No. _____

IN THE

Supreme Court of the United States

GREEN PARTY OF CONNECTICUT, ET AL.,
Petitioners,

—v.—

ALFRED P. LENGE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Connecticut's campaign finance law discriminates against minor party candidates by imposing qualifying requirements for public financing that are more onerous than any others in the nation, and that are not necessary to prevent factionalism or preserve the public fisc, coupled with a trigger provision that effectively penalizes minor party candidates who reach a threshold level of contributions by awarding their major party opponents an offsetting grant that will often far exceed what the minor party candidate has raised and spent.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The Green Party of Connecticut, S. Michael DeRosa, Libertarian Party of Connecticut, Elizabeth Gallo, Joanne P. Philips, Roger C. Vann, and Ann C. Robinson were plaintiffs below and are petitioners in this proceeding.

Alfred P. Lenge, in his official capacity as Executive Director and General Counsel for the State Elections Enforcement Commission, and Richard Blumenthal, in his official capacity as Attorney General were defendants below and are respondents in this proceeding.

Audrey Boudin, Common Cause of Connecticut, Connecticut Citizen Action Group, Kim Hynes and Tom Sevigny, were intervenor-defendants below and are respondents in this proceeding.

In a second opinion issued on the same day, the Second Circuit upheld certain restrictions on campaign contributions by contractors and lobbyists, and struck down others. The parties on the two appeals overlapped but were not identical. The parties identified above are the parties to the relevant public financing appeal. (Barry Williams was erroneously listed in the caption of this case by the Second Circuit, as a plaintiff-appellee.) Alfred P. Lenge replaced Jeffrey Garfield as Executive Director and General Counsel for the State Elections Commission, and was substituted as a party-defendant by the district court pursuant to Fed. R. Civ. P. 25(d).

Following the Second Circuit decision, Dan Malloy, a candidate for Governor, was granted intervention by the district court to address the

severability issue, which has since by mooted by legislative action. Since Mr. Malloy was not a party on the Second Circuit appeal, he is not listed in the caption but his counsel has been served with a copy of this application.

None of the petitioners has a parent corporation or issues any stock.

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The opinion of the court of appeals (App. 81a-164a) is reported at 616 F.3d 213 (2d Cir. 2010). The final judgment of the district court (App.165a-472a) is reported at 648 F.Supp.2d 298 (D.Ct. 2009). The opinion of the district court denying the motion to dismiss (App. 473a-552a) is reported at 537 F. Supp. 2d 359 (D.Ct. 2008).

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2010. On September 21, 2010, Justice Ginsburg extended the time for filing a petition for certiorari to December 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Connecticut's campaign finance law, "An Act Concerning Comprehensive Campaign Finance Reform for State-Wide Constitutional and General Assembly Offices," P.A. 05-05, codified at Conn. Gen. Stat. §§ 9-700-718; 9-750-751, are reprinted in the Appendix at App. 1a-80a.

STATEMENT OF CASE

The Citizen's Election Program ("CEP") was adopted as a part of a broad legislative revision of Connecticut's campaign finance statutes. "An Act Concerning Comprehensive Campaign Finance Reform for State-Wide Constitutional and General Assembly Offices," P.A. 05-05, codified at Conn. Gen. Stat. §§ 9-700–718, 9-750–751. App. 1a-80a. The CEP

establishes a voluntary system of public financing that applies to all state elections held after December 31, 2006. Connecticut is one of only three states in the nation to provide full public financing for all state elections. Maine and Arizona are the others, but unlike the so-called "Clean Elections" models adopted in those states, the Connecticut law discriminates against minor party and independent candidates (hereafter "minor party candidates") in numerous ways that unfairly limit their participation in the program.

In Connecticut, candidates seeking public funding must first raise thousands of dollars in small contributions (the amount varies by office). However, unlike the Maine and Arizona systems that rely solely on qualifying contributions to measure a candidate's level of public support, under the CEP a minor party candidate must have also received at least 10% of the vote in the prior election or satisfy an onerous petitioning requirement to qualify even for partial funding. Quite apart from the fact that the prior vote requirement is twice the threshold upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976), all the evidence shows that the contribution requirement, by itself, would filter out weak candidates and that the additional criteria are unfairly burdensome. No other state in the nation imposes such stringent qualifying criteria.

Shortly after the enactment of the CEP, the Green and Libertarian Parties of Connecticut brought this action against Jeffrey Garfield, the Director of the State Elections Enforcement Commission, which is the agency responsible for administering the program. A number of individuals and advocacy groups were allowed to intervene as

defendants in support of the CEP. The district court struck down the CEP in its entirety. App. 165a-350a. A divided court of appeals agreed that the statute's so called trigger provisions – one based on independent expenditures and one based on "excess" expenditures by nonparticipating candidates – were unconstitutional, but rejected the claim that the statute's remaining provisions discriminated against minor party candidates. App. 81a-164a. The case was remanded to determine whether the excess and independent expenditure trigger provisions could be severed from rest of the statute -- especially in light of the statute's explicit anti-severance provision. The district court certified the issue to the Connecticut Supreme Court, but vacated its Order when the legislature came into special session on August 13, 2010 and repealed those provisions. Their validity is no longer at issue in this litigation.

A. Connecticut's Citizen's Election Program

1. *Qualifying Criteria*

All candidates, irrespective of party affiliation, must raise a specified amount of money in "qualifying contributions" from a specified minimum number of individuals.[1] Candidates for governor must raise $250,000 in qualifying contributions, of which at least $225,000 must come from Connecticut residents. Conn. Gen. Stat. § 9-704(a)(1), App 14a. All other candidates for statewide offices must obtain $75,000 in qualifying contributions, including at least $67,500 from state residents. *Id.* § 9-704(a)(2),

[1] Qualifying contributions cannot exceed $100. Conn. Gen. Stat. § 9-704(a), App. 14a In order for a contribution to be counted, the contribution must be at least $5. § 9-704(a)(3)(B), App. 16a.

