Statement of Karl A. Racine
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Before the

Committee on the Judiciary
The Honorable Kenyan McDuffie, Chairperson

Public Hearing

Bill 21-442, the "Political Action Committee Contribution Regulation Amendment Act of 2015"
Bill 21-509, the "Citizens Fair Election Program Amendment Act of 2015"
Bill 21-511, the "Clean Elections Amendment Act of 2015"
Bill 21-565, the "Elucidating Your Elections Amendment Act of 2016"
Bill 21-622, the "Campaign Finance Transparency and Accountability Amendment Act of 2016"

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Room 500
John A. Wilson Building
1350 Pennsylvania Avenue, NW
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Greetings Chairman McDuffie, Councilmembers, staff, and residents. I am Karl A. Racine, and I have the privilege of serving as the Attorney General for the District of Columbia. I am pleased to be here to discuss the important issue of campaign finance reform, and particularly the five bills on the hearing agenda. I support the goals and objectives of each of the bills and I will go into detail on them later in my testimony, but first I want to touch briefly on why this hearing is so crucial to the sanctity of our elections and our government. On October 12, 2016, the Office of Attorney General (OAG) partnered with Georgetown University Law Center to host a forum titled *Campaign Finance in the District of Columbia*. We were honored to be joined by elected officials, campaign finance experts, and members of the public. What we heard from residents at the forum was consistent with what residents have been telling me since I became Attorney General in January 2015: The perception of pay-to-play politics is a real concern in the District of Columbia. Residents want to be sure that their voices are heard, and that the policy choices of their elected officials reflect their bests interests. I believe each of the bills on the agenda today would be helpful in addressing the concerns of residents, although some of the bills require revision to address specific legal issues.

Bill 21-622, the "Campaign Finance Transparency and Accountability Amendment Act of 2016"

The newly elected Attorney General has a statutory mandate to uphold the public interest. It is with that mandate in mind that I introduced Bill 21-622 to strengthen three major pillars of the District's campaign-finance law: 1) ending pay-to-play politics; 2) making political donations transparent; and 3) creating a "bright line" between candidates and Political Action Committees

(PACs). The proposal also includes other provisions that tighten the District's campaign-finance laws.

Pay-to-Play Politics

"Pay-to-play politics" is a term that many District political observers have used lately to describe the environment in the District of Columbia. Pay-to-play politics means that, when you donate to a politician, you get something of value in return. At the Georgetown forum, residents expressed concern that large contracts or land deals have not necessarily been undertaken in the best interests of the District, but instead may have been favors to campaign donors. This campaign-finance bill addresses this perceived problem by requiring that if someone, including a corporation, donates to a campaign or a PAC, they cannot engage in any major business with the District for two years, including: large business contracts; major grants; and significant tax breaks.

Making Political Donations Transparent

The Supreme Court has said that the government cannot limit someone's independent expenditures – that is, spending to support or oppose a candidate without actually working with a campaign. But government can put important disclosure requirements on this kind of spending to make sure the public knows where the money is coming from. Under current District law, if the primary purpose of an organization is electioneering, donors who contribute money to that organization in order to support independent expenditures must be identified. However, if the primary purpose of an organization is something *other* than electioneering, donors are able to

give unlimited amounts of money to that organization, and that organization can in turn make independent expenditures, while keeping the identities of those donors anonymous. As a result, the District has left itself open to "dark money" groups that can spend large amounts of money in elections without ever revealing the sources of that money.

This discrepancy is a significant loophole in our disclosure laws. The legislation addresses this problem by making sure that all organizations, not just primarily political ones, that make independent expenditures above a certain threshold have to identify anyone who has donated more than $200 towards those expenditures.

Creating a "Bright Line" Between Candidates and PACs

The Supreme Court's rulings make clear that, as long as someone is controlled by or coordinated with a campaign, his or her spending can be subjected to certain regulations, such as monetary caps on donations. Individuals, corporations, and PACs that are *independent*—and not controlled by or coordinated with a campaign—are not subject to these monetary caps. Instead, they can only be subject to certain disclosure requirements. The proposal in this bill would define what it means to be "controlled by or coordinated with" a campaign expansively, in order to ensure that all actions done in concert with campaigns are in fact captured properly. This will ensure that entities and individuals, especially PACs, that are coordinating with a campaign will be subject to the regulations, including monetary caps, that help keep our elections clean and transparent.

