UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GREEN PARTY OF CONNECTICUT, ET AL.,	:	**CASE NO. 3:06-CV-1030 (SRU)**
Plaintiffs,	:	
v.	:	
JEFFREY GARFIELD, ET AL.,	:	
Defendants.	:	
AUDREY BLONDIN, ET AL.,	:	**September 5, 2008**
Intervenor-Defendants.	:	

MEMORANDUM OF DEFENDANTS AND INTERVENOR-DEFENDANTS IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

Statutes

Other Authorities

Defendants Jeffrey Garfield and Richard Blumenthal, and Intervenor-Defendants Audrey Blondin, Tom Sevigny, Connecticut Common Cause and Connecticut Citizens Action Group (collectively, "Defendants") respectfully submit this memorandum in opposition to Plaintiffs' motion for reconsideration of portions of the Court's opinion and order dated March 20, 2008.

PRELIMINARY STATEMENT

In its March 20 opinion, the Court granted Defendants' motion to dismiss Counts II and III of Plaintiffs' Amended Complaint, which challenged the provisions of Connecticut's Citizens Election Program ("CEP") that provide additional matching funds to participating candidates in the event that a non-participating candidate or independent speaker spends more than the initial spending limits. *See Green Party of Conn. v. Garfield*, 537 F. Supp. 2d 359, 391-92 (D. Conn. 2008). The Court held – in accord with the decisions of every circuit to have considered a similar issue – that the matching fund provisions of the CEP did not impose a burden on political speech. *Id.*

Plaintiffs now ask the Court to reconsider its decision, based on the Supreme Court's recent decision of *Davis v. Federal Election Commission,* 128 S. Ct. 2759 (June 26, 2008), even though that decision concerned a provision of federal election law wholly unrelated to public campaign finance. In *Davis*, the Supreme Court held unconstitutional a provision of the Bipartisan Campaign Reform Act ("BCRA") known as the "Millionaire's Amendment," which increased the contribution limits and waived the limits on coordinated party expenditures for congressional candidates faced with an opponent who spent his or her personal funds in an amount exceeding the $350,000 statutory threshold.

The motion for reconsideration should be denied. The Supreme Court in *Davis* held the Millionaire's Amendment unconstitutional because it created an "unprecedented" and

"discriminatory" burden on candidates who exceeded the spending limit – *i.e.*, because it imposed substantially different contribution limits on otherwise similarly-situated congressional candidates who were competing against each other in the same race. Although both candidates were raising funds privately – the case did not involve a public financing scheme – the effect of the Millionaire's Amendment was to restrict the ability of one candidate to raise private funds to a far greater extent than it restricted his opponent, simply because the first candidate was spending more of his own funds. The Court made clear that it was this discriminatory aspect of the Millionaire's Amendment that made it unconstitutional, and not the mere fact that increased spending by the wealthier candidate triggered legal provisions that benefitted his opponent. Indeed, the Court went out of its way to explain that the statute would have imposed no burden on protected speech if Congress had simply raised the contribution limits for *both* candidates in the race – even if that action were triggered by spending by one candidate in excess of the statutory limit, and even if the effect, a triggered increase in his opponent's ability to compete, would have been largely the same as the effect of the Millionaire's Amendment.

Plaintiffs' motion is premised on the simplistic assumption that, since both the contribution limits at issue in *Davis* and the CEP's public financing matching funds involve so-called "trigger mechanisms," both must create unconstitutional burdens on First Amendment interests. Indeed, Plaintiffs go so far as to claim that "[a]fter *Davis*, the sufficiency of the alleged injury is settled." Plaintiffs' Memorandum in Support of Motion for Reconsideration ("Pl. Mem."), at 5. This assertion is wrong.

Davis is not controlling in the very different context at issue here, involving the validity of matching funds provisions that are part of a comprehensive scheme of public financing of election campaigns. Matching funds in the public financing context do not involve the

discriminatory treatment that concerned the Court in *Davis*, and nothing in the *Davis* opinion overturns the settled consensus among the federal circuits that triggered matching funds integrated into a public financing system do not burden the First Amendment rights of non-participating candidates. Unlike the private contribution context, where both candidates are ordinarily subject to the same fundraising limits, in any optional public financing scheme there is by definition a substantial difference between the fundraising restrictions applicable to the participating and non-participating candidate. A candidate who opts in to the system is not permitted to raise private funds at all, and obtains instead the benefit of public financing, whereas a non-participating candidate – after making an informed choice that he or she would forego the benefits of public funding to preserve the freedom to raise funds privately – is subject to no special fundraising restrictions at all.

In other words, participating and non-participating candidates choose at the outset to abide by different sets of fundraising rules, with different burdens and benefits. Yet it is undisputed that such public financing systems are constitutional, and do not impose any unconstitutional burden on the non-participating candidate's First Amendment rights, even though the state is providing public funding to assist his or her opponent. Indeed, the Court in *Davis* specifically reaffirmed this holding. *See* 128 S. Ct. at 2772 (reaffirming holding of *Buckley v. Valeo*, 424 U.S. 1 (1976), 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").

The provisions of a public financing scheme that provide additional matching funds to participating candidates in the event of certain triggering events do not alter this fundamental constitutional calculus. The non-participating candidate, in making her decision up front, is well

aware of the matching grant provisions of the statute and can factor those provisions into her thinking in making the decision whether to opt for public financing or not. Having opted to stay out of the system, with full knowledge of the matching grant provisions, the non-participating candidate has no greater constitutional objection to the additional matching funds than she does to the CEP's initial grant. Indeed, the likely alternative to triggered matching funds – larger lump sum initial grants, at a level that would include the additional funds – would plainly impose no constitutional burden on non-participating candidates, yet would make matters no better for Plaintiffs and would undermine the State's compelling interest in protecting the public fisc by unnecessarily funding even relatively uncompetitive races at the higher level. The fact that the lump sum alternative would impose no constitutional burden on non-participating candidates serves to highlight the fact that the non-participating candidate has no constitutional basis for complaint about the grants awarded to participating candidates.

Moreover, even if *Davis* were construed to require the Court to reconsider its view as to whether a matching grant provision imposes any burden on the First Amendment interests of a non-participating candidate or independent organization, that would not mean that the matching grant provisions of the CEP are unconstitutional. The Court in *Davis* held that the Millionaire's Amendment was unconstitutional because there was no government interest that justified the burden it imposed on First Amendment rights: the Millionaire's Amendment did nothing to further the government interest in preventing corruption – indeed, the Court found it could undermine it – and the Court held the only rationale asserted for the Amendment, to level the electoral playing field, to be illegitimate. But here, it is well settled that there are compelling state interests that support the matching grant provisions, including the state's interest in preventing corruption and the appearance of corruption by limiting private fundraising by

participating candidates – the principal justification for the CEP –and the state's interest in encouraging candidates to participate in its public financing scheme (and eliminating a powerful disincentive to participation). The CEP's trigger provisions – which result only in more *public*, not private, campaign funding – are essential to advancing the State's anti-corruption interests, by incentivizing participation in the CEP program, without which Connecticut's campaigns would remain entirely privately funded and vulnerable to corruption or its appearance.

