BRENNAN CENTER FOR JUSTICE

September 27, 2019

New York State Public Campaign Financing Commission
Commissioner Henry Berger
Commissioner Mylan Denerstein
Commissioner Kimberly Galvin
Commissioner DeNora Getachew
Commissioner Jay Jacobs
Commissioner John Nonna
Commissioner David Previte
Commissioner Crystal Rodriguez
Commissioner Rosanna Vargas

RE: Authority of NYS Public Campaign Financing Commission to reduce contribution limits for candidates who choose not to participate in public financing.

Dear Commissioners:

We, the undersigned, write to express our agreement with the analysis of Professor Richard Briffault (attached) on the question of your authority to reduce contribution limits for candidates who would choose not to participate in a state public financing system. We agree with Professor Briffault that you do have this statutory authority, for the reasons he provides.

We also agree with him that reducing New York's high contribution limits is important as a matter of policy to fulfilling the goals set forth in the legislation creating this Commission: to incentivize candidates to seek small donations, to reduce pressure on them to raise large donations, and to encourage qualified candidates to run for office. Limits for nonparticipating candidates are an important consideration for candidates who are deciding whether or not to participate in public financing, as designers of existing systems, including New York City's, well know. Setting appropriate contribution limits for nonparticipating candidates will be a critical decision as you complete your recommendations of a public financing system that meets your mandated goals. We urge you to seek the assistance of experts in the field in deciding these limits and the many other issues you will need to resolve.

Thank you for the historic service you are performing on behalf of all New Yorkers.

Sincerely, *

Frederick A.O. ("Fritz") Schwarz, Jr.
Former Chair, New York City Campaign Finance Board
Former New York City Corporation Counsel
Chief Counsel, Brennan Center for Justice at NYU School of Law

(*cont.*)

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Bridget and Thomas Black SUNY Distinguished Professor of Law,
University at Buffalo School of Law
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Former Chief Counsel, New York State Senate Minority

Peter L. Zimroth
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Director, Center on Civil Justice, NYU School of Law

** Affiliations listed for identification purposes only.*

Attachment: Supplemental Statement of Richard Briffault, September 24, 2019.

Supplemental Statement of Richard Briffault[1]
To The New York State Public Financing Commission
September 24, 2019

During my testimony at the September 10, 2019 hearing of the New York State Public Financing Commission in New York City, I was asked whether the Commission has the statutory authority to recommend changes to the state's campaign contribution limits for candidates who do not participate in the public campaign financing program the Commission is directed to establish. At that time, I asked for the opportunity to study the question and submit a reply to the Commission at a later date.

I have now researched the question, and have concluded that the Commission does have the authority to recommend such changes – such as to lower the maximum amount -- to the state's campaign contribution limits for all candidates, including candidates who choose not to participate in the public financing program. My analysis follows:

First, section 1 (a) of Part XXX of S. 1509-C/ A. 2009-C – the law establishing the Commission – directs the Commission to make recommendations "for new laws with respect to how the State should implement . . . a system of voluntary public campaign financing," and then specifically states that the commission "shall make its recommendations in furtherance of the goals of incentivizing candidates to solicit small contributions, reducing the pressure on candidates to spend inordinate amounts of time raising large contributions for their campaigns, and encouraging qualified candidates to run for office." The Commission could very well conclude that achieving these goals requires the lowering of contribution limits for all candidates, public financing participants and non-participants alike.

Leaving the state's current very high contributions untouched could encourage many candidates – particularly those with access to large-dollar donors – to continue to prefer private financing over public financing. That could discourage other candidates who

[1] Joseph P. Chamberlain Professor of Legislation, Columbia University School of Law.

might want to opt in to public financing to refrain from doing so out of the fear that they would be outraised and outspent by non-participating candidates who collect large private donations. If so, the continued availability of large contributions would be inconsistent with the statutory "goal[] of incentivizing candidates to solicit small contributions." Similarly, to the extent that very large donations remain an option for candidates, some are likely to feel compelled to continue to spend time soliciting them, which would be inconsistent with the statutory goal of "reducing the pressure on candidates to spend inordinate amounts of time raising large contributions for their campaigns." Leaving the existing high contribution limits in place could also thwart the third statutory goal – encouraging qualified candidates to run for office. If potential candidates who know they will need to rely on public funds see that their opponents have the ability to amass outsized war chests from large donations, the candidates who need public funds might choose not to run at all.

Second, section 2 of the Commission's authorizing statute directs that the Commission shall "specifically determine and identify ***all*** details and components reasonably related to the administration of a public financing program" (emphasis supplied). For the reasons already given, the Commission could easily determine that a general lowering of contribution limits is "reasonably related" to the administration of the public financing program.

