09-3760-cv(L)
09-3941-cv(CON)

IN THE

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, ROGER C. VANN, BARRY WILLIAMS, ANN C. ROBINSON,

Plaintiffs-Appellees,

AMERICAN CIVIL LIBERTIES UNION OF CONNECTICUT, ASSOCIATION OF CONNECTICUT LOBBYISTS,

Plaintiffs,

v.

JEFFREY GARFIELD, in his official capacity as Executive Director and General Counsel of the State Elections Enforcement Commission, RICHARD BLUMENTHAL, in his official capacity as Attorney General,

Defendants-Appellants,

(Additional Caption On the Reverse)

On Appeal from the United States District Court for the District of Connecticut

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Defendants,

and

AUDREY BLONDIN, COMMON CAUSE OF CONNECTICUT,
CONNECTICUT CITIZEN ACTION GROUP, KIM HYNES, TOM SEVIGNY,

Intervenors-Defendants-Appellants.

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PRELIMINARY STATEMENT

Intervenors-Defendants-Appellants Connecticut Common Cause, Connecticut Citizen Action Group, Audrey Blondin and Tom Sevigny (hereinafter "Intervenors") respectfully submit this reply brief in further support of the constitutionality of Connecticut's Citizens' Election Program ("CEP").[1] Intervenors filed a separate opening brief to emphasize two principal points: (1) that the District Court erroneously disregarded the Supreme Court's controlling decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), and applied a novel rationale – and standard of review – to find constitutional "injury" suffered by minor parties that is inconsistent with *Buckley* and would make it impossible for any state to adopt a public financing system; and (2) that the District Court erred in failing to consider the scope of the remedy required to address the constitutional violations it found, when more narrow injunctive relief could fully redress any valid claims Plaintiffs may have while preserving the operation of Connecticut's public financing system.

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[1] Intervenors also join the reply brief submitted by Defendants-Appellants Jeffrey Garfield, Executive Director of the Connecticut State Elections Enforcement Commission ("SEEC"), and Richard Blumenthal, Attorney General of the State of Connecticut (hereinafter, "Defendants").

Intervenors submit this separate reply brief to address the responding brief of Plaintiffs-Appellees (hereinafter, "Plaintiffs") on these two points. First, with respect to *Buckley*, the Supreme Court held that non-major parties and candidates have no valid constitutional challenge to a public financing system unless it "disadvantages non-major parties by operating to reduce their strength below that attained without any public financing." 424 U.S. at 99. Plaintiffs' brief, like the District Court's opinion, makes no effort to show that minor parties have suffered any <u>reduction</u> in their political strength as a result of the CEP. Indeed, in 2008, non-major party candidates saw both their share of the vote and their fundraising totals increase, whether or not they participated in the CEP.

Instead, Plaintiffs argue for a new standard – that a public financing system unconstitutionally discriminates against non-major party candidates if the benefits conferred on participating candidates "enhanc[e] the relative strength of major parties." Brief of Plaintiffs-Appellees ("Pl. Br.") at 39. Plaintiffs claim that this "relative strength" standard is supported by *Buckley*, but this is not true. The presidential public financing scheme upheld in *Buckley* plainly provided substantial benefits to the major parties that were not available to minor parties or their candidates, and enhanced the "relative strength" of the major parties in the same way that the CEP allegedly does.

Plaintiffs' efforts to distinguish *Buckley* on its facts, and to argue that that scheme was somehow more beneficial to non-major party candidates, are completely unpersuasive. Any fair reading of *Buckley* shows that the Court rejected the "relative strength" standard suggested by Plaintiffs. Plaintiffs' proposal should be understood for what it is: an end-run around *Buckley*'s holding that a public financing system invidiously discriminates against minor party candidates only if it <u>reduces</u> their political strength.

Nor is there anything in the Supreme Court's decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008), that would support Plaintiffs' "relative strength" standard. *Davis* did not involve any public financing system, or any alleged discrimination between major party and minor party candidates; instead, it involved a "quite different" issue, 128 S. Ct. at 2772, implicated by a law that imposed different fundraising limits on two similarly-situated privately-financed candidates, based solely on the wealth and campaign expenditures of one of them. Indeed, the Court expressly reaffirmed *Buckley*'s holding with respect to public financing systems, and cannot be viewed as making, *sub silentio*, the dramatic change in the law governing public financing systems that Plaintiffs assert.

