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Brennan Center Analysis of Minor Party Cost to Public Financing Programs

The New York Public Campaign Financing Commission last year designed a solid and, in important ways, innovative program of small donor public financing that will enable competitive candidates to fund their campaigns mostly on small donations from constituents.¹ It is the most powerful response by any state after *Citizens United* to the rising influence of private wealth in politics.² This achievement was historic in a state where huge donors and associated corruption have dominated politics for decades.³

But the commission tarnished that result when it also significantly raised ballot access requirements for minor party and independent candidates, asserting with no evidence that tougher ballot access was important to save public financing costs.⁴ Governor Cuomo and other leaders echoed the commission's assertions and allowed its recommended bill to become law.⁵

Nothing in the experience of longstanding public financing programs provides a reasonable basis for this belief. Two places with the nation's most well-established programs also, like New York State, maintain the rare policy of allowing losers of major party primaries to run in the general election on a third line, generating significant numbers of minor party candidacies.⁶ Contrary to the commission's assumptions, though, New York City and Connecticut have seen only de minimis public financing costs from minor party candidates. The one anecdote Commissioner Jay Jacobs discussed to explain his fear of out-of-control participation in public financing — the 2019 special election for New York City public advocate — occurred under city rules that are irrelevant to the state and was not a product of minor party access to the ballot. The evidence from existing systems reinforces the Campaign Finance Institute's data-based estimate that minor party candidates would, under the state's pre-2020 ballot access rules, cost "*little or nothing beyond what is already estimated*" to be a \$76 million annual cost (including administration) for the new public financing program, well within its \$100 million annual budget.⁷

The governor and legislature should act to preserve their accomplishment of an innovative public financing program and the national praise and imitation it deserves. They should amend the law to remove the commission's ballot access restrictions and clearly detangle public financing from them. Those restrictions are unjustified by evidence and only run counter to the democracy-enhancing benefits of public financing.

This analysis shows the following findings:

1) Minor party candidates have generated minimal public financing costs, even when significant numbers ran for office.

→ New York City's experience is particularly instructive. The city sees high rates of minor party candidacies, significantly higher than in New York State. It has offered multiple match public

financing similar to the new state program for decades.⁸ Yet no more than five truly minor party candidates out of 393 total participating candidates have received matching funds in any of the city's past three election cycles, together costing \$50,784 per year in public financing. The remaining candidates who received some public financing on a third line did so only in the general election, having run as major party candidates in the primary. The matching funds they raised as minor party candidates totaled \$104,840 per year over the three elections.

- Minor party candidates for statewide or citywide office — the most generously funded offices — did not participate in well-established public financing programs in Connecticut and New York City over multiple election cycles. The likely reason is that none who wanted to could meet the programs' private fundraising prerequisites to qualify. The 2019 special election for New York City public advocate occurred under unique circumstances irrelevant to state ballot access, as discussed below.
- Connecticut's popular public financing program has seen almost no cost from minor party candidate participation, even with significant numbers of minor party candidates running in elections. The state imposes certain restrictions on *public financing* access, rather than ballot access, to contain costs, as discussed below.

- 2) **The number of public financing participants in the 2019 special election for New York City public advocate is an irrelevant basis for raising state ballot access thresholds.** The rules for appearing on the ballot in this city special election were entirely different than the state's. Parties played no role in putting candidates on the nonpartisan special election ballot, unlike at the state level, and petitioning requirements were categorically lower than the state's. More to the point, city lawmakers had specially enacted legislation to cut in half the amount in private contributions candidates first needed to raise to qualify for the city's matching funds program.
- 3) **The new New York State program already strictly limits potential public financing for candidates in parties that have low voter support to at most \$5,000 in primaries. Other jurisdictions avoid costs from low-support candidates by imposing different restrictions on access to public financing itself.** Limits on the amount of public funds available to candidates with low voter support are designed directly to meet the aim of conserving public funds, unlike New York State's far broader and potentially unconstitutional decision to raise ballot thresholds and make it more difficult for minor party candidates and their voters to express their political views in elections. Raising ballot thresholds in New York to conserve costs makes even less sense, when the public financing program's \$5,000 low-support primary cap would apply to the vast majority of minor parties in the vast majority of districts. What's more, this \$5,000 primary restriction exists on top of challenging fundraising prerequisites any candidate must meet to qualify to earn matching funds in the first place.

