIMES, June 27, 2011, <http://www.nytimes.com/roomfordebate/2011/06/27/the-court-and-the-future-of-public-financing/matching-funds-what-the-court-didnt-touch>.

103. *Id.*

104. Richard Hasen, *New York City as a Model?*, N.Y. TIMES, June 27, 2011, <http://www.nytimes.com/roomfordebate/2011/06/27/the-court-and-the-future-of-public-financing/new-york-city-as-a-model-for-campaign-finance-laws>.

105. Chris Bragg, *In Wake of Recent Supreme Court Ruling, NYC Campaign Finance Board Nixes Key Provision*, CITY & ST. (Apr. 13, 2012), <http://www.cityandstateny.com/wake-supreme-court-ruling-nyc-campaign-finance-board-nixes-key-provision/>.

106. *Id.* (internal quotation marks omitted).

107. N.Y.C. ADMIN. CODE § 3-706(3) (2012).

108. 599 F. Supp. 2d 434 (S.D.N.Y. 2009).

to end campaign finance regulation, having brought dozens of challenges to campaign finance regulations since the 1980s, including *McConnell v. Federal Election Commission* and *Citizens United*.<sup>109</sup> Bopp challenged a number of provisions of the New York City law, including the new “pay to play” provision, which severely curtails contribution limits for entities that do business with the City.<sup>110</sup> The named plaintiff, Thomas Ognibene, was a Queens politician who had mounted a number of campaigns on Republican and Conservative lines from the 1980s through 2008, including a primary challenge to Mayor Bloomberg in 2005 that was snuffed out when the Bloomberg campaign successfully challenged his signatures.<sup>111</sup>

Local Law 34, an amendment to the Campaign Finance Act that the City Council passed easily in 2007,<sup>112</sup> had limited the size of contributions that people doing business with the City could contribute to candidates, whether or not the candidates participated in the voluntary matching fund system.<sup>113</sup> This “pay to play” provision severely curtailed contribution limits for individuals doing business with the city and extended the ban against corporate contributions to LLCs and partnerships. The regulation was expansive, covering persons who contracted with the City, sought zoning approvals, or purchased real property from the City.<sup>114</sup> Those who did business with the City were limited to making \$400 contributions for citywide races and \$250 for council races, regardless of whether the recipient was participating in the voluntary matching fund program.<sup>115</sup>

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109. David Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. TIMES, Jan. 24, 2010, <http://www.nytimes.com/2010/01/25/us/politics/25bopp.html>.

110. N.Y.C. ADMIN. CODE §§ 3-702 to 3-703 (2012). Local Law 34 was later amended by Local Law 67.

111. Robin Shulman, *Ognibene Loses Bid for Line on Ballot Against Bloomberg*, N.Y. TIMES, Aug. 4, 2005, <http://www.nytimes.com/2005/08/04/nyregion/metro/campaigns/04ognibene.html>.

112. *See Ognibene*, 599 F. Supp. 2d 434.

113. 2007 N.Y.C. Local Law No. 34 § 2 (codified as amended at N.Y.C. ADMIN CODE § 3-702 (2012)).

114. *Id.*

115. *Id.*; *see also* N.Y.C. ADMIN. CODE §§ 3-702 to 3-703 (2012). The tendency of the Campaign Finance Act and its amendments to apply restrictions equally to participating and non-participating candidates led to at least one critic declaring the entire Act constitutionally suspect. Daniel Katz wrote that in an effort “not to strip the non-participating candidate distinction of all meaning,” the Campaign Finance Act permitted nonparticipating candidates to self-fund beyond regular contribution limits, concluding, “The result of this is that a non-participating candidate is bound not to accept more than a participating candidate from any source other than the

While the 2007 amendments broadly defined doing business with the city, and enacted severe restrictions on contribution limits, given the billions of dollars at stake whenever a city rezones an area for redevelopment, the City's policy rationale was evident.<sup>116</sup> During the 2006 hearings on the then-proposed amendments, the CFB found that twenty percent of contributions during the 2001 and 2005 elections had come from individuals and entities doing business with the city, and that those contributions were frequently large, and disproportionately made to incumbents.<sup>117</sup> Ognibene claimed that the new laws violated the First Amendment, and led a class of plaintiffs filing for an injunction against them in advance of the 2009 elections.

Judge Laura Taylor Swain of the Southern District of New York soundly rejected Ognibene's claims, finding all of the challenged CFB provisions constitutional. Judge Swain found that under the framework set forth in *Buckley v. Valeo*, the government had established a rational basis for the stricter contribution limits by demonstrating the "substantial evidence of the existence of a public

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candidate's own funds." Daniel Katz, *New York City's Campaign Finance Law Is Unconstitutional*, ALBANY GOV'T L. REV. ONLINE (Mar. 16, 2009), <http://aglr.wordpress.com/2009/03/16/new-york-citys-campaign-finance-law-is-unconstitutional/>. Katz points out that this is not much of a distinction, given that the right to unlimited self-fundraising was firmly established in *Buckley* and did not depend on the City carving out a statutory exception. *See id.* Katz's conclusion, that the system "functionally reduces non-participating candidates from any person who does not wish to participate in the city campaign finance system, to only those people who are using their own resources to finance a campaign," *id.*, is perhaps an overstatement. In 2012, two first-time candidates for city council, Ken Biberaj and Corey Johnson, raised the maximum funds permitted for participating candidates by the July 2012 reporting date. Chen, *supra* note 8. This maximum threshold (approximately \$80,000–90,000) for city council candidates is not a particularly arduous sum to raise by political fundraising standards, as evidenced by these novice candidates reaching it fifteen months before their respective primaries. While Biberaj and Johnson have not indicated that they will abandon the matching fund program, it stands to reason that future candidates with the ability to raise several hundred thousand dollars for their city council races will bypass the matching fund system, just as presidential candidates have abandoned the presidential public financing program in recent election cycles. *Challenges in the Presidential Public Financing System*, PUB. CITIZEN (July 19, 2012), <http://www.citizen.org/documents/presidential-election-public-financing-challenges.pdf>.

116. Major re-zoning developments that have recently sought approval, been approved or currently seek approval as this Article goes to print include Atlantic Yards (Brooklyn), the NYU expansion (Manhattan), Hudson Yards (Manhattan), East Midtown (Manhattan), Manhattanville (Manhattan), Kingsbridge Armory (Bronx), and Willets Points (Queens). Collectively, and in many cases, individually, these development projects are worth billions of dollars.

117. *Ognibene*, 599 F. Supp. 2d at 449.

perception of corruption or the potential for corruption by those doing business with the City.”<sup>118</sup>

Ognibene appealed the case to the Second Circuit. While the case was on appeal, the Supreme Court issued its *Citizens United* decision, and the plaintiffs asked the Second Circuit to re-brief the matter.<sup>119</sup> The Second Circuit asked the parties to submit briefs on the significance of *Citizens United* on the case before the court. While the CFB’s position was clear from its earlier statement—that the Supreme Court had clearly distinguished between contributions and independent expenditures—James Bopp now focused on Justice Kennedy’s argument that speakers could not be distinguished on the basis of their identities, maintaining that New York City’s law unconstitutionally discriminated against persons solely on the basis of their financial dealings with the city.<sup>120</sup>

Even in the aftermath of *Citizens United*, the Second Circuit rejected plaintiffs’ claims and upheld New York City’s campaign finance laws, including the prohibition on corporate contributions, disclosure requirements, and the “pay to play” provisions.<sup>121</sup> As the court pointed out, *Citizens United* had followed *Buckley*’s bifurcation of contributions and independent expenditures, and applied its First Amendment analysis to expenditures.<sup>122</sup> The provisions at issue in *Ognibene v. Parkes* all related to contributions, where the courts could still give considerable deference to the government’s goal of reducing corruption or the appearance of corruption.

In June, the plaintiffs filed a petition for certiorari to the U.S. Supreme Court. On June 25, 2012, the Supreme Court declined to review the decision,<sup>123</sup> which assured that key provisions of the New York City law would remain in place for the 2013 elections. Following the decision, New York City Law Department senior counsel Jane Gordon channeled the Second Circuit when she stated, “The City’s highly regarded Campaign Finance Law addresses a

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118. *Id.* at 448.

119. Jisha Dymond, *Ognibene v. Parkes: NYC Lobbyists’ Challenge Revived in Wake of Citizens United*, CORP. POL. ACTIVITY L. BLOG (Feb. 24, 2010), <http://www.corporatepoliticalactivitylaw.com/index.php/2010/02/ognibene-v-parkes-nyc-lobbyists-challenge-revived-in-the-wake-of-citizens-united/>.

120. Reply Brief for Plaintiffs-Appellants at 19, *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011) (Nos. 09-0994-cv(L), 09-1432-cv(CON)), 2010 WL 6710720.

121. *Ognibene v. Parkes*, 671 F.3d 174, 178 (2d Cir. 2011).

122. *Id.* at 183–84.

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



significant governmental interest in reducing corruption and the appearance of corruption.”<sup>124</sup>

Interestingly, the Supreme Court’s decision to decline review came on the same day that it reversed a Montana Supreme Court decision limiting corporate spending on state elections.<sup>125</sup> The Montana ruling had seemed to be at odds with *Citizens United*, but the Montana Supreme Court had held that *Citizens United* did not apply to state campaign finance laws, particularly laws predicated on very real issues of corruption, which had precipitated the passage of Montana’s campaign finance laws more than a century earlier.<sup>126</sup> Montana’s documented rationale for legislating against the corrupting influence of corporations challenged Justice Kennedy’s assertion that independent spending by definition could not be corrupting. The Supreme Court did not buy the argument, however, issuing another 5-4 defeat to campaign finance reform.

