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MEMORANDUM

To: The Moreland Commission to Investigate Public Corruption
From: Brennan Center for Justice
Date: November 1, 2013
Re: December Recommendations

Co-chairs Fitzpatrick, Rice, and Williams, and members and staff of the Commission, the Brennan Center for Justice at NYU School of Law submits this memorandum to reiterate our gratitude for your service and our message that reforming the campaign finance system in New York is necessary to change the corrupt culture in Albany.

Over the last several months, the Commission has been presented with an array of potential reforms to cure Albany's ills. Many of these recommendations have been focused on ways to increase prosecutions and penalties for corrupt acts that are currently illegal, including the elimination of state pensions for those who have been convicted of such illegal acts. While a good number of these reforms have merit and should be adopted, comprehensive reformation of the state's campaign finance laws is the single most important recommendation that the Commission can make and we respectfully submit that it should be prioritized by the commission when it issues its preliminary recommendations on December 1.

Albany Needs Systemic Reform

If recent history in Albany has shown anything, it is that closing loopholes and increasing penalties in response to specific scandals — while certainly necessary — too often merely results in incumbent politicians finding new loopholes to exploit, laws to break, and other ways to unfairly favor the small group of special interests that dominate the state's campaign finance system.¹ Each scandal in Albany over the last decade has been

¹ In the past 10 years, the legislature has adopted various laws that increased penalties for violations of conflict of interest laws, election laws and other felonies, while also closing loopholes that had previously been abused by legislators, lobbyists and big campaign donors. *See* Press Release, New York State Governor, Governor Cuomo Signs Ethics Reform Legislation, (Aug. 15, 2013), <http://www.governor.ny.gov/press/08152011EthicsReformLegislation>; Michael Cooper, *Budget Reform Pact Augurs a More Transparent Albany*, N.Y. TIMES, Jan. 17, 2007, available at <http://www.nytimes.com/2007/01/17/nyregion/17budget.html>; N.Y. STATE FIN. LAW § 139(j)-(k) (Procurement Lobbying Law signed by Governor Pataki in 2005).

different, but all have come down to politicians forgetting that they are public servants, elected to represent their constituents above all else.

As United States Attorneys Preet Bharara and Loretta Lynch explained to the Commission in September, no matter how many tools prosecutors are given to hold corrupt politicians accountable, the state will never be able to prosecute its way out of a corrupt culture.² Systemic change can only be achieved by ending lawmakers' financial reliance on a small number of special interests, and by giving more New Yorkers a stake in state politics. Most importantly, this means creation of a small donor matching system that lowers contributions, increases disclosure and transparency, and ensures independent and robust enforcement of the state's campaign finance laws.³

As Long As Money Drives Policy in Albany, the Capitol's Corrupt Culture Will Persist

Reforming the state's campaign finance system is vital to bringing about *systemic change* to Albany. Most importantly, as has been amply shown in hearings before the Commission, money drives policy in Albany, often to the detriment of the public.⁴ As the Brennan Center and others pointed out in their testimony to the Commission, much of the corruption in Albany is *perfectly legal* — from earmarks aimed at big donors to retroactive tax breaks benefitting few, a quick glance at the legislative agenda confirms that the government favors its financial backers.⁵ While big money will exert disproportionate influence in nearly any political system, public financing with a small donor match substantially limits the potential of such money to corrupt the system. What the Feerick Commission wrote in 1990 is just as true today: “public funding strengthens the relationship between candidates and the public they represent, and will allay the cynical belief that current campaign fund-raising practices are a form of ‘legalized bribery.’”⁶ That is because it fundamentally changes the relationship between candidates and their donors: most money is raised not from a few special interests, but from small donations from constituents. As the Feerick Commission put it, “Public funding would make the citizens of New York the special interest of every candidate.”⁷

² Testimony of Preet Bharara, submitted to The Moreland Commission to Investigate Public Corruption (Sept. 17, 2013); Testimony of Loretta E. Lynch, submitted to The Moreland Commission to Investigate Public Corruption (Sept. 17, 2013).

³ See *Fair Elections For New York: Policies Necessary for Real Reform* THE BRENNAN CENTER FOR JUSTICE, <http://www.brennancenter.org/sites/default/files/analysis/FairElectionsPolicies2.pdf>

⁴ Testimony of Karen Scharff, Citizen Action of N.Y., submitted to The Moreland Commission to Investigate Public Corruption (Oct. 28, 2013) (“Our campaign finance laws are so weak that even if we have enforcement, we still have a system that creates a pay-to-play culture.”); Testimony of Bill Mahoney, N.Y. Pub. Interest Research Grp., submitted to The Moreland Commission to Investigate Public Corruption (Oct. 28, 2013); Testimony of Dick Dadey, Citizens Union of the City of N.Y., submitted to The Moreland Commission to Investigate Public Corruption (Sept. 24, 2013).

⁵ Testimony of Lawrence D. Norden, submitted to The Moreland Commission to Investigate Public Corruption (Oct. 28, 2013) at 1-3 & App. A.

