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.,	:	
Intervenor-Defendants.	:	
		October 3, 2008

DEFENDANTS' AND INTERVENOR-DEFENDANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants Jeffrey Garfield, and Richard Blumenthal; and Intervenor-Defendants Audrey Blondin, Tom Sevigny, Connecticut Common Cause, and Connecticut Citizens Action Group (collectively, "Defendants"), hereby respectfully file this reply memorandum in further support of their motion for summary judgment (Docket #236) and to respond to particular points raised in Plaintiffs' memorandum in opposition ("Pl. Opp. Mem." Docket # 257). This reply brief responds to Plaintiffs' misstatements of the standards governing the Court's review of this constitutional challenge and their significant distortions of the factual record.

A grant of summary judgment is warranted here because Plaintiffs have not even come close to satisfying their burden under *Buckley v. Valeo*, 424 U.S. 1 (1976) – to demonstrate that

the CEP has already, or will imminently, reduce the political opportunity of nonmajor party candidates below the level attained prior to the CEP's enactment. Rather than reducing the political opportunities of nonmajor party candidates, the record demonstrates that the CEP will expand and enhance such opportunities, by providing, for the first time, routes for nonmajor party candidates to access campaign funds far in excess of their previous fundraising levels. Indeed, as the facts continue to develop in advance of the CEP October 10, 2008 grant application deadline, both full and partial CEP grants have already been approved or are likely to be approved soon for several minor party candidates. These successes conclusively demonstrate that reasonably diligent candidates can qualify for CEP funding, so that even if this Court were to credit Plaintiffs' testimony that they will be unable to qualify for CEP grants, Plaintiffs' failures are due to their preexisting political weaknesses, not from the advent of the CEP. Accordingly, Plaintiffs' defeatist assumptions and doomsday scenarios are simply immaterial and cannot preclude a grant of summary judgment dismissing their Equal Protection and First Amendment claims.

Plaintiffs' flurry of erroneous and misleading figures, combined with self-serving and speculative testimony similarly fails to raise any material issue of fact. This so-called evidence can be combined into several categories. First, Plaintiffs suggest that CEP grants will increase historical expenditures for legislative races. However, the data Plaintiffs present to the Court are so riddled with errors and so misleadingly presented that they cannot be relied upon to provide support for Plaintiffs' claims. Plaintiffs can offer this Court no reason to substitute its own judgment regarding appropriate grant amounts for the Connecticut legislature's careful gearing of grant amounts to historical expenditure levels, as Defendants have previously set forth. Second, Plaintiffs offer evidence – consisting of self-serving testimony and misleading isolated

examples – purporting to demonstrate the burdens of petitioning and collecting qualifying contributions. However, such issues are immaterial, given that reasonably diligent nonmajor party candidates have qualified and continue to qualify for CEP funding. Third, Plaintiffs claim that the CEP will increase major party competition, but ignore both historical data and undisputed testimony that establishes that the CEP has not altered major parties' incentives in fielding candidates in particular districts. Finally, Plaintiffs complain of supposed "loopholes" in the CEP's expenditure limitations, but fail to demonstrate that the worst-case scenarios they concoct regarding the abuse of such "loopholes" has ever occurred or is likely to occur, or how such abuse results in invidious discrimination against nonmajor party candidates. The pages of argument and evidence that Plaintiffs have amassed fail to yield any material issue of disputed fact that would preclude the grant of summary judgment for Defendants.

I. PLAINTIFFS MISSTATE BOTH THE APPROPRIATE STANDARD OF REVIEW AND DEFENDANTS' POSITION WITH RESPECT TO THE STANDARD OF REVIEW.

Plaintiffs attempt to portray Defendants' thorough and accurate analysis of the *Anderson-Burdick* line of cases in their memorandum in support of their motion for summary judgment as a misguided eleventh hour "changed course" (Pl. Opp. Mem. p. 36) rather than a more complete presentation of the governing analytical framework applicable to First Amendment challenges to complex electoral schemes. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). Plaintiffs argue that "[t]he defendants have provided no explanation why the limiting First Amendment principles discussed in *Buckley* are no longer the relevant benchmark." (Pl. Opp. Mem. p. 36). Defendants have made no such claim and, indeed, it is Plaintiffs – not Defendants – who have misstated the appropriate standard of review.

Contrary to Plaintiffs' arguments, Defendants do not now and have never contended that the First Amendment principles set forth in *Buckley* do not apply to this case. To the contrary, Defendants have consistently asserted that the central teaching of *Buckley* - that the Plaintiffs must establish a burden on their political opportunity caused by the CEP – controls this case because it identifies the harm that Plaintiffs must demonstrate in order to state a viable claim of invidious discrimination. *Buckley* 424 U.S. at 95-96. The *Anderson-Burdick* line of cases instructs the Court on the appropriate standard against which to measure that harm. As Defendants have argued throughout, *Buckley* establishes that Plaintiffs must demonstrate a in their political strength as a result of the CEP in order to state any claim at all, *Anderson-Burdick* dictate that strict scrutiny is only appropriate if that reduction is severe.