Thus, even though New York City’s system survived this round of litigation, the Supreme Court’s message to Montana made it clear that the campaign finance jurisprudence governing *Citizens United* would apply to New York City, should New York City attempt to defy *Citizens United* by regulating independent expenditures in any meaningful way. While the four dissenting Justices in *Citizens United* and *McComish* may well be open to revisiting those decisions, the Court’s current jurisprudential trajectory clearly favors First Amendment campaign speech over government regulation.<sup>127</sup>

### E. McDonald Challenges New York City Contribution Limits

With the 2013 Republican field for mayor still up in the air during summer 2012, George McDonald, the founder of the non-profit Doe

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124. Joseph Ax, *Supreme Court Declines to Hear NY Campaign Finance Case*, REUTERS (June 25, 2012), [http://newsandinsight.thomsonreuters.com/New\\_York/News/2012/06\\_-\\_June/Supreme\\_Court\\_declines\\_to\\_hear\\_NY\\_campaign\\_finance\\_case/](http://newsandinsight.thomsonreuters.com/New_York/News/2012/06_-_June/Supreme_Court_declines_to_hear_NY_campaign_finance_case/).

125. *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012).

126. *W. Tradition P’ship, Inc. v. Att’y Gen.*, 271 P.3d 1, 5–6 (Mont. 2011).

127. In a recent matter, the three Republican members of the F.E.C. held that under *Citizens United*, an employer was permitted to coerce its employees into participating in campaign activity, provided the activity was independent from the campaign. *United Public Workers*, MUR 6344 (Fed. Election Comm’n Aug. 21, 2012), available at <http://eqs.nictusa.com/eqsdocsMUR/12044320562.pdf>. Additionally, the Fourth Circuit recently had to reverse a District Court decision lifting the ban on corporate contributions to campaigns that had relied on *Citizens United*. The case may be appealed to the Supreme Court. *United States v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012).

Fund, declared himself as a possible candidate.<sup>128</sup> As neither a lifelong politician nor a candidate who could self-fund an entire campaign, McDonald would have difficulty raising sufficient funds under New York City's contribution limits. On January 7, 2013, McDonald brought suit challenging New York City's contribution limits on the grounds that state law preempts them, which allows for significantly higher contribution limits (individuals may contribute \$19,700 from primary elections, and \$41,000 for general elections, and corporations are permitted to donate directly to campaigns).<sup>129</sup> McDonald's complaint claimed that the City Council had no authority to legislate contribution limits in contravention of state law, and that state election law occupied the field.<sup>130</sup> In an accompanying press release, McDonald added that the current system was "rigged" against "everyday New Yorkers," and "[w]ithout a personal fortune or preexisting base of donor support, it's impossible to raise the funds necessary to compete for the Mayor's office in New York."<sup>131</sup>

Election lawyer Jerry Goldfeder previously has written, "State law appears to preempt localities from enacting contribution or expenditure limits."<sup>132</sup> Fellow election lawyer and former state senator Marty Connor somewhat concurred: "I wouldn't say [McDonald's lawsuit is] a frivolous case," though he noted, "the courts seemed to give leeway in past years to the city doing its own thing."<sup>133</sup> Should McDonald succeed in his suit, candidates during the next election cycle would be more than tempted to leave a voluntary public matching fund system that caps spending at such a low figure in comparison to the enormous individual contributions allowed by state campaign finance laws. On the other hand, if Governor Cuomo

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128. Celeste Katz, *Doe Fund Founder George McDonald Mulling 2013 Mayoral Bid on Republican Line*, N.Y. DAILY NEWS (Aug. 11, 2012), <http://www.nydailynews.com/blogs/dailypolitics/2012/08/doe-fund-founder-george-mcdonald-mulling-2013-mayoral-bid-on-republican-line>.

129. Complaint, *McDonald v. N.Y.C. Campaign Fin. Bd.*, No. 100038-2013 (N.Y. Sup. Ct. Jan. 8, 2013), available at <http://iapps.courts.state.ny.us/iscroll/SQLData.jsp?IndexNo=100038-2013> (follow "Summons and Complaint" hyperlink).

130. *Id.*

131. Celeste Katz, *Document Drop: George McDonald vs. the CFB*, N.Y. DAILY NEWS, Jan. 8, 2013, <http://www.nydailynews.com/blogs/dailypolitics/2013/01/document-drop-george-mcdonald-vs-the-cfb>.

132. Goldfeder, *supra* note 12, at 13 n.2.

133. Andrew Hawkins & Shane Kavanaugh, *McDonald to Challenge Campaign Finance Limits*, CRAIN'S N.Y. BUS., Oct. 2, 2012, <http://www.craainsnewyork.com/article/20121002/INS/121009989>.

continues his pursuit of campaign finance reform at the state level,<sup>134</sup> McDonald's suit could be rendered moot, as the City and State election laws become mirrors of each other.

On May 1, 2013, Justice Kathryn Freed issued an exhaustive decision rejecting McDonald's petition.<sup>135</sup> The decision reviewed the legislative history behind New York City's campaign finance laws and concluded that New York City's public financing system was "merely another approach to electing public officers," and thus permitted under Municipal Home Rule.<sup>136</sup> On May 17, 2013, McDonald announced that he would appeal Justice Freed's decision, highlighting the "deviant" behavior of potential matching fund recipients Anthony Weiner and Vito Lopez as examples of the system's failure.<sup>137</sup>

### III. THE SPENDERS: NEWCOMERS AND REPEAT PLAYERS IN NEW YORK CITY ELECTIONS

New York City's political commitment to vigorously regulating money in politics is remarkable given the City's preponderance of wealthy individuals, corporations, and savvy political operators. Even in the aftermath of the 2008 financial crisis, New York City remains flush with campaign donors who are contributing more to campaigns than ever. Through the first five disclosure periods of the 2009 election (through July 2008), 34,494 contributors had donated \$14.1 million, with more than half of the contributions coming from Manhattan.<sup>138</sup> By the end of the 2009 election, the twelve citywide

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134. Katrina Vanden Heuvel, *Cuomo's Clean Elections Choice*, NATION (Jan. 22, 2013), <http://www.thenation.com/blog/172346/cuomos-moment-truth-clean-elections-choice#>. State legislative proposals include public financing and strict contribution limits.

135. *McDonald v. N.Y.C. Campaign Fin. Bd.*, No. 100038/2013 (N.Y. Sup. Ct. May 1, 2013).

136. *Id.*

137. Celeste Katz, *GOP's George McDonald Dings "Deviants" Anthony Weiner, Vito Lopez in CFB Fight*, N.Y. DAILY NEWS DAILY POL. (May 17, 2013, 5:12 PM), <http://www.nydailynews.com/blogs/dailypolitics/2013/05/gops-george-mcdonald-dings-deviants-anthony-weiner-vito-lopez-in-cfb-fight>. Anthony Weiner, a mayoral candidate, was the subject of a controversy relating to lewd photos he sent over Twitter, and potential City Council candidate Vito Lopez recently resigned his State Assembly seat over sexual harassment charges. Raymond Hernandez, *Weiner Resigns in Chaotic Final Scene*, N.Y. TIMES, June 16, 2011, <http://www.nytimes.com/2011/06/17/nyregion/anthony-d-weiner-tells-friends-he-will-resign.html>.

138. *Contributions to New York City Candidates*, N.Y.C. CAMPAIGN FIN. BD., [http://www.nycffb.info/maps/maps.htm?sm=press\\_maps](http://www.nycffb.info/maps/maps.htm?sm=press_maps) (last visited Mar. 6, 2013).

candidates raised over \$34 million.<sup>139</sup> Five disclosure periods into the 2013 election, 48,713 contributors had donated \$20.4 million, with Manhattan accounting for 58.5% of the contributions. The uptick in contributions from 2009 may simply be a result of the more crowded field for mayor and higher number of open City Council seats. Considering the vast sums being spent on the 2012 presidential elections by candidates and outside parties, \$20.4 million is not an enormous figure. According to the Center for Responsive Politics, the New York metro area had contributed \$143.5 million to the 2012 presidential election as of September 1, 2012,<sup>140</sup> and New York Senator Kirsten Gillibrand had raised over \$14 million for her re-election campaign.<sup>141</sup> With the 2013 election approaching, several interest groups are expected to reprise their perennial involvement in campaign spending, while other organizations are muscling up for the first time.

### A. Self-Funding

If there was ever a reason to doubt the efficacy of New York City's campaign finance reform laws, it was the political ascent of Michael Bloomberg. During Bloomberg's three campaigns for mayor in 2001, 2005, and 2009, he self-funded to the tune of \$74 million, \$85 million, and \$102 million, respectively.<sup>142</sup> Had Bloomberg participated in the matching fund system, he would have been capped at \$6 million for the general election, which is how he outspent his participating opponent, Bill Thompson, by a margin of fourteen to one.<sup>143</sup> Reflecting on those campaigns, New York Public Interest Research

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139. Azi Paybarah, *Stringer and Quinn Set the Standard on Bundlers, While de Blasio and Thompson are Liu-Like*, CAPITAL N.Y. (Nov. 30, 2011), <http://www.capitalnewyork.com/article/politics/2011/11/4364815/stringer-and-quinn-set-standard-bundlers-while-de-blasio-and-thomps>. This figure does not include the \$102 million of Michael Bloomberg's own money that he spent on behalf of his re-election efforts.

140. *Top Metro Areas*, CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/overview/topmetro.php> (last visited Mar. 6, 2013).

141. *Kristen Gillibrand Campaign Finance Summary*, CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/politicians/summary.php?cid=n00027658> (last visited Mar. 6, 2013).

142. Michael Barbaro, *Michael Bloomberg Spent \$102 Million to Win 3rd Term*, N.Y. TIMES, Nov. 27, 2009, <http://www.nytimes.com/2009/11/27/nyregion/28spending.html>.