(1) Minor party candidates have generated minimal public financing costs, even when significant numbers ran for office.

The New York commission’s justification for toughening minor party ballot access boiled down to the supposition, offered by one commissioner, that “the more parties there are, the more potential there is for primary and general election candidates — each, potentially, having access to public matching funds.”⁹ But nothing in the experience of longstanding public financing programs, including the nation’s most prominent one in the commission’s backyard, indicated that the problem Commissioner Jacobs imagined was real or even logical.

Connecticut and New York City offer two of the nation’s most well-established public financing programs and, also, like New York State, allow losers of major party primaries to run in the general election on a third line. Yet in these places over multiple recent election cycles, minor party and independent candidates have generated minimal public financing costs, even when significant numbers were able to run for office (see Table 1, below). These programs’ experience supports the logic that New York commissioners well knew by the time of their final bill recommendation: that qualifying requirements for accessing public financing, not qualifying requirements for accessing the ballot, are the way to guard against wasting funds on frivolous candidates.

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Table 1: Non-major Party Candidates' Cost to Public Financing Programs in Connecticut and New York City, 2009-2018

Jurisdiction, election cycle	All candidates	Share (and no.) of all candidates who were non-major party	Share (and no.) of all candidates who received public financing	Share (and no.) of publicly-financed candidates who were non-major party	Share (and amt.) of all public financing disbursed to non-major party candidates
New York City, 2009	388	13% (49)	36% (140)	9% (12)	2% (\$131,723/year)
New York City, 2013	371	20% (75)	40% (149)	9% (14)	2% (\$150,984/year)
New York City, 2017	326	21% (68)	32% (104)	16% (17)	4% (\$184,064/year)
Connecticut, 2012	414	6% (24)	65% (268)	0% (0)	0% (\$0/year)
Connecticut, 2014	453	11% (48)	63% (284)	0% (0)	0% (\$0/year)
Connecticut, 2016	396	8% (33)	67% (267)	0.4% (1)	0.04% (\$4,691/year)
Connecticut, 2018	509	9% (47)	64% (328)	0% (0)	0% (\$0/year)

*Underlying data and calculations are on file with the Brennan Center. The candidates analyzed in New York City ran for citywide and legislative offices. The candidates analyzed in Connecticut ran for statewide and legislative offices; statewide elections were held in 2014 and 2018. Resources did not permit analyzing earlier election cycles in a timely manner, but there is no reason to expect different trends in earlier periods. "Non-major party candidates" include minor-party candidates in the primary and general elections; petitioning candidates in the primary and general elections; and so-called "sore loser" candidates who lost major party primaries and ran on a third line in the general election.

New York City's experience is particularly instructive. It sees exceptionally high rates of minor party candidacies, significantly higher than in New York State. In the city's most recent regular election in 2017, 21% of candidates for citywide or legislative office ran at some point in the cycle as a minor party or independent candidate. In the 2018 election cycle in New York State, 15% of candidates for statewide or legislative office ran at some point in the election as a minor party or independent candidate. Many candidates in both jurisdictions first ran as a major party candidate in the primary, before running as a minor party candidate in the general.

The city has offered multiple match public financing similar to the new state program as a candidate incentive for decades. Yet no more than five truly minor party or petitioning candidates have received matching funds in any of the city's past three election cycles, together costing \$50,784 per year in public financing. The remaining candidates who received some public financing as candidates on a third line did so only in the general election, having run as major party candidates in the primary. The matching funds they received for the non-major party portion of their campaigns totaled \$104,840 per year over the three elections.¹⁰

Minor party candidates' participation in New York City's public financing program has been modest even with qualifying requirements that are easier to meet than in the new New York State program. The city requires legislative candidates to raise \$5,000 from residents anywhere in the city, including at least 75 in-district donors.¹¹ The state's geographic requirements are stricter. Assembly candidates must raise \$4,000 or \$6,000, depending on the income level of the district, *entirely* in-district from at least 75 donors, and senate candidates \$8,000 or \$12,000 entirely in-district from at least 150 donors.¹²