Finally, if the Court concludes that *Davis* requires the Court to reconsider its decision on whether the matching funds provisions of the CEP impose any First Amendment burden, the Court must also reconsider in light of *Davis* its decision that the Plaintiffs have standing to object to those provisions. The Supreme Court in *Davis* addressed the issue of standing in detail, and held that Davis had standing only because he had indicated his intention to spend personal funds in excess of the statutory trigger, and had a substantial track record of doing so. Here, however, Plaintiffs have made no showing – nor could they, in light of their limited finances – that they have any prospect of exceeding the spending limits for candidates that might trigger matching funds, and their claim that they might make independent expenditures that would trigger matching funds is utterly implausible. Thus, Plaintiffs have not shown that their First Amendment right to spend their own funds in furtherance of their campaigns or their political views has been burdened to any degree by the CEP's matching funds provisions. Plaintiffs have thus failed to demonstrate as a factual matter that they have standing to make the claims in Counts II and III, as they are required to do on a motion for summary judgment.

All of these points are addressed in further detail below. For the reasons stated herein, Plaintiffs' motion for reconsideration should be denied.

ARGUMENT

I. The Applicable Legal Standards

Under applicable Second Circuit law, there are three principal grounds that may justify a motion for reconsideration: (1) an intervening change in controlling law; (2) the availability of newly discovered evidence; and (3) the need to correct clear error or prevent manifest injustice. *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992). Plaintiffs argue that the Supreme Court's *Davis* decision "warrants reconsideration of the Court's *Order* dismissing Counts II and III." Pl. Mem. at 1. But the decision in *Davis* says nothing about the validity of public financing systems or their matching funds provisions, and is thus not an "intervening change in controlling law." The analysis and holding of this Court's opinion dismissing Courts II and III remains good law, and *Davis* provides no basis for reconsidering that decision.

II. The Supreme Court's Decision in *Davis*

Davis involved the constitutionality of a provision of the BCRA, the Millionaire's Amendment, that was intended to assist congressional candidates dependent on raising money from private campaign contributions who faced wealthy, self-funded opponents. Ordinarily, federal law limits the amount of money that an individual can contribute to a candidate for federal office to $2,300 per election, and also limits the amount that the candidate's party can spend in coordinated expenditures. *See Davis*, 128 S. Ct. at 2765-66 (setting out the governing statutory scheme). The *Davis* Court thus took as the starting point for its analysis the fact that "[u]nder the usual circumstances, the same restrictions apply to all competitors for a seat and their authorized committees." 128 S. Ct. at 2765. Under the Millionaire's Amendment, however, this changed: as the Court explained, when a candidate spent more than $350,000 of her own money on the campaign, "a new, asymmetrical regulatory scheme [came] into play." *Id.*

at 2766. The wealthy candidate's fundraising efforts remained subject to the ordinary $2,300 contribution limit and the ordinary limit on coordinated party spending. But her opponent was freed from those limits, and could receive contributions up to three times the ordinary limit and faced no limit at all on coordinated party spending. *Id.* at 2765 (citing BCRA § 319(a), 2 U.S.C. § 441a-1(a)). The statute awarded the benefit of these high contribution limits to the non-self-financed candidate without imposing any corresponding burden – such as qualification requirements or expenditure limitations – on that candidate.

At the outset of its First Amendment analysis, the Court emphasized that "[i]f § 319(a) simply raised the contribution limits for all candidates, Davis' argument would plainly fail." 128 S. Ct. at 2770. The Court explained that contribution limits are constitutional, even though they "implicate First Amendment interests," as long as they are "'closely drawn' to serve a 'sufficiently important interest,' such as preventing corruption and the appearance of corruption." *Id.* (citations omitted). And the Court noted that there was no constitutional basis for attacking contribution limits on the ground that they are too high: "a candidate who wishes to restrict an opponent's fundraising cannot argue that the Constitution demands that contributions be regulated more strictly." *Id.* at 2771. Accordingly, "if 319(a)'s elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits." *Id.*

The Court made clear that it was the asymmetry of the contribution limits applicable to competing candidates under the Millionaire's Amendment that was constitutionally problematic. As the Court stated, "[w]e have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Id.* at 2771. The Court construed *Buckley v. Valeo*, 424 U.S. 1 (1976), as establishing "the fundamental nature of the right to spend personal funds for campaign speech," 128 S. Ct. at 2771, and held that the

Millionaire's Amendment "impose[d] an unprecedented penalty on any candidate who robustly exercises that First Amendment right" – a "penalty" which the Court described as "subjection to discriminatory fundraising limitations." *Id.* The Court explained that it was "the unprecedented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat" that was "antithetical to the First Amendment." 128 S. Ct. at 2774.

Having determined that the Millionaire's Amendment thus burdened the First Amendment rights of the self-funded candidate, the Court looked to see whether there was any government interest sufficient to justify the burden, and concluded that there was not. *Id.* at 2772-74. The Court found first that the Millionaire's Amendment did not serve any government interest in eliminating corruption; indeed, the Court noted that the statute's liberalized limits for the opposing candidate actually encouraged large contributions and the appearance of corruption that may result from them. *Id.* at 2773. In any event, the Court stated that it was "hard to imagine how the denial of liberalized limits to self-financing candidates" – which was apparently all Congress would have had to do to preserve the statute's constitutionality – "can be regarded as serving anticorruption goals sufficiently to justify the resulting constitutional burden." *Id.*

In the absence of any anti-corruption rationale, the principal interest advanced by the Government to defend the constitutionality of Section 319(a) was the statutory purpose to "level electoral opportunities for candidates of different personal wealth." *Id.* But the Court soundly rejected this argument, noting that there is no Supreme Court authority supporting "the proposition that this is a legitimate government objective." *Id.* The Court also rejected the Government's argument that the Millionaire's Amendment was justified because it reduced harm caused by the "tight limits" on contributions imposed by federal law, which make it harder for "candidates who are not wealthy to raise funds and therefore provide a substantial advantage for

wealthy candidates." 128 S. Ct. at 2774. If this is a problem, the Court noted, it is a result of "Congress' own handiwork" in imposing the contribution limits, and could not be considered a compelling interest. *Id.* The "obvious remedy," the Court held, would be "to raise or eliminate those limits," not to place asymmetrical burdens on self-financing candidates. *Id.*

III. *Davis* Does Not Require the Court to Reconsider Its Ruling That the CEP's Matching Funds Provisions Do Not Impose a Constitutionally Significant Burden on Plaintiffs' First Amendment Rights.

Plaintiffs' motion for reconsideration is premised on the supposed similarity between the matching funds provisions at issue here and the benefits provided under the Millionaire's Amendment to the outspent candidate in *Davis*. In both cases, Plaintiffs' argument goes, the law provides a benefit to the opponent that is triggered by the candidate's (or independent party's) spending, and therefore allegedly imposes an unconstitutional "burden" on that spending decision.

