No. 10-795

IN THE

Supreme Court of the United States

GREEN PARTY OF CONNECTICUT, *et al.*,
Petitioners,

v.

ALRFED P. LENGE, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS AUDREY BLONDIN, COMMON CAUSE OF CONNECTICUT, CONNECTICUT CITIZEN ACTION GROUP, AND TOM SEVIGNY

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QUESTION PRESENTED

Whether the Second Circuit erred in holding, based on its review of the factual record in this case, that petitioners had failed to prove that Connecticut's law establishing a public-financing system for state elected offices imposes an unfair or unnecessary burden on the electoral opportunities of minor parties.

RULE 29.6 STATEMENT

Connecticut Citizen Action Group is a nonprofit corporation that has no parent corporations and issues no stock. Common Cause of Connecticut is a part of Common Cause, a nonprofit corporation that has no parent corporations and issues no stock.

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INTRODUCTION

In this case, the court of appeals applied the principles laid down by this Court in *Buckley* v. *Valeo*, 424 U.S. 1, 90-103 (1976), and held that Connecticut's voluntary system of public financing of candidates for state offices does not place an unreasonable burden on the electoral prospects of minor-party and independent candidates. Petitioners do not contest the applicability of *Buckley*'s analysis or call into question the legiti-

macy of public financing generally. Instead, they ask this Court to review the Second Circuit's application of *Buckley* to the particular facts of this case, and to hold that the criteria established by Connecticut's legislature for allowing minor-party and independent candidates to qualify for funding are too stringent.

Strikingly, on the central issue in the case, petitioners identify no conflict among the lower courts, no unresolved issue of broad national importance, and no case in which any appellate court has found minor-party or independent candidates to be unduly burdened by any public-financing law. Instead, petitioners request that this Court wade into the fact-intensive issue of whether Connecticut's qualifying criteria are too onerous in comparison to the criteria upheld in *Buckley*. But this Court does not sit to review the lower courts' application of settled principles of law to particular facts.

Petitioners' claims that the Second Circuit erred are in any event unpersuasive. The Second Circuit carefully examined the record and reached the conclusion that the Connecticut statute's qualifying criteria do not present unreasonable barriers to minor-party success, and in fact have permitted a significant number of non-major-party candidates to qualify for funding. Petitioners might prefer standards that would permit even more candidates to qualify for funding, but that preference is not enough to demonstrate that the balance struck by Connecticut's legislature, and affirmed as reasonable by the court of appeals, is impermissible in light of the State's substantial interests in preventing waste of public funds on candidacies with no prospect of success and avoiding excessive political factionalism.

Moreover, contrary to petitioners' argument, the issues in this case have nothing in common with those upon which the Court granted certiorari in *McComish* v. *Bennett*, No. 10-239, and *Arizona Free Enterprise Club's Freedom PAC* v. *Bennett*, No. 10-238 ("the Arizona cases"). Those cases concern provisions in a public-finance law that give a participating candidate increased funding when opposition spending exceeds the initial public grant to the participating candidate. The issue the Arizona cases present is whether such provisions violate the opponents' speech rights in contravention of this Court's decision in *Davis* v. *FEC*, 554 U.S. 724 (2008).

The similar provisions that were once present in Connecticut's law no longer exist to present that issue here. The Second Circuit *struck down* the comparable provisions of Connecticut's law (*see* Pet. App. 142a-152a), and those provisions have now been repealed by Connecticut's legislature. Petitioners' assertion that the same issue is presented by a different provision of the Connecticut law, which provides reduced funding grants for participating candidates who are running unopposed or against only token opposition, is meritless. Indeed, petitioners did not even argue below that that provision was unlawful on the *Davis* rationale, and the Second Circuit did not decide any issue relating to its validity.

Equally untenable is petitioners' assertion that the decision below conflicts with the 33-year-old district court decision in *Bang* v. *Chase*, 442 F. Supp. 758 (D. Minn. 1977). The portion of *Bang* relied on by petitioners did not concern claimed unequal treatment of minor parties, but the validity of an idiosyncratic Minnesota-law provision controlling how public funds earmarked by taxpayers for particular political party accounts

would be divided among the party's candidates. Moreover, contrary to petitioners' suggestion, that part of *Bang*'s holding was not summarily affirmed by this Court. Rather, this Court's summary affirmance was limited to the part of the *Bang* decision that *upheld* most of the Minnesota public-finance law, because only the plaintiffs who challenged Minnesota's public-finance system perfected an appeal to this Court. The rulings that this Court affirmed in *Bang*—that Minnesota's public-finance law did not violate the First Amendment or the equal protection clause and did not infringe the rights of minority parties—are fully consistent with the decision below. There is, in short, no decisional conflict among the lower federal courts that would warrant exercise of this Court's jurisdiction.

STATEMENT

A. The Citizens Election Program

Connecticut's public campaign-finance system, called the Citizens Election Program (CEP), was enacted in 2005 as part of the State's Campaign Finance Reform Act (CFRA). The CEP, as well as other provisions of CFRA that are not at issue here, was a response to a succession of scandals involving officials at all levels of Connecticut's government. Allegations of corruption and favoritism toward contributors led to the resignation and eventual criminal conviction of former governor John Rowland. As the district court in this case recognized, the Rowland affair was "but one of the many corruption scandals involving elected officials in state and local government that helped earn the State the nickname 'Corrupticut.'" Pet. App. 184a.

