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INTRODUCTION

In December 2013, shortly after winning election as New York City's mayor—and some weeks before he was sworn into office—Bill de Blasio announced the formation of a "star-studded" public relations campaign that would help him secure the New York state legislature's support for the funding of a centerpiece of his successful election campaign—universal pre-kindergarten for New York City's children.[1] The campaign would be run by a newly formed § 501(c)(4) tax-exempt corporation[2]—the Campaign for One New York (CONY)—which would raise donations from individuals, corporations, unions, and advocacy organizations to build public support and lobby Albany for "universal pre-K."[3] Over the next two-and-one-half years, CONY raised and spent over four million dollars, initially in support of universal pre-K, and then, after that goal was achieved, to promote another plank in the Mayor's 2013 campaign platform—changes to the city's land use

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1. *See* Jill Colvin, *Bill de Blasio Launches Star-Studded Campaign for Universal Pre-K*, OBSERVER (Dec. 19, 2013), https://observer.com/2013/12/bill-de-blasio-launches-campaign-for-universal-pre-k/.

2. Internal Revenue Code Section 501(c)(4) provides that the earnings of an entity organized not for profit but exclusively for promoting social welfare are not subject to income taxation. As "[s]eeking legislation germane to the organization's programs is a permissible means of attaining social welfare purposes . . . ," a § 501(c)(4) social welfare organization may engage in lobbying. IRS, SOCIAL WELFARE ORGANIZATIONS (2020), https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations. As "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office," a § 501(c)(4) social welfare may not engage in electioneering. *Id.* However, it "may engage in some political activities, so long as that is not its primary activity." *Id.* Despite the limits on the legal ability of § 501(c)(4) organizations to engage in campaign activities, they have become important "dark money" actors in elections. *See, e.g.*, Sheldon Whitehouse, *Dark Money and U.S. Courts: The Problem and Solutions*, 57 HARV. J. LEGIS. 273, 277 (2020).

3. *Id.*

and zoning rules to increase affordable housing.[4] The Mayor played an active role in fundraising for CONY, which received huge donations from real estate interests, unions, and other groups that did business with the City, and he participated in its activities, including attending fundraising events hosted by CONY.[5] Much of CONY's spending went to public relations and consulting firms that had ties to de Blasio's 2013 mayoral campaign and much of its public campaign activity—videos aired on television or posted to social media platforms, robocalls, and mailers—featured either the name or appearance of the Mayor or his wife.[6]

Unsurprisingly, CONY and the Mayor's fundraising for it soon became the focus of considerable adverse attention, with the media, public interest groups, and watchdog organizations expressing concern that donors were being rewarded with favorable action by the City on matters affecting them.[7] These allegations triggered investigations by law enforcement agencies, but ultimately no charges against the Mayor were brought.

The New York City Campaign Finance Board (CFB) determined that CONY's creation and distribution of communications promoting the Mayor, and the "extensive and repeated overlap" of CONY's staff with the staffs of de Blasio's 2013 and planned 2017 election campaigns, his mayoral staff "and Mr. de Blasio himself" established "coordination" between CONY and the Mayor's election activities within the meaning of the City's campaign finance law.[8] So, too, the contributions to CONY were wildly above the amounts allowed by the campaign finance law and were from sources forbidden to contribute to municipal election campaigns.[9] But the City's campaign finance law had not been broken. CONY's communications in 2014 were after the 2013 election but also "occurred more than three years before [de Blasio's] next covered election" in 2017.[10] As a result, they could not be considered part of an election regulated by the campaign finance law or the kind of campaign activity that the

4. *See* J. David Goodman, *Nonprofit Linked to Mayor de Blasio is Closing*, N.Y. TIMES (Mar. 17, 2016), https://www.nytimes.com/2016/03/18/nyregion/nonprofit-group-campaign-for-one-new-york-with-close-ties-to-mayor-de-blasio-is-closing.html.

5. *See* N.Y.C. Council Int. No. 1345-A, 5–6 (N.Y. 2016). *Accord* Laura Nahmias, *De Blasio Took Unusually Personal Role in Fundraising for Nonprofit*, POLITICO (May 26, 2016), https://www.politico.com/states/new-york/city-hall/story/2016/05/de-blasio-took-unusually-personal-role-in-fundraising-for-nonprofit-102092.

6. *Id.*

7. *See, e.g.*, Michael Grynbaum, *De Blasio Said to Seek Donations for Nonprofit to Promote His Policy Goals*, N.Y. TIMES (Mar. 10, 2015), https://www.nytimes.com/2015/03/11/nyregion/mayor-de-blasio-is-quietly-soliciting-donations-for-future-policy-battles.html?searchResultPosition=27.

8. N.Y.C. Campaign Fin. Bd. Final Determination No. 2016-1 (July 6, 2016), https://www.nyccfb.info/law/advisory-opinions/2016-1-campaign-one-new-york-and-united-affordable-nyc/ [hereinafter CFB 2016].

9. *Id.*

10. *Id.*

Board had authority to regulate.[11] By the time the Board issued its determination in July 2016, CONY had stopped soliciting contributions and had begun to wind down its operations.[12]

Similarly, the Acting U.S. Attorney for the Southern District of New York—whose investigation also encompassed donations-for-favors allegations concerning contributions to de Blasio's 2013 mayoral election campaign as well as to CONY[13]—declined to bring any federal criminal indictments. His public statement concerning the matter referred to "several circumstances in which Mayor de Blasio and others acting on his behalf solicited donations from individuals who sought official favors from the City, after which the Mayor made or directed inquiries to relevant City agencies on behalf of those donors."[14] Nonetheless, the U.S. Attorney determined not to charge the Mayor or his agents citing "the high burden of proof, the clarity of existing law, any recent changes in the law, and *the particular difficulty of proving criminal intent in corruption schemes where there is no evidence of personal profit*."[15]

As the CFB and U.S. Attorney statements underscore, CONY's activities and de Blasio's fundraising for them fell between two regulatory regimes—election law and ethics. Election law regulates the raising and spending of money for elections. But de Blasio's fundraising and CONY's spending took place shortly after one election and long before the next one. Although the favorable references to de Blasio in CONY's advertising and public communications could have had "promotional benefits" for him, the CFB reasonably concluded that those benefits "likely dissipated" during the more than three years until the next election.[16] Moreover, CONY's spending "focused on issues being discussed by a governmental body."[17] They were not "sham" issue advocacy intended to disguise campaign advertisements, but real

11. *Id.*

12. *Id.*

13. *See* William K. Rashbaum, *Federal Inquiry into Mayor de Blasio Is Said to Focus on Whether Donors Got Favors*, N.Y. TIMES (Oct. 19, 2016 https://www.nytimes.com/2016/10/19/nyregion/bill-de-blasio-donors.html.

14. Press Release, Acting U.S. Attorney Joon H. Kim Statement on the Investigation into City Hall Fundraising (Mar. 16, 2017) (on file with the U.S. Dep't of Just.).

15. *Id.* (emphasis added).

16. CFB 2016, *supra* note 8.

17. *Id.*

advocacy for an issue central to the Mayor's policy agenda.[18] CONY may have been lobbying,[19] but it was not electioneering.

By the same token, ethics regulation aims, *inter alia*, at preventing public servants from misusing their offices for personal gain, which typically means financial gain for the public servant, a family member, or a business associate. In the words of New York City's conflicts of interest law, "[n]o public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant."[20] But, as the U.S. Attorney's statement indicated, the contributions de Blasio solicited were not intended to line his pocket or pad his bank account, but were to be used to advance his public policy goals.[21]

To be sure, CONY's spending could have had both electoral and personal benefits for the Mayor. Achieving universal pre-K and changing zoning rules to promote affordable housing would demonstrate both his effectiveness in accomplishing his campaign promises and, if successful and popular as policies, would support his case for re-election. That could also be considered a "personal advantage" for any politician who wants to hold elective office. But election law rules are focused on the regulation of elections *tout court*, not the policy-making process generally, and ethics rules are targeted on the use of office for "personal profit," not policy success. The political advantages and personal gratification resulting from achieving the policies a politician has campaigned for are, in themselves, neither ethical nor electoral misconduct. Indeed, in a democratic society, one might hope that a politician would reap

18. In campaign finance law, "issue advocacy" refers to a communication that explicitly refers to a candidate—often quite harshly—but is not considered to be a campaign message and therefore not subject to campaign finance law restrictions because it avoids expressly advocating the election or defeat of that candidate. *See generally* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999). The distinction between express advocacy and issue advocacy was created by the Supreme Court, in *Buckley v. Valeo*, to protect general political speech from campaign regulation. *See* Buckley v. Valeo, 424 U.S. 1, 14, 16–19, 23, 29 (1976). As many scholars have pointed out, it is easy to create effective campaign ads that fall within the issue advocacy exemption. *See, e.g.*, Briffault, *supra*. Ads that purport to be about political issues but are really campaign advertisements have come to be known as "sham issue ads." *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 185 (2003).

