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Expert Analysis

New York City Campaign Finance Laws Withstand Constitutional Scrutiny

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This month, we discuss *Ognibene* v. *Parkes*,[1] in which the U.S. Court of Appeals for the Second Circuit rejected a constitutional challenge to the three principal provisions of New York City's political campaign finance and lobbying laws. The court's opinion was written by Judge Paul A. Crotty of the U.S. District Court for the Southern District of New York, sitting by designation. Judge Guido Calabresi wrote a concurring opinion. Judge Debra Ann Livingston wrote an opinion concurring in part and concurring in the judgment. In its opinion, the court considered several recent campaign finance precedents, including the Supreme Court's landmark (and controversial) decision in *Citizens United* v. *Federal Election Commission*, 130 S. Ct. 876 (2010), and concluded that the challenged provisions of New York City's campaign finance laws—designed to prevent the appearance of corruption from so-called "pay-to-play" contributions—were constitutional.

Background

New York City's campaign finance laws have undergone a series of changes over the last few decades. In 1998, the New York City Council, New York's law-making body, passed the Campaign Finance Act (CFA), which imposes contribution limits and disclosure requirements on all candidates for elective office in New York City. The CFA also established the Campaign Finance Program. Administered by the Campaign Finance Board, the Campaign Finance Program provides public matching funds to participating candidates, who in turn must agree to certain limitations on the amount of money they can spend on their candidacies.

In 1998, New York City voters passed a referendum adopting an amendment to the city charter that "directed the Board to prohibit corporate contributions for all participating candidates; required these candidates to disclose contributions from individuals and organizations doing business with the City; and directed the Board to promulgate rules fleshing out these 'doing business' limitations."[2] The City Council later outlawed all corporate contributions to both participating and non-participating candidates.

In 2006, the board issued a report finding that, among other things, more than 20 percent of contributions over a five-year period were made by individuals and entities doing business with the city and that incumbents benefitted more frequently from such contributions than challengers. The board recommended (1) prohibiting contributions from not only corporations, but also partnerships, LLCs, and LLPs, and (2) regulating contributions by individuals and entities doing business with the city. Later that year, the city enacted laws requiring lobbyists to disclose fundraising and consulting activities and excluding lobbyist contributions from being eligible for public matching.

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In 2007, the City Council enacted a law reducing the contribution limits for individuals and entities doing business with the city and making such contributions ineligible for public matching. The law also extended the ban on corporate contributions to partnerships, LLCs, and LLPs. In enacting this law, the City Council reported that, while there was nothing "intrinsically wrong with contributions from those doing business with the city, the ability of such individuals to contribute could create a perception, regardless of whether such perception is accurate, that such individuals have a higher level of access to the city's elected officials."[3]

In February 2008, a group including New York City voters, aspiring candidates for New York City public office and lobbyists brought a lawsuit against members of the board and other city officials, alleging that the three main provisions of New York City's campaign finance laws violated the First and 14th amendments to the U.S. Constitution and the Voting Rights Act, 42 U.S.C. §1973: (1) the limits on contributions by individuals and entities doing business with the city; (2) the exclusion of such contributions from public matching; and (3) the extension of the corporate contribution ban to partnerships, LLCs, and LLPs. Plaintiffs sought to enjoin enforcement of these provisions.

In February 2009, the District Court rejected plaintiffs' constitutional challenge, concluding that all three provisions were closely drawn to further the government's interest in eliminating corruption and the perception of corruption. Plaintiffs appealed.

Legal Framework

The Second Circuit began its analysis by describing the applicable legal framework.[4] The court explained that campaign expenditures and campaign contributions are subject to different levels of scrutiny. While restraints on campaign expenditures are subject to strict scrutiny, the court held that contributions are subject to a lesser degree of scrutiny. As such, the court observed, "contribution limits and bans are permissible as long as they are closely drawn to address a sufficiently important state interest."[5] The Supreme Court has long recognized that preventing actual and perceived corruption is a sufficiently important state interest. Furthermore, under Supreme Court precedent, while the threat of corruption cannot be "illusory" or merely conjectural, evidence of actual corruption is not required.[6]

Precedents

In addition to articulating the legal framework governing its analysis, the Second Circuit briefly discussed three campaign finance-related cases decided after the district court's decision: *Citizens United; Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806 (2011); and *Green Party of Connecticut* v. *Garfield*, 616 F.3d 189 (2d Cir. 2010). The Second Circuit concluded that none of these cases supported plaintiffs' position.

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Citizens United maintained the distinction between campaign expenditures and contributions, reaffirming that, "unlike limits on independent expenditures, [contribution limits] have been an accepted means to prevent quid pro quo corruption."[7] As the Second Circuit observed, "*Citizens United* confirmed the continued validity of contribution limits, noting that they most effectively address the legitimate governmental interest…in preventing actual or perceived corruption."[8]

In *Bennett*, the Supreme Court struck down an Arizona public financing scheme that gave publicly financed candidates additional public funds if their privately funded opponents' expenditures exceeded the initial outlays given to the publicly financed candidates. The Supreme Court reasoned that leveling the playing field was not a compelling state interest and that Arizona's interest in preventing corruption did not justify what amounted to punishment of candidates who chose not to accept public financing. In the Second Circuit's words, *Bennett* "reaffirmed several key holdings: (1) that the lower closely drawn standard applies to contribution limits; (2) that preventing corruption and its appearance is a compelling state interest; and (3) that public financing is still a valid means of funding political candidacy."[9]

Finally, the Second Circuit revisited its decision in *Green Party*. There, the court had invalidated an outright ban on lobbyist contributions on the ground that the ban was not closely drawn because, the court reasoned, mere contribution limits could have addressed corruption concerns. Under *Green Party*, the Second Circuit explained, lobbyist contribution bans may still be permissible if a strong appearance of corruption exists.