143. *See id.*

Group staff attorney Gene Russianoff felt that Bloomberg had “done long-term damage to the system.”<sup>144</sup>

Even before Bloomberg’s mayoral runs and *Citizens United*, the Supreme Court had spoken clearly on the unconstitutionality of regulating self-financing.<sup>145</sup> The self-financing option remains available for wealthy individuals, of which New York has no shortage. John Catsimatidis, owner of the Gristedes supermarket chain, had floated his name as a potential self-funded candidate in 2009, prior to term limits being overturned, and may well run in 2013.<sup>146</sup> Catsimatidis has said that if he does not run, he might consider putting money into a Super PAC if he feels strongly about a particular candidate.<sup>147</sup> “It’s got to be a level playing field with the unions, and I’m sure they’ll be matched dollar for dollar,” he said, “So yes, I think it could be very important next year.”<sup>148</sup> In a head-to-head mayoral campaign Catsimatidis’s opponents would not even have the benefit of the trigger funds utilized by Mark Green, Fernando Ferrer, and Bill Thompson in their general election campaigns against Bloomberg’s limitless checkbook. As of January 2013, Catsimatidis has deposited one million dollars into his own account,<sup>149</sup> and told Joe Lhota, a potential rival for the Republican nomination, that he was willing to spend ten or twenty million dollars of his own money, and “that’s your challenge, and you have to decide what you want to do.”<sup>150</sup>

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144. *Id.*

145. *See generally* Davis v. Fed. Election Comm’n, 554 U.S. 724 (2008). In a 5-4 decision authored by Justice Alito, the Court held that penalties assessed against candidates who self-funded beyond a certain amount did not serve any government interest, because *Buckley v. Valeo* had held that self-funding reduced, rather than increased, corruption. *Id.* at 726.

146. Interview by Sam Roberts with John Catsimatidis (NY1 television broadcast June 2, 2012), *available at* <https://www.youtube.com/watch?v=jRE58BujDWM>.

147. Daniel Massey, *Super PACs Eyed for Mayoral Election*, CRAIN’S N.Y. BUS. (May 13, 2012), <http://www.crainsnewyork.com/article/20120513/POLITICS/305139969>. Catsimatidis has intimated that someone he feels “strongly” about supporting is New York Police Department Commissioner Ray Kelly.

148. David Chen, *In 2013 Races, New York Prepares for ‘Super PAC’ Effect*, N.Y. TIMES, July 31, 2012, <http://www.nytimes.com/2012/08/01/nyregion/new-york-city-regulators-prepare-for-super-pacs-effect-on-local-elections.html>.

149. Beth Morrissey, *The Mayoral Money Game*, N.Y. WORLD (Jan. 24, 2013), <http://www.thenewyorkworld.com/2013/01/24/mayoral-money-game/>.

150. Grace Rauh, *Lhota Lays Groundwork for Possible Mayoral Campaign*, NY1 (Jan. 3, 2013), [http://www.ny1.com/content/top\\_stories/174932/lhota-lays-groundwork-for-possible-mayoral-campaign](http://www.ny1.com/content/top_stories/174932/lhota-lays-groundwork-for-possible-mayoral-campaign).

For his part, Bloomberg will not be spending freely for a fourth straight election. Bloomberg acknowledged that spending liberally on behalf of his preferred candidate “wouldn’t work,” and would likely backfire. His preferred candidate is currently Quinn, though the field remains in flux.<sup>151</sup>

### B. A New York City Super PAC

On the first day of 2008, a law took effect that banned candidates from accepting money from LLC’s and partnerships.<sup>152</sup> While LLCs and partnerships had already donated 3.2% of all contributions in the 2009 elections, that category of donation will be gone entirely by New York City’s 2013 elections.<sup>153</sup> However, corporate money will happily find a home in PACs, and perhaps even Super PACs, in New York City elections.

The 2012 federal election cycle demonstrated the impact of Super PACs, with large amounts of money funded by a small number of individuals.<sup>154</sup> Super PACs raised more than \$300 million for that election cycle, 68% of which came from mega-donors contributing \$500,000 or more.<sup>155</sup> *Crain’s New York* wrote that the emergence of Super PACs in New York City was “inevitable,” and noted that they increased the viability of a late-entry candidate like New York Police Commissioner Ray Kelly.<sup>156</sup> “There will be super PACs,” said New York Republican State Committee Chairman Ed Cox. “It’s impossible not to have them. They’re a part of the process now.”<sup>157</sup> Cox added, “You’ll find there will be a lot of people in this city, which is a wealthy city, who will want to support the candidate, and the mechanism to do that will be a super PAC.”<sup>158</sup>

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151. Sally Goldenberg, *Mike ‘Cashing Out’ of Next Mayor Race*, N.Y. POST, Dec. 27, 2012, [http://www.nypost.com/p/news/local/mike\\_cashing\\_out\\_of\\_next\\_mayor\\_race\\_8yja6L8NqPhSiOK-kCkqg](http://www.nypost.com/p/news/local/mike_cashing_out_of_next_mayor_race_8yja6L8NqPhSiOK-kCkqg).

152. 2007 N.Y.C. Local Law No. 34 § 18.1 (codified as amended at N.Y.C. ADMIN. CODE § 3-702 (2012)); see N.Y.C. ADMIN. CODE § 3-703(1)(I). The law survived a constitutional challenge in *Ognibene v. Parkes*. See *supra* Part II.D.

153. Hamilton, *supra* note 2.

154. Josh Israel, *Two-Year Anniversary of SpeechNow v. FEC Ruling*, THINK PROGRESS (Mar. 26, 2012), <http://thinkprogress.org/justice/2012/03/26/451808/two-year-anniversary-of-speechnoworg-v-fec-ruling/?mobile=nc>.

155. Paul Blumenthal, *Super PAC Contributions Top \$300 Million, Most Goes To GOP Groups*, HUFFINGTON POST (Aug. 22, 2012), [http://www.huffingtonpost.com/2012/08/22/super-pac-contributions\\_n\\_1822290.html](http://www.huffingtonpost.com/2012/08/22/super-pac-contributions_n_1822290.html).

156. Massey, *supra* note 144.

157. See *id.*

158. *Id.*

*Crain's* listed Ray Kelly (who has the support of Catsimatidis and former chairman of the New York Stock Exchange, Richard Grasso, as potential super PAC donors), New York State Board of Regents Chancellor Merryl Tisch, and charter schools executive Eva Moskowitz as potential beneficiaries of Super PAC funding.<sup>159</sup> *Crain's* is a business trade publication, so it is not a coincidence that it highlighted individuals perceived to be more "business-friendly" and in line with Mayor Bloomberg's economic policies than the Democratic candidates, though the paper did not rule out business Super PAC support for a moderate Democrat, City Council Speaker Christine Quinn.<sup>160</sup>

### C. The Education Wars

The proliferation of charter schools has been perhaps the most controversial educational issue during Mayor Bloomberg's tenure. Mayor Bloomberg has championed the expansion of charter schools, co-locating them in many existing public school buildings.<sup>161</sup> Because the state legislature and the next mayor will have the ability to undo much of Mayor Bloomberg's work on this issue, charter school supporters have formed a PAC, StudentsFirstNY, which will be led by top Bloomberg aide, Micah Lashner, and which counts Bloomberg's former Board of Education Chancellor, Joel Klein, as one of its board members.<sup>162</sup> StudentsFirstNY states its mission rather innocuously: "StudentsFirstNY is New York's leading voice for students who depend on public education for the skills they need to succeed, but who are too often failed by a system that puts special interests, rather than the interests of children, first."<sup>163</sup>

More substantively, the organization is expected to advance a policy agenda of reforming public school teacher tenure and proliferating the number of charter schools in New York City. StudentsFirstNY has vowed to raise \$50 million over the next five

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159. *Id.*

160. *See id.*

161. *See, e.g.,* Al Baker, *Likely Mayoral Contenders Suggest Improving Bloomberg's Leadership of Schools*, NY TIMES, Nov. 19, 2012, <http://www.nytimes.com/2012/11/20/nyregion/nyc-mayoral-hopefuls-discuss-improving-schools.html>.

162. Anna Phillips, *StudentsFirstNY Announces Itself*, SCHOOLBOOK (Apr. 4, 2012), <http://www.schoolbook.org/2012/04/04/studentsfirstny-announces-itself/>.

163. *Our Mission in New York*, STUDENTSFIRSTNY, <http://www.studentsfirst.org/pages/our-mission-in-new-york> (last visited Mar. 6, 2013).

years to support Mayor Bloomberg's education policy,<sup>164</sup> an enormous sum by New York City political standards. Bill de Blasio and John Liu, 2013 mayoral contenders, have said that they will not accept donations from the PAC, while Christine Quinn has said that she will accept their donations, and presumably, would not complain about their outside spending on her behalf.<sup>165</sup>

While StudentsFirstNY may be new to the political landscape, their target and foe, the United Federation of Teachers (UFT), has long been a heavy spender in New York elections.<sup>166</sup> In the 2005 Manhattan Borough president race, for example, the UFT spent aggressively against City Councilmember Eva Moskowitz, a well-known charter school supporter.<sup>167</sup> UFT President Michael Mulgrew has vowed to push back against StudentsFirstNY spending by devoting significant UFT resources to the 2013 elections, and even raised the possibility of the UFT forming its own super PAC.<sup>168</sup>

But the UFT has concerns beyond StudentsFirstNY—it will likely negotiate a new contract for 75,000 teachers with the next mayor.<sup>169</sup> The UFT has given the maximum \$4,950 to all four of the leading Democratic mayoral candidates, Council Speaker Christine Quinn, former Comptroller Bill Thompson, Public Advocate Bill de Blasio,

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164. Sarah Butrymowicz, *Ed in the Election: New York Group Tries to Tie Romney to Anti-Union Group*, HECHINGERED (Aug. 17, 2012), [http://hechingered.org/content/ed-in-the-election-new-york-group-tries-to-tie-romney-to-studentsfirst\\_5410/](http://hechingered.org/content/ed-in-the-election-new-york-group-tries-to-tie-romney-to-studentsfirst_5410/).

165. Azi Paybarah, *With Eye Toward the UFT, de Blasio Rejects StudentsFirstNY*, CAPITAL N.Y. (Aug. 22, 2012), <http://www.capitalnewyork.com/article/politics/2012/08/6481074/eye-toward-uft-de-blasio-rejects-studentsfirstny>; see also Celeste Katz, *More NYC Pols Swear Off Students First NY Campaign Help*, N.Y. DAILY NEWS, Aug. 21, 2012, <http://www.nydailynews.com/blogs/dailypolitics/2012/08/more-nyc-pols-swear-off-students-first-ny-campaign-help>.

166. See, e.g., Carl Campanile, *UFT's \$6.3M Albany Tab*, NY POST, Oct. 25, 2010, [http://www.nypost.com/p/news/local/uft\\_albany\\_tab\\_uD4z5ZGiZLNa1KBoUSCH6N](http://www.nypost.com/p/news/local/uft_albany_tab_uD4z5ZGiZLNa1KBoUSCH6N) (discussing the UFT's lobbying and campaign expenses in 2010).

