09-3760-cv(L)

09-3941-cv(CON)

United States Court of Appeals

FOR THE SECOND CIRCUIT

GREEN PARTY OF CONNECTICUT, S. MICHAEL DEROSA, LIBERTARIAN PARTY OF CONNECTICUT, ELIZABETH GALLO, JOANNE P. PHILLIPS, ANN C. ROBINSON, ROGER C. VANN, ASSOCIATION OF CT LOBBYISTS, and BARRY WILLIAMS,
Plaintiff-Appellees,

v.

JEFFREY GARFIELD, RICHARD BLUMENTHAL, PATRICIA HENDEL, ROBERT N. WORGAFTIK, JACLYN BERNSTEIN, REBECCA M. DOTY, ENID JOHNS ORESMAN, DENNIS RILEY, MICHAEL RION, SCOTT A. STORMS, SISTER SALLY J. TOLLES, and BENJAMIN BYCEL, *et al.*,
Defendant-Appellants,

AUDREY BLONDIN, TOM SEVIGNY, COMMON CAUSE OF CT, and CONNECTICUT CITIZENS ACTION GROUP
Intervenor-Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NEW HAVEN DISTRICT OF CONNECTICUT

BRIEF OF PLAINTIFF-APPELLEES

MARK J. LOPEZ
Counsel of Record
LEWIS, CLIFTON & NIKOLAIDIS, P.C.
350 Seventh Avenue, Suite 1800
New York, NY 10001
(212) 419-1512

BENJAMIN SAHL
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 17th Floor
New York, NY 10004
(212) 549-2500

(*Attorneys continued on inside front cover*)

DAVID J. MCGUIRE
AMERICAN CIVIL LIBERTIES UNION
OF CONNECTICUT
2074 Park Street, Suite L
Hartford, CT 06106
(860) 523-9146

Attorneys for Plaintiff-Appellees
Green Party of Connecticut,
S. Michael Derosa, Libetarian Party
of Connecticut, Elizabeth Gallo,
Joanne P. Phillips, Ann C. Robinson
and Roger C. Vann

(*Attorneys continued on inside front cover*)

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PRELIMINARY STATEMENT

The Citizen's Election Program ("CEP") was adopted as a part of a broad legislative revision of Connecticut's campaign finance statutes. "An Act Concerning Comprehensive Campaign Finance Reform for State-Wide Constitutional and General Assembly Offices," P.A. 05-05, codified at Conn. Gen. Stat. §§9-700–718, 9-750–751 (SPA-290-322; SPA-323). The CEP establishes a voluntary system of public financing for candidates seeking state or legislative office. The eligibility and qualification requirements depend on a particular candidate's party affiliation and the office sought. While major-party candidates qualify for full public funding if they satisfy the qualifying contribution requirement, minor and petitioning party candidates are held to a higher and more difficult qualifying standard. The additional eligibility and qualifying requirements have the practical effect of excluding most minor party and petitioning candidates from the public financing system. A diverse group of minor parties and candidates challenged the CEP on the grounds that the financing system distorts the relative positions of the political parties in the State by conferring valuable one-sided benefits on major parties only. Following a bench trial, the district court issued a *Memorandum Decision* and *Order* enjoining enforcement of the CEP as violative of the First and Fourteenth Amendments. (SPA-1).

The district court engaged in a careful analysis of the CEP, both textually and as construed by the agency in charge of enforcing it. It is readily apparent from the text of the statute that the CEP confers valuable government benefits on major party candidates and that the program is structured in a way to maintain the advantages it gives major parties. Even if the discriminatory aspects of the statute are not readily apparent from its mechanics, there is no basis to challenge the district court's evidentiary grounds for its conclusion that, "[f]or all practical purposes, the CEP operates as a one-sided benefit for major-party candidates only." (SPA-83).

In assessing the plaintiffs' claim that the CEP operates to improperly give major parties an unfair advantage, the court considered an extensive factual record that allowed it to view the statute in context. The district court undertook a careful review of the electoral landscape in Connecticut to determine how, if at all, the CEP affects the relative strengths and positions of major and non-major parties. The court properly relied on election and spending data from elections before and after the implementation of the CEP. A comparison of the data shows that the CEP increases the electoral opportunities of major-party candidates by substantially inflating their political and financial strength. In Connecticut, Democrats hold a huge registration and electoral advantage in almost all of the State's 187 legislative districts. The availability of public funding will lock in the party's gains because

the program is structured in such a way as to prevent effective challenges by candidates denied the CEP's benefits. At the same time, the CEP presents the Republican Party with the transformative opportunity to restore their flagging brand in elections for both legislative and statewide office. The CEP provides historically weak major-party candidates with the resources to run full throttle campaigns in legislative districts that have long been vacated or neglected by one or the other major parties. The district court found that these are the districts that have proven to be most fertile for minor-party candidates and that the entry of a second major-party candidate will impair their ability to run effective low cost campaigns. (SPA-76). Inevitably, the relative position of minor-party candidates will suffer.

The district court was not writing on an entirely clean slate when it set to the task of evaluating the reasonableness of the lines drawn by the legislature. In addition to the evidence adduced at trial, the court had the benefit of an extensive legislative record which clearly establishes that the CEP's goals could have been easily achieved without needlessly disadvantaging minor-party candidates. (SPA-102-108). It was apparent from the first moment the Act was signed into law that it was widely viewed as having "rigged" the game in favor of major parties. In fact, that was the exact position taken by the State Elections Enforcement Commission ("SEEC") and the good government groups that have intervened in

this case and who testified in support of legislation that would amend the statute to lessen the burden on minor-party candidates and tap down the one-sided benefits given to major-party candidates. The litigation position taken by defending parties in this case must be understood in this context.

FACTUAL STATEMENT

A. Background and Legislative History of the Act

Following the resignation of Governor Rowland in June 2004, the Connecticut legislature moved quickly to revise the State's campaign finance laws to prevent the abuses brought to light by the Rowland Scandal and to adopt a system of public financing that provided full public financing to candidates for statewide and legislative office. The bills approved in both the House and Senate provided for full public financing to all candidates for statewide and legislative office without regard to party affiliation, requiring merely that a candidate be ballot-qualified and raise a threshold amount in qualifying contributions. (EX-123-125; 215-219). Both bills provided funding for the primary campaigns of minor-party candidates. (EX-123-124; 215-218). When the legislative session ended before the legislature could vote on a unified bill, a working group was established to craft a bill while the legislature was out of session. (SPA-18). The working group heard testimony from representatives of the Intervenors, Common Cause, and CCAG, along with experts from the Brennan Center for Justice, which serves

as counsel for the Intervenors in this case, as well as other national experts in the area of public financing and campaign finance reform, including representatives from the Maine and Arizona financing systems. (SPA-19; EX-294-356). Maine and Arizona, the only states other than Connecticut to provide full public funding to legislative candidates, both provide public financing to minor-party candidates without additional petitioning requirements. (EX-3430-3435). Neither of the witnesses from Maine and Arizona reported having a problem with minor parties exploiting the system. (SPA-103-104). All of the witnesses testified in support of the public financing provisions contained in the bills. (EX-294-356).

Nevertheless, in October 2005, when the legislature enacted "An Act Concerning Comprehensive Campaign Finance Reform for State-Wide Constitutional and General Assembly Offices," (SPA-290-322; SPA-323), the Act departed dramatically from the earlier bills, making it significantly more difficult for minor party and independent candidates to participate in the State's public financing program. §§9-705(c)(1), (c)(2), (g)(1), (g)(2) (SPA-371-432; SPA-298; SPA-300-301). It also eliminated primary grants for minor-party candidates seeking their party's nomination and reduced general election grant amounts. §§9-705(a)(10), (b)(1), (e)(1), (f)(1) (SPA-297; SPA-299-300). Finally, the Act featured a provision amending the statutory definition of "contribution" to allow candidates—including candidates participating in the public financing program—

to raise and spend unlimited campaign funds in direct coordination with their party and legislative leadership committees. §9-601(25) (SPA-220). This amendment to the statute came to be known as the organizational expenditure loophole. (EX-1519).

In response to serious concerns raised by the intervening organizations in this case about the treatment of minor parties and the loophole for organizational expenditures, the Governor called on the Executive Director of the SEEC, Jeffrey Garfield, to recommend changes in the law that would ease the burden on non-major parties and close the organizational expenditure loophole.[1] (SPA-37; EX-374; EX-1518-1519). On February 2, 2006, the SEEC submitted HB 5610 to the GAE committee. The proposed legislation sought to amend the CEP to allow minor-party candidates to qualify as petitioning candidates and to reduce the prior vote total and petitioning requirements to 3/4/5 percent. HB 5610 would have also narrowed the exemption for organizational expenditures. (EX-381; EX-3445-3451).

On March 13, 2006, the Government Administration and Elections ("GAE") Committee held a hearing to consider the proposed amendments to the CEP contained in HB 5610. (EX-1403-1572; EX-381). In his statement, Mr. Garfield

[1] Connecticut Common Cause and Connecticut Citizen Action Group ("CCAG") mobilized a public relations and lobbying effort to have the legislature ease the burden on minor-party candidates. (EX 3203-3204).

testified that the CEP was constitutionally suspect based on his review of *Buckley v. Valeo*, 424 U.S. 1 (1976) and he "urge[d] [] in the strongest terms possible" lowering the 20% qualifying threshold for minor-party candidates' eligibility for full financing, stating that the "standards for [minor-party candidate] participation ... are so high that it is very unlikely that these candidates would qualify for any public grants." (EX-374-375). Garfield argued that a 5% standard—5% of prior vote total or 5% signature requirement (in addition to the qualifying contributions requirement)—was sufficient to protect the state's interests. (EX-374-375; SPA-37-38). Garfield further recommended that minor-party candidates who qualified for a partial grant should be permitted to raise contributions up to the amount of the full grant to make up the difference in funding received by their major party opponents. (EX-374-375).[2]

The hearing transcript indicates that there was almost no discussion whether the changes contained in HB 5610 would pose a threat to the financial integrity of the CEP or to the public fisc. The main concern expressed was that major parties might exploit the system by getting the minor parties to run stalking horse candidates. (EX-1525-1530).

[2] The intervenor organizations in this case and experts from the Brennan Center also testified in support of the HB 5610 amendments. (EX-1467-1473; EX-1493-1494; EX-1494-1495; EX-3349-3351; *see also* EX-402-413; EX-414-420; EX-1410-1411).

HB 5610 was not adopted. To the contrary, the legislature eased certain qualifying requirements for major party candidates. The legislature eliminated a provision in the original Act that prohibited primary grants to a candidate opposed only by a "straw" candidates who either did not qualify for public financing or did not raise a threshold amount of money. PL. 06-137 §22 (SPA-433-468); *see* §9-706(d)(2) and accompanying legislative notes (SPA-306).[3] Finally, although the legislature made minor changes to the organizational expenditure provision, it failed to limit the type of campaign activities that could be coordinated with CEP-funded candidates or to place any ceiling on the amount of expenditures coordinated with candidates for statewide office.

B. The Provisions of the CEP

1. Qualifying Criteria

The CEP creates a two-tiered qualification system for candidates based on party affiliation. All candidates, irrespective of party affiliation, must obtain a requisite number of qualifying contributions specific to the particular office sought. §§9-702(b), 9-704(a); *see* SPA-292, 294-296 (summarizing contribution requirements). A qualifying contribution cannot exceed $100. §9-704(a) (SPA-294-296). Major-party candidates who meet this requirement automatically

[3] In 2008, the legislature further amended the statute to make it easier for major-party candidates to receive supplemental grants triggered the under excess expenditure provision. (SPA-31); s*ee discussion infra* p.14-15.

qualify for public funding. §§9-705(a)(2), (b)(2), (e)(2), (f)(2). (SPA-297; SPA-300). *See also* §9-372(5) (SPA-22-23) (defining "major party").

Minor party and petitioning candidates are held to a different standard. In addition to collecting the requisite number of qualifying contributions, a minor-party candidate must satisfy at least one of two additional requirements in order to qualify for public funding. First, a "minor-party candidate" becomes eligible to receive public funding if that candidate, or another member of her party, received a certain percentage of the vote in the previous general election for the same office (the "prior vote total requirement"). §§9-705(c)(1), (g)(1) (SPA-298; SPA-300-301). To receive a one-third CEP grant, the candidate or party-member must have received at least 10% of the vote in the preceding general election. To be eligible for a two-thirds grant or a full grant, the prior vote requirement increases to 15% and 20%, respectively. *Id*; *see also* Conn. Rev. Stat. §9-372(6) (defining "minor party").

Second, the SEEC has interpreted the statute to allow minor-party candidates to qualify under the separate provisions governing "petitioning" candidates. §9-705(c)(2), (g)(2) (SPA-298; SPA-301; SPA-359-361).[4] Unlike minor-party

[4] The SEEC's interpretation is inconsistent with both the statute's text and the agency's prior construction. The full grant is restored if a minor-party candidate raises a single dollar more than equivalent amount that corresponds to the contribution requirement. It is not necessary that Following adoption of the CEP, the SEEC explicitly sought to amend the statute to allow minor-party candidates to

candidates, a "petitioning candidate" is someone who does not have ballot access status for the office being sought and is required to petition his way onto the ballot. (EX-588-593.) Under the SEEC's reading, minor-party candidates are thus treated as petitioning candidates even though they are ballot-qualified based on prior election results. A minor-party candidate who received 9.9% of the vote in the previous election must therefore qualify in the same manner as a candidate who has never run for office and who must petition to even get on the ballot. Petitioning candidates can qualify for a one-third grant by collecting signatures equal to 10% of the votes cast in the previous election for that office. To obtain a two-thirds grant or a full grant, the signature requirement increases to 15% and 20%, respectively. §9-705(c)(2),(g)(2) (SPA-298; SPA-301).

There is no provision in the statute that would allow a minor-party candidate who is eligible for a partial grant (or actually received one), based on his prior vote total, to attempt to qualify for a full grant under the petitioning provisions. Thus, a candidate who qualifies for a one-third grant cannot improve his position by collecting signatures. This creates the perverse result that a first time office-seeker

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qualify as petitioning candidates. While the legislature did not act on the SEEC's recommendation (EX-381; EX-3445-3451; EX-379-383), the SEEC went ahead and effectively made the change itself—although not until very late in the 2008 election cycle, only 3 weeks before the deadline for submitting petitions. (SPA-356). Although Plaintiffs presented evidence that the SEEC had enforced the statute to originally exclude one of the plaintiff-candidates in this case from the program based on his minor party status (*see* EX-5-6; EX-469-471), the district court nevertheless accepted the SEEC's interpretation. (SPA-24, *n.15*).

has a significant advantage over an established minor-party candidate because he can qualify for a full grant**.**

2. The Grants

The CEP draws significant distinctions between major parties and minor and petitioning parties with respect to the funds it provides. First, only major-party candidates are entitled to funds for primary campaigns. §§9-705(a)(1), (b)(1), (e)(1), (f)(1) (SPA-297; SPA-299-300). The grants for primary campaigns are significant—gubernatorial candidates receive $1.25 million, other statewide candidates receive $375,000, candidates for state senate receive $35,000, and candidates for state representative receive $10,000. *Id.* The CEP increases primary funding for major-party candidates in one-party-dominant districts. *Id.* If the number of electors in a district enrolled in one major party exceeds by twenty percent the number of the electors in the district enrolled in another major party, then the primary grant is $75,000 for the senate and $25,000 for the house. *Id.* These grants are payable regardless of the strength of a candidate's primary opponent or whether his opponent qualified for public financing. *Id.* These grants can be trebled under the independent and excess expenditure provisions of the statute. §§9-713, 9-714 (SPA-314-317; SPA-318).

Second, major-party candidates nominated during their parties' primaries are guaranteed full distribution of general election funds—$3 million for

gubernatorial candidates, $750,000 for other statewide offices, $85,000 for state senate candidates, and $25,000 for candidates for state representative. §§9-705(a)(2), (b)(2), (e)(2), (f)(2) (SPA-297-298; SPA-300). Like the primary grant, the general election grant can be trebled under the independent expenditure and excess expenditure provisions. §§9-713, 9-714 (SPA-314-317; SPA-318).

A major-party candidate opposed by another major-party candidate is entitled to payment of a full grant even if he draws only token opposition in the general election and regardless of whether his opponent raised the necessary qualifying contributions to participate in the CEP. The CEP base grants are supplemented by qualifying contributions, which significantly increase the amount of money a candidate is permitted to spend. The qualifying contributions represent approximately 20% of the base grant amount for legislative candidates and are not offset against the grant amount.[5]

The grant schedule for qualified minor-party and petitioning candidates is different. First, they are not eligible for primary funding. §§9-705(a)(1), (b)(1),

[5] In limited circumstances, the grant amount is adjusted downward: where the candidate is either strictly unopposed or is opposed by a minor party or petitioning candidate whose receipts or expenditures do not exceed the amount of money that candidates are required to raise in qualifying contributions. § 9-705(j)(3), (4) (SPA-302-303; *see also* EX-806-815). The full grant is restored if a minor-party candidate raises a single dollar more than equivalent amount that corresponds to the contribution requirement. It is not necessary that the minor-party candidate qualify for public funding in order to trigger the payment of the full grant to his major party opponent.

(e)(1), (f)(1) (SPA-297; SPA-299-300). *See also* EX-1615 (stating eligibility for primary campaign grants is limited to major-party candidates). Second, while required to raise the same amount in qualifying contributions, they are not assured a full general election grant. Minor-party candidates receive general election grants based on their party's performance in the preceding election for that office: one-third for 10% to 15% of the votes; two-thirds for 15% to 20%; and a full grant for more than 20%. §§9-705(c)(1), (g)(1) (SPA-298; SPA-300-301). Similarly, petitioning party candidates receive a percentage of the full grant based on the number of signatures they obtain. Only those who obtain signatures from at least 20% of the number of district (or state) voters who cast votes in the preceding election are given a full grant. §§9-705(c)(2), (g)(2) (SPA-298; SPA-301).

