UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAM PARTY OF NEW YORK and MICHAEL J. VOLPE, Plaintiffs, v. PETER S. KOSINSKI, *et al.*, Defendants.	No. 1:20-cv-00323-JGK Hon. John G. Koeltl
LINDA HURLEY, *et al.*, Plaintiffs, v. PETER S. KOSINSKI, *et al.*, Defendants.	No. 1:20-cv-04148-JGK Hon. John G. Koeltl

MOTION OF BRENNAN CENTER FOR JUSTICE FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Brennan Center for Justice at NYU School of Law ("Center") respectfully moves for leave to file the accompanying amicus curiae brief in support of no party.[1] The various plaintiffs consent to or do not oppose the filing. Defendants do not consent.

This Court has broad discretion to accept amicus briefs. *Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. and N.J.*, No. 11 Civ. 6746 (RJH), 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011) (citing *Jamaica Hosp. Med. Ctr., Inc. v. United Health Grp., Inc.*, 584 F. Supp. 2d 489, 497 (E.D.N.Y. 2008)). It should do so "when the amicus has unique information or perspective

[1] The Center seeks leave to file an identical brief in both of the above-captioned cases.

that can help the court beyond the help that the lawyers for the parties are able to provide." *Id.* at *2 (quoting *Citizens Against Casino Gambling in Erie Cty. v. Kempthorne*, 471 F. Supp. 2d 295, 311 (W.D.N.Y. 2007)); *accord C&A Carbone, Inc. v. Cty. of Rockland, N.Y.*, No. 08-cv-6459, 2014 WL 1202699, at *3 (S.D.N.Y. Mar. 24, 2014) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)).

Such is the case here. The Center has a particularly strong interest in and expertise relevant to the instant dispute. The outcome of this litigation will determine the fate of a critical democracy-strengthening reform: a system of small donor public financing for New York state elections, enacted in the same statute with the ballot qualification provisions challenged in this case. The Center is a nonpartisan law and policy institute that studies, designs, and advocates for reasonable campaign finance reforms, including public financing of elections. The Center's experts provided extensive policy expertise in the process leading to the enactment of the public financing system implicated in this case.[2]

As the claims in this case center on the statute's ballot qualification requirements, the parties' briefs presumably will adopt this focus. The Center's brief takes no position on the legality of those requirements. With a crucial and long-sought campaign finance reform at stake, however, the Center respectfully believes the Court would benefit from additional information about the legislature's development of the public financing system and relevant legal authority urging that it remain in place. The Center's brief explains why this Court, if it invalidates the ballot qualification requirements, not only is permitted to but should sever those provisions and declare valid the public financing system. It details the long history of government corruption

[2] A more comprehensive description of the Center, its interest as amicus, and the points of law and fact that it wishes to call to the Court's attention are contained in the accompanying brief.

and dysfunction that made reform necessary; the evidence before the legislature and the details lawmakers considered relevant to the system's purpose and operation; and research that shows the challenged ballot access requirements are wholly unnecessary to the system's purpose and operation. The brief also discusses the immediate, real-world consequences, if the law were to be invalidated in its entirety.

By addressing these issues, the Center provides key relevant details that the parties likely will not. The Center's brief therefore will assist this Court to adjudicate this dispute fully informed of the issues at stake. *See C&A Carbone, Inc.*, 2014 WL 1202699, at *4 (leave to file granted where amicus brief would promote a "full airing of the issues at stake").

CONCLUSION

For the foregoing reasons, the Center requests the Court's leave to file the accompanying brief. If the Court grants such leave, the Center requests that the brief be considered filed as of the date of this motion's filing.

Dated: July 3, 2020

Respectfully submitted,

/s/ Joanna Zdanys

Joanna Zdanys (JZ-8123)
Hoonpyo Lee a/k/a Chisun Lee
Lawrence Norden
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
Tel.: (646) 292-8343
joanna.zdanys@nyu.edu
Counsel for Amicus Curiae

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BRIEF OF AMICUS CURIAE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF NO PARTY

Lawrence Norden
Hoonpyo Lee a/k/a Chisun Lee
Joanna Zdanys
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8343
joanna.zdanys@nyu.edu
Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The Brennan Center for Justice at NYU School of Law ("Center") is a non-partisan law and public policy institute that works to strengthen the systems of democracy and justice.[2] It seeks to bring the ideal of representative democracy closer to reality by working to eliminate barriers to full participation and to ensure that public policy and institutions reflect the diversity of voices and interests that enable a robust democracy. The Center researches and designs legislation and policy, empirical studies, and scholarship, among other means, to promote reasonable campaign finance reforms and other objectives that are central to its mission. It routinely advises lawmakers and regulators to advance campaign finance reforms.

Public campaign financing has long been a central focus of the Center's work. The Center contributed research and policy advice throughout the process that led to the public financing component of the statute, Part ZZZ of the Transportation, Economic Development and Environmental Conservation Article VII Enacted Budget Law, that also contains the ballot qualification requirements challenged in this case. *See* 2020 N.Y. Sess. Laws Ch. 58 (S. 7508-B), Part ZZZ (McKinney) (hereinafter "Part ZZZ"). The Center respectfully submits this brief to provide legal and factual context to assist the Court.

SUMMARY OF ARGUMENT

On April 3, 2020, New York enacted a groundbreaking campaign finance reform. Years of legislative deliberation, public debate, and citizen advocacy led to the enactment of Part ZZZ,

[1] The various plaintiffs consent to or do not oppose the filing of this brief. Defendants do not consent. No party's counsel or other person except amicus and its counsel authored this brief or contributed money to fund its preparation or submission.

[2] This brief does not purport to convey the position, if any, of the New York University School of Law.

a system of voluntary small donor public financing for state elections. *See* Part ZZZ, § 4. The system's design serves to boost voter confidence, increase government accountability, and spark civic participation, in a state whose traditional campaign finance system has allowed a wealthy minority to dominate and distort the political process.[3] With innovative mechanisms that enable candidates to raise competitive sums even if they seek only modest contributions from constituents, Part ZZZ has the potential not just to ameliorate New York's dysfunctional democracy but also to serve as a model for the nation.[4] It is the most significant legislative response to *Citizens United* enacted anywhere in the country.

