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Statement of

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For the New York Senate Elections Committee

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The Brennan Center for Justice thanks the Committee for convening this hearing. The Brennan Center is a nonpartisan think tank and legal advocacy organization that focuses on democracy and justice.[1] Our remarks here focus briefly on New York State's campaign finance problems and some of the constitutional issues related to campaign finance regulations.[2]

I will make three primary points:

- First, New York State needs a system of public financing. Any public financing system would be better than the current state of affairs.

- Second, New York should create a functioning set of contribution limits to both make a public financing system attractive and to curb the influence of large donors in general.

- Third, New York needs meaningful enforcement to make its campaign finance system work. The State should strengthen its Board of Elections to better police circumvention of its laws.

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[1] The Center's Democracy Program has been working in the area of campaign finance reform on the federal, state, and local levels since its inception in 1995. The Center was part of the legal defense team in *McConnell v. FEC*, 540 U.S. 93 (2003), in which the U.S. Supreme Court upheld virtually all of the key provisions of the federal Bipartisan Campaign Reform Act of 2002. Center attorneys have also successfully helped to defend numerous challenges to state campaign finance laws throughout the country, including *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (upholding low contribution limits in Missouri); *Daggett v. Commission on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding full public financing); *Duke v. Leake*, 524 F.3d 427 (4th Cir. 2008) (upholding judicial public financing). Presently, the Brennan Center is assisting the State of Connecticut in defending the public financing system enacted in 2005. *Green Party of Connecticut v. Garfield*, 3:06 CV 01030 (D. Conn).

[2] For specific questions, please feel free to contact Ciara Torres-Spelliscy at 212-998-6025 or ciara.torres-spelliscy@nyu.edu.

The Problems of Money in Politics in New York State

1. The Legislature Should Enact a System of Public Financing for Elections

New York provides no public financing for candidates (unlike Arizona, Connecticut, Florida, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, North Carolina, Vermont, and Wisconsin). Public financing systems are typically structured in one of two basic ways: (1) matching funds systems and (2) full public financing systems.

In a matching funds system, candidates raise private money throughout the campaign and are given public dollars that "match" small amounts of private contributions. New York City has a matching fund system. In a full public financing system, a candidate raises a certain number of small contributions at the beginning of the campaign in order to qualify for a public grant sufficient to run for office. In a full public financing system, once the candidate has qualified for a public grant, the candidate may no longer raise private funds. Connecticut, Maine and Arizona have full public financing.

A third model, called a "hybrid model," allows candidates to gather small donations throughout the election cycle but also provides a block grant to the candidate to cover most of the expenses of a typical race. Any candidate may also continue to gather small contributions, which are matched. The Federal bill to provide public funding for Congressional elections, the Fair Elections Now Act ("FENA"), S. 752 and H.R. 1826, uses this hybrid model.

We support adoption of a hybrid model of public financing as the most desirable solution because it would highlight the contributions of small donors. However, any of these three public financing systems would be a vast improvement over New York's privately funded system.

Public Funding Systems Are Constitutional

Programs such as the ones proposed in the three bills before the Committee, which provide public funding to candidates who voluntarily agree to certain restrictions, have been praised and upheld by the United States Supreme Court and courts in several other circuits. *See*, *e.g., Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (upholding the presidential public financing system under Federal Election Campaign Act ("FECA")); *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 for elections); *see also Duke v. Leake*, 524 F.3d 427 (4th Cir. 2008) (upholding North Carolina's judicial public financing system). These courts have concluded that public financing *furthers*, rather than *hinders*, First Amendment values and thus advances sufficiently important and significant state interests. *See Buckley*, 424 U.S. at 92-107.

In the seminal case of *Buckley v. Valeo*, the U.S. Supreme Court explained that a public funding system aims, "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. The Court further noted that:

> the central purpose of the Speech and Press Clauses was to assure a society in which "uninhibited, robust, and wide-open" public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish. Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech.

