

Statement of
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The Brennan Center for Justice at New York University School of Law thanks the Committee for holding this hearing and for the invitation to offer testimony. The Brennan Center is a nonpartisan think tank and legal advocacy organization.¹ Our remarks here focus briefly on the impact of the Supreme Court's recent decision in *Citizens United v. FEC*, New York State's campaign finance problems and how to fix them.²

- *Citizens United* is an invitation to make New York's already bad campaign finance system even worse.
- But there are fixes that the State can adopt to blunt the impact of *Citizens United* as well as fixing long standing problems with the ways that campaigns are funded in New York.
 - 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.

¹ The Center's Democracy Program works in the area of campaign finance reform on the federal, state, and local levels. 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), which is on appeal in the Second Circuit.

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

Since its creation in 1995, the Brennan Center has focused on fundamental issues of democracy and justice, including research and advocacy to enhance the rights of voters and to reduce the role of money in our elections. That work takes on even more urgency after the United States Supreme Court's decision in *Citizens United v. Federal Election Commission* on January 21, 2010. The legislature needs to address all of the ills of New York's campaign finance laws in an omnibus reform package that addresses not only *Citizens United*, but also all of the flaws in New York's system.

I. What Did *Citizens United* Really Say?

Before discussing how *Citizens United* will impact New York's elections, it is important to understand what *Citizens United* did and did not say. Until *Citizens United*, a century's worth of American election laws prohibited corporate managers from spending a corporation's general treasury funds in federal elections.³ Pre-existing laws required corporate managers to make political expenditures via separate segregated funds (SSFs), which are also commonly known as corporate political action committees (PACs), so that shareholders, officers and managers who wanted the corporation to advance a political agenda could contribute funds for that particular purpose.⁴

Citizens United, which was registered under Section 501(c)(4) of the U.S. Tax Code, wanted to air a video-on-demand 90-minute documentary criticizing Senator Hillary Clinton in the weeks leading up to her presidential primary and wanted to pay for this documentary using its general treasury funds, which included money from for-profit corporations. They sued the Federal Elections Commission, claiming that the requirement that they pay for the documentary from a separate segregated fund burdened their First Amendment right to speech.

Citizens United did...

- Hold that corporations have the same First Amendment rights to make independent expenditures as natural people.
- Hold that restrictions that prohibited corporations and unions from spending their general treasury funds on independent expenditures violated the First Amendment.
- Uphold disclosure requirements for political advertisements that mentioned a candidate and were made within 60 days of an election even if they did not expressly advocate for the defeat or election of a candidate.

³ Until *Citizens United*, the Federal Elections Campaign Act (FECA) prohibited corporations (profit or nonprofit), labor organizations and incorporated membership organizations from making direct contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b. The limits have a long vintage. For 63 years, since Taft-Hartley, corporations have been banned from spending corporate treasury money to expressively support or oppose a federal candidate and for 103 years, since the Tillman Act, corporations have been banned from giving contributions directly from corporate treasury funds to federal candidates. After *Citizens United*, corporations are still banned from direct contributions in federal elections.

⁴ 11 C.F.R. 100.6; FED. ELECTION COMM'N, SSFs AND NONCONNECTED PACs (May 2008), available at <http://www.fec.gov/pages/brochures/ssfvnonconnected.shtml>.

Citizens United did not....

- Rule on the constitutionality of contribution limits.
- Rule on the constitutionality of pay-to-play laws.
- Rule on the constitutionality of soft-money regulations.
- Rule on the constitutionality of the public financing of elections.

II. How Will *Citizens United* Impact New York's Elections?

Since New York does not ban or place source restrictions on corporate independent expenditures, *Citizens United* will have little direct impact on New York's campaign finance laws. However, the broader implications that *Citizens United* has on the role of individual voters in elections will undoubtedly change New York's democracy.

Citizens United may make New York's already bad system worse. Therefore, the Brennan Center suggests that the legislature take this key juncture to assess the way money is affecting the democratic processes in the State and fix them at long last.