Candidates who agree to participate in the CEP are prohibited from raising funds other than qualifying contributions with the exception that a partially-funded candidate may continue to raise funds up to the amount of the grant issued to his major-party opponent. §9-702(c) (SPA-292-293). Such funds must be raised in amounts less than $100. *Id*. A partially-funded candidate may be eligible for a supplemental post-election grant if the candidate (a) incurred a spending deficit, and (b) received a greater percentage of the vote than the percentage (of prior voting or signatures gathered) used to calculate his initial grant. §9-705(c)(3) (SPA-299). Candidates are limited in their ability to engage in such deficit

spending, however, by the SEEC's regulation prohibiting a participating candidate from making expenditures "incurred but not paid for which payment of any portion of the outstanding liability is made contingent on the participating candidate committee's receipt of a grant from the Citizens' Election Fund." SEEC 2008 CEP Regulations (SPA-88), citing Conn. Agency Reg. §9-706-2(b)(16) (EX-441 ¶16; *see also* EX-475-476). A participating minor-party or petitioning candidate may not borrow money or use personal funds to make up the difference between a partial grant and a full grant; use of loans or personal funds is limited to nominal amounts needed to jumpstart campaigns. §9-710(c) (SPA-310; SPA-334-337).

Finally, minor party and petitioning candidates who do not qualify for pre-election grants cannot obtain public funding following the election, irrespective of vote totals.

3. The Matching Fund and Disclosure Provisions

a. The Trigger Provisions

Participating candidates agree to expenditure limits in exchange for their grants. §9-702(c) (SPA-292-293). The expenditure limits, however, are not a strict ceiling. Candidates may be released from the limits by the two so-called "trigger provisions," pursuant to which participating candidates are paid supplemental funds. §§9-713, 9-714 (SPA-314-317; SPA-318).

First, participating candidates are provided matching funds when a non-participating candidate spends money in excess of the relevant expenditure limit for the office sought. §9-713 (SPA-314-317). Participating candidates are entitled to receive up to four grants, each worth 25% of the applicable grant. (SPA-314-317). The supplemental grant is triggered by the first dollar in excess spent by the non-participating candidate. Under terms of the statute as originally enacted, candidates could only spend the supplemental grant on a dollar-for-dollar basis that matched his opponent's spending. In 2008, the statute was amended to allow a participating candidate to spend the amount in full. (SPA-31, 314-315). Matching funds are triggered even if the non-participating candidate's spending has not actually exceeded the combined pre-primary, primary, and general election spending of his participating major-party opponent. For example, in a race for state senate, matching funds are triggered if the non-participating candidate's spending exceeds $100,000, even though his opponent's total combined primary and general election spending could be as much as $175,000. §9-705, §9-713 (SPA-297-303; SPA-314-317). If the participating candidate also received payment under the independent expenditure provision, the disparity can be even greater.

Second, matching funds are triggered for independent expenditures made with the intent to promote the defeat of a participating candidate. §9-714. (SPA-

317). Independent expenditures are expenditures that are not coordinated with the candidate. §9-601(18) (SPA-218). The SEEC's implementing regulations define an independent expenditure in broad terms, encompassing virtually any communication that could be viewed as promoting the defeat of a participating candidate. (SPA-32-33; *see also* EX-686). Under this provision, a grant is triggered when non-candidate individuals or groups make independent expenditures advocating the defeat of a participating candidate that, in the aggregate and when combined with the spending of the opposing non-participating candidates in that race, exceed the CEP grant amount. §9-714(c)(2) (SPA-319). Funds are distributed to the participating candidate on a dollar-for-dollar basis to match independent expenditures exceeding the initial grant amount. §9-714(a) (SPA-318).

In races with two or more CEP-participating candidates, the release of matching funds equal to the amount of the independent expenditure is automatic. §9-714(a)-(b) (SPA-318-319). In races where only one candidate is participating in the CEP, matching funds for the participating candidate are released when the amount of *all* independent expenditures, combined with the amount of *all* the non-participating candidates' expenditures, exceed the amount of the participating candidate's CEP grant amount. §9-714(c)(2) (SPA-319). Under this provision, all candidate expenditures and all independent expenditures are "aggregate[d]". *Id.*

(SPA- 32). Communications by the Green Party itself that meet the statutory definition of independent expenditures are regulated. Significantly, under this provision, the publicly-funded candidate's party or other political committees, groups, and individuals can make unlimited independent expenditures that directly advocate the defeat of any non-participating opponent, so long as those expenditures are not coordinated with the candidate or his campaign. The value of those expenditures does not count toward that participating candidate's expenditure limits and is not counted for purposes of the excess expenditure provision**.** **§**9-713 (SPA-314-317).

The excess and independent expenditures are separately capped at 100% of the base grant, meaning that a candidate can receive up to three times the original full grant. §9-713(g), 9-714(c) (SPA-318; SPA-319). The matching fund provisions apply separately to the primary and general election. §9-713(g), 9-714(c) (SPA-318; SPA-319).[6]

[6] A third trigger mechanism is contained in §9-705(j)(4), (SPA-303). As described in *n.5*, *supra*, the reduced grant paid to a major-party candidate whose only opponent is a non-major-party candidate is increased to a full grant if the non-major-party candidate raises or spends a single dollar more than the amount of money that corresponds to the applicable qualifying contribution threshold. In a House election, a minor-party candidate spending as little as $5001 increases his major-party opponent's grant from $15,000 to $25,000. (SPA 92-93).

b. The Disclosure Provisions

The excess and independent expenditure provisions impose significant reporting requirements on candidates and independent spenders. Under the excess expenditure provision, non-participating candidates in races with participating opponents must report to the SEEC once they have made expenditures or received contributions that equal 90% of the participating candidate's expenditure limit. §9-712 (SPA-312-313). Once one non-participating candidate reaches that 90% threshold, *all* non-participating candidates in that race must submit supplemental campaign finance statements on a biweekly or weekly basis, depending on when the election is scheduled to take place. §9-712(a)(3) (SPA-312-313; *see also* EX-813; EX-3424-3427). If the 90% threshold is met more than 20 days before the primary or general election, a report must be filed within 48 hours; if met within 20 days of the election, it must be filed within 24 hours. §9-712(a)(2) (SPA-312). This reporting requirement applies to all candidates, even if the candidate has limited his spending to avoid triggering the CEP's disclosure requirements and matching grants to his participating opponents. *Id.* A candidate who fails to satisfy these reporting requirements incurs thousands of dollars in penalties. §9-712(c) (SPA-313-314).

Independent expenditures must be disclosed even if they would not trigger the payment of matching funds; within 24 hours if made within 20 days of an

election, or within 48 hours if made more than 20 days before an election. §9-612(e)(2) (SPA-262). *See also* EX-814 (explaining independent expenditure reporting requirements). Penalties are imposed for failure to file the disclosures. §9-612(e)(5) (SPA-262).

4. The Organizational Expenditure Provision

The CEP includes a large loophole for organizational expenditures made on behalf of participating candidates. Under Connecticut law, an organizational expenditure is an expenditure coordinated with the candidate by a party committee, a legislative caucus committee, or a legislative leadership committee for the benefit of a candidate. §9-601(25) (SPA-220). Expenditures under this provision are not limited to party-building or get-out-the-vote activities, but may be made in support of individual candidates for a variety of purposes including television and radio advertisements, direct mailings, campaign events, and political advisors. *Id*. *See also* SEEC Organizational Expenditure Fact Sheet (EX-691-699). While candidates who participate in the CEP cannot raise money for their own campaigns, there are no restrictions on the ability to raise money for party and legislative leadership committees. Under the CEP, there are no restrictions on organizational expenditures made on behalf of candidates for statewide offices. While those made on behalf of participating candidates for state senate and state representative are limited to $10,000 and $3,500, respectively, during the general

election, §9-718 (SPA-220; SPA 322), the limits apply on a committee-by-committee basis. Each separate party or legislative leadership committee can contribute up to the limit. In their cumulative effect, these contributions could quickly equal the general election grants for participating major-party candidates.

C. The District's Court Analyzed Election Results and Campaign Expenditures before and after the Implementation of the CEP.

1. Election Results Show that Almost all Elections for State Office in Connecticut are Decided by Landslide Margins or Occur in Legislative Districts that have been Abandoned by one of the Major Parties.

In Connecticut, Democrats enjoy huge majorities in almost all of the state's legislative districts. The Republican Party consistently loses by landslide margins in legislative districts it has not effectively abandoned. *See generally* SPA-39-51 (summarizing election results). "From 1998 through 2006, even *losing* major-party candidates averaged 34.6% of the vote in legislative races." Def.'s Br. at 94 (citing EX-927). In 2006, in 72% of Senate elections and 83% of House elections, the winning major-party candidate either won by at least 20% of the vote or was unopposed by another major-party candidate**.** (SPA-40-41). 44% of General Assembly races either resulted in one of the major-party candidates receiving *less* than 20% of the vote or were uncontested by one of the major parties. (SPA-41).

Election results from 2002 and 2004 are consistent with the 2006 results and confirm the trend of single-party dominance in legislative districts over the past

decade. (SPA-41). That trend continued in 2008, despite the availability of public funding. (SPA-44-46). 46% of General Assembly races were either uncontested by one of the major parties or resulted in one of the major-party candidates receiving *less* than 20% of the vote. (SPA-46).[7]

Party registration numbers are another indication of the lopsided nature of most legislative districts. (SPA-50-51). Republicans comprise barely 20% of the state's registered voters and account for less than 20% of a legislative district's registered voters in 52.8% of state senate districts and 50.3% of house districts. *Id.*

2. Expenditures Under the CEP are Significantly Greater than Campaign Spending Prior to Implementation of the CEP.

a. Candidate Expenditures

When combined with qualifying contributions, the expenditure limits under the CEP correspond to the highest spending in statewide races and to spending in only the most competitive legislative elections. (SPA-52-53; EX-505-507; EX-508-526). In statewide elections, only in the governor's election does the money raised and spent roughly correspond to the public financing grants. (SPA-51-52; EX-505-507). Even this last observation, however, must be understood in the context of the excess expenditure and independent expenditure provisions for

[7] With the exception of the race for Governor, Republican candidates have also consistently lost by landslide margins in recent statewide elections. The Democratic candidates for Secretary of State, Treasurer, Comptroller, and Attorney General all won by 2:1 margins in 2006. (SPA-47).

supplemental grants. Although these provisions did not come into play in the 2008 legislative elections, SEEC Executive Director Garfield recently testified that the CEP will require $22,500,000 in base and supplemental grants to cover the 2010 gubernatorial race (EX-3214), almost double the $11,446,151 raised by the major-party gubernatorial candidates in 2006. (SPA-54). The SEEC expects to spend an unprecedented $39 million on all statewide races in 2010 (EX-3214), far exceeding the $14,547,820 raised by major party statewide candidates in 2006. *See* SPA-54 (listing expenditures for all statewide candidates). In total, the SEEC projects that $52 million will be required to fund initial and supplemental CEP grants during the 2010 election. (EX-3213-3214). Notably, the SEEC's projections assume that no minor-party candidates will qualify for CEP funding in any of the 2010 statewide races. (EX-3214).

Even if supplemental grants do not come fully into play in elections for statewide office, the base grants by themselves provide significantly more money than candidates have previously raised. As a comparison, the district court looked at expenditures in the five under-ticket elections for constitutional office. (SPA-52-53). The major-party candidates for Lieutenant Governor averaged $333,784 in expenditures over the three statewide election cycles from 1994 to 2002. Candidates for Secretary of the State averaged $445,696; candidates for State Treasurer averaged $417,133; candidates for State Comptroller averaged $352,262;

candidates for Attorney General averaged $260,718. *Id.* Under the CEP, the general election grant alone for each of these offices is $750,000.

In legislative elections, the disparity between the expenditure limit applicable under the CEP and campaign spending prior to its implementation is just as pronounced. (SPA-52-58). The legislature enacted the CEP with the understanding that the general election grants, when combined with qualifying contributions, significantly exceed both median and average past expenditures and are "pegged to match average expenditures in competitive elections." (SPA-51; EX-508-526). Average expenditures in "competitive" elections are far from representative. The average candidate expenditure for all elections in 2004 was $65,669.76 for state senate candidates and $16,807.89 for state house candidates. The median expenditure was $47,415 for senate candidates and $14,210 for house candidates. (SPA 52-53). These expenditures are significantly less than the applicable expenditure limits for candidates seeking election to the senate ($100,000) or the state house ($30,000).[8]

The OLR reports actually inflate the expenditure data because they do not take into consideration the eighteen major-party candidates who filed exemptions, i.e., those who spent less than $1,000 (SPA 73, *n.51*), or the more than sixty

[8] The expenditure limits under the CEP are significantly higher than prior expenditures even in elections contested by candidates from both major parties. (SPA-53) (Senate average of $74,122.82, median of $65,898.41; House average of $18,741.59, median of $18,760).

exempt minor-party candidates. (EX-508-526; SPA-53, *n. 37, 38*). Moreover, the data does not properly control for legislative districts that are not contested by one major party. (SPA-114). If in fact a second major-party candidate participated in those elections and that factor was properly controlled for, average candidate spending as reported in the OLR report would have declined significantly.

Because 2008 marked the first cycle with candidates participating in the CEP, the court was readily able to compare the 2004 and 2006 data with 2008 spending attributable to the CEP. (SPA-56-58). Average expenditures by state senate candidates who received a CEP grant in 2008 equaled $89,387.85, up 36% from $65,699.76 in 2004; median expenditures rose to $96,891.65, up 104% from $47,415.70 in 2004. The average CEP-participating house candidate spent $25,712.14 in 2008, up 53% from $16,807.89 in 2004; the median 2008 amount rose 98% to $28,171.11 from $14,210.80 in 2004.[9] (SPA-57-58).

[9] The court undertook a similar analysis based on campaign finance data from the 2006 election cycle. The court found that, while campaign receipts increased that cycle, they were still significantly less than the applicable expenditure limits for contested state house and senate elections under the CEP. (SPA-56-57). The court emphasized the fact that, while in 2006 there were only 13 (36%) Senate districts where one or more of the candidates raised campaign contributions of at least $100,000 (the CEP expenditure limit for participating Senate candidates), CEP participation in 2008 resulted in 27 (75%) Senate districts where one or more of the candidates had access to at least $100,000. (SPA-74). The data comparing 2006/2008 data for state representative showed an even greater disparity in candidate receipts. (SPA-74-75)

The across-the-board averages reported above obscure the real impact the CEP has on individual contests. The increase in available resources is most significant for the Senate and House candidates who are competing in previously abandoned districts and for those candidates competing in districts in which the weaker major-party candidate has historically been unable to raise the amount of money needed to run an effective campaign. (EX-4393-4411) (comparing expenditures before and after implementation of CEP).

Providing funding to weak major-party candidates in traditionally safe districts will have the ancillary effect of increasing spending by safe incumbents. (EX-4393-4411). Incumbent legislators, who might have raised relatively little money because they were unopposed or faced only minimal opposition, are now going to be funded at levels that correspond to the most competitive elections. *Id.* In 2008, at least 14 major-party candidates received full grants even though their major party opponents raised less than $1,000. (EX-3120). Comparing total candidate receipts in individual legislative districts in 2006 with receipts in individual districts in 2008 shows that campaigns have become significantly more expensive since the implementation of the CEP. (SPA-74). *See* (EX-4468-4476). This is inevitable as candidates are being provided with the money to run full

throttle campaigns in legislative districts with little history of significant campaign spending.[10]

Looking forward to the 2010 legislative elections, the SEEC anticipates that spending will continue to increase dramatically. (EX-3211-3215). The SEEC expects spending on legislative races to increase to $13 million. (EX-3214). By way of comparison, total candidate expenditures in legislative elections in 2004 were reported at 7,110,242.82. (EX-513). Garfield has testified that this estimate is based on a "reasonable and realistic set of assumptions." (EX-3213) ("I considered, yet rejected, projections that were based upon primaries for all offices, high percentages of minor and petitioning candidate eligibility, and a very high incidence of independent spending. Instead, we settled on a reasonable and realistic set of assumptions . . . ."). [11]

[10] Another reason expenditures will increase is the expected increase in the number of contested primaries. In 2008, there was an almost two-fold increase in the number of primaries that occurred from 2006. (EX-2400). There were four senate and 16 house primaries in 2008. *Id*. 34 of the 42 candidates who participated in the August 12th primaries received public financing grants of up to $75,000 in the Senate and $25,000 in the House. *Id.*

[11] In 2008, grant payments made from the CEP Fund totaled $9.238 million—even without factoring in the value of qualifying contributions to participating candidates. *See* SEEC Report on Status of Citizens' Election Fund as of December 31, 2008, *pp. 8-9*, available at: http://www.ct.gov/seec/lib/seec/publications/cef_2009_annual_report.pdf.

b. Organizational Expenditures

The court also took into account the value of organizational expenditures. (SPA-58). This provision allows party and leadership committees to supplement the grant provisions by making certain in-kind contribution to candidates. §9-601(25) (SPA-220). *See also* SEEC Organizational Expenditure Fact Sheet (EX-691-699). Relying on a declaration submitted by Mr. Garfield, the court found that, in 2008, organizational expenditures made on behalf of state senate candidates totaled $253,405. (SPA-58). On average, each state senate candidate received $6,849 in organization expenditures. On the state house side, organizational expenditures made on behalf of state house candidates totaled approximately $211,081. On average, each candidate for state representative received $1,649 in organizational expenditures. *Id.* The record does not include a breakdown of organizational expenditures by candidates and therefore obscures the fact that individual candidates may have benefited from much greater organizational funding. (SPA-58).

As much as Defendants downplay the impact of organizational expenditures, the record establishes that the provision permits candidates to work hand-in-hand with their party to circumvent the expenditure limits by running coordinated side campaigns. (EX-1519; EX-374-375). Mr. Garfield testified that the organizational expenditures provision would undermine the effectiveness of the expenditure limits

by allowing "party committees, legislative caucus and leadership committees to make unlimited expenditures" and "leaves the potential for many thousands of dollars of support to be provided to qualifying candidates who are already receiving very generous grants of public dollars." (EX-374-375). Mr. Garfield was particularly concerned with the scope of the organizational expenditure provision. *Id.* He drew a distinction between activities designed to promote the party (including multiple candidate listings and-get-out-the-vote efforts) and the organizational expenditures provision, which allows candidates to directly coordinate their campaigns with party and legislative leaders. *Id. See also* EX-381.[12]

While, in 2006, the General Assembly amended the statute to place some limits on organizational expenditures in legislative elections, the statute still leaves the potential for expenditures under this provision to overtake the applicable expenditure limits. Candidates can raise unlimited amounts of money for legislative leadership PACS and party committees, which, in turn, can funnel thousands of dollars to the candidates' campaign in coordinated expenditures.

[12] *See also* EX-1468 (hearing testimony of Connecticut Common Cause Executive Director Andy Sauer on the organizational expenditure loophole). Sauer testified that "[o]rganizational expenditures could be exploited to create stealth campaigns that completely undermine the clean elections system." *Id.* CCAG's legislative director Phil Sherwood also testified in favor of "closing the in-kind contribution loophole" because "allowing an unlimited amount of money coming from PACs that is undisclosed undermines the spirit and the core principles behind public financing." (EX-1495).

