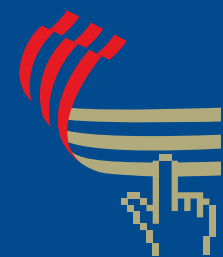


# EMPOWERING SMALL DONORS IN FEDERAL ELECTIONS

Adam Skaggs and Fred Wertheimer

BRENNAN  
CENTER  
FOR JUSTICE

*at New York University School of Law*



Democracy 21

## ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. Our work ranges from voting rights to campaign finance reform, from racial justice in criminal law to Constitutional protection in the fight against terrorism. A singular institution — part think tank, part public interest law firm, part advocacy group — the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector. The Brennan Center’s Money in Politics project works to reduce the real and perceived influence of special interest money on our democratic values.

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## **TABLE OF CONTENTS**

<b>Executive Summary</b>	<b>1</b>
<b>I. The Problem: Our Broken Campaign Finance System</b>	<b>3</b>
<b>II. The Impact of <i>Citizens United</i></b>	<b>5</b>
<b>III. A History of Public Financing of Federal Elections</b>	<b>8</b>
1. The Creation of Public Financing for Presidential Elections	9
2. Success of Presidential Public Financing	10
3. Congress Fails To Modernize the Presidential System	11
<b>IV. A 21st Century Solution: Empowering Small Donors with Public Matching Funds</b>	<b>13</b>
<b>V. Elements of a Small Donor Empowerment System for Congressional Races</b>	<b>16</b>
1. A 5-to-1 Match for Small In-State Contributions	16
2. Reduced Contribution Limits	17
3. A Cap on The Amount of Public Funds Candidates Can Receive, But No Limits on How Much They Can Raise or Spend	18
4. Qualifying Thresholds	18
5. Political Party Support	19
6. Effective Disclosure and Enforcement	19
7. An Adequate and Reliable Funding Stream	22
<b>Conclusion</b>	<b>23</b>
<b>Endnotes</b>	<b>25</b>



## EXECUTIVE SUMMARY

Our government is broken. Partisan gridlock and armies of special interest lobbyists prevent Congress from acting to solve the serious problems facing the nation. On the issues that matter most to Americans, Congress often does nothing. And when Congress does act, it is all too often on issues that favor narrow interest groups that funnel millions of dollars to elect our representatives.

The surge of unlimited, often secretive spending in the wake of *Citizens United*<sup>1</sup> threatens to make this situation even worse. Our money-drenched campaign finance system prevents Congress from working in the public interest. Moreover, as history has shown, unlimited and secret money in politics leads to scandal and corruption.

At the same time, recent years have seen the beginning of a far more positive trend: breakthroughs in the rise of small donors in presidential elections. Beginning a dozen years ago, and spurred on by Internet tools that make political giving easier, small donors began to play an important role in some presidential campaigns. Candidates from John McCain in 2000 and Howard Dean and John Kerry in 2004 to Ron Paul and Barack Obama in 2008 were lifted by small donors.<sup>2</sup>

But even as Obama raised unprecedented amounts of small donations in 2008, he still was raising substantial amounts in large gifts from traditional sources.<sup>3</sup> And Members of Congress continue to raise funds the traditional way, heavily from lobbyists and PACs.

There can be no doubt that small donors — of both major parties, of all ideologies, from all over the country — can play a new, positive role in our politics. Citizens must be engaged as an alternative source of funding to the role being played by influence-seeking donors.

The breakthroughs in small donor fundraising that have occurred in presidential campaigns demonstrate the potential that exists for greatly increasing the role of small contributions in federal elections by magnifying their importance with multiple matching funds. The future of campaign finance reform must include an effort to bolster the power of small donors by amplifying their political voice. Congress can do that by adopting a small donor empowerment program for federal elections.

A system in which small donations to federal candidates are matched with public funds at a multiple ratio would increase the importance of small donations and increase the incentive for a broader base of voters to participate in funding elections. Such a system could transform political candidates into agents of civic participation who focus on mobilizing their constituents, instead of lining up special interest fundraisers.<sup>4</sup> Financial involvement in elections, even in small amounts, serves as a “gateway” to other forms of engagement in the political process — like displaying lawn signs, volunteering for campaigns, canvassing voters, and passing out campaign literature — and studies show that small donors are more likely to engage in this kind of participation.<sup>5</sup>

The system would be strictly voluntary: candidates could opt to participate — and thus to be eligible for public matching funds — in exchange for agreeing to lower contribution limits, limits on the use of their personal wealth, and new reporting requirements. Other candidates could choose to forgo public funds and continue to finance their campaigns in the traditional manner.

The digital age we live in holds great promise for magnifying the role and importance of small donors. Technological breakthroughs in raising and giving small donations through the Internet and social media in combination with a system of multiple matching funds for small contributions could have a revolutionary impact in the way campaigns are financed in our country.

While the transformative power of a small donor matching program would be profound, the design of such a system is comparatively simple. The following components are derived from years of experience with, and analysis of, public funding systems — including the highly successful program developed in New York City.<sup>6</sup> This proposal contemplates a small donor matching program that would be available for primary and general election campaigns, and would include the following elements as the core of a small donor empowerment program to fix federal elections:

- ***A 5-to-1 match*** on in-state contributions up to \$250. Donors could give larger contributions, but only the first \$250 would be matched. A \$100 donation would yield an additional \$500 in matching funds; a \$250 donation would yield an additional \$1,250 in matching funds.
- ***Reducing contribution limits by half*** for participating candidates. The existing limit of \$2,500 per individual contributor (per election) would continue to apply to candidates who chose not to participate in the small donor matching program. For candidates who did participate, the maximum individual contribution would be reduced by 50 percent, to \$1,250 per election.
- ***A cap on public funds*** available per race — \$2 million for a House candidate and \$10 million for a Senate candidate — ***but no expenditure limits for candidates***. Spending limits are not viable in the post *Citizens United* world of outside spending groups. Subject to the cap, the amount of public funds a candidate received would depend on the number of small donations the candidate raised. Even after receiving the maximum public funds, candidates would be able to raise (and spend) additional funds privately — subject to the contribution limits applicable to participating candidates.
- ***A qualifying threshold*** to ensure that public funds were not disbursed to uncompetitive or marginal candidates. Before becoming eligible for public funds, House candidates would need to raise \$40,000 from at least 400 donors, and Senate candidates would need to raise the same amounts times the number of congressional districts in their states. These contributions would need to be in amounts of \$250 or less per donor from in-state residents.
- ***Unlimited coordinated party expenditures in support of candidates***, but only from funds the parties raised from contributions limited to no more than \$1,250 per donor per year. This would strengthen the ability to respond to outside spending groups.
- ***Effective disclosure and enforcement*** to ensure the program was effectively and efficiently administered, and to ensure that the program is not defrauded.
- ***An adequate and reliable funding stream*** to ensure sufficient matching funds and guarantee that the program remains solvent.



## I. THE PROBLEM: OUR BROKEN CAMPAIGN FINANCE SYSTEM

Our campaign finance system does not serve the interests of the American people.

The system's danger to our democracy was captured by former House Member Leon Panetta, one of the nation's most experienced and respected public officials:

“Legalized bribery has become part of the culture of how this place operates,” Panetta said on a visit to Washington. Today's members of the House and Senate “rarely legislate; they basically follow the money. . . . They're spending more and more time dialing for dollars. . . . The only place they have to turn is the lobbyists. Members have a whole list of names in their pockets at all times, and they just keep dialing. It has become an addiction that they can't break.”<sup>7</sup>

The challenges associated with financing contemporary campaigns have multiplied as the sheer cost of campaigns has risen exponentially. The total spent by all congressional candidates rose from \$77 million in 1974 to \$1.8 billion in 2010 — an increase of \$1.7 billion, more than five times the rate of inflation.<sup>8</sup> Rising costs lead to a fundraising arms race, which in turn consumes an ever larger amount of lawmakers' time. Congressional sessions are now truncated because of the imperatives of fundraising; a quorum might be found more easily among the telephone carrels at party fundraising offices, where lawmakers congregate between votes, than on the floor of the House or Senate.