167. See Michael Cooper, *Scott Stringer Wins a Crowded Primary and a Likely Election as Borough President*, NY TIMES, Sept. 14, 2005, <http://www.nytimes.com/2005/09/14/nyregion/metrocampaigns/14manhattan.html> (discussing Scott Stringer's defeat of Eva Moskowitz in the democratic primary election for Manhattan borough president and noting the UFT's opposition to Moskowitz's candidacy and support for Stringer).

168. Chen, *supra* note 148.

169. Michael Howard Saul, *Union Money Floods City's 2013 Election*, WALL ST. J., July 23, 2012, <http://online.wsj.com/article/SB10000872396390444330904577539593988630720.html>.



and Comptroller John Liu, though it has not endorsed a candidate.<sup>170</sup> “We are going to be there financially,” Mr. Mulgrew said, “[a]nd, then, we have to engage in our organizing, grass-roots work.”<sup>171</sup>

#### D. The Long Reach of Unions and the Working Families Party

While union membership has been in decline across the country for decades, one wouldn’t know it from observing the role that unions play in New York City politics. The UFT may be among the better-known unions in the City, but it is only one of many involved in local elections. Another education-based union, the Council of School Supervisors and Administrators, has boosted its political spending fifty-seven percent from this point in the 2009 election cycle.<sup>172</sup> Their spokesperson, Chiara Coletti, attributed the increase to involved educators having been “under tremendous attack politically.”<sup>173</sup> As of late July 2012, the Retail, Wholesale and Department Store Union (RWDSU) had already contributed more than \$31,000 to 2013 candidates, doubling its pace from 2009, and had persuaded the City Council to pass living wage legislation in the process.<sup>174</sup> Noting the union’s increased activity, union president Stuart Appelbaum explained, “We’re putting more focus on electing people who we think can push a working person’s agenda forward.”<sup>175</sup>

Despite the overarching goal of increasing wages and benefits for their respective members, unions have differing relationships with the other titans of local campaign spending, the members of the real estate industry. While construction unions often lobby alongside developers with an eye towards construction jobs, unions like the RWDSU go head to head with developers over wage issues. In 2009, Related Companies attempted to develop the Kingsbridge Armory in the Bronx by bringing a mall to the large, underdeveloped space.<sup>176</sup> Advocates of “living wage” legislation, which would have required

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170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. See Sam Dolnick, *Panel Approves Conversion of Kingsbridge Armory into Mall*, NY TIMES CITY ROOM (Oct. 19, 2009, 3:32 PM), <http://cityroom.blogs.nytimes.com/2009/10/19/panel-approves-conversion-of-kingsbridge-armory-into-mall/>.

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developments that receive city subsidies to pay a living wage,<sup>177</sup> pushed for all jobs at Kingsbridge to pay ten dollars per hour.<sup>178</sup> Related Companies is no stranger to the political arena, having donated large amounts to both Democrats and Republicans during the 2012 election (its largest single donation was \$100,000 to Restore Our Future, a pro-Romney PAC), and it was ready to play hardball.<sup>179</sup> Despite prolonged negotiations, Related Companies and union-backed living wage advocates reached an impasse.<sup>180</sup> Today there is a new proposal to develop the space as an ice skating rink.<sup>181</sup>

Few entities have dominated the City political landscape in recent years more than the Working Families Party (WFP). A progressive, labor-backed third party that supports liberal Democrats as a fusion ticket more often than it runs against Democrats, the WFP scored a number of electoral successes in 2009, claiming credit for John Liu's Comptroller and Public Advocate Bill de Blasio's victorious campaigns.<sup>182</sup> Its robust campaign infrastructure similarly has run sophisticated mailing and canvassing operations to support progressive, pro-union candidates throughout the city, including city council races.<sup>183</sup>

The WFP's get-out-the-vote operation has come under scrutiny, however. The WFP's campaign operation, Data and Field Services, was accused of providing below-cost services to candidates supported

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177. A narrower version of the "living wage" legislation was passed into law in 2012, overriding Mayor Bloomberg's veto. Bloomberg sued to block the law in July 2012, and litigation is still pending. See Barbara Ross, *Bloomberg Sues City Council to Block 'Living Wage' Law*, N.Y. DAILY NEWS, July 27, 2012, [http://articles.nydailynews.com/2012-07-27/news/32893800\\_1\\_minimum-wage-mayor-bloomberg-city-subsidies](http://articles.nydailynews.com/2012-07-27/news/32893800_1_minimum-wage-mayor-bloomberg-city-subsidies).

178. Sam Dolnick, *Voting 45-1, Council Rejects \$310 Million Plan for Mall at Bronx Armory*, N.Y. TIMES, Dec. 15, 2009, <http://www.nytimes.com/2009/12/15/nyregion/15armory.html>.

179. See *Related Companies*, MONEY MONACLE, <http://vote.sigfig.com/org/Related%20Companies/> (last visited Mar. 6, 2013).

180. Dolnick, *supra* note 176.

181. Winnie Hu, *Ice Center with 9 Rinks Is Proposed for Bronx Armory*, NY TIMES, Aug. 23, 2012, <http://www.nytimes.com/2012/08/24/nyregion/ice-center-proposed-for-kingsbridge-armory.html>.

182. De Blasio is the likeliest candidate to receive support from the Working Families Party in his run for mayor. His haul from unions is already significant. See *generally Searchable Database: Bill de Blasio, 2013*, N.Y.C. CAMPAIGN FIN. BD., [http://www.nycfb.info/searchabledb/SimpleSearchResult.aspx?election\\_cycle=2013&cand\\_id=326&cand\\_name=de+Blasio%2c+Bill](http://www.nycfb.info/searchabledb/SimpleSearchResult.aspx?election_cycle=2013&cand_id=326&cand_name=de+Blasio%2c+Bill) (last visited Mar. 6, 2013).

183. See Courtney Gross, *Proposal Could Shed Light on Who Helps Candidates*, GOTHAM GAZETTE (June 1, 2010), <http://www.gothamgazette.com/index.php/archives/532-proposal-could-shed-light-on-who-helps-candidates>.

by the WFP during the 2009 elections, precisely the type of illegal coordination the CFB seeks to avoid.<sup>184</sup> Shortly after the election, a plaintiff's firm led by former Giuliani deputy mayor Randy Mastro filed a lawsuit claiming illegal campaign coordination.<sup>185</sup> The WFP initially settled, admitting no wrongdoing, and agreed to make Data and Field Services a truly independent entity from the WFP.<sup>186</sup> The settlement was not fulfilled, however, and the WFP was found in contempt.<sup>187</sup> Today the WFP is also under investigation for illegal campaign coordination by the Staten Island District Attorney's office.<sup>188</sup> Despite these legal challenges, the WFP intends to maintain its impressive canvassing operation in 2013 by having candidates pay for those services directly.<sup>189</sup>

### E. The Real Estate Industry: Builders and Bundlers

The real estate industry makes no secret about its role in New York politics. In 2009, the Real Estate Board of New York (REBNY) poured more than \$500,000 into a handful of city council races—four Democratic primaries and one general election—in an effort to support candidates whose policies were more favorable to landlords than their WFP-supported opponents.<sup>190</sup> REBNY used the Independence Party as their vessel to send mailers and fund canvassers.<sup>191</sup> In addition to their outsider role in the 2009 city council races, REBNY directly contributed more than \$3.5 million to New York State Senate races in 2010.<sup>192</sup> A single real estate developer

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184. Roy Edroso, *Anti-WFP Suit Charges Debi Rose Didn't Pay Enough for Services (or at Least Not Fast Enough)*, VILLAGE VOICE BLOG (Oct. 27, 2009, 11:08 AM), [http://blogs.villagevoice.com/runninscared/2009/10/anti-wfp\\_suit\\_c.php](http://blogs.villagevoice.com/runninscared/2009/10/anti-wfp_suit_c.php).

185. *Id.*

186. Azi Paybarah, *Working Families Concedes and Downsizes Without Admitting Wrongdoing or Defeat*, CAPITAL N.Y. (Oct. 26, 2011 6:00 AM), <http://www.capitalnewyork.com/article/politics/2011/10/3897901/working-families-party-concedes-and-downsizes-without-admitting-wro>.

187. Liz Benjamin, *The Death of DFS*, CAPITAL TONIGHT (Oct. 26, 2011), <http://capitaltonightny.ynn.com/2011/10/the-death-of-dfs/>.

188. Shane Dixon Kavanaugh, *New Investigation for Working Families Party*, CRAIN'S N.Y. BUS. (Apr. 26, 2012), <http://www.crainsnewyork.com/article/20120426/POLITICS/120429920>.

189. Benjamin, *supra* note 187.

190. Eliot Brown, *Landlords Have a Party*, N.Y. OBSERVER, Dec. 9, 2009, <http://observer.com/2009/12/landlords-have-a-party/>.

191. *Id.*

192. Eliot Brown, *Real Estate Flexes Muscle*, WALL ST. J., Oct. 11, 2010, <http://online.wsj.com/article/SB10001424052748704127904575544323181587664.html>.

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used campaign finance law loopholes to funnel more than \$900,000 into 2012 State Senate races.<sup>193</sup> During the 2013 election cycle the real estate community may potentially flex its muscle even more than usual through unchecked independent expenditures. Given its track record and the stakes in this election cycle, it probably will.

The real estate industry thus far has coalesced around Democratic frontrunner, Christine Quinn.<sup>194</sup> Quinn has accepted maximum contributions (\$4,950) from dozens of individuals in the real estate industry, including significant contributions from Related Companies, Liberty Title, Cushman & Wakefield, Vornado Realty, CB Richard Ellis, Rudin Management, Dermot Company, and Benjamin Companies.<sup>195</sup> Jay Kriegel from Related Companies, Mario Palumbo from Millenium Partners, REBNY Chair Mary Ann Tighe, and William Zeckendorf, the owner of Zeckendorf Realty, are among Quinn's top intermediaries, each raising at least \$34,000 for her campaign.<sup>196</sup> One must note that the other candidates for mayor, Bill de Blasio,<sup>197</sup> John Liu,<sup>198</sup> and Bill Thompson,<sup>199</sup> have all received considerable contributions from major developers.

