UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

No. 21-1213

DR. JILL STEIN AND JILL STEIN FOR PRESIDENT,

Petitioners,

- v. -

FEDERAL ELECTION COMMISSION,

Respondent.

ON APPEAL FROM AN ORDER ENTERED BY THE FEDERAL ELECTION COMMISSION AT FEC-LRA 1021

PETITIONERS' PETITION FOR REHEARING AND REHEARING *EN BANC*

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Pursuant to Federal Rules of Appellate Procedure 35(b) and 40, Petitioners Dr. Jill Stein and Jill Stein for President ("Petitioners") respectfully move for rehearing and rehearing *en banc* of the Court's July 21, 2023 Judgment (ECF No. 2008922) and Opinion (ECF No. 2008923) ("Panel Opinion" or "Pan. Op.").

STATEMENT PURSUANT TO FED. R. APP. P. 35(b)

This appeal presents a novel question of exceptional importance: whether Section 9032(6) of the Presidential Primary Matching Payment Account Act ("the Act") is unconstitutional as applied because it serves no legitimate governmental interest, frustrates the purpose of the Act and produces arbitrary results that impose unequal burdens on Petitioners' fundamental First Amendment rights. *See* 26 U.S.C. § 9032(6). This question is exceptionally important because the Panel Opinion upholds Section 9032(6), bringing it into direct conflict with this Court's decision in *LaRouche v. Federal Election Commission*, 996 F.2d 1263, 1267 (D.C. Cir. 1993), and because the Panel Opinion's resolution of this appeal threatens the continuing viability of the Act as applied to minor party candidates.

INTRODUCTION

Litigants are entitled to a ruling on the merits of their claims. No principle is more fundamental to our system of justice and the rule of law. Yet in this appeal the Panel failed to fulfill its most rudimentary function as an appellate body: it denied Petitioners' appeal by rejecting a claim that Petitioners do not make, while failing to

rule on the merits of the claim that Petitioners actually assert. In so doing, the Panel overlooked the critical points of law and precedents of this Court on which Petitioners rely to demonstrate that Section 9032(6) is unconstitutional as applied. Rehearing should be granted to correct these errors.

ARGUMENT

I. Rehearing Should Be Granted Because the Panel Opinion Fails to Rule on the Merits of Petitioners' Claim That Section 9032(6) Is Unconstitutional as Applied.

The Panel Opinion misapprehends the factual and legal basis for Petitioners' Equal Protection claim. It incorrectly rejects that claim on the ground that "the public funding limits at issue are indistinguishable from those upheld in *Buckley*." (Pan. Op. at 7 (citing *Buckely v. Valeo*, 424 U.S. 1 (1976).) But Petitioners do not challenge the Act's public funding limits and they are not "at issue" in this appeal. As Petitioners expressly state in their opening brief, they assert "a narrow challenge to the constitutionality of a single provision" of the Act – Section 9032(6). (Brief of Appellants (ECF No. 1952624) ("Pet. Br.") at 31.) That provision does not establish the Act's funding limits, but rather establishes the date on which candidates' eligibility to receive funds under the Act ends. It is therefore irrelevant – even if true – that the Act's funding limits are "indistinguishable" from those challenged in *Buckley*, and the Panel Opinion's assertion that this conclusion disposes of Petitioners' claim is error. (Pan. Op. at 7.)

Under Section 9032(6), candidates become ineligible to receive matching funds after the last date of the major parties' conventions. (Pan. Op. at 4-5.) This provision applies not only to major party candidates, but also to minor party candidates, even if they continue to incur ballot access costs that otherwise qualify for funding under the Act, (Pan. Op. at 5), and notwithstanding the express conclusion of the Federal Election Commission ("the Commission") that "the petition process required of the presidential candidates of the minor parties [is] the equivalent of the primary elections and convention process of the major party candidates." AO 1975-44, at 2 (Socialist Workers 1976). As a result, Section 9032(6) guarantees that major party candidates are eligible for funding during the entire length of their primary election campaigns, but terminates a minor party candidate's eligibility for funding in the midst of theirs whenever the major parties happen to hold early nomination conventions. (Pan. Op. at 5.) That occurred in 2016, leading to the Repayment Order at issue in this appeal, (Pan. Op. at 5), but not in 2012, when Petitioners remained eligible for funding for the entire duration of their primary election campaign an no repayment order issued. (Pet. Br. at 9-12.)