The CEP addressed the pervasive problem of corruption and the appearance of corruption by attempting

to free candidates from exclusive reliance on private fundraising through the creation of a public-financing mechanism for elections to state offices. As relevant here, the CEP provides that candidates nominated for statewide or state legislative offices by major parties are eligible for public-funding grants, provided that they collect a specified amount of seed money in "qualifying contributions" of no more than $100. In return, candidates accepting public funding must abide by spending limits equal to the amount of the public funding plus the requisite qualifying contributions.

The CEP uses the definition of "major parties" that Connecticut has long used for other electoral purposes, under which a political party is a major party either if it had a candidate for governor who received at least 20% of the vote in the last election for that office, or if its registered voters make up at least 20% of Connecticut's electorate. Significantly, the 20% threshold does not necessarily limit major parties to Republicans and Democrats. Although the Democratic and Republican parties are now the only major parties in the State, former governor Lowell Weicker's "A Connecticut Party" satisfied the requirements for major-party status under Connecticut law based on the results of the 1990 elections, so all of its candidates would have qualified for funding as major-party candidates had the CEP been in existence in the 1992 and 1994 elections. *See* Pet. App. 134a.

Recognizing, however, that third parties will only rarely qualify as major parties based on the statewide 20% criteria, the CEP provides other means by which minor-party and independent candidates can qualify for funding for campaigns for specific offices. The CEP provides that a candidate can receive a grant of public funding if she (or a candidate of her party) received a

specified percentage of the vote for that office in the last election. Specifically, the CEP provides for a full funding grant if the candidate or party received 20% of the vote; a 2/3 funding grant for 15% of the vote; and a 1/3 grant for receiving 10% of the vote. Additionally, candidates and parties that cannot show a track record of support sufficient to satisfy the qualifying criteria based on electoral success may qualify for full, 2/3, or 1/3 grants by collecting petitions with the signatures of 20%, 15%, or 10% of eligible voters for their office.

Candidates eligible for funding based on these criteria must, like major-party candidates, raise specified levels of qualifying contributions. Candidates receiving only partial grants, however, are not limited to spending only those amounts, but may also raise and spend private contributions up to the full grant amount.

B. The Factual Record

Contrary to petitioners' assertions, the evidentiary record developed at the trial in this case does not show that the CEP's eligibility criteria unfairly burden the electoral opportunities of minor-party or independent candidates. Rather, the uncontradicted evidence demonstrates that minor-party candidates can meet, and have met, the CEP's eligibility standards, and that the prospects of minor-party candidates were not impaired by the advent of public campaign funding.

Specifically, eleven non-major-party candidates were eligible for public funding in the 2008 election based on election results in 2006 (Pet. App. 223a), and four others qualified for funding through petitioning

(EX-4491-4493).[1] Election results in 2008 made at least 15 non-major-party candidates eligible to qualify for funding in 2010, including five who reached the 20% threshold for full funding and four who qualified for 2/3 grants by receiving 15% of the vote. Pet. App. 227a. The 15 non-major-party candidates who received enough votes in 2008 to qualify for funding in 2010 represented well over 1/3 of the 40 non-major-party candidates who ran for state legislative office. Pet. App. 124a.

Moreover, the grants received by non-major-party candidates who qualified for funding—even partial funding—significantly exceeded the amounts such candidates are normally able to raise privately. *See* Pet. App. 174a-180a (most minor-party candidates raise less than $1000 per election). Minor-party or independent candidates who qualified for funding, therefore, received a significant benefit to their ability to campaign for office.

The evidence also showed that the overall performance of minor parties did not suffer with the advent of public funding in the 2008 election. On the contrary, minor-party candidates increased their overall share of the vote in 2008, increased their expenditures, and had levels of ballot access and candidate recruiting comparable to those in prior elections. *See* EX-4488, 4573 (vote percentage); EX-4483-4484, 4496-4497, 4574 (fundraising); EX-4565 (number of candidates).

The record also fails to support petitioners' theme that the CEP discriminates against non-major-party

[1] "EX" refers to exhibit volumes filed in the court of appeals in lieu of including exhibits in the joint appendix.

candidates by treating them differently from supposedly equally hopeless major-party candidates in non-competitive districts. Petitioners assert that such major-party candidates are situated no differently than non-major-party candidates who are ineligible for full funding. However, Connecticut electoral results demonstrate that, while it is rare for a minor-party candidate to receive 20% of the vote in a legislative district (even when only one of the major parties fields a candidate), major-party candidates, when they choose to contest a district, very rarely receive less than 20% of the vote. *See* Pet. App. 219a-221a, 226a-227a; EX-927, 2554-2555. Major-party status is thus a highly reliable proxy for the ability of a candidate to meet the threshold measure of competitiveness that the State has deemed to justify full funding.