19. *See* New York State Joint Comm'n. on Pub. Ethics v. Campaign for One N.Y., Inc., 37 N.Y.S.3d 851 (N.Y. Sup. Ct. 2016) (noting that CONY had registered as a lobbyist for 2014 but was resisting registering as a lobbyist for 2015).

20. N.Y.C. Charter § 2604(b)(3).

21. Of course, the contributions provided significant financial rewards for consultants and lobbyists politically allied with Mayor de Blasio. *See, e.g.*, Samar Khurshid, *The Hole in the Mayor's Money-into-Pockets Defense*, GOTHAM GAZETTE (Mar. 9, 2017), https://www.gothamgazette.com/city/6797-the-big-hole-in-the-mayor-s-money-into-pockets-defense; Thomas Kaplan, *Mayor de Blasio's Hired Guns: Private Consultants Help Shape City Hall*, N.Y. TIMES (Nov. 4, 2015), https://www.nytimes.com/2015/11/05/nyregion/mayor-de-blasios-hired-guns-private-consultants-help-shape-city-hall.html.

both electoral rewards and personal pleasure from successfully pushing for good public policies.

Yet, as the complaints about the Mayor's fundraising indicate, there is something problematic about elected officials being able to raise unlimited sums from individuals or organizations with business pending or potentially pending before them or their subordinates for programs—even socially worthy programs—that are among their top political priorities. The very same concerns that drive the regulation of both campaign contributions to candidates and gifts to public servants—that the official's decision-making will be more receptive to the interests of their donors, and the public perception that such skewed decision-making occurs—are present when elected officials or their agents solicit funds for organizations intended to promote their policy goals, particularly when they are publicly identified with its operations.

CONY and Mayor de Blasio were operating in what I call a "public integrity gap" when they sought funds for a purpose neither electoral nor personally financially beneficial to the Mayor from individuals or organizations whose interests the Mayor was in a position to favor with the powers of his office. Nor was the CONY episode unique. The last decade has witnessed the growing use by elected officials, particularly state and local chief executives, of affiliated nonprofit organizations to advance their policy goals.[22] Some of these, like CONY, are engaged in public advocacy for the executive's legislative or regulatory program. Some, like the Mayor's Fund for Los Angeles,[23] operate more like conventional charities, seeking philanthropic support for a range of social welfare programs like youth employment, assistance for the homeless, or disaster relief. Yet to the extent they involve fundraising by chief executives or their agents,[24] staffing by close associates of the chief executive, or public communications that prominently feature the name or likeness of the chief executive, they also raise the concerns of official favoritism or the appearance of such favoritism to donors that lie at the heart of public integrity law.

This Article addresses this public integrity gap and possible means for closing it. Part II examines the emergence of elected-official-affiliated nonprofits, particularly at the state and local level. Part III considers the public integrity gap revealed by these nonprofits and regulatory approaches that would

22. *See, e.g.*, Karyn Bruggeman and National Journal, *The Permanent Campaign: How Outside Money is Changing the Way Governors Do Business*, ATLANTIC (Mar. 12, 2015), https://www.theatlantic.com/politics/archive/2015/03/the-permanent-campaign-how-outside-money-is-changing-the-way-governors-do-business/434802/.

23. *See* MAYOR'S FUND FOR LOS ANGELES, https://mayorsfundla.org/home/ (last visited Mar. 8, 2021).

24. *See, e.g.*, *Eric Garcetti's Mayor's Fund Lets Companies Give Big*, L.A. TIMES (Mar. 3, 2015); Anna Sanders, *Nonprofit to Raise from Donors with Business Before City – Skirting Campaign Finance Rules in Quest for City Hall*, N.Y. DAILY NEWS (Aug. 11, 2019), https://www.nydailynews.com/news/politics/ny-eric-adams-nonprofit-donors-business-before-city-campaign-finances-20190811-ifhehrejurbi7l3pswqza6hjua-story.html.

close the gap.[25] Like our laws dealing with both elections and ethics, new regulations need to focus on promoting transparency and restricting pay-to-play donations.[26] In the aftermath of the CONY episode, New York City adopted such a law, which provides a template for other jurisdictions to consider. Part IV explores the constitutional questions that likely would be raised by regulating officeholder-affiliated nonprofits. Part V concludes.

II. THE RISE OF ELECTED-OFFICIAL-AFFILIATED NONPROFITS

A. Advocacy Organizations

The precise origins of the phenomenon of elected-official-affiliated nonprofits are uncertain. A study by the Brennan Center for Justice points to the establishment of Organizing for Action (OFA) at the start of President Obama's second term in 2013. OFA was started by veterans of the Obama White House and of his 2012 reelection campaign to promote and defend Obamacare and "other signature policies of the then-president."[27] This OFA was actually a descendant of an earlier OFA—Organizing for America—which was formed on the eve of Obama's first term in 2009. That OFA, in turn, consciously echoed an even earlier OFA—Obama for America—which was Obama's 2008 presidential campaign committee. The 2009 OFA also sought

25. In an important recent article, Professor Nicholas Stephanopoulos examines an overlapping phenomenon—what he calls "Quasi Campaign Finance." Nicholas O. Stephanopoulos, *Quasi Campaign Finance*, 70 DUKE L. J. 333 (2020). His focus is on public campaigns waged outside the electoral context by wealthy individuals, businesses, labor unions, and the nonprofits they support. In his view, because these campaigns "pay[] for political communications with voters" then even though "these communications are nonelectoral yet [they] rely on an electoral link to be effective," and so can be considered to be quasi-electioneering. *Id.* at 336. Acknowledging Professor Stephanopoulos's point that the ultimate goal of electioneering is policymaking, I am more inclined to treat electioneering and policymaking as distinct spheres, with different practices and subject to different rules, although they are closely related, and both fall within the broader domain of democratic self-governance. I am not sure how much turns on the difference between treating elected-official-affiliated nonprofits as a special case of quasi campaign finance, or as its own problem—although my approach may have the advantage of seeing the *funding* of elected-official-affiliated nonprofits through the government ethics as well as the campaign finance lens.

26. "Pay-to-play" restrictions limit the ability of an individual or entity to contribute to the campaign of an elected official who has the power to take a discretionary official action that can directly benefit the donor. *See, e.g.*, N.Y. State Republican Comm. v. SEC, 927 F.3d 499 (D.C. Cir. 2019) (sustaining SEC rule limiting political contributions of broker-dealers, who act as "placement agents" for investment advisers to help them secure contracts advising a government entity).

27. CHISUN LEE, DOUGLAS KEITH & AVA MEHTA, BRENNAN CTR. FOR JUST., ELECTED OFFICIALS, SECRET CASH: HOW POLITICIANS USE NONPROFITS TO CLOAK SPENDING AFTER ELECTION DAY 2 (2018), https://www.brennancenter.org/sites/default/files/publications/EO%20Secret%20Cash.%20Foreword.%20March%2023.pdf.

to promote Obama's legislative priorities, particularly health care reform,[28] but that OFA was a project of and housed in the Democratic National Committee, and therefore subject to the federal campaign finance laws applicable to political parties, including contribution limits and disclosure requirements.[29] The 2013 OFA was independent of the party and officially non-partisan. However, its formation was jointly announced by Obama's 2012 campaign manager and First Lady Michelle Obama,[30] and its executive director came directly from the Obama White House staff,[31] so its connection to President Obama was apparent. By formally separating from the Democratic Party and organizing as a § 501(c)(4) social welfare organization, the 2013 OFA could raise unlimited funds without having to report their sources, although it ultimately chose voluntarily to disclose its donors.[32]

At the subnational level, there were elected-official-affiliated nonprofits even before the OFA morphed into its nonprofit form. At his urging, business allies of newly-elected Governor Andrew Cuomo in late 2010 created a § 501(c)(4) organization—the Committee to Save New York (CSNY)—to raise and spend money to promote Cuomo's legislative agenda, which included balancing the state's budget through spending cuts and public employee pension reforms, rather than new taxes or tax increases.[33] The incoming governor feared the likely resistance of powerful public employee unions to his budget initiatives and urged business interests to use the CSNY to mount a public relations campaign as a counterweight to the unions. Although Cuomo was not directly engaged in the operations of or fundraising for CSNY, "a public relations and consulting firm closely tied to the new governor"[34] represented the organization. Cuomo publicly endorsed the group, which, in turn, spent millions on radio and TV advertisements promoting his agenda. The advertisements often featured and praised him by name; one was so positive that

28. Paul Steinhauser, *'Obama for America' to Morph into 'Organizing for Action'*, CNN: POLITICAL TICKER (Jan. 18, 2013, 10:37 AM), https://politicalticker.blogs.cnn.com/2013/01/18/obama-for-america-to-morph-into-organizing-for-action/.

