UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GREEN PARTY OF CONNECTICUT, *et al.*	:	
	:	
Plaintiffs,	:	
v.	:	
	:	
JEFFREY GARFIELD, *et al.,*	:	CASE NO. 3:06-cv-1030 (SRU)
	:	(Consolidated with 06-cv-1360)
Defendants,	:	
	:	
AUDREY BLONDIN, *et al.,*	:	
	:	
Intervenor-Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This case challenges the constitutionality of the Citizens' Election Program ("CEP") – Conn. Gen. Stat. §§ 9-700–718, 9-750–751 – a comprehensive public financing scheme enacted in 2005 and amended in 2006 by the Connecticut General Assembly. Beginning in 2008, the CEP will provide public financing for participating candidates who seek election to the General Assembly. *Id*. §§ 9-702(a). In 2010, public financing will be available to candidates for statewide offices. *Id*. The plaintiffs are the Green Party of Connecticut ("Green Party"), the Libertarian Party of Connecticut ("Libertarian Party"), and S. Michael DeRosa ("DeRosa"), a Green Party candidate for state senate in 2008.

The CEP explicitly discriminates against minor party and independent candidates. First, the CEP provides direct subsidies to major party candidates on terms that deny the same benefits to minor party and petitioning candidates and on terms that distort the relative positions of the political parties. Second, the CEP impermissibly operates to artificially inflate the strength of major party candidates and diminishes the strength of minor party and petitioning candidates. Third, the CEP entrenches power in the two major parties. Finally, plaintiffs' speech is burdened by the impermissible advantage given to the major parties. The Supreme Court's seminal decision in Buckley v. Valeo, 424 U.S. 1 (1976), does not allow governments to slant the playing field in this way. See Green Party of Connecticut v. Garfield, 537 F. Supp. 2d 359, 379 (D. Conn. 2008).

Under the CEP, major party candidates are given a permanent statutory preference in a way that distorts the competitive conditions that elections are required to be conducted under. Plaintiffs allege violations of their First and Fourteenth Amendment rights. Connecticut does not have a legitimate – much less compelling – interest in stifling the political opportunities of minor

party and petitioning candidates. On the contrary, it has an affirmative obligation to remain strictly neutral.

Defendants and intervenor-defendants (collectively, the "defendants") previously moved to dismiss Counts I, II, and III of plaintiffs' Amended Complaint which concern the public financing system. On March 20, 2008, this Court issued a decision dismissing Counts II and III, but denying the motion as to Count I. *Garfield*, 537 F. Supp. 2d 359. Accepting the allegations as true, the Court held that plaintiffs stated a claim under the First and Fourteenth Amendments in view of the unfair advantage the CEP gives major party candidates. *Id*. at 390. Having completed discovery, plaintiffs now move for summary judgment on Count I.

In addition, in view of the Supreme Court's decision on the last day of the 2008 Term in *Davis v. Fed. Election Comm'n*, No. 07-320, 2008 WL 2520527 (June 26, 2008), plaintiffs move for summary judgment on the previously dismissed Counts II and III of the Amended Complaint. Plaintiffs submit that *Davis* provides controlling support for the First Amendment claims raised in those Counts. Filed simultaneously, herewith, is a motion to vacate the order of dismissal and to reinstate Counts II and III.

FACTUAL STATEMENT

The CEP is a voluntary public financing scheme for state-level candidates in Connecticut. The eligibility and qualification requirements depend on a particular candidate's party affiliation and the office sought. While major party candidates qualify for full public funding if they satisfy the qualifying contribution requirement, *see* Section II.D, *infra*, minor and petitioning party candidates are held to a higher and more difficult standard that, if met, would only entitle them to a fraction of the funds paid to their opponents. Conn. Gen. Stat. §§ 9-705(c)(1), (c)(2), (g)(1),

(g)(2). The additional eligibility and qualifying requirements have the practical effect of excluding most minor party and petitioning candidates from the public financing system.

Except in the limited circumstances where a minor party candidate received more than 10% of the vote in the last election, minor party candidates cannot qualify for public funding and cannot qualify under the petitioning rules. Independent or new party candidates are eligible only if they satisfy prohibitively expensive petitioning requirements and raise thousands of dollars in qualifying contributions – and then they are only eligible for 1/3 of the funding of their major party opponents. A minor party candidate who received less than 1% of the vote in the preceding election loses his minor party status and is in effect treated as a new party candidate. Perversely, as a new party candidate, the candidate who previously ran on a minor party ballot line could attempt to qualify for public financing as a petitioning candidate. The SEEC has acted to correct this anomaly and allow all minor party candidates to proceed as petitioning candidates, but those efforts are still at the proposal stage. *See* Note 18, *infra*. Candidates who fail to qualify for public financing at the outset are not eligible for a post-election grant even if they receive more than 10% of the vote in the general election. Major party candidates who raise the required number of qualifying contributions are automatically eligible for primary and general election grants that are significantly higher than average past candidate expenditures, particularly in the 80%-90% of elections that are not considered competitive or in play.

Candidates who accept public financing are supposed to agree to expenditure limits in return. In reality, the limits are not strictly binding. They are adjusted upward under certain circumstances in a way that increases their financial advantage over minor party and independent candidates. Moreover, by the defendants own admission, the limits contain significant loopholes that undermine their purpose and thwart the goals of public financing by allowing special interest

money to continue to flow into campaigns through candidate-controlled legislative committees and party committees working hand-in-hand with candidates. In fact, nothing in the law prevents candidates from continuing to raise large amounts of money for these committees.

The terms of the CEP, individually or taken together, are unnecessary to further the state's interest in protecting against frivolous candidacies, but rather, can reasonably be viewed as advancing the interests of the elected officials who control state government. This point was not lost on the proponents of public financing in Connecticut – including the intervening organizations in this case and the Brennan Center who have testified in support of relaxing the qualifying criteria and closing some of the loopholes in the program that allow private money to continue to flow into the campaigns of publicly-funded candidates. The State Elections Enforcement Commission ("SEEC") has also sought changes in the CEP to address some of the main areas of concern raised in this case. The actions taken by of the defendants before the legislature in response to the objections raised by the CEP's critics provide a useful context to plaintiffs' challenge to the CEP.

I. Legislative Background

The first legislative proposals for public financing in Connecticut – which would ultimately lead to the adoption of the CEP – originated in the 2005 legislative session with the introduction of SB 61 and HB 6670. *See* SB 61, 2005 Gen. Assem., Reg. Sess. (Conn. 2005); HB 6670, 2005 Gen. Assem., Reg. Sess. (Conn. 2005) (Ex. 1 & Ex. 2). The Senate and House bills proposed public financing legislation based on the Clean Election models enacted in Maine and Arizona. *Id.*; Me. Rev. Stat. tit. 21-A, § 1121 *et seq.*; Ariz. Rev. Stat. §§ 16-901, *et seq.* Under that model, all ballot-qualified candidates regardless of party affiliation can participate in the public financing program provided they raise a minimum amount of money in qualifying

small-dollar contributions. Me. Rev. Stat. tit. 21-A § 1125(3); Ariz. Rev. Stat. § 16-950(D). Both SB 61 and HB 6670 provided for full public financing to all candidates on the same terms. (SB 61, Ex. 1 at 16-18; HB 6670, Ex. 2 at 14-18). This included funding for the primary campaigns of minor party candidates. (SB 61, Ex. 1 at 16-17; HB 6670, Ex. 2 at 14-17). When the legislature failed to enact a public financing program, Governor Rell convened a Campaign Finance Working Group, comprised of a bipartisan group of legislators in August 2005 to study the issue and other campaign finance issues concerning the regulation of lobbyists and state contractors. The group met eleven times, conducted one public hearing at which the Brennan Center[1] and the intervening organizations (Connecticut Common Cause and the Connecticut Citizens' Action Group ("CCAG")) testified, heard from advocates from Maine and Arizona, and heard from national experts in the area of public financing and campaign finance reform. They all testified in support of SB 61 and HB 6670. The Working Group's Report was issued in September 2005, and, consistent with SB 61 and HB 6670, did not make any recommendations suggesting that the public financing system discriminate between major and minor/petitioning party candidates for purposes of public financing. (Campaign Finance Working Group Report, Ex. 3).

In October 2005, the legislature was called into special session and enacted "An Act Concerning Comprehensive Campaign Finance Reform for State-Wide Constitutional and General Assembly Offices." P.A. 05-5, codified at Conn. Gen. Stat. §§ 9-700–718, 9-750–751. The Act provided for public financing for statewide constitutional and general assembly offices.

[1] The Brennan Center wears two hats with respect to the CEP – one relating to policy and the other relating to litigation. First, the Brennan Center served in a policy role by analyzing legislative proposals on public financing when various bills were being considered by the General Assembly. Second, the Brennan Center also serves as counsel to the intervenor-defendants in this litigation. The same people who provided legislative counsel by testifying in front of the General Assembly regarding the CEP, including Ms. Suzanne Novak and Ms. Deborah Goldberg, have also made appearances as lead counsel for intervenor-defendants in this case.

The Act sharply departed from SB 61 and HB 6670 and adopted a system of public financing that provides full funding to major party candidates on terms that deny the same benefits to minor and petitioning party candidates. Conn. Gen. Stat. §§ 9-705(c)(1), (c)(2), (g)(1), (g)(2). The legislation resulted from an eleventh hour compromise between party leaders that was reached without floor debate or input from the good government groups that sought public financing. (Sauer Depo. at 30-33, Ex. 4).

After the bill signing ceremony, the Governor asked Jeffrey Garfield, Executive Director of the SEEC, to study the legislation and make recommendations for its improvement. (Jeffrey Garfield Statement to GAE, Ex. 5 at 1). In a statement to the Joint Committee on Government Administration and Elections, Mr. Garfield "urge[d] [] in the strongest terms possible" that the statute be amended to relax the qualifying criteria for minor and independent party candidates and to close loopholes in the expenditure limits that frustrated the purposes of the CEP. (*Id*.).[2]

In addressing the CEP's treatment of minor and petitioning party candidates, Mr. Garfield identified the very same constitutional issues that plaintiffs have raised in this case:

> The Commission is also very concerned about the treatment of minor party and petitioning candidates for purposes of qualifying for public financing. The legislation creates standards for their participation that are so high that it is very unlikely that these candidates would qualify for any public grants. After reviewing the constitutional jurisprudence concerning the treatment of minor party and petitioning candidates, we feel that a safe harbor is attained with a 5% standard that could be satisfied either with 5% of total votes cast for the office at the preceding election, or a 5% additional petition signature requirement for such candidates. If either 5% standard were attained by the minor party candidate, a full grant would be provided on the same basis as a major party candidate, so long as they also attain the requisite qualifying contributions in the same manner as the major party candidate. Although Maine treats such candidates the same as major party candidates for purposes of eligibility for public financing and Arizona actually provides larger grants to qualifying independent candidates than major

[2] These amendments were contained in HB 5610, a summary of which is attached to his testimony. (Summary of An Act Making Revisions to the Comprehensive Campaign Finance Reform Act, February 2, 2006, Ex. 6).

> party candidates, it is not required by our courts that the legislature treat all candidates the same for this purpose. Our recommendation is based upon consideration of the Buckley case as well as the US Supreme Court decisions regarding ballot access requirements for petitioning candidates.

(*Id*. at 2).[3]

Mr. Garfield took special aim at the loophole for organizational expenditures, which he believed would undermine the effectiveness of the expenditure limits because it allows "party committees, legislative caucus and leadership committees to make unlimited expenditures" and "leave[] the potential for many thousands of dollars of support to be provided to qualifying candidates who are already receiving very generous grants of public dollars." (Garfield Statement, Ex. 5 at 1-2). He specifically addressed how this could further harm minor party and independent candidates who do not have that type of organizational support:

> The disparate treatment of minor and petitioning parties under PA 05-5 is further exacerbated by the organization expenditure loophole which allows legislative caucus and leadership PACs to spend unlimited amounts towards the support of participating candidates, and minor and petitioning candidates do not have a caucus in the General Assembly. In summary, one of the primary goals of public financing is to increase electoral competition, and these provisions work in contravention of that goal.

(*Id*. at 2).

Connecticut Common Cause and CCAG also lined up behind HB 5610. As part of a coalition of organizations called the "Clean Up Connecticut Campaign," Connecticut Common Cause and CCAG organized a major public relations and lobbying effort to reduce the minor party restrictions and to close the expenditure loopholes in the law. (Clean Up Connecticut

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[3] The actual proposed legislation would have relaxed the eligibility requirements for minor and petitioning party candidates by lowering the percentage requirements from 10/15/20% to 3/4/5%. (Summary of Revisions, Ex. 6 at 2). So, minor party candidates could qualify for a 1/3 grant by obtaining 3% of the total votes cast for the same office in the preceding election or submitting a petition with signatures of at least 3% of the qualified electors in the state or district. *Id.* Petitioning candidates would be required to gather signatures from 3% of qualified voters in the district. *Id.* A 2/3 grant would correspond with a 4% requirement. *Id*. And a full grant would correspond with a 5% requirement. The relaxed criteria would have been much lower than the actual requirements, which are discussed more comprehensively in Sections II.B & II.C., *infra*.

Campaign Press Releases, Ex. 7 & Ex. 8). With respect to the CEP's requirements for minor party and petitioning candidates, the Clean Up Connecticut Campaign proposed that the statute be amended to address the following concerns:

- The thresholds for minor and petitioning candidates to qualify be lowered and equalized. The coalition recommends that the state allow those candidates to raise the qualifying thresholds in the same manner and amount of major party candidates and if either the minor/petitioning candidate received 3 percent of the total votes cast for the same office in the preceding election or they obtained petition signature equivalent to 3 percent of the registered voters, the candidate would receive 1/3 of the grant. If the minor/petitioning candidate received 4 percent of the total votes cast, or obtained that amount in petition signatures, allow them to receive 2/3 the grant. If the candidate receives 5 percent of total votes cast in [the] preceding election or gathered the equivalent 5 percent of petition signatures, they would receive the full grant.
- Allow minor party and petitioning candidates to raise funds up to the spending limits for major party candidates. If a candidate receives 1/3 of the grant, they should be permitted to raise private contributions up [to a] level set by the spending limit.
- Public funding be provide[d] for minor party primaries.

(Clean Up Connecticut Campaign Press Release, Ex. 7 at 5-6).

The Clean Up Connecticut Campaign also addressed what they perceived to be in-kind loopholes. The coalition believed that legislative leadership and caucus committees and separate party committees "could raise large sums of money that could be funneled to candidates," which, in turn, could "[p]rovid[e] potentially unlimited in-kind contributions in the form of advertising and mail." (*Id*. at 2). They were particularly concerned with the creation of "stealth campaigns that [would] completely undermine the Clean Elections system." (*Id*.). Finally, the coalition emphasized that "the ability of the major parties to make expenditures on behalf of their participating candidates is not an ability available to minor parties – a factor that could put Connecticut's law on weak constitutional footing." (*Id*.).

The Brennan Center organized it own lobbying effort and testified in support of amendments to relax the qualifying criteria for minor party and petitioning candidates.

(Testimony of Suzanne Novak to GAE, Ex. 9 & Ex.10).[4] The Brennan Center attorneys identified a number of factors that could lead a court to hold that the statute is unconstitutional because it "'unfairly or unnecessarily burden[s] the political opportunity" of minor party candidates, and 'operate[s] to give an unfair advantage to established parties…'" (Novak Testimony, Ex. 9 at 6; *see also* Brennan Center Letter Memorandum to SEEC, Ex. 11 at 8). Moreover, in language that underscores this Court's finding that – taking the allegations as true – the CEP reduces the relative strength of minor party candidates, *Garfield*, 537 F. Supp. 2d at 377, the Brennan Center attorneys made a similar observation, noting that "unlike in *Buckley*, 'the relative position of minor parties that do qualify to receive some public funds' is not necessarily enhanced and in fact may suffer." (Novak Testimony, Ex. 9 at 9) (citation omitted).

Despite the testimony of the SEEC and the intervening organizations, the General Assembly did not relax the qualifying criteria for minor party and petitioning candidates. Nor did the legislature close the organizational expenditure loophole for *statewide* candidates. Organizational expenditures are excluded from the definition of contribution under Connecticut law. Conn. Gen. Stat. § 9-601(25). As a result, the state central committee and other party committees can coordinate unlimited expenditures with the candidate. *Id.* Prior to the enactment of the CEP, coordinated expenditures such as these were treated as contributions and were subject to limits. Governor Rell, for instance, should she seek reelection in 2010, could qualify

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[4] Suzanne Novak of the Brennan Center, and one of the attorneys representing the intervenors in this case, provided the following testimony before the legislature:

> The facts that we believe could most likely [] lead a court to reach that conclusion [that the CEP is unconstitutional] are: (1) Connecticut's failure to provide any funding for minor party primaries; (2) the recent gubernatorial success of a nonmajor party candidate and influence of two minor parties – the Green Party and Working Families Party; (3) only one method of qualifying at a threshold twice as high as that approved in *Buckley* and for offices very different than president; (4) the failure to permit minor party candidates that qualify for public financing to raise private funds to make up the difference between the amount of public funds distributed to them and the amount available to major party candidates; and, (5) the failure to provide post-election funding to minor party candidates who receive a larger percentage of votes cast than the percentage upon which their public funding distribution was based.

(Novak Testimony, Ex. 9 at 6) (citation omitted).

for millions of dollars in public financing by agreeing to expenditure limits and limiting the amount of money she raises for her own campaign to qualifying contributions. Under the organizational expenditure loophole, she can raise unlimited amounts of money for the state central committee, which in turn, can provide unlimited in-kind contributions in the form of broadcast advertising and mail.

The three substantive changes that the General Assembly did make did not materially benefit minor party and petitioning candidates. First, the 2006 amendments narrowed, but did not significantly close the organizational expenditure loophole that allows PACs controlled by House and Senate leaders and party committees to make unlimited campaign expenditures on behalf of legislative candidates participating in the CEP. P.A. 06-137, § 16, codified at Conn. Gen. Stat. § 9-718. Candidates are still allowed to raise tens of thousands of dollars for those PACs, which in turn, can undertake limited but nonetheless thousands of dollars in coordinated expenditures on behalf of the candidate. *Id*. Each Party is allowed three leadership/caucus committees in the Senate, which can spend up to $10,000 each on behalf of its candidate. *Id*. § 9-605(e)(2), (3) (defining legislative and caucus committees). In the House, each Party is also allowed three leadership/caucus committees, which can spend up to up to $3,500 each on behalf of its candidate. *Id*. § 9-718. In addition, the state central committee and town committees can coordinate campaign expenditures with the candidate under this provision. *Id*.

Second, the statute was amended such that a minor party or petitioning candidate who qualified for a partial CEP grant would receive a "supplemental grant" if the candidate (a) incurred a spending deficit, and (b) received a greater percentage of the vote than the percentage used (or the percentage of signatures gathered) to calculate his initial campaign grant. P.A. 06-137, § 19(c)(3), codified at Conn. Gen. Stat. § 9-705(c)(3). As a practical matter, this

amendment provides very little relief to minor party candidates because there are restrictions that prevent them from engaging in deficit spending. Participating candidates are limited to borrowing $1,000 from financial institutions to finance their campaigns, Conn. Gen. Stat. § 9-710(a), and are not permitted to accept loans in any amount from any other source, Decl. Ruling 2007-01, Citizens' Election Program: Loans and Candidate's Personal Funds (Ex. 12 at 2). In addition, candidates cannot loan money to their own campaigns except for the very limited amounts that are allowed at the outset of the campaign. Conn. Gen. Stat. § 9-710(c). For legislative candidates, this amount is limited to $1,000 to $2,000 depending on whether the candidate is running for House or Senate. *Id*. The ability of candidates to engage in deficit spending, moreover, is limited by the SEEC's regulation, which prohibits a participating candidate from making expenditures "incurred but not paid for which payment of any portion of the outstanding liability is made contingent on the participating candidate committee's receipt of a grant from the Citizens' Election Fund." (SEEC 2008 CEP Regulations, § 9-706-2(b)(16), Ex. 13; *see also* Rotman Depo. at 128-30, Ex. 14). Thus, realistically, there is a limit to the amount of credit (if any) available to minor party and petitioning candidates to pay campaign expenses. For instance, in a statewide campaign, the most important campaign expenditure is broadcast media. (Gov. Lowell Weicker Decl. ¶10, Ex. A-2). Broadcast time must be reserved and paid for far in advance. (*Id*.).

Third, the statute was amended to allow a minor party or petitioning candidate who qualified for a partial CEP grant to continue to raise private funds up to the general election grant issued to his major party opponent. P.A. 06-137, § 20(c) codified at Conn. Gen. Stat. § 9-702(c). This provision falls short of providing a meaningful opportunity for minor party and petitioning candidates to supplement their relatively low grants with private funds. Under this provision,

candidates are limited to raising the supplemental funds in amounts less than $100. *Id*. Limits this low will prevent minor party and petitioning candidates from amassing the resources necessary to compete effectively, or to make up the difference between their grant and the full grants paid to major party candidates. (Weicker Decl. ¶ 23, Ex. A-2). As discussed in Section II.D, *infra*, it will be challenge enough to raise qualifying contributions in amounts this small. Minor party candidates lack the type of broad-based, small donor support that major party candidates take for granted. (DeRosa Decl. ¶¶ 39-40, Ex. A-1; Weicker Decl. ¶ 17, Ex. A-2; Thornton Decl. ¶ 17, Ex. A-3). Minor party candidates rely on a more consolidated and highly motivated core group of contributors to finance their campaigns. (*Id*.). There is no scenario under which a minor party candidate can make up a difference in grants in such small contribution amounts. (Weicker Decl. ¶ 23, Ex. A-2).

In 2007, the SEEC returned to the legislature seeking to close yet a second loophole in the expenditure limits under the CEP concerning exploratory committees. Nothing in the CEP prohibits candidates from raising large amounts of money through exploratory committees, and then using the money to finance their campaigns up until the last date for declaring their intent to participate in the public financing program.[5] (Memorandum from Beth Rotman to Karen Hobert Flynn & Andy Sauer re: CEP and Exploratory Committees, Ex. 15). Beth Rotman, Director of Public Campaign Financing in Connecticut, explained the problem at length in a confidential memorandum to Common Cause that because "expenditure limits apply to the candidate's candidate committee, candidates may use exploratory committees to raise and spend large sums of money, and circumvent the overall goals of the Citizens' Election Program." (*Id*. at 2). On March 9, 2007, Ms. Rotman testified before the Government Administration and Elections

[5] The last date to declare one's intent to participate in the CEP in connection with a primary is 25 days prior to the primary; with respect to a general election, the last date is 40 days prior to a general election. Conn. Gen. Stat. § 9-703(a).

Committee in support of closing this loophole – either through the establishment of a defined qualifying period, or by applying the expenditure limits to the exploratory committee. (Rotman Depo., Ex. 14 at 28-30; Testimony of Beth Rotman, March 9, 2007, Ex.16). Although two bills made it out of committee that would have resolved the issue, neither was passed into law. (Rotman Depo., Ex. 14 at 29-30).

In 2008, the General Assembly was once again asked to amend the statute by the SEEC. This time however, the SEEC was seeking a change that would benefit participating candidates by making it easier for them to take advantage of the supplemental grants available under the matching fund provisions of the CEP. (Rotman Depo., Ex. 14 at 46-47). The legislature adopted the SEEC's proposed legislation. P.A. 08-2, § 19(a)-(f), codified at Conn. Gen. Stat. § 9-713(a)-(f). Perversely, rather than narrow the disparity in treatment between major and minor/petitioning party candidates, the amendment actually increases the disparity. Under the original terms of the CEP, if a nonparticipating candidate spent more than the applicable expenditure limit for a participating candidate, the CEP would provide the participating candidate with supplemental grants equivalent to 25% of the initial CEP grant. These supplemental grants would be placed in escrow, and the participating candidate would only be able to spend a portion of the grant based on how much the nonparticipating candidate exceeded the expenditure limit on a dollar-per-dollar basis. However, the law was amended such that the participating candidate can now spend the supplemental grant in its entirety, even if the nonparticipating candidate only exceeds the applicable expenditure limit by one dollar. (*Id.*).