Plaintiffs' cursory dismissal of the *Anderson-Burdick* line of cases on the ground that those cases implicate ballot access and voting rights is inexplicable in light of the fact that ballot access has been recognized as the central political opportunity right of political parties in our democratic system and a necessary precondition for any political party's electoral success. *See e.g, Williams v. Rhodes*, 393 U.S. 23, 31 (1968) ("The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."). A close examination of *Buckley* confirms the preeminence of ballot access rights on the continuum of political opportunity rights. In declining to employ strict scrutiny to the public financing provisions, the *Buckley* Court distinguished a series of ballot access cases that had employed strict scrutiny and noted that:

> These cases, however, dealt primarily with state laws requiring a candidate to satisfy certain requirements in order to have his name appear on the ballot. These were, of course, direct burdens not only on the candidate's ability to run for office but also on the voter's ability to voice preferences regarding representative government and contemporary issues. In contrast, the denial of public financing to

> some Presidential candidates is not restrictive of voters' rights and less restrictive of candidates.'

Buckley 424 U.S. at 94 (*citing Lubin v. Panish,* 415 U.S. 709, 716 (1974); *American Party of Texas v. White,* 415 U.S. 767, 780-781 (1974), *Storer v. Brown,* 415 U.S. 724, 729-730 (1974)). Plaintiffs' contention that statutes which are alleged to impose "direct burdens" on the core political rights of association and voting are less strictly scrutinized than statutes that indirectly burden the ill-defined right of "political opportunity" is illogical. The central importance of the political rights under consideration in the *Anderson-Burdick* line of cases supports Defendants' position that the standard developed in those cases also applies to Plaintiffs' allegations of a burden on their "political opportunity" rights in this case.

While this Court has declined to hold that *Buckley* is dispositive of the present case, it should not disregard the relevance of the analytical framework established in *Buckley* and reinforced in subsequent Supreme Court decisions, which declined to employ traditional strict scrutiny equal protection analysis to core political rights of ballot access and voting. As is more thoroughly set forth in Defendants' opposition to Plaintiffs' motion for summary judgment (Def. Opp. Mem., Docket #260, pp. 47-50), the appropriate analytical framework requires this Court to first assess the burden on these Plaintiffs' political opportunity rights in light of Connecticut's overall electoral scheme and based on the actual record before this Court in this case. [1] Only

[1] Throughout their brief, Plaintiffs reference *Davis v. Federal Election Comm'n*., 128 S.Ct. 2759 (2008), which they claim alters the Court's analysis of the present motion. Defendants have exhaustively addressed the effect of *Davis* on this case in their Memorandum in Opposition to Plaintiffs Motion for Reconsideration (Docket # 259). Defendants respectfully refer the Court to that brief rather than repeating that discussion here.

after a finding that the burden on Plaintiffs' political opportunity is severe may this Court apply strict scrutiny.[2]

II. PLAINTIFFS' BRIEF AND SUPPORTING MATERIALS MISSTATE AND DISTORT THE FACTUAL RECORD.

Plaintiffs have proffered data which purports to establish the effect the CEP will have on the conduct of major party candidates and thereby, indirectly, the relative political opportunity of nonmajor party candidates in 2008 and presumably beyond. While the as-yet unknown indirect effect of the CEP on non-participating nonmajor party candidates requires this Court to engage in speculation, Plaintiffs have exacerbated this uncertainty by presenting facts which are in many instances flatly wrong or distorted. Plaintiffs' unfaithful adherence to the record further undermines their facial constitutional challenge.

A. PLAINTIFFS MISSTATE THE FACTS CONCERNING CAMPAIGN EXPENDITURES UNDER THE CEP.

In their Opposition Memorandum, Plaintiffs submitted to this Court Tables which purport to establish that CEP grants to major party candidates have excessively subsidized major party candidates by increasing average expenditures in Senate district races by $55,829.81 and in the House districts by $17,105.36 (Pl. Opp. Mem. Table 1, Table 2). This purported increase in the average expenditures by major party candidates is the foundation of Plaintiffs' claims that the CEP will result in a "change in the dynamics" of the electoral landscape and thereby "drown out" Plaintiffs' speech in the affected districts.[3] Whether that playing field has further tilted in a way

[2] For a more detailed discussion on the appropriate legal standard, the Defendants respectfully refer the Court to Defendants' Memorandum in Support of Summary Judgment, "Def. Summ. J. Mem." (Docket # 241), at pp. 48-51.

[3] As Plaintiffs appear to concede, nonmajor party candidates are already relatively weak in comparison to major party candidates and have had only minimal impact on the electoral

that disadvantages nonmajor parties since the CEP went into effect and, if so, why, are complex and still-evolving factual questions. Plaintiffs have only compounded the inherent difficulty of making these assessments by supplying the Court with data that is riddled with errors.