Other Provisions

This legislation would also close a loophole in District law that currently allows unlimited contributions to PACs in non-election years. The legislation would ensure that the contribution limits are the same in non-election years and election years.

At the same time, the legislation would amend current law concerning PACs to bring the District into compliance with controlling First Amendment case law. By law, PACs can make both campaign contributions and independent expenditures. Based on the D.C. Circuit's decision in *EMILY's List v. FEC*, if an organization like a PAC makes both contributions and independent expenditures, the Council has the power to limit donations to any PAC account that is used to make campaign contributions. However, if the PAC creates an account that is used only for independent expenditures, the First Amendment forbids the Council from restricting how much money people can contribute into that expenditure-only account. This bill would require PACs to create separate accounts for campaign contributions and independent expenditures, and therefore would ensure that monetary limits on donations are properly applied.

The bill would also ensure that members of boards and commissions appointed by District government officials go through the same ethics training that District government employees undergo.

I will now discuss the other bills under consideration today.

Bill 21-442, the "Political Action Committee Contribution Regulation Amendment Act of 2015"

The OAG supports Bill 21-442, the "Political Action Committee Contribution Regulation Amendment Act of 2015." In our view, the bill is legally sufficient.

Purpose of the Bill

The bill would, like our bill, ensure that limits on contributions to a PAC are the same in non-election years and election years. We support this reform.

Legal Analysis

The bill itself does not run afoul of the First Amendment. I note, however, as I explained above, that any contribution limits on PACs must be implemented in a manner that permits PACs to maintain expenditure-only accounts that are *not* subject to contribution restrictions.

Bill 21-509, the "Citizens Fair Election Program Amendment Act of 2015"

The OAG supports Bill 21-509, the "Citizens Fair Election Program Amendment Act of 2015" with some revisions to ensure it is legally sufficient. The bill's purpose is to create a public financing system for candidates for elected office. In its current form, however, the bill violates the Home Rule Act, raises due process concerns, and contains drafting ambiguities. OAG is confident that these are infirmities that can be res+olved and OAG would be happy to work with the Council to address all of these concerns.

Purpose of the Bill

The bill would make two major changes to District law. First, it would abolish the Office of Campaign Finance ("OCF") and replace it with a Citizens Fair Election Oversight Office ("Office"). That Office would handle all of OCF's current responsibilities, but would also be responsible for overseeing the bill's second major change to District law: a new public financing system.

The system's basic structure is relatively straightforward. It offers candidates for public office a deal: the District will provide you with an allocation as well as matching funds for small-dollar contributions you receive, if you agree to certain conditions. Those conditions are, in essence, that: (1) you may only receive small-dollar contributions (and only from individuals); (2) you must not spend your own funds for campaign purposes; and (3) you must participate in a certain number of debates. This would not be available to *every* candidate for public office; a candidate must demonstrate a minimum level of support by collecting a threshold amount of small-dollar contributions in order to qualify for public financing.

Legal Analysis

In the interest of time, I will forward the Committee a detailed legal analysis of the revisions needed in the bill. But, I will discuss a few of the needed revisions in my testimony. The bill's definitions use the term "qualifying small dollar contribution" to describe the types of contributions that a public-financing recipient may receive. The substantive provisions of the bill, however, do not use this terminology consistently. Some provisions use the phrase "qualifying contribution," and others use the phrase "qualified small dollar contribution." This language needs to be harmonized to avoid confusion. Moreover, the definition of "qualifying small dollar contribution" needs to be clarified. The amount portion of the definition states that it must be "In an amount that is not (i) Greater than or equal to $5 or the amount determined [by the Citizens Fair Election Oversight Office], and (ii) More than the greater of $100 or the amount determined [by the Citizens Fair Election Oversight Office]."

This language means that, unless and until the Office adjusts the qualifying small dollar contribution amounts, these contributions cannot be greater than $100 *and* they cannot be greater

than or equal to $5. But any contribution greater than $100 will, by definition, be greater than $5. Accordingly, one of these two provisions should be removed or revised.