II. Qualifying for Public Financing

A. Criteria for Major Party Candidates

Under the CEP, major party candidates[6] may qualify for public financing if they raise a specified amount of money in "qualifying contributions" from a specified minimum number of individuals.[7] Conn. Gen. Stat. §§ 9-702(b), 9-704(a). Candidates for governor must raise $250,000 in qualifying contributions, of which at least $225,000 must come from Connecticut residents. *Id*. § 9-704(a)(1). All other candidates for statewide offices – Lieutenant Governor, Attorney General, State Comptroller, State Treasurer, and Secretary of the State – must obtain $75,000 in qualifying contributions, including at least $67,500 from state residents. *Id*. § 9-704(a)(2). State senate candidates are required to raise an aggregate of $15,000, including at least 300 contributions from residents of the district.[8] *Id*. § 9-704(a)(3). Candidates for state representative must raise an aggregate of $5,000, including at least 150 contributions from residents of the district. *Id*. § 9-704(a)(4).

Major party candidates who collect the required amount of money in qualifying contributions qualify for public financing for both the primary and general elections.[9] Conn. Gen. Stat. §§ 9-705(a)(1), (b)(1), (e)(1), (f)(1). The grants for primary campaigns are significant

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[6] Major party is defined as:
(A) a political party or organization whose candidate for Governor at the last-preceding election for Governor received, under the designation of that political party or organization, at least twenty per cent of the whole number of votes cast for all candidates for Governor, or (B) a political party having, at the last-preceding election for Governor, a number of enrolled members on the active registry list equal to at least twenty per cent of the total number of enrolled members of all political parties on the active registry list in the state.
Conn. Gen. Stat. § 9-372(5).

[7] Qualifying contributions cannot exceed $100. Conn. Gen. Stat. § 9-704(a).

[8] In order for a contribution to be counted, the contribution must be at least $5. Conn. Gen. Stat. § 9-704(a)(3)(B). The same is true for contributions to candidates for state representative. *Id*. § 9-704(a)(4)(B).

[9] Section 9-705, which designates the amount of the grants, specifically refers only to major party candidates when designating the amount of the grant for primary elections. *See* Conn. Gen. Stat. § 9-705.

– gubernatorial candidates receive $1.25 million, other statewide candidates receive $375,000, candidates for state senate receive $35,000, and candidates for state representative receive $10,000.[10] *Id*. §§ 9-705(a)(1), (b)(1), (e)(1), (f)(1). These grants are payable regardless of the strength of the candidate's primary opponent or whether his opponent qualified for public financing. Major party candidates nominated during their parties' primaries are guaranteed full distribution of the general election funds – $3 million for gubernatorial candidates, $750,000 for other statewide offices, $85,000 for state senate candidates, and $25,000 for candidates for state representative. *Id*. §§ 9-705(a)(2), (b)(2), (e)(2), (f)(2).[11]

Major party candidates are entitled to these generous public financing grants based on two separate, but related fictions. The first is that public financing is a rough substitute for private financing. In fact, these grants grossly distort the financial strength of major party candidates in most cases by providing subsidies that are well in excess of the amount of money they could raise privately. The second fiction is that a candidate's status as a major party candidate is an accurate indicator of the candidate's strength or competitiveness. This premise is also incorrect. In Connecticut, most of the elections are dominated by one major party or the other, and in fact, are frequently uncontested. Minor party candidates are frequently the only alternative candidate in party dominant districts. The Court has already made some findings in

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[10] The CEP makes an exception for major party candidates in one-party dominant districts. *See* Conn. Gen. Stat. §§ 9-705(e)(1)(A), (f)(1)(A). If the percentage of the electors in the district served by the office who are enrolled in the candidate's major party exceeds the percentage of the electors in the district who are enrolled in another major party by 20 percentage points, then the primary grant is $75,000 for senate and $25,000 for the house. *Id*.

[11] Major party candidates must participate in a contested primary in order to receive the primary grant. Conn. Gen. Stat. § 9-705. In addition, major party candidates receive a reduced general election grant if they are unopposed or if their only competitor is a minor or petitioning party candidate who has not raised a total amount of contributions of any type of at least $5,000 in the case of house candidates or $15,000 in the case of senate candidates. *Id*. § 9-705(j)(3), (4); (*see also* SEEC Citizens' Election Program Program Overview, Ex. 46). Minor party candidates who raise or spend a single dollar more than those amounts increase their opponent's grant to the full amount.

this respect based on publicly available records showing past election results and candidate expenditures. *Garfield*, 537 F. Supp. 2d at 375, 378-81. The complete record compiled from data provided by the Secretary of State's office and the State Elections Enforcement Commission is set out below.

1. Public financing grants do not correspond with past candidate expenditures

Only a handful of legislative and statewide elections are considered competitive or "in-play" each cycle. These elections attract the most money, but they are not representative of the amount of money raised and spent by the overwhelming number of candidates. When combined with qualifying contributions, the prescribed funding corresponds to the highest spending in statewide races and spending in only the most competitive legislative elections. (*See* OLR Research Report, Campaign Expenditures by Statewide Office Candidates, Aug. 17, 2005, Ex. 17; OLR Research Report, Campaign Expenditures – 2004 Legislative Races, Feb. 23, 2005, Ex. 18).

As a result, qualifying major party candidates are guaranteed access to funding that far exceeds typical levels of expenditure. The guaranteed grants equalize the funding of major party candidates, even though most elections are generally not competitive and one candidate has a decided financial advantage over the other. (*Id*.). By almost any measure, the grants will increase actual expenditures for almost all major party candidates and result in a financial windfall for most. The point is illustrated in Table 1 below, which shows how candidates for statewide office stand to benefit. Only in the governor's election does the money raised and spent roughly correspond to the public financing grants. Even this last observation, however, must be understood in the context of the excess expenditure and independent expenditure provisions for supplemental grants which could triple the amount of the grant under certain

circumstances, discussed, Section III.A., *infra*. Expenditures in the five under-ticket elections for constitutional office are significantly less than the grant amounts, for both the incumbent and the challenger.

Table 1:

Statewide Office	**Candidate**	**Party**	**Amount Raised in 2006 Statewide Race**[12]	**Corresponding Grants Provided Under the CEP**	**Maximum Amount Under CEP Including Supplemental Grants**[13]
Governor	Jodi Rell	Republican	$4,052,687	$3,000,000 (general election only)	$9,000,000 (match for general election only)
Governor	John DeStefano	Democrat	$4,163,548	$4,250,000 (general election and primary)	$12,750,000 (match for primary and general election)
Governor	Dan Malloy	Democrat (lost in primary)	$3,229,916	$1,250,000 (primary only)	$3,750,000 (match for primary only)
Lt. Governor	Michael Fedele	Republican	$33,731	$750,000 (general election only)	$2,250,000 (match for general election only)
Lt. Governor	Mary Messina Glassman	Democrat	$565,033	$1,125,000 (general election and primary)	$3,375,000 (match for primary and general election)
Lt. Governor	Scott Slifka	Democrat (lost in primary)	$181,063	$375,000 (primary only)	$1,125,000 (match for primary only)
Secretary of State	Richard Abbate	Republican	$48,682	$750,000 (general election only)	$2,250,000 (match for general election only)

[12] Because Connecticut does not keep official statistics of monetary receipts (it provides financial disclosures, but not all are available online), the following statistics are taken from a website called Follow the Money (http://www.followthemoney.org/), which the SEEC provides a link to on its website. Follow the Money is maintained by the Institute on Money in State Politics. The Office of Legislative Research has issued reports based on data from Follow the Money. (*See, e.g.*, Campaign Expenditures and Contributions 2000-2004, Ex. 19).

[13] This column represents the maximum amount that the candidate could receive when taking into account supplemental grants triggered under the matching fund provisions (including the excess expenditure and independent expenditure provisions). *See* Conn. Gen. Stat. §§ 9-713, 9-714.

Secretary of State	Susan Bysiewicz	Democrat	$815,144	$750,000 (general election only)	$2,250,000 (match for general election only)
Treasurer	Linda Roberts	Republican	$39,005	$750,000 (general election only)	$2,250,000 (match for general election only)
Treasurer	Denise Nappier	Democrat	$356,199	$750,000 (general election only)	$2,250,000 (match for general election only)
Comptroller	Cathy Cook	Republican	$0	$750,000 (general election only)	$2,250,000 (match for general election only)
Comptroller	Nancy Wyman	Democrat	$469,285	$750,000 (general election only)	$2,250,000 (match for general election only)
Attorney General	Robert Farr	Republican	$72,851	$750,000 (general election only)	$2,250,000 (match for general election only)
Attorney General	Richard Blumenthal	Democrat	$520,676	$750,000 (general election only)	$2,250,000 (match for general election only)

In legislative elections, the financial disparity between candidates in particular elections, and between candidates and the grant amounts in general, is even more pronounced. This is because elections for state representative and state senate are generally not competitive and frequently uncontested. As a result, the grant amounts are significantly higher than actual spending. (2004 Legislative Expenditures, Ex. 18, median candidate expenditures in 2004 – House: $14,588.64; Senate $61,948.76; OLR Research Report, Campaign Expenditures and Contributions in Connecticut 2000-2004, Aug. 2, 2005, Ex. 19).

Significantly, the OLR reports actually inflate the expenditure data because they do not take into consideration two factors. First, in the senate data, the report excludes 23 candidates who filed exemptions, (2004 Legislative Expenditures, Ex. 18 at 5-8), because they raised and

spent less than $1,000, Conn. Gen. Stat. § 9-333f(b). Actual expenditures by all candidates are thus significantly less. Second, it is common practice for legislators to raise more money than they actually spend in elections. Surpluses are then rolled over to a separate, ongoing committee that the candidate controls. (Jepsen Depo. at 16-18, Ex. 20).

2. A candidate's major party status is not an accurate indicator of the candidate's strength

The use of election results from the last gubernatorial election as a qualifying criteria for all elections, without considering particular election results in under ticket and legislative elections, gives major party candidates a significant advantage over minor and petitioning party candidates. This statutory framework was adopted despite the significant role that minor party and independent candidates in Connecticut have had in recent years. *See* Section II.B., *infra*.[14]

Most statewide elections in Connecticut have not been competitive in years. With the exception of the office of Governor, the Democratic candidates for Secretary of State, Treasurer, Comptroller and Attorney General all won by margins greater than 2:1 in 2006. *See* Office of the Secretary of the State, Election Results for Connecticut State Officers, Nov. 7, 2006, *available at* http://www.sots.ct.gov/sots/cwp/view.asp?a=3188&q=392580 (last visited June 23, 2008).

General Assembly elections follow the same pattern, with only a handful of elections being truly competitive each cycle. *See* Office of the Secretary of the State, Election Results for State Representative, Nov. 7, 2006, *available at*, http://www.sots.ct.gov/sots/cwp/view.asp?a=3188&q=392566 (last visited June 23, 2008) (61 of 151 races included only one major party

[14] Almost 44% of the State's registered voters identify themselves as unaffiliated with any party. *See* Party Enrollment in Connecticut, available at http://www.sots.ct.gov/sots/LIB/sots/ElectionServices/ElectionResults/statistics/enrolhst.pdf (last visited June 23, 2008). The number of self-identified Republicans, in particular, has been declining for years and currently comprises less than 21% of the State's registered voters. *Id*. Although the number of registered Democrats is also in decline, they still have more than a 3:1 advantage over Republicans. *Id.*

candidate, and 65 of the other races won by a major party candidate by at least 20% of vote[15]; approximately 83% of state house races were therefore not competitive); Office of the Secretary of the State, Election Results for State Senate, Nov. 7, 2006, *available at*, http://www.sots.ct.gov /sots/cwp/view.asp?a=3188&q=392586 (last visited June 23, 2008) (9 of 36 races included only one major party candidate, and 17 other races won by a major party candidate by at least 20% of vote; approximately 72% of state senate races were therefore not competitive).

The use of one statewide election as a proxy for the actual support of every major party candidate in every district will unjustifiably inflate the strength of historically weak major party candidates by making full public financing available to them without any showing that they are competitive, much less viable. This is exactly what happened in two special elections held under the CEP. One of the special elections, which was held on January 15, 2008, involved the state senate seat in the 32nd District vacated by Senator Lou C. DeLuca, Republican. This was a "safe" Republican district that was easily held by the Republican candidate in the special election by a margin of 20 points. *See* Office of the Secretary of the State, Election Results for State Senate, Nov. 7, 2006 (includes results from Special Election). Prior to the special election the Democrats had run a candidate in the district only once in the four elections since 2000. *Id.*; Office of the Secretary of the State, Election Results for State Senate, 2004, 2002, 2000, *available at*, http://www.sots.ct.gov/sots/cwp/view.asp?a=3179&Q=392194&SOTSNav_GID =1846 (last visited June 23, 2008). That occurred in 2002, when the Democratic candidate lost by almost 30 points. *See* Office of the Secretary of State Election Results for State Senate 2002,

[15] Defense expert, Donald Green, in his supplemental report defines a "safe district" as one in which a candidate wins a district by getting at least 60% of the vote, *i.e.*, by a 60/40 split. (Green Supplemental Report, Ex. 21 at 1). Safe districts generally coincide with what the State refers to as "party dominant districts," in which one of the two major political parties has at least a 10% to 20% registration advantage. (OLR Research Report, Party-Dominant Districts in Connecticut, Aug. 12, 2005, Ex. 22). Plaintiffs therefore use a 20% margin of victory to denote a race that is uncompetitive.

available at, http://www.sots.ct.gov/ sots/cwp/view.asp?a=3188&q=392516 (last visited June 23, 2008). Although the district is not competitive, the Democratic and Republican candidates each received a public financing grant of $63,750. This was despite the fact that the last time a Democrat ran, she raised only $12,198. *See* Follow the Money, 2002 Statistics for Patricia L. Reilly, *available at*, http://www.followthemoney.org/database/StateGlance/candidate.phtml?c =16174 (last visited June 23, 2008). The grant to the Democratic candidate, in particular, increases his visibility and chances of being elected by distorting his financial strength.

The results of the special election in the 32nd Senate district are consistent with the results of the special election held in October 2007 to fill the House seat in Connecticut's 113th district, formerly held by the late Richard Belden, Republican. Representative Belden spent just over $2,000 to win re-election in 2006 against a Working Families Party ("WFP") candidate. (Richard Belden 2006 Financial Disclosure, Ex. 23). That seat is considered "safe" Republican and was easily held by the Republican candidate in the special election by a margin of almost 30 points. *See* Office of the Secretary of the State, Election Results for State Representatives, Nov. 7, 2006 (includes results from Special Election). Yet the election drew a Democratic candidate who qualified for public financing, and received a grant that does not reflect his electoral support or financial strength. The WFP chose not to run a candidate.

This pattern is inevitably going to continue. The primary goal of the CEP is to increase electoral competition. (Garfield Statement, Ex. 5 at 2). As these elections show, it accomplishes that goal – at least as between major party candidates. It is just as inevitable that minor party and independent candidates will be discouraged from participating in elections by the rich subsidies provided to major party candidates under the CEP. (DeRosa Decl. ¶¶ 57-59, Ex. A-1; Weicker Decl. ¶ 13, Ex. A-2; Gillespie Decl. ¶ 30, Ex. A-7). It will be more difficult for minor party and

independent candidates to have their voices heard in the din of the major party candidates, especially in those elections where they only faced one major party opponent. (DeRosa Decl. ¶¶ 57-58, Ex. A-1).[16]

Party dominant districts are specifically targeted by minor and petitioning parties and are often the ones in which their candidates achieve their best electoral results. (*Id*. ¶ 57). To be sure, in the last four elections, only 33 minor party or petitioning candidates have received over 10% of the vote. (Minor and Petitioning Party Candidates for Legislative Office Receiving Over 10% of the Vote in the 2000, 2002, 2004, 2006 Legislative Elections, Ex. 24). Of the 33 elections in which the minor party or petitioning candidate received over 10% of the vote, 29 of those races involved party dominant districts that included only one major party candidate. (*Id*.).

B. Criteria for Minor Party Candidates

Minor party candidates can qualify for public financing only if they (or someone else in their party) received more than 10% of the vote in the preceding election. Conn. Gen. Stat. §§ 9-705(c)(1), (g)(1). Candidates who received less than 10% of the vote *cannot* qualify through the petition process. "A petitioning candidate is one who is a new party candidate or running with no party affiliation." (OLR Research Report, Qualifying as a Petitioning Candidate Under the New Public Financing System, Jan. 5, 2006, Ex. 25). A minor party candidate who received less than 1% of the vote in the preceding election loses his minor party status and is in effect treated

[16] In both the 32nd Senate district and the 113th House district, a Working Families Party candidate challenged the dominant Republican candidate in the 2006 elections and received slightly more than ten percent of the vote. *See* Office of the Secretary of the State, Election Results for State Representatives & State Senate, Nov. 7, 2006. Neither candidate chose to participate in the special elections, confirming again that the CEP distorts the political playing field by subsidizing major party candidates in a way that increases their strength while siphoning off support from minor party candidates. (DeRosa Decl. ¶¶ 57-59, Ex. A-1; Weicker Decl. ¶ 13, Ex. A-2; Gillespie Decl. ¶ 30, Ex. A-7).

as a new party candidate.[17] Perversely, as a new party candidate, the candidate who previously ran on a minor party ballot line could attempt to qualify for public financing as a petitioning candidate.

An open question under the CEP is whether a minor party candidate who received between 1% and 9.99% can attempt to qualify as a petitioning candidate under his party's designation. Plaintiffs have alleged from the start of this litigation that this subset of minor party candidates (which is the overwhelming majority of candidates) cannot qualify as petitioning candidates and are thus categorically excluded from participation in the CEP. (Amended Complaint ¶¶ 23, 27, Ex. 26). The intervenor-defendants admit this fact in their Answer. (Amended Answer ¶ 27, Ex. 27). Defendants' answer is more ambiguous; they neither admit nor deny this allegation, but state that they have insufficient knowledge. (Defendants' Answer and Affirmative Defenses to Amended Complaint Dated September 29, 2008 ¶¶ 23, 27, Ex. 28).

Although counsel and their clients have repeatedly sought clarification, no clear answer has been given. According to the Director of Public Financing of the SEEC, this is an issue to be decided by the Secretary of State. (Rotman Depo., Ex. 14 at 103-110). The Secretary of State, however, recently issued an opinion stating that the issue was for the SEEC to decide. (Secretary of State Official Opinion – Validity of Nominating Petition to Gain Ballot Access for Existing Minor Parties, May 22, 2008, Ex. 29 at 5). The SEEC has not made a final determination according to the Attorney General's Office. Thus, there is still uncertainty as to whether the

[17] Minor party is defined as: "a political party or organization which is not a major party and whose candidate for the office in question received at the last-preceding regular election for such office, under the designation of that political party or organization, at least one per cent of the whole number of votes cast for all candidates for such office at such election." Conn. Gen. Stat. § 9-372(6).

subset of minor party candidates who received between 1% and 9.99% – the majority of minor party candidates – will be categorically excluded from the CEP.[18]

For example, Mike DeRosa is running for state senate as the nominee of the Green Party in the 1st District in the 2008 elections. (DeRosa Decl. ¶ 13, Ex. A-1). He is not eligible for public financing because the Green Party candidate received 6% of the vote in the 2006 election. (*Id*. ¶ 17). When he attended an SEEC training session in order to determine whether he could participate by meeting the petitioning requirements, he was told by the individual at the training session that he could not. (*Id*.). In like manner, Mr. DeRosa is not eligible to participate in the public financing program when he runs for Secretary of State in 2010. (*Id*.). In 2006, he ran for Secretary of State as the party nominee and received 1.7% of the vote. (*Id*. ¶ 14). Under the terms of the CEP, he is automatically ineligible for public financing. (*Id*. ¶ 16). If the SEEC changes its rules to allow him to attempt to qualify as a petitioning candidate under the Green Party designation, he will be required to satisfy the petitioning requirements that apply to independent and new party candidates. (*Id*. ¶¶ 16-17).

A minor party who satisfies the prior vote total requirement can qualify for public financing if he also meets the additional requirement that he raise a specified amount of money in qualifying contributions. All candidates, regardless of party status, must satisfy this requirement. Conn. Gen. Stat. § 9-704. As discussed in Section II.D, *infra*, this raises separate constitutional concerns. (DeRosa Decl. ¶¶ 39-40, Ex. A-1; Weicker Decl. ¶ 17, Ex. A-2; Thornton Decl. ¶ 17, Ex. A-3). Even if a minor party candidate could raise the money, he would

[18] At its regular meeting on July 2, 2008, the SEEC voted to initiate a declaratory ruling which interprets the statute to allow this subset of minor party candidates to qualify for public financing through the petition requirements. (Proposed Declaratory Ruling 2008-01, Citizens' Election Program: Use of Nominating Petitions for Grant Eligibility, Ex. 47). The proposed ruling is subject to a period of notice and comment. The proposed ruling does not ameliorate the discriminatory impact of the prior vote total requirement – which lies at the core of plaintiffs' claim and was an important factor in the Court's decision. *Garfield*, 537 F. Supp. 2d at 380-381.

receive only a fraction of the grant that major party candidates receive. A minor party candidate who received 10% of the votes cast in the preceding election is eligible to receive 1/3 of the general election grant paid to his major party opponent. *Id*. §§ 9-705(c)(1), (g)(1).

Minor party candidates are not eligible for post-election funds, irrespective of their actual success, if they do not qualify at the outset. Under the federal system for financing presidential elections, minor party candidates who received 5% of the vote automatically qualify for a post-election grant, 26 U.S.C. § 9004(a)(3), as well as funding for the next election, *id*. § 9004(a)(2)(B). Minor party candidates under the CEP are also not eligible for public financing for the primary elections even though primary elections offer candidates exposure that translates to the general election for the nominee. (Novak Testimony, Ex. 9 at 6; DeRosa Decl. ¶ 53, Ex. A-1). This also departs from the approach taken under the federal system, which provides matching funds for all candidates seeking their party's nomination during the primary period. 26 U.S.C. § 9033(b).

The practical effect of setting the bar at 10% is to disqualify at the outset virtually all minor party candidates. In the three legislative election cycles covering the period 2000-2004, 166 candidates represented a minor party or ran as a petitioning candidate. Only 21 received more than 10% of the vote. (OLR Research Report, Past Performance of Petitioning and Minor Party Candidates in Connecticut, March 9, 2006, Ex. 30).[19] Thirty-nine others received between 5% and 9.99% of the vote. *Id*. The number of minor party candidates who would be eligible for public financing under a 5% threshold would increase greatly.

[19] The OLR Report states that there were 168 candidates with 22 receiving more than 10% of the vote. The table actually indicates that only 166 independent candidates ran, *Garfield*, 537 F. Supp. 2d at 379 n.26, and only 21 – not 22 – received more than 10% of the vote.

Significantly, as observed by the Court on its ruling denying defendants' motion to dismiss, if the prior vote thresholds were imposed on major party candidates in the next election cycle, then major party candidates would fail to qualify for full public funding in 43% of all races for the Connecticut General Assembly – and most would not qualify to receive *any* public funds. *Garfield*, 537 F. Supp. 2d at 380.

