

**Testimony of the New York Civil Liberties Union**  
**before**  
**THE NEW YORK STATE PUBLIC CAMPAIGN FINANCING**  
**COMMISSION**  
**regarding**  
**A State Program Authorizing the Public Financing of**  
**Campaigns**

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The New York Civil Liberties Union (NYCLU) appreciates the opportunity to submit the following testimony in support of a state program authorizing the public financing of campaigns, and to recommend that the Commission abstain from recommending broad changes to fusion voting in New York.

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 190,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution through an integrated program of litigation, legislative advocacy, public education, and community organizing. The Commission's charge implicates several fundamental rights that are cornerstones of democracy in the state of New York, including the rights of voters to associate with the candidates and political parties of their choice, and to vote for the candidates of their choice. The NYCLU has been a leader in the fight to actualize and protect every citizen's ability to exercise these basic constitutional rights in New York State.

**1. The NYCLU supports public campaign financing that amplifies democratic power while remaining faithful to constitutional principles.**

The NYCLU firmly supports and recommends the adoption of a small-donor matching public campaign finance system for statewide and state legislative offices that comports with the principles set forth in the United States and New York Constitutions. Along with virtually all participants in the Commission's proceedings to date, we share the broadly-held concern that the outsized influence of wealthy donors and commercial interests can have the effect of diluting the political power of the average New Yorker. An effective public campaign finance



program is not in itself a complete solution to this power imbalance, but it will help to amplify the voices of marginalized voters.

According to a Brennan Center analysis of New York’s 2018 election cycle, the top 100 donors combined donated more to state candidates than all 137,000 of the state candidates’ small donors combined; in addition, small donors made up just 5 percent of all donors to statewide and legislative races, compared to almost a fifth of donors to federal races.<sup>1</sup> The impact of this disparity is clearest when considering historically-marginalized constituencies, including communities of color, immigrant communities, and low-income communities. The needs of these New Yorkers often receive too little attention from campaigns, and their interests get short shrift in the halls of power as a result. A comprehensive and meaningful system of public financing will help create a more level playing field for every qualified candidate – and, importantly, it will encourage more candidates from under-represented communities to run for office.

Unchecked political spending and the glaring disparities in political influence that can result from it are serious concerns – and so is the mounting public perception that the integrity of our electoral system is eroded by the presence of money in politics. The escalating cost of political campaigns may make it more difficult for some views to be heard, and access to wealth often plays a significant role in determining who runs for office and who is elected. Without a doubt, however, the clear answer to these concerns is to expand, not limit, the resources available for political advocacy in our communities.

Our state’s policy responses to these inequities must be consistent with our collective constitutional commitments to freedom of speech and association, principles upon which the foundation of our democracy rests. The NYCLU supports public financing of elections via a small donor matching program, and acknowledge that the Supreme Court has upheld as constitutional reasonable limits on campaign contributions and spending. So long as they do not improperly disadvantage one small-dollar contributor as against another, we support such limitations as a condition of participation in public matching. We support carefully drawn disclosure rules for political candidates. And we strongly support strict, nonpartisan enforcement of existing bans on coordination between candidates and PACs or other independent expenditure

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<sup>1</sup> The Brennan Center, *New York’s Wealthiest Played Outsized Role in Funding 2018 Campaigns* (Dec. 20, 2018), *available at* <https://www.brennancenter.org/blog/new-yorks-wealthiest-played-outsized-role-funding-2018-campaigns>. In this analysis, small donors are defined as having contributed \$175 or less.



sources.<sup>2</sup> But the NYCLU cannot endorse campaign finance reforms premised on the notion that the answer to money in politics is to suppress or discriminate against political speech.

Some argue that campaign finance laws can be surgically drafted to protect what is deemed legitimate political speech while restricting speech that leads to undue influence by wealthy special interests. Any rule that requires the government to determine what or whose political speech is legitimate, and how much political speech is appropriate, is extremely difficult to reconcile with the First Amendment. Experience suggests that money always finds an outlet, and the endless search for loopholes simply creates the next target for new regulation. It also contributes to cynicism about our political process.

Our system of free expression is built on the premise that the people get to decide what speech they want to hear, and what views they want to promote; it is not the role of the government to make those decisions for us. The NYCLU particularly calls upon the Commission to reject, as both needlessly complex and constitutionally infirm, any proposals that restrain the political expression of specified individuals or classes of people by setting forth different contribution limits based upon occupation, geographic location, or other affiliations or statuses.

**2. The Commission does not have the authority to make any changes to fusion voting other than those directly implicated in the advent of a public campaign financing system.**

In the course of making its findings and recommendations regarding public campaign financing, the Commission must operate with attention and restraint towards fusion voting, which the Court of Appeals has held to be protected by the New York Constitution for over a century.<sup>3</sup> Whatever the Commission’s mandate, it clearly cannot supersede state constitutional authority by taking any action to end or undermine the practice of fusion in New York.