Second, on the remedy issue, Plaintiffs argue that Section 9-717 of the CEP demonstrates conclusively that the Connecticut legislature did not

intend the challenged provisions – the differential qualifying contributions, grant reduction provision and matching funds provisions – to be severable. This claim is without merit, and is based on a misunderstanding of the language and purpose of Section 9-717. Properly read, Section 9-717 only applies when a court issues an injunction against the "expenditure of funds" from the CEP in an election year – and provides in that circumstance that the fundraising limitations of the Act no longer apply, obviously so that Connecticut candidates will be able to finance their ongoing campaigns. Section 9-717 is simply irrelevant to the question whether the challenged provisions of the CEP are severable, and Plaintiffs have made no showing that the state's presumption of severability should not be applied, and that the Legislature would not have intended to enact the CEP without these provisions. There is simply no reason for the federal courts to strike down the entirety of a highly successful and widely supported public financing system, merely because certain relatively tangential (and easily remedied) aspects of the system are deemed to be constitutionally flawed.

ARGUMENT

I. *Buckley's* Diminution of Political Strength Standard Is Controlling.

Plaintiffs attempt to distinguish *Buckley* in two ways, but neither distinction is persuasive. They first inaccurately characterize the public

funding scheme upheld in *Buckley* as one that is substantially less onerous for non-major party candidates than the CEP. *See, e.g.,* Pl. Br. at 45-46. Although the District Court accepted this claim, SPA-70, in fact the CEP offers non-major party candidates far greater political opportunities than would have been available if it had been strictly modeled on the Federal Election Campaign Act ("FECA"). Second, they claim (and the District Court agreed) that, unlike non-major parties in Connecticut, no non-major parties have made substantial inroads into major party dominance of the presidential election system. *See, e.g.*, Pl. Br. at 41; SPA-70. This characterization of the history of the presidential public financing system is inaccurate, and provides no basis for distinguishing *Buckley*.

A. The Public Funding System Upheld in *Buckley* is Less Favorable to Non-major Party Candidates than the CEP, Not More Favorable.

Plaintiffs claim that the CEP "discriminates against [non-major] parties in numerous critical respects that were not present in *Buckley*." Pl. Br. at 45-46. This contention is simply not true; the FECA scheme approved in *Buckley* was in fact less supportive of non-major parties than the CEP, not more favorable to them. As detailed below, *Buckley* upheld a system where: (1) qualification for funding was exclusively tied to a party's prior vote totals, so that parties that had received less than 5% of the prior vote or were

ballot qualified in fewer than ten states were completely excluded from pre-election funding; (2) non-major parties were foreclosed from receiving the same funding grants as major parties; and (3) no non-major party candidate would be eligible for a pre-election grant in the first election after the law's effective date. By contrast, under the CEP: (1) candidates can qualify through petitioning even if they cannot qualify based on prior vote totals; (2) full grants are available to non-major party candidates who can achieve the CEP's 20% prior vote or petitioning thresholds; and (3) in 2008, 15 non-major party candidates received CEP funding, EX-931, and 21 non-major party candidates will be automatically eligible for CEP funding in 2010, EX-4490.

Under the public financing scheme upheld in *Buckley*, a candidate's ability to qualify for public monies depends exclusively upon his or her status as a major, minor or new party candidate, which is solely determined by the prior vote percentage attained by the candidate's party in the previous presidential election. Under FECA, (1) a "major party" is a party whose candidate for President in the most recent election received 25% or more of the popular vote; (2) a "minor party" is a party whose candidate received at least 5% but less than 25% of the vote and has qualified for the general election ballot in at least ten states; and (3) a "new party" encompasses all

other parties, including both newly-created parties, those receiving less than 5% of the vote, and those ballot-qualified in fewer than ten states. *Buckley*, 424 U.S. at 87; *see* 26 U.S.C.A. § 9002(6)-(8).

Under FECA, all major party candidates are automatically entitled to full and equal funding in the general election, regardless of their party's vote totals in the previous presidential election. 424 U.S. at 87; 26 U.S.C.A. § 9004(a)(1). New party candidates, on the other hand, are strictly ineligible for <u>any</u> pre-election funding – in other words, any candidate whose political party failed to achieve at least 5% of the total popular vote in the last presidential election or who failed to qualify for the general election ballot in at least ten states is completely shut out of the public funding program. 424 U.S. at 89; 26 U.S.C.A. § 9004(a). A minor party candidate's pre-election funds are based on the ratio of (a) votes achieved by his or her party in the preceding presidential election to (b) the average prior vote percentage of the major party candidates. 424 U.S. at 88; 26 U.S.C.A. § 9004(a)(2).[2] Under this formula, a minor party candidate can never receive more than a fraction of the grant amounts awarded to major party candidates. For example, if a

[2] As the D.C. Circuit in *Buckley* explained, under the FECA system, "major parties, regardless of actual showing in the previous election, are entitled to equal payments from the [FECA program], whereas minor parties are tied to a level which is exactly proportionate to their track records." *Buckley v. Valeo*, 519 F.2d 821, 882 n.155 (D.C. Cir. 1975).