New York needs reforms both large and small. If it is really interested in pushing the "re-set" button on how money and politics work, it should adopt public financing for candidates for statewide, legislative and judicial elections. Short of that, it needs specific protections to counter *Citizens United*, including shareholder protections and better disclosure of political spending. Finally, it needs reforms that are long overdue such as pay-to-play restrictions, lower contribution limits, an end to personal use of campaign funds and meaningful enforcement of the laws on the books.

III. Suggested Reforms for 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).

We urge New York to enact a public financing system for statewide, legislative and judicial elections. 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 any of these three public financing systems which would be a vast improvement over New York’s privately funded system.

Public Funding Systems Are Constitutional

Programs such as the one proposed in S. 7506, 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 partial 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 *further*s, 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).

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.

Indeed, *Citizens United* reaffirmed that “it is our law and our tradition that more speech, not less, is the governing rule.”⁵ The Court thus reiterated the “more speech” principle on which the Court upheld the presidential public financing system in *Buckley v. Valeo*. Recently, however, a new slew of challenges have been launched. These new challenges claim that the Court’s 2008 decision in *Davis v. FEC*, 128 S.Ct. 2759 (2008), has cast doubt on the use of matching funds provisions that are triggered by expenditures of a nonparticipating candidate or independent expenditures. As a result, lawsuits challenging the public funding programs in Connecticut and Arizona are pending before the Second and Ninth Circuits respectively; and two new challenges were recently launched in Wisconsin.⁶

2. New York Should Empower Voters Through Transparency and Accountability

In New York, corporations have long been able to use their general treasury funds to finance independent expenditures in state elections. Thus, *Citizens United* has not opened up any new avenues for corporate political spending at the state level that did not already exist in New York.

However, *Citizens United* may increase corporate independent expenditures in New York’s federal elections. An increase in corporate spending at the federal level may trickle down or even precipitate renewed corporate spending at the state level.

A troubling assumption adopted by the *Citizens United* majority is the adequacy of disclosure laws to safeguard democratic values against subversion. Justice Kennedy’s argument that limits on corporate political spending are unnecessary

⁵ *Citizens United*, Slip op. at 45.

⁶ Matching fund provisions were struck down at the district court level in Connecticut and in Arizona. See *Green Party v. Garfield*, 648 F.Supp.2d 298 (D.Conn. Aug. 27, 2009), argued (2d Cir. Jan. 13, 2010); *McComish v. Brewer*, No. CV-08-1550 (D.Ariz. Jan. 20, 2010), argued (9th Cir. Apr. 12, 2010). In Wisconsin, recently-filed lawsuits challenge the mechanism by which Wisconsin’s program distributes money to participants and the reporting requirements of the system. *Wisconsin Right to Life v. Brennan*, 09-cv-764 (W.D.Wi. 2009); *Koschnick v. Doyle*, 09-cv-767 (W.D.Wi. 2009).

is premised upon his unsupported assumption that disclosure laws allow both the electorate and corporate shareholders to make informed decisions and to give proper weight to different speakers and messages. As Justice Kennedy wrote in *Citizens United*:

With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "in the pocket" of so-called moneyed interests." 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.⁷

Unfortunately, these assumptions are not born out in the current campaign finance system.⁸ In fact, in today's political environment, corporations regularly hide behind false names to disguise their true identity and agenda:

- In a recent Colorado 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. Another group called "Littleton Pride" spent \$35,000 in support of the prohibition. When the disclosure reports for these groups were filed, however, voters discovered that "Littleton Neighbors" was not a grassroots organization but a front for Wal-Mart —the group was, in fact, exclusively funded by Wal-Mart. Behind a grassroots facade, Wal-Mart was able to outspend "Littleton Pride," a true grassroots group, by a 5:1 ratio.⁹
- As the record in *McConnell* demonstrated, corporations commonly veil their political expenditures with misleading names —the "The Coalition-Americans Working for Real Change" was a business organization

⁷ *Citizens United*, Slip op. at 55 (citations omitted).