App. 15a State senate candidates are required to raise an aggregate of $15,000, including at least 300 contributions from residents of the district. *Id.* § 9-704(a)(3), App.15a. Candidates for state representative must raise an aggregate of $5,000, including at least 150 contributions from residents of the district. *Id.* § 9-704(a)(4), App.16a.

Major party candidates who collect the required amount of money in qualifying contributions are automatically entitled to public financing.[2] All other candidates are held to a different qualifying standard. In addition to collecting the requisite number of qualifying contributions, they can only qualify for funding based on their vote total in the prior election or if they satisfy onerous petitioning requirements. Candidates who do not meet these requirements cannot qualify even for post-election funding based on a strong showing in the polls.

Under the prior vote total requirement, a "minor-party candidate" becomes eligible to receive public funding if that candidate, or another member of her party, received a certain percentage of the vote in the previous general election for the same office. §§ 9-705(c)(1), (g)(1), App.21a, 28a. To receive a one-third CEP grant, the candidate or party member must have received at least 10% of the vote in the preceding general election. To be eligible for a two-thirds grant or a full grant, the prior vote

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[2] A major party is defined as a political party whose candidate for Governor in the last-preceding election received at least twenty percent of the votes cast for that office or has a twenty percent of the enrolled registered voters in the state. App.194a

requirement increases to 15% and 20%, respectively. *Id.*[3]

Minor party candidates who are not eligible under the prior vote total requirement can also qualify if they meet the requirements applicable to "petitioning candidates" set forth in *Id.* §§ 9-705(c)(2) & (g)(2), App. 22a, 29a. These provisions exist primarily for the benefit of new party and independent candidates. Under these provisions, petitioning candidates can qualify for a one-third grant by collecting signatures equal to 10% of the votes cast in the previous election for that office. To obtain a two-thirds grant or a full grant, the signature requirement increases to 15% and 20%, respectively. *Id.* The State Elections Enforcement Commission ("SEEC") has interpreted this provision to allow "minor party" candidates to qualify in this manner if they are not eligible under the prior vote total requirement. App. 197a

2. *Applicable Grants*

Major party candidates who are opposed in the primary can qualify for public financing. The amount of the grant will vary depending on the office being sought and whether the election occurs in a party dominant district. Conn. Gen. Stat. §§ 9-705(a)(1), (b)(1),(e)(1),(f)(1), App. 20a-21a, 26a-27a (defining applicable primary grants). There is no provision in the statute for primary election grants to minor party candidates.

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[3] Minor party candidates who qualify for a partial CEP grant prior to the election and then receive a vote total entitling them to a higher grant level can receive a supplemental, post-election grant. Conn. Gen. Stat. §§ 9-705(c)(3), (g)(3) App.24a, 30a.

Major party candidates who successfully secure their party's nomination then qualify for financing in the general election in the following amounts: $6 million for gubernatorial candidates,[4] $750,000 for other statewide offices, $85,000 for state senate candidates, and $25,000 for candidates for state representative. *Id.* §§ 9-705(a)(2), (b)(2), (e)(2), (f)(2), App. 20a-21a, 26a-27a.[5] The grant schedule for qualified minor parties is different. They are categorically shut-out of the program unless they cross the 10% mark under the prior vote and petitioning provisions and can only qualify for a full grant if they cross the 20% mark.

Participating CEP candidates are prohibited from raising funds other than qualifying contributions with the exception that a partially-funded candidate may continue to raise funds up to the amount of the grant issued to his major-party opponent. *Id.* § 9-702(c), App. 8a-9a. Such funds must be raised in amounts less than $100. *Id.* In addition, candidates cannot borrow money or use personal funds to make up the difference between major and minor party funding; use of loans or personal funds

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[4] Following the Second Circuit decision striking down the matching fund grants, the statute was amended to increase the base grant for Governor from $3 million to $6 million. § 9-705(a)(2), App. 20a. 2010 Conn.Public Act 10-1 (July 2010 Spec.Sess.).

[5] The amount of the grant is reduced to 30% of the applicable amount set forth above if a candidate runs unopposed. Conn. Gen. Stat. § 9-705(j)(3), (4), App. 33a. If the candidate's only opponent is a minor or petitioning party candidate, the grant is reduced to 60% of the applicable grant. *Id.*

is limited to nominal amounts needed to jumpstart campaigns. *Id.* § 9-710, App. 50a-51a.

3. *Expenditure Limits*

By participating in the CEP and accepting public funds, candidates agree to accept certain limits on the total amount of money they may spend on their campaigns. In essence, candidates that participate in the CEP may spend only the amount they receive in public funds, plus the amount they raise through the required "qualifying contributions." *See* Conn. Gen. Stat. § 9-702(c). App.8a. Participating candidates are also permitted to spend a nominal amount of their own personal funds to facilitate the qualifying process. *See id.*, § 9-710(c), App.51.

