

# WHAT ALBANY COULD LEARN FROM NEW YORK CITY: A MODEL OF MEANINGFUL CAMPAIGN FINANCE REFORM IN ACTION

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## INTRODUCTION

New York State used to be at the forefront of campaign finance reform.<sup>3</sup> But over the past three decades, the State has fallen further and further behind the nation's best practices.<sup>4</sup> Now it has contribution limits that are sky high, riddled with loopholes, and subject to lax enforcement. Compounding these problems is a pay-to-play culture in Albany where candidates can use campaign funds to improve their personal day-to-day lifestyles.<sup>5</sup> Most of these issues could be addressed with a properly designed public financing system coupled with pay-to-play regulations. Many of the reforms Albany needs have already been tried in New York City. Reformers in Albany, therefore, need look no further than down the Hudson for examples of best practices in campaign finance.

This article explores six key areas where New York State law needs improvement in its approach to campaign finance reform and where New York City provides meaningful examples of better or best practices: (1) contribution limits; (2) candidates' personal use of campaign funds; (3) pay-to-play; (4) disclosure; (5) enforcement; and (6) public financing. This article does not attempt to address every aspect of New York State law that could be reformed in the area of campaign finance regulation. That topic is far too voluminous for so small a space, and it has been ably addressed by other publications.<sup>6</sup>

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<sup>3</sup> See Jeffrey D. Friedlander, Stephen E. Louis & Laurence D. Laufer, *A Symposium on Ethics in Government: The New York City Campaign Finance Act*, 16 HOFSTRA L. REV. 345, 346 (1988) (noting current New York State law is the product of 1970's era reforms).

<sup>4</sup> Gerald Benjamin, *Reform in New York: The Budget, the Legislature, and the Governance Process*, 67 ALB. L. REV. 1021, 1021 (2004) ("New York once prided itself as being a leader in governance among the states. Now mediocrity is the norm.").

<sup>5</sup> 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 12-13 (2006) [hereinafter ARBETMAN ET AL., \$2,100 CLUB], 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).

<sup>6</sup> See Justin F. Teff, *The Need for Campaign Finance Reform in New York*, 79 N.Y. ST. BAR ASS'N. J. 36 (Apr. 2007) (suggesting the need for reform in New York "that will withstand constitutional challenge"); SUZANNE NOVAK & SEEMA SHAH, BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW, PAPER THIN: THE FLIMSY FAÇADE OF CAMPAIGN FINANCE LAWS IN NEW YORK STATE 3 (2006), available at [http://www.brennancenter.org/dynamic/subpages/download\\_](http://www.brennancenter.org/dynamic/subpages/download_)

In Part I, this article highlights problems with New York State's current campaign finance regime. In Part II, this article describes how New York City addresses these issues in a more positive way. In Part III, this article offers a few critiques of the New York City system. Finally, in Part IV, this article offers concrete suggestions for policy changes in New York State. Throughout the text, we explain how each reform discussed is constitutional under current First Amendment jurisprudence.

In Governor Spitzer's State of the State Address in January 2007, he acknowledged many of the problems this article highlights. He eloquently stated:

To neutralize the army of special interests, we must disarm it. In the coming weeks, we will submit a reform package to replace the weakest campaign finance laws in the nation with the strongest. Our package will lower contribution limits dramatically, close the loopholes that allow special interests to circumvent these limits, and sharply reduce contributions from lobbyists and companies that do business with the state. But reform will not be complete if we simply address the supply of contributions. We must also address the demand. Full public financing must be the ultimate goal of our reform effort. By cutting off the demand for private money, we will cut off the special-interest influence that comes with it.<sup>7</sup>

During the time this article was being drafted, Governor Spitzer and legislative leaders in Albany reportedly struck a deal to amend many of the New York State campaign finance laws at

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file\_36590.pdf (providing "a critical analysis of campaign finance law in New York State."); PAUL RYAN, CTR. FOR GOVERNMENTAL STUDIES, A STATUTE OF LIBERTY: HOW NEW YORK CITY'S CAMPAIGN FINANCE LAW IS CHANGING THE FACE OF LOCAL ELECTIONS 2 (2003), available at <http://www.cgs.org/publications/docs/nycreport.pdf> (exploring "the shortcomings of New York City's public financing program, along with its many strengths."); Committee on Election Law, Association of the Bar of the City of New York, *Towards a Level Playing Field—A Pragmatic Approach to Public Campaign Financing*, 52 THE RECORD 660 (1997) [hereinafter ABCNY, *A Level Playing Field*] (addressing "issues regarding the financing of political campaigns in New York State in the context of two pieces of proposed public financing legislation for New York State election campaigns."); Robert Abrams, *Toward a Renewed Spirit of Reform*, 14 PACE L. REV. 339, 344-49 (1994) (suggesting the need to limit campaign finance expenditures and contributions). See generally GOVERNMENT ETHICS REFORM FOR THE 1990S: THE COLLECTED REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY (Bruce Green ed., 1991) [hereinafter GOVERNMENT ETHICS REFORM FOR THE 1990S] (providing reports on government ethics issued by the New York State Commission on Government Integrity).

<sup>7</sup> Gov. Eliot Spitzer, *One New York*, 6-7 (Jan. 3, 2007), available at [www.ny.gov/keydocs/NYS-SoS-2007.pdf](http://www.ny.gov/keydocs/NYS-SoS-2007.pdf).

issue here.<sup>8</sup> In late July, 2007, press reports indicated that this deal was off.<sup>9</sup> As of the time of this article's publication, no new campaign finance law has been proposed or passed at the Statewide level.

## I. CAMPAIGN FINANCE PROBLEMS IN NEW YORK STATE

### A. *Contribution Limits in New York State Are Too High*

New York State's contribution limits are too high in numerous categories including limits on contributions from individuals, corporations, unions and political parties, to all types of statewide and legislative candidates, political action committees (PACs) and political parties. Contribution limits are structured differently in nearly every state that has them.<sup>10</sup> In most states, contribution limits are specific to both who is *giving* the contribution and who is *receiving* the contribution.<sup>11</sup> For example, there are usually separate limits for the recipients: political parties, PACs, statewide candidates, and state senate and house candidates, as well as separate limits for different types of donors: individuals, PACs, corporations, unions and political parties.<sup>12</sup> In most states, therefore, contribution limits can be thought of as a matrix of multiple limits such as those in the chart below.

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<sup>8</sup> Press Release, Gov. Eliot Spitzer, Agreement Reached on Congestion Mitigation Plan, Campaign Finance Reform, Capital Investments and Senior Property Tax Relief (July 19, 2007), available at <http://www.state.ny.us/governor/press/0719071.html>.

<sup>9</sup> Martin Z. Braun & Michael Quint, *Spitzer Probe May Derail Campaign Finance Agreement*, July 25, 2007, <http://www.bloomberg.com/apps/news?pid=20601103&sid=ax6H8jcoGW.e&refer=us>.

<sup>10</sup> See National Conference of State Legislatures, Contribution Limits, <http://www.ncsl.org/programs/legismgt/about/ContribLimits.htm> (providing charted data for limits of each type of contribution in each state) (last visited Dec. 27, 2007).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

**New York State Contribution Limits 2007**

<b>Limits</b>	<b>To Candidates for House</b>	<b>To Candidates for Senate</b>	<b>To Candidates for Governor</b>	<b>To PACs - To Political Parties</b>	<b>To Party House- keeping Account</b>
<b>From Individuals</b>	\$3,800 (Primary) <u>\$3,800</u> (General) \$7,600 (Total)	\$6,000 (Primary) <u>\$9,500</u> (General) \$15,500 (Total)	\$18,100 (Primary) <u>\$37,800</u> (General) \$55,900 (Total)	\$150,000 <sup>13</sup> (Year) - \$94,200 (Year)	Unlimited
<b>From Unions</b>	\$3,800 (Primary) <u>\$3,800</u> (General) \$7,600 (Total)	\$6,000 (Primary) <u>\$9,500</u> (General) \$15,500 (Total)	\$18,100 (Primary) <u>\$37,800</u> (General) \$55,900 (Total)	\$150,000 (Year) - \$94,200 (Year)	Unlimited
<b>From Corpor- ations</b>	\$5,000 aggregate (Year); <sup>14</sup> \$3,800 (per election)	\$5,000 aggregate (Year)	\$5,000 aggregate (Year)	\$5,000 aggregate (Year) - \$5,000 aggregate (Year)	Unlimited

<sup>13</sup> New York State Board of Elections, Contributions and Receipt Limitations, <http://www.elections.state.ny.us> (follow the "Campaign Finance" tab to the "Contribution Limits" tab) (last visited Dec. 27, 2007). This \$150,000 limit for individuals applies to all candidates and committees per year. Therefore, if an individual had already given \$10,000 to a candidate in a year, then the individual could only give \$140,000 to PACs in that same year.

<sup>14</sup> *Id.* The \$5,000 limit for corporations applies to all candidates and committees per year. Therefore, if a corporation had already given \$1,000 to a candidate in a year, then the corporation could only give \$4,000 to PACs or parties in that same year.

<b>From PACs</b>	\$3,800 (Primary) <u>\$3,800</u> (General) \$7,600 (Total)	\$6,000 (Primary) <u>\$9,500</u> (General) \$15,500 (Total)	\$18,100 (Primary) <u>\$37,800</u> (General) \$55,900 (Total)	\$150,000 (Year) - \$94,200 (Year)	Unlimited
<b>From Political Parties</b>	Unlimited	Unlimited	Unlimited	Unlimited - Unlimited	Unlimited

New York State is atypical in its treatment of contribution *donors*. Individuals, limited liability companies (LLCs), unions and PACs are all subject to the same contribution limits.<sup>15</sup> Corporations and partnerships have their own limits.<sup>16</sup> Candidates' families have specific limits.<sup>17</sup> As donors, political parties have no contribution limits.<sup>18</sup> Less unusual are New York State's tiered limits, which apply different limits to different types of *recipients*: candidates for statewide office, the senate and the assembly each have separate contribution limits ranging from highest to lowest.<sup>19</sup>

As will be discussed below, loopholes for corporate subsidiaries, LLCs, and political parties exacerbate New York's already sky-high contribution limits.<sup>20</sup> The loopholes are so bad that they render many of the contribution limits utterly useless.<sup>21</sup>

We will focus on four key problem areas in New York State: limits on contributions from (1) individuals, (2) corporations, (3) unions and (4) political parties. Across the board, New York State's contributions limits are patently too high.<sup>22</sup>

<sup>15</sup> *Id.*

<sup>16</sup> N.Y. ELEC. LAW § 14-116(2) (McKinney 1998).

<sup>17</sup> RYAN, *supra* note 6, at 11 ("A candidate is permitted to receive larger contributions from relatives than from non-relatives.").

<sup>18</sup> NOVAK & SHAH, *supra* note 6, at 12 ("New York . . . [allows] political parties to make *unlimited* contributions to candidates.") (emphasis in original).

<sup>19</sup> New York State Board of Elections, *supra* note 13.

<sup>20</sup> NOVAK & SHAH, *supra* note 6, at 9-10.

<sup>21</sup> RYAN, *supra* note 6, at 1 (noting New York's notoriously high contribution limits, limited disclosure requirements and lack of enforcement of campaign finance law).

<sup>22</sup> Abrams, *supra* note 6, at 344 (concluding "these limits are way too high and directly feed the perception that money unduly influences the decisions of those in politics.").

## 1. Contributions from Individual Donors

Among the states that have contribution limits,<sup>23</sup> New York State's contribution limits are consistently among the highest in the nation.<sup>24</sup> For example, individuals may give \$55,900 per election cycle to candidates for New York Governor and \$94,200 per year to political parties.<sup>25</sup> Individuals have aggregate contribution limits of \$150,000 per year in New York State.<sup>26</sup> To put these limits in perspective, consider that these amounts are higher than \$46,659, which is the median annual income for households in New York State.<sup>27</sup> These limits are also much higher than the \$4,600 an individual can donate to a candidate for President.<sup>28</sup>

New York State's high individual contribution limits give the rich a disproportionate influence on State elections. As New York City's then-Corporation Counsel explained,

[b]y permitting the making of large campaign contributions, New York state law has engendered a process where candidates may solicit, accept, and rely upon large contributions from a small

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<sup>23</sup> NOVAK & SHAH, *supra* note 6, at 3 ("Thirteen states have no campaign finance regulation other than disclosure requirements."); see Ciara Torres-Spelliscy, *Elections and Campaign Reform Committee Illinois General Assembly* (2007), available at [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_48312.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_48312.pdf) (explaining that Illinois, Oregon and Virginia are the only states without contribution limits.).

<sup>24</sup> NOVAK & SHAH, *supra* note 6, at 9; RYAN, *supra* note 6, at 1; ARBETMAN ET AL., \$2,100 CLUB, *supra* note 5, at 23.

<sup>25</sup> New York State Board of Elections, *supra* note 13 (these amounts refer to the 2007 limit); Press Release, New York State Board of Elections, State Board Announces New Campaign Contribution Limits (Feb. 14, 2003), available at <http://www.elections.state.ny.us> (follow "Public Information" tab to "Press Release" tab and scroll to Feb. 14, 2003) (New York State contribution limits automatically increase based on a cost of living adjustment. So in future years, these amounts will be higher).

<sup>26</sup> *Id.* (This aggregate limit means an individual may not give more than \$150,000 per year to all candidates and committees combined).

<sup>27</sup> U.S. Census, Historical Income Tables – Households, Median Income of Households by State: 1984 to 2005 Two-Year Moving Averages, <http://www.census.gov/hhes/www/income/histinc/h08a.html> (last visited Dec. 27, 2007) (reporting \$46,659 value for New York State in 2005).

<sup>28</sup> Federal Election Commission, Contribution Limits 2007-08, <http://www.fec.gov/pages/brochures/contriblimits.shtml> (last visited Dec. 27, 2007) (illustrating that the New York State limits are even higher than the aggregate individual federal biennial limit of \$42,700 to all federal candidates); ARBETMAN ET AL., \$2,100 CLUB, *supra* note 5, at 18 (highlighting that most individual donors do not give the maximum levels, as illustrated by the average individual political donation in New York State from 2002 to 2006, which was \$3,367).

number of wealthy individuals and well-financed special interest groups. This reliance on large private funding sources in campaigns for public office has created a widely held belief that persons and groups which make large contributions exercise corrupt or improper influence over elected officials.<sup>29</sup>

To reduce the time spent on fundraising, candidates have a rational incentive to focus on the largest political donors they can find, often at the expense of reaching out to smaller donors. Additionally, because the limits are so high, a mere handful of large donors who can give the maximum contribution could bankroll a single candidate's campaign.<sup>30</sup> Arguably, a candidate is more likely to feel beholden to a large donor who supplied a large percentage of the candidate's campaign costs.

The Supreme Court has explained that the undue influence or unfair access stemming from a contributor's ability to direct large sums of money to political campaigns can be dangerous to our democratic system of government:

Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and remove the temptation.<sup>31</sup>

New York State is not immune from these corrosive influences.

The structure of New York State's contribution limits appears to have an effect on who is elected and re-elected. Typically, the candidate who can raise the most money wins the election. As a recent study of the 2004 legislative races in New York State showed, "178 of 212 victors in the 2004 election outspent their

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<sup>29</sup> Friedlander, Louis & Laufer, *supra* note 3, at 348.

<sup>30</sup> National Institute on Money in State Politics, *State at a Glance: New York 2004*, [http://www.followthemoney.org/database/state\\_overview.phtml?si=200434](http://www.followthemoney.org/database/state_overview.phtml?si=200434) (last visited Dec. 27, 2007) (In 2004, the average cost of an assembly race in New York State was \$88,013 and the average cost of a senate race in New York State was \$252,246); N.Y. ELEC. LAW § 14-114(1)(b) (McKinney 1998); Press Release, New York State Board of Elections, *supra* note 25 (explaining the new limits for 2004 allowing individuals in New York State to give \$6,800 to candidates for the assembly and \$13,900 to candidates for senate in 2004). Therefore, thirteen people giving the maximum amount could fund the average assembly race and nineteen people giving the maximum amount could fund the average senate race.

