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By Electronic Mail (judiciary@dccouncil.us)

Council of the District of Columbia
Committee on the Judiciary & Public Safety
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Testimony in Support of the Fair Elections Act of 2017

Dear Chairman Allen and Members of the Committee:

Thank you for the opportunity to submit this written testimony, and to testify at the Committee's hearing on June 29, in support of the Fair Elections Act of 2017. The Campaign Legal Center (CLC) has reviewed the Fair Elections Act closely, and we believe it is a well-crafted and constitutional piece of legislation. If enacted, the Act would establish a public financing system for D.C. election campaigns and propel the District to the national forefront in this area.

Multimillion dollar contributions from individuals to super PACs and other political entities have left many Americans feeling excluded from the democratic process. Public funding offers an alternative. Public funding can elevate the voices of all citizens in the political process, not just those who can write large checks. Although there are many important and effective reforms the Council might wish to consider, the Campaign Legal Center believes that public funding is a particularly promising option. Public funding programs can reorient our elections by facilitating dialogue between voters and our elected officials and increasing participation in the electoral process. We urge the committee to move forward with this important piece of legislation.

The Fair Elections Act of 2017 ("Act") establishes a voluntary system of public financing, the Fair Elections Program, for city office candidates.[1] The Fair Elections Program is a "hybrid" public financing system in which the city provides a participating candidate with both an initial lump-sum grant ("base amount") and matching payments for "qualified small-dollar contributions"[2] in exchange for the candidate's agreement to comply with the program's

[1] The bill would provide public funds to qualifying candidates for the offices of Mayor, Council Chairman, Councilmember, Attorney General, and State Board of Education. *See* D.C. Council Bill No. 22-0192 § 2(4) (definition of "covered office").

[2] "'Qualified small-dollar contribution' means a contribution by an individual who resides in the District of Columbia, that when aggregated with all other contributions received by a candidate from that individual within an election cycle, does not exceed: $200 for Mayor; $150 for Council Chairman and Attorney General; $100 for at-large Councilmember; $50 for ward Council Member and at-large State

requirements and strictures.[3] The Office of Campaign Finance ("OCF") is charged with administration and enforcement of the program, and must report on the program to the Mayor and City Council following each election.[4] In this testimony, CLC offers a few suggestions regarding some of the administrative provisions of the Act, provides analysis of the constitutionality of the Act, and presents a brief survey of empirical research on the benefits of public financing.

I. The Act includes important administrative provisions vital to the success of a public financing program; CLC recommends the Council consider additional provisions related to administration of the program.

Experience has shown that the success of any campaign finance system depends in large part on the agency charged with administration and enforcement of that system. The need for proper administration and enforcement is heightened in the context of public financing where public funds are distributed to campaigns. Accordingly, we believe that any program approved by the Council should include robust administrative provisions to help detect potential fraud and appropriately handle any misuse of public funds.

a. The Act's provision requiring a review of the program after every election is crucial in maintaining a viable public financing program.

The Fair Elections Act includes an important provision that would require OCF to review and evaluate the Fair Elections Program after each election.[5] Following OCF's review, the Office would provide a report to the Council and Mayor which, among other things, must include OCF's recommendations for changes to the program. This is a critical administrative provision that will help the program adapt to the changing needs of campaigns and maintain the program as a viable funding option for candidates.

New York City's public financing program includes a similar review provision.[6] The city has updated its matching funds program several times during its nearly thirty-year history to keep it up-to-date with how campaigns are run.[7] This has helped maintain the program as an attractive and widely used funding option for candidates. This is in contrast to what has happened — or

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Board of Education member; and $20 for ward State Board of Education member." D.C. Council Bill No. 22-0192 § 2(13).

[3] The Fair Elections Program is a "hybrid" in that it combines a lump-sum grant with matching funds. Most hybrid systems, however, involve provision of matching funds for the primary, followed by a grant for the general election. Among jurisdictions with public financing programs, only New Haven, Connecticut, appears to use the model under consideration here. *See New Haven Democracy Fund*, Cty. of New Haven, http://www.cityofnewhaven.com/Government/DemocracyFund.asp (last visited July 13, 2017). Because the District's elections differ from many jurisdictions' in certain practical respects — for example, because primaries are often of more consequence than general elections — CLC believes the hybrid approach presented in the bill represents a sensible approach for D.C.

[4] D.C. Council Bill No. 22-0192 § 3.

[5] *Id*. § 3(c).

[6] N.Y.C. ADMIN. CODE § 3-713.