Similarly, the record does not support petitioners' hypotheses that so-called "windfall" funding levels for major-party candidates will lead them to contest more districts and further crowd out the voices of minor-party candidates. Unrebutted evidence demonstrated that this outcome had not in fact occurred in the 2008 elections: The number of districts contested by the major parties did not increase. Pet. App. 223a-227a. The reason is that, as the evidence at trial showed, major-party candidates generally do not decide whether to run for a particular office based on the availability of funding, but on the prospects for success. EX-844-845, 855-856.[2] In any event, petitioners did not show that

[2] The evidence also showed that minor-party candidacies are generally not driven by the availability of funds or the prospects of success (which are almost always small), but by ideological factors and the desire to increase their visibility. EX-871, 1952-1953, 1980-1982, 1994-1995, 2002-2004, 2152.

minor parties' chances of electoral success would suffer harm even if public funding led more major-party candidates to contest noncompetitive districts, because they presented no evidence that minor-party candidates themselves would have any realistic prospects of success in those districts. *See* Pet. App. 223a (minor-party candidates competing against a single major-party candidate received an average of 8.9% of the vote in 2006).

C. The Decision Below

Despite the factual record, the district court, erroneously applying strict scrutiny, struck down the CEP's eligibility criteria principally on the ground that the system was too generous to major-party candidates. The Second Circuit, focusing firmly on the standards set forth by this Court in *Buckley* and on the most pertinent facts established by the extensive record, reversed. The court held that the plaintiffs had not shown that the electoral prospects of minor parties were unfairly burdened by either the CEP's eligibility requirements for minor-party candidates or its provisions allowing funding of major-party candidates based on their parties' statewide levels of support.

Judge Cabranes' majority opinion thoroughly analyzed *Buckley*'s relevant holdings and concluded that the district court had erred in subjecting the CEP to strict scrutiny. The Court concluded that the statute could be sustained if it served sufficiently important state interests and did not unfairly burden the political opportunities of minor parties. Following *Buckley*, the court held that the CEP's public funding mechanism as a whole served important state interests in avoiding corruption or the appearance of corruption resulting from private campaign-financing practices.

The court also found that the CEP's eligibility criteria served important interests in not squandering public funds on hopeless candidacies. The court emphasized that *Buckley* had expressly held that eligibility for public funding could be conditioned on the showing of a threshold level of past support for a party or candidate, and that the determination of that threshold was in the first instance a matter of legislative judgment, subject to a judicial check only if it created an unfair burden on the prospects of minor parties and independent candidates. An important element of this determination, the court held, was whether a statute had the effect of reducing the strength of minor parties "'below that attained without any public financing.'" Pet. App. 121a (quoting *Buckley*, 424 U.S. at 98-99).

Examining the record, the court found that petitioners had failed to carry the burden of demonstrating such unfairness. The court emphasized that the record showed both that minor parties were not "shut out" from participation in the system (Pet. App. 124a), and that "minor-party candidates as a whole are … just as strong—if not stronger—than they were before the CEP went into effect" (Pet. App. 126a). Although the court recognized that the result might be different in a future case with a different record, it held that, on the record before it, it could not find that the CEP unfairly burdened minor parties.

Similarly, the court held that the record did not support the conclusion that the CEP's provisions allowing major-party candidates to qualify for funding statewide based on their party's overall level of support burdened the rights of minor parties. The court found it merely speculative that minor parties would be adversely affected by funding of major-party candidates in supposedly noncompetitive districts. Indeed, the

court pointed out that "it is also possible that the statewide qualification criteria will increase the political opportunity of minor-party candidates, possibly in dramatic fashion," as would occur if a minor-party gubernatorial candidate were again to win 20% or more of the statewide vote. Pet. App. 135a.

In sum, the court held that the design of the CEP's eligibility criteria fell within the "permissible range" of legislative discretion under *Buckley*. Pet. App. 129a, 136a. In contrast, the court struck down the CEP's "trigger provisions," which allowed participating candidates to receive supplemental funds when nonparticipating opponents or independent groups made expenditures against them that exceeded their initial funding grants. According to the court, those provisions "penal[ized]" and "burden[ed]" the right to "'the exercise of the First Amendment right to use personal funds for campaign speech'" (Pet. App. 149a (quoting *Davis*, 554 U.S. at 740)), and could only be justified by a compelling state interest, which the court found lacking.

Shortly after the court's decision, Connecticut repealed the trigger provisions that the Second Circuit had invalidated, and they are thus no longer at issue in this case. What remains is petitioners' challenge to the effect of the CEP's eligibility and funding criteria on minor-party and independent candidates.

REASONS FOR DENYING THE WRIT

I. THE SECOND CIRCUIT'S APPLICATION OF SETTLED PRINCIPLES TO HOLD THAT CONNECTICUT'S PUBLIC-FINANCE LAW DOES NOT UNFAIRLY DISADVANTAGE MINOR PARTIES DOES NOT MERIT REVIEW BY THIS COURT

This Court established the principles governing the issues in this case in *Buckley*, and no subsequent decision either of this Court or of any other has called those principles into question. The Second Circuit carefully and correctly applied those settled principles to the particular features of Connecticut's public-finance law and the factual record of this case. Its holding does not conflict with decisions of this Court or any other appellate court, and does not merit exercise of this Court's discretionary certiorari jurisdiction.