Despite its superficial appeal, Plaintiffs' argument is wrong, and ignores both the reasoning of the Court's decision in *Davis* and the very different context in which the issue arises in this case. As discussed below, there are two fundamental differences between *Davis* and this case that Plaintiffs' argument ignores, and that compel a different result here. First, Plaintiffs misapprehend the nature of the "burden" identified by the Court in *Davis*. Contrary to their argument, the Court in *Davis* focused on the discriminatory treatment afforded by the Millionaire's Amendment with respect to the contribution limits applicable to the candidates – not on the mere fact that the candidate's spending triggered some relief for his opponent – but neither discriminatory treatment nor contribution limits are at issue here. Second, Plaintiffs ignore the fact that this case arises in the context of a comprehensive scheme of public financing of election campaigns, whereas *Davis* involved purely private fundraising activity. The public

financing context changes the constitutional calculus completely. The nature of the choice faced by Plaintiffs here is very different from the choice faced by the candidate in *Davis*, and is not materially different from the choice Plaintiffs' face in deciding whether to join the public financing system in the first place – a choice that the Supreme Court has held does not impose any unconstitutional burden.

A. The Burden on First Amendment Rights Found by the Court in *Davis* Is Not Present Here.

The Supreme Court in *Davis* was very clear about the nature of the burden on First Amendment rights that it found to exist – and it was not at all what Plaintiffs rely upon here. As discussed above, the Court made clear that it was the discriminatory contribution limits applicable to candidates competing in the same race that the Court found to impose a constitutionally problematic burden. *See* 128 S. Ct. at 2771 ("[w]e have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other"). The Court held that the nature of the "unprecedented penalty" that the Millionaire's Amendment imposed on a high-spending candidate was "subjection to discriminatory fundraising limitations." *Id.* It was these "different contribution and coordinated party expenditure limits on candidates vying for the same seat" that were "antithetical to the First Amendment." 128 S. Ct. at 2774.

Moreover, the discriminatory treatment the Court was concerned about in *Davis* related in particular to contribution limits. As the Court is well aware from the first phase of this case, there is no question under the governing Supreme Court case law that contribution limits impose a burden on First Amendment rights, and must therefore be closely drawn to serve a sufficiently important government interest. *See Buckley*, 424 U.S. at 15; *Randall v. Sorrell*, 548 U.S. 230, 247 (2006). Indeed, in upholding the constitutionality of contribution limits in the first place, it

was important to the Court in *Buckley* that they were imposed equally on all candidates. *See Buckley,* 424 U.S. at 31. In this light, it is hardly surprising that the Court in *Davis* found the significantly different limits imposed by the Millionaire's Amendment on two privately-funded candidates running in the same race to be a troubling and "unprecedented" burden on First Amendment rights. 128 S. Ct. at 2771.

But this case does not involve any discriminatory treatment of the privately-funded candidate, with respect to contribution limits or anything else. Indeed, it is the participating candidate in the public financing system that is the more constrained candidate here, since the participating candidate is required to forego all private fundraising and accept a cap on overall spending, whereas the privately-funded candidate is not bound by either of those constraints.

Plaintiffs' argument is premised on the simplistic assumption that, in light of *Davis*, any campaign financing benefit that flows to an opponent from a candidate's higher spending necessarily imposes a constitutionally significant "burden" on the candidate's First Amendment rights. But the Supreme Court in *Davis* went out of its way to explain that this was not its holding or reasoning. As noted above, the Court in *Davis* made clear that the Millionaire's Amendment would have been constitutional if it "simply raised the contribution limits for all candidates." 128 S. Ct. at 2770; *see also id.* at 2771 ("if 319(a)'s elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits"). In other words, if the Millionaire's Amendment had specified that, in response to Davis' spending in excess of the statutory trigger, all candidates in the race would have had their contribution limits trebled, there would have been no cognizable First Amendment "burden," and Davis would have had no cause for complaint. *Id.* And this would be true even though Davis' spending in excess of the statutory amount would have triggered a significant campaign finance benefit to his

contribution limits and expenditure limits) and laws relating to publicly funded systems as analytically distinct. Indeed, the *Davis* Court emphasized this distinction. The Court cited with approval the passages in *Buckley* in which the Court upheld the constitutionality of public funding systems, and noted that the issue presented by the Millionaire's Amendment was not "remotely parallel" to the public financing issues addressed in *Buckley*. *Davis*, 128 S. Ct. at 2772. This analytical distinction stems from the different government interests advanced by private campaign finance regulations like the Millionaire's Amendment, on the one hand, and matching funds provisions in a comprehensive public financing system. The Millionaire's Amendment disfavored self-funded candidates by imposing discriminatory contribution limits for no purpose other than to level the playing field, whereas the CEP provisions simply seek to mitigate the limitations imposed by the CEP on a participating candidate – to which her opponent is not subject – so as to permit the participating candidate to engage in responsive speech in much the same way that she would in a privately funded campaign.

Under any public financing scheme, there is a fundamental difference in treatment between a participating candidate and a non-participating candidate: the participating candidate receives public funding, but the non-participating candidate does not. This differential treatment is justified because the participating candidate agrees to accept limitations on her right to engage in fundraising and on the amount that she can spend in support of her candidacy. As a result, however, the non-participating candidate – by insisting on her constitutional right to engage in fundraising and to spend unlimited money in support of her candidacy – is denied a public benefit (*i.e.*, public funding) that is provided to her opponent.

Nevertheless, the courts have uniformly held that, so long as the terms of a public funding program do not coerce participation, the grant of funds to a participating candidate does

not burden the First Amendment rights of non-participating candidates. *See Buckley*, 424 U.S. at 95; *Vote Choice v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). Rather, the courts have held that programs for public funding of political campaigns "further[ ], not abridge[ ], pertinent First Amendment values," and that they are part of an "effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge discussion and participation in the electoral process . . . ." *Buckley*, 424 U.S. at 92-93; *see also North Carolina Right to Life v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008) (noting the overarching value of public financing system to enhancing speech); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 283-86 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980).

Davis does not disturb this settled consensus that the initial grant of funds to a participating candidate does not burden the First Amendment rights of non-participating candidates. But there is no reason to treat the grant of additional funds to a participating candidate under the CEP's matching funds provisions as raising any different First Amendment concern, and there is nothing in *Davis* that would support such a result. The matching fund provisions of the CEP serve the same speech-enhancing purpose recognized and applauded by the Court in *Buckley*. *See, e.g., Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding statute that raised spending limit in a partial public funding system, noting "that the State's scheme promotes rather than detracts from cherished First Amendment values"). The matching grant provisions are an integral part of the scheme that the participating candidate accepts when she accepts public financing, and that the privately-financed candidate is aware of from the beginning and can take into account in making the choice whether to participate in public financing or not. The candidate who chooses to remain outside the public financing system – and thus does not subject herself to its constraints – thus has no greater First

Amendment objection to the matching grants than she does to the original grant that the publicly-financed candidate receives. Indeed, the state could eliminate this issue entirely by simply increasing the size of the grants for all publicly funded candidates – in effect, building the additional matching funds into the initial grant – without imposing any constitutionally cognizable burden on the rights of candidates who choose to remain outside the system or independent spenders, even though this would leave them in exactly the same position as they are under the present matching grant system.

