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On the Public Financing of Elections

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My name is David Earley and I am Counsel in the Democracy Program at the Brennan Center for Justice at NYU School of Law. On behalf of the Brennan Center, I would like to thank the City Council as well as the Ethics and Elections Commission for giving me the opportunity to share my observations on creating a public financing system for municipal elections in Seattle. Establishing public financing for city elections would improve both elections and governance in Seattle, and the Brennan Center is delighted that the city is moving forward with this process.

I'll begin my remarks by discussing the benefits of public financing, with particular emphasis on the success of New York City's model program. Second, I'll briefly lay out the legal and constitutional framework that governs public financing, and explain that a system modeled on New York's program is constitutional and fully compliant with the First

[1] The Brennan Center is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The Center's Money in Politics project works to reduce the real and perceived influence of money on our democratic values. Our counsel defend campaign finance, public funding, and disclosure laws in courts around the country, and provide legal guidance to state and local reformers through counseling, testimony, and public education. The views expressed in these comments are solely those of the Brennan Center.

Amendment and U.S. Supreme Court precedent. Next, I'll outline the components of an effective public financing system. Though there is no "one size fits all" public financing program, in light of recent legal developments, the best available model is a small donor multiple match system similar to the one that New York City has utilized for 25 years.[2] Finally, I'll address a few concerns that are commonly expressed regarding public financing.

The Benefits of Public Financing

Public financing offers a panoply of benefits that are unavailable through any other campaign finance reform. Though preventing corruption and the appearance of corruption are its primary goals, an effective public financing system accomplishes numerous other benefits as well.

Defeating Corruption and the Appearance of Corruption

Public financing reduces actual corruption. By replacing large private donations with no-strings-attached public funds, candidates can act solely in their constituents' interests rather than in the interests of big campaign donors and political spenders. As then-Arizona Governor Janet Napolitano said in explaining how Arizona was able to reduce the cost of prescription drugs without resistance from those who try to use campaign cash to buy access and influence in traditionally funded elections:

> If I had not run [using public financing], I would surely have been paid visits by numerous campaign contributors representing pharmaceutical interests and the like, urging me either to shelve that idea or to create it in their image. All the while, they would be wielding the implied threat to yank their support and shop for an opponent in four years. [Instead,] I was able to create this

[2] *See* ANGELA MIGALLY & SUSAN LISS, BRENNAN CTR. FOR JUSTICE, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 3 (2010), *available at* http://www.brennancenter.org/publication/small-donor-matching-funds-nyc-election-experience.

> program based on one and only one variable: the best interests of Arizona's senior citizens.[3]

Many involved with the New York City system have echoed similar sentiments.[4] Councilmember Brad Lander said, "Because of the [public financing system], I was able to refuse all contributions from political action committees. Without [public financing], I would not have been able to finance my campaign solely on contributions from individuals."[5] Public financing frees politicians from the grip of big money, allowing them to raise money exclusively from — and thus to be exclusively dependent on — their constituents.

In this regard, New York City's program has been a smashing success. In 2009, 93% of primary election candidates used public financing. Furthermore, 66% of general election candidates participated. These rates have been consistent for a decade.[6] In 2009,"[T]he average contribution to a participating City Council candidate was $199, less than one-third the $690 average contribution for non-participating candidates."[7] Contribution averages in 2005 were slightly higher than in 2009, but comparable.[8]

Public financing also thwarts the appearance of corruption. Even assuming (against common sense) that large political expenditures do not buy access and influence to legislators, they *appear* to do such, raising the specter of corruption and weakening public

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[3] *Why Fair Elections?*, RHODE ISLANDERS FOR FAIR ELECTIONS, http://www.fairelectionsri.org/benefits.php (last visited Dec. 19, 2012).

[4] *See* MIGALLY & LISS, *supra* note 2, at 17-20.

[5] *Id.* at 17.

[6] *Id.* at 10.

[7] *Id.* at 15.