4. *The Minor Party Trigger Mechanism*

In addition to the excess and independent expenditure provisions that were struck down by the Court of Appeals and subsequently repealed, the CEP contains a separate matching fund provision that is triggered by contributions to minor party candidates only. Under this provision, once a minor party candidate raises more than a specified minimum amount of money, the amount of his opponent's grant is automatically increased. See Conn. Gen Stat § 9-705(j)(4), App. 33a. ("minor party trigger provision"). In a senate election, for instance, if the minor party candidate raises as little as $15,000, his opponent's grant will increase from $51,000 to $85,000. *Id.*

This provision only applies in elections that are uncontested by a second major party candidate. *Id.* Approximately 40% of the State's legislative districts are affected by this provision. App. 219a,

227a In these districts, major party candidates initially receive 60% of the otherwise applicable public financing grant in recognition of the fact that expenditures are significantly less than expenditures in elections contested by both major parties. *See* fn. 5, *supra*. The full grant is restored, however, once the minor party candidate has raised an amount equal to the qualifying contributions for that office. The trigger provision applies, however, regardless of whether the minor party candidate satisfies the other requirements for public funding. If not, a minor party candidate who raises $15,000 for a state senate election will trigger an additional $34,000 grant to his publicly financed, major party opponent. A minor party candidate who qualifies for a 1/3 grant by meeting the prior vote or petitioning requirements will receive $28,333, but the $34,000 additional grant provided to his major party opponent still represents more than a one-to-one match.[6] Under either scenario, therefore, the effect of the trigger provision is to widen the financial gap between the major and minor party candidates. The $100 contribution limit, moreover, makes it almost impossible to close that gap from other funding sources.

B. The Proceedings Below

1. *The District Court Decision*

Following a bench trial held after the inaugural run of the CEP in November 2008, the district court issued a 138 page decision finding that

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[6] The effect is even more pronounced in the governor's race. If a minor party candidate raises more than $250,000 but fails to qualify for public funding, *see e.g.* n.8, *infra*, the public grant to his major party opponent is nonetheless increased from $3.6 million to $6 million. *See* n.4, *supra*.

the CEP discriminates against minor parties because the qualifying criteria and funding scheme give major party candidates an unfair campaign advantage that could not be justified by the state's acknowledged interests in preserving the public fisc or preventing unrestrained factionalism. App. 170a, 294a-312a. The district court properly framed the issue as whether the CEP "unfairly or unnecessarily burden[s] the political opportunity of any party or candidate." App. 250a citing, *Buckley,* 424 U.S. at 96. Using *Buckley* as its guide the court focused its analysis on whether minor party candidates have a legitimate opportunity at qualifying for a CEP grant and whether the funding scheme gives major parties an unfair advantage in ways that represent a severe burden on minor parties. App. 259a-260a.

The court found that for all practical purposes minor party candidates did not have a legitimate shot at qualifying for a grant. The court made explicit findings based on undisputed evidence that the legislature knowingly chose to set the prior vote total requirement at vote levels that very few minor party candidates have historically attained, thus ensuring most minor party candidates would need to qualify for the CEP under the petitioning requirement. App. 168a-169a, 277a-278a.[7] In turn,

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[7] In the three election cycles covering the period prior to the implementation of the CEP, there were 179 minor party candidates on the ballot, but only 25 of those candidates received at least 10% of the vote. Only four minor party candidates received over 20% of the vote, or approximately one General Assembly candidate per election cycle. App. 277a. Almost all of these candidates (23 of 25) ran in legislative districts contested by only one major party candidate. App. 278a.

the evidence in the record established the CEP's petitioning requirement thresholds are nearly impossible to achieve given the minor parties' general lack of organizational structure, the great expense of a petition drive in the absence of a sufficient volunteer network, the CEP's prohibition on hiring professional canvassing services "on spec," and the general difficulties faced by unknown minor party candidates who cannot benefit from either name recognition or party identification when seeking the signatures of registered voters of that district. App. 169a, 278a-287a.[8]

The district court also found that even if a handful of candidates do overcome the expense of qualifying, the grants are structured in a way that locks in the advantages of major-party candidates. The main example cited by the court involves the minor party trigger provision. App. 287a-289a. The court found that this provision discourages minor party candidates from participating, or even attempting to participate in the CEP, by releasing significant additional funding to the participating major party opponent once the minor party candidate reaches a minimal level of fundraising. *Id.* In addition, the court found that candidates who qualify for partial grants cannot realistically close the funding gap because they are hamstrung by a $100

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[8] Allowing for an acceptable cushion, a candidate for governor would have to collect over 168,511 signatures to qualify for a partial grant and over 337,024 for a full grant. App. 279a-280a. The evidence showed that the cost of collecting this number of signatures would far exceed the amount of money the candidate is allowed to raise and spend under the CEP's expenditure limits -- which is limited to the amount the candidate raises in qualifying contributions. App. 8a, 282a-284a.

contribution limit imposed as a condition of receiving the grant. *Id*

Moreover, unlike the public financing model upheld in *Buckley*, the district court found that the CEP's qualifying and grant distribution terms are discriminatory not only because they treat the parties differently, but because the program's terms have the effect of "slant[ing] the political playing field" in a way that operates primarily to the benefit of major party candidates. App. 261a-262a. The district court engaged in a careful analysis of the CEP, both textually and in the context of Connecticut's electoral history as a party-dominant state. App. 217a-244a, 261a-276a. Quite apart from the statute's explicitly different treatment of minor parties, the evidence showed that the CEP would substantially improve the position of major party candidates by inflating their actual political strength in the state relative to other candidates. App. 269a.[9]

In reaching this conclusion, the court focused on two factors. First, the court found that the use of the gubernatorial election as a standard for major party designation – and full public funding -- artificially enhances the political strength of many major party General Assembly candidates by disregarding the level of public support for those candidates within their actual legislative district. App. 275a-276a. In the past three election cycles, in nearly half of the legislative districts, one of the major parties has either abandoned the district or its candidate has received less than 20% of the vote.