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193. Beth Morrissey, *Real Estate Big Blankets State Senate Races with Contributions*, N.Y. WORLD (Sept. 12, 2012), <http://www.thenewyorkworld.com/2012/09/12/litwin-senate-spending/>.

194. Quinn has also earned significant backing from the legal community. A number of law firms have provided Quinn with at least \$20,000, including Paul, Weiss; Skadden Arps; Weil, Gotshal; Sullivan & Cromwell; Paul Hastings; and notably, Gibbons, a mid-sized firm with offices in New York and New Jersey that has contributed over \$50,000 to her campaign. *See generally Searchable Database: Christine Quinn, 2013*, N.Y.C. CAMPAIGN FIN. BD., [http://www.nycfb.info/searchabledb/SimpleSearchResult.aspx?cand\\_id=204&cand\\_name=Quinn,%20Christine%20C&election\\_cycle=2013](http://www.nycfb.info/searchabledb/SimpleSearchResult.aspx?cand_id=204&cand_name=Quinn,%20Christine%20C&election_cycle=2013) (last visited Mar. 6, 2013). Law firms are well known for their financial support of political candidates. In 2008, the legal industry contributed \$234 million to campaigns, overwhelmingly to Democratic candidates. *See Lawyers/Law Firms: Top Contributors 2011-12*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/indus.php?ind=K01> (last visited Mar. 6, 2013). The industry reprised its role in the 2010 federal elections. *See Amanda Becker, Law and Lobbying Firms Pump Millions of Dollars into Midterm Campaigns*, WASH. POST, Nov. 1, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/29/AR2010102905908.html>.

195. *See generally Searchable Database: Christine Quinn, 2013, supra* note 194.

196. *See id.*

197. *See generally Searchable Database: Bill De Blasio, 2013, supra* note 182.

198. *See generally Searchable Database: John C. Liu, 2013, supra* note 182. N.Y.C. CAMPAIGN FIN. BD., [http://www.nycfb.info/searchabledb/SimpleSearchResult.aspx?election\\_cycle=2013&cand\\_id=FI&cand\\_name=Liu%2c+John+C](http://www.nycfb.info/searchabledb/SimpleSearchResult.aspx?election_cycle=2013&cand_id=FI&cand_name=Liu%2c+John+C) (last visited Mar. 6, 2013).

199. *See generally Searchable Database: William C. Thompson Jr., 2013, supra* note 182. N.Y.C. CAMPAIGN FIN. BD., <http://www.nycfb.info/searchabledb/SimpleSearchResult.aspx?>

Sometimes unions and real estate developers share common goals. Large development projects might pique the interest of both the real estate development community and unions. For example, during the fall of 2012 the planning process for the expansion of the Chelsea Market was underway.<sup>200</sup> Supporters included the REBNY, the Building and Construction Trades Council of Greater New York, and the SEIU Local 32BJ.<sup>201</sup> The prospect of temporary construction jobs, permanent office jobs, and lasting real estate revenues leads to such politically powerful coalitions. The only organized opposition to such projects comes in the form of neighborhood groups, which are often powerless to stop such developments. All candidates running for office need to be secure in their ability to fundraise and turn out the vote to take the political risk of alienating the enormous spigots of campaign cash and volunteers that the real estate lobby and union tandems offer.

#### F. *Citizens United*, Ray Kelly, and Joe Lhota

If there is any individual in New York City politics who can benefit from a post-*Citizens United* landscape, it is Police Commissioner Ray Kelly. The recipient of consistently strong approval ratings,<sup>202</sup> despite recent controversy over the NYPD's "stop and frisk" procedures,<sup>203</sup> Kelly's candidacy has been floated for several years, generally by Mayor Bloomberg supporters who do not see an obvious heir to Bloomberg's legacy. A poll taken last year showed Kelly with significant support compared to the current candidates.<sup>204</sup>

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election\_cycle=2013&cand\_id=260&cand\_name=Thompson%2c+Jr.%2c+William+C (last visited Mar. 6, 2013).

200. Shane Dixon Kavanaugh, *Stringer Out on Limb Against Chelsea Market Plan*, CRAIN'S N.Y. BUS. (July 20, 2012, 12:42 PM), [http://www.crainsnewyork.com/article/20120719/REAL\\_ESTATE/120719859](http://www.crainsnewyork.com/article/20120719/REAL_ESTATE/120719859).

201. *Id.*

202. *See, e.g., Poll Gives Ray Kelly Record Approval Rating*, CBS N.Y. (Jan. 17, 2013, 11:18 AM), <http://newyork.cbslocal.com/2013/01/17/poll-gives-ray-kelly-record-approval-rating/>.

203. *See, e.g., NYPD Stop and Frisk: Ray Kelly Lashes Out at Critics in Daily News Editorial*, HUFF POST N.Y. (May 21, 2012, 11:14 AM), [http://www.huffingtonpost.com/2012/05/21/nypd-stop-and-frisk-ray-kelly-daily-news\\_n\\_1532930.html](http://www.huffingtonpost.com/2012/05/21/nypd-stop-and-frisk-ray-kelly-daily-news_n_1532930.html) (describing Ray Kelly's response to criticism over the NYPD's stop and frisk practices).

204. *See Bloomberg Losing Focus As Approval Sags, New Yorkers Tell Quinnipiac University Poll; Kelly, Quinn Lead 2013 Mayoral Pack*, QUINNIPIAC U. (Oct. 19, 2011), <http://www.quinnipiac.edu/institutes-centers/polling-institute/new-york-city/release-detail/?ReleaseID=1663>.

For his part, Kelly has never given an affirmative indication that he is interested in running—in fact, he has insisted that he does not plan to run.<sup>205</sup> Given that he lacks the independent wealth of someone like Bloomberg or Castimatidis, this hesitancy would ordinarily be fatal to mounting a race for mayor of New York City; as of the time of this publication, Kelly would have mere months to raise the millions of dollars necessary to run a competitive race, introduce himself to voters, and broadcast his positions on issues other than policing. *Citizens United* and its progeny are what could still make Kelly's candidacy possible, however. A few wealthy backers could jumpstart his campaign overnight and sustain his messaging, albeit in an uncoordinated manner.

Kelly's story raises an interesting perspective in the debate over independent expenditures. If one puts aside the contentious debate over his performance as police commissioner and assumes that he is the ideal public servant, then the opportunities for outside parties to do the heavy financial lifting for Kelly's candidacy may be a boon to democracy. Would voters prefer a sitting police commissioner to fundraise extensively while on the job? If not, should members of a mayor's administration have to choose between performing their duties and running for office, when legislators and other elected officials clearly do not so limit themselves? And finally, does spending large sums of money on behalf of an individual known, for better or worse, by his record as police commissioner, carry the same self-interested taint as spending on a candidate for his or her track record on real estate deals or tax subsidies?<sup>206</sup> If the success of the small donor matching system is to make democracy more participatory for voters and candidates without wealth, this not-so-hypothetical example demonstrates the argument that John McComish made, namely that loosened campaign finance laws can sometimes make democracy more accessible, not less.

There are fewer hypotheticals when considering the candidacy of Joe Lhota. Lhota served as Mayor Giuliani's Deputy Mayor for Operations, and later as Chairman of the Metropolitan Transit

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205. Joe Coscarelli, *Ray Kelly Adamant He's Not Running for Mayor or Violating Anyone's Civil Liberties*, DAILY INTELLIGENCER (Jan. 11, 2013, 9:34 AM), <http://nymag.com/daily/intelligencer/2013/01/ray-kelly-adamant-hes-not-running-for-mayor.html>.

206. The most obvious counterargument is that a candidate with unformed positions on issues would be more beholden, not less, to the benefactors that supported him, and benefactors with significant resources, as discussed throughout Part III, usually have specific agendas.

Authority (MTA).<sup>207</sup> His performance in the aftermath of Hurricane Sandy garnered a wave of positive press, and in January 2013 he resigned his MTA position to declare his candidacy for mayor, doing so at the annual meeting of the New York Building Congress.<sup>208</sup> While his initial poll numbers are strong,<sup>209</sup> and his wife has been called a “fundraising powerhouse,”<sup>210</sup> Lhota’s late entry into the race and the disparity between Democratic and Republican party registration in New York City suggest that his viability will depend in part on whether an outside entity spends liberally on his behalf.

#### IV. REGULATIONS, PENALTIES, AND LOOPHOLES

Having established the origin of the New York City system in Part I, the jurisprudential confines of election law in Part II, and the players who can be expected to thrive under the new campaign finance regime in Part III, we turn to a critically important question for those looking to New York City as a model: Do regulators have the teeth to make the system work? Any law is only as effective as the threat of robust enforcement. In the zero-sum world of elections, establishing effective deterrence is challenging because the benefit of winning office almost always outweighs the cost of punitive measures taken after illegal campaign activity.

##### A. The CFB Metes Out Meek Punishments

Without an effective mechanism for punishing non-compliance, the Campaign Finance Act’s meticulously crafted provisions will do little to deter illicit campaign activity. The CFB has not been shy about handing out fines for campaign violations, and unlike its state counterpart, which strikes little fear into the hearts of lax

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207. Celeste Katz, *As Joe Lhota Deliberates About a 2013 Mayoral Run, His Wife Is His Sounding Board*, N.Y. DAILY NEWS, Dec. 7, 2012, <http://www.nydailynews.com/blogs/dailypolitics/2012/12/as-joe-lhota-deliberates-about-a-2013-mayoral-run-his-wife-is-his-sounding-boa>.

208. David Seifman, *Lhota: ‘I Would Not Have Left the MTA . . . If I Wasn’t Going to Run for Mayor*, N.Y. POST, Jan. 15, 2013, [http://www.nypost.com/p/news/local/would\\_mayor\\_have\\_left\\_the\\_mta\\_run\\_1cfcPs4M5O0eJwZKq88MO](http://www.nypost.com/p/news/local/would_mayor_have_left_the_mta_run_1cfcPs4M5O0eJwZKq88MO).

