UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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

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

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INTRODUCTION

The defendants do not provide a plausible explanation for why this Court should abandon its careful assessment of the discriminatory aspects of the Citizens' Election Program ("CEP") that are apparent from the face of the statute. *Green Party of Connecticut v. Garfield*, 537 F. Supp. 2d 359, 379 (D. Conn. 2008). They repeat the argument that the State's interests in protecting the treasury and avoiding "unrestrained factionalism" fully justify the more difficult qualifying burden the CEP imposes on non-major party candidates. Under *Buckley v. Valeo,* 424 U.S.1 (1976), these interests are arguably legitimate to justify some special burdens on minor parties, but the CEP discriminates against non-major party candidates in numerous ways that the system under consideration in *Buckley* did not. The ease with which major party candidates can qualify for public funding based solely on their statewide popularity will inflate their strength in statewide and legislative elections where they have no chance of winning. Rather than guard the public treasury from hopeless candidacies, the legislature has given the two major political parties in Connecticut the keys to it. The CEP arbitrarily provides historically underfunded major party candidates with the resources to run full throttle campaigns – while denying the same benefit to independent and minor party candidates. Moreover, unlike in *Buckley*, major party candidates suffer no countervailing disadvantage by agreeing to expenditure limits. The base grants could easily be increased under matching fund provisions. They are also augmented by the organizational expenditure and exploratory loopholes.

Conversely, non-major party candidates gain no corresponding advantage under the CEP by the limited ability to qualify or from failing to qualify. First, on the face of the statute, it is substantially more difficult than in *Buckley* or any other public financing system for non-major party candidates to qualify for funding. Second, unlike in *Buckley,* non-major party candidates

who fail to qualify at the outset cannot qualify for a post-election grant based on a strong showing. Third, candidates who qualify for a partial grant cannot realistically close the fundraising gap because they are hobbled by the $100 contribution limits and by restrictions on deficit spending. Fourth, the supplemental grant provisions impose a "substantial burden" on plaintiffs' First Amendment rights. *Davis v. Federal Election Comm'n.*, 128 S.Ct. 2759, 2772 (June 26, 2008). The payment of matching funds will not only increase the financial advantage of major party candidates over minor party candidates, but it will also impose an "unprecedented penalty" on plaintiffs' speech to the extent that their own spending triggers additional funds. *Id.*, at 2771. The matching fund provisions will further dilute the already modest resources of those candidates. Neither *Buckley* nor any other public financing case that we are aware of considered a public financing system that so thoroughly stacks the deck in favor of major party candidates.

What the defendants fail to acknowledge is that while the "Connecticut General Assembly had no obligation to pass a law that levels the playing field," by treating major and non-major party candidates as if they were the same, "the legislature is not free to pass a law that further slants the playing field." *Garfield*, 537 F. Supp. 2d at 379. As this Court well understood, it is this discriminatory aspect of the CEP that distinguishes it from the public financing system upheld in *Buckley*. *Id.* The defending parties in this case are on record stating that the program terms could and should be amended to avoid the objection that they needlessly burden the rights of non-major party candidates. The amendments they proposed for relaxing the qualifying criteria are compelling evidence that there are, in fact, less restrictive ways to further the state's interests without unnecessarily burdening the rights of non-major party candidates.

ARGUMENT

I. The Defendants Misapply the *Anderson-Burdick* Standard

The governing constitutional standard set forth by the defendants is erroneous. This case is controlled by the Supreme Court's campaign finance jurisprudence – not by the ballot access and election law cases relied upon by the defendants. As recognized by all the parties to this litigation during the motion to dismiss, *Buckley* is the controlling precedent. *Buckley* stands for the unremarkable proposition that public financing cannot be deployed in the service of the major political parties if the effect is to decrease the relative electoral and financial position of non-major party candidates. 424 U.S. at 98-99. Any doubt about this controlling First Amendment principle was settled last term when the Court decided *Davis v. Federal Election Comm'n*, 128 S.Ct. 2759 (June 26, 2008). That case reaffirms in the strongest possible terms the main concern expressed in *Buckley* – specifically, that campaign finance regulations cannot have the effect of increasing the speech or election related opportunities of candidates if the regulations work to decrease the opportunities for other candidates. *Id.* at 2773-74 (rejecting argument that a candidate's speech may be restricted in order to "level electoral opportunities" of other candidates).[1]

The State appears to recognize this fundamental aspect of the holding in *Buckley,* but then proceeds to ignore it by attempting to minimize the obvious distorting effect of the CEP on

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[1] In *Davis*, the Court struck down a provision of the McCain-Feingold campaign finance law aimed at leveling the playing field for opponents of wealthy candidates who decide to finance their own campaigns. The so-called "Millionaire's Amendment" ruled on in *Davis* requires self-financing candidates to declare their intention to spend more than $350,000 of their own funds, and then to report when they cross that line. Opponents of the self-financed candidates are then allowed to raise money from individuals at a contribution limit that is three times that of the original contribution limit ($6,900 as opposed to the usual maximum of $2,300), among other benefits. To the majority, the law imposed an "unprecedented penalty," 128 S.Ct. at 2771, and a "substantial burden" on the self-financed candidates, *id.* at 2772.

the electoral opportunities of candidates and its potential to change the dynamics of elections.[2] By urging the adoption of the *Anderson-Burdick* standard, the defendants feign ignorance of the grave First Amendment implications of a system of financing that artificially inflates the strength of one group of candidates relative to another. To the extent the CEP "changes the dynamic" of elections, the State has strayed from its obligation to remain strictly neutral and has arrogated to itself the decision over the qualification of candidates.[3] In the service of leveling the playing field between major party candidates, the CEP is going to make more money available to more major party candidates and will only further slant the playing field in their favor. *See Garfield*, 537 F. Supp. 2d at 378-79; *see also Buckley*, 424 U.S. at 251 (noting the "grave risks in legislation, enacted by incumbents of the major political parties, which distinctly disadvantages minor parties or independent candidates") (Burger, C.J., dissenting); *Davis*, 128 S.Ct. at 2774 ("[I]t is a dangerous business for Congress to use the election laws to influence the voters' choices."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 at 792, n.31 (The "[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves").[4]

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[2] Defendants' and Intevenor-Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, pp .49. ("Under *Buckley,* the test of whether such a burden exists is whether the CEP reduces the 'political opportunity' of non-major parties below those levels attained before public funding," citations omitted).

[3] *See* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 141 (Harvard U.P. 1980): "Where the good or right whose distribution is in issue is not one whose provision or accommodation is affirmatively required, however, it nonetheless remains true that the government, in distributing that good, must be neutral as among political faiths ..."

[4] As this Court has observed: "The CEP is even more 'incestuous' than Subtitle H. Congress enacted Subtitle H to regulate the presidential election, not congressional elections. By contrast, the Connecticut state legislature enacted the CEP to fund elections for the Connecticut state legislature itself (as well as other state-wide executive positions). As such, the benefits the CEP provides to major parties are enjoyed directly by Connecticut state legislators, all of whom are members of the two major parties." *Green Party of CT v. Garfield*, 537 F.Supp.2d at 373, n.17. *See also* Ely, *supra* n.3, at 103: "In a representative democracy value determinations are to be made by our elected representatives. . . . Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out. . . . "

The careful balance of benefits and burdens that was present in *Buckley* is absent here. All the benefits under the CEP flow exclusively to major party candidates without the countervailing burden of binding expenditure limits. Non-major party candidates gain no corresponding advantage from being denied the funding. The effect is to decidedly tilt the playing field to the advantage of major party candidates only. *Buckley* and the Supreme Court's campaign finance jurisprudence provide ample authority to invalidate the CEP because it burdens the speech of one group of speakers. *See Davis*, 128 S.Ct. at 2773 (striking down legislation that applied higher contribution limits for "non-self financing candidates" but imposing lower contribution limits for self-financed "millionaire[s]" because of the "substantial burden" it imposed "on the exercise of First Amendment Right[s]"); *Randall v. Sorrell*, 548 U.S. 230 (2006) (striking down limits that restricted the amount of money political parties could contribute); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. at 784-85 (speaker-based restriction on campaign speech).

It is too late in the day for the defendants to credibly argue that the more deferential balancing test applied in the election law and ballot access cases is the controlling analysis. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Those cases were not cited by the defendants in the earlier proceedings and none of the post-*Buckley* campaign finance or public financing cases apply that standard. *See, e.g.*, *Davis*, 128 S.Ct. 2759; *Federal Election Comm'n v. Wisconsin Right to Life*, 127 S.Ct. 2652, 2664 (2007) ("WRTL"); *Republican Nat'l Comm. v. FEC,* 487 F.Supp 280, 284-286, (S.D.N.Y. 1980) *aff'd,* 445 U.S. 995 (1980); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 466-68 (1st Cir. 2000); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553-57 (8th Cir. 1996). It is only now, after the Court rejected the argument that *Buckley* required dismissal of plaintiffs' claim, that the

defendants have changed course. *Garfield*, 537 F. Supp. 2d at 379. The defendants have not adequately explained why the limiting First Amendment principles discussed in *Buckley* are no longer the relevant benchmark.

To be sure, the *Anderson-Burdick* line of cases involves election regulations which apply a more deferential standard. As the Court explained:

> Each provision of a[n] [election] code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.

Burdick, 504 U.S. at 433.

