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## Insulating Justice: How New York City's Multiple-Matching Funds Can Help Restore the Integrity of Judicial Elections

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## COMMENT

# INSULATING JUSTICE: HOW NEW YORK CITY'S MULTIPLE-MATCHING FUNDS CAN HELP RESTORE THE INTEGRITY OF JUDICIAL ELECTIONS

DEVIN K. BRUCE\*

### ABSTRACT

*There is a growing concern that special interest groups are using campaign contributions to judicial candidates to influence the outcomes of lawsuits. So how do we reduce the influence of money on judges while still allowing judicial elections in Minnesota?*

*I argue that New York City's public finance system, which gives multiple-matching funds to individual small donors, is a possible solution. Because the system amplifies the importance of small donors and shifts reliance away from contributions by special interest groups, the multiple-matching of public funds provides an effective, practical, and constitutional means for removing any real or perceived influence from campaign contributions. Although the following Comment highlights many Minnesota-specific circumstances, the system would work in almost any state that wishes to elect their judges and justices.*

### INTRODUCTION

In 2009, the U.S. Supreme Court was presented with a unique case. A judge who received massive political contributions from a West Virginia coal company refused to recuse himself from a case involving that same company, and in fact, cast the deciding vote in overturning a \$50 million

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jury verdict awarded against the company on appeal.<sup>1</sup> The Court concluded in *Caperton v. A.T. Massey Coal Co.* that, given the “serious risk of actual bias [created] when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign,” Due Process requires that the judge recuse himself.<sup>2</sup> The rationale for the majority opinion was that because actual bias was difficult to prove, the strong appearance of bias was enough to trigger the need for recusal.<sup>3</sup>

What was really at stake in *Caperton*, and in judicial elections generally, was the public confidence in judges’ neutrality. Nearly a decade before writing the opinion in *Caperton*, Justice Anthony Kennedy articulated that concern, stating “the law commands allegiance only if it commands respect[;] [i]t commands respect only if the public thinks the judges are neutral.”<sup>4</sup> There is a way to better insulate judges from the influence of campaign contributions and guarantee fairer, more legitimate judicial elections. New York City uses multiple matching of public funds in municipal elections to achieve this purpose. This system could also work for judicial elections.

Part I of the following Comment will briefly explore the problem of disproportionate influence created by judicial elections generally, then highlight some problems with Minnesota’s current system of electing judges. Part II will propose using multiple-matching public funds, such as the system currently being used in New York City, as a solution for insulating judges from the actual or apparent influence of campaign contributors. Some may argue that the problem illustrated above could be solved simply by strengthening judicial ethics or eliminating judicial elections altogether. However, because the legal community is the primary source of judicial campaign contributions,<sup>5</sup> requiring a judge to recuse himself or herself each time a contributor comes before the court is unreasonable, and whether

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1. The \$3 million contribution to West Virginia Supreme Court of Appeals Justice Brent Benjamin accounted for sixty percent of the money spent on his candidacy and more than three times the amount that Benjamin’s own campaign had spent. JAMES SAMPLE, ADAM SKAGGS, JONATHAN BLITZER & LINDA CASEY, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE* 55–56, 60 (Charles Hall ed., 2010) (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009)), available at <http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf>.

2. *Caperton v. A.T. Massey*, 556 U.S. at 884.

3. *Id.*

4. Peter Joy, *Insulation Needed for Elected Judges*, 22 NAT’L L.J., Jan. 10, 2000, at A19 (quoting Justice Anthony Kennedy, Interview by Bill Moyers with Justices Stephen Breyer and Anthony Kennedy, available at <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html>).

5. Of the \$261,290 given to Minnesota Supreme Court candidates in 2012, the largest single industry was lawyers and lobbyists, providing \$55,322. The top five contributors overall were all law firms or lawyers and only gave to incumbent justices. Nat’l Inst. On Money in State Politics, *Minnesota 2012, Election Overview*, FOLLOW THE MONEY, [http://www.followthemoney.org/data/base/StateGlance/state\\_candidates.phtml?s=MN&y=2012&f=J](http://www.followthemoney.org/data/base/StateGlance/state_candidates.phtml?s=MN&y=2012&f=J) (last visited Aug. 21, 2014).

states should have their judges held accountable to the public is a policy question that should be addressed through thorough public debate. This Comment will then take up the pros and cons of the multiple-matching system, including the hurdles to implementing the system in Minnesota, before concluding that using the system in judicial elections provides a constitutionally sound balance between the state interests in holding judges accountable to the public while also insulating them from the potentially corrupting influence of campaign contributions.

## I. JUDICIAL ELECTIONS INHERENTLY UNDERMINE THE NOTION OF AN IMPARTIAL, APOLITICAL JUDICIARY

Though there are many problems with judicial elections, this section will discuss three of the largest. First, judicial elections leave judges vulnerable to political influence because money is needed to run an effective campaign. Second, the fact that judges receive campaign contributions from the very people that appear before their court creates a perception of bias not only among the public, but also among judges themselves. And third, that simply strengthening judicial ethics fails to address the numerous loopholes in the system and creates an imbalance between judicial candidates and sitting judges up for reelection.

### A. *Judicial elections leave judges vulnerable to political influence*

In designing the judicial system, the Framers intended for the least powerful branch to be a nonpolitical entity from which impartial judges would deliver impartial justice. Alexander Hamilton argued that judicial selection was “too great a disposition to consult popularity,” and that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.”<sup>6</sup> Yet, because the states designed their own judicial systems, many have left their state supreme court justices vulnerable to political forces by allowing their justices to be selected or retained through some form of popular election process.<sup>7</sup> In recent years, the ability of courts to remain insulated from partisan political influences has been jeopardized by the increasing influence of money in judicial elections, as well as attacks on judges and judicial power, as in the Iowa example discussed below.

Thirty-nine states elect some, if not all, of their judges, and nearly ninety percent of all state judges have participated in an election either to

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6. THE FEDERALIST NO. 78 (Alexander Hamilton).

7. Most states have a short-term appointment followed by a longer-term popular election selection process for state supreme court justices. *Methods of Judicial Selection*, AM. JUDICATURE SOC’Y, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm)? (last visited Aug. 20, 2014).

gain or retain a seat on the bench.<sup>8</sup> In describing the current state of judicial elections, former Supreme Court Justice Sandra Day O'Connor, who is now leading an effort to change state judicial elections, characterized them as "tawdry and embarrassing," relegating judges to be nothing more than "politicians in robes."<sup>9</sup> The only four states that provide some type of judicial public financing are North Carolina, Wisconsin, New Mexico, and West Virginia,<sup>10</sup> none of which utilize a multiple-match program.