Plaintiffs' Table 1 purports to establish that the CEP will, on average, increase Senate expenditures, but includes the following factual errors and assumptions:

- Plaintiffs assert that three major party Senate candidates – Melissa Papantones (10th Sen. District), Tony Guglielmo (35th Sen. District), and Scott L. Frantz (36th Sen. District) – will receive full $85,000 grants, *when they are not even participating in the CEP*.

- Plaintiffs assert that Joe Crisco (17th Sen. District) will receive a full $85,000 CEP grant, *when in fact his application was rejected by the SEEC and he subsequently withdrew from the CEP*. Crisco initially joined the Program and applied for public funds; however, on July 2, 2008, the SEEC rejected with prejudice the grant application of the "Crisco 2008" campaign due to material impropriety in connection with his submission of the application. After the Commission denied his grant application, he withdrew from the Program.

- Plaintiffs list Terrance Tierney (24th Sen. District) as having received a $35,000 primary grant from the CEP, *when in fact he received no primary grant at all*. He never filed required CEP forms regarding his participation and was, as a result, referred to the SEEC's Legal Enforcement Unit.

- Plaintiffs' Table 1 is also misleading because it assumes that a major party candidate who is on the ballot will *automatically* receive a *full* campaign grant, *when in fact many of those participating candidates have not yet been approved for a general election grant and some have not even applied*:

    - As of October 2, 2008, the following State Senate candidates' campaigns have applied but have not yet been approved for a grant, and yet are listed in Plaintiffs' Table 1 as receiving full ($85,000) or partial grants: Andrew J. McDonald (27th Sen. District), Thomas C. Simones (20th Sen. District), Thomas P. Gaffey (13th Sen. District), John A. Kissel (7th Sen. District), Thomas A. Colapietro (31st Sen. District), Jonathan Harris (5th Sen. District), Joan V. Hartley (15th Sen. District), Eric D. Coleman (2nd Sen. District), Veronica Airey-Wilson (2nd Sen. District), and Janice Anderson (21st Sen. District).

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landscape in Connecticut. *See* Pl. Opp. Mem. at 45 ("the defendants may be correct about the relative strength of the major parties.")

- As of October 2, 2008, the following State Senate candidates' campaigns have not yet applied for grants[4] but are listed in Plaintiffs' Table 1 as receiving full ($85,000) or partial grants: Tim Lenox (13th Sen. District), Milton Johnson (23rd Sen. District), Martin A. Goldberg (28th Sen. District), Harry Carboni (29th Sen. District), Michael J. Renzullo (30th Sen. District), Edwin A. Gomes (23rd Sen. District), Joseph Merrit (5th Sen. District), John P. McKinney (28th Sen. District), Anne P. Hatfield (18th Sen. District), Mark Diamond (36th Sen. District), Gary Lebeau (3rd Sen. District), Martin M. Looney (11th Sen. District), Edith Prague (19th Sen. District), and Barbara J. Ruhe (1st Sen. District).

- Plaintiffs' Table 1 also lists the following four candidates as having received full ($85,000) grants, when in fact *these individuals are not even on the ballot for the general election*: Valdis Vinkels (35th Sen. District), Leo Moscato (17th Sen. District), Fred Pierre-Louis (27th Sen. District) and Joseph Geladino (31st Sen. District)

(Rotman Decl. ¶ 4).

Plaintiffs' Table 2 purports to establish that the CEP will on average increase expenditures in House races, but it, too, is rife with errors and premature assumptions, including:

- Plaintiffs assert that forty (40) major party House candidates will receive full or partial grants, *when in fact they are not even participating in the Program* . These candidates are: Kenneth Green (1st District), Minnie Gonzalez (3rd District), Timothy Larson (11th District), Faith McMahon (15th District), Chad Thompson (20th District), Barbara Krajewski (25th District), Joe Aresimowicz (30th District), Brian O'Connor (35th District), Elizabeth Ritter (38th District), Edward Moukawsher (40th District), Tom Reynolds (42nd District), Ed Berdick (45th District), Steven Mikutel (45th District), Shawn Johnston (51st District), Clark Chapin (67th District), Sean Williams (68th District), Arthur O'Neill (69th District), Kevin DelGobbo (70th District), Derek Jerome (79th District), Kevin Scarpati (83rd District), Joseph Moller (84th District), Vincent Candelora (86th District), Martin Atkins (89th District), Paul Ortiz (92nd District) , Juan Candelaria (95th District), Cameron Staples (96th District), Robert Megna (97th District), Stephen Dargan (115th District), Louis Esposito (116th District), Cecil Young (124th District), Joseph Minutolo (126th District), Ramona Marquez (128th District), Phillip Young (129th District), Joel Gonzalez (130th District), David Labriola (131st District), Amanda Parks (133rd District), Kevin Ryan (139th District), Terrie Wood (141st District), Jim Shapiro (144th District), Livvy Floren (149th District), Lile Gibbons (150th District).

