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

BRIEF FOR INTERVENORS-DEFENDANTS-APPELLANTS

Ira M. Feinberg
David Dunn
HOGAN & HARTSON LLP
875 Third Avenue
New York, New York 10022
212-918-3000

Monica Y. Youn
Angela Migally
Mimi Marziani
BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW
161 Sixth Avenue
New York, New York 10013
212-998-6730

Attorneys for Intervenors-Defendants-Appellants

PATRICIA HENDEL, in her official capacity as Officials and Members of the Office of State Ethics, ROBERT N. WORGAFTIK, in his official capacity as Officials and Members of the Office of State Ethics, JACLYN BERNSTEIN, in her official capacity as Officials and Members of the Office of State Ethics, REBECCA M. DORTY, in her official capacity as Officials and Members of the Office of State Ethics, ENID JOHNS ORESMAN, in his official capacity as Officials and Members of the Office of State Ethics, DENNIS RILEY, in his official capacity as Officials and Members of the Office of State Ethics, MICHAEL RION, in his official capacity as Officials and Members of the Office of State Ethics, SCOTT A. STORMS, in his official capacity as Officials and Members of the Office of State Ethics, SISTER SALLY J. TOLLES, in her official capacity as Officials and Members of the Office of State Ethics, BENJAMIN BYCEL in his official capacity as Executive Director of the Office of State Ethics,

Defendants,

and

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

Intervenors-Defendants-Appellants.

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JURISDICTIONAL STATEMENT

Intervenors-Defendants-Appellants Audrey Blondin, Tom Sevigny, Connecticut Common Cause, and Connecticut Citizen Action Group (hereinafter "Intervenors-Appellants") were granted leave to intervene in this action on February 27, 2007, A-9 (Dkt. 82), [1] and thereafter participated actively in all aspects of the proceedings in the District Court. [2] The District Court entered a final judgment holding Connecticut's Citizens' Election Program ("CEP") unconstitutional and enjoining its operation on September 2, 2009. SPA-213-14. Intervenors-Defendants filed a timely notice of appeal on September 21, 2009. A-1856-59. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

SUPPLEMENTAL QUESTIONS PRESENTED

1. Whether the District Court erred in ignoring established precedent governing the constitutionality of public financing systems and in instead devising its own theories – which are neither supported by the record

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[1] "SPA___" refers to the relevant page of the Special Appendix; "A___" refers to the relevant page of the Appendix; "EX___" refers to the relevant page of the Exhibit volumes filed by Defendant-Appellants, in lieu of including those materials in the Appendix; "Brief of Defendant-Appellants" or "Defs. Br." refers to the brief filed by Defendants-Appellants Jeffrey Garfield and Attorney General Richard Blumenthal.

[2] On January 14, 2008, the District Court granted the Intervenors-Defendants leave to file an amended answer that removed Kim Hynes as a party. (Dkt. 192).

nor constitutionally cognizable – of how Connecticut's CEP burdens the political opportunity of non-major party candidates?

2. Whether the District Court erred in entering a broad injunction against continued operation of Connecticut's public financing scheme, without any consideration of whether a narrower remedy was feasible, when in fact any provisions that may be constitutionally flawed are severable and the Court can properly strike those provisions while permitting the CEP to continue to operate?

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Intervenors-Appellants join the 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. Intervenors-Appellants respectfully submit this separate brief to address two points. First, we write to emphasize that the novel rationales of the District Court for invalidating the CEP are profoundly at odds with settled precedent upholding the constitutionality of public financing systems, and would impose inappropriate – indeed, insuperable – restrictions upon the design of such systems. Second, Intervenors-Appellants write to raise a new issue not addressed in the Defendants-Appellants' brief: that the District Court's

broad injunction of the CEP in its entirety – without any consideration of the efficacy of a narrower remedy – was erroneous and an abuse of the Court's discretion. In fact, to the extent that the Court may uphold the District Court's holding, the relevant provisions of the CEP are severable and the Court can enjoin their enforcement while leaving the state's public financing scheme largely intact.

This case presents a First Amendment and Equal Protection challenge to a public financing system's differential treatment of major and non-major party candidates, and is therefore squarely governed by the test of invidious discrimination set forth in *Buckley v. Valeo*, 424 U.S. 1, 99 (1976) – whether the system "disadvantages non-major parties by operating to reduce their strength below that attained without any public financing." The District Court correctly identified this test, SPA-65-66, but declined to apply it. Instead, the District Court erred disregarded the absence of any detriment to non-major party candidates and formulated own *ad hoc* standards of constitutional injury. Properly viewed, the record in this case is devoid of any evidence of harm to the political strength of non-major parties. On the contrary, the record shows that the CEP offers non-major parties, who have historically demonstrated negligible political strength in Connecticut, enormous potential benefits and a path to long-term party building and

viability, which even the District Court recognized were potentially "transformative." SPA-4. Moreover, the record demonstrates that non-major party candidates – whether or not they participated in the CEP – saw significant gains in vote totals in the 2008 elections, and either maintained or improved their historical levels of fundraising, ballot access, and candidate recruitment.

Rather than applying the *Buckley* standard – which focuses on any demonstrated *detriment* to the political strength of non-major party candidates, the Court erroneously shifted the focus of its inquiry to the question whether "the public financing scheme artificially *enhances* the political opportunity of favored *major* party candidates." SPA-66 (emphasis added). This approach turns the *Buckley* standard on its head, and constitutes reversible error.

Moreover, the Court's application of its erroneous "enhancement" standard relied upon four brand-new theories of constitutional injury, which are not supported by the record and which contravene existing case law regarding the constitutionality of public financing systems. The District Court's ruling would impose rigid, one-size-fits-all requirements on the design of public financing systems – contrary to the Supreme Court's direction that, in this area of the law, deference to legislative balancing of

myriad competing constitutional interests is appropriate. *Buckley*, 424 U.S. at 100, 103-04.

First, the District Court found that the CEP burdened the political opportunity of non-major party candidates by providing funding to major party candidates at "windfall" levels that "enhance" the major parties' ability to campaign without any countervailing disadvantage. There is no support for the District Court's factual premise that the CEP provides "windfall" funding to major party candidates; the Court's analysis was based on significant methodological and mathematical mistakes, and its finding is clearly erroneous. More fundamentally, the District Court erred as a matter of law in holding that such "windfall" funding rendered the CEP constitutionally defective. The Court's novel theory that the grant of public financing to a qualified participating candidate burdens the First Amendment rights of nonparticipating candidates is legally incorrect, and would make it impossible for legislatures to design public financing systems that offer candidates sufficient incentives to wean them from their dependence on private fundraising.

Second, the District Court erred in holding that the Connecticut legislature's use of the longstanding definition of major party under Connecticut law "artificially enhanced" the strength of major party

challengers in districts in which the major party had not previously competed, resulting in a violation of equal protection to non-major parties and their candidates. This holding was predicated upon a factual assumption – that such new major party challengers are "similarly situated" to non-major party candidates – that has no support in the record. Moreover, the Court ignored settled precedent that permits the state to take into account the fundamental differences between major parties with significant statewide support and minor parties in designing a system of public financing, *see Buckley*, 424 U.S. at 97 ("there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other") (quoting *Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971)), and cases recognizing that the state can permissibly foster electoral competition. *See* pp. 26-28, *infra*.

Third, the District Court erroneously assumed that a public financing system violates equal protection if the "vast majority of minor party candidates will never become eligible to receive public funding." SPA-4. But the proper test is not whether most or even the vast majority of minor party candidates may not be able to qualify; on the contrary, the state can permissibly require grant recipients to demonstrate a "substantial modicum

of public support," *Buckley*, 424 U.S. at 96 (quoting *Jenness*, 402 U.S. at 442), and if most minor party candidates cannot demonstrate that level of support, that fact provides no basis for relief. The state is not constitutionally required to award substantial grants of public funds – in the tens of thousands, or even millions of dollars – to candidates who have made no showing of public support. The purpose of the CEP is to reduce corruption among state elected officials, and the state is entitled to design a program that funds only viable candidates.

Fourth, the District Court found that the CEP's distribution formulae – which award different grants of funds based upon the competitiveness of a given race – "discourage" non-major parties from exercising their First Amendment rights. But the Court's holding was based on abstract logic and speculation, and there was a complete absence of any factual record that the CEP's distribution formulae would in fact "discourage" or "chill" minor party participation. Instead, the evidence was directly to the contrary. The Court's holding would take away the ability of states to protect the public fisc by implementing flexible grant systems tailored to the competitiveness of a given race.