⁸ For example, independent expenditures – the very type of political expenditures unleashed by *Citizens United* – are underreported in most states. As one report explained, "holes in the laws – combined with an apparent failure of state campaign-finance disclosure agencies to administer effectively those laws – results in the poor public disclosure of independent expenditures. The result is that millions of dollars spent by special interests each year to influence state elections go essentially unreported to the public." Linda King, INDECENT DISCLOSURE PUBLIC ACCESS TO INDEPENDENT EXPENDITURE INFORMATION AT THE STATE LEVEL 4 (National Institute of Money in Politics 2007) available at <https://www.policyarchive.org/bitstream/handle/10207/5807/200708011.pdf?sequence=1>.

⁹ Def.'s Response Br. to Pls.' Mot. for Summary Judgment, *Sampson v. Coffman*, 06-cv-01858 at 43-44 (D. Co. 2007) (Dkt. #34).

opposed to organized labor and “Citizens for Better Medicare” was funded by the pharmaceutical industry.¹⁰

The *Citizens United* majority’s assumption that corporate political spending must be disclosed to shareholders or the public at large is similarly incorrect. Under current laws regulating corporations, nothing requires corporations to disclose to shareholders whether corporate dollars are being used to fund politicians or ballot measures.¹¹ In short, corporate managers could be using shareholder funds for political spending, without the knowledge or consent of investors.

A. New York Should Improve Corporate Governance

Because roughly one out of two American households owns stocks,¹² the Brennan Center has proposed a remedy to this disclosure gap in our recently-issued report *Corporate Campaign Spending: Giving Shareholders a Voice*.¹³ We suggest two specific reforms: first, require managers to obtain authorization from shareholders before making political expenditures with corporate treasury funds; and second, require managers to report corporate political spending directly to shareholders.

These requirements will increase corporate accountability by placing the power directly in the hands of the shareholders, thereby ensuring that shareholders’ funds are used for political spending only if that is how the shareholders want their money spent. Moreover, the disclosure requirement serves valuable information interests, leaving shareholders better able to evaluate their investments and voters better-equipped to deliberate choices at the polls.

Our *Corporate Campaign Spending* Report is aimed at Congress, urging a change in the U.S. securities law. However, we do not know that Congress will take up this call in a timely manner, if at all.¹⁴ Furthermore, while Congress can amend the laws that apply to publicly-traded companies, New York has power to regulate all corporations that are incorporated in New York and can reach both publicly-held as well as privately-held corporations. New York is

¹⁰ See *McConnell v. FEC*, 540 U.S. 93, 128, 197 (2003).

¹¹ See Jill Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 *FORDHAM L. REV.* 1593, 1613 (2006) (“Political contributions are generally not disclosed to the board or shareholders, nor are political expenditures generally subject to oversight as part of a corporation’s internal controls.”).

¹² See Joint Economic Committee, 106th Cong., *The Roots of Broadened Stock Ownership* 1 (2000), www.house.gov/jec/tax/stock/stock.pdf; Investment Company Institute, *U.S. Household Ownership of Mutual Funds in 2005*, 2 (2005), <http://www.ici.org/pdf/fm-v14n5.pdf>; THE INVESTMENT COMPANY INSTITUTE, 2009 INVESTMENT COMPANY FACT BOOK 8 (49th ed. 2009), http://www.icifactbook.org/pdf/2009_factbook.pdf (noting “[h]ouseholds are the largest group of investors in [investment] funds, and registered investment companies managed 19 percent of households’ financial assets at year-end 2008.”).

¹³ See Torres-Spelliscy, *supra* n. 3.

¹⁴ Rep. Michael Capuano has introduced the Shareholder Protection Act (H.R. 4790) which would provide the rights for shareholders that the Brennan Center has urged.

well within its rights to adopt bills similar to New York S. 7083, which seeks to give shareholders in New York corporations the ability to consent to corporate political expenditures as well as to require better disclosure to shareholders of corporate political expenditures. Moreover, these two factors can be handled separately. For example, disclosure of past corporate expenditures to shareholders could happen on a quarterly basis, while approval of future political budgets could happen at the annual general meeting of shareholders.

