No. 24-503

IN THE

# Supreme Court of the United States

UPSTATE JOBS PARTY, MARTIN BABINEC, and JOHN BULLIS,
*Petitioners,*

v.

PETER S. KOSINSKI, NEW YORK STATE BOARD OF ELECTIONS CO-CHAIR COMMISSIONER, IN HIS OFFICIAL CAPACITY, HENRY T. BERGER, NEW YORK STATE BOARD OF ELECTIONS CO-CHAIR COMMISSIONER, IN HIS OFFICIAL CAPACITY, ESSMA BAGNUOLA, NEW YORK STATE BOARD OF ELECTIONS COMMISSIONER, IN HER OFFICIAL CAPACITY, ANTHONY J. CASALE, NEW YORK STATE BOARD OF ELECTIONS COMMISSIONER, IN HIS OFFICIAL CAPACITY,
*Respondents.*

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

## REPLY BRIEF FOR PETITIONERS

SHAWN T. SHEEHY
*Counsel of Record*
JASON B. TORCHINSKY
JONATHAN P. LIENHARD
EDWARD M. WENGER
CALEB ACKER
OLIVER ROBERTS
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
2300 N Street, NW
Suite 643
Washington, DC 20037
(202) 737-8808
ssheehy@holtzmanvogel.com
*Counsel for Petitioners*

February 3, 2025

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

## ARGUMENT

New York is the only state that uses asymmetrical contribution and transfer limits to effectively disadvantage independent parties competing against major political parties in the same elections.

Respondents have failed to rebut this fact. It remains true that (1) the asymmetrical treatment between competing political speakers implicates the First Amendment; (2) the asymmetrical treatment is not justified by sufficient evidence of quid pro quo corruption; (3) the circuits could use guidance in this area; and (4) this case presents a clean vehicle for the questions presented in the Petition.

This case is about whether New York, through its asymmetrical contribution limits, may "selectively infringe[] on a fundamental right" to compete in political speech (i.e., contributions). *See Riddle v. Hickenlooper*, 742 F.3d 922, 932 (10th Cir. 2014) (Gorsuch, J., concurring) (emphasis omitted). This Court has "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Davis v. FEC*, 554 U.S. 724, 738 (2008). Here, New York is "insulat[ing] legislators from effective electoral challenge," *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 313 (2022) (quotation marks omitted and cleaned up), by way of benefitting major political parties and disadvantaging independent bodies competing with them.

This case is without vehicle problems and is the type of case featuring the "most fundamental" First Amendment rights this Court is wont to resolve. *Ted Cruz for Senate*, 596 U.S. at 310 (quoting *Buckley v. Valeo*, 434 U.S. 1, 14 (1976)). No stranger to this Court is the question of whether government's restriction on

political speech through campaign finance law is legal under the First Amendment. For example, also right now before this Court is a Petition asking whether the government's limits on coordinated party expenditures violates the First Amendment on its face. See Petition at i, *NRSC et al. v. FEC et al.*, No. 24-261 (filed Dec. 4, 2024). That Petition likewise features the recurring concern of "[g]overnment justifications for interfering with First Amendment rights" that are "hypothesized or invented *post hoc* in response to litigation." *Id*. at 15 (quoting *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) (cleaned up)).

## I. New York's asymmetrical contribution and transfer limits constitute unjustified, selective infringement on Petitioners' First Amendment rights.

**1.** In New York, independent bodies compete directly with political parties—yet New York campaign finance laws disadvantage independent bodies.

To distract from this reality, Respondents offer an objectively erroneous assertion: "a candidate running on the Democratic Party ticket, a candidate running on the Republican Party ticket, and a candidate running on the Upstate Jobs Party ticket would all be subject to the same limit." Opp.15.

This is patently incorrect. By New York's own statutory definitions, independent bodies and political parties compete for votes in the same races. That is because independent bodies compete to *obtain* political party status in the same races where political parties compete to *maintain* political party status. Compare N.Y. Elec. Law §1-104(3) with N.Y. Elec. Law §1-104(12). Competing for votes in the same election is a zero-sum game. New York puts independent bodies

at a competitive disadvantage in those elections. Political parties may raise fifteen times more contributions as compared to independent bodies; indeed, political parties may make *unlimited* transfers to their own candidates, rendering the de facto statutory contribution limit for party candidates fifteen times that for independent candidates. Unlike corporations or PACs, which may permissibly be given different contribution limits, independent bodies in New York compete directly with political parties at a fifteen times handicap.