[4] Of note, the final deadline to apply for a CEP grant is October 10, 2008.

- Plaintiffs list Antonio " Tony " Guerrara (29th District) as having received a full CEP grant in the amount of $25,000, when in fact Mr. Guerrera has returned $10,000 to the CEP because his major party opponent dropped out of the race and he is now only opposed by a non-major party candidate who is not participating in the Program.

- Plaintiffs also include in Table 2 candidates as receiving a $10,000 CEP primary election grants *when in fact none received any primary grant at all*. Those candidates are: Michael Crockett (9th District), Thomas White (49th District), Jason Carlascio (74th District), and Gina Russell Tracy (101st District).

- Plaintiffs' Table 2 also lists the following candidates as having received full ($25,000) grants, when in fact *these individuals are not even on the ballot for the general election*: Howard Gibeling (29th District), Benjamin Rhodes (72nd District), William Harris (73rd District), Ryan Burnett (108th District), John Pavia (127th District), Claudia Puff (147th District), and Charles Pia (148th District).

- Plaintiffs' Table 2 is also misleading because it assumes that every major party candidate who is on the ballot will *automatically* receive a *full* campaign grant, when in fact *many of those candidates have not yet been approved for a general election grant and some have not even applied for a grant*:

    - As of October 2, 2008, the following State Representative candidates' campaigns have applied but have not yet been approved for a grant, and yet are listed in Plaintiffs' Table 1 as receiving full ($25,000) or partial grants: Kelvin Roldan (4th District), Marie Lopez Kirkley-Bey (5th District), John Cusano (28th District), Joseph Serra (33rd District), Jack Malone (47th District), Susan Lavelli-Hozempa (58th District), Stephen R. Ferrucci (71st District), Selim Noujaim (74th District), Emil Altobello (82nd District), Catherine Abercrombie (83rd District), Gary Winfield (94th District), David A. Stevenson (107th District), Ted Farah 109th District), Terry Backer (121st District), Cheryl Bochet (123rd District), Christopher Caruso (126th District), Andres Ayala, Jr. (128th District), Ralph Bowley (132nd District), John Stripp (135th District), and Bruce Morris (140th District).

    - As of October 2, 2008, the following State Representative candidates' campaigns have not yet applied for grants but are listed in Plaintiffs' Table 1 as receiving full ($25,000) or partial grants: Douglas McCrory (7th District), Aaron Jubrey (15th District), Alphonse Wright (24th District), John C. Geragosian (25th District), Peter Tercyak (26th District), Nicholas Paonessa (26th District), Mark Pappa (27th District), Scott Adamsons (32nd District), Nelson Struck (36th District), Gregory Ellis (37th District), Jason L. Catala (39th District), Ernest Hewitt (39th District), Angeline Kwasny (44th District), Melissa Olson (46th District), Denise Merrill (54th District), William Ballard (59th District), Joseph Arcuri (76th District), Dan Banici

> (81st District), Floresia Allen (82nd District), Brendan Sharkey (88th District), Peter Villano (91st District), Toni Walker (93rd District), Marc J. Garofalo (114th District), Jack F. Hennessy (127th District), Fritz Blau (145th District), Gerald Fox (146th District), William Tong (147th District), and Carlo Leone (148th District).

(Rotman Decl. ¶ 5).

Plaintiffs' Tables contains so many errors regarding CEP grant awards and amounts that the resulting averages arrived at in the Tables are simply not reliable. Moreover, their errors here demonstrate the fallacy of their attempt throughout this litigation to conflate the fact that a major party may be eligible to participate in the CEP with fact that the major party candidate will want or be able to satisfy the CEP criteria. The record thus far indicates that not all major candidates want or are able to participate in the CEP.

Moreover, there is evidence that, contrary to Plaintiffs' assumptions, some participating major party candidates are not going to apply for CEP grant money and will in fact run their campaigns on their qualifying contributions alone. (Rotman Decl. ¶ 7). The extent of this practice is not yet known, and may not be knowable until after the deadline for applying for the grant. *Id.*

In addition, history suggests that some major party candidates will actually return funds to the CEP as was the case with the three special elections held in 2007-2008. (Rotman Decl. ¶ 8). *All* of the candidates in the special elections returned funds to the CEP. *Id.* Defendants have already explained in detail how Plaintiffs' contentions regarding the impact of the CEP on the recent Special Elections are highly misleading, and they respectfully refer the Court back to that discussion. (Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, "Def. Opp. Mem.", Docket #260, pp. 21-24).

In order to present an accurate record for this Court, Defendants have submitted Table A attached to the Declaration of Beth Rotman, the Director of the CEP, which sets forth actual CEP grants to major party candidates in 2008. (Rotman Decl., Table A). As the Rotman Declaration Table A demonstrates, the actual CEP grants to date do not support Plaintiffs' claim that the CEP subsidizes major party candidates. On the contrary, the actual CEP grants are in line with historical spending by major party candidates. For a fuller discussion of Defendants' position that the CEP full grant amounts reflect appropriate and reasoned legislative judgments about the range of possible spending in races see Defendants' Memorandum in Support of Motion for Summary Judgment, "Def. Summ. J. Mem.", (Docket # 241), pp. 14-15, 96-97.