⁶ N.Y. State Comm'n on Gov't Integrity, *Restoring the Public Trust: A Blueprint for Government Integrity*, 18 FORDHAM URB. L. J. 173, 181 (1990), available at <http://ir.lawnet.fordham.edu/ulj/vol18/iss2/3>.

⁷ *Id.* at 213

Comprehensive Campaign Finance Reform Has A Proven Track Record

This is no longer mere speculation. In both Connecticut and New York City, public financing systems similar to the one we propose have changed the political culture. Chris Donovan, the former Speaker of the Connecticut House of Representatives, explained that because of the public financing law, “there is less pressure because you don’t have to worry about offending potential special interest donors. You can just raise the money locally and then vote how you want to.”⁸ Former New York State Senator Jose Serrano, who once served on the City Council, has explained that under the state system, his campaign “started seeing more high-dollar fundraisers” because it could not get matching funds from local people, but the city’s match system “really made [] small donors very important.”⁹ Data provides support for these descriptions, showing that candidates using public funding are less reliant on corporations and special interest funding: as of late October, candidates running for New York City office in the November 2013 election had raised 93% of their contributions from individuals. In 2012, state candidates got 69% of their contributions from special interests and corporations.¹⁰

This appears to have had an impact not only on “legal” corruption discussed so extensively during the hearings,¹¹ but the kind of systemic, illegal corruption that previously overwhelmed these two jurisdictions. No political system will ever be free of political corruption, and New York City and Connecticut still have their share. Still, since public campaign financing became the law, New York City has not seen another corruption crisis remotely resembling that of the 1980s.¹² In Connecticut, a series of corruption scandals earned the state the shameful sobriquet of “Corrupticut.” But in the four years after reforms were implemented, the state has had the fewest federal convictions of any four consecutive years since federal officials started reporting this data.¹³

⁸ J. MIJIN CHA & MILES RAPOPORT, DEMOS, FRESH START: THE IMPACT OF PUBLIC FINANCING IN CONNECTICUT 14 (2013), *available at* http://www.demos.org/sites/default/files/publications/FreshStart_PublicFinancingCT_0.pdf.

⁹ ELISABETH GENN ET AL., BRENNAN CENTER FOR JUSTICE & THE CAMPAIGN FINANCE INSTITUTE, DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS 6 (2012), http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

¹⁰ Testimony of Amy Loprest, N.Y.C. Campaign Fin. Bd., submitted to The Moreland Commission to Investigate Public Corruption (Oct. 28, 2013) at 4.

¹¹ Michelle Breidenbach, *On Moreland Commission, Fitzpatrick’s Reaction is Often, ‘You’ve got to be kidding me. This is legal?’*, THE POST-STANDARD, Oct. 22, 2013, *available at* http://www.syracuse.com/news/index.ssf/2013/10/fitzpatrick_moreland_commission.html.

¹² Testimony of Lawrence D. Norden submitted to the New York Senate Standing Committee on Elections (May 7, 2013) at 2.

¹³ U.S. DEP’T OF JUSTICE PUBLIC INTEGRITY SECTION, REPORTS TO CONGRESS 26-33 (1976 – 2011), *available at* <http://www.justice.gov/criminal/pin>.

Public Financing Increases Competition, Which is Essential to Fighting Corruption

Experience also shows that public financing systems increase electoral competition, something that New York sorely needs. When scandal-plagued politicians such as Vito Lopez can be reelected because they do not face serious opposition, reform is needed to make challenges more feasible and allow New Yorkers real choice at the ballot box.¹⁴ Public financing systems in Arizona, Maine, Connecticut and New York City have all been shown to result in more competitive elections.¹⁵ Because they provide candidates with a way to win without relying on big money and the political machines, public financing systems encourage candidates to challenge politicians they might not otherwise oppose.¹⁶ If the state adopts public financing, voters will be provided more options, especially from potential candidates that are currently discouraged from running by the campaign war chests so many in Albany have amassed.

Small Donor Public Financing Depends Upon and Strengthens Independent Enforcement

As was made clear at the Commission's October 28 hearing, New York's system of campaign finance enforcement is woefully inadequate.¹⁷ While any proposed law should create a new state agency to enforce campaign finance rules, creation of a public financing system will also ease the enforcement burden and encourage candidates to comply with the law. Candidates that depend on public money disbursements to operate their campaigns will be much more likely to adhere to reporting requirements and contribution limitations when they face the threat of losing those disbursements if they

¹⁴ In 2012, Lopez faced no primary challenger and easily defeated his Republican opponent despite having been censured by the Assembly for sexual harassment. See Edgar Sandoval and Reuven Blau, *Disgraced State Assemblyman Vito Lopez wins Re-election despite Sex Scandal*, N.Y. DAILY NEWS, Nov. 7, 2012, available at <http://www.nydailynews.com/news/politics/disgraced-politician-vito-lopez-wins-sex-scandal-article-1.1197864>. After resigning from the Assembly, Lopez ran for a seat on the City Council in 2013 but was defeated. See Joseph Berger, *Disgraced Assemblyman Loses Bid for Council Seat*, N.Y. TIMES, Sept. 10, 2013, available at <http://www.nytimes.com/2013/09/11/nyregion/disgraced-assemblyman-loses-bid-for-council-seat.html>.

