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**Testimony of
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**Submitted to the
MARYLAND GENERAL ASSEMBLY
COMMISSION TO STUDY CAMPAIGN FINANCE LAW**

June 11, 2012

Dear Mr. Chairperson and members of the Commission:

Thank you for the opportunity to submit written testimony for the Committee's consideration, and for inviting Ms. Marziani to testify in person on June 12, 2012. We applaud your commitment to improving Maryland's campaign finance regulatory scheme, and are pleased to offer our expertise to assist your efforts.

In the wake of *Citizens United*, large and anonymous political spending poses significant dangers to the health of our democratic processes both in Maryland and in states across the country. Moneyed special interests are seeking to capture government officials through enormous political expenditures, squelching the views of the less wealthy in the process. Maryland took a significant step forward last year by strengthening its campaign finance disclosure laws. But, as we describe below, Maryland should seriously consider additional tools to combat corruption and boost democratic participation through reasonable regulations of money in politics.

CURRENT PROBLEMS WITH MONEY IN STATE POLITICS

A Flood of New Money

Since *Citizens United v. FEC*² lifted restrictions on independent spending in U.S. elections, outside parties, including business corporations, unions, and Super PACs, have spent astronomical sums on campaign advertisements in both federal and state elections. In the 2010 federal elections, for example, outside groups spent a total of \$294 million on political advertising—an increase of more

¹ Mimi Marziani and David Earley both serve as counsel for the Brennan Center's Democracy Program. The views expressed in this testimony are solely those of the Brennan Center and do not necessarily reflect the views of NYU School of Law.

² 130 S. Ct. 876 (2010).

than 300% compared with the previous midterm cycle.³ Similarly, an analysis of just 20 states showed that at least \$193 million was spent independent of campaigns during their 2009 and 2010 state elections—a 14% increase from the comparable 2005-2006 cycle.⁴ Maryland has not been immune to this influx of new money. In 2010, for instance, outside groups—many funded by out-of-state interests—spent over \$4.1 million dollars to influence the results of the state’s election for the first congressional district.⁵

Lack of disclosure

Last decade’s disclosure regime is not equipped to regulate new sources of money in the political system. While “PACs” are transparent under federal law and the law of most states, today’s political actors often resist such characterization. For instance, national non-profit corporations organized under sections 501(c)(4) and (c)(6) of the Internal Revenue Code (“IRC”) are permitted to spend significant money to influence candidate elections, and can often do so without being subject to PAC designation.

Such nonprofits have no general obligation to reveal their donors under federal law and are playing an increasingly large role in state elections. For instance:

- In 2010, the Illinois Civil Justice League spent \$688,000 opposing the retention of Chief Kilbride of the Illinois Supreme Court. Most of the League’s money came from the U.S. Chamber of Commerce, a National Association of Manufacturers spinoff group, and the American Tort Reform Association.⁶ As 501(c)(6) trade associations, none of these organizations have any obligation to disclose their donors under federal law.
- The National Organization for Marriage, a 501(c)(4) organization which supports “traditional marriage,” spent over \$720,000 on Iowa state elections in 2010.⁷
- In the 2011 Wisconsin Supreme Court race, only \$215,000 in independent spending was reported to the state. However, a Wisconsin watchdog organization estimated that over \$4.3 million was spent on “issue ads” that never had to be reported. This total estimate dwarfs the \$1.2 million spent by the

³ See PUBLIC CITIZEN, 12 MONTHS AFTER: THE EFFECTS OF *CITIZENS UNITED* ON ELECTIONS AND THE INTEGRITY OF THE LEGISLATIVE PROCESS 9 (2011).

⁴ See Nat’l Inst. of Money in State Politics, *Independent Spending’s Role in State Elections: 2005-2010*, FOLLOWTHEMONEY.ORG (March 15, 2012), <http://www.followthemoney.org/press/PrintReportView.phtml?r=481>.

⁵ Ctr. for Responsive Politics, *2010 Race: Maryland District 01, Outside Spending*, OPENSECRETS.ORG, <http://www.opensecrets.org/races/index.php?cycle=2010&id=MD01> (last visited June 4, 2012).

⁶ ADAM SKAGGS ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10*, at 20 (2011).

⁷ Nat’l Institute on Money in State Politics, *Iowa 2010 – Independent Spending – National Organization for Marriage*, FOLLOWTHEMONEY.ORG, <http://www.followthemoney.org/database/StateGlance/iespender.phtml?ie=6581> (last visited June 8, 2012).

candidates themselves,⁸ yet most of it was never reported due to inadequate disclosure laws.