In this appeal, Petitioners do not challenge the Act's funding limits, as the Panel Opinion incorrectly states, (Pan. Op. at 6-7), but rather the arbitrary and discriminatory manner in which funds are issued under the Act due to the application of Section 9032(6). The basis for Petitioners' Equal Protection claim is that Section

9032(6), as applied to terminate Petitioners' eligibility for funding in the midst of their 2016 primary election campaign, serves no legitimate governmental interest, frustrates the purpose of the Act and produces arbitrary results that impose unequal burdens on Petitioners' First Amendment rights. (Pet. Br. at 31-40.) The Panel Opinion overlooks these points and relies on *Buckley* as the sole authority for its decision to reject Petitioners' claim. (Pan. Op. at 5-7.) But *Buckley* did not address Petitioners' claim and the Panel Opinion's reliance on its reasoning is misplaced.

In *Buckley*, the minor party plaintiffs asserted an Equal Protection challenge to several recently-enacted statutes that provided for public financing of Presidential election campaigns. *See Buckley*, 424 U.S. at 85-86. As relevant here, the plaintiffs challenged the general election funding provisions on the ground that they "supply larger, and equal, sums to candidates of major parties, … limit new-party candidates to post-election funds, and deny any funds to candidates of parties receiving less than 5% of the vote." *Id.* at 97. The plaintiffs also challenged the primary election funding provisions "because they do not provide funds for candidates not running in party primaries…". *Id.* at 105. The plaintiffs argued that these provisions "work invidious discrimination against minor and new parties in violation of the Fifth Amendment." *Id.* at 97.

As the Panel Opinion observes, the Supreme Court rejected the *Buckley* plaintiffs' arguments, holding that "restrictions on public financing are constitutional

if they further an important government interest and do not 'unfairly or unnecessarily burden[] the political opportunity of any party or candidate.'" (Pan. Op. at 5 (quoting *Buckley*, 424 U.S. at 95-96).) The Panel Opinion cites two governmental interests that justified the funding limits in *Buckley*: (1) the "interest in not funding hopeless candidacies with large sums of public money"; and (2) "the important public interest against providing artificial incentives to splintered parties and unrestrained factionalism." (Pan. Op. at 5-6 (citing *Buckley*, 424 U.S. at 96).) Notably, neither of these interests is furthered by the arbitrary cut-off date that Section 9032(6) imposes on minor party candidates' eligibility to receive funding under the Act, and the Panel Opinion itself does not suggest that they do.

Instead, the Panel Opinion concludes that "[t]he funding limits at issue here easily survive review under [the] standards" articulated in *Buckley*. (Pan. Op. at 6.) To reiterate, however, Petitioners do not challenge the "funding limits" imposed by the Act. Unlike the plaintiffs in *Buckley*, Petitioners do not assert that the Act's funding limits are invidiously discriminatory because they authorize greater funding for major party candidates and lesser funding for minor party candidates based on such candidates' demonstrated level of voter support. *See Buckley*, 424 U.S. at 97. Rather, Petitioners accept the constitutionality of that scheme under the binding precedent that *Buckley* establishes. Petitioners nonetheless assert that Section 9032(6), as applied here, violates Equal Protection by guaranteeing that major

parties are eligible to receive funding for the entire duration of their primary election campaigns, but arbitrarily terminates minor parties' eligibility to receive funding in the midst of theirs in election cycles when the major parties happen to hold early nomination conventions.