Finally, the District Court erred in enjoining the entire operation of the CEP, without even undertaking an analysis regarding the proper scope of the

remedy. The Court was required by Supreme Court doctrine to consider whether a narrow remedy could address Plaintiffs' constitutional claims, and there was no reason why the relatively peripheral provisions relating to minor party participation should be permitted to bring down the entire state public financing scheme. The Connecticut legislature did not intend any such result: the minor party provisions were intentionally drafted to be severable, and there is no reason to believe – in light of the legislature's strong desire to enact a public financing system to combat the appearance of corruption and to restore public confidence in state government – that the legislature would not have enacted the CEP if it could not retain these provisions. Thus, even if this Court affirms some or all of the District Court's reasoning, the proper remedy is to sever any provision found to be constitutionally defective, but to allow the remainder of the CEP program to continue to operate.

ARGUMENT

I. The District Court Erred in Holding that the CEP Is Unconstitutional.

A. The District Court Failed to Follow Precedent on Public Financing Systems.

The District Court's opinion reflects a profound misunderstanding of the case law regarding the constitutionality of public financing systems. The Court disregarded established public financing precedents, and instead

adopted its own *ad hoc* standards from a wide assortment of First Amendment precedents that simply do not apply in this context. *See, e.g.*, SPA-65-68. Nearly absent from the District Court's analysis was any recognition that, on two occasions, the Supreme Court has considered the question presented in this case – whether the grant of public financing to qualified major party candidates violates the constitutional rights of non-major parties and their candidates – and concluded that public financing systems that provide differential treatment between major and non-major party candidates pass constitutional scrutiny. *Buckley*, 424 U.S. at 85-109; *Am. Party of Tex. v. White*, 415 U.S. 767, 791-94 (1974). Two federal circuit courts have reached the same conclusion. *Nat'l Comm. of Reform Party v. Democratic Nat'l Comm.*, 168 F.3d 360, 365-67 (9th Cir. 1999); *Libertarian Party of Ind. v. Packard*, 741 F.3d 981, 987-92 (7th Cir. 1984). Specifically, as set forth in greater detail below, the *Buckley* Court, in assessing whether the presidential public financing system invidiously discriminated against non-major party candidates, formulated the governing test to determine whether a public financing system burdens the constitutional rights of non-major party candidates, and the District Court erred in failing to follow this precedent. Moreover, in striking down the CEP, the District Court became the first court ever to hold that a public

financing system's grant of public funds to qualified participating candidates violated the constitutional rights of nonparticipating candidates. *See Buckley*, 424 U.S. at 85-109 (upholding the presidential public financing system under Federal Election Campaign Act ("FECA")); *North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427 (4th Cir. 2008) (affirming denial of preliminary injunction against public financing system for appellate judicial elections); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's Clean Election Act); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Minnesota's public funding for elections); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) (upholding Rhode Island's public funding system). In so doing, the Court erred in failing to apply the *Buckley* standard, and, instead, formulated new theories of constitutional injury that are inconsistent with Supreme Court and federal precedent on public financing systems.

At bottom, the District Court failed to recognize long-standing constitutional doctrine that public financing systems such as the CEP represent legislative efforts "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."

Buckley, 424 U.S. at 92-93. Like the presidential public financing system at issue in *Buckley*, and other public financing systems around the nation, the CEP "furthers, not abridges, pertinent First Amendment values." *Id.* at 93. Plaintiffs-Appellees are not the only ones who have First Amendment interests at stake in this litigation; the citizens of Connecticut, too, have a strong First Amendment interest in a system of campaign finance that facilitates democratic, representative, and accountable government. As the *Buckley* Court stated, "the central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interests would thrive, for only in such a society can a healthy representative democracy flourish." *Id*. at 93 n.127 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Instead of accepting these constitutional principles, the Court erroneously treated the Connecticut legislature's historic enactment of the CEP as an attempt to suppress, rather than foster, First Amendment values among candidates, parties, and the electorate. As explained below, the District Court's misguided view of the constitutional interests at work in a system of public financing led it to disregard the applicable *Buckley* standard and to create new conceptions of constitutional injury that are at odds with governing precedent.

B. The District Court Erred by Failing to Apply the *Buckley* Test for Invidious Discrimination.

The District Court erred in failing to follow the test set forth in *Buckley* as to whether a public financing system invidiously discriminates against non-major party candidates. In *Buckley*, the Supreme Court considered multiple challenges brought by minor parties to the differential treatment of major and non-major party candidates under the presidential public financing system. In ruling on these questions, the Supreme Court recognized that public financing laws are intended to "enhance . . . First Amendment values." *Id*. at 92-93. The Supreme Court also recognized the compelling state interests underlying public financing systems, including "eliminating the improper influence of large private contributions"; "relieving major-party . . . candidates from the rigors of soliciting private contributions"; "not funding hopeless candidacies with large sums of public money"; and avoiding "providing artificial incentives to "splintered parties and unrestrained factionalism." *Id*. at 96.

The *Buckley* Court balanced this array of First Amendment and state interests against the risk that differential treatment of major and non-major party candidates in a public financing system might "inhibit[] the present opportunity of minor parties to become major political entities if they obtain

widespread support." *Id.* The Court rejected at the outset the notion that different rules for major and non-major parties worked an unconstitutional burden on any protected right to political opportunity. *Id.* at 97 ("[T]he Constitution does not require Congress to treat all declared candidates the same for public financing purposes."); *see also Am. Party,* 415 U.S. at 781 (upholding differential ballot-access and nomination-funding provisions against equal protection challenge by minor parties). Instead, the Court ruled that in order to prove a constitutionally cognizable claim of invidious discrimination, a minor party had to demonstrate that the program "operat[ed] to reduce their strength below that attained without any public financing." *Buckley*, 424 U.S. at 99. In applying this test, the Court emphasized that nonparticipating candidates remained free to engage in private fundraising without any of the limitations imposed upon participating candidates and that nonparticipating candidates were free to pursue any avenue of political involvement that had previously been available to them. The Court also noted that the position of non-major party candidates who qualified for at least partial funding would be enhanced under FECA. Accordingly, the Court concluded that "the limited participation or nonparticipation of minor parties or candidates in public funding does not unconstitutionally disadvantage them." *Id*. at 102.

Thus, under *Buckley*, in order to establish a constitutionally cognizable burden on their political opportunity, the Plaintiffs must show "that the election funding plan disadvantages non-major parties by operating to reduce their strength below that attained without any public financing." *Id*. at 99. This test has been consistently applied by federal courts in evaluating equal protection challenges by non-major parties to public financing laws. *See, e.g., Nat'l Comm. of Reform*, 168 F.3d at 366; *Libertarian Party of Indiana*, 741 F.2d at 992.

C. The CEP is Constitutional Under the *Buckley* Standard

Instead of analyzing whether the CEP resulted in any diminution of the political strength of non-major party candidates as required by *Buckley*, the District Court focused exclusively on whether major party candidates have derived benefits from the operation of the CEP. The Court's focus on this question was mistaken, however, and cannot make up for the fact that the record is devoid of evidence that would establish any burden on the political opportunity of non-major parties. Indeed, the undisputed testimony and evidence show precisely the opposite – rather than being burdened, non-major parties and candidates can expect substantial, even transformative benefits from the CEP. Under a correct application of the controlling *Buckley* standard, the CEP readily passes constitutional muster.

The CEP offers non-major party candidates who qualify for the CEP financial resources far in excess of what non-major party candidates have historically been able to raise through private contributions, and thus offers an enhanced opportunity to get their message out to Connecticut voters. EX-4496-97. A straightforward comparison of the situation of non-major parties in Connecticut prior to and after the enactment of the CEP demonstrates that their political strength has not diminished by any conceivable measure, including election results, number of candidates, or fundraising success. *See* EX-4488, 4573 (vote percentage); EX-4483-84, 4496-97, 4574 (fundraising); EX-4565 (number of candidates). The CEP did not diminish the political strength of the Green Party or the Libertarian Party in the 2008 election whether measured by number of candidates, average vote totals, or fundraising. EX-4493-94, 4577-78 (number of candidates and average vote percentage); EX-4483-84, 4558, 4577-78 (fundraising). Instead, the record demonstrates that, by affording parties who cannot demonstrate statewide popular support alternative routes to qualify for public financing, the CEP has, for the first time, offered non-major parties a path to long-term political viability in Connecticut.