29. *Id.*

30. *Id.*

31. Rick Cohen, *Who Does Organizing for Action Work for?*, NONPROFIT Q. (Jan. 18, 2013), https://nonprofitquarterly.org/who-does-organizing-for-action-work-for/.

32. *See Organizing for Action: Who's Giving to Obama-Linked Nonprofit?*, OPEN SECRETS https://www.opensecrets.org/news/2014/06/organizing-for-action-whos-giving-to-obama-linked-nonprofit/ (June 17, 2014). According to a study conducted by the Center for Responsive Politics and the Sunlight Foundation, "[m]any of OFA's donors . . . turn out to be major political givers with long histories of backing Democratic candidates." *Id.*

33. Charles V. Bagli, *Business Group Prepares Plan to Counter Unions*, N.Y. TIMES (Jan. 7, 2011), https://www.nytimes.com/2011/01/08/nyregion/08save.html?searchResultPosition=4.

34. Nicholas Confessore & Thomas Kaplan, *Group Takes on Albany with Cuomo's Blessing*, N.Y. TIMES (Jan. 17, 2011), https://www.nytimes.com/2011/01/18/nyregion/18cuomo.html?searchResultPosition=21.

it later wound up on the governor's website promoting his budget proposal.[35] CSNY did not directly coordinate its actions with Cuomo, but, as a committee spokesman (who had previously worked for Cuomo's father, Governor Mario Cuomo) explained, it did not have to: "[w]e know what the governor's agenda is, and we don't need a lot of guidance."[36] CSNY was the top spending lobbying organization in New York State in 2011 and 2012 before disbanding. Media accounts linked CSNY's dissolution to a new state law requiring lobbying organizations like CSNY to disclose their donors, as well as to the negative public attention to a large donation to CSNY from a gambling company, which seemed to coincide with the Governor's endorsement of an expansion of casino gambling in the state.[37]

The use of state or local elected-official-affiliated nonprofits was not limited to Democrats, or to New Yorkers. In New Jersey, Republican Governor Chris Christie benefited from the public advocacy of two different § 501(c)(4) committees. Reform Jersey Now, set up shortly after Christie took office in 2010, quickly raised over $600,000, which it spent on radio advertisements, robocalls, and mailers to promote his agenda of civil service reform, public employee pension and benefit changes, and a property tax cap.[38] Christie denied any "responsibility" for the group,[39] but he welcomed its support,[40] and was a featured speaker at one of the group's significant public events.[41] Officially nonpartisan, the group's "volunteer advisory board reads like a who's who list of the state's Republican establishment" and Christie's chief strategist during his gubernatorial campaign was the group's spokesman.[42] Donors included

35. Thomas Kaplan, *Coalition Spends Millions Promoting Cuomo's Agenda*, N.Y. TIMES (Jan. 18, 2012), https://www.nytimes.com/2012/01/19/nyregion/cuomo-gets-help-promoting-agenda-from-business-leaders.html?searchResultPosition=20.

36. Confessore & Kaplan, *supra* note 34.

37. *See, e.g.*, Casey Seiler, *Saying They Accomplished Their Goals, CSNY Disbands*, TIMES UNION (Aug. 30, 2013), https://blog.timesunion.com/capitol/archives/194179/saying-they-accomplished-their-goals-csny-disbands/; Michael Gormley, *Cuomo Lobbying Group Loses Contributions as State Ethics Law Requires Donor Disclosure*, SARATOGIAN (May 12, 2013), https://www.saratogian.com/news/cuomo-lobbying-group-loses-contributions-as-state-ethics-law-requires-donor-disclosure/article_46af8bb9-af11-52c0-8679-fb31eeef5d06.html; Editorial, *The Governor and the Committee*, N.Y. TIMES (June 5, 2012), https://www.nytimes.com/2012/06/06/opinion/gov-cuomo-and-the-committee.html?searchResultPosition=1.

38. *See, e.g.*, Lisa Fleisher, *Pro-Christie Group Reveals Political Spending*, WALL ST. J. (Dec. 29, 2010), https://www.wsj.com/articles/BL-METROB-11304; Matt Friedman, *Reform Jersey Now Has Raised $624K to Push Gov. Christie's Agenda* (Dec. 29, 2010), https://www.nj.com/news/2010/12/reform_jersey_now_raises_624k.html.

39. *See Gov. Christie States He's Not Responsible for Reform Jersey Now Group that Skirts Pay-to-Play Rules*, NJ.COM (Apr. 1, 2019), https://www.nj.com/news/2010/07/gov_chris_christie_defends_tie.html.

40. *Id.*

41. *See* Darryl Isherwood, *Christie Attends Reform Jersey Now Breakfast*, OBSERVER (June 23, 2010), https://observer.com/2010/06/christie-attends-reform-jersey-now-breakfast/.

42. Friedman, *supra* note 38.

major state contractors.[43] Christie subsequently benefited from the work of a second § 501(c)(4), the Committee for Our Children's Future, "a group set up by his college friends," that spent more than $6 million on television advertisements and other efforts to promote his agenda and salute his efforts.[44] Although Christie emphasized his independence from this group as well,[45] its communications praised him and his programs. One television advertisement "portrayed [Christie] as the adult" in state government, cleaning up the mess left by the childish legislature.[46]

Christie's Democratic successor as governor of New Jersey, Phil Murphy, has also enjoyed the backing of a well-financed supportive § 501(c)(4). Shortly after Murphy's election in 2017, three former campaign aides formed New Directions New Jersey to promote his agenda. The group, run by his former campaign manager, former campaign consultants, and former campaign pollster raised $6.8 million within its first two years. Like Cuomo's CSNY, it spent heavily during the state's budget season on television advertisements—in which Murphy starred—urging the legislature to enact Murphy's budget program; although unlike Cuomo and CSNY, Murphy and New Directions New Jersey were seeking a tax increase, not spending cuts. After considerable public controversy and embarrassment for the Governor, the committee, which was under no legal obligation to disclose its donors, finally did so, revealing that most of its money came from the State's public sector unions.[47]

And, of course, New York and New Jersey are not alone in the proliferation of elected-affiliated nonprofits. Soon after Illinois voters elected Republican Bruce Rauner governor, two former campaign aides formed "Turnaround Illinois," a § 501(c)(4) to promote his legislative agenda.[48] In

43. *Id.*

44. *See* Salvador Rizzo, *Committee Run by Christie's Friends Praises His Budget in $1.2M Ad*, NJ.COM (Mar. 30, 2019), https://www.nj.com/news/2012/07/committee_run_by_christies_fri.html.

45. *See, e.g.*, Max Pizarro, *Committee for Our Children's Future Undertakes $1.5 Million Ad Campaign*, OBSERVER (Sept. 20, 2011), https://observer.com/2011/09/committee-for-our-childrens-future-undertakes-1-5-million-ad-campaign/.

46. Erin O'Neill, *PolitiFact N.J.: Committee for Our Children's Future Runs Second Ad Promoting Chris Christie*, NJ.COM (Mar. 30, 2019), https://www.nj.com/news/2012/01/politifact_nj_committe_for_our.html.