The pertinent holdings of *Buckley* include the Court's recognition that voluntary public campaign-finance systems are fully compatible with the First Amendment because they represent efforts "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. 1, 92-93 (1976). The Court held that in assessing an equal protection challenge to a public-financing program based on the claim that it invidiously discriminates against candidates or parties who are ineligible for funding, it is inappropriate to apply the same degree of "exacting scrutiny" applicable to limits on ballot access because "public financing is generally less restrictive of access to the electoral process than the ballot-access regulations dealt with in prior cases." *Id.* at 95. As the Court explained, "the inability, if any, of minor-party candidates

to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions." *Id.* at 94-95.

The Court thus held that a public-finance system that conditions eligibility on a candidate's or party's level of popular support is constitutional if it serves "sufficiently important governmental interests and has not unfairly or unnecessarily burdened the political opportunity of any party or candidate." 424 U.S. at 95-96. The Court recognized that public financing served the "significant governmental interest" of "eliminating the improper influence of large private contributions" and "relieving major-party … candidates from the rigors of soliciting private contributions." *Id.* at 96. And it stated that the important public "interest in not funding hopeless candidacies with large sums of public money necessarily justifies the withholding of public assistance from candidates without significant public support." *Id.* (internal citation omitted). Requiring significant public support, the Court said, "also serves the important public interest against providing artificial incentives to 'splintered parties and unrestrained factionalism.'" *Id.* (quoting *Storer* v. *Brown*, 415 U.S. 724, 736 (1974)).

Ultimately, the Court held that these interests justified the denial of general-election public funding to minor-party and independent candidates who did not make the requisite showing of electoral success (which in the presidential system required meeting a threshold of 5% of the popular vote). Recognizing that the important interests served by limiting eligibility for funding were bounded by "constitutional restraints against inhibition of the present opportunity of minor parties to become major political entities if they obtain widespread support," 424 U.S. at 96, the Court found that

the law's challengers had "made no showing that the election funding plan disadvantages nonmajor parties by operating to reduce their strength below that attained without any public financing." *Id.* at 98-99.

The Second Circuit's decision represents a straightforward application of *Buckley* to the facts of this case. The court properly recognized that Connecticut's public-financing system served the same anticorruption interests as the federal presidential funding mechanism, and that the State had the same interests in not expending scarce funds on hopeless candidacies and not providing artificial incentives for factionalism by funding minor parties that lack substantial support.

Moreover, after a thorough examination of the record, the court concluded that petitioners had not carried their burden of showing that, in pursuing its significant interests, the State had unreasonably or unfairly burdened the electoral prospects of minor parties and independents or "'reduce[d] their strength below that attained without any public financing.'" Pet. App. 125a (quoting *Buckley*, 424 U.S. at 99). Based on the record before it, which included the complete results of elections predating and postdating the advent of public financing, the court found that minor-party candidates in fact had reasonable opportunities to qualify for funding under the law.

Specifically, as the court observed, significant numbers of minor-party candidates would be eligible for funding in the 2010 elections based on the 2008 election results (including several who met the 20% criterion for full funding). Moreover, those results failed to bear out petitioners' arguments that the law would dim the prospects of minor-party candidates by providing so-called "windfall" levels of funding for major-party

candidates and providing financial incentives for each major party to run candidates in the other party's "safe districts." The court observed that petitioners' predicted increase in the number of safe districts contested by major-party candidates had not occurred. Pet. App. 132a-133a. The court found, moreover, that minor-party candidates had fared better in the 2008 election, conducted under the public-finance regime, than under the former system. Pet. App. 131a. And the court pointed out that even if the law did have the effect of increasing the number of "safe districts" in which both major parties ran candidates, that would hardly damage the electoral prospects of minor parties, as a race in such a district "is, by definition, a race in which minor-party candidates have no realistic chance of winning." Pet. App. 140a. In sum, the Second Circuit's analysis of the record led it to conclude that Connecticut had acted reasonably in establishing the threshold levels of support required for funding and in providing funding for major-party candidates in all districts based on the level needed to run a competitive race.

Petitioners' contention that the Second Circuit's decision merits review does not rest on the claim that the court of appeals erred in basing its decision on *Buckley*'s analytical framework. Petitioners also fail to identify any conflict among the federal appellate courts, or state courts of last resort, concerning the legal principles to be applied to public campaign-finance statutes or the application of those principles to comparable statutory provisions. Indeed, they would be hard-pressed to do so because courts have uniformly upheld public-finance statutes, and no appellate court has accepted a claim that the qualification criteria of such a statute disadvantage minor parties. *See, e.g.*, *North Carolina Right to Life Comm. Fund for Indep. Politi-*

cal Expenditures v. *Leake*, 524 F.3d 427 (4th Cir. 2008); *Daggett* v. *Commission on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000); *National Comm. of Reform Party* v. *Democratic Nat'l Comm.*, 168 F.3d 360 (9th Cir. 1999); *Rosenstiel* v. *Rodriguez*, 101 F.3d 1544 (8th Cir. 1996); *Vote Choice, Inc.* v. *DiStefano*, 4 F.3d 26 (1st Cir. 1993); *Libertarian Party of Ind.* v. *Packard*, 741 F.2d 981 (7th Cir. 1984).

