

“NEW YORK’S LAST, BEST HOPE FOR REAL REFORM”

THE CASE FOR CONVENING A STATE CONSTITUTIONAL CONVENTION

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EXECUTIVE SUMMARY602
INTRODUCTION.....605
I. IS STATE GOVERNMENT WORKING FOR YOU?.....609
II. NEW YORK AT THE TIPPING POINT: THREE CRISES..610
III. AMENDING THE STATE CONSTITUTION613
IV. THE STATE CONSTITUTIONAL CONVENTION OF 1967: AN INSIDER’S GAME615
V. SPECIAL INTEREST MONEY AND NEGATIVE ADVERTISING DEFEAT 1997 EFFORT TO CONVENE A CONSTITUTIONAL CONVENTION.....617
VI. 1967’S LESSONS LEARNED: “THE PEOPLE’S CONVENTION TO REFORM NEW YORK ACT”620
CONCLUSION: THE WAY FORWARD TO CONVENE A STATE CONSTITUTIONAL CONVENTION622

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EXECUTIVE SUMMARY

“We The People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION.”¹ So begins the Preamble to the New York State Constitution, the supreme law of the land governing the Empire State and all of its citizens. This approximately 50,000-word framework establishes the contours and parameters of state government, and, like all constitutions, simultaneously enumerates and constrains the government’s powers.

New York’s constitution, the state’s central governing document has been subject to numerous revisions and amendments; it also establishes and codifies the values that shape the Empire State’s cultural identity: the promotion of commerce, the protection of civil liberties and workers’ rights, advancing public welfare and establishing environmental safeguards, among others. On a more tangible level, the document also serves as an “operating manual” for the actual structure and configuration of state government. It is my assertion that fixing the substantial and endemic problems that lie at the core of New York’s dysfunctional public institutions will require nothing short of the wholesale reformation of the aforementioned “manual,” to enact the long overdue reforms that New Yorkers have called for, yet the Executive and Legislative branches have continually failed to deliver.

The convening of a state constitutional convention, as I have championed, is the first step toward that reformation. Key findings of this policy essay outlining my support for convening a state constitutional convention include the following:

- As Assembly Republican Leader, I led a growing, bi-partisan coalition of grassroots, civic and business advocacy organizations that support a constitutional convention. These advocacy organizations favor the enactment of legislation that would place the question of whether New York should call a constitutional convention on the ballot so the people may decide prior to 2017, which is the next time such a question will appear on the ballot.²

¹ N.Y. CONST. pmbl.

² Assem. 9157, 2009 Leg., 232nd Reg. Sess. (N.Y. 2009); Sponsor’s Memorandum from Brian M. Kolb, N.Y. State. Assem., in Support of Assem. 9157, 2009 Leg., 232nd Reg. Sess. (N.Y. 2009).

- Empirical findings from numerous public opinion polls and anecdotal evidence gleaned from the nineteen town hall statewide meetings and public forums I have held on this issue, strongly support the notion that New York State's government has stopped working for the taxpayers. This sentiment cuts across all regional, partisan, and ideological fault lines.
- The combined impact of the state's serious fiscal and governmental challenges has resulted in a "crisis of confidence" among New Yorkers who have lost faith in a government that has continually broken faith with them. If left unchecked, the cumulative effects of these three crises will result in the state becoming virtually ungovernable, which necessitates comprehensive reform of the broken institution in the form of a constitutional convention. The exigency of these crises requires a constitutional convention occurring before 2017, which, as mentioned above, is the next time the question of whether a convention shall be called automatically goes before voters on the fall ballot.³
- New York State's constitution is, much like the United States Constitution, a "living document," and it has been amended over 200 times, contributing to its complexity and sheer enormity.⁴ This openness to amendment is both a strength, and weakness, as previous amendments have codified various rights and protections that special interest groups fear would be diminished if a constitutional convention came to fruition. This fear will be explained later as a "Pandora's Box" argument that special interest groups opposing the convention employed to great effect in defeating the 1997 effort.⁵
- Instead of advancing the cause of reform, the 1967 state constitutional convention set future efforts back, because it was widely viewed as an "insider's game" dominated by the very same elected officials and political insiders who contributed to New York State's challenges. These officials also engaged in "double-dipping" by simultaneously serving as elected officials and convention delegates.⁶ Their actions fueled the efforts of special interest groups who opposed a convention in 1977, 1997, and presently.⁷ Criticism of the process led to the voters' rejection of the 1967 convention's

³ *You Can Reform NY Today: Frequently Asked Questions and Answers Regarding this Proposed Legislation*, REFORMNY.ORG, <http://www.reformny.org/faqs/> (last visited May 15, 2011).

⁴ ROBERT B. WARD, *NEW YORK STATE GOVERNMENT* 162 (2d ed. 2006).

⁵ Nicholas Confessore, *As Voter Disgust with Albany Rises, So Do Calls for a New Constitution*, N.Y. TIMES, Aug. 23, 2009, at A17.

⁶ *Id.*

⁷ *See id.*

revised constitution and why legislation I introduced, “The People’s Convention to Reform New York Act,” sought to address these specific defects.⁸ However, another explanation offered by SUNY New Paltz Professor, scholar, author, and recognized expert on New York State government, Dr. Gerald Benjamin,⁹ was that while the document yielded by the convention had “many strengths,” it “was rejected because of political errors made by convention leadership in presenting the results to the public.”¹⁰

- A powerful coalition of special interest groups defeated the 1997 constitutional convention push, despite the strong support of regional daily newspapers, prominent elected officials, and a majority of New Yorkers who supported the reform effort.¹¹ The defeat was largely due to the anti-convention coalition’s ability to utilize negative paid advertising in the final weeks before voters went to the polls, raising the Pandora’s Box argument that a convention and its subsequent amendments eroded established rights of New Yorkers, and that the whole exercise wasted taxpayer dollars. Also noteworthy, according to Dr. Gerald Benjamin, “[t]here is regular resistance by legislative leaders to calling a convention, as they and their colleagues are, in general, benefited by the status quo.”¹²

⁸ Assem. 9157, 2009 Leg., 232nd Reg. Sess. (N.Y. 2009).

