UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

---	X	
GREEN PARTY OF CONNECTICUT, ET AL.,	:	
Plaintiffs,	:	CASE NO. 3:06-CV-1030 (SRU)
v.	:	
JEFFREY GARFIELD, ET AL.,	:	
Defendants.	:	
---	X	December 3, 2008

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' PRE-TRIAL MEMORANDUM ON COUNTS II AND III

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

I. FACTUAL BACKGROUND 4

A. The Matching Fund Provisions of the CEP Are Well-Designed to Incentivize Participation in the Program and Achieve its Goals 4

B. Multiple Jurisdictions Have Enacted Matching Funds Provisions in Order to Meet the Goals of Public Financing Systems 6

C. The CEP's Reporting Requirements 7

D. The CEP's Grant Reduction Provision 8

E. Matching Funds and Grant Reductions for Uncompetitive Races Are Designed to Incentivize Participation while Protecting the Public Fisc 8

i. Matching Funds Are Necessary to Incentivize Participation 8

ii. The Connecticut Legislature Tailored the Matching Funds and Grant Reduction Provisions of the CEP to Avoid Wasting Public Funds on Uncompetitive Races 11

1. The Matching Funds Grant Amounts Are Tailored to Historical Expenditures in the Most Competitive Races 11

2. Grant Reductions Apply Only in Uncompetitive Races and Are Tailored to Historical Expenditures in Such Races 13

ARGUMENT 14

I. The Appropriate Standard of Review is the *Anderson-Burdick* Standard 14

II. Plaintiffs Lack Standing to Pursue Their Matching Funds Claims 15

A. Plaintiffs' Attempts to Remedy the Deficiencies in Their Demonstration of Standing Fall Short of Article III Requirements of Injury-in-Fact 16

B. The Doctrine of Competitor Standing Does Not Establish an Exception to Constitutional Requirements of Injury-in-Fact 17

III. Matching Fund Provisions That Are Part of a Public Funding Scheme Are Constitutional 21

A. *Davis* Does Not Invalidate All Trigger Mechanisms 23

B. The Asymmetrical Burden Found in *Davis* Cannot Occur in the Context of Public Funding Programs 24

C. The *Davis* Court's Mere Citation to *Day* Does Not Overturn the Settled Consensus Among the Federal Circuits That Matching Funds Create No Burden on First Amendment Rights 27

D. Evidence From Other Jurisdictions Demonstrates That Matching Funds Have Led to More, Not Less, Political Speech 29

E. The CEP's Matching Fund Provisions Serve Compelling State Interests 30

i. "Leveling the Playing Field" is Neither a Purpose Nor an Effect of the CEP's Matching Fund Provisions' 33

F. The Definition of Independent Expenditures is Appropriately Tailored 34

IV. The Reporting Requirements of the CEP Bear a Substantial Relation to an Important State Interest 37

V. The Grant Reduction Provisions of Subsection 704(j)(4) Do Not Invidiously Discriminate Against Minor Party Candidates. 38

VI. Conclusion 41

Table of Authorities

Cases

Anderson v. Celebrezze,
460 U.S. 780 (1983) 14-15

Ass'n of Am. Physicians & Surgs. v. Brewer,
363 F. Supp. 2d 1197 (D. Ariz. 2005) 27

Becker v. F.E.C.,
230 F.3d 381 (1st Cir. 2000) 19-20

Bennett v. Spear,
520 U.S. 154 (1997) 19

Buckley v. Valeo,
424 U.S. 1 (1976) .... *passim*

Burdick v. Takushi,
504 U.S. 428 (1992) 14-15

Center for Reproductive Law and Policy v. Bush,
304 F.3d 183 (2d Cir. 2002) 19

Citizens United v. FEC,
530 F. Supp. 274 (D.D.C. 2008) (*cert. granted*, 2008 U.S. LEXIS 8422
(U.S., Nov. 14, 2008) 36