[9] The findings were supported by a detailed appendix compiled by the district court and incorporated in its final decision. App. 351a-472a.

App. 269a-276a. Relying, in part, on this Court's summary affirmance in *Bang v. Chase*, 442 F. Supp. 758 (D. Minn. 1977), *aff'd Bang v. Noreen*, 436 U.S. 941 (1978), the district court concluded that the CEP distorts the strength of many major party candidates who have otherwise failed to establish any degree of success in a particular district by removing the inhibiting factors that previously deterred candidates from running in that district, such as lack of public support or inability to raise the necessary campaign funding to be competitive. App. 276a. See *Bang,* 442 F. Supp at 768. ("Under this distribution scheme, a party with state-wide plurality can unfairly disadvantage its opponents in those districts where it enjoys little district support."). App. 270a.

Second, the court found that the CEP operates as a direct subsidy to major party candidates without the countervailing burden of meaningful expenditure limits. App. 167a-168a. The undisputed evidence showed that the CEP provides most major party candidates with a financial "windfall" that is not available to minor party candidates and that cannot be characterized as a substitute for traditional fundraising because it greatly exceeds the amount of money most candidates have raised in the past. App.167a, 261a-269a. This has led most districts with CEP-participating candidates to become "awash in public financing," except in a handful of highly competitive elections. App. 261a. [10]

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[10] The limits were pegged to correspond to spending in the handful of competitive elections that are considered in play each cycle. App. 234a, 264a. Most elections are not seriously contested or not contested all. In 2006, in 72% of Senate elections and 83% of House elections, the winning major-party candidate either won by at least 20% of the vote or was

The court held that the high levels of funding that the CEP injects into state legislative races has all but eliminated the existence of "low-cost districts" where the cost of mounting a campaign was well under the CEP grant levels. App. 267a. As a result, the court found, that minor parties' face a more crowded and expensive playing field which will make it very difficult for their candidates to replicate anywhere near the same level of success from pre-CEP election cycles, and, ultimately, more difficult to qualify for public funding in the future. App. 267a, 278a. By providing major parties with the incentive and resources to contest every election, the court found that the CEP unfairly favors competition between major parties over competition from minor parties, and thereby burdens the political opportunity of minor parties. App. 276a, *see also* 261a-262a ("Pegging the CEP's grant levels to the most competitive races has burdened minor party candidates' political opportunity because, by providing major party candidates financing in amounts much higher than typical expenditure levels, it slants the political playing field in favor of major party candidates.").

After considering all the evidence, the trial court had little difficulty distinguishing the facts in this case from the facts present in *Buckley*. Not only are minor parties in Connecticut held to a minimum qualifying standard twice as high as the 5% standard upheld in *Buckley,* but the CEP disadvantages minor parties by providing transformative political

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unopposed by another major-party candidate. App. 218a-219a, These results are representative of results from recent election cycles. *Id.*

opportunities to the major parties that are unfairly denied to minor parties and which make it increasingly difficult for them to effectively run low cost campaigns. App. 267a. The district court recognized that when this Court upheld the constitutionality of the federal public financing scheme at issue in *Buckley*, it expressly noted that the federal scheme did not affect the parties' relative standing and did "not *enhance* the major parties' ability to campaign"; rather, it "substitute[d] public funding for what the parties would raise privately and additionally impose[d] an expenditure limit." App. 258a, *quoting Buckley,* 424 U.S. at 95 n.129. (emphasis added). Any disadvantage to minor party candidates in *Buckley* was "limited to the claimed denial of the enhancement of opportunity to communicate with the electorate," but even that was tempered by the scheme's expenditure ceiling for participating candidates, which the Court described as a "countervailing" disadvantage not imposed on non-participating candidates. *Id.* at 95.

By contrast, the trial court found that the CEP operates to disadvantage minor parties by conferring valuable one-sided subsidies on their opponents, without which many would not have the incentive or money to seek office and would have no greater chance of winning than minor party candidates denied the funding. App. 275a-276a. For these candidates, the court concluded, the expenditure limits do not represent a "countervailing disadvantage" because the limits greatly exceed the amount of money those candidates could have raised privately. App. 167a, 259a, 322a.

Having determined that the CEP severely burdens the political opportunity of minor party

candidates, the court applied "'exacting scrutiny', *i.e.*, strict scrutiny" and concluded that the CEP could not meet that standard. App. 292a. The court held that the CEP is not narrowly tailored to achieving the state's interests in avoiding factionalism and funding unsupported candidacies because the evidence in the record established that the qualifying contribution requirement by itself, or in combination with much lower prior vote total and petitioning thresholds, would serve these interests equally well without imposing an unconstitutional burden on minor party candidates. App. 170a, 310a-311a. In addition, the state failed to demonstrate how the public fisc is actually protected by imposing stringent qualifying criteria on minor party candidates, while permitting equally hopeless major party candidates to qualify under significantly less onerous qualifying criteria, in vastly greater numbers and at windfall funding levels. App. 170a, 300a.[11]

2. *The Court of Appeals Decision*

In a 2-1 decision, the Second Circuit affirmed the district court's ruling invalidating the excess and independent trigger provisions, but reversed the equal protection claim. App. 85a-86a. The court held that petitioners failed to establish how the qualifying criteria and the distribution formulas unfairly and

[11] The Court further concluded that the CEP's excess expenditure and independent expenditure provisions unconstitutionally burden the plaintiffs' exercise of their First Amendment rights in a manner analogous to the law struck down by the Supreme Court in *Davis v. Federal Election Comm'n*, ___ U.S. ___, 128 S.Ct. 2759 (2008). App. 339a-348a. As noted above, these provisions were repealed after the Court of Appeals affirmed the district court's opinion striking down those provisions.

unnecessarily disadvantaged minor parties. App. 131a-142a. In reaching this conclusion, the majority did not address the minor party trigger provision. Similarly, the court failed to address the $100 contribution limit that the district court held would prevent candidates who receive partial grants from closing the spending gap against their major party opponents. The court also failed to address the argument that, unlike *Buckley*, there is no mechanism in the CEP that would allow candidates who fail to qualify for funding before the election to receive a post-election grant based on the results of the election.