minor party candidate had received 10% of the popular vote in 1972 with the remainder of the vote divided evenly between two major party candidates, the minor party's 1976 candidate would only be awarded only 22% of the grants that the major party candidates would receive. *See* 424 U.S. at 102 n.138. Even if a minor party candidate had received 20% in the 1972 election with the remainder of the vote divided evenly between the two major parties, that party would be entitled to only 50% funding in the 1976 election. By contrast, under the CEP, a 10% showing entitles the party's candidate to a 1/3 grant, a 15% showing entitles candidates to a 2/3 grant, and a 20% showing would make that party's candidates eligible for full funding for all races in the next election.[3]

Thus, Plaintiffs' assertion that "*Buckley* did not contemplate" the award of "grants based on a different formula that pays [non-major parties] less" is patently wrong. Pl. Br. at 86. Moreover, although Plaintiffs emphasize that new and minor party candidates have an opportunity under FECA to collect additional post-election funds if they out-perform their party's prior vote total, Pl. Br. at 41, 70, the practical use of post-election funding is effectively limited to repaying loans from national banks. *See*

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[3] The major parties are also entitled to receive full public funding for their party conventions, while minor parties' convention funds are limited by the same prior vote total formula described above. 424 U.S. at 87-88.

Buckley, 424 U.S. at 102. As such loans are rarely available to non-major party candidates, the Court recognized that FECA's post-election funding allowance is of little real value to non-major parties in most circumstances. *See id*.

To illustrate the heavier burdens posed by the FECA scheme, consider Connecticut Working Families Party senatorial candidate Cicero Booker. In 2008, he ran in a senate district where his party received only 4.5% of the vote in the previous senatorial election. SPA-164 (showing 2006 vote totals in Senate District 15). By collecting signatures and raising $15,000 in qualifying contributions, Booker became eligible for and received a full CEP grant of $85,000. EX-4491. Had he been subject to the same criteria imposed by the presidential funding scheme, however, Booker would have been foreclosed from participating in the public financing system and ineligible to receive any pre-election funding, and he would have received only a small, fractional post-election grant, despite the strong grassroots support he was able to demonstrate through petitioning. Similarly, Lowell Weicker – "the most successful minor party candidate in the history of [Connecticut]," SPA-86 – would not have been eligible for pre-election public funding in his 1990 gubernatorial race under the criteria imposed by the presidential funding scheme, notwithstanding his massive popular

support and demonstrated ability to collect hundreds of thousands of petition signatures. EX-2159-60.

When the Supreme Court approved FECA's public funding program, it recognized that no non-major party candidate would receive funds in the next election. *Buckley,* 424 U.S. at 99 n.135. Indeed, for 20 years after *Buckley*, no minor party presidential candidate received a pre-election public financing grant for the general election. *See* FEC, Presidential Public Funding Fact Sheet (2009), http://www.fec.gov/press/bkgnd/Pres_Fund/Pres_Public_Funding.pdf.[4] In fact, only one minor party in history – the Reform Party – has qualified for pre-election general election funding under FECA, and both of those awards – in 1996 and 2000 – were based upon the electoral showing of a single candidate, H. Ross Perot.[5] Even in those elections, the minor party was

[4] In 1980, John Anderson, an independent candidate, achieved approximately 6.7% of the popular vote and received limited *post*-election funds. *See* FEC, Presidential Public Funding Fact Sheet (2009); FEC, The Presidential Public Funding Program app. 3 (1993), http://www.fec.gov/info/pfund1.htm; U.S. Nat'l Archives & Records Admin., Historical Election Results: Electoral College Box Scores 1789-1996, http://www.archives.gov/federal-register/electoral-college/votes/index.html ("NARA Election Results").

[5] In the 1992 presidential election, Perot won 19% of the popular vote, thus qualifying the Reform Party for a grant of slightly more than 50% of the grant awarded major party candidates in the next election. In 1996, Perot won 8.6% of the popular vote, making the Reform Party eligible for

awarded only a fraction of the major party grant amount – approximately a one-half grant in 1996 and a one-fifth grant in 2000. *See id*.

B. *Buckley* is Similarly Not Distinguishable on the Basis of Minor Parties' Allegedly Greater Success in Connecticut.

Plaintiffs' other attempts to distinguish *Buckley* are similarly unpersuasive. For example, Plaintiffs claim that the situation of minor parties in Connecticut is different from the federal situation because "since 1860, no third party had posed a credible threat to the two major parties in Presidential elections." Pl. Br. at 41. But in fact, in 1968 – the election immediately before FECA was enacted – George Wallace ran on the American Independent Party line and received 13.5% of the popular vote, and in 1992, Ross Perot won 19%, *see* NARA Election Results, *supra* n. 4, levels comparable to the support that minor party candidates in Connecticut have occasionally reached.