Daggett v. Comm'n on Gov't Ethics,
205 F.3d 445 (1st Cir. 2000) .... *passim*

Day v. Holahan,
34 F.3d 1356 (8th Cir. 1994) 28-29

Davis v. FEC,
128 S. Ct. 2759 (2008) .... *passim*

Duke v. Leake,
No. 08-120, 2008 U.S. Lexis 8014 (Nov. 3, 2008) 2, 28

FEC v. Wisconsin Right to Life II,
127 S. Ct. 2652 (2007) 35-36

Fulani v. League of Women Voters,
882 F.2d 621 (2d Cir. 1989) 18

Gable v. Patton,
142 F.3d 940 (6th Cir. 1998) 2, 21

Green Party of Connecticut v. Garfield,
537 F. Supp. 2d 359 (D. Conn. 2008)..15, 27

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)... *passim*

McConnell v. FEC,
540 U.S. 93 (2003).. *passim*

Norman v. Reed,
502 U.S. 279 (1992)..14

North Carolina Right to Life Comm. Fund v. Leake,
524 F.3d 427, 437-38 (4th Cir. 2008), c*ert. denied*, *Duke v. Leake*,
No. 08-120, 2008 U.S. Lexis 8014 (Nov. 3, 2008) .... *passim*

O'Shea v. Littleton,
414 U.S. 488 (1974)..21

Ohio Right to Life Society, Inc., v. Ohio Election Commission,
No. 2:08-cv-00492, 2008 U.S. Dist. LEXIS 79165 (Sept. 5, 2008) 36

Republican Nat'l Comm. v. FEC,
487 F. Supp. 280 (S.D.N.Y. 1980)..31

Rosenstiel v. Rodriguez,
101 F.3d 1544 (8th Cir. 1996) .... *passim*

Sec. Indus. & Fin. Mkts. Ass'n Garfield,
469 F. Supp.2d 25 (D. Conn. 2007)... 30-31

Sierra Club v. Morton,
405 U.S 727, 734 (1972) 20

Simon v. Eastern Ky. Welfare Rights Org.,
426 U.S. 26 (1976)..39

Vote Choice v. DiStefano,
4 F.3d 26 (1st Cir. 1993)..26, 31

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001)..3

Whitmore v. Arkansas,
495 U.S. 149 (1990) 15

Wilkinson v. Jones,
876 F. Supp. 916 (W.D. Ky. 1995) 27

State Statutes

Ariz. Rev. Stat. Ann. § 16-952(a)-(c) 6

Conn. Gen. Stat. § 9-612(e)(2) 7, 37-38

Conn. Gen. Stat. § 9-703(a) 4

Conn. Gen. Stat. § 9-705(j)(3) 8, 13, 40

Conn. Gen. Stat. § 9-705(j)(4) ..... *passim*

Conn. Gen. Stat. § 9-713 ..... passim

Conn. Gen. Stat. § 9-713(a)-(d) 5

Conn. Gen. Stat. § 9-713(g) 5

Conn. Gen. Stat. § 9-714 ..... *passim*

Conn. Gen. Stat. § 9-714(a) 5-6

Conn. Gen. Stat. § 9-714(b) 6

Conn. Gen. Stat. § 9-714(c)(1) 6

Conn. Gen. Stat. § 9-714(c)(2) 6

Fla. Stat. § 106.355 7

Me. Rev. Stat. Ann. tit. 14, §1125(9) 7

Minn. Stat. § 10A.25(10) 7

New Jersey Fair and Clean Election Pilot Project Act,
New Jersey Pub. L. No. 2007, ch. 60 (expired June 6, 2008) 7

N.M. Stat. § 1-19A-14 7

N.C. Gen. Stat. § 163-278.67 7

Federal Authorities

Fed. R. Civ. P. 15 37

Fed. R. Civ. P. 56(e) 19

Federal Constitutional Authorities

U.S. Const. art. III .... *passim*

Intervenor-Defendants and Defendants (collectively "Defendants") respectfully submit this Memorandum of Law in Opposition to Plaintiffs' Pre-Trial Memorandum on Counts II and III (Doc. 303-1) ("Pls. Pre-Trial Mem.") regarding the matching funds provisions of the Citizens' Election Program ("CEP"). Conn. Gen. Stat. §§ 9-713, 9-714.