Each party is allowed three leadership/caucus committees in the Senate §9-605(e)(2-3) (SPA-234-235), which can spend up to $10,000 each on behalf of its candidate. §9-718 (SPA-322). In the House, each party is also allowed three leadership/caucus committees, which can spend up to $3,500 each on behalf of its candidate. *Id.* In addition, the state central committee and the hundreds of town committees can coordinate campaign expenditures with the candidate under this provision. *Id.*

Significantly, the General Assembly did not close the organizational expenditure loophole for *statewide* candidates. Conn. Gen. Stat. §9-718. (SPA-322). As a result, there are no restrictions on organizational expenditures made on behalf of candidates for statewide offices. Governor Rell, for instance, should she seek reelection in 2010, could qualify for millions of dollars in public financing by agreeing to expenditure limits and limiting the amount of money she raises for her own campaign to qualifying contributions. At the same time, under the organizational expenditure loophole, she can raise unlimited amounts of money for the state central committee, which, in turn, can provide unlimited in-kind contributions in the form of broadcast advertising and direct mail. *See, e.g.*, EX-687-689 (showing total receipts of over $500,000 for Republican State Central Committee and over $400,000 for Democratic State Central Committee for 2006).

Finally, the legislature failed to amend the statute to limit permissible expenditures to the type of party-building and get-out-the-vote activities that are generally exempted from the definition of coordinated expenditure. *See* SEEC Organizational Expenditure Fact Sheet (EX-691-699). Those activities are designed to aid the party and any benefit that flows to the candidate is considered indirect and ancillary. The organizational expenditure provision permits expenditures that exclusively benefit the candidate. *See* Garfield Testimony (EX-374-375).

D. The Plaintiffs

The plaintiffs are political parties and individual candidates with a record of running minor party campaigns for statewide and legislative office in Connecticut. (SPA-6-12). They intend to run candidates in the 2010 statewide and legislative elections. The Libertarian Party challenges the CEP on the basis that it operates to increase the election-related opportunities of major-party candidates relative to their own. The Green Party challenges the CEP on the same grounds and on the additional basis that they are effectively denied the program's benefits by operation of the more difficult qualifying criteria and grant structure. The District Court held that the evidence established that the plaintiffs had standing to raise their First and Fourteenth Amendment claims because they come within the class of individuals and groups directly affected by the operation of the statute. (SPA-123, *n.73*). The

court additionally found that plaintiffs had standing to challenge the matching fund provisions because it is their speech that the statutes target and because they must adjust their campaign strategies to negotiate around those provisions. (SPA-123-130).

SUMMARY OF ARGUMENT

The defendants do not provide a coherent explanation for why this Court should set aside the district court's careful and holistic assessment of how the CEP discriminates in favor of major parties. The CEP discriminates in numerous ways that are apparent from both the face of the statute and when viewed in the context of Connecticut's electoral landscape. The defendants repeat the argument rejected below that the State's interests in protecting the treasury and avoiding unrestrained factionalism fully justify the more difficult qualifying burden the CEP imposes on non-major party candidates under *Buckley*. While that argument may be persuasive in cases like *Buckley*, where there was no showing that minor parties were disadvantaged, it is inapposite here because the CEP operates to significantly enhance the political opportunities for most major party candidates. There is no suggestion in *Buckley* that the government's asserted interests in this case would justify a system that discriminates in this way.

The CEP is discriminatory in numerous ways that the system under consideration in *Buckley* was not. The ease with which major-party candidates can

qualify for public funding will inflate their strength in statewide and legislative elections in which they have no chance of winning. Rather than guard the public treasury from hopeless candidacies, the legislature has given the two major political parties in Connecticut its keys. The CEP arbitrarily provides historically underfunded major party candidates with the resources to run full throttle campaigns—while denying the same benefit to independent and minor-party candidates. Moreover, unlike in *Buckley*, major-party candidates suffer no countervailing disadvantage by agreeing to expenditure limits. The limits are not strictly binding and can be substantially increased depending on the ability of the candidate's opponent to raise more money than the applicable expenditure limit or based on the independent spending of an opposing candidate's supporters. The expenditure limits are also augmented by the organizational expenditure loophole which arms participating candidates with the ability to easily circumvent the expenditure limits.

The CEP's qualifying and grant distribution terms are discriminatory not solely because the program's terms treat the parties differently, but because the program's terms have the effect of "slant[ing] the political playing field." (SPA-72). That fact will not change just because the legislature made the program available to a handful of minor-party candidates who can successfully navigate around the qualifying criteria. The district court found that the CEP substantially

enhances the relative strength of major-party candidates because it encourages major parties to field candidates for historically uncompetitive seats, without regard to these candidates' likelihood of success or the inhibiting factors that have led to the abandonment or neglect of those districts in prior years. (SPA-82-83). These are the legislative districts that have proven most fertile for minor-party candidates. The court additionally found that the CEP provides most candidates with a financial "windfall" that significantly exceeds the amount of money they have been able to raise privately. (SPA-78). Historically underfunded major-party candidates are getting as much as a 15:1 return on their money if they choose to participate in the program and raise the qualifying contributions. While this benefit is theoretically available to minor parties as well, it is the major parties who are the primary beneficiaries of the government largesse. By providing major parties with the incentive and resources to contest every election, the court found that the CEP unfairly favors competition between major parties over competition from minor parties, and thereby burdens the political opportunity of minor parties. (SPA-82-83).

The distorting effects of the CEP might plausibly be mitigated if minor parties could participate on terms that were not so absurdly difficult to meet and on terms that are not so patently designed to maintain and augment the competitive advantage of major parties. The district court found that, even if a handful of

minor-party candidates do overcome the expense of qualifying, the grants are structured in a way that locks in the advantages of major-party candidates. The district court concluded that the benefits major-party candidates will gain from participation in the CEP will increase, rather than maintain, the advantages they already have over minor party candidates. (SPA-66-71). Neither *Buckley* nor any other public financing case relied on by the defendants so thoroughly stacks the deck in favor of major party candidates.

In view of the important First and Fourteenth Amendment interests that are implicated under a campaign finance system that increases the speech and electoral related opportunities of one group of favored candidates only, the district court properly applied the heightened scrutiny that is applicable to campaign finance restrictions on speech. *Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 465 (2007). A program like the CEP that increases the speech and election-related activities of major party candidates is no different than a statutory scheme that increases the ability of your opponent to speak. *See Davis v. Federal Election Com'n,* 128 S.Ct. 2759, 2772 (2008) (finding that increasing the fundraising advantage of one group of candidates imposes a "substantial burden" on the First Amendment rights of candidates denied the advantage); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (noting that "the First Amendment is plainly offended" when the legislature attempts to give one

group "an advantage in expressing its views to the people"). There is no support for the defendants' argument in *Buckley* or elsewhere that the relatively complaisant review that is applied in cases involving ballot access and election regulations is the standard that should be applied here.

Applying heightened scrutiny, the district court had little difficulty finding that the statute could not pass muster under that standard. The court found that the State's interest in not funding "hopeless" or frivolous minor-party candidates was adequately served by the qualifying contribution requirement, and that it was superfluous to tack on the prior vote total and petitioning requirements. (SPA-109). Moreover, the court could reasonably conclude that it is more likely that favoring "hopeless" major-party candidates over minor-party candidates would result in a raid on the public fisc "because it is easier for such candidates to become eligible for public financing and because more hopeless major party candidates than hopeless minor party candidates run for office." (SPA-101-102).

Finally, the district court also struck down the excess and independent expenditure provision on the separate First Amendment grounds that they, in effect, function as expenditure limits and are, therefore, presumptively invalid under *Davis*. To be sure, those provisions represent valuable sticks in the bundle of benefits that plaintiffs claim give major-party candidates an unfair edge. If this Court were to affirm on Count I, it would arguably be unnecessary to decide

Counts II and III, since the stay would be lifted and the injunction prohibiting the enforcement of the CEP would be in place. The converse is also true since the defendants' position is that those provisions are integral to the success of the program. If the Court decides to reach the merits on Counts II and III, we submit that the defendants' argument in support of those provisions is foreclosed by *Davis*. The decision calls into questions the legitimacy of these types of mechanisms because they impose an "unprecedented penalty of speech." The cases relied on by the defendants were all decided before *Davis* and can no longer be considered persuasive authority.

ARGUMENT

A. The CEP Violates the First and Fourteenth Amendments.

1. The First and Fourteenth Amendments Prohibit the State from Adopting Legislation that Confers Substantial One-Sided Benefits on Major-Party Candidates.

Defendants' briefs approach this case from many different directions. At bottom, we understand their position to be that, under *Buckley*, plaintiffs cannot establish an injury from the fact that the CEP contains different qualifying criteria for major and non-major party candidates. That argument is an oversimplification of the basis of plaintiffs' claim. The claimed injury in this case flows directly from the "one-sided benefit[s]" that are conferred on major parties and the distorting effects it has on electoral competition in Connecticut. (SPA-83). The fact that

minor parties have to satisfy more difficult qualifying criteria to share equally in the CEP's benefits is only part of the relevant First and Fourteenth Amendment analysis. The defendants' exclusive focus on that aspect of *Buckley* obscures the fact that the statute, by its express terms and without any consideration of external facts that place this challenge in context, confers substantial one-sided benefits on major parties without imposing any measurable countervailing burden and, therefore, impermissibly "slants" the playing field. (SPA-69; SPA-72).

The CEP is structured in such a way as to make it exceedingly difficult for minor parties to share in the program's valuable benefits, then denies them equal funding even if they manage to qualify. The program makes no provision for post-election grants, no matter how well the candidate performed if he did not qualify in advance. More importantly, candidates denied funding under the CEP gain no corresponding advantage and, in fact, are worse off, given the provisions that release candidates from the agreed upon expenditure limits and that pay out additional money. All these discriminatory aspects of the CEP are immediately apparent from the text of the statute and its "readily apparent mechanics." (SPA-44, *n. 27*; SPA-116).

Even if the injury asserted in this case was not readily apparent from the face of the statute, the statute gives major parties a significant leg up when evaluated in the context of the State's electoral and campaign finance history (SPA-71; SPA-

116, *n.70*), increasing major parties' electoral opportunities in countless ways that the statute under consideration in *Buckley* did not. (SPA-69-70). By doing so, the statute exacts a heavy corresponding price on minor parties. Such candidates are effectively crowded to the edge of the stage because their ability to run effective, low-cost campaigns is compromised by the substantial communications benefits that flow almost exclusively to major-party candidates. (SPA-76).

The parties do not dispute that a public financing law operates to burden the political opportunity of minor parties where it "disadvantages nonmajor parties by operating to reduce their strength below that attained without any public financing." (SPA-65-66, quoting, *Buckley*, 424 U.S. at 99). The minor parties who brought *Buckley* could not show how public financing either increased the election-related advantages of major-party candidates or decreased the strength of minor-party candidates below the point obtained without public financing. *Id.* at 95, *n.129*. The system for financing Presidential elections was upheld in *Buckley* against the charge that it discriminated against non-major parties precisely because the funding did not alter the relative strengths of the parties. *Id.* at 99.

That argument is not available to the defendants in this case, given what the evidence shows about the impact the CEP has on the relative position of major and non-major parties. The CEP provides major parties with transformative political opportunities by substantially enhancing their actual political strength. The fact

that the program features a small window of opportunity for minor parties does not alter the fact that the major parties will primarily benefit under the CEP because of the ease with which candidates can qualify for funding that in most cases far exceeds the amount they could raise privately. (SPA-2-3).

The CEP distorts the political playing field by significantly enhancing the relative strength of major parties. It does so through the following ways: (1) it provides a statutory preference for all major-party candidates by using a statewide measure of support as a proxy for the actual support of each major-party candidate—despite the obvious fact that not all major-party candidates are similarly situated; (2) it provides generous—even windfall—grants that far exceed what most major-party candidates have raised and spent in past elections; (3) it provides primary grants to major-party candidates alone; (4) it imposes such an onerous qualifying burden on minor-party and independent candidates that they are largely shut out of the program; and (5) even in the limited circumstances in which minor-party and petitioning candidates could qualify, the strength of major party candidates is nevertheless maintained by the large disparity in grants disbursed. (SPA-70-71). Finally, and most importantly, under *Buckley*'s analysis, the benefits gained under the CEP are not offset by any corresponding burden in view of the absence of meaningful expenditure limits. As a result, the CEP needlessly burdens the political opportunity of minor-party and petitioning candidates. (SPA-70).

Properly understood, *Buckley* flatly rejects the legitimacy of this type of public financing system. The distinction between a benefit and a burden was justified in *Buckley* because there was no evidence in the record that federal funds would enable any candidate to purchase scarce communication resources, thereby effectively reducing the relative freedom of speech of a non-subsidized candidate. *Buckley*, 424 U.S. at 96, *n.129* ("[a]s a practical matter . . . [the Presidential system] does not enhance the major parties' ability to campaign: it substitutes public finding for what the parties would raise privately and additionally imposes an expenditure limit."). The qualifying and funding provisions under the CEP impermissibly operate to artificially inflate the strength of major-party candidates and reduce the strength of minor and petitioning party candidates. The CEP provides major parties with the resources and incentives to compete against their non-major parties on terms that give them a statutory advantage. This will inevitably stifle competition from minor parties and further entrench power in the two major parties. *Buckley* and other Supreme Court precedents expressly forbid such a result. *See, e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (striking down Ohio ballot requirements because they "give the two old, established parties a decided advantage over any new parties struggling for existence."). Plaintiffs' speech is impermissibly burdened by giving major party speakers the resources to drown out their minor-party opponents in Connecticut's marketplace of ideas.

The Supreme Court's holding in *Buckley* is premised on several considerations that are not present under the CEP. First, the Court described the "disadvantage" to minor party candidates as minimal because it was limited to "denial of the enhancement of opportunity to communicate with the electorate …" 424 U.S. at 95, and because they had failed to make a showing that the system categorically reduced the strength of their parties. *Id*. at 98-99. Additionally, the denial was not "total." Candidates who were ineligible at the outset of the campaign were still eligible for a post-election grant. *Id*. at 101. Second, any advantage garnered by major party candidates was offset by a "countervailing denial"—expenditure limits. *Id*. at 95. In fact, the Court viewed public financing as no real advantage to major-party candidates because public funding served as a "substitute" for private contributions and minor-party candidates were freed to out-raise and out-spend their opponents through private contributions. *Id*. at 95, *n.129*, 99. Third, the 5% threshold for qualifying was "reasonable" in light of the fact that, since 1860, no third party had posed a credible threat to the two major parties in Presidential elections. *Id*. at 98. Based on those circumstances, the Court held that identical treatment of all parties was unnecessary and would have fostered the proliferation of splinter parties, resulting in raids on the treasury. *Id*. The Court also recognized "the public interest in the fluidity of political affairs," *Id*. at 96, and

cautioned against the creation of public financing programs that might inhibit the growth of minor political parties. *Id*. at 104.

To reach defendants' desired outcome in this case, this Court would have to ignore the facts and the reasoning upon which the holding in *Buckley* rests. In every critical respect, the CEP differs in kind from the system upheld in that case. *Buckley*, in fact, supports plaintiffs' claims that the CEP invidiously discriminates against minor parties by subsidizing major parties in a way that distorts plaintiffs' ability to campaign. (SPA-70).

The defendants argue that politics is not a zero sum game and that a valuable benefit given to one candidate does not constitute a cognizable injury to the candidate denied the benefit. That is a dubious proposition under *Buckley*, and this Court's cases as well. *Buckley* stands for the unremarkable proposition that public financing cannot be deployed in the service of the major political parties if the effect is to decrease the relative electoral and financial position of non-major party candidates. 424 U.S. at 98-99. The decision is explicitly premised on the fact that there was no evidence in the record that federal funds would improve the relative position of major party candidates. *Buckley*, 424 U.S. at 95, *n.129.*

Any doubt about this controlling First Amendment principle was settled when the Court decided *Davis*. In *Davis*, the Court struck down legislation that increased the contribution limits for "non-self financing candidates" if they were

opposed by a self-financed "millionaire" candidate because of the "substantial burden" it imposed "on the exercise of the First Amendment Right[s]…" *Id.* at 2772. That case reaffirms in the strongest possible terms the main concern expressed in *Buckley*—specifically, that campaign finance regulations cannot have the effect of increasing the speech or election-related opportunities of candidates if the regulations work to decrease the opportunities for other candidates. *Id*. at 2773-74 (rejecting argument that a candidate's speech may be restricted in order to "level electoral opportunities" of other candidates).[13]

Although the district court did not consider *Davis* directly on point, it nevertheless found the decision instructive on the issues in this case. (SPA-68, *n.49*). Based on its reading of that case, the court held that "just as the government is not permitted to level the playing field by removing advantages from certain candidates, it is equally prohibited from advantaging certain candidates, i.e., slanting the playing field, so that it enhances the relative position of one candidate over another." *Id*. "The argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications because it would

[13] *See infra* pp.111-112 (discussing *Davis*).

permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office." *Davis*, 128 at 2773.[14]

This Court has taken a similar view of the validity of statutory schemes that provide valuable government benefit to major parties only. *See Schulz v. Williams*, 44 F.3d 48, 60 (2d Cir.1994). There, the Court affirmed a lower court order striking down a New York statute that required lists of registered voters to be sent free of charge to parties that earned more than 50,000 votes in the last gubernatorial election. The statute at issue was originally invalidated in 1970 in *Socialist Workers Party v. Rockefeller,* 314 F. Supp. 984 (S.D.N.Y. 1970) (three-judge court), *summarily aff'd*, 400 U.S. 806 (1970), but was reenacted in all "material and unlawful respects," and again struck down in *Schulz.* The Court

[14] The cases cited by the defendants are not to the contrary. In *American Party of Texas v. White*, 415 U.S. 767 (1974), the Supreme Court upheld a Texas law that provided funds to major parties in order to defray some of the costs of administering state mandated primary elections. *Id*. at 794. Minor parties were not required to hold primaries and therefore did not have any corresponding expense. In this case, the funding is given directly to the candidates for the purpose of running their campaigns. In *Nat'l Comm. of the Reform Party of the United States v. Democratic Nat'l Comm.*, 168 F.3d 360, 366 (9th Cir. 1999), the court rejected the claim that minor-party candidates who qualified for partial funding could not close the funding gap if they were bound by the generally applicable contribution limits that applied to privately financed candidates. In this case, plaintiffs claim that they cannot close the gap because the limits are capped at $100. In *Libertarian Party of Indiana v. Packard*, 741 F.2d 981 (7th Cir.1984), the court rejected a facial challenge to a state funding scheme that provided grants to political parties under a 5% threshold identical to the one upheld in *Buckley*. The case was remanded to determine if the funding scheme operated to reduce the political opportunities of minor parties.

stated that "[t]he reasons why the courts found the provision invalid in 1970 remain true today and apparently require repeating: It is clear that the effect of these provisions ... is to deny independent or minority parties ... an equal opportunity to win the votes of the electorate. The State has not shown a compelling state interest, or even a justifiable purpose for granting what, in effect, is a significant subsidy only to those parties which have least need therefore … The State is not required to provide such lists free of charge, but when it does so it may not provide them only for the large political parties and deny them to those parties which can least afford to purchase them." *Id.* at 60. *See also, Green Party of N.Y. State v. N.Y. State Bd. Of Elections*, 389 F.3d 411 (2nd Cir 2004) (denial of voter lists to minor parties). *See also Greenberg v. Bolger*, 497 F. Supp. 756, 778 (E.D.N.Y. 1980) (invalidating postal subsidy given exclusively to major parties and stating: "To suggest that the benefit granted the major parties is acceptable because it only creates a relative impediment to 'new' parties ignores the reality that in a competitive intellectual environment assistance to one competitor is necessarily a relative burden to the other.").