Minor party and independent candidates are treated differently under the CEP despite the significant role that they have had in Connecticut in recent years. (Gillespie Decl. ¶¶ 31-33, Ex. A-7). In 1990, independent candidates were elected to Governor and Lieutenant Governor.[20] In 1994, the gubernatorial candidates for the "A Connecticut Party" and the "Independence Party" received a combined 30% of the vote. (Past Performance of Petitioning and Minor Party Candidates, Ex. 30 at 4). In the 1992 and 1994 legislative elections, some independent candidates outpolled major party candidates. (Brennan Center Memo., Ex. 11 at 4). In 2006 Senator Joseph Lieberman was defeated in the Democratic primary and won as a petitioning candidate. *See* Office of the Secretary of State Election Results for United States Senator 2006, *available at*, http://www.sots.ct.gov/sots/cwp/view.asp?a=3188&q=392590 (last visited June 24, 2008). The Green Party has been placing candidates on the ballot in Connecticut since 1985 and qualified a statewide slate of candidates for the first time in 2006. (DeRosa Decl. ¶ 11, Ex. A-1). Since 2000, several of its candidates have received between 10% and 20% of the vote in legislative elections. (*Id.*). Green Party candidates have won city council elections in Hartford and New Haven. (Green Party of Connecticut Election History, Ex. 31). In addition, the Working Families Party has been a presence in Connecticut since 2002, when it first placed candidates on the ballot. (*See* http://www.ct-workingfamilies.org/elections.php?show=smenu4)

[20] Kirk Johnson, *The 1990 Elections: Connecticut – Battle for Governor; Weicker Triumphs Narrowly As Loner in a 3-Way Race*, N.Y. TIMES, Nov. 7, 1990, at B9.

(last visited June 23, 2008). In 2004, 20 WFP candidates ran for state senate seats and 51 ran for state representative. (Office of the Secretary of State Election Results for State Senate 2004 & Election Results for State Representatives 2004, *available at*, http://www.sots.ct.gov/sots/cwp/view.asp?a=3188&q= 392556) (last visited June 23, 2008). Of those, 4 candidates for senate received between 5% and 10% of the vote, and 14 candidates for the house won between 5% and 10% of the vote. (*Id*.).

C. Criteria for Petitioning Party Candidates

Independent candidates and new party candidates (and possibly minor party candidates who fail to qualify based on their prior vote totals, *see* Section II.B., *supra*) can qualify for public financing as petitioning candidates. To qualify for 1/3 of the funding of his major party opponent, a petitioning candidate is required to collect thousands of signatures in the same way that an independent candidate would petition to get on the ballot. (DeRosa Decl. ¶¶ 21-24, Ex. A-1). Unlike the ballot access requirement which requires candidates to collect signatures from 1% of the total number of votes cast in the preceding election for the same office, Conn Gen. Stat. § 9-453d, the CEP requires the candidate to collect the signatures from 10% of the total number of votes cast in the preceding election for the same office, *id*. §§ 9-705(c)(2), (g)(2) (hereinafter "petitioning requirement"). To obtain a 2/3 general election grant, the same requirements apply, except that the percentage needed is increased to 15%. *Id*. §§ 9-705(c)(2), (g)(2). And for a full general election grant, the percentage needed is increased to 20%. *Id*.

The petitioning requirements are "so high that it is very unlikely that these candidates would qualify for any public grants." (Statement of Jeffrey Garfield, Executive Director of the SEEC, Ex. 5 at 1-2). Mr. Garfield testified that the petitioning requirement should be lowered to

3%-5% to qualify for either a partial or full grant. (*Id*.). The record fully supports the objection raised by Mr. Garfield.

1. Statewide petitioning

There is almost no scenario under which a minor party or independent candidate could realistically satisfy the petitioning requirements for statewide office. (Weicker Decl. ¶ 15, Ex. A-2; DeRosa Decl. ¶ 21, Ex. A-1; Thornton Decl. ¶¶ 11-12, Ex. A-3). They must collect more than 110,000 *valid* signatures to qualify for 1/3 of the amount of money paid to their major party opponents.[21] According to the defendants own petitioning expert in this case, a candidate would actually want to collect twice as many raw signatures to provide an acceptable cushion for signatures that are disqualified by town clerks as invalid.[22] (Hubschman Depo., Ex. 32 at 46-47; *see also* Weicker Decl. ¶ 15, Ex. A-2; DeRosa Decl. ¶ 21, Ex. A-1; Ferrucci Decl. ¶ 9, Ex. A-4; Thornton Decl. ¶ 12, Ex. A-3). To qualify for a full grant, a candidate would have to submit more than 200,000 valid signatures, and as much as 400,000 with the cushion. (Weicker Decl. ¶ 15, Ex. A-2; DeRosa Decl. ¶ 21, Ex. A-1; Ferrucci Decl. ¶ 9, Ex. A-4). These signature totals are unprecedented in Connecticut. Even the best organized campaigns could not realistically collect that number of signatures. (Weicker Decl. ¶ 15, Ex. A-2).

During Lowell Weicker's 1990 campaign for governor, his campaign collected approximately 100,000 signatures as part of a sustained two-month statewide effort that had the help of at least 1,500 volunteers. (*Id*.). From the beginning, the campaign mobilized a vast statewide network of volunteers and supporters that had previously worked for or contributed to

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[21] There were 1,123,412 votes in the 2006 gubernatorial election. *See* Office of the Secretary of State, Election Results for Governor and Lieutenant Governor, Nov. 7, 2006, *available at*, http://www.sots.ct.gov/sots/cwp/view.asp?a=3188&q=392578 (last visited June 23, 2008). Ten percent of this number is approximately 112,000.

[22] Petitions signatures are routinely disqualified for various reasons, including the signatures being illegible, the signatures being duplicates, the signer not being a registered voter, etc. (DeRosa Decl. ¶ 21, Ex. A-1; Ferrucci Decl. ¶ 9, Ex. A-4).

earlier campaigns. (Weicker Decl. ¶ 8, Ex. A-2). The network drew support from all or most of the state's 169 towns and he was able to rely on this network of volunteers to raise money, organize support, attend campaign appearances and, most critically, to collect signatures on nominating petitions. (*Id*.). Even a candidate with an organizational base as strong as Governor Weicker's could not realistically collect the hundreds of thousands of additional signatures that are necessary to qualify for public financing, much less for a full grant. (*Id*. ¶ 15). It would be pointless for a candidate without the name recognition and political base of a Lowell Weicker to even attempt collect that many signatures. (*Id*.). "In the entire history of the United States, no independent candidate has ever successfully met a petition requirement greater than 134,781 signatures."[23] (Winger Decl. ¶ 21, Ex. A-6).[24]

Petitioning requirements on this scale requires a professional and sustained effort that involves hiring paid petitioners or preferably, a firm that specializes in collecting signatures. (Thornton Decl. ¶ 14, Ex. A-3; DeRosa Decl. ¶ 38, Ex. A-1). Petitioning firms are part of a cottage industry that provide services to candidates seeking access to the ballot and issue groups seeking to place referenda on the ballot. The defendants' expert, Harold Hubschman, is the executive director of SpoonWorks, one of the preeminent firms specializing in collecting signatures. In 2006, Senator Joseph Lieberman lost the Democratic nomination and decided to run as an independent. In order to be placed on the ballot as an independent, Senator Lieberman had to submit 7,500 valid signatures. (Hubschman Depo., Ex. 32 at 47). His campaign hired SpoonWorks to collect the signatures. (*Id*.). To allow for an acceptable cushion, SpoonWorks

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[23] This was Ross Perot's California petition in 1992 to get on the ballot as a Presidential candidate. (Winger Decl. ¶ 21, Ex. A-6).

[24] Richard Winger is plaintiffs'expert in the area of ballot access requirements in the United States. He is the publisher of *Ballot Access News* and has been qualified as an expert in a number of cases challenging restrictive ballot requirements. (Winger Decl., Ex. A-6).

set its goal at 15,000 signatures. (*Id*. at 48-49). The campaign paid SpoonWorks $60,000, or $4 per signature for this service (*id*. at 47-48, 79-82, 89) – but according to widely-published reports, his campaign actually spent $400,000 in unaccounted cash expenditures (or "street money") to pay the expenses for hundreds of out-of-state canvassers. (*See* Andrew Miga, *Lamont Questions Lieberman's Spending*, THE ASSOCIATED PRESS, Oct. 22, 2006, Ex. 33). The $4 per signature fee charged by SpoonWorks is the standard in the industry for services of a firm like SpoonWorks.[25] Using these prices, it would easily cost a candidate a million dollars or more to meet the 20% mark for a full grant.

Based on these rates for professional petitioners, the amount of money necessary to collect the hundreds of thousands of signatures needed to qualify for public financing exceeds the resources available to most minor party and independent candidates. (DeRosa Decl. ¶ 38, Ex. A-1). More importantly, the expense of collecting the signatures exceeds the amount of money that a candidate is allowed to spend during the qualifying period. (*Id*.). Candidate expenditures – when the candidate is attempting to qualify for governor – cannot exceed the $250,000 raised in qualifying contributions.[26] Conn. Gen. Stat. § 9-702(c). Major party candidates can spend up to this limit to collect the qualifying contributions and on general campaign expenditures. (Weicker Decl. ¶ 19, Ex. A-2; DeRosa Decl. ¶ 43, Ex. A-1).

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[25] Chris Gabrieli hired SpoonWorks in 2006 to help him collect signatures to get ballot access in Massachusetts for his candidacy for governor. (Hubschman Depo., Ex. 32 at 39-40). The required number of signatures was 10,000, and Mr. Hubschman's firm set out a target of 20,000 signatures. (*Id*. at 41-42, 45). The 20,000 signatures cost Mr. Gabrieli $82,500. (*Id*. at 56). Christy Mihos, an independent candidate running for governor for Massachusetts, paid $85,000 for 20,000 signatures. (*Id*. at 60). Sam Kelly, who was running for Lieutenant Governor in Massachusetts, paid Mr. Hubschman $16,000 for 4,000 signatures. (*Id*. at 57).

[26] Candidates are allowed to supplement this amount with a limited amount of their own personal resources, depending on the office the candidate is running for. *See* Conn. Gen Stat. § 9-710(c). For governor, a candidate is limited to $20,000. *Id*. For other statewide offices, a candidate is limited to $10,000. *Id*. For state senate, a candidate is limited to $2,000. *Id*. And for state representative, a candidate is limited to $1,000. *Id*. In addition, candidates cannot borrow more than $1,000, *id*. § 9-710(a); Declaratory Ruling 2007-01, Citizens' Election Program: Loans and Candidate's Personal Funds. Loans also must be repaid before a candidate applies for a CEP grant. Conn. Gen Stat. § 9-710(b).

Independent and petitioning minor party candidates have the additional expense of financing the cost of the petition drive. (DeRosa Decl. ¶ 43, Ex. A-1).

For minor party and independent candidates without the resources of a Lowell Weicker or a Joe Lieberman, the petition requirement is a non-starter for all intent and purposes. (Weicker Decl. ¶ 15, Ex. A-2). They do not have the financial resources or the type of statewide organization that could mobilize thousands of volunteers.[27] (*Id*.). Nor do they start with the name recognition of those candidates. Once Governor Weicker announced his candidacy in the 1990 gubernatorial election, public opinion polls showed that he had a substantial lead over his opponents. (*Id*. ¶ 5). His lead in the polls directly translated into widespread enthusiasm and excitement about his candidacy. (*Id*.). From the outset, he was able to raise funds on par with his opponents and to mobilize the type of organizational ground game that rivaled the major parties. (*Id*.). He benefited from equal media coverage and participated in debates on equal terms with his opponents. (*Id*.). All these factors contributed to Governor Weicker's ability to go out and collect the 100,000 signatures that he did.

The amount of resources needed just to qualify for the ballot every four years already places significant burdens on the minor parties in this case. In 2004, the Green Party organized a petition drive to get Ralph Nader on the ballot in Connecticut as its Presidential nominee. (Ferrucci Decl. ¶ 11, Ex. A-4). Nader needed 7,500 valid signatures. To allow for an acceptable cushion, the Party collected approximately 12,000 signatures. (*Id*.). The 2004 Nader petition

[27] Finding dedicated volunteers who are able and willing to petition for signatures over a long period of time is an extremely difficult task. (Ferrucci Decl. ¶¶ 11-12, Ex. A-4). Volunteers usually can devote only small chunks of time to petition for signatures because most of them have jobs and other familial obligations. (*Id*. ¶ 12). The signature requirements for the CEP would require a much larger contingent who could devote a great deal of time to collecting signatures. (*Id*.).

drive involved 100 volunteers and 10 paid petitioners.[28] (*Id.*). In a three-week span, the group petitioned for signatures at about four or five concerts, six or seven carnivals/fairs, and 50 supermarkets. (*Id.*).

In 2006, the Green Party organized a petition drive to qualify its statewide slate of candidates for the ballot. The Party collected approximately 13,500 signatures to meet the 7,500 needed to qualify the slate. (Ferrucci Decl. ¶ 10, Ex. A-4; Thornton Decl. ¶¶ 6-7, Ex. A-3; DeRosa Decl. ¶ 28, Ex. A-1). Just as the Green Party did on behalf of the Nader campaign two years earlier, the Party once again expended tremendous resources to gather those signatures – amounts that seem trivial next to the numbers they would be required to gather for public financing. (*Id.*). The campaign relied on approximately 65 people volunteering as much of their time as possible over a span of 8 to 10 weeks. (Thornton Decl. ¶ 7, Ex. A-3). About 5 or 6 of the people volunteered on a full-time basis. (*Id.*). The Party also hired a campaign manager to coordinate the effort, and paid him about $12,000 to $14,000 for a period of four months. (*Id.*; DeRosa Decl. ¶ 28, Ex. A-1).

The most significant obstacles in trying to mount a successful petition drive are: (1) getting people to actually sign the petition; (2) ensuring that the signatures are valid; (3) finding reliable volunteers who can put in a sustained, long-term effort; (4) raising enough money to pay for the petition drive; and (5) finding appropriate venues. (DeRosa Decl. ¶ 26, Ex. A-1). Most of these issues have already been discussed above in the context of comparing the resources available to a campaign like Lowell Weicker's or Joe Lieberman's with the resources available

28 Even if the petition campaign is not contracted out to a firm like SpoonWorks, the cost of managing a campaign in-house can be prohibitive. Campaigns often cannot meet the petitioning requirements relying strictly on volunteers. (DeRosa Decl. ¶ 38, Ex. A-1). Even in the context of qualifying for the ballot, petitioners are paid $1-$2 per signature to incentivize them. (Thornton Decl. ¶ 14, Ex. A-3; DeRosa Decl. ¶ 38, Ex. A-1; Ferrucci Decl. ¶ 13, Ex. A-4). In 2006, the Libertarian Party spent approximately $20,000 for 11,000 signatures. (Rule Decl. ¶ 11, Ex. A-5).

to the Green Party when it sought to qualify its candidates for the ballot in 2004 and 2006. There are fewer volunteers, less money, and almost always less enthusiasm for a minor party candidate, which makes it all the more difficult to get people to sign a petition. (Thornton Decl. ¶ 10, Ex. A-3). And as previously mentioned, candidates must allow for a comfortable cushion to ensure that they have submitted enough *valid* signatures.[29] (Hubschman Depo., Ex. 32 at 46-47; Weicker Decl. ¶ 15, Ex. A-2; DeRosa Decl. ¶ 21, Ex. A-1; Ferrucci Decl. ¶ 9, Ex. A-4; Thornton Decl. ¶ 12, Ex. A-3). There are 169 towns in Connecticut and each town clerk must check to ensure that the person who signed the petition is registered in that town. (DeRosa Decl. ¶ 33, Ex. A-1). The logistical requirements of coordinating a statewide petition drive and submitting proper petitions to each town clerk can be overwhelming. (*Id.*).[30]

Indeed, convincing people to actually sign a petition is a challenge unique to minor party candidates and other candidates out of the mainstream. (*Id.* ¶ 27; Thornton Decl. ¶ 10, Ex. A-3). People are reluctant to sign minor party candidate petitions for different reasons. (*Id.*). They may disagree with the candidate's message or they may simply be reluctant to place their name and address on a document being circulated by a perfect stranger associated with a political party out of the mainstream. (*Id.*). People might very well be more reluctant to sign a petition

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[29] The failure to collect a comfortable margin of signatures has victimized more than one politician. Mr. Jim Ogonowski, a Republican from Massachusetts, was the presumptive nominee that the GOP had expected to challenge Senator Kerry for his U.S. Senate seat in this November's elections. Mr. Ogonowski needed 10,000 valid signatures to secure a spot on the GOP primary ballot. Although he submitted more than 22,000 signatures, the town clerks found that only 9,970 of the signatures were valid. He was therefore 30 valid signatures short, and failed to secure a spot on the GOP primary ballot – despite submitting more than twice the number of required signatures. *See* Frank Phillips, *Ogonowski Fails to Qualify for GOP Ballot: Party Had Counted on Him to Take On Kerry for Senate*, BOSTON GLOBE, June 4, 2008, at 2; Frank Phillips, *GOP's Ogonowski Could Be Short on Voter Signatures*, BOSTON GLOBE, May 20, 2008, at 1.

[30] Town clerks are responsible for verifying signatures. A voter can only sign a petition from the town in which he is registered. Therefore, when working a venue like a state fair or even in downtown Hartford, volunteers must carry with them a petition from each of the state's 169 towns, and ensure that the voter signs the correct petition. The petitions are then returned to the Secretary of State's office, who distributes them to each town clerk, or are returned to the town clerks directly. The back of each petition must be completed with a sworn verification by the petitioner that the signatures are legitimate. (DeRosa Decl. ¶ 33, Ex. A-1).

qualifying a candidate for public financing – especially a minor party candidate. (DeRosa Decl. ¶ 27, Ex. A-1; Winger Decl. ¶ 26, Ex. A-6). Although people supposedly jumped at the opportunity to sign the petitions circulated by Governor Weicker's campaign in 1990, he readily acknowledges that the level of enthusiasm for his campaign is not representative of the amount of enthusiasm for other insurgent candidates. (Weicker Decl. ¶¶ 11-12, 15, Ex. A-2).

Minor party candidates face one last difficulty not faced by mainstream candidates. They are not always given access to the same venues to collect signatures that are open to major party candidates. (DeRosa Decl. ¶ 30, Ex. A-1). The best venues for collecting signatures are outside supermarkets, government buildings, train stations, special events venues, and downtown areas that have heavy pedestrian traffic.[31] (*Id*. ¶ 31). Volunteers collecting signatures on behalf of Green Party candidates are often harassed or told to leave when they are petitioning. (*Id*. ¶ 30). For instance, they are frequently not allowed to petition in front of supermarkets because it is private property.[32] (*Id*.). Green Party volunteers have even encountered difficulties in front of government buildings and other special event venues where they have been told that petitioning is not allowed. (*Id*.).

2. District petitioning – state senate & state house

At the state senate and state house levels, the petitioning requirements as a percentage correspond to the petitioning requirements for statewide office. On average, 30,000 votes are

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[31] Canvassing door-to-door is uniquely ineffective in a statewide petition drive. (Ferrucci Decl. ¶ 14, Ex. A-4; DeRosa Decl. ¶ 32, Ex. A-1). It is time consuming, labor intensive, and significantly less productive than other venues. (Ferrucci Decl. ¶ 14, Ex. A-4). Downtown business districts are more effective during busy daylight hours, but there is a limit to the number of signatures that you can collect. (*Id*.). At some point, you exhaust the stock of pedestrians even in the best locations in Hartford, New Haven, and Bridgeport. (*Id*.).

[32] Unlike some other states (*e.g.*, Massachusetts) where the law requires that shopping centers open up their perimeter for petitioning, Connecticut law does not require that shopping centers allow petitioners to gather signatures. *See Cologne v. Westfarms Associates*, 469 A.2d 1201 (Conn. 1984) (holding that a court cannot direct owners of a privately owned shopping center to open up its premises to a women's group to collect signatures for a petition drive).

cast in a Senate district. (Office of the Secretary of State Election Results for State Senate 2006). A candidate would therefore have to collect 3,000 valid signatures to qualify for a 1/3 grant. (Ferrucci Decl. ¶ 9, Ex. A-4). Allowing for signatures that are invalid, a candidate would want to collect around 6,000 raw signatures. (*Id*.). To qualify for a full grant the candidate would have to collect at least 6,000 valid signatures and around 12,000 raw signatures. (*Id*.; DeRosa Decl. ¶ 23, Ex. A-1). This is comparable to the 7,500 signatures needed to qualify for the statewide ballot.

A candidate in a competitive House district where 10,000 votes were cast would have to collect 1,000 valid signatures to qualify for a partial grant. (Office of the Secretary of State Election Results for State Senate 2006; DeRosa Decl. ¶ 24, Ex. A-1; Ferrucci Decl. ¶ 9, Ex. A-4). Allowing for an acceptable cushion for invalid signatures, a candidate would want to safely collect 1,500-2,000 signatures. (DeRosa Decl. ¶ 24, Ex. A-1; Ferrucci Decl. ¶ 9, Ex. A-4). To qualify for a full grant a candidate would want to safely collect 4,000 signatures. (*Id*.).

Satisfying the petitioning requirement at the district level can be more difficult than meeting the requirement for statewide office. (DeRosa Decl. ¶ 34, Ex. A-1). This is primarily because the candidate does not have state central committee working on his behalf the way they would for a statewide candidate. (*Id*.). Legislative candidates are generally left to their own devices and have fewer volunteers and financial resources than statewide candidate. (*Id*.). A minor party candidate working on his own or with a few volunteers could not realistically collect the required number of signatures without the concerted effort that is made on behalf a statewide candidate. (*Id*.). A candidate for state senate might have to knock on 20,000-30,000 doors to satisfy the signature requirement. (*Id*.). In downtown Hartford or Bridgeport, the candidate

might have to approach up to 50,000 people on the street, and only about 1 in 10 people will sign a petition on the street. (*Id*.).

The difficulty is compounded by the fact that candidates can only submit signatures from qualified electors within his or her district. Conn. Gen. Stat. §§ 9-705(c)(2), (g)(2). This restriction significantly increases the error rate and the resources required to collect the necessary number of valid signatures. Individuals often will not know whether they are registered to vote in a particular district. (DeRosa Decl. ¶ 35, Ex. A-1). As a result, many signatures would later be disqualified by the town clerk or secretary of state because the signatures did not come from qualified electors residing in that district. (*Id*.).

The requirement that the signatures come from within a particular district also limits the venues. (*Id*. ¶ 36; Ferrucci Decl. ¶¶ 15-16, Ex. A-4). At the statewide level, some of the more popular and effective venues for petitioning include supermarkets, concerts, parks, sporting events, and fairs. (Ferrucci Decl. ¶ 16, Ex. A-4; DeRosa Decl. ¶ 36, Ex. A-1). However, fairs and concerts are completely ineffective for district petitions because most of the people attending the fairs and concerts are not from the district. (*Id*.). A petitioner would therefore spend far too much time trying to figure out whether the individual was a qualified voter from that district for the method to be worthwhile. (Ferrucci Decl. ¶ 16, Ex. A-4). At the district level, petitioners will often attempt to go door-to-door because this method ensures that the signer is, at a minimum, from the district. (*Id*. ¶ 14). This method, however, is only feasible when a candidate needs a hundred or so signatures; it is far too time-consuming and ineffective when thousands or even hundreds of signatures are needed. (*Id*.).