209. Celeste Katz, *Former MTA Chairman Joseph Lhota Leads Possible GOP Mayoral Candidates but Would Get Crushed by Democrats: Poll*, N.Y. DAILY NEWS, Jan. 17, 2013, <http://www.nydailynews.com/new-york/dem-rivals-trounce-lhota-poll-article-1.1241656>.

210. Katz, *supra* note 207.

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campaigns,<sup>211</sup> its reports demonstrate an impressive attention to the details of every campaign filing. The weakness in the CFB's regulation, however, is that the fines are simply insubstantial to castigate improper behavior.

Consider the 2009 election cycle. Councilmember Mathieu Eugene was found to have violated a number of campaign finance laws on ten occasions, particularly the provision that campaign contributions must be spent in furtherance of the campaign.<sup>212</sup> Because the CFB found that these ten violations represented \$6,087.77 in undocumented funds, Eugene was fined \$608 (\$4,666 for all of his violations).<sup>213</sup> This means that if Eugene or any other candidate sought to appropriate campaign funds for personal use, which might be particularly tempting in a non-competitive election cycle, the worst they can expect from the CFB is a 10% "getting caught tax." Despite these troubles, Councilmember Eugene received \$109,742 in public matching funds.<sup>214</sup>

The last decade has also seen several instances of improper coordination between candidates and outside groups. When SEIU organizer Annabel Palma ran for City Council in 2003, the SEIU spent heavily on the campaign.<sup>215</sup> An investigation by the CFB found that the SEIU had illegally collaborated with the candidate, to put it mildly.<sup>216</sup> The SEIU had essentially run Palma's campaign out of their offices, from printing literature to running its "get out the vote" operation.<sup>217</sup> As a result, the SEIU was assessed with three penalties of \$10,000 each.<sup>218</sup> This figure hardly acts as a deterrent against one of the most powerful unions in the country meddling in future races. The \$30,000 penalty sends a message to unions, corporations, and

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211. Jon Campbell, *\$31 Million in New York Campaign Accounts Unreported, Group Claims*, EFFECTIVENY.ORG (Aug. 22, 2012), <http://effectiveny.org/press-clip/news-coverage/small-donor-empowerment/democrat-and-chronicle-31-million-new-york-campaign>.

212. *Mathieu Eugene*, N.Y.C. CAMPAIGN FIN. BD. (2009), [http://www.nycfb.info/PDF/PM/CY2012PM\\_Eugene\\_071212.pdf](http://www.nycfb.info/PDF/PM/CY2012PM_Eugene_071212.pdf); see also Celeste Katz, *Campaign Finance Board Sets \$17.5k in Fines*, N.Y. DAILY NEWS, July 12, 2012, <http://www.nydailynews.com/blogs/dailypolitics/2012/07/campaign-finance-board-sets-175k-in-fines>.

213. See *supra* note 198 and accompanying text.

214. *Id.*

215. ANNABEL PALMA FINAL AUDIT, *supra* note 68, at 6.

216. *Id.*

217. *Id.*

218. *Id.*



other outside influence peddlers that the cost of electing a favorable city councilmember is a modest cost of doing business.

Even worse, during Palma's own legal investigation, the newly elected councilmember used union funds to pay for her legal fees and the penalties that the CFB assessed against her.<sup>219</sup> Kevin Finnegan, 1199 SEIU's political director, established a legal defense fund worth at least \$64,000, with \$51,675 that the SEIU contributed and the rest contributed from other unions and political sources.<sup>220</sup> In her defense, Palma claimed, "That fund was created separate and apart from my knowledge. It's an independent fund."<sup>221</sup> On a separate occasion, Palma remarked, "I had no idea how I was going to pay this. The CFB was calling me on a daily basis just like a creditor would. Was the fund a blessing? I think so. If not, I would have been over \$100,000 in the hole to this day."<sup>222</sup> The CFB did not even make its determination until 2007, by which point Palma had been reelected.<sup>223</sup> She went on to win reelection to a final term in 2009.<sup>224</sup>

Palma is not the only recent candidate to use the independent funds of potentially interested parties in paying off campaign finance violations. Unions have also contributed to the legal defense funds of Councilmembers Elizabeth Crowley and Jose Rivera.<sup>225</sup> Rivera needed to pay for his legal defense after the CFB fined him \$56,245 for violations accrued during his 2003 campaign. The defense fund's address was identical to the address listed in Rivera's City Council campaign finance account.<sup>226</sup> In response to the *Gotham Gazette's* reporting on this trend, Citizens Union executive director Dick Dadey remarked, "I'm stunned that this practice is permissible. It undercuts the integrity of the campaign finance penalty system for gross violations and misuse of public funds."<sup>227</sup> The practice is legal,

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219. Courtney Gross, *Unions Pick Up Tab for Council Members' Fines, Legal Bills*, GOTHAM GAZETTE (June 4, 2010), <http://www.gothamgazette.com/index.php/archives/535-unions-pick-up-tab-for-council-members-fines-legal-bills>.

220. *Id.*

221. *Id.*

222. *Id.*

223. Michael Clancy, *Campaign Finance Board Fines Barron, Palma, and Four Others*, VILLAGE VOICE BLOG (Oct. 11, 2007, 3:02 PM), [http://blogs.villagevoice.com/runninscared/2007/10/campaign\\_financ.php](http://blogs.villagevoice.com/runninscared/2007/10/campaign_financ.php).

224. *2009 Election Results*, N.Y. TIMES, Nov. 9, 2009, <http://elections.nytimes.com/2009/results/city-council.html>.

225. Gross, *supra* note 219. Rivera has been the city council majority leader since 2006.

226. *Id.*

227. *Id.*

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however, because contributions to legal defense funds do not technically advocate for the victory or defeat of individual candidates. This allows them to operate outside of the CFB's regulated contribution structure, and outside parties can even contribute unlimited amounts to defense funds of candidates who participate in the CFB's public matching funds program.

Many of the other candidates discovered to have violated the Campaign Finance Act were also incumbents, making their mistakes less attributable to lack of familiarity with the rules. Councilmember Vincent Ignizio was fined \$1,802 for a variety of violations, including going over the spending limit, even as he received \$88,450 in public funds. Councilmember Vincent Gentile was fined \$26,882 for similar offenses.<sup>228</sup> Councilmember Ydanis Rodriguez was fined \$4,750.<sup>229</sup> In defense of the candidates, some of the violations related to filing omissions and did not imply foul play. The small fine amounts are of little consequence to these officials, however, who, having won reelection, are in a position to raise more funds from their donors. Indeed, if a candidate competing in a close election had to choose between risking a fine of several thousand dollars or risking his career, the politically and fiscally prudent choice would be clear to most candidates. The candidate simply needs to remember to pay the fine before the next election cycle so that he is eligible for another round of matching funds.<sup>230</sup>

These stories of elected officials flouting even basic campaign regulations demonstrate how difficult it is to hold campaign finance lawbreakers accountable. Even if these officials' fines had been more severe, their adept legal teams and well-funded supporters likely could have mitigated them or paid them.<sup>231</sup> The CFB is authorized, under CFB Rule 2-02, to require a campaign to forfeit all public matching funds if it has been found to improperly coordinate with an

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228. N.Y.C. CAMPAIGN FIN. BD., FINAL AUDITS: VINCENT GENTILE (2009), available at [http://www.nycffb.info/PDF/PM/EC2009PM\\_Gentile\\_120811.pdf](http://www.nycffb.info/PDF/PM/EC2009PM_Gentile_120811.pdf).

229. N.Y.C. CAMPAIGN FIN. BD., FINAL AUDITS: YDANIS RODRIGUEZ (2009), available at [http://www.nycffb.info/PDF/PM/EC2009PM\\_Rodriguez\\_120811.pdf](http://www.nycffb.info/PDF/PM/EC2009PM_Rodriguez_120811.pdf).

230. See N.Y.C. ADMIN. CODE § 3-703(1)(n) (2012).

231. One notable recent exception is former City Councilmember Kendall Stewart, who was required to pay \$200,000 in fines—all of the public funds he received and more than \$60,000 in penalties—for committing numerous infractions. This staggering fine led election lawyer Jerry Goldfeder to remark, "The candidate had to have really ran afoul of the campaign finance laws for such a Draconian penalty. It's very rare." Nathaniel Herz, *Ex-Councilmember Hit with \$200k Bill from Campaign Finance Board*, N.Y. WORLD (Nov. 15, 2012), <http://www.thenewyorkworld.com/2012/11/15/ex-councilmember-hit-with-200k-bill-from-campaign-finance-board/>.

allegedly independent actor.<sup>232</sup> This measure does not appear to have been used very frequently. Likewise, the CFB may fine up to \$10,000 per violation, and revoke all public funds for a “fundamental breach” of CFB regulations, but the CFB does not hand down either of these punishments often enough to create a realistic deterrence.<sup>233</sup> Criminal activity, of course, can be referred to law enforcement.<sup>234</sup>

Perhaps the law should be amended to make an entity convicted of illegal coordination ineligible to participate in the following election cycle. While such a law would certainly be challenged on First Amendment grounds, restricting the speech of an entity convicted of corruption would surely warrant consideration for the type of speech that can be regulated to reduce the appearance of corruption. For now, the CFB is obviously prohibited from declaring an election winner invalid or meting out some other severe punishment, as an arbiter of some other contest might upon finding conclusive evidence that the winner cheated, and it must rely on the weak enforcement stick of small fines. Smartly, however, the CFB knows that shaming comes with its own deterrent effect. All of the examples provided above were discussed in daily newspaper publications, bringing disrepute to the elected official highlighted. The CFB makes access to this information easy for the media, good government groups, and political opponents by posting its determinations publicly as soon as it makes them (which, unfortunately, may be quite some time after the election), and emailing these determinations to anyone who signs up for the CFB’s notifications.

### B. More Matching Fund Misuse

Critics have accused campaigns of using public matching funds to boost campaign treasuries, even in the absence of competitive reelection races.<sup>235</sup> Because so many races for local office are non-competitive, many candidates—usually incumbents—do not even use the funds they are given for campaign purposes.<sup>236</sup> Out of 140

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232. See GOLDFEDER, *supra* note 12, at 22 n.72.