47. *See, e.g.*, Andrew Seidman, *Dark Money Group Aligned with Gov. Phil Murphy Finally Discloses Donors*, PHILA. INQUIRER (Sept. 12, 2019), https://www.inquirer.com/news/phil-murphy-dark-money-new-direction-nj-disclose-donors-20190912.html; Charles Stile, *'Dark Money' Politics Shadows Gov. Phil Murphy Despite His Call to Make Donor Names Public*, NORTHJERSEY.COM. (Jan. 7, 2019), https://www.northjersey.com/story/news/columnists/charles-stile/2019/01/07/murphy-faces-nj-dark-money-problem-over-secret-donors/2482953002/; Matt Friedman, *Murphy: Group Run by My Campaign Advisers Should Disclose Its Donors*, POLITICO (Jan. 4, 2019), https://www.politico.com/states/new-jersey/story/2019/01/04/murphy-group-run-by-my-campaign-advisers-should-disclose-its-donors-773033.

48. *See* Monique Garcia, *Aides Form Super PAC to Promote Illinois Governor's Agenda*, GOVERNING (Apr. 21, 2015), https://www.governing.com/archive/aides-form-super-pac-to-promote-illinois-governors-agenda.html.

Maryland, Governor Larry Hogan has been actively raising money for Change Maryland, a non-profit intended "to build support for Hogan's second-term goals" including anti-tax messaging, his education plan, and redistricting reform.[49] Hogan's fundraising letter for the organization indicated that donors could expect their money to be "spent to direct the public to call, email, crowd hearing rooms, and put pressure on their legislators."[50] Unlike the other § 501(c)(4)'s discussed so far, Hogan's initiative was launched long after he had already won re-election to his second and—due to term limits—final term. For that very reason, as a state election official acknowledged, campaign finance rules did not apply to the group, despite Hogan's undisputed connection to it, because Hogan was not running for office.[51]

It would be tedious to go through every elected-official-affiliated nonprofit, even when limited just to those connected to governors. A study by the Citizens for Responsibility and Ethics in Washington (CREW) found that nineteen governors in office at the start of 2017 could be linked to thirty such supportive committees.[52] Excluding those that appear to have electoral as well as policy goals or a connection to an election campaign, the group found seventeen governors had ties to twenty-four groups created to support their policy agendas.[53] As the study found, some governors were actively and publicly involved with these supportive groups. A number of governors either raised funds for the supportive groups,[54] or were featured in advertisements paid for by the groups.[55] The organizations were typically run by friends, family members, former campaign staff, or other close associates of the governor.[56]

49. *See* Erin Cox, *Hogan Raising 'Dark' Money to Boost His Agenda, Stop Costly Education Plan*, WASH. POST (Sept. 19, 2019), https://www.washingtonpost.com/local/md-politics/hogan-raising-dark-money-to-boost-his-agenda-stop-costly-education-plan/2019/09/19/d0bba432-d324-11e9-9343-40db57cf6abd_story.html.

50. *Id.*

51. *Id*.

52. *See* MAYA GOLD, CITIZENS FOR RESP. AND ETHICS IN WASH., SHADOW GOVERNORS: HOW NONPROFITS WITH ANONYMOUS DONORS INFLUENCE POLITICS AND POLICY IN THE STATES 3 (2018).

53. *See id.* at 8, tbl.1.

54. *See, e.g.*, *id.* at 20 (fundraising by Idaho Governor Otter and his wife for Education Voters of Idaho, Inc.), 28 (Louisiana Governor Edwards spoke at fundraiser for Rebuild Louisiana), 43 (Montana Governor Bullock fundraised for Early Edge Action and spoke at a rally).

55. *See, e.g.*, *id.* at 22–23 (Illinois Governor Rauner appeared in an ad run by Turnaround Illinois); 28 (Louisiana Governor Edwards appeared in an ad released by Rebuild Louisiana in support of his budget plan).

56. *See, e.g.*, *id.* at 12 (Alabama Council for Excellent Government founded by Governor Bentley's former legal adviser), 17 (Georgia Leads, Inc. run by someone previously in Governor Deal's office), 26 (in Kansas, president of Road Map Solutions was Governor Brownback's former chief of staff, and group's director was the Governor's campaign treasurer), 30 (Governor LePage's daughter was executive director of Maine People Before Politics from 2015–2017), 39 (A New Missouri was founded by Governor Greitens' campaign finance director and campaign treasurer; executive director was the Governor's sister-in-law); 62 (principal staff of

In other words, just as in electoral politics a candidate's formal campaign committee is frequently accompanied and bolstered by the work of independent Super PACs and dark money groups not subject to the rules applicable to the candidate's personal campaign committee, many governors now pursue their policy agendas with the support of "shadow" advocacy nonprofits.[57] Two of these groups—in Alabama and Missouri—were caught up in the misconduct of their governors, who ultimately resigned.[58] But the real issue for most of these groups is not what is illegal but what is legal: the lack of mandatory disclosure of their donors and the lack of any restriction on the solicitation or receipt of contributions from individuals or organizations who have interests before the state that the governor has the authority to affect. Some of these groups have voluntarily disclosed some of their donors, but the timing and contents of disclosure have been highly variable.[59] It does not appear that any have taken any significant voluntary steps to limit the potential for pay-to-play donations.

B. Service-Delivery Charitable Organizations

The nonprofit elected-affiliated groups discussed so far are, for federal tax purposes, § 501(c)(4) "social welfare" organizations, which can engage in public advocacy, such as lobbying for or against legislative or regulatory proposals, as well as a limited amount of electoral activity. These are the organizations that elected officials have turned to when they want their allies to raise funds to mount advocacy campaigns to support their legislative agendas. Due to their ability to undertake public political advocacy with unlimited and undisclosed donations, they resemble the dark money groups that have come to play a growing role in elections. There is another category of elected-affiliated groups less focused on policy and politics that has drawn less attention and less controversy, but that still provide donors an opportunity for undue influence.

Many officials, particularly at the local level, have created § 501(c)(3) charitable nonprofits to raise contributions to supplement the kinds of programs that their governments provide. At a time when many local governments are facing financial difficulties, such organizations provide a way to tap into private philanthropy to support public services. This is the model provided by the many "mayor's funds"—such as the Mayor's Fund to Advance New York City,[60] the Mayor's Fund for Los Angeles,[61] the Mayor's Fund for Philadelphia,[62] the Long

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Tennessee Business Partnership came from public relations firm closely connected to Governor Haslam).

57. *Id.*

58. *Id.* at 3, 5, 12–14, 41–42.

59. *Id.* at 6–7.

60. *See About the Fund*, MAYOR'S FUND TO ADVANCE NEW YORK CITY, https://www1.nyc.gov/site/fund/about/about.page (last visited Mar. 7, 2021).

61. *See* MAYOR'S FUND FOR LOS ANGELES, https://mayorsfundla.org/home/ (last visited Mar. 7, 2021).

62. *See Who We Are*, THE MAYOR'S FUND FOR PHILADELPHIA, http://www.mayorsfundphila.org/about/who-we-are/ (last visited Mar. 7, 2021).

Beach, California's Mayor's Fund for Education,[63] the Mayor's Fund for Las Vegas Life,[64] and similar organizations around the country.[65] These Funds typically operate as public-private hybrids, with connections to both city government and the private sector. The degree of direct mayoral involvement in fundraising for and the operations of these funds may vary. Some are housed in the mayor's office and receive staff or office spaces from city government, while others are under the direction of relatively independent boards with just a limited number of mayoral appointees. In New York City, the Mayor's Fund has a place on the City's website; the chair of the board of directors is the mayor's spouse,[66] and the mayor has been publicly associated with its activity.[67] In Los Angeles, Mayor Eric Garcetti "frequently namechecks the Mayor's Fund for Los Angeles, which has assumed a major role in the city's response to the coronavirus pandemic."[68]

These funds no doubt often do valuable work. By August 2020, the Los Angeles Fund had provided $56 million in aid for COVID relief projects, including home meal delivery for seniors, childcare for hospital workers, and shelter and services for domestic violence survivors.[69] The New York City

63. *See About* MAYOR'S FUND FOR EDUCATION, http://mayorsfundfored.org/ (last visited Mar. 7, 2021).

64. *See About the Fund*, MAYOR'S FUND FOR LAS VEGAS LIFE, https://mayorsfundlv.org/About-the-Fund (last visited Mar. 7, 2021).