Relying on paid petitioners is not realistic. (DeRosa Decl. ¶ 38, Ex. A-1; Ferrucci Decl. ¶ 13, Ex. A-4). For all practical purposes, the total costs (based on the cost per signature) would

exceed the $5,000 and $15,000 expenditure limits that apply, respectively, to House and Senate candidates during the qualifying period. (DeRosa Decl. ¶ 38, Ex. A-1). The Libertarian Party spent $20,000 in 2006 to collect 7,500 valid signatures in order to qualify its candidate for governor. (Rule Decl. ¶ 11, Ex. A-5). The Green Party paid its campaign manager $12,000 to $14,000 primarily to coordinate the petition drive. (Thornton Decl. ¶ 7, Ex. A-3; DeRosa Decl. ¶ 28, Ex. A-1). At the very least the petition drive would deplete the limited resources available to finance other parts of the campaign during the qualifying period. (DeRosa Decl. ¶ 38, Ex. A-1).

D. Qualifying Contribution Requirement

To qualify for public financing candidates must demonstrate that they have adequate public support by raising an aggregate amount of money from a minimum number of individuals.[33] Petitioning candidates must meet this requirement even though they have already collected hundreds of thousands of signatures from people who believe that public financing should be available to the candidate. In contrast to other states that have adopted public financing, the amount of money that a candidate must raise is substantial. *See, e.g.*, Me. Rev. Stat. tit. 21-A § 1125(3) (candidates for governor need only raise $12,500); Ariz. Rev. Stat. § 16-950(D) (candidates for governor need only raise $20,000).[34]

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[33] Candidates for governor must raise $250,000 in qualifying contributions, of which at least $225,000 must come from Connecticut residents. *Id.* § 9-704(a)(1). All other candidates for statewide offices – Lieutenant Governor, Attorney General, State Comptroller, State Treasurer, and Secretary of the State – must obtain at $75,000 in qualifying contributions, including at least $67,500 from state residents. *Id.* § 9-704(a)(2). State senate candidates are required to raise an aggregate of $15,000, including at least 300 contributions from residents of the district. *Id.* § 9-704(a)(3). Candidates for state representative must raise an aggregate of $5,000, including at least 150 contributions from residents of the district. *Id.* § 9-704(a)(4).

[34] By way of comparison, under the federal system for financing Presidential primaries, candidates are eligible for matching funds if they first raise $5000 in each of twenty states, counting only the first $250 toward the benchmark. 26 U.S.C. § 9033(b)(3), (b)(4). Unlike the Connecticut system, the candidate can continue to raise money under the generally applicable contribution limits. *Id.* § 9003(c); *Buckley*, 424 U.S. at 88-89, 99 n.134. The current contribution limits are $2300. *See* Press Release, Federal Election Commission, FEC Announces Updated Contribution Limits (Jan. 23, 2007), *available at*, http://www.fec.gov/press/press2007/20070123limits.html (last visited June 24, 2008).

Even if a minor party or independent candidate could raise the money, he would not qualify for funding on the same terms that apply to major party candidates. By its very terms, the statute denies equal funding for what is in effect the equal burden of collecting thousands of dollars in qualifying contributions.[35] The legislature's attempt to ameliorate this facial inequality by amending the statute: (1) to make supplemental post-election grants in some circumstances, and (2) to allow candidates who receive partial grants to continue to raise private funds, did not, in fact, achieve equality. *See* Section I, pp. 10-13, *supra*; *see also* (Weicker Decl. ¶¶ 23, 24, Ex. A-2; DeRosa Decl. ¶¶ 51-52, Ex. A-1).

1. Criteria for statewide elections

A candidate for governor is required to raise $250,000. The candidates for the other constitutional offices must each raise $75,000. Conn. Gen. Stat. §§ 9-704(a)(1), (a)(2). To qualify the entire slate, the party would have to raise $625,000. Under the CEP rules, a qualifying contribution cannot exceed $100. *Id*. § 9-704(a). Raising the aggregate amount of money needed to qualify is made more difficult by the $100 cap on individual contributions. A limit this low will effectively prevent minor party candidates from amassing the financial resources necessary to finance the campaign during the qualifying period – including the expense of conducting a statewide petition and fundraising drives. (Weicker Decl. ¶ 18, Ex. A-2). Independent and minor party candidates are dependent on a consolidated base of larger contributors who provide the seed money needed to finance the campaign until it attracts enough attention to draw additional supporters. Seed money is essential to pay for office space, staff,

[35] Minor party candidates receive a percentage of the general election grants based on the party's performance in the preceding election for that office: one-third for 10% to 15% of the votes; two-thirds for 15% to 20%; and a full grant for more than 20%. Conn. Gen. Stat. §§ 9-705(c)(1), (g)(1). In an identical manner, petitioning party candidates receive a percentage of the full grant based on the number of signatures they obtain. Only those who obtain signatures from at least 20% of the number of district (or state) voters who cast votes in the preceding election are given a full grant. *Id*. §§ 9-705(c)(2), (g)(2).

mailings, literature and other campaign expenses – including fundraising expenses. (*Id*. ¶ 17; DeRosa Decl. ¶ 39. Ex. A-1). It costs money to raise money, and without a substantial seed money investment to publicize the campaign and send out an appeal, it is impossible to get a fundraising drive campaign off the ground. (Weicker Decl. ¶ 17, Ex. A-2).

A gubernatorial candidate is required to identify a minimum of 2,500 contributors who give the maximum $100 contribution. He might have to identify thousands of additional donors if the contributions are smaller.[36] Identifying this many new contributors requires a professional and costly fundraising effort that rivals systems in place for major party candidates. (Thornton Decl. ¶ 21, Ex. A-3). A major party candidate for statewide office could easily satisfy this requirement by tapping into the party infrastructure.[37] (Jepsen Depo., Ex. 20 at 84-85; Weicker Decl. ¶ 14, Ex. A-2). The State Central Committee maintains a list of proven contributors and can provide other fundraising assistance to the candidate. (Jepsen Depo., Ex. 20 at 29-31).

The qualifying threshold under the CEP is based on the proven fundraising capacity of major party candidates that few minor party or independent candidates can match. (Weicker Decl. ¶¶ 16-17, Ex. A-2; DeRosa Decl. ¶ 40, Ex. A-1; Thornton Decl. ¶ 18, Ex. A-3). Without the political and financial base of a Lowell Weicker or Joe Lieberman who were elected to statewide office as independents, other third party candidates will effectively be shut out of the

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[36] Cliff Thornton of the Green Party raised $27,000 from less than 90 individual contributors. (Thornton Decl. ¶¶ 8, 19, Ex. A-3). Only about $1,700 of the $27,000 that he raised came from contributions of $100 or less. *Id*. Moreover, he received several large individual contributions, including a couple for $1,000, one for $2,000, and another one for $2,500. (*Id*. ¶ 8). Approximately $7,000 came from the Green Party. (*Id*.). Based on the qualifying contribution rules set forth by the CEP for gubernatorial candidates, Mr. Thornton would have to identify about 180 additional contributors at the $100 limit just to match the $27,000 that he raised in 2006. (*Id*. ¶ 19). To raise the $250,000 required by the CEP, he would have to identify at least 2,500 contributors at the $100 level, and most likely 5,000-10,000 contributors if the contributors give less than $100 on average. (*Id*. ¶ 20).

[37] For example, in 2006, the major party candidates for the gubernatorial race in Connecticut raised money from more than 14,000 individual contributors. *See* Follow the Money, 2006 Statistics for Jodi M. Rell, available at: http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=78401 (last visited June 9, 2008); Follow the Money, 2006 Statistics for John Destefano, available at: http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=78399 (last visited June 9, 2008).

CEP because of the difficulty of raising the money from such a broad constituency. (Weicker Decl. ¶ 12, Ex. A-2; Thornton Decl. ¶ 10, Ex. A-3). Minor party and independent candidates do not have access to thousands of proven contributors – especially at the outset of the campaign. (Weicker Decl. ¶¶ 16-17, Ex. A-2; DeRosa Decl. ¶ 40, Ex. A-1). In addition, under the CEP rules, candidates are drastically limited from the use of personal money ($20,000 for Governor's race), Conn. Gen Stat. § 9-710(c), party money, or from borrowing any significant amount of money ($1,000 limit), *id*. § 9-710(a); (Declaratory Ruling 2007-01, Ex. 12).

The burden on independent and minor party candidates is also made more difficult by the expenditure limits that apply during the qualifying period. (Weicker Decl. ¶ 19, Ex. A-2). Candidate expenditures cannot exceed the amount they are required to raise in qualifying contributions. Major party candidates can spend up to this limit to collect the qualifying contributions and on general campaign expenditures. Independent and petitioning minor party candidates have an additional expense: they must finance the cost of the petition drive. The combined expense conducting a statewide petition and fundraising drive would exceed the expenditure limits that apply during the qualifying period. (Weicker Decl. ¶ 19, Ex. A-2; DeRosa Decl. ¶ 43, Ex. A-1; Thornton Decl. ¶¶ 21-22, Ex. A-3).

2. Criteria for general assembly candidates

The aggregate amount of money that minor party and independent candidates must raise to satisfy the qualifying contribution requirement in General Assembly elections will effectively shut them out of the CEP. (DeRosa Decl. ¶ 44, Ex. A-1). The real burden, however, comes from the additional requirement that the money be raised from a minimum number of individuals in

the district.[38] (*Id*. ¶¶ 45-46). A candidate for state senate would have to identify a minimum of 300 contributors. Conn. Gen. Stat. § 9-704(a)(3). Based on a review of the campaign records of state senate candidates in 2006, this number of donors corresponds to the number of donors that might contribute to major party candidates. *See* Follow the Money, Contributions to Senate Candidates, available at: http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=CT&y=2006&f=S (last visited June 9, 2008) (links to each state senate candidate and their contribution data; clicking on individual candidate provides number of contributors).[39]

The burden on state house candidates is similar. (DeRosa Decl. ¶ 46, Ex. A-1). They have to collect an aggregate of $5,000 from a minimum of 150 individuals. Conn. Gen. Stat. § 9-704(a)(4). If people contributed $25 on average, a candidate would have to collect 200 contributions. Coincidentally, this was the threshold under a pilot program in New Haven in the 2007 mayoral election.[40] Although Ralph Ferrucci, the Green party candidate, received 12% of the vote (Ferrucci Decl. ¶ 6, Ex. A-4), he fell short of collecting the 200 contributions despite a sustained effort, (id. ¶ 18). Again, this number of contributions more accurately corresponds to the number of contributions that a major party candidate could reasonably expect to collect.

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[38] State senate candidates are required to raise an aggregate of $15,000, including at least 300 contributions from residents of the district. *Id*. § 9-704(a)(3). Candidates for state representative must raise an aggregate of $5,000, including at least 150 contributions from residents of the district. *Id*. § 9-704(a)(4).

[39] Indeed, each of the six major party candidates in the three special elections held since the implementation of the CEP satisfied the contribution requirement during the abbreviated qualifying period that applied. (Press Release, State Elections Enforcement Commission Announces Public Grant Payment from the State of Connecticut's Landmark Citizens' Election Program (Sept. 25, 2007); Press Release, Commission Announces Second Public Grant Payment from Connecticut's Landmark Citizens' Election Program in 32nd Senatorial District Special Election (Jan. 3, 2008); State Election Enforcement Commission, Participating and Nonparticipating Candidates District #22 Special Election, all Ex. 34).

[40] Connecticut allows its municipalities to implement their own public financing programs. For its 2007 mayoral election, New Haven implemented a pilot public financing program called the New Haven Democracy Fund. Under the program, a candidate – regardless of party affiliation – was eligible for a public financing grant of $15,000 if that candidate could raise 200 contributions of $25 or more (not to exceed $300) from qualified electors in New Haven. (Ferrucci Decl. ¶ 17, Ex. A-4). The Green Party candidate failed to qualify. (*Id*. ¶¶ 18-19). This proved that a program does not have to treat major and minor party candidates differently to protect the public fisc.

There are few scenarios under which a minor party candidate could identify the needed number of contributors at the $50-$100 level or even at the $25 level. (DeRosa Decl. ¶ 47, Ex. A-1). Without the assistance of the state central committee on the scale of the major parties or the network of town committees that nominate the Democratic and Republican candidates for the General Assembly, minor party and independent candidates are basically left to their own devices. (*Id.*). They generally rely on a network of contributors comprised primarily of family, friends, associates and a core group of the party loyalists. (*Id.*; Thornton Decl. ¶ 17, Ex. A-3). At the district level, this may only comprise 20-30 people. (DeRosa Decl. ¶ 46, Ex. A-1). They would have to undertake the process of mining for hundreds of new contributors, which is both an expensive and time consuming process. (*Id.* ¶ 47; Thornton Decl. ¶ 22, Ex. A-3). The amount of money available to candidates during the qualifying period would not even begin to pay the cost of collecting the qualifying contributions. (DeRosa Decl. ¶ 47, Ex. A-1; Thornton Decl. ¶ 21, Ex. A-3). When you factor in the additional cost of the petitioning process that most minor party candidates and all independent candidates are required to meet, the whole enterprise is an exercise in futility. (DeRosa Decl. ¶ 47, Ex. A-1; Thornton Decl. ¶¶ 21-23, Ex. A-3).

III. Expenditure Limits

All participating candidates agree to expenditure limits in exchange for the public grants. Conn. Gen. Stat. § 9-702(c). The expenditure limits correspond to the amount of the grant plus the qualifying contribution requirement. *Id.* The expenditure limits, however, are tempered in a number of ways that diminish their significance. First, the CEP will dramatically increase average spending since the initial grants are based on expenditures from the most expensive past elections. *See* Section II.A.1, *supra*. Second, participating candidates are released from the limits by the matching fund provisions that could increase the generous original grants by three

times as much. Third, there are significant loopholes in the CEP that allow candidates to raise and spend large sums of money through exploratory committees and organizational expenditures. Thus, private funding will remain integral to the campaigns of some publicly financed candidates.

A. Matching Fund Provisions

1. Excess expenditures

The expenditure limits are not strictly binding because candidates may be released from the limits by the so-called "trigger provisions." *See* Conn. Gen. Stat. §§ 9-713, 9-714. Participating candidates are given matching funds for two different reasons. First, they are given matching funds when a nonparticipating candidate has received contributions, loans, or other funds in excess of the applicable expenditure limit (primary or general),[41] or has spent money in excess of the applicable expenditure limit (primary or general) for the office sought. *Id*. § 9-713. Participating candidates are entitled to receive up to four grants, each worth 25% of the applicable grant.[42] *Id*. When the participating candidate has the 25% grant, he is free to spend it in full even if the nonparticipating opponent has only exceeded the applicable expenditure limit by one dollar. *Id*. Additional 25% grants are made whenever the nonparticipating candidate's spending exceeds 125%, 150% and 175% of the original grant amount. *Id*.

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[41] The applicable expenditure limit has been defined as "the sum of (A) the applicable qualifying contributions that the participating candidate is required to receive under section 9-704 . . . to be eligible for grants from the Citizens' Election Fund, and (B) one hundred per cent of the applicable full grant amount for a major party candidate authorized under section 9-705 for the applicable campaign period." Conn. Gen. Stat. § 9-712(b)(1).

[42] Excess expenditure matching funds are capped at 100% of the grant during said campaign (*i.e*., primary campaign or general election campaign). Conn. Gen. Stat. § 9-713(g). So, for example, a major party candidate for governor could receive a matching primary grant of up to $1.25 million, and also a matching general election grant of up to $3 million because each is considered a separate campaign.

Also, matching funds are triggered even though spending by a minor or petitioning party candidate has not necessarily exceeded the combined spending of his participating major party opponent. This is because minor party expenditures correspond directly to his opponents general election expenditure limit, and does not take into account expenditures during the primary or exploratory period. For example, in a race for state senate, matching funds are triggered if the nonparticipating minor or petitioning party candidate's spending exceeds roughly 74% of the participating major party candidate's total spending.[43]

2. Independent expenditures

The CEP also provides matching funds for independent expenditures made with the intent to promote the defeat of a participating candidate. *Id*. § 9-714. Independent expenditures are expenditures that are not coordinated with the candidate. *Id*. § 9-601(18). Funds are triggered under this provision when the independent expenditure combined with the spending of the nonparticipating candidate exceeds the primary or general election grant. *Id*. § 9-714(c)(2).

Any matching funds triggered by independent expenditures are delivered directly to the CEP candidate. *Id*. §§ 9-714(a), (b). They are likewise capped at 100% of the primary or general grant. *Id*. § 9-714(c)(1). However, as the Court noted in its ruling on defendants' motion to dismiss, a participating candidate could potentially receive up to three times the original full public grant – one additional full grant based on the independent expenditure trigger, and another additional full grant based on the excess expenditure trigger. *Garfield*, 537 F. Supp. 2d at 377. Despite the potential of this provision to increase the funding disparity between major party candidates and minor party candidates who fail to qualify for public financing, independent expenditures made on behalf of a participating candidate do not count toward that candidate's

[43] The 74% is $100,000 ($15,000 in qualifying contributions + $85,000 general election grant) out of $135,000 ($15,000 in qualifying contributions + $35,000 primary grant + $85,000 general election grant).

expenditure limits and are not counted for purposes of the excess expenditure matching funds under section § 9-713.

The independent expenditure provision will inevitably increase the number and size of supplemental grants as contributors redirect their money to political committees that work to promote the defeat or election of candidates. This is the conclusion reached in a report prepared for the New Jersey Legislature following a pilot program implementing public financing in three legislative districts in 2007. (Conclusions & Recommendations on New Jersey's "Clean Election" Experiment, May 2008, Ex. 35 at 7). In a competitive district in New Jersey, independent expenditures triggered $100,000 in matching funds for one candidate. (*Id*.). The report also concluded that independent expenditures in Maine increased under public financing and cautioned that the same will inevitably happen in New Jersey, meaning that the demand for "rescue" or matching funds will increase. (*Id*.); *cf*. Steve Lawrence, *Independent Expenditure Use Skyrockets to Skirt Donation Limits*, THE ASSOCIATED PRESS, Feb. 14, 2008 (showing that the use of independent expenditures has jumped more than 6,000 percent in legislative races and more than 5,000 percent in campaigns for governor and other statewide offices since Proposition 34 – which places limits on donations – was enacted by California in November 2000).

In fact, the SEEC recently promulgated regulations that define independent expenditures so that this provision is more easily triggered. (SEEC 2008 CEP Regulations, § 9-714-1, Ex. 36). It substantially expands the definition beyond explicit words such as "vote against", "defeat", or similar bright-line words, in favor of words that will encompass almost any communication that can be viewed as promoting the defeat of a participating candidate.

The new text provides:

> Section 9-714-1
> Independent Expenditures
>
> (a) A person makes or obligates to make an independent expenditure with the intent to promote the defeat of a candidate … if the independent expenditure expressly advocates the defeat of such candidate.
>
> (b) "Expressly advocates" shall mean:
>
> 1. …or
>
> 2. Making a public communication which names or depicts one or more clearly identified candidates, which, when taken as a whole and with limited reference to external events, contains a portion that can have no reasonable meaning other than to urge the defeat of the candidate(s), as evidenced by factors such as the presentation of the candidate(s) in a unfavorable light, the targeting, placement, or timing of the communication, or the inclusion of statements by or about the candidate.

(SEEC 2008 CEP Regulations, § 9-714-1, Ex. 36).

The new text represents a significant departure from the traditional definition of independent expenditures which was previously limited to words of express advocacy and provides "rescue funds" for any negative ads. The purpose and effect of the expanded definition is to encompass more speech, which will trigger the matching fund provision more easily. As a result, more candidates will qualify for matching funds, leading to an increase in overall spending by major party candidates. The spending gap between the major and minor parties will inevitably increase.

B. The Expenditure Limits Contain Two Significant "Loopholes"

1. Organizational expenditures

The CEP includes a large loophole for organizational expenditures made on behalf of participating candidates. Under Connecticut law, an organizational expenditure is an expenditure made by a party committee, a legislative caucus committee, or a legislative

leadership committee for the benefit of a candidate. Conn. Gen. Stat. § 9-601(25). These funds can be used for a variety of purposes including television and radio advertisements, direct mailings, campaign events, and political advisors. *Id*. There are no restrictions on organizational expenditures made on behalf of candidates for statewide offices. According to their disclosure reports, the Democratic and Republican State Central Committees raised hundreds of thousands of dollars each year for party building activities and to assist candidates. (*See, e.g.*, 2007 Disclosure Reports for Republican and Democratic State Central Committees, Ex. 37) (showing total receipts of over $500,000 for Republican State Central Committee, and over $400,000 for Democratic State Central Committee for 2006); (*see also* Jepsen Depo., Ex. 20 at 31-33) (stating that annual budget while he was chairman of the Democratic State Central Committee was between $400,000 and $500,000). Public financing will inevitably allow these committees to raise more money and to play a larger role in financing campaigns in the same way that the Democratic and Republican National Committees run shadow campaigns for their presidential nominees. In addition to the state central committees, major party candidates benefit from the activities the state's hundreds of town committees – which can coordinate literature drops, mailings, fundraising events and other campaign activities. (Jepsen Depo., Ex. 20 at 46-49; SEEC Organizational Expenditure Fact Sheet, May 2008, Ex. 38 at 7). According to disclosure reports these committees also raise hundreds of thousands of dollars in the aggregate. *See* eCRIS, SEEC Website for Campaign Finance Data, *available at*, http://uat.seec.ct.gov/ecrisreporting/searchingdoc.aspx?seecNav=|&seecNav=| (last visited June 24, 2008).

Organizational expenditures made on behalf of participating candidates for state senate and state representative are limited to $10,000 and $3,500, respectively, during the general

election. *Id*. § 9-718. There are a total of 12 leadership/caucus committees that are allowed to operate under the radar of the expenditure limits. (Organizational Expenditure Fact Sheet, Ex. 38 at 1). These committees in the aggregate raise hundreds of thousands of dollars each cycle to assist candidates in competitive elections. (Jepsen Depo., Ex. 20 at 23-29; *see also See* eCRIS, SEEC Website for Campaign Finance Data, *available at*, http://uat.seec.ct.gov/ecrisreporting/searchingdoc.aspx?seecNav=|&seecNav=| (last visited June 24, 2008). In fact, according to the defendants, these committees are the main beneficiaries of special interest money and have the most potential to abuse the system. (Corrected Decl. of Jonathan Pelto, Ex. 39 at ¶ 10). Due to their cumulative effect, these contributions could quickly equal the general election grants for participating major party candidates.

The most cynical part of the organizational expenditure exception is that it allows leadership committees to actually hold fundraisers with candidates to help them raise the qualifying contributions. (Organizational Expenditure Fact Sheet, Ex. 38 at 7). The General Assembly permitted this exception with the knowledge that it would benefit major party candidates far more appreciably because minor party and independent candidates do not have legislative leadership or caucus committees. (Garfield Statement, Ex. 5 at 2).

2. Exploratory committees

Another loophole, as discussed in Section I, *supra*, involves the use of exploratory committees. Here, a participating candidate can conceivably raise and spend large amounts of money – and circumvent the contribution and expenditure limits set forth by the CEP – by simply using an exploratory committee. This is because the CEP's rules apply to candidate committees, not the candidates themselves, so one who uses an exploratory committee is not bound by the rules. (Rotman Memo., Ex. 15 at 2). The candidate can therefore circumvent these

limits for most of the qualifying period because a candidate does not have to declare his intent to participate in the public financing program until either 25 days prior to the primary or 40 days prior to a general election. Conn. Gen. Stat. § 9-703(a). In short, nothing prevents a candidate from undermining the limits of the CEP by using an exploratory committee, and dissolving it right before the deadline. On March 9, 2007, Ms. Rotman testified before the legislature in support of closing this loophole – either through the establishment of a defined qualifying period, or by applying the expenditure limits to the exploratory committee. (Rotman Depo., Ex. 14 at 28-30; Rotman Testimony, Ex. 16). The measures that would have addressed the issue did not pass. (Rotman Depo., Ex. 14 at 29-30).