Moreover, the court upheld the 10%, 15%, and 20% prior vote and petitioning standards without any consideration of how it works in tandem with the contribution requirement to limit minor party participation in the CEP. The trial court explicitly found that that the contribution requirement, by itself, will filter out weak candidates and that the additional criteria are unfairly burdensome. App.310a-311a. No other state in the nation imposes such stringent qualifying criteria, App. 525a-547a, nor did *Buckley* approve a system that requires minor-party candidates to demonstrate their level of support by collecting thousands of qualifying contributions in tandem with the prior vote total or petitioning requirements. Finally, the court never addressed the fact that major and minor party candidates are held to the same rigorous qualifying contribution requirement, but only major party candidates presumptively qualify for a full grant.

Instead, the court of appeals held that petitioners could not show how they were harmed under the CEP -- despite the trial court's

determination that it operates in a way that substantially inflates the political strength of major party candidates without providing minor party candidates a realistic opportunity to share in the program's benefits. In particular, the majority noted that fifteen minor party candidates in 2008 received more than 10% of the vote. App. 124a. The court considered that result presumptive evidence of the reasonableness of the qualification criteria, even though thirteen of the fifteen ran against only one major party candidate. App. 278a. The undisputed evidence shows that minor party candidates rarely receive more than 10% of the vote in elections contested by both major parties. App. 277a-278a. Furthermore, because the number of minor party candidates who received more than 10% of the vote increased slightly from 2006 to 2008, the court held that minor parties could not show how they were worse off under the CEP. App. 126a. Significantly, in the 2010 elections (which occurred after the court of appeals decision), not a single minor party or petitioning candidate qualified for public funding.

Once the court upheld the prior vote total requirement, the majority found it unnecessary to address the trial court's determination that the petitioning requirements were unduly burdensome. App.128a. The petitioning alternative, however, was adopted as a result of a delicate legislative balance designed to offset the fact that the vast majority of minor party candidates would be ineligible under the prior vote total standard -- including all new party and unaffiliated candidates running for the first time. *Id., see also n. 7, supra.*

Finally, the court of appeals dismissed the district court's finding that the use of a statewide

proxy to determine eligibility for funding in individual legislative districts would make it more difficult for minor parties to compete in those districts by providing historically weak major party candidates with windfall grants as speculative and inconclusive. App. 132a-137a. Purporting to hew to *Buckley,* the court concluded that petitioners could not prove with "any certainty" that they were worse off under the funding scheme simply because CEP provided valuable benefits to major party candidates. App.137a.

Judge Kearse dissented with respect to the equal protection claim. App. 161a-164a. She would have affirmed the district court's holding that use of a statewide proxy to determine eligibility for funding in legislative elections discriminates between candidates of different political parties in a manner analogous to the funding scheme at issue in *Bang v. Chase, supra,* In *Bang,* a three-judge district court held that giving public funds to local legislative candidates based on the public support of their parties statewide "invidiously discriminates between candidates of different political parties..." because "a party with state-wide plurality can unfairly disadvantage its opponents in those districts where it enjoys little district support.". 442 F. Supp. at 768. This Court summarily affirmed. *Bang v. Noreen,* 436 U.S. 941. In Judge Kearse's view, the majority's reliance on *Buckley* rather than *Bang* was "misplaced since that case involved only campaigns for the same office, the presidency; thus, only elections that were comparable provided the measure for determining whether and to what extent the various parties in *Buckley* were entitled to public funds." App162a-164a.

REASONS FOR GRANTING THE WRIT

1. The Second Circuit decision is inconsistent with *Buckley* and later cases that prohibit the use of campaign finance laws to give election related advantages to one group of preferred speakers or candidates, or to disadvantage others. Laws that disadvantage minor parties raise special concerns because of the potential to entrench the two major parties, and are considered presumptively invalid if they unfairly limit or burden their political opportunities. *Buckley* 424 U.S. at 95-96. Although the court below purported to rely on *Buckley,* that decision cannot be read as endorsing a campaign finance system that arbitrarily excludes minor parties by erecting multiple barriers to participation and which, at the same time, provides many equally weak major party candidates the transformative opportunity and resources to compete on a level playing field. While petitioners have no quarrel with the State's goal of promoting competition in a state where most elections are dominated by a single party, *Buckley* does not support a funding scheme that promotes major party competition only, and which, for all practical purposes, excludes minor parties. Not a single minor party candidate qualified for a grant in 2010.

2. The Second Circuit's failure to address the operation of the minor party trigger provision provides a separate but related basis for review of this case. Under this provision, minor party contributions that reach a threshold level trigger an additional public grant to participating major party candidates that can be twice as large as the amounts raised by the minor party. This Court's decision in *Davis v. Federal Election Comm'n,* 128 S.Ct. 2759

(2008), casts serious doubt on the constitutionality of such multiplier effects. Here, that constitutional infirmity is aggravated by a statutory scheme that, as now written, uniquely disadvantages minor party candidates who alone are subject to a trigger provision. At a minimum, the final decision in this case should be held pending a final decision in *McComish v. Bennett,* 611 F.3d 510 (9th Cir. 2010), *cert. granted,* __ S.Ct. ___ (Nov. 29, 2010) (No. 10-239), which involves the application of *Davis* to the trigger provisions contained in Arizona's campaign finance law.