Similarly, the District Court asserted that presidential elections, unlike state and legislative elections in Connecticut, are "always" competitive between the major parties, thereby justifying FECA's grant of equal funds to all major candidates. *See* SPA-70. This claim is also untrue, according to the District Court's own definition of uncompetitiveness (*i.e.*, any election

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approximately 21% of the grant amount awarded to major party candidates in the 2000 election. *See* FEC, Presidential Public Funding Fact Sheet (2009); NARA Election Results, *supra* n.4.

with a margin of victory over 20%). SPA-39. At the time *Buckley* was decided, two of the three most recent presidential elections had been uncompetitive because the weaker major party candidate had lost by a "landslide" margin of more than 20%.[6]

Equally important, the examples upon which the District Court relied for the relative "strength" of minor party candidates – former Governor Lowell Weicker and U.S. Senator Joseph Lieberman – are both anomalous, since both candidates had built their popular support as major party candidates and their success does not indicate any general burgeoning of support for Connecticut's non-major parties. EX-886. Indeed, no non-major party candidate has won more than 2.5% of the popular vote in any statewide election in Connecticut in the past decade. EX-925.

II. The *Buckley* Court Recognized that Substantial Deference is Appropriate when Evaluating Legislative Efforts to Enact Public Financing Systems.

Plaintiffs also ignore that the overriding theme of the *Buckley* Court's review of FECA's presidential public financing system is the appropriateness of deference to the legislature in light of the myriad

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[6] Richard Nixon won 60.7% of the popular vote to George McGovern's 37.5% in the 1972 presidential election and Lyndon Johnson won 61.1% of the popular vote to Barry Goldwater's 38.5% in the 1964 presidential election. *See* Wikipedia.com, List of Landslide victories, http://en.wikipedia.org/wiki/List_of_landslide_victories (last visited Dec. 29, 2009).

constitutional interests at play in the public financing arena. The *Buckley* Court consistently emphasized the reasonableness of the balance Congress struck among competing interests and goals. For example, the *Buckley* plaintiffs challenged the legislative decision to use vote totals from past elections as the sole eligibility criteria for general election funding. 424 U.S. at 99. The Court refused to second-guess the legislature, explaining that "Congress was not obliged to select instead from among [the plaintiffs'] suggested alternatives." *Id*. at 100. The Court recognized that many legitimate reasons could reasonably support Congress' decision, such as the cost and administrative burden imposed by petition drives, the potential unreliability of opinion polls to gauge current levels of public support, and the difference between primary and general election campaigns. *See id*. at 100, 100 n.136.

Similarly, the plaintiffs in *Buckley* challenged the 5% prior vote threshold for pre-election funding as unreasonable, but the Supreme Court held that "the choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make." *Id*. at 103. The Court noted that "a range of formulations would sufficiently protect the public fisc and not foster factionalism," and held that "[w]e cannot say that Congress' choice falls without the permissible range." *Id*. at 103-04.

In these examples and many others, the Court repeatedly emphasized that it would defer to the reasoned judgments of the legislature. *See, e.g.*, *id.* at 98 (deferring to legislative decision to set disparate grant levels for major and non-major party candidates); 99-100 (refusing to obligate legislature to provide alternative ways for non-major party candidates to qualify for funding); 104 n.141 ("Congress could reasonably determine that there was no need for reforms as to minor-party conventions."), 106 (noting range of possible legitimate reasons for legislature to decide to limit scope of primary election reform). The Court was clearly unwilling to substitute its own policy preferences for that of elected officials with intimate knowledge of the realities of political campaigns.

This principle of deference is notably lacking in the District Court's assessment of the CEP. As explained in Intervenors' opening brief, the District Court improperly second-guessed the decisions of the Connecticut legislature regarding a number of crucial aspects of the design of the CEP: whether the grant amounts were an adequate incentive for a participating candidate's voluntary acceptance of an expenditure ceiling as well as strict limits on party support; whether a "statewide proxy" was a reasonable measure of a candidate's likely performance in a given legislative district; whether a 10% showing of popular support was a reasonable threshold at

which to award public funds; whether a 20% showing demonstrated sufficient viability to warrant a full grant of public monies; and whether the ability to draw on matching funds in unexpectedly high-spending races would be necessary to incentivize sufficient participation to ensure the program's success. *See* Int. Br. at 17-40.

In overturning each of these legislative determinations, the District Court did not attempt to show that the legislature's decisions were erroneous or ill-founded – indeed, the evidence shows that, in designing the CEP, the Connecticut legislature successfully balanced multiple competing interests and goals and ultimately designed a public funding system that led the majority of Connecticut's elected officials to participate, while also allowing substantial nonmajor party participation.[7] Nor did the District Court base its holding of unconstitutionality on any demonstrated detriment to the political strength of minor parties – again, the evidence demonstrates that minor parties have maintained their political strength and even flourished since the enactment of CEP. *See, e.g.*, EX-4488, 4573 (increased vote percentages); EX-4483-84, 4495, 4574 (increased fundraising); EX-4565 (number of non-major candidates); EX-4493-94, 4575, 4577-78 (number of plaintiffs'

[7] For example, the legislature's prediction that candidates whose parties had received 20% of the statewide vote would receive at least 20% of the vote in a legislative race was correct in 95% of races in 2008. EX-4487.

candidates and average vote percentages); EX-4483-84, 4558, 4577-78 (plaintiffs' fundraising).

