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.	:	

PLAINTIFFS' PRE-TRIAL MEMORANDUM ON COUNTS II AND III

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INTRODUCTION[1]

This Court previously dismissed Counts II and III of Plaintiffs' Amended Complaint for failure to state a First Amendment claim. *Green Party of Connecticut v. Garfield*, 537 F. Supp. 2d 359, 392 (D. Conn. 2008). Those counts separately challenge the trigger provisions for excess expenditures and independent expenditures on the grounds that they pay matching funds to publicly financed candidates so that they can counter speech intended to defeat them.[2] Relying on the majority of cases that have rejected similar challenges, the Court rejected the argument that the trigger provisions burdened or penalized speech. *Id.* at 392. On October 10, 2008, the Court vacated that prior dismissal of Counts II and III, and agreed to reconsider these claims in light of the Supreme Court's decision in *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008). In the event this Court or a higher court rejects plaintiffs' main claim contained in Count I that the Citizens' Election Program ("CEP") is discriminatory as a whole, plaintiffs submit that *Davis* provides an independent First Amendment basis to invalidate the excess expenditure and independent expenditure provisions of the CEP.

The defendants respond that *Davis* involved discriminatory contribution limits and that the decision does not establish that trigger provisions necessarily burden speech. The defendants reject the application of *Davis* in the context of public financing programs that use a similar trigger mechanism. They argue, in the alternative, that the use

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[1] For the convenience of the Court, this pre-trial memorandum consolidates plaintiffs' prior briefing in support of Counts II and III made in plaintiffs' earlier memoranda in support of their Motion for Reconsideration and Motion for Summary Judgment.

[2] Although the Court dismissed Counts II and III, the legitimacy of the trigger provisions nevertheless remained applicable to plaintiffs broader First and Fourteenth Amendment claim asserted in Count I because the triggers work together with the other provisions of the statutory scheme to increase the relative advantage of major party candidates and to marginalize plaintiffs' political opportunities. *See Garfield*, 537 F. Supp. 2d at 367 n.9, 377.

of triggers in this context is narrowly tailored to serve the state's compelling interest in encouraging candidates to participate in the CEP and forgo private financing. The defendants' final argument is that plaintiffs lack standing because they cannot establish that their action would trigger matching funds.

The defendants' response is based on a narrow and erroneous understanding of *Davis* which fails to recognize the gravity of the burden on First Amendment rights at issue in this case. The fact that different interests are asserted in this case cannot avoid the conclusion that the means chosen to advance those interests are no longer permissible after *Davis* because triggers function as a *de facto* expenditure limit. The defendants must realize that expenditure limits have been considered presumptively invalid since *Buckley v. Valeo,* 424 U.S. 1 (1976) was decided.

The trigger provision for independent expenditures is suspect under *Davis* for the additional reason that it is discriminatory. The trigger protects publicly funded candidates from attacks on their campaign by giving them the resources to respond, while at the same time allowing them to reap the benefit of unlimited independent (and party) spending used to attack their privately financed opponents. That type of discrimination cannot be reconciled with *Davis* and is hardly evidence of narrow tailoring.

Finally, the argument that plaintiffs lack standing has already been rejected and the defendants have asserted nothing new that would justify a different conclusion. *Garfield*, 537 F. Supp.2d at 366-367 & n.9. The relevant case law fully supports the Court's decision. The defendants' argument simply expresses their disagreement with the Court's holding.

STATEMENT OF FACTS

I. CEP Matching Fund Provisions

All candidates participating in the CEP's public financing program agree to expenditure limits in exchange for the public grants. Conn. Gen. Stat. § 9-702(c). The expenditure limits correspond to the amount of the grant plus the qualifying contribution requirement. *Id.* The expenditure limits, however, are tempered in a number of ways that diminish their significance. Relevant to Counts II and III are matching fund provisions that release participating candidates from expenditure limits and that could increase the generous original grants by three times as much. Plaintiffs allege that these provisions act as *de facto* expenditure limits by discouraging candidates and political groups from engaging in constitutionally protected First Amendment activity.

In addition to supplemental grants triggered by excess expenditures and independent expenditures, there is another aspect of the grant provision of the CEP that is constitutionally suspect because it relies on a similar trigger mechanism. In elections involving only one major party candidate, the grant to the major party candidates is 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). This provision, like the excess expenditure provision, penalizes candidates who raise even a single dollar more than these modest amounts.

A. Excess Expenditure Matching Funds

Count II challenges the CEP's excess expenditure provisions, which give participating candidates matching funds when a nonparticipating candidate has received contributions, loans, or other funds in excess of the applicable expenditure limit (primary

or general),[3] or has spent money in excess of the applicable expenditure limit (primary or general) for the office sought. *Id.* § 9-713(a)-(f). Participating candidates are entitled to receive up to four grants, each worth 25% of the applicable grant.[4] *Id.* Additional grants equal to this amount are paid thereafter each time the opponent spends one dollar in excess of 125%, 150%, and 175% of the applicable expenditure limit. *Id.* The payments are capped at 200% of the grant amount. *Id.* § 9-713(g).[5]

B. Independent Expenditure Matching Funds

Count III challenges the CEP's independent expenditure provision, which grants participating candidates supplemental matching funds in response to independent expenditures made with the intent to promote the defeat of that candidate. *Id.* § 9-714. Independent expenditures are expenditures that are not coordinated with the candidate. *Id.* § 9-601(18). Funds are triggered under this provision when the independent expenditure combined with the spending of the nonparticipating candidate exceeds the primary or general election grant. *Id.* § 9-714(c)(2). Disclosure of independent expenditures is mandatory, even if they would not trigger the payment of matching funds.

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

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

Plaintiffs' brief in support of their Motion for Summary Judgment stated that a participating candidate is free to spend this 25% grant in full even if the nonparticipating opponent has only exceeded the applicable expenditure limit by one dollar. Although defendants did not challenge this characterization, it appears based on further review of the statute that the candidate is not free to spend the money beyond the actual excess expenditure.

[5] A review of the SEEC's public records indicates that no supplemental grants were awarded under the excess expenditure provision during the 2008 election cycle. Plaintiffs asked defendants to provide information on any supplemental grants awarded during the 2008 election cycle, in a letter request dated November 7, 2008, but have to date received no response.

Independent expenditures must be disclosed within 24 hours if made within 20 days of an election, or within 48 hours if made more than 20 days before an election. *Id.* § 9-612(e)(2). *See also* SEEC, Basic Requirements for 2008 General Election Candidates, available at http://www.ct.gov/seec/lib/seec/Basic_Requirements_for_2008_General_Assembly_Candidates2.pdf, at 8 (explaining independent expenditure reporting requirements). The failure to file such disclosures leads to the imposition of fines and penalties. Conn. Gen. Stat. § 9-612(e)(5).

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

The CEP's independent expenditure provision had a limited impact during the 2008 election cycle. A review of the SEEC's public meeting minutes[6] shows that the

[6] SEEC agendas and minutes are available at http://www.ct.gov/seec/cwp/view.asp?a=2358&Q=305490 (last visited Nov. 12, 2008).

SEEC considered several matching funds requests but apparently only granted a single request. This grant was awarded on October 15, 2008 to State Assembly candidate Jason W. Bartlett (a Democrat in Assembly District 2) for $630 in matching funds, in response to a flyer distributed by the Bethel Republican Town Committee. (*See* Minutes of the SEEC Regular Meeting, Oct. 15, 2008, at 4, available at http://www.ct.gov/seec/lib/seec/Minutes_10-15-2008_Final%27.pdf (last visited Nov. 12, 2008) ("SEEC Oct. 15, 2008 Minutes"), attached to this brief as Ex. 1.)

However, the experience of other states indicates that these matching funds will increasingly come into play in the future. Indeed, the Connecticut legislature was confident enough in the relevance of these provisions to include them in the CEP and to find them to be a necessary component of the program. Moreover, matching fund requests are more likely to appear in competitive races. Notably, the Second Assembly District race cited above, where independent expenditure matching funds were awarded to the Democratic candidate, was a relatively competitive district; Bartlett ultimately won with 5,966 votes, compared to 5,021 votes for his competitor Melanie O'Brien, who ran as a Republican and Independent. *See* CT Secretary of State, Election Results for State Representative, available at http://www.sots.ct.gov/sots/lib/sots/electionservices/electionresults/2008_election_results/2008_state_representative.pdf (last visited Nov. 12, 2008). Other competitive races will likely attract such independent expenditures in the future.[7]

[7] The Connecticut legislature has a solid Democratic Party majority at present. If the control of the legislature is up for grabs in the future (as it was in New York in 2008, where the State Senate switched from Republican to Democratic control), then the introduction of greater independent expenditures into the system would become even more likely.

Moreover, the independent expenditure provision will inevitably increase the number and size of supplemental grants as contributors redirect their money to political committees that work to promote the defeat or election of candidates. This is the conclusion reached in a report prepared for the New Jersey Legislature following a pilot program implementing public financing in three legislative districts in 2007. (Conclusions & Recommendations on New Jersey's "Clean Election" Experiment, May 2008, Ex. 35 at 7.)[8] In a competitive district in New Jersey, independent expenditures triggered $100,000 in matching funds for one candidate. (*Id.*) The report also concluded that independent expenditures in Maine increased under public financing and cautioned that the same will inevitably happen in New Jersey, meaning that the demand for "rescue" or matching funds will increase. (*Id.*) A Maine report on its public financing system similarly observed a rise in independent expenditures, and concluded that money that was previously contributed to candidates was now being given to PACs and party committees for independent expenditures. (2007 Report on the Maine Clean Elections Act, attached as Ex. 1 to Amended Decl. of Peter Mills (dated Aug. 1, 2008) at 48.) Independent expenditures have also been prevalent under Arizona's public financing program, as shown by the state's significant spending on matching funds. During the 2008 general election, Arizona disbursed $983,521.66 in independent expenditure matching funds to candidates, out of a total of $4,549,597.72 in general election disbursements. *See* Arizona Citizens Clean Elections Commission, 2008 General Election Candidate Listing, available at http://www.azcleanelections.gov/ccecweb/ccecays/ccecPDF.asp?docPath=docs/2008GeneralElection.pdf (last visited Nov. 18,

[8] Unless otherwise noted, all exhibit numbers refer to the exhibits accompanying Plaintiffs' Motion for Summary Judgment, dated July 10, 2008.

