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Testimony of
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Submitted to the
NEW YORK CITY COUNCIL
COMMITTEE ON GOVERNMENTAL OPERATIONS

For the hearing on
RESOLUTION # 646

February 11, 2011

Ms. Chairwoman and Members of the Committee:

I am here to voice my strong support of Resolution Number 646, authorizing the New York City Council to participate as *amicus curiae* in *McComish v. Bennett*, an upcoming U.S. Supreme Court case concerning the constitutionality of Arizona's public financing system.[1] This case will be the Court's first consideration of a public funding program since its 1976 decision in *Buckley v. Valeo*, where it upheld the presidential public funding program. By participating as an *amicus*, this Council would play a significant role in a case that may well set the constitutional parameters for public financing for the foreseeable future. What may be at stake is a jurisdiction's ability to design workable and cost-effective public funding systems that can offer a viable alternative to potentially corrupting private campaign fundraising. Indeed, as explained in greater detail below, an adverse ruling in *McComish* could disrupt public financing systems in at least twenty jurisdictions, including New York City's own groundbreaking system. Moreover, *amicus* participation would affirm the Council's robust support of New York City's small-donor matching funds program – one of this country's most innovative and successful public financing systems.[2]

[1] The Brennan Center, with its *pro bono* counsel Munger, Tolles & Olson LLP, represents Arizona Clean Elections Institute, one of the defendants in the case.

[2] For more information, see ANGELA MIGALLY & SUSAN LISS, SMALL DONOR MATCHING FUNDS: THE NYC EXPERIENCE (Brennan Center 2010), submitted as an appendix to this testimony.

The Constitutional Issues at Stake in *McComish v. Bennett*

Public financing has long stood on firm constitutional footing. Ever since the Supreme Court's ruling in *Buckley v. Valeo*,[3] federal courts have repeatedly upheld public financing systems against constitutional challenge.[4] In recent years, however, litigious plaintiffs, most of them ideological opponents to public funding, have advanced a series of attacks to such systems across the country. The most hotly-contested issue is that which lies at the heart of the *McComish v. Bennett* case – the constitutionality of trigger funds.

Trigger funds, also known as "rescue funds" or "fair fight funds," are additional public grants made available to a publicly-funded candidate facing high spending from either a privately-funded opponent or from an independent spender. Under Arizona's Clean Elections Act, participating candidates initially receive a base grant equal to one-third of the maximum per-candidate funding. If a publicly-funded candidate's privately-funded opponent spends more than that base grant amount, or if she is targeted by hostile independent expenditures, the participating candidate receives additional funds ultimately capped at twice the amount of the initial grant. (In other words, extra public money is "triggered" to publicly-funded candidates when they are caught in particularly competitive, high-spending races.) This system was carefully designed to both provide participating candidates with sufficient resources to run competitive campaigns and to avoid wasting limited state funds on noncompetitive races.

Buckley did not address the constitutionality of trigger funds because the presidential public financing system does not contain this type of funding mechanism. But, historically, lower federal courts have easily upheld these provisions, finding them to be presumptively constitutional.[5] In recent years, however, following the Supreme Court's 2008 decision in *Davis v. FEC*,[6] appellate courts have reached different conclusions in their assessments of trigger funds. Indeed, while the Ninth Circuit Court of Appeals unanimously upheld the trigger funds specifically at issue in *McComish*, the Second Circuit recently struck down similar provisions in Connecticut's Citizens Election Act.[7]

The Brennan Center, counsel for intervening-defendants in *McComish* and involved in similar litigation nationwide, is confident that *Davis* provides no grounds for invalidating trigger funds within a public funding program. As the Ninth Circuit correctly held, "*Davis* says nothing about

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[3] 424 U.S. 1, 85-109 (1976) (upholding the presidential public financing system under Federal Election Campaign Act).

[4] *See, e.g.*, Green Party of Conn. v. Garfield, 616 F.3d 213 (2d Cir. 2010) (upholding majority of Connecticut's Clean Election Program); McComish v. Bennett, 605 F.3d 720 (9th Cir. 2010) (upholding Arizona's Clean Elections Act); Duke v. Leake, 524 F.3d 427 (4th Cir. 2008) (upholding North Carolina's judicial public financing system); Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's Clean Election Act); Rosenstiel v. Rodriguez, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Minnesota's public funding program); Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39 (1st Cir. 1993) (upholding Rhode Island's public financing law).