65. Many such "funds" operate on a sub-municipal basis, created by and supporting a specific local agency. In New York City, for example, there is a Fund for Public Housing, created in 2016 to provide financial support for the New York City Housing Authority. *See About Us*, FUND FOR PUBLIC HOUSING, https://www.fundforpublichousing.org/(last visited Mar. 7, 2021); a Fund for Public Schools, to support the City's Department of Education. *See Our Mission*, FUND FOR PUBLIC SCHOOLS, https://www.fundforpublicschools.org/mission (last visited Mar. 7, 2021); and, at the borough-level, the One Brooklyn Fund created by the borough president of Brooklyn to "promote[] collaboration and engagement among Brooklyn's diverse communities through events, programs, and services." *See* ONE BROOKLYN FUND INC., https://onebrooklynfund.org/ (last visited Mar. 7, 2021). Local elected officials may be closely affiliated with these entities as well. *See, e.g.*, Sanders, *supra* note 24 (skirting campaign finance rules in quest for City Hall).

66. *See Board Leadership*, MAYOR'S FUND TO ADVANCE NEW YORK CITY, https://www1.nyc.gov/site/fund/about/board-leadership.page (last visited Mar. 7, 2021).

67. *See* Laura Nahmias, *Mayor's Fund Raised $25M in Fiscal 2016*, POLITICO, https://www.politico.com/states/new-york/city-hall/story/2016/07/mayors-fund-raised-25-million-in-2016-fiscal-year-104078 (July 21, 2016, 5:32 AM).

68. Aaron Mendelson, *$42 Million and Counting: Mayor's Nonprofit Plays Major Role in Pandemic Response*, LAIST, https://laist.com/2020/05/11/mayors-fund-eric-garcetti-donors-database.php (May 11, 2020, 6:00 AM). *Accord* City News Service, *Two LA COVID-19 Initiatives Reach Funding Goals, Mayor Says*, NBC LOS ANGELES, https://www.nbclosangeles.com/news/local/two-la-covid-19-initiatives-reach-funding-goals-mayor-says/2492518/ (Dec. 23, 2020).

69. *See* City News Service, *LA Mayor's Fund Raises $56 Million to Help Those Hit by Coronavirus Outbreak*, LOS ANGELES DAILY NEWS, https://www.dailynews.com/2020/08/12/la-mayors-fund-raises-56-million-to-help-those-hit-by-coronavirus-outbreak (Aug. 12, 2020, 12:18 PM).

Fund has supported mental health services and youth employment;[70] the Las Vegas Fund has taken on a range of initiatives including homelessness, youth sports, and public art.[71] As § 501(c)(3) organizations they can engage in only a limited amount of public advocacy and no electioneering, so they likely provide less of a boost to the mayor's public image or political success. Yet, to the extent that the mayor is closely associated with the fund, and especially if the mayor solicits contributions for it,[72] donations to these funds—which typically are not subject to any dollar limits or to public donor disclosure requirements—can be another way individuals or organizations that do business with a city can establish a positive relationship with a mayor. As one donor to the Los Angeles mayor's fund explained, not only did he support the fund's programmatic goals, but "he also saw the gift as a way to forge bonds with Garcetti."[73] Even if the fund doesn't undertake quasi-electoral campaigns in support of a mayor's policy initiatives, any favorable publicity that accompanies a fund's work can benefit the mayor's popularity and political fortune as well. As a result, even § 501(c)(3) funds, notwithstanding the good work they often do, can be a source of potential pay-to-play concern.[74]

III. CLOSING THE PUBLIC INTEGRITY GAP

A. *Gifts, Campaign Contributions, and Elected-Affiliated Organizations*

A central concern of government ethics is the provision of a private benefit to a public servant in exchange for an official action that benefits the donor. An exchange that involves an intentional quid pro quo can be prosecuted as a bribe. Many ethics laws go beyond bribery to proscribe or limit gifts in which there is no actual quid pro quo due to the real possibility that gifts may subtly influence the public servant's official decision-making, or appear to do so. Gifts provided even without strings attached may cause a grateful public servant to be more favorably disposed to his or her benefactor's interest in a government action the public servant can affect. So, too, the acceptance of gifts or comparable benefits can create an appearance of favoritism that undermines public confidence in

70. *See About the Fund*, MAYOR'S FUND TO ADVANCE NEW YORK CITY, *supra* note 60.

71. *See Priorities & Initiatives*, MAYOR'S FUND FOR LAS VEGAS LIFE, https://mayorsfundlv.org/Programs-Initiatives (last visited Mar. 7, 2021).

72. *See* Aaron Mendelson & Mary Plummer, *'A Tricky Area of Philanthropy': LA Mayor Solicits Millions for His Favored Causes*, S. CA. PUB. RADIO, https://www.scpr.org/news/2017/08/23/74917/la-mayor-garcetti-behested-payments/, (Aug. 23, 2017).

73. *See* Peter Jamison et al., *Eric Garcetti's Mayor's Fund Lets Companies Give Big*, L.A. TIMES, https://www.latimes.com/local/cityhall/la-me-0303-garcetti-fund-20150303-story.html (Mar. 3, 2015).

74. *See* Rich Calder, *Feds Probe Eric Adams' Non-Profit Over Donor Favor Claims*, N.Y. POST, https://nypost.com/2016/08/08/feds-probe-eric-adams-non-profit-over-donor-favor-claims/ (Aug. 8, 2016) (federal investigators probing fundraising activities of the One Brooklyn Fund, Inc., created by Brooklyn Borough President Eric Adams to advance his summer concert series and other projects).

government. By prohibiting gifts in circumstances in which a reasonable person would infer that the gift could influence official decision-making, ethics rules can deter both actual corruption and undue influence short of criminal misconduct, and thereby promote the integrity of government and public confidence in government integrity.

Campaign contributions are the exception that prove the rule. They clearly provide a benefit to the candidate who receives them who, if he or she wins office, will be in a position to reward the donor. That may very well be a reason for the donation. But in a democracy in which campaigns cost money, there is minimal to no public funding of campaigns, and elective office needs to be open to candidates who do not have the means to fund their campaigns out of their own resources, campaign contributions are essential, and protected by the First Amendment.[75] The tension between banning gifts and permitting campaign contributions is to some degree mitigated by campaign finance laws that require campaign contributions to be: (i) donated to a legally distinct campaign committee; (ii) publicly reported and disclosed; and (iii) limited in amount. Some jurisdictions go further and adopt so-called "pay-to-play" restrictions that more tightly limit or bar contributions from individuals or entities that do business or seek to do business with, or are subject to regulation by, the office that the candidate is seeking. In addition, to prevent campaign contributions from subverting a gift ban, campaign finance laws typically bar the "personal use" of campaign funds.[76]

As described in Part II, contributions to elected-official-affiliated nonprofits fall into a gap between ethics regulation and campaign finance law. Gift bans focus on the provision of "things of value," which, even when broadly defined, are still limited to things that provide some kind of pecuniary benefit to the official, a family member, or someone comparably associated with the official. Contributions to affiliated committees surely involve things of value but they are not given "to" the official, but to a legally separate entity for policy advocacy or charitable purpose. If a particular donation winds up in the official's bank account (or pays for a luxury vacation), that could be a violation of the jurisdiction's ethics law. But there is likely no problem under a traditional ethics law with donations given and used for advocacy or charitable purposes by organizations affiliated with the official.

So, too, these donations do not support electioneering. The policy advocacy nonprofits are often created and initially funded after an election, when the official is preparing to, or has just taken office, and sees the need for a well-funded public campaign to overcome the political obstacles to the enactment of his or her legislative agenda. Others may be used by a

75. A campaign contribution tied to an express quid pro quo for favorable government action can be prosecuted as a bribe. *See* McCormick v. United States, 500 U.S. 257, 273–74 (1991); *cf.* United States v. Ring, 706 F.3d 460 (D.C. Cir. 2013) (campaign contribution found to be illegal gratuity).

76. *See, e.g.*, 52 U.S.C. § 30114(b).

term-limited incumbent unable to seek re-election.[77] As for the charitable service-delivery nonprofits, federal tax law requires them to avoid political advocacy work.