2008). *See also McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (upholding ban on "electioneering communications" by special interest groups based on record showing that that they were used to circumvent limits on corporate expenditures).

In fact, the SEEC has promulgated regulations that define independent expenditures so that this provision is more easily triggered. (SEEC 2008 CEP Regulations, § 9-714-1, Ex. 36.) First, it defines public communications as any communication by any individual or organization. It extends to all political literature or advertising. And it is not limited to independent expenditures by corporations and labor unions. These are the organizations whose independent expenditures have traditionally been regulated due to their ability to aggregate wealth and have an undue influence on the electoral process. Under this provision, communications by the Green Party itself that meet the statutory definition of independent expenditures are subject to regulation.

The statute also substantially expands the definition beyond explicit words such as "vote against", "defeat", or similar bright-line words, in favor of words that will encompass almost any communication that can be viewed as promoting the defeat of a participating candidate.

The new text provides:

> Section 9-714-1
> Independent Expenditures
>
> (a) A person makes or obligates to make an independent expenditure with the intent to promote the defeat of a candidate … if the independent expenditure expressly advocates the defeat of such candidate.
>
> (b) "Expressly advocates" shall mean:
>
> 1. …or

> 2. Making a public communication which names or depicts one or more clearly identified candidates, which, when taken as a whole and with limited reference to external events, contains a portion that can have no reasonable meaning other than to urge the defeat of the candidate(s), as evidenced by factors such as the presentation of the candidate(s) in an unfavorable light, the targeting, placement, or timing of the communication, or the inclusion of statements by or about the candidate.

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

The new text represents a significant departure from the traditional definition of independent expenditures which was previously limited to words of express advocacy and provides "rescue funds" for any negative ads.[9] The purpose and effect of the expanded definition is to encompass more speech, which will trigger the matching fund provision more easily. As a result, more candidates will qualify for matching funds, leading to an increase in overall spending by major party candidates. The spending gap between the major and minor parties will inevitably increase.

C. Supplemental Funds Triggered by Entrance of Minor Party Opponent

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

[9] As explained below, although the SEEC regulations purport to follow the Supreme Court's opinion in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL*"), these regulations will in fact capture far more speech than the statue that was under review in *WRTL*. *See infra*, Argument § II.B.3.

$25,000. It makes no difference whether the minor party candidate qualified for public funding or not. This provision will discourage nonparticipating minor party candidates from spending up to the limit. (Supplemental Declaration of S. Michael DeRosa, dated Nov. 18, 2008 ("DeRosa Supp. Decl.") ¶¶ 33-35.)

II. Impact of CEP and the Matching Fund Provisions

Minor party and independent candidates are competing in a more competitive and more expensive environment since the implementation of the Citizens Election Program. The ease with which major party candidates can qualify for public financing is a powerful inducement for major party candidates to square off against each other in races that were previously abandoned by one party or the other. As a result, minor parties have had to reassess their ability to compete and adjust their strategies for future elections. The CEP has made it harder for minor parties to run effective races, and this has in turn made it harder for minor parties to recruit candidates and attract contributions, media attention and public support. The increased competition will inevitably reduce opportunities to participate in candidate forums and debates, as well as opportunities for earned media. In effect, minor parties will be inevitably crowded off the stage. Over time, this will decrease their share of the vote, diminish their already limited success and dilute their already modest resources. (DeRosa Supp. Decl. ¶ 3.)

The increased competition will also diminish the ability of third party candidates to qualify for the CEP, because it will be more difficult for parties to attract the prior vote total thresholds in a three-party race than in a two-party race. Mike DeRosa, for instance, has twice previously polled more than 10% of the vote when he ran in a two-party race

against Democrat John Fonfara for State Senate. In 2008, in a three-party race against a Democrat and Republican, he polled less than 5%. (*Id.* ¶ 4.)

The matching fund provisions are a critical part of the CEP's discriminatory scheme, and will exacerbate the disparities between major parties and minor parties. They will directly affect the Green Party and other minor parties in at least two distinct ways. First, they effectively reduce minor parties and their candidates to bystanders when supplemental funds are triggered by the actions of major party candidates and their supporters. (DeRosa Supp. Decl. ¶ 18.) This increases the funding disparity that already exists under the CEP. *See Garfield*, 537 F. Supp. 2d at 377. Second, they directly penalize minor party speech and blunt any fundraising success or advantage independent candidates gain by staying outside the public financing system. (DeRosa Supp. Decl. ¶ 18.)

A. Impact of Independent Expenditure Provision on the Speech of Political Parties and Organizations

The most direct restraint is on the Green Party's ability to speak out on its own in opposition to a participating candidate. For instance, where a Green Party candidate has qualified for public funding, the party would be penalized if it distributed a mailing critical of the opposing candidate. (DeRosa Supp. Decl. ¶ 20.) Under an equally likely scenario, in an election where the Green Party is not running a candidate but wants to support one of the major party candidates, the party would be penalized if it paid for a mailing or literature drop critical of the opposing candidate. (*Id.*) The defendants are correct that the Green Party has not engaged in this type of advocacy in the past, but it has endorsed major party candidates. (*See id.* ¶¶ 21-24 (describing Green Party endorsement of Democratic candidate in 2006).) As part of its future strategy, the Green

Party plans to engage in advocacy in opposition to candidates whose views the party disagrees with. (*Id.* ¶ 21.) In such situations, the matching fund triggers will discourage the party from making independent expenditures.

The potential for the independent expenditure trigger to limit independent speech by political parties and other political organizations is heightened because the challenged provision broadly defines independent expenditure to capture almost any communication that is critical of an opposing candidate. *See infra*, Argument § II.B.3. Indeed, as noted above, the only independent expenditure matching grant awarded in 2008 was for $630 in matching funds, in response to a flyer distributed by a Republican Party Town Committee. (*See* SEEC Oct. 15, 2008 Minutes, attached as Ex. 1.) This flyer is similar in scope and cost to the type of independent communication that the Green Party would make in the future. (DeRosa Supp. Decl. ¶ 25.)

A final aspect of the independent expenditure provision that places a unique burden on minor parties is the accompanying disclosure requirement. Disclosure of independent expenditures is mandatory, even if they would not trigger the payment of matching funds. Independent expenditures must be disclosed within 24 hours if made within 20 days of an election, or within 48 hours if made more than 20 days before an election. Conn. Gen. Stat. § 9-612(e)(2). The failure to file such disclosures leads to the imposition of fines and penalties. *Id.* § 9-612(e)(5). Although this provision is designed to facilitate the payment of supplemental grants triggered by independent expenditures, it also creates an unnecessary burden on minor parties and other advocacy groups who wish to speak in favor of any candidates. These disclosure requirements burden the First Amendment rights of any individuals who wish to spend their own money to take

independent actions in support of a candidate without government interference or regulation. These requirements also force minor parties to act within 24 or 48 hours, even where their disclosures have no consequence.

The independent expenditure provision also affects minor parties by deterring other outside groups from speaking out against the major party candidates. If an advocacy group decides to scale back its criticism of Governor Rell's environmental or health care policies in the next election because of the trigger provision, that decision to stay silent disadvantages her Democratic and Green Party opponents alike – no less than if the Green and Democratic parties scaled back their criticism of the Governor's policies directly. (DeRosa Supp. Decl. ¶ 26.) Any regulation of speech that discourages independent speech against the candidates of the two major parties is a benefit to the major parties and a burden on minor parties who are challenging that system.

B. Impact of Excess Expenditure Provision on the Speech of Political Parties and Candidates

The excess expenditure provision also directly restrains minor party speech by preventing independent candidates from running a full-throttle campaign outside the CEP's public financing system. In a legislative race, a candidate who spends as little as $30,000 on a State Assembly seat would begin to trigger additional funds for his opponent. Although in the past, minor parties candidates have not typically raised or spent the amount of money that would trigger the excess expenditure provision, minor parties now face greater pressure to raise more money, and to attract candidates who have the ability to self-finance or raise large amounts of money. (DeRosa Supp. Decl. ¶¶ 29-32.) The alternative is to accept the weakened position that the CEP has left minor parties in. The only way for minor parties to maintain their relative position is to raise

more money, but this law would thwart that strategy. (*Id.* ¶ 29.) Independent candidates like Governor Weicker, who have an opportunity to defeat major party opponents, are now at a disadvantage because the CEP eliminates any fundraising advantage they might gain. (Weicker Decl. ¶ 21, Ex. A-2.) This would distort the dynamic in an election and could change its outcome. (*Id.*) The excess expenditure provision punishes minor party and independent candidates who have the ability to self-finance or raise large amounts of money. Invariably, this will make it more difficult for minor parties, including the Green Party, to recruit candidates with the ability to self-finance or raise the amounts of money necessary to run an effective campaign. (DeRosa Supp. Decl. ¶¶ 29, 37-38.)