The election law cases cited by the defendants involve the voting process itself, not electoral speech. Statutes that restrain electoral speech are subject to strict scrutiny – even if they arise in the electoral context. . *Republican Party of Minnesota v. White*, 536 U.S. 765, 774 (restriction on speech of judicial candidates): *Burson v. Freeman,* 504 U.S.191, 197 (1992) (restrictions on polling place electioneering). The ballot access cases are not to the contrary. The claimed discrimination and the resulting burden on the right of association at issue in those cases do not involve direct restraints on speech. A candidate denied access to the ballot can still reach his intended audience without limit and without the state interceding on his opponent's behalf. *Cf. Miami Herald Publ'g Co., v. Tornillo*, 418 U.S. 241 (1974) (invalidating a state law that required newspapers to afford political candidates space for replying to criticisms). His message is not diluted by the distorting effects of a public financing system that enhances the political opportunities of his opponents.

Campaign finance regulations are evaluated under the same rigorous standards that apply to electoral speech because they represent direct restraints on speech. *Buckley*, 424 U.S. at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."). Laws that have the effect of restricting electoral speech are presumptively invalid and rarely upheld. *WRTL*, 127 S.Ct. at 2664. It makes no difference whether the restriction is a direct restraint or results from a statutory scheme that increases the relative ability of your opponent to speak. *See Davis*, 128 S.Ct. 2759 (striking down legislation that increases relative ability of non-self-financing candidates to speak by allowing them to raise money using higher contribution limits). The First Amendment prohibits the government from altering the electoral opportunities of candidates in the service of other objectives. *Id.*

The issue for this Court to decide, then, is whether the CEP imposes a burden on plaintiffs' speech by distorting their relative ability to be heard or by "unfairly or unnecessarily burden[ing] the political opportunity" of minor party or independent candidates. *Buckley*, 424 U.S. at 95-96. If the Court answers that question affirmatively, the CEP must withstand the "exacting scrutiny" or strict scrutiny that applies to restrictions on campaign-related speech. *See Buckley*, 424 U.S. at 15, 44-45; *WRTL*, 127 S.Ct. 2652, 2664 (2007) ("Because [the Act] burdens political speech, it is subject to strict scrutiny."). Statutes that burden political speech are subject to strict scrutiny and the burden is on the government to demonstrate a compelling interest which is narrowly tailored to achieve that interest. *See Davis*, 128 S.Ct. at 2772.[5]

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[5] Even if the Court were to apply the *Anderson-Burdick* balancing test, defendants would fare no better. The evidence shows that the CEP's qualifying criteria imposes a severe burden on the electoral opportunities of minor party candidates, *see* Plaintiffs' Memorandum Opposition to Defendants' Motion for Summary Judgment, Factual Statement Section II.C, and thus strict scrutiny would still apply. *See Burdick*, 504 U.S. at 434 (where an

II. Discrimination in the Campaign Finance Context is Analyzed using the Same Standard whether under the Equal Protection Clause or under the First Amendment

The defendants also feign ignorance of the relationship between the First Amendment and the Equal Protection Clause when laws restricting speech draw distinctions based on the identity of the speaker – whether the speaker is a corporation, political party, political committee or a candidate. The defendants reject this Court's application of traditional equal protection analysis that applies strict scrutiny to speaker- and content-based regulation of speech. For constitutional purposes, speaker-based discrimination is a violation of both the First Amendment and the Equal Protection Clause and the analysis is the same. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Bellotti,* 435 U.S. at 786-787 ("The Supreme Judicial Court did not subject [the legislation] to the critical scrutiny demanded under accepted First Amendment and equal protection principles. . . . " (internal quotations and citations omitted)); *Davis*, 128 S.Ct. 2759 (No justification for discriminatory contribution limits).[6]

The defendants are thus demonstrably wrong about the precedential weight of the lower court cases applying traditional equal protection analysis in cases involving the exclusion of minor parties from state subsidy programs. *See Greenberg v. Bolger*, 497 F. Supp. 756, 778 (E.D.N.Y. 1980) (invalidating postal subsidy given exclusively to major parties and stating: "To suggest that the benefit granted the major parties is acceptable because it only creates a relative

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individual's First Amendment rights are subjected to severe restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance."). But even if the Court applies a more deferential standard, defendants would still lose because it is unlikely that this law would survive rational basis review. *See Garfield*, 537 F. Supp. 2d at 390 n.66.

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

impediment to 'new' parties ignores the reality that in a competitive intellectual environment assistance to one competitor is necessarily a relative burden to the other."). *See also Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y. 1970) (three-judge court), *summarily aff'd,* 400 U.S. 806 (1970). There, the court struck down a statute that required lists of registered voters to be sent free of charge to parties that earned more than 50,000 votes in the last gubernatorial election. *Id.* at 995. The court noted that "[t]he State is not required to provide such lists free of charge, but when it does so it may not provide them only for the large political parties and deny them to those parties which can least afford to purchase them." *Id.* at 996. *See* also Ely, *supra* n.3 (state must be neutral in distributing goods they are not affirmatively required to supply).

The defendants fail to persuasively distinguish the *Greenberg* and *Socialist Workers Party* decisions – except to argue that the state's asserted interests in those cases are less weighty than the interests that support the exclusion of minor parties from the CEP in this case. That is a strange argument since the justification for withholding the subsidy in those cases was explicitly linked to the public fisc. Although the defendants give it short shrift, they cannot avoid the significance of the holding in *Socialist Workers Party.* Not only was the decision summarily affirmed by the Supreme Court, *supra,* but when the statute was re-enacted in "all material, unlawful respects," it was again struck down on equal protection grounds in *Schulz v. Williams*, 44 F.3d 48, 60 (2d Cir.1994):

> The reasons why the courts found the provision invalid in 1970 remain true today and apparently require repeating: It is clear that the effect of these provisions ... is to deny independent or minority parties ... an equal opportunity to win the votes of the electorate. The State has shown no compelling state interest nor even a justifiable purpose for granting what, in effect, is a significant subsidy only to those parties which have least need therefore.... The State is not required to provide such lists free of charge, but when

> it does so it may not provide them only for the large political parties and deny them to those parties which can least afford to purchase them.[7]

In short, the State might decline to fund candidates altogether, but once it has decided to fund some candidates it must do so on terms that are non-discriminatory. *Garfield*, 537 F. Supp 2d at 379 ("It is also well established that individuals generally do not have a First Amendment right to government-subsidized speech. But when the government endeavors to enter that fray and, as alleged in this case, subsidize the expression of one set of political parties' views to the exclusion of other political parties, it must do so in a way that does not alter the status quo to unfairly and unnecessarily burden the political opportunity of disfavored minor parties." (citations omitted)). The defendants have failed to assuage this concern.

III. The Defendants' Insistence that the CEP will not Alter the Relative Political Positions of Major and Non-Major Party Candidates is Demonstrably Wrong

The defendants argue that major and non-major party candidates were not similarly situated prior to the enactment of the CEP and that its implementation does nothing to alter their relative political positions. That assertion is not only demonstrably false on the facts, but it explains the defendants' stubborn refusal to take seriously just how harmful this statute is to the political opportunities of minor party candidates. It also provides the rationale for the defendants' insistence that the plaintiffs' claims are speculative, and, even, that the plaintiffs lack standing.

The defendants' argument requires the Court to ignore the legislative history and other publicly available information about the impact of the CEP on the electoral opportunities of candidates denied the program's benefits. At the time of its adoption it was understood by the legislature, as well as by the SEEC and the intervening organizations, that major party candidates

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[7] *See also Green Party of Michigan v. Land*, 541 F. Supp. 2d 912 (E.D. Mich. 2008) (striking down a statute that only allowed major political parties to have access to information regarding the party preference of the state's voters); *Libertarian Party of Indiana v. Marion County Bd. of Voter Registration,* 778 F. Supp. 1458 (S.D. Ind. 1991) (striking down a statute that provided voter registration lists only to the major parties).

would be the primary beneficiaries under the CEP. Minor party candidates would not only be effectively excluded from the program, but would gain no corresponding advantage because of the matching fund and organizational expenditure provisions. (Garfield Statement, Pl. Ex. 5 at 1-2; Clean Up Connecticut Campaign Press Release, Pl. Ex. 7 at 5-6; Testimony of Suzanne Novak to GAE, Pl. Ex. 9 & Pl. Ex.10).

There is nothing speculative about the concerns expressed by the SEEC and intervening organizations. See Factual Statement, Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, pp. 4-13 (discussion of legislative history). The CEP was enacted with the goal of "encouraging competition in the electoral process" by creating a "more level playing field among candidates" and by providing candidates without access to sources of money the "opportunity to seek elective office." *See* A Guide for 2008 General Assembly Candidates Participating in the Citizens' Election Program at 2, *available at*: http://www.ct.gov/seec/lib/seec/CEP_GUIDE_JUNE_2008_-_FINAL.pdf (last visited October 1, 2008).[8] Now that the CEP is underway, the record amply demonstrates that major party candidates are the winners under the program and that minor party and independent candidates will be competing in a more competitive and difficult environment.[9]

By any objective measure, the CEP dramatically increases the electoral opportunities for major party candidates without providing any corresponding benefit to the minor party candidates denied entry into the program. Over time, the increased opportunities for major party

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[8] *See also* SEEC CEP Program Overview, Pl. Ex. 46 at 1.

