

**BRENNAN
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FOR JUSTICE**

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On Campaign Finance Reform

Presented to the

**Governmental Operations Committee
of the New York City Council**

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On behalf of the Brennan Center for Justice at NYU School of Law, I would like to thank you for inviting me to testify about Int. No. 586 and for holding this hearing today.

The Brennan Center is a nonpartisan think tank and legal advocacy organization that focuses on democracy and justice, including issues pertaining to campaign finance and the preservation of fair and impartial courts. Our remarks here focus briefly on some of the constitutional issues related to public financing. For a more detailed analysis of these constitutional issues, we refer you to our 200-page treatise, *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws*, which you may download chapter-by-chapter at http://www.brennancenter.org/subpage.asp?key=38&tier3_key=10340. For specific questions, please feel free to contact Ciara Torres-Spelliscy at 212-998-6025.

The Center's Democracy Program has been working in the area of campaign finance reform on the federal, state, and local levels since its inception in 1995. The Center was part of the legal defense team in *McConnell v. FEC*, 540 U.S. 93 (2003), in which the U.S. Supreme Court upheld virtually all of the key provisions of the federal Bipartisan Campaign Reform Act of 2002. Center attorneys have also successfully defended public funding systems throughout the country, including as lead counsel for intervenors in *Association of American Physicians & Surgeons v. Brewer*, 2007 WL 1366077 (9th Cir. 2007) (affirming dismissal of complaint against Arizona's public funding program); *Daggett v. Commission on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's full public financing system); and *Jackson v. Leake*, 2006 WL 4091233 (E.D.N.C. 2006) (denying plaintiffs' motion for preliminary injunction against North Carolina's public financing system for appellate judicial elections), No. 5:06-CV-324-BR. (E.D.N.C. Mar. 30, 2007) (granting motion to dismiss the complaint), *appeal filed* (4th Cir. April 30, 2007). Presently, the Brennan Center is assisting the State of Connecticut in defending its public financing system enacted in 2005. *Green Party of Connecticut v. Garfield*, 3:06 CV 01030 (D. Conn. filed July 6, 2006). In addition to litigation assistance, the Center provides legal counseling, legislative drafting assistance, and

policy analysis to citizens and elected officials who are interested in promoting campaign finance bills or initiatives.

The Brennan Center would like to commend the New York Council being a leader in the realm of campaign finance reform by providing the citizens of New York with a dynamic public matching funds system for candidates who run for office in the City which encourages them to seek support from smaller donors.

We applaud your effort to prevent the undue influence of lobbyists¹ and city contractors on political decision-making. Such provisions are commonly known as “pay-to-play” regulations, because they seek to prevent deals whereby contributors “pay” officials for the opportunity to “play” with the government. Like other restrictions on campaign contributions, these regulations have been subject to First Amendment scrutiny.

The U.S. Supreme Court has not addressed the constitutionality of pay-to-play contribution restrictions, although it has upheld low contribution limits, even for ordinary members of the general public, who do not pose the heightened threat of corruption that lobbyists and city contractors do. *Shrink Missouri*, 528 U.S. 377 (upholding \$1,000 contribution limit for statewide office).² Moreover, no other courts whose rulings are binding on New York City have issued opinions on the constitutionality of pay-to-play contribution limits. Consequently, any court considering the City’s provisions will likely look to other jurisdictions for guidance.

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. See, e.g., *Blount v. SEC*, 61 F.3d 938, 944-48 (D.C. Cir. 1995); *Institute of Gov’tal Advocates v. Fair Political Practices Comm’n*, 164 F. Supp. 2d 1183, 1189 (E.D. Cal. 2001) (upholding ban on contributions by lobbyist to offices for which lobbyist is registered to lobby); *Casino Ass’n of Louisiana v. State*, 820 So. 2d 494 (La. 2002) (upholding ban on contributions from riverboat and land-based casinos), *cert. denied*, 529 U.S. 1109 (2003); *Gwinn v. State Ethics Comm’n*, 426 S.E.2d 890 (Ga. 1993) (upholding ban on contributions by insurance companies to candidates for Commissioner of Insurance); *Soto v.*