Fundamentally, a voluntary public financing scheme like Connecticut's leaves the rights of nonparticipating candidates unaffected;

they remain free to raise funds for political purposes,[3] make electioneering expenditures, and exercise their other First Amendment rights just as they did before the CEP was enacted. *See Buckley*, 424 U.S. at 99 (upholding funding system treating major and non-major party candidates differently in part because nonparticipants remained free to privately raise as much as participants received, even though "admittedly [achieving] those limits may be a largely academic matter" to non-major party candidates); *Leake*, 524 F.3d at 437 (rejecting First Amendment challenge to public funding system in part because nonparticipants "remain free to raise and spend as much money, and engage in as much political speech, as they desire"); *Republican Nat'l Comm. v. F.E.C.*, 487 F. Supp. 280, 284 (S.D.N.Y. 1980) (three-judge court) (finding that public funding system poses no First Amendment injury because "candidate[s] remain[] free to engage in unlimited private funding and spending instead of limited public funding"); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 361 (1997) (upholding election provision against First Amendment challenge when minor party "remains free to endorse whom it likes, to ally itself with others, to nominate

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[3] Clearly, "the public financing of some candidates does not make private fundraising for others any more difficult." *Buckley*, 424 U.S. at 94, n.128. In addition, however, "the elimination of private contributions to major-party . . . candidates might make more private money available to minority candidates." *Id*.

candidates for office, and to spread its message to all who will listen"). Accordingly, Plaintiffs-Appellees failed to establish the *sine qua non* of their claim of invidious discrimination – any injury resulting from the operation of the CEP – and the District Court erred in finding that the CEP unconstitutionally burdened their political opportunity.

D. The District Court Erred in Holding that the CEP Burdened the Constitutional Rights of Non-major Party Candidates.

1. The District Court's Novel "Enhancement" Theory of Injury Is Erroneous, Both Legally and as a Matter of Fact.

As discussed in detail in the Brief of Defendants-Appellants, at 89-90, the District Court clearly erred when it determined that the CEP provides major party candidates with "public funding at windfall levels." SPA-71, SPA-72-78. Additionally, the District Court wrongly found that any such "windfall" enhanced the major parties' ability to campaign with no countervailing disadvantage. SPA-66. The District Court's calculations are based on several methodological errors which exaggerated candidate spending in 2008 while understating candidate spending in 2004. In fact, when properly calculated and compared, no such "windfall" in major party expenditures resulted from the CEP, and, in any case, any gains in major party expenditures were offset by substantial decreases in allowable party organizational expenditures. Defs. Br. at 89-90.

More fundamentally, however, the Court's reasoning rests upon an unprecedented conception of First Amendment injury that is wholly inconsistent with constitutional precedent.[4] Even assuming, *arguendo*, that the CEP would, in fact, enable major party candidates to qualify for substantially more public funds than they could raise privately, it does not follow that the political opportunity of nonparticipating candidates would thereby be diminished.

The District Court entirely ignores the fact that Plaintiffs' constitutional claims must be assessed within the context of a public financing system. In such a system, the grant of public funds awarded to one candidate cannot be equated with a simple gift from the state. Instead, the benefits conferred on candidates who opt into a public funding system are "a premium earned by meeting statutory eligibility requirements." *Vote Choice*, 4 F.3d at 38.[5] In public financing, as with other public subsidies of

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[4] The District Court points to no legal authority that would support this novel "windfall" theory of First Amendment injury. *See* SPA-72-78; SPA-114-115 (discussing unconstitutionality of CEP grant amounts).

[5] The District Court relied on three precedents involving constitutionally impermissible subsidies to major parties. SPA- 65-67 (discussing *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y. 1960) (three-judge court); *aff'd,* 400 U.S. 806, and *Greenberg v. Bolger*, 497 F. Supp. 756, 799 (E.D.N.Y. 1980)). However, the major party subsidies in those cases were very different from the funding candidates receive in a public financing system, where "eligible candidates suffer a countervailing denial," *Buckley*,

speech, the government can create a program that sets qualification standards for public funds. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983) (rejecting equal protection challenge to federal law subsidizing lobbying by only one category of speakers). As the *Buckley* Court noted, the state may adopt "laws providing [categorical] financial assistance to the exercise of free speech"; that some may fail to qualify for such assistance does not result in constitutionally cognizable harm. 424 U.S. at 93 n.127.

Although the District Court paid lip service to the *Buckley* test, *see* SPA-65-66, it proceeded to apply a completely different standard, asking "whether the [CEP] artificially enhances the political opportunity of favored *major* party candidate beyond what it would have been in the absence of public financing." SPA-66 (emphasis in original). The District Court derives this "enhancement" test from a footnote in *Buckley*, where the Supreme Court noted that "as a practical matter . . . Subtitle H does not enhance the major parties' ability to campaign; it substitutes public funding

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424 U.S. at 95, consisting of expenditure limitations and other program requirements. Furthermore, none of the state's compelling interests in creating a viable public financing system – combating corruption, protecting the public fisc, and avoiding the incentivization of splinter groups – applied to the subsidies provided in those three cases. Accordingly, the District Court's reliance on these precedents in assessing any constitutional burden resulting from the CEP was erroneous.

for what the parties would raise privately and additionally imposes an expenditure limit." *Buckley*, 424 U.S. at 95 n.129. The District Court would read this language to mandate that any net benefit a participating candidate derives from a public financing system renders the system constitutionally defective. This reading is implausible, both as a reading of *Buckley* and as a matter of constitutional law, and would inappropriately tie the hands of the state. First, the *Buckley* comment is *dicta* – part of the Supreme Court's response to the minor party plaintiffs' argument that, as a practical matter, they would have difficulty raising sufficient private funds to compete with major party candidates – and not the Court's holding, which is set out above.

Second, although the *Buckley* Court did note that the expenditure ceiling accepted by participating candidates served as a "countervailing disadvantage" to the "enhancement of opportunity to communicate with the electorate" awarded to participating candidates, *id*., nothing in the Court's opinion suggests that such a "countervailing disadvantage" must *cancel out* any advantage a participating candidate derived from the system. *Id.* Instead, a public financing system need only ensure that "the state exacts a fair price from complying candidates in exchange for receipt of the challenged benefits." *Vote Choice*, 4 F.3d at 39. In the CEP, in exchange for public monies, participating candidates accept very real burdens upon

their own political rights – the rigors of the qualification process, restrictions on their campaign spending, and substantial limitations on their ability to enjoy support from their political parties. Accordingly, the District Court erred when it found that "the CEP does not impose a true countervailing disadvantage to participating candidates," or that any expenditure limits are "illusory," SPA-70, even if it were true that such expenditure limits significantly exceeded historical candidate expenditure averages, which they do not. *See* Defs. Br. at 89-90. Awarding public campaign funds to qualified participating candidates is not comparable to "funnel[ing] large amounts of money to major party candidates," as the District Court simplistically assumes. SPA-117.

Moreover, as courts have consistently recognized, the state has a substantial interest in making the benefits offered by public funding sufficiently attractive that even candidates with established fundraising capabilities opt into the program. *See, e.g., Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998) ("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."); *Daggett*, 205 F.3d at 471 (describing cases upholding state public funding systems that offer "an array of benefits" to "entic[e]" participants); *Libertarian Party of*

Indiana v. Packard, 741 F.2d 981, 988 n.4 (7th Cir. 1984) (upholding public financing program that lacked *any* restrictions on the use of public funds given to political parties, *i.e.*, in which participating candidates suffered *no* countervailing burden in exchange for public financing benefits); *Leake*, 524 F.3d at 436 ("courts recognize that a public financing system may provide significant incentives for participation without crossing the line into impermissible coercion"). Only where a public financing program succeeds in incentivizing participation can it achieve its anti-corruption goals. In sum, the District Court erred in concluding that the "windfall funding enhances participating major party candidates' ability to campaign without any corresponding disadvantage." *See* SPA-78.

2. The District Court Erred in Finding that the Statewide Proxy Artificially Enhances the Political Strength of Major Party General Assembly Candidates.

Contending that "the use of a statewide proxy to determine eligibility for public funding on the legislative district level . . . does not require [major parties] to first demonstrate any threshold of public support in a district before becoming eligible for full funding," the District Court found that the proxy "enhances the relative strength of major party candidates" and therefore burdens the Plaintiffs' First Amendment rights. SPA-78. In fact, however, the statewide proxy represents a reasonable, and constitutionally

valid, legislative decision to account for indisputable differences between major and non-major parties. As shown below, the District Court's conclusion is based upon clearly erroneous factual conclusions, as well as fundamentally incorrect legal analysis.

a. The 20 Percent Threshold Represents a Reasonable Exercise in Legislative Line-Drawing

It is well established that Connecticut "may legitimately require some preliminary showing of a significant modicum of support, as an eligibility requirement for public funds." *See Buckley*, 424 U.S. at 96 (citation and quotation marks omitted). There is also no question that the state can create different routes for major and non-major parties to demonstrate this quantum of public support. As the Supreme Court held in *American Party of Texas*:

> So long as the larger parties must demonstrate major support among the electorate at the last election, whereas the smaller parties need not, the latter, without being invidiously treated, may be required to establish their position in some other manner.

415 U.S. at 782-83; *see Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 766 (9th Cir. 1994) (finding it rational for state to presume substantial support for major party candidate based on party's past performance while requiring individualized signature-based showing of support from non-major party candidates).

Nevertheless, the District Court summarily rejected the legislature's reasoned decision to incorporate the statutory definition of major party into its CEP eligibility requirements. According to the District Court, the 20% prior vote threshold was nothing more than a "proverbial 'magic number,' *i.e.*, a threshold that major parties will almost always reach yet one that the minor parties will almost never reach." SPA-80. This cynical assumption has no basis either in the legislative history of the CEP or in applicable case law.