[9] The record conclusively shows that major party candidates will be the primary beneficiaries of the public financing, despite the defendants' contention that the differential qualifying criteria can be easily satisfied by non-major party candidates. The defendant's evidence on this last point must be taken with a grain of salt, given their testimony before the legislature that the qualifying criteria will effectively shut out minor party candidates. (Garfield Statement to GAE, Pl. Ex. 5 at 2). At this juncture, no non-major party candidate has qualified for a grant and only four have filed a declaration of intent according to the defendants. *See* List of Participating and Nonparticipating Candidates, *available at*: http://www.ct.gov/seec/cwp/view.asp?a=2861&Q= 401806&PM=1 (last visited Oct. 1, 2008).

candidates will inevitably impair the ability of minor party candidates to compete effectively. *Garfield*, 537 F. Supp. 2d at 377 ("By conferring a communications benefit and compelling highly competitive two-party races in one-party-dominant districts, the CEP changes the dynamic of many state legislative races in a way that further marginalizes minor parties.").

Beginning with the 2008 legislative election cycle, the record already establishes that minor party candidates will be competing in a more difficult environment against more and better financed candidates as a direct result of the ease with which major party candidates can qualify for public financing. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, Factual Statement, Section II.C. The defendants attempt to cast doubt on this assertion by manipulating the facts, but the record shows that the CEP has incentivized scores of major party candidates to participate in previously uncontested elections in party dominant and other previously safe districts. The CEP will also significantly increase expenditures in elections that were previously uncontested or where the winning candidate faced only token opposition. These represent the majority of elections in Connecticut. The amount of public money that will flow into these previously low-dollar campaigns is staggering and will dilute the modest efforts and resources of the non-major party candidates who previously targeted those elections. *Id.*

It is disingenuous for the defendants to now maintain that the CEP will have no effect on elections or on the political opportunities of candidates. The CEP may not change electoral outcomes, but it will definitely change the dynamics of elections in Connecticut by providing major party candidates with increased resources and political opportunities, while denying non-major party candidates the same opportunity. The argument that minor party candidates will be unaffected is too cynical to be taken seriously.

A. The Ease with Which Major Party Candidates can Qualify for Public Financing will Significantly Increase their Political Opportunities

The ease with which major party candidates can qualify for public financing will increase their political opportunities. Under the CEP, Democratic and Republican candidates are given a permanent statutory preference for funding in all state elections based solely on their party's results in the prior gubernatorial race. *See* Conn. Gen. Stat. § 9-372(5). Major party candidates who are seeking or have secured their party's nominations can qualify for public funding if they raise the required amount of money in qualifying contributions. According to the former Chairman of the State Democratic Party, this requirement is a mere formality given the ability of major party candidates to tap into the party apparatus. (Jepsen Depo., Pl. Ex. 20 at 84-85).

The major political parties have been given this advantage even though their actual level of support in many elections, particularly for the General Assembly, may be less than the qualifying thresholds established for their minor party counterparts. By this measure alone, 43% of major party candidates would fail to qualify for full public finding based on prior vote totals. *Garfield*, 537 F. Supp. 2d at 380. In 2006, for example, 61 of the 151 (40%) races for state representative included only one major party candidate. Election Results for State Representative. On the state senate side, nine of the 36 (25%) races included only one major party candidate. Election Results for State Senate. In addition, many major party candidates faced only token opposition from their major party competitors. Six races for state representative and five for state senate were won by a major party candidate who captured at least 80% of the vote, even when facing another major party candidate. *Id.* [10]

The results in those largely abandoned districts tell only part of the story. There are only a handful of state elections for legislative and statewide office that are considered "in-play" each

[10] In total, 81of 187 (43%) General Assembly races in 2006 were uncompetitive by any objective standard.

cycle. According to the defendants' expert, a 20% margin of victory is considered an electoral landslide. (Green Supplemental Report, Pl. Ex. 21 at 1) (defining a "safe district" as one in which a candidate wins a district by getting at least 60% of the vote, *i.e.*, by a 60/40 split). In 2006, 72% of Senate elections and 83% of House elections involved a winning major party candidate who was either unopposed by another major party candidate, or who won by at least 20% of the vote. *See* Election Results for State Representative (61 of 151 races included only one major party candidate, and 65 of the other races won by a major party candidate by at least 20% of vote); Election Results for State Senate (9 of 36 races included only one major party candidate, and 17 other races won by a major party candidate by at least 20% of vote). [11]

The defendants do not contest this data. Instead they argue that major party candidates are presumptively stronger than non-major party candidates and that it would be pointless to require them to satisfy the prior vote total and petitioning requirements that minor party candidates are subject to. They go so far as to assert that they could presumptively meet the 20% prior vote total in any election they contest. Without conceding the facts necessary to support the defendants' sweeping assertions, the argument that major party candidates are presumptively stronger than non-major party candidates is entirely beside the point.[12] Major party candidates

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[11] Party registration numbers are even less helpful to the defendant's argument. Thirty-three percent of Senate districts and 38% of House districts are considered party dominant districts under the CEP's definition, meaning that one of the two major parties has a 20% registration advantage over the other. (OLR Report: Party-Dominant Districts in Connecticut, May 17, 2008, Garfield Decl. II Ex. 17). These numbers are actually a little misleading. The Democratic advantage is much greater. In 66% of the Senate districts and 64% of the House districts the Democrats have at least a 10% registration advantage. *Id.* Republicans barely comprise 20% of the state's registered voters. They represent less than 20% of the registered voters in 16 Senate districts and 71 House districts. There are only 4 Senate districts where the Republican registration exceeds 30%, the highest being the being in the 36th district which is an outlier with 39%. On the House side, there are only 20 districts where the Republican registration exceeds 30%. *Id.*

[12] The defendants may be correct about the relative strength of the major parties, but that does not mean that the two major parties maintain a competitive balance or are equally electable. Party registration numbers and election results clearly show just the opposite. (OLR Research Report, Elections – Party-Dominant Districts, June 17, 2008, attached as Pl. Ex. 50). In 2006, for instance, there were 9 senate elections in party dominant Democratic districts. Four were uncontested. In three others, the Republican candidate received 15% of the vote or less. In the

that consistently lose by landslide margins are no more viable than any other supposedly inferior candidate. That is why the major parties have effectively abandoned almost 40% of the legislative districts. For purposes of justifying the exclusion of minor party candidates, "major party candidates have proven to be just as capable of running hopeless candidacies or no candidacies at all, as minor party candidates." *Garfield,* 537 F.Supp. at 381.

In an attempt to create a material dispute over the impact of the CEP on a candidate's decision to seek office, the defendants argue that the CEP will not have a meaningful effect on competition and that the relative positions of the parties will remain unchanged. The defendants beat a hasty retreat from their widely publicized description of the laudatory goals of the CEP. The CEP was adopted with the goal of reducing the influence of special interest money and wealth by providing candidates with the resources to compete on "a more level playing field." (SEEC CEP Program Overview, Pl. Ex. 46 at 1). The primary beneficiaries of the program are the major party candidates who did not previously have the resources to compete in previously non-competitive districts.[13]

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remaining two, the Republican received a paltry 23% and 28% of the vote. *Id.* The House numbers in party dominant districts are comparable. The Republicans either did not run a candidate or its candidate received less than 20% of the vote in 28 of the 46 party dominant Democratic districts. *Id.* In the remaining others, the Republican candidate rarely broke through the 30% vote total. These results reinforce the fact that 70%-80% of the elections in Connecticut are not competitive. The justification for adopting a financing system based on the assumption that they are is therefore dubious.

[13] The defendants' claim that the CEP will not affect competition is not believable. Indeed, prominently posted on the SEEC website is an August 6, 2008 *New York Times* editorial, titled "*Cleaning Up Connecticut.*" The editorial commends the State for adopting a public financing that will most likely increase competition the same way it did under the system adopted in Maine. (Attached as Pl. Ex. 53). A cursory review of Exhibit 1 to the Declaration of Senator Peter Mills shows how dramatically public financing increased competition in Maine. During the period 1990-2000 (prior to the adoption of the MCEA), the average number of incumbents seeking re-election without a challenger was 30.6 out of 186 legislative districts. In 2004 and 2006, the number of unopposed incumbents dropped to an average of 2.5 districts. The trend is reinforced by the number of challengers to incumbents in a primary. *See* Decl. of Peter Mills, Ex. 1, Maine Report at 18-19.