⁹ Dr. Gerald Benjamin is a recognized expert on New York State government and constitutional conventions. He currently serves as a Dean and Distinguished Teaching Professor at the State University of New York (SUNY) at New Paltz. He is also the Director of the Center for Research, Regional Education and Outreach (CRREO). Additionally, prior to joining SUNY New Paltz, Dr. Benjamin served in various positions including: Director of the Center for New York State and Local Government Studies; Director of the Rockefeller Institute of Government Research; Principal Researcher for the New York State Constitutional Revision Commission; Chairman of the New York City Charter Revision Commission and a Lecturer at the University of Tokyo. For more biographical information on Dr. Benjamin, see STATE UNIV. OF N.Y. AT NEW PALTZ, <http://www.newpaltz.edu/ocm/experts/display.cfm?id=53> (last visited May 15, 2011). Brian M. Kolb, the author of this work, submitted this article to Dr. Benjamin for his review prior to its publication. On January 26, 2011, Dr. Benjamin provided the author with his expert commentary on this article. Dr. Benjamin’s January 26, 2011 commentary is cited throughout this work.

¹⁰ Brian M. Kolb, “*New York’s Last, Best Hope for Real Reform*”: *The Case for Convening a State Constitutional Convention*, 4 ALB. GOV’T L. REV. 601 (2011), commentary by Dr. Gerald Benjamin (Jan. 26, 2011) [hereinafter Dr. Benjamin Commentary] (on file with author).

¹¹ Richard Perez-Pena, *The 1997 Elections: Ballot Questions; Voters Reject Constitutional Convention*, N.Y. TIMES, Nov. 5, 1997, at B1.

¹² Dr. Benjamin Commentary, *supra* note 10.

- “The People’s Convention to Reform New York Act”¹³ is non-partisan legislation I introduced (thirty-three members of the Assembly are co-sponsors) to put the question of whether a constitutional convention should be convened before the voters on the fall ballot.¹⁴ The legislation is unique in that it recognizes past failures of the 1967 convention and the unsuccessful 1997 effort.¹⁵ Specifically, the legislation would prevent elected officials and political party leaders from simultaneously serving as convention delegates by requiring them to first resign their office, or political position, before being sworn in as a delegate.¹⁶ This provision would ensure a convention that is truly of, by, and for the people and is not “captured” by political insiders.
- Future efforts to promote the “People’s Convention to Reform New York Act” will require a continued statewide grassroots push, the vocal support of media, business, civic and good government groups. Also necessary to this effort, is the active involvement of the State Legislature’s Legislative Conferences, their leaders, statewide elected officials, and Governor Andrew Cuomo, who already expressed his strong support for the convention in his formal public policy agenda offered while a gubernatorial candidate.¹⁷

INTRODUCTION

This policy essay was initially composed per the invitation of the *Albany Government Law Review* several days after Andrew M. Cuomo’s inauguration as New York’s fifty-sixth Governor and the delivery of his well-received and highly ambitious 2011 State of the State Address. This is a fitting backdrop since both current Governor Cuomo and his father, former Governor Mario M. Cuomo, much like myself, are on record as supporting the convening of a “People’s Constitutional Convention” to reform the broken institution of New York State government.¹⁸ In his policy

¹³ See Assem. 1262, 2011 Leg., 234th Reg. Sess. (N.Y. 2011); see also Assem. 9157.

¹⁴ See Assem. 1262.

¹⁵ See *id.*

¹⁶ *Id.*

¹⁷ ANDREW CUOMO, THE NEW NY AGENDA: A PLAN FOR ACTION 28 (2010), available at [http://www.andrewcuomo.com/system/storage/6/34/9/378/acbook final.pdf](http://www.andrewcuomo.com/system/storage/6/34/9/378/acbook_final.pdf).

¹⁸ Letter from Brian M. Kolb, Minority Leader of N.Y. State Assembly, to Andrew M. Cuomo, Governor of N.Y. (Feb. 25, 2011), available at <http://www.scribd.com/doc/49807088/Assembly-Minority-Leader-Brian-Kolb->

book released in the summer of 2010, *The New NY Agenda: A Plan for Action*, then State Attorney General and gubernatorial candidate Andrew Cuomo affirmed his support for a constitutional convention.¹⁹ Attorney General Cuomo indicated: “I will also spearhead a Constitutional Convention—a People’s Convention—to rewrite the rules, because we are just plain tired of waiting for the state legislature to act.”²⁰ In a joint opinion piece that he co-authored for the *Wall Street Journal* in 2009 with SUNY New Paltz professor Dr. Gerald Benjamin, former Governor Mario Cuomo made a clear and compelling case for reform and put the onus on the State Legislature to enact legislation in support of the convention.²¹ The piece stated,

Albany can show that it is genuinely interested in considering reform by putting the convention question on the ballot. Alternately, it can ignore calls for change. This, of course, would further reinforce the cynicism of New Yorkers and push them further away from public life—and from democracy. If the legislature wants to avoid this fate, which is of its own doing, then it should take up the calls for reform.²²

In addition to the aforementioned Op-Ed, there are also additional sources cited in this regard.²³

As the sole legislative leader who has championed the convening of a non-partisan, grassroots “People’s Convention to Reform New York” and introduced legislation to make it a reality,²⁴ I have consistently advocated for this effort since the summer of 2009. A “People’s Constitutional Convention” is not some new, untested idea. The question of whether such a convention should be convened will automatically appear on the 2017 ballot for voters to decide, as the New York State Constitution requires.²⁵ All told, New York has convened eight constitutional conventions in the years 1801, 1821, 1846, 1867,

Redistricting-Letter.

¹⁹ CUOMO, *supra* note 17, at x.

²⁰ *Id.*

²¹ Gerald Benjamin & Mario M. Cuomo, *New York Needs A Constitutional Convention*, WALL ST. J., July 10, 2009, at A15.

²² *Id.*

²³ Gerald Benjamin, *A Convention for New York: Overcoming Our Constitutional Catch-22*, 12 N.Y. ST. B.A. GOV’T, L. & POL’Y J. 13 (2010); Gerald Benjamin, *The Necessity for Constitutional Change*, 69 ALB. L. REV. 877 (2006).

²⁴ See Assem. 1262, 2011 Leg., 234th Reg. Sess. (N.Y. 2011); see also Assem. 9157, 2009 Leg., 232nd Reg. Sess. (N.Y. 2009).

²⁵ N.Y. CONST. art. XIX, § 2.