B. PLAINTIFFS' MISSTATE THE FACTS CONCERNING NONMAJOR PARTY CANDIDATES' QUALIFICATION FOR THE CEP.

After repeatedly representing to this Court that nonmajor party candidates are effectively barred from participating in the CEP and that all nonmajor party candidates will be unable to qualify, *see Garfield*, 537 F. Supp. 2d 359, 361 n. 4 (D. Conn. 2008), Plaintiffs now concede, as they must, that reasonably diligent nonmajor party candidates can both participate in the CEP and qualify for grants of funding. (Pl. Opp. Mem. p. 19). Once again the record has not born out Plaintiffs' dire predictions of impossibility for nonmajor party participation. Although these figures will continue to develop until the CEP application deadline of October 10, 2008, as of the time of filing this reply memorandum, a two-third (2/3) grant of CEP funding has been awarded to one Independent Party candidate, Rocco Frank and other nonmajor party candidates appear likely to meet the qualifying contribution threshold and be awarded full or partial CEP grants. (Rotman Decl. ¶¶ 9-11). Moreover, as set forth in Defendants' opening brief, nonmajor party candidates are automatically eligible for full or partial CEP funding in fourteen legislative districts, and it remains to be seen whether candidates from these nonmajor parties will also

fulfill qualifying contributions requirements in advance of the deadline. (Def. Summ J. Mem. p. 39).

These facts doom Plaintiffs' claim that the CEP's requirements invidiously discriminate against nonmajor party candidates. In the context of ballot access requirements, courts assessing whether a particular ballot access requirement invidiously discriminated against nonmajor party candidates have held that a reasonably diligent candidate could meet such requirements even where only a few – or even no – candidates had actually accomplished this goal. *See Libertarian Party of Florida*, 710 F.2d 790, 794 (11th Cir. 1983) (holding that a single party having achieved ballot access in two successive elections demonstrated that Florida's 3% petition requirement provided a realistic means of ballot access for minor parties); *Hall v. Simcox*, 766 F.2d 1171, 1176 (7th Cir. 1985) (upholding a regulation under which no parties had met the petition requirement in the preceding election but under which the court thought certain parties could likely meet the requirement if they tried harder in the next election). Accordingly, Plaintiffs' defeatist assertions of impossibility are immaterial and cannot preclude a grant of summary judgment dismissing their constitutional claims.

1. Contrary to Plaintiffs' factually unsupported and defeatist arguments, nonmajor party candidates can and have qualified for the CEP.

Plaintiffs erroneously contend that that only two nonmajor party candidates have filed declarations of intent to participate in the CEP and that none has qualified for a CEP grant. (Pl. Opp. Mem. p. 39). In fact, as of October 2, 2008, a petitioning Independent Party candidate in the 118th House district, Rocco Frank, has qualified for and received a two-thirds CEP grant in the amount $16,616. (Rotman Decl. ¶ 9). Mr. Frank, who was not automatically eligible for a CEP grant because the Independent Party did not run a candidate in the 118th District in 2006, qualified for the CEP by gathering 1,049 valid signatures. Other nonmajor party candidates are

anticipated to be awarded CEP grants at the upcoming SEEC Commission meetings. (Rotman Decl. ¶¶ 10-11). These facts contradict a central tenet of Plaintiffs' case – the claim that "[the CEP creates] barriers to public financing for minor and petitioning party candidates that are unattainable and ensure that such candidates will not be able to participate in the public financing system." (Pl. Amend. Compl., Docket #17, ¶ 27).

The record demonstrates that a reasonably diligent nonmajor party candidate who attempts to qualify can qualify for the CEP in this, the very first election cycle under this new complex electoral scheme. It is instructive to contrast the efforts of these well-organized and diligent non major party candidates with the efforts of Plaintiff Michael DeRosa. On March 19, 2008, Mr. DeRosa averred that he would not raise more than $1000 and thereby effectively announced his intention not to meet the CEP's qualifying contribution threshold. (Rotman Decl. ¶25). Mr. DeRosa subsequently had a change of heart and decided he would attempt to qualify for the CEP through petitioning, but failed to meet the Secretary of the State's August 6, 2008 deadline for requesting petitions. *Id*. The August 6, 2008 deadline has been applied uniformly to all candidates this election cycle, and other nonmajor party candidates were able to comply with it. Thus, despite Mr. DeRosa's extensive involvement with this litigation and the resources and infrastructure available to him through his party, he could not satisfy even the most basic administrative prerequisites for CEP participation – a timely request - let alone gather sufficient qualifying contributions and petition signatures to demonstrate his entitlement to a grant. Other than Mr. DeRosa's late, self-defeating and half-hearted attempt to qualify for the CEP, Plaintiffs have adduced no evidence supporting their claim that either the petition signature requirement or the qualifying contribution requirements are unduly burdensome for nonmajor party candidates

this election cycle – a claim conclusively rebutted by the examples of other, more diligent candidates.