The Iowa Supreme Court unanimously struck down a law prohibiting same-sex marriage in 2009.<sup>11</sup> When three of the justices went up for retention election the following year, money from groups opposed to same-sex marriage poured in from across the country.<sup>12</sup> Judicial candidates in Iowa traditionally do not raise money or campaign, so as to avoid apparent or actual bias.<sup>13</sup> Instead, independent groups were formed to support or oppose their retention. Nearly \$1 million was raised to defeat the Iowa justices, while only \$423,767 was raised in support of retention, and the justices were ousted for the first time since 1962.<sup>14</sup> Though Iowa's judicial campaigns are atypical, the underlying problem of increased politicization reaches all states where judges are elected. These elections, traditionally low-dollar races, are becoming more expensive and it is increasingly difficult for judges to rely on individual donors to run effective campaigns. Large-dollar races come with large donor special interests that seek to use sizeable campaign contributions to influence policymaking. In fact, more than twenty-seven percent of all spending in the 2011–12 judicial elections was attributed to independent groups, with the top ten spenders accounting for more than \$19.6 million of the \$56.4 million total spending.<sup>15</sup>

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8. Adam Skaggs, *Buying Justice: The Impact of Citizens United on Judicial Elections*, BRENNAN CENTER FOR JUSTICE 1, 2 (2010), available at <http://www.brennancenter.org/sites/default/files/legacy/publications/BCReportBuyingJustice.pdf?nocdn=1>.

9. John Schwartz, *Effort Begun to End Voting for Judges*, N.Y. TIMES, Dec. 23, 2009, [http://www.nytimes.com/2009/12/24/us/24judges.html?\\_](http://www.nytimes.com/2009/12/24/us/24judges.html?_).

10. *Public Financing*, JUSTICE AT STAKE, [http://www.justiceatstake.org/issues/state\\_court\\_is\\_sues/public-financing/](http://www.justiceatstake.org/issues/state_court_is_sues/public-financing/) (last visited Aug. 20, 2014).

11. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

12. Five out-of-state groups spent \$980,473 on independent expenditures to oust the justices facing retention. Linda Casey, *Independent Expenditure Campaigns in Iowa Topple Three High Court Justices*, FOLLOW THE MONEY (Jan. 10, 2011), <http://www.followthemoney.org/press/ReportView.phtml?r=440>.

13. See Grant Schulte, *Iowans Dismiss Three Justices*, THE DES MOINES REGISTER, Nov. 3, 2010, <http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/iowans-dismiss-three-justicesaccessed>.

14. Between 2000 and 2008, no money was spent on judicial elections in Iowa, including independent spending. Kevin McNellis, *Independent Spending in Iowa, 2006–2010*, FOLLOW THE MONEY (Oct. 27, 2011), <http://www.followthemoney.org/press/ReportView.phtml?r=464>.

15. ALICIA BANNON, ERIC VELASCO, LINDA CASEY & LIANNA REAGAN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2011–2012: HOW NEW WAVES OF SPECIAL INTEREST SPENDING RAISED THE STAKES FOR FAIR COURTS 2–4 (Laurie Kinney & Peter Hardin, 2013), available at <http://www.brennancenter.org/sites/default/files/publications/New%20Politics%20of%20Judicial%20Elections%202012.pdf>.

*B. Campaign contributions to judges raise serious doubts about whether judges can remain impartial*

Some surveys suggest that there is already skepticism about whether judges are truly being impartial when large donors come before the courts. In a 2001 national poll by Greenberg Quinlan Rosner, a highly regarded public-opinion-polling organization, seventy-six percent of those surveyed believed campaign contributions influenced judicial decisions.<sup>16</sup> Statewide polls have shown similar results. Nearly eighty-five percent of Wisconsin residents and ninety percent of Minnesota residents believed campaign contributions influenced judicial decision-making,<sup>17</sup> while New York residents responded in two separate polls with the same sentiment.<sup>18</sup> The most troubling poll comes from judges themselves. In a survey of about 2,400 state judges, forty-six percent of respondents believed that judicial decisions were influenced by campaign contributions, and fifty-six percent believed judges should be prohibited from presiding over cases where one of the parties has given money to their campaigns.<sup>19</sup> The entire system of justice is predicated on the belief that the system is impartial and fair. When people no longer believe that state judiciaries can deliver impartial and neutral justice, then the courts have lost their legitimacy. Evidence suggests their belief has merit.

Several studies focused on whether campaign contributions affected judicial decision-making. The Texans for Public Justice, a non-profit research organization, released a study of the petitions for review filed with the Texas Supreme Court from 1994 to 1998.<sup>20</sup> The study found that the court was four times more likely to accept a petition filed by a party, attorney, or firm that had contributed to one or more of the justices who were up for election during that time than if the petition were filed by non-contributors.<sup>21</sup> Moreover, the study found the probability that the petition would be granted review increased with the amount of the contribution; those who gave \$100,000 were seven-and-a-half times more likely to have their petitions granted than non-contributors, and those who gave \$250,000 were ten times more likely to have the petition granted than non-contributors.<sup>22</sup>

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16. Aman L. McLeod, *If at First You Don't Succeed: A Critical Review of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 509 (2005) [hereinafter *A Critical Review*] (citing Greenberg Quinlan Rosner Research, Inc., *Justice at Stake – State Judges Frequency Questionnaire*, 5 (2001)).

17. Skaggs, *supra* note 8, at 5. For actual survey used in Minnesota, see Decision Resources, Ltd., *Justice at Stake Study* (Jan. 2008), available at [http://www.justiceatstake.org/media/cms/MinnesotaJusticeatStakesurvey\\_717C253F67D9B.pdf](http://www.justiceatstake.org/media/cms/MinnesotaJusticeatStakesurvey_717C253F67D9B.pdf).

18. Skaggs, *supra* note 8, at 5.

19. *Id.* at 7.

20. McLeod, *supra* note 16, at 506.

21. *Id.*

22. *Id.*

Another study on the effects of campaign contributions on justices' voting behavior found that in Alabama, Kentucky, and Ohio, contributions from pro-plaintiff lawyers and party affiliation were important predictors of a pro-plaintiff vote.<sup>23</sup> Separately, a closer analysis of the Texas Supreme Court found a stronger correlation between contributions and judicial decisions.<sup>24</sup> Madhavi McCall, a political science professor at San Diego State University, looked at a group of cases between 1994 and 1997 and found that some of the more conservative justices were more likely to vote with plaintiffs in cases concerning procedural issues if the plaintiffs or their lawyers had made campaign contributions to those justices during the most recent election.<sup>25</sup>

Finally, a study was conducted on the effects of campaign contributions made by firms representing clients in certain civil cases before the Michigan Supreme Court.<sup>26</sup> After controlling for variables such as party affiliation and proficiency of the law firm, the results indicate that firms contributing more than opposing counsel to a justice's campaign had a greater chance of winning that justice's vote in cases regarding the acts of state and local governments.<sup>27</sup> For example, in cases involving government regulation, when there was a \$5,000 contribution advantage by firms supporting the government's position over their opponents, the probability of a Democratic justice voting with the larger contributor increased seventeen percent; for a Republican justice, the probability increased twenty-eight percent.<sup>28</sup> For cases where firms opposing the government's position donated more, the likelihood that a Democratic justice would find for the government decreased six percent, while the likelihood that a Republican justice would support the government's regulation decreased fourteen percent.<sup>29</sup> The evidence suggests there is a correlation between money and influence in judicial elections. A recent study focusing on corporate contributions shows a stronger relationship between business contributions and justices voting in the years 2010–12 compared to 1995–98.<sup>30</sup>

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23. *Id.* at 507.