1894, 1915, 1938, and 1967, respectively.²⁶ Accordingly, any arguments to the effect that convening a convention is some radical idea is, frankly, nonsensical and without substantiation. To move a convention forward, I have hosted over nineteen meetings across the state, written Op-Eds for newspapers, taken part in question-and-answer forums, and appeared on television and radio public affairs programs promoting the effort. Besides these traditional media venues, I employed frequent use of “new media” outlets such as the Internet, Twitter, and Facebook to deliver my message of why a constitutional convention is necessary to chart a positive, new direction for New York State and to reform our dysfunctional government. Furthermore, I launched an online petition, located at www.reformny.org,²⁷ which allows individuals to enlist in this effort and download more information about the convention, the enacting legislation, as well as a listing of elected officials and communities supporting this initiative.

To date, some 2,475 individuals have signed the petition and enlisted in the non-partisan grassroots effort to make the convention a reality.²⁸ In addition, this effort has already received public endorsement from fifty local governments, civic organizations, and business advocacy organizations throughout New York.²⁹ Joining taxpayers and local governments and organizations in expressing this support are newspapers from Western New York to New York City—and all regions in between. All told, twelve prominent daily newspapers have run editorials and guest opinion pieces strongly in favor of convening a “People’s Constitutional Convention,” including the *Staten Island Advance*, *Daily Freeman*, *Plattsburgh Press Republican*, *Utica Observer Dispatch*, *Batavia Daily News*, *Auburn Citizen*, *Post Star*, *Times Union*, *Post-Standard*, *Buffalo News*, *Dunkirk Observer*, and the *Batavia Daily News*.

Independent polling also confirms broad, bi-partisan support among the public for the convening of a state constitutional convention. A poll taken by the Siena Research Institute in late August 2009 reported that, by a margin of sixty-three to twenty-

²⁶ THE ENCYCLOPEDIA OF NEW YORK STATE 387 (Peter Eisenstadt & Laura-Eve Moss eds., 2005) [hereinafter ENCYCLOPEDIA OF N.Y.].

²⁷ *You Can Reform NY Today*, REFORMNY.ORG, <http://www.reformny.org> (last visited May 15, 2011).

²⁸ *Id.*

²⁹ *Id.*

five percent, New Yorkers overwhelmingly favored the reform effort.³⁰ Summing up the poll's findings, Siena New York pollster Steven Greenberg stated:

By a 63-25 percent margin, voters support having a state constitutional convention, including a majority of voters from every party, every region, every religion, every race, and every age group While the issue of a convention is not popular with many elected officials, it is with their constituents.³¹

This 2009 finding represents a statistically significant increase of public support for a constitutional convention from 1997, when the reform effort was also surveyed and supported by fifty-six percent of New Yorkers.³²

It is my belief that the challenges facing state government—challenges that are decidedly bi-partisan in nature as both Democrats and Republicans helped create them—have become systemic, self-perpetuating, and virtually immune to any incremental attempts seeking to remedy them. The only way to address what have now become structural defects of state government is to introduce fundamental reforms to our state constitution so that the broken institution of government can be repaired. While there are critics of convening a state constitutional convention—encompassing both ends of the ideological and political spectrum, partially out of a misplaced fear that any revisions to the state constitution could undermine their “power” or group rights—public opinion polls show that a clear statewide majority of New Yorkers are supportive of such an effort. In one of the very first media stories about my effort, Associated Press Capitol Editor Michael Gormley provided an overview of the effort—and the potentially sweeping state governmental reforms it could manifest:

Kolb, of Canandaigua, seeks to petition for a constitutional convention run by delegates who aren't politicians or part of special interests to change how the Legislature operates. That could include term limits and other measures that he says can contribute to Albany's notorious pay-to-play reputation where lobbyists have

³⁰ SIENA RESEARCH INST., VOTERS: NY POLS TODAY HAVE LESS INTEGRITY & WORK LESS HARD FOR PEOPLE, COMPARED TO NY POLS 40-50 YEARS AGO (2009), http://www.siena.edu/uploadedfiles/home/Parents_and_Community/Community_Page/SRI/SNY_Poll/09%20August%20SNY%20Poll%20Release%20-%20FINAL.pdf (This survey of 621 New York State registered voters has a +/- 3.9% margin of error).

³¹ *Id.*

³² *Poll: New Yorkers Favor Constitutional Convention*, LEGIS. GAZETTE, Sept. 29, 1997, at 2 [hereinafter *Poll: New Yorkers*].

great sway over decisions He and other Republican assembly members will explain what could happen at the convention that could lead to changes in the state constitution. “The probability of a ‘People’s Convention’ happening is in direct proportion to the grassroots demanding it; the more Albany does not perform, the greater the chances increase,” he said.³³

This policy essay will focus on efforts undertaken by myself and others who believe that convening a constitutional convention could be New York State’s best—and possibly its last—chance for real reform.

I. IS STATE GOVERNMENT WORKING FOR YOU?

“Is state government working for you?”³⁴ For the better part of two years, that is the opening question I continually ask audiences during my town hall meetings, public appearances, and speeches delivered before local chambers of commerce, rotary clubs, and other civic and business organizations. From December 2009 to December 2010, I conducted town hall meetings and similar public forums throughout the state aimed at building grassroots support for the convention. My events were held in: Elmira, Canisteo, Patchogue, Hicksville, Verona, Binghamton, Huntington Station, Hamburg, Hudson, East Fishkill, Penn Yan, Queensbury, Plattsburgh, Rotterdam, Cornwall, Amsterdam, New Paltz, Seneca Falls, and New City.

To provide a visual accompaniment to my event-opening question, I ask attendees to raise their hands if their state government was, in fact, working for them. At every public event where I ask this introductory question, not a single hand is raised—ever. This fact alone provides a reliable measure of anecdotal feedback as to the extent of the state government’s dysfunction and the public’s perception of this new reality confronting New York’s public institutions. When measured against the size, severity, and scope of the challenges facing New York, our public institutions appear virtually ungovernable.

³³ Michael Gormley, *Examining how Government Works: Hearings Set Concerning a New York “People’s Convention,”* TIMES UNION, Dec. 15, 2009, available at <http://www.timesunion.com/news/article/Examining-how-government-works-555668.php>.