- In federal elections, the U.S. Chamber of Commerce, a trade association for business interests, has already spent over \$3.5 million dollars in 2012⁹ and intends to spend over \$100 million by the end of the election cycle.¹⁰

In addition to spending money directly, these groups can funnel large sums to other political committees without revealing their underlying income sources. For instance, substantial media attention has been dedicated to election spending by federal Super PACs—groups that can raise and spend unlimited sums for electioneering, so long as they do not coordinate their expenditures with candidates. While Super PACs must disclose all of the money they raise and spend directly, many—if not most—operate with an affiliated 501(c)(4) to give camera-shy donors a means to contribute large sums of money without public scrutiny.¹¹ To illustrate:

- During the 2010 Iowa Supreme Court retention election, the American Family Association (“AFA”), a Mississippi-based organization devoted to supporting “traditional marriage,” utilized its 501(c)(4) arm, American Family Association Action (“AFA Action”) to create a new organization, Iowa for Freedom, to run campaign ads. Iowa for Freedom then spent over \$190,000 on ads to oust certain justices (an effort that was ultimately successful). While all of Iowa for Freedom’s funds came from AFA Action, AFA Action did not have to disclose its donors under Iowa law; thus, the source of funding for this spending blitz has

⁸ *Supreme Court Campaign 2011*, WIS. DEMOCRACY CAMPAIGN (Aug. 12 2011), <http://www.wisdc.org/pro11supreme.php>.

⁹ Running totals are compiled by the Center for Responsive Politics. Ctr. for Responsive Politics, *2012 Outside Spending, By Groups*, OPENSECRET.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=O&type=A&chrt=D> (last visited June 6, 2012).

¹⁰ Mike Allen & Jim Vandehei, *GOP Groups Plan Record \$1 Billion Blitz*, POLITICO (May 30, 2012), <http://www.politico.com/news/stories/0512/76849.html>.

¹¹ Super PACs and affiliated nonprofits have become so brazen in their efforts to exploit the Russian doll loophole that comedian Stephen Colbert has lampooned current law as essentially legalizing money laundering. See Interview by Terry Gross with Trevor Potter, attorney to comedian Stephen Colbert, *Fresh Air*, NAT’L PUB. RADIO (Feb. 23, 2012), available at <http://www.npr.org/2012/02/23/147294509/examining-the-superpac-with-colberts-trevor-potter>. And, the *New York Times* has enlisted the help of its readers in attempts to discern the true sources of Super PAC funders. See Michael Luo, *Readers: Help Us Discover a Secret Donor*, N.Y. TIMES, THE CAUCUS BLOG (Feb. 3, 2012, 10:35 AM), <http://thecaucus.blogs.nytimes.com/2012/02/03/a-crowdsourcing-experiment-help-us-discover-a-secret-donor/?src=tp>.

never been revealed.¹² Overall, out-of-state independent advocates spent just under \$1 million; a mere \$10,000 originated from within Iowa.¹³

- In 2010, the Greater Wisconsin Political Independent Expenditure Fund spent over \$640,000, receiving *all* of its contributions from the Greater Wisconsin Political Fund, a group organized under section 527 of the IRC.¹⁴ Tax filings by the Greater Wisconsin Political Fund reveal numerous contributors, including \$300,000 in 2009 from the Greater Wisconsin Committee, a 501(c)(4) organization that is not required to disclose its donors.¹⁵ And, not only are the Greater Wisconsin Committee's contributors not disclosed, but the funds it gave to Greater Wisconsin Political Fund were later commingled with other contributions to that fund, making it impossible to know who truly funded the Greater Wisconsin Political Independent Expenditure Fund's spending frenzy.

On top of gaps in disclosure laws that fail to capture the transfer of funds, outside groups may try to veil their true political intentions by using deceptive names. For example:

- In a 2010 Colorado ballot measure election, a group called "Littleton Neighbors Voting No," spent \$170,000 to defeat a restriction that would have prevented Wal-Mart from coming to town. When the disclosure reports for these groups were filed, however, it was revealed that "Littleton Neighbors" was exclusively funded by Wal-Mart and was not a grassroots campaign at all.¹⁶
- During the 2011 Wisconsin Supreme Court race, a group named "Citizens for a Strong America" funded an advertising blitz against candidate JoAnne Kloppenburg, but provided no public information about its organization, leadership, or funders. The address listed for the group led to a mailbox at a local UPS store and its phone number led to a full voicemail box. Eventually, the Center for Media and Democracy discovered that "Citizens for a Strong

¹² Kevin McNellis, Nat'l Inst. of Money in State Politics, *Best Practices for Independent Spending: Part Two*, FOLLOWTHEMONEY.ORG (Mar. 15, 2012), <http://www.followthemoney.org/press/ReportView.phtml?r=480#id.1g65m2ldkddj>.

¹³ Linda Casey, *Independent Expenditure Campaigns in Iowa Topple Three High Court Justices*, NAT'L INST. OF MONEY IN STATE POLITICS (Jan. 10, 2011), <http://www.followthemoney.org/press/ReportView.phtml?r=440> (indicating that \$990,651 was spent opposing the justices' retention).