3. The Second Circuit's decision also conflicts with the three-judge district court decision in *Bang v. Chase, supra,* over whether giving public financing to local legislative candidates based on the public support of their parties statewide invidiously discriminates between candidates of different political parties. In *Bang,* the court struck down this type of funding scheme because "a party with statewide plurality can unfairly disadvantage its opponents in those districts where it enjoys little district support." 442 F. Supp. at 768. The majority here acknowledged the conflict, and that this Court summarily affirmed the decision, *Bang v. Noreen,* 436 U.S. 941, but distinguished the case in a discussion relegated to a footnote. App. 103a-104a.

4. This case raises issues of urgent national importance. Connecticut is one of a growing number of states and municipalities to adopt public financing systems for state and local elections. Almost all the other state systems, except Connecticut's are party-neutral, and the few that are not involve statewide office only and use 5% as the prior success requirement. The Second Circuit has given its

imprimatur to a public financing system that needlessly and unfairly raises the bar for minor parties even though all the available evidence shows that the qualifying criteria used in other states has not led to a proliferation of minor party candidates in those states. If the constitutional rules governing political campaign financing are now to be changed, the responsibility lies with this Court.

I. The Discriminatory Treatment of Minor Party Candidates Under Connecticut's Campaign Finance Law Is Inconsistent With *Buckley* And This Court's Campaign Finance Jurisprudence.

The Second Circuit decision is based on the flawed assumption that the treatment of minor parties in the presidential campaign finance scheme upheld in *Buckley* is constitutionally indistinguishable from Connecticut's treatment of minor parties. In fact, the CEP departs from the federal model in numerous constitutionally significant ways that "unfairly or unnecessarily burden the political opportunity" of minor parties, *see Buckley,* 424 U.S. at 95-96, and that "slants the political playing field." in favor of the major parties. App 261a-262a. By failing to recognize these differences as constitutionally significant, the decision below is inconsistent with *Buckley* and violates the First Amendment.

Under the Federal Election Campaign Act that the Court considered in *Buckley,* minor-party candidates qualified for public financing if their party received 5% percent of the vote in the prior election. 424 U.S. at 97. Connecticut has arbitrarily adopted a standard twice as high, despite the

parallel requirement that the candidate must make a preliminary showing of widespread public support by raising thousands of dollars in small dollar contributions, and even though the trial court found that the contribution requirement, by itself, would effectively filter out frivolous and hopeless minor party candidates. App. 310a-311a.

Furthermore, major party candidates who raise the necessary qualifying contributions are automatically entitled to public funding for both the primary and general elections. Minor party and petitioning candidates must satisfy the same financial threshold, but are awarded grants based on a different formula that pays them less, and then makes it almost impossible for them to close the funding gap by not allowing them to raise funds in amounts greater than $100. App. 288a. Quite apart from the fact that limits this low are presumptively suspect, *see Randall v. Sorrell*, 548 U.S. 230, 265 (2006), the Court's decision in *Buckley* cannot be read as endorsing this type of overt discrimination.

Unlike the federal system, moreover, minor party candidates in Connecticut who do not qualify for CEP funding prior to the election cannot qualify for post-election funding based on their election results. In addition, Connecticut law provides that minor party candidates who raise more than a threshold amount of money trigger an additional public grant that can be more than twice as large to the major party opponent. *See* Point II, *supra*. There is no corresponding trigger under federal law.

These provisions in Connecticut law have two principal effects. First, they make it substantially more difficult for minor party candidates to qualify

for public financing than federal law or in either of the other two states (Arizona and Maine) that now have a comprehensive public financing system. App. 312a-317a. Second, by allowing major party candidates to qualify for public financing based on prior gubernatorial vote totals, the CEP provides a windfall grant to major party candidates in legislative districts where they have never run competitively, to the further disadvantage of minor party candidates. The CEP thus does precisely what *Buckley* said FECA did not: it simultaneously burdens minor parties and tilts the playing field in favor of major party candidates.

The Court's electoral jurisprudence has recognized that state's legitimate interest in avoiding factionalism, *Buckley*, 424 U.S. at 96, and its related interest in assuring that publicly financed candidates first demonstrate a reasonable level of public support. *Id.* At the same time, this Court has also stressed that the state cannot use its electoral rules to entrench, much less enhance, the electoral position of the two major parties. A public financing system must account for the "potential fluidity of American political life," *id.* at 97 (internal quotation marks omitted), including the fact that minor party candidates do, occasionally, defeat major party opponents. Although the Court has recognized the political reality that electoral districts within the United States operate in a two-party system, it has historically rejected attempts by the legislature to solidify the Democrats and Republicans as *the* two major parties. *Williams v. Rhodes,* 393 U.S. 23, 24-25 (1968).