³⁴ Press Release, Brian M. Kolb, Minority Leader of N.Y. State Assembly, Broken State Government has Embarrassed New Yorkers for Long Enough, We Need a “People’s Convention To Reform New York” to Deliver Real Change (Mar. 12, 2010), available at <http://assembly.state.ny.us/Minority/20100312/>.

After the question of whether state government is working for them, I then typically ask the audience whether their personal income has risen by nearly seventy percent, which is as much as state government spending has risen over the last decade.³⁵ Again, not a single hand is ever raised. The universal non-response to this question illustrates the extent to which awareness of Albany's fiscal irresponsibility is embedded in the public consciousness. Simply stated, New York State government is no longer working for the people it is supposed to serve.

II. NEW YORK AT THE TIPPING POINT: THREE CRISES

It is my belief that New York State government is broken and has been so for quite some time. A preponderance of contemporary evidence supports this assertion as New York State has operated under some derivation of "governance by crisis" for several years. At their essence, the challenges confronting state government can be characterized as three crises: (1) fiscal, (2) governmental, and (3) confidence.

Regarding New York's fiscal crisis, for the last two years, the severity of the government's cash-flow problem has caused the state to struggle when trying to meet its most basic financial obligations, such as providing timely payments to local school districts, or reimbursing construction contractors for work performed.³⁶ Several times during his administration, former Governor David Paterson held press conferences and gave media interviews, warning that the state literally was running out of money and would struggle to meet its payroll.³⁷ State Comptroller Thomas DiNapoli, New York's chief fiscal officer, repeatedly echoed this sentiment.³⁸ Governor Paterson also

³⁵ Press Release, Brian M. Kolb, Minority Leader of N.Y. State Assembly, Welcome to Upstate: Property Tax Capital of America! (Nov. 3, 2010), available at <http://assembly.state.ny.us/Minority/20101103f/>.

³⁶ See N.Y. EXEC. ORDER NO. 10 (Mar. 2, 2011), available at <http://www.governor.ny.gov/executiveorder/10>; Steve Ference, *New York: The State Budget, Risk of Layoffs and Cash Flow Problems*, YNN, May 14, 2010, http://watertown.ynn.com/content/top_stories/504718/new-york--the-state-budget--risk-of-layoffs-and-cash-flow-problems/?ap=1&MP4.

³⁷ Fredric U. Dicker, *Slash or We Run Out of Cash: Gov*, N.Y. POST, Nov. 10, 2009, available at http://www.nypost.com/p/news/local/slash_or_we_run_out_of_cash_gov_X5csmYBHjMjHQ03pGnaIjO.

³⁸ Press Release, Office of the N.Y. State Comptroller, DiNapoli Warns of Potential State Cash Shortfall (Mar. 17, 2010), available at <http://www.osc.state.ny.us/press/releases/mar10/031710.htm>.

called the State Legislature into several extraordinary sessions to make budget cuts, only to see the Assembly and Senate Democratic majorities continually rebuff his overtures for fiscal responsibility or to enact his Deficit Reduction Plan (DRP).³⁹ Without question, the state's financial crisis is far from asymptomatic.

New York has endured record levels of government spending and taxation that have precipitated its day of "fiscal reckoning."⁴⁰ Besides over-spending and over-taxation, this day was brought on by a reckless accumulation of multi-billion dollar budget deficits and state-incurred debt,⁴¹ an economic implosion resulting in a twenty-six-year high of unemployment,⁴² the worst state business tax climate in the nation,⁴³ America's second-highest per capita property tax burden,⁴⁴ and exploding public pension costs that threaten to swamp state and local government finances.⁴⁵

Governmental mismanagement and ethical scandals also continually plague the broken institution of state government. From programs and state agencies with little accountability by way of legislative oversight, to high-profile convictions of current and former legislators and their staff, to endemically late state budgets and "three men in a room" closed door negotiations,⁴⁶

³⁹ *New York Legislature Holds Not-So-Special Session at Which Nothing was Done*, SYRACUSE.COM, July 28, 2010, available at http://www.syracuse.com/news/index.ssf/2010/07/new_york_legislature_holds_not.html.

⁴⁰ E.J. McMahon, *New York State's Fiscal Reckoning*, 18 CITY J. 23 (2008), available at http://www.city-journal.org/2008/18_4_new_york_state.html.

⁴¹ Elizabeth Lynam, *A Straight-Forward Budget Proposal*, CBNY.ORG (Jan. 20, 2011), <http://www.cbcny.org/cbc-blogs/blogs/straightforward-budget-proposal> (New York faced a \$6.7 billion budget deficit in the 2010–2011 fiscal year that included a \$500 million deficit from the previous fiscal year. The deficit amounted to approximately eight percent of State operating funds, which were expected to increase unless the Legislature acted to reduce their growth).

⁴² Press Release, N.Y. State Dep't of Labor, Highest Statewide Unemployment Rate Since 1983 (Sept. 17, 2009), available at http://www.labor.ny.gov/pressreleases/2009/September17_2009.htm.

⁴³ KAIL M. PADGITT, 2011 STATE BUSINESS TAX CLIMATE INDEX 5 (Tax Found., Background Paper No. 60, 2010), available at <http://www.taxfoundation.org/files/bp60.pdf>.

⁴⁴ *The Facts on New York's Tax Climate*, TAX FOUND., <http://www.taxfoundation.org/research/topic/46.html> (last visited Apr. 7, 2011).

⁴⁵ E.J. McMAHON & JOSH BARRO, NEW YORK'S EXPLODING PENSION COSTS 1 (2010), available at <http://www.empirecenter.org/Documents/PDF/PensionExplosion.12.2010.pdf>.