For Congress, we suggested two targeted reforms, but states have broad authority to change their own corporate law and to dictate the rules of corporate governance. New York is not limited to the reforms we suggested to Congress. For example, in Missouri, Louisiana, and as of April 8, 2010 in Iowa too,¹⁵ boards are required to approve corporate political spending.¹⁶ In addition to shareholder notice and consent, New York could also require board approval of corporate political spending. This will provide internal controls over such spending which often goes on without board sanction.¹⁷

For those who may argue that shareholders do not care about corporate political spending, the evidence demonstrates the contrary. A recent survey of shareholders found that shareholders do care about corporate political spending and want greater disclosure.¹⁸ Shareholders have demonstrated their interest in disclosure of corporate political activity by filing shareholder resolutions requesting more corporate transparency on this very topic. As the Committee for Economic Development (CED) reports, disclosure of political expenditures has become the second most popular shareholder resolution.

After climate change, the leading category of social issue proposals filed by shareholders in 2007 dealt with political contributions, according to an analysis by the governance rating firm RiskMetrics. Proposals on political contributions usually ask

¹⁵ Iowa Senate File 2354, An Act Relating to Campaign Finance, Including Political Campaign Activities and Independent Expenditures by Corporations, Making Penalties Applicable, and Including Effective Date Provisions (2010),

<http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&hbill=SF2354>.

¹⁶ The lack of board approval is the norm. However, Louisiana and Missouri require board approval of political donations before they are made. See La. Rev. Stat. Ann. §18:1505.2(F) (also allowing officers of the corporation to make such contributions if empowered to do so by the board of directors); Mo. Ann. Stat. §130.029.

¹⁷ Fisch, *supra* note 21, at 1613.

¹⁸ Press Release, Center for Political Accountability, *Shareholders See Risky Corporate Political Behavior As Threat to Shareholder Value, Demand Reform, CPA Poll Finds*, (April 5, 2006),

<http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1267> (announcing a “poll found a striking 85 percent [of shareholders] agreed that the ‘lack of transparency and oversight in corporate political activity encourages behavior’ that threatens shareholder value. 94 percent supported disclosure and 84 percent backed board oversight and approval of ‘all direct and indirect [company] political spending.’”).

companies to issue semi-annual reports on political contributions and to provide guidelines for making contributions.¹⁹

In the past few years, there have been numerous shareholder resolutions requesting the disclosure of political expenditures by corporations. In 2006 such resolutions gained the support of 20% or more of the vote at 11 major companies, including Citigroup (20%), American Financial Group (20.5%), Clear Channel Communications (20.5%), General Dynamics (21%), Washington Mutual (22%), Wyeth (25.2%), Charles Schwab (27%), Marsh and McLennan (30.5%), Verizon (33%) and Home Depot (34%).²⁰ At Amgen, a political expenditure disclosure resolution received 75.5% of the vote following endorsement by the company's directors.²¹ At least 56 disclosure resolutions were filed during the 2009 proxy season, including at major financial institutions such as Charles Schwab, Goldman Sachs, JPMorgan Chase, Regions Financial and Wells Fargo.²² Such resolutions have been strongly supported by major institutional investors, including the New York City pension fund.²³ In 2008, the proxy voting advisory service RiskMetrics Group supported a disclosure resolution calling on AT&T to disclose its political spending, after opposing a similar resolution at AT&T the three previous proxy seasons.²⁴ For example, a typical resolution requests periodic disclosure of political expenditures including payments to trade associations and other tax exempt organizations.²⁵

Additionally, public opinion polling conducted after *Citizens United*, shows that the American public also supports giving more rights to shareholders. A poll of 1,200 Americans commissioned by People for the American Way conducted from February 5 through February 9, 2010 found strong support for post-*Citizens United* reforms including shareholder approval:

¹⁹ Committee for Economic Development, *Rebuilding Corporate Leadership: How Directors Can Link Long-Term Performance with Public Goals* 18 (2009), http://www.ced.org/images/library/reports/corporate_governance/cgpt3.pdf (citing Carolyn Mathiasen, "2008 Preview: Social Issues," *RiskMetrics Risk & Governance Blog* (Mar. 28, 2008), http://blog.riskmetrics.com/2008/03/2008_preview_social_issuessubm.html).