The CEP is forcing minor parties to reassess their ability to compete in a more crowded field. They will need to be more careful about which races they target, and how they spend their limited resources. (DeRosa Supp. Decl. ¶ 30.) It is foreseeable that the Green Party would concentrate all its resources on a candidate if he or she had an opportunity to win a legislative or statewide seat. (*Id.*) Although the Party has not acted in this role in the past, part of its new strategy if it wants to remain relevant is not only to increase the party's role in fundraising, but to be more strategic in how it deploys that money. (*Id.*) Under these circumstances, a privately-financed Green or Libertarian Party candidate in a competitive election could easily have expenditures that would trigger matching funds for his opponents. (*Id.*)

C. Increased Grants for Candidates Facing Minor Party or Petitioning Party Opposition

Candidates facing limited minor party or petitioning party opposition are eligible for 60% of the base general election grant. When a minor party candidate in a legislative race raises as little as $5,000 (State Representative) or $15,000 (State Senate), his major

party opponent is paid the full base grant amount. Conn. Gen. Stat. § 705(j)(4). This provision, like the excess expenditure provision, penalizes candidates who raise even a single dollar more than these modest amounts. Ostensibly, this provision assumes that the minor party candidate who raises this amount of money would qualify for public financing. But the law is not limited to those circumstances. The provision applies equally to candidates who are self-financed or otherwise do not qualify for public financing. So an independent candidate for State Assembly, for instance, who raises $1,000 each from five business associates, would trigger this provision. (DeRosa Supp. Decl. ¶ 34.) Even in the circumstances of a candidate who does qualify for public financing, this provision does not distinguish between candidates who qualify for full or partial financing.

This provision, like the excess expenditure provision, will have a dampening effect on the enthusiasm and ability of third party candidates to raise money and run competitive races. This provision, even more than the excess expenditure trigger, is likely to come into play and deter spending, because the threshold is so low. (DeRosa Supp. Decl. ¶ 35.) It will also make it more difficult for minor parties to attract candidates who could self-finance or who could raise the amounts of money necessary to run an effective campaign. (*Id.*) At some point, the whole exercise becomes futile if every attempt by a minor party candidate to run a competitive race is met by a government financed response.

ARGUMENT

I. After *Davis*, Matching Fund Provisions are no Longer Permissible because they Unconstitutionally Burden the First Amendment Rights of Candidates, Political Parties and Independent Groups

As this Court recognized in granting the Motion to Reconsider, *Davis* makes clear that the CEP's matching fund provisions burden plaintiffs' First Amendment rights. *See* October 10 Hearing Tr. At 9:13-16 ("*Davis* made clear for the first time that providing a benefit to one's opponent constitutes a burden on First Amendment rights. It wasn't clear to me that under *Buckley* that that was the case.")

In *Davis*, the Court by a 5-4 vote struck down a little-known provision of the McCain-Feingold campaign-finance law aimed at leveling the playing field for opponents of wealthy candidates who decide to finance their own campaigns. The so-called "Millionaire's Amendment" ruled on in *Davis* requires self-financing candidates to declare their intention to spend more than $350,000 of their own funds, and then to report when they cross that line. Opponents of the self-financed candidates are then allowed to raise money from individuals at a contribution limit that is three times that of the original contribution limit ($6,900 as opposed to the usual maximum of $2,300), among other benefits. To the majority, the law imposed an "unprecedented penalty," 128 S. Ct. at 2764, and a "substantial burden" on the self-financed candidates, *id.* at 2773. The Court also struck down the law's disclosure requirements, because the burden imposed on plaintiff's First Amendment rights was not justified by any legitimate government interest. *Id.* at 2775.[10]

[10] The disclosure requirements here would also violate the First Amendment if the matching fund provisions are found unconstitutional. *See Davis*, 128 S. Ct. at 2775.

Justice Alito, writing for the majority, said the "asymmetrical" treatment of opposing candidates "impermissibly burdens [Davis'] First Amendment right to spend his own money for campaign speech." *Id.* at 2771. Justice Alito said the law forced a self-financing candidate into a Catch-22: Either the self-financed candidate could limit his or her own spending, or risk triggering a system that helps his or her opponent raise significantly more money. *Id.* at 2772. That kind of government-compelled choice violates the First Amendment unless it serves a "compelling state interest." *Id.*

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

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

Davis, 128 S. Ct. at 2772.

The Court rejected the government's main justification for the provision, namely that it would "level electoral opportunities for candidates of different personal wealth." The Court held that far from being a compelling governmental interest, this justification did not even rise to the level of a *legitimate* government interest – as had been held in previous Court decisions. *Id.* at 2773. Significantly, the Court warned that restricting a

candidate's speech "in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office." *Id.*

In this case, the trigger provisions force the speaker to make the same impermissible choice of having to either limit his own expenditures or "endure the burden" of activating increased expenditure limits (and grants) for his major party opponents. *Id.* at 2772. The burden on plaintiffs is real and substantial. *See supra,* Statement of Facts § II. As a result, just like in *Davis*, these provisions must serve a "compelling state interest." *See Davis*, 128 S. Ct. at 2772.

In dismissing Counts II and III, the Court's analysis was limited to its conclusion that the matching fund provisions did not burden plaintiffs' First Amendment rights. *Garfield*, 537 F. Supp. 2d at 391-92. The Court relied on a number of appellate decisions that rejected the First Amendment claim raised here and upheld similar matching fund provisions as a necessary "carrot" to offset the relative burden of agreeing to expenditure limits and as a "stick" to encourage maximum participation. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464-65 (1st Cir. 2000); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1550 (8th Cir. 1996). These decisions are also called into question by *Davis*, which instead adopted the reasoning of the one decision that is in conflict with the other circuit decisions. In *Davis*, 128 S. Ct. at 2772, the Court cited with approval to *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (concluding that a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures). *Day* previously invalidated a matching fund

provision in the context of a comprehensive public financing system similar to the one at issue in this case. Although the logic in *Day* had been uniformly rejected by this and every other court to consider similar provisions, *see Garfield*, 537 F. Supp. 2d at 391, plaintiffs would urge the Court to reconsider the precedential value of *Day* in light of *Davis*.

The defendants argue that the logic of the earlier cases upholding matching fund provisions identical or similar to Connecticut's remains sound after *Davis*.[11] While that argument is plausible since the trigger mechanism at issue in *Davis* did not specifically arise in the context of a public financing system, it is ultimately based on a narrow and unreasonable reading of both *Davis* and the Supreme Court's seminal decision in *Buckley v. Valeo,* 424 U.S. 1 (1976), upon which *Davis* rests. Moreover, this argument ignores the significance of the previously disapproved decision in *Day*, and other campaign finance decisions which have recognized that a matching fund trigger is effectively a regulation of expenditures. *See Anderson v. Spear*, 356 F.3d 651, 667 (6th Cir. 2004) (matching fund triggers are impermissible when they are effectively an indirect regulation of candidate expenditures). This regulation of campaign expenditures, even indirectly, is forbidden under *Buckley*. *Id.*[12]

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[11] When *Davis* was originally decided in the district court upholding the "Millionaires' Amendment," the defendants immediately brought the decision to the attention of the Court arguing that the claim rejected in that case is "very similar" to the claims raised in this case. Letter from S. Novak to J. Underhill, dated Sept. 12, 2007, at 2.

[12] The defendants acknowledge that at least one U.S. District Court has already cited *Davis* as authority for invalidating a matching funds provision. See *McComish v. Brewster*, No. cv-08-1550-PHX-ROS, 2008 WL 4629337 (D. Ariz. Oct. 17, 2008); Sept. 5, 2008 Letter to Judge Underhill from Ira Feinberg. While denying the preliminary injunction request due to the late stage of the election, the Court found that the plaintiffs had established a "very strong likelihood of success on the merits" of their First Amendment claim. *Id.* at *12. The court noted that although the Arizona Act's matching fund mechanism differs from the statute in *Davis*, "it enforces substantially the same coercive choice on traditional candidates -- to 'abide by a limit on personal expenditures' or else endure a burden placed on that right." *Id.* at *6 (citing *Davis* at 2772).

The Court, in *Buckley*, held that involuntary limits on a candidate's campaign expenditures are unconstitutional. 424 U.S. at 58. This holding would be rendered meaningless if the government could effectively force privately funded candidates to abide by expenditure limits by punishing those who refuse to participate in public campaign finance schemes. *Davis* makes explicit what was implicit in *Buckley*. The decision broadly rejects the argument that the government has any legitimate interest that would justify increasing the relative ability of one group of candidates to compete by limiting the expenditures of a second group. 128 S. Ct. at 2773 (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").

The defendants fail to recognize this fundamental aspect of *Davis* and limit their analysis to the discriminatory contribution limits *per se*. If the issue was that simple, the Court in *Davis* would have analyzed the case under the more deferential First Amendment standard that applies to restrictions on political contributions. Instead, the Court analyzed the challenged regulation as an expenditure limit and applied "strict scrutiny." *See Davis*, 128 S. Ct. at 2772. The defendants gloss over the importance of how the Court framed the issue, but the Court's assessment of the trigger mechanism as an expenditure limit is critical to a proper understanding of the grave First Amendment interests that are at stake in this case.

The Court was concerned with the operation of the trigger mechanism *itself* – and the *de facto* expenditure limit it imposed on candidates. The plaintiff in *Davis* maintained that § 319(a) unconstitutionally burdened his exercise of his First Amendment right to make unlimited expenditures of his personal funds because making expenditures that

create the imbalance has the effect of enabling his opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of his own speech. 128 S. Ct. at 2770. The Court agreed:

> *Buckley*'s emphasis on the fundamental nature of the right to spend personal funds for campaign speech is instructive. While BCRA does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right. Section 319(a) requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.... Under § 319(a), the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics. Cf. *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 14, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) (finding infringement on speech rights where if the plaintiff spoke it could "be forced ... to help disseminate hostile views").