<sup>31</sup> *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 153 (2003).

opponents by a ratio of at least 4 to 1.”<sup>32</sup> Unsurprisingly, incumbents who have both name recognition and official power, raise far more money than most challengers in New York State.<sup>33</sup> Thus, the State’s broken campaign finance system reinforces incumbency.<sup>34</sup>

Limiting individual contributions to candidates promotes a number of values at issue in the debate over campaign finance reform. These values include: (1) prevention of corruption and the appearance of corruption, (2) restoring confidence in democracy, and (3) enhancing the quality of representation.<sup>35</sup> Preventing corruption and its appearance is the only rationale that the Supreme Court has recognized to justify contribution limits.<sup>36</sup> But equally important is the desire to improve average citizens’ fragile confidence in democracy. Contribution limits improve citizen’s confidence in elected government by ensuring

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<sup>32</sup> LIAM ARBETMAN, BLAIR HORNER & LISA RITCHIE, BLOW OUT ELECTIONS: A LOOK AT THE 2004 NEW YORK STATE LEGISLATIVE RACES; HOW CAMPAIGN FINANCE AND DISTRICT LINES LIMIT ELECTORAL COMPETITION 7 (2005), available at <http://www.nypirg.org/goodgov/BLOW%20OUT%20ELECTION.final.pdf>.

<sup>33</sup> *Id.* at 11 (NYS legislative “[i]ncumbents, in the aggregate, raised over 3.8 times as much . . . money as did non-incumbent candidates.”); ABCNY, *A Level Playing Field*, *supra* note 6, at 668 (concluding “[t]he amount of these [incumbent] ‘war chests’ often deters potential challengers or indirectly hinders their fundraising efforts in that major donors may be unwilling to make a futile contribution to a challenger to a well-funded and seemingly safe incumbent. The ultimate result: uncontested or barely contested elections and a disaffected electorate that rightly believes that it has no real choice in the voting booth.”).

<sup>34</sup> Benjamin, *supra* note 4, at 1067 (“Enormous imbalance in the availability of campaign resources to incumbents and challengers contributes to the noncompetitiveness of New York elections and to the entrenchment of legislative majorities in both houses.”).

<sup>35</sup> See BURT NEUBORNE, BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW, THE VALUES OF CAMPAIGN FINANCE REFORM 7 (1998), available at <http://www.brennancenter.org/dynamic/subpages/cfr2.pdf> (last visited Sept. 15, 2007) (outlining the values at issue in the debate over campaign finance reform and analyzing how various models of campaign finance affect those values).

<sup>36</sup> Justice Breyer has written that contribution limits seek to strengthen democracy. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring) (concluding “restrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action. . . . Moreover, by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. . . . [T]hey seek to build public confidence in that process and broaden the base of a candidate’s meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.”); see also JUSTICE STEPHEN BREYER, ACTIVE LIBERTY 45-49 (2005).

that office holders are less likely to tailor their actions to please only their largest donors.<sup>37</sup> 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. Reasonable contribution limits also promote public confidence that elected representatives will be accountable to voters rather than wealthy donors.<sup>38</sup>

Prescribing reasonable contribution limits requires balancing competing concerns. Setting contribution limits too low may over-burden candidates with fundraising activities by making it too hard for a candidate to raise enough money to communicate her message to the public, thereby limiting voter knowledge,<sup>39</sup> but setting limits too high hinders other values at stake in campaign finance reform. Spending huge amounts of time fundraising may limit the hours in a day that a sitting official spends governing and may also dissuade qualified candidates from running for office or remaining in office. These effects reduce the quality of representation and may reduce the quality of democratic discourse.<sup>40</sup>

Reasonable contribution limits are constitutional. During the thirty years after the seminal case of *Buckley v. Valeo*, the rule of thumb was that courts would generally defer to legislative choices in setting contribution limits.<sup>41</sup> But in 2006, in the case of *Randall v. Sorrell*, the Supreme Court for the first time invalidated a contribution limit as unconstitutionally low.<sup>42</sup> Because *Randall* is a novel case, which departs from previous precedent, we will discuss it at some length to explain the contours of the new doctrine.

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<sup>37</sup> See NEUBORNE, *supra* note 35, at 12 (stating that the Supreme Court seeks to prevent corruption, and thus treating “as corrupt money that [which] causes officeholders to be more likely to respond to large donors than to the needs of ordinary citizens.”).

<sup>38</sup> *Id.* at 15-16.

<sup>39</sup> See *id.* at 16 (noting that lack of regulation may limit voter knowledge when one candidate is able to drown out the messages of other candidates).

<sup>40</sup> See generally *id.* at 9-11 (discussing the effects fundraising has on political candidates).

<sup>41</sup> See generally *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003) (upholding the soft-money ban); *Shrink Mo.*, 528 U.S. 377 (upholding Missouri’s limits); *Cal. Med. Ass’n. v. Fed. Election Comm’n*, 453 U.S. 182 (1981) (upholding \$5,000 contribution limit to multi-candidate PACs); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (upholding \$1,000 contribution limit to federal candidates).

<sup>42</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2494, 2500 (2006).

In *Randall*, the Supreme Court asked:

[W]hether [the] contribution limits prevent candidates from ‘amassing the resources necessary for effective [campaign] advocacy’; whether they magnify the advantages of incumbency to the point where they would put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny.<sup>43</sup>

In response, the *Randall* Court found Vermont’s contribution limits (ranging from \$200 to \$400) unconstitutional.<sup>44</sup>

While the Court historically deferred to the legislature on the levels of contribution limits, in *Randall*, the Court acknowledged that it must recognize some lower bound to contribution limits.<sup>45</sup> According to the Court, contribution limits that are too low may harm the very electoral fairness they seek to promote by “preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.”<sup>46</sup> Contribution limits that are substantially lower than those in force in other states and those previously upheld by the Court in the past raise the risk that the limits are not “closely drawn.”<sup>47</sup> In *Randall*, the Court noted that “Vermont’s contribution limits, considered as a whole, [were] the lowest in the nation.”<sup>48</sup> The Court also noted that Vermont’s limits were well below the limits upheld in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000).<sup>49</sup>

In *Randall*, the Court noted five factors indicating that the contribution limits in question imposed substantial restrictions on First Amendment rights.<sup>50</sup> They are the following: (1) a record

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<sup>43</sup> *Id.* at 2492 (quoting *Buckley*, 424 U.S. at 21).

<sup>44</sup> *See id.* at 2495 (stating that the statute’s “contribution limits are too restrictive”), 2486 (Vermont’s “Act 64” limited contributions from individuals, political parties and PACs during a two-year general election cycle to \$400 to candidates for statewide office, \$300 to state senators, and \$200 to state representatives, as well as limiting contributions by individuals to a political party to \$2,000 for a two-year election cycle).

<sup>45</sup> *Id.* at 2492.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 2494.

<sup>48</sup> *Randall*, 126 S. Ct. at 2493.

<sup>49</sup> *Id.* at 2494 (citing *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000)) (stating that the Court in *Nixon* upheld a limit of \$1,075 (adjusted for inflation bi-annually) for Missouri state auditor candidates and that Missouri’s 2006 limit of \$1,275 was more than six times the \$200 per election limit (not adjusted for inflation) for Vermont).

<sup>50</sup> *See id.* at 2494 (stating that “Act 64’s contribution limits may fall outside tolerable First Amendment limits.”).

that suggests the “contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns,”<sup>51</sup> (2) limits on contributions from political parties to candidates at exactly the same low levels that apply to other contributors,<sup>52</sup> (3) the lack of an exception for expenses incurred by volunteers in the course of campaign activities,<sup>53</sup> (4) limits that are not adjusted for inflation,<sup>54</sup> and (5) the lack of any special justification for such a low contribution level.<sup>55</sup>

Because New York State’s limits are some of the highest in the nation, they can be significantly reduced without risking being overturned using the *Randall* standards.<sup>56</sup> New York State’s current contribution limits for individuals should be reduced to address the risk to democratic integrity posed by large donors.

## 2. Contributions from Corporations

The federal government<sup>57</sup> and twenty-three states ban contributions from corporations to candidates because of the unique risks of corruption posed by corporate contributions.<sup>58</sup> The Supreme Court has specifically addressed the constitutionality of campaign finance restrictions with respect to corporate entities, and has upheld the constitutionality of such restrictions.<sup>59</sup> The Court has pointed out that the government

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<sup>51</sup> *Id.* at 2495.

<sup>52</sup> *Id.* at 2496.

<sup>53</sup> *Id.* at 2498 (noting also that the lack of an exception has a greater effect where contribution limits are very low).

<sup>54</sup> *Randall*, 126 S. Ct. at 2499.

<sup>55</sup> *Id.*

<sup>56</sup> NOVAK & SHAH, *supra* note 6, at 9 (the contribution limits in New York are “among the highest in the country”).

<sup>57</sup> See FED. ELECTION COMM’N, THIRTY YEAR REPORT 19 (2005), available at <http://www.fec.gov/info/publications/30year.pdf> (the federal government has regulated contributions from corporations for 100 years, starting with the Tillman Act of 1907).

<sup>58</sup> NOVAK & SHAH, *supra* note 6, at 12 (“Contributions from corporations to gubernatorial and legislative candidates are prohibited in 23 states, limited in 22 states, and unlimited in 4 states.”).

<sup>59</sup> See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 668 (1990) (“Requiring corporations to make all independent political expenditures through a separate fund” which helps in reducing unfair influence over elections); see also *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 459 U.S. 197, 209 (1982) (“In order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations.”). It should be noted that campaign finance scholar Rick Hasen has argued that the Supreme

asserts a valid interest when it comes to restricting campaign contributions from corporations.<sup>60</sup> That interest is to “ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political ‘war chests’ which could be used to incur political debts from legislators who are aided by the contributions.”<sup>61</sup>

New York State allows contributions by corporations, but limits them to an aggregate of \$5,000 per year.<sup>62</sup> This limit is much less effective than it could be because each affiliated or subsidiary corporation has its own \$5,000 limit.<sup>63</sup> Consequently, a corporation with nine subsidiaries could make \$50,000 in contributions in New York State (\$5,000 from the parent corporation plus \$45,000 from the nine subsidiaries). Thus, any business with a complex corporate structure can multiply its influence by giving through its subsidiaries.

Permitting corporate subsidiaries to have their own separate contribution limits<sup>64</sup> makes a mockery of having a corporate contribution limit at all. Major corporations, which have complex corporate structures with many tiers of subsidiaries for liability and accounting purposes, can magnify their political influence by

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Court’s recent decision in *Fed. Election Comm’n v. Wis. Right to Life (WRTL II)*, 127 S. Ct. 2652 (2007) has thrown doubt on the on-going precedential value of *Austin*. Richard Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. (forthcoming Apr. 2008), available at <http://ssrn.com/abstract=1003922> [hereinafter *Beyond Incoherence*] (“The principal opinion in *WRTL II* not only turns *McConnell*’s section 203 holding on its head; it also undermines the Court’s earlier treatment of corporate spending in candidate elections from *Austin* and *Beaumont*, calling into question the continued constitutionality of a PAC requirement for corporate (and union) general treasury spending on advertisements *expressly advocating* the election or defeat of candidates for federal office.”) (emphasis in original).

<sup>60</sup> *Nat’l Right to Work Comm.*, 459 U.S. at 208.

<sup>61</sup> *Id.* at 207; see also *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 204 (2003) (upholding ban on corporate funded electioneering communications in federal elections); *Austin*, 494 U.S. at 660 (holding that states have a compelling interest in addressing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”).

<sup>62</sup> N.Y. ELEC. LAW § 14-116(2) (McKinney 1998). This limits a corporation to giving \$5,000 to all candidates, political committees and parties. Thus a corporation could choose to give \$5,000 to candidate x or \$5,000 to party y, but not both in the same year.

<sup>63</sup> *Id.*; New York State Board of Elections, *supra* note 13.

<sup>64</sup> New York State Board of Elections, *supra* note 13.

giving through each one of their existing subsidiaries, so long as it is a “separate legal entity.”<sup>65</sup> To take an extreme example, Enron, before it went bankrupt, had *hundreds* of subsidiaries.<sup>66</sup> Had it been so inclined, every Enron subsidiary would have had the ability to give \$5,000, thereby allowing Enron to give as much as \$1 million each year.<sup>67</sup> A single corporation should not be able to distort the political process with infusions of vast sums of corporate wealth.

There are two ways to close this loophole: either aggregate corporate contributions or ban corporate contributions altogether. The original intent of the law could be restored so that a corporation would be able to give a modest amount (\$5,000 or less).<sup>68</sup> Under this solution, contributions from a parent corporation and its subsidiary corporations would be considered to be from a single source for campaign finance purposes.<sup>69</sup>

The other option is to ban corporate contributions entirely, provided that corporations were allowed to give through a PAC or separate segregated fund.<sup>70</sup> New York State used to have a ban on corporate contributions from 1907 through 1974.<sup>71</sup> This solution has the advantage of simplicity and effectiveness, but is likely to be harder to pass because of the role corporations have had in funding incumbents’ campaigns. Either solution would be preferable to the current subsidiary loophole which allows corporations to make contributions that are much too large.

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<sup>65</sup> *Id.*

<sup>66</sup> Enron Corp. and Subsidiary Co., *Subsidiary and Limited Partnership Interests as of 12/31/00*, available at <http://www.sec.gov/Archives/edgar/data/1024401/000102440101500010/exh21.txt>.

<sup>67</sup> See New York State Board of Elections, *supra* note 13 (allowing each affiliated or subsidiary corporation to contribute the maximum \$5,000 each year).

<sup>68</sup> N.Y. ELEC. LAW § 14-116(2) (McKinney 1998).

<sup>69</sup> Teff, *supra* note 6, at 39 (noting under federal law, the parent and its subsidiaries are considered one entity).

<sup>70</sup> See Kennedy v. Gardner, 1999 WL 814273, at \*2-4 (D.N.H. 1999) (invalidating New Hampshire’s ban on corporate contributions because it did not allow for separate segregated funds). Scholar Rick Hasen predicts,

[o]n the corporate/union PAC requirement for express advocacy, it is not a large step at all from the principal opinion in *WRTL II* to a holding overruling *Austin* and *McConnell* on this point. The Court could simply quote those parts of the *WRTL II* opinion extolling the First Amendment virtues of free speech, and criticizing the ‘ban’ that ‘criminalizes’ corporate free speech in candidate elections an opinion reaching the conclusion that Chief Justice Roberts and Justice Alito resisted acknowledging in *WRTL*.

*Beyond Incoherence*, *supra* note 59, at 35.

<sup>71</sup> Friedlander, Louis & Laufer, *supra* note 3, at 346 n.10.

LLCs provide another distinct type of corporate loophole in New York State. An LLC, which is really a legal hybrid between a corporation and a partnership, is treated as an *individual* by the New York State Board of Elections.<sup>72</sup> Therefore, LLCs are subject to the very high individual contribution limits.<sup>73</sup> If one were rich enough, one could establish a string of LLCs and each LLC could give a maximum contribution.<sup>74</sup> The LLC contribution loophole is another boon for the rich who can circumvent contribution limits by making multiple contributions through LLCs.<sup>75</sup> This loophole could be closed by (1) treating LLCs like corporations subject to a \$5,000 limit, (2) limiting the amount of donations an LLC can make, (3) aggregating contributions from associated LLCs, or (4) banning contributions from LLCs altogether, provided that they could give through a PAC or separate segregated fund.

### 3. Contributions from Unions

The federal government<sup>76</sup> and sixteen states<sup>77</sup> ban contributions from unions to candidates.<sup>78</sup> The Supreme Court has upheld laws treating corporations and unions more strictly than individual contributors.<sup>79</sup> Most states that regulate

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<sup>72</sup> New York State Board of Elections, *supra* note 13 (emphasis added).