Connecticut's qualifying thresholds are somewhat tougher than New York State's, but Connecticut offers successful candidates a sizeable grant rather than requiring them to continuously raise private dollars to earn public matching funds. To qualify in Connecticut, candidates for state house must raise \$5,100 in donations of \$5 to \$250, including from at least 150 residents of towns that overlap with the district.¹³ Candidates for senate must raise \$15,300, including from at least 300 residents of towns overlapping with the district.¹⁴

Commissioner Jacobs justified toughening minor party ballot access with a scenario of minor party candidates' potential to attain matching funds that is divorced from the reality of their fundraising record in New York State and their participation rates in existing public financing programs. He wrote, "At just \$3,500,000 [in possible matching funds per candidate] for the general election, assuming an average of 7 candidates JUST on the gubernatorial line, the taxpayers would be spending \$24,500,000."¹⁵ But no minor party candidate for statewide office in Connecticut or for citywide office in New York City — the most generously funded offices — has participated in public financing over a combined 11 regular election cycles. In New York State, not a single minor party candidate for a statewide office in 2018 or 2014 would have met the private fundraising prerequisites to qualify for the new state program.¹⁶ Even if a small number in the future did, the Campaign Finance Institute concludes that their cost in public financing would be modest and factors that projected cost into the \$76 million (including administrative costs) annual cost of the program, well within the \$100 million annual budget.¹⁷

(2) The number of public financing participants in the 2019 special election for New York City public advocate is an irrelevant basis for raising state ballot access thresholds.

The one real experience with public financing that any commissioner cited to support toughening minor party ballot access was the 2019 special election for public advocate in New York City. In that election, 11 candidates for a citywide office participated in public financing. Commissioner Jacobs pointed to this instance as "cautionary," claiming that "this could mirror what general elections in the future look like with many parties."¹⁸

But his speculation, that the state would see a similar explosion in public financing participation for any given seat if it did not restrict ballot access, was undermined by two known features of the city special election that simply do not exist at the state level. First, parties, major and minor, played no role in putting candidates on the city special election ballot, which was nonpartisan.¹⁹ Rather, candidates

reached the citywide office ballot by gathering just 3,750 signatures.²⁰ This requirement was drastically lower than even the state’s pre-2020 rule, which required 15,000 signatures including 100 each from at least half the state’s congressional districts for statewide office candidates.²¹

More to the point — as merely appearing on a ballot is no guarantee of receiving public financing — city lawmakers had enacted legislation to reduce by half the amount in private donations that candidates in this special election would have to raise to qualify for the public financing program.²² The new state program provides no such exception for special election candidates. And it is worth noting the singularity of the 2019 public advocate special election: New York City had never before in the three-decade history of its public financing program seen a special election for a citywide office, which is eligible for significantly greater matching funds than are legislative offices.²³

New York City’s 2019 special election for public advocate simply was not a relevant basis for raising New York State’s ballot access requirements. The categorical distinctions between the two scenarios were widely known and easily available to the state commissioners.

(3) The new New York program already strictly limits potential public financing for candidates in parties that have low voter support to at most \$5,000 in primaries. Other jurisdictions avoid costs from low-support candidates by imposing different restrictions on access to public financing itself.

These policies are designed directly to meet the aim of conserving public funds, unlike New York State’s far broader and potentially unconstitutional decision to raise ballot thresholds and make it more difficult for minor party candidates and their voters to express their political views in elections. Underscoring the senselessness of raising ballot thresholds to contain minor party public financing costs, analysis shows that the low-support primary restriction of \$5,000 per candidate would apply to the vast majority of parties in the vast majority of districts.²⁴