There is no support whatsoever for the District Court's suggestion that the legislature deliberately picked a threshold which it knew non-major parties could not meet for the purpose of excluding non-major parties from the CEP – in fact, the record shows the contrary. First, the Court failed to appreciate that the statutory definition of "major party" preexisted the CEP – indeed, Connecticut has defined "major party" in this manner since 1963. Conn. Gen. Stat. § 9-372 (effective 1963) – and it was a perfectly logical and appropriate test for the legislature to adopt as a measure of a party's strength.[6] Significantly, the 20% threshold does not automatically exclude

[6] Connecticut is not alone in using a 20% threshold to define a political party or to qualify a designated political party for differential electoral treatment; similar provisions are used in Alabama (Ala. Code § 17-13-40) (defining political party as organization for which more than 20 % of vote is cast at county and state levels), Georgia (Ga. Code. Ann. § 21-2-2(25))

any particular party: because it is based upon shifting measures of statewide voter enrollment and votes received in the most recent election, the definition of "major party" is inherently fluid. *See, e.g., Jenness*, 403 U.S. at 439 (praising Georgia law using 20% prior vote threshold to define political party because it "implicitly recognizes the potential fluidity of American political life"). Indeed, had the CEP been in effect when third-party candidate Lowell Weicker won Connecticut's gubernatorial election in 1990, his party would have achieved statewide major party status in the following election cycle. EX-891.

The Connecticut legislature was undoubtedly entitled to rely on the preexisting definition of major party as a sufficient guarantee that a candidate has significant public support at the district level. Historical data demonstrates, and the 2008 election results confirm, that the legislature could justifiably predict that major party candidates would consistently

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(defining political party as any political organization whose candidate for governor or president polled at least 20% of vote in preceding election), Kentucky (Ky. Rev. Stat. Ann. § 118.015(1)) (defining political party as an organization whose candidate received at least 20% of vote at last election in which presidential electors were selected), Mississippi (Miss. Code. Ann. § 23-15-301) (limiting funding of party primaries to parties who garnered 20% of the vote for governor or president in each of two previous elections for that office), and Ohio (Ohio Rev. Code Ann. § 3501. l(F)) (defining major political party as a party whose candidate for governor or president received no less than 20% of vote cast).

receive 20% of the vote in virtually any race they chose to contest. *See* Defs. Br. at 91-93; *see also* EX-4487.

Finally, requiring new major party challengers[7] to demonstrate an additional showing of support at the district level would not only be gratuitous; imposing a petitioning requirement upon them would also result in severe administrative burden upon local officials. EX-4082-85 (testifying that it took the resource-strapped registrars of voters hundreds of hours to verify 3,694 signatures in 2008); EX-4498 (calculating that, had new major party challengers been required to petition in 2008, local officials would have had more than 50,000 more signatures to verify).

b. Even Weak Major Party Candidates or New Major Party Challengers Are Not "Equally Hopeless" as Non-major Party Candidates.

i. The District Court Erred in Finding New Major Party Challengers and Non-major Party Candidates to be Similarly Situated.

As an initial matter, the election statistics referenced above – showing that major party candidates nearly always achieve the 20% vote threshold, while non-major party candidates consistently fail to meet this threshold – definitively refute any argument that major party candidates and non-major

[7] "New major party challengers" are major party candidates who compete in districts where their party did not field a candidate in the previous election or fielded a candidate who received less than 20% of the vote.

party candidates are similarly situated, even in one-party-dominant districts. The District Court's opinion put an unwarranted slant on these statistics, stating that major party candidates would fail to qualify for full public funding in 46% of General Assembly districts if the prior-vote thresholds were imposed on them in the 2010 election cycle. SPA-79. This figure is inaccurate and misleading. In fact, the overwhelming majority of the elections comprising that figure were simply races that one major party had chosen not to contest; they were not races in which a major party fielded a candidate who failed to achieve 20% of the vote.[8] As set out in the Brief of Defendants-Appellants, at 92-94, when major parties do field candidates, they consistently fulfill the Connecticut legislature's prediction that they will receive 20% of the vote. *See also* EX-927, EX-2554-55. In contrast, few non-major party candidates have achieved similar vote totals. EX-2555. Accordingly, even in one-party-dominant districts, the Connecticut legislature was correct to predict that new major-party challengers would consistently surpass the CEP 20% threshold whenever the major party chose to field a candidate.

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[8] According to the District Court, major party legislative candidates in 86 out of 187 districts failed to meet the prior-vote threshold. In fact, however, only 11 of the 187 competed but failed to achieve 20% of the vote; the remaining 75 districts to which he refers were uncontested. EX-4487; *see also* SPA-184-207. Accordingly, only 6% (not 46%) of major party candidates failed to meet the 20% threshold.

Moreover, and as illustrated by the Brief of Defendants-Appellants, at 72-77, the record shows that a major party's decision not to compete in a particular district does not mean that the party and its candidates can reasonably be considered as weak as a non major party candidate in that district.[9] The evidence shows that major parties simply respond to different incentives when deciding whether to field candidates. Non-major parties often run candidates simply to increase visibility for themselves, their parties, and their platforms, *see, e.g.*, EX-871; EX-1952-53; EX-1980-82; EX-1994-95; EX-2002-04; EX-2152; major parties generally run candidates where they have a realistic expectation of winning the election. EX-844-45; EX-855-56. There was no evidence to the contrary.

ii. "Landslide" Losses by Major Party Candidates Do Not Establish that They Are "Equally Hopeless"

The District Court also pointed out that some major party candidates have lost by "landslides" – *i.e.*, more than 20% margins. However, even

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[9] The District Court also erroneously disregarded the unrebutted testimony of Defendants' expert witness Donald Green, a professor of political science at Yale University. Prof. Green explained two reasons why even relatively weak major party candidates enjoy significantly more popular support than non-major party candidates: because the major parties possess substantial statewide infrastructure, even in districts in which they may not recently have run a candidate, and because they have a base of "party identifiers," voters with an enduring attachment to the parties and their platforms. *See* EX-897-900; EX-846-47; EX-858-61; EX-987-98.

such "landslide" losers cannot be deemed to be "similarly situated" to non-major party candidates – a major party candidate who loses an election with 40% to her opponent's 60% cannot be considered "similarly situated" to a candidate whose party consistently fails to receive even 10% of the vote.[10]

The District Court declared that "there is no reason . . . to believe that achieving a 20% [prior] vote threshold is any more predictive of electoral success . . . than a candidate who garners some statistically lower percentage of the vote," but there is no legal or factual support for this conclusion. SPA-80. The District Court had no justification for substituting its own sense of an appropriate level of candidate "viability" for that of the Connecticut legislature. In setting the definition of "major party" at 20% statewide support decades ago, the Connecticut legislature, in accordance with many other state legislatures, determined that 20% was the level at which a political party would be deemed sufficiently viable to be awarded

[10] Indeed, at the time the *Buckley* Court upheld the differential treatment of major and minor party candidates under FECA's presidential public financing system, major party presidential candidates in two of the three most recent presidential elections had lost by "landslide" margins of over 20% of the popular vote. Richard Nixon won 60.7% of the popular vote to George McGovern's 37.5% in the 1972 presidential election, while Lyndon Johnson had 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 Nov. 4, 2009). By the District Court's analysis, the state would have to treat the losing party in those elections the same as a minor party that achieves far less electoral support.

major party status. In enacting the CEP more than forty years later, the legislature chose to use the same long-established measure. This type of line-drawing is properly left to the judgments of elected officials who are accountable to Connecticut voters. *See Buckley*, 424 U.S. at 103-04 (emphasizing importance of deferring to legislative determination of prior vote percentage threshold for public financing eligibility); *see also Libertarian Party of Wash.*, 31 F.3d at 766 (upholding state's determination that substantial support for major party candidate could be presumed based on her party's prior statewide performance). The District Court's failure to accord adequate deference to this legislative judgment was improper and requires reversal.

c. The District Court Erred in Holding that Increased Major Party Competition Created First Amendment Harm to Non-major Party Candidates.

The District Court erred in concluding that the availability of public financing "encourages major parties to field candidates for historically uncompetitive seats." SPA-83. In fact, the evidentiary record demonstrates exactly the opposite: there is no evidence of any causal relationship between the availability of public funding and a major party's decision to field a candidate in a particular district. *See* Defs. Br. at 96. The District Court had no basis for ignoring the factual record and substituting its own speculation.