Instead, the District Court simply substituted its own judgment regarding the optimal design of the CEP for that of the legislature. For example, in striking down the CEP's eligibility thresholds as too "onerous," the District Court merely opined that "very few" minor party candidates would be automatically eligible for CEP funding under the existing thresholds, and noted the truism that had the thresholds been set at five percent, more minor party candidates would have been automatically eligible. SPA-84. The District Court did not attempt to argue that non-major party candidates who received between five and ten percent of the vote were somehow viable, competitive, or otherwise objectively deserving of tens of thousands of dollars in public funds. Instead, in striking down these thresholds on constitutional grounds, the District Court relied upon nothing more than its own subjective opinion as to the appropriate percentage threshold, thus overstepping the proper limits of the judicial role.

III. Plaintiffs' "Relative Strength" Theory of Injury Contradicts *Buckley* and All Other Relevant Case Law.

A. Plantiffs' Theory Is Based on a Misreading of *Buckley*, and Contradicts its Central Holding Regarding the Constitutionality of Public Financing Systems.

Plaintiffs strain to find support in *Buckley* for their "relative strength" theory. *See, e.g.*, Pl. Br. at 42-43, 59. Plaintiffs claim that *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." Pl. Br. at 42. In actuality, however, nothing in the language or holding of *Buckley* provides any support for this proposition. On the contrary, Plaintiffs' theory is inconsistent with the Supreme Court's decision, which recognized that the federal system provided substantial benefits to major party candidates that were largely denied to minor party candidates. Plaintiffs' theory, if adopted, would make unconstitutional any public financing system that provided any net advantage to participating candidates – including the presidential system the Court in *Buckley* upheld.

Plaintiffs argue that *Buckley* "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," Pl. Br. at 42, but this "explicit premise" appears nowhere in the Court's opinion. On the contrary, *Buckley*

expressly recognized that FECA would offer participating candidates "the enhancement of opportunity to communicate with the electorate." *Id*. at 95.

To support their position, Plaintiffs cite to a single phrase and its accompanying footnote. Pl. Br. at 42 (citing *Buckley*, 424 U.S. at 95 n.129). In the cited passage, the Court noted that participating candidates are subject to a "countervailing disadvantage" in exchange for receiving public monies – they agree to abide by expenditure limits that cannot be constitutionally imposed on nonparticipating candidates. *Id*. at 95, 99.[8] Nothing in *Buckley*, however, suggests that this "countervailing disadvantage" must completely cancel out any advantage a participating candidate derives from the system, nor that any relative advantage would render the system unconstitutional.[9]

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[8] Of course, the same is true here. As Defendants' reply brief explains in detail, CEP participating candidates are subject to real, legally enforceable expenditure limits, and extensive regulatory controls. *See* Def. Rep. Br. at 28-29.

[9] Indeed, in *American Party of Texas v. White*, the Court upheld a public funding program where major parties were benefitted without any countervailing burden. 415 U.S. 767, 792-94 (1974); *see also* page 23, *infra*. Moreover, subsequent case law has clarified that although a public funding program cannot be so advantageous that participation ceases to be voluntary, a system may offer its participants substantial benefits before even approaching this constitutionally-impermissible line. *North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427, 436-37 (4th Cir. 2008); *see also Daggett v. Comm. on Gov't Ethics & Elec. Practices*, 205 F.3d 445, 471 (1st Cir. 2000) (describing circuit court decisions upholding state public funding systems that offered "an array of benefits" to "entic[e]" participants).

See id. at 94-95, 99. Indeed, the Court recognized that the weaker major party candidate would be given equal funding to the stronger one, thereby accepting that some participants would enjoy greater relative benefits than others under the public financing system. *See id*. at 98.

The cited footnote provides no support for Plaintiffs' interpretation. In response to the minor party appellants' argument that they would not be able to raise money to equal major-party spending, the Court noted that, "[a]s a practical matter," the award of funding to major parties would make little difference to minor parties' ability to close the fundraising gap, since it would merely substitute public funds for the private funds that major party candidates had previously raised. *Id.* at 95 n.129. Nothing in this text suggests what Plaintiffs now argue – *i.e.*, that any improvement in the relative position of major party candidates would render a public financing system unconstitutional. The main point of both cited passages is that nonparticipating non-major parties had demonstrated no injury, since they enjoyed the same opportunities to access the ballot and to raise private funds that they always had. *See id*. at 94-95, 99. Simply put, Plaintiffs' implausible reading of *Buckley* contradicts the Court's holding: a public funding program is only constitutionally infirm if it invidiously

discriminates against non-major parties "by operating to reduce their strength below that attained without any public financing." *Id.* at 99.