The ballot qualification provisions of Part ZZZ challenged by plaintiffs have nothing to do, in purpose or function, with the historic campaign finance reform. In this brief, the Brennan Center does not address the legality of these ballot qualification provisions, but urges that, if the Court decides to invalidate them, it must also sever and declare valid the remainder of the statute. The applicable law, the statute's purpose and functional scheme, and the needs of New Yorkers compel this result.

To be sure, Part ZZZ contains language purporting to render all its "clauses, sentences," and other aspects "non-severable." Part ZZZ, § 11. But that language does not block this Court

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[3] *The Case for Small Donor Public Financing in New York State*, BRENNAN CTR. FOR JUSTICE, 3, 9 (Feb. 26, 2019), https://www.brennancenter.org/sites/default/files/2019-08/Report%2BCaseforPublicFinancingNY.pdf [hereinafter *The Case for Small Donor Public Financing*].

[4] *See* Michael J. Malbin & Brendan Glavin, *Small Donor Public Finance in New York State: Major Innovations – With a Catch*, CAMPAIGN FIN. INST., 1-2 (Jan. 15, 2020), http://cfinst.org/pdf/state/ny/Small-Donor-Public-Finance-in-NY_Jan2020.pdf [hereinafter *Major Innovations*].

from performing its own inquiry as to whether the legislation's purpose and functional scheme can and should stand without the challenged provisions. Plainly they can. Part ZZZ's self-stated purpose is to establish a "crucial" campaign finance reform that improves and expands democracy, not to restrict ballot qualification. Part ZZZ, § 4 (adding N.Y. ELEC. LAW § 14-200). And the challenged provisions make no difference to the public financing system's operation, including its cost, compared to the state's pre-2020 ballot qualification requirements. The challenged provisions are not remotely integral to Part ZZZ's purpose or functional scheme.

The legislature's findings show the urgency of ensuring that construction of the new public financing system, currently under way, continues and is ready to serve New Yorkers as promised in 2022 — a very tight timeframe, compared to launches of much simpler systems elsewhere. New York's campaign finance status quo creates "the potential for and the appearance of corruption," pressures candidates to spend more time courting large donors than listening to voters, and breeds "distrust in government and citizen apathy that undermines the democratic operation of the political process," the legislature found. Part ZZZ, § 4 (adding N.Y. ELEC. LAW § 14-200). Any uncertainty about the continued validity of the public financing system would derail implementation of the alternative that lawmakers determined was crucial to remedy these defects in the state's democracy. The law empowers this Court to avoid that outcome by severing the challenged provisions if they are invalidated and upholding the remainder of Part ZZZ.

ARGUMENT

I. PART ZZZ'S PUBLIC FINANCING SYSTEM MUST BE SEVERED AND UPHELD NOTWITHSTANDING THE STATUTE'S NON-SEVERABILITY LANGUAGE

Part ZZZ's non-severability language cannot compel this Court to strike down the statute's new public financing system, should it decide to invalidate the unrelated ballot

qualification provisions. Though Section 11 purports to render "the component clauses, sentences," and other aspects of Part ZZZ "non-severable" from all the others, Part ZZZ, § 11, such non-severability provisions cannot trump the Court's own inquiry. No precedent of federal or, as is the rule in state law severability questions, New York law so ties this Court's hands. *See Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 88 (2d Cir. 2015) (severability is a question of state law). Rather, the Court should inquire whether the legislation's purpose and operation can stand without the challenged provisions. *See Envtl. Encapsulating Corp. v. City of New York*, 855 F.2d 48, 60 (2d Cir. 1988).[5] If so, the valid portion must be severed and upheld, as a legislative enactment is the ultimate expression of the people's will. *See United States v. Conyers*, 227 F. Supp. 3d 280, 284-85 (S.D.N.Y. 2016) ("Courts should be careful not to invalidate more of a statute than necessary because holding legislation unconstitutional 'frustrates the intent of the elected representatives of the people.'") (quoting *Ayotte v. Planned Parenthood of N. New England*, 540 U.S. 320, 329 (2006)); *Atkin v. State of Kansas*, 191 U.S. 207, 223 (1903) (declaring that "legislative enactments . . . embody[] the will of the people").

Guidance from prior decisions affirms that Part ZZZ's Section 11 cannot end this Court's inquiry. No case in this Circuit, U.S. Supreme Court, or New York court has determined the effect of a non-severability clause.[6] Instructively, though, the First Circuit has reasoned that

[5] As the Second Circuit reasoned, severance is appropriate if "the remaining portions are sufficient to effect the legislative purpose deducible from the entire act unless the valid and invalid provisions are so interwoven that neither can stand alone." *Id.* (internal citations omitted).

[6] The Supreme Court has discussed but not decided the question of non-severability language in a statute. In *Brockett v. Spokane Arcades*, it concluded that the invalid portion of a Washington statute should be severed, remarking in dicta that Washington law required severance unless the statute was "unseverable"

such a clause "cannot ultimately bind a court," in a case where that court needed to evaluate a statute's non-severability charge. *Biszko v. RIHT Fin. Corp.*, 758 F.2d 769, 773 (1st Cir. 1985); *see also Biszko v. RIHT Fin. Corp.*, 102 F.R.D. 538, 543 (D.R.I. 1984), *aff'd*, 758 F.2d 769 ("A severability or, in this case non-severability, clause is a guideline for statutory interpretation but not a mandate to the court."). Rather, that court examined the legislature's intent in enacting the law and whether removal of the challenged provision would "clearly do violence to the fundamental legislative scheme." *Biszko*, 758 F.2d at 774.[7] Like the First Circuit in *Biszko*, several state courts of last resort have reasoned that a non-severability clause is not dispositive,