[8] *Id.*

trust in government.[9] As a result, citizens begin to believe that candidates work for their donors, not their constituents. This leads the public to disengage from their democracy and government.[10]

Public financing like that used in New York City — which provides a 6-to-1 match on small contributions from New York City residents — creates incentives for average people to get more involved and reinforces the belief that their participation matters. It allows small donations from regular citizens to provide a powerful counterweight to influence-seeking, big money contributions. Opportunities for actual and perceived corruption diminish when candidates look to their own constituents for contributions, rather than exclusively relying on wealthy, favor-seeking benefactors.

Voter-Centered Campaigns and Governance

Besides defeating corruption and its appearance, public financing encourages voter-centered campaigns. In 2012, 0.4% of the U.S. population provided over 67% of all political donations at the federal level.[11] With numbers like these, it's no wonder that officials respond more to big donors—there are very few of them and they provide the vast majority of the financial support. For example, former Senator Paul Simon of Illinois explained that if, at the end of a long day, he had twenty calls waiting for him, nineteen of which were from people he didn't recognize and a twentieth which was from a $1,000 donor to his campaign, the donor would be the one person he would call. "You feel a sense of gratitude for their support," he said.[12]

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[9] LAWRENCE LESSIG, REPUBLIC, LOST 167 (2011) ("The vast majority of Americans believe that it is money that is buying results.").

[10] *Id.* at 167-70.

[11] Ctr. for Responsive Politics, *2012 Overview: Donor Demographics*, OPENSECRETS.ORG, http://www.opensecrets.org/overview/donordemographics.php (last visited Feb. 5, 2013).

[12] *Quoted in* LESSIG, *supra* note 9, at 145.

If instead each voter is potentially the source of a substantial contribution, even if they do not have much to give, candidates are far more likely to reach out to these citizens for contributions. The citizens, in turn, are then more likely to become informed about the candidates, make a contribution, and ultimately vote. Arizona experienced a more than threefold increase in gubernatorial contributions after the implementation of public financing, with the majority of contributors earning $50,000 or less per year.[13] Contribution rates are similarly three times higher under New York City's small donor matching system than they are in New York State elections (where there currently is no public financing).[14] The typical New York City council candidate participating in the program has more than double the number of contributions than a typical nonparticipating candidate.[15] Many of those who give are also more likely to volunteer for a campaign.[16] In short, public financing encourages involvement by many more individuals in the electoral process.

After Election Day, when victorious candidates take office, public financing also helps ensure elected officials focus on the needs of their constituents. With traditionally funded elections, fundraising distracts legislators by consuming a substantial amount of their time and energy. Retiring Senator Tom Harkin of Iowa recently lamented the closure of the Senate Dining Room, explaining that the dining room was closed because people quit going there. As he explained, "Why did they quit going? . . . They're out raising money. The time

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13 MIMI MARZIANI ET AL., BRENNAN CTR. FOR JUSTICE, MORE THAN COMBATING CORRUPTION: THE OTHER BENEFITS OF PUBLIC FINANCING 6 (2011), *available at* http://www.brennancenter.org/analysis/more-combating-corruption-other-benefits-public-financing.

14 *Id.* at 7-8.

15 MIGALLY & LISS, *supra* note 2, at 15.

16 *Id.* at 18.

is so consumed with raising money now . . . ."[17] A recent PowerPoint presentation made to incoming congressional freshmen by the Democratic Congressional Campaign Committee recommended four hours of "call time" — daily — where legislators would call political donors asking for money. Connecticut Representative John Larson summarized the typical response to fundraising by saying "You might as well be putting bamboo shoots under my fingernails,"[18] but even if elected officials do not enjoy it, it is an unavoidable obligation for traditionally funded officials.

Fundraising is literally exhausting for public officials. Public financing significantly lightens the burdens of fundraising, allowing legislators to focus on legislating and candidates to focus on voters.