Moreover, recognition of Plaintiffs' relative strength claim would render all public financing systems unworkable, or, at the very least, constitutionally suspect. All public financing systems provide some relative advantage to participating candidates – otherwise, no rational candidate would accept an expenditure ceiling and strict limits on private fundraising and party support. *See, e.g.*, *Daggett*, 205 F.3d at 470 ("[A] voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice.") (quoting *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998)). To constitutionally forbid a public financing system from offering any net benefit to participating candidates would straitjacket legislative efforts to design effective public financing systems, and potentially undermine the constitutionality of all such programs.

B. The "Relative Strength" Theory of Injury is Not Supported by Any Public Financing Case Law.

Apart from the decision below, no court has ever recognized the "relative strength" claim advanced by Plaintiffs and erroneously accepted by the District Court. Instead, both the Supreme Court and the circuit courts have reaffirmed that the controlling test for invidious discrimination is

whether the non-major party can prove any actual decline in political strength. *Buckley*, 424 U.S. at 94-95, 99; *American Party*, 415 U.S. at 794; *Nat'l Comm. of the Reform Party v. Democratic Nat'l Comm.*, 168 F.3d 360, 366 (9th Cir. 1999); *Libertarian Party of Indiana v. Packard*, 741 F.2d 981, 991 (7th Cir. 1984).

Neither the District Court nor Plaintiffs has explained how the relative strength theory is valid in the face of this legal authority. Plaintiffs bury discussion of these cases in a single footnote. Pl. Br. at 44 n.14. Despite Plaintiffs' efforts to distinguish these controlling cases, their holdings flatly contradict Plaintiffs' new theory of injury.[10]

For example, in *American Party*, minor party plaintiffs claimed that a public financing system was discriminatory since it provided grants to finance the major party primary process, but provided no money to minor parties to offset the expense of their conventions and petitioning process. 415 U.S. at 793-94. The Court did not measure the alleged injury to minor

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[10] Plaintiffs' attempts to distinguish *Reform Party* and *Packard* are unconvincing, since none of the distinctions to which they point cast doubt upon the applicability of the *Buckley* standard. *See* Pl. Br. at 44 n.14. Indeed, in *Packard* the Seventh Circuit affirmed that *Buckley* looked at factors describing the absolute position of minor parties to determine if there had been a reduction in political strength. *See Packard*, 741 F.2d at 987, 991. Plaintiffs acknowledge that the Seventh Circuit in *Packard* "remanded [the case] to determine if the funding scheme operated to reduce the political opportunities of minor parties." Pl. Br. at 44 n.14 (emphasis added).

parties by analyzing whether the grant enhanced the power of major parties relative to minor parties. Instead, it looked to whether the financing scheme caused any actual injury to plaintiffs' existing political opportunity. Finding no such detriment – despite the unquestioned advantage provided to major party candidates – the Court upheld the challenged system. *Id*. at 794. This is simply incompatible with Plaintiffs' relative strength theory – indeed, major parties were benefitted, without any countervailing burdens, and minor parties were entirely shut out.[11]

Plaintiffs' relative strength theory of injury is similarly inconsistent with case law concerning public financing. The circuits that have considered state public funding programs have made clear that such programs need not achieve an "exact balance" between benefits and burdens, but may offer "incentives for participation." *Daggett*, 205 F.3d at 470; *accord Leake*, 524 F.3d at 436 ("[C]ourts recognize that a public financing system may provide significant incentives for participation without crossing the line into impermissible coercion."); *Gable*, 142 F.3d at 947-49

[11] Plaintiffs argue that in *American Party*, "minor parties were not required to hold primaries" and that the money in *American Party* went to the parties and not the candidates. The first point has no relevance since under Connecticut law, as in Texas, minor parties are not required to hold primaries. Similarly, "[t]hat the aid in *American Party* was provided to parties and not to candidates . . . is immaterial." *Buckley*, 424 U.S. at 95 n.130.

(upholding public financing scheme where substantial advantages to participants clearly outweighed costs of participation); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1555 (8th Cir. 1996) (concluding that "any favoritism enjoyed by the publicly financed candidate" as result of participation "is simply a permissible byproduct of the campaign financing process"); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (recognizing state interest in "making it more probable that candidates will choose to partake of public financing" by incentivizing participation). The Seventh Circuit in *Packard*, for instance, found no *per se* constitutional problem with a scheme that lacked any restriction on the use of public funds given to political parties, even though participants suffered no countervailing burden at all. 741 F.2d at 988 n.4. Under Plaintiffs' relative strength theory, the relative advantage enjoyed by participating candidates in each of the programs mentioned above would have rendered those programs unconstitutional. Instead, none of the schemes at issue was invalidated.