On a more fundamental level, however, and as a matter of law, greater competition for Connecticut's citizens' freely-given votes cannot constitute an unconstitutional burden on the political opportunity of the state's non-major parties. Federal courts have uniformly upheld laws whose express intention was to promote electoral competition. *See, e.g.*, *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 923 (6th Cir. 1998) (holding that Michigan had compelling interest in "foster[ing] electoral competition by reducing the advantages of incumbency and encouraging new candidates"); *Bates v. Jones*, 131 F.3d 843, 847 (9th Cir. 1997) (upholding term limits for state officeholders and affirming state interest in "opening up the political process and restoring competitive elections"); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995) (striking down Arkansas's term limits for U.S. Senators and Representatives on procedural grounds, but noting that term limits are legitimate means to "provide for the infusion of fresh ideas and new perspectives"). Far from burdening individual rights, increased participation in the electoral process, including increased competition for elected office, enhances First Amendment values. *See* Defs. Br. at 98.

3. The District Court Erred in Holding that the CEP Eligibility Requirements Were "Nearly Impossible" to Achieve.

a. The District Court Erred in Ignoring the Governing Legal Standards.

The District Court committed reversible error when it ignored controlling precedent from both the Supreme Court and this Court for determining the validity of eligibility requirements for non-major parties. The District Court held that these requirements were invalid because the "vast majority of minor party candidates will never be able to become eligible." SPA-3. But the appropriate standard is not whether a certain percentage of non-major party candidates will be able to qualify for a grant; rather, the test is whether viable non-major party candidates – candidates who have demonstrated a significant modicum of public support – can qualify under these eligibility requirements. *Buckley*, 424 U.S. at 96 (holding that state can "withhold[] public assistance from candidates without significant public support); *Libertarian Party of Wash.*, 31 F.3d at 762 ("the question is whether 'reasonably diligent' minor party candidates" can gain ballot access (citations omitted)). Under this standard, even a scheme under which no non-major party candidate qualifies is not *per se* invalid, so long as a non-major party candidate with a substantial modicum of public support could become eligible. *See Buckley*, 424 U.S. at 101-02; *Lightfoot v. Eu*, 964 F.2d 865, 870 (9th Cir. 1992) (upholding ballot access requirement

despite plaintiffs' inability to meet threshold where such inability resulted from lack of public support for Libertarian Party). Accordingly, other courts have repeatedly upheld systems in which only a handful of non-major party candidates have been able to achieve eligibility. *Am. Party*, 415 U.S. at 783-84 (upholding ballot access law that required minor parties but not major parties to submit signatures where two minor party candidates obtained ballot access); *see also Swanson v. Worley*, 490 F.3d 984, 904-05 (11th Cir. 2007) (upholding signature requirement for independent candidates where 10 candidates in the last three election cycles would have achieved ballot access).

Second, and as set out in the Brief of Defendants-Appellants, at 100-04, the District Court ignored this Court's decision in *LaRouche v. Kezer*, 990 F.2d 36, 41 (2d Cir. 1993), which set out the proper analysis for evaluating a petition signature requirement. Instead, the lower court applied its own *ad hoc* tests – substituting its own unfounded opinion as to the appropriate degree of difficulty for eligibility requirements for the considered judgment of the Connecticut legislature and the expert testimony before the District Court. SPA-85-91. Such disregard for both controlling legal authority and the legislature's line-drawing prerogatives was reversible error.

b. The District Court's Conclusion Is Inconsistent with the Facts.

The District Court compounded these errors by disregarding clear and undisputed evidence that the CEP eligibility requirements have, in fact, been repeatedly met by Connecticut's non-major parties. The record demonstrates that numerous non-major party candidates have, in fact, qualified under both the prior vote and petition based eligibility provisions, in numbers greater than the systems upheld in *American Party of Texas* and *Swanson*. The District Court's own findings show that the prior vote percentage thresholds have historically been readily achievable by non-major party candidates. SPA-84 (finding that, in the three election cycles from 2002 to 2006, 25 non-major party candidates would have been eligible for CEP monies and four would have been eligible for full CEP funding). Fifteen non-major party candidates from the Working Families Party, the Independent Party and the Green Party were eligible for CEP funding in the 2008 election. SPA-44; EX-4491-93. Moreover, 21 non-major party candidates will be eligible to receive a CEP grant in 2010. *See also* EX-4490-91. This demonstrates that the CEP's eligibility requirements are readily achievable for candidates with a modicum of public support, and shows that the District Court's finding that it was "virtually impossible" to satisfy these requirements is not supported by the factual record.

c. The Weaknesses of Non-major Parties are the Result of Preexisting Disadvantages that the CEP need not Correct.

The District Court's reliance on the alleged inability of minor parties to reach the qualification threshold is also flawed because the Court repeatedly relied upon factors that factors that are attributable to the preexisting political weakness of these parties, not from the operation of the CEP. For example, in finding the petitioning requirements overly difficult, the District Court observed that because supporters of major party candidates might not want to sign petitions for non-major party candidates, it would be "nearly impossible" for non-major party candidates to achieve eligibility. SPA-90-91. Similarly, the Court noted that the fact that "minor parties generally lack established organizational structures" made it less likely that such parties could meet the petitioning requirements. SPA-92. But in relying on the lack of support for non-major party candidates as a basis for invalidating the petitioning requirements, the Court turned well-established constitutional principles on their head; it is well settled that the state has no obligation in a public financing system to provide grants to candidates without public support. There is no evidence that the relatively weak position of the non-major parties is the result of any discrimination

against them, nor that the CEP will weaken their political strength. As a three-judge panel in the District of Connecticut has observed:

> [A]ny dominant position enjoyed by the Democratic and Republican Parties is not the result of improper support, or discrimination in their favor, by the State. Rather, the two Parties enjoy this position because, over a period of time, they have been successful in attracting the bulk of the electorate, so that they now have substantial followings. . . . "Success" in this endeavor, such as the major parties have achieved, . . . does not necessarily call for strict constitutional scrutiny by the judiciary so as to increase the political strength of those who have not actively attempted to advance their political views.

Nader v. Schaffer, 417 F.Supp. 837, 843 (D. Conn. 1976) (three judge court). Connecticut has no constitutional obligation to remedy any pre-existing inequalities between candidates, nor should a public financing system offer a political party the means to bypass the decades of party building activity and consequent growth in popular support that major parties have had to undergo. *See Buckley*, 424 U.S. at 97-98.

4. The District Court Erred in Holding that a Public Funding System that Adjusts Grant Amounts Based Upon the Competitiveness of a Given Election Thereby Violates the First Amendment Rights of Nonparticipating Candidates.

The CEP features a flexible, four-tiered grant distribution scheme to meet the differing needs of races with varying levels of competition:

unopposed races, races with only token opposition, fully contested races, and high-spending races. In a race where a participating candidate faces a CEP-funded opponent, or a major party or relatively high spending non-major party opponent, the base grant amount levels apply. Grant amounts are reduced to 30% of the base grant for unopposed races. Conn. Gen. Stat. § 705(j)(3); SPA-302-03. Participating candidates with only token opposition[11] receive a 60% grant (hereinafter the "grant reduction provision"). Conn. Gen. Stat. § 705(j)(4); SPA-303. In high-spending races – races where a nonparticipating opponent or independent spender makes expenditures in excess of the CEP expenditure limit – the participating candidate can receive "triggered matching funds" capped at two times the base grant (hereinafter the "triggered matching funds provisions"). Conn. Gen. Stat. § 713-714; SPA-314-319.[12]

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[11] Races with token opposition are races in which participating candidates face only non-major party opponents who fail to raise an amount equivalent to the qualifying contribution threshold for that particular race, *e.g.*, $5,000 in a house race or $15,000 in a senate race. Conn. Gen. Stat. § 705(j)(4); SPA-303.

[12] As set forth in the Brief of Defendants-Appellants, at 120-22, the District Court erred in holding that plaintiffs had standing to challenge the trigger matching funds provisions. In addition, the District Court similarly erred in finding Plaintiffs challenge to the grant reduction provision to be justiciable. According to the District Court, this provision discourages non-major candidates from raising money in excess of the qualifying contribution threshold because such fundraising will trigger an increase in the grant awarded to a participating candidate. However, this alleged injury

a. The Distribution Formulae Pose No First Amendment Burden.

To start, and as set forth in Brief of Defendants-Appellants, at 122-25, the District Court erred in extending the holding of the Supreme Court's decision in *Davis v. FEC*, 554 U.S. ___ (2008) – a case involving contribution limits applicable to private fundraising – to the public financing context, where the package of benefits and burdens awarded to participating candidates does not constitute the type of "discriminatory burden" created by the provision at issue in *Davis*.

But even if the grant reduction provision and triggered matching funds could theoretically burden Plaintiffs' First Amendment interests – and we submit that they cannot as a matter of law – the District Court erred in finding that the grant reduction and trigger matching funds provisions "chilled" or "discouraged" Plaintiffs' exercise of their First Amendment rights, because there is no evidentiary support for this theory in the record. *See* SPA-92-93; *see also* Defs. Br. at 117-27.