Better Elections

Finally, public financing makes elections better in three other ways: creating more contested races, creating more competitive races, and enabling ordinary citizens to run for office. Contested races help ensure that public officials are responsive to all of their constituents. Having an opponent helps guard the most important check on an official's power and decision making — the electorate. Even in the case of a well-liked incumbent who is unlikely to be defeated, having an opponent helps ensure that opposing views are aired and brought into the public discourse, even if those views are not ultimately adopted. Contested elections are good for democratic values. Public financing has been shown to increase the percentage of contested races; a 2010 study found that "both Maine and

[17] Andy Kroll, *Retiring Senator: Congress Doesn't Work Because We Fundraise Way Too Much*, MOTHER JONES (Jan. 28, 2013, 6:48 AM), http://www.motherjones.com/mojo/2013/01/tom-harkin-retire-senator-fundraise-money.

[18] Ryan Grim & Sabrina Siddiqui, *Call Time for Congress Shows How Fundraising Dominates Bleak Work Life*, HUFFINGTON POST (Jan. 8, 2013, 7:30 AM), http://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html.

Arizona have enjoyed a general decline in races with unopposed incumbents" since public financing was implemented.[19]

Public financing produces more competitive races for similar reasons. Instead of being required to ingratiate themselves to existing big funders, neophyte candidates can begin a serious campaign with only a minimal threshold of financial support. Once they are able establish a campaign, a substantial hurdle in and of itself, they can then begin to potentially compete with traditionally strong opponents and give the public a real choice. New York City Councilmember Mark Weprin commented that "The [public financing] system definitely accomplishes the goal of making it easier to have a competitive race . . . . It was harder for me but good for the district."[20]

Public financing enables ordinary citizens to seek office and compete with the established, the wealthy, and the well-connected. New York City Council Speaker Christine Quinn has noted that "the system makes it much more likely that a candidate who only has access to small donors will run for office."[21] The data bear this out. After the implementation of the New York City program, the city council included a wider variety of occupations among its ranks, including police officers, teachers, and community organizers.[22]

Nicole Gordon, the former director of the New York City Campaign Finance Board makes the important point that public financing is not aimed at displacing incumbents. Instead, the system seeks "simply the regular presence of opposition and the threat that someone might have the wherewithal to make a meaningful run for office . . . . forc[ing]

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[19] MARZINI ET AL., *supra* note 13, at 2.

[20] MIGALLY & LISS, *supra* note 2, at 19.

[21] *Id.*

[22] *Id.* at 21.

elected officials to focus on what the voters want . . . ."[23] Ultimately, public financing is about strong elections, strong representation, and strong democracy.

Public Financing is Constitutional

Public financing is undoubtedly constitutional and conforms with the First Amendment. In the U.S. Supreme Court's landmark *Buckley v. Valeo* decision, which is still the cornerstone of modern campaign finance law, the Court upheld the constitutionality of public financing, saying that such programs are "a means of eliminating the improper influence of large private contributions."[24] The Court reaffirmed the constitutionality of public financing in its 2011 *Arizona Free Enterprise* decision, saying that "governments may engage in public financing of election campaigns and that doing so can further significant governmental interests, such as the state interest in preventing corruption."[25] Public financing programs are generally constitutional and can be enacted without fear of a serious First Amendment challenge.

There are only two notable First Amendment concerns in creating a public financing program. First, participation must be voluntary for the candidates. Candidates cannot be required to participate nor can the program be so benefit-laden as to coerce candidates into participating.[26]

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[23] *Id.* at 20.

[24] Buckley v. Valeo, 424 U.S. 1, 96 (1976).

[25] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2827 (2011) (internal citation and quotation marks omitted).

[26] *See* CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUSTICE, WRITING REFORM, at IX-10 to -12 (2010), *available at* http://www.brennancenter.org/publication/writing-reform-guide-drafting-state-local-campaign-finance-laws-2010-revised-edition.

Second, funds cannot be distributed through the use of triggered supplemental funds, a mechanism in which additional public funds are disbursed in response to spending by a participating candidate's opposition. The Supreme Court struck down the use of such triggered funds in *Arizona Free Enterprise*, finding that they imposed an unconstitutional burden on opposition speech.[27] Triggered supplemental payments based on opposition spending, however, are fundamentally different from public funds used to match small contributions to a participating candidate. The latter mechanism presents none of the concerns at issue in the Arizona case — in which the Supreme Court reiterated that public financing without triggers stands on firm constitutional ground.