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**The current campaign finance system compels members of Congress to focus their fundraising on a tiny slice of the American electorate.**

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Less visibly, but more disturbingly, the current campaign finance system compels members of Congress to focus their fundraising on a tiny slice of the American electorate. George Washington University Law Professor Spencer Overton explained:

While 64% of eligible Americans voted in the November 2008 election, less than 0.5% are responsible for the bulk of the money that politicians collect[ed] from individual contributors.<sup>9</sup> [In 2004] Individuals with family incomes over \$100,000 represented 11% of the population . . . and cast 14.9% of the votes, but such individuals were responsible for approximately 80% of itemized political contributions.<sup>10</sup>

This dynamic has been consistent throughout recent years. In the 2010 election, more than two-thirds of all federal campaign dollars came from about one quarter of one percent of the public.<sup>11</sup>

The same pattern applies across both House and Senate races. During the 2008 election, House candidates received only eight percent of their funds from donors who contributed \$200 or less — while they received 35 percent from donors who gave \$1,000 or more, and another 36 percent from PACs. Donors of \$200 or less were responsible for only 14 percent of the funds raised by candidates for the Senate; contributors who gave \$1,000 or more, by contrast, accounted for two of every five dollars raised.<sup>12</sup>

These gifts come from Park Avenue, not Main Street — literally. According to the bipartisan Americans for Campaign Reform, for example, residents of Manhattan’s Upper East Side donated \$72 million in itemized contributions in 2008 — more than the total itemized contributions given from 39 entire states.<sup>13</sup> In addition to wealthy individuals, members of Congress turn to lobbyists and other influence-seekers for a huge amount of their political fundraising.

Because Congress disproportionately relies on a tiny class of wealthy donors and lobbyists, and because these groups have exponentially greater access and influence than average voters, it is not surprising that public cynicism about government has risen to extraordinary heights. As the 2012 election cycle kicked into high gear, an ABC News/Washington Post poll found that just 13 percent of Americans approved of the way Congress is handling its job, while 84 percent disapproved — the worst rating in that poll since 1974.<sup>14</sup> Sixty-five percent of respondents to the poll reported disapproving “‘strongly,’ a vast level of high-intensity criticism.”<sup>15</sup> In Gallup’s most recent annual survey of confidence in institutions, Congress ranked dead last — with a 12 percent approval rating — behind institutions like big business, banks, organized labor, and the public schools.<sup>16</sup>

Public disquiet is driven by the perception, held by huge majorities of voters, that elected officials serve the interests of big donors, not the public interest. A CNN/Opinion Research Poll in June 2011 found that 86 percent of the public “thinks elected officials in the nation’s capital are mostly influenced by the pressure they receive from campaign contributors.”<sup>17</sup> A 2012 Opinion Research Corporation poll found that more than three in four Americans — 77 percent — agreed that members of Congress are more likely to act in the interest of a group that spent millions of dollars to elect them than to act in the public interest.<sup>18</sup> And approximately three in five Americans believe that “political donors get more than their money back in terms of favors from members of Congress,”<sup>19</sup> and that “the middle class will not catch a break . . . until we reduce the influence of lobbyists, big banks, and big donors.”<sup>20</sup>

According to a poll taken in July 2012, reducing corruption in the federal government is viewed by the public as the second highest priority for the next president — only job creation is seen as more important.<sup>21</sup>

These public concerns must be addressed “if confidence in the system of representative Government is not to be eroded to a disastrous extent.”<sup>22</sup> And this must be done within a campaign finance landscape that the Supreme Court has radically reshaped — by permitting unlimited corporate expenditures and undermining the contribution limits that have long been at the heart of our campaign finance system.

## II. THE IMPACT OF *CITIZENS UNITED*

On January 21, 2010, a sharply divided Supreme Court dramatically altered the landscape of American politics by handing down its decision in *Citizens United v. Federal Election Commission*.<sup>23</sup> The decision has wreaked havoc on our political system.

In striking down the ban on corporate campaign expenditures in federal elections, the Court overturned decades of its own precedent and a national policy to keep corporate funds out of federal elections — a policy that began more than a century earlier in response to the Robber Baron era. The Supreme Court held that as long as corporate campaign expenditures were made independently from the candidate being supported, the expenditures could not have a corrupting influence on the candidate and therefore could not be limited.<sup>24</sup>

Justice Anthony Kennedy, writing for the majority, went much further, however, in an unprecedented and little noted statement:

Limits on independent expenditures, such as [the ban on corporate expenditures] have a chilling effect extending well beyond the Government's interest in preventing quid pro quo corruption. The anticorruption interest is not sufficient to displace the speech here in question.<sup>25</sup>

In essence, Justice Kennedy asserted that the need of the nation to protect itself from the corruption of our democracy is trumped by the constitutional right of a corporation to make expenditures to influence elections.<sup>26</sup>

The *Citizens United* decision, followed by a D.C. Circuit Court of Appeals decision in *SpeechNow v. Federal Election Commission*<sup>27</sup> which was explicitly based on *Citizens United*, unleashed Super PACs and unlimited contributions in federal elections. The decision, in combination with flawed FEC regulations, also unleashed secret contributions in federal elections, injected through campaign expenditures made by non-profit 501(c) “social welfare” groups and business associations.<sup>28</sup>

Super PACs, which did not exist before *Citizens United*, are now playing a major role in our elections, funded by six, seven, and even eight-figure contributions. They raise and spend unlimited contributions from wealthy individuals, corporations, labor unions, and others. Their contributions and expenditures are required to be disclosed and their expenditures are supposed to be made independently from the candidates they are supporting.

As of July 2012, the top 65 donors to Super PACs had given \$143 million, or 67 percent, of the total individual contributions given to all Super PACs, at an average of \$2.2 million per donor, according to the Center for Responsive Politics. These 65 donors represented just one percent of the itemized donors to Super PACs.

As of July 2012, 33 billionaires had given contributions to Restore Our Future, the candidate-specific Super PAC supporting presidential candidate Mitt Romney. This included contributions ranging from \$50,000 to \$10 million.

Candidate-specific Super PACs are a particularly virulent form of Super PACs. They are simply vehicles for donors and candidates to circumvent and eviscerate the \$2,500 per election limit on the amount an individual can give to a federal candidate — a limit enacted by Congress in 1974 as an essential bulwark against government corruption.

In addition to Romney, all of the major Republican presidential primary candidates in 2012 had Super PACs supporting them. President Obama also has a Super PAC, Priorities USA Action, supporting his campaign.

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Candidate-specific Super PACs support only one candidate and function as *de facto* arms of the campaigns they support. They are run by former close political associates of the candidate and raise and spend unlimited contributions to support only that candidate. Campaign aides and political associates of the candidate — and sometimes the candidate himself — appear at events held to raise contributions for the Super PAC.

Six, seven, and eight-figure unlimited contributions to candidate-specific Super PACs directly benefit the candidate just as if the contributions were given directly to the candidate. And when a donor makes a \$10 million contribution to a candidate-specific Super PAC, it can buy the donor \$10 million worth of influence with the candidate supported by the Super PAC.

The Supreme Court said in *Buckley v. Valeo* that limits on contributions to candidates are constitutional because they are necessary to deal with the “reality or appearance of corruption inherent in a system permitting unlimited financial contributions.”<sup>29</sup> The *inherently corrupt* system of unlimited contributions envisioned by the Court is facing us with the advent of Super PACs.

The kind of candidate-specific Super PACs influencing the 2012 presidential election, however, can be eliminated by enacting new statutory requirements that would make clear that such Super PACs are engaged in prohibited coordinated expenditures with the candidates they are supporting.<sup>30</sup>

Tax-exempt, non-profit groups compound the problem of unlimited money being spent to influence federal elections by adding another threat to our democracy: secret money. Following *Citizens United*, non-profit groups spent more than \$135 million in secret contributions to influence the 2010 congressional elections.<sup>31</sup> This amount is expected to greatly increase in the 2012 presidential and congressional races.

One such group, Crossroads GPS, as of December 2011 had received 24 contributions of \$1 million or more each, totaling \$67 million, from donors whose identities have been kept secret from the American people. This included two \$10 million contributions from unidentified donors.<sup>32</sup> There is no way to know what these secret donors may be seeking from elected officials, or what they may receive in government favors in return for their contributions.<sup>33</sup>

The *Citizens United* decision is in the process of returning us to the system of legalized bribery that existed prior to the Watergate scandals. One of the nation's leading conservative judges, Judge Richard Posner of the Seventh Circuit Court of Appeals, aptly captured the damaging impact of *Citizens United* when he stated: "Our political system is pervasively corrupt due to our Supreme Court taking away campaign-contribution restrictions on the basis of the First Amendment."<sup>34</sup>

Given the Supreme Court's decision in *Citizens United*, it is not possible to stop outside groups from spending unlimited amounts of unlimited contributions as long as the expenditures are really made independently from the candidates they are supporting. What can be done, however, is to empower citizens to play a central role in financing our elections and thereby to serve as a powerful counterforce to the corrupting influence of unlimited contributions, secret money, corporate spenders, and other influence-seeking special interests.