24. *Id.* at 507–08.

25. *Id.*

26. McLeod, *supra* note 16, at 508 (citing Aman L. McLeod, An Excess of Participation: A Critical Examination of Judicial Elections and Their Consequences for American Democracy 43–76 (June 8, 2004) (unpublished dissertation, University of Michigan) (on file with the author)).

27. McLeod, *supra* note 16, at 505–10.

28. *Id.* at 508.

29. *Id.*

30. Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, AM. CONSTITUTION SOC'Y FOR LAW AND POLICY 14 (2013), available at [http://www.acslaw.org/ACS%20Justice%20at%20Risk%20\(FINAL\)%206\\_10\\_13.pdf](http://www.acslaw.org/ACS%20Justice%20at%20Risk%20(FINAL)%206_10_13.pdf).

The sources of campaign contributions in general are overwhelmingly from a small sector of the population and special interest groups,<sup>31</sup> such as the involvement of the legal community in judicial elections mentioned above. When a small, homogenous group of donors makes up a majority of campaign contributions, the public will perceive that results are bought and paid for by those special interests. And the studies above seem to indicate that there is at least some small truth to that perception. The judicial election process promotes this type of symbiotic relationship between money and influence because candidates need large amounts of money to run for election, and to keep the contributions coming from the “donor class,” those candidates need to produce favorable policy outcomes.

*C. Judicial ethics do not adequately address the problem of disproportionate influence*

Current judicial codes of conduct do provide some protection against disproportionate influence by judicial campaign contributors. Minnesota, for example, prohibits judges and judicial candidates from personally soliciting donations when speaking to an audience of less than twenty people,<sup>32</sup> and the candidates’ committees are prohibited from communicating the names of the donors to the judicial candidate.<sup>33</sup> Furthermore, candidates are prohibited from accepting individual contributions of, in aggregate, \$2,000 in an election year and \$500 in a nonelection year.<sup>34</sup> But these do not adequately address disproportionate influence in judicial elections.

In the Minnesota system, a judicial candidate’s committee is prohibited from communicating the names of donors with the candidate. However,

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31. Although the article focused on congressional and presidential campaigns, the proposition extends to campaigns at all levels. See Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 73 (2004).

32. MINN. CODE OF JUD. CONDUCT. R. 4.2(b)(3) (2014).

33. MINN. CODE OF JUD. CONDUCT. R. 4.4(b)(3) (2014).

34. *Judicial Campaigns and Elections: Minnesota*, AM. JUDICATURE SOC’Y [http://www.judicialselection.us/judicial\\_selection/campaigns\\_and\\_elections/campaign\\_financing.cfm?state=MN](http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state=MN) (last visited July 29, 2013). There is also some debate on the legality of Minnesota’s aggregate contribution limits after *McCutcheon v. FEC*, in which the U.S. Supreme Court struck down aggregate contribution limits for federal elections. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014). Even if the decision applies to state campaign finance laws, Minnesota’s aggregate contribution limit is much different in that it applies to the candidates rather than the contributors. MINN. STAT. § 10A.27(11) (2013). This creates a limit on how much money a candidate can receive from a certain group, such as lobbyists and political action committees, effectively creating a “first-come, first-serve” basis for having contributions accepted by a specific campaign. *Id.* On May 19, 2014, Federal District Judge Donovan Frank issued an order enjoining the Minnesota Campaign Finance and Public Disclosure Board from enforcing the “large giver” provision of the statute, which previously limited the amount of contributions that are more than half of the individual limit to twenty percent of the candidate’s total amount. Memorandum from the Minn. Campaign Fin. and Disclosure Bd. on the Campaign Finance Board’s implementation of court-ordered changes in the application of aggregate special source contribution limits released to the general public (May 20, 2014), available at <http://www.cfboard.state.mn.us/bdinfo/Memo-Seatons-v-Wiener-5-20-14.pdf>.



since the committee reports are readily available to the public via the Campaign Finance and Public Disclosure Board's website, judges can easily find out who donated to their campaign and how much they donated.<sup>35</sup>

The problem is not that there is too much money in judicial campaigns; it is that there is too much of the wrong kind of money. As former chair of the Federal Election Commission and anti-campaign finance reformist Bradley Smith posits, money is not inherently corrupting, and is in fact necessary to effectuate political speech.<sup>36</sup> To advocate for candidates and issues in a meaningful and effective way, modern campaigns require advertising, signs, literature, etc. Therefore, the goal of reducing corrupting influences on judicial officers can best be achieved by increasing the number of small, independent donors, which will dilute the influence of special interests and incentivize candidates to seek out small donors instead. The best system to accomplish this is small donor multiple-matching funds.

## II. SMALL-DONOR MULTIPLE-MATCHING FUNDS: THE NEW YORK CITY MODEL

The small-donor multiple-matching funds system, such as the one used in New York City, has proven to be a constitutionally sound option to reduce corruption or the appearance of corruption, increase reliance on individual small donor contributions, and incentivize participation from small donors and judicial candidates. Before discussing the benefits however, a detailed explanation of the New York City system and how it would work for judicial candidates is necessary.

On the heels of massive quid pro quo scandals in New York City,<sup>37</sup> a push for reform swept through City Hall. Among the many ethics reform laws was the enactment of the Campaign Finance Act.<sup>38</sup> At the heart of the Act is the voluntary Campaign Finance Program, which gives public matching funds to candidates who qualify for and agree to abide by strict spending limits. The New York City Campaign Finance Board (the Board) administers the Act.<sup>39</sup> Although some provisions of the Act focus on the

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35. *Candidate Reports of Receipts and Expenditures*, MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., <http://www.cfbreport.state.mn.us/rptViewer/viewRptsCan.php#searchType=Candidate&office=&year=14E&regnum=&letter=&name=&dist=&alpha=0> (last visited July 20, 2014).

36. See generally BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* (Princeton Univ. Press 2001) (arguing why campaign finance laws do not work and are unconstitutional).