Structuring a Public Financing Program

Structuring a public financing program is an art, not a science, and the distribution formula and amount of funding used will vary. Several core elements, however, create the foundation for a successful program.

Fund Distribution Formula

The most important part of a public financing program is the fund distribution formula. The formula determines how much funding candidates are likely to receive by participating and therefore has a strong influence on how many candidates will participate. If public funding is insufficient, candidates will eschew the program in favor of traditional financing.

A small donor matching system, the method used in New York City, is the ideal system. Under that system, the city issues a six-to-one match of small contributions city residents make to candidates, increasing both the incentive to give and the effectiveness of

[27] *See Ariz. Free Enter.*, 131 S. Ct. at 2828-29.

the contribution. For example, if a New York resident donates $100 to a participating candidate, the city provides $600 in matching funds, for an overall value of $700. For a qualified $175 contribution, the city gives the candidate an additional six times $175, or $1,050, resulting in a total benefit of $1,225 going to the candidate as a result of the $175 contribution.[28] Contributions larger than $175 are permitted, but only the first $175 of the contribution are matched.[29]

Not all contributions are matched — only those of New York City residents are matched. Contributions from PACs, unions, out-of-district residents, lobbyists, and people doing business with the city are not matched. Consequently, even a $100 contribution by a city resident is more valuable than a $500 contribution by an out-of-state PAC.[30] This strongly incentivizes candidates to seek contributions from within the city, and therefore, be more responsive to constituent concerns

Finally, the maximum amount of funds per candidate is capped. In 2013, the per candidate cap for council candidates is $92,400.[31] Of course, the more funding that is available, the more attractive the program will be for potential candidates, but the maximum grant must be determined in the context of the relevant fiscal environment. Crucially, a public financing program need not — and indeed, should not — aim to ensure that any publicly financed candidate will be able to match the spending of his or her opponent; so long as a participating candidate has enough to get his or her message out, the program can succeed.

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[28] MIGALLY & LISS, *supra* note 2, at 4-5.

[29] *Id.*

[30] *Id.* at 5.

[31] *See* 2013 Limits, Requirements, and Public Funds, N.Y.C. CAMPAIGN FIN. BD., http://www.nyccfb.info/candidates/candidates/limits/2013.htm?sm=press_ (last visited Jan. 31, 2013)

Contribution and Expenditure Limits

In thinking about a contribution limit for participating candidates, the two primary concerns are whether the contribution limit will be equal to the portion of contributions that is matchable and whether the contribution limit will be the same for participating candidates as for nonparticipating candidates. New York City has opted to apply the same contribution limits to both participating and nonparticipating candidates, which also means that contributions to participating candidates that are larger than the matchable amount are permitted.[32] The limits that are chosen are largely a matter of discretion — there is no magic formula in this regard. Lower contribution limits for particular nonhuman entities, such as political parties, corporations, unions, PACs, lobbyists, or those holding public contracts, may also be appropriate. To address concerns about pay-to-play corruption, donations from some groups might be severely limited or even banned entirely.

One other item that is likely to influence the contribution limits decision is whether participating candidates will be subject to an expenditure limit. New York City has expenditure limits for participating candidates; for city council candidates in 2013, it is $168,000 each for the primary and general elections.[33] Because of the unlimited outside spending permitted by *Citizens United*, however, as a policy matter, it may make sense not to include an expenditure limit in a new public financing program, even if the maximum amount of public funds available is capped. By allowing participating candidates to spend unlimited amounts with lower contribution limits, it allows those candidates to fight back when faced with massive outside spending while also not compromising the goals of public financing.

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[32] *See id.*; MIGALLY & LISS, *supra* note 2, at 4 n.*.

[33] *See* 2013 Limits, Requirements, and Public Funds, *supra* note 31.

Qualification Criteria

To participate in the program, candidates should be required to satisfy qualification criteria. As is true with most aspects of public financing, the criteria should be of a Goldilocks nature—not too much of one thing or another, but "just right." In this case, the criteria should be difficult enough to satisfy such that trivial, nonserious candidates cannot easily enter the system and drain the public fisc, but not so strenuous as to discourage legitimate candidates from participating in the program.