IV. Plaintiffs

The plaintiffs in this case include two minor parties – the Green Party of Connecticut ("Green Party"), and the Libertarian Party of Connecticut ("Libertarian Party") – as well as S. Michael DeRosa ("DeRosa"), a co-chairman of the Green Party of Connecticut. Since its establishment in 1996, the Green Party of Connecticut has had dozens of candidates run for federal, state, and legislative office. (DeRosa Decl. ¶ 11, Ex. A-1). In 2006, they qualified their first slate of candidates for statewide office. (*Id*.). While the Party has not yet identified all of its candidates for the 2008 elections, it has nominated two candidates for state senate: Colin Bennett in the 33rd District, and Michael DeRosa in the First District. In 2010, the party will run a gubernatorial slate. (*Id*.). Mr. DeRosa also plans on running for Secretary of State as well in 2010. (*Id*. ¶ 14).

Since at least 1998, the Libertarian Party has also placed several candidates for office in Connecticut. (Rule Decl. ¶ 4, Ex. A-5). The Libertarian Party has not identified all of its candidates for the 2008 elections. (*Id*. ¶ 6). However, as of this date, the Party has nominated

two candidates for state legislative races: Mark Guttman for state senate in the 20th District, Joshua Katz for state house in the 23rd District. (*Id*.).

Plaintiffs the Green Party and Mr. DeRosa have brought suit because minor party and independent candidates are effectively shut out from participating in the CEP. The two announced Green Party candidates running for state senate in 2008 are not entitled to public funding because they did not receive more than 10% of the vote in the last election. They cannot qualify as petitioning candidates because they received more than 1% of the vote. Green Party candidates will attempt to participate in the CEP in circumstances where they are eligible – including the 2010 gubernatorial election. (DeRosa Decl. ¶ 15, Ex. A-1). The CEP distorts the political playing field by subsidizing major party candidates in a way that increases their strength while siphoning off support from minor party candidates. This is particularly true in party dominant districts, which are specifically targeted by minor and petitioning parties and are often the ones in which minor party and independent candidates achieve their best electoral results because there is only one major party opponent. Inevitably, minor party and independent candidates will be discouraged from participating in elections by the rich subsidies provided to major party candidates under the CEP. (DeRosa Decl. ¶¶ 57-58, Ex. A-1). In addition, the base grant and supplemental grant amounts are laddered in a way that will discourage the Party (and its supporters) and its candidates from raising or spending money on elections because it will increase the resources available to major party candidates. (*Id*. ¶ 54).

The Libertarian Party is opposed to public financing of campaign under any circumstances and believes that elections should be left to the marketplace. (Rule Decl. ¶ 8, Ex. A-5). The Libertarian Party suffers a corresponding disadvantage when public financing artificially inflates the financial strength of major party candidates. The money will enhance the

ability of major party candidates to get their message out and will increase their visibility. It will be increasingly difficult for Libertarian candidates to have their voices heard over the din of their opponents – especially in elections where one party previously did not run competitively. By leveling the playing field between major party candidates, the Libertarian Party's candidates are being crowed off the stage. Elections occur in a competitive environment and a benefit given to one candidate is a relative disadvantage to the candidate denied the benefit. (*Id*.; *see also* DeRosa Decl. ¶¶ 57-58, Ex. A-1).

The CEP will also free up money for the major parties for party building activities and for both independent and organizational expenditures that are coordinated directly with the candidate. (Rule Decl. ¶ 9, Ex. A-5). The CEP will inevitably broaden and solidify the party base in the same way that Howard Dean's "50 State Strategy" has broadened the base of the Democratic Party. (*Id*.; DeRosa Decl. ¶ 57, Ex. A-1). Public financing under the CEP will further marginalize the Green and Libertarian Parties. It will be increasingly difficult for those parties to compete or remain viable when the CEP is fully implemented. (*Id*.).

STANDARD OF REVIEW

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-324 (1986). As the Supreme Court has explained, Federal Rule of Civil Procedure 56(c) requires "the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 250 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the [opposing] party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986). Facts need not be viewed in the light most favorable to the opposing party unless "there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007). A factual dispute is "material" if it "might affect the outcome of the suit under the governing law," and is "genuine" if the evidence is such that "a reasonable jury could return a verdict for the [opposing] party." *Anderson*, 477 U.S. at 248. The Court need not consider any "factual disputes that are irrelevant or unnecessary . . . ." *Id.*

ARGUMENT

The CEP provides direct subsidies to major party candidates on terms that deny the same benefits to minor and petitioning party candidates and on terms that distort the relative positions of the political parties. This is fatal under *Buckley*. The distinction between a benefit and a burden was justified in *Buckley* because there was no evidence in the record that federal funds would enable any candidate to purchase scarce communication resources thereby effectively reducing the relative freedom of speech of a non-subsidized candidate. *Buckley*, 424 U.S. at 95, n.129 ("[a]s a practical matter . . . [the Presidential system] does not enhance the major parties' ability to campaign"). The qualifying and funding provisions under the CEP impermissibly operate to artificially inflate the strength of major party candidates and reduce the strength of minor and petitioning party candidates. The CEP provides major party candidates with the resources and incentive to compete against their non-major party opponents on terms that give them an unfair advantage. This will inevitably stifle competition and further entrench power in the two major parties. *Buckley* and other Supreme Court precedents expressly forbid such a result. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (striking down Ohio ballot

requirements because they "give the two old, established parties a decided advantage over any new parties struggling for existence"). Plaintiffs' speech is also burdened by giving one side of the debate the resources to drown out the sound of their opponents.

Under any conception of the First or Fourteenth Amendment, the CEP's qualifying and grant provisions are unconstitutional. The provisions discriminate based on the content of the speech and the identity of the speaker, and have the effect of distorting the relative positions of major and non-major party candidates. The issue for this Court to decide is whether the CEP imposes a burden on plaintiffs' speech by distorting their relative ability to be heard, or by "unfairly or unnecessarily burden[ing] the political opportunity" of minor party or independent candidates. *Buckley*, 424 U.S. at 95-96. If the Court answers that question affirmatively, the CEP must withstand the "exacting scrutiny" or strict scrutiny that applies to restrictions on campaign-related speech. *See Buckley*, 424 U.S. at 15, 44-45; *Fed. Election Comm'n v. Wisconsin Right to Life*, Inc., 127 S. Ct. 2652, 2664 (2007) ("WRTL") ("Because [the Act] burdens political speech, it is subject to strict scrutiny.").

This law imposes a negative restraint on the speech of non-major party candidates by significantly increasing the resources of their major party opponents on terms that deny the same benefit to minor party and independent candidates. The resulting financial disparity impedes their ability to be heard no less than a direct restraint on speech. The Supreme Court's campaign finance jurisprudence provides ample authority to invalidate the CEP because it burdens the speech of one group of speakers. *See Davis v. Fed. Election Comm'n*, No. 07-320, 2008 WL 2520527, at *10 (June 26, 2008) (striking down legislation that applied higher contribution limits for "non-self financing candidates" but imposing lower contribution limit for self-financed "millionaire" because of the "substantial burden" it imposed "on the exercise of the First

Amendment Right[s]…."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (speaker-based restriction on campaign speech).

This Court properly framed the analysis under the Equal Protection Clause and recognized how the CEP operates to increase the competitive advantage of major party candidates to the detriment of non-major party candidates. For constitutional purposes, speaker based discrimination is a violation of both the First Amendment and the Equal Protection Clause.[44] The only difference in the applicable analysis – if any – is that under the First Amendment any discrimination is fatal because the government can almost never justify discrimination. *See Davis*, 2008 WL 2520527, at *10-12 (No justification for discriminatory contribution limits). We turn first to *Buckley* and the Supreme Court's campaign finance jurisprudence.

I. The CEP Violates the First and Fourteenth Amendments

A. The First and Fourteenth Amendments Prohibit the State from Enacting Legislation that Distorts the Political Playing Field or Burdens the Political Opportunity of Minor Party and Independent Candidates

The CEP purports to regulate the most fundamental First Amendment activities – the conduct of campaigns. "[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . of course includ(ing) discussions of candidates . . . ." *Buckley*, 424 U.S. at 14, quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *see also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the

[44] Speaker-based discrimination in the First Amendment context has sometimes been characterized as a violation of the First Amendment itself, *see Simon & Schuster Inc., v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991); *Arkansas Writers' Project Inc., v. Ragland*, 481 U.S. 221 (1987); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (Stewart, J. concurring); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978); and has sometimes been characterized as a violation of the Equal Protection Clause, *see Carey*, 447 U.S. at 461; *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). *See also Garfield*, 537 F. Supp. 2d at 367 n.10. The analysis and result is nonetheless the same.

conduct of campaigns for political office"). The Supreme Court's campaign finance jurisprudence is a bulwark against government regulation of political speech that has the effect of reducing the quantity of expression during a political debate. Restrictions that target campaign speech (or speakers) are presumptively invalid and rarely upheld because they cannot withstand "exacting scrutiny." *Buckley*, 424 U.S. at 16, 44-45. Statutes that burden political speech are subject to strict scrutiny and the burden is on the government to demonstrate a compelling interest which is narrowly tailored to achieve that interest. *See Davis*, 2008 WL 2520527 *10; *WRTL*, 127 S.Ct. at 2664.

Buckley recognizes that the government cannot control the political debate by limiting campaign expenditures. 424 U.S. at 57 (government may not control "the quantity and range of debate on public issues in a political campaign"). It makes no difference whether the restriction is a direct restraint on speech or a restriction on the amount of money a candidate can spend on political communication. *Id*. at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."). Because money is needed for access to the means of communication, *Buckley* held that any limit on the use of money for political speech is a limit on that speech. *Id*. Political speech without an audience is not worth the effort. And, while the Court has generally upheld contribution limits because they do not have any "dramatic adverse effect on the funding of campaigns and political associations," *Buckley*, 424 U.S. at 21, it has struck down contribution limits where they have prevented candidates from "amassing the resources necessary for effective advocacy," *Randall v. Sorrell*, 548 U.S. 230, 247 (2006)

(quoting *Buckley*, 424 U.S. at 21), or where they are discriminatory and give one group of candidates an advantage over another, *Davis*, *supra*.

That said, it makes no difference whether the regulation directly restrains the candidate's ability to reach his intended audience or whether the regulation works to decrease the size of his audience by making it easier for his opponent to monopolize the debate. It is of no moment to the disadvantaged candidate whether his microphone is turned off at the outset of the debate or whether during the debate his opponent's is turned up so loud that only his opponent's voice can be heard. In the realm of protected speech, the legislature is constitutionally disqualified from manipulating the rules of the debate to give one speaker an advantage any more than it could permissibly dictate the subjects about which persons may speak and the speakers who may address a public issue. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Such power in government to distort or "channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people…." *Bellotti*, 435 U.S. at 784-85.

At its core, *Buckley* prohibits the government's use of campaign finance regulations to manipulate or distort the political debate. Manipulating different candidates' ability to speak is decidedly fatal under *Buckley*. Elections occur in a competitive environment and giving one group of candidates an advantage – much less a windfall advantage as alleged here – might alter the outcome of the election. (Weicker Decl. ¶ 20, Ex. A-2). In *Buckley*, the Court recognized the illegitimate nature of having the government adjust the relative voices of participants in the political market place. In rejecting the argument that FECA's limits on independent expenditures were justified by the government's interest in "leveling the playing field," the Court

stated that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley,* 424 U.S. at 48-49. *Davis* presents the flip side of this limiting principle. It rejects the argument that the government can increase the resources of one group of candidates to counteract the resources of another. 2008 WL 2520527, at *11 (Warning against governmental interference with the political process and stating that "it is a dangerous business for Congress to use the election laws to influence voters' choices"); *cf. Miami Herald Publ'g Co., v. Tornillo,* 418 U.S. 241 (1974) (invalidating a state law that required newspapers to afford political candidates' space for replying to criticisms because it distorts editorial message of newspaper); *Arkansas Educ. Television Comm'n v. Forbes,* 523 U.S. 666 (1998) (requiring that a minor party candidate be included in a debate distorts editorial message of sponsor).[45]

In *Buckley*, the Court was very concerned with how the distorting effects of expenditure limits could affect the outcome of elections by "handicap[ping] a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." 424 U.S. at 57. *see also id.* at 251 (noting the "grave risks in legislation, enacted by incumbents of the major political parties, which distinctly disadvantages minor parties or independent candidates") (Burger, C.J., dissenting). In *Davis,* the Court reiterated those concerns. 2008 WL 2520527, at *11 ("The argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office."). The danger

[45] The Supreme Court has held that the First Amendment prohibits the government from manipulation and distortion of speech in other forums, including the legal system, *see Legal Services Corp. v. Velazquez,* 531 U.S. 533, 544 (2001) (striking down government restriction that prohibited legal service lawyers from challenging the constitutionality of welfare laws and stating that the government restriction "distorts the legal system by altering the traditional role of the attorneys"), and privately-sponsored parades, *see Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995) (holding that sponsor of parade has right to exclude speakers and that forcing the sponsor to include a speaker could distort the message of the sponsor).

of self-protective legislation is greatest in the context of campaign finance because it tends to prevent effective challenge. *See Randall*, 548 U.S. at 248-49 (unreasonably low contribution limits inhibit competition).

If the First Amendment prohibits government from adjusting the relative voices of the participants in a political debate in the service of leveling the playing field, it assuredly does not allow the government to slant the playing field by increasing the resources available to some candidates and denying the same to others. *See Garfield*, 537 F. Supp. 2d at 379 (the legislature "had no obligation to pass a law that levels the playing field, but the legislature is not free to pass a law that further slants the playing field"). An increase in a candidate's available resources is no less a burden to the candidate denied the benefit. *See Greenberg v. Bolger*, 497 F. Supp. 756, 778 (E.D.N.Y. 1980) (invalidating postal subsidy given exclusively to major parties and stating: "To suggest that the benefit granted the major parties is acceptable because it only creates a relative impediment to 'new' parties ignores the reality that in a competitive intellectual environment assistance to one competitor is necessarily a relative burden to the other."). Increasing the relative speaking power of the "have's" creates a differential burden on the "have not's" by diluting the effectiveness of their already limited spending power. This violates the First and Fourteenth Amendments just as assuredly as a discriminatory speech tax on one candidate would. Indeed, this was precisely the case in *Davis*, which involved a discriminatory contribution scheme that penalized candidates who financed their campaigns with their own money. 2008 WL 2520527, at *9 ("While BCRA does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right. Section 319(a) requires a candidate to choose

between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.").

B. The CEP Distorts the Political Playing Field and Burdens the Political Opportunity of Minor Party and Independent Candidates by Enhancing the Relative Strength of Major Party Candidates

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

The extent and magnitude of the burden that results from the discriminatory qualifying and grant provisions on non-major party candidates is described at length in the factual statement and the supporting affidavits. Plaintiffs' assessment of the burden is neither exaggerated nor speculative. It is real, immediate and fully supported by the record and legislative history. The General Assembly had fair warning that the CEP imposed a substantial constitutional burden on

non-major party candidates, but failed to heed the advice of the Executive Director of the SEEC, who "urged in the strongest terms possible" that in order to comply with *Buckley* the statute should be amended to relax the qualifying criteria for minor and independent party candidates and to close loopholes in the expenditure limits that frustrated the purposes of the CEP. (Garfield Statement, Ex. 5 at 1).

The General Assembly had ample opportunity in the three legislative sessions following the enactment of the statute (2006-2008) to address the constitutional concerns raised by the SEEC and the intervening organizations in this case. It knew full well that the program terms might lead a court to conclude that that CEP was unconstitutional because it because: (1) it "'unfairly or unnecessarily burden[s] the political opportunity" of minor party candidates, (2)'operate[s] to give an unfair advantage to established parties…," Novak Testimony, Ex. 9 at 6, and (3) that "unlike in *Buckley*, 'the relative position of minor parties that do qualify to receive some public funds' is not necessarily enhanced and in fact may suffer," *id.* at 9.

In addition, the General assembly had the benefit of this Court's opinion denying the defendants' motion to dismiss. *Garfield, supra*. Although the Court was required to accept the allegations as true, the Court expressed serious reservations concerning the differential treatment of major party and non-major party candidates. *See Garfield,* 537 F. Supp. 2d at 381 ("Defendants have suggested no good reason why the legislature sought to protect the public fisc from hopeless minor party candidacies, on the one hand, while spending significant sums of money on hopeless major party candidacies, on the other."). Instead of addressing these concerns, the legislature amended the supplemental grant provision to make it easier for participating candidates to receive supplemental grants by awarding a 25 percent bonus for the first dollar in excess expenditures made by the nonparticipating candidate. P.A. 08-2, § 19(a)-

(f), codified at Conn. Gen. Stat. § 9-713(a)-(f). This amendment increases, rather than ameliorates, the advantage of major party candidates.

The legislative history shows that the state could have readily adopted a public financing system that advanced the state's interests without needlessly burdening the political opportunity of minor party and independent candidates. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567, 585-86 (2000) (observing, *in dicta*, that California's "blanket" partisan primary system was not narrowly tailored to further the asserted state interests because "a nonpartisan blanket primary" would advance the same interests "without severely burdening a political party's First Amendment right of association").

1. The CEP's qualifying criteria provides a statutory preference for all major party candidates and assumes that they are all competitive even in legislative districts where they have little or no actual support

Major party candidates are given a permanent statutory preference under the qualifying provisions of the CEP based solely on the candidate's major party status. The use of one statewide election as a proxy for the actual support of every major party candidate in every district will unjustifiably inflate the strength of historically weak major party candidates by making full public financing available to them. *See Bang v. Chase*, 442 F. Supp. 758, 768 (D. Minn. 1977), *aff'd Bang v. Noreen*, 436 U.S. 941 (1978) ("Under this distribution scheme, a party with state-wide plurality can unfairly disadvantage its opponents in those districts where it enjoys little district support.").[46] While major party candidates are presumptively eligible for full public funding in every legislative and statewide election, minor and petitioning party

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

candidates are held to a different standard that requires them to qualify on an office-by-office basis.

The relative ease with which major party candidates can qualify for public financing gives them an obvious advantage over minor party and independent candidates because they do not have to meet the prior vote total standard or satisfy onerous petitioning requirements. Significantly, as observed by the Court on its ruling denying defendants' motion to dismiss, if the prior vote thresholds were imposed on major party candidates in the next election cycle, then major party candidates would fail to qualify for full public funding in 43% of all races for the Connecticut General Assembly – and most would not qualify to receive any public funds. *See Garfield*, 537 F. Supp. 2d at 380.

The major political parties have been given this advantage even though their actual level of support in many elections, particularly for the General Assembly, may be less than the qualifying thresholds established for their minor party counterparts. More than 70% of the elections in Connecticut are not considered competitive and many are not contested by a major party opponent. *See* Factual Statement, Section II.A.2., pp. 19-20, *supra*.

Minor and petitioning parties have filled the competitive void in many of these elections by providing an alternative candidate. In fact, it is particularly in these legislative districts that minor and petitioning party candidates make the strongest showings. In 2006, 11 of the 12 minor and petitioning party candidates that received at least 10% of the vote competed against only one major party candidate. *See* Office of the Secretary of the State, Election Results for State Representative and State Senate, 2006. Thus, the CEP works to enhance the status of major party candidates in areas where they have not made any historical showing of support and in areas where minor and petitioning party candidates have made their greatest strides.

In effect, the CEP "compels a competitive two-party race between major party candidates in which the government finances, at exceedingly generous levels, major party candidates' efforts to communicate their views and policies to the electorate. Minor party candidates will be crowded out of those races, and the CEP will snuff out the gains that minor parties have made." *Garfield*, 537 F. Supp. 2d at 377. Although this may not occur in every district that minor party candidates have targeted in the past, it does not alter the fact that the CEP provides a powerful inducement for major party candidates to compete in elections that they previously avoided. For instance, Michael DeRosa is running for election in the 1st Senate District. He has previously run and received as much as 11.4% of the vote. (DeRosa Decl. ¶ 13, Ex. A-1). The district is a party dominant Democratic district in which the Republicans have fielded a candidate only once since 2000. The 2008 election has not only drawn a Republican candidate, but also an opponent in the Democratic primary. (List of Participating and Nonparticipating Candidates, Ex. 42). The two special elections held since the CEP was implemented suggest that elections will follow this pattern in the future. *See* Factual Statement, Section II.A.2., *supra* at pp. 20-22.

The justification for holding minor party and independent candidates to a more difficult qualifying standard than the one that applies to major party candidates is based on the misunderstanding that the Supreme Court approved this approach in *Buckley*. In *Buckley*, the Supreme Court concluded that the 5% threshold required of minor parties to qualify for pre-election funding was reasonable. 424 U.S. at 98. The Court reached this judgment based, almost entirely, on the lack of success among third party candidates in the previous 100 years of Presidential politics. *Id*. Given the marginal showing of support for these candidates and fearing an inducement to create splinter parties, the Court considered it reasonable to require a showing of a "modicum of support" before public funds were made available. *Id*. at 96.

Presidential elections are "quite different" than Connecticut state elections because presidential elections are always competitive with both major party candidates enjoying significant popular support. *Garfield,* 537 F. Supp. 2d at 375-76 & n.20.[47] The comparison is less apt in Connecticut where elections are almost uniformly less competitive and where non-major party candidates have been more successful. *See* Factual Statement, Section II.A.2, pp. 19-22, *supra*. The comparison to the election results in *Buckley* is even less suitable for legislative elections.[48] The imposition of a requirement more than double the one upheld in *Buckley* is deserving of *less*, not more, deference. *See Garfield,* 537 F. Supp. 2d at 380 ("I do hold, however, that because the percentages the legislature has chosen are significantly higher than the threshold upheld in *Buckley,* they are entitled to less deference.").

The General Assembly crafted the 10% requirement (as opposed to the 5% approved in *Buckley*) with the knowledge that it would categorically exclude a significant number of well-supported minor party candidates. For example, in 2006, 12 minor and petitioning candidates for state representative received more than 5% and less than 10% of the vote. *See* Office of the Secretary of the State, Election Results for State Representative and State Senate, 2006. The historical trend is even more dramatic. Between 2000 and 2004, 166 minor and petitioning party candidates ran for legislative office, and 61 received at least 5% of the vote. (Past Performance

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[47] The accompanying factual circumstances underlying the enactment of FECA's public funding provisions in 1976 were, in fact, radically different – different in terms of compelling evidence of third-party activity and potential efficacy – than conditions attendant when the Connecticut legislators recently enacted the CEP in 2005. This is true with respect to the increased influence of third party candidates in presidential elections and in state elections. Their success in state elections in particular, including in Connecticut and other New England States that have elected independent candidates for state-wide office, makes the comparison to presidential elections even less apt. (Gillespie Decl. ¶¶ 22-29, Ex. A-7). Professor Gillespie is the author of Politics at the Periphery: the Parties in Two-Party America, a book comprehensively covering the history and roles of third parties from their advent in the early Nineteenth Century to the time of the book's publication.

[48] In 2006, 22 minor and petitioning party candidates for state representative and three minor and petitioning party candidates for state senate candidates received at least 5% of the vote. *See* Office of the Secretary of the State, Election Results for State Representative and State Senate, 2006. Two years earlier, there were 23 similar candidates for state representative and eight for state senate. (Past Performance of Petitioning and Minor Party Candidates, Ex. 30 at 9-12).

of Petitioning and Minor Party Candidates, Ex. 30 at 1-2). Only 21 of those 61, however, received 10% or more of the vote. (*Id*.). The legislature's decision to set the bar at 10% should therefore be viewed with skepticism and should be given less deference. *Garfield*, 537 F. Supp. 2d at 373 & n.17 (where the Court remarked that in contrast to Subtitle H considered in *Buckley*, the benefits under the CEP flow directly to the Connecticut state legislators who enacted the CEP to fund their own elections).