In some states, lobbying laws may require the public advocacy committees to report their expenditures. But some jurisdictions define lobbying narrowly to exclude the kind of "grassroots lobbying"—radio, television, social media advertising, mailers, and robocalls—that target the general public rather than the legislature directly.[78] In those jurisdictions, the advocacy committee would likely be exempt from reporting requirements. Moreover, even in jurisdictions whose lobbying laws cover grassroots advocacy, disclosure requirements are often limited to just the reporting of expenditures. A few jurisdictions go further and require the disclosure of the identities of the individuals or organizations funding the lobbying campaign and the sums that the donors provided, but many do not.[79] In those situations, the public knows only that some group with an anodyne name like the "committee for good government" funded the advocacy activity, but they have no idea who is funding the "committee for good government." Moreover, even when lobbying laws provide some transparency concerning the size and sources of the donations funding the public advocacy lobbying, they do not impose limits, even on donations from individuals or organizations that do business with the government lobbied.[80] As a result, lobbying laws at best fill the public integrity only partially. Laws that require both donor transparency and limits on potential pay-to-play donations are necessary to close the integrity gap.

B. Establishing Transparency and Contribution Limits for Elected-Official-Affiliated Organizations

New York City, which acted in the aftermath of the CONY episode, provides one model of how to do this. The New York measure, adopted by the City Council in late 2016 and modified in 2019, has three elements.

First, any "organization[] affiliated with an elected official" must annually submit a publicly available report about itself, indicating the names of its principal officers and board members, the elected official with which it is affiliated, and the names of any individuals or entities that donated $5,000 or more to the organization in the previous calendar year.[81] There is a potentially very open-ended exception from donor disclosure for "a donor who does not wish to have their identity made public."[82] For such $5,000+ donors, only the dates and amounts of their donations need be disclosed. In addition, if the reporting entity provides persuasive evidence that disclosure would "cause

77. Cox, *supra* note 49.

78. *See, e g.*, Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 ELEC. L.J. 160, 186–90 (2014).

79. *Id.*

80. *Id.* at 165.

81. *See* N.Y.C. ADMIN. CODE § 3-902(b) (2021).

82. *Id.* at § 3-902(b)(7).

harm, threats, harassment, or reprisal[] to the donor, or to individuals or property affiliated with the donor," the name of such a donor shall not be publicly disclosed.[83] It is not clear if the anti-harassment exception is intended to limit the bases for a donor or entity to seek exemption from disclosure or whether the law provides two separate bases for exceptions from disclosure.[84] If the latter, then the donor disclosure "requirement" begins to look voluntary.

The real bite of the law is its second part, which addresses so called "restricted" organizations, defined as "organizations affiliated with an elected official" that "spend or reasonably expect to spend at least 10% of the expenditures in the current or next calendar year on the production or dissemination of elected official communications."[85] "Elected official communications," in turn, consist of communications via broadcast, print, telephone, or paid internet advertising that include the name, voice, or likeness of the elected official with which the organization is affiliated.[86] These "restricted organizations" may not accept donations in excess of $400 a year from any person who does business with the City, and may accept donations only from natural persons.[87] These restrictions track the "doing business" restrictions on donations to candidates for City office under the City's campaign finance law. The City maintains a database of organizations "doing business" with the City, which determines which donors are subject to the restriction.

Third, the law defines what it means for an organization to be "affiliated" with the elected official. For some organizations that will be relatively straightforward. If an organization is incorporated as the "mayor's fund" it is not a great stretch to determine that it is affiliated with the mayor. But for many organizations—like CONY—the relationship is less formal. The New York City law focuses on whether a city elected official or an agent or appointee of the elected official "exercises control" over the organization. It then sets out a multi-factor test for the City's Conflicts of Interest Board (COIB) to apply to determine whether the official exercises control. These include: whether the organization was created by the elected official or an agent of the official, or by an individual who was previously employed by, or was a paid political consultant of, the elected official; whether the organization is chaired by the elected official or an agent of the official; "the degree of involvement or direction by the elected official in such organization's policies, operations, and activities," and "such other factors" as the COIB shall determine by rule.[88]

83. *Id*. at § 3-902(c)

84. The relevant City Council committee report is silent on this point. GENERAL COUNSEL & COMM. ON STANDARDS & ETHICS, COUNCIL OF THE CITY OF N.Y., REPORT INT. NO. 1272 (N.Y.C. 2018).

85. N.Y.C. ADMIN. CODE § 3-902(a).

86. *Id.* at § 3-901. The definition exempts communications with journalists or news media staff; communications to the members of the organizations; or communications in connection with a debate, town hall or forum in which more than one candidate or proponents of two or more sides of an issue are invited to participate.

87. *Id.* at § 3-903.

88. *Id.* at § 3-901.

This is, of course, extremely open-ended, and mixes relatively objective factors like whether the organization was created by former staff of or political consultants to the elected official, with the more indeterminate "degree of involvement" of the elected official in the organization's policies, operations, and activities. To be sure, the elected official's "degree of involvement" is a crucial factor. But it is hard to assess—both quantitatively (how much is the official involved?) and qualitatively (how much involvement is needed to establish affiliation?)—in tandem with the other factors.

The definition of "affiliation" would benefit from more concreteness. The personnel used to establish an affiliation between the elected official and the organization could be expanded to include members of the elected official's family. The definition of former employees could be clarified to confirm they include employees from both the elected official's government position and his or her former election campaign.[89] Looking to the federal regulations that define whether a political committee is coordinating its efforts with a campaign committee, the law could also treat as evidence of affiliation the sharing of consultants or commercial vendors between the advocacy committee and any campaign committee of the elected official.[90]

"Degree of involvement" could also be concretized by treating solicitation of funds for the organization, speaking at fundraising events even if the elected official avoids "making the ask," or otherwise promoting donations to the organization as presumptive evidence of affiliation. Similarly—borrowing again from the federal rules defining coordination[91]—if the elected official is involved in the advocacy organization's decisions concerning the content, means, timing, or audience for its public communications that should also require a finding of affiliation.

The Brennan Center for Justice has put forward a slightly different template for the determination of affiliation. It proposes a two-part test to determine whether an organization is affiliated with an elected official: (i) whether there is a "structural affiliation" based on factors similar to the ones cited by the New York City law, and (ii) whether the organization spends a "significant portion of its resources (exact amounts would vary by jurisdiction) on public communications containing the name or image of that elected official."[92] In other words, public communications by the organization featuring an elected official would be part of the definition of whether the organization is affiliated with the elected official, not, as in New York, the basis for a restriction on donations to the organization. That has the advantage, relative to the New York City law, of being more determinate. Unless the organization is spending more than a certain amount—or, *pace* the New York law, a percentage of its expenditures—on public communications featuring the elected official, the question of whether the organization is affiliated with an

89. *See, e.g.*, N.Y. ELEC. L. § 14-701(1)(d); CAL. CODE REGS. tit. 2, § 18225.7(d).

90. *See* 11 C.F.R. § 109.21.

91. *Id.*

92. *See* LEE ET AL., *supra* note 27, at 13.

elected official would not even arise. However, there would still be some indeterminacy in assessing "structural affiliation," which, as with New York's law,[93] relies on the relatively open-ended concept of whether the elected official (or current or recent employee or advisor, or family member) "participates in directing the work of the organization."[94]

Moreover, by eliminating coverage of organizations which, even if structurally affiliated, do not devote significant resources to featuring the elected official, the Brennan Center most likely exempts most of the "mayor's funds" and similar service-delivery affiliates. That is consistent with the Brennan Center's regulatory call for both disclosure and pay-to-play contribution restrictions;[95] the New York City law requires only disclosure for—and imposes no restrictions on donations to—organizations that do not engage in advocacy featuring an elected official.

Although advocacy organizations probably present the greater danger of serving as avenues for undue influence with elected officials, that danger may also arise from donations to service-delivery charitable organizations affiliated with elected officials or their appointees. Elected officials may engage in fundraising for these organizations and have a stake in their success even if the organizations do not engage in public advocacy. As a result, New York's approach of defining affiliation solely based on the existence of connections between the elected official—or an agent or appointee of the official—and the organization seems the better approach. Moreover, it may often be easier to find the kind of relationship that indicates affiliation with many of the service delivery nonprofits labeled "mayor's fund" than for the advocacy nonprofits. As previously noted, many of the service delivery nonprofits have some formal tie to local government, whether in their name or through the appointment of board members or staff. Thus, New York's definition of affiliated organization and its requirement for the disclosure of larger donations is the better one.