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and severance would undermine the statute's intent or function. 472 U.S. 491, 506 (1985). Regarding the severability of a core provision of an Alaska dividend program — rules for how dividends would be distributed — the Court commented that non-severability language in the statute saved speculation, but remanded the question to the Alaska court where the case originated. *Zobel v. Williams*, 457 U.S. 55, 56, 65 (1982). In *Green Party of Conn. v. Garfield*, the Second Circuit invalidated certain funding provisions in Connecticut's public financing system but remanded as to whether another provision was intended to function as a non-severability clause. 616 F.3d 213, 242, 246-48 (2d Cir. 2010). The legislature amended the law before the question was resolved. CONN. GEN. STAT. § 9-717 (2010). A decision in this District, *Rebaldo v. Cuomo*, observed that literal application of non-severability language in a New York public health law would lead to an "absurd result," but resolved the case on other grounds. NO. 83 Civ. 8707 (WCC), 1984 WL 48826, at *10 (S.D.N.Y. Mar. 13, 1984), *vacated on other grounds*, 749 F.2d 133 (2d Cir. 1984).

[7] In that case, the court decided that provisions of a statute could not be severed to preserve plaintiff's standing. *Biszko*, 758 F.2d at 774. Important here, though the statute contained a non-severability clause, the court performed its own inquiry into whether severance would thwart the statute's purpose and function. *See id.* (adopting district court's analysis).

but that it at most creates a presumption not difficult to overcome by examining an invalidated provision's importance to the legislation's intent and operation. These courts have severed and upheld portions of statutes even though those statutes contained non-severability clauses. *See, e.g.*, *Stiens v. Fire and Police Pension Ass'n*, 684 P.2d 180, 184-85 (Colo. 1984) (en banc) ("The unseverability clause in the 1978 Act is categorical, without qualification, but that is insufficient to resolve the issue."); *Louk v. Cormier*, 218 W. Va. 81, 96-98 (2005) (reasoning that a non-severability clause "is construed as merely a presumption" against severability and holding certain aspects of a legislative scheme severable and others non-severable).

Rather than accept Part ZZZ's non-severability language as the ultimate rule, which no precedent requires, this Court should perform the more typical and sensible inquiry to decide if the state's new public financing system should survive invalidation of the challenged ballot qualification requirements. This inquiry asks two questions: (1) whether the remaining provisions of the law suffice to effectuate the legislation's purpose, and (2) whether the legislative scheme can function without the invalidated portions because those portions are not "so interwoven" with the remainder as to prevent the statute from operating without them. *Envtl. Encapsulating Corp.*, 855 F.2d at 60; *accord Buckley v. Valeo*, 424 U.S. 1, 108 (1976). This approach affirms the principle that "a court should refrain from invalidating an entire statute when only portions of it are objectionable." *Evergreen Ass'n, Inc. v. City of New* York, 740 F.3d 233, 243 (2d Cir. 2014) (internal citation omitted). Rather, it must proceed "pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots." *Gen. Elec. Co. v. N.Y. State Dep't of Labor*, 936 F.2d 1448, 1460 (2d Cir. 1991) (internal citation omitted).

Following these principles, the Supreme Court has invalidated unconstitutional portions of statutes without destroying the remainder. In *Alaska Airlines v. Brock*, for example, it severed a legislative veto provision from the Airline Deregulation Act's Employee Protection Program, but upheld the remainder of the statute. 480 U.S. 678, 697 (1987). The Court reasoned that the invalid provision was not central to the statutory scheme because it was "separate" from the operative provisions of the statute and a Senate Committee's report had "paid scant attention" to it while providing "extensive discussion" of the core aspects of the law. *Id.* at 684-85, 691, 693. The Court found relevant that the bill summary in the record did not mention the provision and that only one Congressman mentioned it during deliberations. *Id*. at 694, 696.

Just this week the Court reaffirmed the importance of saving the constitutional parts of statutes when excising an unconstitutional provision. Severing an unconstitutional provision in the Dodd-Frank Act, the Court explained, "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Seila Law LLC v. Consumer Fin. Protection Bureau*, No. 19-07, slip. op. at 32 (U.S. June 29, 2020) (internal citations omitted). Though the Court discussed the presence of a severability provision, its reasoning did not depend solely on that provision. *Id.* at 32-34. The Court invoked precedents going back more than a century to emphasize its long-settled preference for allowing the valid portions of statutes to stand. *See id.* at 32.

Of particular note, courts have severed and upheld public financing systems even when they invalidated provisions that, unlike in the instant case, related to the public financing system itself. In *Buckley v. Valeo*, the Supreme Court struck down campaign spending limits that were part of a comprehensive campaign finance reform scheme, but allowed the related presidential public financing system, among other provisions, to stand. 424 U.S. at 143. The Court reasoned

that public financing was "not dependent" on the spending limits and that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* at 108-09. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Supreme Court struck as unconstitutional a provision of Arizona's public financing system that entitled participating candidates to more funds if a privately-financed opponent outspent their public funds allotment, but upheld the rest of the system. 564 U.S. 721, 729-30, 754-55 (2011). This District, in *Ognibene v. Parkes*, invalidated as unconstitutional one of nine criteria in New York City's public financing system that could serve to increase a candidate's maximum funding; but the remainder of the system continued. No. 08 Civ. 1335 (LTS) (FM), 2013 WL 1348462, at *3, *11 (S.D.N.Y. Apr. 4, 2013).