By mischaracterizing Petitioners' claim as a challenge to the Act's funding limits, rather than the more narrow challenge that Petitioners assert against Section 9032(6), the Panel Opinion fails to rule on the merits of that claim. Further, as explained *infra* at Part II.A-C, the Panel Opinion does not address the very points and binding precedents of this Court on which Petitioners rely to support their claim. Simply put, the Panel Opinion purports to reject Petitioners' claim by rejecting a claim that Petitioners do not assert. The Panel Opinion's failure to rule on the merits of Petitioners' claim warrants rehearing.

II. Rehearing Should Be Granted Because the Panel Opinion Overlooks the Points and Binding Precedents on Which Petitioners Rely to Demonstrate That Section 9032(6) Is Unconstitutional as Applied.

A. The Panel Opinion Overlooks Petitioners' Argument That Section 9032(6) Serves No Legitimate Governmental Interest.

The Panel Opinion concedes that restrictions on public funding must "further an important governmental interest" to withstand constitutional scrutiny. (Pan. Op. at 5 (quoting *Buckley*, 424 U.S. at 95-96).) Petitioners argue that Section 9032(6) fails this test because no governmental interest is served by a provision that makes

minor party candidates eligible for funding under the Act for the entirety of their primary election campaigns in one election cycle, as Section 9032(6) did for Petitioners in 2012, while terminating their eligibility in the midst of their primary election campaign in the next election cycle, as Section 9032(6) did for Petitioners in 2016, based on nothing more than the happenstance of when the major parties decide to hold their nomination conventions. (Pet. Br. at 34-38.) The Panel Opinion fails to address this argument.

The Panel Opinion conspicuously fails to identify *any* governmental interest that Section 9032(6) furthers. (Pan. Op. at 6-7.) Instead, the Panel Opinion avers that the Act's "funding limits" – which Petitioners do not challenge – "implicate the important government interests in limiting public funding for candidates with slim support." (Pan. Op. at 6.) But if the Panel Opinion intends to suggest that Section 9032(6) also furthers these interests, the Panel Opinion is in error. The record demonstrates that the provision is woefully inadequate to the task.

Petitioners were entitled to funding for the entire duration of their primary election campaign in 2012 because the major parties held their nomination conventions on September 6, 2012, and Petitioners had completed their ballot access petition drives on that date. (Pet. Br. at 9-10.) In 2016, however, Petitioners' eligibility for funding was terminated on August 6, 2016 – even though they were still engaged in multiple ballot access petition drives, the cost of which qualifies for

funding under the Act – only because the major parties held earlier nomination conventions that year. (Pet. Br. at 11.) The discrepancy between these disparate outcomes – full eligibility in 2012 and partial eligibility in 2016 – is attributable to only one factor: the date on which the major parties held their nomination conventions. (Pet. Br. at 10-11.)

Contrary to the Panel Opinion's implication, Section 9032(6) does not further the "government interests in limiting public funding for candidates with slim support." (Pan. Op. at 6.) Because the provision terminates candidates' eligibility to receive funding based solely on the date on which the major parties' nomination conventions end, *irrespective of the candidates' level of public support*, Section 9032(6) is not even rationally related to that interest. Indeed, under Section 9032(6), a candidate with less support who runs in an election when the major parties hold later nomination conventions will be entitled to a longer period of eligibility than a candidate with more support who runs in an election when the major parties hold earlier nomination conventions. That does not further the governmental interest the Panel Opinion cites, but eviscerates it.

The Panel Opinion does not identify any other governmental interest that Section 9032(6) might conceivably protect. (Pan. Op. at 6-7.) The Commission also failed to identify any legitimate governmental interest that the provision furthers. The Commission asserted that Section 9032(6) furthers Congress's intent to ensure

that major and non-major party candidates are eligible to receive funding under the Act for the same "length of time," (App. 70 (Repayment Determination at 17)), but as Petitioners have explained, (Pet. Br. at 35), the Commission failed to cite any authority for that assertion and it directly conflicts with this Court's conclusion that "it was Congress's explicit intention that the funds be issued on a nondiscriminatory basis." *LaRouche*, 996 F.2d at 1267 (citation omitted).