That is precisely what Connecticut has done here. Rather than probe the justification for these

barriers to minor party participation in the CEP, the Second Circuit discounted their significance by noting that the CEP is presumptively valid since minor party candidates have shown that they can meet the 10%, 15%, and 20% thresholds and, therefore, are at least theoretically eligible for funding, provided they can also raise the requisite qualifying contributions. The court reached this conclusion even though the evidence clearly showed that the only minor party candidates who consistently receive at least 10% of the vote are ones who run in districts abandoned by one of the major parties, including thirteen of the fifteen who hit that mark in 2008. App. 278a.[12] Minor party candidates almost never receive more than 10% of the vote in elections contested by both major parties. App.277a-278a. The majority's exclusive focus on the results in single party districts obscures the fact that the prior vote total requirement will unfairly and unnecessarily limit participation by minor party candidates as a whole -- including all independent and minor party candidates running for office for the first time. That is why the legislature provided an alternative means of participation by allowing non-

[12] There is nothing remarkable about the 2008 election results. It is strictly indicative of the number of minor party candidates who ran in single party districts and is entirely consistent with prior results. Twenty-three of the twenty-five minor party candidates received more than 10% of the vote between 2002 and 2006 competed against only one major party candidate. App. 278a. In 2010, seven of the eight minor party candidates who received more than 10% of the vote competed against only one major party candidate. These results are available on the Connecticut Secretary of State website. http://www.statementofvotesots.ct.gov/StatementOfVote/WebModules/ReportsLink/OfficeTitle.aspx.

major party candidates to qualify through a petitioning process.[13]

The CEP's discriminatory impact is even more apparent when understood in the context of the State's numerous party dominant or "safe" legislative districts. App. 217a-244a, 261a-276a. The CEP has changed the dynamics of elections in these districts by providing major party candidates who have little district wide support with the resources to compete on a level playing field. The high level of funding that the CEP injects into state legislative races gives major party candidates an unfair statutory advantage, which, in turn, exacts a heavy corresponding price on minor parties that unfairly burdens their political opportunities. See *Buckley* 424 U.S. at 95-96. Their ability to run effective, low-cost campaigns is compromised by the substantial communications benefits that flow almost exclusively to major-party candidates. App. 267a. Minor party candidates denied the CEP's benefits are inevitably worse off as a result because they must now navigate a political field that is both more competitive and expensive and that in the future will make it increasingly difficult for their candidates to replicate anywhere near the same level of success from pre-CEP election cycles, and, ultimately, more difficult to qualify for public funding in the future. App 267a, 278a.

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[13] Although the petitioning alternative remains in place, the trial court found that it imposes an equal or greater burden than the prior vote total requirement. App. 278a-287a. *See* fn. 8 and accompanying text, *supra*. The Second circuit did not disturb those findings.

The court of appeals acknowledged that a public financing law operates to burden the political opportunity of minor parties where it "disadvantage[d] non-major parties by operating to reduce their strength below that attained without any public financing" App. 106a, quoting, *Buckley,* 424 U.S. at 98-99), but then failed to properly apply that standard. The public financing system upheld in *Buckley* achieved a rough proportionality between its benefits and burdens that did not affect the "relative strengths" of the parties – it maintained the status quo. For minor party candidates, that proportionality is lacking under the CEP.

Connecticut's rules for minor party participation are not unconstitutional simply because they are unique, but their uniqueness undermines the state's assertion that they are necessary to avoid factionalism and protect the public fisc. Like Connecticut, both Arizona and Maine require all participating candidates to raise a threshold amount of small qualifying contributions to demonstrate public support before receiving public financing. But unlike Connecticut, neither Arizona nor Maine additionally requires minor party candidates to meet a prior vote standard or satisfy an onerous petitioning requirement. App. 312a-317a. [14] Under the federal system, by contrast, minor party candidates can initially qualify for public financing based on a prior vote total, but that requisite

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[14] For a more in-depth description of the Maine and Arizona clean election programs and the various constitutional challenges that have been mounted against those programs, as well as a description of the public financing programs in place in North Carolina, Minnesota, Massachusetts, Vermont, and others, *see* App. 525a-547a.

percentage is half of what Connecticut requires to participate in the CEP. And, unlike Connecticut, federal law has a safety valve that permits post-election reimbursement of campaign expenses based on election results for minor party candidates who do not qualify for pre-election funding. Finally, Connecticut alone compounds the competitive disadvantage suffered by minor party candidates through a trigger provision that can provide more than a 2:1 grant to major party candidates once a minor party candidate's contributions exceed a threshold amount. Neither Connecticut nor the Second Circuit has offered any plausible explanation why these additional burdens on political participation are necessary to avoid factionalism or protect the public fisc.

Although *Buckley* cautioned against drawing unwarranted inferences from the record about how minor parties are affected by campaign finance laws that treat minor parties differently, it does not require courts to be willfully blind to a statute's readily apparent purpose and effects. No one disputes that the CEP was adopted to encourage increased major party competition. App.224a-225a, fn. 27(summarizing legislative history). It provides historically weak candidates with the resources to run full throttle campaigns without regard to their likelihood of success or the "inhibiting factors" that have led to the abandonment or neglect of those districts in prior years. App. 276a. Giving major party candidates the resources to compete on a level playing field based solely on their affiliation with the major parties gives them an unfair advantage over other candidates in those districts where the major party candidates enjoy little district support.

While petitioners have no quarrel with the state's interest in promoting major party competition, *Buckley* does not give states the green light to devise public financing schemes that favor major party competition only or that gives the major parties an unfair advantage. *Buckley* and other Supreme Court precedents expressly forbid such a result. *See, e.g.*, *Williams v. Rhodes*, 393 U.S. at 31(striking down Ohio ballot requirements because they "give the two old, established parties a decided advantage over any new parties struggling for existence."). There is no reason not to apply the same limiting First Amendment principle here. In the service of leveling the playing field between major party candidates, the CEP further slants the playing field in their favor. *See Buckley*, 424 U.S. at 96 n.129 ("[a]s a practical matter . . .[the presidential financing system] does not enhance the major parties' ability to campaign: it substitutes public funding for what the parties would raise privately and additionally exposes an expenditure limit."); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (noting that "the First Amendment is plainly offended" when the legislature attempts to give one group "an advantage in expressing its views to the people").