When public financing systems have survived judicial invalidation even of incorporated features, Part ZZZ's public financing system must survive invalidation of new ballot qualification requirements that are unrelated to public financing.[8] The purpose of Part ZZZ can

[8] Though even a clearly intended non-severability clause cannot trump this Court's inquiry, the circumstances of Section 11's inclusion in Part ZZZ also counsel against giving it weight. Two legislators attest to being told that Part ZZZ reproduced a prior draft bill that did not include a non-severability clause. Niou Decl. ¶¶ 7, 9, *Hurley v. Kosinski*, No. 1:20-cv-04148-JGK (June 10, 2020), ECF No. 34; Jackson Decl. ¶¶ 10, 13, *Hurley v. Kosinski*, No. 1:20-cv-00323-JGK (June 10, 2020), ECF No. 35. The SAM Party's apparent assertion that this prior draft bill did contain a non-severability provision, like Part ZZZ's, is inaccurate. Am. Compl. ¶ 59, *SAM Party of N.Y. v. Kosinski*, No. 1:20-cv-00323-JGK (May 11, 2020), ECF No. 53. The prior draft bill, which was designed by a commission in December 2019 and invalidated by Justice Boniello on March 12, 2020, did not contain a non-severability provision.

be fulfilled, and the operation of the remainder is entirely feasible, if ballot qualification requirements revert to their pre-2020 levels. Should this Court invalidate the challenged provisions, the law of severability and the purpose and functional scheme of Part ZZZ urge that it sever and uphold the rest of the statute.

II. PART ZZZ'S PURPOSE IS TO BOOST CIVIC CONFIDENCE AND GOVERNMENT ACCOUNTABILITY BY A "CRUCIAL" CAMPAIGN FINANCE REFORM, NOT TO RESTRICT BALLOT QUALIFICATION

A. The Statute Details How the State's Traditional Campaign Finance System Harms Democracy and How the Public Financing System Will Ameliorate Those Harms

Part ZZZ provides a powerful statement of the legislation's findings and goals that nowhere names or implies a desire to make ballot qualification more difficult. The statement begins: "The legislature finds that reform of New York state's campaign finance system is crucial to improving public confidence in the state's democratic processes and continuing to ensure a government that is accountable to all the voters of the state regardless of wealth or position." Part ZZZ, § 4 (adding N.Y. ELEC. LAW § 14-200). It enumerates a series of harms the legislature found in the traditional campaign finance system. It found that the system "created the potential for and the appearance of corruption," causing "a distrust in government and citizen apathy that undermines the democratic operation of the political process." *Id.* The traditional system also "creates an electoral system that encourages candidates to spend too much time raising money rather than attending to the duties of their office, representing the needs of their constituents, and communicating with voters." *Id.*

See Campaign Fin. Reform Comm'n, *Report to the Governor and the Legislature*, STATE OF N.Y., 17-36 (Dec. 2019), https://campaignfinancereform.ny.gov/system/files/documents/2019/12/campaignfinancereformfinalreport.pdf.

The purpose of the newly enacted public financing system, the legislation states, is to reduce the harms from large donors' "undue influence over state officials," increase "responsiveness of elected officials to all voters," increase electoral competition, and reduce pressure on candidates to spend time courting large donors, among other goals. *Id.* The legislation intends no less than to "enlarge the public debate and increase participation in the democratic process," by "reducing voter apathy [and] building confidence in government." *Id.*

Perhaps the pithiest summary of public financing's purpose comes from Governor Andrew M. Cuomo. He said:

> Every day, ordinary New Yorkers struggle to make their voices heard in our political system. No matter the issue, candidates are incentivized to focus on large donations over small ones. The only way to truly fix this problem is to institute a public financing system for political campaigns that matches funds from small donations.[9]

B. The Statute's Findings Reflect Extensive Evidence of the Need to Remedy Public Corruption and the Outsized Influence of Large Donors in New York Through Public Financing

Extensive official investigation, analysis by campaign finance experts, citizen testimony, and public opinion polls furnished the lawmakers who enacted Part ZZZ support for their stated findings. These lawmakers received this evidence during legislative hearings this year and last.[10]

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[9] ANDREW M. CUOMO, 2017 STATE OF STATE BOOK, 2017-2018 LEG. SESS. 302 (N.Y. 2017) (advocating passage of a public financing bill substantially similar to the system enacted in Part ZZZ).

[10] NY Senate, *Joint Leg. Pub. Hr'g on 2019-2020 Exec. Budget Proposal: Local Gov't 02/11/19* at 8:38:25, YOUTUBE (Feb. 11, 2019), https://www.youtube.com/watch?v=MLLPRlurpPU; NY Senate, *NYS Senate Pub. Hr'g on Elections - 3/20/19*, YOUTUBE (Mar. 21, 2019), https://www.youtube.com/watch?v=KvksU0SqV4E; NY Senate, *Joint Leg. Pub. Hr'g on 2020-2021 Exec. Budget Proposal: Local Gov't Officials/Gen. Gov't* at 7:26:10, YOUTUBE (Feb. 10, 2020),

None of this evidence, and none of the legislators' comments or questions during hearings, so much as mentioned ballot qualification requirements, which helps explain why the legislature expresses no finding or purpose to support that aspect of Part ZZZ.

Evidence of public corruption, and the traditional campaign finance system's relationship to it, emerged from the work of the Moreland Commission to Investigate Public Corruption (the "Moreland Commission").[11] Governor Cuomo appointed this body of experts in government ethics and criminal law, and other civic leaders, in 2013, to address an "epidemic of public corruption."[12] Its work helped spur other official investigations and news reports, including one finding that more New York public officials were convicted on federal corruption charges than in any other state over four decades.[13] The heart of the problem, the Moreland Commission found, was a "pay-to-play political culture . . . greased by a campaign finance system in which large

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https://www.youtube.com/watch?v=wT3QiwhNnXM&feature=emb_title. Though the legislature votes annually on a state budget, and Part ZZZ emerged from this year's budget process, the same legislators heard relevant evidence last year and this year because of their two-year term.

[11] *See* Moreland Comm'n to Investigate Public Corruption, *Preliminary Report*, STATE OF N.Y. (Dec. 2, 2013), https://publiccorruption.moreland.ny.gov/sites/default/files/moreland_report_final.pdf [hereinafter "Moreland Report"].