2. The grant amounts increase the relative financial strength of major party candidates because they significantly exceed what most major party candidates have raised and spent in the past

Qualified major party candidates are eligible for public financing grants in amounts that significantly exceed median expenditures made by candidates running for comparable offices in previous years. In statewide races, candidates on the under ticket will be eligible for hundreds of thousands of dollars in grants over the amount of money previously raised. The grant amounts can also be adjusted significantly upward under the excess expenditure and independent expenditure provisions. The supplemental grants paid under these provisions could treble the already generous grant amounts. For example, a major party candidate running for Lt. Governor is eligible for $1,125,000 in combined primary and general election funding. With supplemental grants that amount is increased to $3,375,000. There is no precedent for this level of expenditure. In the 2006, Lt. Governor Michael Fedele raised $33,731. The base general election grant ($750,000) significantly exceeds the expenditures of all 11 candidates on the under ticket – except Secretary of State Susan Bysiewicz. Her opponent would be eligible for a general election grant of $750,000 even though he raised less than $50,000. The base primary grant *alone* ($375,000) exceeds the total combined expenditures of all the challengers on the under ticket. *See* Table 1, pp. 17-18, *supra*.

The likelihood of vastly increasing the resources of major party candidates in house and senate districts is also inevitable. *See* Factual Statement, Section II.A.1., pp. 16-19, *supra* (2004 Legislative Expenditures, Ex. 18) (median candidate expenditures in 2004 – House: $14,588.64; Senate $61,948.76).[49] When combined with qualifying contributions, the prescribed funding corresponds to the highest spending in statewide races and spending in only the most competitive legislative elections. (Statewide Campaign Expenditures, Ex. 17; 2004 Legislative Expenditures, Ex. 18).

Only a handful of legislative elections are considered competitive or "in-play" each cycle. These elections attract the most money, but they are not representative of the amount of money raised and spent by the overwhelming number of candidates. In this case, the competitive elections are not a relevant consideration because the distorting effects on minor party speech will generally flow from the public subsidies that artificially inflate the resources of historically low spending candidates.[50]

In 2004 there were only 8 senate districts where the expenditures of one or more of the candidates exceeded the $100,000 expenditure limit ($85,000 base grant for general election plus $15,000 in qualifying contributions). (2004 Legislative Expenditures, Ex. 18). These high spending elections significantly inflated the median expenditures in the other 28 districts. On the house side only 23 out of more than 300 candidates had expenditures which exceeded the $30,000 expenditure limit for the general election ($25,000 base grant plus $5,000 in qualifying contributions). (*Id*.). Many of these candidates actually appear to have faced poorly-funded

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[49] Significantly, the OLR reports actually inflate the expenditure data. *See* Factual Statement, pp. 18-19, *supra*.

[50] In the context of evaluating contribution limits, by contrast, the Supreme Court has stated that the relevant consideration is the spending levels in competitive elections because unreasonably low limits might interfere with the ability of candidates to amass the resources necessary to finance their campaigns. *See, e.g., Randall*, 548 U.S. at 248.

candidates. (*Id*.). Major party candidates as a whole will receive a windfall that artificially broadens their appeal by increasing the volume of their message.

This is exactly what happened in the two special elections held in October 2007 and January 2008 involving two previously non-competitive districts, *see* Factual Statement, Section II.A.2., *supra*. The availability of public financing attracted a second major party candidate in both elections and crowded out the minor party candidate who had previously provided the only opposition. Tens of thousands of dollars in new money came into the race, not as a result of the popularity or strength of the candidates, but as a result of the alerting effects of public financing which changed both the debate and the dynamic of the election. *Buckley* specifically prohibits states from interceding in elections in this manner.

The value of the grants to major party candidates is actually enhanced by two other aspects of the CEP which have the effect of virtually eliminating the purported "burden" or disadvantage of agreeing to expenditure limits. *See Buckley*, 424 U.S. at 95 (candidates who agree to expenditure limits "suffer a countervailing denial"). First, the CEP provides matching funds to participating candidates based either on the value of any excess expenditures made by his privately financed opponent or on the value of any independent expenditures advocating the participating candidates defeat, or both. In tandem the two provisions could treble the base grant amount. Second, the CEP allows candidates to actually evade the expenditure limits under the organizational expenditure provision and through the use of exploratory committees. By the defendants own account these are significant "loopholes" in the law that will allow candidates to circumvent the expenditure limits. *See* Factual Statement, Section I, *supra*. In short, the fact that there is no real corresponding burden placed on major party candidates who participate in the

CEP further enhances their relative financial strength. Unlike in *Buckley*, major party candidates are protected against any "countervailing" burden. 424 U.S. at 95.

The lack of any meaningful expenditure limits is more fully discussed in Section II.A.2., *supra*, where we explain why the CEP does not advance the state's asserted interest of driving down campaign spending or eliminating the appearance of corruption in politics. Nevertheless, in light of the explicit concerns expressed by the Court about how the matching fund provisions could burden plaintiffs' rights by trebling the amount of the base grants to major party candidates, *see Garfield*, 537 F. Supp. 2d at 377, we submit that after *Davis*, *supra*, there can be no doubt that the matching fund provisions constitute a discrete First Amendment burden on the disadvantaged candidate or speaker. 2008 WL 2520527, at *9-10; *see* Section IV, *infra*. It makes no difference if the disadvantage results from a discriminatory contribution scheme or a discriminatory public financing scheme.[51]

A final aspect of the funding provision that has the potential to significantly increase candidate spending to the disadvantage of non-major party candidates relates to party dominant districts and uncontested elections. The grant amounts are adjusted depending on whether the candidate draws a general election opponent and whether the opponent is a major party candidate. In senate elections, for instance, candidates who are opposed by only a minor party

[51] Consider the circumstances of Governor Lowell Weicker if the CEP was in effect in 1990 when he was elected governor as an independent. He would have a faced a lose-lose situation. By failing to qualify, he gains no advantage because regardless of how much he could have raised privately (and he did raise more than his Democratic opponent), the matching fund provision would not only have thwarted his funding advantage, but would have, in effect, imposed a 25% penalty on the first dollar he spent over the applicable expenditure limit. If his opponents received a primary grant, he would be at a further disadvantage. On the other hand, if he had qualified for a 1/3 partial grant through the petitioning process (which he acknowledge he might have done given his name recognition, proven contributor base, organized ground game and lead in the polls from the outset), he would have faced a 3:1 spending disadvantage against both major party candidates. He could not have competed under these circumstances and could not have made up the difference hobbled by the $100 limit on contributions and the restriction on borrowing. (Weicker Decl. ¶ 18, Ex. A-2). If you factor in the value of independent expenditures that might trigger additional funds to his major party opponents, he might very well have foregone his run as an independent candidate. All of these factors would have decidedly distorted the playing field and almost certainly influenced the outcome of the election.

candidate receive $51,000. Conn. Gen. Stat. § 9-705(j)(4). The general election grant is increased to the full $85,000 if the minor party candidate raises $15,000. *Id.*[52] *Davis* specifically disapproves of this type of laddered financing scheme because it forces the disadvantaged candidate to make the impermissible choice of limiting his own expenditures or financing his opponent's speech. 2008 WL 2520527, at *9.[53] This provision will discourage minor party candidates from spending more than the $5,000 and $15,000 that trigger full funding to their major party opponents. (DeRosa Decl. ¶ 54, Ex. A-1). There is no requirement that the minor party candidate qualify for public financing before the increased funding is triggered. The restriction applies to any minor party candidate, regardless of how he raised the money, including self-financed candidates. *See* Note 11, *supra*. That means a candidate in a party dominant district who faces an underfinanced minor party opponent who raises or spends $15,000 can spend close to $100,000 in the general election ($85,000 base grant plus $15,000 in qualifying contributions).

Remarkably, if the same major party candidate in the same district also drew a primary candidate, he would receive and additional $75,000. Conn. Gen. Stat. § 9-705(e)(1). In party dominant districts, the primary grants are increased to roughly correspond with the general election grants. For instance, Senator Jon Fonfara in the First District has drawn a primary opponent and will receive $75,000 under the CEP. If he drew no opponent in the general election, he would receive an additional $28,500. As it is, he has drawn a major party opponent and will receive at least another $85,000. Here is the rub: In 2004 he had expenditures of

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[52] In House elections, the base grant is increased from $15,000 to $25,000 if the minor party candidate raises or spends $5000. Conn. Gen. Stat. § 9-705(j)(4).

[53] Just as with the excess expenditure and independent expenditure provisions, which trigger supplemental funds, *Davis* provides an independent First Amendment basis to invalidate this type of financing scheme. *See* Section IV, *infra*.

$12,321. (Fonfara 2004 Financial Disclosure, Ex. 40). For Mike DeRosa, who is running in that district as a Green Party candidate (and who is not eligible for public financing under the CEP rules), the field has not only become more crowded with major party candidates, but the district will be flooded with public money flowing exclusively to his opponents.

Because the CEP provides grants in amounts that correspond to the most competitive races, it marks a significant departure from the approach taken in other comprehensive public financing programs that establish funding levels based on average campaign expenditures in the immediately prior election. *See Garfield*, 537 F. Supp. 2d at 381-92. The goal in those programs is to decrease overall campaign expenditures. By the defendants own account, spending will actually increase under the CEP. (SEEC Report on CEP's Projected Levels of Candidate Participation 2008, Ex. 41 at 10-12).

3. The primary grants increase the relative financial position of major party candidates

Major party candidates who draw a primary opponent can qualify for primary grants regardless of the strength or seriousness of the opponent. Candidates in party dominant districts are eligible for larger primary grants that are almost the same amount of the general election grants. The primary grants provide a strong incentive to challenge even the strongest incumbent. Perversely, safe incumbents might very welcome a novice primary opponent in light of the amount of money that will become available to them.

A candidate in legislative elections can qualify to appear on the primary ballot with relative ease. In single town legislative districts, the town committee nominates the candidate. Nothing prevents town committees from selecting more than one candidate. In multi-town districts and in senate and statewide elections, the candidates are nominated by delegates. Any

candidate who receives the vote of 15 percent of the delegates qualifies for the primary ballot.[54] Conn. Gen. Stat. § 9-400. If the CEP meets its goal of increasing competition, the number of contested primaries will inevitably increase. Under the scenario that is most consistent with the CEP goals of increasing competition, there will be more contested primaries because of the availability of public financing. Ideally, these candidates will qualify for public financing and run competitive campaigns. In a party dominant senate district, this will yield $150,000 in combined spending in the primary alone. Conn. Gen. State. § 9-705(e)(1). This is new money that was previously not on the table and distorts the market by increasing the resources available to major party candidates who qualify for the money. The grants more than "substitute" for money that the candidate would have raised privately. *See Buckley*, 424 U.S. at 99.

Under an equally plausible scenario, some candidates who participate in the primary will run half-hearted campaigns and not even attempt to qualify for public financing. These candidates will nevertheless trigger generous primary grants to the favored candidate in the primary. Under this scenario, incumbents might welcome a weak primary opponent. For example, as described above, Senator Jon Fonfara has drawn a primary opponent in the First District – which is a party dominant district. He will qualify for a $75,000 grant even though he is a strong incumbent who has faced a major party opponent only once since 2000. This amount is more than twice the entire amount he spent in the 2006 election and six times more than the $12,000 he spent in 2004. The amount of money he will receive is not simply a "substitute" for private financing.

The competitive advantage created by making primary grants available to major party candidates while denying them to minor party candidates was understood by the legislature. In

[54] Candidates who fail to receive 15 percent of the delegate votes can qualify by collecting signatures from 2 percent of the voters in the relevant senate district, or in statewide elections, 2 percent of the statewide vote. Conn. Gen. Stat. § 9-400.

fact, the original House and Senate bills provided primary grants to all candidates seeking their party's nomination. (SB 61, Ex. 1 at 16-17; HB 6670, Ex. 2 at 14-17). Following the adoption of the CEP, the General Assembly was urged by the intervening organizations in this case to make primary funding available to all qualified candidates on equal terms. (Clean Up Connecticut Campaign Press Release, Ex. 7 at 6). Primary campaigns offer candidates exposure that translates to the general election for the nominee. (DeRosa Decl. ¶ 53, Ex. A-1; Brennan Center Memo., Ex. 11 at 10).

The CEP provides major party candidates with the resources to get their message out during the primary period while denying the same to minor party candidates. The fact that minor party candidates are not compelled by state law to conduct official primaries is not the issue. The issue is whether it is appropriate to increase the relative financial strength of major party candidates with primary grants. It is one thing to provide political parties who have been deputized to conduct state mandated primaries with the resources to pay for state mandated primaries, *see Am. Party of Texas v. White*, 415 U.S. 767 (1974), it is quite a different matter to subsidize the candidates seeking the nomination. Minor party candidates seek their party nomination no less vigorously than major party candidates and in effect hold informal primaries at the state convention. Under the system for financing presidential primaries, all candidates seeking their party's nomination can qualify for matching funds. Numerous minor party candidates have received federal matching funds under FECA – including Ralph Nader who secured the Green party nomination for the presidency in 2004. (*Matching Money for Nader*, N.Y. Times, May 29, 2004, Ex. 43; Nader 2004 Certification Seeking Public Financing as Third Party Nominee, Ex. 44).

4. The major party candidates' relative strength is enhanced because the qualifying criteria imposed on minor party and independent candidates is so onerous that they have effectively been shut out from participating in the CEP

The distorting effects of the CEP might plausibly be mitigated if minor party and independent candidate could participate on terms that were not so absurdly difficult to meet and on terms that are not so patently designed to maintain the competitive advantage of major party candidates. The qualifying criteria, individually, or working together, will effectively prevent minor party candidates from participating in the CEP. Non-major party candidates therefore benefit from no corresponding opportunity to offset the benefits to major party candidates. The benefits major party candidates will gain from participation in the CEP will increase, rather than maintain, the substantial advantages they already have over minor party candidates.

The discrimination against minor party candidates who did not receive 10% of the vote in the last election is total. They are categorically denied funding and cannot obtain it through the petition process the way a new party or independent candidate could. Although the SEEC has initiated a declaratory ruling that would allow minor party candidates to proceed as petitioning candidates, *see* Note 18, *supra*, minor party and independent candidates can qualify for a general election grant only if they satisfy prohibitively expensive petitioning requirements and raise thousands of dollars in qualifying contributions – and then they are only eligible for 1/3 of the funding of their major party opponents. Moreover, unlike *Buckley*, the injury suffered as a result of failing to qualify cannot be remedied by a strong showing in the polls. Minor and petitioning party candidates who are ineligible for pre-election grants cannot obtain any public funding

following the election.[55] In *Buckley*, the Supreme Court highlighted the fact that minor and new party candidates could qualify for post-election funding, which meant, as a result, that the "claimed discrimination [was] not total." 424 U.S. at 102. In this case, the discrimination is complete. The CEP's funding scheme embodies the concerns articulated by Chief Justice Burger in his dissent in *Buckley*: "the present system could preclude or severely hamper access to funds before a given election by a group or an individual who might, at the time of the election, reflect the views of a major segment or even a majority of the electorate."[56] *Id*. at 251 (Burger, C.J., dissenting).

a. The Prior Vote Total Requirement

As explained above, the justification for holding minor party and independent candidates to a more difficult qualifying standard than the one that applies to major party candidates is based on the misunderstanding that the Court approved this approach in *Buckley*. That decision must be understood in the context of the more generous system for financing presidential elections. Minor party candidates could qualify for public financing if they received five percent of the prior vote. Connecticut has arbitrarily adopted a standard twice as high despite the proven success of third-party candidates in the state. Minor party and independent candidates must satisfy this standard in each legislative district and for each statewide office. *Buckley* says nothing about this additional burden. More importantly, the claimed discrimination from failing to qualify for public financing based on the results of the last election was offset by the

[55] Minor and petitioning party candidates are eligible for public funding only if they qualify prior to the election. Conn. Gen. Stat. §§ 9-705(c)(3), (g)(3).

[56] Neither *Buckley* nor any other case cited by defendants in the motion to dismiss endorses a public finance system that categorically denies public funding to minor or petitioning party candidates. The discrimination in the primary grants is also complete despite the recognized benefits to major party candidates who draw a primary opponent.

availability of post-election grants based on a strong showing in the current election.[57] The General Assembly has chosen not to provide this alternative means of qualifying despite the objections of the SEEC and the intervening organizations.

The legislature knew full well the practical effect of using 10% as the qualifying standard. It was explained to them by the agency head in charge of implementing the program. Referring to both the prior vote total requirement and the petitioning requirement, Mr. Garfield testified that the "[t]he legislation creates standards for their participation that are so high that it is very unlikely that these candidates would qualify for any public grants." (Garfield Statement, Ex. 5 at 1-2). The SEEC joined with the intervening organizations in seeking amendments to the CEP that would lower the standard to the levels upheld in *Buckley*. The proposed amendment was never adopted. As a result, no minor party candidates will qualify for public funding in the 2008 senate elections unless they meet the petitioning requirements.[58]

b. Petitioning Requirements

New party and independent candidates can qualify for public financing through the petition process. This alternative is not available to candidates with minor party status. A minor party candidate who received less than 1% of the vote is no longer qualified for the ballot and no longer has minor party status. Candidates in this situation can attempt to qualify for public financing as a new party or independent candidate. *Buckley* did not consider this alternative means of qualifying for new party and independent candidates because eligibility was based

[57] Minor party candidates could also qualify for presidential primary matching funds unrelated to prior vote totals.

[58] The Democratic candidates in the 34th and 35th districts were crossed-endorsed by the Working Families Party and received more than 10% of the vote on the WFP line. If the WFP chose to run their own candidates in those districts, they could seek to qualify for public financing. The election strategy of the WFP, however, is to use cross-endorsements to achieve its ends. (Connecticut Working Families Party Election Strategy, Ex. 45). In this respect, they are different than other minor parties who seek to elect their own candidates. One independent candidate in the 15th district received more than 10% of the vote.

strictly on the percentage of votes a candidate received. Nor did the Court consider whether Congress must provide an alternative means to qualify for pre-election funds. Nothing in the Court's opinion suggests, however, that public financing can legitimately flow only to major parties if the effect is to increase their relative advantage over minor parties. 424 U.S. at 94-95. If minor party and independent candidates suffer a corresponding disadvantage, they must be provided – at the very minimum – an opportunity to restore the status quo. *Id*.

That said, the petitioning requirements do not provide that opportunity – especially if considered in tandem with the qualifying contribution requirement. Without rehashing the extensive record describing the difficulty of meeting the petitioning requirements, we submit that the differential burden on non-major party candidates to collect thousands and hundreds of thousands of valid signatures will effectively shut new party and independent candidates out of the funding program. *See* Factual Statement, Section II.C., *supra*. A statewide campaign would require hundreds of volunteers and hundreds of thousands of dollars. It would require the type of statewide effort that only the major political parties could pull together. (Weicker Decl. ¶ 15, Ex. A-2. At the district level, the petitioning requirements are admittedly more modest, but they still require the level of resources that correspond with statewide petition drives. (DeRosa Decl. ¶ 34, Ex. A-1).

Although the *Buckley* court rejected the analogy to its ballot access cases, the Court did compare the 5% prior vote total to the signature threshold upheld in the context of ballot access. 424 U.S. at 103. It determined that 5% was not outside a permissible range, implying that there are some petition requirements that would fall outside the permissible range. *See Williams v. Rhodes*, 393 U.S. 23 (1968) (striking down petition requirement that appeared designed to protect major party control); *see also Storer v. Brown*, 415 U.S. 724, 743-44 (1974) (explaining

that Courts should question whether gathering signatures of substantially more than 5 percent of the signature pool is necessary to demonstrate community support). We raise this point only to establish that some petition requirements can indeed be so difficult to satisfy that they cannot realistically be complied with. *See Rockefeller v. Powers*, 78 F.3d 44, 46 (2d Cir. 1996).

Historically, petitioning has only been required in the context of ballot access. Although it is not strictly analogous, the petition requirements for ballot access in the different states provide a useful base of comparison for evaluating the petition requirements here. Each state has its own ballot access laws, and presently, "[f]or statewide office, no state requires even 2% of the registered voters to sign petitions (when the states are compared by using the easier ballot access method in each state)."[59] (Winger Decl. ¶ 17, Ex. A-6). Moreover, a survey of the history of the various states' ballot access laws reveals that a 10% or higher ballot access petition requirement is so difficult to attain that virtually no one has met the requirement. (*Id*. ¶¶ 4-16). In the past 80 years, only four states have had ballot access requirements at 10% or above. (*Id*. ¶ 6). In Illinois, for example, a 10% requirement was in effect from 1979 through 2006. (*Id*. ¶¶ 9, 14). During that span, there were 1,711 elections for the State House of Representatives. (*Id*. ¶ 14). Out of those 1,711 elections, only three independents qualified for the ballot. (*Id*.). In all four of the states where the ballot access petition requirement was 10% or higher, the statute was struck down as unconstitutional.[60] (*Id*. ¶ 6).

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[59] Plaintiffs fully understand that the constitutional analysis for ballot access differs from the constitutional analysis for a public financing program. Nevertheless, as Mr. Winger notes in his expert report, "since Connecticut is the only state that has ever had petitions for any class of candidates to qualify for public funding, and since Connecticut has yet to fully implement its own system, I believe the comparison is relevant and useful for predicting how the Connecticut system will work." (Winger Decl. ¶ 7, Ex. A-6). In other words, the process of collecting signatures is essentially the same, whether it be for ballot access or for public financing. Thus, it is more than apropos to look to the ballot access requirements to see whether candidates have met these requirements in the past.

[60] Even a 5% ballot access requirement is exceedingly difficult and burdensome to comply with, especially at the district level. Since 1991, North Carolina has required that an independent candidate for district office gather signatures from 4% of registered voters. (Winger Decl. ¶ 19, Ex. A-6). During the period since 1991, the state has

c. Qualifying Contributions

The CEP departs from *Buckley's* understanding of permissible qualifying criteria in another crucial respect. Candidates must make a substantial financial showing by raising thousands of dollars in qualifying contributions. Conn. Gen. Stat. § 9-704. In view of the fact that prior election results – the additional threshold for minor party candidates – already provide a rough measure of support, the additional burden is unnecessary under *Buckley's* rationale. Connecticut has a legitimate interest in preserving the public fisc and not funding hopeless candidacies, but those interests are already served by the vote total and petitioning requirements. Thus, the qualifying contribution threshold, particularly because it is set so high, only serves to frustrate the ability of minor and petitioning party candidates to qualify and, in that regard, unfairly favors major party candidates.

In *Buckley* the Court made the observation that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." 424 U.S. at 97-98, quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). This truism is well illustrated by this case. The qualifying contribution requirement is unquestionably based on the proven fundraising ability of the major political parties.[61] It requires candidates who have historically relied on consolidated base of contributors to mine for hundreds and thousands of new donors. *See* Factual Statement, Section II.D., *supra*. To hold all candidates to the same standard ignores the inherent differences in the fundraising capacities of major and non-major party candidates. To

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conducted 1,360 regularly-scheduled legislative elections. (*Id.*). Out of those 1,360 elections, only 6 independent candidates have qualified. (*Id.*). Georgia requires a petition signed by 5% of its registered voters for an independent or minor party candidate for district office to get on the ballot. (*Id.* ¶ 18). No one in Georgia has been able to complete a 5% petition for U.S. House since 1964. (*Id.*). On its face, then, Connecticut's 10% petitioning threshold for just one-third of the general election grant will effectively exclude nearly all petitioning party candidates from the CEP.