In order to accomplish this goal we need both to repair the presidential public financing system and to create a new public financing system for congressional races. These systems should be based on matching smaller contributions with public funds on a multiple ratio. This approach would greatly increase the role and importance of citizen donations in financing our elections, and concomitantly dilute the role and importance of influence-seeking money. It would provide candidates with an alternative way to run for office that does not place them on the auction block to the highest bidders.

### III. A HISTORY OF PUBLIC FINANCING OF FEDERAL ELECTIONS

As his second term neared its completion, President Theodore Roosevelt sent Congress his annual address. The year was 1907. In his address, Roosevelt stated his worry regarding the need to prevent corporate contributions and the corruption that they would engender. Roosevelt declared, “The need for collecting large campaign funds would vanish if Congress provided an appropriation for the proper and legitimate expenses of each of the great national parties, an appropriation ample enough to meet the necessity for thorough organization and machinery, which requires a large expenditure of money.”<sup>35</sup> His proposed solution introduced the components of what would become the presidential public financing system.

Roosevelt’s proposal was more than a half century ahead of its time, but he proved to be prescient.

In 1949, Sen. Henry Cabot Lodge (R-Mass.) witnessed the selling of government positions to campaign donors. In response, he introduced a resolution to commission a study by the Committee on Rules and Administration to research the establishment of a public funding system for presidential campaigns. Lodge said, “All this talk of an ‘office market,’ and of putting high executive and diplomatic positions on the auction block — all of this breeding of suspicion and cynicism would disappear, I believe, overnight if the primary cause of evil were obliterated at its root . . . . If there are no bidders, there can be no auction.”<sup>36</sup>

No congressional action was taken on Lodge’s resolution.<sup>37</sup>

Roosevelt’s 1907 call for public financing of elections was invoked again in 1956 by Sen. Richard Neuberger (D-Ore.). Neuberger introduced legislation calling for direct public campaign subsidies for all major party candidates to federal office. He believed that “raising campaign funds from private sources hampered the integrity of the government and created an inequality in gaining access to voters by various candidates.”<sup>38</sup> Neuberger said, “An undemocratic element is introduced when one nominee can eclipse his opponent not because of superiority of ability or of his policies, but merely through a preponderance of coin of his realm.”<sup>39</sup>

In 1966, under the leadership of Sen. Russell Long (D-La.), Congress enacted the Presidential Campaign Fund Act, which provided public subsidies to major political parties for use in their presidential general election campaigns and created the tax check-off to fund the system. President Johnson signed the act into law on November 13, 1966.

The following year, however, the measure was put into a state of suspension — though not repealed — in an effort led by Senators Robert Kennedy (D-N.Y.), Albert Gore (D-Tenn.), and John Williams (R-Del.).<sup>40</sup> The effort by Senators Kennedy and Gore was fueled by internal party differences with President Johnson as the 1968 presidential election approached.

In 1971, with Senate Democrats again taking the lead, Congress revived the presidential public financing system that had been suspended in 1967. President Nixon only agreed to the new system after a limitation had been adopted to provide it would not be effective until the 1976 presidential election.<sup>41</sup> Then came Watergate.

Watergate constituted the worst campaign finance scandals of the 20th century, and involved widespread illegal and improper activities in President Nixon's re-election campaign.<sup>42</sup>

## 1. The Creation of Public Financing for Presidential Elections

In the wake of the Watergate scandals, Congress enacted the Federal Election Campaign Act Amendments of 1974, which created the presidential public financing system. The new system built on the 1966 law and established a public matching funds system for the presidential primaries and a fixed grant to pay for the general election.<sup>43</sup>

Congress also came close at that time to creating a system of public financing for congressional races. As part of the Watergate reform legislation, the Senate passed a public financing system for Senate races that mirrored the presidential public financing system. The House, however, by a vote of 228 to 187, defeated an amendment to create a public matching funds system for House general elections. The public financing system for Senate races was dropped in the House-Senate conference on the reform legislation enacted in 1974.<sup>44</sup>

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The presidential financing system was immediately challenged on constitutional grounds, but the Supreme Court in *Buckley v. Valeo* (1976) upheld the new funding system. The Court found that “Congress was legislating for the ‘general welfare’ — to reduce the deleterious influence of large contributions on our political process, to facilitate communications by candidates with the electorate, and to free candidates from the rigors of fundraising.”<sup>45</sup>

The Court also recognized that public financing is consistent with the First Amendment, saying that:

[Public financing] is a congressional effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the presidential system] furthers, not abridges, pertinent First Amendment values.<sup>46</sup>

The Court also accepted the concept that the government could attach conditions to the receipt of public funds, upholding the spending limits that candidates had to agree to in order to receive public financing.<sup>47</sup>

## 2. Success of Presidential Public Financing

For more than two decades, the presidential public financing system worked well for the country and for candidates.

The success of the presidential financing system was documented in 1986 by a study done by the bipartisan Commission on National Elections, which concluded, “Public financing of presidential elections has clearly proved its worth in opening up the process, reducing the influence of individuals and groups, and virtually ending corruption in presidential election finance.”<sup>48</sup>

Anthony Corrado, one of the nation’s leading campaign finance scholars, said in 2005 about the presidential public financing system, “At the time of its adoption, public funding was heralded as the most innovative change in federal campaign finance law in American history. It remains so to this day.”<sup>49</sup>

In 2006, Washington Post columnist E.J. Dionne wrote about the system:

Opponents of campaign finance reform love to claim that the money-in-politics problem is insoluble. But the public financing of presidential campaigns, instituted in response to the Watergate scandals of the early 1970s, was that rare reform that accomplished exactly what it was supposed to achieve.<sup>50</sup>

Every presidential election from 1976 to 2008 was financed at least in part with public funds.

Almost all of the major party candidates for president from 1976 through 2000 used the system to finance their primary campaigns. The main exception was Gov. George W. Bush in 2000.<sup>51</sup>

Every Republican presidential nominee from 1976 to 2008 used the presidential funding system to finance their general election campaigns. This included President Gerald Ford, President Ronald Reagan (twice), President George H.W. Bush, Sen. Bob Dole, President George W. Bush (twice), and Sen. John McCain. All but George W. Bush and Sen. McCain also used the system to finance their primary races.<sup>52</sup>

Similarly, every Democratic presidential nominee from 1976 to 2008, with the exception of President Barack Obama, used the system to finance their general election campaigns. This included President Jimmy Carter (twice), Vice President Walter Mondale, Gov. Michael Dukakis, President Bill Clinton (twice), Vice President Al Gore, and Sen. John Kerry. All but Kerry and President Obama also used the system to finance their primary races.<sup>53</sup>

With both using the presidential system, challengers beat incumbents in three of the six races involving incumbents. This represents a 50 percent rate of success for challengers over incumbents as compared to the 10 percent or less rate of success that challengers have in congressional races.<sup>54</sup>



No candidate benefitted from public financing more than Ronald Reagan. Using the system three times, he almost beat an incumbent president in the 1976 Republican presidential primary and then twice won the presidency in 1980 and 1984.

In 1976, the first year the public funding system was available to presidential candidates, Reagan had less than \$44,000 in campaign money in January during the Republican primary. His opponent, Gerald Ford, had more than 15 times that in cash on hand. The public funding Reagan received in January and February in 1976 proved crucial in helping to extend his primary campaign and allowing him to mount a competitive race that came very close to succeeding.<sup>55</sup>

President Reagan is the only candidate who received the maximum amount of public funds available for the primary and general elections.<sup>56</sup> To understand the dramatic difference that public financing made in the 1984 presidential race as compared with the 2012 presidential race, President Reagan *did not hold a single campaign fundraiser* for his 1984 presidential campaign.<sup>57</sup>

### **3. Congress Fails to Modernize the Presidential System**

The presidential public financing system broke down in recent years for several reasons.

First and foremost, Congress failed to take any steps from 1974 to the present to revise and modernize the system in response to the dramatic growth in the cost of campaigns. (Although the grant was indexed for inflation, the original grant was pegged at an amount less than that spent in 1972 by the unsuccessful George McGovern presidential campaign.) As a result, over time, the amount of public funds for candidates and the spending limits they voluntarily agreed to were increasingly dwarfed by the costs of running a modern presidential campaign.

Changes in the presidential nominating process also contributed to the weakening of the system, which assigned specific primary campaign spending ceilings for each state. The growth of the soft money system in the 1990s damaged the presidential public financing system as well. “Soft money” describes contributions that are not subject to federal contribution limits but that were raised and spent by political parties to influence federal elections.