⁴⁶ Karina Ioffe, *In New York State, Corruption Never Dies*, REUTERS, July 15, 2010, available at <http://www.reuters.com/article/idUSTRE66E3IG20100715>; JEREMY M. CREELAN & LAURA M. MOULTON, THE NEW YORK STATE LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM 1 (2004), available at

New York State's government—once held in such high esteem—has been reduced to an embarrassing punch line. Nowhere was this more the case than when the Brennan Center for Justice released a much-publicized, scathing report on the State Legislature which led to the institution being labeled by the media and academia alike as the “most dysfunctional in the nation.”⁴⁷ Adding to this perception, New York State still lacks basic government reforms that empower citizens and ensure public accountability, such as: initiative and referendum, term limits for legislative leaders and legislators, an independent Legislative Redistricting Commission, and a statewide succession plan for filling vacancies. The latter particular deficiency came to light during a nearly three-year period when New York was presided over by an unelected comptroller and governor, had no lieutenant governor, and its junior United States Senator was initially appointed, and not elected, by the aforementioned unelected state chief executive.⁴⁸

The third crisis is one of confidence. Numerous recent public opinion polls have previously shown that a majority of New Yorkers have lost faith in their state government and that public trust in the governor, state legislature and the appendices of state government—the state agencies and public authorities charged with implementing Albany's public policies—resides at historic lows. This sentiment cuts across partisan, ideological, and regional distinctions as recorded by independent public opinion polls taken by the Siena Research Institute,⁴⁹ Quinnipiac University,⁵⁰ and the Marist Poll,⁵¹ respectively. Individually,

http://brennan.3cdn.net/1f4d5e4fa546eaa9cd_fxm6iyde5.pdf [hereinafter BLUEPRINT FOR REFORM].

⁴⁷ See Kenneth Lovett, *The Dysfunctional Government in Albany: You Guys Are A Disgrace!*, N.Y. DAILY NEWS, Mar. 29, 2009, available at http://articles.nydailynews.com/2009-03-29/local/17917849_1_reformers-legislative-leaders-assembly-speaker; see also BLUEPRINT FOR REFORM, *supra* note 46, at 1.

⁴⁸ See e.g., Ken Rudin, *New York Gets Another Unelected Statewide Official* NPR: IT'S ALL POLITICS (July 8, 2009, 5:27 PM), http://www.npr.org/blogs/politicaljunkie/2009/07/new_york_gets_another_unelecte.html.

⁴⁹ *Majority of Voters Say Paterson Need Not Resign*, SIENA RESEARCH INST. (Mar. 8, 2010), http://www.siena.edu/uploadedfiles/home/parents_and_community/community_page/sri/sny_poll/SNY030810_Release.pdf (“This SRI survey was conducted March 7, 2010 by telephone calls to 712 New York State registered voters. It has a margin of error of +/- 3.7 percentage points.”).

⁵⁰ *Voters Say 4-1 New York State Government Is Broken, Quinnipiac University Poll Finds; More Would Dump Their State Senator To Clean House*,

each of the three crises would command the full time, attention, and resolve of state policymakers. Collectively, the fiscal crisis, governmental crisis, and crisis of confidence have made New York State virtually ungovernable and conspired to rob New Yorkers of the ethical, fiscally responsible, and responsive government they were long promised. Piecemeal reforms to each of the challenges have proven temporal and wholly insufficient: Executive Orders issued by one governor can simply be undone by their successor; the state legislature can enact a new law overriding actions taken during a previous legislative session; and a new state agency commissioner can take the entity in an entirely different direction, all of which could be construed as both strengths and weaknesses.

If left unchecked, the three crises I referenced will continue to erode what little public confidence New Yorkers have left in their state government and inexorably lead to a further diminution of the Empire State. Nevertheless, perhaps it requires a perspective from someone outside state government to best frame the nature of New York's challenges and its three crises. Louis Grumet, publisher of *The CPA Journal* and Executive Director of the New York State Society of Certified Public Accountants did exactly that in a journal opinion piece published in October of 2009. Grumet stated:

The machinery of New York State's government has broken down and is badly in need of repair A vast majority of our legislators are regularly reelected and, yet, some of the most important positions of our current statewide elected offices – the governor, the comptroller, one United States senator – are all appointees The debacle that occurred this summer following the political power play in Albany only reinforces the need for a constitutional convention.⁵²

III. AMENDING THE STATE CONSTITUTION

The New York State Constitution serves as the supreme law of

QUINNIPIAC UNIV. POLLING INST. (Aug. 18, 2009), <http://www.quinnipiac.edu/x1318.xml?ReleaseID=1365> ("Quinnipiac University surveyed 1,667 New York State registered voters, with a margin of error of +/- 2.4 percentage points.")

⁵¹ *Budget Blues in Albany*, MARIST COLLEGE INST. FOR PUB. OPINION (May 7, 2010), <http://maristpoll.marist.edu/57-budget-blues-in-albany/> (This poll of 686 New York State registered voters has a +/- 4% margin of error).

⁵² Louis Grumet, *Time for Change in State Government*, 79 CPA J., Oct. 1, 2009, at 7.

New York and fulfills a three-fold purpose. First, it provides the basic organization of state government and its Executive, Legislative and Judicial branches. Second, it establishes the fundamental rights and liberties of the people through their codification into law. Third and finally, it articulates the basic values and principal concerns that the people wish their state government would address. In speaking of the central role the Constitution of the United States plays in the lives of all Americans—a sentiment I believe applicable to state constitutions—Linda Monk, author of *The Words We Live By*, stated, “[f]or the Constitution to have meaning, it must be not only the words we recite, but also the words we live by.”⁵³

Amending such a complex and important document—indeed, the very words New Yorkers live by—is no simple undertaking. It has been approached by others and myself, supporting a “People’s Constitutional Convention,” as far more than a simple political exercise. However, it would be fallacious to assert that New York State’s Constitution was intended to be free from amendment, as the document has been rewritten, replaced, and amended over 200 times.⁵⁴ As Robert Ward noted: “All of those changes represent shifting voter attitudes about powers the people give to the government and the division of authority among the various branches of the government.”⁵⁵ In fact, thanks to an amendment, the current incarnation of our state constitution specifically requires that the following question, “Shall there be a convention to revise the constitution and amend the same?” be placed on the ballot every twenty years so the people may decide whether to convene a convention (the last convention having been held in 1967).⁵⁶

The inclusion of this provision recognizes the fact that most state constitutions are longer, larger, contain more detail, and codify more protections for citizens than the United States Constitution—and New York’s governing document is no exception. In fact, the New York State Constitution is approximately 50,000 words, roughly six times the length of the Constitution of the United States⁵⁷ and somewhat higher than the

⁵³ LINDA R. MONK, *THE WORDS WE LIVE BY: YOUR ANNOTATED GUIDE TO THE CONSTITUTION* 9 (2003).

⁵⁴ WARD, *supra* note 4, at 162.

⁵⁵ *Id.*

⁵⁶ N.Y. CONST. art. XIX, § 2; *see* WARD, *supra* note 4, at 168, 187.