PRELIMINARY STATEMENT

In challenging the CEP's matching funds provisions, Plaintiffs in effect ask this Court to hold that a state is constitutionally barred from designing a public funding program that disburses grants in incremental amounts tailored to the competitiveness of a given race, rather than in a single lump sum.[1] This contention should be rejected.

Since the Supreme Court's seminal public financing decision in *Buckley v. Valeo*, 424 U.S. 1, 85-109 (1976), the design of public funding programs has evolved to meet the ever-changing landscape of political campaigns. Matching funds provisions were developed as an integral feature of all public funding programs in response to the unprecedented flood of private money raised and spent by candidates and independent organizations in recent years. As explained below, matching funds provisions are a necessary tool to enable states to incentivize sufficient participation in a public financing program, and thus achieve its anticorruption goals, while protecting the public fisc by avoiding the waste of public funds in races where large grants would be superfluous. <u>Every</u> state to enact a full public funding system has included matching funds as an integral part of the system, and the federal courts have consistently upheld the constitutionality of this feature of public funding programs. *See North Carolina Right to*

[1] As Defendants have pointed out, standing is a threshold issue, and it would be inappropriate for the Court to rule on the merits of the matching funds claims without first considering standing. Defendants have already fully briefed these issues, *see* Defendants' Memorandum of Law in Support of Motion for Partial Summary Judgment, November 19, 2008 (Doc. 301-2), and will not repeat those arguments here.

Life Comm. Fund v. Leake, 524 F.3d 427, 437-38 (4th Cir. 2008), *cert. denied*, *Duke v. Leake*, No. 08-120, 2008 U.S. Lexis 8014 (Nov. 3, 2008); *Daggett v. Comm'n on Gov't Ethics*, 205 F.3d 445, 464 (1st Cir. 2000); *Gable v. Patton*, 142 F.3d 940, 947-49 (6th Cir. 1998); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996).

Like Plaintiffs, opponents in these cases sought to collapse the relevant legal distinctions, claiming that matching funds are a constraint on speech. Courts have roundly rejected these claims in light of *Buckley*'s holding that public funding systems are efforts "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976).

Plaintiffs can offer no sound constitutional basis for removing the valuable policy tool of matching funds from the hands of the Connecticut legislature. Plaintiffs fail to mention that, only a few weeks ago, the Supreme Court denied *certiorari* in *Leake*, declining to review the Fourth Circuit's decision upholding the matching funds provisions of the judicial public financing system in North Carolina. *Duke v. Leake*, No. 08-120, 2008 U.S. Lexis 8014 (Nov. 3, 2008). The Court denied *certiorari* in *Leake* even though the plaintiffs in that case forcefully argued in their petition that the Fourth Circuit's decision was inconsistent with the Court's decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008) – the same argument that Plaintiffs make here.

Plaintiffs err in basing their constitutional challenge on *Davis*, because that case dealt with regulation of private campaign contributions and did not address either matching funds provisions or public funding programs. Plaintiffs' novel theory is that "triggers function as a *de facto* expenditure limit," Pls. Pre-Trial Mem. at 2, and that

Davis, without acknowledging it, established *sub silentio* a far-reaching new doctrine that casts into doubt a wide range of previous Supreme Court and federal precedent. The language and reasoning of *Davis* provide no support for this radical interpretation: the Court does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001). Indeed, to the contrary, the *Davis* Court was careful to point out that a triggered scheme in which contribution limits were raised across the board would have been <u>constitutional</u>. *Davis*, 128 S. Ct. at 2770. The "Millionaire's Amendment" at issue in *Davis* imposed a constitutional burden, not because of its trigger mechanism, but because it created a discriminatory asymmetry in the otherwise evenhanded regulation of privately funded candidates.