C. *Davis v. FEC* Does Not Lend Support to Plaintiffs' New Theory of Injury.

Finding no support in public financing case law for their novel "relative strength" standard, Plaintiffs rely heavily on the Supreme Court's decision in *Davis v. FEC*. *See* Pl. Br. 42-44, 63-64, 91-92. In *Davis*, the Court held unconstitutional the so-called "Millionaire's Amendment" to the

Bipartisan Campaign Reform Act, which increased three-fold the maximum contribution that a congressional candidate faced with a high-spending opponent could accept, while leaving his opponent subject to the original contribution limits. 128 S. Ct. at 2766. The Court explained that it had "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other" and held these "discriminatory fundraising limitations" invalid. *Id*. at 2771.

Plaintiffs attempt to read *Davis* to stand for a broad constitutional principle that a benefit to one candidate constitutes a cognizable First Amendment injury to the candidate denied the benefit, and that the government cannot constitutionally adopt a policy "that increases the ability of your opponent to speak." Pl. Br. at 34, 48. The Court's holding in *Davis* was in fact far more limited, and provides no support for these extravagant claims. Properly construed, *Davis* has no bearing on Plaintiffs' claims that the CEP unfairly discriminates against minor parties.[12]

Plaintiffs ignore the fact that *Davis* involved candidates who were privately financed, and did not address any aspect of a public financing scheme. Indeed, Plaintiffs' simplistic reading of *Davis* would potentially invalidate <u>all</u> public financing schemes, since <u>any</u> system that gives public

[12] For additional discussion of Plaintiffs' mischaracterization of *Davis*, *see* Def. Br. at 123-26 and Def. Reply Br. at 53-58.

funds to a candidate's opponent "increases his ability to speak." Pl. Br. at 92. In effect, Plaintiffs interpret *Davis* as somehow overturning *Buckley*'s holding that a plaintiff cannot establish cognizable injury merely from "the claimed denial of the enhancement of opportunity to communicate with the electorate that [public funds] afford eligible candidates." *Buckley*, 424 U.S. at 95. But the Court in *Davis* expressly reaffirmed *Buckley*'s holding that public financing schemes are constitutional, 128 S. Ct. at 2772, and emphasized that the issues in *Davis* were "quite different." *Id*.

Public financing schemes inevitably put candidates who decide to participate and those who do not on different, asymmetrical financing regimes – the candidate participating in the CEP is not permitted to raise any funds after the initial qualifying contributions, while the non-participating candidate is free to raise as much as she likes. And the Supreme Court in *Buckley* held that this choice is constitutional, and that the privately financed candidate is not constitutionally injured as a result of the public funding received by her opponent.

The District Court recognized that *Davis* was "not directly on point because it does not address a public financing scheme." SPA-68 n.49. Nevertheless, the District Court found *Davis* "instructive," *id*., because of its holding that "the government may not infringe on political candidates' First

Amendment rights in order to level the playing field between candidates possessing different levels of wealth." *Id*. (citing 128 S. Ct. at 2772-73). But this view is based on a misreading of *Davis* and its applicability to the very different context of a public financing scheme.

Contrary to Plaintiffs' argument and the District Court's reasoning, the provisions of the CEP are not intended to "level the playing field" by advantaging particular candidates. Plaintiffs ignore that the CEP candidate is absolutely prohibited from raising any funds for her campaign, whereas the privately-financed candidate can raise funds at will (and the independent spender can spend funds at will). It is overly simplistic and erroneous to equate a grant of public financing to participating candidates with an attempt to discriminate against candidates lacking the requisite popular support to qualify for funds. Nothing in *Davis* has any bearing on this very different situation.

IV. The Challenged Provisions Can Readily Be Severed.

In Intervenors' opening brief, we demonstrated that the District Court was required as a matter of constitutional principle to adopt the narrowest possible remedy to address any constitutional defects in the statute; that Connecticut law required the District Court to apply a presumption of severability; that the Connecticut Legislature specifically intended the

provisions at issue to be treated as severable in the event of a constitutional flaw; and that any unconstitutional provision can be readily severed to preserve the State's public financing scheme, consistent with the fundamental purposes of the statute. *See* Int. Br. at 40-60.

Plaintiffs do not dispute that the District Court erred in failing to conduct any severability analysis and in immediately enjoining operation of the statute without giving any consideration to the scope of its remedy. Nevertheless, Plaintiffs urge this Court to affirm the District Court's order enjoining the CEP in its entirety. In Plaintiffs' view, Section 9-717 of the CEP is a broad anti-severability provision that precludes the contention that any aspect of the program could be severed from the rest of the CFRA. Pl. Br. 115-16. This argument is without merit, and is based on a misunderstanding of the language and purpose of Section 9-717.