Instead, petitioners argue principally that the Second Circuit misapplied the *Buckley* standard to the specific features of Connecticut's statute and the extensive factual record regarding its effects on minor parties. But it is axiomatic that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10.

Petitioners' claims that the Second Circuit misapplied *Buckley* are in any event wholly unpersuasive. Focusing heavily on Connecticut's 10%-of-the-vote qualification threshold, petitioners argue that it burdens their rights because it is less permissive than the 5% threshold for qualification for presidential general-election funding upheld by the Court in *Buckley*.[3] *Buckley*, of course, nowhere suggested that 5% was a constitutional upper limit on the percentage of votes

[3] Petitioners also observe that the Connecticut statute is unlike the presidential public-finance provisions upheld in *Buckley* because it does not allow minor-party candidates to qualify retroactively for funding in an election based on their showing in that same election. But denying after-the-fact reimbursement based on election results is unlikely to significantly diminish third parties' chances of succeeding in that election, because such funding, by definition, is triggered only when the minor party achieves the required level of success without a public subsidy.

that could be required of minor-party or independent candidates in order to qualify for funding. Nor are petitioners able to cite any other authority supporting their position that 10% is too high.

Moreover, petitioners' contention that the Connecticut statute imposes a greater obstacle to the success of independent or minor-party candidates than the presidential public-funding system approved by *Buckley* is unpersuasive because it looks only at the percentage of the vote needed to qualify for funding and ignores other features of Connecticut's system that are actually *more* favorable to minor parties and independents. Under the federal system, attaining the 5% threshold qualifies a candidate only for funding proportionate to the average of the voting percentages received by the major parties. An independent or minor-party presidential candidate who qualified based on 5% of the vote would therefore most likely receive somewhere between 1/9 and 1/10 of the grant available to the major party candidates. A candidate who qualified based on receiving 10% of the vote would likely receive less than 1/4 the grant received by major-party candidates; one who qualified with 15% of the vote would most likely receive just over 1/3 as much as the major-party candidates; and a minor-party or independent who achieved 20% of the vote would get only about half as much as the major-party candidates.

By contrast, Connecticut, while setting a somewhat higher threshold for qualification, provides significantly larger grants to those who qualify. Minor-party candidates receive 1/3 grants based on the 10% threshold; the amount rises to 2/3 with a 15% level of support; and full funding requires only 20% support. In other words, Connecticut's legislature made the fiscally responsible judgment that it would not waste funds on minor-party

and independent candidates with minimal popular support, but would provide more meaningful levels of funding to candidates and parties with low to moderate levels of support. In fact, these grants far exceed the amounts typically raised by minor-party candidates on their own. Minor-party or independent candidates who attain these levels of support receive a greater opportunity to build support further and campaign more competitively in the next election. Nothing in *Buckley*, or anything else in this Court's jurisprudence, suggests that such a legislative judgment is unconstitutional. Indeed, *Buckley* emphasized that such questions of line-drawing are intrinsically matters of legislative judgment: "the choice of the percentage requirement that best accommodates the competing interests involved was for [the legislature] to make." 424 U.S. at 103.

Petitioners' other efforts to nitpick the Second Circuit's application of *Buckley* are no more convincing. Petitioners argue that major-party candidates running in the other major party's "safe districts" have no better prospects for success than minor-party candidates and should therefore not be able to qualify for funding based on their party's statewide electoral success. But this claim founders on the factual record, which shows that when major-party challengers contest a "safe district," they almost always achieve at least 20% of the vote, while minor-party candidates very rarely reach that level. Treating a major-party candidate—even one running in a supposedly non-competitive district—the same for funding eligibility purposes as a minor-party candidate would thus run afoul of *Buckley*'s admonition that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were

exactly alike." 424 U.S. at 97-98 (quoting *Jenness* v. *Fortson*, 403 U.S. 431, 441-442 (1971)).

Petitioners fare no better with their contention that the Connecticut law burdens them by providing major parties with competitive funding levels and thus supposedly encourages major parties to contest "safe districts" more often. Petitioners cite no authority for their novel contention that a candidate who is not eligible for funding suffers an injury of constitutional proportion if a publicly funded candidate receives more money than he or she otherwise would have raised. Nor do petitioners explain how increasing electoral competition among major parties would violate their rights, or why the Court should consider it a problem if the small fraction of votes a minor-party candidate may receive in a major party's "safe district" must now be contested with another major-party candidate. On the contrary, increasing electoral competition is a public good.

Most importantly, petitioners fail to overcome the factual record showing that, far from being crowded out by major-party candidates, minor-party candidates fared *better* after the establishment of public financing than they did before. Moreover, the evidence showed that financing is not the major determinant of whether a major-party candidate chooses to run in a "safe district" of the other major party and that the number of contested districts did not increase in 2008. In short, petitioners' claim that the availability of funding for major-party candidates in the other party's "safe districts" somehow unfairly burdens minor parties is, as the Second Circuit found, unconvincing.