All this is true regardless of whether independent bodies and political parties are "similarly situated" for purposes of the Equal Protection Clause, which is not at issue here. Respondents' "similarly situated" fixation is thus misplaced. See Opp.11 n.4, 18, 26-27, 29.

Moreover, this is true regardless of whether New York explicitly and intentionally singled out independent bodies for disfavored treatment. All that matters is that the effect of New York's campaign finance laws is that independent bodies and their candidates are disadvantaged vis-à-vis political parties competing in the same races.

**2.** Because independent bodies compete with political parties, New York's special treatment for political parties imposes restrictions on certain disfavored speakers—independent bodies—in violation of the First Amendment.

Without citing any authority, Respondents manufacture a new rule claiming that this Court has limited First Amendment campaign finance harms to "cap" or "penalty" theories. This Court has done no such thing. Knowing how dubious that claim is, Respondents promptly contradict themselves, noting that this Court

"arguably recognized an inequality-based theory of First Amendment harm" where "the imposition of restrictions on certain disfavored speakers violates the First Amendment." Opp.25-26. It is Respondents, not Petitioners, that push a novel theory: That inequality-based harms only have purchase in the context of a "total ban." Opp.26. The First Amendment makes no such granular, arbitrary distinctions. Rather, Respondents *are* correct that this Court has recognized inequality-based harms on the fairly basic premise that a government's disfavoring of political speech implicates the First Amendment. See *Citizens United v. FEC*, 558 U.S. 310, 341 (2010).

Courts have acknowledged that an incumbent-protectionist program via campaign finance regulation implicates the First Amendment. Restrictions on political speech may well be "an effort to insulate legislators from effective electoral challenge." *Ted Cruz for Senate*, 596 U.S. at 313 (quotation marks omitted and cleaned up). Then-Judge Gorsuch in *Riddle* expressly denounced Colorado's asymmetrical contribution limit regime as "something distinct, different, and more problematic" where "government *selectively* infringes on a fundamental right." 742 F.3d at 932 (Gorsuch, J., concurring) (emphasis in original). The unequal treatment arose from "a bald desire to help major party candidates at the expense of minor party candidates." *Id*. at 933. Thence flows the reality that this Court has "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Davis*, 554 U.S. at 738. The entire thrust of *Davis* is that asymmetry among competitors is a First Amendment problem. It is no "novel" theory that unequal treatment of political speakers is a First Amendment issue.

Here, New York's campaign finance laws benefit political parties and disfavor independent bodies. New York has explicitly chosen to give political parties a distinct advantage: Unlike others—including those like independent bodies that compete with political parties—political parties may use unlimited contributions-and-transfers to functionally have no contribution limits on their candidates. This conferred benefit serves as the basis for Petitioners' First Amendment harm. This asymmetric system has created inequality among speakers attempting to compete in the same political elections. These are basic First Amendment concepts, yet Respondents assert that the First Amendment is not implicated *at all*.

**3.** With the First Amendment implicated, the quantum of evidence needed to justify the asymmetrical limits under *Cruz* is not met here.

Respondents double down on New York's expert hypotheticals about corruption risk, stating flatly that the expert reports' fears are enough to clear this Court's threshold requirements. Opp.13. But even the expert reports were fatally flawed. For example, one expert, like the expert in *Cruz*, failed to distinguish between quid pro quo corruption and mere political influence. See Pet.App.178a (Wilcox Report) (citing concerns about "special access for and influence by large donors"); Pet.App.182a (citing concerns that Senators may "adopt [donors'] position" on legislation). The Eighth Circuit has correctly held that an expert report (itself criticizing the approach of the "Supreme Court led by Chief Justice John Roberts") that fails to give "real-world examples of corruption" is insufficient for *Cruz* purposes. *Miller v. Ziegler*, 109 F.4th 1045, 1050–51 (8th Cir. 2024). This case is no different; New York has not presented any real-world examples.

Rather, they present merely an expert who does not even know this Court's current law on corruption in the First Amendment, just like the expert in *Miller* and *Cruz*. *Ted Cruz for Senate*, 596 U.S. at 307–08 (faulting media reports about increased access, a poll that the FEC commissioned, and a scholarly article for failing to distinguish between access/influence on the one hand and true quid pro quo corruption on the other).