Based on the foregoing discussion, there is no basis to accept the defendants' argument that *Buckley* categorically bars a facial challenge in this case, particularly given the doubt the *Davis* casts on the legitimacy of trigger provisions. It is immediately apparent from face of the statute that the CEP discriminates against

minor parties in numerous critical respects that were not present in *Buckley*. Even if it is not apparent from the face of the statute, there is no basis to challenge the district court's findings and conclusions that the statute, when viewed in the context of Connecticut's electoral history, increases the relative financial and electoral opportunities of major parties to the detriment of minor parties who suffer a corresponding diminution of their political opportunities. (SPA-70-71; SPA-116-117, *n.70*). There is no merit to the defendants' contention that the district court's assessment of the distorting effects of the CEP is exaggerated or speculative. The CEP's distorting effects are real, immediate, and fully supported by the record. *Id.* Looking forward to 2010, projected grants under the CEP are three times the amount spent in the 2006 election cycle for statewide office and almost double the amount for legislative office. *See supra* pp.21-22, 26. While the defendants are right that increased competition is desirable, it must be accomplished through means that do not entrench the two major parties by giving them a financial advantage which slants the playing field in their favor.

2. The CEP Increases the Electoral Opportunities of Major Party Candidates to the Disadvantage of Minor Party and Petitioning Candidates Denied the Program's Benefits.

Because treating major and minor party candidates differently for purposes of public funding is not necessarily unconstitutional, the district court properly framed the issue as whether the statute's discriminatory terms provide major party

candidates an unfair advantage, thereby enhancing relative strength and thus burdening the minor party candidates' political opportunity. (SPA-71). Using *Buckley* as its guide the court focused its analysis on the following considerations: (1) whether the CEP's public funding grants are mere *substitutes* for what the participating candidates would have raised privately or whether they actually enhance the major party candidates' abilities to campaign beyond their normal capabilities; (2) whether the CEP's expenditure limits represent a true countervailing disadvantage for participating candidates; and (3) whether minor parties have a legitimate shot at qualifying for a CEP grant. In addition, the court addressed the state's argument that the CEP enhances the political opportunity of minor party candidates. (SPA-70-71).

Based on a record that in many material respects is uncontested, the district court found in plaintiffs' favor on these issues in every critical respect. (SPA-71). The defendants strain to make the case that the district court's findings are largely beside the point and that the operation of the CEP has not resulted in any dilution of the absolute political strength of minor parties. The defendants' position requires this Court to reject the districts court's findings as irrelevant to the constitutional issues raised in this case or as clearly erroneous. The defendants offer very little in the way of contesting the accuracy of the court's actual findings. Instead, most of their fire is directed at the lower court's reliance on those facts in

the first instance. The defendants take the court to task for failing to give sufficient weight to other facts that they assert are more relevant—like whether plaintiffs' ability to speak or raise money was actually impaired or whether plaintiffs or other non-major party candidates actually raised less money, ran fewer candidates, participated in fewer debates, or received fewer votes this cycle. Under the defendant's conception of the relevant First Amendment analysis, these considerations are the only proper measure of harm.

The defendants' position is demonstrably wrong under *Buckley* and *Davis.* It is sufficient under those cases that the district court has found that the CEP increases the election-related advantages of one group of favored candidates, relative to the candidates denied the benefits under the statute. It is of no consequence that, after one election cycle, major party candidates have not fully taken advantage of the transformative opportunities that the statutory scheme provides or that minor parties have not been completely pushed off the stage. This was exactly the case in *Davis* where the benefits under the challenged trigger provision did not come into play in that particular election cycle. 128 S.Ct. at 2767, 2769. This case is no different than any other campaign finance case where the court is called upon to determine how the challenged restrictions actually impede a candidate's ability to compete. *See Randall v. Sorrell,* 548 U.S. 230 (2006) (restrictive contribution limits). There is no requirement that the court must

take a wait and see approach to assess how the challenged statutory scheme will affect competition. *Id.* at 249. The CEP must inevitably augment major parties and their candidates because the statute arms major party candidates with resources that they did not previously have and, as a result incentivizes major parties to run a full slate of candidates in previously abandoned or neglected elections for statewide or legislative office. (SPA-66).

As the district court recognized, regardless of the ballot access, fundraising results, and vote outcomes, in 2008, the CEP, in fact, funneled large amounts of money to major party candidates in 2008, thus dramatically enhancing their relative ability to reach the electorate beyond their past ability to raise contributions and campaign, and without any countervailing disadvantage to those participating candidates. *Id. See also* SPA-115-117. As a result, the relative strength of major party candidates has been dramatically increased and the relative strength of the minor party candidates has been dramatically diminished. *Id.*

a. The Use of a Statewide Proxy Artificially Enhances Major Party Candidates' Competitiveness.

Major party candidates are given a permanent statutory preference under the qualifying provisions of the CEP, based solely on the candidate's major party status. The use of one statewide election as a proxy for the actual support of every major-party candidate in every district will unjustifiably inflate the strength of historically weak major-party candidates by making full public financing available

to them. *See Bang v. Chase*, 442 F. Supp. 758, 768 (D. Minn. 1977), *aff'd Bang v. Noreen*, 436 U.S. 941 (1978) ("Under this distribution scheme, a party with state-wide plurality can unfairly disadvantage its opponents in those districts where it enjoys little district support.").[15] While major-party candidates are presumptively eligible for full public funding in every legislative and statewide election, minor and petitioning party candidates are held to a different standard that requires them to qualify on an office-by-office basis.

The relative ease with which major party candidates can qualify for public financing gives them an obvious advantage over other candidates because they do not have to meet the prior vote total standard or satisfy onerous petitioning requirements. Significantly, as observed by the district court, if the prior vote thresholds were imposed on major-party candidates in the next election cycle, then major-party candidates would fail to qualify for full public funding in 46% of all races for the Connecticut General Assembly—and most would not qualify to receive any public funds. (SPA-46). Moreover, by drawing the line at 20%, the legislature chose a percentage that would ensure that Democrats and Republicans would remain eligible for full funding under the CEP regardless of that candidate's

[15] *Bang* involved a Minnesota statutory scheme that subsidized parties in proportion to their statewide vote totals; the funds, however, were disbursed *equally* to all candidates of a given party, regardless of their level of party support in their own district. The three-judge court found no rational basis for this scheme and deemed it unconstitutional. 442 F. Supp. at 768. The decision was summarily affirmed by the Supreme Court. *Bang v. Noreen*, 436 U.S. 941 (1978).

"historical odds of competing with any degree of success in that particular district." (SPA-81). The evidence shows that while even weak major-party candidates may be presumptively stronger than minor-party candidates in election that they contest, they have no greater chance of actually winning than supposedly inferior minor party candidates do. (SPA-101-102). Almost 80% of all legislative and statewide elections in Connecticut are uncontested or are won by landslide margins of twenty percent or more. (SPA-99-100). *See supra* p.20.[16]

The district court found that that the CEP substantially enhances the relative strength of major-party candidates compared to minor-party candidates because it encourages major parties to field candidates for historically uncompetitive seats, without regard to their likelihood of success or the inhibiting factors that have led to the abandonment or neglect of those districts in prior years. (SPA-82-83). In doing so, the court found that CEP unfairly favors competition between major parties over competition from minor parties, and thereby burdens the political opportunity of minor parties. (SPA-82-83).

In distinguishing the CEP from the funding scheme upheld in *Buckley*, the court found that use of a single state-wide proxy distorts the political strength of major parties in many legislative districts by disregarding the composition,

[16] According to defendants' expert Donald Green, political scientists typically dub any legislative district where a major party candidate wins over 60% of the vote to be a "safe" district for that major party. (SPA-39). Thus, by Defendants' terms, an election won by more than 20% indicates a "safe," party-dominant district. *Id.*

demographics, and voting history of particular districts. (SPA-70). In *Buckley*, by comparison, the public financing scheme applied to a single race—the presidential race—which has almost always been competitive between the major parties, unlike the majority of the state and legislative elections to which the CEP is applicable. (SPA-70). Moreover, the holding in *Buckley* rests in part on the complete lack of success of minor party and independent candidates. 424 U.S. at 98. That factor is absent here. Governor Weicker was elected Governor on a minor party line in 1990 and held office through 1994. In 1994, the gubernatorial candidates for the "A Connecticut Party" and the "Independence Party" received a combined 30% of the vote. (EX-598). In 2006 Senator Joseph Lieberman was defeated in the Democratic primary and won as a petitioning candidate. In the 1992 and 1994 legislative elections, some independent candidates out-polled major party candidates. (EX-425). Minor party candidates seeking legislative office in Connecticut are the only alternative on the ballot in districts abandoned by one or the other of the major parties and, although they have not won, many have achieved significant vote totals. (SPA-43-44). These differences in the success of minor parties in Connecticut elections provide less, not more, justification for the use of a state-wide proxy.

The evidence establishes that the primary beneficiaries under the CEP are major-party candidates because of the ease with which they can qualify for full

grants. A total of 236 major party candidates received full grants compared to one minor-party candidate who qualified for a full grant under the petitioning requirements. (EX-2875). In 2008, the CEP funded 8 Senate and 32 House candidates who had no realistic chance of winning and lost by more than 20%. (SPA-82). The major parties are moving quickly to contest previously abandoned districts and to bring full throttle challenges in districts where they did not have the resources to run vigorous campaigns. *See also* EX-4582-84 (5 newly contested elections in the Senate and 28 in the House).[17] The court found that the burden on minor parties is even greater when you consider that these are the districts that have been fertile ground for their candidates in the past and where they have the best opportunity make a run at the CEP without having to satisfy the petitioning requirements. (SPA-76; SPA-84-85). Achieving at least 10% of the vote, which is critical for entry into the program, will only become more difficult for minor party candidates in the future. (SPA-84-85). According to Professor Green's testimony at trial, the increased competition between the major parties will result in fewer votes cast for minor party candidates. *See* A-960, A-963-964.

[17] The data reported in EX-4582-4585 was amended by stipulation of the parties. (A-1352). In preparing the joint appendix the defendants failed to include the exhibits to the stipulation which contain the amended data. The stipulation and accompanying exhibits were filed with the district court, Docket No. 361, and can be accessed electronically. It reports the same number of newly contested districts.

Although the court recognized that this phenomenon will not occur in every district and that other districts may become newly uncontested, it does not alter the fact that the CEP provides a powerful inducement for major-party candidates to compete in elections that they previously avoided. (SPA-101-102). The district court explicitly found that major parties have every incentive to run candidates as challengers to entrenched incumbents in one-party-dominant districts, even with no hope of actually winning, as part of a long-term effort to build candidate and party recognition over time in a particular district, i.e., to use free public monies to slowly chip away at the dominant party's foothold. In that scenario, not only is the major party using public financing to fund its party-building efforts, but with more major party candidates incentivized to run, more public funds are being expended. (SPA-101-102). *See also* SPA-82; SPA-44, *n.27*.[18]

b. The CEP Provides Windfall Funding for Most Candidates.

The district court found that the operation of the CEP has dramatically increased the funding and resources of major party candidates well beyond what they have been historically able to raise and spend in any given election. (SPA-72-

[18] The defendants argue an equal number of legislative seats were vacated in the 2008 election cycle as were newly contested. All this establishes is the precariousness of the weaker party's ability to compete in those districts. It does not change the fact that the CEP arms the major parties with the resources to run candidates in those districts in the future. The district court was hesitant to give significant weight to this fact after just one election cycle since, among other things, it is readily apparent, from the legislative history and the "mechanics" of the statute, that it will lead to increased major-party competition. (SPA-44, *n.27*).

78). By promoting an "even playing field" between major candidates, public financing will create a "different game" for minor parties in party-dominant districts by giving the weak major party candidate "some serious cash to play with." (SPA-44-45, *n. 27* (quoting legislative statement by Rep. Caruso)). According to the defendants' expert, the CEP provides new resources to major parties and allows them "to contest less competitive districts, without sacrificing resources needed for winnable ones." (EX-902). As a result, most districts with CEP-participating candidates have become "awash" in public financing. (SPA-72). This has significantly inflated the cost of running campaigns by compelling expensive two party contests in previously low spending districts and elections. *See* SPA-74-75 (discussing data) ("With so much money now available it has become next to impossible to spend very little money and still run a meaningful campaign. The CEP sets such a high fundraising threshold for nonparticipating candidates that it virtually compels participation in the program by major party candidates, and thus drowns out the voices of minor party candidates who have been historically incapable of raising anything close to full CEP grant levels.") *See also* EX-4412-4450 (district by district comparison of expenditures pre and post CEP). By doing so, the CEP has increased the campaign-related opportunities of major-party candidates relative to the traditionally low-cost campaigns that are the hallmark of minor parties. (SPA-78). Based on this evidence, the court reasonably

concluded that the CEP "slants the political playing field in favor of major party candidates." (SPA-72).[19]

The defendants maintain that the grant amounts are in line with historical expenditure levels and do not increase the relative standing of major-party candidates. The district's court's findings belie this assertion. (SPA-72-78). This is particularly true when the data is properly controlled to account for candidates who filed exemptions and for the lack of expenditures in those districts abandoned by one of the major parties. (SPA-53; SPA-114). The Defendants' preferred analysis cannot change these facts. The OLR reports referenced by the district court on candidate spending in statewide and legislative elections speak for themselves. (SPA-51-52). Average and median expenditures are significantly less than the expenditure levels under the CEP. *Id.* The district court's comparison of that data with candidate expenditures under the CEP shows very clearly how individual and aggregate expenditures have increased. *Id.*

[19] Providing funding to weak major party candidates in traditionally safe districts will have the ancillary effect of increasing spending by safe incumbents. *See* EX-4393-4411 (comparison of candidate expenditures). For instance, Senator Jon Fonfara in the First District received a combined primary and general election grant totaling $160,000. (SPA-178). This is a party-dominant district and is considered safe; he won with 78.6% of the vote in 2008. In 2004, he had expenditures of $3226. (SPA-139). The Green Party candidate in this election was obviously competing in a more challenging environment in 2008 compared to previous cycles. The windfall grant given to his opponent will make it much more difficult to maintain his relative standing in the district. (EX-2776-2777).

Whatever minor points the defendants hope to score by attacking the district court's findings, their argument cannot conceal the impact the CEP has on individual election contests. The increase in available resources is most significant for the Senate and House candidates who are competing in previously abandoned districts and for those candidates competing in districts in which the weaker major-party candidate has historically been unable to raise the amount of money needed to run an effective campaign. (EX-4393-4411). This represents the majority of districts, as almost all districts are considered safe—72% of Senate and 83% of House districts. (SPA-80-81). The evidence establishes that the CEP provides funding at levels well beyond the fundraising capabilities of these historically weak and underfunded candidates—if not of most candidates. (SPA-72-77).

To underscore this point, the court undertook a detailed analysis of how the CEP would affect spending in districts that minor parties have targeted both prior to and after the implementation of the CEP. Comparing the average and median receipts in those districts, the evidence established that it is significantly more expensive to run in those districts due to the influx of public funding provided by the CEP. (SPA-77-78). *See also* A-1374-1376, EX-3117-3119 (summarizing data showing impact of CEP in minor party districts).

The court found that the CEP's funding provisions create an "evident paradox" for minor-party candidates by effectively eliminating the number of

"low-cost" districts that minor candidates have had the most success in. (SPA-76). Their success has come most frequently by targeting those fundraising resources in districts where the major-party candidate has run unopposed and/or did not spend a sizable amount of money on the campaign. (SPA-76). The high levels of funding that the CEP injects into these districts makes it that much more difficult for minor party candidates running to hold onto their gains.

Contrary to the defendants' argument, there is no basis for setting aside the district court's finding that the CEP provides "windfall funding" in most cases. (SPA-78). Most participating major-party candidates receive more money through the CEP than they could have raised privately and are subject to expenditure limits well above the average expenditures in prior election cycles. *Id*. This finding is entirely consistent with the proven *inability* of weak major-party candidates to raise the amount of money necessary to mount an effective challenge in the great majority of legislative and statewide elections. (SPA-51-58; SPA-72-78). The CEP changes that dynamic. In return for raising the required amount of money in qualifying contributions, candidates can qualify for primary and general election funding more than ten times the amount they raised.[20] There is absolutely no indication in the record that most candidates could raise an equivalent amount on

[20] A Gubernatorial candidate who raises $250,000 in qualifying contributions is eligible to receive a combined $4.25 million in combined primary and general election funding. Legislative candidates gain a similar windfall. *See n. 19 supra.*

their own. A minor-party candidate who ran a low-cost campaign for state representative by spending several thousand dollars would have to raise ten times that amount to maintain his relative position in a district where a second major-party candidate entered the election for the first time. Based on this evidence, the district court could reasonably find that the ability of major party candidates to campaign is substantially improved relative to the ability of minor parties to continue to run effective low cost campaigns. (SPA-78).