Finally, venturing outside the record, petitioners complain that the Connecticut law "for all practical

purposes, excludes minor parties" because "not a single minor party candidate qualified for a grant in 2010." Pet. 19.[4] The results of a single election, however, cannot alter the fact that the levels of support set by the Connecticut law are ones that, historically, several minor-party candidates have shown the ability to meet, including surprisingly large numbers in the 2008 election. That is not to say that most minor-party candidates will meet them. After all, the very point of the eligibility criteria is to serve the State's important interest in not squandering funds on "hopeless candidacies," *Buckley*, 424 U.S. at 96—a term that, for better or for worse, describes most minor-party candidacies in our two-party system. Connecticut made a reasonable judgment in drawing the line between those candidacies that it is not fiscally responsible to support and those candidacies (including minor-party candidacies) for which it will provide support. That Connecticut's voters in 2010 did not find minor-party candidates appealing does not mean that Connecticut chose the wrong dividing line. And it certainly does not mean that petitioners' fact-bound challenge to the lower court's application of *Buckley* to the record before it deserves to be second-guessed by this Court.

Indeed, the opinion in *Buckley* pointed out that *no* minor-party presidential candidate would qualify for funding in 1976, but the Court found no infirmity in the presidential public funding scheme as a result. 424 U.S. at 99 n.135. *Buckley* flatly contradicts the suggestion

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[4] Presumably what petitioners mean is that no candidate qualified for a grant in 2012 based on the 2010 elections, as the evidence showed that several candidates were eligible for 2010 grants based on the 2008 results.

that the failure of minor-party candidates to qualify for funding in any one election means that a public-financing system unfairly limits electoral opportunities of minor parties.[5]

II. THIS CASE DOES NOT PRESENT THE "TRIGGER" ISSUE THAT IS BEFORE THE COURT IN *MCCOMISH* AND *ARIZONA FREE ENTERPRISE CLUB*

Implicitly recognizing that their fact-bound claim that Connecticut's law unduly burdens their electoral chances does not present an issue meeting this Court's ordinary standards for exercising its certiorari jurisdiction, petitioners attempt to persuade the Court that this case presents the same issue as the two Arizona public-finance cases in which the Court is hearing argument this Term, *McComish* and *Arizona Free Enterprise Club*. But the question presented in the Arizona cases is wholly distinct from any issues properly before the Court in this case.

At issue in the Arizona cases is whether the triggered matching-funds provision in Arizona's public-financing program unduly burdens the right of nonparticipating candidates and independent spenders to make unlimited campaign expenditures, in violation of the principles of this Court's decision in *Davis* v. *FEC*, 554 U.S. 724 (2008). Under the challenged provision, publicly funded candidates receive additional funding when privately funded opponents or hostile independent groups make expenditures exceeding the partici-

[5] In addition, the Second Circuit itself left open the possibility that the issue could be revisited should a different factual record in a future case demonstrate the existence of a constitutional infirmity not evident on the record of this case.

pating candidate's basic funding grant. Connecticut's CEP, as originally enacted, included a similar provision, which petitioners challenged in this case.

The problem with petitioners' current argument is that the Second Circuit *agreed* with their claim that the Connecticut statute's trigger mechanism was unconstitutional under *Davis*. No one has challenged that ruling before this Court, nor could they—the Connecticut legislature repealed the trigger provision shortly after the court of appeals issued its decision, so the defendants and intervenors could not have sought this Court's review of the Second Circuit's invalidation of the trigger mechanism even if they had wanted to. In short, the opponents of the Connecticut statute have already prevailed on this issue both in court and in the legislative arena, and it is no longer part of the case.

Petitioners have now shifted their attack to another provision of the Connecticut law, Conn. Gen. Stat. § 9-705(j)(4). Section 9-705(j)(4) provides a reduced grant of public funds (60% of the standard grant) to participating candidates who face only token opposition.[6] Petitioners now argue that § 9-705(j)(4) is analogous enough to the trigger provisions struck down by the Second Circuit to require its invalidation under *Davis* as well. Thus, petitioners contend that even though the Second Circuit *accepted* their *Davis* argument, its decision upholding the remainder of the CEP presents the same claimed conflict with *Davis* that the Court is considering in the Arizona cases.

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[6] Section 9-705(j)(3), which petitioners do not seem to include in their challenge, provides an even more reduced grant (30% of the standard grant) to participating candidates who are unopposed.

Petitioners' argument has three major flaws. First, the issue they now raise was not actually decided by the Second Circuit. Second, the reason it was not decided was that *no one raised it*. And third, § 9-705(j)(4) creates a funding mechanism that is entirely different from Arizona's triggered matching funds, does not depend on expenditures by privately financed candidates or independent committees, and therefore does not implicate the same constitutional issues presented in the Arizona cases.

As to the first flaw in petitioners' argument, this Court has repeatedly stated that it "ordinarily do[es] not decide in the first instance issues not decided below." *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (internal quotation marks omitted); *see Clingman* v. *Beaver*, 544 U.S. 581, 598 (2005). There is no doubt that the Second Circuit did not rule on the constitutionality of § 9-705(j)(4) under *Davis*. The provision was mentioned only once by the Second Circuit, in the "background" section of the court's opinion. Nothing in the court's discussion of the case suggests that it intended to issue a ruling of any kind on the constitutionality of that specific provision, still less a ruling on whether the court's invalidation of the triggered matching-fund provisions under *Davis* should apply to this provision as well.