Id. at 93 n.127 (citations omitted). Because public funding for campaigns promotes rather than impairs First Amendment values, *Buckley* did not apply heightened scrutiny to the public financing provisions of FECA, even though the law conditioned participation in the program on acceptance of spending limits. *Id.* at 57 n.65, 85-107.

Public financing promotes "uninhibited, robust, and wide-open public debate" not only through direct subsidies for speech but also through more indirect means. A full public funding system severs the connection between candidates hungry for cash and donors hungry for influence. In this sense, then, a public financing system serves the same interest as contribution limits, *i.e.*, combating "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (internal quotation omitted). "Because the electoral process is the very 'means through which a free society democratically translates political speech into concrete governmental action,' . . . measures aimed at protecting the integrity of the process . . . tangibly benefit public participation in political debate." *Id.* at 137 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).

The proposed public financing systems for New York, like the presidential public financing program and those in Maine, Arizona and North Carolina, further First Amendment values by seeking to enlarge public discussion, prevent corruption and its appearance, and open elective offices to a broader pool of candidates.

2. Lower Campaign Contribution Limits and Close Loopholes

Contributions Limits Promote Accountability and Public Trust

Contribution limits promote accountability. Limits on the size of contributions to candidates encourage candidates to reach out to a broad base of supporters, including moderate-income constituents. A candidate who needs widespread support from ordinary people is more likely to respond to their needs. Contribution limits also promote public confidence that elected representatives will be accountable to voters rather than wealthy donors.

Reasonable Contribution Limits Are Constitutional

Federal law limits the amount that individuals, political action committees ("PACs"), and political parties may contribute to federal candidates, PACs, and political parties. Federal law also limits the aggregate amount of contributions that an individual may make in a two-year period.[3] Corporations, labor unions, and banks may not use treasury funds to make contributions in federal elections. These limits have been upheld by the Supreme Court.[4]

Most states have separate contribution limits for individuals, corporations, unions, PACs, and political parties. Limits typically rise with the size of jurisdiction for which the candidate seeks office. State contribution limits have been upheld by the Supreme Court and by lower courts.[5] Many states, in addition to limiting the amount that may be contributed to an individual candidate, also limit the aggregate amount of contributions a donor may make during a given time period or the amount that a candidate may accept from PACs in the aggregate. Both sorts of aggregate contribution limits are constitutional.[6]

Only once has the Supreme Court invalidated contribution limits. In *Randall v. Sorrell* (2006), the Court held that Vermont's contribution limits, considered with other factors, were so low as to prevent candidates from amassing sufficient funds for competitive campaigns.[7] Vermont's limits were the lowest in the nation—individuals, PACs and political parties in Vermont were allowed to give, per election *cycle*, only $400 to candidates for statewide offices; $300 to candidates for state senator; and $200 to candidates for state representative.[8] *Randall* also noted that the limits were not indexed for inflation; volunteer expenses counted toward contribution limits; limits on contributions from individuals and political parties were the same; and there was no special justification (such as a history of corruption) for the low limits.[9]

However, recent research regarding elections in 42 states by the Brennan Center and economist Dr. Thomas Stratmann has shown that, contrary to the Supreme Court's opinion in *Randall* which suggested that low contribution limits hurt challengers; in fact, low contribution limits actually make elections more competitive.[10]

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[3] Federal Elections Commission, *Contribution Limits* available at http://www.fec.gov/pages/brochures/contrib.shtml#Chart.

[4] *See McConnell v. FEC*, 540 U.S. 93 (2003) (upholding the soft-money ban); *California Medical Assn. v. FEC*, 453 U.S. 182 (1981) (upholding $5,000 contribution limit to multi-candidate PACs); *Buckley v. Valeo,* 424 U.S. 1, 21, 25-26, 30 (1976) (per curiam) (upholding $1,000 contribution limit to federal candidates).