¹ The Supreme Court recognized over fifty years ago that lobbyists can be subject to special regulations because of their influence on the legislative process. *U.S. v. Harris*, 347 U.S. 612 (1954) (upholding disclosure requirements for federal lobbyists). The Court described modern legislative process in the following way:

Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. *Otherwise the voices of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.*

U.S. v. Harris, 347 U.S. 612, 625 (1954) (emphasis added). The Court concluded that Congress could require disclosures from federal lobbyists in part because Congress had the “power of self-protection.” *Id.*

² However, in 2006 the Supreme Court made it clear that there could be contribution limits that were too low if they prevented challengers from mounting effective campaigns against incumbent officeholders. *Randall v. Sorrell*, 126 S. Ct. 2479, 2482-83 (2006).

State, 565 A.2d 1088 (N.J. Super. Ct. App. Div. 1989) (upholding ban on political contributions from casino employees); *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61 (Ill. 1976) (upholding ban on contributions from members of liquor industry). But these courts sustained pay-to-play restrictions only after examining the factual basis for them and determining that they were carefully designed to further an important government interest. See, e.g., *Blount*, 61 F.3d at 943; *Institute of Gov'tal Advocates*, 164 F. Supp. at 1189.³

Whether a court will uphold a particular “pay to play” restriction as constitutional depends upon the reach of the restriction and the grounds for imposing it. While narrow pay-to-play regulations like those proposed by New York City are generally upheld, see, e.g., *Blount*, 61 F.3d at 944-48, court decisions on broader pay-to-play regulations (including bans) have been mixed, depending on the courts’ judgments about whether the broader restrictions were necessary to address the potential for corruption. Compare *Fair Political Practices Comm’n v. Superior Ct.*, 25 Cal. 3d 33, 45 (1979) (noting the importance of ridding the political system of corruption but nonetheless striking down as overbroad a state law that banned all contributions from lobbyists), with *Casino Ass’n of Louisiana*, 820 So. 2d 494 (upholding a broad ban on contributions from riverboat and land-based casinos).

A court adjudicating a challenge to New York City’s proposed pay-to-play restrictions, which restrict contributions from a wide range of donors to candidates for many offices, would consider whether the reach of those provisions is necessary to address the reality and appearance of corruption in the City. It will be particularly important to have legislative findings supporting such restrictions, which could include references to any recent experience with campaign finance and corruption scandals.

Int. No. 586 would limit the amount of contributions that a lobbyist or certain city contractors could give to candidates to roughly 10% of the contribution limit which would otherwise apply. Int. No. 586 §2 (1-a). These lower limits allow lobbyists and contractors to indicate their financial support for candidates of their choice, thereby preserving their associational rights under the First Amendment.

Int. No. 586 also bars the City Campaign Finance Board from matching funds that come from a lobbyist or a city contractor. Int. No. 586 §1(3)(g). This provision protects the public fisc by providing matching funds only to contributions from individuals free of conflicts of interest. Both aspects (lower contribution limits and the lack of public matching funds for contributions from lobbyists and city contractors) appear to be within the permissible restrictions that the City may place on candidates participating in the City’s public financing system.

³ Courts considering pay-to-play restrictions have applied varying levels of constitutional scrutiny in analyzing the statutes. Some have held that the government must show that the restriction furthers a “compelling” interest, see, e.g., *Gwinn*, 426 S.E.2d at 892, while others have held that it must show an “important” or “substantial” interest, see, e.g., *Institute of Gov’tal Advocates*, 164 F. Supp. at 1194; *Casino Ass’n of Louisiana*, 820 So. 2d 504. Similarly, some have held that the statute must be “narrowly tailored” to further the government interest, see, e.g. *Institute of Gov’tal Advocates*, 164 F. Supp. at 1194; *Gwinn*, 426 S.E.2d at 892, while others have held that the statute must be “closely drawn,” or something similar, to further the interest, see, e.g. *Casino Ass’n of Louisiana*, 820 So. 2d at 504.