[12] *See id.* at 3; Moreland Comm'n to Investigate Public Corruption, *Commissioners and Special Advisors*, State of N.Y., https://publiccorruption.moreland.ny.gov/commissioners.html (last accessed July 2, 2020).

[13] Harry Enten, *Ranking the States from Most to Least Corrupt*, FIVETHIRTYEIGHT (Jan. 23, 2015), https://fivethirtyeight.com/features/ranking-the-states-from-most-to-least-corrupt/. Nineteen New York State legislators were convicted on federal corruption charges between 2008 and 2018. *The Case for Small Donor Public Financing* 4.

donors set the legislative agenda."[14] The body recommended that the state create a public financing system substantially similar to the system enacted in Part ZZZ.[15] Such a system would help "ordinary citizens and the candidates they support . . . be heard in the political process," the commission concluded.[16]

Nonpartisan campaign finance experts documented evidence of the outsized influence of large campaign donations in New York, and urged the state to adopt a public financing system like Part ZZZ's to amplify the significance of small donors to candidates for elected office.[17]

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[14] Moreland Report 10.

[15] *Id.* at 11, 44-46.

[16] *Id.* at 49.

[17] Brennan Center counsel met frequently with legislators to provide expertise and written materials concerning these problems, in addition to providing written and oral testimony at hearings. We observed others submitting written testimony and materials on public financing to the legislature, but were unable to find a comprehensive official source. *See, e.g.*, Chisun Lee, Brennan Ctr. for Justice, Testimony Submitted to the N.Y. Leg. at the Joint Leg. Pub. Hr'g on 2019-2020 Exec. Budget Proposal: Local Gov't Officials/General Gov't (Feb. 11, 2019), https://www.brennancenter.org/our-work/research-reports/testimony-support-small-donor-public-financing-and-automatic-voter [hereinafter Lee Feb. 2019 Testimony]; Michael Malbin, Campaign Fin. Inst., Testimony Submitted for the Joint Leg. Pub. Hr'g on 2019-2020 Exec. Budget Proposal: Local Gov't Officials/Gen. Gov't (Feb. 11, 2019), https://nyassembly.gov/write/upload/publichearing/000964/002002.pdf [hereinafter Malbin Feb. 2019 Testimony]; Chisun Lee & Joanna Zdanys, Brennan Ctr. for Justice, Testimony Submitted to the S. Standing Comm. On Elections at the Hr'g Concerning Campaign Fin. Reform and a Small Donor Pub. Fin. System for N.Y. State (Mar. 20, 2019), https://www.brennancenter.org/our-work/research-reports/testimony-nys-senate-elections-committee-hearing-small-donor-public [hereinafter Lee & Zdanys

The Brennan Center found that, in 2018, the most recent election cycle for which complete data were available, just 100 large donors contributed more to state candidates than all of the estimated 137,000 small donors combined.[18] State candidates raised most of their campaign funds from large donors, who gave more than $10,000, and only 5 percent of their funds from small donors giving $200 or less.[19] A separate analysis by political scientist Michael Malbin of the nonpartisan Campaign Finance Institute documented similar trends.[20] A small donor match

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Mar. 2019 Testimony]; Joanna Zdanys, Brennan Ctr. for Justice, Testimony Submitted to the N.Y. Leg. at the Joint Leg. Budget Hr'g Concerning Local Gov't Officials & Gen. Gov't (Feb. 10, 2020), https://www.brennancenter.org/sites/default/files/2020-02/Zdanys%20Testimony%20-%20February%2010%2C%202020%20Hearing%20on%20Local%20Government%20and%20General%20Government.pdf [hereinafter Zdanys Feb. 2020 Testimony]; NY Senate, *NYS Senate Public Hearing on Elections - 3/20/19* (references throughout to witnesses' written testimony).

[18] Chisun Lee & Nirali Vyas, *Analysis: New York's Big Donor Problem & Why Small Donor Public Financing Is an Effective Solution for Constituents and Candidates*, BRENNAN CTR. FOR JUSTICE (Jan. 28, 2019), https://www.brennancenter.org/analysis/nypf [hereinafter *New York's Big Donor Problem*]. This comparison does not include the millions of dollars contributed by corporations and limited liability companies, which likely would increase the imbalance between large and small donors. *Id.*

[19] *Id.*

[20] *See* Michael J. Malbin & Brendan Glavin, *Small-Donor Matching Funds for New York State Elections: A Policy Analysis of the Potential Impact and Cost*, CAMPAIGN FIN. INST., 7-9 (Feb. 2019), http://www.cfinst.org/pdf/State/NY/Policy-Analysis_Public-Financing-in-NY-State_Feb2019_wAppendix.pdf [hereinafter *Small-Donor Matching Funds*].

public financing system like Part ZZZ's would dramatically increase the relative financial importance of small donors to state office candidates, these analyses concluded.[21]

Public opinion polls showed lawmakers that New Yorkers understood the political harms caused by large donor-dominated elections and believed public financing would alleviate them. In a 2018 Quinnipiac University survey of New York voters, 85 percent of respondents said government corruption was a "serious" problem.[22] A March 2019 survey by Public Policy Polling found that 78 percent of New York voters supported the state's enacting public financing, roughly the same levels polled six years earlier.[23]

Lawmakers received all this evidence of the need for public financing, and discussed the policy's design, in legislative hearings.[24] Not once did a question or comment arise concerning

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[21] Lee & Vyas, *New York's Big Donor Problem*; Malbin & Glavin, *Small-Donor Matching Funds*, 7-9.

[22] *New Yorkers Say Almost 4-1 Increase Abortion Rights, Quinnipiac University Poll Finds; But Few Say Abortion Is Most Important In Gov Race*, QUINNIPIAC UNIV. (Jul. 19, 2018), https://poll.qu.edu/new-york-state/release-detail?ReleaseID=2556.