The increase in major party competition has also translated into an increase in major party primaries. (Press Release, State Elections Enforcement Commission Sees Increase In The Number Of Primaries Since 2006 And Awards Final Primary Election Grants (July 24, 2008), attached as Pl. Ex. 49). There were four senate primaries in 2008. (*Id.*) The largest number of senate primaries since 1996 was two, and there were no primaries in 2006. *See* Office of Secretary of State, Election Results and Related Data, Primary Results, *available at*:

It is not credible for the defendants to now argue that the CEP will not materially increase the electoral opportunities of major party candidates. By the defendants' own account, there will be dozens of newly contested elections in the 2008 legislative elections. (Foster Decl. ¶ 14) (Thirty-one state house races previously contested by one major party in 2006 will now be contested by both major parties in 2008; five senate races that were previously contested by only one major party in 2006 will now be contested by both major parties in 2008). The final tally on the number of candidates who will participate in the CEP is not complete, but the SEEC projects an almost 80% participation rate. (SEEC Report on CEP's Projected Levels of Candidate Participation 2008, Pl. Ex. 41 at 12-13).[14]

The defendants nevertheless argue that the number of newly contested elections in the 2008 legislative cycle is offset by the number of newly uncontested elections. They are mixing apples and oranges. In the Senate, for instance, the five newly contested elections all occur in districts previously dominated by one of the major parties. *See* Decl. of A. Nikolaidis, Ex.A-8, ¶ 7 and Table 5.[15] The availability of public funding will level the playing field in terms of the resources available to the two major party candidates and clearly provided a powerful incentive. By contrast, two of the three newly uncontested elections occur in districts that are historically competitive and adequately financed. *Id.* The decision not to contest those elections has nothing to do with the availability of public financing. For instance, in the 16th Senate District the two

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http://www.sots.ct.gov/sots/cwp/view.asp?a=3179&Q=392194&SOTSNav_GID=1846 (last visited August 28, 2008). In 2008, there were sixteen primaries for the House of Representatives. This is almost a two-fold increase in the number of primaries for state legislative office from 2006. (SEEC Press Release about Primaries, Pl. Ex. 49).

[14] Major party candidates are, indeed, crashing the gate to take advantage of the opportunities that the CEP provides. The deadline for filing a declaration of intent to participate in the CEP passed on September 25, 2008. A combined 270 candidates filed the required declaration. Only a relative handful of major party candidates have opted out, including just four candidates for the State Senate and 37 candidates for State Representative. See http://www.ct.gov/seec/cwp/view.asp?a=2861&q=421960 (last visited Oct. 1, 2008).

[15] For the convenience of the Court, a copy of the Nikolaidis Declaration and accompanying tables has been attached as an appendix to this brief.

candidates raised a combined $380,000 in 2006. *Id.* This year the Republican incumbent is running unopposed. Whatever factors led the Democrats to abandon the district this cycle, it was not for the lack of the ability to raise money or to qualify for the CEP.

The effect of the CEP on elections for state representative is just as pronounced. Of the 32 newly contested elections, the overwhelming majority occur in districts that have been abandoned by one party or have generally not been competitive over the last four election cycles. *See* Decl. of A. Nikolaidis, Exh. A-8, ¶ 8 and Table 6. In almost all of these districts, the losing candidates failed to raise the type of money needed to run a competitive campaign. *Id.* Public financing will create a more level playing field by providing those candidates with the resources to compete.

The decision to contest an election that has not been "in play" for many years is not some random act. Conversely, the fact that there are a significant number of newly uncontested elections only shows that public financing was not the deciding factor in those districts. In this respect, the defendants are correct that other factors come into play in deciding which elections to contest but in the 32 newly contested House and five newly contested Senate elections, there is no basis to conclude that funding was not a factor when one major party consistently had difficulty finding the candidates and resources necessary to compete in those elections in the past. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, Factual Statement, Section II.C.[16]

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[16] The defendants' reliance on newly *uncontested* elections to disprove the correlation between the CEP and candidate behavior is flawed. These elections have historically been more competitive than the elections that are newly contested this cycle. *See* Decl. of A. Nikolaidis, Exh. A-8, ¶¶ 7, 8 and Tables 5 & 6. The losing candidates are generally more competitive and raise more money than the losing candidates in the newly contested elections. *Id.* Tables 5-6 were prepared by a research associate under the supervision of undersigned council. *See* Declaration of Alex Nikolaidis Exh.A-8 ¶ 1.

While major party candidates have shown that they are capable of running competitive campaigns in legislative districts and statewide elections that are "in-play," they have not established that they can run viable campaigns in elections that are not considered "in-play." If anything, the evidence shows that the exercise would be futile and explains why 70%-80% of the legislative districts are either abandoned districts or result in landslide defeats. For instance, in the special election to replace long-term Republican incumbents Senator Lou DeLuca and Representative Richard Belden, both Democratic candidates lost by landslide margins, despite qualifying for public financing. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, Factual Statement, Section II.C.[17]

While the State might legitimately adopt a public financing system that does not require candidates to qualify on a district-by-district basis (which is the practice under the other public financing systems), it cannot arbitrarily impose this burden on non-major party candidates. All the reasons cited by the defendants for holding non-major party candidates to a more difficult standard apply equally to uncompetitive major party candidates. *See Garfield,* 537 F. Supp. 2d at 381 ("Defendants have suggested no good reason why the legislature sought to protect the public fisc from hopeless minor party candidacies, on the one hand, while spending significant sums of money on hopeless major party candidacies, on the other."). The State has no legitimate interest in leveling the playing field as between major party candidates only. *See Davis*, 128 S.Ct. 2759.

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[17] The pattern of futility is the same in statewide elections. With the exception of the office of Governor, Republican candidates have consistently lost by landslide margins in recent statewide elections. *See* Election Results for Connecticut State Officers (With the exception of the office of Governor, the Democratic candidates for Secretary of State, Treasurer, Comptroller and Attorney General all won by margins greater than 2:1 in 2006). The justification for funding these futile candidacies is dubious. The defendants' argument that weak major party candidates will fail to qualify is contradicted by the record showing that weak major party candidates have had no difficulty qualifying for public financing in the 2008 legislative cycle. Jepsen Depo., Pl. Ex. 20 at 85-88.

B. The CEP Provides Major Party Candidates with the Resources to Compete in Elections in Which They did not Previously Have the Resources to Run Effective Campaigns

The defendants maintain that the grant amounts are in line with historical expenditure levels and do not increase the relative standing of major party candidates. The record belies this assertion. Moreover, the defendants' argument fails to respond to the objection that public financing will disproportionately benefit those candidates who previously lacked the resources to run competitive campaigns. Public financing provides them with a powerful incentive to seek office. ("[T]he CEP has now created a perverse incentive for the non-dominant major party to run well-financed candidates, regardless of the party's prior success in the district, and regardless of the candidate's potential for electoral success."). *Garfield,* 537 F.Supp.2d *at* 377. It is this aspect of the CEP that will change the dynamics of elections in Connecticut. *Id* [18]

The increases will be most dramatic in districts where the candidate ran unopposed or was opposed by a poorly financed opponent – including an increase in the number of contested primaries.[19] This assertion can be easily confirmed by comparing 2006 receipts with projected 2008 CEP grants. *See* Declaration of Alex Nikolaidis Ex. A-8, Tables 1-4 attached thereto. In state senate elections, 37 candidates will receive grants that are at least $20,000 more than the money they raised in 2006. The impact of the funding will be most significant for the 22 candidates who will receive grants that are at least $50,000 more than they raised in 2006. *See* Table 1. Only one of those 22 candidates raised more than $50,000 in 2006. *Id.*

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[18] Perversely, the CEP will have the ancillary effect of increasing spending as a whole in previously safe districts. Incumbent legislators who might have raised relatively little money because they were unopposed or faced only minor party opposition are now going to be funded at levels that correspond to the most competitive elections. Hundreds of thousands of dollars are flowing into this previously low spending district. *See* Decl. of A Nikolaidis, Tables 3 & 4 (district-by-district comparison of total 2006 campaigns receipts with projected 2008 CEP grants).

[19] In 2008, 34 of the 42 candidates who participated in the August 12th primaries received public financing grants ranging from $75,000 in the Senate to $25,000 in the House. (SEEC Press Release re: Primaries, Pl. Ex. 49).

In elections for state representative, 128 candidates will receive grants that are $10,000 or more than the amount that the candidate raised in 2006. *Id.*, Table 2. Only four of those 128 candidates raised more than $15,000 in 2006. *Id.* The impact of the funding will be the greatest for the 69 candidates who will receive grants that are at least $20,000 more than they raised in 2006. The candidates who stand to benefit the greatest are the ones who are running in previously uncontested elections or in elections where the candidate raised almost nothing.[20]

The defendants' attempt to minimize the impact of the CEP funding on major party candidates is misleading for several additional reasons. First, it fails to fully account for actual candidate expenditures under the CEP. The base grants are supplemented by qualifying contributions, which significantly increases the amount of money that a candidate is permitted to spend. The qualifying contributions represent approximately 20% of the base grant amount for legislative candidates and are not offset against the grant amount. Second, expenditure data relied upon by the defendants does not take into account (1) grants made to candidates participating in a primary [21] and (2) supplemental grants under the matching fund provisions – which could treble the base grant amounts. The grants are also augmented by the ability to raise money through exploratory committees as well as coordinate tens of thousands of dollars in expenditure with party and legislative PACs.

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[20] Only 59 candidates for state representative will receive grants that are $10,000 less than the amount they raised in 2006. *Id.* Of the second group, 28 candidates are running unopposed by a major party candidate and the fact that they are receiving less money than they raised in 2006 will have no impact on the election. *Id.*

[21] The CEP provides major party candidates with the resources to get their message out during the primary period while denying the same to minor party candidates. The fact that minor party candidates are not compelled by state law to conduct official primaries is not the issue. The issue is whether it is appropriate to increase the relative financial strength of major party candidates with primary grants. Under the system for financing presidential primaries, all candidates seeking their party's nomination can qualify for matching funds. Numerous minor party candidates have received federal matching funds under FECA – including Ralph Nader who secured the Green Party nomination for the presidency in 2004. (*Matching Money for Nader*, N.Y. Times, May 29, 2004, Pl. Ex. 43; Nader 2004 Certification Seeking Public Financing as Third Party Nominee, Pl. Ex. 44).