Since the initial grant to participating candidates imposes no unconstitutional burden on the speech of non-participating candidates, it follows that the provision of additional funds to participating candidates in response to spending from candidates or independent speakers also does not impose any burden on their speech. *See Daggett v. Comm'n on Gov'tal Ethics and Practices,* 205 F.3d 445, 464 (1st Cir. 2000) (upholding Maine's system of matching funds for independent expenditures). Whether the public funding stems from the initial grant or a triggered match, the nature of the asserted injury to non-participating candidates is the same: "the claimed denial of the enhancement of opportunity to communicate with the electorate that the formulae afford eligible candidates." *Buckley*, 424 U.S. at 95. Absent a coercive system, this asserted injury is not constitutionally cognizable. As the courts have repeatedly held, since the very purpose of the First Amendment is to "'secure the widest possible dissemination of information from diverse and antagonistic sources,'" there is no right to speak free from response. *See Daggett,* 205 F.3d at 464 (quoting *Buckley*, 424 U.S. at 49 (citations omitted)). Because a matching fund system provides more money for speech, "it in no way limits the quantity of speech" that a non-participating candidate or independent spender can engage in. *Id.*

Plaintiffs' analysis improperly seeks to isolate the triggered matching funds provisions from the rest of the CEP, in violation of the "totality approach" mandated by the Supreme Court in *Burdick v. Takushi*, 504 U.S. 428, 435-37 (1992),[1] and disregards the CEP's complex balancing of benefits and burdens for participating candidates. As this Court is aware, the CEP imposes one set of rules on candidates who choose to participate, while candidates who choose not to participate are subject to another set of rules. *See Green Party,* 537 F. Supp.2d at 361. At the outset of the campaign, a candidate must decide whether to participate in the CEP's public funding system and receive public campaign funding. Conn. Gen. Stat. § 9-703. The candidate must satisfy eligibility requirements and qualify for the program by collecting "qualifying contributions," and must agree to abide by the applicable spending limit. *Id.* §§ 9-702, 703. In exchange, the candidate receives an initial grant to pay for the campaign, which varies depending on the office sought and the existence and strength of the opposition. *Id.* § 9-705. Once a candidate has accepted public funds, she cannot raise or spend anything beyond the amount made available under the program. *Id.* §§ 9-702, 9-705. Participating candidates thus agree to campaign with the uncertainty regarding the total amount of public funds they will receive, which will depend on a variety of factors, including the existence and strength of any opposition and the amount of opponent or independent spending against them. *See* Conn. Gen Stat. §§ 9-705 (setting the initial grant), 9-713 (candidate matching funds) and 9-714 (independent spending matching funds). Participating candidates also face the reality that no matter how

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[1] Under the "totality approach," the court is required to consider the challenged statute in the context of the totality of the state's electoral scheme. *See Burdick,* 504 U.S. at 435-37; *Green Party of N.Y. v. N.Y. State Board of Elections*, 389 F.3d 411, 419 (2d Cir. 2004) ("Courts are required to consider [challenged electoral] restrictions within the totality of the state's overall plan of regulation."); *Lerman v. Board of Elections,* 232 F.3d 135, 145 (2d Cir. 2000) ("The burden imposed by the challenged regulation is not evaluated in isolation, but within the context of the state's overall scheme of election regulations.").

much may be spent in opposition to their campaign, the amount of the additional grants that they can receive by virtue of candidate or independent spending against them are capped at 100% of the original spending limit, *id.* §§ 9-713, 9-714 – in effect establishing an absolute maximum on the amount that participating candidates may receive, no matter how much the opposition may spend.

The non-participating candidate, on the other hand, is not faced with any spending limit of any kind, and can raise as much money as she likes. When a candidate chooses not to participate in public funding, he or she makes that decision knowing the full benefits and burdens that attach to participation – including the fact that public funding grants and spending limits will vary depending on how much the non-participating candidate (and any independent speaker) may spend. *See Republican Nat'l Comm.*, 487 F. Supp. at 284 (noting that candidate's First Amendment rights are not violated as long as she "remains free to engage in unlimited private funding and spending instead of limited public funding"); *see also Daggett*, 205 F.3d at 468, 471 (discussing range of issues to consider in deciding whether participate in public funding system).

In other words, the potential for matching funds is simply part of the overall limit that a participating candidate will face – and thus part of the balance of benefits and burdens that a candidate must assess when choosing whether to participate in the system. *See Vote Choice.* 4 F.3d at 39 ("the government may legitimately provide candidates with a choice among different packages of benefits and regulatory requirements"). Establishment of a comprehensive public funding system offers a wide range of different, voluntarily assumed, spending limits. Triggered matching funds are only one aspect of this range of limitations, which also includes reductions in grants under specified conditions. For example, general election grants are reduced to 30% of the full amount if a candidate is unopposed in the general election, Conn. Gen. Stat. § 9-705(j),

and general election grants are reduced to 60% of the full amount if the candidate faces only a minor or petitioning party opponent who has not raised an amount equal to the qualifying contribution threshold level for that office. Conn. Gen. Stat. § 9-705(j).

The Supreme Court in *Buckley,* reviewing the federal presidential public funding system, held that it was constitutional to require candidates to make the choice whether to "forgo private fundraising and accept public funding," 424 U.S. at 57 n.65, or to opt out, with the result that her opponent might receive the benefit of public funds that she does not receive. *See also Republican Nat'l Comm.*, 487 F. Supp. at 284-85 (discussing constitutionality of choice imposed on candidates in presidential public funding system).

Under the CEP, this choice occurs in the context of a system of varying level of benefits that is appropriately hinged on actual conditions in a race. At each disbursement and limit level, the CEP's design balances two competing state interests: reducing unnecessary strain on the public fisc and encouraging participation by candidates by assuring them that they will have the resources necessary to field viable campaigns. Like other aspects of the legislative scheme that may reduce benefits depending on the intensity of competition in a race, triggered matching funds are part of a carefully crafted package that provides both adequate incentives to candidates and reasonable limits.

C. The *Davis* Court's Citation to *Day v. Holahan* Does Not Require This Court to Reconsider Its Ruling.

As this Court noted, almost every court to consider whether matching funds in the context of a comprehensive public financing scheme impose a burden or "chill" on the speech of non-participating candidates and independent speakers has found that they do not. *See Green Party*, 537 F. Supp.2d at 391 (citing, *inter alia*, *Daggett,* 205 F.3d at 465; *Ass'n of Am. Physicians & Surgs. v. Brewer*, 363 F. Supp. 2d 1197, 1200 (D. Ariz. 2005); and *Wilkinson v.*

Jones, 876 F. Supp. 916, 928 (W.D. Ky. 1995)); *see also North Carolina Right to Life*, 524 F.3d at 437. The analysis of these decisions remains persuasive as applied to the CEP, and is not undermined by the holding of *Davis* with respect to the Millionaire's Amendment.