<sup>73</sup> See Teff, *supra* note 6, at 39 (describing and urging the end of the LLC loophole).

<sup>74</sup> See NOVAK & SHAH, *supra* note 6, at 13 (analyzing how campaign finance laws in New York allow LLCs “legally to circumvent contribution limits placed on corporations.”).

<sup>75</sup> See ARBETMAN ET AL., \$2,100 CLUB, *supra* note 5, at 26 (describing how donations were made from multiple entities owned by a single real estate developer); see also Danny Hakim, *Wealthy Donors Find a Loophole to Limit on Gifts*, N.Y. TIMES, Aug. 4, 2006, at A1 (“The L.L.C. exemption is a loophole big enough to push the Titanic through it.”) (internal quotations omitted).

<sup>76</sup> See Fed. Election Comm’n v. Nat’l Right to Work Comm., 459 U.S. 197, 209 (1982) (explaining that the federal government has restricted contributions from unions since 1940 in the second Hatch Act).

<sup>77</sup> See NOVAK & SHAH, *supra* note 6, at 14 (“Sixteen states prohibit contributions from labor unions to candidates for gubernatorial and legislative office.”).

<sup>78</sup> *United States v. Int’l Union United Auto.*, 352 U.S. 567, 578 (1957) (“And so the belief grew that, just as the great corporations had made huge political contributions to influence governmental action or inaction, whether consciously or unconsciously, the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process.”).

<sup>79</sup> See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 206-08 (2003) (holding for the regulation of corporation advertisements during the thirty to sixty day period preceding federal primary and general elections to preserve the

corporate contributions usually have matching parallel limits for unions (\$1,000 per union and \$1,000 per corporation, for example).<sup>80</sup> But in New York State, unincorporated unions are subject to the high contribution limits that apply to individuals, instead of the lower \$5,000 limits for corporations.<sup>81</sup> Thus, unions have the same potential to give high amounts of \$55,900 per election cycle to candidates for New York governor and \$94,200 per year to political parties.<sup>82</sup>

#### 4. Contributions from Political Parties

Political parties in New York State may receive no more than \$94,200 from any individual contributor and \$5,000 from any corporation, but political parties can give unlimited contributions to candidates.<sup>83</sup> Any donor who has reached her own contribution limit to candidates may give money to political parties, who can in turn funnel those contributions to candidates.<sup>84</sup> Thus, political parties can magnify the voices of already powerful large donors by providing them with an additional, albeit indirect, outlet to support candidates financially.

It is constitutional to place limits on contributions both to and

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“integrity of the electoral process”) (internal quotations omitted); *Nat’l Right to Work Comm.*, 459 U.S. at 208-09 (examining the movement toward greater regulation of corporation and union contributions to prevent corruption); *Intl Union United Auto.*, 352 U.S. at 585 (stating the need for legislation to “avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital.”).

<sup>80</sup> See National Conference of State Legislatures, <http://www.ncsl.org/programs/legismgt/about/CorpCand.htm> (last visited Dec. 27, 2007) (detailing the limits of corporate and union contributions to candidates by state). But nothing requires that unions and corporations be treated exactly the same. Arguably they can be treated differently and justifiably so. Unions get their money from their individual members who are likely to share their unions’ political beliefs, while corporations often get their money from investors or consumers who have no particular interest in the corporation’s political positions.

<sup>81</sup> New York State Board of Elections, *supra* note 13; NOVAK & SHAH, *supra* note 6, at 14.

<sup>82</sup> New York State, Governor’s Press Releases, <http://www.ny.gov/governor/SenatesUnfinishedBusiness> (last visited Dec. 27, 2007); New York State Board of Elections, *supra* note 13.

<sup>83</sup> New York State Board of Elections, *supra* note 13; NOVAK & SHAH, *supra* note 6, at 12.

<sup>84</sup> See NOVAK & SHAH, *supra* note 6, at 11 (“New York places no limits on contributions from individuals to parties for the purpose of ‘housekeeping’ expenses.”).

from political parties.<sup>85</sup> But, as with individual contribution limits, party contribution limits cannot be set too low.<sup>86</sup> In *Randall*, the Supreme Court criticized Vermont for its low limits on parties because they would “severely limit the ability of a party to assist its candidates’ campaigns by engaging in coordinated spending on advertising, candidate events, voter lists, mass mailings, even yard signs.”<sup>87</sup> Furthermore, low limits for political party contributions would prevent a political party from using the accumulated “contributions from small donors to provide meaningful assistance to any individual candidate.”<sup>88</sup> Additionally, the Court also cautioned against limiting contributions from party committees to individual candidates too severely, since exceptionally low limits may improperly affect the contributor’s associational rights.<sup>89</sup> Nevertheless, New York should adopt reasonable party contribution limits. Because the State’s party limits are some of the highest in the nation, they can be significantly reduced without fear of running afoul of *Randall*.

Unfortunately, the use of “Housekeeping Accounts” permits political parties in New York State to circumvent the contribution limits that would otherwise apply.<sup>90</sup> Housekeeping Accounts are accounts established by a political party ostensibly to maintain a permanent party headquarters and staff, and to carry on ordinary activities which are not for the express purpose of promoting specific candidates.<sup>91</sup> Donations to Housekeeping Accounts are unlimited.<sup>92</sup> A recent study by Common Cause New

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<sup>85</sup> *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 142-46 (2003) (upholding BCRA’s ban on soft money to and from political parties); *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm. (Colorado Republican II)*, 533 U.S. 431, 435-36 (2001) (stating that the Federal Election Campaign Act’s (FECA) limitation on donations to political parties is constitutional and is narrowly tailored); *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (per curiam) (upholding FECA’s \$25,000 aggregate yearly limit on contributions to political party committees); see also *United States v. Int’l Union United Auto*, 352 U.S. 567, 576 (1957) (“We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions.”) (internal quotations omitted).

<sup>86</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2495-99 (2006).

<sup>87</sup> *Id.* at 2497.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 2496, 2499.

<sup>90</sup> NOVAK & SHAH, *supra* note 6, at 10.

<sup>91</sup> New York State Board of Elections, *supra* note 13.

<sup>92</sup> N.Y. ELEC. LAW § 14-124(3) (McKinney 1998).

York found that a staggering \$53.2 million was given to Housekeeping Accounts between 1999 and 2006.<sup>93</sup> In practice, these contributions are largely unregulated<sup>94</sup> so it is difficult to know whether the vast sums of money flowing into Housekeeping Accounts are really being segregated from funds helping specific campaigns.<sup>95</sup>

Corporations, and to a lesser extent unions, abuse the Housekeeping Account loophole.<sup>96</sup> Between 1999 and 2006, corporations and other business entities gave over thirty-two million dollars to New York State political parties' Housekeeping Accounts.<sup>97</sup> For example in 2004, GNYHA Management Corporation, one of the top twenty donors in New York State, gave a total of \$400,500 in political contributions; \$399,500 of this sum went to various political parties.<sup>98</sup> GNYHA Management Corporation, gave donations of \$264,500 to Democratic political parties, and \$136,000 to Republican political parties in New York.<sup>99</sup> While the corporate contribution limit that applies to GNYHA Management Corporation is \$5,000, it was nonetheless able to pour an additional \$394,500 into the political process by exploiting the Housekeeping Account loophole.<sup>100</sup>

Unions have also exploited this loophole. Unions have much higher contribution limits than corporations because they are treated as individuals in New York State.<sup>101</sup> Thus, unions presently can give \$94,200 per year to a political party.<sup>102</sup> Yet

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<sup>93</sup> LIAM ARBETMAN ET AL., *THE LIFE OF THE PARTY: HARD FACTS ON SOFT MONEY IN NEW YORK STATE 1* (Common Cause/New York 2006) [hereinafter *LIFE OF THE PARTY*], available at [http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/SOFT\\_MONEY\\_REPORT.PDF](http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/SOFT_MONEY_REPORT.PDF).

<sup>94</sup> *Id.* at 17 (noting that “a lack of oversight from the Board of Elections means that parties are essentially their own umpires.”).

<sup>95</sup> *See id.* at 15 (“It is interesting to note that the largest category of soft money [Housekeeping Account] expenses is the amorphous ‘other’ category.”).

<sup>96</sup> *Id.* at 4.

<sup>97</sup> *Id.*

<sup>98</sup> National Institute on Money in State Politics, Contributor Summary GNYHA Management Corp., <http://www.followthemoney.org/database/StateGlance/contributor.phtml?si=200434&d=12005097> (last visited Dec. 27, 2007).

<sup>99</sup> *Id.*

<sup>100</sup> New York State Board of Elections, *supra* note 13.

<sup>101</sup> *Id.*

<sup>102</sup> In 2004, the union limit was \$84,400 per year to a political party. *Groups Assail State's Campaign Contribution Limits*, N. COUNTRY GAZETTE, Feb. 1, 2007, available at <http://www.democracymatters.org/article.php?cat=Press&select=473>.

even among unions, giving to political parties exceeds these already high amounts through the use of Housekeeping Accounts.<sup>103</sup> For example, in 2004, New York State Service Employees Local 1199/SEIU, another one of the top twenty donors in New York State, gave \$234,400 to the Senate Republican Campaign Committee of New York and \$135,400 to the Democratic Assembly Campaign Committee of New York.<sup>104</sup> Thus, the Housekeeping Account loophole allows union money to follow power.<sup>105</sup>

Lobbyists in Albany have tried to further their clients' interests by giving generously to these party-run Housekeeping Accounts.<sup>106</sup> But any entity—corporate, union or otherwise—which wants to give more to a political party than would otherwise be allowed, can do so by donating to a political party's Housekeeping Account.<sup>107</sup> This loophole effectively makes all other political party contribution limits meaningless.

The Supreme Court directly dealt with restrictions on contributions to party committees in *McConnell v. Federal Election Commission*, and those restrictions were upheld.<sup>108</sup> As the Court pointed out “both common sense and the ample record in these cases” lead to the conclusion that “soft-money contributions to national party committees have a corrupting influence or give rise to the appearance of corruption.”<sup>109</sup> As discussed previously, closing political party loopholes is permissible so long as it is done in a way that the political parties

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<sup>103</sup> LIAM ARBETMAN, BLAIR HORNER & MEGAN QUATTLBAUM, A WORK IN PROGRESS 2005 MIDTERM REPORT CARD ON REFORM FOR NEW YORK STATE GOVERNMENT 13 (2006) [hereinafter MIDTERM REPORT CARD], available at: <http://www.commoncause.org/atf/cf/%7B8A2D1D15-C65A-46D4-8CBB-2073440751B5%7D/Final%20report.pdf>.

<sup>104</sup> NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, CONTRIBUTOR SUMMARY NEW YORK STATE SERVICE EMPLOYEES LOCAL 1199/SEIU NEW YORK (2004), [http://www.followthemoney.org/database/StateGlance/contributor.phtml?si=200434&d=8077074&p=A01P01A01#party\\_contrib](http://www.followthemoney.org/database/StateGlance/contributor.phtml?si=200434&d=8077074&p=A01P01A01#party_contrib).

<sup>105</sup> For the past four decades, New York State has had a Republican controlled Senate and a Democratic controlled Assembly. Thus it is not surprising to see contributors giving generously to Republicans in the Senate and Democrats in the Assembly.

<sup>106</sup> MIDTERM REPORT CARD, *supra* note 103, at 7; BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW ET AL., STRENGTHENING ETHICS IN NEW YORK: THE ETHICS IN GOVERNMENT ACT OF 2006 5 (2006) [hereinafter STRENGTHENING ETHICS], available at [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_8611.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_8611.pdf).

<sup>107</sup> *Id.*

<sup>108</sup> *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 223 (2003).

<sup>109</sup> *Id.* at 145.

retain their associational rights.<sup>110</sup>

If contribution limits are to be effective in New York State, they must be uniformly lowered and the loopholes that undermine these limits should be closed. Because of Supreme Court precedent, it would be constitutional for New York State to close all the aforementioned contribution loopholes—corporate subsidiary, LLC and Housekeeping Accounts.<sup>111</sup> In its campaign finance jurisprudence, the Supreme Court has developed an anti-circumvention doctrine to justify certain restrictions on contributions.<sup>112</sup> Under the anti-circumvention doctrine state interests in combating real and perceived corruption justify certain campaign finance restrictions needed to prevent contributors from circumventing contribution limits by giving to entities that funnel money to candidates' campaigns.<sup>113</sup> Thus, with the aid of the anti-circumvention doctrine, most attempts to close loopholes in the law are on solid constitutional ground.

*B. Personal Use of Campaign Funds Creates More Risks of Corruption*

New York State's weak contribution limits and many loopholes work hand in hand with laws that allow the personal use of campaign funds by candidates, creating significant opportunities for corruption.<sup>114</sup> On its face, New York State law bans personal use of campaign funds, stating that “[c]ontributions received by a

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<sup>110</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2498 (2006).

<sup>111</sup> *See* *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 155 (2003) (holding “recent cases have recognized that restricting contributions by various organizations hedges against their use as conduits for circumvention of [valid] contribution limits.”) (internal quotations omitted).

<sup>112</sup> *Id.*; *see* *Cal. Med. Ass'n. v. Fed. Election Comm'n*, 453 U.S. 182, 198-99 (1981) (upholding \$5,000 limit on annual contributions by individuals and unincorporated associations to multi-candidate PACs based on anti-circumvention rationale); *see also* *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (*per curiam*) (upholding \$25,000 overall cap on individual contributions as a corollary of the basic individual contribution limitation).

<sup>113</sup> *See* *Cal. Med. Ass'n*, 453 U.S. at 198; *Buckley*, 424 U.S. at 110. The anti-circumvention argument cannot be used to justify every campaign finance regulation. In 2007, the Supreme Court struck down the application of BCRA to a campaign ad by Wisconsin Right to Life because it was not the functional equivalent of express advocacy. *WRTL II*, 127 S. Ct. 2652, 2672 (2007). The Court specifically rejected the anti-circumvention rationale as a justification for applying BCRA to Wisconsin Right to Life's ad, stating “such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny.” *Id.* at 2672.

<sup>114</sup> NOVAK & SHAH, *supra* note 6, at 10.

candidate or a political committee . . . shall not be converted by any person to a personal use which is unrelated to a political campaign or the holding of a public office or party position.”<sup>115</sup>

While New York’s Election Law section 14-130 seems to clearly state that it is unlawful for a candidate to spend campaign funds for personal use, over time this law has been given such a strained interpretation that candidates can and do utilize campaign funds for many personal uses. For example, opinions by the Board of Elections have permitted candidates for elected office to use campaign funds (1) to cover travel costs between their home jurisdictions and Albany,<sup>116</sup> (2) to pay for memorial services for lawmakers who have died,<sup>117</sup> (3) to give money to a charity of choice,<sup>118</sup> (4) to pay for child care services,<sup>119</sup> (5) to pay for receptions for campaign contributors,<sup>120</sup> (6) to pay for portraits of retiring public officials,<sup>121</sup> and (7) to pay for the production of a public access cable television program about governmental issues.<sup>122</sup>

Beyond these opinions from the Board of Elections, which specifically sanction certain uses of campaign funds, there is no laundry list of what is and is not allowed to guide either candidates or regulators. This lack of legal guidance gives candidates and elected officials wide latitude to decide for themselves what spending is “unrelated to a political campaign or the holding of a public office or party position.”<sup>123</sup> This ambiguity about personal use has led to situations where

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<sup>115</sup> N.Y. ELEC. LAW § 14-130 (McKinney 1998); *see* *United States v. Pisani*, 773 F.2d 397, 410 (2d Cir. 1985) (“Had . . . [§ 14-130] been in effect during the period covered by Pisani’s indictment, we would not hesitate to affirm his convictions here. But since no similar provision had ever been enacted previously, we conclude that prior to 1985 a candidate in New York state was not prohibited from using campaign funds for personal purposes.”).