Buckley did not endorse this type of unrestrained system for subsidizing political campaigns. Importantly for the *Buckley* Court, the public financing scheme did "not enhance the major parties' ability to campaign," but rather "substitute[d] public funding for what the parties would raise privately and additionally impose[d] an expenditure limit." *Id*. at 95 *n.129* (emphasis added). In sum, public financing achieved a rough proportionality between the benefits and burdens that did not affect the "relative strengths" of the parties—it maintained the *status quo*. That is demonstrably not the case here. The CEP operates as a "subsidy" rather than a permissible "substitute" for the amount of money most candidates can realistically raise and therefore does not achieve the proportionality between benefits and burden that is required under *Buckley*. (SPA-3).

c. The CEP's Expenditure Limits do not Impose a True Countervailing Burden on Major Party Candidates.

i. The Expenditure Limits are Meaningless to Most Candidates Because They could not Raise an Equivalent Amount Privately.

Based on its finding that the financial position of most major party candidates is substantially improved under the CEP (SPA-78), the district court reasonably concluded that they face no disadvantage by agreeing to the applicable expenditure limits. *Id.* For most candidates, the countervailing burden of expenditure limits is only theoretical because the expenditure limits represent such a "windfall" over the amount of money most candidates could raise privately. Participation in the CEP is the only rational choice. (SPA-78). In the absence of a countervailing burden, the CEP is exposed for what it really is—a valuable subsidy for major party candidates only. In the district court's view, this was fatal under *Buckley* because the funding scheme increases, rather than maintains, the advantage major parties already have. (SPA-66-69).

The cases are clear that there are strict limits on the ability of the government to subsidize only the major parties. When the government enters the arena of political speech, it must do so in a way that does not give one side of the debate an advantage by unfairly and unnecessarily burdening the political opportunity of disfavored minor parties or candidates. *Buckley*, 424 U.S. at 99. *See Schulz*, 44 F.3d at 60 (overturning state statute granting free voter lists to major

parties because, although "[t]he State is not required to provide such lists free of charge, ... when it does so it may not provide them only for the large political parties and deny them to those parties which can least afford to purchase them") (quoting *Socialist Workers Party*, 314 F.Supp. at 996.) *See also, Greenberg*, 497 F.Supp. at 775-76, 778-79.

Judge Weinstein's opinion in *Greenberg* is particularly instructive because it explicitly rejects the defendant's position here. The court held that a postal subsidy provided only to major parties was an unconstitutional burden on minor party candidates' exercise of fundamental rights of speech and association, particularly because the major party candidates did not receive any countervailing disadvantage by accepting the discounted postage rate. 497 F.Supp. at 775-76, 778-79, 781. According to the Court, by enacting the postal subsidy the government had impermissibly "chosen to benefit those with popular views and burden those with unpopular views," labeling the subsidy as essentially speech censorship. *Id.* at 776. The fact that minor-party candidates continued to pay the same postal rate as before was not a mitigating factor for the Court. "The realities of the process for building financial and popular support for a political party, the integral role played by mailings, and the extremely tight budgetary constraints under which most third and independent parties operate all mitigate against the proposition that the government could facilitate access for one political party and

not necessarily burden all other parties that are in competition with the benefitted party." *Id*. at 778. As the Court reasoned, "in a competitive intellectual environment assistance to one competitor is necessarily a relative burden to the other." *Id.* Finally, the subsidy was distinguishable from the scheme at issue in *Buckley*; because the postal subsidy was "not conditioned on any sacrifice regarding receipt or expenditure of private funds," the discount could not, "in any way, act to the advantage of the non-qualifying parties." *Id.* at 779.

There is no reason not to apply the same limiting First Amendment principle here. In the service of leveling the playing field between major party candidates, the CEP is going to make more money available to more major party candidates and will only further slant the playing field in their favor. *See Buckley*, 424 U.S. at 251 (noting the "grave risks in legislation, enacted by incumbents of the major political parties, which distinctly disadvantages minor parties or independent candidates.") (Burger, C.J., dissenting).

ii. The Expenditure Limits are not Strictly Limiting.

The already generous grants are augmented by supplemental grants and significant loopholes in the expenditure limits that will allow major party candidates to continue to tap into private funds. The legislature designed a program that is as close to a "heads we win, tails you lose" proposition as can be contrived. Although the district court properly took into account the windfall

funding levels discussed above as part of its analysis under *Buckley*, it inexplicably failed to consider the potential for these other provisions to widen the financial disparity between major and minor candidates.

Under the matching fund provisions the base grants for primary and general elections could be trebled. Although the district court struck those provisions down on separate First Amendment grounds because they, in effect, function as expenditure limits and are, therefore, presumptively invalid under *Davis*, they are equally applicable to the analysis here. The availability of matching funds represent valuable sticks in the bundle of benefits that plaintiffs claim give major party candidates an unfair edge. The matching fund provisions alter the "electoral opportunities" of the competing candidates by ensuring that major party candidates suffer no countervailing disadvantage from their decision to be bound by expenditure limits—to say nothing of the "unprecedented penalty" it imposes on the candidate who triggers the provision. *Davis*, 128 S. Ct. at 2764. They clearly increase the advantage of the candidate who benefits from it. It makes no difference whether it is plaintiffs' spending that is the triggering event or whether it is someone else's. In either case, minor-party candidates are worse off because

more government money is being provided to their opponents—notwithstanding the agreement to be bound by expenditure limits.[21]

The most obvious effect of this type of mechanism is that it blunts any theoretical fundraising advantage that privately-financed candidates might have by not agreeing to spending limits. (SPA-128-129). In fact, they may be worse off to the extent the provisions come into play in a way that actually increases the fundraising advantage of the participating candidate. The defendants' argument that minor party candidates somehow benefit by being denied funding is thus patently false.[22]

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[21] As discussed more fully *infra* pp.112-113, the legitimacy of this type of release mechanism is doubtful in light of *Davis.* 128 S.Ct. at 2772.

[22] Consider the circumstances confronting Governor Weicker if the CEP had been in effect in 1990 when he ran for governor as an independent. He would have a faced a lose-lose situation. By failing to qualify, he gains no advantage because regardless of how much he could have raised privately (and he did raise more than his Democratic opponent), the matching fund provision would not only have thwarted his funding advantage, but would have, in effect, imposed a 25% penalty on the first dollar he spent over the applicable expenditure limit. If his opponents received a primary grant, he would be at a further disadvantage. On the other hand, if he had qualified for a 1/3 partial grant through the petitioning process (which he acknowledge he might have done given his name recognition, proven contributor base, organized ground game and lead in the polls from the outset), he would have faced a 3:1 spending disadvantage against both major party candidates. He could not have competed under these circumstances and could not have made up the difference hobbled by the $100 limit on contributions and the restriction on borrowing. (EX-28-29). If you factor in the value of independent expenditures that might trigger additional funds to his major party opponents, he might very well have foregone his run as an independent candidate. All of these factors would

To be sure, however, the burden on minor-party candidates and parties is not limited to circumstances where it is their own spending or speech that is the triggering event. They suffer a relative harm whenever matching funds are triggered because it only increases the financial gap between them and their opponents. By leveling the playing field between two major party candidates, the CEP actually increases the spending disadvantage faced by minor party candidates. Minor-party candidates are essentially bystanders in this attempt to level the playing field between major-party candidates. The grants are exclusively in the service of major-party candidates, and work against the candidates who are unable to qualify for public financing. The "major party slugfest…further marginalize[s]" the ability of minor-party candidates to be heard. *See Garfield I,* A-210. This provision will not only undermine the state's interest in decreasing expenditures, but it also has the dangerous potential to alter electoral outcomes. *See supra* p. 64, n.22.

The independent expenditure provision, in particular, gives participating candidates a decided advantage. They receive matching funds equal to the value of any independent expenditure that target their campaigns. The provision is justified as necessary to counter the impact negative advertising could have on an election. Here is the kicker: the protection does not go both ways. Under this provision, the

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have decidedly distorted the playing field and almost certainly influenced the outcome of the election. (SPA-128-129).

participating candidate's supporters, including the party, can attack the privately-financed candidate without consequence. The government is prohibited from conferring this type of discriminatory benefit here anymore than it could adopt the discriminatory contribution limits in *Davis*.

iii. The Exception for Organizational Expenditures

The significant financial advantages major party candidates are provided under the CEP are augmented by a significant loophole in the statute that allows CEP-participating candidates to continue to raise and spend thousands of dollars in private funding in coordination with their legislative leadership and party committees. *See* SEEC Organizational Expenditure Fact Sheet (EX-691-699). The exception for organizational expenditures is not limited to party-building activities and effectively allows these committees to make unlimited in-kind contributions. *Id.* There are no limits on organizational expenditures made on behalf of statewide candidates by the state central committee and other party committees. Section 9-718 does place some restrictions on organizational expenditures to legislative candidates ($3,500 to state representative and $10,000 to state senate), but these restrictions apply separately to the twelve caucus and leadership committees, the state central committees, and the more than 100 town committees that nominate legislative candidates and work on their behalf. Thus, in the aggregate, participating candidates can benefit from organizational

expenditures that can easily outpace the value of the general election grant. The legislature also understood how this would disparately affect the rights of minor-party candidates who do not have leadership and caucus committees and the level of party infrastructure that major parties have. (EX-375).

Although exception for organizational expenditures theoretically benefits all candidates, the legislature was fully apprised that the loophole would primarily benefit major-party candidates by allowing participating candidates to have it both ways. *Id.* It gives them the means to easily circumvent the expenditure limits. The defendants also understood the potential these provisions held for undermining the CEP's goal of eliminating the influence of special interest money. *Id.* The defendants' argument that this provision does not increase the advantage of major party candidates is therefore contradicted by testimony from their own witnesses. On the contrary, the organizational expenditure provision provides an additional reason to conclude that the CEP does not impose a countervailing burden on CEP-participating candidates in exchange for the already generous funding they receive.

3. The Substantial One-Sided Benefits the CEP Offers Major Party Candidates are not Mitigated by the Limited Benefits the CEP Offers Minor Party and Petitioning Candidates.

The distorting effects of the CEP might plausibly be mitigated if minor party and independent candidate could participate on terms that were not so absurdly difficult to meet and on terms that are not so patently designed to maintain the

competitive advantage of major party candidates. The qualifying criteria, individually, or working together, will effectively prevent most minor-party and petitioning candidates from participating in the CEP. Moreover, even if a handful of candidates do overcome the expense of qualifying, the grants are structured in a way that locks in the advantages of major-party candidates. Non-major party candidates, therefore, benefit from no realistic corresponding opportunity to offset the benefits to major-party candidates. (SPA-83-91). The district court concluded that the benefits major-party candidates will gain from participation in the CEP will increase, rather than maintain, the substantial advantages they already have over minor-party candidates. (SPA-66-71).

The defending parties seek to minimize additional requirements placed on minor-party candidates by claiming that the CEP provides minor-party candidates with "transformative" political opportunities. That assertion begs the question and it is, frankly, unclear whether defendants are making a serious argument considering the significantly transformative opportunities it offers major-party candidates. The defendants' attempt to couch the more burdensome requirements placed on minor-party candidates as if it were a benefit to minor-party candidates is patently disingenuous in light of the legislative record in this case. The defendants' do not even address the testimony of Director Garfield and the intervening organizations before the legislature. Nor do they adequately explain

why it was necessary to adopt qualifying criteria significantly more onerous than the criteria considered in *Buckley* or the criteria established by other states. (SPA-110-114). *See also Garfield I*, A-216-232

More importantly, the defendants' argument proceeds from the erroneous assumption the CEP is presumptively valid just because a handful of minor-party and petitioning candidates will inevitably qualify for partial or full funding. What the defendants fail to grasp is that, while that argument may be persuasive in cases like *Buckley*, where there was no showing that minor parties were disadvantaged, it has no place here since the operation of the CEP so fundamentally changes the dynamics of election in Connecticut by improving the political of most major-party candidates—regardless of the few minor party candidates who might qualify. Unlike *Buckley*, the CEP's qualifying and grant distribution terms are discriminatory not because the program's terms treat the parties differently, but because the benefits that accrue to major parties "slants the political playing field." (SPA-72).

a. Prior Vote Bar

The justification for holding minor-party and independent candidates to a more difficult qualifying standard than the one that applies to major-party candidates is based on the misunderstanding that the Court approved this approach in *Buckley*. That decision must be understood in the context of the more

reasonable system for financing presidential elections. Minor-party candidates qualified for public financing if they received 5% percent of the prior vote. 424 U.S. at 97. Connecticut has arbitrarily adopted a standard twice as high despite the proven success of third-party candidates in Connecticut and the relative weakness of the Republican Party in this Democratic leaning state, particularly at the district level. Additionally, in *Buckley*, the claimed discrimination from failing to qualify for public financing based on the results of the last election was offset by other factors that allowed minor parties to share in the program's benefits. 424 U.S. at 102. Under the federal system for financing presidential elections, minor-party candidates who received 5% of the vote automatically qualify for a post-election grant (26 U.S.C. § 9004(a)(3)), as well as for funding for the next election without any qualifying contribution requirement. *Id.* § 9004(a)(2)(B).[23]

Moreover, there is no indication in *Buckley* that the Court would approve a system that requires minor-party candidates to demonstrate their level of support by collecting thousands of qualifying contributions in tandem with the prior vote total or petitioning requirements. The prior vote total requirement and petitioning requirements are superfluous under these circumstances. The prior vote total

[23] In *Buckley*, minor party candidates could also qualify for Presidential primary matching funds unrelated to prior vote totals. 424 U.S at 86, *see* 26 U.S.C. § 9033(b).

requirement in this case must, therefore, be seen as distinct from and more discriminatory than the prior vote total requirement in *Buckley.*

The legislature knew full well the practical effect of using 10% as the qualifying standard. It was explained to them by the agency head in charge of implementing the program. Referring to both the prior vote total requirement and the petitioning requirement, Mr. Garfield testified that the "[t]he legislation creates standards for their participation that are so high that it is very unlikely that these candidates would qualify for any public grants." (EX-375). The SEEC joined with the intervening organizations in seeking amendments to the CEP that would lower the standard to the levels upheld in *Buckley*. *See supra* pp.6-7. Garfield testified that a safe harbor of 5%, along with the requisite qualifying contribution requirement, would be sufficient to achieve the state's purpose of restricting hopeless candidates' access to CEP funding. (SPA-106-107; EX-1520-1522; EX-375).

The evidence establishes that very few minor-party candidates who ran for the General Assembly in recent prior elections would have been eligible for even partial CEP funding in their subsequent elections under the prior vote total requirement. (SPA-84). In the three election cycles that occurred from 2002-2006, there were 179 minor-party candidates on the ballot, but only 25 of those candidates received at least 10% of the vote. During that period only four minor

party candidates received over 20% of the vote, or approximately one General Assembly candidate per election cycle. (SPA-84). As a point of comparison, the district court found that if the legislature had adopted Garfield's 5% recommendation as the threshold level for full CEP funding , 72 minor-party candidates over three election cycles would have been potentially eligible for a full grant in the subsequent election, or approximately 24 General Assembly candidates per election cycle. (SPA-84). At trial, the defendant's acknowledged that the legislature relied on this Report when considering the thresholds. (SPA-107; A-1036-1037).

Based on the foregoing, the district court found that the legislature essentially set the threshold criteria at the level guaranteed to ensure extremely minimal minor party participation in the CEP. (SPA-108). "Faced with a choice of providing full CEP funding to an average of 20 minor party General Assembly candidates per election cycle versus 1.33 minor candidates per cycle, the legislature chose the latter." *Id.* Although a handful of minor-party candidates will theoretically be eligible for a partial or full grant in future cycles based on prior vote totals, by setting the bar at 10%-20% for a partial or full grant, the legislature has made sure that the great majority will have to use the more burdensome petitioning process. (SPA-84, *n.54*) (Looking forward to 2010 under the prior vote provision, five minor party candidates would be eligible for a full CEP grant.

Under a 5% prior vote requirement, that number would increase to 23 minor party candidates).

The district court also found that qualifying based on prior vote total will only become more difficult for minor-party candidates in the future, because the CEP's incentives encourage major-party candidates to compete in districts they had previously abandoned, where minor-party candidates have historically had their greatest successes. (SPA-84-85). Of the 25 minor party candidates who received over 10% of the vote between 2002 and 2006, 23 candidates ran against only one major party candidate. Similarly, in 2008, of the 15 minor-party candidates who received over 10% of the vote, 13 ran against only one major-party candidate. *Id*. Relying on testimony of the defendants' expert, the court found that with increased competition comes a smaller piece of the electoral pie for all candidates, thus making the 10% threshold even more onerous over time as more districts become contested by candidates from both major parties. *Id.*; *see* A-951-953; A-963-964.

b. Burden of Petitioning

The defendants assert that the petitioning requirements are "minimal" and can be achieved by any "reasonably diligent candidate." The defendants own witnesses do not even believe that this is true. (SPA-88; SPA-89, *n.56*). The district court found that that the CEP petitioning requirements are exceedingly difficult to meet—if not nearly impossible in some elections—given what the

evidence showed to be the time and expense involved. (SPA-91). The court's findings are based, at least, in part, on two important premises that are drawn from the testimony of the defendants own experts and corroborated by plaintiffs' witnesses. First, the State's expert conceded at trial that petition campaigns generally employ paid petitioners. (SPA-86-87; A-975-976; A-978-983). He conceded that petition campaigns would need to hire paid petitioners at $1.50 to $2.00 per signature in order to meet the petitioning requirement. Second, the state's other petitioning expert, Harold Hubschman, testified that a successful petition campaign would need to collect 150% of the threshold number of signatures in order to have a sufficient cushion against signature invalidity. (SPA-86; EX-2569; *see also* EX-27; EX-7).[24]

At the statewide level in 2010, this means that a minor-party gubernatorial candidate, using the 150% guide, would need to collect 168,511 signatures to qualify for a one-third grant and 337,024 for a full grant. **(**SPA-86). The court found that the expense of collecting this many signatures greatly exceeds the amount of money a candidate is even allowed to raise to finance the effort. (SPA-

[24] Hubschman actually testified in his deposition that the "typical goal is to collect . . . twice as many raw signatures so as to give us a margin.." to provide an acceptable cushion for signatures that are disqualified by town clerks as invalid. EX-639. Hubscham also testified that the standard rate his firm charges for petitioning is $3-$4 per signature. EX-647-648; EX-650. That is the rate he charged Senator Joseph Lieberman who ran as an independent in 2006 and was required to submit 7500 valid signatures. He actually submitted 15,000 signatures. *Id*.