Presidential candidates in the 1990s accepted public financing and spending limits to finance their campaigns, and then proceeded to also run parallel soft money campaigns using unlimited contributions that they raised for their national parties and that were spent to support the candidates. The soft money system became a means for presidential nominees to circumvent the contribution restrictions and spending limits they agreed to accept in return for receiving public funds to pay for their elections. In 2002 Congress ended the soft money system by enacting the Bipartisan Campaign Reform Act (BCRA). Sponsored by Senators John McCain (R-Ariz.) and Russ Feingold (D-Wis.), BCRA banned the national parties from raising or spending money that did not comply with federal contribution limits and prohibited federal officeholders and candidates from soliciting such funds.<sup>58</sup>

As a result of the problems with the political viability of the public financing system, serious candidates beginning in the 2000 campaign started to reject using the system. Gov. George W. Bush rejected public financing for his 2000 Republican presidential primary campaign, but used the system for his general election race. In 2004, Gov. Howard Dean, Sen. John Kerry, and President Bush rejected public financing for their presidential primary races, but Kerry and President Bush used the system for the general election.<sup>59</sup>

In 2008, Barack Obama announced that he would not participate in public financing for either his primary or general election presidential campaign. Obama became the first person elected president since Richard Nixon to fail to use public financing to pay for his general election campaign. The 2008 Republican nominee, Sen. John McCain, rejected public financing for his primary race, but used the system for his general election campaign.

The failure of President Obama to use the presidential public financing system sealed the fate of the system in its current form and ended its political viability. The presidential funding system had served the nation well for much of its existence, but it was now clear that the system had to be repaired and modernized to serve the country in the future.<sup>60</sup>

Legislation to repair the presidential public financing system was introduced in the current Congress by Reps. David Price (D-N.C.), Chris Van Hollen (D-Md.) and Walter Jones (R-NC) (H.R. 414). A companion bill was introduced in the Senate by Sen. Mark Udall (D-Colo.) (S. 3312).<sup>61</sup> The legislation is pending in Congress.

The legislation to fix the presidential public financing system is based on concepts similar to the proposal set forth below for financing congressional races. Together the proposals will allow small donors to effectively challenge and counter the role of influence-seeking money in federal elections.

## IV. A 21<sup>ST</sup> CENTURY SOLUTION: EMPOWERING SMALL DONORS WITH PUBLIC MATCHING FUNDS

“It is highly improbable that the question of campaign funds would ever have been raised in American politics if party contributions were habitually made by a large number of persons each giving a relatively small amount.”

— Robert Brooks, 1910<sup>62</sup>

A number of responses to money’s distorting influence on politics and government decisions over the years have aimed at driving influence-seeking money out of the system by restricting the amount of money that can be raised and spent in campaigns.<sup>63</sup> But, as has often been observed, money in politics is like water flowing downhill: it always seeks a way around any obstacles that have been erected. Moreover, the Supreme Court has reasoned that modern political communication is impossible without campaign funds, and therefore that restricting campaign expenditures is equivalent to limiting First Amendment speech.<sup>64</sup> Under this reasoning the Supreme Court has rejected as unconstitutional both limits on independent spending and limits on candidate spending (except as a condition of public financing), while upholding the constitutionality of restrictions on contributions to candidates and parties as necessary to prevent corruption.

The Supreme Court has also made clear that policies which *increase* the amount of political speech stand on solid constitutional ground.<sup>65</sup> The First Amendment operates to guarantee that debate on public issues is “uninhibited, robust, and wide-open,”<sup>66</sup> and policies that generate *more* speech are immune to constitutional attack — as long as they do not increase the speech of some at the expense of others.

For these practical and legal reasons, it is not possible to address the distorting effects of money in politics by restricting the wealthy from making campaign expenditures. Rather, we must find ways to unleash the voices of ordinary citizens. If we are concerned that money allows some speakers to monopolize political debate — enabling them to purchase the metaphorical loudspeaker to drown out those speaking on soapboxes — the solution lies in helping ordinary citizens amplify their own voices.

From 1987 through 1994 numerous bills were considered on the House and Senate floor to establish public financing for congressional races. In 1992, President George H.W. Bush vetoed legislation passed by Congress that included a system of public matching funds for House general election races.<sup>67</sup>

In 1993, the House again passed legislation to establish a public matching system for House general election races. The Senate also passed a reform bill in 1993 that provided television time for Senate candidates at 50 percent below normal advertising rates. With a Democratic president prepared to sign the legislation, House Democratic leaders delayed and stalled reaching a conference agreement with the Senate throughout 1994 until the last few days of the session, when it was too late to get the bill through Congress.<sup>68</sup> With the Republican takeover of Congress in 1995, the repeated efforts in Congress over an eight year period to enact public financing system for congressional elections came to an end.

In the current environment in which deep-pocketed groups roll out plans to spend hundreds of millions of dollars in federal elections,<sup>69</sup> making the voices of regular voters matter in elections is vital to the health of our democracy — even if it would appear to be a daunting challenge.

Fortunately, the problems of money in politics are not intractable.

As noted earlier, the presidential public financing system established in the wake of the Watergate scandals worked very well for the country for a long time. The system now needs to be repaired, and a parallel system for congressional elections must be adopted.

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**Making the voices of regular voters matter in elections is vital to the health of our democracy.**

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Over the last two decades, an experiment has been unfolding in New York City that provides a proven blueprint for success.

In the late 1980s, as New York City reeled from a series of scandals involving large campaign contributions, extortion, and pay-to-play government, the City embarked on a bold path to reform its campaign finance system. It developed a program of small donor empowerment in which small donations

from average New Yorkers were matched with public funds, magnifying the importance of small donations from middle- and working-class New Yorkers. The system became broadly popular with citizens and political leaders. Over time, it was strengthened so it now matches up to the first \$175 donated to a candidate with City funds at a 6-to-1 ratio. A \$100 contribution is worth a total of \$700 to a candidate.

By increasing the significance of these small contributions with public matching funds, New York City's public funding program has increased civic participation and engaged substantially larger numbers of citizens in funding elections.

According to the City Campaign Finance Board, most contributors in the 2009 elections were first-time donors, and these new donors “overwhelmingly ma[d]e small contributions: more than 80 percent gave \$175 or less.”<sup>70</sup> The typical participating City Council candidate counted almost three times the number of small donors compared to nonparticipants.<sup>71</sup> And, according to analysis from the Campaign Finance Institute, the percentage of residents contributing to City candidates was more than three times the percentage of residents contributing to those seeking state office (with no matching funds).<sup>72</sup>

In 2009, while non-participants in New York City's small donor matching program raised only 14 percent of funds from individuals who contributed less than \$250, participating candidates raised fully 63 percent of their funds from individuals who contributed less than \$250. By contrast, in 2008, candidates for the U.S. House and Senate raised only 8 and 14 percent, respectively, from small donors — percentages in line with the ratio of candidates who did not participate in New York City's system.<sup>73</sup>

Two Midwestern states with partial public financing have seen increased participation by small donors consistent with the New York City's experience. In Minnesota, 57 percent of funds raised in 2010 came from donors who gave \$250 or less; in Wisconsin, more than one third of all political funds raised were from small donors.<sup>74</sup> In a nutshell, when public funds are available, candidates rely dramatically more on small, non-corrupting donations than do candidates who rely on traditional fundraising.

Public funding of elections also increases the diversity of participants in the process — both candidates and donors.

Numerous studies have documented the increased diversity of candidates in publicly funded elections. The Center for Governmental Studies, for example, found that minority candidates constituted 30 percent of those running under public financing, compared with 16 percent of non-publicly funded candidates. Similarly, women constituted 39 percent of publicly funded candidates, compared with 31 percent outside public financing.<sup>75</sup>

New York City's small donor matching program has also encouraged participation by a more diverse group of donors. Compared with donors to state candidates, with no matching funds, donors to City candidates come from a "much broader array of city neighborhoods," as reflected in census block groups.<sup>76</sup> "Almost 90 percent of the city's census block groups were home to someone — and often, many people — who gave \$175 or less to a City Council candidate in 2009. By contrast, the small donors in the 2010 State Assembly elections came from only 30 percent of the city's census block groups."<sup>77</sup>

The neighborhoods where small donors in City elections reside "are more representative of New York City as a whole . . . [and] have lower incomes, higher poverty rates, and higher concentrations of minority residents" than the neighborhoods where donors to state candidates reside.<sup>78</sup>

In short, "small donor matching funds help bring participants into the political process who traditionally are less likely to be active."<sup>79</sup>

Because of this record of success, the small donor matching model has been adopted in Los Angeles and San Francisco, and after New York Gov. Andrew Cuomo publicly stated that adoption of a small donor matching program is his highest legislative priority,<sup>80</sup> a concentrated push is underway to adopt a program modeled on the City program for all of New York State.