Second, the Second Circuit did not decide the issue because petitioners did not argue it. Given the seriousness with which the Second Circuit took the *Davis*-based challenge to the CEP's triggered matching-funds provisions, it undoubtedly would have considered the application of *Davis* to § 9-705(j)(4) had it understood petitioners to assert that that provision was unconstitutional under *Davis*. But nothing in petitioners' briefs alerted the court to this possibility. Petitioners briefly

mentioned § 9-705(j)(4)'s existence in two footnotes to their statement of facts (2d Cir. Appellees' Br. 12 n.5, 17 n.6), and discussed it in passing again in one paragraph of their argument. But in the 15 pages of their brief devoted to developing their *Davis*-based argument against the constitutionality of the CEP's triggered matching-funds provisions, petitioners never mentioned § 9-705(j)(4) at all. *Id.* at 99-115. Having failed to make the argument in their brief below, petitioners are in no position now to fault the Second Circuit for not addressing the issue, let alone to claim that the court of appeals implicitly decided the point against them. A purely imaginary decision on a point not raised cannot justify either granting the petition or holding it pending the outcome in the Arizona cases.

In any event, petitioners' contention that § 9-705(j)(4) poses the same constitutional issues as the Arizona triggered matching-funds provisions is meritless. The constitutionality of provisions triggering matching funds based on opposition spending is not the same question as the constitutionality of providing *reduced* funding to candidates in essentially uncontested races. Section 9-705(j)(4) does not provide additional funding for participating candidates in danger of being outspent by nonparticipating opponents. Rather, together with § 9-705(j)(3), it protects the State's limited financial resources by providing reduced funding for a candidate who is unopposed or faces only token opposition. It avoids squandering public funds on such uncompetitive races by using the absence of a major-party opponent or of a minor-party opponent who has raised more than a *de minimis* amount of campaign funds as a measure of the absence of a genuinely contested race. It does not even arguably "penalize" a candidate's opponents for engaging in unlimited spend-

ing outside of the public-finance system, as it does not make eligibility for full funding dependent on such spending by opponents, but principally on whether a candidate's opponents raised the amount of funds needed to qualify for *public* financing.

In short, petitioners' effort to paint their petition as one involving the same issues as the Arizona cases is a sham. The "trigger" question those cases involve—whatever its proper resolution—is now out of this case because petitioners *prevailed* on it below. The statutory provision petitioners now seize on to create the illusion that there is a common issue was never ruled on or challenged on this basis below. Even if it had been, the Millionaire's Amendment that was at issue in *Davis* and the triggered matching-funds provisions at stake in the Arizona cases raise issues of fact and law that are distinct from those that would arise in an assessment of the constitutionality of § 9-705(j)(4).

III. PETITIONERS' ASSERTION THAT A "CONFLICT" WITH A 1977 DISTRICT COURT OPINION JUSTIFIES A GRANT OF CERTIORARI IS MERITLESS

Petitioners' contention that this case merits a grant of certiorari because of a conflict with the district court decision in *Bang* v. *Chase*, 442 F. Supp. 758 (D. Minn. 1977), is as far-fetched as their claim that this case presents the same issues as the Arizona cases.

For starters, on the point for which the petitioners cite it, *Bang* is nothing more than a district court decision. To be sure, a part of what *Bang* decided was summarily affirmed by this Court, and the Second Circuit therefore devoted considerable attention to whether it was bound by the district court's holding striking down a portion of Minnesota's public-finance law. But petitioners fail to acknowledge (and the Sec-

ond Circuit was apparently unaware) that this Court's summary decision in *Bang* in fact only affirmed the district court's holding that the Minnesota public-finance statute was, for the most part, *constitutional*. That holding (which did not include the part of the *Bang* opinion on which petitioners rely) was the only issue before this Court on direct appeal from the district court's decision.

Bang involved a broad challenge to Minnesota's voluntary public-financing system as well as other provisions of Minnesota's campaign-finance laws, including mandatory expenditure limitations that were obviously invalid under the then-recent decision of this Court in *Buckley*. The district court struck down the expenditure limitations but generally upheld the public-financing system. The court held that public financing served important state interests in preventing actual corruption and the appearance of corruption and that the law's challengers had not "adequately demonstrated that the Act's public-financing provisions will unfairly or unnecessarily burden the political opportunity of minority party candidates." 442 F. Supp. at 767. The court struck down only one aspect of the public-finance system, relating to the allocation of funding among participating candidates. *Id.* at 768.