[5] *See, e.g.*, Leake, 524 F.3d at 437-38; Daggett, 205 F.3d at 464-65.

[6] Davis v. FEC, 128 S. Ct. 2759 (2008).

[7] *See* Green Party, 616 F.3d at 243-46; *see also* Scott v. Roberts, 612 F.3d 1279 (11th Cir. 2010) (striking down trigger provisions in Florida's public financing law). *But see* Respect Maine PAC v. McKee, 622 F.3d 13 (1st Cir. 2010) (denying emergency motion to enjoin Maine's triggered supplemental funds in advance of 2010 election), *aff'd* 131 S. Ct. 445 (U.S. Oct. 22, 2010) (No. 10-A362).

public funding schemes and therefore says nothing about their constitutionality."[8] Instead, the *Davis* case arose in the context of traditional, private financing, where the same fundraising rules necessarily apply to all candidates. The *Davis* Court struck down the so-called "Millionaires' Amendment" to the Bipartisan Campaign Reform Act, a law that imposed an "unprecedented penalty" upon the speech of self-funded candidates. Specifically, under that provision, once a candidate spent more than $350,000 of personal funds on his or her campaign, the initial contribution limits were tripled and the limits on coordinated party/candidate expenditures were eliminated – but *only* for the self-funded candidate's opponent. Thus, in the same privately-funded, congressional race, a self-funded candidate could potentially be subject to discriminatory fundraising that were substantially more restrictive than those governing her opponent.

Plaintiffs challenging trigger funds in Arizona and elsewhere claim that the prospect of triggering additional funds to their political foe constitutes a similar penalty upon their free speech; thus, they allege, they are forced to refrain from spending. There is, however, absolutely no evidence that the prospect of triggering supplemental funds in fact deters the speech of privately-funded speakers in Arizona, or anywhere else.[9] Moreover, Plaintiffs' reliance on *Davis* is grossly misplaced: The discriminatory penalty struck down by the *Davis* Court cannot apply where candidates – some publicly-funded and some not – voluntarily occupy different fundraising spheres in which different rules necessarily apply.

While *Davis* is readily distinguishable and there is no proof of any actual First Amendment injury, there is reason to be genuinely concerned about the Court's decision in *McComish*. Shortly after the Ninth Circuit upheld Arizona's system, the Court issued a stay, instantly enjoining the trigger funds. Technically, this order has no precedential force and expresses no view on the merits of the case.[10] But the Court's willingness to disrupt Arizona's public financing system in the midst of the 2010 election cycle signals some amount of preexisting suspicion towards the contested provisions.

Moreover, in recent years, the Court has issued a series of decisions finding state and federal campaign finance regulations to be unconstitutional. Specifically, in 2006, the Court struck down (for the first time) a state's campaign contribution limits as too low;[11] in 2008, it invalidated the Millionaires' Amendment as discussed above; and, in the controversial *Citizens United v. FEC*, the

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[8] McComish v. Bennett, 611 F.3d 510, 521 (9th Cir. 2010) (citation and quotation marks omitted).

[9] Indeed, both the district court and the Ninth Circuit confirmed that there is no evidence of any substantial chilling effect. *See* McComish, 611 F.3d at 524 ("Plaintiffs have not demonstrated that any chilling effect exists."); McComish v. Brewer, No. CV-08-1550-PHX-ROS, 2010 WL 2292213, at *3 (D. Ariz. Jan. 20, 2010) ("Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act.").

[10] *See* Indiana State Police Pension Trust v. Chrysler LLC, 129 S. Ct. 2275, 2276-77 (2009) (emphasizing that decision to grant or deny stay is "not a decision on the merits of the underlying legal issues"); Barefoot v. Estelle, 463 U.S. 880, 907 n.5 (1983) (Marshall, J. dissenting) ("Denials of certiorari never have precedential value …and the denial of a stay can have no precedential value either …."). A cautionary example about attempting to guess the direction of the Court based on a stay decision may be found in the recent *Doe v. Reed* decision, in which the Court granted a stay against the application of a state disclosure law at the plaintiffs' request but then ruled in favor of state defendants on the merits. *Compare* Doe v. Reed, 130 S. Ct. 486 (2009) (granting stay against disclosure requirements) *with* Doe v. Reed, 130 S. Ct. 2811 (2010) (upholding disclosure requirements against facial challenge).