New York City, like most other jurisdictions, has two primary qualification criteria: 1) acquiring a certain number of in-district qualifying contributions and 2) aggregating a requisite dollar amount of contributions. For the 2013 New York City council races, participating candidates must acquire 75 qualifying contributions aggregating to at least $5,000.[34] A qualifying contribution is the portion of any contribution to the candidate that is matchable under the program, which in the case of New York City is $175. There is no inherent need to only allow the matchable portions of contributions to count toward qualification, but it is a good practice because it gets candidates off on the right foot and encourages them to focus on a broad range of donors rather than a select few.

Strong Enforcement Body

A strong, nonpartisan, and independent body should administer the city's campaign finance laws. Such a body builds public confidence that the public financing system is being put to good use and that the election laws are being followed and enforced.

The regulatory body should be charged with many duties, including determining whether qualification criteria are satisfied, distributing public funds, conducting candidate debates, and enforcing the campaign finance laws of the city. The powers of the

[34] *Id.*

enforcement body should include those of the New York City Campaign Finance Board, namely "the power to audit candidates, issue subpoenas, depose witnesses, bring enforcement actions, promulgate regulations and render advisory opinions."[35]

Other Considerations

Finally, I will offer several additional suggestions that would serve to strengthen the design of a public financing system.

First, participating candidates should be required to participate in public debates. This is a very low cost addition which the public is likely to view positively. Nonparticipating candidates should be invited to the debates as well, and while they cannot be compelled to participate, they may find it strategically beneficial to participate in debates that include their publicly financed opponents. Notably, Michael Bloomberg participated in New York City's debates during each of his campaigns, even though he self-financed his campaigns.[36]

Second, monetary values should automatically be adjusted for inflation, obviating the need to periodically amend the law as the prices of campaigning increases over time, as has historically been the case.

Third, a strong disclosure system will help build public confidence in the system by helping ensure candidates appropriately use funds. Disclosure also informs the public about who is contributing to candidates' campaigns and allows for contribution limit enforcement.

Fourth and finally, after the election is over, participating candidates should be required to return funds remaining in their campaign accounts, whether public or private, up to the amount of public funds they have received. Candidates should not be permitted to

[35] MIGALLY & LISS, *supra* note 2, at 8.

[36] *Id.* at 7.

retain public dollars they have not spent on campaign expenses to build a war chest for future elections.

Common Concerns with Public Financing

I will close by addressing three commonly asserted arguments against publicly financed elections.

Cost

The first is cost — that government cannot afford public financing in fiscally difficult times. This is a misleading argument, most fundamentally because the costs of our traditionally funded campaign system — in inefficient government, in giveaways to campaign contributors, in elevating the agenda of big spenders over the public interest — dramatically outweigh the relatively minor costs involved in establishing a public financing program.

Though quantifying the precise amount saved through public financing is difficult, examples abound of government wasting taxpayer funds because of the influence of campaign contributions. In a recent and stark example, the biotechnology firm Amgem has expended about $5 million in political spending since 2007. A provision was included as part of the "fiscal cliff" deal that delayed the imposition of a Medicare price constraint on one of Amgem's drugs used by kidney dialysis patients. Because the company can sell its drug without government price controls for an additional two years (beyond the two year extension it has already received), it may cost Medicare, and therefore the American taxpayer, up to $500 million.[37] This is only an example, but it shows precisely the type of

[37] Eric Lipton & Kevin Sack, *Fiscal Footnote: Big Senate Gift to Drug Maker*, N.Y. TIMES, Jan. 19, 2013, http://www.nytimes.com/2013/01/20/us/medicare-pricing-delay-is-political-win-for-amgen-drug-maker.html. *But see* Raymond C. Jordan, Senior Vice President, Corporate Affairs, Amgen, Letter to the Editor, *A Drug Maker Objects*, N.Y. TIMES, Feb. 3, 2013, http://www.nytimes.com/2013/02/04/opinion/the-drug-maker-amgen-objects.html.