Additionally, there is a legitimate question as to the Commission’s prescribed statutory authority to make changes to fusion voting outside the scope of adjustments required to institute public campaign

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<sup>2</sup> See, e.g., New York Civil Liberties Union, NYCLU Applauds Campaign Finance Reform Opinion Issued by Governor’s Office (June 9, 2016), *available at* <https://www.nyclu.org/en/press-releases/nyclu-applauds-campaign-finance-reform-opinion-issued-governors-office>

<sup>3</sup> *Matter of Callahan*, 200 N.Y. 59 (1910); *Hopper v. Britt*, 203 N.Y. 144 (1911); *Devane v. Touhey*, 33 N.Y.2d 48 (1973).



financing. This Commission was constituted for the prevailing purpose of establishing a statewide public campaign financing program, and is not the proper body to make any substantive reforms to fusion voting. As state Senate Elections Chair Zellnor Myrie has already testified to this Committee, sound legislative history and statutory construction arguments suggest that the Commission does not have a legislative mandate to either consider or recommend such changes.<sup>4</sup>

On substance, whether a candidate may accept the nomination of more than one political party has little to do with whether candidates should receive matching funds for small dollar donations. New York City has been able to enact and successfully implement a public campaign financing system without making changes to fusion voting. There is no discernable reason why the Commission should not be able to do so with a minimum of technical amendments to the sections of state Election Law that permit fusion voting.

Finally, even if the language of the statute could be stretched to argue for a broad mandate on fusion voting, the appearance of multiple conflicts around the issue weighs in favor of the Commission's restraint. And since the Commission has already voted to bundle its recommendations, the inclusion of any substantive changes to fusion voting risks acting as a poison pill to predetermine the failure of the Commission's legitimate public campaign financing recommendations. If the Commission means to produce a valid recommendation on campaign financing, it must act with extreme restraint toward fusion voting.

The NYCLU also supports the maintenance of fusion voting on its own merits. At its best, fusion voting represents the propagation of core democratic principles including the free speech and association rights of candidates and political parties, as well as voters who are empowered to select the preferred candidate – and partisan affiliation – of their choice. Fusion voting contributes a great deal to the pluralism of democracy in New York. It weakens a false political binary and permits a variety of

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<sup>4</sup> See N.Y.S. Senate, In Testimony, Senator Myrie Tells Public Financing Commission to Leave Fusion Voting Alone (Sep. 12, 2019), *available at* <https://www.nysenate.gov/newsroom/press-releases/zellnor-myrie/testimony-senator-myrie-tells-public-financing-commission> (quoting N.Y.S. Senate Stenographic Record (Mar. 31, 2019) at 2653-55, *available at* <https://legislation.nysenate.gov/pdf/transcripts/033119.txt>/ “But I think collectively the 10 subsections [enumerating areas of inquiry related to a public campaign financing program], combined with Section 2 and the following section, that says it must limit its recommendations to the public financing program, do not allow for this commission to examine things outside of public financing. When it mentions political party qualifications or multiple party candidate nominations, it is as it pertains to public financing.”); *see also* Ch. 59, L. 2019, Part XXX.



viewpoints to emerge and flourish, often raising the level of public debate and diversifying the voices contributing to it. It permits voters to convey to candidates which aspects of their platforms are most appealing, and reminds elected officials of the spectrum of views held among their constituencies.

**3. The Commission’s enabling statute and the manner in which it was enacted give rise to serious concerns about the general delegation of legislative power to the Commission, and the Commission should make clear its understanding of its own authority so as to address these concerns.**

The NYCLU’s final recommendation is less properly addressed to the Commission itself, or to its members who will no doubt apply themselves fully to the task before them, and more properly addressed to the legislative and executive branches of our state government as a note of caution. However, it is incumbent on the Commission to make clear its own understanding of the bounds of its authority.

While official urgency around development of a statewide public campaign financing system may be entirely appropriate, the processes by which the Commission was created and by which its endorsements may be adopted into law are less apparently so. In the future, it would be judicious to avoid replicating the model of legislating controversial or difficult issues by the recommendation of a politically-appointed commission, which was enabled in the 76th part of an omnibus budget bill, which in turn was printed on the final day of budget proceedings and passed in the second chamber just after 5am in the final hours of those proceedings, and which was itself seemingly drafted to consolidate legislative power away from the legislature. This extremely tenuous model of legislating stretches the bounds of official validity, and raises significant constitutional concerns regarding appropriate delegation of authority from the legislature to amend the law.

The Commission’s authorizing statute requires the Commission to provide a report to the governor and the legislature of the Commission’s findings and recommendations by December 1, 2019, and requires those reported items be adopted by a majority vote of the Commissioners. Making findings and recommendations for action by the elected branches of government is the well-established province of such commissions. However, this Commission’s authorizing statute contains a highly unusual provision that the Commission’s reported recommendations “shall have the force of law, and shall supersede,

where appropriate, inconsistent provisions of the election law, unless modified or abrogated by statute prior to December 22, 2019.”

Actions to amend or supersede statutes enacted by the legislature and signed by the governor should be similarly enacted by the legislature and signed by the governor. But this Commission’s recommendations can purportedly take the force of statute, and repeal properly enacted statutes, without any affirmative steps taken by any of New York’s elected representatives. Making matters worse, the authorizing statute provides that the Commission’s recommendations shall become codified by default, unless the state legislature comes into special session during a three-week period between Thanksgiving and Christmas to vote down those recommendations.



This framework fails to ensure that the Assembly and the Senate will have an adequate role in exercising the legislative power expressly delegated to them by the New York Constitution. Moreover, the schedule for legislative action in response to the Commission’s recommendations fails to provide an adequate opportunity for the legislature to receive public input on the Commission’s recommendations, to debate those recommendations publicly, or to vote on the recommendations during the regular legislative session, which begins in January 2020.

As a result, in order to secure the legitimacy of its recommendations, the Commission should communicate clearly to the public its understanding of both the constitutional bases and limits of its own delegated authority. Absent an adequate opportunity to hold the state’s elected government accountable for their substance, the Commission’s findings and recommendations risk lacking either legal legitimacy or public confidence.