[11] Randall v. Sorrell, 548 U.S. 230 (2006).

Court recently freed business corporations from longstanding restrictions upon their political spending.[12] To many, the Court's decision in *Citizens United* raises serious concerns that at least some current Justices may be inclined to reach beyond the four corners of the issues presented in *McComish* and speak more broadly about public financing. And indeed, some of the *amici* in support of Petitioners in *McComish* – perhaps sensing some naturally sympathetic allies on the Court – have urged a broad ruling that could undermine the constitutionality of public financing generally.

The Constitutionality of Trigger Funds is an Issue of National Importance

The constitutionality of trigger funds is undoubtedly an issue of national importance. As the Supreme Court and other federal courts have found time and again – and as New York City knows from experience – successful public financing systems promote myriad public interests. Indeed, public financing promotes "uninhibited, robust, and wide-open public debate" through direct subsidies for speech as well as through more indirect means.[13] Instead of relying on the deep pockets of special interests, public financing makes it possible for candidates to run a viable, competitive campaign through grassroots outreach alone. This lowers fundraising barriers to entering the political process, thereby encouraging electoral competition and enhancing voter choice. And, public financing leaves participants indebted to no one but their constituents when they reach public office. In this way, public financing systems serve compelling anti-corruption interests, combating "both the actual corruption threatened by large financial contributions and the erosion of public confidence in the electoral process through the appearance of corruption."[14] Moreover, by protecting the integrity of the electoral process – "the very means through which a free society democratically translates political speech into concrete governmental action" – public financing directly encourages widespread public participation in political debate.[15]

Trigger funds play a key role in ensuring the success of many public funding programs nationwide. In addition to Arizona, ten states and local governments have triggered supplemental funds within their public financing systems. On top of that, at least ten more jurisdictions have a different sort of triggered benefit – for instance, raising the expenditure limits of publicly-funded candidates when an opponent exceeds a certain spending threshold.[16] Like Arizona, these states and municipalities have pointedly designed their public financing systems to provide sufficient funds to participating candidates in competitive contests while protecting the public fisc against unnecessary spending.[17] Indeed, in light of the fiscal crises at all levels of government and the surge of corporate

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[12] 130 S.Ct. 876. Some commentators have marveled at the Roberts Court's sudden deregulatory turn in this area of the law, departing from the Rehnquist Court's generally deferential approach to campaign finance reform regulations enacted by federal and state lawmakers. *See, e.g.*, Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1064 (2008).

[13] Buckley, 424 U.S. at 93 n.127 (citations omitted).

[14] McConnell v. FEC, 540 U.S. 93, 136 (2003) (quotation marks omitted); *see also* Buckley, 424 U.S. at 96 ("It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant government interest.").

[15] *See* McConnell, 540 U.S. at 137 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).

[16] For more information, see the memorandum entitled "States and Municipalities with Public Financing for Candidate Elections," submitted as an appendix to this testimony.

[17] Unsurprisingly, undisputed evidence in *McComish* shows that, without trigger funds, participation in Arizona's program would either decline substantially – out of fear of insufficient funds – or Arizona would have to spend millions more each year to fund larger initial grants.

political spending facilitated by the *Citizens United* decision, triggered supplemental funds have perhaps never been so important.

By broadly ruling against Arizona's system, the Supreme Court could potentially disrupt all of these public financing systems. More generally, an adverse decision could handicap the ability of state and local governments to properly protect the integrity of their elections. And, as Justice John Stevens noted, dissenting in *Citizens United*, "[t]ake away [government's] authority to regulate the appearance of undue influence and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."[18]

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It is no secret that New York City's own public financing system, which matches small donations at a six-to-one ratio of public funds, is one of the most innovative and successful in this country. To affirm its support of that program, and its support of public financing initiatives in Arizona and elsewhere, this Council should adopt Resolution Number 646 and participate as an *amicus* in this important upcoming constitutional litigation.

Please do not hesitate to contact me for further information.

Respectfully submitted,

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The following documents are attached as appendices to this testimony:

- Angela Migally & Susan Liss, *Small Donor Matching Funds: The NYC Experience* (Brennan Center 2010)
- Brennan Center Memorandum Entitled "States and Municipalities with Public Financing for Candidate Elections"

[18] Citizens United, 130 S. Ct. at 963 (Stevens, J., dissenting) (citation and quotation marks omitted).