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fails the redressability requirement of the law on justiciability: "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61(1992) (citation and quotation marks omitted). Invalidation of the challenged grant reduction provision would leave Plaintiffs worse off than they are now, since each of their opponents would receive a full grant under the CEP, rather than the 60% reduced grant to which such candidates are currently entitled.

b. The CEP's Grant Reduction Provision and Trigger Matching Fund Provisions Represent Legislative Efforts to Avoid the Waste of Public Funds By Tailoring Grant Amounts to the Level of Competitiveness of a Given Election.

Moreover, even assuming, *arguendo*, that the District Court's determination that the grant reduction and triggered matching funds provisions impose a burden on Plaintiffs' First Amendment rights was supported by law and fact, the District Court erred in concluding that these provisions were not justified by several compelling state interests. SPA-136-38. The legislative history of the CEP makes clear that lawmakers designed the CEP's four-tiered program in order to advance its anti-corruption interest by incentivizing sufficient participation in the program while simultaneously protecting the public fisc. *See, e.g.*, EX-1303-04; EX-1031; *see also* EX-2955 (Sen. Edward Meyer) (testifying, as three-time incumbent, that he would not have participated in CEP without availability of triggered matching funds). At the same time, the legislature decided to tailor grant amounts to the level of competition faced by CEP recipients as one way to limit costs and protect the public fisc. *See, e.g.*, EX-1097; EX-1221. It was error for the District Court to conclude that the triggered matching funds provisions or the grant reduction provision were not justified

by the compelling state interests in preventing corruption, preserving the public fisc and incentivizing participation.

II. THE DISTRICT COURT'S REMEDY WAS UNNECESSARILY OVERBROAD.

After holding that the CEP's differential eligibility scheme, triggered matching funds provisions and grant reduction provisions were constitutionally flawed, the District Court summarily enjoined the entire operation of Connecticut's public financing scheme, without any discussion of the proper scope of the required remedy.[13] The District Court took this action, despite the fact that Defendants and Intervenors-Defendants had alerted the Court to the remedy issue, had argued that the Court was required to adopt a narrow remedy, and had suggested that relief could be fashioned to remedy Plaintiffs' constitutional claims without destroying the public financing system. *See* Defs' Opp. to Motion for Summ. J., filed Sept. 5, 2008, at 87-89 (Dkt. 260-1); A-1832-34 (raising issue at trial).

The District Court's broad injunction was a constitutional error and an abuse of the Court's discretion. Even assuming that this Court affirms the District Court's holding that the provisions of the CEP relating to the grants

[13] The District Court's order was so broad that it would have prevented the SEEC from continuing to perform routine auditing and compliance functions arising from the 2008 elections, or provide advice to potential candidates in 2010 regarding the operation of the CEP. The District Court subsequently granted a stay pending appeal. *See* A-43 (Dkt. 385).

and qualifying criteria for non-major party candidates are unconstitutional, the Court can readily address those relatively minor flaws in the CEP's governing statutes and fashion appropriate relief without destroying the state's public financing system and the fundamental electoral reform that it represents. The Court is required as a matter of constitutional law to adopt the narrowest possible remedy sufficient to cure the constitutional defects, and the Connecticut Legislature specifically intended to make the non-major party provisions severable in the event of any successful constitutional challenge.

A. The Federal Courts are Required to Adopt the Narrowest Possible Remedy Consistent with Legislative Intent.

The scope of injunctive relief is ordinarily reviewed under the abuse of discretion standard. *See Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 744, 747 (2d Cir. 1994); *Dean v. Coughlin*, 804 F.2d 207, 213-15 (2d Cir. 1986). But when the federal courts are required to address the proper remedy after a state statute has been held unconstitutional, there are additional factors at stake, and the Court's failure to consider those factors is an error of law requiring reversal. *See, e.g.*, *Somoza v. New York City Department of Education*, 538 F.3d 106, 112 (2d Cir. 2008) ("The District Court necessarily abuses its discretion when its decision rests on an error of law.").

As the Supreme Court recently emphasized in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006):

> [W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact.

Id. at 328-29 (citations omitted). Moreover, when the validity of a state statutory scheme is at issue, basic principles of federalism elevate the importance of properly tailored relief, lest the federal government unjustifiably thwart the will of the state legislature. *See Dean*, 804 F.2d at 213 ("appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief") (quoting *Rizzo v. Goode*, 423 U.S. 362, 379 (1976)); *Association of Surrogates v. New York*, 966 F.2d 75, 79 (2d Cir. 1992) ("Discretion to frame equitable relief is limited by considerations of federalism, and remedies that intrude unnecessarily on a state's governance of its own affairs should be avoided.").

Accordingly, the Supreme Court in *Ayotte* identified three principles which should inform the Court's approach to the proper remedy: "First, we try not to nullify more of a legislature's work than is necessary, for we know

that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.' . . . Accordingly, the 'normal rule' is that 'partial, rather than facial, invalidation is the required course…'" 546 U.S. at 329 (citations omitted). Second, the Court must refrain "from 'rewrit[ing] state law to conform it to constitutional requirements' even as we strive to salvage it." *Id.* Whether the offending provisions can be severed depends in part on "how easily we can articulate the remedy" that would leave the balance of the statutory scheme intact. *Id.* And "[t]hird, the touchstone for any decision is legislative intent . . . . After finding an application or a portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Id.* at 330 (citations omitted); *see also Hankins v. Lyght*, 441 F.3d 96, 109 (2d Cir. 2006) ("A court must sever the invalid parts of a statute from the valid parts 'unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'" (quoting *INS v. Chadha*, 462 U.S. 919, 931-32 (1983)).

Consideration of these factors here demonstrates that the constitutionality of the CEP can be preserved by striking those provisions that the Court determines to impose unreasonable barriers to non-major party participation or unequal treatment on non-major party candidates,

while preserving the state's public financing system. This is consistent with the general presumption of severability found in Connecticut law, and with the intent of the Connecticut legislature in reorganizing the provisions governing the CEP to make the non-major party provisions easily severable.

Thus, the District Court erred and abused its discretion when it summarily enjoined the enforcement of the entire CEP without first determining whether the invalid provisions were severable. As demonstrated below, analysis of the severability of the relevant provisions demonstrates that the non-major party provisions, the triggered matching funds provisions and the grant reduction provision are severable.[14]

B. Connecticut Law Provides for a Strong Presumption of Severability.

When a portion of a state statute is held unconstitutional, severability is a matter of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 389 (2d Cir. 2000). Over sixty years ago, the Connecticut legislature enacted a general severability provision, which states:

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[14] Where the lower court has abused its discretion by issuing overbroad relief, it is appropriate for this Court to narrow the injunction. *See, e.g., Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003) (narrowing injunction of statute prohibiting dissemination of material harmful to minors); *Sterling Drug*, 14 F.3d at 747 (2d Cir. 1994) (ordering district court to narrow extraterritorial injunction).

> If any provision of any act passed by the General Assembly or its application to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of such act.

Conn. Gen. Stat. § 1-3. The Connecticut Supreme Court has consistently held that this provision demonstrates the legislature's intent that invalid provisions of statutes are presumed to be severable from the valid provisions. *State v. Bell*, 283 Conn. 748, 811 (2007) (quoting *State v. Menillo*, 171 Conn. 141, 145 (1976)); *Payne v. Fairfield Hills Hosp.*, 215 Conn. 675, 685 (1990); *State v. Golino*, 201 Conn. 435, 442-43 (1986); *In re Robert H.*, 199 Conn. 693, 703-04 (1986). To overcome this presumption, it must be shown (1) that the remaining valid provisions of a statute cannot operate without the invalid provisions, and (2) that the legislature would not have adopted the statute without the invalid portion. *Bell,* 283 Conn. at 811 (quoting *Menillo*, 171 Conn. at 145). By framing this two-part test in the negative, state law intentionally places the burden of proof on those opposing severance to demonstrate that the invalid provisions *cannot* be severed. As the Connecticut Supreme Court stated in *Bell*, the Court's

guiding maxim is to "strive to interpret a statute so as to sustain its validity, and give effect to the intention of the legislature." *Id.*[15]

While the issue here is one of state law, the Supreme Court and this Court have consistently applied similar standards when determining whether a provision of a federal statute is severable. *See Buckley*, 424 U.S. at 108-09 ("Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.") (citation and internal quotation marks omitted); *Hankins*, 441 F.3d at 109 (same); *Carlin Commc'n v. FCC*, 837 F.2d 546, 561 (2d Cir. 1988) (same). Indeed, in *Buckley,* the Supreme Court applied a similar test in holding that the FECA's unconstitutional expenditure limits could be severed from the Act's provisions establishing a valid public financing program. 424 U.S. at 108-09.