<sup>116</sup> New York State Board of Elections, Op. 86-1 at 1 (1986), *available at* <http://www.elections.state.ny.us/NYSBOE/download/law/advisory.pdf>.

<sup>117</sup> New York State Board of Elections, Op. 86-2 at 2 (1986), *available at* <http://www.elections.state.ny.us/NYSBOE/download/law/advisory.pdf>.

<sup>118</sup> New York State Board of Elections, Op. 86-5 at 5 (1986), *available at* <http://www.elections.state.ny.us/NYSBOE/download/law/advisory.pdf>.

<sup>119</sup> New York State Board of Elections, Op. 90-2 at 9 (1990), *available at* <http://www.elections.state.ny.us/NYSBOE/download/law/advisory.pdf>.

<sup>120</sup> New York State Board of Elections, Op. 93-1 at 10 (1993), *available at* <http://www.elections.state.ny.us/NYSBOE/download/law/advisory.pdf>.

<sup>121</sup> New York State Board of Elections, Op. 93-2 at 11 (1993), *available at* <http://www.elections.state.ny.us/NYSBOE/download/law/advisory.pdf>.

<sup>122</sup> New York State Board of Elections, Op. 95-3 at 14 (1995), *available at* <http://www.elections.state.ny.us/NYSBOE/download/law/advisory.pdf>.

<sup>123</sup> N.Y. ELEC. LAW § 14-130 (McKinney 1998).

lawmakers use campaign funds to pay for non-campaign items. For example, Senator 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.<sup>124</sup> In another egregious case, 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.<sup>125</sup> 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.<sup>126</sup>

This extra incentive to fundraise may come at the expense of doing constituent work or meeting with voters who are not wealthy enough to make contributions. Thus, in New York State, there is an additional risk of corruption because campaign funds may not just go into campaign coffers, but rather, such dollars may end up in the pockets of individual candidates.<sup>127</sup>

Restricting personal use of campaign funds is perfectly constitutional. In fact, several federal criminal cases have been brought on the basis of mail fraud where the predicate crime was using campaign funds for personal use.<sup>128</sup>

### *C. Pay-to-Play Restrictions Don't Exist in New York State*

Given its weak campaign finance system, New York State needs pay-to-play protections to guard against the most self-interested contributors.<sup>129</sup> While nomenclature varies from state to state, 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-

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<sup>124</sup> Editorial, *Toward Cleaner Campaigns; Fattening Albany's Cats*, N.Y. TIMES, June 10, 2000, at A14 [hereinafter *Toward Cleaner Campaigns*], available at 2000 WLNR 3258729.

<sup>125</sup> ARBETMAN ET AL., \$2,100 CLUB, *supra* note 5, at 12.

<sup>126</sup> *Toward Cleaner Campaigns*, *supra* note 124; ARBETMAN ET AL., \$2,100 CLUB, *supra* note 5, at 13; STRENGTHENING ETHICS, *supra* note 106, at 10.

<sup>127</sup> ARBETMAN ET AL., \$2,100 CLUB, *supra* note 5, at 13.

<sup>128</sup> *United States v. Henningsen*, 387 F.3d 585, 588 (7th Cir. 2004); *United States v. Rostenkowski*, 59 F.3d 1291, 1295 (D.C. Cir. 1995); *United States v. Blandford*, 33 F.3d 685, 692 (6th Cir. 1994); *United States v. Pisani*, 773 F.2d 397, 409 (2d Cir. 1985).

<sup>129</sup> ABCNY, *A Level Playing Field*, *supra* note 6, at 686 (noting “the strong appearance of impropriety that arises when makers of large political contributions receive substantial business from political entities governed by the recipients of those contributions.”).

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.<sup>130</sup> Contributions from government contractors and highly regulated industries, which seek contracts, licenses and other beneficial treatment from the government, often raise the appearance of corruption. Similarly, contributions made by lobbyists, “who are paid to meet directly with public officials about legislation or administrative action affecting the lobbyists’ clients at the same time they are delivering checks to candidates, raise at least the appearance of corruption.”<sup>131</sup>

Although this is an unsettled area of the law, courts throughout the nation have recognized that political contributions by lobbyists, government contractors, or highly regulated industries pose severe risks of corruption and have upheld pay-to-play regulations.<sup>132</sup> In many states, pay-to-play

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<sup>130</sup> BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, WRITING REFORM: A GUIDE TO DRAFTING STATE & LOCAL CAMPAIGN FINANCE LAWS III-34 (Deborah Goldberg ed., 2004) [hereinafter WRITING REFORM], *available at* [http://www.brennancenter.org/dynamic/subpages/whole\\_manual\\_2004.pdf](http://www.brennancenter.org/dynamic/subpages/whole_manual_2004.pdf).

<sup>131</sup> *Id.*

<sup>132</sup> *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); 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); 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); Gwinn v. State Ethics Comm’n, 426 S.E.2d 890, 893 (Ga. 1993) (upholding ban on contributions by insurance companies to candidates for Commissioner of Insurance); 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); 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). *But see* Ark. Right to Life State Political Action Comm. v. Butler, 29 F. Supp. 2d 540, 553 (E.D. Ark. 1998) (invalidating ban on fundraising during any legislative session as well as thirty days before and after regular sessions); Shrink Mo. Gov’t PAC v. Maupin, 922 F. Supp. 1413, 1419 (E.D. Mo. 1996)

regulations come in the form of bans on contributions from or solicitations by lobbyists or state contractors.<sup>133</sup> In some states, these bans are only in effect during the legislative session.<sup>134</sup> In other states, pay-to-play bans are in place year round.<sup>135</sup> Another approach is to set low contribution limits for lobbyists and contractors.<sup>136</sup>

Pay-to-play limits have the added benefit of protecting lobbyists from undue pressure from politicians to donate large sums of money.<sup>137</sup> Beyond the crime of extortion, politicians, especially the more powerful ones in leadership or in committee chairpersonships, may exert subtle forms of pressure, “ranging from fund-raising events scheduled shortly before hearings to insinuations that lobbyists—whose business depends upon their ability to present their arguments to legislators—will gain privileged access if they give enough money.”<sup>138</sup> The result is larger and larger contributions. These types of situations appear corrupt, as politicians imply a quid pro quo of official actions for donations. Electoral competition is hindered as incumbents are able to elicit more donations and consequently improve their chances of re-election by exercising their official powers.<sup>139</sup> This harms the quality of representation, confidence in democracy, and political equality. A system where a few powerful legislators hold a disproportionate amount of power also leads to inefficiency.<sup>140</sup> Analogous to an economic oligopoly, a few sellers

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(*Maupin II*) (invalidating a session ban that lasted 4 ½ months, because cutting off funds for 1/3 of an election year prevented candidates from amassing the resources necessary for effective advocacy); *State v. Dodd*, 561 So. 2d 263, 264 (Fla. 1990) (invalidating a session ban that applied to both regular and special sessions, which may be called at any time, because it imposed a “potentially . . . limitless” period of time during which money could not be raised); *Fair Political Practices Comm’n v. Superior Ct.*, 25 Cal. 3d 33, 45 (1979) (invalidating broad lobbyist contribution ban).

<sup>133</sup> See, e.g., CONN. GEN. STAT. § 1-86e(a)(3) (2007) (regulating the activities of contractors hired by the state).

<sup>134</sup> *N.C. Right to Life*, 168 F.3d at 716.

<sup>135</sup> See, e.g., S.C. CODE ANN. § 2-17-110(A), (J) (2006) (implementing year-round restrictions on contributions and solicitation from lobbyists).

<sup>136</sup> See, e.g., N.Y.C., N.Y., LOCAL LAWS NO. 34, at 7 (2007), available at [http://www.nycouncil.info/pdf\\_files/bills/law07034.pdf](http://www.nycouncil.info/pdf_files/bills/law07034.pdf).

<sup>137</sup> MICHAEL J. MALBIN & THOMAS L. GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 167 (1998).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> As the Brennan Center has noted, this is the case in New York. See, e.g., LAWRENCE NORDEN, DAVID E. POZEN & BETHANY FOSTER, *BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW, UNFINISHED BUSINESS: NEW YORK STATE*

of political influence force many who seek to buy influence (for either altruistic or selfish reasons) to overpay.<sup>141</sup> Unfortunately, New York State has no pay-to-play restrictions.<sup>142</sup>

### 1. State Contractors

Under New York State law, contractors can give contributions to elected officials who have (or to candidates who, if elected, shortly will have) influence over state contracting decisions.<sup>143</sup> State contractors who are incorporated can use the corporate subsidiary loophole to magnify their political impact. Principals of state contractors can also give large contributions in their individual capacities in addition to any corporate giving. New York State should adopt laws to curb these potential sources of abuse.

For example, one of the major contributors in New York State is a Japanese company called Kawasaki Rail Car, Inc.<sup>144</sup> At first blush it may seem odd that a Japanese company is so interested in New York State politics. But a possible reason emerges when one learns the following facts:

Kawasaki Rail Car, Inc. is a Japanese company that 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. Kawasaki has given over \$400,000 in soft money to the State and Senate Republican committees.<sup>145</sup>

New York State should eliminate the potential for conflicts of interest that arise when a major source of funds for money in

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LEGISLATIVE REFORM 2006 UPDATE 28 (2006), *available at* [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_37893.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_37893.pdf) (noting that legislators used time and funds inefficiently for their own purposes).

<sup>141</sup> This behavior of lawmakers demanding contributions is more clearly documented at the federal level. *Beyond Incoherence*, *supra* note 59, at 32 (“[S]ome soft money was likely given by corporations to curry favor with elected officials who demanded the donations.”).

<sup>142</sup> NOVAK & SHAH, *supra* note 6, at 12.

<sup>143</sup> James A. Gardner, *The Uses and Abuses of Incumbency: People v. Ohrenstein and the Limits of Inherent Legislative Power*, 60 FORDHAM L. REV. 217, 225 (1991) (“Several influential legislators have been criticized for accepting large campaign contributions from individuals or entities who are subject to state regulation by committees on which these legislators sit.”).

<sup>144</sup> LIFE OF THE PARTY, *supra* note 93, at 12.

<sup>145</sup> *Id.*

state politics is also a company holding (or seeking) major state contracts.

## 2. New York State Lacks Pay-to-Play Laws for Lobbyists

Similarly, lobbyists in New York State can give to candidates or elected officials who handle issues that they advocate for or against.<sup>146</sup> Many of these lobbyists are paid to have an impact on legislative outcomes, and paid handsomely. The top ten lobbyists in New York State were paid over \$38 million in 2006 alone.<sup>147</sup> They have a strong personal incentive to cross the line when seeking to influence people with the power to legislate. Lobbyists can also “bundle” multiple contributions from their clients to increase their influence. Many reform groups have noted, “The common Albany practice of holding political fundraisers that are attended by professional lobbyists exacerbates the public perception that lobbyists are ‘buying’ access to elected officials.”<sup>148</sup>

As the Fourth Circuit explained:

With respect to actual corruption, lobbyists are paid to effectuate particular political outcomes. The pressure on them to perform mounts as legislation winds its way through the system. . . . While lobbyists do much to inform the legislative process, and their participation is in the main both constructive and honest, there remain powerful hydraulic pressures at play which can cause both legislators and lobbyists to cross the line. State governments need not await the onset of scandal before taking action. . . . Even if lobbyists have no intention of directly “purchasing” favorable treatment, appearances may be otherwise.<sup>149</sup>

For similar reasons, other courts have historically held that states and the federal government have an important and even compelling interest in regulating lobbyists.<sup>150</sup> Frequently,

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<sup>146</sup> STRENGTHENING ETHICS, *supra* note 106, at 4 (noting “Albany’s top lobbying firm, Wilson, Elser, spent \$253,525 on contributions to candidates in the 2004 election.”).

<sup>147</sup> See New York Temporary State Commission on Lobbying, 2006 Annual Report, Appendix A: Lobbyists Ranked by Total Compensation and Reimbursed Expenses for 2006 (2007), [http://www.nylobby.state.ny.us/ann\\_rept06/appendix\\_a.html](http://www.nylobby.state.ny.us/ann_rept06/appendix_a.html) (relating the total compensation and reimbursed expenses of the top ten lobbyists in New York State during 2006, which total more than \$38 million).

<sup>148</sup> STRENGTHENING ETHICS, *supra* note 106, at 4.

<sup>149</sup> N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 715-16 (4th Cir. 1999).

<sup>150</sup> See McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 356 (1995) (stating “the activities of lobbyists who have direct access to elected representatives, if

lobbyists are not making contributions because they agree ideologically with the recipient. Rather, they give to ensure continued access to their primary audience: lawmakers.<sup>151</sup> This is evidenced by the fact that lobbyists have been known to give to both political parties.<sup>152</sup>

Permitting political giving by lobbyists, especially during the legislative session, is an open invitation for political corruption.<sup>153</sup> This risk is particularly grave in light of the personal use issues highlighted above. In essence, the lax personal use laws along with the lack of pay-to-play laws, allow a client to pay a lobbyist, the lobbyist to pay the campaign committee and the campaign committee to pay the elected official, and the elected official to spend the funds on improving his own lifestyle. While catching a candidate in an actual quid pro quo arrangement with a lobbyist is rare, aggregate policy making arguably tilts towards the will of lobbyists who make large contributions in Albany.<sup>154</sup> At the very least, the *appearance* of corruption is particularly acute when lobbyists appear to be “buying” the influence of lawmakers through generous campaign contributions directly before key votes on legislation.<sup>155</sup> It is this appearance of corruption that

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undisclosed, may well present the appearance of corruption.”); *United States v. Harriss*, 347 U.S. 612, 626 (1954) (holding that the federal lobbying act “is designed to safeguard a vital national interest.”); *Md. Right to Life State Political Action Comm. v. Weathersbee*, 975 F. Supp. 791, 797 (D. Md. 1997) (“The Supreme Court has acknowledged that governments have a legitimate interest in regulating lobbyists.”).

<sup>151</sup> New York Temporary State Commission on Lobbying, 2006 Annual Report (2007), *available at* [http://www.nylobby.state.ny.us/ann\\_rept06/annrept.html](http://www.nylobby.state.ny.us/ann_rept06/annrept.html) (“Groups attempting to influence [New York State] government continue to spend ever-increasing amounts of money to get their point of view across to state and local decision-makers. According to semi-annual reports filed with the Commission for the 2006 calendar year, \$151 million was spent on lobbying.”).

<sup>152</sup> In the 2006 election cycle, lobbyist firms Wilson Elser Moskowitz Edelman & Dicker LLP gave \$29,308 to Democratic committees and \$56,100 to Republican committees; Patricia Lynch Associates gave \$46,800 to Democratic committees and \$51,000 to Republican committees; Greenberg Traurig gave \$17,500 to Democratic committees and \$17,500 to Republican committees; and Featherstonhaugh, Conway, Wiley & Clyne gave \$23,000 to Democratic committees and \$12,850 to Republican committees. National Institute on Money in State Politics, [www.followthemoney.org](http://www.followthemoney.org) (enter the name of the desired lobbyist firms in the “contributor” field) (last visited Dec. 27, 2007).

<sup>153</sup> STRENGTHENING ETHICS, *supra* note 106, at 4 (“In a typical session, lawmakers are scheduled to be in Albany for 60 days, including 40 nights. During that time, as many as 200 Albany-based fundraisers can occur.”).

<sup>154</sup> MIDTERM REPORT CARD, *supra* note 103, at 7.

<sup>155</sup> See STRENGTHENING ETHICS, *supra* note 106, at 7 (describing the influence

makes the public lose faith in their elected leaders.

#### *D. Disclosure*

In order for the public to know who is funding elections, treasurers of candidates' campaigns, PACs and political parties need to disclose contributions and expenditures to the State.<sup>156</sup> These disclosures should be easily accessible to the public in searchable electronic forms.<sup>157</sup> Without strong disclosure requirements, voters lack important information that allows them to evaluate candidates.