2. Plaintiffs continue to misstate the burden of petition gathering for nonmajor party candidates.

Plaintiffs continue to overstate and distort the burdens of qualifying for the CEP through petitioning. The most definitive rebuttal to this claim does not come from the arguments of counsel or the opinions of experts, but from the real world example of other non-major party candidates in this election who have *succeeded*, or are on track to succeed, in satisfying the CEP's signature requirements. In particular, as noted above, one independent petitioning candidate, Rocco Frank, has already been awarded a two-thirds CEP grant through petitioning, and other such grants are likely to be approved shortly. Plaintiffs have not satisfied their burden of explaining why these candidates – who apparently do not subscribe to Plaintiffs' defeatist, worst case assumptions about the CEP – can meet the petitioning thresholds, but they cannot. Accordingly, the record before this Court indicates that even in this the first election cycle under the CEP, nonmajor party candidates are demonstrating that they can capitalize on never-before available financial resources made possible by the CEP.

In light of this example, it is not surprising that Plaintiffs proffer no evidentiary support for their hypothetical doomsday scenarios regarding the unique hardships of petitioning for nonmajor party candidates under the CEP. No evidence supports their conjecture that: (1) people are more reluctant to sign petitions for nonmajor party candidates in the CEP; and (2) nonmajor party candidates have been barred from petition gathering at locations available to major party candidates. Plaintiffs do not even adduce evidence that they could have met a more lenient petition signature threshold of 5% for which they appear to advocate and apparently concede would be constitutional. Instead, Plaintiffs rest on conclusory and demonstrably false arguments

that, for them "the petition requirement is a non-starter for all intent and purposes" for non-major party candidates. (Pl. Mem. in Supp. Summ J. p. 31, Pl. Opp. Mem. pp. 24-25). On this, the parties agree: The petition signature requirement is a "non-starter" if one never starts, as Plaintiffs appear to have done this election cycle.

Plaintiffs claim that even Lowell Weicker could not have met the signature requirements under the CEP (Pl. Mem. p. 25). However, Weicker's own deposition testimony is to the contrary. *See* Youn Dec. Ex. 22 (Weicker Dep) at 33:22-34:10. Plaintiffs repeat their reliance on Winger's misleading statement that "no petitioning candidate" has ever met the petitioning requirements for statewide office, without the necessary qualification that this statement is not applicable to nonmajor *party* petitioning candidates. (Pl. Opp. Mem. p. 25). Moreover, Plaintiffs' assertions regarding the burden and cost of petitioning are contradicted by their own witnesses and may necessitate an evidentiary hearing should this Court deem them material. (Pl. Opp. Mem. p. 25, 27).[5]

The experience of the Working Families Party ("WFP") further undermines Plaintiffs' arguments regarding the burden of petitioning in Connecticut. The history of the WFP demonstrates that Connecticut's lenient ballot access requirements, coupled with its generous fusion balloting provisions, provide nonmajor party candidates with unique political opportunities that are likely to increase under the CEP. These provisions liberally facilitate not only a nonmajor party's presence on the ballot, but also permit it to garner a vote percentage that may not be attainable in another state. As a result, nonmajor parties that effectively take

[5] See Def. Opp. Mem. pp. 65-72, for a more thorough discussion of the ability of reasonably diligent nonmajor party candidates' ability to satisfy the CEP petitioning requirements.

advantage of these provisions will likely qualify for CEP grants in the future based on prior vote totals alone.[6]

Finally, contrary to Plaintiffs' apparent belief, a petition gathering requirement is not unconstitutional simply because it is difficult for some. As noted above, and as explained in Def. Opp. Mem. pp. 65-70, courts have upheld petition signature thresholds based upon a showing that a few reasonably diligent candidates or parties could satisfy the requirement.

3. *Plaintiffs overstate the burden of gathering qualifying contributions for nonmajor party candidates.*

The CEP's qualifying contributions requirements apply uniformly to all candidates. Apparently, Plaintiffs believe that their current political weaknesses entitle them to *preferential* treatment when it comes to qualifying contributions, but Plaintiffs can offer no legal basis to support this view, which would amount to a true "leveling of the playing field." Moreover, as with the petition gathering burden discussed above, Plaintiffs have adduced no evidence of their attempt to raise the qualifying contributions under the CEP. Here too, other nonmajor party candidates in this election have undermined Plaintiffs' arguments. The Independent Party candidate, Rocco Frank, who has already been awarded a CEP grant, raised the requisite $5000 in qualifying contributions. (Rotman Decl. ¶ 9). Moreover, other nonmajor party candidates, who have yet to be awarded CEP grants, have indicated to the SEEC that they have raised close to $20,000 in qualifying contributions. *Id.*