Plaintiffs also argue that the provision of matching funds to participating candidates – but not to nonparticipating candidates – is "discriminatory" in the same way as the Millionaire's Amendment in *Davis*. But this claim is simplistic, and does not make sense in the context of public financing. If the grant of funds to participating candidates, but not to nonparticipants, were "discriminatory" in the way that Plaintiffs suggest, then any public funding scheme that awards grants only to participating candidates, would also constitute "discrimination" – a conclusion that both *Davis* and *Buckley* explicitly rejected. *Buckley v. Valeo*, 424 U.S. 1, 85-109 (1976) (upholding public funding program that disbursed money only to participating candidates); *Davis*, 128 S. Ct. at 2772 (reaffirming *Buckley*). Indeed, the *Davis* Court went out of its way to reaffirm the constitutionality of public financing systems, and pointed out that they were not "remotely parallel" to the regulations on private fundraising at issue in *Davis. Davis*, 128 S. Ct. at 2772. Under *Buckley* and its progeny, the asymmetrical funding of participating

and nonparticipating candidates is not unlawful and creates no burden on constitutional rights.

Finally, even if a law creates a burden on First Amendment rights, that is only the first step in the constitutional analysis. Plaintiffs would still have to demonstrate that such a burden is not outweighed by the state's compelling interests in incentivizing participation in the public financing program, while protecting the public fisc from waste of public funds. The undisputed testimonial and record evidence, from Connecticut and other states, demonstrates that the availability of matching funds has been a central factor in incentivizing many candidates to opt into public financing programs. In so doing, participating candidates surrender their ability to defend themselves by raising private funds. If public financing programs did not provide matching funds, participating candidates would be helpless to respond to attacks from high-spending opponents or independent expenditure organizations, and candidates would not participate. Moreover, the alternative to matching funds – higher lump sum grants sufficient to enable participating candidates to compete in even the highest-spending races – would waste public funds in less competitive races, and would in no way redress Plaintiffs' asserted injuries.

I. Factual Background

A. The Matching Fund Provisions of the CEP Are Well-Designed to Incentivize Participation in the Program and Achieve its Goals

To reduce the corrupting influence of large private contributions, the CEP almost entirely prohibits participating candidates from raising private money once they qualify for the public funding program. Conn. Gen. Stat. § 9-703(a). Because the legislature desired to achieve a level of participation that would allow it to realize the CEP's anti-

corruption goals, it established a maximum level for the total public funding grant large enough to permit participating candidates to wage a competitive campaign in high-spending races, as warranted by actual circumstances. The law reasonably provides a base grant for office in a pre-set amount, and incremental releases of additional funds that are part of the full grant as needed for candidates. Since the actual costs of running a competitive campaign will depend on many factors difficult to anticipate prior to an election, Connecticut devised a flexible system that is adjustable in real time with a series of tiered funding levels. Conn. Gen. Stat. §§ 9-713, 9-714.

If and when expenditures by non-participants or outside groups are made that exceed the matching funds threshold,[2] a participating candidate is eligible to receive two types of matching funds, up to the total amount of the potential grant provided by the law. Conn. Gen. Stat. § 9-713, § 9-714.

"Nonparticipating opponent matching funds" are awarded when the nonparticipating opponent of a participating candidate receives funds or makes expenditures in excess of the matching funds threshold. Conn. Gen. Stat. § 9-713(a)-(d). Matching funds worth 25% of the original grant are provided to the participating candidate when her nonparticipating opponent receives funds or makes expenditures in excess of 100%, 125%, 150% and 175% of the matching funds threshold. *Id.* Matching funds are capped at 100% of the matching funds threshold. Conn. Gen. Stat. § 9-713(g).

"Independent expenditure matching funds" are disbursed when excess independent expenditures are made urging the defeat of a participating candidate. Conn. Gen. Stat. § 9-714(a). When such independent expenditures exceed the matching funds

[2] The matching funds threshold during the general election is the full initial grant plus any qualifying contributions not spent in the primary. Conn. Gen. Stat. § 9-702(c)(C).

threshold, or when the sum of the aggregate independent expenditures and expenditures made by a nonparticipating opponent exceed the matching funds threshold, a matching grant in the amount of the excess expenditure is awarded to the participating candidate. Conn. Gen. Stat. § 9-714(a), (b), (c)(2). Such matching grants are capped at 100% of the matching funds threshold. Conn. Gen. Stat. § 9-714(c)(1).