²⁰ Timothy Smith and Bruce Freed, *Social Investment—Highlights from 2006 Proxy Season*, *GreenMoneyJournal.com*, Oct. 10, 2006, available at <http://www.politicalaccountability.net/index.php?ht=d/ArticleDetails/i/373>.

²¹ *Id.*

²² Jeanne Cummings, *Companies Try to Clean Up Their Act*, *Politico*, Mar. 24, 2009, <http://www.politico.com/news/stories/0309/20401.html>.

²³ Francesco Guerrera, *Investors Want Facts on Political Donations*, *Financial Times*, Apr. 1, 2007, available at <http://www.politicalaccountability.net/index.php?ht=d/ArticleDetails/i/532>.

²⁴ *Key Proxy Advisor Recommends Vote Against AT&T Management on Political Contributions Disclosure*, *Center for Political Accountability*, Apr. 21, 2008, <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1275>.

²⁵ Shareholder Resolution filed by Trillium Asset Management Corporation Requesting Political Contributions by Ford Motor Company (2010), <http://www.onlineethicalinvestor.org/eidb/wc.dll?eidbproc-reso~9143> (asking for semi-annual reporting on Ford's political expenditures).

- * 78% believe that corporations should be limited in how much they can spend to influence elections, and 70% believe they already have too much influence over elections
- * 73% believe Congress should be able to impose such limits, and 61% believe Congress has done too little in the past to limit corporate influence over elections
- * 82% support limits on electioneering by government contractors, and 87% support limits on bailout recipients
- * 85% support a complete ban on electioneering by foreign corporations [and]
- * 75% believe that a publicly traded company should get shareholder approval before spending money in an election.²⁶

This national poll demonstrates how deep the anger at *Citizens United* is and that voters want action.

Finally, it is not too late to close one avenue for corporate money in New York elections: direct contributions to candidates and political parties. The federal government and 23 states ban contributions from corporations to candidates because of the unique risks of corruption posed by corporate contributions.²⁷ 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 S. 5282B requires.

B. New York Should Empower Voters Through Disclosure

After the Supreme Court's decision in *Citizens United*, the importance of disclosure to the health of our democracy cannot be overstated. Unfortunately, there is currently a sustained and unrelenting wave of legal challenges aimed at eliminating disclosure of independent expenditures. Indeed, the *New York Times* recently quoted the attorneys who brought the *Citizens United* suit as stating that disclosure was their next target in a ten-year strategy to eliminate campaign finance regulations.²⁸ The Supreme Court has already granted *certiorari* in *Doe v. Reed*, a case brought by the same lawyers who brought

²⁶ People for the American Way, *New Poll Shows Broad Support for "Fixing" Citizens United* (Feb. 18, 2010), http://site.pfaw.org/site/PageServer?pagename=media_2010_02_new_poll_shows_support_for_fixing_citizens_united.

²⁷ 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.

²⁸ See David Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. TIMES, Jan. 25, 2010, at A11, available at <http://www.nytimes.com/2010/01/25/us/politics/25bopp.html?scp=1&sq=james%20bopp&st=cse>.

Citizens United. This case has been fully briefed.²⁹ Although that case, which involves the disclosure of ballot petition signatures, does not implicate campaign finance disclosures directly, the plaintiffs advance a broad conception of a right to anonymous speech which would undermine campaign finance disclosure regimes.