Davis, 128 S. Ct at 2771-72.

The irony of the defendants' position is that, even if analyzed on their terms, the trigger provisions would fail because they discriminate in the same manner as the provision challenged in *Davis.* Independent expenditures that target the defeat of a participating candidate trigger matching payments to the candidate and effectively increase his expenditure limits. Independent expenditures targeting a non-participating candidate are not offset against the participating candidates funding or limits. The trigger provision for independent expenditures allows the publicly-funded candidate's party or other individuals to make virtually unlimited independent expenditures that directly advocate the defeat of the two challengers, as long as those expenditures are not coordinated by the candidate or his campaign. *See Garfield*, 537 F. Supp. 2d at 377. The

result could easily throw the whole election out of balance by giving one candidate a decided financial advantage.[13]

The independent expenditure provision is suspect for the additional reason that it punishes a candidate for speech that it out of his control. In *McComish v. Brewster*, for instance, the plaintiff candidate testified that a $6,000 independent expenditure made by the Arizona Realtors Association to attack his opponent "hurt more than it helped," because "the expenditure on [his] behalf was not consistent with what [he] was trying to do," but "[his] opponents received the [matching fund] cash so that they could use it efficiently." *McComish*, 2008 WL 4629337, at * 2. Because the independent trigger provisions here are similarly outside the strategic control of the non-participating candidate, the extent of additional public funding that they provide is particularly unjust. The matching funds slant the playing field by giving one candidate a major financial benefit. For example, if NARAL targets a gubernatorial candidate in the 2010 elections with a $20,000 campaign because of that candidate's position on an issue important to NARAL, their conduct will trigger a $20,000 supplemental matching grant to the candidate who is the target of NARAL's speech. This imposes an unprecedented penalty,

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[13] Consider the circumstances of Governor Lowell Weicker if the CEP was in effect in 1990 when he was elected governor as an independent. He would have faced a lose-lose situation. By failing to qualify, he gains no advantage because, regardless of how much he could have raised privately (and he did raise more than his Democratic opponent), the matching fund provision would not only have thwarted his funding advantage but would have, in effect, imposed a 25% penalty on the first dollar he spent over the applicable expenditure limit. Conn. Gen. Stat. § 9-713(a)-(f). If his opponents received a primary grant, he would be at a further disadvantage. On the other hand, if he had qualified for a 1/3 partial grant through the petitioning process (which he acknowledges he might have done given his name recognition, proven contributor base, organized ground game, and lead in the polls from the outset), he would have faced a 3:1 spending disadvantage against both major party candidates. He could not have competed under these circumstances and could not have made up the difference hobbled by the $100 limit on contributions and the restriction on borrowing. (Weicker Decl. ¶ 18, Ex. A-2). If you factor in the value of independent expenditures that might trigger additional funds to his major party opponents, he might very well have foregone his run as an independent candidate. All of these factors would have decidedly distorted the playing field and almost certainly influenced the outcome of the election.

not only on NARAL's speech, but also on competing candidates who may or may not agree with NARAL's message but are placed at a funding disadvantage for actions outside their control.

The Supreme Court's unambiguous assessment of the punitive nature of §319(a) and its impact on speech cannot be summarily dismissed simply because the trigger mechanism under consideration in that case did not arise in the context of a public financing system. Indeed, the Court's apparent approval of the directly analogous decision in *Day v. Holahan, supra,* is persuasive evidence that the Court's holding is not limited to the facts of the case.

In *Day,* the Eighth Circuit struck down the matching funds provision in Minnesota's public campaign finance scheme. 34 F.3d at 1366. The challenged matching fund provision was triggered by independent expenditures. The law was actually less burdensome than Connecticut's matching funds provision. Minnesota's law only matched independent expenditures, but not "excess" candidate expenditures. Independent expenditures were matched by one-half the amount spent to advocate the publicly financed candidate's defeat (while also increasing that candidate's spending limits). *Id.* at 1359. Connecticut's scheme matches the independent expenditure dollar-for-dollar and increases the government funded candidate's expenditure limit by the amount of matching funds issued. Matching funds are also triggered under the provisions that are tied to expenditures by non-participating candidates. *Id.*

In *Day*, the Eighth Circuit examined the effect on independent expenditures when the government pays matching funds to the political candidates whose election the independent expenditure is designed to defeat. 34 F. 3d at 1359. Not surprisingly, the

court found that the threat of triggering payments to government funded candidates caused independent groups to self-censor. *Id.* at 1360. This is because "[t]he knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech." *Id.* Moreover, as the Eight Circuit recognized, independent expenditure triggers are particularly problematic under the First Amendment because they single out "particular political speech – that which advocates the defeat of a candidate and/or supports the election of her opponents – for negative treatment." *Day*, 34 F.3d at 1360. These content-based regulations require a court to apply the most exacting scrutiny available. *Id.* at 1361. The Eighth Circuit appropriately found that Minnesota's comparable independent expenditure provisions placed a burden on First Amendment rights that did not satisfy "strict, intermediate, or even the most cursory scrutiny." *Id.* at 1362.

The analysis in *Day* (and *Davis)* has until now been largely rejected. *See Daggett,* 205 F.3d at 464-465; *Gable v. Patton,* 142 F.3d 940 (6th Cir 1998); *Rosenstiel v. Rodriguez*, 101 F.3d at 1550. Indeed, this Court declined to adopt *Day*'s logic when confronted with the challenge to Connecticut's matching funding provisions. *Garfield*, 537 F. Supp. 2d at 391-92. The Court in *Daggett* upheld a matching funds provision nearly identical to the Connecticut provisions that plaintiffs challenge in this case. The First Circuit's rejection of *Day* is premised on the oft-quoted proposition that under the First Amendment, individuals "have no right to speak free from response." 205 F.3d at 464.

Plaintiffs agree that the First Amendment does not protect a right to speak free from response. But objecting to being "directly responsible for adding to" the campaign coffers of a candidate the speaker opposes is a far cry from asserting a right to speak free from response. *Day,* 34 F. 3d at 1360. The First Circuit failed to account for the true cost to candidates and political organizations of triggering matching funds when they speak out against a government funded candidate: namely, there is a chilling effect on the exercise of constitutionally protected speech when the direct result of that speech is to provide one's opponent with a large cash subsidy. *See Anderson v. Spear*, 356 F.3d at 667 (matching fund triggers are impermissible when they are effectively an indirect regulation of candidate expenditures); *McComish*, 2008 WL 4629337, at *6 (finding after *Davis* that the Arizona clean election law's matching fund mechanism "enforces substantially the same coercive choice on traditional candidates [rejected by *Davis*] – to 'abide by a limit on personal expenditures' or else endure a burden placed on that right," and that the Arizona law thereby "imposes a substantial burden on the First Amendment right to use personal funds for campaign speech." (quoting *Davis*, 128 S. Ct. at 2772)).

The defendants minimize the harm to plaintiffs by arguing, in effect, that the plaintiffs do not have the resources to trigger the matching fund provisions. The fact that plaintiffs have not spent these amounts in the past is not dispositive, because the State may not set up rules that would prevent plaintiffs from doing so in the future. *See Garfield*, 537 F. Supp. 2d at 379 ([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."). As discussed in the Statement of Facts, and the later Argument section on plaintiffs' standing, these

provisions in fact impose direct restraints on the speech of all political parties and advocacy groups, including the Green and Libertarian Parties, and limit the ability of minor party and independent candidates to compete in state and legislative elections by regulating their expenditures.

In any event, the defendants' argument that plaintiffs and other minor party and independent candidates lack the resources to trigger the matching fund provisions is factually incorrect. The defendants' position is contradicted by their own submissions showing that minor party candidates are fully capable of raising the amount of money necessary to trigger matching funds. (*See* Supp. Decl. of Jon Green, dated Sept. 4, 2008, at ¶¶ 9 & 13 (describing thousands of dollars raised by two Working Families Party candidates in their effort to qualify for public financing through the petition process)). To be sure, the Court need not look further than the election of Governor Weicker and Senator Lieberman and the similar success of Independent statewide candidates in other States (including Maine and Vermont) to know that the public can become dissatisfied with the major parties. Even at the local level, minor party candidates are increasingly being elected to office in Connecticut. *See* Factual Section, Plaintiffs' Memorandum in Support of Motion for Summary Judgment.[14]

The burden on speech that the Court struck down in *Davis* was the mere opportunity to raise more money under increased contribution limits (and the suspension of the party coordinated expenditure limits). *Davis,* 128 S. Ct. at 2765. Unequal contribution limits are certainly a benefit, but not nearly the same benefit as a check cut

[14] The defendants have no basis to argue that the Green and Libertarian Parties will not limit future expenditures urging the defeat of an opposing candidate. The defendants scoff at the suggestion, but that response is not sufficient to rebut plaintiffs' evidence on the issue. The Green Party may in fact increase future expenditures in response to the more competitive political environment its candidates are now competing in. (DeRosa Supp. Decl. ¶¶ 30-31.)

by the government directly to your opponent's campaign. Under matching funds provisions, the harder a privately financed candidate works at fundraising, the more his government funded opponent benefits. Matching funds give government funded candidates a free ride on their privately financed opponents' coat-tails. No less is true of independent expenditures made by the candidate's party or by independent groups. The result is those privately funded candidates and their parties and groups that might support them face two choices, both bad: accept expenditure limits by running for office with government funds or suffer the punitive provisions of the public campaign finance scheme.