¹⁴ GREATER WISCONSIN POLITICAL INDEPENDENT EXPENDITURE FUND, FALL PRE-ELECTION 2010 REPORT (amended Jan. 28, 2011), *available at* <http://cfis.wi.gov/Public/Registration.aspx?page=FiledReports>.

¹⁵ Greater Wisconsin Political Fund, Form 8872 (July 31, 2009), *available at* <http://forms.irs.gov/politicalOrgsSearch/search/gotoSearchDrillDown.action?pacId=%2724558%27&criteriaName=%27Greater+Wisconsin+Political+Fund%27>.

¹⁶ *See* Def.'s Response Br. to Pls.' Motion for Summary Judgment, *Sampson v. Coffman*, 06-cv-01858 at 43-44 (D. Colo. 2007) (Dkt. #34).

America” was controlled by a leader of Americans for Prosperity, a national organization largely funded by billionaire David Koch.¹⁷ This could not have been discerned from required disclosure reports.

When spending lacks transparency, voters lack the tools needed to properly evaluate the messages they receive that are trying to influence their votes. They also lack the ability to police corruption after candidates are elected into office. Disclosure deficits thus pose serious problems for Maryland’s governmental systems, and undermine the rights of Maryland voters.

Negative effects on democracy

There is increasing evidence that Americans are concerned by the influx of new money—particularly dark money—and its impact on our governmental systems. Indeed, a recent national survey found that nearly 70 percent of Americans believe Super PAC spending will lead to corruption. Of those who expressed an opinion, more than 80 percent believe that, compared with past elections, the money being spent by political groups this year is more likely to lead to corruption. And, most alarmingly, the poll revealed that concerns about the influence Super PACs have over elected officials undermine Americans’ faith in democracy: one in four respondents—and even larger numbers of low-income people, African Americans, and Latinos—reported that they are less likely to vote because big donors to Super PACs have so much more sway than average Americans.¹⁸

There is no reason to think that Marylanders are any less concerned. Editorials in Maryland’s largest newspapers have called for greater disclosure and for the Supreme Court to reevaluate its decision in *Citizens United*. For instance, the *Capital* lamented the impact that *Citizens United* would have on misleading advertising, saying “[E]veryone who thought that the election-season deluge of distorted advertising couldn’t possibly get any worse will be proven wrong this fall.”¹⁹ The *Baltimore Sun* criticized the lack of disclosure for independent spending in the wake of *Citizens United*, arguing that the prevalence of secret money “eliminates the one safeguard our porous campaign finance laws had previously afforded—if politicians were being bought, we could have at least figured out by whom.”²⁰ In addition, the cities of Greenbelt, College Park, and Mt. Rainier, as well as Prince

¹⁷ Lisa Graves, *Group Called “Citizens for a Strong America” Operates out of a UPS Mail Drop but Runs Expensive Ads in Supreme Court Race?*, PRWATCH.ORG (Apr. 2, 2011, 6:37 PM), <http://www.prwatch.org/news/2011/04/10534/group-called-citizens-strong-america-operates-out-ups-mail-drop-runs-expensive-ad>.

¹⁸ BRENNAN CTR. FOR JUSTICE, NATIONAL SURVEY: SUPER PACS, CORRUPTION, AND DEMOCRACY 2-3 (2012), available at http://brennan.3cdn.net/5d2ff3bdfc12b2eb27_pym6b9cdv.pdf.

¹⁹ Editorial, *State Response to Campaign Finance Ruling Needed*, CAPITAL (Annapolis, Md.), Jan. 28, 2010, at A12.

²⁰ Editorial, *Here Comes the Cash; Our View: New Rules Allow Corporations to Spend Freely*, BALT. SUN, Sept. 10, 2010, at 14A. See also Editorial, *Our View: And Campaign Fiance Evolves*, Daily Times (Salisbury, Md.), Mar. 29, 2010; Editorial, *A Roadmap for Reform; Our View: The Shortcomings of Maryland Campaign Finance Law Are Clear Enough; Now It’s Time for Lawmakers to Do the Right Thing and Close Glaring Loopholes*, BALT. SUN, Jan. 7, 2011, at 14A; Editorial, *Disclose, Disclose, Disclose; Our View: Obama Should Sign Order Forcing Contractors to Reveal Political Donations*, BALT. SUN, May 10, 2011, at 10A; Editorial, *The Rise of the Super PAC; Our View: Ugliness of the Republican Presidential Primaries Could Advance Efforts to Reverse the Supreme Court’s Citizens United Decision*,

George's County, have all passed resolutions calling for a constitutional amendment to overturn *Citizens United*.²¹

In short, big money in politics has caused an outcry both in Maryland and across the country. Now is the time for the Maryland General Assembly to respond.