85-91). Former Governor Lowell Weicker, who was elected Governor of Connecticut in 1990 as a petitioning candidate, testified that even his campaign could not possibly meet this requirement, particularly if he was required to comply with the CEP's $100 contribution limit and $250,000 spending limit. (SPA-49; EX-27-29; EX-7; EX-37-38). As plaintiffs' expert, Richard Winger, has noted, "[i]n the entire history of the United States, no independent candidate has ever successfully met a petition requirement greater than 134,781 signatures." (EX-63-64).

Although on appeal the defendants dispute whether it is necessary to hire paid petitioners, their position is not only contradicted by the testimony of their experts, but there is almost nothing in the record to support it. The district court found that the record contained no convincing evidence that petitioning on the scale required under the CEP could be accomplished by relying on low-cost grassroots campaigns. (SPA-87). Instead, the evidence established that the process requires more effort with a lower chance of success. (SPA-90). A typical minor-party or independent candidate has fewer volunteers and faces greater difficulties mobilizing a purely volunteer based petition drive. (SPA-87). Because of the limited availability of petitioning forums, candidates also have to rely on door-to-door canvassing, which is both more time consuming and expensive. (SPA-90). They also encounter more obstacles gathering signatures than the major

parties because they lack name recognition and party identification. Their lack of latent support means that they must collect signatures from substantially less than 100% of the electorate, which the court found means that the petitioning requirements are realistically possible to meet. *Id*. These disadvantages can realistically only be overcome—if at all—by hiring paid petitioners. (SPA-87).

For instance, although the defendants offered the testimony of Jon Green, the director of the Working Families Party of Connecticut, to show that the petition requirements could be easily satisfied at the district level, the evidence showed that professional petitioners spent hundreds of hours and were paid thousands of dollars to collect signatures on behalf of the party's legislative candidates, and that the process took months to complete before the signatures were validated by the Secretary of State's office. (EX-2575-2576).[25]

[25] The defendants try to score some cheap points by pointing out two computation errors the court supposedly made. For instance, at page 104 of the defendants' brief, they assert that the district court erroneously calculated the amount of money one candidate spent collecting signatures. The Court was referring to Cicero Booker's state senate campaign. His campaign reported spending $9,210 on canvassing services. (EX-2575-2576). The director of the WFP testified in his declaration and at trial that Booker spent at least this much collecting signatures by both going door-to-door and by canvassing in high-traffic locations. The $3,010 referenced mistakenly by the court referred only to the cost of gathering signatures in high-traffic locations. The balance of the expense was for gathering signatures and qualifying contribution by going door-to-door. *Id. See also* A-1712-13. It is surprising that the defendants would even flag this discrepancy since the court found that the evidence actually showed that Booker spent an additional $76,000 on canvassing services before the end of the 2008 election. (SPA-88, *n55*). For all his trouble and expense, Booker did not qualify and receive a grant until just 3

Working from the premise that petitioning on this scale requires the use of paid petitioners, the court reasonably found that the expense alone is an effective bar to participation when considered in light of the limits on how much money a candidate is allowed to raise to cover the expense. SPA-87-89. In fact, the defendant's expert acknowledged that the amount of money needed to qualify could easily exceed the amount of money a candidate is allowed to spend during the qualifying period – particularly when you factor in the added cost of satisfying the contribution requirement. SPA-88-89; *See also* A-942-944; A-977-979. Professor Green's opinion that the petitioning requirement was nevertheless reasonable was disproved during the bench trial, when it was shown to be based on the erroneous assumption that candidates could contract for petition services on "spec", i.e., with no assurance of payment. SPA-88-89; SPA-89 *n.56*. Under the CEP's implementing rules, candidates are expressly prohibited from having goods or services extended to them on credit based on the possibility of receiving a post-election grant. *Id.* *See also* EX-438-441 ¶16.

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weeks before the election. (EX-2865-2867; EX-2875). In addition to this mischaracterization of the record, the defendants also erroneously state that the court found senate candidate would have to collect between 3,528 and 8,141 signatures to qualify for a full grant. Def.'s Brief at 104. The court was referring to the number of signatures for a "one-third grant." A full grant would require twice the number of signatures, or between 7,056 and 16,283 signatures. (SPA-85).

The CEP imposes strict rules on the amount of money candidates can raise and spend on their campaigns during the qualifying period. Candidates are prohibited from raising any contribution other than the qualifying contributions, which are limited to amounts of $100 or less. §9-704 (SPA-294-297). A candidate's expenditures—when the candidate is attempting to qualify—cannot exceed the amount raised in qualifying contributions plus a limited amount of personal funds provided by the statute. §9-702(c) (SPA-292-293). Candidates cannot finance their own campaigns once they agree to participate in the CEP, except for very limited amounts to help jumpstart the qualifying process. For state senate, a candidate is limited to $2,000. §9-710(c) (SPA-310). For state representative, a candidate is limited to $1,000. *Id.* They cannot borrow more than $1000 *Id*. §9-710(a) (SPA-310; SPA-334-337), or accept contributions other than the limited amount of money they can raise in qualifying contributions. §9-702(c). (SPA-292-293). Although candidates can rely on uncompensated volunteers, §9-601(b)(4) (SPA-226), they are not allowed to accept "anything of value," including the value of any goods or services that someone might seek to "advance" 9-601(a)(1). (SPA-222).[26]

[26] For this reason, none of the ballot access cases or statutes cited by the defendants are particularly relevant. They involve no comparable restrictions on the amount of money a candidate can raise or spend while try to petition onto the ballot. To be sure, none of the cases cited by the defendants require a candidate to collect signature from more than 5% of the population. The principal case relied on by the

Even if a resourceful candidate could find some way to finance the petition process without violating the CEP's restrictions, it assumes that the candidate will collect the necessary number of signatures and will also raise the necessary number of qualifying contributions. A minor-party candidate who fails to qualify runs the risk of paying thousands of dollars out of his own pocket at the close of the campaign for wasted canvassing services instead of focusing their efforts on their campaign. (SPA-89-91). A major-party candidate does not have this expense. Even if the candidate does qualify for a grant, especially a partial one, the value of the grant to the candidate is, for all practical purposes, reduced by the cost of petitioning. This gives CEP-funded major-party candidates a decided financial advantage over a qualified minor party candidate, especially if the candidate only qualifies for a partial grant.

The district court found that the signature requirements for legislative districts are just as difficult—despite the defendants' characterization of them as minimal. To put the requirement in context, the court compared the requirements to the State's requirements for qualifying for the ballot. In Connecticut, to get on the ballot as a gubernatorial candidate, a candidate must gather valid signatures 7,500 signatures from registered voters statewide. (SPA-90-91). To meet this

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defendants upheld a requirement upheld Connecticut's 1% ballot access requirement for a statewide slate, or 7500 signatures. *LaRouche v. Kezer*, 990 F.2d 36 (2nd Cir. 1993).

requirement in the past, the minor parties in this case spent thousands of dollars and needed hundreds of hours. *See* EX-9; EX-54. These resources supplemented dozens of volunteers. (EX-35-36). In contrast, to qualify for full CEP funding, a state senate candidate must collect, on average, even more signatures—7,916—from within a single senatorial district. (SPA-91). In fact, the evidence shows that satisfying petitioning requirement at the district level is significantly more difficult than meeting the requirement for statewide office because of the requirement that the signatures come from registered voters in the district. (EX-12). It is also more time-consuming and expensive because it requires petitioners to rely more on door-to-door canvassing. (SPA-90; EX-48).[27]

Finally, the challenge faced by petitioning candidates is made more difficult by the fact that the petitions must be submitted 90 days before the general election. (EX-3441). This is the deadline that corresponds to candidates seeking access to the ballot. Conn Gen Stat. §9-543i. The deadline for filing a CEP grant

[27] The defendants argue that since four candidates qualified for grants through petitioning, the process must be reasonable. These few examples do not provide the type of transformative opportunities for minor parties that the CEP provides for major parties. The defendants' argument also obscures the significance of the burden involved and the fact that it distracts the candidate from the primary goal of campaigning. (SPA-91). Nor is the process as minimal as the defendants suggest. The three House candidates who sought CEP grants through the petitioning process qualified for only a partial grant. *See* EX-2693-2694; EX-2921-2933; EX-3452-3464. Only one candidate qualified for public financing in the Senate. *Id*. Moreover, the record shows that this candidate spent almost the entire grant amount on canvassing services. (SPA 88, *n. 55*).

application is the fourth to last Friday before the general election, which in 2008 was October 10th. 9-706(a)(8)(g) (SPA-307). As a practical matter, this means that a petitioning candidate with ballot access status based on the prior election results has less time to organize their campaigns, mobilize their supporters and raise the funds necessary to finance the qualifying process. (EX-2775-2776). In addition, it may then take a month or longer for the signatures to be verified. (A-1698-1702). As a result, the campaign is effectively suspended while the candidate waits for the signatures to be verified. (A-1708). Both WFP candidates who qualified for grants this cycle did not receive them until 2-3 weeks prior to the election. (EX-2865-2867; EX-2875).

c. Burden of Collecting Qualifying Contributions

The CEP departs from *Buckley's* understanding of permissible qualifying criteria in another crucial respect. Candidates must make a substantial financial showing by raising thousands of dollars in qualifying contributions. § 9-704 (SPA-294-297). The district court did not take this aspect of the statute into account as a separate basis to find that the qualifying criteria are exclusionary. Instead, the court limited its analysis to whether the prior vote total and petitioning requirements were justified in view of the evidence that the qualifying contribution requirement, itself, is a significant barrier to participation for minor-party and petitioning candidates. (SPA-109-110). We submit that the contribution

requirement is discriminatory itself, facially and as applied. The evidence shows that, while major party candidates can satisfy the requirement with relative ease, for minor party candidates it is an equal or greater barrier to participation than the prior vote total and petitioning requirements—particularly to the extent it works in tandem with the petitioning requirements to amplify the burden. The contribution requirement discriminates on its face. Candidates who satisfy the contribution requirement are not funded equally. The grants for minor-party and petitioning candidate are substantially less. In effect, non-major party candidates are denied the same benefits for the same work. There is no indication in *Buckley* or other cases that this type of statutory scheme is permissible. This aspect of the statute is addressed in the next section.

Given that the prior vote total and petitioning requirements already provide a rough measure of support, the additional burden of collecting qualifying contributions is unnecessary under *Buckley's* rationale. Connecticut has a legitimate interest in preserving the public fisc and not funding hopeless candidacies, but those interests are already served by the vote total and petitioning requirements. Thus, the qualifying contribution threshold, particularly because it is set so high, only serves to frustrate the ability of minor and petitioning party candidates to qualify and, in that respect, unfairly favors major-party candidates.

In *Buckley* the Court made the observation 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, 442 (1971). This truism is well illustrated by this case. The qualifying contribution requirement is unquestionably based on the proven fundraising ability of the major political parties.[28] It requires candidates who have historically relied on a consolidated base of contributors to mine for hundreds and thousands of new donors. Minor-party and independent candidates do not have access to thousands of proven contributors—especially at the outset of the campaign. (EX-28; EX-13-14). To hold all candidates to the same standard ignores the inherent differences in the fundraising capacities of major and non-major party candidates. To then provide minor party candidates with only 1/3 of the grant amount for meeting the same fundraising goal makes the discrimination complete.

Raising the needed qualifying contributions for statewide office is all but impossible. (EX-28; EX-14; EX-40). The most successful minor-party candidate in recent Connecticut electoral history has been Governor Lowell Weicker. Running as a minor-party gubernatorial candidate on the A Connecticut Party

[28] The separate means-based standard was adopted with the knowledge that few, if any, minor and petitioning party candidates had the capacity to meet the contribution requirement. SPA-109-110. Minor party candidates almost never raise this amount of money. *See* EX-509-526 (listing expenditures by minor party candidates in 2004; indicating that most minor party candidates are exempt from reporting because they did not receive or spend over $1000).

ticket, Weicker beat his Democratic and Republican opponents with just over 40% of the vote in 1990. (SPA-48). Governor Weicker attributes his victory as a minor-party candidate in 1990 to the "reservoir of financial and organizational support" that he had accrued over his 30 years in public service. (SPA-48; EX-26). Significantly for Weicker, he was able to tap into his established base of high-dollar contributors from his years as U.S. Senator, raising over $2.7 million in campaign contributions. (SPA-49; EX-25). Most of those contributions were between $500 and $1000; Weicker testified that he "cannot envision" a minor-party gubernatorial candidate "collecting the $250,000 in small dollar contributions that is necessary" to qualify for public funding. (SPA-49; EX-28-29).

Raising the aggregate amount of money needed to qualify is made more difficult by the $100 cap on individual contributions. (EX-28-29). A limit this low will effectively prevent minor-party candidates from amassing the financial resources necessary to finance the campaign. *See Randall*, 548 U.S. at 248-49 (invalidating $200 and $400 limits). Independent and minor-party candidates rely on their own resources or are dependent on a consolidated base of larger contributors who provide the seed money needed to finance the campaign until it attracts enough attention to draw additional supporters. Seed money is essential to pay for office space, staff, mailings, literature, and other campaign expenses—

including fundraising expenses. (EX-28; EX-13-14). It costs money to raise money and, without a substantial seed money investment to publicize the campaign and send out an appeal, it is impossible to get a fundraising drive off the ground. (EX-28). Defendants' own expert admitted at trial that the cost of raising the qualifying contributions might easily exceed the amount of money a candidate is allowed to spend during the qualifying period. *See* A-942-944; A-977-979.[29]

Buckley did not approve such an overtly discriminatory scheme. The public financing system for the general election under consideration in *Buckley* did not include a means-based test. It was sufficient if the candidate received his party's nomination, in the case of major-party candidates or if the candidate satisfied the 5% vote total requirement in the case of non-major party candidates. Although other states that have adopted "clean elections" require candidates to raise a modest amount of money in $5 qualifying contributions, the aggregate amount of money is *de minimis* compared to the CEP's requirements. (SPA-111-114). *See also Garfield I*, A-216-232 (comparison with Maine and Arizona public financing systems). Moreover, under those models, public financing was not made

[29] "Petitioning" candidates face the additional challenge and expense of trying to raise the qualifying contributions at the same time that they are trying to satisfy the petitioning requirements. The combined expense of conducting a statewide petition and fundraising drive would exceed the expenditure limits that apply during the qualifying period. (EX-28-29).

dependent on the candidates' status as a major party candidate. All candidates who raised the qualifying contributions could participate. *Id*.[30]

d. Minor Party and Petitioning Candidates who Meet the Contribution Requirement are not Entitled to the Same Funding as Major Party Candidates.

The final discriminatory aspect of the grant provisions involves the disparity in the funding provided for qualified candidates. Major-party candidates who satisfy the financial threshold qualify for public funding for both the primary and general elections. Minor and petitioning party candidates must satisfy the same financial threshold, but are awarded grants based on a different formula that pays them less. *Buckley* did not contemplate this type of disparity. For instance, a major-party state senate candidate in a party dominant district who raises the required $15,000 in qualifying contributions is eligible for $160,000 in primary and general election funding. An eligible minor or petitioning party candidate must raise the same amount in the same way, but may only receive 33% of the $85,000 general election base grant, or $25,757. The reduced payout is significant to minor and petitioning party candidates because they face greater obstacles to

[30] The *Buckley* Court's analysis upholding the system for financing Presidential primaries is not to the contrary. Any candidate seeking his party's nomination can qualify for matching funds by raising a relatively *de minimis* amount of money. Once they qualify, the first $250 of every contribution is matched. To finance the effort, candidates can use $50,000 of their own money and any money they raise under FECA's generally applicable contribution limits. 424 U.S. at 89-90. *See* 26 U.S.C. § 9031, *et al.*

meeting the petitioning requirements and raising the qualifying contributions. In effect, any advantage they gain from a partial grant is more than offset by the expense of qualifying. Unlike their major party counterparts, they receive no return on their investment. (EX-14).

The reduced grants take on even greater significance when you consider that a candidate who is eligible for a partial grant (or who actually received one) based on the prior vote total requirement cannot improve his position through the petitioning process. Thus, a candidate who received 14.9% of the vote in the last election is only eligible for a one-third grant and cannot improve his position by proceeding as a petitioning candidate. This creates the perverse result that a petitioning candidate who is seeking office for the first time has a significant advantage over an established minor-party candidate because he could potentially qualify for a full grant by collecting the required number of signatures**.**

The grant disparities are not ameliorated by the so called "catch-up" provisions that were later added to the law. §9-702(c) (SPA-292-293). First, although candidates who qualify for partial grants are allowed to continue to raise private funds up to the full grant amounts paid to their major party opponents, they are hobbled by the contribution limits that apply to CEP candidates. (SPA-92-93). Those limits are capped at $100. In a gubernatorial election involving a minor-party candidate who received a one-third grant under the prior vote total

requirement, it is completely unrealistic to think that the candidate could make up the $2 million difference in small-dollar contributions. (EX-30-31; EX-32; EX-18). *See also Randall*, 548 *U.S. at* 265 ($200 contribution limit handicaps candidates). A less restrictive approach would be to allow candidates to make up the difference under the limits that apply to privately financed candidates. (EX-30-31). That is the approach under FECA which allows minor-party candidates who qualified for proportion funding based on their vote total in the last election to continue to raise contributions under the general limits applicable to individuals and groups. *Buckley*, 424 U.S. at 88-89.

Second, although candidates who qualify for a partial grant are entitled to a post-election grant if they receive more than 20% of the vote, the supplemental grant is limited to the circumstances where the candidate's campaign shows an actual deficit. This is an unrealistic standard because candidates are not allowed to incur a deficit by lending money to their campaigns or borrowing from a financial institution or from elsewhere. In the closing stages of a campaign, this is how campaigns are financed. Under the federal system which provides post-election grants, candidates who lend money to their own campaigns or borrowed from financial institutions can repay those loans with any money they receive in post-election grants. *Buckley*, 424 U.S. at 102. Federal candidates can also borrow from any other sources—including their party committees—subject to the

understanding that those loans are treated as contributions. *Id*. *See also,* FEC Advisory Opinion 2008-09 (EX-3402-3405). Under the CEP, borrowing from a financial institution is limited to $1,000. § 9-710(a) (SPA-310). Moreover, under the CEP's implementing rules, candidates are prohibited from having goods or services extended to them on credit, based on the possibility of receiving a post-election grant. (EX-441 ¶16).