Section 3 of the bill would create a new Citizens Fair Election Oversight Office that would be situated in the Board of Ethics and Government Accountability and would replace the Office of Campaign Finance. OAG has multiple concerns about this provision. The most significant concern is that section 3 empowers the Citizens Fair Election Oversight Office, an agency, to modify statutory requirements in order to fine-tune the public-financing system to current needs. Authorizing an executive body to amend statutory provisions, and therefore to legislate, violates the Charter because legislative authority rests in the Council alone.[1] In addition, it is not clear how the Office's authority would operate. Significantly, the bill does not give the Office rulemaking power.

To reiterate, OAG supports the goals of this bill, believes that these issues are easily remediable, and is happy to work with the Council to ensure that it is legally sufficient.

Bill 21-511, the "Clean Elections Amendment Act of 2015"

OAG supports the goals of Bill 21-511, the "Clean Elections Amendment Act of 2015." This legislation would clarify aspects of the District's campaign-finance law, but it also raises significant legal concerns. We would be happy to work with the Council to address these concerns.

Purposes of the Bill

As the bill's long title explains, the bill is designed to accomplish two main purposes: "clarify when candidates or public officeholders are considered to control or coordinate with election-related committees"; and "specify that only individuals may contribute to political

[1] See D.C. Official Code § 1-204.04 (2012 Rep) ("the legislative power granted to the District in this Act is vested in and shall be exercised by the Council in accordance with this Act").

committees and constituent service programs." Control and coordination matter because entities that are controlled by or coordinate with candidates and public officials (political committees) are treated differently from those that do not (political action committees and independent expenditure committees). Moreover, allowing only individuals to contribute to political committees and constituent-service programs would significantly alter current law because, currently, corporate entities are permitted to contribute to both political committees and constituent-service programs.

Legal Analysis

The bill raises two significant First Amendment issues: It reaffirms aggregate contribution limits that are likely unconstitutional, and imprecise drafting creates ambiguity in its new contribution limits.

The bill reaffirms limits on how much an individual may contribute, in total, to all candidates and political committees over the course of an election. The problem with these limits is that, under the Supreme Court's decision in *McCutcheon v. FEC*, they are likely unconstitutional. The *McCutcheon* Court struck down federal aggregate contribution limits because they were not closely drawn to protect against the appearance or reality of *quid pro quo* corruption. The Court's holding in that case likely means that the District's own, highly similar limits may be unconstitutional as well.

The bill provides that an "expenditure that is made by a person controlled by or that is coordinated with a candidate or committee is considered a contribution to that candidate or committee." While this appears designed to mean that the *expenditure* (not the *person)* must be "controlled by" or "coordinated with" a candidate or committee, this provision's syntax leaves that somewhat unclear. We recommend clarifying this language.

Bill 21-565, the "Elucidating Your Elections Amendment Act of 2016"

The OAG appreciates the goals of Bill 21-565, the "Elucidating Your Elections Amendment Act of 2016." The bill proposes: (1) regulating PACs and independent expenditure committees more stringently than political committees, and (2) enhancing categorical contribution limits on PACs. The bill raises legal concerns that would need to be addressed. It also raises technical concerns that, for the sake of time, I will not speak to but will share with the Committee.

Purpose of the Bill

The bill would enhance existing disclosure requirements for PACs and independent expenditure committees by increasing the disclosures they would be required to make in non-election years. Political committees would be required, as they are now, to file reports by July 31 of each non-election year. PACs and independent expenditure committees, on the other hand, would be required to file three times per non-election year: April 31, July 31, and October 31. In addition, the bill would add a $2,000 limit on contributions "in support of a [PAC]" to the list of limits on contributions in support of the Mayor, the Attorney General, the Council Chair and other Councilmembers, State Board of Education members, and Advisory Neighborhood Commissioners. The current limit on contributions to a PAC or political committee is $5,000.

Legal Analysis

Those stricter limits on contributions to PACs would raise First Amendment concerns, just as the current limits do, because both limits lack any exception for PAC accounts that are only used for independent expenditures.

Conclusion

I greatly appreciate the opportunity to testify on these bills. As I have noted, OAG is in full support of the policies surrounding each of these bills. It is vital that the District address these issues, and OAG stands ready to assist the Council with any legislation it sees fit to pursue. I am pleased to answer any questions that members may have.