[5] *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 382 (2000) (upholding Missouri's limits); *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092-96 (9th Cir. 2003) (upholding Montana's limits).

[6] *Buckley*, 424 U.S. at 27 (upholding $25,000 aggregate annual limit on individual contributions); *see Eddleman*, 343 F.3d 1085 (upholding Montana's aggregate contribution limits for PACs).

[7] *Randall v. Sorrell*, 126 S. Ct. 2479, 2495 (2006).

[8] *Id.* at 2486.

[9] *Id.* at 2486, 2495, 2496, 2499.

[10] Ciara Torres-Spelliscy, Kahlil Williams & Thomas Stratmann, *Electoral Competition and Low Contribution Limits* (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1400740.

New York Should Enact Lower Limits for Individual Contributors

Among the states that have contribution limits, New York's contribution limits are consistently one of the highest in the nation. Individuals may give $55,900 per election cycle to candidates for New York Governor and $94,200 per year to political parties. Individuals have aggregate contribution limits of $150,000 per year in New York.

To put these aggregate limits in perspective, consider that these amounts are higher than $64,602, which is the median annual income for households in New York. These limits are also much higher than the $4,800 an individual can donate to a candidate for federal office.

Contribution limits should be lowered dramatically both per candidate and in the aggregate. Senator Squadron's Bill S4549A, which lowers contribution limits to $5,000 per election for statewide candidates, $2,300 per election for legislative candidates, and $25,000 per year for contributions to parties, is clearly a significant step in the right direction. However, even these amounts could be lowered. Research at the Brennan Center suggests that, provided that New York State offers a public financing option to candidates, contributions to assembly races can be set as low as $500 per election cycle.

New York Should Ban or Tightly Limit Corporate Contributions

The federal government and 23 states ban contributions from corporations to candidates because of the unique risks of corruption posed by corporate contributions.[11] New York allows contributions by corporations, but limits them to an aggregate of $5,000 per year. This limit is much less effective than it could be because each affiliated or subsidiary corporation has its own $5,000 limit. Consequently, any business with a complex corporate structure can multiply its influence by giving through its subsidiaries. Corporate contributions should be banned or, at the very least, tightly limited to $5,000 from all related corporate entities as Sens. Squadron and Serrano's Bill S5282A requires.

New York Should Close the "Housekeeping Accounts" Loophole

The use of "Housekeeping Accounts" permits political parties to circumvent contribution limits. Housekeeping Accounts are accounts established by a political party ostensibly to maintain a permanent party headquarters and staff, and to carry on activities which are not for the express purpose of promoting specific candidates. Donations to Housekeeping Accounts are *unlimited*. A recent study by Common Cause found that a staggering $53.2 million was given to Housekeeping Accounts between 1999 and 2006.[12]

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[11] National Conference of State Legislatures, *State Limits on Contributions to Candidates* (Apr. 30, 2009), http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf.

[12] LIAM ARBETMAN ET AL., THE LIFE OF THE PARTY: HARD FACTS ON SOFT MONEY IN NEW YORK STATE 1 (Common Cause/New York 2006) *available at* http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/SOFT_MONEY_REPORT.PDF.

Corporations, and to a lesser extent unions, abuse the Housekeeping Account loophole. For example in 2008, CSC Holdings, a subsidiary of Cablevision, one of the top twenty donors in New York, gave donations of $440,000 to Democratic political parties, and $234,000 to Republican political parties in New York. While the corporate contribution limit that applies to CSC Holdings is $5,000, it was nonetheless able to pour an additional $669,000 into the political process by exploiting the Housekeeping Account loophole.[13] The Housekeeping Account loophole should be closed as in Senator Squadron's Bill S4549A by removing New York Election Law § 14-124, Subdivision 3.