Similarly unconvincing is Respondents' defense of common sense. Opp.13-14. Petitioners never stated that the First Amendment categorically bars judges from exercising common sense when evaluating campaign finance restrictions. Rather, judicial common sense *must* be rooted in *actual evidence*, not just mere conjecture. See, e.g., *McCutcheon v. FEC*, 572 U.S. 185, 212–13, 217 (2014) (plurality op.) (using common sense to reject hypothetical "100-PAC" scenario in part because the risk was purely conjectural and the FEC had not provided "any real-world examples of circumvention of the base limits along the lines of the various hypotheticals").

One way to conceptualize this is that, if "common sense" fears about corruption are a major premise, then there must be a minor premise of *actual evidence of corruption* before a government can draw the conclusion that restrictions on political speech are necessary. The Second Circuit, in essence, did the following:

i. It is common sense that there is a higher risk of corruption of independent bodies than political parties.

ii. The State proffered an expert's hypothetical that independent bodies can be used as alter egos.

iii. Therefore, New York may disadvantage independent bodies in relation to political parties in the same elections.

Petitioners' contrary position is that common sense, combined only with the post hoc and conclusory hypotheticals of the State's expert (which did not adhere to this Court's definition of corruption), is simply not enough to restrict First Amendment rights. This is the position of the Sixth, Eighth, and Ninth Circuits. Pet.App.18-20. In contrast, the Second Circuit reached an erroneous conclusion.

Furthermore, the meager evidence presented in support of the restriction supported regulation of the political parties, which are the beneficiaries of the restriction. New York's historical concern prompting the laws at issue here was the "years-long investigation by the New York State Commission on Government Integrity into the historically corrupt *major* political parties." Pet.App.32a-33a. In other words, as a matter of legislative fact, the *only* corruption identified was that of political parties, not independent bodies, which Respondents concede by averring that New York did not consider independent bodies in shaping the regulation. Opp.12. Yet Respondents now wish to justify the hamstringing of independent bodies by using alleged evidence of corruption in the major political parties. Such a perverse result cannot possibly justify restrictions on fundamental constitutional rights.

**4.** Respondents fail to explain away the *Upstate Jobs Party-Riddle* circuit split. *First*, the fact that *Riddle* was an Equal Protection Clause case is a red herring; as noted (Pet.22 n.3), *Riddle* struck down asymmetrical limits under closely drawn scrutiny while the Second Circuit upheld materially indistinguishable asymmetrical limits under closely drawn scrutiny, rendering the

distinction of Amendments without a difference. *Second*, as noted above at p.3, whether the parties are "similarly situated" for Equal Protection Clause purposes is immaterial to the split between the Second and the Tenth Circuits. The question is whether the government is justified, through anticorruption interests about upstart parties, in creating asymmetrical contribution limits for candidates and parties competing in the same races. One circuit has answered yes, the other no.

* * *

No party is arguing that New York, like Congress, is prohibited under the First Amendment from passing proactive and prophylactic campaign finance laws. Contra Opp.20. But when it comes to burdening First Amendment rights, as here, such laws *must* be backed by at least some real evidence of quid pro quo corruption. The Second Circuit—along with the Fifth Circuit—has flouted this Court's threshold requirement in *Cruz* and instead opted to follow the Eighth Circuit's precedent in *Miller v. Ziegler*. This Court should correct the Second Circuit.

## II. This case is an ideal vehicle to resolve pressing First Amendment issues.

Respondents have failed to rebut the Petitioners' assessment that this case was decided on final summary judgment, features no factual disputes, and presents straightforward and pressing facial First Amendment challenges to campaign finance rules.

Rather, Respondents raise illusory vehicle problems: (1) Petitioners' claims do not implicate the First Amendment; (2) different future petitioners could bring a different as-applied challenge to the same laws; (3) it would be inappropriate for this Court to

decide Petitioners' arguments on "appearance"; and (4) the case rests on "mistaken premises."

All four theories are either wrong or irrelevant.

**1.** As stated above, Respondents' "cap or penalty" exclusivity rule is made up out of whole cloth, and this Court and other courts have established that selective infringement of First Amendment rights in campaign finance is a First Amendment harm.