To be sure, *Citizens United* upheld BCRA's disclosure requirements against the plaintiffs' challenge, and expressly affirmed the importance of disclosure as a means of "provid[ing] the electorate with information' about the sources of election-related spending."³⁰

In order to have meaningful disclosure for voters, they must know who is funding political advertisements, whether they are independent expenditures which contain express advocacy (direct appeals to vote for or against a given candidate); or whether they are electioneering communications, *i.e.*, broadcast ads aired directly before an election, that mention a candidate, and are targeted at that candidate's electorate.

New York's definition of independent expenditures is limited to express advocacy. There is not a definition of an independent expenditure under current New York State law. Rather, there is an exception to the definition of contribution.³¹ Furthermore, New York does not presently require reports of the independent expenditures that are made.

New York should clarify its law such that no matter who funds either independent expenditures or electioneering communications, they must be subject to disclosure and must reveal who provided the funding for the advertisements. Bills S. 7506 or S. 7479, which requires disclosure of independent expenditures, should both be expanded to capture "electioneering communications"; otherwise, corporate "sham issue ads" may evade regulation.

As a result of the *Citizens United* decision, there is a risk that corporations that want to make political expenditures without having to disclose their identity may funnel their money through benign sounding social welfare organizations (501(c)(4)'s) and/or trade associations (501(c)(6)'s). Under current tax law, these organizations are not required to publically disclose the identity of their contributors to the IRS.³² New York may pass legislation which, like the

²⁹ *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009), *cert. granted*, __ S.Ct.__, 2010 WL 144074 (2010) (No. 09-559).

³⁰ *Citizens United*, Slip op. at 52 (quoting *Buckley v. Valeo*, 424 U. S. 1, 66 (1976)).

³¹ See NY Elec. Code § 14-100(9)(3) ("none of the foregoing shall be deemed a contribution if it is made, taken or performed by a candidate or his spouse or by a person or a political committee independent of the candidate or his agents or authorized political committees. For purposes of this article, the term 'independent of the candidate or his agents or authorized political committees' shall mean that the candidate or his agents or authorized political committees did not authorize, request, suggest, foster or cooperate in any such activity...").

³² Shayla Kasel, *Show Us Your Money: Halting the Use of Trade Organizations as Covert Conduits for Corporate Campaign Contributions*, 33 J. CORP. L. 297, 312 (Fall 2007) (internal citations omitted). ("The 501(c)(6) organizations, like most other 501(c)

regulations promulgated by the Federal Election Commission, would require disclosure from anyone or any entity that funds an independent expenditure or an “electioneering communication,” as that term is defined under federal law, over a certain dollar threshold.³³

3. New York Should Adopt Pay-to-Play Restrictions

The Supreme Court in *Citizens United* did not address the constitutionality of pay-to-play restrictions and leaves the case law in that area undisturbed. Narrow and well crafted pay-to-play restrictions have generally been upheld against speech related challenges.³⁴ However, at least one federal court has struck down a broad pay-to-play scheme where the state was unable to demonstrate that the law had been tailored to target the potential for corruption.³⁵

Contribution restrictions that apply to lobbyists, government contractors or highly regulated industries are often known as “pay-to-play” restrictions. They are referred to as “pay-to-play” regulations because they seek to prevent deals

organizations, are not required to disclose their itemized contributors and expenditures; they only have to report net income and expenditures to the IRS.”).

³³ See 2 U.S.C. 431(17) (defining independent expenditure); 11 C.F.R. 109.102 (requiring disclosure of \$250 contributors towards a federal independent expenditure of \$10,000 or more); 2 U. S. C. § 434(f)(2)(F) (requiring disclosure of contributors who paid \$1,000 or more towards a federal electioneering communication valued at \$10,000 or more).