By making small, affordable contributions matter, the small donor matching system has incentivized candidates to fuse their fundraising efforts with voter outreach, and has incentivized political engagement by communities that can only afford modest contributions — communities all too often ignored by traditionally funded candidates. New York City's ongoing successful experiment has improved voter choice by allowing more diverse candidates to mount competitive campaigns, and it has been embraced by candidates across the ideological spectrum.

## **V. ELEMENTS OF A SMALL DONOR EMPOWERMENT SYSTEM FOR CONGRESSIONAL RACES**

Our democracy would benefit in numerous ways if Congress adopted a small donor matching system. This section explains in detail the key elements of the proposed system for congressional races.

### **1. A 5-to-1 Match for Small In-State Contributions**

The foundation for effectively empowering small donors is a multiple matching program for small donations. Candidates who opt to participate in this voluntary program would agree to lower contribution limits in exchange for being eligible for public matching funds. After these candidates had qualified by collecting the specified number and amount of qualifying in-state contributions from individuals, the federal government would match the qualifying contributors and the first \$250 of additional in-state contributions from individuals at a 5-to-1 ratio.

A multiple match program structured in this manner would provide strong incentives for candidates to spend more time talking to their own constituents. Statistical analysis by the Campaign Finance Institute shows that New York City’s small donor matching system “brought more low-dollar donors into the system,” leading to a “substantial increase not only in the proportional role of small donors but in their absolute numbers per candidate.”<sup>81</sup> In short, a small donor matching program can transform political candidates into agents of civic participation who bring more — and new — voters into the system by increasing the value of their modest donations.

Under the small donor matching system, a \$250 donation to a publicly funded candidate matched at 5-to-1 would yield \$1,250 in matching funds — so the total value to the candidate from a \$250 contribution would be \$1,500.

If a participating candidate received a maximum \$1,250 individual donation, only the first \$250 would be matched. Thus, a \$1,250 contribution to a participating candidate would yield the same \$1,250 in matching funds as would a \$250 contribution. Under this system, a maximum level contribution of \$1,250 to a participating candidate would provide \$1,250 in public matching funds for a total amount of \$2,500 and would be worth the same amount to that candidate — \$2,500 — as a maximum level contribution to a non-participating candidate.

Under the small donor matching program, if a participating candidate received a maximum contribution, public funds would make up exactly half of the value received by the candidate. The contribution limits for participating candidates would be set at 50 percent of those for non-participating candidates, and the public funds would make up 50 percent of a maxed-out donation to a participating candidate.

To ensure that the small donor matching program has the intended purpose — making candidates dependent on small donations from citizens of the state they serve, and not big money or out-of-state donors — certain restrictions would apply to what contributions are matched.

First, as noted, only the first \$250 per election that a donor gives would be matched. Whether a donor made four \$250 contributions, or one \$1,000 contribution, only the first \$250 would be matched.

Second, only donations from natural persons residing in a House or Senate candidate’s home state would be matched. This would incentivize participating candidates to turn to the citizens in their district and state for their campaign funds, reinforcing candidates’ dependence on the voters and communities they serve.

Table 1 illustrates the functioning of the multiple match program by portraying six different contributions to a participating candidate. The system turns one relatively small \$75 contribution from an in-state resident into \$450 for the participating candidate, dramatically more than the value of a \$75 contribution from an out-of-state resident or a PAC. A participating candidate would have to solicit six \$250 contributions from PACs or out-of-state contributors in order to equal the same total value of a single \$250 contribution from an in-state donor — \$1,500.

**Table 1**

Contributor	Contribution Amount	Match Amount	Total Value of Contribution to Candidate
In-State Resident	\$75	\$375	\$450
In-State Resident	\$250	\$1,250	\$1,500
In-State Resident	\$1,250	\$1,250	\$2,500
Out-of-State Resident	\$75	\$0	\$75
Out-of-State Resident	\$1,250	\$0	\$1,250
PAC	\$250	\$0	\$250

The public matching funds in this proposal would be released to qualified candidates in a timely manner as more match-eligible funds were raised and the campaign progressed, to ensure candidates had access to sufficient funds to promote their campaign messages at different stages of the campaign.<sup>82</sup>

## 2. Reduced Contribution Limits

In return for being eligible for public matching funds, participating candidates would agree to stricter contribution limits than traditionally funded candidates. The reduced contribution limits, coupled with matches on the first \$250 donated to candidates, would further encourage publicly funded candidates to focus their fundraising efforts on voters of more modest means than the current “donor class.”

Under the small donor matching program, individual contribution limits would be cut in half for participating candidates. Non-participating candidates could continue to accept donations up to \$2,500 per contributor, per election. Participating candidates could accept donations only up to \$1,250 per election from any donor.

As Fredrick A.O. Schwarz, Jr., the former Chair of New York City’s Campaign Finance Board, has observed: “Political contributions are *not* inherently tainted. Political contributions do not always raise

the specter of corruption. Large ones may. But small financial contributions are a natural part of a healthy participatory democracy.”<sup>83</sup> By reducing the size of contributions by 50 percent, the small donor matching program would encourage candidates to focus on the small contributions that would allow a healthy democracy to flourish and reduce the distorting influence of the small number of individuals who can make large contributions.

### **3. A Cap On The Amount of Public Funds Candidates Can Receive, But No Limits On How Much They Can Raise or Spend**

As described above, there are practical obstacles to any proposal that would place a limit on the overall amount of money candidates could spend. Accordingly, under the small donor matching program, participating candidates would be free to spend as much as they wish during an election cycle, though they would only be able to fundraise under the new, stricter contribution limits and would have a limit on the amount of personal wealth they could use of \$50,000 per election. And while there would be no expenditure ceilings, there would be a cap on the maximum amount of public funding any candidate could receive. The caps would be set at \$2 million for a House candidate and \$10 million for a Senate candidate. These caps are necessary to ensure fiscal discipline for the program. They are designed to provide sufficient funds for candidates to run competitive elections for Congress without providing an open-ended distribution of public funds.

Even after they received the maximum amount of public funds, however, candidates would be able to continue private fundraising — under the new lower contribution limits. Because of the increasing prevalence of free-spending outside groups in federal elections — including Super PACs and non-profit 501(c) organizations — candidates would be hesitant to participate in any funding regime that imposed a hard cap on the amount they could spend. Under current circumstances, an overall spending limit could lead many, if not most, serious candidates to conclude that they could not run a competitive campaign if they participated in the public financing system. The absence of any expenditure limit in this proposal allows participating candidates to compete with large outside spenders by continuing to raise and spend private contributions.

Candidates who had surplus funds remaining after an election would be required to use those surplus funds to repay the Treasury up to the amount of public funds they received for the election. If they retained any additional surplus funds after a full repayment, such funds could be used in a future election cycle. Allowing candidates to use amounts from previous campaigns — or a limited amount of personal funds — would permit candidates to use seed money to get campaigns off the ground.

### **4. Qualifying Thresholds**

By requiring candidates to demonstrate some base of support before they are able to receive public funds, the program will ensure that frivolous candidates do not drain the public fisc. Thus, candidates would only become eligible for public matching funds after first demonstrating a reasonable threshold level of public support from small donors in their states.



House candidates would qualify after raising \$40,000 in contributions of \$250 or less from at least 400 in-state residents. Senate candidates would qualify after raising a total amount equal to the qualifying amounts for a House race times the number of congressional districts in their state.

After certification of candidates' qualifying contributions, small in-state contributions would be matched at the 5-to-1 ratio (up to the maximum amount of public funds available for the race).

Importantly, the design of the small donor matching program would help to ensure that public funds are not wasted on frivolous or uncompetitive candidates with little hope for electoral success. Because public funds would only be disbursed in conjunction with donations received from private contributors, the program allows private citizens to direct the distribution of all of the public funds. The program is fine-tuned to ensure that public funds are used to support candidates with public support: candidates who have little success engaging private contributors will receive little public support, and significant public funds will only be granted to candidates who are able to successfully mobilize substantial numbers of small donors.

## **5. Political Party Support**

Political parties can now make expenditures in coordination with their candidates up to a coordinated spending limit. The parties can also make independent expenditures for the candidate once they reach the coordinated spending limit.