II. The Minor Party Trigger Provision Upheld Below Is Inconsistent With Both *Davis* and *Buckley*

The barriers to minor party participation in Connecticut's campaign finance system are reinforced by the CEP's minor party trigger provision, which further tilts the playing field against minority party candidates and thus cannot

be reconciled with either *Buckley* or *Davis*. Under this provision, if a minor party candidate's fundraising exceeds a minimum threshold, the amount of his opponent's grant is automatically increased by almost 70%. *See* § 9-705(j)(4), App. 33a. This means that a minor party candidate running for state senate in one of the State's many single party districts will increase the size of his opponent's grant from $51,000 to $85,000 if he raises a single dollar more than $15,000. The district court held that this provision discriminates against minor parties by acting as a strong incentive to avoid raising contributions that exceed the qualifying threshold. App. 287a-289a.

In *McComish v. Bennett*, No. 10-298, this Court recently granted certiorari to review the constitutionality of Arizona's campaign finance law that provides a dollar-for-dollar match based on the expenditures of nonparticipating candidates and independent advocacy groups above the initial public financing amount. Whatever the ultimate result in that case, the minority trigger provision in Connecticut more clearly resembles the "Millionaire's Amendment" struck down in *Davis* because of its multiplier effect. In *Davis*, the contribution limit for candidates was increased threefold – from $2,300 to $6,900 – when their opponent spent more than $350,000 of personal funds on his own campaign. Here, as explained above, contributions in excess of $15,000 received by a minor party candidate for state senate will trigger a $34,000 grant to his publicly-funded, major party opponent.

Although it relied on *Davis* to strike down other provisions in the CEP that triggered additional public financing based on independent expenditures

and "excess" spending by major party candidates, which have since been repealed, the Second Circuit did not address the CEP's minor party trigger provision at all or its relationship to *Davis*.

This Court should grant certiorari to clarify that the use of punitive trigger provisions to discriminate against minor party candidates is unconstitutional under both *Buckley* and *Davis*. Alternatively, the Court should hold this petition pending a final decision in *McComish v. Bennett*.

III. The Second Circuit Decision Conflicts with the Three-Judge District Court Decision in *Bang v. Chase* Involving the Statewide Qualification Criteria

The Second Circuit's decision conflicts with the three-judge district court decision in *Bang v Chase, supra,* over whether giving public financing to local legislative candidates based on the statewide popularity of the party invidiously discriminates between candidates of different political parties. *Bang* involved a Minnesota statutory scheme that subsidized parties in proportion to their statewide vote totals; the funds, however, were disbursed *equally* to all candidates of a given party, regardless of their level of party support in their own district. The three-judge court found no rational basis for this scheme and deemed it unconstitutional because "a party with state-wide plurality can unfairly disadvantage its opponents in those districts where it enjoys little district support." 442 F. Supp. at 768.

The CEP operates in substantially the same way as the Minnesota financing program, except that the money is paid directly to the candidate. By awarding grants based on the candidate's major

party affiliation, the legislature ensured that major party candidate would always be presumptively eligible for funding in districts where they lack popular support. These are the districts where minor party candidates have had their greatest success and giving money to their opponents will make it more difficult to replicate that success. App. 278a

Without attempting to seriously distinguish *Bang,* the Second Circuit held that it was permissible under *Buckley* to award grants based on the candidate's major party status. The majority's reliance on that decision is misplaced because it "involved campaigns for the same office," as Judge Kearse pointed out in her dissent. The decision below is thus in direct conflict with the decision in *Bang.*

IV. This Case Raises Issues of National Significance Concerning The Treatment of Minor Parties

Connecticut is one of approximately a dozen states to enact public financing laws, and one of only three states to provide full public financing to candidates for all legislative and statewide offices. Most states have enacted programs modeled after or similar to the so-called "Clean Elections" systems that have been adopted in Maine and Arizona. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000); *McComish v. Bennett, supra.* Under these systems, all ballot qualified candidates, without regard to party affiliation, who raise a relatively modest amount of money in small dollar contributions, qualify for the same amount of funding. *See e.g., North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524

F.3d 427 (4th Cir. 2008); *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). These programs either provide full funding or partial funding on a matching dollar basis similar to the system for financing the presidential primary., App. 525a-547a. (summarizing different state programs). The few public financing systems that do look to a candidate's prior vote total use 5% as the relevant criterion for determining major party status and are limited to elections for statewide office. *Id.* The record shows that use of these more reasonable criteria has not led to a proliferation of minor party candidates seeking public funding or a raid on the treasury. App. 312a. The threat to the public fisc -- at least in Connecticut -- comes primarily from major party candidates because of the ease with which they can qualify for windfalls amount of money. App. 300a.

The CEP purports to be modeled on the Maine and Arizona systems, but in fact is a hybrid that radically departs from those systems and from the system upheld in *Buckley*. The Second Circuit has given its approval to a public financing system that needlessly raises the qualifying bar for minor parties, while at the same time, confers substantial election related advantages on the major parties. The court has given the green light to legislatures across the country to abandon the non-discriminatory approach to public financing that every state, except Connecticut, has opted to follow. Giving the legislature keys to the treasury to finance their own campaigns is risky business fraught with the danger that they will enact legislation that will stifle competition.

There is an urgent need for uniformity in this developing area of the law. If the constitutional rules

governing political campaign financing are now to be changed, the responsibility lies with this Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted. Alternatively, the petition should be held pending a final decision in *McComish v. Bennett*, No. 10-298.

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