Any limitation upon private expenditures for political speech, whether direct or indirect, is not compatible with the First Amendment's free speech guarantee. Matching funds are designed to limit both candidate speech and independent expenditures. Matching funds thus compel privately financed candidates to abide by the same expenditure limits as government funded candidates and punish those candidates or independent groups who dare to robustly exercise their free speech rights.

II. The Matching Fund Provisions are not Narrowly Tailored to Serve a Compelling State Interest

Having established that the matching fund provisions burden plaintiffs' First Amendment rights to political speech, the burden shifts to the government to prove that these provisions advance a compelling a state interest and are narrowly tailored. *See Buckley*, 424 U.S. at 44-45; *Davis*, 128 S. Ct. at 2772. Defendants can prove neither.

A. The Matching Fund Provisions do not Advance a Compelling State Interest

Although the defendants have conspicuously tried to avoid framing the issue in terms of "leveling the playing field" in elections, there is no doubt that that is the purpose of the matching fund provisions. The fact that the defendants characterize their interest in terms of "encouraging participation by candidates who fear being outspent" does not alter the fact that the trigger provisions serve that interest by "leveling the playing field."[15] The defendants are right that the availability of matching funds is intended as a "carrot." What they omit from their discussion is that the trigger provisions are also intended as a "stick" to discourage candidates from opting out of public financing by ensuring that they gain no advantage from spending freely. This "stick" is impermissible when it functions to limit a non-participating candidate's campaign expenditures. *See Anderson v. Spear*, 356 F.3d at 667 (characterizing a Kentucky matching fund provision, which triggered additional funds to a participating candidate when a non-participating candidate received contributions above the participating candidate's spending limit, as "an indirect regulation on *expenditures*" that is forbidden by *Buckley* (emphasis in original)).

Given the State's acknowledged interest in limiting both excess expenditures and independent expenditures, it is clear that such systems must face significant constitutional scrutiny in light of the Court's explicit language in *Davis*. The Court explained that:

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[15] The facts are not helpful to the defendants. The CEP was designed with the goal of removing what the defendants perceived as the distorting and unhealthy effects of private financing and to provide a "level playing field" that would encourage competition from candidates without the resources to compete effectively. *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 November 17, 2008) (goals include "[a]llowing candidates to compete without reliance on special interest money," "curtail[ing] excessive spending and creat[ing] a more level playing field among candidates," and "[e]ncouraging competition in the electoral process.").

> The argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office.... Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.

Davis, 128 S. Ct. at 2773-2774.

The defendants nevertheless argue that the logic of *Daggett,* 205 F.3d 445, 464-65 and other case involving trigger provisions remains sound after *Davis.* That argument finds little support in the language of *Davis* itself. The governmental purpose justifying matching funds provision is to equalize the relative financial resources of publicly and privately funded candidates. Public campaign finance schemes intend to level the playing field so that privately financed candidates do not outspend their government funded opponents. But leveling the resources of competing speakers is not a legitimate governmental purpose. Indeed, as the Court recently recognized in *Davis v. FEC,* it is a concept "'wholly foreign to the First Amendment.'" *Davis,* 128 S. Ct. at 2773 (quoting *Buckley,* 424 U.S. at 48-49.)

The independent expenditure provision finds even less support in *Davis,* particularly since the Court cited with apparent approval the Eight Circuit's decision in *Day,* which involved a substantially similar matching fund provision that was triggered by independent expenditures. 128 S. Ct. at 2772. The only interest served by this provision is to counter speech intended to defeat the publicly financed candidate. It attempts to protect candidates from speech that is the normal grist of political campaigns

by providing them with the resources to respond to their critics.[16] While the defendants may believe that the independent expenditure match is a necessary inducement, *Davis* does not allow the State to burden speech in this manner. Moreover, to the extent the payment of matching funds under this provision gives participating candidates an advantage over their opponents or provides them with the resources to respond that they would not otherwise have, *Davis* takes a decidedly dim view of this type of government intervention into the political process. 128 S. Ct. at 2773.

Indeed, this Court has also already expressed reservations concerning the independent expenditure provision because expenditures targeting non-participating candidates are not factored into the funding equation. The publicly-funded candidate's party, or other individuals, can make virtually unlimited independent expenditures that directly advocate the defeat of the two participating candidates, as long as those expenditures are not coordinated by a participating candidate or his campaign. *See Garfield*, 537 F. Supp. 2d at 377. The First Amendment does not allow the government to subsidize one side of the debate if it has the effect of distorting the relative ability of the candidates or their supporters to speak and be heard. *See Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . "). The distorting effects of the trigger provision for independent expenditures constitute discrimination, and cannot be justified by the state's interest in facilitating debate among major party candidates only.

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[16] *See infra*, Argument § II.B.2 (describing broad construction given to the independent expenditure provision by the SEEC).

The CEP cannot withstand strict scrutiny because the government can have no legitimate – much less compelling – interest in discriminating against non-major party candidates. The state might legitimately establish non-discriminatory criteria for public financing that recognize the inherent differences between major and minor parties, *id.* at 96-104, but the state's actions cross into forbidden discrimination once it increases the competitive advantage of major party candidates (and correspondingly disadvantages non-major party candidates). *See Davis,* 128 S. Ct. at 2770-74 (Congress has no interest that would support discriminatory contribution limits that favored one group of candidates).

B. The Matching Fund Provisions are not Narrowly Tailored

"'In order to satisfy the "narrow tailoring" standard, the government must . . . prove that the mechanism chosen is the least restrictive means of advancing'" the asserted state interest. *Garfield*, 537 F. Supp. 2d at 380 (quoting *Landell v. Sorrell*, 382 F.3d 91, 125 (2d Cir. 2002), *rev'd on other grounds,* 548 U.S. 230 (2006)). Even assuming that these provisions advance a legitimate state interest, they nonetheless fail because they are not the least restrictive means of advancing that interest.

1. The Matching Fund Provisions are not the Least Restrictive Means of Encouraging Candidate Participation in the CEP Because Defendants Cannot Establish that they are Necessary to Advance that Goal

The defendants maintain that the matching fund provisions advance the State's interest in encouraging candidates to participate and that without them the success of the program would be seriously jeopardized. They conspicuously fail to cite any evidence to support this contention and rely instead on other public finance cases that have accepted the argument that the payment of matching funds is narrowly tailored to advance the

state's interest. See *Rosenstiel*, 101 F.3d at 1554. In fact, most courts, including this one, have not reached the issue because they have concluded at the outset that "triggers do not actually burden the exercise of political speech." *Garfield,* 537 F. Supp. 2d at 392. Until *Davis* was decided, this was the prevailing view expressed in *Daggett* and other cases involving trigger provisions. 205 F.3d 445, 464-65.

Even if the state's interest in facilitating its public financing system could arguably justify some burden on plaintiffs' speech, the trigger provisions are unnecessary because major party candidates already have ample incentive to participate in the CEP. For most candidates it is the only rational choice because they could not possibly raise the generous amount of money that is being handed to them on a platter. This fact alone distinguishes the Maine and Arizona public financing models which were alleged to provide inadequate funding.[17] In light of the generous grants provided by the CEP, the candidates here do not need further encouragement to participate. The legitimacy of the state's asserted interest is therefore doubtful, and cannot justify the restriction imposed on candidate's speech. *See Day*, 34 F.3d at 1361 (finding that interest in encouraging participation in public financing could not support punitive trigger provisions when candidate participation was already adequate).

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17 It is important to emphasize that the cases relied upon by the defendants were all decided in the context of public financing programs that provided public financing to all candidates on equal terms if the candidates satisfied relatively modest qualifying requirements. There was no claim that minor party candidates were unfairly excluded. The only candidates allegedly penalized were those who felt that they had no choice but to participate and accept expenditure limits which were inadequate to run an effective campaign. *See Daggett*, 205 F.3d at 452; *Association of American Physicians and Surgeons v. Brewer*, 363 F. Supp. 2d 1197, 1200 (D. Ariz. 2005). To discourage candidates from opting out, the excess expenditure provision acted as a powerful and arguably justifiable disincentive. That additional inducement is not necessary under the CEP. The combination of the generous base grants and the ability of party committees to intercede in close elections is adequate inducement given the general imbalance in the relative strength of competing major party candidates in Connecticut. More importantly, the candidates most affected by the provision are not those who voluntarily opt out, but those who are excluded.

The ease with which major party candidates can qualify for public financing provides all the encouragement they need. Major party candidates – including those with absolutely no chance of winning in legislative districts and in statewide elections dominated by one party – are presumptively eligible for full public financing. The only prerequisite they must satisfy is that they raise a minimum number of qualifying contributions. For major party candidates, this 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). Except in a handful of unusually competitive elections, the grant amounts significantly exceed actual campaign expenditures in past elections. (*See* Declaration of Alex Nikolaidis, Ex. A-8, Tables 1-4.)[18] In close elections, the organizational expenditure provisions augment the grants to ensure that every participating candidate is adequately funded.

The availability of public financing has opened up transformative opportunities for major party candidates. They are flocking to the system at a rate identified by the defendants at 75%-80%. (SEEC Report on CEP's Projected Levels of Candidate Participation 2008, Pl. Ex. 41 at 12-13.) The final participation results indicate that participation rates in Connecticut doubled the national average. (SEEC Press Release,

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[18] The defendants have challenged the accuracy of these tables on the grounds that they contain projections based on candidates' declarations that they would seek public financing, and were not based on the actual grant awards. That data was not available when the tables were prepared. The tables compare past candidate expenditures with the potential new funding available under the CEP. They plainly show that the great majority of candidates would receive thousands of dollars more in funding by participating in the CEP than they could have raised privately.