PROPOSALS FOR MARYLAND

There is, unfortunately, no silver bullet that can eradicate the corrosive effect of big money in politics. There are, however, a series of reforms that, working in tandem, could guard against possible corruption and facilitate greater political participation:

- First, robust disclosure requirements are essential to a functioning, twenty-first century democracy. Voters have a right to know the identities of those seeking to influence their vote. And, disclosure deters corrupt, back-room dealings and enables regulators to detect violations of other campaign finance laws, like contribution limits. Maryland's existing disclosure scheme should be further strengthened.
- Second, small-donor public financing of elections offers a way to free candidates from the influence of special interests and boost democratic participation. Maryland should consider modernizing its presently unused public financing program to further these goals.
- Third, the state should prohibit campaign contributions by government contractors in order to thwart the possibility of corrupt arrangements.
- Fourth, the state should continue to modernize its voter registration system to ensure that all those who are eligible are registered and able to vote on Election Day. Ultimately, the best way to combat the influx of new political money will be through an empowered, informed and active electorate.

Enhanced Disclosure

In 2011, Maryland adopted groundbreaking new disclosure rules that corrected deficiencies in preexisting law—and “propel[ed] the state to the vanguard.”²² The law shined a bright light on

BALT. SUN, Jan. 23, 2012, at 12A; Editorial, *Buying the Presidency: Our View: Supreme Court Should Take Another Look at Citizens United*, BALT. SUN, Feb. 24, 2012, at 18A.

²¹ *Citizens United v. FEC Constitutional Remedies: List of Local, State, and Federal Resolution Efforts*, PEOPLE FOR THE AM. WAY, (May 22, 2012), <http://www.pfaw.org/issues/government-the-people/citizens-united-v-fec-constitutional-remedies-list-of-local-state-and-f>.

²² Mimi Murray Digby Marziani, Op-Ed., *Make Maryland Elections Transparent*, BALT. SUN, Apr. 22, 2011, at 19A.

Maryland elections, helping voters know who is trying to influence their votes. But a few additions to existing law could make the overall scheme even better.

To combat the so-called “Russian doll problem” described above—where dark organizations funnel money to political committees for political ads—the State should treat such indirect contributions just like direct contributions. In other words, if a person or entity gives money knowing that it will be used for campaign advertisements, that contribution should have to be publicly disclosed, regardless of whether it is funneled through an intermediary non-profit. The routing of money through multiple entities to avoid disclosure should not be tolerated. The best model for such policy can be found in proposed federal legislation, the DISCLOSE Act of 2012.²³

More frequent disclosure reports would also boost Maryland’s system. Political spenders are currently required to provide only four reports during election season, regardless of how much they spend or receive—four weeks before the primary election, two weeks before the primary election, two weeks before the general election, and three weeks after the general election.²⁴ This leaves voters in the dark when it matters most—right before Election Day. With the advance of modern technology, the public is entitled to real-time information about political spending in the closing days before an election, when most money is spent.

Here again, federal law provides a useful example. Federal disclosure rules require that independent expenditures of over \$10,000 from January 1 of an election year until 20 days before an election be reported within two days of the expenditure being made.²⁵ Ten thousand dollar expenditures made within 20 days of an election must be reported in 24 hours,²⁶ and the FEC posts these reports on the Internet within 48 hours.²⁷ Rather than having to wait until after Election Day to discover who is behind the money, voters and the press can almost immediately go online to find out what is really going on.

Finally, the state should consider strengthening its preexisting disclaimer provisions. Maryland currently requires that a disclaimer appear on political advertising that includes the name of the entity that paid for it, as well as the name of that entity’s treasurer.²⁸ This policy, however, leaves Maryland voters susceptible to the deceptive name practices described above. Enhanced disclaimers are necessary for voters to properly—and quickly—evaluate the messages they receive.

To combat the use of misleading pseudonyms, Maryland should require additional information on the face of advertisements about their main sources of funding. For instance, in Washington state and in Connecticut, ads must show the names of the top donors to the organization running the

²³ See DISCLOSE Act of 2012, S. 2219, 112th Cong. § 2(b)(1) (2012).

²⁴ See MD. CODE ANN., ELEC. LAW § 13-309(a) (West 2012).

²⁵ 11 C.F.R. § 104.4(b)(2) (2012).

²⁶ *Id.*

²⁷ 2 U.S.C. § 434(a)(11)(B).

²⁸ MD. CODE ANN., ELEC. LAW § 13-401(a)(1) (West 2012).

ad.²⁹ Similar provisions are included in the pending DISCLOSE Act.³⁰ Another model is Delaware's new disclosure act—which was just passed by the legislature and is awaiting the Governor's signature. Under Delaware law, political advertisements will advise viewers that more information about the political spender is available at the Commissioner of Elections' website, and provide a link for easy access.³¹

Public Financing of Elections

Maryland should also update and expand its existing public financing program. The State had a good idea in 1974 when it first implemented public financing of elections. Unfortunately, the program was underfunded from the start, and—as a result—was never active. Maryland must try again; this time, by enacting a fully-funded, carefully-crafted public financing program that will combat corrupt and boost democratic participation.