On the other hand, the provision of the New York City law that appears to provide an easy opt-out from disclosure may undermine the transparency requirement for non-advocacy affiliates. Exclusion from the disclosure of the identities of larger donors should be limited to those that can make a showing of a well-founded concern of harassment or reprisal, as the other provision of the New York law authorizes.

But the benefit of the New York law is more in its approach than its specifics. Service-delivery affiliated organizations should be required to disclose their large donors. Advocacy nonprofits—defined by their featuring an elected official in a significant fraction of their public communications—should be required to disclose their donors *and* be barred from accepting large donations from individuals or organizations that do business or seek to do business with the elected official's government. Affiliation can be established by a mix of formal and informal connections between the elected official and

93. N.Y.C. ADMIN. CODE § 3-901.

94. LEE ET AL., *supra* note 27, at 12.

95. *Id.* at 15–17.

the organization, including: the role of family members or past or present staff or political aides or consultants in creating or running the organization; fundraising and related activity by the elected official for the organization; and involvement of the elected official in the development of the organization's public advocacy campaigns.

IV. CONSTITUTIONAL QUESTIONS

Laws imposing transparency requirements for, and dollar or source limitations on, donations to organizations seeking to influence government action implicate the freedom of association protected by the First Amendment. As the Supreme Court has held, donor privacy safeguards unpopular opinions and protects donors to unpopular groups from retaliation.[96] In so doing, privacy protects those groups, too. The Court has also found that the First Amendment protects the right to contribute to candidates and political committees. This is a right of the individual to participate in the political process, and of the freedom of association of groups that depend on donations for their ability to advocate for candidates or causes on behalf of their supporters.[97]

The Supreme Court has, however, also upheld disclosure requirements and contribution restrictions as part of the regulation of elections and has sustained transparency requirements for those engaged in lobbying. In the elections context, the Court has found that disclosure serves the important public interests in preventing corruption and its appearance, and in informing the voters of the identities of candidates' financial backers. That information enables voters to "place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches."[98] As a result, disclosure promotes informed voter decision-making and increases the likelihood that voters' choices will reflect their electoral preferences. Due to the importance of voter information to democratic elections, the Court has treated campaign donor disclosure—including disclosure to political party committees and to independent committees that expressly advocate for or against candidates—as presumptively valid. Exemptions may be available for donations to unpopular groups on an as-applied basis, but the burden is on the group seeking an exemption from disclosure to show that there is a serious risk their donors will be subject to harassment or reprisal if their names are publicly revealed.[99]

The Court has also determined that contribution limits can be a constitutionally valid means of advancing the important governmental interests in preventing corruption and the appearance of corruption. The Court has explained that anti-corruption laws need not be "confined to bribery of public officials, but extend[] to the broader threat from politicians too compliant with

96. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

97. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976).

98. *Id.* at 67.

99. *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm. 459 U.S. 87 (1982).

the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery."[100] Lower courts have also affirmed the constitutionality of "pay-to-play" contribution limits, that is, laws that set lower limits on or ban contributions to candidates from individuals or firms that do business with or are regulated by the office that the candidate is seeking.[101]

Outside elections, the Supreme Court has sustained the constitutionality of requiring lobbyists to disclose who is paying for their activities. In *United States v. Harriss*,[102] the Court emphasized the important public interest in knowing who is behind efforts to influence legislative action—to "know who is being hired, who is putting up the money, and how much."[103] *Harriss*, however, dealt with a law that regulated only "'lobbying in its commonly accepted sense'—to direct communication with members of Congress on pending or proposed federal legislation."[104]

There is a suggestion in *Harriss*' footnotes that applying disclosure requirements to money spent on efforts to persuade the public to communicate with legislators as part of their efforts to pass or block legislation—what is now generally referred to as "grassroots lobbying"—would be constitutional,[105] but the Court did not address the issue and has not done so in the more than six decades since *Harriss* was decided. Today grassroots communications are an integral part of many contemporary lobbying campaigns.[106] There is the same legislator- and public-information benefit to learning the identities of donors to grassroots campaigns as there is to learning the identities of donors to lobbyists who simply work the halls of the state capital. Nor is there any reason to believe that donors to grassroots campaigns are any more at risk of harassment or reprisal than donors to campaigns that engage solely in "lobbying in its commonly accepted sense."[107] Courts have sustained state laws that require financial disclosures by committees active in ballot proposition campaigns.[108] Ballot committee campaigns to influence voter decisions whether or not to approve proposed state laws or constitutional amendments closely resemble grassroots lobbying to influence legislative action. To be sure, ballot measure

100. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000), (quoting *Buckley*, 424 U.S. at 28).

101. *See, e.g.*, Ognibene v. Parkes, 671 F.3d 174 (2d Cir. 2011), *cert. denied*, 567 U.S. 935 (2012); Wagner v. FEC, 793 F.3d 1 (D.C. Cir. 2015), *cert. denied sub nom*. Miller v. FEC, 577 U.S. 1102 (2016); Schickel v. Dilger, 925 F.3d 858 (6th Cir. 2018), *cert. denied sub nom*. Schickel v. Troutman, 140 S. Ct. 649 (2019).

102. United States v. Harriss, 347 U.S. 612 (1954).

103. *Id.* at 625.

104. *Id.* at 620.

105. *See* Briffault, *supra* note 78, at 171–72.

106. *Id.* at 186–87.

107. *Harriss*, 347 U.S. at 620.

108. *See, e.g.*, Nat'l Org. for Marriage v. McKee, 649 F.3d 34 (1st Cir. 2011); Hum. Life of Washington, Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010).

campaigns do involve elections. Like other elections, they culminate at a moment in time and yield a dispositive result for a specific issue, unlike legislative lobbying, which is ongoing. But the informational value and threats to privacy (or their lack) posed by the disclosure of the donors behind both ballot proposition and grassroots lobbying campaigns are analogous.

Although state grassroots lobbying disclosure requirements are widespread, lower courts have divided over the constitutionality of disclosure requirements for grassroots campaigns aimed at influencing ordinary legislation, and the issue remains unresolved.[109] Even with this uncertainty, the case for requiring donor disclosure by elected-affiliated-advocacy organizations is stronger by far than the case for the disclosure of grassroots advocacy donors generally. For elected-official-affiliated advocacy committees, disclosure is justified not only by the legislature's—and public's—interest in knowing who is trying to influence legislative action, but by the public interest in knowing who is trying to win an executive official's gratitude. When an organization that is established and operated by agents of an elected official, works to promote the official's agenda, prominently and positively features the official in its public communications, and benefits from the elected official's fundraising or publicly-stated endorsement, it is likely that at least some of the individuals and firms contributing to it are doing so with the hope, if not the expectation, that their interests will be taken into account when they are or may be affected by government action. The executive whose policy agenda benefits from the support of such a donor may be influenced by the donation when it comes time to make a decision that directly affects the donor's interests. In this context, to follow Brandeis' metaphor, disclosure would be the best "disinfectant"[110]—if not by reducing the likelihood that the donation will be followed by some favorable governmental action, then by making it easier for the media, watchdog organizations, or the public to determine when such a sequence of events occurs and to assess its significance for the integrity of the government's action.[111]

109. *Compare* Fla. Ass'n of Pro. Lobbyists, Inc. v. Div. of Legis. Info. Servs., 525 F.3d 1073 (11th Cir. 2008) (sustaining regulation); Fla. League of Pro. Lobbyists, Inc. v. Meggs, 87 F.3d 457 (11th Cir. 1996) (same); Many Cultures, One Message v. Clements, 830 F. Supp. 2d 1111 (W.D. Wash. 2011) (same), *aff'd in part*, *vac'd in part*, Young Ams. for Freedom, Inc. v. Gorton, 522 P.2d 189 (Wash. 1974) (same); *with* Citizens Union of New York v. Att'y Gen., 408 F. Supp. 3d 478, 503–08 (S.D.N.Y. 2019), Mont. Auto. Ass'n v. Greely, 632 P.2d 300 (Mont. 1981).

110. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT 62 (Nat'l Home Library Found., Washington, 1933) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

111. As this Article was going to press, the Supreme Court heard oral argument in, but had not yet decided, Americans for Prosperity v Rodriquez, *cert. granted sub nom.* Americans for Prosperity v. Becerra, 141 S. Ct. 973 (2021), and Thomas More Society v. Rodriquez, *cert. granted sub nom.* Thomas More Society v. Becerra, 141 S. Ct. 974 (together "*APF*"), a pair of cases raising the question of what is the standard of review applicable to a state measure requiring the disclosure of the names and addresses of major donors to private nonprofit organizations, outside the electoral context. Depending on what the Court decides, *AFP* could have implications for the disclosure

Much as the Supreme Court has treated expenditures by parties or political committees that are coordinated with a candidate as the functional equivalent of a contribution to a candidate and subject to the same rules as contributions,[112] contributions to a committee affiliated with an elected official should be treated as contributions to the official. To be sure, they are not personal gifts or even campaign contributions. Their benefit to the elected official is not to her personal wealth or even directly to her electoral success. There may be a public benefit from the program that the advocacy committee is supporting. But the connection to the elected official, the public interest in knowing about it, and the public concern over the potential for improper influence are all comparable to both campaign contributions and personal gifts. Disclosure of donations to elected-official-affiliated nonprofits advances the same values, and is justified by the same concerns, as disclosure of campaign contributions or personal gifts.[113]

Contribution restrictions are a harder case. There is a jurisprudence of lobbying disclosure but no tradition of limiting contributions to lobbying organizations. Indeed, restrictions on lobbying would almost certainly be unconstitutional.[114] So, the fact that these organizations advocate policy changes would not justify limits on donations to them; to the contrary, their policy advocacy is a powerful argument against such a limitation. Rather, the case for contribution limits rests on the affiliation of the organization with an elected official and the concern that the organization is a conduit of improper influence from the donor to the officeholder. As the elected-official-affiliated advocacy organizations are engaged in constitutionally protected public communications in support of legitimate policy objectives—universal pre-K, inclusionary zoning, civil service and public pension law changes, education reforms, etc.—to be constitutional, any limitation on donations to these organizations would have to be narrowly tailored to address only those donations that pose the most serious danger of improper influence on government action. That means that limits should be targeted on (i) large donations, (ii) from donors who do business with the government or are in a business subject to regulation by the government, and (iii) to an organization

requirements proposed by this Article. However, the disclosure requirements challenged in *AFP* were broadly applicable and not narrowly tailored to organizations affiliated with elected officials. Whatever the standard of review for disclosure requirements, the government interest in disclosure would surely be strong for organizations affiliated with elected officials, and tailoring proposed in this Article would minimize the burden on First Amendment rights.

112. *See, e.g.*, FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001).

113. Professor Stephanopoulos also argues that disclosure is an appropriate and constitutional means for regulating "quasi campaign finance." *See* Stephanopoulos, *supra* note 25, at 405–08.

114. Professor Stephanopoulos is extremely skeptical about contribution limits as a means of regulating "quasi campaign finance." *Id.* at 398–401. He thinks they are unlikely to be effective and emphasizes their "sheer novelty. There is no modern American tradition of restricting nonelectoral, yet still political, speech. To the contrary, the Court has a consistent record of striking down such constraints." *Id.* at 401.

affiliated with an elected official who is in a direct position to help or hinder the donor's business with or regulation by the elected official's government. Such a contribution limit focused on significant pay-to-play donors has the best chance of passing constitutional muster, and ought to do so.

As the Supreme Court explained in the campaign finance context, the burden contribution limits place on the First Amendment rights of donors is partly ameliorated by the donors' freedom to engage in unlimited independent spending. In this context, too, any donors required to limit their contributions to the affiliated advocacy committee would still be free to spend as much as they want on their own in support of the policy program of the affiliated committee. The limit, thus, would function not as a limit on constitutionally protected policy advocacy, but solely as a restriction on pay-to-play contributions to an organization closely affiliated with an elected official from donors with business interests subject to that official's decision-making.[115] As in New York, the level of the contribution limit ought to be modeled on the contribution limit for campaign donations. This underscores the connection between the anti-undue-influence justifications behind both sets of restrictions. Some pay-to-play donors surely support an affiliated nonprofit not because they support the nonprofit's policy agenda, but as a means of circumventing campaign finance limits on donations directly to the elected official. Preventing the circumvention of constitutional contribution limits is a constitutionally acceptable justification for further contribution restrictions that are narrowly tailored to avoid unduly burdening protected political activity.[116]

The last proposed requirement—disclosure of donations to affiliated service-delivery nonprofits—may also be tricky to justify as these organizations are not engaged in the kinds of efforts to influence legislation that provide some of the justification for regulating advocacy organizations. Their donors are engaged in the type of philanthropy that is not ordinarily subject to public disclosure. The basis for requiring disclosure of the significant donors to these organizations, thus, is not the type of activity their contributions are financing, or even the fact of their support for such work, but the concern that their donations are a backdoor means of seeking to influence elected officials. As discussed in Part II, there is evidence some donations have been made as a means of establishing a relationship with the public official whose work the organization supports. This is particularly likely when the official is actively engaged in fundraising for the organization or when the organization is closely identified with the official, such as when the official has a role in naming the organization's board, providing it with staff, giving it a place on a governmental website, or publicly celebrating the organization's support for local

115. *Id.* Professor Stephanopoulos sees the ability of dollar-limited donors to switch to other means of influencing public policy as a serious weakness for contribution limits rather than, as I have suggested, a basis for arguing that the burden on constitutionally protected rights is a limited one. Moreover, his central concern is with the ability of interest groups to achieve the public policy goals their money is being used to advance rather than the potential for such donations to win the gratitude of the elected official affiliated with the donor organization.

116. *See* McConnell v. FEC, 540 U.S. 93, 185 (2003).

governmental programs. Public disclosure of the major donors to the organization provides the transparency necessary for determining whether support for the organization has become a conduit for influencing the elected official affiliated with the organization.

As the Supreme Court has noted in the campaign finance setting, disclosure is the least intrusive form of regulation. It does not prevent anyone from supporting an organization or operate to limit the level of support.[117] If disclosure of a donation from an unpopular donor or to an unpopular program creates a serious risk of harassment or reprisal, the donor is constitutionally entitled to an exemption from public reporting.[118] To assure that the disclosure requirement is narrowly targeted at only those donations that raise the prospect of improper influence on the government decision-maker affiliated with the organization, only large donations or only donations from donors who do business with the affiliated official's government—or, even more narrowly, only large donations from such pay-to-play donors—should be subject to disclosure. That ought to achieve the balance between informing the public about who is spending money in a manner that could affect government decision-making, while minimizing both the intrusion on donor autonomy and the administrative burden on the affiliated service-delivery nonprofit.[119]

CONCLUSION

The emergence of elected-official-affiliated nonprofits has taken advantage of—and highlighted—a gap in our public integrity laws. Donations to these organizations neither enrich these elected officials personally, nor contribute to their electoral fortunes in a manner that our campaign laws can reach. Although they support potentially valuable—and constitutionally protected—public advocacy campaigns and service delivery programs, donations to these organizations provide an opportunity for individuals, firms, and interest groups to obtain improper influence with the elected officials affiliated with them and whose policies and initiatives they were created to support.

The public integrity gap can be closed by first, examining the basic elements of some of the most prominent of these organizations to determine when a public-advocacy or service-delivery nonprofit can be said to be affiliated with an elected official, and then, extending some of the basic tools for promoting public integrity—transparency requirements and donation restrictions—to this new public integrity frontier. The definition of "affiliated" for the public-advocacy nonprofits may be a little tricky since the links between the official and the relevant committee are likely to be informal, particularly when compared to the more formal mayor's fund type of service-delivery

117. Citizens United v. FEC, 558 U.S. 310, 366 (2010).

118. *See* Brown v. Socialist Workers '74 Campaign Comm. 459 U.S. 87 (1982).

119. The constitutional analysis of the disclosure proposed here may also be affected by the Supreme Court's resolution of Americans for Prosperity v. Rodriquez, discussed *supra* in note 111.

nonprofits. But the proliferation of affiliated advocacy committees over the last decade demonstrates that the connections between the elected officials and their supportive committees are real, as are the possibilities for undue influence and its appearance. It is past time to close the public integrity gap. Targeted disclosure requirements and, for the advocacy committees, limitations on pay-to-play donors are constitutionally appropriate mechanisms for doing so.