Buckley did not endorse this type of unrestrained system for subsidizing political campaigns. That decision is premised on several important considerations absent under the CEP. First, the Court viewed public financing as no real advantage to major party candidates because public funding served as a *substitute* for private contributions and minor party candidates were freed to out-raise and out-spend their opponents through private contributions. *Id.* at 99. Second, the Court described the "disadvantage" to minor party candidates as minimal because it was limited to "denial of the enhancement of opportunity to communicate with the electorate," *Buckley,* 424 U.S. at 95, and because they had failed to make a showing that the system categorically reduced the strength of their parties, *id.* at 98-99. Third, any advantage garnered by major party candidates was offset by a "countervailing denial" – expenditure limits. *Id.* at 95. In sum, public financing achieved a rough proportionality between the benefits and burdens that did not affect the "relative strengths" of the parties – it maintained the *status quo*. That is demonstrably not the case here. The CEP not only upsets the *status quo,* it impermissibly distorts the playing field by giving a decisive financial advantage to major party candidates. *Davis,* 128 S.Ct., at 2773. [22]

In contrast to the public financing system in *Buckley*, the grant amounts are not a rough substitute for what the candidates could have otherwise raised privately. 424 U.S at 95, n.129. The CEP provides subsidies to candidates that far exceed the amount of money candidates could have raised privately. Indeed, the CEP is premised on the express goal of increasing the electoral opportunities of candidates by providing them with the wherewithal to compete in primaries and

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[22] *Davis* makes explicit what was implicit in *Buckley* – that increasing the ability of one group of candidates to compete imposes a substantial burden on First Amendment rights of the group of candidate denied the benefit. The decision rejects the argument that the government can have any legitimate justification for altering the "electoral opportunities" of candidates. *Davis,* 128 S.Ct. at 2774 (warning against governmental interference with the political process and stating that "it is a dangerous business for Congress to use the election laws to influence voters' choices").

in previously uncompetitive general elections. *See* A Guide for 2008 General Assembly Candidates Participating in the Citizens' Election Program at 2, *available at*: http://www.ct.gov/seec/lib/seec/CEP_GUIDE_JUNE_2008_-_FINAL.pdf (last visited Oct. 1, 2008). The principal beneficiaries will be major party candidates because of the ease with which they can qualify for full grants.[23] Minor party candidates will be competing in a more competitive and difficult environment that will impede their already modest efforts to be heard.[24]

C. The Supplemental Grant Provisions and the Significant Loopholes in the Expenditure Limits will Augment the Financial Advantage of Major Party Candidates.

1. Supplemental Grants

The already generous grants are augmented by supplemental grants that are triggered by excess expenditures and independent expenditures. The defendants argue that it is speculative to believe that these aspects of the CEP will come into play – much less increase the advantages major party candidates already have over minor party candidates who fail to qualify for public funding. That argument is dubious. On the one hand, the defendants are attempting to minimize the potential for these provisions to trigger additional grants, while on the other hand they are defending the matching fund provisions as essential to the success of the program. *See* Memorandum of Defendants' and Intervenor-Defendants in Opposition to Plaintiffs' Motion for

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[23] Unlike in *Buckley*, for instance, the injury suffered as a result of failing to qualify cannot be remedied by a strong showing in the polls. Minor and petitioning party candidates who do not qualify for pre-election grants cannot obtain any public funding following the election. Conn. Gen. Stat. §§ 9-705(c)(3), (g)(3). In *Buckley*, the Supreme Court highlighted the fact that minor and new party candidates could qualify for post-election funding, which meant, as a result, that the "claimed discrimination [was] not total." 424 U.S. at 102. In this case, the discrimination is complete. The CEP's funding scheme embodies the concerns articulated by Chief Justice Burger in his dissent in *Buckley*: "the present system could preclude or severely hamper access to funds before a given election by a group or an individual who might, at the time of the election, reflect the views of a major segment or even a majority of the electorate." *Id.* at 251 (Burger, C.J., dissenting).

[24] After *Davis*, the argument that minor party candidates "gain" by being denied public funding is no longer available to the defendants. The "advantage" that minor party candidates supposedly derive from being excluded from the system because they can theoretically raise money without limit is blunted by the supplemental grant provisions. This aspect of the CEP provides the explicit basis to distinguish the public financing system upheld in *Buckley*. *See Davis*, 128 S.Ct. at 2772.

Reconsideration. According to the defendants, the matching fund provisions are justified by the state's interest in protecting participating candidates from being outspent by privately financed candidates or from being attacked by independent groups. *Id.*

The defendants cannot have it both ways. If the matching fund provisions are a critical aspect of the program because there exists a real threat that excess and independent expenditures will come into play, then the defendants cannot credibly argue that plaintiffs' fears of being further marginalized by that threat are unfounded. If there is only a remote likelihood that supplemental grants will be triggered by excess expenditures or independent expenditures, then the defendants' entire defense of the matching fund provisions is doubtful. *Davis,* 128 S.Ct. at 2772; *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (High participation rate in public financing program undermined justification for matching fund provision).

To the extent the supplemental grant provisions inevitably come into play, the only purpose served is to increase funding for the major party candidates. *Davis* casts doubt exactly on this type of trigger mechanism designed to level the playing field:

> But the choice involved in *Buckley* was quite different from the choice imposed by § 319(a). In *Buckley,* a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures. Here, § 319(a) does not provide any way in which a candidate can exercise that right without abridgment.

128 S.Ct. at 2772. The supplemental grant provisions alter the "electoral opportunities" between competing candidates by ensuring that major party candidates suffer no countervailing disadvantage from their agreement to be bound by expenditure limits. *Id.* at 2773-74. The provisions plainly increase the advantage of the candidate who benefits from it, while the

candidate and his supporters denied the benefit bear the "unprecedented" burden on the speech. *Id.* at 2774.[25]

Minor party candidates are essentially bystanders in this attempt to level the playing field between major party candidates. The provision will exaggerate the disparity between majority and non-majority party candidates.[26] The grants are exclusively in the service of major party candidates, and will inevitably work against the candidates who are unable to qualify for public financing. This Court stated the obvious when it wrote, "Because of the government-funded and government-induced major-party slugfest, the Green Party candidate's modest efforts to communicate with the electorate are alleged to be further marginalized." *See Garfield*, 537 F. Supp. 2d at 377. This provision will not only undermine the state's interest in decreasing expenditures, it also has the dangerous potential to alter electoral outcomes. (Weicker Decl. ¶ 21, Ex. A-2).

The defendants provide no response to the concerns expressed by the Court about the distorting effects of the matching grant provisions. In light of *Davis,* the point is arguably moot. The decision casts substantial doubt on the legitimacy of this type of funding mechanism not only because of the advantage it gives the group of preferred candidates, but because it imposes

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[25] It should be equally clear after *Davis* that a candidate cannot be forced to make the impermissible choice of limiting his expenditures or financing the speech of his opponent. 128 S.Ct. at 2772. Some minor party candidates will inevitably face this choice. (DeRosa Decl. ¶ 54, Pl. Ex. A-1). This is a separate ground to invalidate the excess expenditure provision.

[26] For instance, it is not too much to predict that independent committees will increase their spending on independent expenditures now that they are no longer compelled to contribute directly to candidate campaigns. In one highly-publicized case from the last election cycle involving New Jersey's pilot program for financing legislative campaigns, one of the candidates received $100,000 in matching funds that were triggered by independent expenditures. (New Jersey's "Clean Election" Experiment, Ex. 35 at 7). *See* Decl. of Peter Mills, Ex. 1, Maine Report, at 41-48, 65-71 (impact of matching funds on Maine program). *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (upholding ban on "electioneering communications" by special interest groups based on record showing that that they were used to circumvent limits on corporate expenditures).

an "unprecedented penalty," 128 S.Ct. at 2771, and a "substantial burden" on the candidate denied the benefit, *id.* at 2772.[27]

2. The Organizational Expenditure and Exploratory Committee "Loopholes"

The subsidies are also augmented by significant loopholes in the state campaign finance laws that allow major party candidates to continue to raise and spend thousands of dollars. They can accomplish this by establishing an exploratory committee or by taking advantage of the organizational expenditure provision under the CEP. The SEEC and intervening organizations understood all too well how these loopholes in the statute would allow major party candidates to have it both ways by giving them the means to easily circumvent the expenditure limits. (Garfield Statement, Pl. Ex. 5 at 2; Clean Up Connecticut Campaign Press Release, Pl. Ex. 7 at 2; Memorandum from Beth Rotman to Karen Hobert Flynn & Andy Sauer re: CEP and Exploratory Committees, Pl. Ex. 15). The defendants also understood the potential these provisions held for undermining the CEP's goal of eliminating the influence of special interest money. *Id.*

Defendants' claim that these provisions do not increase the advantage of major party candidates is therefore contradicted by testimony from their own witnesses. In fact, their submissions in this case also belie the assertion that these loopholes do not benefit major party candidates. *See* Decl. of Peter Mills, Ex. 1, Maine Report, at 41-48, 65-71 (describing increase

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[27] Supplemental grants are also triggered under a lesser known but more invidious provision that uniquely takes aim at non-major party candidates. In elections where the only opponent is a single major party candidate (which are the elections targeted by minor party candidates), the grants to the major party candidates are significantly increased if a minor party candidate enters the race and raises or spends more than $5,000 in House elections or $15,000 in Senate elections. Conn. Gen. Stat. § 9-705(j)(4). In a Senate election, for instance, the grant amount to the major party opponent is increased from $51,000 to $85,000. In House elections, the grant is increased from $15,000 to $25,000. It makes no difference whether the minor party candidate qualified for public funding or not. This provision will discourage non-participating minor party candidates from spending up to the limit. (DeRosa Decl. ¶ 54, Pl. Ex. A-1).

in overall spending in elections attributable to Party and Leadership PAC expenditures and describing how matching funds paid to candidates have increased based on independent expenditures).