Section 9-717 provides that in the event a court "prohibits or limits … the expenditure of funds from the Citizens' Election Fund … for grants or moneys for candidate committees" for more than one week on or after April 15 in an election year, all of the provisions of the CFRA – including the bans on contributions from lobbyists and contractors, as well as the provisions establishing the CEP – would become "inoperative," and the state's campaign finance system would revert back to the pre-CFRA system. Conn.

Gen. Stat. 9-717; SPA 321.[13] The purpose of Section 9-717 is readily apparent – it embodies the Legislature's concern that candidates for state offices must have some means to finance their election campaigns. Accordingly, the statute only applies in the event of an injunction against the "expenditure of funds" for candidates from the CEP, and only after April 15 of an election year. In other words, the statute only applies if public money for candidates is cut off in the run-up to an election. Under such circumstances, it compensates candidates for the loss of public funds by reverting to pre-CFRA means of fundraising, including seeking contributions from lobbyists and contractors.[14]

Contrary to Plaintiffs' contention, Section 9-717 does not broadly apply to any injunction affecting any provision of the CEP; it only applies if

[13] Section 9-717 identifies the specific provisions of the Act which would become inoperative: the provisions establishing and funding the CEP (§§ 9-700 to 9-716, §§ 9-750 to 9-751); the contribution and solicitation bans on lobbyists and contractors and changes in contribution limits (the amendments enacted by Public Act 05-5, §§ 9-612 (g) to (j), and § 1-100b); and certain provisions relating to a pilot program for public financing of municipal elections (§ 9-760, § 49 of Public Act 05-5).

[14] As amended in 2006, this reversion to the pre-CFRA system of fundraising lasts only for the balance of that election year, and the CFRA is then reinstated for the following year. This gives the Legislature, in effect, another year to try to fix any constitutional problem that led to the court injunction. If, however, the injunction remains in effect on April 15 of the year after that, then the provisions of the Act are permanently repealed.

a court enjoins the "expenditure of funds" from the CEP. And, as Intervenors demonstrated in their opening brief, the Court can easily fashion complete relief here that does not require the Court to cut-off funding from the CEP. *See* Int. Br. at 57-58. Section 9-717 thus has nothing to do with the severability of any particular provision of the CEP. While Section 9-717 indicates on its face that the contribution bans enacted by the CFRA cannot be sustained if the CEP's distribution of public money is enjoined, Section 9-717 is silent on the severability of any of the provisions establishing and defining the operation of the CEP.

While the legislative history of Section 9-717 is sparse, it supports that Section 9-717 was merely intended to serve as a reversion mechanism in the event that the public financing program was interrupted.[15] Equally important, post-enactment revisions to the CEP demonstrate that the legislature did not intend Section 9-717 to serve as a general prohibition on severance of all provisions of the CEP. Indeed, as explained in Intervenors' principal brief, the Connecticut Legislature amended the CEP's eligibility

[15] *See* EX-1447 (Statement of Rep. Tim O'Brian) (noting that, under Section 9-717, increased contribution limits for privately financed candidates under CFRA would revert back to lower pre-CFRA levels in event public financing was enjoined).

requirements for non-major party candidates in 2006 in order to facilitate their severance and to avoid triggering Section 9-717. *See* Int. Br. at 53-55.

Plaintiffs also argue that the challenged provisions are important to the statutory scheme – as both Defendants and Intervenors have emphasized in defending the validity of those provisions – and that Intervenors are therefore "wrong to suggest the legislature would be satisfied with a system that lacks those elements." Pl. Br. at 116. It is certainly true that the differential qualifying requirements for non-major party candidates are important to avoid funding frivolous candidates, discourage splinter parties and candidates, protect the public fisc, and maintain public support for the program; and that the matching grants provide an important incentive for candidates to participate in the CEP. But the question is not whether the Legislature would be "satisfied" with a system that did not include those provisions, as Plaintiffs suggest. The question is whether the Legislature – faced with the choice of a CEP lacking those provisions or no public financing system at all – would have intended to enact the CEP without the offending provisions.

As set forth in Intervenors' principal brief, the CEP can operate without the challenged provisions, and there is no evidence that the Legislature would not have adopted the statute without them. *See* Int. Br. at

47-60; *see also State v. Bell,* 283 Conn. 748, 811 (2007) (holding that, to overcome Connecticut's presumption of severability, opponents must demonstrate that remaining valid provisions of statute cannot operate without invalid provisions and that Legislature would not have adopted the statute without invalid portion). Accordingly, the Court should give effect to the Legislature's intent: In the event the Court affirms any part of the District Court's decision, it should sever any provision it finds to be constitutionally flawed, but allow this groundbreaking program to continue.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's judgment and remand the case with directions to enter judgment in favor of Defendants and Intervenors. In the alternative, to the extent the Court affirms any part of the District Court's decision, the Court should sever the invalid provisions in a way that will preserve the continued operation of the CEP.

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Respectfully submitted,

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