Section 9032(6) is plainly discriminatory. It guarantees that major party candidates are eligible to receive funding under the Act for the entire duration of their primary election campaigns but terminates minor party candidates' eligibility in the midst of theirs whenever the major parties hold early nomination conventions. Neither the Panel Opinion nor the Commission identify any governmental interest that such discrimination might serve. Section 9032(6) is therefore unconstitutional under *Buckley* because nothing in the record supports the conclusion that it furthers "an important governmental interest." *Buckley*, 424 U.S. at 95-96. The Panel Opinion's failure to address this argument warrants rehearing.

B. The Panel Opinion Overlooks Petitioners' Argument That Section 9032(6) Frustrates the Purpose of the Act.

This Court has repeatedly recognized that the purpose of the Act is "to provide partial federal financing for the campaigns of qualifying presidential primary candidates." *Simon v. Federal Election Com'n.*, 53 F.3d 356, 357 (D.C. Cir. 1995); *see LaRouche*, 996 F.2d at 1267 ("The object of the statute is to enhance the ability

of candidates to present their positions and themselves to voters in presidential primaries.") Further, as this Court and the Supreme Court have emphasized, Congress intended that "the funds be issued on a nondiscriminatory basis," *LaRouche*, 996 F.2d at 1267, that does not "give an unfair advantage to established parties…." *Buckley*, 424 U.S. at 96-97. Petitioners argue that Section 9032(6) frustrates the purpose of the Act as applied to minor parties by arbitrarily terminating their eligibility to receive funds in election cycles when the major parties hold early nomination conventions. (Pet. Br. at 36-38.)

The Panel Opinion fails to address this argument. Instead, the Panel Opinion reasons that because "Congress could permissibly deny all public funding" to Petitioners "based on [their] lack of widespread support…," it follows that Congress could take "the less restrictive step" of providing Petitioners with funding that is "less generous than the funding provided to primary candidates of major parties." (Pan. Op. at 6.) But once again the Panel Opinion misconstrues Petitioners' claim. Petitioners accept that Congress can constitutionally provide minor party candidates with less funding than major party candidates under *Buckley*. Petitioners nonetheless contend that Section 9032(6) is invidiously discriminatory because it guarantees that major party candidates remain eligible to receive the greater funding to which they are entitled for the entire duration of their primary election campaigns, but arbitrarily terminates minor party candidates' eligibility to receive the lesser funding to which

they are entitled in the midst of their primary election campaigns whenever the major parties hold early nomination conventions. Petitioners' challenge is not to the Act's "funding limits," as the Panel Opinion incorrectly states, (Pan. Op. at 6), but to Section 9032(6)'s arbitrary and premature termination of their eligibility to receive the lesser funding to which they are entitled.

The Panel Opinion's failure to address this argument places it in direct conflict with *LaRouche*. In *LaRouche*, this Court unequivocally concluded that Congress intended that funds be issued under the Act "on a nondiscriminatory basis," *LaRouche*, 996 F.2d at 1267, and Section 9032(6) makes that impossible in any election cycle when the major parties hold early nomination conventions. In such elections, major party candidates are eligible to receive funding for the entire duration of their primary election campaigns, but minor party candidates are not. By upholding such disparate treatment, the Panel Opinion sanctions a discriminatory statutory scheme. Such a holding cannot be reconciled with *LaRouche*. Rehearing is therefore warranted to resolve the conflict between the Panel Opinion and *LaRouche*.

C. The Panel Opinion Overlooks Petitioners' Argument That Section 9032(6) Imposes Unequal Burdens on Petitioners' First Amendment Rights.

It is well-settled that statutes such as the Act, which provide benefits rather than imposing prohibitions, "remain subject to First Amendment limits." *LaRouche*,

996 F.2d at 1269.[1] Furthermore, a public financing system violates the Fifth Amendment guarantee of equal protection if it "unfairly or unnecessarily burden[s] the political opportunity of any party or candidate." *Buckley*, 424 U.S. at 96. Petitioners contend that Section 9032(6) unfairly and unnecessarily burdened their First Amendment rights by terminating their eligibility for funding in the midst of their 2016 primary election campaign.