[61] The adoption of a separate means-based standard occurred with the knowledge that few, if any, minor and petitioning party candidates had the capacity to meet the contribution requirement. *See* Factual Statement, Section II.D., *supra*.

then provide minor party candidates with only 1/3 of the grant amount for meeting the same fundraising goal makes the discrimination complete.

Buckley did not approve such an overtly discriminatory scheme. The public financing system for the general election under consideration in *Buckley* did not include a means-based test. It was sufficient if the candidate received his party's nomination, in the case of major party candidates, or if the candidate satisfied the 5% vote total requirement in the case of non-major party candidates. Although other states that have adopted "clean elections" require candidates to raise a modest amount of money in $5 qualifying contributions, the aggregate amount of money is *de minimis* compared to the CEP's requirements. *See Garfield*, 537 F. Supp. 2d at 381-386 (comparison with Maine and Arizona public financing systems). Moreover, under those models, public financing was not made dependent on the candidates' status as a major party candidate. All candidates who raised the qualifying contributions could participate. *Id*.

The *Buckley* Court's analysis upholding the system for financing presidential primaries is not to the contrary. To be sure, in order to qualify for primary matching funds candidates must satisfy certain financial benchmarks, but that is where the similarity between the federal statute and the CEP ends. First, the threshold under the CEP for the office of governor is more than twice the amount a candidate is required to raise to qualify for presidential primary matching funds. Under Subtitle H a candidate must raise $5,000 in each of twenty states counting only the first $250 of each contribution toward that goal. Thereafter the candidate was eligible for federal matching funds for the first $250 of each contribution received, provided the candidate agreed to an overall limit on expenditures. 424 U.S. at 89-90. Under the federal system, the candidate can qualify by collecting as few as 400 contributions from a nation-wide base of contributors. In Connecticut, the candidate has to meet the significantly more difficult requirement of collecting

2,500 contributions. Even taking into account the effects of inflation, the qualifying standard in Connecticut will inevitably work against candidates without the type of proven and broad-based donor support of major party candidates or with the type of advantages of a Governor Weicker or a Senator Lieberman. The burden is no less difficult at the district level where candidates must seek out hundreds and even thousands of new contributors. (DeRosa Decl. ¶¶ 44-47, Ex. A-1). Such a means-base standard "can put at serious disadvantage a candidate with a potentially large, widely diffused but poor constituency. The ability of a candidate's supporters to help pay for his campaign cannot be equated with their willingness to cast a ballot for him." *Buckley*, 424 U.S. at 252 (Burger, C.J., dissenting). It is also more difficult to raise the qualifying contributions because almost all the money must be raised within Connecticut. For minor party candidates this is a serious impediment because of their reliance on contributors from other states in which they have an established base. (Thornton Decl. ¶ 25, Ex. A-3). This restriction works as effectively to prevent a candidate from raising needed funds as a state law that prevented out of state contributions altogether. *See Landell v. Sorrell*, 382 F.3d 91, 146-47 (2d Cir. 2004), *rev'd on other grounds*, 548 U.S. 230 (2006) (striking down restriction on out-of-state contributions).

Second the contributions under the CEP are capped at $100. This cap will prevent candidates from raising needed funds to finance the extensive petitioning and fundraising drives that the CEP compels. (Weicker Decl. ¶ 18, Ex. A-2; DeRosa Decl. ¶¶ 39-47, Ex. A-1). Obviously, this works a greater hardship on petitioning candidates. Under the federal system, candidates can continue to raise individual and organizational contributions to finance their campaigns, the only relevant restriction being that only the first $250 contributed from individuals would trigger matching funds. The money a candidate otherwise raises allows him to finance the campaign in a way that the CEP does not. The $100 ceiling on permissible

contributions will in effect prevent candidates from "amassing the resources necessary for effective campaign advocacy." *See Randall*, 548 U.S. at 248, quoting *Buckley*, 424 U.S. at 21 (invalidating $200 and $400 limits).

The third and most important factor that distinguishes this case from *Buckley* is the disparate grant awards that are paid once a candidate satisfies the qualifying contribution requirement. In effect, non-major party candidates are denied the same benefits for the same work. Any method of compensation that does not provide equal pay for equal work would be suspect. This aspect of the CEP is discussed below.

5. The partial grants available to minor party and independent candidates are designed to maintain the funding advantage of major party candidates

Under the CEP there is disparity in the funding provided for qualified candidates. Major party candidates who satisfy the financial threshold qualify for public funding for both the primary and general elections. Minor and petitioning party candidates must satisfy the same financial threshold, but are awarded grants based on a different formula that pays them less. *Buckley* did not contemplate this type of disparity. For instance, a major party candidate for state senate who raises the required $15,000 in qualifying contributions is eligible for $120,000 in primary and general election funding. An eligible minor or petitioning party candidate must raise the same amount in the same way, but may only receive 33% of the $85,000 general election base grant, or $25,757. The reduced payout is significant to minor and petitioning party candidates because they face greater obstacles to meeting the petitioning requirements raising the qualifying contributions. In effect, any advantage they gain from a partial grant is more than offset by the expense of qualifying. Unlike their major party counterparts, they receive no return on their investment. (DeRosa Decl. ¶ 41, Ex. A-1).

The grant disparities are not ameliorated by the so called "catch-up" provisions that were later added to the law. Conn. Gen. Stat. § 9-702(c). First, although candidates who qualify for partial grants are allowed to continue to raise private funds up to the full grant amounts paid to their major party opponents; they are hobbled by the contribution limits that apply to CEP candidates. Those limits are capped at $100. It is completely unrealistic to think that a candidate could make up the 2 million dollar difference in small-dollar contributions, especially in the narrow window of time following the primary. (Weicker Decl. ¶¶ 23, 26, Ex. A-2; DeRosa Decl. ¶ 51, Ex. A-1); *see also Randall*, *supra* ($200 contribution limit handicaps candidates). A more sensible approach would be to allow candidates' to make up the difference under the limits that apply to privately financed candidates. (Weicker Decl. ¶ 23, Ex. A-2). That is the approach under FECA which allows minor party candidates who qualified for proportion funding based on their vote total in the last election to continue to raise contributions under the general limits applicable to individuals and groups. *Buckley*, 424 U.S. at 88-89.

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

(*Id*.). Under the CEP borrowing is limited to only $1,000 from a financial institution. Conn. Gen. Stat. § 9-710(a). Moreover, under the CEP's implementing rules, candidates are even prohibited from having goods or services extended to them on credit based on the possibility of receiving a post-election grant. (SEEC 2008 CEP Regulations, § 9-706-2(b)(16), Ex. 13). Vendors do not typically extend credit beyond a normal billing cycle. A candidate might be able to defer salaries, but there is a limit to the amount of credit (if any) available to a candidate to pay campaign expenses. A candidate who fails to pay his bill is cut-off. (Weicker Decl. ¶ 24 Ex. A-2; DeRosa Decl. ¶ 52, Ex. A-1). As explained by Governor Weicker, the most important campaign expenditure in a statewide election is broadcast media. Broadcast time must be reserved and paid for in advance. A more sensible approach would be to allow candidates to take out a line of credit from a financial institution if the loan was available and to reimburse the candidate if he meets the standard for a supplemental grant. (Weicker Decl. ¶ 24, Ex. A-2).

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

Having established that the CEP burdens plaintiffs' speech and political opportunity, the burden shifts to the government to prove that the CEP advances a compelling state interest and is narrowly tailored. *See Buckley*, 424 U.S. at 44-45; *Davis*, 2008 WL 2520527, at *10; *WRTL*, 127 S. Ct. at 2664. The defendants cannot meet this burden because the CEP does not advance the state's interests, and needlessly increases the competitive advantage of major party candidates. As this Court knows from its analysis of *Buckley* and its extensive canvass of the public financing systems adopted by other states, Connecticut could easily have adopted a public financing system that does not so unnecessarily burden the rights of minor party and independent candidates by so overtly increasing the competitive advantage of major party candidates.

A. No Government Interest Justifies the Burdens on the Speech and Political Opportunities of Non-Major Party Candidates Imposed by the CEP

Buckley recognizes that the government has a sufficiently important interest in using public funds to finance campaigns as a means of eliminating the improper influence of large private contributions. 424 U.S. at 96. The Court also recognized that the state can establish non-discriminatory qualifying criteria that take into account the differences between major and non-major party candidates to ensure that public funds are not wasted on frivolous candidacies. Neither of those interests is advanced in this case. It is not too much to predict that special interest groups will continue to exert influence on the political process. They will inevitably spend more on independent expenditures since they can no longer contribute directly to candidates. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (upholding ban on "electioneering communications" by special interest groups based on record showing that that they were used to circumvent limits on corporate expenditures). In like manner, they can be expected to take advantage of the organizational expenditure loophole by increasing their contributions to legislative leadership and party committees. They are already the primary contributors to these committees. As for the sufficiency of the state's interest in not funding weak candidacies, that interest is not served by the CEP, which finances weak major party candidates.

Plaintiffs emphasize at the outset that it is a dubious proposition at best that the government can have any legitimate – much less compelling – interest in adopting a subsidy program that increases the competitive advantage of major party candidates in a way that slants the playing field further in their favor. The government's obligation to remain strictly neutral as between different candidates and political views is greatest in the context of elections. *See Buckley*, 424 U.S. at 251 (noting the "grave risks in legislation, enacted by incumbents of the

major political parties, which distinctly disadvantages minor parties or independent candidates") (Burger, C.J., dissenting); *Davis*, 2008 WL 2520527, at *11 ("…it is a dangerous business for Congress to use the election laws to influence the voters' choices."); *Bellotti*, 435 U.S. at 792, n.31 (The "[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves").

1. The state does not have a legitimate interest in discriminating against minor party and independent candidates

The First Amendment does not allow the government to subsidize one side of the debate if it has the effect of distorting the relative ability of the candidates to speak and be heard. *See Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment…."). The distorting effects of the CEP constitute discrimination in and of itself and cannot be justified by the state's interest in facilitating debate among major party candidates only. The CEP cannot withstand strict scrutiny because the government can have no legitimate – much less compelling – interest in discriminating against non-major party candidates. The state might legitimately establish nondiscriminatory criteria for public financing that recognizes the inherent differences between major and minor parties, *id*. at 96-104, but the state's actions cross into forbidden discrimination once it increases the competitive advantage of major party candidates (and correspondingly disadvantages non-major party candidates). *See Davis*, 2008 WL 2520527, at *8-11 (Congress has no interest that would support discriminatory contribution limits that favored one group of candidates).

In this case, the state's purported interest in making distinctions between major party and minor party candidates is in preserving the public fisc. *See Garfield*, 537 F. Supp. 2d at 380. This interest is often coupled with its interest in not providing "artificial incentives to 'splintered

parties and unrestrained factionalism.'" *See Buckley*, 424 U.S. at 96. These interests are arguably legitimate to justify some special burdens on minor parties under *Buckley* and in other contexts. *Id.* They cannot have the unprecedented effect, however, of distorting the relative positions of the parties. There is no suggestion in *Buckley* or in any other case that the government has a legitimate interest in adopting a discriminatory funding scheme that reduces the electoral opportunities of non-major party candidates. The argument is antithetical to the "primary values protected by the First Amendment – 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open' – are served when election campaigns are not monopolized by the existing political parties." *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983), (quoting *New York Times Co., v. Sullivan*, 376 U.S. 254, 270 (1964)); *see also Davis*, 2008 WL 2520527, at * 11 (explicitly disapproving legislation that seeks to alter the "electoral opportunities" of candidates).

The Court in *Buckley* was mindful of the danger of using public financing to discriminate against non-major parties and was careful to emphasize that the system for financing presidential elections did not distort the relative strength of the major and minor parties. The differential qualifying criteria for non-major parties was justified in *Buckley* because there was no evidence in the record that federal funds would enable any candidate to purchase scarce communication resources thereby effectively reducing the relative freedom of speech of a non-subsidized candidate. This is most assuredly not true in this case. In the service of leveling the playing field between major party candidates, the CEP is going to make more money available to more major party candidates and will only further slant the playing field in their favor. *See Garfield*, 537 F. Supp. 2d at 378-79.

In defense of the differential qualifying criteria, the defendants have previously argued that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Buckley*, 424 U.S. at 97-98, quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). What the defendants fail to recognize is that the CEP's qualifying and grant distribution terms are discriminatory not because the program terms treat the parties differently, but because the program terms have the effect of "slant[ing] the playing field." *Garfield*, 537 F. Supp. 2d at 378-79. As this Court well understood, this was decidedly not the case in *Buckley*. *Id*. While Connecticut may choose not to offer any incentives or assistance to new parties or independent candidates, it may not act to create disincentives for the purpose of protecting the two parties which now share control of the government. *See Garfield*, 537 F. Supp. 2d at 379; *see also Buckley*, 424 U.S. at 293 (Congress "has enshrined the Republican and Democratic Parties in a permanently preferred position, and has established requirements for funding minor-party and independent candidates to which the two major parties are not subject") (Rehnquist, J., dissenting); *accord Greenberg*, 497 F. Supp. at 781.

It is absurd to suggest that a state subsidy which increases the competitive advantage of the major political parties is not discriminatory. It would ignore the inherent content-based relationship between the popularity and substance of the views that separate major party candidates from political parties outside the mainstream. *See Greenberg*, 497 F. Supp. at 775-76 (postal subsidy to major political parties only). The state might decline to fund candidates altogether, but once it has decided to fund some candidates it must do so on terms that are non-discriminatory. *See Garfield*, 537 F. Supp. 2d at 379 ("It is also well established that individuals generally do not have a First Amendment right to government-subsidized speech. But when the government endeavors to enter that fray and, as alleged in this case, subsidize the expression of

one set of political parties' views to the exclusion of other political parties, it must do so in a way that does not alter the status quo to unfairly and unnecessarily burden the political opportunity of disfavored minor parties.") (citations omitted); *see also Greenberg*, 497 F. Supp. 756; *U.S. ex rel. Milwaukee Social Democratic Publ'g Co., v. Burleson*, 255 U.S. 407, 431 (1921) (Brandeis, J., dissenting) (denial of use of mails to political group).

The state's interest in not funding hopeless candidacies is limited by this principle and nothing the Court said in *Buckley* is to the contrary in view of its holding that the system for financing presidential elections was not discriminatory. *See Buckley*, 424 U.S. at 95 n.129 ("As a practical matter . . . (the Campaign Fund Act) does not enhance the major parties' ability to campaign; it substitutes public funding for what the parties would raise privately and additionally imposes an expenditure limit.").

2. The state's asserted interest of eliminating the appearance of corruption is not advanced by the CEP because the expenditure limits are so easily circumvented

Buckley recognizes that the state has an interest in "eliminating the improper influence of large private contributions," and that the use of a public financing system is a means towards achieving that interest. 424 U.S. at 96. In its decision denying defendants' motion to dismiss, this Court also recognized that public financing systems, in general, are designed to "eliminat[e] the appearance of corruption by encouraging candidates for state office to forgo private donations, the traditional source of political contributions, in exchange for public funding." *Garfield*, 537 F. Supp. 2d at 379. The state has also asserted an interest in "curtail[ing] excessive spending and creat[ing] a more level playing field among candidates." (SEEC CEP Program Overview, Ex. 46 at 1). The legitimacy of this interest is doubtful as the Supreme Court has previously rejected efforts to curtail spending in the service of leveling the playing field. *See*

Buckley, 424 U.S. at 48-49; *see also Davis*, 2008 WL 2520527, at *8-11. Even if any of the asserted interests in this case could justify a public financing system that treats major and non-major parties differently, the CEP does not advance these interests because the expenditure limits are so easily circumvented and will in fact increase spending. Most assuredly, the CEP does not eliminate the influence of private money or the appearance of corruption.

a. The CEP's Expenditure Limits are Easily Circumvented by the Supplemental Grants Triggered by the Matching Fund Provisions

(i) Excess Expenditures

Quite apart from the substantial primary and general election grants discussed above, which will actually increase candidate expenditures, the General Assembly has also provided for supplemental grants for both the primary and general elections. *See* Conn. Gen. Stat. §§ 9-713, 9-714. The excess expenditure provision will inevitably increase spending and will ensure that major party candidates are completely protected against any corresponding disadvantage that might arise from their agreement to be bound by expenditure limits. In the rare event that a candidate considering participating in the CEP is opposed by a candidate with unlimited resources, the candidate has the option of opting out.[62]

Section 9-713 releases participating candidates from the limits they voluntarily accept in a situation where a nonparticipating candidate spends more money than provided by the primary or the general election grant. These supplemental payments only serve to increase the financial disparity between participating major party candidates and minor party candidates in

[62] The irony of the CEP is that it is just as likely that in truly competitive elections in which both candidates view the expenditure limits as inadequate, the candidates will opt out. An unintended consequence of financing the less competitive elections is that it allows private money to be concentrated on the competitive elections that could affect which party controls the government. In fact, this seems to be the case to date based on the limited number of candidates who have signed up for public financing thus far. Currently only half of legislative candidates have declared their intent to participate in the CEP. (Participating and Nonparticipating Candidates – November 2008 General Election, Ex. 42) (as of June 25, 2008).

circumstances where matching funds are triggered by the spending of a major party candidate who opts out of the CEP. By leveling the playing field between two major party candidates, the CEP actually increases the spending disadvantage faced by minor party candidates. After *Davis*, *supra*, it should be clear that the state cannot increase the resources of one group of candidates in the service of leveling the playing field.[63]

The matching fund provisions generally serve to diminish the significance of the expenditure limit for participating candidates. The lack of a countervailing burden violates the First Amendment and Equal Protection Clause. In *Buckley*, disparate treatment of the parties was explicitly justified by the corresponding burden of spending limits imposed on candidates who received funding. 424 U.S. at 98-99. Candidates who were unable to qualify remained free to raise unlimited amounts of money and, therefore, to outspend their participating opponents. *Id*. In this case, the system of benefits and burdens is skewed. Excess expenditures trigger more money for your opponent. This type of mechanism is called into question by *Davis*. 2008 WL 2520527, at *9 ("But the choice involved in *Buckley* was quite different from the choice imposed by § 319(a). In *Buckley*, a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures. Here, § 319(a) does not provide any way in which a candidate can exercise that right without abridgment."). The excess expenditure provision alters the "political opportunities" of the competing candidates by ensuring that major party candidates suffer no countervailing disadvantage from their decision to be bound by expenditure limits. *Id.* at *11. Moreover, it is important to emphasize that while the excess expenditure provision is colloquially referred to as a "matching fund" provision, this is not

[63] It should be equally clear after *Davis* that a candidate cannot be forced to make the impermissible choice of limiting his expenditures or financing the speech of his opponent. 2008 WL 2520527, at *9. Some minor party candidates will inevitably face this choice. (DeRosa Decl. ¶ 54, Ex. A-1). This is a separate ground to invalidate the excess expenditure provision. *See* Section IV, *infra*.

strictly accurate – and is in fact somewhat misleading. Supplemental grants are triggered if an opponent spends a single dollar in excess of the applicable expenditure limit. Conn. Gen. Stat. § 9-713(a)-(f). The supplemental payment is 25% of the base grant. *Id*. Additional grants equal to this amount are paid thereafter each time the opponent spends one dollar in excess of 125%, 150%, and 175% of the applicable expenditure limit. *Id*. The payments are capped at 200% of the grant amount. *Id*. § 9-713(g). By way of example, in a state senate race, a privately-financed candidate who exceeds the applicable expenditure limit ($100,000) by a single dollar will trigger an additional grant equivalent to $21,500 (25% of $85,000).

Minor party candidates are essentially bystanders in this attempt to level the playing field between major party candidates. The grants are exclusively in the service of major party candidates, and will inevitably work against the candidates who are unable to qualify for public financing. The major party slugfest will inevitably further marginalize the ability of minor party candidates to be heard. *See Garfield*, 537 F. Supp. 2d at 377. This provision will not only undermine the state's interest in decreasing expenditures, but it also has the dangerous potential to alter electoral outcomes. (Weicker Decl. ¶ 21, Ex. A-2).

A number of courts of appeals have upheld similar matching fund provisions as a necessary "carrot" to offset the relative burden of agreeing to expenditure limits and as a "stick" to encourage maximum participation. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464-65 (1st Cir. 2000); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1550 (8th Cir. 1996); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). These decisions are also called into question by *Davis*, 2008 WL 2520527, at *9, which instead adopted the reasoning of the one decision that is in conflict with the other circuit decisions. *See Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). In all these cases, the Courts of Appeals declined to find

impermissible coercion from the fact that a candidate's refusal to participate in a public financing scheme triggered relaxation of otherwise applicable limits on an opponents' fundraising. According to those courts, lifting limits on candidates participating in public funding merely offsets sacrifices they made by accepting public funding in the first place. That premise does not hold for the CEP in light of the overly generous base grants and in view of the ease with which the expenditure limits – by the defendants' own admission – can be circumvented. Participating candidates must make few, if any, sacrifices. The only risk they undertake is the remote possibility of facing an opponent with unlimited funds. Under that scenario, the participating candidate would have faced a funding disadvantage regardless of the existence of public funding.

More importantly, these cases were decided in the context of public financing programs that provided public financing to all candidates on equal terms if the candidates satisfied relatively modest qualifying requirements. There was no claim that minor party candidates were unfairly excluded. The only candidates allegedly penalized were those who opted out. To discourage candidates from opting out, the excess expenditure provision acted as a powerful and proper disincentive. Again, that consideration is largely absent here because there is no significant corresponding burden of accepting public financing – except in the case of an opponent with unlimited means. More importantly, the candidates most affected by the provision are not those who voluntarily opt out, but those who are excluded.

(ii) Independent Expenditures

Supplemental grants are also triggered by independent expenditures made with the intent to promote the defeat of a participating candidate. This provision – together with the excess expenditure provision – could treble the amount of the base grant. This provision has been given a broad construction by the SEEC and is intended to counteract the effects of negative

advertising. Here again, *Davis* casts doubt on the legitimacy of this provision. 2008 WL 2520527; *see also Day v. Holahan*, 34 F.3d at 1359-60 (striking down identical provision).[64]

The SEEC recently promulgated regulations that expand the definition of "express advocacy" for purposes of regulating independent expenditures. *See* Factual Statement, Section III.A.2., pp. 45-46, *supra*. Under the new definition, express advocacy is not limited to words such as "vote against", "defeat", or similar words. The new definition of "express advocacy" is significantly broader than the definition upheld in *Buckley*, *supra*, and is intended to counteract the effects of all negative ads. It appears to be cobbled from the definition of "electioneering communications" upheld in *McConnell*, 540 U.S. 93, and *WRTL*, 127 S. Ct. 2652. Those cases, however, involved broadcast communications, and the broader definition of "express advocacy" or its "functional equivalent" was upheld based on an extensive record unique to broadcast ads.

Indeed, in *WRTL*, the Supreme Court actually struck down a statute prohibiting a corporation from broadcasting ads shortly before an election where the ad "expressly advocated" for or against an individual's candidacy as it applied to issue ads. The idea was that the government could not prohibit the "functional equivalent of express advocacy" to the extent that the corporation's speech related to issue advocacy because issue advocacy was core political speech. *See WRTL*, 127 S. Ct. at 2674. Here, the SEEC's new regulations on "independent expenditures" define "express advocacy" so broadly that it not only targets all communications, but fails to adhere to the line between permissible regulation of express advocacy and impermissible regulation of speech.