[7] *See History of the CFB*, N.Y.C. Campaign Fin. Bd., http://www.nyccfb.info/about/history (last visited July 13, 2017).

failed to happen — with the presidential public financing system on the federal level. The presidential public financing system was a successful program with virtually every major party candidate using public funds from 1976 (the first presidential election in which the program was in place) through 2004. Unfortunately, due in part to a lack of legislative maintenance by Congress, the presidential program is no longer a viable option for presidential candidates.[8]

CLC recommends the Council keep the review provision in the bill. Additionally, as the Council considers enacting public financing in the District, we urge the Council to see enacting a program as an important first step in a longer process and not the end of the process. Once enacted, a public financing program will require evaluation, maintenance, and updates. The program will benefit from the Council's continued interest and attention.

b. CLC recommends requiring audits of participating candidates' campaigns.

The Act does not require mandatory audits of participating candidates' campaigns. CLC believes this is an important administrative safeguard and recommends adding it to the Act. Audits are essential for detecting mistakes and wrongdoing and ensuring the public's confidence in public funding systems. Many other public financing programs require audits for participating candidates.[9] Any public financing program enacted by the Council should include a similar provision. If candidates or their campaigns misuse public funds — whether intentional or not — it is important that the public knows the misuse will be caught and addressed by OCF through the audit process.

c. Considering the potential for fraud, CLC recommends that the Council carefully evaluate whether to match cash contributions.

The Act provides that qualified small-dollar contributions may be made by "personal check, credit card, *cash*, or electronic payment."[10] We recommend that the Council carefully weigh the benefits and risks of matching cash contributions.

The benefits of matching small cash contributions are clear: For residents who do not have a checking or savings account, cash or a cash equivalent may be the only means to make a small-dollar contribution. On the other hand, cash contributions pose special risks that can seriously undermine effective administration of a public financing program. In particular, cash

[8] For an in-depth history of the presidential public financing system, how the system operates, and the atrophy of the system due to congressional neglect, *see* Anthony Corrado, *Public Funding of Presidential Campaigns*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 180 (Anthony Corrado, Thomas Mann, Daniel Ortiz, Trevor Potter eds., 2005).

[9] *See, e.g.*, 26 U.S.C. §§ 9007, 9038 (requiring the FEC to conduct audits of qualified campaign expenses of every candidate after each primary matching payment period and after each presidential election); N.Y.C. ADMIN. CODE § 3-710 (empowering Campaign Finance Board to audit city candidates); S.F., CAL., CAMPAIGN & GOVERNMENTAL CODE § 1.150(a) (directing its Ethics Commission to audit all candidates who receive public financing); L.A., CAL., ADMIN. CODE § 24.41 (mandating audits for all candidates who raise or spend more than $100,000 and at least twenty percent of all other candidates at random).

[10] D.C. Council Bill No. 22-0192 § 8(2) (emphasis added).

contributions create a greater incentive for "straw donor" contributions and other types of campaign fraud due to the difficulty in tracing cash contributions and their easy transferability. For these reasons, federal law does not allow matching of cash contributions within the presidential public financing regime[11] and prohibits cash contributions in excess of $100 to any federal candidate (publicly financed or otherwise).[12] Many states, as well as the District, have analogous restrictions on cash contributions to candidates.[13] The risk is of particular note in the District, given recent campaign finance scandals involving cash and money orders.[14]

In light of such risks, CLC recommends allowing participating candidates to accept cash contributions within the lower limit established by law, but excluding cash contributions from matching eligibility, as is done on the federal level. We believe this is the right balance between facilitating unbanked citizens' participation in the financing of campaigns while maintaining appropriate safeguards.

d. CLC recommends allowing some flexibility as to the method of distributing funds to candidates.

The Fair Elections Act provides that both the base amount and matching payments must be distributed to participating candidates "through the use of an electronic funds exchange or a debit card."[15] However, CLC advises against specifying the exact methods of disbursement within the legislation. Since methods of disbursing funds are constantly evolving, there is a likelihood that debit cards and electronic funds exchanges will become obsolete within the foreseeable future.[16] CLC thus recommends giving the Board of Elections regulatory authority to set how funds will be disbursed to participating candidates. For example, the Council could revise the relevant sections to read: "Funds shall be distributed to participating candidates under this section through

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[11] *See* 11 C.F.R. § 9034.3(j) (listing "contributions of currency" among examples of "non-matchable" contributions).

[12] 52 U.S.C. § 30123.

[13] *See, e.g.*, D.C. CODE § 1–1163.33(e); CAL. GOV'T CODE § 84300; CONN. STAT. ANN. § 9-611(d); N.Y. ELEC. LAW § 14-118(2).