37. Mayor Edward Koch had appointed several corrupt officials to agencies via patronage; Queens Borough President Donald Manes was caught receiving kickbacks for directing contracts and patronage jobs. See generally JACK NEWFIELD & WAYNE BARRETT, *CITY FOR SALE: ED KOCH AND THE BETRAYAL OF NEW YORK CITY* (Harper Collins 1988).

38. NEW YORK CITY, N.Y., LOCAL L. NO. 8 of 1988 § 1, available at <http://www.nycfb.info/act-program/CFACT.htm>.

39. N.Y.C., N.Y., ADMIN. CODE § 3-708 (2014), available at [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$ADC3-708\\$\\$@TXADC03-708+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=31730242+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$ADC3-708$$@TXADC03-708+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=31730242+&TARGET=VIEW).

public finance program, many provisions extend to all candidates, such as reporting requirements, contribution limits, and disclosure. The purpose of the Act is to: (1) “[p]rovide easily accessible and comprehensive information on candidates’ campaign finances,” (2) “[m]ake candidates and elected officials more responsive to New York City citizens, rather than special interests,” (3) “[r]educe the opportunity for campaign contributors to influence candidates and elected officials,” and (4) “[p]rovide a means for credible candidates who might not have access to ‘big money’ to run competitive campaigns via the matching funds program.”<sup>40</sup> The following sections will detail what the Act does, how the Board administers and enforces the Act, and why state judicial elections would benefit from such a model.

### A. *Qualifying for public funds*

To qualify for public matching funds, the candidate must meet the requirements to appear on the ballot.<sup>41</sup> The Act specifies that the public financing program extends only to candidates seeking a certain office, in this case, candidates for mayor, city council, comptroller, public advocate, and borough president.<sup>42</sup> Candidates must then agree to comply with several limitations.

First, the candidate must agree to provide the Board with any information it may request relating to the contributions or expenditures by the candidate and the candidate’s committee.<sup>43</sup> The candidate must also disclose the existence of all other committees he or she has certified that have not been terminated.<sup>44</sup> This prevents committees that were created previously by the candidate, which may not be subject to the public finance program’s limitations, from circumventing the Act’s spending and contribution limits.

Second, participating candidates must meet a qualifying threshold by acquiring contributions from a certain number of constituents, scaled to the size of the constituency.<sup>45</sup> A participating candidate for mayor, for example, needs to raise \$250,000 from 1,000 city residents, while a candidate for city council needs to raise \$5,000 from seventy-five in-district residents.<sup>46</sup> Candidates are not prohibited from accepting legal contributions from corporate PACs and unions during the qualifying period, “[b]ut only the first \$175 of any contribution from a natural person in the candidate’s district” counts

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40. *Program Overview*, N.Y.C. CAMPAIGN FINANCE BOARD (Dec. 2, 2012), [http://www.nycfb.info/act-program/program-act.aspx?sm=press\\_ap1](http://www.nycfb.info/act-program/program-act.aspx?sm=press_ap1).

41. N.Y.C., N.Y., ADMIN. CODE § 3-703(a) (2014). This prevents people who want to run for office that are ineligible (such as a candidate living outside the political district) from receiving the public funds and then being disqualified for failing to meet the residence requirement. *Id.*

42. *Id.* § 3-703(b).

43. *Id.* § 3-703(d).

44. *Id.* § 3-703(e)(i).

45. ANGELA MIGALLY & SUSAN LISS, *Small Donor Matching Funds: The NYC Election Experience* 6 (2010), [http://brennan.3cdn.net/8116be236784cc923f\\_iam6benvw.pdf](http://brennan.3cdn.net/8116be236784cc923f_iam6benvw.pdf).

46. *Id.*

towards the qualifying threshold.<sup>47</sup> So even if a mayoral candidate raises \$500,000 through various PACs, self-financing, and out-of-district residents, none of those contributions would count toward the threshold requirements. The only contributions that count toward the threshold are ones made by individual small donors living within city limits. After reaching the threshold amount and having the Board certify the candidate as qualified, the candidate must agree to contribution limits and voluntary expenditure limits.

### *B. Contribution limits for participating candidates*

Participating candidates in New York City elections are subject to contribution limits that are different from state limits. The most important difference between these contribution limits, however, is not just the amount; it is how the money is treated. Contribution limits traditionally focused on the identity of the contributor, setting one limit for individuals and others for interest groups. New York City instead focuses its contribution limitations on the office being sought. In 2013, candidates for mayor, public advocate, and comptroller could receive up to \$4,950 from individuals and political committees,<sup>48</sup> while contribution limits for candidates for borough president and City Council were set at \$3,850 and \$2,750, respectively.<sup>49</sup> In 2009, participating candidates could donate to their own campaigns, but only up to three times the maximum individual contribution for that specific office.<sup>50</sup>

There are some limits still based upon the identity of contributors. Direct contributions by corporations, limited liability companies (LLCs), limited liability partnerships (LLPs), and partnerships are prohibited.<sup>51</sup> Individuals and entities doing business with the city are limited to contributing \$400 for mayor, public advocate, and comptroller, \$320 for borough president, and \$250 for city council campaigns.<sup>52</sup> In addition to having special limits, those doing business with the city are not eligible to have their funds matched with public money.<sup>53</sup> Participating candidates also cannot receive anonymous contributions, or contributions from unregistered political committees.<sup>54</sup>

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47. *Id.*

48. *Campaign Finance Handbook*, N.Y.C. Campaign Finance Board (2009), [http://www.nycffb.info/candidates/candidates/handbooks/2009\\_Handbook.pdf](http://www.nycffb.info/candidates/candidates/handbooks/2009_Handbook.pdf) [hereinafter *Handbook*].

49. *Id.* (noting that the contribution limits are for the primary and general election combined, including any in-kind contributions).

50. *Id.* at 10.

51. *Id.* at 8.

52. *Id.* at 11.

53. *Id.*

54. *Handbook*, *supra* note 48, at 8.

### C. *Multiple-matching of individual contributions*

Multiple-matching funds are available only to candidates that have qualified and agreed to be subject to the special limitations imposed by the city's public finance system. Participation is not compulsory, and candidates may choose to run traditional, privately funded campaigns which are subject to the state limits. The benefits of running a privately funded campaign are that the candidate is not subject to the expenditure limits discussed below, and he or she may use contributions from many sources that are restricted by the public finance system, such as unregistered political committees or self-financing.<sup>55</sup>

Multiple-matching of individual contributions is a fairly straightforward process. An individual living within the district who contributes to a participating candidate will have his or her contribution matched six-to-one for the first \$175.<sup>56</sup> For example, if a participating candidate receives a \$100 contribution from an individual person living in his or her district, the city gives \$600 in public funds, making that \$100 contribution actually a \$700 contribution. The maximum match amount provided by the city is \$1,050 per person.<sup>57</sup> The total amount that a candidate may receive is also capped, limiting the amount of public funds to fifty-five percent of the total expenditure limits of each office.<sup>58</sup>

### D. *Voluntary expenditure limits and disclosure requirements*

As a condition of receiving public funds, participating candidates are limited in how much they can spend in a given election cycle. Expenditure limits are based on estimates from the Board, taking into account previous costs of running a competitive campaign for each city office.<sup>59</sup> For example, the expenditure limits for participating mayoral candidates in 2013 was \$6,426,000 per election (\$12,852,000 for the primary and general elections combined).<sup>60</sup>

In addition to limits of spending, participating candidates may only receive and spend money from donors who disclose their identity.<sup>61</sup> This includes political committees, who must register with the Board and disclose all of their donors if they wish to contribute to a publicly funded campaign.<sup>62</sup> A rigorous disclosure provision is essential to reforming judi-

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55. *Id.* at 34.