New York Should Cease Allowing Unlimited Transfers of Contributions

Under current New York State law, candidates can transfer unlimited amounts of money to other candidates. By contrast under federal law, transfers from one candidate to another are limited to $2,000 per election. *See* 2 U.S.C. 432(e)(3)(B) and 11 C.F.R. 102.12(c)(2). Transfer limits prevent the circumvention of candidate contribution limits and should be adopted by New York. The State should follow the federal model and limit transfers to $2,000 or less.

New York Should Address Candidates' Personal Abuses of Campaign Funds

New York's weak contribution limits and many loopholes work hand-in-hand with laws that allow personal use of campaign funds by candidates, creating significant opportunities for corruption. Lack of clear legal rules on personal use give candidates and elected officials wide latitude to use campaign funds to pay for non-campaign items. For example, Former Majority Leader Joseph L. Bruno infamously used campaign funds to pay for his pool cover and then claimed that it was a legitimate campaign expense.[14] In another egregious case, former Senator Martin Connor spent over $70,000 on his car as a "campaign expense" during a period when he faced no primary or general election opponents.[15] Other Albany lawmakers have been found using campaign funds to pay for cell phones, country clubs, sporting events tickets, legal bills, meals and pet food.[16] The law must be revised to clearly disallow personal use of campaign funds.

New York Should Enact Pay-to-Play Restrictions

Contribution restrictions that apply to lobbyists, government contractors or highly regulated industries are often known as "pay-to-play" restrictions. They are referred to

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[13] National Institute on Money in State Politics, *New York State 2008 Contributor Summary: CSC Holdings*, http://www.followthemoney.org/database/StateGlance/contributor.phtml?d=334111959.

[14] Editorial, *Toward Cleaner Campaigns; Fattening Albany's Cats*, N.Y. TIMES, June 10, 2000, at A14, *available at* 2000 WL 3258729.

[15] LIAM ARBETMAN, MEGAN QUATTLEBAUM & RACHEL LEON, COMMON CAUSE/NY, THE $2,100 CLUB: WHAT NEW YORK STATE POLITICAL CAMPAIGNS COST, HOW MUCH THOSE COSTS ARE RISING AND WHO'S FOOTING THE BILL 12 (Common Cause 2006), *available at:* http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/$2100%20club%20newest%20newest.pdf.

[16] $2,100 Club, at 13; BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW ET AL., STRENGTHENING ETHICS IN NEW YORK: THE ETHICS IN GOVERNMENT ACT OF 2006 10 (2006), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_8611.pdf.

as "pay-to-play" regulations because they seek to prevent deals whereby contributors "pay" officials for the opportunity to "play" with the government or in a government-regulated arena. Under New York law, contractors can give contributions to elected officials who have (or to candidates who, if elected, shortly will have) influence over state contracting decisions. For example, one of the major contributors in New York is a Japanese company called Kawasaki Rail Car, Inc. At first blush it may seem odd that a Japanese company is so interested in New York State politics. But a possible reason emerges from the fact that it "has enjoyed big MTA [Metropolitan Transit Authority] contracts for the past two decades and especially under the Pataki administration. In 2003 the company, with a partner, won a $2.3 billion contract with the MTA to build new subway cars."[17] New York should eliminate the potential for conflicts of interest that arise when a major source of money in state politics is also a company holding (or seeking) state contracts.

Contributions from lobbyists raise similar concerns about the appearance of corruption. Frequently, lobbyists are not making contributions because they agree ideologically with the recipient. Rather, they give to ensure continued access to their primary audience: lawmakers. This is evidenced by the fact that lobbyists have been known to give to both political parties. For example, in the 2008 election cycle, lobbyist firms Wilson Elser Moskowitz Edelman & Dicker LLP gave $207,024 to Democratic committees and $163,701 to Republican committees; Patricia Lynch Associates gave $43,601 to Democratic committees and $16,166 to Republican committees (while Patricia J. Lynch gave an additional $40,350 to Democratic committees and $33,975 to Republican committees); and Greenberg Traurig gave $22,275 to Democratic committees and $32,250 to Republican committees.[18] Therefore, New York should also curb contributions from lobbyists.