In addition, unlike in *Buckley*, minor-party candidates under the CEP are not eligible for public financing for the primary elections. § 9-705 (SPA-297-303). Defendants' vague explanation that minor-party candidates could theoretically qualify for primary funding if they change their nominating process is not credible given the plain text of the statute. It refers only to "major party candidates" when designating the amount of the grant for primary elections. §9-705 (SPA-297-303). *See also* EX-1615 (stating that eligibility for primary campaign grants is limited to major party candidates). Major party candidates are unilaterally armed with the resources to dominate the debate during the primary period. The competitive advantage created by making primary grants available to major-party candidates while denying them to minor-party candidates was understood by the legislature. The original House and Senate bills provided primary grants to all candidates seeking their party's nomination. (EX-123-124; EX-215-218). Following the adoption of the CEP, the General Assembly was urged by the intervening

organizations in this case to make primary funding available to all qualified candidates on equal terms. (EX-3203-3205; EX-3343-3344). Primary campaigns offer candidates exposure that translates to the general election for the nominee. (EX-18-19; EX-431). Under the system for financing presidential primaries, all candidates seeking their party's nomination can qualify for matching funds. 26 U.S.C. § 9033(b). Numerous minor party candidates have received federal matching funds under FECA – including Ralph Nader who secured the Green party nomination for the presidency in 2004. FEC Advisory Opinion 2000-18 (EX-3206-3210).

e. The CEP Discourages Minor Party Participation.

Quite apart from the system of reduced grants by virtue of which minor-party and petitioning candidates who satisfy the qualifying contribution requirement are not assured a full grant, the district court found that the CEP's distribution scheme was structured in such a way so as to discourage minor-party candidates from trying to raise the qualifying contribution amount or even raising or spending an equivalent amount. (SPA-92-93). Where a participating major-party candidate is running against only a non-participating minor-party candidate who has raised private donations totaling less than the qualifying contribution amount for that office, the participating major-party candidate is eligible for a reduced CEP grant worth only 60% of the full grant amount. §9-705(j)(4) (SPA-

303). As soon as the minor-party candidate qualifies for a partial CEP grant or privately collects contributions or finances his own campaign in an amount equal to the qualifying contribution amount for that office, the participating major-party candidate's grant is automatically increased to the full amount. *Id.* Moreover, even if the candidate does qualify for a partial grant, the court found that the candidate cannot realistically close the gap given the $100 contribution limit that applies to CEP candidates. (SPA-92). Therefore, the minor-party candidate faces a strong incentive to avoid raising contributions or spending his own money in excess of the applicable qualifying contribution minimum, whether or not that candidate hopes to become eligible for the CEP. (SPA-92-93).

B. The CEP Cannot Survive Strict Scrutiny Because It Is Not Narrowly Tailored To Serve A Compelling State Interest.

1. Level of Scrutiny

This case is controlled by the Supreme Court's campaign finance jurisprudence—not by the ballot access and election law cases relied upon by Defendants. *Buckley* and later cases involving campaign finance regulations that limit or inhibit speech provide ample support for the district court's use of strict scrutiny to invalidate the CEP. Campaign finance regulations that limit a candidates' ability to reach his intended audience are evaluated under the same rigorous standards that apply to speech because they are considered direct restraints on speech. *Buckley*, 424 U. S. at 19. They are presumptively invalid and

rarely upheld because they cannot withstand the "exacting scrutiny" required under *Buckley* and later cases. *Id* at 44-45. *WRTL*, 127 S.Ct. at 2664. If the government is to prevail in this case it must overcome that presumption and prove that the burden that the CEP imposes on minor-party and petitioning candidates is narrowly tailored to advance a compelling state interest. *Id. See also Davis,* 128 S.Ct. at 2772.

In terms of the applicable First Amendment standard, it makes no difference whether the regulation is a direct restraint on a candidate's speech or results from a statutory scheme that increases the relative ability of your opponent to speak. *See Davis*, 128 S.Ct. 2759. The First Amendment prohibits the government from altering the electoral opportunities of candidates or attempting to influence or control the debate in the service of other objectives. *Id. See also, Bellotti,* 435 U.S. at 784-85 (noting that "the First Amendment is plainly offended" when the legislature attempts to give one group "an advantage in expressing its views to the people"). *Cf. Miami Herald Publ'g Co., v. Tornillo*, 418 U.S. 241 (1974) (invalidating a state law that required newspapers to afford political candidates' space for replying to criticisms because it distorts editorial message of newspaper).

By urging the adoption of the *Anderson-Burdick* standard,[31] the defendants feign ignorance of the grave First Amendment implications of a system of financing that artificially inflates the strength of one group of candidates relative to another. They ignore the limiting language in *Buckley* which emphasized the distinction between a public financing system that enhanced the relative position of major parties and one that preserved the *status quo.* 424 U.S. at 99. Similarly, they ignore *Davis.* That decision holds in explicit terms that a statutory scheme that gives an expenditure or fundraising advantage to one group of preferred candidates cannot survive strict scrutiny because of the "substantial burden" that it imposes on the candidate denied the benefit. 128 S.Ct. at 2772.[32]

The election law cases cited by the defendants involve the voting process, itself, not electoral speech. The election regulations in those cases are judged by a different standard because they do not restrict speech. When an election regulation crosses over and targets speech, it is subject to a more rigorous standard applicable to restrictions on speech. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 774 (2002) (Restriction on speech of judicial candidates); *Burson v. Freeman*, 504 U.S.191, 197 (1992) (Restrictions on polling place electioneering). The ballot access cases are not to the contrary. The claimed discrimination and the resulting

[31] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

burden on the right of association at issue in those cases do not involve direct restraints on speech. A candidate denied access to the ballot can still reach his intended audience without limit and without the state interceding on his opponent's behalf. His message is not diluted by the distorting effects of a public financing system that enhances the political opportunities of his opponent.[33]

2. The CEP is not Narrowly Tailored to Serve the State's Interests.

Having established that the CEP "severely" burdens plaintiffs' rights the burden shifts to the government to prove that the CEP advances a compelling state interest and is narrowly tailored. *WRTL*, 127 S. Ct. at 2664; *Davis*, 128 S. Ct. at 2772. The defendants cannot meet this burden.

It is settled law that public financing serves important governmental interests. To further those interests, the State can adopt non-discriminatory qualifying criteria that recognize the difference between major and non-major party candidates. That said, when the public financing scheme crosses the line and impermissibly discriminates, the government cannot have any legitimate interest in

[33] The district court held that even if the *Anderson-Burdick* test is the appropriate way to determine the level of scrutiny that must be applied in this case, the plaintiffs have satisfied their burden of demonstrating the CEP is a "severe" burden on their right of political opportunity, and therefore, strict scrutiny would nevertheless apply. (SPA-95, *n. 60*). *See Burdick*, 504 U.S. at 434 (noting that, where the rights protected under the First and Fourteenth Amendments are subject to "severe restrictions," the "regulation must be narrowly drawn to advance a state interest of compelling importance") (internal quotation omitted).

maintaining that system. The government's obligation to remain strictly neutral as between different candidates and political views is greatest in the context of elections. *Davis*, 128 at 2774 ("…it is a dangerous business for Congress to use the election laws to influence the voters' choices."); *Bellotti*, 435 U.S. at 792, *n.31* (The "[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves"). There is no suggestion in *Buckley* or in any other case that the government has a legitimate interest in adopting a discriminatory funding scheme that reduces the electoral opportunities of non-major party candidates. The argument is antithetical to the "primary values protected by the First Amendment—'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'—[] served when election campaigns are not monopolized by the existing political parties." *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) (quoting *New York Times Co., v. Sullivan*, 376 U.S. 254, 270 (1964)).

The defendants do not point to anything in the record or provide a convincing explanation for why this Court should set aside the district court's determination that the CEP is not narrowly tailored. (SPA-97-115). They merely repeat the argument made in *Buckley*, that the State's interests in preserving the public fisc and avoiding factionalism fully justify the different treatment of major and non-major parties under the CEP. What the defendants fail to grasp is that

while those interests may suffice under financing programs like the one considered in *Buckley*, where there was no showing that minor parties were disadvantaged, those interests cannot provide the justification under a discriminatory system like Connecticut's. The qualifying and funding provisions of the CEP are by definition not narrowly tailored precisely because they work individually and together to increase the competitive advantage of major party candidates. In almost every detail the numerous provisions depart from the non-discriminatory program terms upheld in *Buckley*. As we have said previously, there is no indication in *Buckley* that those interests would suffice to justify a system that impermissibly discriminates. The defendants' tailoring analysis fails to respond to this overarching objection.

According to the defendants, in the absence of sufficiently high qualification and eligibility standards, many minor party candidates with little or no chance of winning election to office could qualify for funding, thus squandering public monies on hopeless candidacies. The district court was skeptical of this argument and ultimately found it unconvincing since the primary beneficiaries of the government's largesse will not be the handful of minor party candidates who might qualify, but major party candidates who can qualify for financing at "platinum levels" even if they have no chance of winning or could not raise an equivalent amount of money privately. (SPA-114-115; SPA-100-101) ("In a district where a

Democrat beats his or her Republican opponent 75% to 25%, no one would argue that the Republican candidate's vote total represented a realistic chance of winning or even a showing of significant strength."). These represent almost all legislative districts—83% of House districts and 72% of Senate districts. (SPA-99-100).

From this premise, the district court found that the defendants failed to demonstrate how its interest in protecting the public fisc is served by treating hopeless minor party candidates differently from hopeless major party candidates. If anything, "it is more likely that favoring hopeless major party candidates over hopeless minor party candidates will result in a raid on the public fisc because it is easier for such candidates to become eligible for public financing and because more hopeless major party candidates than hopeless minor party candidates run for office." (SPA-101). The court found that major parties have every incentive to run candidates as challengers to entrenched incumbents in one-party-dominant districts, even with no hope of actually winning, as part of a long-term effort to build candidate and party recognition over time in a particular district, i.e., to use free public monies to slowly chip away at the dominant party's foothold. In that scenario, not only is the major party is using public financing to fund its party-building efforts, but with more major party candidates incentivized to run, more public funds are being expended. (SPA-101-102).

Even if the state's interests in this case could arguably justify the additional barriers faced by minor-party and petition candidates under the CEP, the district court found that those interests could be equally served by the adoption of less onerous criteria that did not so unfairly slant the playing field. (SPA-97-115). In reaching this conclusion, the court relied on uncontested evidence showing that the legislature and the Campaign Finance Working Group were both aware that a less restrictive approach would not lead to a proliferation of CEP minor party candidates that would in any way threaten the solvency or integrity of the program. (SPA-102-103; SPA-109). The General Assembly's joint Government Administration and Elections Committee was presented with testimony from defendant Garfield that a safe harbor of 5%, along with the requisite qualifying contribution requirement, would be sufficient to achieve the state's purpose of restricting hopeless candidates' access to CEP funding. (SPA-109). *See also* EX-1520. Garfield also assured lawmakers that Arizona and Maine had experienced no problems with factionalism or splintered parties. (SPA-103-104; EX-1531).[34] Moreover, most evidence in the record supports the conclusion that the CEP could

[34] Defendants' own witness, State Senator Peter Mills of Maine, confirmed that third party candidacies on the state legislative level have never posed a threat to the public fisc under Maine's public financing system. (EX-2391-2392). Attached to his declaration is a Study Report on the MCEA which concludes that the availability of public funding has not resulted in "fringe" candidates in legislative elections and has not had any discernible impact on the public fisc. *See* EX-2199-2325.

further the compelling state interests even without requiring minor party candidates to submit to additional qualifying criteria. The court found compelling evidence to suggest that the fundraising criteria set by the qualifying contribution requirement alone would present a significant hurdle for most minor party candidates to overcome since they have had little success in fundraising generally; historically most minor party candidates have run as "exempt." (SPA-109).

Finally, this lower court's comprehensive analysis of the public financing systems enacted by other states proves that there are clearly less restrictive alternatives that do not entail the needless discrimination against minor party and independent candidates that Connecticut has chosen to impose. (SPA-111-114). As the district court observed in its earlier opinion denying the defendants' motion to dismiss, "almost all other state public funding laws, except for the CEP, are party-neutral, and the few that are not do not impose qualifying criteria that are even remotely similar to the CEP's qualifying criteria. *Garfield I* (A-216-232). It thus appears more than possible to weed out hopeless candidacies, and avoid a doomsday raid on the public fisc, through party-neutral qualifying criteria, or at least without the proxy that the legislature has chosen. (SPA-111-114).

C. The Matching Fund Provisions Violate the First Amendment.

The district court permanently enjoined operation of the matching fund provisions of the CEP pursuant to Count I, holding that the CEP is discriminatory

as a whole, and, independently, pursuant to Counts II and III, holding that the provisions function as expenditure limits and are therefore presumptively invalid under *Davis*.[35] (SPA-134-136). *See also* SPA-118 *n.71* (explaining that the court's holdings with respect to counts II and III are intended to forestall a remand in the event the court is reversed on count I).

1. Plaintiffs Have Standing to Challenge the Matching Fund Provisions.

Defendants and Intervenors first argue that the district court erred in finding that Plaintiffs have standing to raise the claims in counts II and III,[36] effectively calling into question the sufficiency of Plaintiffs' injury-in-fact.[37]

Analysis of injury-in-fact is case-specific, turning on the nature of the claim. *Raines v. Byrd,* 521 U.S. 811, 818 (1997). The harm alleged must be concrete and particularized and, where imminent, the threat must be "real, immediate, and direct." *Davis*, 128 S. Ct. at 2768-69. With respect to a claim arising under the

[35] Counts II and III are challenges to these provisions, respectively, each both facially and as-applied. *See* Compl. at ¶¶ 54-55 (A-66-67). Both counts allege violation of the First Amendment rights of non-participating candidates and their supporters; count III also alleges violation of the First Amendment rights of non-candidates. *Id.*

[36] Defendants do not challenge Plaintiffs' standing to challenge these provisions with respect to count I. (SPA-123, *n.73*.)

[37] The constitutional component of standing imposed by Article III, § 2 of the U.S. Constitution, *see Lujan*, 504 U.S. at 559-60, requires that each plaintiff demonstrate injury-in-fact, causation, and redressability with respect to each claim. *See Id.* at 555, 561.

First Amendment, the injury-in-fact requirement may be satisfied if a challenged statute imposes self-censorship. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988).

Political candidates and political parties have standing to challenge state election laws that shape their electoral opportunities, strategies and outcomes. *See, e.g., Vote Choice, Inc. v. Di Stefano*, 814 F. Supp. 195, 204 (D. R.I. 1993), *aff'd* 4 F.3d 26 (1st Cir. 1993) ("[A] long line of election law standing cases have held that a candidate or party need only be subject to election law requirements in order to have standing to challenge them."); *Shays v. Federal Election Commission*, 337 F. Supp.2d 28, 39 (D.D.C. 2004), *aff'd* 414 F. 3d 76 (D.C. Cir. 2005) (finding that candidates and potential candidates have standing to challenge "law regulating the processes by which they may attain office").

This Circuit has approved broad standing for political parties to challenge campaign finance laws impairing the parties' activities in support of candidates, particularly where the laws impose a competitive disadvantage. *Landell v. Sorrell*, 382 F.3d 91, 105 (2nd Cir. 2004), *rev'd on other grounds*, *Randall v. Sorrell*, 548 U.S. 230 (2006) (upholding findings below granting comprehensive standing to challenge provisions imposing competitive disadvantage). A plaintiff has standing to challenge a government action that "'creates an uneven playing field' for organizations advocating their views in the public arena," so long as the plaintiff

can show that "he personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit." *Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183, 197 (2d Cir. 2002) (quoting *In re U.S. Catholic Conference*, 885 F.2d 1020, 1029 (2d Cir. 1989)). *See also Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir. 1989) (finding injury-in-fact because, by being excluded from televised debates, her ability to compete with other candidates "on equal footing" had been impaired, resulting in "a loss of competitive advantage"). In *Fulani*, this Circuit cited as "persuasive" the "judicial assessment of injury for standing purposes" found in *Common Cause v. Bolger*, 512 F. Supp. 26, 30-31 (D.D.C. 1980) (three-judge court). *Id.* at 627. As *Bolger* explained, political campaigns "serve other purposes besides electing particular candidates to office. They are also used to educate the public, to advance unpopular ideas, and to protest the political order, even if the particular candidate has little hope of election. The First Amendment most certainly protects political advocacy of this type, and infringements of these rights can occur regardless of the success or failure of a particular candidate at the polls." *Bolger*, 512 F. Supp. at 32.

That a campaign finance law impacts a potential candidate's strategic concerns is sufficient to confer standing. *See, e.g., Becker v. Federal Election Commission*, 230 F.3d 381, 386 (1st Cir. 2000) (finding candidate had standing to

claim that he had to adjust his campaign to account for the challenged regulations); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993) (finding that plaintiff had standing to claim that she had to adjust her campaign to account for the possibility of facing a publicly-funded opponent, even though in the end that possibility did not materialize); *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995) (finding standing despite plaintiff having alleged no more than that he *might* run for office). *See also Davis*, 128 S.Ct. at 2768 (finding standing despite statute not being triggered); *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 184 (2000) (finding that "conditional statements" of intent, which allege that plaintiffs would engage in a course of conduct but for the defendants' allegedly illegal action, are not too speculative to demonstrate injury-in-fact). This approach to assessing injury is appropriate where a plaintiff challenges matching fund triggers. *See, e.g., North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427, 434 (4th Cir. 2008), *cert denied by Duke v. Leake*, 129 S. Ct. 490 (2008) (standing found where plaintiffs alleged they had refrained from action to avoid triggering matching grants).[38]

[38] Of the *Leake* plaintiffs, two were political action committees which alleged that they had refrained from making political contributions to judicial candidates because of the state's Judicial Campaign Reform Act. One specifically "allege[d] that it chose not to make expenditures on behalf of nonparticipating candidates due to a fear that such expenditures might result in the disbursement of matching funds

a. Excess Expenditures

The excess expenditure provision[39] targets candidates who do not participate in the CEP, including self-funded candidates who run as candidates of, or are cross-endorsed by, the Green or Libertarian party. *See* SPA-127 (describing Green Party cross-endorsement of Democrat Dianne Farrell). The impact of the provision on the rights of affected candidates and political parties can be startling. For example, where the amount spent by a non-participating candidate for Governor, cross-endorsed by the Green or Libertarian party, has equaled the State's grant to a participating opponent, the first excess dollar spent by the candidate triggers an additional grant of $750,000.00 to the opposing candidate. §9-713 (SPA-314-317).