item that can appear in the endless cycle of giving and influence that flows from privately financed elections.[38]

It is also relatively simple to protect the public fisc by establishing reasonable thresholds for the maximum amount of funding available to any given candidate. Under a well-designed system, candidates should only be allowed to receive funds up to a maximum amount. This will prevent prolific fundraisers from receiving public funds above the level necessary to allow them to run effective campaigns. Additionally, the city can set an aggregate maximum amount that it is willing to contribute for public financing. If the amount candidates would receive exceeds this amount, funds can be distributed on a pro rata basis for the current year and funding of the program can be revisited for future years.

Finally, by employing a small donor matching system, the public financing system is finely calibrated so that only candidates with broad public support receive substantial funds. In a lump sum, or block-grant system, once a candidate qualifies, the candidate receives the entire public funding grant at once. Small donor matching not only prevents the maximum amount of funding from being distributed all at once, but also ensures funding is more commensurate with public support. Candidates on the outer edge of viability are unlikely to amass a large number of qualifying contributions, protecting public funds. Only candidates able to raise a significant number of small donations from qualified contributors will receive significant levels of public funding.

Forced Support of Disapproved Candidates

Opponents of public financing also frequently object to the use of taxpayer money to support candidates with whom they may disagree. But in a post-*Citizens United* world,

[38] For a more in depth discussion of this phenomenon and more examples, see generally LESSIG, *supra* note 9, at 142-66.

public financing should be thought of an investment in the infrastructure of democracy. Like paying for city office buildings, public roads, or election administration officials, it is a necessity required for the optimal functioning of representative government. Additionally, candidates of all stripes can and do use public financing systems across the country; they're not limited to one point of view. Just as tax deductions for charitable giving are designed to promote philanthropy and associational values — even if some taxpayers contribute to groups and causes that do not enjoy universal support — by increasing electoral competition, public financing can give voters more choices and ultimately improve elections and government.

Big Spenders

The third most common concern is that public financing is pointless because participating candidates can be vastly outspent by either unlimited outside spenders or extremely rich self-financed candidates, like New York City Mayor Michael Bloomberg. To be sure, when a publicly financed candidate faces a wealthy or otherwise strongly financially-backed opponent, that advantage can have an effect on the race. But elections are ultimately decided by votes, not dollars. As New York City mayoral candidate Mark Green, who faced and lost to Bloomberg in 2001, said "it is irrational to argue against a system that enables a diverse group of people to run competitive campaigns because a wealthy candidate can occasionally outspend a participating candidate. The program benefits are not undermined by the rare occurrence of a Bloomberg candidate."[39] In 2009, City Comptroller William Thompson ran for mayor as a publicly financed candidate and was outspent by Bloomberg by more than ten times, yet lost by only five points. The city can't match the spending of

[39] MIGALLY & LISS, *supra* note 2, at 22.

wealthy candidates and interests, but that doesn't mean public financing isn't worthwhile. In short, "candidates need enough money, not necessarily equal money."[40]

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In summary, enacting public financing is a vital step in the fight against big political money and corruption and the Brennan Center applauds the City of Seattle for moving forward with the process of establishing the public financing of elections.[41] I would be glad to take any questions you might have. Thank you.

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[40] *Id.*

[41] For more in information on public financing, see ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, & FRED WERTHEIMER, DEMOCRACY 21, EMPOWERING SMALL DONORS IN FEDERAL ELECTIONS (2012), *available at* http://www.brennancenter.org/publication/empowering-small-donors-federal-elections; MARZIANI ET AL., *supra* note 13; N.Y.C. CAMPAIGN FIN. BD., NEW YORKERS MAKE THEIR VOICES HEARD: A REPORT ON THE 2009 ELECTIONS (2010), *available at* http://www.nyccfb.info/PDF/per/2009_PER/2009PostElectionReport.pdf; MIGALLY & LISS, *supra* note 2. Of course, both I and my colleagues at the Brennan Center would be glad to offer any further support that may be desired.