While New York State recently adopted an electronic filing system, the State's disclosure system has significant flaws. First, New York State fails to require key disclosures. For example, "New York [State] does not require reporting of the occupations and employers of large contributors, candidates' accrued expenses, or expenditures that are owed but not paid at the time a service is provided (such as money owed to political consultants or other vendors for goods or services)."<sup>158</sup> Second, New York fails to require disclosure of independent expenditures for political advertising other than ads that expressly advocate the election or defeat of a candidate. This permits "sham issue ads" to be aired in New York State without disclosure about who paid for them.<sup>159</sup> Thus, New York leaves the public in the dark about the financing of major independent advertising campaigns that influence elections.<sup>160</sup>

Poor disclosure feeds into poor enforcement. If regulators do not know how much campaigns are taking in and from whom, they cannot enforce key components of campaign finance laws such as contribution limits.

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of lobbyists on a 1995 tax cut for certain businesses while the state's budget had a \$5 billion shortfall).

<sup>156</sup> See Federal Election Commission, Campaign Finance Report, <http://www.fec.gov/disclosure.shtml> (last visited Dec. 27, 2007).

<sup>157</sup> *Id.*

<sup>158</sup> NOVAK & SHAH, *supra* note 6, at 8.

<sup>159</sup> See The League of Women Voters of New Jersey, Questions and Answers on Sham Issue Ads, <http://www.lwvnj.org/action/cfr/sham.shtml> (last visited Dec. 27, 2007) (defining sham issue ads as advertisements intended to influence a candidate's election by avoiding the use of "magic words" of express advocacy (such as "vote for" or "vote against"); thereby avoiding contribution restrictions and disclosure requirements that are triggered by express advocacy for or against a candidate for office).

<sup>160</sup> NOVAK & SHAH, *supra* note 6, at 9.

*E. New York State's Lax Enforcement*

Enforcement is a key ingredient to ensure that other reforms are meaningful.<sup>161</sup> Without meaningful enforcement there is nothing to deter candidates and other political actors from violating the contribution limits or failing to properly disclose campaign spending. In the high stakes world of politics, every effort should be made by regulators to ensure that all candidates are abiding by the same rules.

However, penalties for violations of campaign finance laws in New York State are either nonexistent or extremely weak. For example, those who illegally exceed the contribution limits in New York State are not subject to any fines.<sup>162</sup> The maximum civil fine for violating campaign finance disclosure laws is only \$500.<sup>163</sup> Higher fines are needed to act as more effective deterrents.<sup>164</sup>

In addition to properly structured penalties in the law, enforcement agencies need the funding and staff to properly enforce the law.<sup>165</sup> A poorly funded enforcement agency only has the staffing resources to enforce the law selectively. The weaker the enforcement, the more likely candidates are to try to push the envelope and break the rules. New York State's Board of Elections is not properly funded to get the job done, and enforcement of campaign finance laws in New York State is therefore sporadic at best.<sup>166</sup>

Where enforcement agencies are particularly weak, as in New York State, citizens should have the ability to seek enforcement from the courts through a private right of action. Regrettably, New York State has the worst of both worlds: weak official

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<sup>161</sup> ABCNY, *A Level Playing Field*, *supra* note 6, at 685 (“[T]he primary means of reducing corruption or any perception of corruption is through full enforcement of existing laws against corruption.”).

<sup>162</sup> NOVAK & SHAH, *supra* note 6, at 17.

<sup>163</sup> *Id.*; N.Y. ELEC. LAW § 14-126(1) (McKinney 1998).

<sup>164</sup> See N.Y.C., N.Y., ADMIN. CODE § 3-711 (2006) (setting the fine for violating campaign finance disclosure laws in New York City at \$10,000); New York City Campaign Finance Board, Final Audits: 2005 Citywide Elections, [hereinafter Final Audits], [http://www.nyccfb.info/public\\_disclosure/audt\\_05.htm](http://www.nyccfb.info/public_disclosure/audt_05.htm) (last visited Dec. 27, 2007) (including links to final audit reports describing assessed penalties).

<sup>165</sup> See LIFE OF THE PARTY, *supra* note 93, at 23 (urging the creation of an entirely new enforcement agency in New York State).

<sup>166</sup> NOVAK & SHAH, *supra* note 6, at 17 (“[L]enient civil penalties and a criminal standard that is rarely met combine to provide no real incentive to comply with New York’s campaign finance regulations.”).

enforcement and no private right of action for citizens.<sup>167</sup> Even if no other reform is implemented, New York should increase its enforcement of the campaign finance laws already on the books.

#### *F. New York State Lacks Public Financing*

New York State provides no public financing for candidates<sup>168</sup> (unlike Arizona, Connecticut, Florida, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, North Carolina, Vermont, and Wisconsin).<sup>169</sup> Public financing systems are typically structured in 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.<sup>170</sup> 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 a campaign.<sup>171</sup> In a full public financing system, once the candidate has qualified for the public grant, the candidate may no longer raise private funds.<sup>172</sup>

##### 1. Public Matching Funds Systems

New York State could model a future public financing system on New York City’s matching fund system. As discussed in more detail in Part II.F., New York City’s public financing system allows participating candidates to receive public funding to

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<sup>167</sup> NOVAK & SHAH, *supra* note 6, at 16.

<sup>168</sup> *Id.*

<sup>169</sup> See STEVEN M. LEVIN & SMITH LONG, MAPPING PUBLIC FINANCING IN AMERICAN ELECTIONS (2007), available at [http://cgs.org/publications/docs/pfae\\_map\\_final\\_v2.pdf](http://cgs.org/publications/docs/pfae_map_final_v2.pdf) (illustrating that Arizona, Connecticut and Maine have full public financing system for statewide and legislative candidates. New Jersey has full public financing for a limited legislative pilot program. New Mexico and North Carolina have full public financing for appellate judicial candidates. New Mexico has full public financing for candidates for its Public Regulation Commission. North Carolina has full public financing for certain Council of State races, state auditor, insurance commissioner and superintendent of public instruction. Florida, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Vermont, and Wisconsin have partial public financing systems).

<sup>170</sup> Common Cause, What is Public Financing?, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=1415173> (last visited Sept. 9, 2007).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

match small private contributions and portions of larger (but still reduced by comparison to New York State) private contributions.<sup>173</sup> Participating candidates also must take part in debates (to which nonparticipating candidates can be invited) and all candidates are featured in a voter guide to educate the public about the candidates.<sup>174</sup> During the nearly two decades that the New York City system has been in place, it has helped level the playing field among new and veteran candidates and expanded the range of candidates who choose to run for office in the City.<sup>175</sup> Some argue that a matching funds system is best because it costs taxpayers less than a full public financing system.<sup>176</sup> Others are supportive of partial matching funds systems because they focus the candidates' attention on small donors.<sup>177</sup>

## 2. Full Public Financing Systems

New York City's matching funds system is not the only model

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<sup>173</sup> New York City Campaign Finance Board, Contribution Limits, Spending Limits, and Public Funds Requirements: 2009 Citywide Elections [hereinafter Contribution Limits, Spending Limits, and Public Funds Requirements], [http://www.nycfb.info/program\\_law/program\\_info/program\\_2009\\_info.htm](http://www.nycfb.info/program_law/program_info/program_2009_info.htm) (last visited Sept. 16, 2007) (reporting that individuals may give \$2,750 to candidates for city council and \$4,950 to candidates for mayor; however, only the first \$250 of such a contribution is matchable with public funds).

<sup>174</sup> New York City Campaign Finance Board, The Debate Program, [http://www.nycfb.info/debates\\_vg/debates/index.htm](http://www.nycfb.info/debates_vg/debates/index.htm) (last visited Sept. 16, 2007); New York City Campaign Finance Board, About the Voter Guide, [http://www.nycfb.info/debates\\_vg/voter\\_guides/index/htm](http://www.nycfb.info/debates_vg/voter_guides/index/htm) (last visited Sept. 16, 2007).

<sup>175</sup> RYAN, *supra* note 6, at ix ("New York City's campaign finance program, combined with the city's term limits law, encouraged a record number of candidates to run for office in 2001, noticeably increasing the racial and gender diversity of New York City's elected leaders."); Gene Russianoff, *Money and Government: Ethics Reform Since 1986: A View from the Sidelines*, 13 CITY L. 1, 2 (2007) ("The [NYC] law greatly broadened the base of contributors, helped people of modest means run for office, greatly increased disclosure, and helped diversify the City Council.").

<sup>176</sup> STEVEN M. LEVIN, CTR. FOR GOVERNMENTAL STUDIES, KEEPING IT CLEAN: PUBLIC FINANCING IN AMERICAN ELECTIONS 30 (2006) [hereinafter KEEPING IT CLEAN], available at [http://www.cgs.org/publications/docs/Keeping\\_It\\_Clean.pdf](http://www.cgs.org/publications/docs/Keeping_It_Clean.pdf).

<sup>177</sup> ELIZABETH DANIEL, BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW, SUBSIDIZING POLITICAL CAMPAIGNS: THE VARIETIES & VALUES OF PUBLIC FINANCING 14 (2000), <http://www.brennancenter.org/dynamic/subpages/cfr6.pdf> (suggesting that "[b]ecause matching funds encourage candidates to reach out to smaller donors and may, in turn, encourage people of modest means to contribute, matching funds programs may assist in revitalization of the democratic process.").

available.<sup>178</sup> New York State could adopt a full public financing system modeled after the laws in Arizona, Connecticut and Maine.<sup>179</sup> Under a full public financing system, candidates would receive a lump sum grant from the State to run their primary and general election campaigns. A full public funding system severs the connection between candidates hungry for cash and donors hungry for influence.<sup>180</sup> See discussion of full public financing, Part III.B. *infra*.

Both public funding systems—matching or full—are good options that would open up the political system in New York State by giving candidates incentives to focus on small donors and by assisting candidates who do not have links to wealthy donors. Both types of public financing systems would be far superior to the current system, which is skewed to benefit the wealthiest political donors and candidates with connections to this jet set.

## II. CAMPAIGN FINANCE SOLUTIONS FROM NEW YORK CITY

New York City provides a useful point of comparison to New York State because New York City's campaign finance system is battle-tested, well structured and large-scale.<sup>181</sup> The system has been in place for nineteen years.<sup>182</sup> Over that time, the system has been modified in response to feedback the Campaign Finance Board (CFB) has given the New York City Council on the system's day-to-day operations.<sup>183</sup> This is not a small scale

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<sup>178</sup> See Benjamin, *supra* note 4, at 1067 (“A great range of other campaign finance reforms are available and have been tried in various combinations to reduce the need for funds.”).

<sup>179</sup> See *id.* (“Reforms that combine full public funding with the acceptance of spending limits have been adopted in Arizona, Maine, Massachusetts, and Vermont.”).

<sup>180</sup> See *id.* (“The need to raise campaign money would be removed both as a measure of credibility and as a barrier to entry for potential candidates.”); see also NOVAK & SHAH, *supra* note 6, at 6 (noting that participating candidates do have to raise qualifying contributions, which are small private contributions, but they are spared the classic ordeal of dialing for dollars throughout the election).

<sup>181</sup> RYAN, *supra* note 6, at ix (“New York City’s public campaign financing law, enacted by 1988 by a combined city council-approved local law and a voter-approved charter amendment, serves as a model for the United States.”).

<sup>182</sup> *Id.*

<sup>183</sup> *From the Ground Up: Local Lessons for National Reform*, 27 FORDHAM URB. L.J. 5, 6 (1999) (“The [New York City] Program has benefited from continual refinement by the legislature, guided by the Board’s mandated post-election reports that evaluate the effects of the Program and make

experiment. The system is in place in the largest metropolitan area in the country.<sup>184</sup> Furthermore, New York City's population of eight million people makes up over 40% of New York State's population of nineteen million.<sup>185</sup> Therefore, a huge portion of New York State's population is already acclimated to the system. Moreover, New York City has recently had two two-term Republican Mayors with Democratic City Councils.<sup>186</sup> This mirrors the partisan split in Albany where the Governor is from a different party than the majority in one of the legislative chambers.<sup>187</sup> New York City demonstrates that campaign finance reform can work even when those in power are from different political parties. Finally, many of the architects of the New York City system are still available to counsel lawmakers from Albany who want to change the State's system.

Before proceeding to the comparison with New York City's campaign finance system, we should define a few key terms. The entire campaign finance system (both public and private) is administered by the New York City CFB.<sup>188</sup> Those candidates who seek to participate in the public financing system are called

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recommendations for reform.”).

<sup>184</sup> See U.S. Census Bureau, July 1, 2005 Population Estimates For Metropolitan, Micropolitan, and Combined Statistical Areas, [http://www.census.gov/population/www/estimates/Estimates%20pages\\_final.html](http://www.census.gov/population/www/estimates/Estimates%20pages_final.html) (table 4) (last visited Nov. 30, 2007).

<sup>185</sup> See U.S. Census Bureau, State and County QuickFacts, <http://quickfacts.census.gov/qfd/states/36/3651000.html> (last visited Sept. 18, 2007) (finding that over eight million people of New York State's nineteen million residents live in New York City).

<sup>186</sup> See City of New York, A Biography of Mayor Rudolph W. Giuliani, <http://www.nyc.gov/html/records/rwg/html/bio.html> (last visited Sept. 21, 2007) (noting that Giuliani was elected twice as a candidate of the Republican party); City of New York, Biography of Michael R. Bloomberg, <http://www.nyc.gov/cgi-bin/misc/pfprinter.cgi?action=print&sitename=OM> (last visited Sept. 21, 2007) (noting that Bloomberg was reelected for a second term as mayor); MSNBC.com, Bloomberg leaves Republican Party, <http://www.msnbc.msn.com/id/19317522> (last visited Sept. 21, 2007) (noting that Bloomberg was a Republican candidate but decided to become an independent shortly after reelection).

<sup>187</sup> See generally Rick Karlin, *Day 1 + 99*, TIMES UNION, Apr. 10, 2007, available at <http://timesunion.com/AspStories/storyprint.asp?StoryID=579388> (discussing the conflicts between Democratic New York Governor and Republican Dominated Senate).

<sup>188</sup> See New York City Campaign Finance Board, About the Campaign Finance Board, <http://www.nycffb.info/about/index.htm> (last visited Sept. 22, 2007) (listing “administering the Campaign Finance Program” as the first of its primary mandates).

“participating candidates” or “participants.”<sup>189</sup> Those candidates who are entirely privately funded are “nonparticipating candidates” or “nonparticipants.”<sup>190</sup> There is also a category of “limited participants” who do not receive public funding, but agree to abide by most of the rules applicable to participants (including expenditure limits), and are not subject to the limits on how much candidates can normally contribute to their own campaigns that apply to full participants.<sup>191</sup>

In New York City, some regulations apply only to participating candidates, rather than to all candidates.<sup>192</sup> Throughout this article we will clarify which provisions apply to which class of candidate. Unlike the public financing systems in Arizona, Connecticut and Maine, which provide full public financing to candidates in the form of a lump sum, in New York City, participating candidates receive partial public funds that match private funds raised throughout the course of the campaign.<sup>193</sup> Therefore, New York City has very specific rules about which types of private campaign contributions may be matched with public funds. Such contributions are called “matchable.”<sup>194</sup> This term should not be confused with matching funds in full public financing systems, which are additional lump sum grants given to publicly funded candidates to “match” high private spending by nonparticipating opponents.

The City recently revised the campaign finance system in July 2007, increasing the size of the public funding match and

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<sup>189</sup> See generally New York City Campaign Finance Board, Campaign Finance Law: New York City Campaign Finance Rules: Candidate Requirements, [http://www.nyccfb.info/program\\_law/cflaw/rules/chapter2.htm#01](http://www.nyccfb.info/program_law/cflaw/rules/chapter2.htm#01) (last visited Sept. 22, 2007) (referring to candidates participating in the program as “participants”).