The proposal would establish a system whereby national parties could make unlimited coordinated expenditures to support their candidates who are participating in the public financing system, provided the contributions they spent came from a pool of contributions limited to no more than \$1,250 per donor per year.<sup>84</sup>

This would provide an important new way for candidates participating in the small donor matching program to respond to outside spending campaigns against them by working with their parties to conduct unlimited coordinated party expenditure campaigns to support their candidacies.

## **6. Effective Disclosure and Enforcement**

A prerequisite to successful implementation of the proposed small donor matching program is an effective disclosure and enforcement regime. According to the former Chair of New York City's Campaign Finance Board, a major reason for the Board's success — and that of the City's small donor matching program as a whole — is that the Board “has had no partisan divides or partisan stalemates.”<sup>85</sup> Replacing the current Federal Election Commission with a similarly non-partisan (and effective) agency is needed, as is enacting additional effective disclosure rules for the agency to oversee.

*First*, fundamental reform of the FEC is an essential component of reforming the way American elections are financed. A competent, effective agency is needed to implement and oversee the small donor matching program and the rest of the campaign finance laws.

As Congress debated the McCain-Feingold campaign finance law 15 years ago, *The Washington Post* wrote in an editorial that “no significant overhaul of campaign finance is likely to succeed without a concomitant invigoration of the FEC.”<sup>86</sup> It is as true today as it was then: The problems that handicapped the FEC before the passage of McCain-Feingold are even worse today.

The six-member FEC is controlled by three commissioners who are opposed to the campaign finance laws and refuse to properly interpret and enforce them. Since four votes are necessary for the Commission to take any action, this has allowed the three commissioners ideologically opposed to the laws to shut down agency enforcement for all practical purposes.

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**The FEC must be reformed for the health of all campaign finance laws.**

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Over the past several years, the FEC has increasingly deadlocked even on routine enforcement issues, oftentimes ignoring the recommendations of its own nonpartisan staff, leading to campaign finance regulation riddled with inadequacies.<sup>87</sup> In one of the most consequential and illustrative non-decisions in the current election cycle, the FEC split on whether it was acceptable for candidates to prepare scripts for and appear in outside groups’ ads without running afoul of the requirement that candidates not coordinate with such groups.<sup>88</sup>

The FEC must be fundamentally reformed for the health of all of the campaign finance laws. The agency should be reformed along the lines of a decade-old proposal from a blue ribbon task force composed of campaign finance and enforcement experts at the national, state, and local levels and led by Democracy 21. Under the Democracy 21 proposal, the bipartisan, six-member commission would be replaced with an agency led by a publicly recognized impartial administrator. A long-term appointment (similar to the FBI director’s 10-year term), high standards for removal from office, and benchmark qualifications for appointment all would help to insulate the office from partisan politics and greatly increase the ability of the agency to be properly run.<sup>89</sup> Under legislation introduced to implement the Democracy 21 proposal, the new agency would also have two additional administrators, one from each party, to participate in final decisions by the entity but full powers to run the agency on a day-to-day basis would rest with the lead administrator. The revamped FEC would be able to make budget requests and to litigate independently of the Department of Justice, giving the agency independence from the White House.<sup>90</sup>

The new agency would have a larger enforcement budget as well as the ability to impose penalties on its own, with the option for respondents to seek adjudication before administrative law judges. Such changes would give the agency greater enforcement powers that would combat the perception that there are no costs associated with committing campaign finance violations.<sup>91</sup>

*Second*, a new agency modeled on these recommendations would be able to aggressively combat loopholes in campaign finance regulation, to enforce robust new disclosure rules, and to ensure that wrongdoing by candidates does not go unpunished due to partisan or ideological reasons. An improved disclosure regime is an integral part of an effective small donor matching program, both to provide voters with information about who funds elections, and to provide the data necessary for enforcement.

Such a regime would require strengthening existing law. Under current law, federal candidates file quarterly reports with the FEC in addition to a report immediately before and after each election.<sup>92</sup> Given the advent of modern technology, timely and accessible disclosure of contribution information online is easier than ever before.

Accordingly, in conjunction with the small donor matching program, new disclosure deadlines and procedures would be applied. In the 90 days before a general election and the 60 days before a primary, all federal candidates would be required to disclose all itemized contributions within 72 hours of receipt. These contributions would be disclosed to the agency overseeing the program — effectively, a revamped FEC — and would be posted on the FEC website and the candidate’s personal website. For donations received outside of those timeframes, candidates should be required to file monthly disclosure reports.

Federal law does not now require campaign committees to publicly report the names of donors who contribute less than \$200, and such public disclosure would not be required under the proposed small donor matching system.<sup>93</sup> Participating campaigns, however, *would* be required to report these small donors to the revamped FEC administering the small donor matching program, to ensure accurate recordkeeping, verify that contributions meet the requirements to receive matching funds, and prevent fraud. The administering agency would have audit authority, and would be charged with detection of violations.

Adequate disclosure should also include additional disclosure requirements for “bundlers” — individuals who solicit multiple contributions and then send them packaged together to a candidate or otherwise provide them in a way that the bundlers get credit for raising the contributions. Under traditional campaign financing, bundlers are often thought to magnify the corrupting influence of contributions by getting credit and influence for the total amount of contributions they provide to a candidate.<sup>94</sup> Under the small donor matching program, however, individual bundlers could actually enhance the participatory impact of public financing by reaching out to more small donors than campaigns could reach by themselves.<sup>95</sup> Indeed, a signature element of campaigning under New York City’s program has been house parties in which individuals bring together their friends and family to learn about candidates’ campaigns — and frequently to make small donations. Such fundraisers reflect an engaged citizenry and a healthy participatory democracy, and should be encouraged in a system that empowers small donors.

Accordingly, individuals other than lobbyists would be allowed to bundle contributions for matching purposes up to a maximum dollar limit. Contributions raised by PACs, other entities, and lobbyists, in contrast, would not be eligible to be matched.

Furthermore, the public has the right to know the individuals and groups who ingratiate themselves to lawmakers by bundling large total amounts of contributions. Therefore, disclosure of the identities of bundlers and the amounts they raise would be required for bundlers raising more than a threshold amount. The bundling disclosure requirements would cover both participating and nonparticipating candidates.

## 7. An Adequate and Reliable Funding Stream

In order to serve the interests of the country and the candidates who participate in the system, the small donor matching program must receive adequate and reliable funding. The tax check-off system accomplished this goal for the presidential public financing system. States and cities have used various approaches to funding their public financing systems.

According to analysis performed by the Campaign Finance Institute, the cost of financing the new system being proposed for House and Senate races is estimated to be approximately \$700 million per year.

The costs of financing a small donor matching fund program for federal elections are far outweighed by the costs to the American people of a government that is on the auction block to influence-seeking political money — in special interest tax breaks and spending programs, inefficient government, and the failure to address pressing social and economic problems.

One approach that has been suggested for financing the small donor matching program would build on the existing tax check-off by increasing the amount that taxpayers can check-off to finance federal elections, providing the opportunity for individuals to make voluntary contributions to the check-off fund, and providing back-up, automatic funding from the Treasury to make up for any shortfall in the funds needed to finance the system.

As the Center for Governmental Studies correctly observed in a report on funding approaches, “Finding the money for public financing . . . is essentially a political problem, not a financial problem.”<sup>96</sup> The Center identified a wide range of funding sources in its report that could be used to support public funding.<sup>97</sup>

Adequate and reliable funding can be found for a program that is essential to protecting the interests of the American people against the corruption of our democracy.

## CONCLUSION

Following the disastrous *Citizens United* decision, our elections are now dominated by unlimited contributions, secret money, corporate spenders, bundlers, lobbyists, PACs, Super PACs, and other special interest funders. The role played by influence-seeking money in our political system affects almost all aspects of public policy in the country.

Empowered citizens are the answer to successfully challenging this corrupt system.

If the importance of their small contributions is magnified with multiple public matching funds, millions of citizens can serve as a counterforce to our current influence-money system. Breakthroughs in Internet and social media fundraising will make a small-donor based matching funds system even more powerful as an alternative way to finance our elections.

An effective new public matching funds system in which citizens direct the distribution of public funds to candidates would fundamentally change the way our campaigns are financed. The system would decrease the opportunities for corruption of federal officeholders and government decisions, and provide candidates with an alternative means for financing their elections without being obligated to special interest funders. Most importantly, the system would restore citizens to their rightful pre-eminent place in our democracy.