The provision is particularly injurious to Plaintiffs in that it restricts their ability to address the challenges imposed by the CEP as a whole. To remain relevant in a CEP-funded environment, minor parties must implement strategies addressing the fact that low-cost districts, once fertile ground for minor parties, are a thing of the past. (SPA-72; EX-2785). They must improve their fundraising and seek opportunities to align themselves with candidates who have the wherewithal

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to a participating candidate that the organization opposed." 524 F.3d at 434. The PAC had not previously made independent expenditures or demonstrated than they had the resources to do so. *Id*. The court found these allegations sufficient to establish standing. *Id.*

[39] §9-713, SPA-314-318; SPA-119; *see also* SPA-312-313; SPA-120 (concomitant disclosure requirements); *see generally supra* pp. 14-15 (discussing provision).

to self-finance. *Id.* While all that is required for standing is that the CEP "color" Plaintiffs' strategies, *see Vote Choice,* 4 F.3d at 37, the excess expenditure provision goes further, restricting the ability of minor parties to execute these strategies. (SPA-128-129). *See also* EX-2784-2786; EX-2787-2788.

The provision blunts any fundraising advantage that *Buckley* theorized non-participating candidates might gain from the opportunity to attract new funding from those no longer contributing to publicly-funded major-party candidates. 424 U.S at 99. A potential supporter might reasonably find it pointless to contribute to a minor-party candidate absent a reasonable likelihood that the contribution will produce any financial advantage for the candidate. *See* SPA-128-129. It would be inconsistent with *Buckley* to find that Plaintiffs lack injury when they claim they are being denied an advantage *Buckley* cited as offsetting the benefits conferred on those who receive public funding.

Finally, the provision hampers Plaintiffs' ability to attract strong, financially independent candidates. Potential candidates are disincentivized from running on a minor-party line in the first place by the difficulty of qualifying for public financing. *See supra* pp. 68-86. In light of this, the further reality imposed by the provision—that a candidate cannot create an advantage by self-financing—is all

the more damaging to minor parties.[40] *See* SPA-128-129 (challenged provision makes it more difficult to attract candidates like Governor Weicker); EX.-30-31 (testimony of Governor Weicker that "[t]he CEP will have the effect of discouraging strong independent candidates like me from challenging major-party candidates."). While operation of the CEP makes it easier for the major parties to attract strong candidates, the effect of both the CEP as a whole, and this provision in isolation, is to discourage candidates from running as minor party or independent candidates.

b. Independent Expenditures

The impact of the independent expenditure provision[41] is similarly direct and pernicious. For example, in an election in which one of the political party plaintiffs in this case does not run its own candidate, *any speech* opposing a participating candidate is penalized through a dollar-for-dollar grant from the State to that candidate. §9-714; SPA-318-319. Thus, if the Green Party chooses to take sides in this year's Democratic Gubernatorial primary and distributes a mailing that

[40] The parallel mandatory disclosure requirements, imposed on *all* non-participating candidates in a race in which one of those candidates spends or receives contributions equal to 90% of the participating candidate's expenditure limit, further disincentivize potential candidates from minor party affiliation. (SPA-129).

[41] §9-714, SPA-318-319; SPA-121-123; *see generally supra* pp. 15-17 (discussing provision).

opposes one or more of the CEP-participating candidates, that expenditure will trigger the payment of matching funds. If, on the other hand, the party runs or endorses a non-participating candidate in the general election, once the aggregate spending of all non-participating candidates, combined with any independent spending opposing the participating candidate, exceeds the CEP grant amount, *any speech* in which Plaintiffs engage, opposing the participating candidate is penalized through a dollar-for-dollar grant from the State to the candidate they oppose. *Id.* *See* SPA-126. This is true whether it is the party's expenditures that are the triggering event or the candidate's. Because expenditures are aggregated, the provision can be triggered by an act as modest as a minor-party candidate's $500 mailing. *Id.* Meanwhile, because the provision penalizes only the speech of those supporting non-participating candidates, those supporting the participating candidate or opposing his opponents may engage in independent expenditures without these restrictions. *Id.*

The independent expenditure provision imposes a direct restraint on minor parties and their ability to speak out in opposition to participating candidates. By Defendants' own admission, the Green Party has in the past made independent expenditures on behalf of Green Party candidates. *See* EX-2766-2767 (collecting data concerning Green Party's past independent expenditures). Plaintiffs have alleged both an intent to make independent expenditures in the future, as one

means of responding to the political landscape as altered by the CEP, and that the matching funds provisions will deter such spending. (EX-2782; EX-2783-2784). Plaintiffs have demonstrated a past practice of, and alleged an intent to consider in the future, engaging in cross-endorsements. (SPA-127). *See also* EX-2782-2783 (describing Green Party endorsement of Democratic candidate in 2006). Plaintiffs have testified to the direct and imminent impact that these matching funds will have on the Green Party's political speech and on the ability of minor parties and independent candidates to adapt to the changes imposed by the CEP. *See* SPA-127; EX-2782-2783 (party official describing how provision will restrict their speech).

As is the case with respect to the excess expenditure provision, plaintiffs have standing, even if they do not trigger release of independent expenditure matching funds through their own conduct and even if the funds are not triggered at all. All that is required for standing is that plaintiffs have testified that they intend to raise money for future elections and that they would raise and spend money but for the trigger provision. In *Leake*, the Fourth Circuit considered whether the plaintiffs had standing to challenge a public campaign financing program's trigger provisions, despite having insufficient funds to make an independent expenditure that would have triggered matching funds. 524 F.3d at 434-35. The court held that "a plaintiff may establish the injury necessary to

challenge campaign finance regulations by alleging an intention to engage in a course of conduct arguably affected with a constitutional interest" and that a plaintiff may establish injury-in-fact by making "conditional statements of intent" that he or she "would engage in a course of conduct but for the defendants' allegedly illegal action." *Id*. at 435.

When Defendants attack as "too attenuated" the district court's finding that spending by Plaintiffs could trigger the provision, Defs. Br. at 122 *n.37*[42] (discussing SPA-126), their error is similar to the one made by the defendants in *Shays* and sharply critiqued in that opinion.

> Defendant's attacks on Plaintiffs' factual support for the injury-in-fact prong miss the point of Plaintiffs' alleged harm. Plaintiffs are undisputedly participants in the federal campaign finance system. They attest that their activities are affected not only by the manner in which they respond to the campaign finance rules, but also by the way in which other participants, both allies and adversaries, respond to the rules. Whether or not they have alleged that some entity has in fact taken advantage of an alleged FEC-created loophole in BCRA, the fact that such a loophole exists *affects the way these politicians, who face election in a matter of months, will run their campaigns.*

[42] Defendants summarily cite *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344-45 (2006), but fail to explain how the analysis of the threat of imminent harm with respect to taxpayer standing addressed in that decision is relevant to the analysis of the threat of imminent harm with respect to standing to bring a First Amendment claim, where the chill imposed by the threat is itself the injury. *Port Washington*, cited by Defendants on the same point, similarly addresses non-First Amendment claims. *Port Washington Teachers' Ass'n v. Board of Educ. of Port Washington Union Free School*, 478 F.3d 494, 499 (2d Cir. 2007).

337 F. Supp.2d at 42-43 (record citations omitted; emphasis added). While Defendants cite *McConnell*'s finding of lack of injury-in-fact, in *McConnell*, due to the interplay of the claim alleged, the challenged statute, the candidate-plaintiff's term of office, and the election cycle, the first opportunity for the asserted harm to arise would have been almost five years after the issuance of the Supreme Court's opinion. Defs' Br. at 121 (citing *McConnell*, 540 U.S. at 226). Plaintiffs here have alleged that the excess expenditure provision is already forcing them to re-evaluate their strategies for recruiting candidates and spending campaign resources. (EX-2784-2786). It is undisputed that Mike DeRosa intends to run for statewide office in 2010 and that both the Green and Libertarian Parties will be running candidates for local office in 2010. (EX-4, 5; EX-55).

While the parties disagree about the likely impact of these provisions, it is enough that a plaintiff perceives that his rights are chilled by government action. It is neither for the Defendants nor a court to "second-guess a candidate's reasonable assessment of his own campaign." *Becker*, 230 F. 3d at 387. Plaintiffs have standing to the extent their speech and strategic choices are burdened by the trigger provisions.

2. The Matching Fund Provisions are not Narrowly Tailored to Serve a Compelling Governmental Interest.

Defendants and Intervenors also argue that the district court erred in finding that the excess and independent expenditure provisions violate the First Amendment. Defs' Br. at 123-128; Int.-Defs' Br. at 36-37.

A law which "imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech … cannot stand unless it is 'justified by a compelling state interest.'" *Davis*, 128 S. Ct. at 2772 (*quoting Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256, (1986)). In *Davis*, the Court struck down the so-called "Millionaire's Amendment" to the McCain-Feingold campaign finance law, which permitted an opponent of a high-spending self-financing candidate to raise money from individuals at a contribution limit three times that of the self-financing candidate. The Court reasoned that the law imposed a Catch-22 on any self-financing candidate: either limit her own spending, or trigger a system that helps her opponent raise money in a manner from which the self-financing candidate is herself excluded. *Id*. at 2772. By so doing, the provision "impermissibly burdens [the candidate's] First Amendment right to spend his own money for campaign speech." *Id*. at 2771-2773.

Under the statute addressed in *Davis*, the effective restriction on expenditures is not undertaken voluntarily, which distinguished that statute, as it does these provisions, from the statute addressed in *Buckley*.

> In *Buckley*, a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures. Here, [the statute] does not provide any way in which a candidate can exercise that right without abridgment.

Davis, 128 S.Ct. at 2772.

Davis cited, with approval, *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). *Day* had concluded that a Minnesota law increasing a candidate's expenditure limits and eligibility for public funds, based on independent expenditures made opposing her candidacy, burdened the speech of those making the independent expenditures. *Davis*, 128 S.Ct. at 2772. As the district court held, the logic of *Day*, rejected by other courts addressing similar provisions,[43] must be reconsidered in light of *Davis*. *See* SPA-132-135**.** *See also McComish v. Brewer*, 2008 WL

[43] *See, e.g., Leake*, 524 F.3d 427; *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000)*; Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). Defendants argue that *Leake*'s merits holding survives *Davis*, based upon the opaque fact that *cert*. was denied after *Davis* had been decided. Defs' Br. at 125, *But see* SPA-134 *n.74* (dismissing this argument). The critical rationale in *Leake* cannot be squared with the reasoning in the subsequently-issued *Davis*. *Leake* reasoned that "*Day*'s key flaw is that it equates the potential for self-censorship created by a matching funds scheme with direct government censorship," even though plaintiffs "will not be jailed, fined, or censured if they exceed the trigger amounts." *Leake*, at 437-38. *Davis*, like *Day*, adopted precisely that view, finding impingement on First Amendment rights despite the absence of direct government censorship. *Davis*, 128 S. Ct. at 2772.

4629337 at *6 (D. Ariz. 2008) (finding after *Davis* that the Arizona Clean Election Law's matching fund mechanism "enforces substantially the same coercive choice on traditional candidates [rejected by *Davis*]—to 'abide by a limit on personal expenditures' or else endure a burden placed on that right," and that the Arizona law thereby "imposes a substantial burden on the First Amendment right to use personal funds for campaign speech" (quoting *Davis*, 128 S. Ct. at 2772)).[44]

Just like the provisions addressed in *Davis*, the CEP's trigger provisions impermissibly force the speaker to either limit her own expenditures or endure the burden of activating increased expenditure limits for and pouring public dollars into the coffers of her major party opponents. Just as in *Davis*, these provisions must be shown to serve a "compelling state interest." *Id*. at *10.

The state has no legitimate—much less compelling—interest in restricting the expenditures of candidates who do not participate in the CEP. However one may phrase it, the State's interest here is precisely the one rejected in *Davis*. To facilitate its public financing system, the state is attempting to level the playing

[44] Defendants summarily characterize *Ognibene v. Parkes*, 599 F.Supp.2d 434, 444, 449-50 (S.D.N.Y. 2009) and *Ohio Right to Life Soc., Inc. v. Ohio Elections Com'n.*, 2008 WL 4186312 (S.D. Ohio 2008), as "refrain[ing] from applying *Davis* to state statutes different from the Millionaire's Amendment." Defs' Br. at 125 *n. 38*. These decisions are irrelevant here. The first, which concerns contribution limits rather than chill on expenditures, merely echoes the distinction between the two discussed in *Davis* and applies the level of scrutiny appropriate to contribution limits articulated in *Davis*. The second merely applies to disclosure requirements the same level of scrutiny that *Davis* applied to disclosure requirements.

field between candidates who participate in the CEP and candidates who do not. *Davis* categorically rejected such governmental paternalism:

> Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.

Davis, 128 S.Ct. at 2774 (citations omitted).

Even if the state's interest in facilitating its public financing system could arguably justify some burden on Plaintiffs' speech, the trigger provisions are not narrowly tailored to advance the State's interests. Major-party candidates receive ample incentives and can qualify for sizable grants. Except in a handful of unusually competitive elections, the grant amounts significantly exceed actual campaign expenditures in past elections. (SPA-78). The organizational expenditure provision augments the grants to ensure that every participating candidate is more than adequately funded. Under these circumstances, there is no justification for releasing participating major-party candidates from the initial expenditure limits and funding them at even more excessive levels.

In the potent imagery evoked by the district court, like the sword of Damocles which need not fall to be felt, the matching fund provisions hang above

Plaintiffs, chilling Plaintiff's First-Amendment protected expression. Should this Court find the CEP otherwise constitutional, *Davis* requires that it enjoin the trigger provisions.

D. The Appropriate Remedy is to Enjoin Enforcement of the Entire Statute.

Intervenors argue that the District Court erred in enjoining the CEP in its entirety rather than severing certain provisions and leaving others in force, an argument the Attorney General and the SEEC have abandoned. Int.-Defs' Br. at 2, 40-61. Intervenors do not explain how their argument survives the statute's explicit anti-severance provision, §9-71 (SPA-321), which appears to expressly prohibit the outcome Intervenors promote. Section 9-717 provides that, once a court enjoins distributions from the fund for any reason, all changes made by CFRA become inoperative, including all provisions of the CEP.

> [Where] a court of competent jurisdiction prohibits or limits, or continues to prohibit or limit, the expenditure of funds from the Citizens' Election Fund established in section 9-701 for grants or moneys for candidate committees authorized under sections 9-700 to 9-716, inclusive … sections … 9-700 to 9-716, inclusive … shall be inoperative and have no effect.

SPA-321.

The CEP is a funding statute; any order enjoining its enforcement will necessarily have the effect of "prohibiting or limiting the expenditure of funds from the CEP." The only reasonable construction of §9-717 is that it provides that,

if the Court enjoins the enforcement of any provision of the CEP, the statue will be rendered inoperative in its entirety. However narrow a remedy this Court might seek to impose, enjoining the CEP's qualifying criteria and funding provisions would trigger §9-717.

The suggestion that the legislature might be amenable to this Court changing the terms of the statute—and the functioning of the legislature's campaign finance scheme—is belied by the plain language of §9-717. If Intervenors believe that this Court should pick and choose from among the CEP's provisions despite this language, they should explain how doing so would not frustrate the intent of the legislature. Defendants take the position, for example, that the additional qualifying criteria are critical to the integrity and financial soundness of the CEP. If true, Intervenors are wrong to suggest the legislature would be satisfied with a system that lacks those elements. Similarly, Defendants argue that the base grants for major parties are appropriately tailored to incentivize participation and that the reduced grants for minor parties are necessary to avoid wasteful spending. If correct, Intervenors are wrong to suggest that the legislature would approve a system of funding that is less generous to major parties and more generous to minor parties.

Finally, there is no reasonable basis upon which to conclude that the legislature would approve a public financing program that lacks the matching fund

provisions. That the matching fund provisions are essential to the success and operation of the CEP as a whole is offered as the very rationale for their inclusion in the statute. According to the Defendants' own witnesses, no sensible candidate would participate in the CEP if he would have to stand idly by when targeted by a negative advertising campaign or opposed by a high-spending opponent. (EX-2954-2956). If Defendants are correct about the inextricable relationship of the different provisions of the CEP, the Court should not attempt to sever offending provisions. *See Randall v. Sorrell*, 548 U.S at 262 ("To sever provisions to avoid constitutional objection would require us to write words into the statute, or to leave gaping loopholes … or to foresee which of many possible ways the legislature might respond to the constitutional objections we have found.").

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Dated: December 11, 2009

Respectfully submitted,

/s/ *Mark J. Lopez*
Mark J. Lopez
Lewis, Clifton & Nikolaidis, P.C.
350 Seventh Avenue
Suite 1800
New York, NY 10001
(212) 419-1512
mlopez@lcnlaw.com

Benjamin Sahl
American Civil Liberties Union Foundation
125 Broad Street, 17th Floor
New York, New York 10004
Tel: (212) 549-2500
bsahl@aclu.org

David McGuire
American Civil Liberties Union of Connecticut
2074 Park Street, Suite L
Hartford, Connecticut 06106
(860) 523-9146
dmcguire@acluct.org

Counsel for Plaintiff-Appellees

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a) because:

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DATED: December 11, 2009

/s/ *Mark J. Lopez*

Mark J. Lopez
Lewis, Clifton & Nikolaidis, P.C.
350 Seventh Avenue, Suite 1800
New York, NY 10001
(212) 419-1512

Counsel for Plaintiffs-Appellees Green Party of CT, et al.

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I hereby certify that on this 11th day of December, 2009, a copy of the foregoing Brief for Plaintiffs-Appellees was served was sent by electronic mail and U.S. mail pursuant to Rule 25 of the Federal Rules of Appellate Procedure to:

Perry A. Zinn Rowthorn
Maura Murphy Osborne
Gregory T. D'Auria
Assistant Attorneys General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Phone: (860)808-5020
Fax: (860)808-5347
Perry.Zinn-Rowthorn@po.state.ct.us
Maura.MurphyOsborne@po.state.ct.us
Gregory.DAuria@po.state.ct.us

Monica Youn
Angela Migally
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Phone: (212) 998-6730
Fax: (212) 995-4550
monica.youn@nyu.edu
angela.migally@nyu.edu

Ira M. Feinberg
David Dunn
HOGAN & HARTSON L.L.P.
875 Third Avenue
New York, NY 10022
Phone: (212) 918-3000
Fax: (212) 918-3100
IMFeinberg@hhlaw.com
DDunn@hhlaw.com

Mark J. Lopez
Mark J. Lopez
Lewis, Clifton & Nikolaidis, P.C.
275 Seventh Avenue, Suite 2300
New York, New York 10001
Tel: (212) 419-1512
mlopez@lcnlaw.com
Counsel for Plaintiffs-Appellees