56. MIGALLY & LISS, *supra* note 45, at 1.

57. *Id.* at 5. Contributions are aggregated by individual contributor, so that if one person makes multiple contributions under the \$175 limit, public funds are not issued once the combined amount of an individual's contributions exceeds \$175.

58. *Handbook*, *supra* note 48, at 66.

59. N.Y.C., N.Y., ADMIN. CODE § 3-709, § 3-713 (2014).

60. *Id.*

61. *Id.*

62. *Id.* at 8.

cial elections to help prevent judges from presiding over cases involving major contributors, thus creating an improper conflict. As Justice Louis Brandeis famously wrote, “[s]unlight is said to be the best of disinfectants[.]”<sup>63</sup> Participating candidates are also required to participate in one public debate and be featured in the city’s voter guide.<sup>64</sup>

### *E. The Campaign Finance Board and Fund*

The Campaign Finance Act created a special fund, the New York City Campaign Finance Fund, which is segregated from the general city budget and pays for the finance system.<sup>65</sup> The Fund is financed through appropriations from the Mayor’s Executive Budget, based upon the Board’s estimates and recommendations.<sup>66</sup> The Board, which administers both the Act and the Fund, has five members, each serving staggered five-year terms.<sup>67</sup> The Mayor and the City Council Speaker appoint two members each, with the Chair being appointed by the Mayor in consultation with the Speaker.<sup>68</sup> The Board, as mandated by the New York City Charter, must conduct all of its duties in a nonpartisan fashion.<sup>69</sup> Unlike its federal counterpart, the Federal Election Commission, the Board has clear statutory authority to enforce the Act, including the power to “audit candidates, issue subpoenas, depose witnesses, bring enforcement actions, promulgate regulations, and render advisory opinions.”<sup>70</sup>

## III. ADAPTING THE MINNESOTA PUBLIC FINANCE SYSTEM FOR MULTIPLE-MATCH JUDICIAL ELECTIONS

Minnesota currently has a partial public finance system for state legislative and gubernatorial candidates, but it does not extend to judicial candidates.<sup>71</sup> The system is structured much like the New York City public finance system, requiring candidates to sign an agreement with the Minnesota Campaign Finance and Public Disclosure Board to limit spending and

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63. Louis Brandeis, *Other People’s Money, Chapter V: What Publicity Can Do*, HARPER’S WEEKLY, Dec. 20, 1913, at 10.

64. MIGALLY & LISS, *supra* note 45, at 7–8.

65. N.Y.C., N.Y., ADMIN. CODE § 3-709, § 3-713 (2014).

66. The report to the City Council includes “recommendations as to whether the provisions of this chapter governing maximum contribution amounts, thresholds for eligibility and expenditure limitations should be amended and setting forth the amount of, and reasons for, any amendments it recommends[.]” *Id.* at § 3-713(e).

67. *Id.* § 3-708(1).

68. *Id.*

69. N.Y.C., N.Y., CHARTER § 1057 (2014).

70. MIGALLY & LISS, *supra* note 45, at 8 (citing N.Y.C., N.Y., ADMIN. CODE § 3-708).

71. SUZANNE NOVAK & PAIGE AMMONS, CAMPAIGN FINANCE IN MINNESOTA BRENNAN CENTER FOR JUSTICE 14 (2007), [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_48578.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_48578.pdf).

not make independent expenditures.<sup>72</sup> The participating candidate then must raise a certain amount of money from a specified number of voters.<sup>73</sup>

The Minnesota grants are funded by an income tax check-off and an annual legislative appropriation to the general fund.<sup>74</sup> Minnesota also allows the taxpayer to choose between donating to the general fund and designating the tax dollars for use by a specific political party whose candidate is participating in the public financing system.<sup>75</sup> To incentivize voter participation, a tax rebate is provided to contributors up to \$50 per donor.<sup>76</sup>

#### A. *How the Multiple-Match System Would Work in Judicial Elections*

The proposed judicial election system would largely mimic the New York City Campaign Finance Act. States such as Minnesota with judicial elections for their supreme court justices would need to begin by reorganizing their campaign finance regulatory boards to give the boards clear statutory authority for enforcement of the Act, as well as explicitly provide that judicial campaigns are subject to the current campaign finance laws. Like the New York City Board, the state board should be able to issue subpoenas, audit candidates, issue regulations and advisory opinions, and bring enforcement actions against violators of the Act. The governor of the state and the speaker of the state House of Representatives would make appointments to the board. A strong, independent board with clear authority has been integral in New York City's successful implementation of reform.

The opposite is true of the Federal Election Commission, which is a bipartisan agency of six commissioners and requires four commissioners to vote in the affirmative to even initiate an investigation.<sup>77</sup> Since the bloc of Republican commissioners has adopted an anti-regulatory ideology, refusing to investigate apparent campaign finance violations at the recommendation of their own in-house counsel,<sup>78</sup> the New York City and Minnesota agencies are better equipped to administer and enforce the statutes and regulations.

72. *Id.*

73. *Id.*

74. The annual appropriation to the general fund is \$1.5 million. *Id.* (citing MINN. STAT. § 10A.31 (2006)).

75. *Id.*

76. PETER S. WATTSON, MINNESOTA'S CAMPAIGN FINANCE LAW pt. IIIA, available at <http://www.senate.leg.state.mn.us/departments/scr/treatise/campfin.htm>.

77. The FEC is widely criticized for being one of the most ineffective federal agencies in existence, particularly due to its even-numbered, bipartisan board and murky statutory authority to enforce its regulations. See Benjamin Weiser & Bill McAllister, *The Little Agency that Can't*, WASH. POST, Feb. 12, 1997, at A01, <http://www.washingtonpost.com/wp-srv/politics/special/campfin/stories/fec.htm>.

78. See generally Ann Ravel, Op-Ed., *How Not to Enforce Campaign Laws*, N.Y. TIMES, (Apr. 3, 2014), [http://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html?\\_r=0](http://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html?_r=0) (lamenting the faults of the current system).