<sup>190</sup> *Id.* (referring to candidates not participating in the program as “non-participants”).

<sup>191</sup> N.Y.C., N.Y., ADMIN. CODE § 3-718 (2006) (defining “limited participation”).

<sup>192</sup> *From the Ground Up: Local Lessons for National Reform*, *supra* note 183, at 6 (“Candidates who join the voluntary Program agree to limit their contributions and spending.”).

<sup>193</sup> See Benjamin, *supra* note 4, at 1067 (stating that Arizona, Maine, Massachusetts, and Vermont have adopted “[r]eforms that combine full public funding with the acceptance of spending limits”, whereas “[c]urrent practice in New York City. . . combines limited, focused private fundraising with public support to finance legislative campaigns.”).

<sup>194</sup> *Id.* at 1068 (“When a candidate reaches a specified threshold of contributions and contributors, the city provides four dollars of public matching funds for each dollar of private contributions of up to \$1,000 per contributor.”).

implemented pay-to-play restrictions, among other reforms.<sup>195</sup> Because these changes are so new, a few items mentioned in text below have not yet been fully implemented in New York City.

A. *City Contribution Limits Are More Functional than State Contribution Limits*

1. Individual Contribution Limits in New York City Are More Reasonable than the New York State Limits

For the 2009 City elections, as in the past, New York City will place limits on contributions to campaigns for City offices that are far lower than New York State's. For example, whereas the State's formula setting limits for citywide races results in an individual contribution limit of \$37,800, the City's individual contribution limit for citywide races is \$4,950.<sup>196</sup> State contribution limits also continue to apply and can be separately enforced by the New York State Board of Elections.<sup>197</sup> Where the State limit is lower, the State limit applies.<sup>198</sup>

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<sup>195</sup> See N.Y.C., N.Y., Int. No. 586-A (signed July 3, 2007) (to be codified at N.Y.C., N.Y., ADMIN. CODE § 3-801), available at <http://webdocs.nycouncil.info/textfiles/Int%200586-2007.htm?CFID=940206&CFTOKEN=37670355>.

<sup>196</sup> See Tables 1.A and 1.B *infra* for other contribution limits. Individuals, PACs and unions have the same contribution limits in New York State. Corporations have a \$5,000 aggregate limit to give to all candidates and committees. This structure is mirrored in New York City. Individuals, PACs and unions have the same contribution limits in New York City. Corporations are barred from giving in New York City. Although the City contribution limits initially applied only to participants due to preemption concerns about New York City's ability to enforce mandatory regulations on non-participants, the City Council extended them in 2004 to apply to nonparticipating candidates as well. See also 1995 N.Y. Op. Atty. Gen. (Inf.) 1105 Informal Opinion No. 95-46, 1 (N.Y. AG 1995) (concluding that mandatory municipal pay-to-play ordinances would be preempted). Richard Briffault, an expert on campaign finance and home rule law, suggests that imposing limits on non-participants "opens [the limits] to legal attack." Richard Briffault, *Home Rule and Local Political Innovation*, 22 J. L. & POL. 1, 17 (2006). But in the past three years since this change in the law, there has not been any challenge or court decision in New York on the municipal contribution limits.

<sup>197</sup> NEW YORK CITY CAMPAIGN FINANCE BOARD, NEW YORK CITY CAMPAIGN FINANCE HANDBOOK (2005) [hereinafter CAMPAIGN FINANCE HANDBOOK], available at [http://www.nycffb.info/handbook2005\\_np/chapter02/2-01.aspx?sm=two\\_01](http://www.nycffb.info/handbook2005_np/chapter02/2-01.aspx?sm=two_01).

<sup>198</sup> *Id.*

	<b>Table 1.A</b>	<b>Table 1.B</b>
<b>Office</b>	<b>State Contribution Limits (non-family members)<sup>199</sup></b>	<b>City Contribution Limits<sup>200</sup></b>
Citywide Election	\$37,800	\$4,950
Borough President	5 cents per registered voter in borough	\$3,850
City Council	5 cents per registered voter in district	\$2,750

<b>Table 1.C<sup>201</sup></b>		
<b>Other State Individual Contribution Limits</b>		
<b>Office</b>	<b>Primary</b>	<b>General</b>
Governor	\$18,100	\$37,800
New York State Senate	\$6,000	\$9,500
New York State Assembly	\$3,800	\$3,800

## 2. Corporate and Union Limits in New York City

Candidates in New York City may not accept contributions from corporations,<sup>202</sup> LLCs, or limited liability partnerships (LLPs).<sup>203</sup> Therefore, unlike under State law, corporate subsidiaries and LLCs cannot be used to undermine City limits because no incorporated organizations may donate to any

<sup>199</sup> See N.Y. ELEC. LAW § 14-114(1)(b) (McKinney 1998); 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 6214.0 (2007) (listing the statewide general limit as \$37,800.00); see also New York State Board of Elections, *supra* note 13 (listing general statewide non-family limit as “any amount up to \$37,800”).

<sup>200</sup> N.Y.C., N.Y., ADMIN. CODE § 3-703(7) (2006); Contribution Limits, Spending Limits, and Public Funds, *supra* note 173.

<sup>201</sup> 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 6214.0.

<sup>202</sup> N.Y.C., N.Y., RULES, tit. 52, § 1-04 (2006).

<sup>203</sup> N.Y.C., N.Y., Int. No. 586-A § 33(d) (signed July 3, 2007) (to be codified at N.Y.C., N.Y., ADMIN. CODE § 3-801(d)), available at <http://webdocs.nycouncil.info/textfiles/Int%200586-2007.htm?CFID=940206&CFTOKEN=37670355>.

candidate running in City races.<sup>204</sup> By contrast, candidates may accept contributions up to the same contribution limits as apply to individuals from “unincorporated organizations such as community groups, employee organizations/unions, and associations.”<sup>205</sup> Unions can give \$4,950 to candidates for Mayor, \$3,850 to candidates for Borough President and \$2,750 to candidates for City Council.<sup>206</sup> These limits are more reasonable than the high union limits available at the State level.

### 3. Party and Other Political Committee Limits in New York City

Candidates in New York City may also accept contributions (subject to the same limits as individuals) from party committees or PACs.<sup>207</sup> Participants in the matching funds system may accept contributions only from PACs that have registered with the CFB and either do not accept contributions from corporations or “undertake[] not to use corporate funds for contributions to participants.”<sup>208</sup>

State law allows party and constituted committees to form Housekeeping Accounts for the maintenance of a permanent party headquarters and staff and to carry on ordinary activities which are not for the express purpose of promoting the candidacy of specific candidates.<sup>209</sup> As discussed above, this allows party Housekeeping Accounts to act as a large loophole in New York State campaign finance law.<sup>210</sup> By contrast, New York City does not require the formation of separate party accounts, but instead distinguishes between various uses of party funds.<sup>211</sup> The CFB rules state that specific types of “expenditures made by party committees or constituted committees are not considered in-kind

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<sup>204</sup> N.Y.C., N.Y., RULES, tit. 52, § 1-04(e). Even before corporations were barred from giving contributions, the combined contributions of the corporation and its subsidiaries could not exceed the individual contribution limits. *Id.* (Historical Note 9).

<sup>205</sup> CAMPAIGN FINANCE HANDBOOK, *supra* note 197.

<sup>206</sup> Contribution Limits, Spending Limits, and Public Funds Requirements, *supra* note 173.

<sup>207</sup> N.Y.C., N.Y., ADMIN. CODE § 3-703(1)(k) (2006); N.Y.C., N.Y., RULES, tit. 52, § 1-04(d).

<sup>208</sup> N.Y.C., N.Y., ADMIN. CODE § 3-703(1)(k); N.Y.C., N.Y., RULES, tit. 52, § 1-04(d).

<sup>209</sup> LIFE OF THE PARTY, *supra* note 93, at 1.

<sup>210</sup> *See supra* pp. 212-15, notes 90-113.

<sup>211</sup> N.Y.C., N.Y., RULES, tit. 52, § 1-08(f)(4).

contributions to a candidate unless it is demonstrated that the candidate in some way cooperated in the expenditure and that the expenditure was intended to benefit that candidate.”<sup>212</sup> Included in that category are general party-building materials<sup>213</sup> and activities that do not refer to particular candidates,<sup>214</sup> such as poll watching, registering and turning out voters, and party fundraising.<sup>215</sup> Other expenditures may be presumed to be in-kind contributions unless the candidate demonstrates otherwise. These include, for example, messages about a clearly identified candidate, advertising expenditures for candidates, and loans to candidates.<sup>216</sup> Thus, there is not a similar “Housekeeping Account” loophole in New York City. Due to attentive oversight by the CFB, there is less likelihood of donors abusing party committees as impermissible conduits of campaign funds.

### *B. No Personal Use of City Campaign Funds*

Participants may not use campaign funds for “any purpose other than the furtherance of the participant’s nomination or election,”<sup>217</sup> including any cash payments,<sup>218</sup> payments to the participant or close relatives of the participant,<sup>219</sup> contributions to other candidates or committees,<sup>220</sup> or gifts of any kind.<sup>221</sup> In July 2007, the City clarified its ban on all candidates’ converting campaign funds to personal use unrelated to a political campaign, including, for example, normal living expenses, household items, clothing, automobile purchases, tuition, club dues, non-campaign related travel, food, drink, or entertainment, and most gifts.<sup>222</sup>

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.* § 1-08(f)(4)(A).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* § 1-08(f)(4)(D).

<sup>216</sup> *Id.* § 1-08(f)(4)(ii)(C).

<sup>217</sup> N.Y.C., N.Y., RULES, tit. 52, § 1-08(g)(2)(i).

<sup>218</sup> *Id.* § 1-08(g)(2)(vii).

<sup>219</sup> *Id.* § 1-08(g)(2)(iv).

<sup>220</sup> *Id.* § 1-08(g)(2)(viii).

<sup>221</sup> *Id.* § 1-08(g)(2)(ix).

<sup>222</sup> N.Y.C., N.Y., Int. No. 586-A § 7(19)(b) (signed July 3, 2007) (to be codified at N.Y.C., N.Y., ADMIN. CODE § 3-702(19)), available at <http://webdocs.nycouncil.info/textfiles/Int%200586-2007.htm?CFID=940206&CFTOKEN=37670355>.

*C. Pay-to-Play Restriction in New York City*

As alluded to above, “pay-to-play” regulations seek to prevent deals whereby contributors such as contractors, lobbyists or members of regulated industries “pay” officials for the opportunity to “play” with the government or in a government-regulated arena.<sup>223</sup> New York City has chosen two novel ways to limit the undue influence of funds donated by lobbyists and contractors: (1) these donors are subject to lower contribution limits than other individuals and (2) public funds are not available to match their contributions.<sup>224</sup>

As of July 2007, those doing business with the City, including lobbyists, are subject to contribution limits roughly 90% lower than those applicable to other individuals.<sup>225</sup> The New York City pay-to-play contribution limits are: \$400 for Citywide offices, \$320 for Borough President, and \$250 for City Council.<sup>226</sup> These lower contribution limits permit lobbyists and contractors to express their associational rights with candidates of their choice, but the lower limits ensure that the potentially corrupting impact of lobbyists’ and contractors’ contributions is greatly diminished.

In New York City, contributions made by those “doing business” with the City,<sup>227</sup> lobbyists<sup>228</sup> or affiliated parties are not “matchable contributions”<sup>229</sup> under the public financing system and therefore such contributions do not result in additional public matching funds for participating candidates. This provision ensures that public dollars are not used to magnify the voices of special interests.<sup>230</sup> These two pay-to-play provisions

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<sup>223</sup> *Id.* § 1(18)(a) (to be codified at N.Y.C., N.Y., ADMIN. CODE § 3-702(3)(h)), § 2(1-a) (to be codified at N.Y.C., N.Y., ADMIN. CODE § 3-703(1-a)) (expanding the definition of business dealings with the city and limiting the total contribution amounts that may be allowed by the regulation).

<sup>224</sup> *Id.* § 2 (to be codified at N.Y.C., N.Y., ADMIN. CODE § 3-703(1-a)).

<sup>225</sup> *Id.* § 1(3)(g) (to be codified at N.Y.C., N.Y., ADMIN. CODE § 3-702(3)(g)), § 2 (to be codified at N.Y.C., N.Y., ADMIN. CODE § 3-703(1-a)).

<sup>226</sup> *Id.* § 2(1-a) (to be codified at N.Y.C., N.Y., ADMIN. CODE § 3-703(1-a)).

<sup>227</sup> *Id.* § 1(18)(a) (to be codified at N.Y.C., N.Y., ADMIN. CODE § 3-702(3)(h)).

<sup>228</sup> N.Y.C., N.Y., ADMIN. CODE § 3-211(a), (c) (2006) (defining “lobbyist” to mean every person or organization retained, employed or designated by any client to engage in lobbying and defining “lobbying” as attempting to influence as set forth in the statute).

<sup>229</sup> N.Y.C., N.Y., ADMIN. CODE § 3-702(3) (defining matchable contribution).

<sup>230</sup> N.Y.C., N.Y., Int. No. 586-A § 2(1-a) (to be codified at N.Y.C., N.Y., ADMIN. CODE § 3-703(1-a)) (limiting the aggregate contributions of those having business dealings with the city), *available at* <http://webdocs.nycouncil.info/>

together give candidates incentives to seek contributions from political donors who do not have financial stakes in the outcome of City contracts or legislation.

*D. New York City Has Robust Disclosure Requirements*

All candidates, regardless of whether they participate in New York City's public funding system, "must file accurate and timely disclosure statements, which are made public by the CFB in a number of ways, including through the use of a searchable database."<sup>231</sup> Through examining these filings, the press, public interest organizations and other members of the public can easily learn "details about every contribution received by a campaign, including the name, occupation and employer of the contributor, the amount of the contribution, whether or not the contribution was collected by an intermediary, and how the campaign spent its contributions" as well as information about campaign expenditures.<sup>232</sup> All candidates must make regular filings throughout the campaign, and must file daily reports of large contributions, loans, or expenditures that occur in the final two weeks of the election.<sup>233</sup> These disclosure requirements, combined with a system for making filings easier and more accessible for any interested party, allow for public oversight to complement the Board's own enforcement efforts. A Center for Governmental Studies report on New York City's system cited the CFB's electronic disclosure system as "a resounding success" that "revolutionized the dissemination of campaign finance information" and requires a "level of disclosure detail . . . far greater than that required by the state of New York."<sup>234</sup>

*E. New York City Has Effective Enforcement of Campaign Finance Laws*

Campaign finance scholar Richard Briffault observed that "[t]he New York City Campaign Finance Board . . . has demonstrated that effective enforcement is possible . . . if regulators are given the necessary funds and the legal authority

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textfiles/Int%200586-2007.htm?CFID=940206& CFTOKEN=37670355.

<sup>231</sup> New York Public Finance Board, Public Disclosure, [http://www.nyccfb.info/public\\_disclosure/index.htm](http://www.nyccfb.info/public_disclosure/index.htm) (last visited Sept. 20, 2007).

<sup>232</sup> *Id.*

<sup>233</sup> N.Y.C., N.Y., RULES, tit. 52, § 3-02 (2006).

<sup>234</sup> RYAN, *supra* note 6, at 27.

to do the job, and if the agency itself is structured to be independent and nonpartisan, rather than bipartisan.”<sup>235</sup> The CFB is professionally run and the staff has the courage to enforce the campaign finance laws and levy meaningful fines and penalties against the very politicians who control their purse strings.<sup>236</sup>

### 1. Independent, Nonpartisan Enforcement Agency with Professional Staff

The CFB has been frequently complimented as a “formidable enforcement body,” with a “nonpartisan culture and evenhandedness in the heat of campaigns.”<sup>237</sup> It has been starkly contrasted with the “toothless Federal Election Commission” (FEC).<sup>238</sup> Georgetown Professor Roy A. Schotland hypothesized that the City board is likely to have “members of such local repute that they bring an independence not easily provided by law,”<sup>239</sup> and Gene Russianoff noted that “the City’s Campaign Finance Board angered all four incumbent mayors in office since 1988” and has “earned a reputation for strong enforcement, even against City Council candidates.”<sup>240</sup>

The CFB’s non-partisan culture,<sup>241</sup> professional staff-driven operation,<sup>242</sup> and “power to direct the Commissioner of Finance to replenish the public fund for candidates, should there be a short-

<sup>235</sup> Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 585 (1999).