We recognize that the Court's opinion in *Davis* cited with apparent approval the Eighth Circuit's opinion in *Day v. Holahan*, 34 F.3d 1356, 1359-60 (8th Cir. 1994), the one circuit court decision which had held that a law increasing spending limits and public funding for a candidate based on independent expenditures burdened the speech of those making the independent expenditures. But the bare fact that the Court cited *Day* does not require this Court to reconsider its well-supported ruling. The Court in *Davis* was not addressing the validity of matching grants in the context of comprehensive public financing schemes. Indeed, in light of the Court's explicit reaffirmance of *Buckley*'s holding on the validity of public financing schemes, 128 S. Ct. at 2772, it is hard to imagine that the Court intended to call into question the constitutionality of one of the essential features necessary to the success of any public financing scheme. In addition, the Court's citation to *Day* was unnecessary to its decision, and therefore dictum. Moreover, the Court in *Davis* merely cited *Day* as an example of a situation that presented a "*potentially* significant burden" on the higher spending candidate, 128 S. Ct. 2772 (emphasis added), and did not hold or state that there was in fact any burden cognizable under the First Amendment in that situation.

In addition, *Day* is distinguishable on its facts. *Day* involved an unusual partial public funding system that raised a candidate's spending limits dollar-for-dollar for each dollar of independent spending against the candidate, and provided additional public funding to the participating candidate of half the amount of any independent spending. 34 F.3d at 1359-60. The *Day* court found that lifting the spending limits and providing additional public funds "as a

direct result of that independent expenditure[ ] chills the free exercise of that protected speech." *Id.* at 1360. In contrast, there is no similar "direct" dollar for dollar link between opposition spending and increased funding under the CEP (or most other full public funding programs). Under the CEP, the spending limit for the participating candidate is not raised – and no additional money is released – simply because there is a single dollar of independent spending against her. On the contrary, there are no additional matching funds until the combined spending of opposing candidates and independent spenders exceeds the initial grant made to the participating candidate. Conn. Gen. Stat. § 9-714. Thus, the matching funds at issue here are tied to the amount of the initial public grant, and represent in effect an adjustment of the amount of the public grant, in a way that the Minnesota statute at issue in *Day* did not. In addition, the matching funds for independent expenditures under the CEP are capped at 100% of the original spending limit. Thus, the matching grant provisions at issue here lack the element of a direct dollar-for-dollar "penalty" on independent speech that the *Day* court found persuasive. Indeed, in the context of matching fund provisions in a public financing scheme like the CEP, it is the Eighth Circuit's holding in *Rosenstiel*, that such triggered benefits do not burden the opposing candidate's First Amendment rights, 101 F.3d at 1552-53, rather than *Day*, that is controlling here.

IV. Even If the CEP's Matching Funds Provisions Imposed a Burden on Plaintiffs' First Amendment Rights, These Provisions Are Necessary to Advance Compelling State Interests.

A. Unlike the Millionaire's Amendment at issue in *Davis*, the CEP's Matching Grant Provisions Are Supported by Compelling State Interests.

Even if the Court concludes that, in light of *Davis*, it must reconsider its conclusion that the CEP's matching funds provisions do not impose any burden on the Plaintiffs' First Amendment rights, that hardly means that these provisions are unconstitutional, as Plaintiffs

assume. The existence of a burden on First Amendment rights is only the beginning of the Court's analysis, not the end. Assuming that strict scrutiny is the right standard of review, the Court must also consider whether the matching funds provisions are narrowly tailored to serve compelling state interests. And the matching funds provisions of the CEP satisfy that test, because they provide an indispensible incentive for candidates to participate in the public financing system, without which the entire success of the CEP would be jeopardized.

As a preliminary matter, Plaintiffs erroneously assume that the Court should apply strict scrutiny in assessing the constitutionality of the triggered matching funds under the CEP. *See* Plaintiffs' Mem. at 5.[2] Defendants respectfully submit, however, that the appropriate standard of review of First Amendment challenges to the provisions of a public financing system is the "flexible standard" developed in *Anderson v. Celebrezze,* 460 U.S. 780, 786-89 (1983), and *Burdick v. Takushi,* 504 U.S. at 433-34. Under this flexible standard, the Court must weigh "the character and magnitude of the asserted injury" to rights protected by the First Amendment, against "the precise interests put forward by the State as justification for the burden imposed," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick,* 504 U.S. at 434 (quoting *Anderson,* 460 U.S. at 789). Where "those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick,* 504 U.S. at 434 (quoting *Norman v. Reed,*

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[2] We recognize that the Court in its opinion on the motion to dismiss also stated that the appropriate test was "whether the provision in question . . . is narrowly tailored to serve a compelling state interest." *Green Party*, 537 F. Supp. 2d at 391 (quoting *Rosenstiel*, 101 F.3d at 1549). But the parties had not briefed the issue (since Defendants' asserted that there was no First Amendment burden as a matter of law), and the Court never had occasion to actually apply its test (because the Court reached the same conclusion). In these circumstances, if the Court finds it necessary to reach this issue now, we urge the Court to consider anew the standard of review, and to apply the flexible standard of *Anderson* and *Burdick*.

502 U.S. 279, 289 (1992)). "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick,* 504 U.S. at 434 (quoting *Anderson,* 460 U.S. at 788). Since any burden on Plaintiffs' First Amendment rights here is not "severe" (assuming there is any First Amendment burden at all), it is the more deferential standard under *Anderson-Burdick* that applies here, not strict scrutiny.

However, even assuming that strict scrutiny is applicable, the CEP's matching grant provisions satisfy that test. First, there should be no question that these matching grant provisions serve compelling state interests. It is well settled that public funding systems such as the CEP further several compelling government interests. States have a compelling interest in maintaining public financing programs as a means of preventing corruption and the appearance of corruption. *See Buckley*, 424 U.S. at 96 ("public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest"); *Rosenstiel*, 101 F.3d at 1553 (same); *Republican Nat'l Comm.,* 487 F. Supp. at 284-85 (reducing deleterious influence of large contributions on political process is a compelling state interest). States also have a compelling interest in reducing the burden imposed by fundraising on its candidates and elected officials, and thereby freeing them to attend to public business. *See Buckley*, 424 U.S. at 90-91 ("public financing . . . [is] a means to reform the electoral process . . . to free candidates from the rigors of fundraising"); *Rosenstiel,* 101 F.3d at 1553 (well settled that government has an interest in reducing the amount of time candidates spend fundraising); *Republican Nat'l Comm.,* 487 F. Supp. at 284-85 (citing *Buckley*). In addition, as the Court recognized in *Buckley*, a public funding program involves the "use [of] public money to facilitate

and enlarge discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. at 92-93.