**2.** The fact that future plaintiffs may bring as-applied challenges to New York's restrictions is true—yet totally irrelevant. This is a facial challenge, per the Second Circuit. Pet.App.16a. Respondents' argument is self-defeating. *This* Petition features a facial First Amendment challenge with no factual disputes. That is a *far* cleaner vehicle than some hypothetical future as-applied challenge.

Further, Respondents' assertion that Petitioners may not challenge a statute merely because the Petitioners are not explicitly named in that statute is patently erroneous.

Yet another bizarre, inescapable implication of Respondents' theory is that First Amendment rights are dependent upon the level of sophistication of certain plaintiffs. See Opp.26-27.

These arguments are illogical. Either New York had sufficient evidence to draw its distinctions between major political parties and independent bodies, or it did not. That is what this Petition and facial challenge is about, and the particular nature of the Upstate Jobs Party is irrelevant to that.

**3.** This Court is well within its rights to consider whether attempting to prevent merely the appearance of quid pro quo corruption is a sufficient justification

for infringing on First Amendment political speech rights. Petitioners are not shying away from their argument: Petitioners respectfully request that this Court modify its precedents and recognize that attempting to stop the "appearance of quid pro quo corruption" is not a valid reason for curtailing First Amendment political speech. The Second Circuit was right at least as to the fact that *right now*, targeting the "appearance of quid pro quo corruption" remains a valid reason, per this Court's most recent recital. See *Ted Cruz for Senate*, 596 U.S. at 305 ("This Court has recognized only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance."). That can mean only one thing: This Court, and this Court alone, can change that. *Mallory v. Norfolk S. Ry.*, 600 U.S. 122, 136 (2023) (Circuit courts should "leav[e] to this Court the prerogative of overruling its own decisions") (internal quotations and citation omitted).

It is this Court's routine to consider questions only it can answer—like overturning or modifying its own precedent—even when that issue was not raised at the circuit court level. See, e.g., *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 384 (2024) (considering and crediting Petitioners' arguments to overrule *Chevron* decision even though Petitioners had not pressed the argument at the D.C. Circuit).

It would have been futile, indeed even arguably frivolous, for Petitioners to have asked the Second Circuit to remove the "appearance" justification of its own initiative. Instead, Petitioners have consistently maintained that New York has failed to justify its campaign finance laws under the First Amendment, enough to press this argument on appearance now. See, e.g., *Citizens United*, 558 U.S. at 331 ("Citizens

United's argument that *Austin* should be overruled is not a new claim. Rather, it is—at most—a new argument to support what has been a consistent claim: that the FEC did not accord Citizens United the rights it was obliged to provide by the First Amendment.") (cleaned up).

**4.** Last, as noted above, the Petition is not premised on "fiction." To the contrary, Respondents' protestations notwithstanding, the Second Circuit itself accepted that premise.

Here is what Respondents label the "false premise":

the "special problem" addressed by the challenged campaign-finance laws is that "independent bodies pose a greater risk of corruption necessitating lower contribution limits." (Pet. 15; *see also, e.g.*, Pet. ii.)

Here are the Second Circuit's premises from its own decision:

- "New York has sufficiently demonstrated that its interest in anticorruption motivates the distinct contribution limits for parties and independent bodies." Pet.App.27a.
- "[T]he State Board has provided a straightforward and well-recognized justification for New York's distinct contribution limits for political parties and independent bodies: in the absence of these limits, donors could bestow large contributions on concentrated independent bodies serving as the alter ego of a single candidate." Pet.App.32a.
- "In sum, the State Board has demonstrated that asymmetry in New York's contribution limitations is supported by a sufficiently important

state interest in combatting actual and apparent *quid pro quo* corruption." Pet.App.33a.

In the end, it is the Second Circuit's decision that has crafted this Petition into an excellent vehicle for this Court to review New York's asymmetrical political speech restrictions as a facial challenge under the First Amendment.

## CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

SHAWN T. SHEEHY
*Counsel of Record*
JASON B. TORCHINSKY
JONATHAN P. LIENHARD
EDWARD M. WENGER
CALEB ACKER
OLIVER ROBERTS
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
2300 N Street, NW
Suite 643
Washington, DC 20037
(202) 737-8808
ssheehy@holtzmanvogel.com

*Counsel for Petitioners*

February 3, 2025