⁵⁷ WARD, *supra* note 4, at 164.

national average for state constitutions.⁵⁸ Edward Schneier and John Brian Murtaugh, authors of *New York Politics: A Tale of Two States* further address this idea:

Theoretically, the long-windedness of the states is attributed to the greater potential range of state powers and the consequent need to detail precise limits. More important, frequent amendments and revisions of state constitutions have provided numerous opportunities to make constitutional policies that would appear in statutory form at the national level.⁵⁹

Robert Ward, noting the work of Henrik Dullea's *Charter Revision in the Empire State: The Politics of New York's 1967 Constitutional Convention*, stated that New York's Constitution is, "not only one of the longest but one of the most complex and intimidating constitutions among the fifty states."⁶⁰

The first New York State Constitution, adopted in 1777, predates the Federal Constitution by ten years and, much like other state constitutions, New York's document establishes the basic organizational structure of government, codifies the fundamental rights and protections of its citizens, and specifies that important public policies of the state should not be left merely to revision by simple legislation.⁶¹ In terms of its history, the state constitution established in 1777 was replaced by a new constitution in 1822, which, in turn, was rewritten in 1846, only to be replaced by a new document that was adopted in 1894.⁶² The state constitution adopted in 1894 has been amended over 200 times, both through action taken by the state legislature and the subsequent constitutional conventions that have occurred, yet there has been no wholesale revision of the document in some 116 years.⁶³

IV. THE STATE CONSTITUTIONAL CONVENTION OF 1967: AN INSIDER'S GAME

As previously noted, 1967 marked the last time that New York State actually convened a constitutional convention. The New

⁵⁸ EDWARD SCHNEIER & JOHN BRIAN MURTAUGH, *NEW YORK POLITICS: A TALE OF TWO STATES* 146 (2001).

⁵⁹ *Id.*

⁶⁰ WARD, *supra* note 4, at 164 (citing HENRIK N. DULLEA, *CHARTER REVISION IN THE EMPIRE STATE* 5 (1997)).

⁶¹ *Id.* at 163.

⁶² SCHNEIER & MURTAUGH, *supra* note 58, at 146.

⁶³ *Id.*

York State constitutional convention of 1967 was held in Albany and lasted from April 4 to September 26, 1967.⁶⁴ This gathering actually laid the foundation for many of the contemporary criticisms used by those who oppose calling another convention. This includes concerns that the process would be hijacked by the same political insiders currently serving in government that cause many of the problems a convention seeks to remedy. Their assertion is that if the constitutional convention is primarily populated by the ranks of elected officials—federal, state, or local—how could revisions to the constitution that the convention produced be viewed with anything other than suspicion? Simply stated, many believe that it is difficult, if not impossible, for elected officials to advance constitutional amendments and revisions that would limit their power and influence.

This criticism is not without substantiation, as the 1967 state constitutional convention was, unquestionably, dominated by political insiders. Of the 186 delegates who served in the 1967 convention, thirty-two were former state legislators or members of Congress, thirteen were sitting members of the State Legislature, two-thirds were lawyers, and roughly one-quarter were judges.⁶⁵ In terms of political affiliation, 102 delegates were Democrats, eighty-three were Republicans, and one delegate was a registered Conservative.⁶⁶ Considering New York State's peculiar allowance of so-called "third parties," the 1967 convention's bifurcation of political affiliation mirroring those of the State Legislature and Congress lends itself to an appearance of the "same old, same old" and not the diverse political and ideological cross section one might expect at such a reform effort. Further fueling concerns that elected officials would dominate a constitutional convention, the President of the 1967 convention was the Speaker of the New York State Assembly, Anthony J. Travia, and the convention adopted and operated under the official rules of the Assembly, while legislative staff acted as staff to the convention.⁶⁷

Regarding concerns that political insiders serving within the convention would stand to benefit financially, the 1967 convention provided ample evidence, as elected officials who served as delegates collected their regular legislative and

⁶⁴ DULLEA, *supra* note 60, at 11.

⁶⁵ *Id.* at 36.

⁶⁶ *Id.* at 113.

⁶⁷ *Id.* at 142.

convention compensation, a clear case of double dipping. Further adding to concerns about the effort's costs, the expense to taxpayers of the 1967 convention was estimated at approximately \$6.5 million.⁶⁸ Despite its inclusion of many important reforms such as re-apportionment via a special commission as opposed to the State Legislature—a reform that continues to garner strong support over forty years later—the revised state constitution submitted to voters in the November 7, 1967 general election was ultimately rejected by a margin of 1,327,999 to 3,487,513.⁶⁹

Going forward, any effort to convene a constitutional convention would need to address the specific concerns that arose in the wake of the failed 1967 reform effort: the convention being dominated by political insiders beholden to the status quo, and the ability of those insiders to enrich themselves by serving in the convention. The failure by supporters of the 1977 and 1997 efforts to convene a constitutional convention to learn those important lessons, along with a vigorous effort by coalition opponents in raising concerns about the potential dangers of opening the state constitution to revision, ultimately doomed both efforts. As noted by Dr. Gerald Benjamin, the state fiscal crisis of 1977 did not provide an opportunity for preparation of another convention push, while the 1997 effort was hamstrung by a series of issues. First among them was the 1994 electoral defeat of Governor Mario Cuomo, who had been a strong proponent of the convention. Second, the state legislature failed to assist fully with the preparations necessary for a convention. Third, the convention commission was not strong enough in its recommendations.⁷⁰

V. SPECIAL INTEREST MONEY AND NEGATIVE ADVERTISING DEFEAT 1997 EFFORT TO CONVENE A CONSTITUTIONAL CONVENTION

A coalition of business organizations and prominent elected officials, including then Governor, Republican George Pataki, and former Governor, Democrat Mario Cuomo, supported and campaigned for a constitutional convention in 1997.⁷¹ The

⁶⁸ Dennis C. Vacco, *The Convention was Rejected, But Here's Another Route to Reforming State Government*, BUFFALO NEWS, Nov. 13, 1997, at B2.

⁶⁹ ENCYCLOPEDIA OF N.Y., *supra* note 26, at 390.

⁷⁰ Dr. Benjamin Commentary, *supra* note 10.