Once again, the Panel Opinion fails to address this argument. The Panel Opinion merely observes that the Act did not "weaken" Petitioners "in absolute terms or relative to major-party candidates." (Pan. Op. at 6.) But the dispositive issue is not whether the Act conferred some benefit upon Petitioners. *See LaRouche*, 996 F.2d at 1269. Rather, the issue is whether Section 9032(6) "unfairly or unnecessarily burdened" Petitioners by terminating their eligibility for funding in the midst of their 2016 primary election campaign. *Buckley*, 424 U.S. at 96. The record demonstrates that it did.

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[1] Both this Court and the Supreme Court have recognized that the Act "has an important impact on the exercise of First Amendment rights, inasmuch as campaign funds are often essential if 'advocacy' [of beliefs and ideas] is to be truly or optimally 'effective.'" *Com. to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834, 844 (D.C. Cir. 1979) (quoting *Buckley*, 424 U.S. at 65-66). That is especially true as applied to "a candidate [who] either lacks national prominence or belongs to a minor party outside the mainstream of American politics." *Id.* It is therefore "particularly important to ensure that the Commission is applying the eligibility criteria for primary matching funds in an even-handed manner." *Id.* (noting "our national commitment to open and robust discussion of all political viewpoints") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).)

As previously explained, Section 9032(6) unequally burdens Petitioners not because it provides them with "less generous" funding than major party candidates under the Act – indeed, Section 9032(6) has no bearing at all on the Act's funding limits – but because it guarantees that major party candidates remain eligible to receive funding for the entire duration of their primary election campaigns but terminates minor party candidates' eligibility in the midst of theirs whenever major party candidates hold early nomination conventions. Further, that disparate treatment is plainly unnecessary because it serves no governmental interest whatsoever. *See supra* Part II.A. Consequently, the Panel Opinion's conclusion that the Act's funding scheme "strengthens the position of minor and new party candidates" does not dispose of Petitioners' claim under *Buckley*. (Pan. Op. at 7.)

Finally, the Panel Opinion, should it remain undisturbed, will have a devastating impact on the fundamental First Amendment rights of all minor party candidates who may qualify for funding under the Act in future election cycles. *See supra* n.1. Such candidates have no control over when the major parties decide to hold their nomination conventions. Nor do minor party candidates have control over the deadlines the states establish for submitting their nomination petitions and thereby completing their primary election campaigns. If Section 9032(6) remains in effect, however, minor party candidates may be eligible for funding for the entire duration of their primary election campaigns, as Petitioners were in 2012, or their

eligibility may be terminated in the midst of their primary election campaigns, which happened to Petitioners in 2016 and gave rise to the Repayment Order at issue here. The uncertainty engendered by Section 9032(6) therefore threatens the Act's continuing viability as applied to minor party candidates. A statutory scheme that promises such candidates federal funding for their primary election campaigns, subject to the risk that their eligibility to receive the funding may be terminated in the midst of those campaigns, is unworkable.

As this Court has recognized, it is "particularly important to ensure that the Commission is applying the eligibility criteria for primary matching funds in an even-handed manner." *Com. to Elect Lyndon LaRouche*, 613 F.2d at 844 (quoting *Buckley*, 424 U.S. at 65-66). The Panel Opinion fails to heed that admonition. Rehearing should be granted to correct that error.

CONCLUSION

For the foregoing reasons, the Petition for Rehearing and Rehearing En Banc should be granted.

Dated: August 21, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2023, I caused the foregoing document to be filed using the Court's CM/ECF system, which will effect service upon all counsel of record.

/s/Oliver B. Hall
Oliver B. Hall

CERTIFICATE OF COMPLIANCE

I certify that this petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,296 words (including footnotes and endnotes). This petition complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word, Times New Roman, size 14 point.