Moreover, once the state has established a public funding system, it has a compelling interest in creating incentives for candidates to opt into the system and to forgo their right to raise and spend an unlimited amount of private funds. *See Rosenstiel,* 101 F.3d at 1553 ("the State has a compelling interest in stimulating candidate participation in its public financing scheme"); *Vote Choice*, 4 F.3d at 39 (state has compelling interest in creating incentives for candidates to accept public financing); *Wilkinson*, 876 F. Supp. at 928 ("Kentucky has a compelling interest in encouraging candidates to accept public financing and its accompanying limitations").

In addition, while providing these incentives, the state also has an important interest in structuring the public financing program in a way that it will not become too expensive. *See Buckley*, 424 U.S. at 96 (Congress has an "interest in not funding hopeless candidacies with large sums of public money"); *Anderson v. Spear*, 356 F.3d 651, 676 (6th Cir. 2004) (interest in not funding hopeless candidacies with public money is a "significant governmental interest"). The CEP's matching funds provisions further both government interests, by providing incentives for candidates to participate while also protecting the public fisc. Moreover, even the additional monies provided by the matching grant provisions are capped to preserve the state's fiscal interests and to contain the potential overall costs of the program.

The CEP provisions at issue here thus stand in stark contrast to the Millionaire's Amendment at issue in *Davis*. In *Davis*, the Court held that there was no government interest sufficient to justify the burden imposed by the statute on First Amendment rights. 128 S. Ct. at 2773-74. The Court found that the Millionaire's Amendment did nothing to further the

government interest in preventing corruption, and possibly undermined it by allowing larger contributions. *Id.* at 2773. The Court found, instead, that the only interest served by the Millionaire's Amendment was to "level electoral opportunities for candidates of different personal wealth," *id*, an objective the Court held to be illegitimate. *Id.* at 2773-74.

In an effort to bring their case within the scope of *Davis*, Plaintiffs argue that the only governmental interest furthered by the CEP's matching funds provisions is similarly the interest in "level[ing] the playing field." Plaintiffs' Mem. at 5-6. But this simply mischaracterizes the goals of the CEP's matching funds provisions – which are principally intended to encourage participation in the CEP, and to prevent candidates from opting out because of the fear that they will be outspent – and ignores well-settled law on the state interests supporting public funding systems in general and matching fund provisions in particular.

B. The CEP's Matching Grants Are Narrowly Tailored to Satisfy These Compelling State Interests.

Moreover, the CEP's matching grant provisions are carefully tailored to further these compelling state interests. The CEP asks a lot of participating candidates: in order to accept the State's offer of public funding, candidates must agree to forgo any additional fundraising and to spend only the amount the State provides. This puts the participating candidate at great risk if she finds herself in a contest with a well-financed candidate who is not participating, and who is free to raise and spend as much as she wants to, or if the participating candidate finds herself opposed by vigorous independent spending.

The matching grant provisions provide an essential incentive for candidates to participate in the CEP, by reassuring participating candidates that they will not be left without the resources to combat a high-spending campaign against them. Without these provisions, the success of the public funding program would be in serious jeopardy. As this Court recognized in its opinion on

the motion to dismiss, "the absence of triggers may have serious consequences for the participation rate." *Green Party*, 537 F. Supp. 2d at 391 n.67; *see also Rosenstiel*, 101 F.3d at 1554 ("Absent such a safeguard, the State could reasonably believe that far fewer candidates would enroll in its campaign financing program, with its binding limitation on campaign expenditures, because of the candidates' concerns of placing their candidacy at an insurmountable disadvantage."); *Daggett*, 205 F.3d at 469 ("without the matching funds . . . candidates would be much less likely to participate because of the obvious likelihood of massive outspending by a non-participating opponent"); *Gable v. Patton*, 142 F.3d 940, 947-49 (6th Cir. 1998) ("[a] voluntary campaign finance scheme must rely on incentives for participation").

Moreover, the amounts of the matching grants are carefully calibrated to provide participating candidates only the amount necessary to respond to the spending against them. Unlike the statute struck down in *Day*, the Connecticut statute does not match, dollar-for-dollar, all independent spending against the participating candidate. On the contrary, the Connecticut statute provides an initial grant which is considered to be adequate by historical standards to allow the participating candidate to run a competitive race, and provides no matching funds at all unless the total of the opposing candidate's spending and independent spending against her exceeds that limit. And then, once that threshold is exceeded, the amount of matching funds is increased in stages, only as necessary to respond to additional spending against the participating candidate, Conn. Gen. Stat. § 9-713, and the matching funds for both excess opposition spending and third party spending are ultimately each capped at 100% of the initial grant. Conn. Gen. Stat. §§ 9-713, 9-714. These trigger provisions are intended to tailor the grant amounts to allow participating candidates to meet the competition, while avoiding the waste of public funds that would be entailed by higher initial grants in races that are not competitive. The triggered

matching funds allow the state to avoid unnecessary expenditures in relatively uncompetitive races while allowing participating candidates the ability to be competitive in high-dollar races. Indeed, the CEP matching funds merely track what the participating candidate would in all likelihood have been able to raise herself to respond to substantial spending against her, if she had not opted to participate in the CEP.[3]

The CEP's matching funds provisions are thus narrowly tailored to serve the State's compelling state interest in fostering participation in its public financing program, as the courts addressing similar provisions have uniformly held. For example, in *Rosenstiel*, the Eighth Circuit upheld the constitutionality of a provision of the Minnesota campaign finance scheme which waived the expenditure limits applicable to participating candidates in the event of large independent expenditures against them. The court noted that "this provision removes the disincentive a candidate may have to participate in the public financing system because of the candidate's fear of being grossly outspent by a well-financed, privately funded opponent," and found "little difficulty concluding that the expenditure limitations waiver is narrowly tailored to serve the State's interests." 101 F.3d at 1554. *Accord Wilkinson*, 876 F. Supp. at 928 (holding similar provision narrowly tailored to serve compelling state interest); *Vote Choice*, 4 F.3d at 39 (holding relief from expenditure cap narrowly tailored to serve compelling state interest).[4]

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[3] In contrast to the CEP's careful provision of supplemental funds only when necessary to allow participating candidates to respond to spending against them, the statute struck down in *Davis* provided discriminatory benefits to the millionaire's opponent whether or not she needed them, and even if the opponent had already raised, through traditional means, more than enough to respond to the millionaire's spending. Thus, in some circumstances, the Millionaire's Amendment would simply have provided a mechanism for an well-financed opponent to fatten her war chest. The CEP is much more carefully tailored, as it only provides funds to a candidate whose spending is limited by law, and only when necessary to respond to opposition spending, and requires candidates to return all excess funds to the CEP after the election.

[4] Again, the Eighth's Circuit's decision in *Day* is distinguishable. In addition to the fact that the Minnesota statute at issue in *Day* granted additional funds to a participating candidate for every dollar of

C. The Recent Statement of an Arizona District Court that Matching Funds Are Unconstitutional is Entitled to Little Weight Here.