⁷¹ See Gerald Benjamin, *The Mandatory Constitutional Convention Question*

question of whether New York would call such a convention was slated to appear before voters on the fall ballot as per the twenty-year requirement, established through amendment within Article XIX of the state constitution.⁷² Also in strong support of convening a constitutional convention were the groups “All-County Taxpayers Association” and the “We the People Congress,” both led by Robert Schultz.⁷³ However, they faced opposition that was well organized and well financed. While there were convention supporters, there was no countervailing well-organized, well-financed coalition. For convention proponents, as noted by Dr. Gerald Benjamin: “There was no agreement on goals, only on means.”⁷⁴

In addition to the Schultz-led groups, also supporting the effort was the Business Council of New York State, Inc., which endorsed the measure in the fall. These organizations provided much of the grassroots support and advertising funding to push the convention question throughout 1997. This pro-constitutional convention coalition scored early successes by publicizing the necessity of voters going to polls and supporting the convention question so that reforms could finally be made to fix New York’s perpetually broken state government.

A majority of daily newspapers were strongly in support of the effort to call the convention and editorialized in its favor, urging readers to vote “yes” on ballot question number one in the November elections. Newspapers that endorsed the convening of the constitutional convention in 1997 included the following: *Buffalo News*, *New York Post*, *New York Times*, *Daily News*, *Newsday*, *Watertown Daily Times*, *Times Union*, *Poughkeepsie Journal*, *Post-Standard*, *Press and Sun Bulletin*, *Niagara Gazette*, *Daily Gazette*, and the *Legislative Gazette*. An extensive statewide search of the internet and newspaper microfiche contained within the State Legislative Library found only one regional daily newspaper on record as opposing the 1997 constitutional convention, that being the *Democrat and Chronicle*

Referendum: The New York Experience in National Context, 65 ALB. L. REV. 1017, 1018, 1037 (2002).

⁷² N.Y. CONST. art. XIX, § 2.

⁷³ See *History of Legal Action*, ALL-COUNTY TAXPAYERS ASS’N, <http://www.givemeliberty.org/acta/docs/legal.htm> (last visited May 15, 2011); *Certificate of Incorporation*, WE THE PEOPLE CONGRESS, INC., <http://www.givemeliberty.org/congress/docs/certbylaws.htm> (last visited May 15, 2011).

⁷⁴ Dr. Benjamin Commentary, *supra* note 10.

which editorialized against it on November 2, 1997.⁷⁵

The fact that the 1997 effort built some measure of popular support was confirmed through a Quinnipiac College Polling Institute survey that found fifty-six percent of New Yorkers indicated that a convention would be “a good thing.”⁷⁶ However, despite the strong support of daily newspapers, the pro-convention group’s efforts were matched by a diverse and powerful anti-convention coalition. The anti-convention coalition spent heavily on radio and television advertising primarily focused on the possible dangers that could ensue if the state’s constitution were amended, possibly eroding long codified labor rights, abortion access, and environmental protections such as the constitution’s “forever wild” provision established in Article XIV of the state constitution of 1894.⁷⁷ Also part of the anti-convention coalition was the New York State League of Women Voters, a good-government civic organization who opposed the effort largely over concerns that state legislators would simultaneously serve as delegates and thus double dip—similar to what occurred in 1967.⁷⁸ Convention opponents also focused on what they perceived as the convention’s excessive cost and, much like the 1967 convention demonstrated, how the process would be subordinated to political insiders that largely created the problems confronting state government.⁷⁹

This three-pronged approach, and the considerable advertising spending behind it, proved successful in overcoming the pro-convention coalition’s early success in making a case that the convention was necessary to solve the systemic problems confronting state government, despite the considerable support of newspaper editorial pages who favored the measure. As noted in a 2009 story by *New York Times* reporter Nicholas Confessore analyzing my current efforts and the unsuccessful 1997 convention push,

Backed by hundreds of thousands of dollars in advertising, opponents argued in 1997 that a convention would open the door to rolling back New York’s environmental and labor protections. Other critics, noting that incumbent lawmakers were those most likely to be elected delegates—posts in which they could serve

⁷⁵ Editorial, *Constitutional Convention: Vote Against Illusory Fix*, DEMOCRAT & CHRON., Nov. 2, 1997, at 10A.

⁷⁶ *Poll: New Yorkers*, *supra* note 32.

⁷⁷ See N.Y. CONST. art. XIV, § 1. Confessore, *supra* note 5, at A17.

⁷⁸ Confessore, *supra* note 5, at A17.

⁷⁹ See *id.*

simultaneously, drawing a second salary—argued that it was merely an expensive boondoggle.⁸⁰

The question of whether New York should call a convention was overwhelmingly defeated in 1997 by a statewide vote of sixty-two to thirty-eight percent.⁸¹

This outcome demonstrated the power of the Pandora's Box argument that was advanced by labor, environmental, and women's rights organizations. In a concluding comment on the crushing defeat of the 1997 effort to convene a state constitutional convention, then *Associated Press* Albany Bureau Chief Joel Stashenko, writing in the *Legislative Gazette*, cited the last-minute infusion of special interest money used to finance negative advertising against the convention. Stashenko wrote, "[a] last-minute advertising campaign and a phone-bank and direct-mail push by the unions drove home the anti-convention camp's message."⁸² Another post mortem commentary appearing in *The Buffalo News* by Mitchell Kaidy, a former state legislative aide and staffer to the 1967 constitutional convention, discussed what the convention's defeat in 1997 would portend for future sessions of the state legislature and beleaguered taxpayers:

Unfortunately, the defeat of the constitutional convention has made their task harder. It has sent a misleading message to the malperforming state legislators—that the voters remain tolerant of the late budgets, the back-door borrowing, the pork barrel spending, the self-serving reapportionment and the chronic deadlock between the two Houses If that is what the convention opponents and voters truly intended, cast an eye toward next year. All of the public's worst fears for the constitutional convention will be realized in 1998 by the overpaid and chronically underperforming State Legislature.⁸³

VI. 1967'S LESSONS LEARNED: "THE PEOPLE'S CONVENTION TO REFORM NEW YORK ACT"

On September 22, 2009, I introduced legislation entitled the "People's Convention to Reform New York Act," Assembly Bill A.9157, a non-partisan measure that would amend the State's

⁸⁰ *Id.*

⁸¹ Perez-Pena, *supra* note 11, at B1.

⁸² Joel Stashenko, *Blueprint for Con-Con Defeat Typical of Politics*, LEGIS. GAZETTE, Nov. 17, 1997, at 10.