Fundamental campaign finance reforms have been enacted in the past to protect the integrity of our democracy and our elections. They will be enacted again. The small donor matching funds program is an essential reform to address the nation's campaign finance problems.



## ENDNOTES

- <sup>1</sup> *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).
- <sup>2</sup> See generally, Michael J. Malbin, Aaron Dusso, Gregory Fortelny & Brendan Glavin, *The Need for an Integrated Vision of Parties and Candidates: National Political Party Finances, 1999-2008*, in *THE STATE OF THE PARTIES* (John Green, ed., Bliss Inst. of Applied Politics at the Univ. of Akron) (forthcoming), available at [http://www.cfinst.org/pdf/books-reports/Bliss/Malbin-et-al\\_for-the-Bliss\\_Inst\\_draft-20100325.pdf](http://www.cfinst.org/pdf/books-reports/Bliss/Malbin-et-al_for-the-Bliss_Inst_draft-20100325.pdf); *Small Donors and Federal Elections*, CAMPAIGN FIN. INST., <http://www.cfinst.org/smallDonors/federal.aspx> (last visited Aug. 9, 2012); *FINANCING THE 2008 ELECTION* (David B. Magelby & Anthony Corrado, eds., Brookings Institute Press, 2011); *FINANCING THE 2004 ELECTION* (David B. Magelby, Anthony Corrado & Kelly D. Patterson, eds., Brookings Institute Press, 2006); *FINANCING THE 2000 ELECTION* (David B. Magelby, ed., Brookings Institute Press, 2002); see also MICHAEL WALDMAN, *A RETURN TO COMMON SENSE* 74-75 (Sourcebooks 2008).
- <sup>3</sup> Press Release, Campaign Fin. Inst., *Reality Check: Obama Received About the Same Percentage from Small Donors in 2008 as Bush in 2004* (Nov. 24, 2008), available at [http://www.cfinst.org/Press/PReleases/08-11-24/Realty\\_Check\\_-\\_Obama\\_Small\\_Donors.aspx](http://www.cfinst.org/Press/PReleases/08-11-24/Realty_Check_-_Obama_Small_Donors.aspx).
- <sup>4</sup> A groundbreaking report on this subject was published in January 2010 by four of the nation's leading campaign finance scholars and experts. See ANTHONY J. CORRADO, BROOKINGS INST., MICHAEL J. MALBIN, CAMPAIGN FIN. INST. THOMAS E. MANN, BROOKINGS INST. & NORMAN J. ORNSTEIN, AM. ENTER. INST., *REFORM IN AN AGE OF NETWORKED CAMPAIGNS: HOW TO FOSTER CITIZEN PARTICIPATION THROUGH SMALL DONORS AND VOLUNTEERS* (2010), available at [http://www.cfinst.org/books\\_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf](http://www.cfinst.org/books_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf).
- <sup>5</sup> Spencer A. Overton, *The Participation Interest*, 100 Geo. L.J. 1259, 1279 (2012).
- <sup>6</sup> Several studies in addition to CORRADO ET AL., *supra* note 4, have identified the key elements of a successful small donor matching program. See, e.g., 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 (2011); ANGELA MIGALLY & SUSAN LISS, BRENNAN CTR. FOR JUSTICE, *SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE* (2010), available at [http://www.brennancenter.org/content/resource/small\\_donor\\_matching\\_funds\\_the\\_nyc\\_election\\_experience/](http://www.brennancenter.org/content/resource/small_donor_matching_funds_the_nyc_election_experience/); Ciara Torres-Spelliscy & Ari Weisbard, *What Albany Could Learn from New York City: A Model for Meaningful Campaign Finance Reform in Action* 1 ALB. GOV'T L. REV. 194, (2008).
- <sup>7</sup> ROBERT G. KAISER, *SO DAMN MUCH MONEY* 19 (Vintage 2009). Panetta, a Democratic Representative in the House from 1977 to 1993, made his comments prior to re-entering the government in 2009. His extensive record of government service has included serving as Director of the Office for Civil Rights, Department of Health, Education and Welfare in the Nixon Administration, Chairman of the House Budget Committee, Director of the Office and Management Budget and White House Chief of Staff in the Clinton Administration, and CIA Director and Secretary of Defense in the Obama Administration.
- <sup>8</sup> Calculations based on *Table Containing History of CPI-U U.S. All Items Indexes and Annual Percent Changes From 1913 to Present*, U.S. DEPT. OF LABOR BUREAU OF LABOR STATISTICS (July 17, 2012), <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiat.txt>. The inflation-adjusted cost of the 1974 congressional elections is calculated by multiplying the cost of the election in 1974 dollars by the difference between the annual average consumer price indexes in 2010 and 1974.
- <sup>9</sup> Overton, *supra* note 5, at 1261.
- <sup>10</sup> *Id.* at 1262. Professor Overton has persuasively documented the manner in which many elected officials have become dependent on large donations from a “relatively small and wealthy group of individuals—the ‘donor class’—[that supplies] contributions that fund the bulk of American politics.” Spencer A. Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. Penn. L. Rev 73, 74-75 (2004).
- <sup>11</sup> MIMI MARZIANI, LAURA MOY, ADAM SKAGGS & MARCUS WILLIAMS, BRENNAN CTR. FOR JUSTICE, *MORE THAN COMBATING CORRUPTION: THE OTHER BENEFITS OF PUBLIC FINANCING* 5 (2011) (citing demographic data from the Center for Responsive Politics).
- <sup>12</sup> CORRADO ET AL., *supra* note 4, at 21-22.

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- <sup>16</sup> Jeffrey M. Jones, *Americans Most Confident in Military, Least in Congress*, GALLUP (June 23, 2011), <http://www.gallup.com/poll/148163/Americans-Confident-Military-Least-Congress.aspx>.
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- <sup>36</sup> *Id.* at 12.
- <sup>37</sup> *Id.*
- <sup>38</sup> *Id.* at 13.
- <sup>39</sup> *Id.*
- <sup>40</sup> *Id.* at 14-15.
- <sup>41</sup> *Id.* at 15. Congress also enacted the Federal Election Campaign Act of 1971, which established comprehensive campaign finance disclosure requirements for federal elections.
- <sup>42</sup> The Watergate scandals resulted in twenty corporations being criminally convicted for illegal campaign-finance activities. Ambassadorships were sold for six-figure campaign contributions and President Nixon's personal attorney went to jail for selling an ambassadorship. ITT pledged \$400,000 to help finance the 1972 Republican convention, and the Justice Department quickly settled an antitrust case in ITT's favor, with President Nixon personally intervening in the case. The dairy industry gave \$2 million to the Nixon campaign and soon got an increase in the dairy price supports they were seeking with President Nixon personally overriding the objections of his Agriculture Department to put the increase in place. Wertheimer, *supra* note 28.
- <sup>43</sup> The law also established new limits on contributions from individuals to candidates and parties, created mandatory spending limits and established the Federal Election Commission to oversee and enforce the laws. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 11.
- <sup>44</sup> GARRETT, *supra* note 35, at 15-17.
- <sup>45</sup> 424 U.S. at 91.
- <sup>46</sup> *Id.* at 92-93.
- <sup>47</sup> The Court in *Buckley* also upheld the constitutionality of the limits on contributions from individuals and PACs to candidates and the campaign finance disclosure requirements but found that the mandatory spending limits for candidates and the limit on independent expenditures were unconstitutional. *Id.* at 35, 58.
- <sup>48</sup> Fred Wertheimer, Testimony to DNC Commission on Presidential Nomination Timing and Scheduling (Sept. 30, 2005).
- <sup>49</sup> ANTHONY CORRADO, THOMAS E. MANN, DANIEL ORTIZ & TREVOR POTTER, THE NEW CAMPAIGN FINANCE SOURCEBOOK 180 (Brookings Inst. Press 2005).
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<sup>51</sup> *Fact Sheet on the Presidential Public Financing System*, DEMOCRACY 21 (Jan. 21, 2011), [http://www.democracy21.org/index.asp?Type=B\\_PR&SEC={91FCB139-CC82-4DDD-AE4E-3A81E6427C7F}&DE={FA70E030-8B39-4ADC-A5A9-66725E29932C}](http://www.democracy21.org/index.asp?Type=B_PR&SEC={91FCB139-CC82-4DDD-AE4E-3A81E6427C7F}&DE={FA70E030-8B39-4ADC-A5A9-66725E29932C}).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Reelection Rates over the Years*, OPENSECRETS.ORG, [www.opensecrets.org/bigpicture/relect.php](http://www.opensecrets.org/bigpicture/relect.php) (last visited July 30, 2012).