As the Brennan Center has extensively documented, public financing of elections provides myriad benefits.³² First, public financing reduces conflicts of interest by freeing decision-makers from dependence upon big donors. Rather than worrying about the reactions of large contributors and special interest groups when they oppose or support a particular bill, elected officials are freed to simply consider the best interests of their constituents. Janet Napolitano, who ran for governor of Arizona using public funds, explained that:

If I had not run [using public financing], I would surely have been paid visits by numerous campaign contributors representing pharmaceutical interests and the like, urging me either to shelve that idea or to create it in their image. All the while, they would be wielding the implied threat to yank their support and shop for an opponent in four years. [Instead,] I was able to create this program based on one and only one variable: the best interests of Arizona's senior citizens.³³

Similarly, public financing thwarts the *appearance* of corruption, boosting the public's faith in the integrity of the government and the democratic process.

²⁹ WASH. REV. CODE ANN. § 42.17A.320 (West 2012); CONN. GEN. STAT. ANN. § 9-621(h) (West 2012).

³⁰ See DISCLOSE Act of 2012, S. 2219, 112th Cong. § 3(b)(2) (2012).

³¹ Delaware Elections Disclosure Act, H.R. 300, 146th Gen. Assemb. § 5 (Del. 2012).

³² ELISABETH GENN ET AL., BRENNAN CTR. FOR JUSTICE & THE CAMPAIGN FIN. INST., DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS (2012); MIMI MARZIANI ET AL., BRENNAN CTR. FOR JUSTICE, MORE THAN COMBATING CORRUPTION: THE OTHER BENEFITS OF PUBLIC FINANCING (2011); ANGELA MIGALLY & SUSAN LISS, BRENNAN CTR. FOR JUSTICE, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE (2010); see also *The Fair Elections Now Act: A Comprehensive Response to Citizens United: Hearing on S. 750 Before the Subcomm. on the Constitution, Civil Rights, & Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Monica Youn, Senior Counsel, Brennan Center for Justice).

³³ *Why Fair Elections?*, RHODE ISLANDERS FOR FAIR ELECTIONS, <http://www.fairelectionsri.org/benefits.php> (last visited June 5, 2012).

Second, public financing can greatly enhance political participation. By supercharging the power of small donations, for instance, small-donor public financing programs encourage candidates to campaign to their constituents. This draws more voters in and gives regular citizens a meaningful voice in the electoral process. Indeed, a recent Brennan Center study found that New York City’s small-donor public financing program drastically expanded the diversity of donors—for example, residents of several poor, minority neighborhoods were twenty times more likely to participate in city races. And, public financing allows new and more diverse candidates to run for office, resulting in more contested and more competitive elections.³⁴

Finally, public financing plays a particularly important role in judicial elections. Such programs remove the potential for conflicts of interest in the courtroom when judges raise money from the parties and lawyers who then appear before them.³⁵ Unsurprisingly, judicial public financing is embraced by the public. North Carolina’s system has strong public support—one poll found that 74 percent of respondents supported the program.³⁶ Similarly, a majority of West Virginia voters support the proposed public financing system in that state.³⁷ And public financing is popular with judicial candidates: as North Carolina Court of Appeals Judge Wanda Bryant said, public financing “makes all the difference. I’ve run in two elections, one with campaign finance reform and one without. I’ll take ‘with’ any time, any day, any where.”³⁸

Because it has the potential to dramatically boost participation while combating corruption, small-donor systems represent the best model of public financing. In particular, Maryland should consider a small-donor, multiple-match funding program, similar to the type successfully used by New York City and currently contemplated by New York State. In such a program, the government matches, by some multiple, each small contribution received by a candidate. For example, New York City provides a six-to-one match of contributions up to \$175. Hence, a \$175 contribution to a candidate results in a corresponding \$1,050 contribution by the public financing program.³⁹

³⁴ See MARZIANI ET AL., *supra* note 32.

³⁵ As the President of the American Bar Association has noted, “[a] judicial system that requires judges to solicit contributions from interests appearing before the court risks removing the blindfold from the eyes of Lady Justice.” Carolyn B. Lamm, *Let’s Leave Politics Out of It*, A.B.A. J., Mar. 1, 2010, *available at* http://www.abajournal.com/magazine/article/lets_leave_politics_out_of_it/.

³⁶ See Press Release, Justice at Stake, Justice at Stake Hails Public Financing Breakthrough in Wisconsin (Nov. 5, 2009), *available at* http://www.justiceatstake.org/newsroom/featured_stories.cfm/justice_at_stake_hails_public_financing_breakthrough_in_wisconsin?show=news&newsID=6241.