Plaintiffs argue that the Green Party has relied on large donors, an option that will not be available under the CEP. However, Plaintiffs have failed to demonstrate any record of fundraising success among any type of donor. In any event, the qualifying contribution limits

[6] For a detailed discussion of Connecticut's liberal election laws, which provide non-major party candidates with unusually broad political opportunities, Defendants respectfully refer the Court to Def. Summ. J. Mem. pp. 69-71.

will equally require both major party and nonmajor party candidates to eschew large-dollar contributions in favor of broad based fundraising efforts, and Plaintiffs have adduced no evidence to show that they have diligently tried to adapt to this new fundraising environment. Moreover, the *Buckley* Court rejected the same type of hypothetical argument by minor party plaintiffs regarding their unique reliance on large donors. *Buckley*, 424 U.S. at 34, n. 40 ("As appellees note, it is difficult to assess the effect of the contribution ceiling on the acquisition of seed money since candidates have not previously had to make a concerted effort to raise start-up funds in small amounts.")

C. PLAINTIFFS INACCURATELY CLAIM THAT THE CEP HAS SPURRED INCREASED MAJOR PARTY COMPETITION IN THIS ELECTION CYCLE.

Plaintiffs' claim that the CEP has spurred new competition in previously uncompetitive Senate and House districts remains unsubstantiated. (Pl. Opp. Mem. p. 14-15). Plaintiffs unabashedly perpetuate this claim despite the fact that there is no evidence of such a change in competitiveness attributable to the CEP. The actual record indicates that there is no real increase in competition in either House or Senate races in 2008 relative to 2006. On the Senate side, there are five newly-uncontested districts and five newly-contested districts, so there is no change. (Rotman Decl. ¶ 13, Foster Decl. ¶ 14, Docket # 236-16). On the House side, there are 28 newly-uncontested districts and 29 newly-contested districts. (Rotman Decl. ¶ 14). In addition, five of the newly competitive House districts and one of the newly competitive Senate districts are open seats. These seats may have become contested due to the absence of an incumbent. (Rotman Decl. ¶ 19). Consequently, not only are Plaintiffs' claims of new competitiveness caused by the CEP inherently speculative, they are inconsistent with the facts in this case.

Plaintiffs' arguments regarding increased competition are faulty for an additional reason. In support of their claim that the CEP improperly spurs major party competition Plaintiffs continue to rely on 2006 as the sole benchmark for their claim that these districts have been historically uncompetitive.[7] Moreover, Plaintiffs have adduced no witnesses or other evidence that demonstrates even one of the major party candidates who ran in a "newly contested" district this cycle did so because of the possibility of a CEP grant.[8]

C. PLAINTIFFS IMPROPERLY DIMINISH THE VERY REAL BURDENS IMPOSED BY THE CEP ON PARTICIPATING CANDIDATES, AND DISTORT THE APPLICATION OF POST ELECTION GRANT PROVISION.

1. Plaintiffs Contentions that the CEP contains illusory spending limits are not supported by the record.

Plaintiffs incorrectly argue the expenditure limits are "not binding" and can be "easily circumvented" (Pl. Opp. Mem. p. 61). The CEP's expenditure limits and regulatory burdens are not illusory and do impose real restraints on candidates opting to participate. Much of Plaintiffs' attack on the expenditure limits has to do with the possibility of CEP candidates receiving

[7] Plaintiffs' reliance on a report from Maine for the proposition that the CEP will spur major party competition and thereby diminish their political opportunity is unpersuasive because the Maine Report indicates there has been an 11.45% increase in competition in Maine since the inception of public financing. (Mills Declaration Ex 1, p. 18). Plaintiffs improbably argue that this 11.45% increase in Maine, under a different electoral scheme and in a different political climate, supports their claim that in Connecticut there will be a dramatic increase in major party competition.

[8] Plaintiffs have inaccurately claimed that minor and major party candidates are similarly situated in certain party dominant districts. As explained in Defendants' opening brief and supporting materials, major parties enjoy significant organizational and resource advantages in all districts. (Def. Summ. J. Mem. pp.). Plaintiffs now acknowledge that "the defendants may be correct about the relative strength of the major parties" (Pl. Mem. p. 45).

supplemental grants by virtue of the trigger provisions. However, as set forth in the affidavits of Jeffrey Garfield, the SEEC has not issued a single trigger grant in any of the special elections or primaries that have occurred since the CEP went into effect, nor in any of the ongoing legislative general election campaigns. (Rotman Decl, ¶ 22).