This should come as no surprise, because almost half of the legislative elections in Connecticut were previously uncontested or uncompetitive. In 2006, a full 43% of the legislative districts involved a winning candidate who was unopposed by another major party candidate or was opposed by a major party candidate who received less than 20% of the vote. *Garfield*, 537 F. Supp. 2d at 380. On December 3, 2008, when plaintiffs' proposed findings of fact are due, they will submit updated and final tables showing how actual grants compared to past expenditures. The final data may show that some participating candidates did not receive the full benefit of the CEP, but it does not change the fact that the overwhelming number of major party candidates stand to benefit greatly.

Final Public Campaign Financing Grants Awarded, Oct. 16, 2008, available at http://www.ct.gov/seec/lib/seec/Press_Release_10-16-2008_web.pdf, attached to this brief as Exhibit 2.)[19] The defendants cannot show that the high participation rate is attributable to the existence of the trigger provisions, and in fact it is highly doubtful that these provisions were relevant given the already generous base grants. What is known for certain is that there were no supplemental grants triggered by excess expenditures, and only a single modest $630 grant awarded under the independent expenditure provision.[20] This would suggest that the base grants, combined with the availability of organizational expenditures from party committees, are adequate to attract participants, and indeed there is no indication that the relatively small percentage of major party candidates who opted out, many of whom were unopposed, did so because of their concerns about being outspent.[21]

In *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), the court found that a State's interest in encouraging participation in public financing cannot support punitive trigger provisions when candidate participation is already adequate. The court explained that, because participation rates in public financing for state congressional races approached

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[19] The CEP was adopted, moreover, in conjunction with a prohibition on all fundraising by lobbyists and state contractors. Based on the presumed role of these groups in the private financing of elections, spending should decline from previous levels. Under these circumstances, there is no justification for releasing participating major party candidates from the initial expenditures limits and paying them additional matching funds.

[20] Plaintiffs base this information on the SEEC's public meeting minutes. Plaintiffs asked defendants to confirm and clarify this information in a letter request of November 7, 2008, but have to date received no response.

[21] In 2008, only 44 major party State Assembly candidates opted out of the CEP, of whom 25 were unopposed. *See* SEEC, List of Participating and Non-Participating Candidates, available at http://www.ct.gov/seec/cwp/view.asp?a=2861&q=421960 (last visited Nov. 17, 2008); CT Secretary of State, Election Results for State Representative, available at http://www.sots.ct.gov/sots/lib/sots/electionservices/electionresults/2008_election_results/2008_state_representative.pdf (last visited Nov. 17, 2008).

100% even prior to the enactment of the matching fund provisions, the triggers were not necessary to encourage candidates' involvement in public campaign financing. *Day*, 34 F.3d at 1361. According to the court, "no statute that infringes on First Amendment Rights can be considered 'narrowly tailored' to meet the state's purported interest" in encouraging participation when that interest was so limited. *Id.* Similarly, here, because candidates face overwhelming incentives to participate in the public financing scheme even without these additional matching provisions, their promulgation goes beyond what is necessary to achieve the government interest, thereby unjustifiably infringing upon First Amendment rights.

In short, there is no evidentiary basis to conclude that participation would be less if matching funds were not available. Strict scrutiny places the burden squarely on the defendants to prove that the success of the program would be actually jeopardized without the trigger provision. They cannot begin to satisfy their heavy burden by relying solely on their belief that participation rates would be less.[22] Accordingly, this interest cannot justify the matching fund provisions' burden on plaintiffs' First Amendment rights.

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[22] Moreover, even if the availability of matching funds was a factor in the decision of some candidates to participate, that would not satisfy the defendants' evidentiary burden. They would still have to show that the excess expenditure and independent expenditure provisions would actually come into play in a way that would jeopardize the success of the CEP. But during the 2008 election cycle, the SEEC provided no supplemental grants due to excess expenditures, and only one supplemental grant (for $630) in response to independent expenditures. The SEEC anticipated that the supplemental grants would not be prevalent, and predicted that the provisions were unlikely to have a major impact on the success of the program. (SEEC Report on CEP's Projected Levels of Candidate Participation 2008, Pl. Ex. 41 at 8-9.) If there is only a remote likelihood that supplemental grants will be triggered by excess expenditures or independent expenditures, then defendants' entire defense of the matching fund provisions is doubtful. *See Davis*, 128 S. Ct. at 2772; *Day*, 34 F.3d at 1361 (high participation rate in public financing program undermined justification for matching fund provision). Instead, the law is an exaggerated response to what amounts in practice to a relatively narrow public problem of electioneering communications.

2. The Independent Expenditure Triggers are not Narrowly Tailored Because They are Discriminatory

The independent expenditure provision fails narrow tailoring for the additional reason that it discriminates based on the identity of the speaker. Not unlike the "asymmetrical" contribution limits struck down in *Davis*, it provides a benefit to one candidate that is denied to another. It protects the publicly funded candidate from attack on his campaign by giving him the resources to respond while, at the same time, allowing him to reap the benefit of unlimited independent spending attacking his privately financed opponent without consequence. However, there is no corresponding trigger to punish a publicly funded candidate, or benefit a privately funded candidate, in response to independent expenditures made against a non-participating candidate. This provision not only discriminates in favor of participating candidates, whose supporters remain free to criticize non-participating candidates, but it puts the state in the position of evaluating the speaker's message. It allows the state to punish one type of speech (negative advertisements) while forcing speakers to change their message to avoid state regulation. These aspects of the law are hardly evidence of narrow tailoring and will further marginalize minor party speech. *See Garfield*, 537 F. Supp. 2d at 377.

3. The Independent Expenditure Triggers are not Narrowly Tailored Because They Capture More Speech than Necessary to Serve the State's Interests

The trigger provision for independent expenditures is suspect under narrow tailoring analysis for the additional reason that it is fatally overbroad. It is not limited to the type of communications that courts have previously allowed government to regulate to prevent corruption or undue influence of elections. *See McConnell v. FEC*, 540 U.S.

93, 204-07 (2003). The SEEC regulations define independent expenditures to include any

> public communication which names or depicts one or more clearly identified candidates, which, when taken as a whole and with limited reference to external events, contains a portion that can have no reasonable meaning other than to urge the defeat of the candidate(s), as evidenced by factors such as the presentation of the candidate(s) in a unfavorable light, the targeting, placement, or timing of the communication, or the inclusion of statements by or about the candidate.

(SEEC 2008 CEP Regulations, § 9-714-1, Ex. 36). This language is intended to track the Supreme Court's ruling in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL*"), which permitted the regulation of electioneering communications that expressly advocate a candidate's victory or defeat, but not "genuine issue ads" that exist beyond this definition. *See id.* at 2667. *WRTL*'s "as applied" challenge followed the Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), which upheld BCRA's definition of "electioneering communications," and in doing so found that the definition of express advocacy could move beyond the traditional test for "magic words" (such as "vote for" or "vote against"). *See McConnell*, 540 U.S. at 190-91. However, *McConnell* was premised on the fact that the statute's regulation of electioneering communications was limited to disclosure requirements, and to prohibitions of broadcast advertisements paid for by the general treasury funds of a corporation or union within 30 days of a primary or 60 days of a general election. *See id.* at 189-90. The Court relied on an extensive Congressional record which "found that corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections, and that remedial legislation was needed to stanch that flow of money." *Id.* at 207.

The SEEC regulations purport to follow the rule of law of *WRTL*, but they in fact capture far more speech that the federal campaign finance statute in question there. The SEEC would regulate any "public communication," made by any independent speaker. As a result, a mailing or flyer distributed by the Green Party would be subject to regulation under the CEP's matching fund triggers. This expansive approach to regulating election speech was never envisioned by the Supreme Court in *WRTL*. Unlike *McConnell*, which relied on the finding of a "torrent of televised election-related ads" to justify the BCRA's regulation of broadcast communications, there is no record here to show that all "public communications" regulated in Connecticut create a danger that justifies the burden on plaintiffs' First Amendment rights.

Moreover, the public interest at stake in *McConnell* was preventing corruption or the appearance of corruption caused by the undue influence of electioneering by corporations and unions. This interest was sufficient to allow some regulation, in part because corporations and unions still had the ability to "finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *McConnell*, 540 U.S. at 206. In contrast, the CEP not only regulates far more speech than the BCRA – under the logic of *Davis*, it is a far harsher regulation, because it will directly deter or blunt political speech through the use of matching funds to targeted candidates. The CEP targets expenditures by individuals, political parties and other advocacy groups and community organizations, even though their potential to unduly influence the political process cannot be equated with the potential for corruption attributed to large corporate expenditures. The breadth of this regulation is unrelated to the CEP's efforts to prevent corruption or

encourage participation. Accordingly, even accepting *arguendo* that the CEP's independent expenditure provisions support legitimate state interests, they are not targeted to those interests, and they regulate far more speech than the Supreme Court has permitted in its campaign jurisprudence. This lack of narrow tailoring renders the CEP's matching fund provisions unconstitutional.

4. Section 9-705(j)(4) is not Narrowly Tailored Because it Unjustifiably Increases Grants for Candidates Facing Minor Party or Petitioning Party Opposition

Candidates facing limited minor party or petitioning party opposition are eligible for 60% of the base general election grant. When a minor party candidate in a legislative race raises as little as $5,000 (State Representative) or $15,000 (State Senate), his major party opponent is paid the full base grant amount. Conn. Gen. Stat. § 705(j)(4). This provision, like the excess expenditure provision, penalizes candidates who raise even a single dollar more than these modest amounts. Unlike the excess expenditure provision, the benefitting candidate is allowed to spend the entire base grant amount. Ostensibly, this provision is an attempt to level the playing field between a major party candidate and a minor party candidate who qualifies for public funding. The triggering thresholds correspond with the amount of money that a minor party candidate must raise in qualifying donations. But the law is not narrowly tailored to those circumstances. The provision applies equally to candidates who are self-financed or otherwise do not qualify for public financing. So an independent candidate for State Assembly, for instance, who raises $1,000 each from five business associates, would trigger a 70% increase in his opponent's funding. A more narrowly tailored approach would attempt to maintain, rather than distort, the candidates' relative position.