As this Court observed, under this provision, the publicly-funded candidate's party, or other individuals, can make virtually unlimited independent expenditures that directly advocate

[64] As discussed in Section IV, *infra*, this provision not only increases the advantage of major party candidates, but it also constitutes a separate burden on plaintiffs who must either forgo expenditures or make them with the knowledge that they will trigger more resources for major party candidates.

the defeat of the two challengers, as long as those expenditures are not coordinated by the Republican candidate or his campaign. Here again, because of the government-funded and government-induced major-party "slugfest," the Green Party candidate's modest efforts to communicate with the electorate are further marginalized. *See Garfield*, 537 F. Supp. 2d at 377.

The amount of money triggered under this provision could be astronomical. Consider again the discriminatory effects of this provision through the lens of Governor Weicker's campaign had the CEP been in effect in 1990. Negative advertising targeting his opponent might have yielded up to 3 million dollars in supplemental grants and would have completely altered the dynamic of the election. On the other hand, negative advertisements targeting his independent candidacy, and paid for by Republican or Democratic State Committees, for instance, are not included in the calculation. In addition, the grant amounts are not offset by any advertising that benefits the major party candidates. The funding is a one-way street that protects only the major party candidates from negative ads. Nothing could be so distorting of the political process.

The only purpose served by the independent expenditure provision is to increase funding for the major party candidates to the extent that independent expenditures inevitably come into play. It is not too much to predict that independent committees will increase their spending on independent expenditures now that they are no longer compelled to contribute directly to candidate campaigns. In one highly-publicized case from the last election cycle involving New Jersey's pilot program for financing legislative campaigns, one of the candidates received $100,000 in matching funds that were triggered by independent expenditures. (New Jersey's "Clean Election" Experiment, Ex. 35 at 7). Minor party and independent candidates (and any candidate who chooses not to participate in the CEP) are essentially bystanders in this attempt to

level the playing field between major party candidates. The provision will exaggerate the disparity between the major party and minor and petitioning party candidates.

b. The CEP's Expenditure Limits are Easily Circumvented by the Organizational Expenditure and Exploratory Committee Loopholes

(i) Organizational Expenditures

Under the organizational expenditure provision, candidates can still raise money from special interests and benefit from thousands of dollars in what are in effect coordinated expenditures. Remarkably, candidates can even hold joint fundraisers with leadership committees for purposes of raising the qualifying contributions. (Organizational Expenditure Fact Sheet, Ex. 38 at 7). There are no limits on organizational expenditures made on behalf of statewide candidates by the state central committee and other party committees. Section 9-718 does place some restrictions on organizational expenditures to legislative candidates ($3,500 to state representative and $10,000 to state senate), but these restrictions apply separately to the 12 caucus and leadership committees, the state central committees and the more than 100 town committees that nominate legislative candidates and work on their behalf. Thus, in the aggregate, participating candidates can benefit from organizational expenditures that can easily outpace the value of the general election grant. The legislature also understood how this would disparately affect the rights of minor party candidates who do not have leadership and caucus committees and the level of party infrastructure that major parties have. (Garfield Statement, Ex. 5 at 2).

Although the Court did not specifically address this provision in its opinion, there can be no doubt about the pernicious effects of this loophole on the state's asserted interests. The fact that candidates can continue to raise and spend money from these special interest sources completely undermines the state's interest in eliminating the influence of those special interests.

The General Assembly was made fully aware of how the organizational expenditure provision would thwart the statute's purposes by creating stealth campaigns that would allow candidate-controlled committees and party committees to work directly with candidate committees to finance campaigns. *See* Factual Statement, Section I., *supra*; (*see also* Clean Up Connecticut Campaign Press Release, Ex. 7 at 2; Garfield Statement, Ex. 5 at 2). The legislative committees, in particular, are the very source of special interest money that gave rise to the restrictions on contributions from lobbyists. (Pelto Decl., Ex. 39 at ¶ 10). The fact that candidates can raise the qualifying contributions directly through these committees is about as cynical an end run around these limits as can be designed.

(ii) Exploratory Committees

A second loophole that the SEEC has sought to close – because it undermines the state's interest in reducing the influence of private money – concerns the use of exploratory committees to raise and spend large sums of money and circumvent the expenditure limits that candidates who accept public financing are supposed to abide by. A candidate who plans to participate in the CEP can avoid the expenditure limits that apply during the qualifying period by forming an exploratory committee and using the money to finance the campaign up until the last date to declare one's intent to participate in the CEP, which is 25 days prior to the primary or 40 days prior to the general election. Candidates can raise unlimited amounts of money during this period from any source available to privately financed candidates – industry PACs and other special interests. This loophole will not only allow candidates to circumvent the overall goals of the Citizens' Election Program, but it will increase the financial advantage of major party candidates.

B. The CEP is Not Narrowly Tailored to Serve the State's Interests

"The narrow tailoring inquiry examines the 'fit' between means and ends." *Landell v. Sorrell*, 382 F.3d at 125. To satisfy the narrow tailoring standard, the government must prove that the mechanism chosen is the least restrictive means of advancing that interest. *See, e.g., U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000); *see also California Democratic Party v. Jones, supra*. Thus, "[w]hen the First Amendment demands strict scrutiny, if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Landell*, 382 F.3d at 126 (quotations and citations omitted).

The qualifying and funding provisions of the CEP are by definition not narrowly tailored precisely because they work individually and together to increase the competitive advantage of major party candidates. In almost every detail the numerous provisions depart from the non-discriminatory program terms upheld in *Buckley*. By any objective measure, the program terms work against the interests of non-major party candidates and will inevitably further marginalize them. *Garfield*, 537 F. Supp. 2d at 377 ("By conferring a communications benefit and compelling highly competitive two-party races in one-party-dominant districts, the CEP changes the dynamic of many state legislative races in a way that further marginalizes minor parties.").

Here, the state has never attempted to justify its discriminatory qualifying and grant provisions on the grounds that the CEP is narrowly tailored to advancing a compelling state interest. Its position thus far is that *Buckley* is controlling without consideration of any tailoring analysis. But this Court has already rejected that broad position. *See Garfield*, 537 F. Supp. 2d at 379. The defendants cannot establish that the CEP's discriminatory provisions are narrowly-tailored. The defending parties in this case are on record stating that the program terms could and should be amended to avoid the objection that they needlessly burden the rights of non-

major party candidates. Although they may not be legally estopped from taking a contrary position here, the amendments they proposed for relaxing the qualifying criteria provides compelling evidence that there are in fact less restrictive ways to further the state's interests without unnecessarily burdening the rights of non-major party candidates. The testimony of both the Executive Director of Common Cause and the Director of the CEP that the "greater good" was served by the adoption of the CEP – despite the acknowledged discriminatory impact on minor party candidates – is no consolation to the candidates denied the benefits of the CEP. (Sauer Depo., Ex. 4 at 26-27).

At this point in this litigation, there is very little doubt that the state's interest in this case could have been served by less restrictive means. Its interest in protecting the public fisc from hopeless candidacies could have been accomplished by adopting program terms that were modeled after the public financing programs in Maine and Arizona. These were the programs that were originally under consideration by the legislature and by the Campaign Finance Working Group, which took testimony from representatives in those states, and from the good government groups that have intervened in this case. (SB 61, Ex. 1 at 16-18; HB 6670, Ex. 2 at 14-18; Campaign Finance Working Group Report, Ex. 3). The record provides no explanation for why the legislature decided on the most draconian approach. The legislature settled on a public financing system whose criteria for participation exceed the stringent eligibility criteria that govern the financing of Presidential elections and which were upheld in *Buckley*.

To be sure, *Buckley* does not provide the defendants any relief. First, as this Court held in its decision denying the motion to dismiss, the ten-fifteen-twenty percent threshold applied to minor party candidates is deserving of less deference because it is significantly higher than the percentage upheld in *Buckley*. *Garfield*, 537 F. Supp. 2d at 380. The legislature did not have to

set the bar so high to advance its interests. (Garfield Statement, Ex. 5 at 2). Moreover, if the same thresholds were applied to major party candidates in the 2008 election, major party candidates would fail to qualify for full funding in 43 percent of all races for the General Assembly, and most would not qualify to receive any public funds. *Garfield*, 537 F. Supp. 2d at 380 & n.28.

Second, there is no reason to apply the thresholds only to minor party candidates in light of the fact that the majority of Connecticut's elections are uncontested or not competitive. In party dominant districts, "major party candidates have proven to be just as capable of running hopeless candidacies, or no candidacies at all, as minor party candidates." *Id*. at 381. Thus, there is no reason why the state should grant a statutory preference to all major party candidates that allows them to receive full public funding, while requiring all minor party and petitioning candidates to satisfy additional qualifying criteria for just partial public funding. Indeed, the state's public fisc is much more likely to be raided by hopeless major party candidacies than hopeless minor party candidacies.

Third, this Court's comprehensive analysis of the public financing systems enacted by other states proves that there are clearly less restrictive alternatives that do not entail the needless discrimination against minor party and independent candidates that Connecticut has chosen to impose. *Id*. at 381-390. As this Court noted, "[a]lmost all other state public funding laws, except for the CEP, are party-neutral, and the few that are not do not impose qualifying criteria that are even remotely similar to the CEP's qualifying criteria. It thus appears more than possible to weed out hopeless candidacies and avoid a doomsday raid on the public fisc through party-neutral qualifying criteria, or at least without the proxy that the Connecticut legislature has chosen." *Id*. at 390.

Quite apart from the discriminatory qualifying terms, there are numerous other ways that the CEP is not narrowly tailored because it slants the playing field in favor of major party candidates. They all flow from discriminatory qualifying provisions at the outset, but they are no less egregious. The base and supplemental grants give major party candidates an unfair competitive advantage. Major party candidates also benefit disproportionately from the organizational expenditure and exploratory loopholes. Neither *Buckley* nor any other public financing case that we are aware of considered a public financing system that so thoroughly stacks the deck in favor of major party candidates.

Accordingly, the CEP should be struck down because it is not narrowly tailored to advancing a compelling interest.[65]

III. The CEP Is Unconstitutional Under Traditional Equal Protection Analysis

The same result is required under the Equal Protection Clause of the Fourteenth Amendment which is the analysis the Supreme Court applies in its election law cases involving discriminatory restrictions on access to the ballot and other restrictions on minor parties. *Williams v. Rhodes*, 393 U.S. 23 (1968), *but see Anderson v. Celebrezze*, 460 U.S.780, 786-87 & n.7 (1983) (basing ballot access decision on First Amendment rather than Equal Protection Clause, but noting that analysis is the same). In the ballot access cases the First Amendment burden is sometimes subordinated to the equal protection claim because the restraint on speech is arguably less direct. In this case the burden on speech is more direct because of the distorting affects of the CEP. The Equal Protection Clause is nevertheless directly applicable in this case because the benefits given to major party candidates (and denied to non-major party candidates)

[65] As this Court also noted, the CEP would be suspect even under rational basis review. *See Garfield*, 537 F. Sup. 2d at 390 n.66.

are conferred, not solely on *different* grounds, but on *discriminatory* grounds. It is this distinction that the defendants fail to appreciate.

A system of benefits given exclusively to one group of favored speakers and denied to another group violates the Equal Protection Clause just as a system that directly restrains the speech of one group of speakers does. *See Mosley*, 408 U.S. at 95; *Bellotti*, 435 U.S. at 786-787 ("The Supreme Judicial Court did not subject [the legislation] to the critical scrutiny demanded under accepted First Amendment and equal protection principles….") (internal quotations and citations omitted). Although governments rarely discriminate in such an overt manner when providing benefits in the electoral context, it is not unprecedented and numbers of lower courts have struck down discriminatory state laws that provide valuable subsidies and other advantages solely to major party candidates. *See Greenberg*, 497 F. Supp. 756 (invalidating postal subsidy given exclusively to major parties). Under this analysis, the Court must similarly asses the magnitude of the burden on the claimed right. When those rights are subject to "severe" restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. *Anderson*, 460 U.S. at 789. For all of the reasons stated in Sections II.A & II.B, the CEP cannot withstand strict scrutiny.

In *Greenberg*, Judge Weinstein held unconstitutional on both First Amendment and equal protection grounds a section of the 1980 Postal Service Appropriation Act providing that no funds would be available for implementing special third-class rates for qualified political committees other than national, state, or congressional committees of a major or minor party. Plaintiffs in that action were national and state political third parties defined under the pertinent statutes as "new" parties because their candidates received less than 5% of the vote in the preceding presidential election. New parties were ineligible for the special third-class rate. The

Court found that the Appropriation Act burdened a new party's access to mail services and constituted a constitutionally impermissible restriction on that party's First Amendment rights. 497 F. Supp. at 774-78. The Court went on to apply an equal protection analysis, concluding that the Appropriation Act was a denial of equal protection insofar as it impaired plaintiff's First Amendment rights of expression, and that this impairment was entitled to greater weight than the Government's interests in conserving scarce resources and administrative efficiency. 497 F. Supp. at 778-81; *see also McKenna v. Reilly*, 419 F. Supp. 1179, 1187 (D.R.I. 1976) (allocating check-off moneys to endorsed candidates but not to unendorsed candidates "works an invidious discrimination against nonendorsed candidates in violation of the equal protection clause.").

After *Greenberg*, the closest case on point is *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y. 1970) (three-judge court), *summarily aff'd,* 400 U.S. 806 (1970). The court struck down a statute that required lists of registered voters to be sent free of charge to parties that earned more than 50,000 votes in the last gubernatorial election. *Id*. at 995. The court noted that "[t]he State is not required to provide such lists free of charge, but when it does so it may not provide them only for the large political parties and deny them to those parties which can least afford to purchase them." *Id*. at 996.

The law that was invalidated in *Socialist Workers Party* was re-enacted in "all material, unlawful respects" and again struck down on equal protection grounds in *Schulz v. Williams*, 44 F.3d 48, 60 (2d Cir.1994) ("The reasons why the courts found the provision invalid in 1970 remain true today and apparently require repeating: It is clear that the effect of these provisions ... is to deny independent or minority parties ... an equal opportunity to win the votes of the electorate. The State has shown no compelling state interest nor even a justifiable purpose for granting what, in effect, is a significant subsidy only to those parties which have least need

therefor. .... The State is not required to provide such lists free of charge, but when it does so it may not provide them only for the large political parties and deny them to those parties which can least afford to purchase them."); *see also Green Party of Michigan v. Land*, 541 F. Supp. 2d 912 (E.D. Mich. 2008) (striking down a statute that only allowed major political parties to have access to information regarding the party preference of the state's voters); *Libertarian Party of Indiana v. Marion County Bd. of Voter Registration,* 778 F. Supp. 1458 (S.D. Ind. 1991) (striking down a statute that provided voter registration lists only to the major parties).

These cases fully support this Court's analysis. They stand for the unremarkable proposition that government cannot provide valuable benefits to favored political groups on terms that discriminate – a simple proposition that the CEP has failed to heed. Accordingly, the CEP is unconstitutional under equal protection grounds as well.

IV. The Matching Fund Provisions and the Provision Providing for Increased Grants in Party Dominant Districts Violate the First Amendment

This Court previously dismissed Counts II and III of Plaintiffs' Amended Complaint for failure to state a First Amendment claim. Those counts challenge the supplemental matching fund grants that are triggered by excess expenditures and independent expenditures. Relying on the majority of cases that have rejected similar challenges, the Court rejected the argument that the trigger provisions burdened or penalized speech. *Garfield*, 537 F. Supp. 2d at 391-92. That conclusion has been called into question by *Davis*, 2008 WL 2520527. In the event this Court or a higher court rejects plaintiffs' main claim contained in Count I that the CEP is discriminatory as a whole, *Davis* provides an independent First Amendment basis to invalidate the excess expenditure and independent expenditure provisions of the CEP. The decision also provides grounds to invalidate § 9-705(j)(3), (4), which, like the excess expenditure provision, increases the grants payable to major party candidates in party dominant districts based on the

expenditures of their minor party opponents. Filed simultaneously herewith is a motion to reinstate the dismissed claims.

In *Davis*, the Court by a 5-4 vote struck down a little-known provision of the McCain-Feingold campaign-finance law aimed at leveling the playing field for opponents of wealthy candidates who decide to finance their own campaigns. The so-called "Millionaire's Amendment" ruled on in *Davis* requires self-financing candidates to declare their intention to spend more than $350,000 of their own funds, and then to report when they cross that line. Opponents of the self-financed candidates are then allowed to raise money from individuals at a contribution limit that is three times that of the original contribution limit ($6,900 as opposed to the usual maximum of $2,300), among other benefits. To the majority, the law imposed an "unprecedented penalty," 2008 WL 2520527, at *9, and a "substantial burden" on the self-financed candidates, *id*. at *10.

Justice Alito, writing for the majority, said this "asymmetrical" treatment of opposing candidates "impermissibly burdens [Davis'] First Amendment right to spend his own money for campaign speech." *Id*. at *8. Justice Alito said the law forced a self-financing candidate into a Catch-22: Either the self-financed candidate could limit his or her own spending, or risk triggering a system that helps his or her opponent raise significantly more money. *Id*. at *9. That kind of government-compelled choice violates the First Amendment unless it serves a "compelling state interest." *Id*. at *10.

The Court specifically distinguished the situation in Buckley where the restriction on expenditures was voluntarily agreed to by the candidate:

> The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice. In *Buckley*, we held that Congress "may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified

> expenditure limitations" even though we found an independent limit on overall campaign expenditures to be unconstitutional. 424 U.S., at 57, n. 65, 96 S.Ct. 612; see *id.*, at 54-58, 96 S.Ct. 612. But the choice involved in *Buckley* was quite different from the choice imposed by § 319(a). In *Buckley*, a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures. Here, § 319(a) does not provide any way in which a candidate can exercise that right without abridgment. Instead, a candidate who wishes to exercise that right has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits. The choice imposed by § 319(a) is not remotely parallel to that in *Buckley*.

Davis, 2008 WL 2520527, at *9.

The Court rejected the government's main justification for the provision, namely that it would "level electoral opportunities for candidates of different personal wealth." The Court held that far from being a compelling governmental interest, this justification did not even rise to the level of a *legitimate* government interest – as had been held in previous Court decisions. *Id*. at *10. Significantly, the Court warned that restricting a candidate's speech "in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office." *Id*. at *11.

In this case, the different trigger provisions forces the speaker to make the same impermissible choice of having to either limit his own expenditures or "endure the burden" of activating increased expenditure limits (and grants) for his major party opponents. 2008 WL 2520527, at *9. As explained below, the burden on plaintiffs is real and substantial. As a result, just like in *Davis*, these provisions must serve a "compelling state interest." *Id*. at *10.

First, in elections where the only opponent is a single major party candidate (which are the elections targeted by minor party candidates), the grants to the major party candidates are significantly increased if a minor party candidate raises or spends more than $5,000 in House elections, or $15,000 in Senate elections. Conn. Gen. Stat. § 9-705(j)(4). In a Senate election, for instance, the grant amount to the major party opponent is increased from $51,000 to $85,000.

In House elections, the grant is increased from $15,000 to $25,000. *See* Note 11, *supra*. This provision will discourage candidates from spending up to the limit. (DeRosa Decl. ¶ 54, Ex. A-1).

Second, the grants can be significantly increased under the excess expenditure provision. Conn. Gen. Stat. § 9-713. In the past, Green Party candidates have not typically raised or spent the amount of money that would trigger the excess expenditure provision. This does not, however, preclude the possibility of a Green Party candidate spending such an amount. In fact, a strong Green Party candidate in a competitive election might easily have expenditures that would trigger matching funds for his opponents. (DeRosa Decl.¶ 55, Ex. A-1). The Green Party would then concentrate all its resources on this candidate if he or she had an opportunity to win a legislative or statewide seat. (*Id*.). The candidate might also be self-funded and willing to spend the money needed to effectively compete. (*Id*.). Thus, the excess expenditure provision presents the candidate with a Hobson's choice: Either limit his expenditures, or spend freely, and increase the resources available to his opponent.

Finally, the grants are increased based on independent expenditures. Conn. Gen. Stat. § 9-714. This provision is triggered if the Party or one its supporters sends out a mailing or distributes literature which urges the defeat – or is even critical – of his opponent. The cost of the expenditure could be minimal because the value of all expenditures is aggregated for purposes of the calculation. Thus, if the Trial Lawyers coordinate with several other groups and spend thousands of dollars in ads urging voters to oppose a particular candidate, the modest cost of the Green Party's independent expenditures opposing the same candidate is added to the calculation. Thus, the Green Party's independent expenditures could actually be the triggering event. (DeRosa Decl.¶ 56, Ex. A-1).

In dismissing Counts II and III, this Court did not consider whether the matching fund provisions were justified by a compelling state interest. The Court's analysis was limited to its conclusion that the matching fund provisions did not burden plaintiffs' First Amendment rights. *Garfield*, 537 F. Supp. 2d at 391-92. The Court, however, is not without guidance. In *Davis*, 2008 WL 2520527, at *9, the Court cited with approval to *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (concluding that a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures). *Day* is the only case to have previously invalidated a matching fund provision in the context of a comprehensive public financing system similar to the one at issue in this case. The logic in *Day* had been uniformly rejected by this and every other court to consider similar provisions. *See Garfield*, 537 F. Supp. 2d at 391; *Daggett*, *supra*. Plaintiffs would therefore urge the Court to reconsider the precedential value of *Day* in light of *Davis*.

Here the state's interest is in effect the same interest rejected in *Davis*. To facilitate its public financing system, the state is attempting to "level the playing field" between candidates who agree to participate in the CEP and candidates who opt out. *Davis* categorically rejects this paternalistic role of government:

> The argument that a candidate's speech may be restricted in order to "level electoral opportunities" has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office… Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.

Davis, 2008 WL 2520527, at *11 (citations omitted).

It is therefore doubtful that the state has a legitimate – much less compelling – interest in restricting the expenditures of candidates who opt out of the CEP. Indeed, the burden on speech in this case is even more burdensome than in *Davis* because the "resulting drag on First Amendment rights" does not "attach as a consequence of a statutorily imposed choice." *Id*. at *9. In contrast to the public financing systems upheld in *Daggett* and other similar cases involving trigger provisions, plaintiffs are effectively excluded from participating in public financing by the onerous qualifying criteria. Plaintiffs therefore must raise money privately. Under these circumstances, it is even more imperative to ensure that the candidate "retain[s] the unfettered right to make unlimited personal expenditures." *Davis*, 2008 WL 2520527, at *9. The trigger provisions only exaggerate the disparities by imposing an "unprecedented penalty" on their speech. *Id*. at *9.

Even if the state's interest in facilitating its public financing system could arguably justify some burden on plaintiffs' speech, the trigger provisions are unnecessary and not narrowly tailored to advance the state's interests.[66] Major party candidates are given ample incentives and can qualify for sizable grants. Except in a handful of unusually competitive elections, the grant amounts significantly exceed actual campaign expenditures in past elections. The organizational expenditure provision augments the grants to ensure that every participating candidate is adequately funded. The CEP was adopted, moreover, in conjunction with a prohibition on all fundraising by lobbyists and state contractors. Based on the presumed role of these groups in the private financing of elections, spending should decline from previous levels.

[66] In striking down the trigger provision, the court in *Day v. Holahan*, did not find it necessary to reach the broader issue of whether the burden on speech was justified by the state's interest in facilitating its public financing program since it found that participation in the state's pre-existing program was already near 100%. *Day*, 34 F.3d at 1361.

Under these circumstances, there is no justification for releasing participating major party candidates from the initial expenditures limits and paying them additional matching funds.

Thus, even if this Court upholds the CEP in the main, this trigger provisions should be enjoined as unconstitutional.

CONCLUSION

For all the foregoing reasons, plaintiffs request that summary judgment be entered on Counts I, II, and III, and that an injunction be entered to enjoin the enforcement of the Citizens' Election Program.

Dated: July 10, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2008, a copy of the foregoing *Plaintiffs' Motion for Summary Judgment* was filed electronically. Notice of this filing will be sent by electronic mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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