³⁴ See *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 718 (4th Cir. 1999) (upholding sessional ban on lobbyist’s contributions as constitutional); *Blount v. Sec. Exch. Comm’n*, 61 F.3d 938, 946-47 (D.C. Cir. 1995) (upholding constitutionality of SEC regulations that prohibit municipal finance underwriters from making campaign contributions over \$250 to officeholders who award government underwriting contracts); *Wachsman v. City of Dallas*, 704 F.2d 160, 173 (5th Cir. 1983) (upholding City charter provision prohibiting contributions by City employees to City council elections); *Ognibene v. Parkes*, No. 08 Civ. 1335 (S.D.N.Y. 2009) (upholding New York City’s city contractor pay-to-play laws); *Green Party of Conn. v. Garfield*, 590 F. Supp. 2d 288 (D. Conn. 2008) (upholding Connecticut’s state contractor pay-to-play laws); *Inst. of Governmental Advocates v. Fair Political Practices Comm’n*, 164 F. Supp. 2d 1183, 1192 (E.D. Cal. 2001) (upholding ban on contributions from lobbyists to offices lobbied); *Earle Asphalt Co.*, 198 N.J. 143 (NJ 2009) (upholding NJ’s state contractor pay-to-play laws); *Casino Ass’n of La. v. State*, 820 So. 2d 494, 509 (La. 2002) (upholding ban on contributions from riverboat and land-based casinos to all candidates and all PACs that support or oppose a candidate); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 619-20 (Ala. 1999) (upholding a restriction on lobbyists’ giving contributions to candidates outside of their own district); *Kimbell v. Hooper*, 164 Vt. 80, 665 A.2d 44, 48 (1995) (upholding sessional ban on lobbyist’s contributions); *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61, 67-68 (Ill. 1976) (upholding ban on contributions from members of liquor industry to any candidate or political party); *Soto v. State*, 565 A.2d 1088, 1098 (N.J. Super. Ct. App. Div. 1989) (upholding ban on political contributions from casino employees to any candidate or political committee).

³⁵ See *Dallman v. Ritter*, No. 09CV1188 (Co. Dt. Ct. 2009) (Colorado state court invalidated a broad pay-to-play ban that banned contributions “to any candidate for any office at any level of government anywhere in Colorado, and to political parties” without any evidence that such a reach was necessary to combat corruption).

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.”³⁶ 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, so far in the 2010 election cycle, lobbyist firms Wilson Elser Moskowitz Edelman & Dicker LLP gave \$136,662 to Democratic committees and \$40,900 to Republican committees; Patricia Lynch Associates gave \$28,101 to Democratic committees and \$3,400 to Republican committees; and Greenberg Traurig gave \$50,300 to Democratic committees and \$23,250 to Republican committees.³⁷ 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.³⁸ *Ognibene v. Parkes* upheld New York City’s law subjecting those doing business with the city to lower contribution limits.³⁹ And *Green Party of Connecticut v. Garfield* upheld Connecticut’s ban on contributions and solicitations from lobbyists and state contractors.⁴⁰

³⁶ LIFE OF THE PARTY, at 12.

³⁷ National Institute on Money in State Politics, www.followthemoney.org (enter the name of the desired lobbyist firms in the “contributor” field).

³⁸ *Earle Asphalt Co.*, A-37-08 (NJ 2009).

³⁹ *Ognibene v. Parkes*, No. 08 Civ. 1335 (S.D.N.Y. 2009).

⁴⁰ *Green Party of Connecticut v. Garfield*, 590 F. Supp. 2d 288 (D. Conn. 2008).

It should be noted that past pay-to-play laws that have been upheld have either been bans on contractors' making direct contributions to candidates or bans on soliciting direct contributions to candidates. The pay-to-play bans that have been upheld by courts did not apply to independent expenditures.

New York S. 7478 proposes a pay-to-play ban on all state contractors' contributions and independent expenditures. This is a novel approach that has not yet been reviewed by the courts. If New York adopts pay-to-play restrictions for state contractors, we suggest that the legislature needs to fully document through public hearings and legislative findings, the particular problems of corruption and the appearance of corruption in New York that have prompted this change in the law.

4. Other Key Reforms are Needed in New York

Even before *Citizens United*, New York State's campaign finance regime was in bad need of repair. The legislature can use the public anger at *Citizens United* as an opportunity to fix the many flaws in New York's laws. For example, contribution limits in New York are set at stratospheric levels and are riddled with 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.⁴¹ 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.⁴²

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

⁴¹ Federal Elections Commission, *Contribution Limits* available at <http://www.fec.gov/pages/brochures/contrib.shtml#Chart>.