³⁷ See Press Release, Justice at Stake, Poll: West Virginia Voters Support Public Financing for Court Elections, Mar. 8, 2010, *available at* http://www.justiceatstake.org/newsroom/press_releases.cfm/poll_west_virginia_voters_support_public_financing_for_court_elections?show=news&newsID=6959.

³⁸ Justice at Stake, *supra* note 36.

³⁹ See MIGALLY ET AL., *supra* note 32, at 4-5 (2010).

For any public financing system to be successful, Maryland must dedicate funding sufficient to allow candidates to run competitive campaigns—and recognize that such funding is a small price to pay for better government and a stronger democracy. Notably, publicly-financed candidates do not need a king’s ransom to be competitive with high-spending opponents; they just need enough to get their message out and have the chance to connect with voters. The 1994 gubernatorial election provides a valuable lesson in this regard. Though publicly financed candidate Ellen Sauerbrey was vastly outspent by her opponent, Ms. Sauerbrey lost by just under 6,000 votes, a mere four-tenths of one percent of the more than 1.4 million votes cast that year.⁴⁰

Preventing Pay-to-Play: Government Contractor Contribution Bans

Maryland should also consider a stronger pay-to-play law that bans contributions by government contractors. The preexisting law offers a strong baseline—by requiring specific reports from government contractors, the public can more diligently guard against *quid pro quo* arrangements and other improper activities. But, the State can and should go farther by implementing a complete ban of contributions by government contractors, as several other states have done.⁴¹

A government contractor contribution ban protects the integrity of government services by ensuring that those with personal stakes in governmental decision-making are unable to exert improper influence through monetary contributions. And, such bans prevent the appearance of corruption that can arise whenever a government contractor gives a large donation to an official’s campaign coffers. By banning campaign contributions by contractors, the public can be assured that government contracts are being awarded in an efficient fashion, resulting in not only the highest quality work but also savings to taxpayers.

Voter Registration Modernization

Finally, perhaps the best way to counter the flood of new money into our electoral process is to add thousands of new voters by modernizing voter registration systems. Fortunately, Maryland has already made huge strides in this area. By recently kicking off its automated registration process at the Motor Vehicle Administration, Maryland is already striving to ensure that all of its citizens who are eligible to vote can do so on Election Day.

Maryland should continue this trend by implementing the online registration process approved by the legislature.⁴² Voters already engage in extensive election-related activities online, including learning about candidates’ positions, telling their friends about their political views, and making

⁴⁰ Megan Poiniski, *Rarely Used Public Campaign Funds Redirected for Voting Machines, May Be Retiring After 2010 Election*, MD. REP. (Aug. 5, 2010), <http://marylandreporter.com/2010/08/05/rarely-used-public-campaign-funds-redirected-for-voting-machines-may-be-retiring-after-2010-election/>; *1994 Gubernatorial General Election Results*, MD. STATE BD. OF ELECTIONS, http://www.elections.state.md.us/elections/1994/results_1994/gagov.html (last visited June 5, 2012).

⁴¹ See, e.g., 2 U.S.C.A. § 441c(a) (West 2012); CONN. GEN. STAT. ANN. § 9-612(g) (West 2012); HAW. REV. STAT. § 11-355 (West 2012); S.F. CAMPAIGN & GOVERNMENTAL CONDUCT CODE § 1.126 (2012).

⁴² See MD. CODE ANN., ELEC. LAW § 3-201(a)(6) (West 2012) (allowing a person to register “through the State Board’s online voter registration system”); *id.* § 3-204.1 (describing the online registration system).

monetary donations.⁴³ Providing for online voter registration is the next logical step in the Digital Age.⁴⁴ Additionally, the legislature should allow for Election Day registration so that all citizens who wish to vote can do so, even if they did not register weeks in advance of an election.⁴⁵

THESE PROPOSALS REST ON FIRM CONSTITUTIONAL GROUND

Our proposals all rest on firm constitutional ground. While the Supreme Court has struck down campaign finance laws that limit money in politics, the Court and lower federal courts have repeatedly affirmed disclosure laws, public financing programs, and anti-pay-to-play laws. Voter registration modernization strategies pose no conceivable constitutional concerns.

Enhanced Disclosure

For more than three decades—from *Buckley v. Valeo*,⁴⁶ upholding the post-Watergate regulation of money and politics in 1976, through *McConnell v. FEC*,⁴⁷ upholding the Bipartisan Campaign Reform Act’s disclosure requirements for electioneering communications in 2003, to *Citizens United* and beyond—the Supreme Court has consistently and repeatedly held disclosure of the source of campaign funds to be constitutional.

In *Buckley*, the seminal case on money in politics, the Court explained that campaign finance disclosure serves three key governmental interests: (1) “disclosure provides the electorate with information as to where political campaign money comes from and how it is spent; (2) “disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity;” and (3) “disclosure requirements are an essential means of gathering the data necessary to detect violations” of other campaign finance regulations.⁴⁸ Thereafter, the Court has repeatedly reaffirmed this triumvirate of governmental interests in robust disclosure.