There are a number of options for dealing with pay-to-play issues. New York could ban contributions from lobbyists and state contractors as Connecticut did in 2005. Or New York could subject lobbyists and state contractors to lower contribution limits than other contributors, as New York City did in 2007.

Across the nation, state and federal courts have upheld pay-to-play laws as serving to prevent corruption and the appearance of corruption. Over the past few months, a steady parade of cases reaffirmed the value and validity of these protective measures. In New Jersey, the recent *Earle Asphalt Co.* case upheld a state law prohibiting any agency from awarding a large contract to a business that has contributed more than $300 to certain political candidates.[19] *Ognibene v. Parkes* upheld New York City's law subjecting those doing business with the city to lower contribution limits.[20] And *Green Party of Connecticut v. Garfield* upheld Connecticut's ban on contributions and solicitations from lobbyists and state contractors.[21]

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[17] LIFE OF THE PARTY, at 12.
[18] National Institute on Money in State Politics, www.followthemoney.org (enter the name of the desired lobbyist firms in the "contributor" field).
[19] *Earle Asphalt Co.*, A-37-08 (NJ 2009).
[20] *Ognibene v. Parkes*, No. 08 Civ. 1335 (S.D.N.Y. 2009).
[21] *Green Party of Connecticut v. Garfield*, 590 F. Supp. 2d 288 (D. Conn. 2008).

3. Lax Enforcement Must Be Addressed with Legislative Action

Enforcement is a key ingredient to ensure that other reforms are meaningful. Penalties for violations of campaign finance laws in New York are either nonexistent or extremely weak. For example, those who illegally exceed the contribution limits in New York are not subject to any fines. The maximum civil fine for violating campaign finance disclosure laws is only $500. Higher fines are needed to act as more effective deterrents. Senator Schneiderman's Bill S4061B takes steps in the right direction.

The Board of Elections needs to be restructured by adding of a fifth non-partisan commissioner to the existing four-member Board. The current Board faces potential deadlocks since two members are appointed by the Democrats and Republicans. In addition, the Board needs the funding and staff to properly enforce the law.

A Summary of Needed Reforms in New York

In conclusion, New York's legislature should:

- Provide meaningful public financing to executive and legislative candidates
- Reduce contribution limits in all categories;
- Close the corporate subsidiary loophole and the housekeeping account loophole;
- End personal use of campaign funds by candidates;
- Place reasonable limits on transfers among candidates;
- Introduce thoughtful restrictions on contributions by state contractors and lobbyists; and
- Enhance enforcement by increasing fines and penalties, and by properly funding and restructuring the Board of Elections.

Further Reading

For a more detailed analysis about legislative drafting of campaign finance laws, we refer you to our treatise, *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws.*[22] For more specific information, please read the article, "What Albany Could Learn from New York City: A Model of Meaningful Campaign Finance Reform in Action." which details many of the problems plaguing New York State's current campaign finance regime[23] or the Brennan Center's 2006 report entitled "Paper Thin: The Flimsy Facade of Campaign Finance Laws in New York"[24] Both of these publications are available for free on the Brennan Center's webpage, www.brennancenter.org. Unfortunately, all of the problems detailed in these two publications remain unaddressed.

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[22] Deborah Goldberg, ed., *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws* (2008), http://www.brennancenter.org/content/resource/writing_reform_2008/.

[23] Ciara Torres-Spelliscy & Ari Weisbard, *What Albany Could Learn from New York City: A Model of Meaningful Campaign Finance Reform in Action* 1 ALBANY GOV'T L.R.194 (2008) available at www.ssrn.com.

[24] Suzanne Novak & Seema Shah, *Paper Thin: The Flimsy Facade of Campaign Finance Laws in New York* (2006), http://www.brennancenter.org/content/resource/paper_thin_the_flimsy_facade_of_campaign_finance_laws_in_new_york/.