<sup>236</sup> The Campaign Finance Board has two special budgetary powers. First, the mayor has to include the Board’s itemized estimates of the financial needs of the board in the executive budget without revision. N.Y.C. Charter § 1052(a)(13)(c) (2006); N.Y.C. Charter § 254(c). Second, the Board can order the comptroller to replenish the fund for financing participants’ campaigns to ensure sufficient funds. N.Y.C. Charter § 1052(a)(10).

<sup>237</sup> Editorial, *A Solid Choice for City Campaign Chief*, N.Y. TIMES, Mar. 6, 2003, at A1; see *From the Ground Up: Local Lessons for National Reform*, *supra* note 183, at 127 (“[A] nonpartisan agency as opposed to a bipartisan agency is the way to structure enforcement of campaign finance laws.”).

<sup>238</sup> *A Solid Choice for City Campaign Chief*, *supra* note 237, at A1.

<sup>239</sup> Roy A. Schotland, *And for the Student? The Seven Striking Strengths of “Ballots, Bucks, Maps & the Law”*, 32 LOY. L.A. L. REV. 1227, 1234 (1999).

<sup>240</sup> Russianoff, *supra* note 175, at 1.

<sup>241</sup> Ernest Gellhorn, Ben Bycel, Nicole Gordon & Lawrence Noble, *Symposium on Campaign Finance Enforcement: A Comparative View*, 11 J. L. & POL. 1, 5 (1995) [hereinafter *Comparative View*] (priding New York on having a “non-partisan . . . culture at the Campaign Finance Board”).

<sup>242</sup> *Id.* at 19.

fall” also contribute to its independence.<sup>243</sup> Unlike the FEC, the Board has a tie-breaking mechanism, which helps prevent stalemates over enforcement.<sup>244</sup> The method of appointment allows the Mayor, who in recent years has been a Republican, and the City Council Speaker, who for decades has been a Democrat, each to appoint two people of different parties to the Board, with the fifth person appointed by the Mayor in consultation with the Speaker.<sup>245</sup> This has resulted in a Board with relative partisan balance and may have contributed to the Board’s nonpartisan character.

## 2. Meaningful Penalties Act as Deterrents

New York City’s CFB has the power to audit and subpoena campaigns before or after the election and can withhold public funds from candidates the Board believes are not in compliance.<sup>246</sup> Although the Board technically cannot levy fines directly, it can make civil penalty assessments and go to court to enforce them.<sup>247</sup> The CFB assesses penalties as high as \$10,000 per violation—or even higher when participants exceed spending caps—and can require campaign committees and candidates themselves to repay public funds.<sup>248</sup>

Regular audits maintain the integrity of the campaign finance system. The former director of the CFB, Nicole A. Gordon, once noted that “candidates know up front that they will be audited at some point” and are therefore likely to comply with campaign finance regulations.<sup>249</sup> Audits ensure that public money is being spent properly and facilitates the return of taxpayer moneys if funds have been misused.<sup>250</sup>

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<sup>243</sup> *Id.* at 8.

<sup>244</sup> *See id.* at 17 (crediting the tie-breaking mechanism for keeping the Board “away from the partisan aspects” of the FEC). *Compare* BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* 62-63 (1990) (noting that the FEC could use a tie-breaking feature similar to the Board).

<sup>245</sup> N.Y.C., N.Y., ADMIN. CODE § 3-708(1) (2006).

<sup>246</sup> *Comparative View, supra* note 241, at 7.

<sup>247</sup> *Id.*

<sup>248</sup> N.Y.C., N.Y., ADMIN. CODE § 3-711(1); *In re Espada* 2001 v. N.Y.C. Campaign Fin. Bd., 15 Misc. 3d 647, 649 (N.Y. County Ct. 2007); *see also* Final Audits, *supra* note 164 (including links to the 2005 Citywide Elections final audit reports describing assessed penalties).

<sup>249</sup> *Comparative View, supra* note 241, at 6.

<sup>250</sup> *See id.* at 6-8 (describing the strict requirements placed on candidates to become eligible to receive public money. Upon receiving public funds, candidates are required to “provide a fairly significant amount of back-up

*F. New York City Provides Public Financing*

1. New York City's Matching Funds System Encourages Candidates to Voluntarily Accept Spending Limits

New York City offers a voluntary public financing system to candidates for municipal office.<sup>251</sup> To be eligible to receive matching funds from the New York City Campaign Finance Program, candidates must agree to accept caps on total campaign expenditures,<sup>252</sup> bans on contributions by unregistered PACs,<sup>253</sup> and limits on their ability to contribute to their own campaign.<sup>254</sup> New York City's generous public financing has encouraged 73% of candidates to participate.<sup>255</sup> Despite this generosity, the public financing system has been well-guarded by provisions that deny public funding to candidates who are not facing serious opposition<sup>256</sup> or are unable to demonstrate viability,<sup>257</sup> and by cutting the funding available to candidates running in primaries with small numbers of voters.<sup>258</sup>

2. Six-to-One Public Match Encourages Smaller Donors

Under the newly passed Intro 586-A, eligible participating candidates in the next City election will receive six dollars for each one dollar of matchable contributions, up to \$1,050 per contributor, in public funds to use on qualified campaign expenditures,<sup>259</sup> up to a maximum of 55% of the spending limit

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documentation with their filings.”).

<sup>251</sup> See Contribution Limits, Spending Limits, and Public Funds Requirements, *supra* note 173 (setting forth the maximum public funds candidates may receive in New York City).

<sup>252</sup> For 2009 campaigns, these limits will be: mayor, \$5,728,000; public advocate or comptroller, \$3,581,000; borough president, \$1,289,000; city council, \$150,000. *Id.*

<sup>253</sup> N.Y.C., N.Y., ADMIN. CODE § 3-703(1)(f) (2006).

<sup>254</sup> *Id.* § 3-703(1)(h) (limiting candidate's donations to their own campaign to three times the normal contribution limits).

<sup>255</sup> NEW YORK CITY CAMPAIGN FINANCE BOARD, PUBLIC DOLLARS FOR THE PUBLIC GOOD: A REPORT ON THE 2005 ELECTIONS 3 (2006) [hereinafter PUBLIC DOLLARS], available at [http://www.nyccfb.info/PDF/per/2005\\_PER/2005\\_Post\\_Election\\_Report.pdf](http://www.nyccfb.info/PDF/per/2005_PER/2005_Post_Election_Report.pdf).

<sup>256</sup> N.Y.C., N.Y., RULES, tit. 52, § 5-01(2) (2006).

<sup>257</sup> N.Y.C., N.Y., ADMIN. CODE § 3-703(2).

<sup>258</sup> *Id.* § 3-705(6); N.Y.C., N.Y., RULES, tit. 52, § 5-01(3)(i).

<sup>259</sup> N.Y.C., N.Y., Int. No. 586-A § 21 (signed July 3, 2007) (to be codified at N.Y.C., N.Y., ADMIN. CODE § 3-705(2)(a), available at

for their race, when facing other participating candidates or low-spending nonparticipants.<sup>260</sup> In passing Intro 586-A, New York City recently increased the matching funds from 4-to-1 to 6-to-1 to “incentivize . . . smaller contributions” without adding substantial additional cost.<sup>261</sup> As discussed in more detail *infra* Part II.F.3., when facing high-spending nonparticipants, participants receive more matching funds and expenditure limits are raised or eliminated.<sup>262</sup>

### 3. Trigger Provisions Help Participants Compete with High-Spending Opponents

In order to allow participants to compete on a more level playing field with nonparticipating opponents who threaten to outspend them, the New York City campaign finance system relaxes certain restrictions and provides participants with additional matching funds when they face serious opposition from non-participants.<sup>263</sup> When facing a nonparticipating opponent who spends more than half of the applicable expenditure limit, participants may spend up to 50% more than the original expenditure limit and receive an increased match of up to \$200 per contributor, up to a maximum of two-thirds of the original expenditure limit.<sup>264</sup> If a nonparticipating opponent spends more than three times the expenditure limit, participants are no longer subject to the expenditure limit and receive an increased match of up to \$450 more per contributor, up to 125% of the original expenditure limit.<sup>265</sup> Although these triggers do

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<http://webdocs.nycouncil.info/textfiles/Int%200586-2007.htm?CFID=940206&CFTOKEN=37670355>. Prior to July 2007, only \$4 of matching funds were available for each \$ 1 raised, resulting in up to \$1,000 in public funds. N.Y.C., N.Y., ADMIN. CODE § 3-705(2)(a).

<sup>260</sup> N.Y.C., N.Y., ADMIN. CODE § 3-705(2)(b); N.Y.C., N.Y., RULES, tit. 52, § 5-01(2).

<sup>261</sup> COMM. ON GOVERNMENTAL OPERATIONS, REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION, PROPOSED INT. NO. 586-A Part IV.C (2007), *available at* <http://webdocs.nycouncil.info/attachments/78245.htm>.

<sup>262</sup> In 2005, Mayor Michael Bloomberg and three City Council candidates exceeded set expenditure amounts, triggering additional public matching funds for their opponents. PUBLIC DOLLARS, *supra* note 255, at 83, 86.

<sup>263</sup> CAMPAIGN FINANCE HANDBOOK, *supra* note 197, at 11-12.

<sup>264</sup> N.Y.C., N.Y., Int. No. 586-A § 34 (signed July 3, 2007) (to be codified at N.Y.C., N.Y., ADMIN. CODE § 3-706(3)(a)(iii)), *available at* <http://webdocs.nycouncil.info/textfiles/Int%200586-2007.htm?CFID=940206&CFTOKEN=37670355>; N.Y.C., N.Y., ADMIN. CODE § 3-706(3)(a).

<sup>265</sup> N.Y.C., N.Y., Int. No. 586-A § 196 (to be codified at N.Y.C., N.Y., ADMIN.

not always provide participants with equal resources to communicate with voters, they do help ensure that participants' messages are not completely drowned out by high-spending opponents who have opted out of the public funding system.

#### 4. Debate Requirement and Voter Guides Help Expand Public's Knowledge of Candidates and Issues

Since 1996, New York City has required participating candidates to take part in at least one public debate, which is also open to nonparticipating candidates.<sup>266</sup> There is also a second debate for run-off contenders in primaries and special elections.<sup>267</sup> The CFB publishes "Voter Guides" printed in English and Spanish (and in some districts, Chinese or Korean) and mails them to each household with a registered voter in the City, as well as publishing them online.<sup>268</sup> The guides contain each candidate's photograph, name, party identification, previous and current public offices, current and prior occupation and employer, experience in public service, educational background, major organizational affiliations, and the candidate's concise statement of his or her "principles, platform, or views," as well as more general information about the election date, polling hours, voter registration and absentee or regular voting processes, district maps, and other materials.<sup>269</sup> These debates and voter guides inform both voters and candidates for City office.

### III. CRITIQUES OF NEW YORK CITY'S SYSTEM

New York City provides a fertile testing ground for publicly financing campaigns. The cost of communicating with a highly diverse population of more than eight million in an expensive media market like New York City is quite high.<sup>270</sup> The fact that

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CODE § 3-706(3)(b)(iii), available at <http://webdocs.nycouncil.info/textfiles/Int%200586-2007.htm?CFID=940206&CFTOKEN=37670355>; N.Y.C., N.Y., ADMIN. CODE § 3-706(3)(b).

<sup>266</sup> N.Y.C., N.Y., ADMIN. CODE § 3-709.5(1)(a).

<sup>267</sup> *Id.* § 3-709.5(1)(b).

<sup>268</sup> About the Voter Guide, *supra* note 174.

<sup>269</sup> N.Y.C., N.Y., RULES, tit. 52, § 10-02 (2006).

<sup>270</sup> Cornelius P. McCarthy, *Campaign Finance: A Challenger's Perspective on Funding and Reform*, 6 J.L. & POL'Y 69, 69 (1997) ("This region's media markets are many, with full coverage requiring purchases in Dutchess County, Northern Westchester and New York City. . . . [A] race here, as in many large suburbs throughout the country, is expensive.").

the public system has worked so well, bodes well for wider State reform.

Nevertheless, there are areas in which the New York City campaign finance system can improve. Therefore, this Article does not mean to suggest that an exact carbon copy of New York City's system should be enacted at the statewide level. Any lawmaker in Albany who is considering campaign finance reforms for New York State should be cognizant of the critiques of the New York City system so that any improvements to New York State's system take into account the lessons learned by New York City over the past two decades.

*A. New York City's Match Applies to Part of Large Donations*

While the New York City matching fund system is laudable because it provides a generous match to participating candidates, its contribution limits are fairly high. As Paul Ryan has reported in his in-depth analysis of the New York City system, "New York City's contribution limits are the highest local government contribution limits in the nation among jurisdictions with public campaign financing programs."<sup>271</sup> Ryan went on to state that "many candidates took advantage of the city's high contribution limits by accepting large contributions."<sup>272</sup> It should not be the case that a donor can give more to a candidate for Mayor of New York than he or she can give to a candidate for President of the United States.<sup>273</sup> The City's contribution limits could be lowered significantly while still abiding by *Randall's* requirements.

*B. Managing the Effects of High-Spending Nonparticipants*

Like any campaign finance system, New York City's public financing system can be overwhelmed by an extraordinarily wealthy self-financed candidate. For example, in 2001, Michael Bloomberg, who did not participate in the public financing system, spent \$73.9 million.<sup>274</sup> Bloomberg's publicly funded opponent, Mark Green, spent \$11.32 million, which, while record-setting by historical standards, was still less than one-fifth of

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<sup>271</sup> RYAN, *supra* note 6, at 53.

<sup>272</sup> *Id.* at 54.

<sup>273</sup> *Id.* at 56.

<sup>274</sup> PUBLIC DOLLARS, *supra* note 255, at 16.

Bloomberg's war chest.<sup>275</sup>

In 2004, the City Council adopted a CFB recommendation to increase the additional public funding that participants received when facing opponents who were high-spending nonparticipants.<sup>276</sup> Nevertheless, history repeated itself when Bloomberg ran for re-election; he spent \$84.6 million, dwarfing the \$9.2 million spent by his publicly funded opponent, Fernando Ferrer.<sup>277</sup> Additional funding for candidates in this situation could help level the playing field and dissuade nonparticipants from excessive spending, but even New York City's relatively modest "triggers" help participants to have adequate, if hardly equal, funding to get their message out.<sup>278</sup>

The problem of how to address wealthy self-financed candidates is neither unique to public financing systems nor to New York City. It is also an intractable issue in privately funded campaign systems as a result of historical constitutional constraints. *Buckley v. Valeo* struck down federal spending limits of candidates' personal or family resources.<sup>279</sup> "The Court reasoned that candidates could not be corrupted by spending their own money."<sup>280</sup> Congress attempted to address the advantage of self-funded candidates in federal elections with the so-called "millionaire's amendment" to the Bipartisan Campaign Reform Act (BCRA). This provision raises contribution limits for candidates facing high-spending, self-financed opponents, and allows increased coordinated party expenditures for candidates operating under those limits.<sup>281</sup>

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<sup>275</sup> *Id.*

<sup>276</sup> N.Y.C., N.Y., ADMIN. CODE § 3-706(3) (2006); *see also* New York City Campaign Finance Board, A Brief History of the CFB, [http://www.nyccfb.info/about/board\\_history.htm](http://www.nyccfb.info/about/board_history.htm) (last visited Nov. 12, 2007) (explaining the purpose of the Campaign Finance Program and the role of the Campaign Finance Board).