¹⁵ Testimony of Conn. Deputy Secretary of State James Spallone, submitted to The Moreland Commission to Investigate Public Corruption (Oct. 28, 2013) at 7; Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 ST. POLS. & POL'Y Q. 263, 263 (2008); Kenneth R. Mayer, Timothy Werner & Amanda Williams, *Do Public Funding Program Enhance Electoral Competition?*, in THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 245 (Michael P. McDonald & John Samples eds., 2006); CITIZENS UNION OF THE CITY OF N.Y., FAIR ELECTION FOR NEW YORK STATE: HOW PUBLIC MATCHING CREATES GREATER VOTER CHOICE AND COMPETITION (2012), available at http://www.citizensunion.org/www/cu/site/hosting/Reports/CU_Report_FairElectionsforNY_11_19_2012.pdf.

¹⁶ J. MIJIN CHA & MILES RAPOPORT, DEMOS, FRESH START: THE IMPACT OF PUBLIC FINANCING IN CONNECTICUT 12 (2013); ANGELA MIGALLY & SUSAN LISS, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 19-20 (2010) (quoting candidates explaining increased competitiveness under public financing).

¹⁷ New York Public Interest Research Group has identified over 100,000 unenforced campaign finance violations over the last two years. See Testimony of Bill Mahoney, N.Y. Pub. Interest Research Grp., submitted to The Moreland Commission to Investigate Public Corruption (Oct. 28, 2013) at 1.

fail to comply. When candidates comply with the rules and expect others to do so as well, this in turn encourages participation in the public financing system.¹⁸

Testimony from the New York City Campaign Finance Board demonstrates that the agency is a model for a successful enforcement body. In New York City, the CFB “carries out a thorough audit of every campaign’s expenditures and contributions,” and candidates who cannot show that they used public funds for a qualified purpose must pay the city back.¹⁹ As a result of the CFB’s diligence, “candidates in New York City know that their campaign will be held to strict standards.”²⁰

Small Donor Public Financing Is the Only Proposed Reform That Can Reengage a Cynical Public

Recent scandals in Albany have seriously eroded New Yorkers trust in our state government. A small donor matching system can bring people into the system at a time when many may be inclined to withdraw from that system entirely. The experience in New York City shows this system is particularly effective in increasing participation and encouraging support from a broad base of voters, many of whom are new to the political system.²¹ Just as importantly, this is a change that is currently supported by a broad range of New Yorkers. Almost three-quarters of New Yorkers support comprehensive campaign finance reform that includes small-donor matching funds, including strong majorities across party affiliation, upstate and down.²² A Zogby poll of New York business leaders found that over 70 percent support the creation of a public financing system that gives citizens the incentive to give small dollar contributions.²³

We are under no illusion that it will be it will be easy to convince the legislature to adopt this change. Entrenched interests, particularly certain big donors and legislators, are likely to continue to oppose it.

At the same time, the opportunity to make this kind of systemic change has never been greater. The governor and other statewide leaders have championed it, as have good government groups and editorial boards from around the state.²⁴ In 2013, the legislature

¹⁸ Testimony of Amy Loprest, N.Y.C. Campaign Fin. Bd., submitted to The Moreland Commission to Investigate Public Corruption (Oct.28, 2013) at 5.

¹⁹ *Id.* at 5-6.

²⁰ *Id.* at 6.

²¹ ELISABETH GENN, MICHAEL MALBIN, SUNDEEP IYER & BRENDAN GLAVIN, DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS (2012),

http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

²² Global Strategy Group & Mercury, Polling Memo from May 6, 2013,

<http://fairelectionsny.org/posts/new-bipartisan-poll-new-york-voters-overwhelmingly-agree-campaign-finance-reform-is-key-to-ending-corruption/3421>.

²³ Zogby Analytics, Polling Memo from Oct. 19, 2013, <http://www.ced.org/reports/single/poll-new-york-business-leaders-overwhelmingly-support-reform-of-state-campa>.

²⁴ We have enclosed several recent editorials in this book.

felt so much pressure for systemic change that small donor public financing passed through the Assembly, and fell just two votes short in the Senate.²⁵ It is imperative that the Commission — which, after all, was established for the very purpose of shaking things up in Albany and forcing real change — use its special role to maintain and increase that pressure.

²⁵ Paul Blumenthal, *New York State Campaign Finance Reform Amendment Fails*, THE HUFFINGTON POST, July 21, 2013, available at http://www.huffingtonpost.com/2013/06/21/ny-campaign-finance-reform-fails_n_3476221.html.