[23] Public Policy Polling, *New York Survey Results*, FAIR ELECTIONS N.Y. (Mar. 28-29, 2019), https://fairelectionsny.org/cms/wp-content/uploads/2019/03/NewYorkResults.pdf; Celinda Lake et al., *Statewide Polling in New York Shows Deep and Broad Support for Comprehensive Campaign Finance Reform*, LAKE RESEARCH PARTNERS & PUBLIC CAMPAIGN ACTION FUND (Dec. 20, 2012), https://fairelectionsny.org/cms/wp-content/uploads/2019/10/Memo-PCAF-LRP-2012.pdf.

[24] NY Senate, *Joint Leg. Pub. Hr'g on 2019-2020 Exec. Budget Proposal: Local Gov't 02/11/19* at 8:38:25; NY Senate, *NYS Senate Pub. Hr'g on Elections - 3/20/19*; NY Senate, *Joint Leg. Pub. Hr'g on 2020-2021 Exec. Budget Proposal: Local Gov't Officials/Gen. Gov't* at 7:26:10; Lee Feb. 2019 Testimony; Malbin Feb. 2019 Testimony; Lee & Zdanys Mar. 2019 Testimony; Zdanys Feb. 2020 Testimony.

ballot qualification. Legislators heard from numerous citizens, advocates, and policy experts. They wrestled with the details of creating a workable public financing system, addressing such aspects as "the timing of people getting certified,"[25] "the timing of the distribution of funds,"[26] how to regulate compliance reporting so that it is effective but "not overly onerous,"[27] "the time frame to do audits,"[28] and whether "the State Board of Elections is the best agency to handle the enforcement side."[29] They did not at all discuss how candidates or parties attain a place on the ballot.

Nothing in Part ZZZ or in the evidence its enactors considered indicates that restricting ballot qualification is a part of the law's purpose, much less an inseverable part. The legislation's purpose, to restore civic confidence and increase government accountability to voters regardless of their wealth, is fully achievable without the challenged provisions.

III. PART ZZZ'S PUBLIC FINANCING SYSTEM WOULD FUNCTION UNCHANGED WITHOUT THE UNRELATED CHALLENGED PROVISIONS

A. The Only Known Justification for Tying the Public Financing System to the Challenged Ballot Qualification Requirements Is Wrong

Just as Part ZZZ's purpose does not require the challenged provisions, neither does the functioning of its legislative scheme. *Envtl. Encapsulating Corp.*, 855 F.2d at 60 (severing invalid provisions because the court could "leav[e] the remainder of the program viable and

[25] NY Senate, *NYS Senate Public Hearing on Elections - 3/20/19* at 31:03 (statement of Senator Brian Kavanagh).

[26] *Id.* at 17:35 (statement of Senator Alessandra Biaggi).

[27] *Id.* at 39:57 (statement of Assemblymember Robert Carroll).

[28] *Id.* at 56:37 (statement of Assemblyman Harvey Epstein).

[29] *Id.* at 2:02:23 (statement of Senate Elections Chair Zellnor Myrie).

intact"). The only known justification for tying the public financing system to the ballot qualification requirements challenged in this case is simply wrong. And there is no evidence that the legislature even considered this erroneous justification.

That justification receives its most elaborate explanation in the commentary of a gubernatorial appointee to a commission since invalidated for lacking the legal authority to exist. *See Hurley v. Pub. Campaign Fin. & Election Comm'n*, Index No. E169547/2019, NYSCEF No. 213, slip op. at 7-8 (Sup. Ct. Niagara Cty., Mar. 12, 2020) (invalidating statute creating public campaign financing commission on grounds of improper delegation of legislative authority); *Jastrzemski v. Pub. Campaign Fin. & Election Comm'n of the State of N.Y.*, Index No. E169561/2019, NYSCEF No. 279, slip op. at 2 (Sup. Ct. Niagara Cty., Mar. 12, 2020) (same). The appointee, the chair of the state's Democratic Party, opined that access to the ballot must be reduced by enactment of the challenged provisions to keep too many candidates from claiming public financing dollars.[30] It is worth addressing the erroneousness of this view, as, at first blush, it may hold intuitive appeal.[31]

[30] Campaign Fin. Reform Comm'n, *Report to the Governor and the Legislature* 62-65.

[31] Should Defendants urge this Court to consider the Public Campaign Financing Commission's deliberation about ballot qualifications as relevant to resolving this case, such consideration would be inappropriate for several reasons. The commission and all its work were invalidated by a state court as illegally constituted. *Hurley*, Index No. E169547/2019, NYSCEF No. 213, slip op. at 7-8; *Jastrzemski*, Index No. E169561/2019, NYSCEF No. 279, slip op. at 2. There is no evidence that the legislature that enacted Part ZZZ ever considered the commission's deliberations. And in any event, the commission's reasoning about the relevance of ballot qualification to public financing was flatly wrong.

His reasoning fundamentally misunderstands the legislative scheme of what is now Part ZZZ (and also relies on inapposite data).[32] Certainly managing the cost of a public financing system is relevant to its success. Were the system to waste public funds on frivolous candidacies with no hope of winning office, for instance, voters could come to question the system's efficacy and legitimacy.[33] But restricting ballot qualification is not how Part ZZZ, or any public financing system in the country, contains public financing's costs.

Part ZZZ includes myriad well-accepted mechanisms for limiting the availability of public financing that do not depend on a particular ballot qualification rule. To ensure that only viable candidates may participate in the public benefit, candidates must first meet a two-part eligibility threshold that requires them to raise a baseline sum in private donations from a minimum number of small donors to qualify.[34] Part ZZZ, § 4 (adding N.Y. ELEC. LAW § 14-203(2)(a)(i)-(iv)). Participating candidates may receive public financing only in proportion to the matchable contributions they are able to raise from constituents, further limiting candidates' draw on the public benefit by their electoral viability. *Id.* (adding N.Y. ELEC. LAW § 14-205(2)). The system then caps the amount of public financing that any candidate may receive at a certain

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[32] *See Brennan Center Analysis of Minor Party Cost to Public Financing Programs*, BRENNAN CTR. FOR JUSTICE, 5 (Jan. 15, 2020), https://www.brennancenter.org/sites/default/files/2020-01/Brennan%20Center%20Analysis%20of%20Minor%20Party%20Cost%20to%20Public%20Financing%20Programs_1.pdf [hereinafter *Brennan Center Analysis of Minor Party Cost*].