Even if these contributions are to help a minor party candidate qualify for public financing, the value of that public financing is reduced by the fact that the major party opponent also receives significantly more public money – even though the major party opponent did not have to spend any additional funds or time on the CEP's petitioning and qualifying requirements. This is true even though the value of the grant to minor party candidates is already significantly diminished by the cost of the petition requirements. (Supp. Decl. of Jon Green, dated Sept. 4, 2008, at ¶ 9.) Once again, the increased funding distorts rather than maintains the relative position of the candidates.

III. Plaintiffs Face the Requisite Injury from the Operation of the Matching Fund Provisions to Establish Article III Standing.

The defendants do not contend that plaintiffs lack standing to challenge the matching fund provisions as part of their main claim that the CEP discriminates against minor party and petitioning candidates and their supporters in violation of the First and Fourteenth amendments. The trigger provisions are applicable to that claim because they work together with the other provisions of the statutory scheme to increase the relative advantage of major party candidates and to marginalize plaintiffs' political opportunities. Minor party candidates are essentially bystanders in this attempt to level the playing field between major party candidates. The grants are exclusively in the service of major party candidates, and will inevitably work against the candidates who are unable to qualify for public financing. The major party slugfest will inevitably further marginalize the ability of minor party candidates to be heard. *See* DeRosa Supp. Decl. ¶ 3; *see also Garfield*, 537 F. Supp. 2d at 377. The burden on plaintiffs' political opportunity that flows directly from the operation of the CEP is an injury sufficient to establish standing. *Garfield*, 537

F. Supp. 2d at 367, n.9. Whether it is sufficient to establish a constitutional violation goes to the merits. *Id.*

The defendants' argument is limited to the narrow issue of whether plaintiffs have standing to assert the separate First Amendment claims alleged in Counts II and III of the amended complaint. Those claims are based on the argument that matching funds provisions impose a *penalty* on any privately funded candidate who triggers the excess expenditure provision and on any political party or group that triggers the independent expenditure provision. The gist of the defendants' argument is that plaintiffs have not made the requisite showing that they are injured by the matching fund provisions since there is no likelihood that their actions would trigger additional payments to their opponents. That argument has already been rejected by the Court. *Garfield*, 537 F. Supp.2d at 366-367. The defendants have asserted nothing new that would justify a different conclusion.

As this Court has already explained, Article III standing's "injury-in-fact requirement 'serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem.'" *Garfield*, 537 F. Supp. 2d at 365 (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 (1973))). There is no question that plaintiffs fulfill this requirement. Indeed, this case falls easily within two lines of standing cases. First, because the matching fund provisions are designed to regulate the political speech of non-participating candidates and independent organizations, including plaintiffs, they are suffering the imminent and real "injury-in-fact" of chilled political speech. Second, in the electoral context, numerous cases recognize that a candidate has

standing to challenge regulations that affect his ability to compete. These cases provide ample authority for this Court's prior ruling that plaintiffs have standing to challenge the matching fund provisions as part of their broader First Amendment attack on the CEP. They are equally applicable to the First Amendment claims raised in Counts II and III, because of the way those provisions alter the political playing field.

A. Plaintiffs Have Standing Because the CEP's Matching Fund Provisions Burden Their First Amendment Right to Political Speech

The trigger provisions are like the proverbial "sword of Damocles; its impact is felt even when it merely hangs, it need not fall." *Garfield*, 537 F. Supp. 2d at 367. "[T]he very fact that the trigger would prevent a potential spender from spending in the first instance constitutes the injury that gives rise to standing." *Id.* The defendants maintain that more is required than this, but they fail to explain why the dampening effect on "potential spenders" and potential candidates and contributors is not sufficient when the express purpose of the trigger provision is to discourage spending.[23] The fact that the potential spender or contributor has not acted does not deprive plaintiffs of standing because it is the trigger itself that may account for that person or group holding back their contribution or limiting their spending. *Id.*

This court's analysis is consistent with the analysis of other courts that have reviewed challenges to matching fund trigger provisions and have found standing under similar circumstances. In *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995), plaintiffs challenged numerous aspects of Kentucky's campaign finance law, including a

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[23] Indeed, the explicit purpose of the trigger provisions is to limit excess expenditures and attack ads by political parties and independent groups. *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 Nov. 17, 2008) (goals include: "curtail[ing] excessive spending and creat[ing] a more level playing field among candidates").

trigger provision that awarded matching funds to publicly-financed candidates in the event of excess expenditures by privately-financed opponents. The court found that plaintiff Wilkinson had standing to allege that the law, including these triggers, was deterring him from running for office. In so finding, the court rejected defendants' claim that this injury was overly speculative. The court explained:

> [T]he defendants contend that because Wilkinson has not definitively declared that he *will* run for Governor if the purported burdens which the election statutes place upon him are lifted by this court. Instead, Wilkinson has stated only that he "may run for Governor of Kentucky." The defendants contend that the alleged harm to Wilkinson is purely speculative. Should he choose not to run, he would suffer no harm by operation of the campaign financing laws.
>
> Wilkinson has stated, however, that as long as the statutes stand in their present form he *will refrain* and *is refraining* from running for office. It is well-settled that a chilling effect on one's constitutional rights constitutes a present injury in fact. We find that this burden moves Wilkinson's claims beyond the realm of speculative injury. Wilkinson need not pronounce to a certainty that he will run for office if he obtains the requested relief. It is sufficient that he has alleged that his choice to run is hindered by the statutes he challenges as unconstitutional.

Wilkinson, 876 F. Supp. at 924 (internal quotations and citations omitted, emphasis in original).

The Fourth Circuit similarly found standing to challenge matching fund triggers in *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524 F. 3d 427, 434 (4th Cir. 2008). Two of the plaintiffs in *Leake* were political action committees who alleged that they had refrained from making political contributions to judicial candidates because of the state's Judicial Campaign Reform Act. One plaintiff specifically "allege[d] that it chose not to make expenditures on behalf of nonparticipating candidates due to a fear that such expenditures might result in the disbursement of matching funds to a participating candidate that the organization opposed." *Id.* at 434. The court found that these allegations were sufficient to establish

standing. Moreover, the court specifically rejected the state's contention that one plaintiff PAC "did not show that it had sufficient funds available to make independent expenditures in amounts that would have triggered the statutory reporting requirements." *Id.* The court also rejected defendants' argument that another plaintiff PAC had not historically made such candidate contributions. *Id.* at 435. Thus, the fact that the Green or Libertarian Parties, or any of their candidates, have not previously engaged in the type of spending that would trigger supplemental grants does not deprive them of standing. Instead, as in *Leake*, plaintiffs' statements of intent are sufficient to create standing to challenge the chilling effects of the matching fund provisions.

These analyses are directly applicable to the current case. The trigger provisions will inevitably discourage candidates, contributors, political parties, and independent groups from engaging in constitutionally protected speech under numerous different scenarios that are real, immediate, and recurring. The explicit purpose of the trigger provisions is to limit candidate expenditures and attack ads by political parties and independent groups. If a single contributor holds back a contribution to a Libertarian or Green Party candidate because he or she fears that it will trigger additional funding for the opposition or if a single candidate curtails his spending for that reason, the result is the same – less speech.

More importantly, if a single candidate is discouraged from seeking office as an independent or on a third party line because of the perceived futility of running in the face of the trigger provision, that alone is sufficient to establish standing. Mike DeRosa is co-chair of the Green Party of Connecticut, and has testified that the matching fund provisions will make it more difficult to field candidates in the future. (DeRosa Supp.

Decl. ¶ 37-38.) Governor Weicker has explained the dilemma he would have faced if the CEP was in effect in 1992. Governor Weicker examined the funding disparities created by the CEP, as well as the matching fund provisions which guarantee that an independent candidate can never accumulate a financial advantage over a major party candidate, and concluded that this law could have cost him the election. (Weicker Decl. ¶¶ 20-21, Ex. A-2.) As a result, he concluded that "the CEP will have the effect of discouraging strong independent candidates like me from challenging major party candidates." (*Id.* ¶ 25.)

The excess expenditure provision directly restrains minor party speech by preventing independent candidates from running a full-throttle campaign outside the CEP's public financing system. Although in the past, minor parties candidates have not typically raised or spent the amount of money that would trigger the excess expenditure provision, minor parties now face greater pressure to raise more money, and to attract candidates who have the ability to self-finance or raise large amounts of money. The alternative is to accept the weakened position that the CEP has left minor parties in. The only way for minor parties to maintain their relative position is to raise more money, but this law attempts to thwart that strategy. Invariably, the excess expenditure provision will make it more difficult for minor parties, including the Green Party, to recruit candidates with the ability to self-finance or raise the amounts of money necessary to run an effective campaign. (DeRosa Supp. Decl. ¶¶ 37-38.)

The independent expenditure provisions also represent a direct restraint on minor parties. It restricts their ability to speak out in opposition to a participating candidate. For instance, where a Green Party candidate has qualified for public funding, the party (and in turn its candidate) would be penalized if it distributed a mailing critical of the

opposing candidate. (DeRosa Supp. Decl. ¶ 20.) Under a second scenario, in an election where the Green Party is not running a candidate but wants to support one of the major party candidates, the party would be penalized if it paid for a mailing or literature drop critical of the opposing candidate. (*Id.*) As part of its future strategy, it is foreseeable that the Green Party will engage in more advocacy against candidates whose views they disagree with. (*See* DeRosa Supp. Decl. 21-24 (describing Green Party endorsement of Democratic candidate in 2006).) The independent expenditure trigger would punish and deter this strategy.