This schedule for grant disbursement is an integral part of the package of benefits and burdens that candidates accept when choosing whether or not to participate in the CEP and is necessary to incentivize the levels of candidate participation required to make the CEP successful. In the absence of this pragmatic and reasonable schedule, the state would have to either: (1) grant participating candidates unreasonably high grants at the outset, much of which would be unneeded, wasting state funds and risking public legitimacy, or (2) leave participating candidates to shoulder an inappropriate risk of being drastically outspent by opponents or outside groups and unable to respond to attacks, an option that would dramatically suppress participation.

B. Multiple Jurisdictions Have Enacted Matching Funds Provisions in Order to Meet the Goals of Public Financing Systems

The State of Connecticut is neither the first, nor is it the only, state to employ matching funds provisions as a means of realizing the overall goals of public funding programs. At least seven other states – Florida, New Mexico, North Carolina, Maine, Arizona, Minnesota and New Jersey – have incorporated this feature to incentivize sufficient participation while protecting taxpayer money from unnecessary waste.[3] In

[3] Arizona: Matching funds are given to participating candidates when the sum of the nonparticipating candidate's expenditures and independent expenditures opposing the participating candidate exceed the participating candidate's expenditure limit. Ariz. Rev. Stat. Ann. § 16-952(a)-(c).

each of these states, a participating candidate is given more public money and/or released from strict expenditure limits in response to expenditures made by nonparticipating opponents and/or independent spenders. Courts have consistently upheld these provisions against challenges similar to those raised by Plaintiffs. *See Leake*, 524 F.3d at 437-38; *Daggett*, 205 F.3d at 464; *Rosenstiel*, 101 F.3d at 1553.

C. The CEP's Reporting Requirements

To facilitate administration of the independent expenditure matching provisions, the Connecticut statute requires that any independent expenditures in excess of $1000 that promote the success or defeat of any CEP participant must be reported. Conn. Gen. Stat. § 9-612(e)(2). If such expenditure is made more than 20 days before the day of an election, the report must be made within 48 hours of the expenditure. If such expenditure is made 20 days or less before the day of an election, the report must be made within 24 hours. *Id.*

Florida: The expenditure limit for a participating candidate is removed when a nonparticipating candidate raises or spends money in excess of the participating candidate's expenditure limit. Fla. Stat. § 106.355.

Maine: The participating candidate is released of the strict expenditure limit when his nonparticipating opponent makes expenditures in excess of an established threshold. Me. Rev. Stat. Ann. tit. 14, § 1125(9).

Minnesota: The expenditure limit for a participating candidate is removed when a nonparticipating candidate raises or spends money in excess of the participating candidate's expenditure limit. Minn. Stat. § 10A.25(10).

New Jersey: New Jersey launched a pilot program that provided matching funds to participating candidates when their nonparticipating opponent raised funds or made expenditures in excess of the public grant amount. Participants also received matching funds when independent expenditures were made against the participating candidate. New Jersey Fair and Clean Election Pilot Project Act, New Jersey Pub. L. No. 2007, ch. 60 (expired June 6, 2008).

New Mexico: Matching funds are given to a participating candidate when the sum of the nonparticipating candidate's expenditures or funds raised alone or in conjunction with independent expenditures made on behalf of the participating candidate exceeds the grant amount given to the participant. N.M. Stat. § 1-19A-14.

North Carolina: Matching funds are given to a participating candidate when the sum of expenditures made by nonparticipating opponents and independent expenders exceeds the expenditure limit of participating candidates. N.C. Gen. Stat. § 163-278.67.