[14] Nikita Stewart, *Vincent Gray campaign accepted cash donations above legal limit, review shows*, WASH. POST, July 18, 2011, https://www.washingtonpost.com/local/dc-politics/vincent-gray-campaign-accepted-cash-donations-above-legal-limit-review-shows/2011/07/14/gIQAQMQpMI_story.html; Tim Craig, *Orange releases campaign contribution records linked to Thompson*, WASH. POST, Mar. 13, 2012, https://www.washingtonpost.com/blogs/dc-wire/post/orange-releases-campaign-contribution-records-linked-to-thompson/2012/03/13/gIQA3Sv29R_blog.html.

[15] D.C. Council Bill No. 22-0192 §§4(c), 5(f).

[16] For example, a federal election law enacted 40 years ago mandates that all disbursements by political committees be made via "check." 52 U.S.C. § 30102(h)(1). The Federal Election Commission, faced with political committees wishing to use new, more modern methods of disbursement, has been forced to jump through interpretative hoops to construe "check" to include "wire transfers" and "computer driven billpayer services." *See* Fed. Election Comm'n, Adv. Op. 1982-25 (interpreting "check or similar draft"); 11 C.F.R. § 102.10 (interpreting 52 U.S.C. § 30102(h)(1)) to include "wire transfers"); Fed. Election Comm'n, Adv. Op. 1993-04 ("[D]isbursements through a computer driven billpayer service, which has access to Committee funds on deposit in a qualified bank depository of the Committee, would be permitted under the Act and Commission regulations.").

a method, to be determined by the Board of Elections, that grants the candidates expeditious access to those funds." Such language would provide sufficient flexibility in the administration of funds and avoid tying the Fair Elections Program to any particular method of disbursement that could become outdated, while still furthering the interest of participating candidates in receiving their funds quickly.

II. The Supreme Court has largely upheld public financing as constitutional under the First Amendment.

After careful review of the Act, CLC believes it is entirely consistent with all relevant constitutional requirements. As discussed below, the Supreme Court has generally determined that public financing of election campaigns is constitutional under the First Amendment as long as (1) candidates' participation in the public financing system is voluntary; and (2) the system does not include "trigger" provisions that give additional public funds to participating candidates in direct response to campaign spending by non-participating candidates and outside groups. Because the Fair Elections Act neither compels participation by candidates nor contains trigger provisions, the Campaign Legal Center is confident that the legislation is constitutional under existing First Amendment case law.

Since the enactment of the first public financing programs in the 1970s, courts have consistently recognized that voluntary systems of public financing advance important governmental interests in preventing political corruption and enhancing participation in the political process. In *Buckley v. Valeo*, the U.S. Supreme Court upheld the presidential public financing regime as a constitutional means "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising."[17] The Court expressly rejected the assertion that public financing violates the First Amendment, explaining that public financing "is a congressional effort, 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."[18] The Court had little difficulty concluding that these aims were "sufficiently important" to uphold the presidential system.[19]

Following *Buckley*, a three-judge federal district court reaffirmed the constitutionality of the presidential program and repudiated the claim that public financing infringes the First Amendment rights of candidates and their supporters.[20] In *RNC v. FEC*, plaintiffs asserted the presidential system violated their First Amendment rights because the program effectively compelled participation and conditioned eligibility for public funds on candidates' acceptance of expenditure limits.[21] As in *Buckley*, the district court stressed public financing served a compelling governmental interest in preventing corruption by diminishing candidates' "reliance on large private contributions and on the implicit obligations to private contributors that may

[17] 424 U.S. 1, 91 (1976) (per curiam).
[18] *Id.* at 92-93.
[19] *Id.* at 95-96.
[20] *Republican Nat'l Committee v. FEC*, 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd mem.*, 445 U.S. 955 (1980).
[21] *Id.* at 283.

arise from such reliance without decreasing the ability of the candidates to get their message to the people."[22]

Moreover, the fact that a candidate's acceptance of public funds was completely voluntary offset any First Amendment burden imposed by the program's expenditure ceilings. "[Public financing] merely provides a presidential candidate with an additional funding alternative which he or she would not otherwise have and does not deprive the candidate of other methods of funding which may be thought to provide greater or more effective exercise of rights of communication or association than would public funding."[23] The district court proceeded to dismiss the plaintiffs' challenge, and the Supreme Court summarily affirmed.[24]