That restriction places a cap of \$5,000 in possible matching funds on any candidate that qualifies for public financing in a primary where fewer than 1,000 eligible voters are enrolled in the given party.²⁵ This \$5,000 restriction exists on top of the challenging private fundraising prerequisites that all candidates must meet to qualify to participate in public financing in the first place. Of the six minor parties with a ballot line as of 2019, only Independence Party candidates would be able to exceed the \$5,000 cap in nearly all legislative districts, but *only if* each candidate first managed to qualify for the program.²⁶ The Campaign Finance Institute finds that extremely few minor party candidates in 2018 would have come close to qualifying.²⁷ Candidates from the Green, Libertarian, and SAM Parties would be subject to the \$5,000 cap in *every* legislative district. Working Families Party candidates would be subject to the \$5,000 cap in all assembly districts and 56 of 63 senate districts. And Conservative Party candidates would be subject to the cap in 76 assembly districts and 20 senate districts.

Although the Board of Elections does not publish enrollment data on the parties that are not qualified for automatic ballot access, it is safe to assume they would all be subject to the small primary cap. For

example, both the Women’s Equality Party and the Reform Party would have been well under the 1,000-registered voter threshold in every district in 2016.

Connecticut takes a different route to directly limit public financing costs from non-competitive candidates. There, as in New York, candidates who lose a major party primary election may run in the general on a minor party line or as an independent. Connecticut does not permit those candidates to participate in public financing at the general election stage.²⁸ Connecticut also reduces the potential public financing amount for candidates who run entirely as minor party candidates on a line that received less than 20% of the vote in the previous election.²⁹

Ironically, as Campaign Finance Institute points out, making it tougher for candidates to run on minor party lines will only encourage more candidates to run in major party primaries, where they will be free to try to qualify for and earn matching funds.³⁰ Restricting ballot access also threatens First Amendment rights. New York’s governor and legislators should immediately amend the new public financing law to preserve its powerful and innovative amplification of small-donor New Yorkers and eliminate its logically unjustified and potentially unconstitutional ballot restrictions.

¹ Michael Malbin and Brendan Glavin, “Small Donor Public Finance in New York State: Major Innovations – With a Catch,” January 15, 2020, http://cfinst.org/pdf/state/ny/Small-Donor-Public-Finance-in-NY_Jan2020.pdf.

² Ian Vandewalker, “The 2018 Small Donor Boom Was Drowned Out by Big Donors, Thanks to Citizens United,” Brennan Center for Justice, January 10, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/2018-small-donor-boom-was-drowned-out-big-donors-thanks-citizens-united>.

³ Brennan Center for Justice, *The Case for Small Donor Public Financing in New York State*, February 28, 2019, https://www.brennancenter.org/sites/default/files/publications/CaseforPublicFinancingNY_0.pdf.

⁴ Campaign Finance Reform Commission, “Report to the Governor and the Legislature,” State of New York, December 1, 2019, 14, <https://campaignfinancereform.ny.gov/system/files/documents/2019/12/campaignfinancereformfinalreport.pdf>.

⁵ Samar Khurshid, “State Lawmakers Criticize Campaign Finance Commission Results While Legislative Leaders Stay Mum,” *Gotham Gazette*, November 27, 2019, <https://www.gothamgazette.com/state/8960-state-legislators-criticize-campaign-finance-commission-outcomes-while-legislative-leaders-mum-cuomo-heastie>; Ben Max and Jarrett Murphy, “State Campaign Finance Reform Takes Shape, With Threat To Minor Parties,” December 4, 2019, in *Max & Murphy*, podcast, <https://soundcloud.com/gotham-gazette-max-murphy/episode-186-state-campaign-finance-reform-takes-shape-with-threat-to-minor-parties>; Karen DeWitt, “Lack Of Key Provision Could Sink New York Public Campaign Finance Plan In Court,” *WSHU*, December 4, 2019, <https://www.wshu.org/post/lack-key-provision-could-sink-new-york-public-campaign-finance-plan-court#stream/0>.

⁶ “Sore loser laws in the 50 states,” Ballotpedia, accessed January 14, 2020, https://ballotpedia.org/Sore_loser_laws_in_the_50_states.

⁷ Michael Malbin and Brendan Glavin, “Small Donor Public Finance in NY State – Major Innovations, With a Catch,” 29, 33 (emphasis in original).