Applying the two-part test for severability established by Connecticut law to the differential eligibility requirements applicable to non-major party

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[15] Neither the Supreme Court nor this Court has had occasion to apply Connecticut's severability clause, but it has been referenced on several occasions by the district courts. *See, e.g., Pacific Capital Bank v. Connecticut*, No. 3:06-CV-28, 2006 U.S. Dist. LEXIS 55627, *35 n.9 (D. Conn. Aug. 10, 2006) (citing Connecticut's two-part severability test); *Zimmerman v. Board of Educ.*, 597 F. Supp 72, 78 n.6 (D. Conn. 1984) (acknowledging that Conn. Gen. Stat. § 1-3 established a presumption of severability).

candidates, the triggered matching funds provisions and the grant reduction provision demonstrates that the CEP can function without these provisions and that severance would conform with legislative intent.

C. The Differential Eligibility Requirements are Severable.[16]

1. The CEP Can Easily Operate Without the Differential Eligibility Requirements.

The first prong of a severability analysis is to determine whether a statute can continue to operate without the invalid provisions. Here, the differential eligibility requirements applicable to non-major party candidates and the reduced grants awarded to non-major party candidates meeting the lower thresholds, can be easily severed. The result would be that the statute would provide for party-neutral grants of public financing to all qualified candidates – including major party and non-major party candidates, on equal

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[16] The District Court held that the grant reduction provisions of the CEP contributed to the burden imposed by the differential eligibility requirements because the grant reduction provision discouraged minor party participation in the CEP. If this Court affirms the lower court's holding, the grant reduction provision can be severed easily. In the absence of the grant reduction provision, a participating candidate will receive the same amount of money regardless of whether she is faced by a major or minor party candidate. Although, there are certainly statements in the legislative record indicating that the legislature, in adopting the provision, acted with appropriate concern that public money should not be wasted in minimally contested races, *see supra*, Section I.D(4)(b), there is no evidence that the legislature would rather have seen the entire CEP fail than sever this provision.

terms – who have raised the requisite number of qualifying contributions. Indeed, the Connecticut General Assembly specifically redrafted the grant provisions of the CEP in 2006 to make them readily severable in the event of any constitutional problem with respect to the provisions governing non-major party participation.

The generally applicable provisions providing grants to candidates in the general election are found in Sections 9-705(a)(2) (Governor), 9-705(b)(2) (other statewide offices), 9-705(e)(2) (state senator) and 9-705(f)(2) (state representative) of the Connecticut General Statutes. SPA-297-98, 300 (collectively, the "General Election Grant Provisions"). As reorganized by the Connecticut General Assembly in 2006, these provisions provide simply for the award of a full grant, in the specified amount, to all candidates for the office who have qualified (by securing the required number of small contributions) for CEP funding.[17] On their face, the General Election Grant Provisions provide that all qualified candidates are eligible to receive general election grants, regardless of whether they are

[17] Prior to the 2006 amendments, these provisions provided grants exclusively to major party candidates. The 2006 amendments struck the term "major party" and added the phrase "or who has qualified to appear on the election ballot . . . ." These amendments transformed these provisions into generally applicable party-neutral provisions, treating major and non-major party candidates the same. SPA-446-49; 2006 Conn. Acts 137, §§19(a)(2),(b)(2),(e)(2)&(f)(2) (Jan. Sess.).

from a major party, a minor party, or became eligible through petitioning.

The provisions that establish alternate eligibility requirements for non-major party candidates (including the 10%, 15%, and 20% prior-vote or petition-signature requirements), and provide for modified grants to non-major party candidates who only achieve the lower percentage thresholds, are contained in Sections 9-705(c) and 9-705(g). SPA-298-302 (collectively "the Non-major Party Provisions"). As reorganized in 2006, these provisions were drafted as stand-alone provisions from the otherwise generally applicable General Election Grant Provisions.

Assuming the Court has found that the alternate eligibility requirements for non-major party candidates are unconstitutional, the Non-major Party Provisions can be easily excised from the statute, while leaving the generally applicable General Election Grant Provisions intact. *See Bell*, 283 Conn. at 812 (finding permissible excision of offending phrase – which permitted court, rather than jury, to make findings necessary for sentencing enhancement in criminal case – in order to preserve statute's constitutionality). By excising Sections 9-705(c) and 9-705(g), as the state legislature intended, the statutes governing CEP grants would provide that all eligible candidates would receive a full general grant, on a party-neutral basis, without any requirement for a prior vote showing or any petitioning

requirements. Thus, all candidates would qualify for a general election grant by raising the requisite number of qualifying contributions.

The provisions of the CEP relating to grants for candidates in primary elections are Sections 9-705(a)(1) (Governor), 9-705(b)(1), (other statewide offices), 9-705(e)(1) (state senator), and 9-705(f)(1) (state representative). SPA-297-98, 300 (collectively "the Primary Election Grant Provisions"). These provisions, by their terms, provide grants only to "major party" candidates, since no non-major party in Connecticut has ever held a primary election and major parties are required to nominate their candidate through primary election. *See* Conn. Gen. Stat. §§ 9-400, 9-415 (requiring major party candidates to hold primary elections). However, should this Court uphold the District Court's ruling that limitation of primary election grants to major party candidates is constitutionally defective, the Primary Election Grant Provisions can be readily corrected to eliminate the constitutional problem by simply excising the phrase "major party" from the first sentence of each provision. With that simple excision, the statutes would operate on a party-neutral basis and provide financing for non-major party primary elections, should a non-major party ever hold one.

2. The Connecticut Legislature Intended that the CEP Be Preserved and the Differential Eligibility Requirements for

Non-major Party Candidates be Eliminated In The Event of a Constitutional Problem.

The second prong of the severability analysis is whether "the legislature would not have adopted the statute without the invalid portion." *Bell,* 283 Conn. at 811. Examination of the legislative history here reveals no evidence that the differential eligibility requirements for non-major party candidates were so central to the CEP that the legislature would not have enacted the CEP if it did not include those provisions. On the contrary, the legislative history shows that in 2006 the legislature revised the statutory provisions governing the CEP for the express purpose of facilitating the severance of these provisions in the event that they were held unconstitutional.

The legislative history of the Campaign Finance Reform Act ("CFRA") shows that the principal purpose of the CEP was to revive the public's confidence in state government by providing candidates with a non-corrupting source of money with which to run their campaigns. Defs. Br. at 13-19. There are certainly statements in the legislative record indicating that the legislature, in crafting the CEP, acted with appropriate concern that public money should not be wasted in financing candidates who had no real public support. *See generally* EX-1144-1163, EX-1173. However, there is no evidence that the legislature would not have enacted the CEP without

these provisions, particularly since the cost of extending full grants to qualified non-major party candidates is relatively small in comparison with the overall cost of operating the CEP. Based on this history, the extension of grants under the CEP to qualified non-major party candidates on equal terms with major party candidates, rather than the elimination of the CEP in its entirety, is more in line with the state's principal purposes.

Moreover, as noted above, the legislative history of the 2006 amendments to the CEP shows that the legislature intended the Non-major Party Provisions to be severable in the event of an adverse court decision. As originally enacted in 2005, the General Election Grant Provisions were not party-neutral. SPA-376-379; 2005 Conn. Acts 5, §6 (spec. sess.). Instead, the statute contained two separate party-specific provisions governing the eligibility requirements for a general election grant. One provision forth the eligibility requirements for major party candidates only, another specified the eligibility requirements for non-major party candidates. *Id.* In June 2006, the legislature amended the eligibility requirements to their present form, transforming the first provision into a generally applicable party-neutral provision by removing the phrase "major party" and making the Non-major Party Provisions simply exceptions, in separate

sections, to the generally applicable provision. SPA-446-49; 2006 Conn. Acts 137, §19 (Jan. Sess.).

The legislative history demonstrates that these amendments were made to ensure the continued viability of the CEP in the event the Non-major Party Provisions were held unconstitutional. The CFRA includes a provision intended to address the severability of the contribution bans enacted under CFRA (at issue in the appeal being heard in tandem with this appeal, No. 09-0599) vis-a-vis the public financing system established in the CEP. Section 9-717 provides that in the event a court "prohibit[s] or limits[] the expenditure of funds from the [CEP] for grants or moneys for candidate committees" for one week, the contribution bans would no longer be effective and the entire political financing system would revert back to the pre-CEP system. Conn. Gen. Stat. §9-717; SPA-321. The purpose of this provision was to make clear that if the public financing system were no longer available due to a court injunction, candidates could return to the system of private fundraising that existed prior to 2005 in order to meet their campaign finance needs.

During the 2006 legislative session – the first session after the 2005 Special Session that enacted the CFRA – the legislature held hearings with respect to a number of proposed amendments. During those hearings, Arn

Pearson of Common Cause testified that the most likely constitutional challenge to the CEP would be an equal protection challenge to the eligibility requirements and grant provisions relating to non-major party candidates. EX-1448. Mr. Pearson warned that if the challenge was successful and a court enjoined the operation of the CEP, Section 9-717 would also result in termination of the contribution bans. *Id.* To make the eligibility requirements and grant provisions dealing with non-major parties severable – and thus avoid a broad injunction triggering the application of Section 9-717 – Mr. Pearson proposed that the legislature redraft the General Election Grant Provisions to make them party-neutral, and reenact the Non-major Party Provisions as exceptions to the general rule set out in the General Election Grant Provisions. EX-1413, 1448-49.