Since judicial elections are generally lower profile and have fewer participating candidates, the public finance fund would be relatively smaller in comparison to the New York City fund. Total spending by judicial candidates generally does not exceed \$5 million.<sup>79</sup> The multiple-match system for judicial elections should therefore start at a two- or three-to-one match on individual contributions up to \$250. In order to get judicial candidates to participate, the cap has to be high enough to assure participating candidates that the multiple-match program will provide enough funds to run a competitive campaign. The match also has to convince individual donors that their contribution would amplify their influence enough to compete with well-financed special interest groups. By setting the bar at this level, the multiple-match program might be able to attract both candidates and donors to participate in the public system, as was achieved in New York City.

Expenditure limits will also need to be established to control the costs of the program. Strict disclosure laws are necessary to prevent not only fraud and waste, but to reduce corruption and the appearance of corruption. This may involve some companion provisions to reform judicial ethics rules on the ability of judges to preside over cases involving large contributors so as to avoid an appearance of impropriety.<sup>80</sup>

For Minnesota to implement the multiple-match system in their judicial elections, few changes would have to actually occur. First, the statutory language would need to be amended to include state judicial candidates as qualified recipients of public funds. The Campaign Finance and Public Disclosure Board already exists and has regulatory authority to conduct audits and investigations, issue subpoenas, initiate civil proceedings, and issue advisory opinions.<sup>81</sup> Second, the judicial ethics rules would not need to change for the multiple-match program to be effective. Judicial candidates are not prohibited from soliciting donors through their campaign committees, television advertisements, emails, or direct-mail pieces. In fact, candidates are only prohibited from personally soliciting donations when speaking to less than twenty people.<sup>82</sup> The candidate's committee is not bound by these restrictions and may operate as any other political campaign committee.<sup>83</sup> Additionally, the ability to discover a donor's identity would no longer be a problem, particularly if the success of a multiple-match system occurs because judicial campaigns would no longer be pursuing large donors.

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79. Sample et al., *supra* note 1, at Appendix 1.

80. To be clear, I am not proposing absolute recusal of the judge who receives large contributions from an attorney appearing before the court, rather it could be something as simple as disclosing to the attorneys and parties just as any other potential conflict of interest requires.

81. NOVAK & AMMONS, *supra* note 71, at 18–19.

82. 52 MINN. STAT. ANN. § 4.2(b)(3) (West 2009).

83. *Id.* at § 4.4.

## B. *Benefits of Small-Donor Multiple-Match of Public Funds*

Although proponents of the multiple-matching system assert many benefits, three stand out as the most important for reforming campaign finance in judicial elections. First, the system survives the constitutional pitfalls that fell most reform legislation. Second, the system reduces corrupting influence and the appearance of influence of campaign contributions. Third, and perhaps most important, the program increases participation among both small donors and candidates because access to large donors is no longer a barrier to running for office.

### 1. *It avoids the constitutional pitfalls of most campaign finance reform legislation*

Over the past thirty years, the Supreme Court has systematically narrowed the attempts to reform campaign finance laws. While never wholly rejecting the notion that legislatures can pass laws to regulate campaign spending, the Court has struck down many provisions that have crossed certain thresholds in restricting First Amendment rights.

First, the Court has expressly held that public finance schemes are generally constitutional because they are voluntary agreements with the government to abide by certain restrictions in exchange for public dollars.<sup>84</sup> In *Buckley v. Valeo*, campaign expenditures were deemed to be covered by First Amendment protections, as expenditures were equated with speech; therefore, limits on expenditures failed to be narrowly tailored enough to achieve the interest in reducing corruption or the appearance of corruption.<sup>85</sup> These First Amendment protections were extended to judicial campaigns in *Republican Party of Minnesota v. White*.<sup>86</sup>

Furthermore, public finance systems, such as clean election acts, have been held to be constitutional.<sup>87</sup> These acts are similar to New York City's in their qualification requirements, but may vary in how money is distributed from the Fund to the campaign, usually in a block grant. Problems occur when one candidate participates, and is therefore subject to the expenditure cap, and the other candidate does not participate, allowing that candidate to raise and spend unlimited amounts of money. Anticipating this fundraising disadvantage, some state public finance systems included a trig-

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84. See *Buckley v. Valeo*, 424 U.S. 1, 85–109 (1976).

85. See *id.*

86. A candidate for associate justice for the Minnesota Supreme Court challenged the announcement clause of the court's canon of judicial conduct, which prohibited a candidate from announcing his or her views on legal or political issues. See *Republican Party of Minnesota v. White*, 536 U.S. 765, 768–78 (2002).

87. "We have said 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." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011) (quoting *Buckley*, 424 U.S. at 57 n.65, 92–93, 96).



ger mechanism by which a participating candidate receives an additional dispersal of funds if the non-participating opponent outraises the participating candidate by a certain amount. In *Arizona Free Enterprise Club's Freedom PAC v. Bennett*,<sup>88</sup> the Court reviewed such a program and found that although the system itself was constitutional, the trigger unlawfully burdened speech because it forces the privately funded candidate to “‘shoulder a special and potentially significant burden’ when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy.”<sup>89</sup> The Court was specifically concerned that spending from independent groups against the participating candidate also activated the dispersal of public funds.<sup>90</sup>

The judicial campaign law modeled after New York City’s Campaign Finance Act avoids these initial pitfalls. First, the judicial multiple-matching fund is a public financing system that applies only to candidates that opt-in and agree to abide by its restrictions. It would not limit expenditures by non-participating candidates. Second, it does not suffer from the flaws of other public finance schemes. Instead of providing a block grant, and thus needing the unconstitutional trigger to allay judges’ concerns of being outspent, the multiple-match system works to supplement fundraising efforts. Although the amount distributed overall is capped, funds are continually distributed until the cap is reached.

Additionally, the proposed multiple-match system does not trigger First Amendment problems along *Citizens United* doctrine. *Citizens United* held that the provision of the Bipartisan Campaign Reform Act (BCRA) that limited independent expenditures based upon the corporate identity violated the First Amendment.<sup>91</sup> The Court, however, did not strike down the limits on how much independent groups may contribute to candidate committees.<sup>92</sup> The only prohibition on independent groups is the amount that the participating party may receive. Under *Buckley v. Valeo*, this requirement still passes constitutional muster because the proposed system is a public financing program.<sup>93</sup>

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88. *Id.*

89. *Id.* at 2809 (quoting *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 739 (2008)).

90. *See id.* at 2819–22.

91. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 343 (2010).

92. *See id.* at 365.

93. In *Buckley v. Valeo*, the Court struck down a portion of FECA that imposed expenditure limits on candidates as violating First Amendment protected speech, but upheld the expenditure limits under public financing systems because the limits were voluntary. *See* 424 U.S. at 85–109.