<sup>277</sup> PUBLIC DOLLARS, *supra* note 255, at 16.

<sup>278</sup> Although the matching funds ratio has been increased from four-to-one to six-to-one, the maximum public funds available to participants facing nonparticipating opponents who spend over the threshold will be only slightly higher than in 2005, since it is still capped at two-thirds or 125% of the normal expenditure limit. N.Y.C., N.Y., Int. No. 586-A § 34-35 (signed July 3, 2007) (to be codified at N.Y.C., N.Y., ADMIN. CODE §§ 3-706(a)(iii), 3-706(b)(iii), *available at* <http://webdocs.nyccouncil.info/textfiles/Int%200586-2007.htm?CFID=940206&CFTOKEN=37670355>).

<sup>279</sup> *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (per curiam).

<sup>280</sup> WRITING REFORM, *supra* note 130, at I-8.

<sup>281</sup> The millionaire's amendment was just affirmed against a facial challenge. *Davis v. Fed. Election Comm'n*, 501 F. Supp. 2d 22, 34 (D.D.C. 2007).

In designing a statewide system of partial or full public financing, lawmakers should try to minimize the effect of high spending nonparticipants by providing additional public funds to publicly funded candidates in high-spending races. However, the problem presented by the multi-millionaire or billionaire candidate should not drive the structure of the entire system. Albany lawmakers should look at the historic costs of running for assembly, senate and statewide office when setting spending limits under a public financing system. Otherwise, too much focus on high spending races may make the entire public financing system too expensive or have an unintended inflationary effect on the cost of running for office.<sup>282</sup>

*C. Full Public Financing Could Increase Voter Equality*

Although New York City's matching funds system significantly increases the importance of small contributors relative to those who can make large donations, it does not make all contributors equally important. In a partial public funding system, reliance on private contributions drops precipitously, but it does not disappear entirely.<sup>283</sup> Full public financing systems that provide lump-sum grants to candidates who raise a threshold number of very small contributions can promote "competition and political equality by putting all candidates on a level playing field, even if their supporters can afford to make only very small contributions or none at all" and allow candidates to "concentrate on connecting with voters rather than on soliciting campaign contributions."<sup>284</sup> New York State could adopt a full public financing system in lieu of a partial public financing system modeled on New York City.<sup>285</sup>

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<sup>282</sup> The inflationary effect is caused by privately funded candidates trying to outspend publicly funded candidates. Thus the higher the public funds available, the more a privately funded candidate will need to spend in order to outspend the publicly funded candidate. See *The Program and the Law*, [http://www.nyccfb.info/program\\_law/index.htm](http://www.nyccfb.info/program_law/index.htm) (last visited Nov. 12, 2007) (noting that the purpose of the Campaign Finance Act is to "help credible candidates, who may not have access to 'big money,' run competitive campaigns.").

<sup>283</sup> See Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L.J. 95, 104 (2003) ("The system does not eliminate private contributions, but it can substantially reduce the candidate's dependence upon them.").

<sup>284</sup> *Id.* at 105.

<sup>285</sup> ABCNY, *A Level Playing Field*, *supra* note 6, at 692 (endorsing full public

Arizona,<sup>286</sup> Connecticut<sup>287</sup> and Maine<sup>288</sup> have full public financing systems. While these systems have particular aspects that make each system unique, all three have similar structures that New York State could implement.<sup>289</sup> Typically, in a full public financing system, candidates who seek public funding collect a number of small contributions, which are known as qualifying contributions (QCs).<sup>290</sup> Once a candidate has gathered enough QCs to qualify for public financing, he or she then requests public funding from the State. After the State certifies that all of the QCs are legitimate in size and source (often between \$5 and \$100 from a registered voter in the candidate's district), the State gives the candidate a public grant to finance the campaign during the primary election season.<sup>291</sup> If the candidate wins his or her primary, the candidate is given an additional public grant for the general election.<sup>292</sup> These public grants are often reduced or eliminated if the candidate does not face an opponent. However, in high-spending races, additional public funds (also referred to, somewhat confusingly, as "matching funds") are released to the candidate so that the publicly funded candidate is not grossly outspent and can remain competitive with the privately funded opponent.<sup>293</sup> Once a

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financing).

<sup>286</sup> Brennan Center for Justice at NYU School of Law, *AAPS v. Brewer*, [http://www.brennancenter.org/stack\\_detail.asp?key=102&subkey=9466](http://www.brennancenter.org/stack_detail.asp?key=102&subkey=9466) (last visited Nov. 12, 2007).

<sup>287</sup> Brennan Center for Justice at NYU School of Law, Public Financing, [http://www.brennancenter.org/subpage.asp?init\\_key=82&key=38](http://www.brennancenter.org/subpage.asp?init_key=82&key=38) (last visited Nov. 12, 2007). Connecticut's public financing system was enacted in 2005 but will not be in effect until 2008. Also, aspects of Connecticut's public financing system have been challenged in the on-going case *Green Party of Conn. v. Garfield*, 3:06 CV 01030 (D. Conn.). See Brennan Center for Justice at NYU School of Law, *Green Party of Connecticut v. Jeffrey Garfield, et al.*, [http://www.brennancenter.org/stack\\_detail.asp?key=102&subkey=39008](http://www.brennancenter.org/stack_detail.asp?key=102&subkey=39008) (last visited Dec. 29, 2007) (explaining the case's impact).

<sup>288</sup> Brennan Center for Justice at NYU School of Law, *Daggett v. Commission on Governmental Ethics & Election Practices*, [http://www.brennancenter.org/stack\\_detail.asp?key=102&subkey=7120](http://www.brennancenter.org/stack_detail.asp?key=102&subkey=7120) (last visited Nov. 12, 2007).

<sup>289</sup> Public Campaign, Annotated Model Legislation for Clean Money/Clean Elections Reform, <http://www.publiccampaign.org/modelbill> (last visited Nov. 12, 2007).

<sup>290</sup> JANICE THOMPSON, CLEAN MONEY COMPARISONS: SUMMARIES OF FULL PUBLIC FINANCING PROGRAMS 1 (2006) available at <http://library.publiccampaign.org/research/2006/08/clean-money-comparisons-summaries-full-public-financing-programs> (follow "final comparisons.doc" hyperlink).

<sup>291</sup> *Id.* at 2.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 3.

candidate receives a public grant, he or she cannot raise any additional private campaign funds. The public grant acts as a spending cap because the candidate may spend only the public grant to finance his or her campaign. Public grants may be used only for campaign related expenses, not the candidate's personal expenses. After the election, the candidate's campaign committee is subject to an audit to ensure that the public funds have been used properly. Any misuse of public funds triggers repayment to the State, or in the case of egregious misconduct, fines and criminal penalties.

Supporters of full public financing systems think that these systems are a better mechanism for leveling the playing field than matching funds systems because, in a matching funds system, private fundraising occurs only once (while gathering QCs), instead of throughout the election cycle.<sup>294</sup> Some argue that matching funds systems have the unintended consequence of magnifying the voice of campaigns that already have access to sources of significant contributions.<sup>295</sup> Full public financing frees candidates' schedules to focus on communicating with average voters—or in the case of an incumbent, focusing on his or her official duties— instead of focusing on fundraising. The laws in Arizona, Connecticut, and Maine would provide excellent models for a new full public financing system in New York State.

Programs that provide public funding to candidates who voluntarily agree to certain restrictions have been praised and upheld by the Supreme Court and courts in several appellate circuits.<sup>296</sup> These courts have concluded that public financing

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<sup>294</sup> KEEPING IT CLEAN, *supra* note 176, at 29 (quoting Susan Lerner, “[w]hen candidates voluntarily accept Clean Money Funds, they can't take any money from private contributors.”).

<sup>295</sup> ABCNY, *A Level Playing Field*, *supra* note 6, at 692 (“[T]he concept of matching funds to contributions on a dollar-for-dollar basis would devote too large a share of public funds to campaigns that already have substantial fundraising capacity and too little to campaigns that could become more competitive with public assistance.”).

<sup>296</sup> *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 94-6 (1976) (per curiam) (upholding the presidential public financing system under FECA); Daggett v. Comm'n on Governmental Ethics and Election Practices, 205 F.3d 445, 472 (1st Cir. 2000) (upholding Maine's Clean Election Act); Rosenstiel v. Rodriguez, 101 F.3d 1544, 1552-53 (8th Cir. 1996) (upholding Minnesota's public funding for elections); Ass'n of Am. Physicians & Surgeons v. Brewer, 363 F. Supp. 2d 1197, 1202-03 (D. Ariz. 2005) (upholding Arizona Clean Election Act), *rev'd in part* and *aff'd in part*, 494 F.3d 1145 (9th Cir. 2007), *order amended*, 497 F.3d 1056 (9th Cir. 2007); *see also* Jackson v. Leake, 476 F. Supp. 2d 515, 530 (E.D.N.C. 2006) (denying plaintiffs' motion for preliminary injunction against public financing

further, rather than hinders, First Amendment values and thus advances sufficiently important and significant state interests.<sup>297</sup>

In *Buckley*, the 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.”<sup>298</sup> 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 . . . .<sup>299</sup>

Public financing promotes “uninhibited, robust, and wide-open public debate”<sup>300</sup> 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, 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.”<sup>301</sup>

Public financing systems further First Amendment values by enlarging public discussion, preventing corruption and its appearance, and opening elective offices to a broader pool of candidates. A new public financing system for New York State following the New York City model or those in Arizona, Connecticut, and Maine would be on sound constitutional ground.

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system for appellate judicial elections).

<sup>297</sup> See *Buckley*, 424 U.S. at 92-107.

<sup>298</sup> *Id.* at 92-93.

<sup>299</sup> *Id.* at 93 n.127 (internal citations omitted).

<sup>300</sup> *Id.*

<sup>301</sup> See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 136 (2003) (quoting *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982)); see also *Sec. Indus. & Fin. Mkts. Ass’n v. Garfield*, No. 3:06-CV-2005 (D. Conn. 2007) (order granting preliminary injunction).

*D. Granting a Private Right of Action Could Improve Enforcement*

New York State could adopt a private right of action to increase enforcement of its campaign finance laws. This improvement would go further than the City's current law. New York City's Campaign Finance Act allows private citizens to file complaints with the Board, but does not have a specific provision allowing them to file suit against candidates or to challenge the Board's decision about whether another party has committed a violation.<sup>302</sup> Even if most complaints are usually addressed by the New York City Board expeditiously,<sup>303</sup> other agencies charged with enforcing campaign finance laws are often accused of under-enforcement.<sup>304</sup> Allowing citizens a cause of action against campaign finance violators when the enforcement agencies decline to act would complement official enforcement actions and avoid under-enforcement.

Other states provide useful models for how a private right of action can work well. In California, for example, the Political Reform Act authorizes private citizens to sue violators<sup>305</sup> if the Fair Political Practices Commission declines to act within 120 days.<sup>306</sup> To encourage private attorneys general to step forward, the Political Reform Act offers them fifty percent of the amounts they recover.<sup>307</sup> Similarly, Colorado's Constitution requires the Secretary of State to refer complaints to an administrative law judge who, within thirty days, must hold a hearing and render a decision, which the filer of the complaint can sue to enforce.<sup>308</sup>

If resorting to private rights of action is necessary frequently enough, the legislature might be persuaded to strengthen and properly fund the enforcement agencies so that the State can take proper responsibility for enforcing the law in a uniform way, instead of relying on enforcement by private attorneys general, which may be more haphazard.

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<sup>302</sup> N.Y.C., N.Y., ADMIN. CODE § 3-708 (2006); *Comparative View*, *supra* note 241, at 15.

<sup>303</sup> *Comparative View*, *supra* note 241, at 26.

<sup>304</sup> See, e.g., Fred Wertheimer & Alexandra T.V. Edsall, *Response to Voting with Dollars: A New Paradigm for Campaign Finance*, 37 U. RICH. L. REV. 1111, 1113 (2003) (noting the "FEC's notoriously weak enforcement.").

<sup>305</sup> CAL. GOV'T CODE § 91004 (West 2007).

<sup>306</sup> *Id.* § 91007.

<sup>307</sup> *Id.* § 91009.

<sup>308</sup> COLO. CONST. art. XXVIII, § 9(2)(a).

Another alternative would be to allow suits against the regulatory agency to compel it to enforce campaign finance law, as the D.C. Circuit Court recently allowed candidates to do in *Shays v. Federal Election Commission*.<sup>309</sup> If accompanied by a right of first refusal for the agency and a sanction regime for preventing frivolous or harassing lawsuits, any of these methods could reduce the probability that regulatory agencies would under-enforce campaign finance laws in New York City or New York State.

#### IV. SPECIFIC POLICY SUGGESTIONS FOR NEW YORK STATE

Based on the foregoing reasons, we offer the following policy proposals for New York State.<sup>310</sup>

- Lower the individual contribution limits so they are in line with the contribution limits in most states. Limits of a few thousand dollars or less would reduce corruption and the appearance of corruption, increase the quality of representation, be more democratic than the current high limits, and be constitutional under *Randall*.<sup>311</sup>
- Ban contributions from corporations. Corporations could still give money through separate segregated funds or PACs, but treasury money should not infect State politics.
- Close the corporate subsidiary, LLC, and Housekeeping Account loopholes so that other limits are meaningful.
- Ban the private use of campaign funds by candidates and elected officials for personal living expenses.
- Provide public financing for statewide and legislative elections. Such a public financing system could be a full or matching funds system. Either public financing system would be a vast improvement over the current privately funded regime.
- As part of the public financing system, candidates for statewide office should be required to participate in public debates to help inform the public about their positions on issues.

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<sup>309</sup> *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 83-95 (D.C. Cir. 2005) (finding that Representatives Shays and Meehan had standing to challenge the FEC's decision to delay enforcement of the BCRA).

<sup>310</sup> These policy suggestions have been offered by others repeatedly over the past few decades. See, e.g., NOVAK & SHAH, *supra* note 6, at 18-19 (suggesting similar reforms in 2006 based on review of New York State's laws in comparison with other states' laws). See generally GOVERNMENT ETHICS REFORM FOR THE 1990S, *supra* note 6 (suggesting similar reforms in 1991 based on government commissioned studies in the 1980s).

<sup>311</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006).

- New York State should publish a voter guide so that the public is more informed about the candidates running for State office. Voter guides are often recommended, especially in elections with low information and voter turnout.<sup>312</sup>
- Increase the penalties for campaign finance violations so that all candidates will respect and abide by the same rules.
- Create an independent, nonpartisan enforcement agency with proper staffing and funding to enforce campaign finance laws.<sup>313</sup>
- Provide citizens with a private right of action to increase enforcement of existing campaign finance laws.

### CONCLUSION

New York State should reclaim its traditional position as a role model for other states by radically improving its campaign finance laws and by adopting public financing. Drawing on the many best practices in New York City, New York State could develop one of the strongest set of campaign finance laws in the country which, at the same time, opens up the political system to a broader array of candidates by making public dollars available. The Governor and the legislature need to act in concert to fix New York State's laws now—the future of our State's democracy depends on it.

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<sup>312</sup> Goldberg, *supra* note 283, at 116 (noting that “voters often explain their failure to vote by citing their lack of adequate information about the candidates” and arguing that publicly-funded voter guides can help “remedy that problem at a relatively low cost to taxpayers.”); *see also* Peter Brien, *Voter Pamphlets: The Next Best Step in Election Reform*, 28 J. LEGIS. 87, 100-01 (2002); ABCNY, *A Level Playing Field*, *supra* note 6, at 682 (citing the New York City Voter Guide as an example to be emulated); *Comparative View*, *supra* note 241, at 38 (Nicole Gordon referring to the voter guide as a “tremendous thing” with a “very high profile”).

<sup>313</sup> ABCNY, *A Level Playing Field*, *supra* note 6, at 684 (suggesting “any public financing system would require an administrative body similar in concept to the New York City Campaign Finance Board and separate from the . . . Board of Elections.”).