⁴² 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).

been upheld by the Supreme Court and by lower courts.⁴³ 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.⁴⁴

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.⁴⁵ 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.⁴⁶ *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.⁴⁷

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.⁴⁸

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.

⁴³ *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).

⁴⁴ *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).

⁴⁵ *Randall v. Sorrell*, 126 S. Ct. 2479, 2495 (2006).

⁴⁶ *Id.* at 2486.

⁴⁷ *Id.* at 2486, 2495, 2496, 2499.

⁴⁸ Ciara Torres-Spelliscy, Kahlil Williams & Thomas Stratmann, *Electoral Competition and Low Contribution Limits* (2009),

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1400740.

Contribution limits should be lowered dramatically both per candidate and in the aggregate. Senator Squadron's Bill S. 4549C, which lowers contribution limits to \$5,000 per election for statewide candidates, \$2,400 per election for legislative candidates, and \$25,000 per year for contributions to parties, is clearly a significant step in the right direction. By contrast S. 4545 only lowers the aggregate contribution limit for individuals by cutting it in half. However, even these amounts in these bills 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 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 2006.⁴⁹

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.⁵⁰ The Housekeeping Account loophole should be closed as in Senator Squadron's Bill S. 4549C 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.

⁴⁹ 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.

⁵⁰ 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>.

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.⁵¹ 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.⁵² 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.⁵³ The law must be revised to clearly disallow personal use of campaign funds. New York should adopt a bill like Senator Krueger's S. 743A which would curb personal use of campaign funds.

5. Law Enforcement Must Be Addressed with Legislative Action

Finally, all of New York's reforms will mean nothing if the law is not enforced. Presently, 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 S. 4061B 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.

IV. The Need for a Rich Legislative Record

Courts reviewing laws that impact political speech are likely to use heightened constitutional scrutiny, which will demand that the law is properly tailored to address a particular harm. Therefore, it is imperative that the Senate develop a

⁵¹ Editorial, *Toward Cleaner Campaigns; Fattening Albany's Cats*, N.Y. TIMES, June 10, 2000, at A14, available at 2000 WL 3258729.

⁵² 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](http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/$2100%20club%20newest%20newest.pdf).

⁵³ *Toward Cleaner Campaigns; \$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.

rich legislative record that demonstrates the factual underpinning of any new regulations.

V. Conclusion

In the aftermath of *Citizens United*, there are still several ways to empower voters and return to a citizen-centric democracy. The Brennan Center urges New York to enact following reforms:

New York's legislature should:

- Provide meaningful public financing to executive and legislative candidates;
- Protect shareholder with shareholder votes;
- Increase transparency through stronger disclosure;
- 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 pay-to-play restrictions by state contractors and lobbyists; and
- Enhance enforcement by increasing fines and penalties, and by properly funding and restructuring the Board of Elections.

VI. Further Reading

For more information about the impact of *Citizens United* on campaign finance laws, please see the Brennan Center's 2010 report, "Corporate Campaign Spending: Giving Shareholders A Voice"⁵⁴ or Ciara Torres-Spelliscy's "Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach" (forthcoming 2010).⁵⁵

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*.⁵⁶

For more specific information on New York State law, 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

⁵⁴ Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders A Voice* (Brennan Center Jan. 2010).

⁵⁵ Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach* (forthcoming 2010).

⁵⁶ Deborah Goldberg, ed., *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws* (2008),

http://www.brennancenter.org/content/resource/writing_reform_2008/

plaguing New York State's current campaign finance regime⁵⁷ or the Brennan Center's 2006 report entitled "Paper Thin: The Flimsy Facade of Campaign Finance Laws in New York"⁵⁸. 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 publications remain unaddressed.

⁵⁷ 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.

⁵⁸ 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/.