<sup>55</sup> *Fact Sheet*, *supra*, note 51.

<sup>56</sup> *Id.*

<sup>57</sup> Dan Eggen, *Financing Comes Full Circle After Watergate*, WASH. POST, June 17, 2012, at A1.

<sup>58</sup> Legislation to ban political party soft money was first introduced in 1990 by Senators David Boren (D-OK) and George Mitchell (D-ME) as part of a comprehensive campaign finance bill. S. 137, 101st Cong. §§ 215-216 (1990). The ban was finally enacted in 2002 with the passage of the Bipartisan Campaign Reform Act (BCRA). Pub. L. No. 107-155, 116 Stat. 82. In *McConnell v. FEC*, the Supreme Court upheld the constitutionality of BCRA and made clear that the soft money system had been created by the Federal Election Commission. The Court found that the FEC had promulgated “regulations [that] permitted more than Congress, in enacting FECA, had ever intended,” had “subverted” the law and had “invited widespread circumvention” of the law. 540 U.S. 93, 142 & n.44, 145 (2003).

<sup>59</sup> Andy Kroll, *Follow the Dark Money*, MOTHER JONES, July/Aug. 2012, *available at*, <http://www.motherjones.com/politics/2012/06/history-money-american-elections>.

<sup>60</sup> “The system of presidential public financing was set up in the aftermath of Watergate and worked well for a long time . . . . If anything, in the wake of the ill-considered Supreme Court rulings that have paved the way for more campaign spending by outside interest groups, wealthy donors and corporations, the need for rehabbing the presidential funding system is even greater than during the 2008 campaign. Fix the system – don’t junk it.” Editorial, *Don’t Put Out That Match*, WASH. POST, Jan. 25, 2011, at A18.

<sup>61</sup> The legislation eliminates spending limits on candidates and increases the public matching funds from 1 to 1 to 4 to 1 for donors who contribute \$200 or less. In return, the legislation requires participating candidates to agree to accept contribution limits significantly below the current limit of \$2,500 per donor per election. The bill also requires presidential campaigns to disclose their bundlers who raise more than \$50,000 during a four-year cycle. H.R. 414, 112th Cong. (2011); S. 3312, 112th Cong. (2012).

<sup>62</sup> ROBERT CLARKSON BROOKS, *CORRUPTION IN AMERICAN POLITICS AND LIFE* 228 (Dodd, Mead & Co. 1910).

<sup>63</sup> Public financing of elections, however, has been the main goal of campaign finance reform advocates since 1974, when Congress created the presidential public financing system and came close to creating a similar system for congressional races.

<sup>64</sup> *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 16-21 (1976).

<sup>65</sup> *See id.* at 92-93 (upholding presidential public financing law because it aims “not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people”).

<sup>66</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>67</sup> *Bush Vetoes Effort to Overhaul Campaign Financing*, HOUS. CHRON., May, 10, 1992, at A19.

<sup>68</sup> GARRETT, *supra* note 35, at 24-25.

<sup>69</sup> *See, e.g.,* Mike Allen & Jim Vandehei, *GOP Groups Plan Record \$1 Billion Blitz*, POLITICO, May 30, 2012, *available at* <http://www.politico.com/news/stories/0512/76849.html>.

- <sup>70</sup> N.Y.C. CAMPAIGN FIN. BD., *WHY DO WE HAVE PUBLIC FINANCING OF NYC ELECTIONS?* 1 (2012), *available at* [http://www.nycfb.info/PDF/press/WhyPublicFinancing.pdf?sm=press\\_21f](http://www.nycfb.info/PDF/press/WhyPublicFinancing.pdf?sm=press_21f).
- <sup>71</sup> MIGALLY & LISS, *supra* note 6, at 15 & n.113.
- <sup>72</sup> Malbin et al., *supra* note 6, at 14.
- <sup>73</sup> *Id.* Because of different reporting systems for federal candidates, these percentages are for donors of \$200 or less, not \$250 or less.
- <sup>74</sup> MICHAEL J. MALBIN, PETER W. BRUSOE & BRENDAN GLAVIN, CAMPAIGN FIN. INST., *PUBLIC FINANCING OF ELECTIONS AFTER CITIZENS UNITED AND ARIZONA FREE ENTERPRISE 2* (2011), *available at* [http://www.cfinst.org/pdf/state/CFI\\_Report\\_Small-Donors-in-Six-Midwestern-States-2July2011.pdf](http://www.cfinst.org/pdf/state/CFI_Report_Small-Donors-in-Six-Midwestern-States-2July2011.pdf).
- <sup>75</sup> STEVEN M. LEVIN, CTR. FOR GOVERNMENTAL STUDIES, *KEEPING IT CLEAN: PUBLIC FINANCING AND AMERICAN ELECTIONS* 46-47 (2006), *available at* [http://users.polisci.wisc.edu/kmayer/466/Keeping\\_It\\_Clean.pdf](http://users.polisci.wisc.edu/kmayer/466/Keeping_It_Clean.pdf).
- <sup>76</sup> ELISABETH GENN, SUNDEEP IYER, MICHAEL MALBIN & BRENDAN GLAVIN, BRENNAN CTR. FOR JUSTICE & CAMPAIGN FIN. INST., *DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS* 4 (2012), *available at* [http://www.brennancenter.org/content/resource/donor\\_diversity\\_through\\_public\\_matching\\_funds/](http://www.brennancenter.org/content/resource/donor_diversity_through_public_matching_funds/).
- <sup>77</sup> *Id.*
- <sup>78</sup> *Id.*
- <sup>79</sup> *Id.*
- <sup>80</sup> *See, e.g.*, Jimmy Vielkind, *Cuomo turns to campaign finance; Governor cites need for change as supporters rally to advance issue*, ALBANY TIMES-UNION, July 11, 2012.
- <sup>81</sup> Malbin et al., *supra* note 6, at 9. Much of the Campaign Finance Institute's rigorous empirical analysis relied on a model that included a 5-to-1 match, demonstrating the appropriateness of a 5-to-1 match model. *See id.* at 13-16.
- <sup>82</sup> Legislation to establish a congressional financing system that includes large grants of public funds to congressional candidates has been introduced in the House by Representative John Larson (D-CT) and in the Senate by Senator Richard Durbin (D-IL). H.R. 1404, 112th Cong. (2011); S.750, 112th Cong. (2012).
- <sup>83</sup> Fredrick A.O. Schwarz, Jr., *Foreword* to MIGALLY & LISS, *supra* note 6, at ii.
- <sup>84</sup> *See generally* CORRADO ET AL., *supra* note 4, at 48-53 (discussing the role of political parties in federal elections and how they could augment a small donor matching system).
- <sup>85</sup> Schwarz, *supra* note 83, at ii.
- <sup>86</sup> Benjamin Weiser & Bill McCallister, *The Little Agency That Can't*, WASH. POST, Feb. 12, 1997, at A1.
- <sup>87</sup> CRAIG HOLMAN & KELLY GRIFFIN, PUB. CITIZEN, *FEC SPLIT VOTE TOTALS 2003-2010* (2011), *available at* <http://www.citizen.org/documents/FEC-Splits-20110302.pdf>; Editorial, *Cynical Non-Enforcers*, N.Y. TIMES, Mar. 10, 2011, at A26.
- <sup>88</sup> Robin Bravender, *FEC Splits on 'Coordination,' POLITICO*, Dec. 1, 2011, *available at* <http://www.politico.com/news/stories/1211/69550.html>.
- <sup>89</sup> PROJECT FEC TASKFORCE, *NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION'S CAMPAIGN FINANCE LAWS* 35-38 (2002), *available at* <http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/%7BB4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf>.
- <sup>90</sup> *Id.* at 39-40.

<sup>91</sup> *Id.* at 40-44.

<sup>92</sup> 2 U.S.C. § 434(2)(A).

<sup>93</sup> 2 U.S.C. § 434(2)(C).

<sup>94</sup> Philip M. Nichols, *The Perverse Effects of Campaign Contribution Limits: Reducing the Allowable Amounts Increases the Likelihood of Corruption in the Federal Legislature*, 48 AM. BUS. L.J. 77, 81, 107-08 (2011) (arguing that the practice of bundling allows individuals to offer “an exchange of a large donation in exchange for a favor”).

<sup>95</sup> Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 31 (1996).

<sup>96</sup> CENTER FOR GOVERNMENTAL STUDIES, PUBLIC FINANCING OF ELECTIONS: WHERE TO GET THE MONEY? 3 (2003), available at <http://www.policyarchive.org/handle/10207/bitstreams/232.pdf>.

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