The Green Party and other minor parties are also injured when other groups are silenced from speaking out against major party candidates. For example, if an advocacy group decides to scale back its criticism of Governor Rell's environmental or health care policies in the next election because of the trigger provision, that decision to stay silent disadvantages her Democratic and Green Party opponents alike – no less than if the Green and Democratic parties scaled back their criticism of the Governor's policies directly.

Defendants have argued throughout that plaintiffs' claimed injury is too speculative. But courts have repeatedly cautioned against second-guessing a candidate's assessment of his future campaign decisions, as defendants urge the Court to do here. *See Leake*, 524 F.3d at 435 (rejecting defendants' argument that "conditional statements of intent are too speculative to confer standing" (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000))); *Becker v. FEC*, 230 F.3d 381, 387 (1st Cir. 2000) ("[W]e do not think it proper to second-guess a candidate's reasonable assessment of his own campaign. . . . To probe any further into these

situations would require the clairvoyance of campaign consultants or political pundits – guises that members of the apolitical branch should be especially hesitant to assume."); *Shays v. FEC*, 337 F. Supp. 2d 28, 43 (D.D.C. 2004) (finding that plaintiffs had standing to challenge campaign finance regulations that would affect how they run their campaigns, because the law's impact on plaintiffs' political strategy was an injury in fact even if speculative), *aff'd* 414 F.3d 76, 83 (D.C. Cir. 2005). *See also Friends of the Earth,* 528 U.S. at 184 (finding that "conditional statements" of intent, which allege that plaintiffs would engage in a course of conduct but for the defendants' allegedly illegal action, are not too speculative to demonstrate "injury in fact").

Moreover, to the extent that the parties disagree about the likely impact of these provisions, that disagreement is no reason to deny standing. As the First Circuit has explained, it is enough that a plaintiff perceives that his rights are chilled by a government action. *See Becker*, 230 F.3d at 388 ("[C]learly, [a candidate] who challenges a governmental action may not be denied standing merely because his challenge in a sense stems from his own choosing."). That perception, after all, is the root of self-censorship. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (self-censorship is sufficient harm for standing); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988) ("Self-censorship is immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power."). And there is no question that this "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable

injury.'" *Wilkinson*, 876 F. Supp. at 925 (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976)).[24]

B. Plaintiffs Have "Competitor" Standing

There is an additional reason why plaintiffs have standing in this case. The claims alleged in Counts II and III are essentially an alternative basis for challenging the trigger provisions that are included in the broader First and Fourteenth Amendment claim alleged in Count I. The root of the claimed injury is the same under all three counts – unfairly providing a benefit to the plaintiffs' political opponents. Defendants do not challenge the Court's finding that plaintiffs have standing to challenge the matching fund provisions as part of their main claim (in Count I) that the CEP discriminates against minor party and petitioning candidates and their supporters in violation of the First and Fourteenth Amendments. *See Garfield*, 537 F. Supp. 2d at 367 n.9. If plaintiffs have standing to challenge the matching fund provision in the context of Count I, then there is no reason why plaintiffs would lack standing to make a related First Amendment argument attacking the *same* statutory provision if the alleged injury is the same. Whether analyzed under the First or Fourteenth Amendment, the trigger provisions protect major party candidates from insurgent candidates and independent speech in a way that increases their electoral advantages at the expense of the candidate, political party or outside group whose speech is burdened.

Numerous cases recognize that political candidates and political parties have standing to challenge state election laws that shape their electoral opportunities, strategies and outcomes. As this Court has already observed, "where 'plaintiffs allege an intention

[24] In addition, just as plaintiffs have standing to challenge the trigger mechanisms, they also have standing to challenge the independent expenditure disclosure requirements. *See Davis*, 128 S. Ct. at 2768.

to engage in a course of conduct arguably affected with a constitutional interest which is clearly proscribed by statute, courts have found standing to challenge the statute, even absent a specific threat of enforcement.'" *Garfield*, 537 F. Supp. 2d at 365 (quoting *United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir.1988)). *See also Vote Choice, Inc. v. Di Stefano*, 814 F. Supp. 195, 204 (D.R.I. 1993) ("[A] long line of election law standing cases have held that a candidate or party need only be subject to election law requirements in order to have standing to challenge them."), *aff'd* 4 F.3d 26, 37 (1st Cir. 1993).

Plaintiffs' standing to challenge matching fund provisions that unfairly benefit their political opponents is supported by the Second Circuit's analysis of "competitive advocate standing." The Second Circuit has explained that a plaintiff has standing to challenge a government action that "'creates an uneven playing field' for organizations advocating their views in the public arena," so long as the plaintiff can show that "'he personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit.'" *Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183, 197 (2d Cir. 2002) (quoting *In re United States Catholic Conference*, 885 F.2d 1020, 1029 (2d Cir. 1989)). *See also Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 625-26 (2d Cir. 1989) (finding that minor-party presidential candidate was injured by inability to compete on an equal footing).[25]

[25] Other circuits have similarly found that candidates have standing to challenge electoral regulations that affect their campaigns. This is because the regulations affect plaintiffs directly, and also because plaintiffs are forced to react to changes by their political competitors. *See Shays v. Federal Election Com'n*, 414 F.3d 76, 85-86 (D.C. Cir. 2005); *Becker v. Federal Election Comm'n*, 230 F.3d 381, 387 n.5 (1st Cir. 2000); *Vote Choice v. DiStefano*, 4 F.3d 26, 37 (1st Cir. 1993) (citing *Buckley*, 424 U.S. at 12 & n.10).

Critically, in *Fulani* the Second Circuit explained that the minor party candidate's "injury does not derive solely from the fact that she ultimately failed to win the presidency in 1988. Rather, the asserted harm also flows from the League's and the federal government's *allegedly partisan restriction of her opportunities to communicate her political ideas to the voting public at large.*" *Fulani*, 882 F.2d at 627 (emphasis added). The Second Circuit also cited as "persuasive" the "judicial assessment of injury for standing purposes" found in *Common Cause v. Bolger*, 512 F. Supp. 26, 30-31 (D.D.C.1980) (three-judge court). As *Bolger* explained, political campaigns "serve other purposes besides electing particular candidates to office. They are also used to educate the public, to advance unpopular ideas, and to protest the political order, even if the particular candidate has little hope of election. The First Amendment most certainly protects political advocacy of this type, and infringements of these rights can occur regardless of the success or failure of a particular candidate at the polls." *Id.* (quoting *Bolger*, 512 F. Supp. at 32).

Defendants in this case, like the defendants in *Fulani*, have suggested that their actions are not responsible for the electoral success or failure of minor party candidates. But the Second Circuit has made clear that political opportunity cannot be measured only in votes. *See Fulani*, 882 F.2d at 627. Plaintiffs are running for public office because they hope to be elected. But independent parties know that electoral success against the two major parties requires a long-term strategy of party-building at the local level. (*See* Gillespie Exp. Aff. ¶¶ 30-34, Ex. A-7.) In the meantime, minor party candidates – like their major party opponents – are also focused on building support for their political

ideas.[26] Indeed, third parties are often responsible for introducing critical new ideas that are later adopted and enacted by the major parties, representing "a substantial and beneficial legacy for many third parties." (Gillespie Exp. Decl. ¶ 41, Ex. A-7.) The CEP, including its matching fund provisions, distorts this process, by making it harder for plaintiffs to be heard over their major-party opponents, and by discouraging plaintiffs from participating in the political process.

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[26] To illustrate the importance of these political activities, it is helpful to examine the benefits that the CEP provides to a hopeless *major party* candidate. For example, plaintiffs have already illustrated for the Court the impact of the CEP on two special elections held during the current election cycle. (Gillespie Exp. Decl. ¶¶ 37-38, Ex. A-7.) These elections were held in a State Senate and House district that were both dominated by the Republican Party. (*Id.*) As a result, Republicans had often run unopposed by a Democrat in the past, and Democrats who did run were defeated by an overwhelming majority of the vote. (*Id.*)

In 2007 and 2008, Democratic candidates, lured by the availability of generous public financing, competed in both of these special elections. (*Id.*) Notably, the House district was one where the Working Families Party had competed in the past, but did not compete in the special election. (*Id.*)

The Democratic Party candidates lost these two special elections by 20 to 30 percentage points. (*Id.*) In retrospect, these major party candidates were just as "hopeless" as a minor party candidate would have been. However, by running a campaign, the Democratic Party was able to engage in important party building activities, communicate political ideas to voters and force the Republican Party candidate to participate in a two-sided political debate. Through these activities, the Democrats might not have been able to win the election, but they were able to improve their party's future prospects, and hopefully garner public support for their message. These are all political benefits that are denied to plaintiffs and other minor party candidates excluded from the CEP.

CONCLUSION

Davis represents a major shift in the controlling law concerning the legitimacy of matching fund provisions in campaign finance schemes. Defendants have not presented a compelling interest for the CEP's triggering mechanisms, and the statute is not narrowly tailored to match the interests that have been asserted. Moreover, the reasoning this Court used in granting plaintiffs standing to assert the dismissed counts remains equally valid, if not more so, after *Davis*. The Court stands on firm ground to grant plaintiffs judgment on Counts II and III.

Dated: November 19, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2008, a copy of the foregoing *Plaintiffs' Reply Memorandum in Support of Motion for Reconsideration* 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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