The *plaintiffs* in *Bang* then filed a jurisdictional statement challenging the district court's holding that the public-finance system was constitutional. No. 77-1450, Jurisdictional Statement (U.S. filed Apr. 11, 1978). Meanwhile, Minnesota's legislature repealed the allocation system that the district court had held unconstitutional, and the defendants in the case accordingly did not file a jurisdictional statement challenging that holding. No. 77-1450, Motion to Dismiss or Affirm 4-5 & n.4 (U.S. filed May 11, 1978). Thus, the issues ap-

pealed to this Court related solely to the district court's decision *upholding* Minnesota's public-finance law, and the Court's summary affirmance represented only a judgment that the district court had correctly held the State's voluntary public-finance system *constitutional*. The district court's holding as to the allocation of funds, on which petitioners so heavily rely, was not before this Court on appeal, and this Court's summary affirmance therefore adds no precedential weight to that holding.[7]

Thus, even taken at face value, petitioners' reliance on *Bang* is nothing more than a claim of conflict between a recent decision of a federal court of appeals and a decades-old decision of a single district court. Such a claim of conflict is not generally a sufficient basis for the exercise of this Court's certiorari jurisdiction. *See* S. Ct. R. 10. Indeed, that petitioners' principal claim of decisional conflict is based on just one district court decision—and one that can hardly be called recent—only underscores the absence of any divergent rulings among the lower courts that call for resolution by this Court.

Moreover, the claim of conflict is not even accurate, as the issue decided in *Bang* was remote from those implicated in this case. Unlike Connecticut's CEP, the statute at issue in *Bang* permitted taxpayers to designate a portion of their taxes to support candidates of a particular party. Funds designated for each party were then distributed uniformly to that party's legislative

[7] Because the reasoning of Judge Kearse's partial dissent rested largely on the erroneous premise that the part of *Bang* striking down the allocation provision was a binding precedent because this Court had summarily affirmed it, the dissent's analysis lacks persuasive force.

candidates in districts statewide. Thus, whichever of the two *major* parties (Independent Republican and Democratic Farmer-Labor) received more designated funds statewide would get a funding advantage over the other major party in *every* legislative district. It was that systematic disparity between the funding for the two major parties that led the district court to strike down that portion of the legislation on the ground that it unfairly discriminated against whichever party lacked a statewide plurality of support (even though any "discrimination" was the result of the individual funding preferences expressed by taxpayers statewide). *See* 442 F. Supp. at 768.

This unique allocation feature of Minnesota's former law has no counterpart in Connecticut's CEP. Unlike the former Minnesota statute, Connecticut's public-finance law does not create disparities in funding of major-party candidates based on the parties' relative popularity at the statewide level; rather, it provides equal funding to all major-party candidates. Moreover, Connecticut's law, unlike the law in *Bang*, makes funding available to non-major-party candidates based on their support in particular districts. The unfairness that troubled the district court in *Bang* is not present under the Connecticut law.

Nor is it the case, as petitioners suggest, that *Bang* stands for some broader principle that it is always unfair to use statewide levels of party support to distinguish among parties when applying election laws at the individual district level. Certainly nothing in the three short paragraphs that *Bang* devoted to the allocation issue suggests that it was purporting to adopt such a general rule. Indeed, had it done so it would have placed itself squarely in conflict with this Court's then-recent decision in *American Party of Texas* v. *White*,

415 U.S. 767 (1974), which upheld a Texas law providing for automatic general-election ballot access statewide, as well as statewide funding for primary elections, based upon a party's vote total in the most recent gubernatorial election. Under *Buckley*, criteria determining eligibility for public funding are subject to less stringent scrutiny than are ballot-access laws. Thus, *a fortiori*, *White*'s approval of the use of statewide vote totals to determine major-party status for purposes of automatic ballot access at the individual district level refutes the existence of a per se rule against use of statewide vote totals to determine a party's eligibility for public funding. The assertion that the context-specific ruling in *Bang* is in conflict with the Second Circuit's approval of Connecticut's very different statutory scheme is meritless.

IV. Review Of This Case Is Not A Matter Of National Importance

Petitioners acknowledge that the specific eligibility criteria that they challenge in Connecticut's statute differ from those of other state public campaign-finance laws. They make no pretense of pointing to any broad disagreement among the lower courts about the standard to apply to claims that public-finance laws burden minor parties, nor do they identify any specific conflict over how that standard has been applied (aside from their inaccurate claim of a conflict between the decision below and *Bang*). Yet they nonetheless assert that review of the Second Circuit's application of *Buckley* to a distinctive statutory scheme and an extensive factual record is somehow a matter of national importance.

Petitioners have it backwards. Although public-finance statutes (and public-finance litigation) have existed since the 1970s, legislatures on both the state and

federal levels are continuing to experiment with different approaches to public-finance legislation, and it remains to be seen whether public financing of political campaigns will expand significantly, and, if it does, what form that expansion will take. Litigation in this area has generally involved application of the lenient *Buckley* standard to the specific features of each statute and the particular ways in which each jurisdiction has adapted public financing to suit its own needs.

There is little reason for this Court to step into this evolving area to address claims that a particular legislature drew the lines in the wrong place in exercising its broad and undoubted authority to limit scarce public funding to candidates with realistic prospects of competing. Absent a real conflict among the lower courts requiring this Court's attention or a substantially more compelling claim that a statute has genuinely burdened the prospects of minor parties, this Court should not expend its resources on a case that presents nothing more than a question of the fact-specific application of the general principles laid out by *Buckley* a generation ago.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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