233. N.Y.C. ADMIN. CODE § 3-711(2)(b) (2012); N.Y.C. CAMPAIGN FIN. BD. R. 2-02 (2010), available at [http://www.nyccfb.info/act-program/rules/index.aspx#2\\_02](http://www.nyccfb.info/act-program/rules/index.aspx#2_02).

234. See GOLDFEDER, *supra* note 12, at 43.

235. Ray Rivera, Russ Buettner & William Rashbaum, *In Council Campaigns, Relatives on the Payroll*, N.Y. TIMES, Apr. 25, 2008, <http://www.nytimes.com/2008/04/25/nyregion/25council.html>.

236. In theory, the CFB would not provide matching funds in noncompetitive races, but candidates can submit a “Statement of Need” and can ask for funds using

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candidates accepting public funds during the 2009 election cycle, only one refunded the balance of his matching funds in its entirety, and only eleven refunded any money at all.<sup>237</sup> The leftover money was used to pay for victory parties, parking tickets, fines for poster violations, and even fundraisers to raise more money eligible for future matching funds.<sup>238</sup> Even more scandalously, public matching funds have been funneled to family members of candidates without evidence that they worked on a campaign.<sup>239</sup> Steering campaign funds in such a manner is questionably legal even when private campaign funds are involved, but even greater care should be taken when taxpayer funds are concerned. Jurisdictions emulating New York City's model should consider the backlash against taxpayer money inappropriately funding campaigns and plan spending guidelines accordingly, especially for noncompetitive races.

### C. The Department of Sanitation and New York City Campaigns

Interestingly, there is another entity that hits candidates hard both through media shaming and the wallet. The Department of Sanitation has the unenviable task of removing the thousands of illegal campaign posters hanging from property around the city the morning after an election. The price of using city property for last minute voter outreach is not cheap; the Department of Sanitation fines candidates \$75 for each violation.<sup>240</sup> Nearly every mayor runs afoul of this regulation to some degree; in 2009 Mayor Bloomberg paid over \$5,000 in fines for violations.<sup>241</sup> But while Bloomberg is seemingly always in position to cut such a check, other campaigns often find their campaign coffers near empty at the very time they are asked to pay these violations.

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even the specter of an opponent as justification. See N.Y.C. ADMIN. CODE § 3-705(7) (2012).

237. Chris Glorioso, *Candidates Who Take Public Funds Rarely Pay Back Taxpayers*, NBC N.Y. (Apr. 1, 2011), <http://www.nbcnewyork.com/news/local/Candidates-Who-Take-Public-Funds-Rarely-Pay-Taxpayers-Back-119099959.html>.

238. *Id.*

239. Rivera et al., *supra* note 235.

240. See N.Y.C. DEP'T OF SANITATION, A SUMMARY OF RULES AND REGULATIONS 8 (2009), available at [http://www.nyc.gov/html/dsny/downloads/pdf/rules/digest/DSNY\\_Rules\\_Reg.pdf](http://www.nyc.gov/html/dsny/downloads/pdf/rules/digest/DSNY_Rules_Reg.pdf).

241. Michael Howard Saul, *Bloomberg, Liu Trade Barbs*, WALL ST. J., Aug. 10, 2012, <http://online.wsj.com/article/SB10000872396390443404004577581683739863926.html>.

The Department of Sanitation fined Bill Thompson \$594,375 for violations committed during his 2009 mayoral race,<sup>242</sup> Bill de Blasio more than \$300,000 for his violations committed during his Public Advocate race,<sup>243</sup> and John Liu \$527,400 for violations committed during his Comptroller race.<sup>244</sup> The *New York Post* suggested that it was long overdue for de Blasio to pay the fine to remove it “as a potential issue from his campaign,”<sup>245</sup> a statement just as applicable to de Blasio’s 2013 mayoral opponents, Liu and Thompson. Each of the candidates could legally use their public matching funds to pay off the fines, though that would be hundreds of thousands of dollars less that they could spend on more pressing needs in their mayoral races.

#### D. The “Doing Business” Loophole

Part II of this Article analyzed the City’s “pay to play” provision (also called the “doing business” provision), including the litigation over its constitutionality in *Ognibene v. Parkes*. According to a recent investigative report by the *New York World*, however, the regulation may have a considerable loophole.<sup>246</sup> When *New York World* crosschecked the list of intermediaries registered with the CFB against the New York City’s Doing Business database, it found “[d]ozens of executives of companies that do business with city government . . . raising nearly \$1 million so far on behalf of prospective 2013 candidates for mayor.”<sup>247</sup> Serving as an intermediary is not technically in violation of the provision limiting those doing business with the city to \$400 contributions.<sup>248</sup> But allowing those individuals to deliver enormous funds to campaigns certainly flouts

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242. Editorial, *Bill Thompson Must Stop Trying to Weasel Out of Paying Fines*, N.Y. DAILY NEWS, Apr. 12, 2012, [http://articles.nydailynews.com/2012-04-12/news/31326903\\_1\\_illegal-campaign-posters-public-campaign-financing-jerry-goldfeder](http://articles.nydailynews.com/2012-04-12/news/31326903_1_illegal-campaign-posters-public-campaign-financing-jerry-goldfeder).

243. David Seifman, *Poster Boy de Blasio to Pay 300G*, N.Y. POST, Sept. 29, 2011, [http://www.nypost.com/p/news/local/poster\\_boy\\_de\\_blasio\\_to\\_pay\\_qru5bAz9jn4MKzGhDeXAyH](http://www.nypost.com/p/news/local/poster_boy_de_blasio_to_pay_qru5bAz9jn4MKzGhDeXAyH).

244. Saul, *supra* note 241.

245. Seifman, *supra* note 243.

246. Beth Morrissey, *The Campaign Finance Loophole Developers Love*, N.Y. WORLD (Aug. 7, 2012) [hereinafter Morrissey, *Loophole*], <http://www.thenewyorkworld.com/2012/08/07/the-campaign-finance-loophole-developers-love/>; see also Beth Morrissey, *Unpacking Campaign Bundlers*, N.Y. WORLD (Aug. 9, 2012), <http://www.thenewyorkworld.com/2012/08/09/unpacking-campaign-bundlers/>.

247. Morrissey, *Loophole*, *supra* note 246.

248. Intermediaries are governed under N.Y.C. ADMIN. CODE § 3-702(12).

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the intention of the law. The *New York World* investigation noted the particular prevalence of real estate developers among the intermediaries, giving the example of Jay Kriegel, a lobbyist from Related Companies who has bundled nearly \$100,000 for Quinn, de Blasio, and Thompson.<sup>249</sup> *New York World* notes that Related Companies recently won the right to build at Willets Point in Queens, an area that may become a major commercial development zone.<sup>250</sup> In 2009, Related Companies earned Council approval for Related's development of Hudson Yards, and, thanks to Quinn, were exempted from the Council's living wage bill for that project.<sup>251</sup> The intermediary who has bundled the most money so far for an individual 2013 candidate is Charles Dorego, a senior vice president at the real estate company Glenwood Management, who channeled almost \$150,000 to Manhattan Borough President Scott Stringer, who ran for mayor throughout 2012 before switching to the comptroller race.<sup>252</sup>

This loophole is not the only problem with the "pay to play" provisions. Some have criticized them for not extending to municipal unions, despite their obvious history of political spending and the risk of corruption between the unions seeking new contracts and elected officials determining them. Under the provision, "A union that negotiates a collective bargaining agreement with the [C]ity on behalf of its members" is not considered to be "doing business" with the City, unless the union is a registered lobbyist or involved in a real property transaction with the City.<sup>253</sup> Additionally, under the "doing business" law, corporations, partnerships and LLCs can donate to PACs, but PACs "cannot make contributions with money received from prohibited sources."<sup>254</sup> One wonders how effectively the CFB can track a PAC's movement of such highly fungible campaign funds.

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249. Morrissey, *Loophole*, *supra* note 246.

250. *Id.*

251. Dana Rubinstein, *The Hudson Yards Exception and Christine Quinn's Business-Safe Liberalism*, CAPITAL N.Y. (Mar. 30, 2012, 2:20 PM), <http://www.capitalnewyork.com/article/politics/2012/03/5588041/hudson-yards-exception-and-christine-quinns-business-safe-liberalis>.

252. Shane Dixon Kavanaugh, *Mayoral Backers Raising Bundles*, CRAIN'S N.Y. BUS. (Jan. 22, 2012), <http://www.crainsnewyork.com/article/20120122/POLITICS/301229972>.

253. *Frequently Asked Questions*, N.Y.C. CAMPAIGN FIN. BD., [http://www.nyccfb.info/candidates/candidates/doing\\_biz\\_faq.aspx](http://www.nyccfb.info/candidates/candidates/doing_biz_faq.aspx) (last visited Mar. 6, 2013) (follow "Are unions included in the DBDB?" hyperlink).

254. *Id.* (follow "If a business is in the DBDB, can the business form a political action committee that can make contributions to city candidates?" hyperlink).

### E. Regulating Political “Charities”

As discussed in Part I, New York City began requiring independent organizations to disclose their campaign expenditures in late 2012. At the federal level, political outfits masquerading as 501(c)(4) nonprofits, such as Americans for Prosperity (backed by the billionaire brothers Charles and David Koch) and the Karl Rove-led Crossroads GPS have been held to no such disclosure obligations,<sup>255</sup> allowing wealthy donors and corporate interests to donate funds without the scrutiny that disclosure brings. Under the law, 501(c)(4)s are required to serve a predominantly charitable, educational, or recreational purpose in order to reap the benefits of being a tax-exempt social welfare group.<sup>256</sup> In 2012, the IRS sent detailed inquiries to investigate whether such organizations were flouting the law by raising and spending funds exclusively for political purposes, which would carry significant fines for the organizations; unfortunately, no such investigations were concluded by the end of the 2012 general elections.<sup>257</sup> Likewise, an attempted lawsuit to have the names of certain non-profit donors released was recently turned back by the D.C. Circuit.<sup>258</sup> These efforts to put such nonprofit organizations under greater scrutiny, however, may impact their political aggressiveness in New York City’s upcoming elections.