[33] *See The Case for Small Donor Public Financing* 5.

[34] For example, a candidate for Governor must raise at least $500,000 from at least 5,000 individual contributors in order to qualify. The thresholds are lower for other offices. *See* Part ZZZ, § 4 (adding N.Y. ELEC. LAW § 14-203(2)(a)(i) – (iv)).

maximum. *Id.* (adding N.Y. ELEC. LAW § 14-204(1)-(2)). Candidates unopposed in a primary cannot receive funds,[35] and candidates with minimal opposition or running in primaries with low voter support are eligible to receive only a very modest amount. *Id.* (adding N.Y. ELEC. LAW §§ 14-204(5), 14-205(4)).

The challenged provisions do nothing to affect the costs of public financing under Part ZZZ. There is no dispute that the two major parties would easily clear the challenged provisions, so the system would see no cost savings there. And of the candidates who did not run on a major party line in the most recent relevant elections, under the old ballot qualification requirements, none would have met Part ZZZ's challenging eligibility thresholds to be able to access public financing, and few even would have come close.[36]

The lack of connection between particular ballot qualification requirements and a functioning public financing system may explain why the two policies do not appear together in any other public financing scheme. None of the many previous bills introduced by New York state lawmakers to create a materially similar small donor match public financing system, going back two decades, proposed any change to ballot qualification requirements.[37] No other

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[35] Candidates unopposed in the primary may receive up to half the maximum amount of public funds if there is a contested primary in one of the two major political parties for the same office. *Id.* (adding N.Y. ELEC. LAW § 14-204(3)).

[36] *See Brennan Center Analysis of Minor Party Cost* 5; Malbin & Glavin, *Major Innovations* 32.

[37] Governor Cuomo proposed public financing legislation substantially similar to Part ZZZ's public financing system every year from 2013 through 2019. The Senate and Assembly also proposed similar legislation every session since 1999; and the Assembly passed such legislation in 2005, 2006, 2008, 2009, and 2013. Each of these bills contained the same essential elements of Part ZZZ's public financing

jurisdiction that enacted public financing made it harder as a part of that system to appear on the ballot, even those jurisdictions with very active minor parties.[38] These systems rely instead on fundraising-based eligibility prerequisites and other direct limitations on public financing like Part ZZZ's to control costs.[39] Nor does any known academic or policy study counsel increasing ballot qualification thresholds to effectuate public financing policy.

B. The Challenged Provisions, if Struck, Should Be Severed Because They Are Not Integral to Part ZZZ's Legislative Scheme, and the Remainder Upheld.

For the reasons above, the challenged provisions are far from being "so intertwined" with Part ZZZ's legislative scheme that the law could not stand if they should fall. *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 603 F. Supp. 2d 715, 734 (S.D.N.Y. 2009), *aff'd*, 612 F.3d 97 (2d Cir. 2010). The tougher ballot qualification requirements hardly lie at "the heart of the statute's regulatory scheme," *Franza v. Carey*, 518 F. Supp. 324, 338 (S.D.N.Y. 1981), or constitute one of the "pillars" of the law. *Healthcare Distrib. All. v. Zucker*, 353 F. Supp. 3d 235, 265 (S.D.N.Y. 2018). Nor would severing these provisions, and reverting to the pre-2020 ballot qualification rules, "create a confusing and unworkable statute." *N.Y. SMSA Ltd. P'ship*, 603 F. Supp. 2d at 735.

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system: a multiple match, eligibility prerequisites, limits on funding, and oversight and enforcement provisions. None proposed changing ballot qualification. *See Resource Page: Proposed Public Financing Legislation in New York State*, BRENNAN CTR. FOR JUSTICE, https://www.brennancenter.org/our-work/research-reports/resource-page-proposed-public-financing-legislation-new-york-state (last visited Jul. 2, 2020).

[38] *Brennan Center Analysis of Minor Party Cost* 3.

[39] *Id.* at 6-7.

To apply Part ZZZ's purported non-severability provision by its literal word, without performing this inquiry, would produce the absurd result of decimating a public financing system that can function fully as intended under the pre-2020 ballot access requirements. Should this Court invalidate the challenged provisions, it must sever and uphold the remainder of Part ZZZ to effectuate the will of New York voters to improve their democracy through public financing.

IV. FAILURE TO UPHOLD PART ZZZ'S PUBLIC FINANCING SYSTEM WOULD DERAIL A CRUCIAL DEMOCRACY REFORM THAT HAS ALREADY BEGUN

The stakes are not theoretical. Candidates will not begin participating until 2022, but the system that the legislature deemed "crucial to improving public confidence in the state's democratic processes" has already begun necessary operations, with a very tight implementation timeframe compared to far simpler systems elsewhere.[40] Part ZZZ, § 4 (adding N.Y. ELEC. LAW § 14-200 (legislative intent)); § 12 (effective date). The system promises to be effective in delivering its intended public benefit of ameliorating the outsized influence of private wealth in the state's political process, according to data-based analysis.[41] To strike all of Part ZZZ — or

[40] Connecticut's public financing system is far simpler, providing lump sum grants to qualifying candidates instead of the ongoing per-donation matching scheme at different ratios that New York's new system provides. *Compare* CONN. GEN. STAT. § 9-705 (2018) (listing grant amounts by office and election) *with* Part ZZZ, § 4 (adding N.Y. ELEC. LAW § 14-205(2)(a)-(b)) (outlining tiered match formulae). Connecticut required more than two years to ready its system for full participation, similar to the period New York's new law provides. *See* Press Release, State Elections Enforcement Commission, State Elections Enforcement Commission Launches Citizens' Election Program For the 2008 General Election, Keynote Speaker: Governor M. Jodi Rell (June 3, 2008) (announcing June 2008 launch of system passed in December 2005).