D. Non-Major Party Candidates will be either Crowded out of Elections or will Face Increased Competition From Publicly Financed Candidates as a Result of the CEP

This Court stated the obvious when it wrote that the CEP, in effect, "compels a competitive two-party race between major party candidates in which the government finances, at exceedingly generous levels, major party candidates' efforts to communicate their views and policies to the electorate. Minor party candidates will be crowded out of those races, and the CEP will snuff out the gains that minor parties have made." *Garfield*, 537 F. Supp. 2d at 377. Although the defendants express disagreement with the Court's assessment of the impact of the CEP on minor party and independent candidates, they provide no basis to cast doubt on the conclusion that the minor party candidates will be competing in a more competitive and difficult environment as a result of the increased competition from major party candidates.

On a whole, the CEP will change the dynamics of elections in Connecticut by increasing the electoral opportunities and resources of major party candidates. This will inevitably allow them to dominate the debate and push minor party candidates further off the stage. The First and Fourteenth Amendments prohibit the state from slanting the playing field in a way that distorts the relative positions and political opportunities of candidates. *See Garfield*, 537 F. Supp. 2d at 379 (the legislature "had no obligation to pass a law that levels the playing field, but the legislature is not free to pass a law that further slants the playing field").

The facts relied on by defendants do not contradict the evidence supporting plaintiffs' claim that the CEP will radically distort the playing field to their disadvantage. For instance, in

2006, 11 of the 12 minor and petitioning party candidates that received at least 10% of the vote competed against only one major party candidate. *See* Election Results for State Representative and State Senate, 2006. There were 13 other races in which minor and petitioning party candidates received between 5% and 9.9% of the vote, and in 11 of them only one major party candidate competed. *Id.* In total, in 85% of the districts in which minor and petitioning party candidates demonstrated a "modicum of support," they benefited from a lack of major party competition. Thus, the CEP works to enhance the status of major party candidates in areas where they have not made any historical showing of support and in areas where minor and petitioning party candidates have made their greatest strides. *See Bang v. Chase*, 442 F. Supp. 758, 768 (D. Minn. 1977), *aff'd Bang v. Noreen*, 436 U.S. 941 (1978) ("Under this distribution scheme, a party with state-wide plurality can unfairly disadvantage its opponents in those districts where it enjoys little district support.").[28]

In the 2008 legislative cycle, a second major party candidate has entered the contest in 16 of the 22 elections that were targeted by minor party or independent candidates in 2006. *See* Decl. of A. Nikolaidis ¶ 9 and Table 7. In addition, if you consider all the elections in which a non-major party candidate ran for legislative office in 2006, the record shows that they will be competing in a more competitive environment against better financed candidates. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, Factual Statement, Section II.C.

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

Although the defendants are correct that this may not occur in every district that minor party candidates have targeted in the past, it does not alter the fact that the CEP provides a powerful inducement for major party candidates to compete in elections that they previously avoided. As discussed above, the number of contested elections has dramatically increased in legislative districts dominated by one party or candidate. *See* Section III.A. For instance, Michael DeRosa is running for election in the 1st Senate District. He has previously run and received as much as 11.4% of the vote. (DeRosa Decl. ¶ 13, Pl. Ex. A-1). The district is a party dominant Democratic district in which the Republicans have fielded a candidate only once since 2000. The 2008 election has not only drawn a Republican candidate but also an opponent in the Democratic primary. (2008 State Senate candidate List, Pl. Ex. 51; List of Participating and Nonparticipating Candidates, Pl. Ex. 42). The dynamics of this election have been significantly altered. Hundreds of thousands of dollars are flowing into this previously low spending district. *See* Decl. A Nikolaidis, Tables 1& 3; (Sen J. Fonfara 2004 Financial Disclosure, Ex. 40). [29]

The defendants' argument at base is that minor parties exist only at the margins and are so disorganized in Connecticut that the statutory preference given to major party candidates could not possibly further diminish the standing of minor parties in the State. According to the defendants, minor parties are so inferior that any arguable discrimination that results from the operation of the CEP is fully justified. The Court already rejected this argument. "[T]he fact that minor party candidates have not achieved substantial success in past elections does not mean that the CEP cannot, as a matter of law, burden their political opportunity in future elections."

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[29] Similarly, the two special elections held since the CEP was implemented each occurred in a district where a minor party was the only opponent in the 2006 election. The availability of funding under the CEP changed that dynamic and drew a second major party opponent in each district . The WFP candidates who previously ran in those districts subsequently decided to abandon the districts. *See* Plaintiffs' Memorandum in Opposition to the Defendants' Motion for Summary Judgment, Factual Statement, Section II.A.2. The defendants' argument that open seat elections are always contested by the major parties does not establish that the second major party candidate could have raised the money necessary to run an effective a campaign or to "crowd out" minor party candidates.

Garfield 537 F.Supp.2d at 379. The defendants' position, moreover, is fundamentally at odds with the primary values underlying the First Amendment. *See Buckley*, 424 U.S. at 293 (warning against "enshrin[ing] the Republican and Democratic Parties in a permanently preferred position") (Rehnquist, J., dissenting); *Celebrezze*, 460 U.S. at 794 (the "primary values protected by the First Amendment – 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open' – are served when election campaigns are not monopolized by the existing political parties.") (*quoting New York Times Co., v. Sullivan*, 376 U.S. 254, 270 (1964)); *see also Davis*, 128 S.Ct. at 2773-74 (explicitly disapproving legislation that seeks to alter the "electoral opportunities" of candidates).

IV. The CEP's Eligibility Requirements and Partial Funding Provisions are Discriminatory

A. It is Immediately Apparent From the Face of the Statute itself that the CEP's Qualifying Criteria Make it Substantially more Difficult for Minor Party Candidates to Receive Public Funds than Major Party Candidates

The defendants also claim that the qualifying criteria are not discriminatory because plaintiffs are unable to show that their inability to qualify is attributable to anything other than their own limitations. That argument implies that the qualifying criteria are within the permissible range upheld in *Buckley*. Distilled of the lengthy and unnecessary discussion of ballot access cases,[30] the defendants' argument is a rehash of the argument previously rejected by

[30] The ballot access cases cited by the defendants are inapposite. Denial of access to the ballot involves associational interests that are analyzed under a more deferential standard than direct restraints on speech. *See* Sections I and II, *supra.* Statutes that distort the speech-related opportunities of candidates are subject to strict scrutiny, *See Davis*, 128 S.Ct. at 2772, not the lesser standard applicable in ballot access cases.

The comparison to ballot access requirements is unsuitable for an additional reason. In order to qualify for a full grant, a candidate would have to collect the signatures of 1 out of 5 voting age residents. None of the ballot access cases or statutes cited by the defendants involve a remotely difficult and unprecedented requirement. Indeed, none of the cases cited by the defendants require a candidate to collect signature from more than 5% of the population. The principal case relied on by the defendants upheld Connecticut's 1% ballot access requirement. *LaRouche v Kezer,* 990 F.2d 36 (2nd Cir. 1993).

the Court distinguishing the facts in *Buckley.* Presidential elections are "quite different" than Connecticut state elections because presidential elections are always competitive with both major party candidates enjoying significant popular support. *Garfield,* 537 F. Supp. 2d at 375-76; 375 n.20. In Connecticut, elections are not only uniformly less competitive, non-major party candidates have been more successful. *See* Plaintiffs' Memorandum in Support of Motion for Summary Judgment, Section II.A.2, pp. 19-22. The imposition of a requirement more than double the one upheld in *Buckley* is deserving of *less*, not more, deference. *See Garfield*, 537 F. Supp. 2d at 380 ("I do hold, however, that because the percentages the legislature has chosen are significantly higher than the threshold upheld in *Buckley*, they are entitled to less deference.").

The defendants go to great lengths to draw the Court into a dispute over plaintiffs' claim that the prior vote total and petitioning requirements will effectively limit the participation of non-major party candidates in the CEP. The Court need not resolve this dispute in order to grant the plaintiffs' motion for summary judgment. *See Garfield*, 537 F. Supp. 2d at 375 ("It is immediately apparent from the face of the statute itself that the CEP's qualifying criteria make it substantially more difficult for minor party candidates to receive public funds than major party candidates."). The issue in this case is limited to whether the legislature was justified in giving major party candidates a statutory preference under the CEP while imposing an additional burden on non-major party candidates – however modest the defendants describe it. As this Court stated, "[t]he size of the ten-fifteen-twenty percent stepped thresholds is not as problematic *as the fact that the thresholds apply only to minor party candidates in the first instance.*"

Although the ballot referendum examples cited by the defendants admittedly require candidates to collect hundreds of thousands of signatures, the defendants neglect to explain that these petition drives cost millions of dollars. For example, in 2003, a petition drive in California to force a recall election against Governor Gray Davis cost over $2 million to finance. The state referendum required nearly 900,000 signatures, but based on the disqualification rate, the petitioners sought to collect at least 1.6 million signatures. The primary group financing this petition drive paid $2.4 million to gather 1.3 million signatures. This was at a rate of $1.80 per signature. *See* Robert D. Davila, "Petition Drive Cost $1.80 Per Signature," *The Sacramento Bee*, Aug. 1, 2003, at A3.