⁸³ Mitchell Kaidy, *There'll be no Convention, but the State Constitution Still Needs Some Work*, BUFFALO NEWS, Dec. 13, 1997, at C2.

Election Law and the Public Officer's Law and, if enacted, would have placed the question of whether New York should convene a constitutional convention before voters on the 2010 fall ballot, effectively moving up the opportunity for reform by seven years.⁸⁴ Specifically, that question would have appeared before voters as the following, "Shall there be a convention to revise the constitution and amend the same?"⁸⁵

"The People's Convention to Reform New York Act" is distinguished from previous legislative initiatives that also sought to establish a constitutional convention in several regards, most notably, it directly deals with the principle criticisms of the convention delegate selection process which was driven, and dominated, by elected officials and political insiders, as opponents of the 1997 convention effort asserted. This was certainly a valid concern in the aftermath of the 1967 convention, which, as noted earlier, was presided over by the Assembly Speaker, and had many elected officials as delegates.

To rectify this, and ensure the reform effort truly was, to paraphrase the Gettysburg Address, "of, by, and for the people," the "People's Convention to Reform New York Act" specifies that any elected official wishing to serve as a constitutional convention delegate must resign their office before being seated as a delegate.⁸⁶ This particular requirement was added, by design, to dissuade elected officials from attempting to hold office while simultaneously serving in the convention. This would eliminate the potential for double-dipping along with concerns about the convention being "captured" by politicians, lobbyists, political party leaders, and special interest representatives—which occurred during the 1967 convention.⁸⁷

Another differentiating characteristic of the legislation is its recognition of the need to insulate delegate candidates from any potential appearance of conflict or political impropriety. Specifically, the legislation prohibits contributions from political party committees, political committees and political action committees to candidates for delegate to the state constitutional

⁸⁴ Assem. 9157, 2009 Leg., 232nd Reg. Sess. (N.Y. 2009).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Sponsor's Memorandum from Brian M. Kolb, N.Y. State Assem., in Support of Assem. 9157, 2009 Leg., 232nd Reg. Sess. (N.Y. 2009); see DULLEA, *supra* note 60, at 116–27.

convention, or any such candidates' campaign committees.⁸⁸ Furthermore, the initiative requires that anyone interested in lobbying the constitutional convention register and report their activities and that such individuals would, because of a clear conflict of interest, be disqualified from serving as delegates at the convention.⁸⁹ These provisions make this current effort to convene a state constitutional convention less partisan, more open and responsive, and more accountable to the people by minimizing political party involvement and possible domination by elected officials, political insiders, lobbyists, and special interest groups.

Additionally, as noted by Dr. Gerald Benjamin, three separate votes by the people are required to bring a constitutional convention and its recommended changes to fruition.⁹⁰ First, a vote by the people on the question to hold the convention; second, a vote on the delegates running to serve in the convention; and a final vote on the reform proposals or an entirely new constitution, yielded during the convention.⁹¹ It is also highly unlikely that convention delegates would remove important constitutional practices that are valued by New Yorkers, for example, the constitution's "forever wild" provision.⁹² The fact that a bipartisan coalition of thirty-three assembly members support the "People's Convention to Reform New York Act"—and several state senators support its companion measure,⁹³—demonstrates the viability of a constitutional convention as far as the legislative process is concerned.

CONCLUSION: THE WAY FORWARD TO CONVENE A STATE CONSTITUTIONAL CONVENTION

In light of the defeat of two successive attempts to convene a state constitutional convention in 1977 and 1997, respectively, some have questioned whether such a reform effort is even possible or, if concerns about cost, the Pandora's Box argument, and the effort being dominated by political insiders are simply too much to overcome. I remain undaunted and firmly believe that

⁸⁸ Sponsor's Memorandum from Brian M. Kolb, N.Y. State Assem., in Support of Assem. 9157.

⁸⁹ *Id.*

⁹⁰ Dr. Benjamin Commentary, *supra* note 10.

⁹¹ *Id.*

⁹² *Id.*

⁹³ S. 6156, 2009 Leg., 232nd Reg. Sess. (N.Y. 2009).

far from being a quixotic endeavor, convening a state constitutional convention is a reform effort firmly within New York's grasp and worthy of the Empire State. A state constitutional convention is tailor-made for this new media era dominated by the Internet, Facebook, and Twitter. Today, information provided in a free medium can quickly and effectively countervail the false arguments and free spending by special interests who want to perpetuate Albany's broken status quo.

State government's dysfunction, corruption, and fiscal irresponsibility are still the ultimate trump card that can mobilize public opinion and serve as an urgent call to action. As symptoms of these "cancers" on government continue to manifest themselves in the form of chronic unemployment, late state budgets, multi-billion dollar deficits and debt, some of the nation's highest property, business, and income taxes, the "case" for convening a constitutional convention will be self-evident, extremely powerful, and, in my opinion, open and shut. The fact that state government still lacks a statewide succession plan for state offices, an independent Legislative Redistricting Commission, term limits for legislative leaders and legislators, initiative and referendum, and stronger ethics laws will continue inspiring calls for reforming the broken institution of state government.

However, I believe it is not enough to merely stand on the sidelines and bemoan the challenges—we must engage New Yorkers to reconnect them to their government and empower citizens to make the changes and reforms that elected officials and political insiders have refused to adopt. This is precisely what I am seeking to achieve through my promotion of a non-partisan, grassroots "People's Constitutional Convention." Convening a "People's Convention to Reform New York" that is truly of, by, and for the people, would not only start New York down the path of much-needed reform, it could help erase the stain of government dysfunction that has hung like a millstone around the state's neck.

New Yorkers have listened to certain politicians in Albany talk about reform, and yet, year after year, session after session, nothing changes and the broken status quo continues. A "People's Convention to Reform New York" is our best chance to see reforms such as capping state spending and property taxes, banning backdoor borrowing, controlling public pension costs, enactment of initiative and referendum, term limits, an

independent Legislative Redistricting Commission, and a succession plan for statewide offices. A constitutional convention could help circumvent the state legislature's inertia to ensure these reforms finally see the light of day. This is why the fight for a constitutional convention is worth fighting, no matter how long the odds or steep the obstacles. To the critics of this effort, I have repeatedly posed the following question: If not a "People's Constitutional Convention," then what? Their silence has been deafening, which is why I will continue speaking out and championing this crucial reform effort.