[41] Malbin & Glavin, *Major Innovations* 1.

merely to strike the challenged provisions but remain silent about the fate of the rest — would be to ignore the immediate costs to New Yorkers in such a derailment. This Court can and should avoid such a result. It is critical that officials charged with readying the system, potential candidates who would plan campaigns on this more representative system, and New Yorkers who for too long have starved for a political process they can believe in, have certainty that this historic law remains in force.

Necessary operations to fulfill Part ZZZ's purpose have already begun.[42] The State Board of Elections's (SBOE) work this fiscal year to implement public financing includes "creating the detailed program processes, building the IT system to those specifications, promulgating regulations that provide the legal framework and crafting the forms, manuals, and other documents that will translate the program into usable instructions for users."[43] The SBOE leadership has commenced deliberations, necessary in the bipartisan body to reach agreement to proceed, about implementation of the public financing system, and this year pledged to "report

[42] The SAM Party asserts that certain provisions of Part ZZZ's public financing system will not take effect until November 2022. Am. Compl. ¶ 58, *SAM Party of N.Y. v. Kosinski*, No. 1:20-cv-00323-JGK, ECF No. 53 (Apr. 16, 2020). But it is important to note that other provisions of the public financing system already have taken effect – for instance, the implementation work that must be completed in advance of the system's launch. *See* Part ZZZ, § 4 (adding N.Y. ELEC. LAW § 14-207(1)).

[43] Robert Brehm & Todd Valentine, Testimony at the Joint Leg. Pub. Protection Budget Hr'g Before the S. Fin. Comm. and the Assemb. Ways & Means Committee 3 (Feb. 12, 2020), https://www.nysenate.gov/sites/default/files/9_new_york_state_board_of_elections_-_director_robert_brehm_and_director_todd_valentine_.pdf [hereinafter Brehm & Valentine Feb. 2020 Testimony].

on the status of implementation . . . at each of [its public] meetings in the next year."[44] SBOE staff have begun drafting regulations for the unusually complex public financing system, and told SBOE commissioners they would submit an initial draft this summer.[45] Contemplating the extensive preparation the system would require before public participation, Part ZZZ provides that its Public Campaign Finance Board, charged with administering the system, be appointed this July. Part ZZZ, § 4 (adding N.Y. ELEC. LAW § 14-207(1)).

Estimates of the effect of Part ZZZ on New York candidates' fundraising show a remarkable potential for the legislative scheme to fulfill its crucial democratic purpose. Applying the reform's features to campaign finance data from the latest completed election cycle in 2018, Professor Malbin of the Campaign Finance Institute found the system could have had a "dramatic impact on the sources of election money in New York State elections."[46] State senate

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[44] New York State Bd. of Elections, *April 27, 2020 N.Y. State Bd. of Elections Meeting* at 1:20:42 YOUTUBE (Apr. 28, 2020), https://www.youtube.com/watch?v=L7YPeRLw1_Q&feature=youtu.be (statement of Co-Chair Douglas Kellner).

[45] New York State Bd. of Elections, *N.Y. State Bd. of Elections Comm'rs Meeting - 5.27.2020* at 00:13:00, YOUTUBE (May 27, 2020), https://www.youtube.com/watch?v=vdJaz1fejiI&feature=youtu.be; *see* Malbin & Glavin, *Major Innovations* 1 (describing system's innovative but complex rules). Part ZZZ's public financing system includes unusually complex features – for example, a tiered multiple match on in-district contributions to legislative candidates of $12-to-$1 on the first $50, $9-to-$1 on the next $100, and $8-to-$1 on the next $100 – which require special effort to implement via creation of new regulations, rules, and practical advice for users. *See* Part ZZZ, § 4 (adding N.Y. ELEC. LAW § 14-205(2)); Brehm & Valentine Feb. 2020 Testimony 3.

[46] Malbin & Glavin, *Major Innovations* 1.

candidates could have raised more than 50 percent of their campaign funds from small donors giving $250 or less, instead of the less than 10 percent they actually raised from small donors.[47] State assembly candidates could have raised nearly 75 percent of their campaign funds from small donors giving $250 or less, instead of just 14 percent.[48] The new system will enable candidates to raise competitive sums even if they choose to rely primarily on contributions from constituents of modest means[49] — a sea change that would bring New York's wealth-dominated political process closer to the American ideal of democratic equality.

When it enacted Part ZZZ, the legislature sought to make government more accountable to all New Yorkers. The reform's operation has already begun, and its potential efficacy is measurably real. The challenged provisions are not at all necessary to this continuing progress. This Court must declare that the progress of Part ZZZ's public financing system will continue.

CONCLUSION

If this Court invalidates the challenged ballot qualification requirements, it must sever and make clear the survival of the remaining public financing system. Part ZZZ's non-severability language cannot compel this Court to do otherwise. The challenged provisions are not remotely integral, or even related, to the statute's purpose or functional scheme. This Court must ensure that New York's crucial campaign finance reform, and therefore the improvement of its democratic process, may proceed.

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[47] *Id.* at 22.

[48] *Id.* at 21.

[49] *See id.* at 1, 11-12, 21-22.

CERTIFICATE OF COMPLIANCE

I certify that, consistent with Part II.D. of this Court's Individual Practices, this brief (1) contains 6,772 words, excluding the cover page, certificate of compliance, table of contents, and table of authorities; and (2) complies with the Court's formatting requirements.

Dated: July 3, 2020

/s/ Joanna Zdanys
Joanna Zdanys (JZ-8123)
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8343
joanna.zdanys@nyu.edu
Counsel for Amicus Curiae