The Court should be aware that, within the past week, a District Court in Arizona has stated in *dictum* that the matching funds provision of the Arizona Clean Elections Act is unconstitutional in light of *Davis*. *See McComish v. Brewer*, No. CV-08-1550-PHX-ROS, at 7 (D. Ariz. Aug. 29, 2008).[5] The Court made this statement in the course of denying a temporary restraining order against operation of the Arizona statute in this fall's elections, which the court denied because of concerns that an injunction against the statute at this late date could unfairly harm the interests of candidates who had been depending upon the matching funds as well as the interest of the state in running a fair and orderly election. *See id.* at 7-9. The court scheduled a further hearing on plaintiffs' application for a preliminary injunction, which has now been postponed until late September or October to allow for expedited discovery.

It is not at all clear that the court's statement that the Arizona matching funds provision is unconstitutional was the Arizona court's last word on the issue. The court was forced to consider the issue in haste – the defendants had only one day to submit their responding papers – and the court has scheduled a preliminary injunction hearing to give further consideration to the issues. Indeed, the court has expressly stated in open court that the issue of the statute's unconstitutionality remains open and will be further considered in connection with the motion

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independent spending against her, even though the overall spending against the candidate may not have been great, the court in *Day* held the statute invalid only because the court found no state interest sufficient to justify the burden imposed on First Amendment rights. In defending the law, the State argued that the provision was necessary to encourage participation in the state's public financing program, but the Eighth Circuit found that argument unpersuasive because participation rates were nearly 100 percent even *before* enactment of the statute. *Day,* 34 F. 3d at 1360; *see Daggett*, 205 F.3d at 465 n.26 (noting that *Day* is distinguishable on this ground).

[5] Defendants are providing the Court with a copy of the Arizona District Court's ruling in a letter submitted with this memorandum.

for a preliminary injunction.[6] Moreover, in light of the court's denial of TRO relief, the court's statement that the statute is unconstitutional is *dictum* that was unnecessary to the court's decision.

However, to the extent that this is the Arizona court 's view, it is based on a mistaken reading of *Davis*; fails to take into account the compelling state interests that support matching funds provisions; and is any event distinguishable. First, the Arizona court clearly erred in stating that the *Davis* Court "quoted from Day extensively and affirmatively." *Id.* at 5. In fact, the *Davis* opinion did not quote from *Day* at all, and merely cited it in passing, without any substantive discussion, for the relatively modest proposition that the Millionaire's Amendment imposed a "potentially" significant burden on wealthy self-funded candidates. 128 S. Ct. at 2772. Second, as discussed above, the court erred in its understanding of the nature of the "burden" on First Amendment rights found by the Supreme Court in *Davis*, failed to appreciate the significance of the Court's statement that the statute would have been constitutional if it had only raised the contribution limits for both candidates, and failed to appreciate the fundamental differences between public funding systems and the privately financed race at issue in *Davis*. *See McComish*, slip op. at 5-7.

Equally important, the Arizona court failed to give any consideration to the compelling state interests that support a matching funds provision in the context of a public financing scheme. The court briefly addressed whether there was a compelling state interest, *id.* at 7, but noted only the general interest in avoiding corruption, and failed to consider at all the compelling state interest in providing sufficient incentives to make the public financing scheme viable.

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[6] A transcript of the relevant proceedings is not yet available, but will be provided to the Court as soon as it is available.

Finally, the Arizona decision is distinguishable because the court ultimately relied upon its conclusion that the anti-corruption goal of the statute was undermined by two avenues of gamesmanship that candidates could possibly use to undermine the intent of the statute. *Id.* at 7. The court's reliance on these "possibilities" was erroneous, since they had nothing to do with any question of corruption and were remote possibilities at best that should not have weighed heavily when compared with the compelling state interest in providing incentives to participation in the public financing system. More important for present purposes, however, neither of these possibilities has any relevance to the Connecticut statutory scheme.[7]

Accordingly, the Arizona court's statement has no persuasive value here, and should not be followed.

V. If the Court Decides to Reconsider Its Decision in Light of *Davis*, the Court Must Also Reconsider Its Decision That Plaintiffs Here Have Standing.

Finally, if the Court concludes that *Davis* requires the Court to reconsider its decision on whether the matching funds provisions of the CEP impose any First Amendment burden, the Court must also reconsider its decision that the Plaintiffs have standing to object to those provisions, and must consider anew the standing issue in light of Plaintiffs' motion for summary judgment.

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[7] One of the court's possible avenues of gamesmanship related to the abuse of "slate" tickets in Arizona's multi-member districts, *id.*, but Connecticut does not have any such districts and the court's discussion of the possible abuses of such slates is irrelevant here. The court's other potential avenue of abuse related to the possibility that a political action committee ("PAC") could deliberately run ineffective advertising in favor of a privately funded candidate, thereby generating matching funds for the opposing participating candidate. *Id.* But not only is this concern fanciful – why wouldn't the PAC just run advertising in support of its favored candidate, rather than running bogus advertising for the opponent that would generate matching funds for their favored candidate? – it is irrelevant to the Connecticut scheme, because the Connecticut statute (unlike the Arizona statute) only provides matching funds for independent spending urging the *defeat* of a participating candidate, not spending urging the election of a non-participating candidate. Conn. Gen. Stat. § 9-714(a).

The Supreme Court in *Davis* addressed the issue of standing in detail. 128 S. Ct. at 2768-69. The Court specifically reaffirmed its decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), that in order "[t]o qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent." *Davis*, 128 S. Ct. at 2768. The Court also re-emphasized that "a plaintiff must demonstrate standing for each claim he seeks to press." 128 S. Ct. at 2769 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). After a careful analysis, the Court held that Davis had standing to challenge the Millionaire's Amendment only because he had declared his intention to spend $1 million of his personal funds (far more than $350,000 statutory trigger) in the election campaign, 128 S. Ct. at 2767, and thus the Millionaire's Amendment would "shortly burden his expenditure of personal funds by allowing his opponent to receive contributions on more favorable terms." *Id.* at 2769. Davis in fact had spent $1.2 million, mostly from his own funds, in his prior race for Congress, and wound up spending $2.3 million in the 2006 race at issue. *Id.* at 2767. As discussed below, Plaintiffs here have not come close to establishing any similar actual injury from the impact of the CEP's matching funds provisions, or any likelihood that any such injury is imminent or real.

Moreover, wholly apart from the *Davis* decision, the Court on summary judgment is required to re-assess whether Plaintiffs have standing, whether or not the Court previously addressed the standing issue in the very different context of a motion to dismiss. As the Court in *Davis* noted, "the requirement that a claimant have 'standing is an essential and unchanging part of the case-or-controversy requirement of Article III.'" *Id.* at 2768 (quoting *Lujan*, 504 U.S. at 560); *see also Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). The standing inquiry thus goes directly to the Court's jurisdiction, and the Court, of course, is required to

assess whether it has jurisdiction at each stage of the litigation. *See* Fed. R. Civ. P. 12(h)(3); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

It is well settled, in particular, that the Court in ruling on a summary judgment motion must be satisfied that Plaintiffs have standing, that it is Plaintiffs' burden to establish standing as a matter of fact, and that it is irrelevant whether Plaintiffs may have sufficiently alleged standing in their complaint for purposes of a motion to dismiss. As the Supreme Court held in *Lujan*:

> The party invoking federal jurisdiction bears the burden of establishing these elements [of standing]. Since they are not mere pleading requirements but rather an indispensible part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule. Civ. Proc 56(e) . . . .