In 2011, the Supreme Court again endorsed the overall constitutionality of public financing even as it recognized that "trigger" provisions providing publicly financed candidates additional funds in response to campaign spending by non-participating candidates and independent expenditure groups impermissibly burdened political speech.[25] Despite invalidating the trigger mechanism in Arizona's Citizens Clean Elections Act, the Court reaffirmed that "governments may engage in public financing of election campaigns and that doing so can further significant governmental interest[s], such as the state interest in preventing corruption."[26] Thus, *Arizona Free Enterprise* did not "call into question the wisdom of public financing as a means of funding political candidacy," or the constitutionality of such systems.[27]

III. Evidence regarding the effects of public financing on election campaigns

A considerable body of empirical and academic research substantiates the beneficial effects of public financing on the political process. In particular, research demonstrates that public financing promotes engagement between candidates and voters, and increases electoral competitiveness.

a. Public financing promotes engagement.

By design, public financing programs encourage candidates to draw more voters into the political process. In full public financing regimes, an aspiring participant typically must demonstrate viability as a candidate by raising a certain number of small donations from constituents before becoming eligible for a grant of public funds. Accordingly, these candidates must conduct a substantial amount of direct voter outreach early in the campaign cycle to qualify for the grant. Once a participating candidate does qualify, full public funding systems continue to promote meaningful engagement since a candidate need not concentrate resources on fundraising and can instead focus on winning over voters through canvassing and other outreach efforts.

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[22] *Id.* at 284 (quotation omitted); *see also id.* ("If the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately-financed campaign.").
[23] *Id.* at 285.
[24] 445 U.S. 955 (1980).
[25] *Ariz. Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011).
[26] *Id.* at 754 (quotations and citation omitted).
[27] *See id.* at 753.

Matching funds programs similarly spur candidates to interact with more voters by magnifying the economic power of small contributions. These systems give candidates a financial incentive to reach out to a greater number of voters since the candidate will collect additional public funds for each qualifying contribution raised. Different studies of jurisdictions with public financing demonstrate these effects.

- Following Connecticut's introduction of full public financing for statewide elections in 2010, the importance of small contributions increased dramatically. In 2006, prior to the enactment of public financing, successful candidates for statewide office in Connecticut raised about 8% of their total campaign funds in contributions from individuals in amounts between $5 and $100. When public financing was introduced for statewide races in 2010, every successful candidate opted to participate in the program. In accordance with the program's qualification requirements for full funding, these candidates raised a full 100% of their campaign contributions from individuals in amounts between $5 and $100.[28]

- A 2008 survey of state legislative candidates found that candidates accepting full public funding devoted significantly more time to non-fundraising campaign activities, such as canvassing and public speaking, than candidates who did not accept public financing. Statistical analysis of the survey results showed that legislative candidates accepting full public funding spent about 11.5% more time per week on direct voter outreach than privately financed candidates.[29]

- In Minnesota, which offers partial public financing grants to legislative candidates, candidates for the state legislature raised 57% of their campaign funds from individual donors in amounts of $250 or less in 2010.[30]

- A study of New York City's public financing program found that the city's implementation of multiple-matching funds in 2001 resulted in a significant increase both in the number of small contributors, measured as donors of $250 or less, and in the proportional importance of small contributors to "competitive" candidates for City Council (*i.e.*, candidates who received at least half as many votes as the winning candidate in a primary or general election) participating in the program.[31]

- Following New York City's adoption of multiple-matching funds, examination of campaign data revealed that 92% of the city's census block groups had at least one contributor of $250 or less to a city candidate in the 2009 municipal elections. Moreover,

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[28] STATE ELECTIONS ENFORCEMENT COMM'N, CITIZENS' ELECTION PROGRAM 2010: A NOVEL SYSTEM WITH EXTRAORDINARY RESULTS 8-12, (2011), http://www.ct.gov/seec/lib/seec/publications/2010_citizens_election_program_report_final.pdf.

[29] Michael G. Miller, SUBSIDIZING DEMOCRACY: HOW PUBLIC FUNDING CHANGES ELECTIONS AND HOW IT CAN WORK IN THE FUTURE 56-62 (2013).

[30] Michael J. Malbin et al., CAMPAIGN FIN. INST., PUBLIC FINANCING OF ELECTIONS AFTER CITIZENS UNITED AND ARIZONA FREE ENTERPRISE 2 (2011).