2. *Multiple matching of public funds reduces the reliance on large contributors and dilutes possible influence or appearance of influence from special interests*

The use of multiple-matching reduces disproportionate influence by making large contributions a smaller part, and thus less important part, of the total contributions. The system encourages participating candidates to pursue small, individual donors because the amount is multiplied six times its face value, essentially turning a small contribution into a large one. The system reduces reliance on traditional large donors and special interests by incentivizing participation of nontraditional donors through amplification. A large segment of the population believes that elections are bought by wealthy special interests,<sup>94</sup> and the financial advantage these groups have minimizes any influence that nontraditional donors might exert in a campaign.<sup>95</sup> This poses unique problems for the judiciary, in which any influence outside of the rule of law is suspect. Matching the individual small donor at a set ratio amplifies the importance of a small donation, which increases the influence and importance of the small donor. The small donor multiple-matching system therefore encourages campaigns to engage with, and rely on, small donors. As former New York City Councilman David Yassky attests:

[W]ithout the multiple match, a \$175 contribution is of marginal value to a campaign because it is simply too time intensive to seek out small donors. For example, I could make one phone call and ask for a \$2,000 check, or I could make [twenty] calls to solicit \$100 donations. The six-to-one multiple match turns \$100 into \$700, making it worth it to pursue small donors.<sup>96</sup>

A benefit of increasing the participating candidate's focus on small donors is that multiple-matching also increases the efficiency of campaign fundraising by integrating fundraising with voter outreach. Fernando Ferrer, four-term Bronx Borough President, explained that "the match makes it effective for me to raise money . . . [because] my fundraising activities do not diverge as much from my actual campaign as they would without the match. I am in contact with the same people, regular voters, both for regular campaign purposes and fundraising purposes."<sup>97</sup> This increase in efficiency can be especially beneficial to state judicial candidates, many of whom are

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94. Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OP. Q. 778, 793–94 (2005).

95. *Id.*

96. MIGALLY & LISS, *supra* note 45, at 14 (quoting Interview by Angela Migally with David Yassky, Comm'r/Chair, N.Y. City Taxi and Limousine Comm'n, in New York, N.Y. (June 25, 2010)).

97. *Id.* at 18 (quoting Affidavit of Fernando Ferrer ¶ 4, *City of New York v. N.Y. City C.F.B.*, No. 40050/01 (Feb. 12, 2001)).

lower court judges and must balance their workloads and campaign schedule.

Data supports the idea that the multiple-match system increases reliance on small donors. In 2009, participating New York City Council candidates had more than twice the number of contributors than nonparticipating candidates, with the average contribution being less than one-third the size of nonparticipating candidates.<sup>98</sup> Furthermore, individual contributions to participating candidates of \$250 or less comprised thirty-seven percent of total donations and \$1,000 or more comprised thirty-one percent of total donations.<sup>99</sup> The *Caperton* case demonstrates why it is important to shift reliance on contributions from large donors to small donors, particularly in judicial elections. The Court was not concerned with the amount raised or spent by the campaign, but with how large the contribution and the overall percentage of that contribution was to the justice's election.<sup>100</sup> By increasing the reliance on small donors, the large donors, and thus the appearance of influence, is diminished.

### 3. *Multiple-Matching Funds Increase Small Donor and Candidate Participation*

Possibly the most important facet of multiple-matching funds is having both small donors and candidates willing to participate in the multiple-matching fund program. Without enough small donors, candidates will not participate because there would not be enough funds to replace those that could be solicited from large donors in competitive races. Multiple-matching funds have been successful on both of those fronts.

Before the six-to-one multiple-match program, five times more New York City residents contributed to candidates in the 2005 city election than contributed to the 2006 state election.<sup>101</sup> The ratio increased to seven times more contributors in 2009 that contributed to City Council elections than those who contributed to state campaigns in 2006.<sup>102</sup> Although this phenomenon may be influenced by other factors, the number of donors-to-candidate pairs contributing \$175 or less also grew between 2005 and 2009 by fifty-five percent.<sup>103</sup> There is also no shortage of candidates willing to participate in the program. During the 2009 New York City primary election,

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98. *Id.* at 15.

99. The percentages come before the allocated public matching funds are added, which changes the percentage of individual contributors donating \$250 or less to sixty-four percent and \$1,000 or more to sixteen percent. Michael J. Malbin, Peter W. Bruscoe & Brendan Glavin, *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and State*, 11 ELECTION L.J. 3, 8 tbl.1 (2012).

100. *See Caperton*, 556 U.S. at 882–85.

101. Spencer Overton, *Matching Political Contributions*, 96 MINN. L. REV. 1694, 1714–15 (citing Malbin, *supra* note 99 at 12 tbl.4).

102. *Id.*

103. Malbin, Bruscoe & Glavin, *supra* note 99, at 12.

ninety-three percent participated while sixty-six percent participated in the general election.<sup>104</sup> This system helps incentivize small donors to participate because their money is amplified. Candidates will also be willing to participate because seeking out donations from individuals will be more valuable.

While some judicial candidates choose to opt out of the public financing scheme, many judges believe that public financing of judicial elections has improved judicial elections immensely. Facing the abolition of their judicial public financing system, fourteen of fifteen sitting North Carolinian appellate judges signed a letter to the State Senate requesting that the system not be altered.<sup>105</sup> The judges say that the “current system of nonpartisan judicial elections supplemented by public financing is an effective and valuable tool for protecting the public confidence in the impartiality and independence of the judiciary.”<sup>106</sup> While the judges admit that the “public financing program is not a panacea[,] . . . it gives qualified and credible judicial candidates access to funds necessary to campaign statewide without having to rely on sources that might be questioned by the public as potentially influencing judicial elections.”<sup>107</sup>

### C. *The concerns about multiple-matching funds are overstated*

There are several valid concerns that are raised in regards to implementing the multiple-matching fund program, beginning particularly with the costs. Given the current state of the economy and that even though state budgets are on the rebound, state legislatures may be reticent to spend millions of dollars to overhaul their judicial election systems to provide, as some have called it, “welfare for politicians.”<sup>108</sup>

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104. The decrease in the number of participants between the primary election and general election is attributed to the decrease in the level of competitiveness in the campaign. According to the Campaign Finance Board report, after controlling for “paper candidates,” participation rises to eighty percent. N.Y.C. CAMPAIGN FIN. BD., *NEW YORKERS MAKE THEIR VOICES HEARD* 139–40 (2010), available at [http://www.nycfb.info/PDF/per/2009\\_PER/2009PostElectionReport.pdf](http://www.nycfb.info/PDF/per/2009_PER/2009PostElectionReport.pdf).

105. Editorial, *Judges: Public Financing Has Been Tested, Works*, THE CHARLOTTE OBSERVER, June 9, 2013, <http://www.charlotteobserver.com/2013/06/09/4092249/judges-public-financing-has-been.html> [hereinafter Editorial].