Contribution Limits

With these legal principles in mind, the Second Circuit addressed the three challenged provisions. The court began with the doing business contribution limits. Those limits, the court reasoned, withstood constitutional scrutiny because they were contributions as opposed to expenditures, they were limits as opposed to bans, and they addressed the appearance of corruption as opposed to the appearance of influence. The court explained that "because the scope of quid pro quo corruption can never be reliably ascertained, the legislature may regulate certain indicators of such corruption or its appearance, such as when donors make large contributions because they have business with the City, hope to do business with the City, or are expending money on behalf of others who do business with the City."[10]

Moreover, because such contributions can create a perception of quid pro quo corruption, limits on such contributions are constitutionally permissible, as the Supreme Court reaffirmed in *Citizens United*. The Second Circuit wrote that the threat of corruption created by such contributions was not illusory because such contributions "mix money and politics on both ends of the equation."[11] The court was unswayed by plaintiffs' contention that the city was required under *Green Party* to present evidence of actual recent scandals to justify its contribution limits. As the court explained, "[t]here is no reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures."[12]

Taking stock of the city's extensive study of the issue, the court concluded that the city had appropriately determined that there was an appearance that large contributions were made for the purpose of securing government contracts. Under these circumstances, the court concluded, "where people believe that many public officials are corrupt, and there is substantial and material evidence to support that belief, clearly the public may enact preventative measures to address the contaminating belief that everything is for sale and to restore faith in the integrity of the political process."[13]

Non-Matching Provisions

The Second Circuit next addressed the provisions making lobbyists and individuals doing business with the city ineligible for public matching contributions. The court determined that these provisions were more like limits than outright bans because, rather than prevent such individuals from making contributions, they simply devalued such individuals' contributions. Accordingly, the court concluded that these provisions were subject to the less stringent standard of review under which the court had analyzed the city's contribution limits. The court observed that the non-matching provisions encouraged small contributions—the law provides matching funds of up to $175 per eligible contribution at a rate of six dollars in public funds for every one dollar in private contributions—and furthered the government's interest, as recognized by the Supreme Court, in preventing incumbent entrenchment.

The Second Circuit's decision in 'Ognibene' makes plain that campaign finance laws, to the extent they regulate contributions as opposed to expenditures, may still survive constitutional challenges so long as they are closely drawn to address perceived or actual corruption.

The court further explained that the provisions did not impose impermissible restrictions on contributors to privately funded candidates, but rather reflected the Legislature's decision "not to amplify their contributions with tax dollars."[14] To the extent the non-matching provisions imposed a burden on candidates who did accept public funds, the court wrote, such a burden was not constitutionally objectionable because, unlike the challenged provision in *Bennett*, the city's non-matching provisions did not require such candidates to help fund their opponents' campaigns. Finally, unlike the provisions at issue in *Bennett* and other cases, the city's non-matching provisions ensured that, while different contributors received different treatment, the way in which they were treated differently was the same for all candidates.

Extension of the Entity Ban

With respect to the extension of the corporate contribution ban to partnerships, LLPs, and LLCs, the court concluded that this extension was supported by two of the justifications for the federal ban on corporate contributions previously identified by the Supreme Court: the anti-corruption interest and the anti-circumvention interest. The court wrote that its earlier analysis of the city's anti-corruption interest applied with equal force to the extended entity ban and noted that entities such as partnerships, LLPs, and LLCs were structurally capable of evading contribution limits just as well as corporations were.

Furthermore, the record contained evidence of perceived corruption and circumvention by such entities. In particular, there was evidence that contributions by such entities had dramatically increased over time and had flowed disproportionately to incumbents. The court also pointed to these entities' minimal disclosure requirements and their accompanying lack of transparency as further evidence that contributions by such entities promoted the perception of corruption.

Conclusion

Although *Citizens United* un-leashed a storm of criticism re-garding the viability of campaign finance laws, the Second Circuit's decision in *Ognibene* makes plain that such laws, to the extent they regulate contributions as opposed to expenditures, may still survive constitutional challenges so long as they are closely drawn to address perceived or actual corruption. It will be interesting to see how the courts address future challenges to campaign finance laws that New York City or other municipalities within the Second Circuit may enact to address any loopholes left by existing law. *Ognibene* provides a helpful road map for legislatures seeking to enact such laws that pass constitutional muster.

1. Docket Nos. 09-0994-cv (Lead) 09-1432-cv (Con), 2011 U.S. App. LEXIS 25301 (2d Cir. Dec. 21, 2011).
2. Id. at *6.
3. Id. at *9 (record citation omitted).
4. In his concurrence, Judge Calabresi stated that he agreed with Judge Crotty's analysis because it was consistent with the state of the law, but wrote separately to register his disagreement with the Supreme Court's campaign finance precedents. In her opinion concurring in part and concurring in the judgment, Judge Livingston disagreed with the Court's analysis but nevertheless agreed that the challenged provisions passed constitutional muster.
5. *Ognibene*, 2011 U.S. App. LEXIS 25301, at *17 (citations omitted).
6. Id. at *18.
7. *Citizens United*, 130 S. Ct. at 909 (citations omitted).
8. *Ognibene*, 2011 U.S. App. LEXIS 25301, at *19 (citations omitted).
9. Id. at *24 (internal citations omitted).
10. Id. at *31.
11. Id. at *32.
12. Id. at *33 (citing *Citizens United*, 130 S. Ct. at 908) (other citation omitted).
13. Id. at *39.
14. Id. at *50.