New York City reached that conclusion after sixteen years' experience with its public financing program. When it initially adopted its program in 1988, New York City applied lower contribution limits only to participating candidates. In 2004, the City determined that the same, lower limits should apply to both participating and non-participating candidates. As Judge Kathryn Freed explained in her decision sustaining the City's action:

> "The City realized that the original law had created a disparity which resulted in benefits accruing to non-participating candidates by affording them the easier task of raising higher amounts of money from both fewer contributors and additional sources. The Council found this disparity was frustrating the overall goal of eliminating the influence of wealth and special interests in local elections. As such, it was necessary to place uniform restrictions on all candidates."

McDonald v. New York City Campaign Finance Bd., 40 Misc.3d 826, 845 (Sup. Ct., N.Y. Co., 2013), aff'd 117 A.D.3d 540 (1st Dep't 2014). Although the goals of New York City's public financing program may not be precisely the same as the State's, the value of a level playing field achieved through "uniform restrictions on all candidates" would be as applicable to the State's program as to the City's. Moreover, as Judge Freed noted, at that time at least eight states with public financing programs applied "uniform contribution limits on all candidates vying for the same positions, not just those accepting public financing." *See id.* at 846.

Third, the only argument against the Commission's authority to recommend uniform contribution for all candidates, is the language in section 2(d) of the statute which states -- after the language previously quoted directing the Commission to identify all the details and components "reasonably related to administration of a public financing program" – that the Commission "shall also specifically determine and identify new election laws in the following areas: . . . (d) contribution limits applicable to candidates participating in the program." It could be argued that subsections (a) through (j) of section 2 spell out the "details and components" of the public financing program that the legislature wanted the Commission to address, and that the specific reference to contribution limits for participating candidates in (d) implicitly precludes a recommendation for contribution limits for all candidates.

This seems unpersuasive for several reasons. The subsections of section 2 should not be treated as an exhaustive list of the details and components of the public financing program. On the one hand, at least one of the subsections – (j) – addresses issues unrelated to public funding. On the other hand, other "details and components" – such as the timing of matching fund payments, or the indexing of payments to inflation – are not mentioned and yet could be crucial to an effective program. With respect to the specific mention of contribution limits for participating candidates, the best reading is that is an issue the legislature definitely wants the Commission to address, without necessarily precluding uniform limits for ***all*** candidates.

Finally, section 5 of the Commission's authorizing statute specifically provides that "[e]ach recommendation made to implement a determination pursuant to this act shall

have the force of law, and ***shall supersede, where appropriate, inconsistent provisions of the election law***, unless modified or abrogated by statute prior to December 22, 2019" (emphasis supplied). The state's contribution limits are a part of Article 14 of the Election Law. *See, e.g.,* N.Y. Elec. L. § 14-114 (contribution and receipt limitations). The authorizing statute's grant of authority to the Commission to implement its determinations by superseding ***any*** provision of the Election Law plainly applies to the section setting contribution limits.

This broad grant of authority concerning the entire Election Law differs from the more limited grant given to the 2018 New York State Committee on Legislative and Executive Compensation in a way that supports this Commission's power to adopt uniform contribution limits. Two state supreme court decisions have held that the Compensation Committee's recommendations concerning the outside income and employment of legislators did not have the force of law, unlike its recommendations concerning salaries. In doing so, both courts focused on the fact that the Committee's enabling legislation gave it the power to supersede ***only*** the inconsistent provisions of specific sections of the Executive Law and the Legislative Law which set salaries, but did not give it the power to supersede the relevant sections of the Public Officers Law which address the ethical obligations of legislators concerning outside income and employment. *See* Barclay v. New York State Comm. on Legislative and Executive Compensation, ___ N.Y.S.3d ___, 2019 WL 4065448 at *8 -*10 (Sup. Ct., Albany Co., Aug. 28, 2019); Delgado v. State of New York, Index No. 907537-18 (Sup. Ct. Albany Co., June 7, 2019).

In *Delgado*, Judge Ryba quoted from the "force of law" section of the Committee's authorizing statute, which referred only to the specific salary-setting provisions of the Executive and Legislative Laws, and said "[i]f this section intended to grant the Committee authority to amend or revise ethical rules, [it] would have set forth that the Committee's recommendations, where appropriate, shall supersede relevant sections of Public Officers Law." *See id*. at p. 11. By contrast, the Public Financing Commission's statute gives it broad authority to supersede any provision of the Election Law -- the power Judge Ryba (and Judge Platkin in the *Barclay* case) found that the Compensation Committee lacked.

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In short, in my opinion, the statute creating the Commission gives it the discretion to recommend uniform reductions in contribution limits, applicable to participating and non-participating candidates alike, if it determines that that is “reasonably related” to the creation of an effective public financing program.