106. *Id.*

107. *Id.*

108. In addition to the Cato Institute, a conservative-leaning think-tank, publishing a book titled *Welfare for Politicians?*, which criticizes public financing, New York Republican State Senator Jack Martins is leading a fight to dismantle the State’s current system. Jack M. Martins, *Join the Fight Against Welfare for Politicians*, N.Y. STATE SENATE, (Mar. 27, 2014), <http://www.nysenate.gov/webform/join-fight-against-welfare-politicians>; Art Pope, North Carolina conservative activist turned state budget director, axed the judicial public financing system accusing it of being “[c]andidate welfare.” Matea Gold, *In N.C., Conservative Donor Art Pope Sits at Heart of Government He Helped Transform*, WASH. POST, July 19, 2014, [http://www.washingtonpost.com/politics/in-nc-conservative-donor-art-pope-sits-at-heart-of-government-he-helped-transform/2014/07/19/eecce18ec-0d22-11e4-b8e5-d0de80767fc2\\_story.html](http://www.washingtonpost.com/politics/in-nc-conservative-donor-art-pope-sits-at-heart-of-government-he-helped-transform/2014/07/19/eecce18ec-0d22-11e4-b8e5-d0de80767fc2_story.html).

In actuality, implementing the multiple-matching funds for judicial elections would not be costly. The New York City multiple-matching program cost \$27 million in 2009, which is roughly \$3 per resident once every four years.<sup>109</sup> In context, “this represented 0.00011% of New York City’s budget . . . [and] New York City spends more on . . . printing than it does on the multiple-match program.”<sup>110</sup> Furthermore, the multiple-matching program is more cost-efficient than conventional full-public financing. Instead of providing a flat grant, such as the clean elections programs discussed earlier, the funds are used to supplement private funds. Public funds are only distributed when private money is contributed. While some skeptics may argue that this could be used to hold over campaign funds for future races, systems such as New York City’s give the Campaign Finance Board authority to conduct audits and require campaigns to return unused funds.

Funding the program may be the biggest hurdle in implementing the judicial public finance system in Minnesota. The elections are non-partisan, thus the money allocated from the tax check-off for use by political parties is not available. The simplest solution is to create another segregated account and check off for non-partisan judicial candidates, as well as increasing the annual legislative appropriations to ensure an adequate treasury for participating candidates. Given that the eight candidates running for state supreme court in 2012 only raised an aggregate of \$260,317,<sup>111</sup> the increase in the legislative appropriation would be very minimal. Another option would be to adopt North Carolina’s judicial public finance scheme, which not only uses the tax check-off and legislative appropriation, but also draws funding from a \$50 fee levied on active members of the state bar association.<sup>112</sup> This is a better option because it provides a stable source of funding while diffusing concerns about wasting taxpayer dollars.

Another concern is that labor unions and corporations could direct their members and employees to donate en masse to candidates that they wish to influence, thus skirting the law and using public money to do it. These organizations already do this in a sense by passing out fliers, endorsements, and making donations from political committees or treasuries. What the skeptics actually fear is that money would be distributed to the individuals, who would then contribute the money to the campaign so that it

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109. Overton, *supra* note 101, at 1722 (citing N.Y.C. CAMPAIGN FIN. BD., NEW YORKERS MAKE THEIR VOICES HEARD).

110. *Id.* (citations omitted).

111. Dollar amount does not include independent groups or contributions made to justices not up for election. See *High Court Candidates*, NAT’L INST. ON MONEY IN STATE POL., tbl. 1, [http://www.followthemoney.org/database/StateGlance/state\\_candidates.phtml?s=MN&y=2012&f=J&so=a#sorttable](http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=MN&y=2012&f=J&so=a#sorttable) (last visited Aug. 31, 2014).

112. Editorial, *supra* note 105.

could be matched. This is already illegal under current conduit laws and prosecutable as fraud.<sup>113</sup>

Finally, opponents may cite the recent New York City mayoral election, where Michael Bloomberg opted out of the system and financed his own campaign,<sup>114</sup> as an example of the inherent flaw in the system. A publicly financed candidate would not be able to raise the kind of money needed to defeat a nonparticipating candidate that has access to a massive war chest of deep-pocketed donors. The presidential public financing system faced similar issues, where candidates began opting out because more money could be raised outside the system.<sup>115</sup> The Bloomberg example does not apply here or to the problem that the multiple-matching system is trying to address, since money from one's own pockets could hardly be seen as being improperly influencing a candidate's behavior after reaching office. Funding from one's own pockets cannot be realistically said to contain a corrupting influence from special interests. Also, even when nonparticipants are funded by wealthy special interests, the multiple-match system would allow participating candidates without access to traditional large donors to run a more competitive and effective campaign.

There are substantial differences between the presidential system and the multiple-match system as well. First, as previously mentioned, the multiple-match system supplements private money raised and is not a block grant like the presidential system.<sup>116</sup> Once the fund is depleted, the candidate may continue to raise money.<sup>117</sup> Second, participation has actually increased since the system was established because it increases the incentive to go after small donors. There is no incentive to do so in the presidential public finance system. The multiple-matching system will help judicial candidates who are well-qualified but do not have access to, or would like to avoid receiving, contributions from large donors or special interests run more competitive races.

## CONCLUSION

There is no realistic way to get money out of judicial politics, nor is there an effective method for controlling the increase in campaign spending. Future reform should have a different focus, especially since the current

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113. Overton, *supra* note 101, at 1724.

114. MIGALLY & LISS, *supra* note 45, at 22.

115. Barack Obama became the first presidential candidate from a major party to opt out of both the primary and general election public financing schemes. Adam Nagourney & Jeff Zeleny, *Obama Forgoes Public Funds in First for Major Candidate*, N.Y. TIMES, June 20, 2008, <http://www.nytimes.com/2008/06/20/us/politics/20obamacnd.html>.

116. See *Public Funding of Presidential Elections*, FED. ELECTION COMM'N, <http://www.fec.gov/pages/brochures/pubfund.shtml> (last updated Apr. 2014).

117. Spending caps can be lifted if a nonparticipating candidate's and participating candidate's campaign becomes increasingly competitive. See N.Y.C., N.Y., ADMIN. CODE § 3-706(1)(a).

constitutional framework is unlikely to change. Because outside groups will continue to spend unprecedented amounts of money on judicial elections, candidates need more money to compete, not less. The special nature of the judiciary—that judges be fair and impartial—requires judicial campaign finance reform to insulate Minnesota’s judges from corrupting influences. The New York City public financing system helps judges reduce their reliance on special interest groups for large contributions to win elections by incentivizing a broader participation of small donors. This minimizes any corrupting, or perceivably corrupting influence, such as preferential treatment before the bench that relying on large contributions from special interest groups may cause.