D. The CEP's Grant Reduction Provisions

In an effort to more accurately tailor the grant amount to the needs of a particular race, the CEP is designed to disburse reduced grants in races that are less competitive. The CEP disburses 30% of an initial where the participating candidate is unopposed. Conn. Gen. Stat. § 9-705(j)(3). If a participating candidate's only opponent is a minor or petitioning party candidate who has raised an amount less than the qualifying contribution required for that office, the participating candidate will receive a grant worth 60% of the initial grant. Conn. Gen. Stat. § 9-705(j)(4). If the participating candidate faces a minor or petitioning party opponent who has raised an amount equal to or greater than the qualifying contributions for that office, the participating candidate will receive a full grant. *Id.*

E. Matching Funds and Grant Reductions for Uncompetitive Races Are Designed to Incentivize Participation while Protecting the Public Fisc

i. Matching Funds Are Necessary to Incentivize Participation

Under the traditional private fundraising model, major party candidates have the option to tap their parties' extensive fundraising networks to quickly respond to unanticipated attacks by high-spending opponents or organizations making independent expenditures. Declaration of George Jepsen, dated December 3, 2008, (Jepsen Decl. II) ¶11-13. Participation in the CEP requires candidates to surrender this option, and candidates must instead rely on the state to provide sufficient funds to provide a substitute for the candidate's ability to engage in defensive private fundraising. To induce candidates to give up this option, Connecticut – like North Carolina, Arizona and Maine – had to provide candidates with assurance that they would not be helpless to

respond if they were targeted by unanticipated independent expenditures or a high-spending opponent.

Three-time incumbent State Senator Edward Meyer from the 12th District participated in the CEP in the 2008 election cycle. In previous election cycles, he had raised as much as $194,170 through private fundraising – well in excess of the initial CEP grant. Declaration of Edward Meyer, dated November 26, 2008 ("Meyer Decl.") ¶5. Had he found himself targeted by a high-spending opponent or independent expenditures, he was confident that he could count on his existing network of financial supporters as well as the party infrastructure to help him raise sufficient funds to respond. *Id.* ¶7. Thus, he was only willing to participate in the CEP if the CEP were able to provide him with an adequate substitute for his ability to defend himself through private fundraising, and would not have chosen to participate in the CEP without the availability of matching funds. *Id.*

The CEP cannot expect candidates to enter the political arena with their hands tied, helpless targets for unexpected attacks, and must give candidates with proven private fundraising ability sufficient incentive to give up their fundraising potential and accept the limitations of the CEP. Without the participation of these candidates – who are often incumbents for whom the appearance of corruption arising from large private contributions is the greatest – the CEP cannot achieve its prophylactic anticorruption goals.

The testimony of Senator Meyer echoes the experiences of candidates in other public funding systems. Requiring candidates to relinquish their fundraising potential as a condition of participation, without providing them with the means to respond to high-

spending opponents or independent expenditures, will lead candidates to opt out of the system and threaten the viability of a public funding program. In the most well-known example, President-elect Barack Obama stated that he did not participate in the presidential public financing system in large part because the existing program lacked means to protect his campaign against runaway independent spending by outside groups. Obama, Barack, "Both Sides Must Agree," *USA Today* (Feb. 21, 2008).[4] Similarly, in Michigan, which has a public financing system for gubernatorial candidates, not one candidate in the 2006 primary election participated in the program and only one candidate participated in the general election.[5] The nonpartisan Center for Governmental Studies attributed this failure, in part, to the fact that "no supplemental funds are available to publicly-financed candidates to respond to advertising by outside groups or wealthy candidates [so that] [c]andidates feel doubly pigeonholed by restrictive spending limits and the unlikelihood they can respond to better funded attacks." Horwitz, Sasha, *Public Campaign Financing: Michigan*, Center for Governmental Studies (2008).[6] Additionally, in New Jersey's pilot public financing program – which offered legislative candidates up to $534,000 base grant amounts, but which capped matching funds at $100,000 – Linda Greenstein, a recent participating candidate, complained that the matching funds provided were far too low, and that she found herself in a position where she was unable to respond to an independent expenditure campaign targeting her. Declaration of Linda Greenstein, dated December 2, 2008 ("Greenstein Decl.") ¶7-8. She further stated that