Meanwhile, New York State Attorney General Eric Schneiderman has launched an investigation into New York-based nonprofits across the political spectrum seeking the same information.<sup>259</sup> The Attorney General’s office has jurisdiction over 501(c)(4)s that raise \$25,000 or more from New Yorkers,<sup>260</sup> and given the prevalence of New York City fundraising for both Democratic and Republican-affiliated groups, that included most of the prominent 501(c)(4)s that were

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255. See Peter Overby, *As Election Nears, Keeping Donors a Secret Is Trickier*, NPR (Sept. 8, 2012, 5:59 AM), <http://www.npr.org/2012/09/08/160788546/as-election-nears-keeping-donors-a-secret-is-trickier>.

256. 26 U.S.C. § 501(c)(4)(A) (2006).

257. Brody Mullins & Jacob Gershman, *IRS Probes Non-Profit Political Groups*, WALL. ST. J., June 27, 2012, <http://online.wsj.com/article/SB10001424052702304830704577493054251481454.html>.

258. *Ctr. for Individual Freedom v. Christopher Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012). The court held that the F.E.C. should clarify these rules, though paralysis at the regulatory body suggests that an immediate clarification is unlikely.

259. Nicholas Confessore, *Groups’ Campaign Spending Scrutinized in New York*, N.Y. TIMES, Aug. 9, 2012, <http://www.nytimes.com/2012/08/09/us/politics/eric-schneiderman-investigating-groups-campaign-spending.html>.

260. N.Y. EXEC. LAW § 172-a (McKinney 2002).

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involved in the 2012 election. Thus far there is no New York City equivalent of Americans for Prosperity, but if one were to emerge, it is reasonable to assume that Attorney General Schneiderman would join the CFB in monitoring it closely. Daniel Kurtz, former head of the Attorney General's Charities Bureau, commented, "If he can make an example of somebody, I think that can really have some consequences."<sup>261</sup> In January 2013, Schneiderman began hearings on a requirement that all non-profits that spend over \$100,000 on city and state elections, including 501(c)(4)s, register with the state to disclose contributions of over \$100.<sup>262</sup> The far-reaching proposal earned the praise of Democratic mayoral candidates Quinn, de Blasio, and Thompson, but Schneiderman acknowledged that the plan had opponents, and "he expected to defend these changes in court."<sup>263</sup>

#### F. The "Member-to-Member" Exception

Early in 2013, the City Council approved Intro 978, legislation that exempts organizations, corporations, and unions from disclosing communications related to candidates in an election year.<sup>264</sup> The bill originated out of concern that the CFB's 2010 regulations concerning coordination between candidates and outside groups had become so onerous that organizations could not even request biographical information from candidates, or even schedule with them.<sup>265</sup> In response, the CFB had issued an advisory opinion clarifying that such "logistical" activities were permitted.<sup>266</sup> Nevertheless, the legislation moved forward and passed overwhelmingly. Mayor Bloomberg criticized the legislation as a "terrible idea" that would allow

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261. Reid Pillifant, *Eric Schneiderman's Mission to Expose America's Most Influential Donors*, CAPITAL N.Y. (Aug. 3, 2012), <http://www.capitalnewyork.com/article/politics/2012/08/6321774/eric-schneidermans-mission-expose-americas-most-influential-donors>.

262. Curtis Skinner, *Bold Campaign Spending Rules in the Spotlight*, N.Y. WORLD (Jan. 15, 2013), <http://www.thenewyorkworld.com/2013/01/15/campaign-rules/>.

263. *Id.*

264. Nick Powell, *NYC Council Amends Campaign Finance Disclosure Rules*, CITY & STATE (Jan. 24, 2013), <http://www.cityandstateny.com/city-council-passes-bill-amending-campaign-finance-disclosure-rules/>.

265. Beth Morrissey, *Campaign Finance Board Fires Back at City Council*, N.Y. WORLD (Jan. 11, 2013), <http://www.thenewyorkworld.com/2013/01/11/campaign-finance-fires-back/>.

266. *Id.*



corporations and unions to “get around [campaign finance limits].”<sup>267</sup> The CFB also strongly opposed the legislation, with Executive Director Amy Loprest stating in testimony before the City Council that “[d]isclosure of money in politics is fundamental to the democratic process,” and “a campaign message is a campaign message, no matter where or to which audience it is aimed.”<sup>268</sup> For unions with large memberships, this legislation will act as an end run around campaign finance laws, though the City Council vote suggests a widespread political consensus that member-to-member communications should be treated differently than external advocacy. Meanwhile, it remains to be seen whether corporations will exercise the right to communicate with their shareholders, and which other membership organizations will take advantage of the legislation.

### CONCLUSION

Public support for limiting the influence of money in elections is overwhelming.<sup>269</sup> Given the enormous challenge of preventing special interest money from flowing where it seeks to go, the CFB should be commended for its relentless and meticulous enforcement of the law. Many of its shortcomings are statutory, jurisprudential or resource-related, but its savvy use of the charter amendment process, presentation of data, and media accessibility make it a potent, nonpartisan force for reform. No large jurisdiction adopting New York City’s campaign finance model would be able to effectively implement it without an organization approaching the CFB’s caliber.

Yet for all of the CFB’s successes in reducing the flow of special interest money, problems endemic to a private contribution-driven finance system remain. Special interest groups with specific legislative and contracting goals, like real estate groups, unions, law firms, teachers, and charter school proponents, may not be permitted to make contributions of greater than \$4,950 per person, but they still vastly outspend the average citizen. Such groups had a

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267. Erin Durkin, *Mayor Bloomberg: Christine Quinn’s Bill to Allow Corporations Pour Money at Mayoral Campaigns ‘Terrible Idea,’* N.Y. DAILY NEWS, Dec. 11, 2012, <http://www.nydailynews.com/news/politics/bloomberg-quinn-mayoral-money-bill-terrible-idea-article-1.1218062>.

268. Amy Loprest, Exec. Dir., N.Y.C. Campaign Fin. Bd., Testimony to City Council Comm. on Governmental Operations (Jan. 16, 2013), *available at* <http://www.nyccfb.info/press/news/testimony/pdf/cfb/2013-01-16-AL-Testimony.pdf>.

269. Mark Sherman, *Poll: Strong Support for Campaign Spending Limits*, YAHOO! NEWS (Sept. 15, 2012), <http://news.yahoo.com/poll-strong-support-campaign-spending-limits-120557612--election.html>.

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disproportionate influence on local elections before *Citizens United* and other decisions gave them carte blanche to throw their weight around as independent entities.

Even a system that publicly matches funds may not generate a nexus between certain pressing local issues and the donors who fund campaigns. Consider what will likely be one of the main policy issues being discussed during the lead-up to the 2013 mayoral campaign, the New York Police Department's use of "stop and frisk" as a street-policing strategy. The strategy has engendered major opposition, particularly in poor communities of color,<sup>270</sup> who do not have organized election lobbying outfits to make donations, and are unlikely to welcome many citywide candidates into their homes for cocktail receptions. Even if public matching funds increase small donor diversity, issues like homelessness, AIDS funding, and endemic poverty in fringe neighborhoods of the City will remain subordinate to the interests of more reliable fundraising sources, or at least require the advocacy of affluent donors.

Another critique that Leo Glickman, a former CFB attorney who now advises candidates on election law, has raised is that "one reform [the New York City system] has not achieved . . . is addressing the advantages of incumbency, especially at the City Council level."<sup>271</sup> A year after Glickman's comments, four Councilmembers lost their reelection bids, an astonishing level in a city where, as the *New York Times* put it, "council members were more likely to lose their seats by being convicted of a felony than losing an election."<sup>272</sup> The CFB's highly regulated system can seem impenetrable to outsiders, and aspects of the system certainly favor incumbents who can utilize relationships with political clubs, election lawyers, and the special interest groups with whom they interact as office holders.

For any supporter of campaign finance reform, however, critiques of the New York City system pale in comparison to the post-regulatory landscape that *Citizens United's* unfettered First Amendment rationale foreshadowed. At a panel on the potential

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270. Tina Susman, *N.Y. Support for 'Stop and Frisk' Split Along Racial Lines in Poll*, L.A. TIMES, Aug. 16, 2012, <http://articles.latimes.com/2012/aug/16/nation/la-na-nn-stopandfrisk-20120816>.

271. Letter from Leo Glickman, Partner, Stoll, Glickman & Bellina, LLP, to Sue Ellen Dodell, Gen. Counsel, N.Y.C. Campaign Fin. Bd. (Oct. 24, 2008), *available at* <http://www.nyccfb.info/PDF/aor/aor-ao-2008-07-lglickman.pdf>.

272. Sam Roberts, *Voters Reject 3 Council Members Backing Longer Term Limits*, N.Y. TIMES, Sept. 16, 2009, <http://www.nytimes.com/2009/09/16/nyregion/16council.html>.

role of super PACs in the 2013 elections, political operatives warned that the independent spenders might see the best “return on investment” from cheap city council races.<sup>273</sup> Kevin Finnegan (who coordinated the payment of Councilmember Palma’s legal fees nearly a decade ago),<sup>274</sup> commented on unions’ interest in cultivating candidates early in their careers.<sup>275</sup> Even the operatives skeptical of a major infusion of outside spending in the mayoral race believed so due to the homogeneous or uninspiring composition of the candidate field, rather than a philosophical or strategic objection.

Thus, reformers should eye New York City’s 2013 elections warily, as unlimited expenditures may be unleashed on a system that encourages candidates to restrain their own spending to qualify for public matching funds. Wealthy individuals, corporations or unions could swamp a candidate they oppose. Indeed, they have all demonstrated a propensity to do so before, and do not seem likely to hesitate to do so again.

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273. Reid Pillifant, *What Would a Super PAC Want with the 2013 Mayor’s Race Anyway?*, CAPITAL N.Y. (Oct. 22, 2012), <http://www.capitalnewyork.com/article/politics/2012/10/6538533/what-would-super-pac-want-2013-mayors-race-anyway>.

274. *See supra* notes 221–22 and accompanying text.

275. *See* Pillifant, *supra* note 273.