⁸ When New York City’s small donor matching program was first implemented in 1989, contributions were matched \$1-to-\$1, up to the first \$1,000 per contributor. In 1998, the match ratio increased to \$4-to-\$1 for the first \$250 per contributor. In 2007, the match ratio increased again to \$6-to-\$1 on the first \$175 per contributor. And following a successful ballot referendum in 2018, the match ratio was amended to its current level of \$8-to-\$1 on the first \$250 for citywide candidates and on the first \$175 for borough president and city council candidates. “History of the CFB,” New York City Campaign Finance Board, accessed January 14, 2020, <https://www.nycffb.info/about/history>; “What’s New in the Campaign Finance Program,” New York City Campaign

Finance Board, accessed January 14, 2020, <https://www.nyccfb.info/program/what-s-new-in-the-campaign-finance-program-2/>.

⁹ Campaign Finance Reform Commission, “Report to the Governor and the Legislature,” 63.

¹⁰ Underlying data and calculations on file with the Brennan Center.

¹¹ New York City, N.Y. Code § 3-703(2)(a)(iv).

¹² Campaign Finance Reform Commission, “Report to the Governor and the Legislature,” 24.

¹³ Conn. Gen. Stat. §§ 9-704(a)(4), 9-704(b)(3) (2017) (setting forth qualifying thresholds and providing adjustments for inflation); Connecticut State Elections Enforcement Commission, “Understanding Connecticut Campaign Finance Laws,” June 2018, 23, <https://seec.ct.gov/Portal/data/Publications/Guidebooks/2018CEPGuide.pdf>. These qualifying thresholds are current as of this writing but will be adjusted for inflation for the 2020 elections.

¹⁴ Conn. Gen. Stat. §§ 9-704(a)(3), 9-704(b)(3) (2017) (setting forth qualifying thresholds and providing adjustments for inflation); Connecticut State Elections Enforcement Commission, “Understanding Connecticut Campaign Finance Laws,” June 2018, 23, <https://seec.ct.gov/Portal/data/Publications/Guidebooks/2018CEPGuide.pdf>.

¹⁵ Campaign Finance Reform Commission, “Report to the Governor and the Legislature,” 65.

¹⁶ Underlying data and calculations on file with the Brennan Center.

¹⁷ Michael Malbin and Brendan Glavin, “Small Donor Public Finance in NY State – Major Innovations, With a Catch,” 29.

¹⁸ Campaign Finance Reform Commission, “Report to the Governor and the Legislature,” 63.

¹⁹ Azi Paybarah, “What You Need to Know About the Public Advocate Election,” *New York Times*, February 26, 2019, <https://www.nytimes.com/2019/02/26/nyregion/newyorktoday/ny-news-public-advocate-candidates.html>.

²⁰ N.Y.C., N.Y. Charter, ch. 46, § 1057-b(a)(1) (2010).

²¹ N.Y. Elec. Law § 6-142(1) (1993).

²² N.Y.C., N.Y. Local Law 1 Int. No. 1288-a, §§ 1-2 (2019) (reducing qualifying thresholds in citywide special elections by half and applying changes to 2019 special election).

²³ Samar Khurshid, “James Victory in Attorney General Race Would Trigger Citywide Special Election,” *Gotham Gazette*, May 19, 2018, <https://www.gothamgazette.com/city/7681-james-victory-in-attorney-general-race-could-trigger-first-citywide-special-election>.

²⁴ Data and calculations based on 2018 New York state party enrollment figures are on file with the Brennan Center.

²⁵ Campaign Finance Reform Commission, “Report to the Governor and the Legislature,” 25.

²⁶ Underlying data and calculations on file with the Brennan Center.

²⁷ Michael Malbin and Brendan Glavin, “Small Donor Public Finance in NY State – Major Innovations, With a Catch,” 32.

²⁸ Conn. Gen. Stat. § 9-706(a)(4) (2013).

²⁹ Conn. Gen. Stat. §§ 9-705(c)(1), 9-705(g)(1) (2018).

³⁰ Michael Malbin and Brendan Glavin, “Small Donor Public Finance in NY State – Major Innovations, With a Catch,” 32.