Most recently, eight justices voted to uphold challenged disclosure requirements in *Citizens United*. In doing so, they explained that even if “[d]isclaimer and disclosure requirements may burden the ability to speak, . . . they impose no ceiling on campaign-related activities, and do not prevent anyone

⁴³ See ANTHONY J. CORRADO ET AL., CAMPAIGN FIN. INST., AM. ENTER. INST., & BROOKINGS INST., REFORM IN AN AGE OF NETWORKED CAMPAIGNS 8-11 (2010)..

⁴⁴ See also WENDY WEISER ET AL., BRENNAN CTR. FOR JUSTICE, COMPONENTS OF A BILL TO MODERNIZE THE VOTER REGISTRATION SYSTEM (2010).

⁴⁵ MD. CODE ANN., ELEC. LAW § 3-302 (West 2012) (closing voter registration 21 days before an election).

⁴⁶ 424 U.S. 1 (1976).

⁴⁷ 540 U.S. 93, 95-107 (2003).

⁴⁸ *Buckley*, 424 U.S. at 66-68.

from speaking.”⁴⁹ And, the Court made clear that disclosure of money in politics furthers important First Amendment values, and is a necessary component of our electoral process:

The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.⁵⁰

Since *Citizens United*, lower federal courts—from Washington to Florida and from Maine to Hawaii—have consistently and repeatedly upheld state campaign finance disclosure laws that target outside spending.⁵¹ Over and over, these courts have stressed the importance of robust

⁴⁹ *Citizens United*, 130 S. Ct. 876, 914 (2010).

⁵⁰ *Id.* at 916; *see also Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring) (“Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.”).

⁵¹ *See, e.g., Family PAC v. McKenna*, Nos. 10–35832, 10–35893, 2012 WL 266111, at *6 (9th Cir. Jan. 31, 2012) (upholding Washington’s \$25 and \$100 disclosure thresholds for reporting information about contributors to political committees that support ballot measures); *Nat’l Org. for Marriage v. Daluz*, 654 F.3d 115, 118 (1st Cir. 2011) (finding that Rhode Island’s “relatively small imposition” for disclosing information about independent expenditures is related to government interest in providing electorate with key information); *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 41 (1st Cir. 2011) (upholding Maine’s political committee financial disclosure requirements and finding that provisions “neither erect a barrier to political speech nor limit its quantity”), *aff’d* No. 11-1196, 40 (1st Cir. Jan. 31, 2012) (finding that “ballot question committee” law, like PAC laws, are constitutional and that “transparency is a compelling objective”), *cert. denied*, No. 11-559 (U.S. Feb. 27, 2012); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010) (upholding Washington’s political committee financial disclosure requirements and noting, “indeed, it is the Supreme Court’s decision in *Citizens United* . . . that provides the best guidance regarding the constitutionality of the Disclosure Law’s requirements.”); *Justice v. Hosemann*, No. 3:11-CV-138-SA-SAA, 2011 WL 5326057, at *14 (N.D. Miss. Nov. 3, 2011) (holding that Mississippi’s disclosure forms are not “overly intrusive” and that \$200 threshold amount is rational and substantially related to government’s important informational interest); *ProtectMarriage.com v. Bowen*, No. 2:09-CV-00058-MCE-DAD, 2011 WL 5507204, at *18 (E.D. Cal. Nov. 4, 2011) (finding that alleged harassment related to financial support of Proposition 8 did not warrant exception from California’s general disclosure laws); *Nat’l Org. for Marriage, Inc. v. Roberts*, 753 F.Supp.2d 1217, 1222 (N.D. Fla. 2010) (finding that Florida disclosure requirements connected to “electioneering communications organizations” “would not prohibit [plaintiff] from engaging in its proposed speech”); *Yamada v. Kuramoto*, No. 10-00497 JMS/LEK, 2010 WL 4603936, at *1 (D. Haw. Oct. 29, 2010) (finding that “*Citizens United* also endorsed disclosure” and upholding Hawaii’s disclosure regime); *Iowa Right to Life Comm., Inc. v. Smithson*, 750 F.Supp.2d 1020, 1026 (S.D. Iowa 2010) (finding “under *Citizens United*, [t]he Government may regulate corporate political speech through disclaimer and disclosure requirements” and upholding Iowa disclosure regime (alteration in original)); *Wis. Club for Growth, Inc. v. Myse*, No. 10-cv-427-wmc, 2010 WL 4024932, at *5 (W.D. Wis. Oct. 13, 2010) (refusing to enjoin Wisconsin’s disclosure regulations; noting “[P]laintiffs’ reliance on *FEC v. WRTL* ignores the Supreme Court’s later treatment of disclosure and disclaimer regulations in *Citizens United*”); *Ctr. for Individual Freedom v. Madigan*, 735 F. Supp. 2d 994, 1000 (N.D. Ill. 2010) (upholding Illinois’ registration, disclosure, and reporting provisions; noting “in *Citizens United*, the Supreme Court expressly rejected the contention that election-law disclosure requirements are limited to express advocacy or its functional equivalent”). *See also SpeechNow.org v. FEC*, 599 F.3d 686,

transparency of money in state politics. For instance, as the Ninth Circuit Court of Appeals explained, upholding Washington state disclosure laws:

Campaign finance disclosure requirements . . . advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas. An appeal to cast one’s vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another.⁵²

Public Financing of Elections

The constitutionality of public financing is also beyond question. As was the case with disclosure, the Court first approved of public financing in *Buckley*. In upholding the constitutionality of the presidential public financing program, that Court explained that public financing can “facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”⁵³ Public financing also helps “eliminat[e] the improper influence of large private contributions [and therefore] furthers a significant governmental interest.”⁵⁴

The Court recently reaffirmed the constitutionality of public financing in *Arizona Free Enterprise*. Citing *Buckley*, the Court explained that governments “may engage in public financing of election campaigns and . . . doing so can further significant governmental interests such as the state interest in preventing corruption.”⁵⁵ While the Court narrowly struck down Arizona’s triggered matching funds provisions, which provided a dollar-for-dollar match to publicly financed candidates triggered by their opponents’ spending, it left no doubt that public financing programs are generally constitutional.⁵⁶

696–97 (D.C. Cir. 2010) (upholding federal disclosure requirements for organizations making independent expenditures; finding “*Citizens United* upheld disclaimer and disclosure requirements for electioneering communications as applied to *Citizens United*, again citing the government’s interest in providing the electorate with information”).

⁵² *Brumsickle*, 624 F.3d at 1008.

⁵³ *Buckley*, 424 U.S. at 92-93.

⁵⁴ *Id.* at 96.

⁵⁵ *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011) (internal quotation marks and brackets omitted).

⁵⁶ In the 2004 Study Commission on Public Funding of Campaigns in Maryland, the Study Commission suggested incorporating trigger fund mechanisms—funding provided to a publicly financed candidate as a result of spending by a traditional opponent—into its program. See Study Comm’n on Pub. Funding of Campaigns in Md., Final Report (Feb. 2004). This model of public financing is no longer an option for Maryland after *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*.

Government Contractor Contribution Bans

Prohibiting contributions by contractors to candidates is also constitutional, and has been upheld by federal courts.

In 2010, the Second Circuit upheld Connecticut’s ban on contractor contributions in light of the state’s extensive problems with bribery and corruption.⁵⁷ Connecticut enacted the contractor contribution ban in response to a major corruption scandal which included, among other things, the governor illegally accepting numerous gifts from government contractors in exchange for support in acquiring state contracts.⁵⁸ The Connecticut General Assembly responded with a comprehensive campaign finance law, including a ban on contributions by government contractors and would-be government contractors.⁵⁹

In upholding the ban, the Second Circuit found that, while a ban is “a drastic measure,” a ban was necessary to counter the appearance of corruption raised by even small donations from government contractors.⁶⁰ The ban “eliminate[d] any notion that contractors can influence state officials by donating to their campaigns.”⁶¹

Similarly, the Fourth Circuit Court of Appeals (which sets federal law within Maryland) recently upheld a North Carolina law banning lobbyist contributions. “The imposition of a restriction, whether a limit or a ban, on contributions by a specific group of individuals serves only as a channeling device, cutting off the avenue of association and expression that is most likely to lead to corruption but allowing numerous other avenues of association and expression.”⁶² Accordingly, the Fourth Circuit affirmed the “rational judgment that a complete ban was necessary as a prophylactic to prevent not only actual corruption but also the appearance of corruption in future state political campaigns. This is both an important and a legitimate legislative judgment that courts simply are not in the position to second-guess, especially where corruption is the evil feared.”⁶³ Finally, the Fourth Circuit noted that alternative means of expressing support for a candidate existed, such as volunteering one’s time or putting a supportive sign in one’s yard, thereby ensuring that the ban was not overly broad.

The Brennan Center is committed to fostering good government across the country and is delighted that Maryland is again taking steps to improve its campaign finance laws. If the Commission has

⁵⁷ *Green Party of Conn. v. Garfield*, 616 F.3d 189, 205 (2d Cir. 2010).

⁵⁸ *Id.* at 193.

⁵⁹ *Id.*

⁶⁰ *Id.* at 204-05.

⁶¹ *Id.* at 205.

⁶² *Preston v. Leake*, 660 F.3d 726, 734 (4th Cir. 2011).

⁶³ *Id.* at 736 (internal citations, quotation marks, and brackets omitted).

any questions or if there is any other information we could provide, please do not hesitate to contact Ms. Marziani, or any of our other campaign finance experts.