The Connecticut legislature adopted this suggestion, and enacted the amendments suggested by Mr. Pearson. And the legislative history shows that it did so in order to make the Non-major Party Provisions more easily severable in the event of an adverse court decision. *See* EX-1449 (Statement by Rep. Tim O'Brian: "[I]f the Court chooses to say that this provision is not constitutional, then they can strike down just the minor party point. And, in effect, what happens is that minor party and petitioning candidates revert to what applies to major party candidates."). Thus, the legislative

history demonstrates the legislature's intent that the Non-major Party Provisions be excised and the operation of the CEP revert to a party-neutral standard, rather than to lose the public financing system as a whole.

This resolution is also supported by an extensive body of case law in analogous equal protection cases. Where a court finds that an underinclusive statute violates the equal protection clause by denying a benefit to one class that it grants to another class, the court is frequently faced with two choices: depending on its analysis of the statute and the legislature's intent, the court can sever the invalid provision and expand the benefits provided by the statute to both classes, or it can invalidate the entire statutory scheme and nullify the benefit to both classes. *See Soto-Lopez v. New York City Civil Serv. Comm.,* 755 F.2d 266, 280 (2d Cir. 1985), *aff'd, Attorney Gen. v. Soto-Lopez*, 476 U.S. 898 (1986) (citing *Califano v. Westcott*, 443 U.S. 76, 89 (1979)). Thus, the severability question in an equal protection case is "'whether it more nearly accords with [the legislature's] wishes to eliminate the policy altogether or extend it to render what [the legislature] plainly did intend, constitutional.'" *Id.* (quoting *Welsh v. United States*, 398 U.S. 333, 355-56 (1970) (Harlan, J. concurring)).

In making this determination, the courts will look to the legislature's objectives in enacting the statute, in order to assess whether extension of

benefits or nullification would more closely comport with legislative intent. *See Frontiero v. Richardson*, 411 U.S. 677, 691 n.25 (1973); *Soto-Lopez*, 755 F.2d at 280-81. The Supreme Court has held that "'extension, rather than nullification is the proper course,'" so long as extension comports with legislative intent. *Heckler v. Matthews*, 465 U.S. 728, 739 n.5 (1984) (quoting *Califano v. Westcott*, 443 U.S. 76, 91 (1979)). As a result, the courts in equal protection cases have frequently found that the right constitutional remedy is to extend benefits to a previously excluded class – even when that means imposing an additional burden on the public fisc – rather than holding the entire statutory scheme invalid. *See, e.g., Califano v. Goldfarb*, 430 U.S. 199, 217 (1977); (extension of Social Security survivors benefit to class of widowers); *Jimenez v. Weinberger*, 417 U.S. 628, 637-38 (1974) (extending disability benefits to illegitimate children); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (extending food assistance to households containing unrelated persons); *Frontiero*, 411 U.S. at 691 n.25 (extending housing and medical benefits to dependent spouses of servicewomen, rather than nullifying benefits to dependent spouses of all members of uniformed services, because more consistent with basic purpose of statute to attract career members of uniformed services); *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971) (extending welfare benefits to

aliens); *Soto-Lopez*, 755 F.2d at 277-78, 281 (extending bonus points on civil service exam to veterans who were non-residents of New York when enlisted, rather than nullifying bonus points for all veterans, because it better comported with statutory purpose to give hiring preferences to veterans).

D. The Triggered Matching Funds Provisions Are Severable.

The District Court held that the triggered matching funds chilled the First Amendment rights of non-participating candidates and of individuals making independent expenditures in excess of the triggered matching funds threshold. If this Court affirms the District Court's holding that these provisions violate the First Amendment, any remedy should be limited to excising the triggered matching funds provisions and their accompanying reporting requirements, Sections 9-712 through 9-714 and Section 9-612(e)(2), from the remainder of the statute.[18]

1. The CEP is Fully Operational without Triggered Matching Funds and Their Accompanying Disclosure Requirements.

Like the invalid provisions in *Buckley* discussed above, the triggered matching funds provisions are not so intertwined with the remaining valid

[18] The District Court relied on the Eighth Circuit's decision in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), the only circuit court decision to hold triggered matching funds provisions invalid. *See* SPA-132. There, however, the Eighth Circuit only enjoined the enforcement of the triggered matching funds provisions, and left the public financing system operational. *Day*, 34 F.3d at 1362-63.

provisions of the CEP that their severance would prevent the CEP from operating. Indeed, the provisions can be cleanly excised from the statute leaving a fully functioning public financing program.

The purpose of the triggered matching fund provisions was to incentivize participation in the program, but the CEP could plainly continue to operate without them. In the absence of triggered matching funds, candidates would still (1) qualify under the same eligibility standards, (2) receive the same initial grant and (3) be subject to the same expenditure and contribution limits. The only difference would be that candidates would no longer be entitled to receive additional funds in the event of a high-spending race or an attack by independent expenditures. There is no reason to believe, however, that the availability of such matching funds is such an indispensible aspect of the public financing system that the CEP cannot exist without them.

On the contrary, the impact of the matching funds provisions, thus far, has been marginal. Although 231 candidates participated in the CEP in the 2008 elections, excess expenditure matching funds were never awarded and independent expenditure matching funds were awarded only once, triggering the release of a mere $632 in additional grant monies. And other public financing programs – including the Presidential public financing system

upheld in *Buckley* – function without any provision for triggered matching funds.

2. Nothing in the Legislative History Indicates that the Legislature Would Not Have Enacted the CEP Without the Triggered Matching Funds Provisions.

The legislative history regarding enactment of the triggered matching funds provisions is sparse, but there is no evidence that the legislature would not have enacted the CEP without these provisions. The limited record includes testimony regarding how triggered matching funds provisions have worked in the public financing systems of other states, *see* EX-946-49, 981-82, 990 (statement of Barbara Lubin); EX-971 (statement of Jonathan Wayne); comments regarding the appropriate grant amounts and distribution mechanisms, *see* EX-993, 1107 (statements of Senator John McKinney) (discussing appropriate grant levels and questioning witnesses about how triggered matching funds are distributed); and concerns about the influence of independent expenditures, EX-1024-25 (statements of Senator Andrew Roraback) (voicing concern over the influence of independent expenditure organizations and issue advocacy). But none of these comments even remotely suggests that enactment of the CEP was contingent on the triggered matching funds provisions.

Accordingly, this Court should look to the fundamental purposes of the statute to determine whether severability or invalidation of the entire statute would more closely comport with legislative intent. Here, the principal purpose of the CEP was to provide a corruption-free funding alternative for candidates in state politics, and that purpose can be readily achieved without triggered matching funds. The legislature enacted triggered matching funds to incentivize participation by ensuring that candidates in a high-spending race would have access to enough funds to stage a viable campaign, and it is possible that, without triggered matching funds, some candidates may decline to participate. But there is no reason to believe that the lack of matching funds will have a dramatic effect on participation rates, and a public financing system, without triggered matching funds, would still offer a corruption-free source of money for candidates in many races. In the absence of any evidence that severability is inconsistent with the legislative intent, this Court should sever the triggered matching funds rather than enjoining enforcement of the statute in its entirety.[19]

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[19] The District Court held that the grant reduction provisions of the CEP contributed to the burden imposed by the differential eligibility requirements because the grant reduction provision discouraged minor party participation in the CEP. If this Court affirms the lower court's holding, the grant reduction provision can be severed easily. In the absence

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 the defendants. In the alternative, to the extent that the Court affirms any part of the District Court's decision, the Court 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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Monica Youn
Angela Migally
Mimi Marziani
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Phone: (212) 998-6730

Ira M. Feinberg
David Dunn
HOGAN & HARTSON LLP
875 Third Avenue
New York, NY 10022
Phone: (212) 918-3000

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of the grant reduction provision, a participating candidate will receive the same amount of money regardless of whether she is faced by a major or minor party candidate. Although, there are certainly statements in the legislative record indicating that the legislature, in adopting the provision, acted with appropriate concern that public money should not be wasted in minimally contested races, *see supra*, Section I.D(4)(b), there is no evidence that the legislature would rather have seen the entire CEP fail than sever this provision.

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,378 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

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Monica Youn
Angela Migally
Mimi Marziani
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Phone: (212) 998-6730

Ira M. Feinberg
David Dunn
HOGAN & HARTSON LLP
875 Third Avenue
New York, NY 10022
Phone: (212) 918-3000

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See Second Circuit Interim Local Rule 25(a)6.

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