Plaintiffs also inaccurately claim that, under the CEP supplemental grant provisions, participating candidates are "released" from expenditure limits. (Pl. Opp. Mem. p. 56). Participating candidates remain capped at a maximum of an additional 100%, in graduated disbursements, of the initial CEP grant amount as a result of opponent expenditures. Additional money is available for participating candidates in the event of independent expenditures opposing that candidate, but only in the amount of that independent expenditure and never to exceed 100% of the initial grant amount. To date, the SEEC has not issued CEP funds pursuant to either the independent expenditure provision or the excess expenditure provision. (Rotman Decl. ¶ 22). Plaintiffs concede that they will not be directly affected by the supplemental grants and are "essentially bystanders" in the supplemental grant process. (Pl. Opp. Mem. p. 56). As with much of Plaintiffs' case, their projections of the application of the CEP have not come to pass.

Similarly, Plaintiffs attack the constitutionality of the CEP because of the availability of organization expenditures which apply to all political parties. (Pl. Opp. Mem. pp. 8-9). Once again, however, Plaintiffs' claims regarding organization expenditures remain unsubstantiated because to date there has been little reporting of organization expenditures in the 2008 election cycle and it is simply too early to tell whether the impact will be different for major and minor party candidates. (Rotman Decl. ¶ 23). Moreover, Plaintiffs are unable to substantiate their argument that major parties – and not minor parties – will benefit from the organization

expenditure provisions: in this election cycle, another minor party has utilized organization expenditures to facilitate qualification for the CEP by paying for petition gathering. *Id.* Plaintiffs' claimed inability to avail themselves of these and other opportunities proves nothing except for their lack of political organization, which predated the CEP and is not exacerbated by it.

2. ***Participating candidates are more strictly regulated under the CEP than privately financed candidates***

The CEP also imposes real restraints and burdens on how participating candidates conduct their campaigns that simply do not apply to privately financed candidates. For example, participating candidates are subjected to more rigorous review of their contributors, more extensive reporting requirement, more auditing, and more document retention requirements. (Rotman ¶ 20). In addition to the reporting, auditing and documentation restrictions described above, a participating candidate is also strictly constrained in the manner that he or she may expend CEP grant monies. *Id*. Expenditures that are prevalent in privately financed campaigns, such as bonus payments to staff, payments to family members and family run businesses, unlimited food for volunteers are all strictly prohibited under the CEP. *Id*.

A participating candidate's failure to abide by the CEP's strict regulatory requirements is exposed to the risk of significant regulatory action and penalties that a privately financed candidate is not subjected to such as personal liability to repay impermissible expenditures. (Rotman Decl. ¶ 21). This fact was demonstrated in this election cycle by Senator Crisco, who

was expelled from the program due to his failure to comply with CEP regulatory requirements and who is now under investigation by SEEC. *Id*..[9]

3. ***Plaintiffs Misstate the Availability of Post Election CEP Grants.***

Plaintiffs contend that they are practically barred from receiving post-election CEP grants because the CEP requires a "spending deficit." (Pl. Opp. Mem. p. 8). Plaintiffs purport to represent, without citing any evidence or authority whatsoever, that the "normal way" of deficit funding a campaign. But the CEP does not require a "spending deficit," as Plaintiffs contend, but instead provides that non major party candidates may get a post election grant if they report a deficit:

> [A participating candidate] shall be eligible to receive a supplemental grant from the fund after the general election if the treasurer of such candidate committee reports a deficit in the first statement filed after the general election, pursuant to section 9-608, and such candidate received a greater percent of the whole number of votes cast for all candidates for said office at said election than the percent of votes utilized by such candidate to obtain a general election campaign grant.

Conn. Gen. Stat. § 9-705(c)(3)

Under this section, a nonmajor party candidate is eligible for a postelection grant if he or she reports outstanding liabilities. (Rotman Decl. ¶ 24). The candidate could receive a post election grant if monies are owed to vendors, campaign staff, etc. provided the liabilities were incurred during the campaign and represent a fair market value for the services. Thus, for example, a nonmajor party candidate could contract for printing services in the last week before the election, agreeing with the vendor that payment would not be due until after the election.

[9] Plaintiffs appear to represent to this Court that participating candidates have the option to "opt out" of the CEP if there is too much spending against the candidate. (Pl. Mem. p. 56). This is simply untrue. Once a participating candidate has received a CEP grant he or she cannot "opt out" of the CEP.

Under these circumstances, a candidate who meets the criteria for a post election grant could use such a grant to pay the vendor, provided that the payment was at a fair market value and was not contingent on receipt of the grant.[10] *Id.*

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that their motion for summary judgment on Count One of Plaintiffs' Amended Complaint should be granted by this Court.

Respectfully Submitted,

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[10] Plaintiffs have suggested that they cannot convince vendors to structure contracts in this fashion, essentially because they are considered bad credit risks. Of course, if Plaintiffs standing in the community prevents them from forging productive relationships with vendors, this is not the fault of, or remediable by, the CEP, but rather supports the CEP's treatment of minor parties.

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CERTIFICATION

I hereby certify that on October 3, 2008, a copy of the foregoing reply memorandum in further support of Defendants' motion for summary judgment 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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