Garfield, 537 F. Supp. 2d at 381 (emphasis added). What the defendants fail to accept is that unlike *Buckley*, the CEP's qualifying and grant distribution terms are discriminatory not because the program terms treat the parties differently, but because the program terms have the effect of "slant[ing] the playing field." *Garfield*, 537 F. Supp. 2d at 379.

The defendants seek to minimize additional requirements placed on minor party candidates by claiming that the CEP provides minor party candidates with "transformative political opportunities ... by allowing them to access unprecedented levels of funding." Def's Opposition Mem., pp. 61-62.[31] That assertion begs the question and it is, frankly, unclear whether defendants are making a serious argument. The defendants' attempt to couch the more burdensome requirements placed on minor party candidates as if it were a benefit to minor party candidates is patently disingenuous in light of the legislative record in this case.[32] The

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[31] Minor party candidates who are barred from CEP eligibility under the prior vote threshold may attempt to qualify for public financing through the same manner as petitioning candidates, *i.e.*, by gathering signatures. Conn. Gen. Stat. §§ 9-705(c)(2), (g)(2). Minor party candidates are thus treated as new party candidates even though they may have a proven record of support in the district. A minor party candidate who received 9.9% of the vote in the previous election must qualify in the same manner as a candidate who has never run for office and who must petition to even get on the ballot. Perversely, minor party candidates who qualify for a partial grant based on their party's performance in the last elections cannot qualify for a full unless they proceed as a petitioning candidate. Defendants do not explain why it is necessary to treat minor party candidates and petitioning party candidates the same when minor party candidates have already established their *bona fides*.

[32] The defendants' trivialization of the burden imposed by the qualifying criteria is flat-out contradicted by the record. The very same parties that are defending the qualifying criteria now implored the legislature to relax the criteria because it "creates standards for their participation that are so high that it is very unlikely that these candidates would qualify for any public grants." Garfield Statement, Pl. Ex. 5 at 1-2; *see also*, Clean Up Connecticut Campaign Press Release, Pl. Ex. 7 at 5-6; Testimony of Suzanne Novak to GAE, Pl. Ex. 9 & Pl. Ex.10. Although the defendants go on for pages trying to establish that the qualifying criteria are relatively modest and can be easily satisfied, they have cited to almost nothing in the record to suggest that non-major party candidates are in fact benefiting from the CEP. At this juncture, not a single non-major party candidate has qualified for public financing in 2008. (Participating and Nonparticipating Candidates, *available at*: http://www.ct.gov/seec/cwp/view.asp?a=2861&Q= 401806&PM=1 (last visited Oct. 1, 2008)). The affidavits from the WFP Executive Director describing the elaborate efforts of its two candidates to qualify do not support the dependents position. Both candidates have spent many months and thousands of dollars trying to meet the petitioning requirements. *See* Supp. Decl. of J. Green. It remains to be seen whether their substantial efforts will be sufficient. The burden for petitioning candidates is particularly difficult because the deadline for submitting petitions to the Secretary of State's Office corresponds to the deadline for ballot access, not the deadline for submitting a grant application. The deadline for submitting petitions seeking ballot access is 90 days prior to the general election. Conn. Gen. Stat. § 9-453i. Michael DeRosa, one of the plaintiffs who is running for State Senate on the Green Party

defendants do not even address the testimony of Director Garfield and the intervening organizations before the legislature. Nor do they adequately explain why it was necessary to adopt qualifying criteria significantly more onerous than the criteria considered in *Buckley* and in numerous cases state public financing programs. *See Daggett*, 205 F.3d at 464-65 (1st Cir. 2000).

B. The Qualifying Contribution Requirement is Discriminatory as Applied because it only "Filters Out" Non-Major Party Candidates

The defendants justify the qualifying contribution requirement as necessary to "filter out" candidates lacking popular support and the ability to raise the amount of money that corresponds to the grant amount. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, p. 70. ("[T]he CEP aims to filter out candidates lacking the ability to raise private funds, thus *ensuring that these funds remain a substitute for private funding rather than a subsidy* to candidates who have no reasonable chance of winning an election.") (emphasis added). The defendants' argument is not supported by the record. As previously described, the CEP will dramatically inflate the resources of major party candidates, especially in those districts that have either been abandoned by one party or where one party consistently wins by a landslide margin against underfunded opponents.[33]

Already dozens of major party candidates with no chance of winning have raised the qualifying contributions – including the two Democratic candidates who lost by 20 and 30 points, respectively, in the two special elections referenced above, *supra,* and the losing

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line this cycle, is ineligible for public financing because he was unable to submit the required number of signatures by the August 6 deadline.

[33] In 2006, 72% of Senate elections and 83% of House elections involved a winning major party candidate who was either unopposed by another major party candidate, or who won by at least 20% of the vote. *See* Election Results for State Representative (61 of 151 races included only one major party candidate, and 65 of the other races won by a major party candidate by at least 20% of vote); Election Results for State Senate (9 of 36 races included only one major party candidate, and 17 other races won by a major party candidate by at least 20% of vote).

candidates in the 2008 legislative primaries.[34] The point that major party candidates will be able to raise the qualifying contributions does not establish their ability to raise the full grant amount privately. The defendants' argument is a fig leaf. No one disputes the ability of major party candidates to raise the qualifying contributions. For major party candidates, it is a mere formality. (Jepsen Depo., Pl. Ex. 20 at 84-85). It is not unlike the statutory preference they benefit from under the party registration and prior vote total provisions.

Minor party candidates do not have the benefit of a broad level of statewide or district support that major party candidates can easily access. *See* Jepsen Decl. They must take a different and more difficult route that would require them to identify hundreds and thousands of new contributors. For minor party candidates, the hurdle is substantially higher and requires a much greater effort. (Weicker Decl. ¶¶ 16-17, Pl. Ex. A-2; DeRosa Decl. ¶ 40, Pl. Ex. A-1; Thornton Decl. ¶ 18, Pl. Ex. A-3).

Minor party candidates must raise the qualifying contributions under restrictions that require the type of broad-based constituency and proven fundraising apparatus that only major party candidates benefit from. They are limited to contributions of $100 or less and cannot jumpstart their campaigns with seed money from their party or elsewhere. Major party candidates are limited by the same rules but have the ability to tap into the party's organizational apparatus. Jepsen Decl. Minor party candidates also have the additional expense of meeting the petitioning requirements. *See* Supp. Decl of J Green (defendants' witness explaining cost of collecting signatures). The qualifying criteria, individually or together, will effectively preclude

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[34] *See* Secretary of State Election Results, http://www.sots.ct.gov/sots/lib/sots/electionservices/electionresults/2008_election_results/2008_primary_results_&_turnout.pdf , and list of participating candidates, http://www.ct.gov/seec/cwp/view.asp?a=2861&q=421956.

nearly all participation by non-major party candidates. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, Factual Statement, Section II.C.3.[35]

C. The Qualifying Contribution Requirement is Discriminatory on the Face of the Statute

The final discriminatory aspect of the CEP's eligibility requirements involves the disparity in the funding provided for qualified candidates. Major party candidates who satisfy the financial threshold qualify for public funding for both the primary and general elections. Minor and petitioning party candidates must satisfy the same financial threshold but are awarded grants based on a different formula that pays them less. *Buckley* did not contemplate this type of disparity. For instance, a major party candidate for state senate who raises the required $15,000 in qualifying contributions is eligible for $120,000 in primary and general election funding (and any supplemental payments triggered by the matching fund provisions). An eligible minor or petitioning party candidate must raise the same amount in the same way, but may only receive 33% of the $85,000 general election base grant, or $25,757.[36]

The reduced payout is significant to minor and petitioning party candidates because they face greater obstacles in meeting the petitioning requirements and in raising the qualifying contributions. In effect, any advantage they gain from a partial grant is more than offset by the expense of qualifying. Unlike their major party counterparts, they receive a significantly

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[35] The only arguable disputed factual issue is whether the qualifying contribution requirement will effectively limit participation by most, if not all, non-major party candidates. Defendants have not offered any evidence to contradict the extensive record compiled by plaintiffs on this point. The qualifying contribution requirement is an equal or even greater barrier to participation than the prior vote total and petitioning requirements. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, Factual Statement, Section II.C.3.