[31] Michael J. Malbin et al., *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 ELECTION L. J. 3, 9-10 (2012).

the census block groups with at least one small donor were statistically less affluent and more racially diverse than census block groups with at least one large donor (those who gave $1,000 or more), suggesting that the city's program spurred candidates to interact with a much broader segment of the city population.[32]

- Following New York City's implementation of a 6-to-1 rate for matching funds, analysis of the city's program found that more than half of the people who made a contribution during the 2013 city elections were first-time contributors. Additionally, 76% of these first-time donors made a small contribution of $175 or less, giving strong support to the assertion that public financing brings new and diverse voices into the electoral process.[33]

b. Public financing increases electoral competitiveness

Multiple analyses of public financing programs have found these systems increase measures of electoral competitiveness, and may even weaken incumbent candidates' advantages over challengers. In particular, studies show a measurable increase in the number of contested elections in jurisdictions that have adopted public financing.

- A 2008 academic study on the impact of the Maine Clean Elections Act determined that, after taking effect, the availability of public financing immediately increased the number of candidates and decreased the margin of victory in state senate elections in 2000 and 2002—compared to 1994 through 1998—in races where a candidate accepted public funding.[34]

- Another study of Maine following its adoption of public financing concluded that, through 2004, "electoral competitiveness" had improved, as measured by percentage of incumbents facing major-party opposition, percentage of incumbents winning with less than 60% of the vote, and incumbent re-election rate.[35]

- According to data compiled by Connecticut's State Elections Enforcement Commission, the number of unopposed legislative races decreased substantially following the state's implementation of public financing, from 53 unopposed elections in 2008 to 32 in 2010. This jump in contested elections was consistent with an overall increase in the number of legislative candidates in 2010, many of whom cited the availability of public funds as a factor in their decision to seek office.[36]

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[32] *Id*. at 12-13.
[33] N.Y.C. CAMPAIGN FIN. BD., BY THE PEOPLE: THE NEW YORK CITY CAMPAIGN FINANCE PROGRAM IN THE 2013 ELECTIONS 41 (2014).
[34] Neil Malhotra, *The Impact of Public Financing of Electoral Competition: Evidence from Arizona and Maine*, 8 ST. POL. & POL'Y Q. 263, 275-77 (2008).
[35] Kenneth R. Mayer, Timothy Werner & Amanda Williams, *Do Public Funding Programs Enhance Electoral Competition?, in* THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION & AMERICAN POLITICS 245, 247-49 (Michael P. McDonald & John Samples, eds., 2006).
[36] STATE ELECTIONS ENFORCEMENT COMM'N, CITIZENS' ELECTION PROGRAM 2010: A NOVEL SYSTEM WITH EXTRAORDINARY RESULTS 6 (2011).

- The availability of public funds for candidates for Connecticut's legislature in 2008 and 2010 correlated with a general decline in candidates' margins of victory in "competitive" races, defined as those in which two major party candidates opposed each other, after 2006.

- In 2016, the National Institute for Money in State Politics issued a report on monetary competitiveness in state legislative races in 2013 and 2014. Under the report's methodology, a legislative race was considered monetarily competitive if the race's top fundraiser raised no more than twice the amount of the next-highest fundraiser. Analyzing campaign data from 47 states, the report found that only 18 percent of legislative races nationally were monetarily competitive during the 2013 and 2014 elections. However, the percentage of monetarily competitive elections was considerably higher in the five states offering public financing for legislative candidates: an average of 41 percent of legislative races in states with public financing programs for legislative candidates were monetarily competitive in 2014. Moreover, three of the five *most* monetarily competitive states had public financing systems for legislative candidates, while none of the ten *least* monetarily competitive states offered public funds to candidates for the legislature.[37]

- The National Institute for Money in State Politics report also concluded that public financing increased the number of contested legislative races. In states with public financing for legislative elections, 87% of legislative seats were contested. By comparison, only 61% of legislative seats were contested in states lacking public financing programs.[38]

[37] Zac Holden, NAT'L INST. FOR MONEY IN STATE POLITICS, 2013 AND 2014: MONETARY COMPETITIVENESS IN STATE LEGISLATIVE RACES (2016), https://www.followthemoney.org/research/institute-reports/2013-and-2014-monetary-competitiveness-in-state-legislative-races/#ftnref_3_link.
[38] *Id.*

V. Conclusion

For all of these reasons, the Campaign Legal Center supports the Fair Elections Act of 2017. We respectfully recommend that the Committee add the described administrative provisions to the Act and to take favorable action on this important piece of legislation. We appreciate the opportunity to submit these comments.

Sincerely,

/s/
Adav Noti
Senior Director of Trial Litigation & Strategy

/s/
Catherine Hinckley Kelley
Director of Policy & State Programs

/s/
Austin Graham
Policy Specialist