504 U.S. at 561 (other citations omitted, and emphasis added); *see also Bennett v. Spear*, 520 U.S. 154, 168 (1997) ("a plaintiff must 'set forth' by affidavit or other evidence 'specific facts' [to demonstrate standing] to survive a motion for summary judgment") (citing Fed. R. Civ. P 56(e)). As the Court stated in *Davis*, "the proof required to establish standing increases as the suit proceeds." 128 S. Ct. at 2769.

Plaintiffs have failed to demonstrate that they have standing to challenge the matching funds provisions of the CEP, and the Court must therefore deny their motion for summary judgment on Counts II and III, and grant Defendants' motions to dismiss these counts. Plaintiffs rely solely on Paragraphs 55 and 56 of the Declaration of Plaintiff S. Michael DeRosa, *see* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment ("Sum. J.

Mem."), at 106, but DeRosa's declaration does not contain facts to demonstrate that there is any likelihood of "concrete," "actual" or "imminent" injury to him or to the Green Party. Plaintiffs, by their own admission, have not in the past "raised or spent the amount of money that would trigger the excess expenditure provision" of the CEP, *id.*; DeRosa Decl ¶ 55, and they have made no showing that they will do so in the foreseeable future. *See also* Declaration of Bethany Foster, ¶¶ 22-24 (detailing minimal historical spending by minor parties). Instead, DeRosa's Declaration simply asserts that "a strong Green Party candidate" – without identifying who that might be or when he might appear – "might easily" have expenditures that would trigger matching funds for his opponents. DeRosa Decl. ¶ 55. This is pure speculation, and does not remotely satisfy Plaintiffs' burden to demonstrate standing by specific articulable facts. Plaintiffs cannot identify the candidate who would be running, the race that he or she would be competing in, where the candidate would get the funds to spend, or in what year – or decade – this "might" occur.

Plaintiffs' claims with respect to the independent expenditures trigger are similarly based on pure speculation. Plaintiffs point to the fact that the all independent spending is aggregated for purposes of determining whether a matching grant is appropriate, and rely solely on a hypothetical scenario in which a "minimal" amount of Green Party spending is sufficient – when added to spending by other groups – to push the total spending against a candidate over the statutory limit. *See* Sum. J. Mem. at 106; De Rosa Decl. ¶ 56. This is nothing more than a shot in the dark. There is no reason to believe that any such scenario will ever come to pass, and it is absurd to suggest that there is any real possibility that Green Party spending might turn out to be the key – in some future race, involving some unnamed future candidates, and independent spending by other unnamed and unknown groups – to triggering matching funds.

Indeed, although there have been already three special elections and 18 primary elections held under the CEP, and there is a full slate of ongoing legislative campaigns for this fall's elections, there have not yet been any matching funds that have been triggered under the statute. *See* Declaration of Jeffrey Garfield, dated September 4, 2008, ¶ 8. In this light, the prospect that a low-spending minor party candidate will do so is especially remote.

These hypothetical possibilities are plainly insufficient to support standing, under well settled law. A theoretical possibility that an injury might occur is not an injury in fact. *Port Washington Teachers Ass'n v. Bd. of Educ.*, 478 F.3d 494, 500 (2d Cir. 2007). An actual or imminent harm is necessary "to ensure that the court avoids deciding a purely hypothetical case in which the projected harm may ultimately fail to occur." *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003). Such "speculation and conjecture" is insufficient to support the Court's Article III jurisdiction. *See O'Shea v. Littleton*, 414 U.S. 488, 495 (1974). Plaintiffs have also failed to satisfy their burden of establishing that any putative injury is temporally imminent. *See Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990) ("A threatened injury must be *certainly impending* to constitute injury in fact.") (internal quotation marks and citations omitted); *Golden v. Zwickler*, 394 U.S. 103, 109 (1969) (no "sufficient immediacy and reality" where unlikely that congressman would be a candidate for Congress in the next election); *McConnell v. Federal Election Commission*, 540 U.S. 93, 225 (2003) (denying standing to Senator McConnell because his "plans to run ads critical of his opponents in the future" could not take effect until the 2008 election, and this was "too remote temporally to satisfy Article III standing").

Moreover, the summary judgment record affirmatively demonstrates that Plaintiffs do not have standing to challenge the matching funds provisions. As noted in Defendants' Memorandum in opposition to Plaintiffs' summary judgment motion, *see* Defendants' Mem. at

58, the Green Party does not have a formal budget, any paid staff, or a headquarters; and it has had only a handful of part-time volunteer staff. *See* Youn Decl. Ex. 3 (Ferrucci Dep.) at 22:18-23:5; Sevigny Aff. ¶¶ 13, 33; Youn Decl. Ex. 18 (Thornton Dep.) at 51:17-54:2; Youn Decl. Ex. 5 (Krayeske Dep.) at 58:12-16. There is thus no reason to believe that it has the financial resources either to support its candidates or to engage in substantial independent spending. DeRosa raised only $573 in support of his candidacy for the state Senate. Youn Decl. Ex. 1 (DeRosa Dep.) at 113-14. Plaintiffs have only a small number of supporters in Connecticut. The Green Party had only 713 enrolled voters in 2006, and the Libertarian party had at most 50 members as of early 2008. Youn Decl. Ex. 1 (DeRosa Dep.) at 59-60, 64; Youn Decl. Ex. 12 (Rule Dep.) at 90-92. As a matter of party policy, the Libertarian Party does not provide financial or logistical support to its candidates. Youn Decl. Ex. 13 (Rule Dep. Ex. 1). Past candidates for these parties have intentionally not raised funds for campaigns for various reasons, including as a "matter of principle" and "to avoid paperwork." Youn Decl. Ex. 3 (Ferrucci Dep.) at 98; Youn Decl. Ex. 12 (Rule Dep.) at 117. For the Libertarian Party, the very concept of electoral success conflicts with the core anti-government ideology of many Libertarian Party supporters. Youn Decl. Ex. 12 (Rule Dep.) at 43.

There is simply no realistic likelihood that any Plaintiff will spend enough to trigger a matching grant for her opponent, or that Plaintiffs will make independent expeditures that will trigger matching funds. Thus, Plaintiffs have made no showing whatsoever that their First Amendment right to spend their own funds in furtherance of their campaigns or their political views has been burdened to any degree by the CEP's matching funds provisions, and they do not have standing to make the claims in Counts II and III.

VI. Conclusion

In light of the arguments above, defendants respectfully request that the Court deny Plaintiffs' motion for reconsideration.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on September 5, 2008, a copy of the foregoing Memorandum in Opposition to Plaintiffs' Motion for Reconsideration was filed electronically. Notice of this filing will be sent by e-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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