[36] Minor party candidates who qualify for a partial grant based on their party's performance in the last elections cannot qualify for a full grant unless they proceed as a petitioning candidate.

reduced return on their investment. (DeRosa Decl. ¶ 41, Pl. Ex. A-1).[37] Plaintiffs are not aware of any public financing system that denies minor party candidates equal funding after they have satisfied the requirement of raising qualifying contributions. The systems in Maine and Arizona certainly do not take that approach. *See* Me. Rev. Stat. tit. 21-A, § 1121 *et seq.*; Ariz. Rev. Stat. §§ 16-901, *et seq.*

The grant disparities are not ameliorated by the so called "catch-up" provisions that were later added to the law. Conn. Gen. Stat. § 9-702(c). Although candidates who qualify for partial grants are allowed to continue to raise private funds up to the full grant amounts paid to their major party opponents, they are hobbled by the contribution limits that apply to CEP candidates. Those limits are capped at $100. It is completely unrealistic to think that a candidate could make up the $2 million difference in small-dollar contributions, especially in the narrow window of time following the primary. (Weicker Decl. ¶¶ 23, 26, Pl. Ex. A-2; DeRosa Decl. ¶ 51, Pl. Ex. A-1); *see also Randall v. Sorrell*, 548 U.S. 230, 249 (2006) ($200 contribution limit handicaps candidates). A more sensible approach would be to allow candidates to make up the difference under the limits that apply to privately financed candidates. (Weicker Decl. ¶ 23, Pl. Ex. A-2). That is the approach under FECA which allows minor party candidates who qualified for proportion funding based on their vote total in the last election to continue to raise contributions under the general limits applicable to individuals and groups. *Buckley,* 424 U.S. at 88-89.[38]

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[37] Even in elections where the grant to the major party candidate is reduced because he or she is unopposed by another major party candidate, the grant is (1) doubled if a minor party candidate enters the race and (2) increased to the full amount if the minor party candidate raises or spends more than $5,000 in House elections or $15,000 in Senate elections. Conn. Gen. Stat. § 9-705(j)(4). It makes no difference whether the minor party candidate qualified for public funding or not.

[38] In addition, although candidates who qualify for a partial grant are entitled to a post-election grant if they receive more than 20% of the vote, the supplemental grant is limited to the circumstances where the candidate's campaign shows an actual deficit. This is an unrealistic standard because candidates are not allowed to incur a deficit by lending money to their campaigns or borrowing from a financial institution or from elsewhere. In the closing stages of a campaign, this is how campaigns are financed. Under the federal system which provides post-

V. The Qualifying Criteria and Grant Provisions are not Narrowly Tailored to Serve the Interests Asserted by the Defendants

At this point in the litigation, there is very little doubt that the state's interest in this case could have been served by less restrictive means. The state's asserted interest in protecting the public fisc from hopeless candidacies was not even considered by the legislature. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, Section II.A. The State's interest could have been accomplished by adopting program terms that were modeled after the public financing programs in Maine and Arizona. These were the programs that were originally under consideration by the legislature and by the Campaign Finance Working Group, which took testimony from representatives in those states and from the good government groups that have intervened in this case. (SB 61, Pl. Ex. 1 at 16-18; HB 6670, Pl. Ex. 2 at 14-18; Campaign Finance Working Group Report, Pl. Ex. 3).

There was no evidence that participation by minor party candidates threatened the financial integrity of the systems in Maine and Arizona. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, Section II.A. The record provides no explanation for why the legislature decided on the most draconian approach towards minor party candidates. The legislature settled on a public financing system whose criteria for participation exceed the stringent eligibility criteria that govern the financing of Presidential elections and which were upheld in *Buckley*.

In addition, there is no reason to apply the thresholds only to minor party candidates in light of the fact that the majority of Connecticut's elections are uncontested or not competitive.

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election grants, candidates who lend money to their own campaigns or borrowed from financial institutions can repay those loans with any money they receive in post-election grants. *Buckley*, 424 U.S. at 102. Federal candidates can also borrow from any other sources – including their party committees – subject to the understanding that those loans are treated as contributions. (*Id.*). Under the CEP borrowing is limited to only $1,000 from a financial institution. Conn. Gen. Stat. § 9-710(a). Moreover, under the CEP's implementing rules, candidates are even prohibited from having goods or services extended to them on credit based on the possibility of receiving a post-election grant. (SEEC 2008 CEP Regulations, § 9-706-2(b)(16), Pl. Ex. 13).

In party dominant districts, "major party candidates have proven to be just as capable of running hopeless candidacies or no candidacies at all, as minor party candidates." *Garfield*, 537 F. Supp. 2d at 381. Thus, there is no reason why the state should grant a statutory preference to all major party candidates that allows them to receive full public funding, while requiring all minor party and petitioning candidates to satisfy additional qualifying criteria for just partial public funding. Indeed, the state's public fisc is much more likely to be raided by hopeless major party candidacies than hopeless minor party candidacies. This is especially true in light of the impact of the matching fund provisions. *See* Decl. of Peter Mills, Ex. 1, Maine Report, at 41-48, 65-71.

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

VI. The Appropriate Remedy is to Enjoin the Enforcement of the CEP

As a precaution against the entry of summary judgment on plaintiffs' motion, the defendants ask the Court to enter a narrowly tailored remedy that preserves as much of the CEP as possible and allows it to remain in force. That is a curious argument in view of the plain text of the statute. Although not a model of clarity, § 9-717 does not allow the Court to rewrite the statute to edit out the offending provisions if the result is to "prohibit or limit... the expenditure

of funds from the Citizens' Election Program... for grants or moneys for candidate committees." The defendants appear to recognize this aspect of the legislation, but do not explain how the limiting text can be avoided by the Court.[39] Instead, they request another round of briefing. Additional briefing would serve no other purpose than to extend this already lengthy litigation. Section 9-717 provides:

> **Sec. 9-717. Effect of court of competent jurisdiction's prohibiting or limiting expenditure of funds from Citizens' Election Fund for grants or moneys for candidate committees.** (a) If, on or after April fifteenth of any year in which a general election is scheduled to occur, or on or after the forty-fifth day prior to any special election scheduled relative to any vacancy in the General Assembly, a court of competent jurisdiction prohibits or limits, or continues to prohibit or limit, the expenditure of funds from the Citizens' Election Fund established in section 9-701 for grants or moneys for candidate committees authorized under sections 9-700 to 9-716, inclusive, for a period of one hundred sixty-eight hours or more, (1) sections 1-100b, 9-700 to 9-716, inclusive, 9-750, 9-751 and 9-760 and section 49 of public act 05-5 of the October 25 special session* shall be inoperative and have no effect with respect to any race that is the subject of such court order until December thirty-first of such year, and (2) (A) the amendments made to the provisions of the sections of the general statutes pursuant to public act 05-5 of the October 25 special session** shall be inoperative until December thirty-first of such year, (B) the provisions of said sections of the general statutes, revision of 1958, revised to December 30, 2006, shall be effective until December thirty-first of such year, and (C) the provisions of subsections (g) to (j), inclusive, of section 9-612 shall not be implemented until December thirty-first of such year. If, on the April fifteenth of the second year succeeding such original prohibition or limitation, any such prohibition or limitation is in effect, the provisions of subdivisions (1) and (2) of this section shall be implemented and remain in effect without the time limitation described in said subdivisions (1) and (2).
>
> (b) Any candidate who has received any funds pursuant to the provisions of sections 1-100b, 9-700 to 9-716, inclusive, 9-750, 9-751 and 9-760 and section 49 of public act 05-5 of the October 25 special session prior to any such prohibition or limitation taking effect may retain and expend such funds in accordance with said sections unless prohibited from doing so by the court.

The only reasonable construction of § 9-717 is that if the Court enjoins the enforcement of any provision of the CEP, the statute is rendered inoperative in its entirety. Because the CEP is a funding statute, any order entered finding that statute violates plaintiffs'

[39] *See* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment *at* 88-89

rights under the First and Fourteenth Amendments and enjoining its enforcement, will necessarily have the effect of "prohibiting or limiting the expenditure of funds from the CEP." For instance, if the Court finds that the CEP qualifying criteria and the funding provisions discriminate against non-major party candidates that would be sufficient to trigger § 9-717 because the only remedy is to enjoin the enforcement of those provisions.

The defendants' argument is suspect for a second reason. They have defended the CEP on the grounds that it must be evaluated as an integrated whole. ("Consideration of the CEP in its totality [is] required under *Burdick*. . . . ").[40] Indeed, this is the explicit basis for their defense of the matching fund provisions. ("[T]he matching fund provisions of the CEP…provide an indispensable incentive for candidates to participate in the public financing system, *without which the entire success of the CEP would be jeopardized*.") (emphasis added).[41] If the defendants are correct about the inextricable relationship between the different provisions of the CEP, they cannot very well argue that the Court should attempt to sever any offending provisions. *See Randall v. Sorrell*, 548 U.S at 262 ("To sever provisions to avoid constitutional objection would require us to write words into the statute, or to leave gaping loopholes, …or to foresee which of many possible ways the legislature might respond to the constitutional objections we have found."). Indeed, the very suggestion that the legislature might be amenable to the Court changing the terms of the statute by severing provisions or giving it a limiting construction is belied by the plain language of § 9-717.

The defendants' last argument is made in a footnote. They "ask" that any order issued prior to the November 4, 2008 elections that would affect the operation of the CEP, be stayed

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[40] Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment at 61.

[41] Memorandum of Defendants in Opposition to Plaintiffs' Motion for Reconsideration at 21.

pending appeal.[42] That issue is premature and can be addressed under the Federal Rules of Civil Procedure when and if the need arises.

CONCLUSION

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

Dated: October 3, 2008

Respectfully submitted,

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[42] Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, at p. 89, nn.28 & 29.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2008, a copy of the foregoing *Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment* was filed electronically. Notice of this filing will be sent by electronic mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Mark J. Lopez
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