[4] For the Court's convenience, a copy of this article is attached hereto as Exhibit 1.
[5] Michigan Department of State, *Michigan Gubernatorial Public Funding Update for 2006 Elections,* (2006). A copy of this report is available on-line at http://www.michigan.gov/documents/sos/2006_GUBERNATORIAL_PUBLIC_FUNDING_UPDATE_209728_7.pdf (last visited December 3, 2008).
[6] Horwitz, Sasha, *Public Campaign Financing: Michigan*, Center for Governmental Studies (2008). A copy of this report is available on-line at http://www.cgs.org/images/publications/cgs_mi_final_081808.pdf (last visited December 3, 2008).

her future participation in the program was far less likely without sufficient levels of matching funds being available. *Id.* ¶10.

ii. The Connecticut Legislature Tailored the Matching Funds and Grant Reduction Provisions of the CEP to Avoid Wasting Public Funds on Uncompetitive Races

The matching funds provisions, in combination with the grant reduction provisions, protect the public fisc by tailoring CEP grant amounts to the relative competitiveness of a given election. This flexibility – as opposed to a large lump-sum "one size fits all" grant – prevents the CEP from wasting funds on uncompetitive races. Thus, on one end of the spectrum, a participating candidate who faces no opposition would receive a grant that was only 30% of the base grant, while a participating candidate in a hotly contested race whose opponent's spending greatly exceeds historical spending averages could receive a grant of 200% the base grant amount. Both the matching funds and grant reduction provisions of the CEP are geared to historical expenditures so that they do not distort the political playing field in Connecticut.

1. The Matching Funds Grant Amounts Are Tailored to Historical Expenditures in the Most Competitive Races.

In setting the CEP grant amounts, the Connecticut Legislature relied on Office of Legislative Research ("OLR") reports that describe high, average, and low expenditure races in historical races. *See* Declaration of Jeffrey Garfield, dated July 10, 2008 ("Garfield Decl. II") Exs. 20, 21. The base grant amounts of CEP funds were geared to average historical expenditures. The matching funds totals were geared to the expenditure levels of the highest spending campaigns, which are the only campaigns in which matching funds would be triggered by opponents' expenditures.

For legislative races, the Legislature considered OLR's analysis of high, average, and low expenditures in 2004 legislative races of various degrees of competitiveness, breaking out elections where an open legislative seat was contested, where a challenger defeated an incumbent, and where a candidate ran unopposed. *Id.* Ex. 20. The Legislature was concerned to set appropriate funding for each level of competitive election in view of historic conditions, and the resulting CEP grant amounts – which correspond to these various levels of historical expenditures – amply support this conclusion. The OLR Report found that for the most competitive Senate races – those with an open seat – the expenditure average was $128,871, with expenditures in some races ranging as high as $200,000. *Id.* Similarly, the OLR Report found that Senate challengers who had successfully unseated an incumbent spent an average of over $170,000, with expenditures ranging as high as $195,000 in some races. *Id.* Accordingly, the maximum CEP Senate grant that can be triggered by a nonparticipating opponent, $170,000 – the base grant of $85,000, plus an additional 100% grant based on spending by the nonparticipating opponent – is well in line with historical expenditures in the most competitive races.

On the House side, average expenditures in races with an open seat were $21,058, but ranged as high as $58,164. *Id.* Ex. 20. Average expenditures by House challengers who unseated incumbents were $23,199, while expenditures in such races ranged as high as $40,000. *Id.* Accordingly, the CEP set the base grant for a House race at $25,000, in line with average historical expenditures. And, as with the Senate grants, the maximum House grant that can be triggered by a nonparticipating opponent – $50,000 – is in line with historical expenditures in the most competitive races.

2. Grant Reductions Apply Only in Uncompetitive Races and Are Tailored to Historical Expenditures in Such Races

The grant reduction provisions, Conn. Gen. Stat. §§ 9-705(j)(3)-(4), by contrast, apply only in relatively uncompetitive races, reducing a participating candidate's grant amount to 30% of the initial grant where a race is uncontested, and to 60% of the initial grant where the participating candidate's only opponent is a nonparticipating non-major party candidate who has raised less then the qualifying threshold amounts. Once again, these reduced grants amounts are in line with, or lower than, historical expenditures in these less-competitive races. *See* Defendants' Memorandum of Law in Support of Motion for Partial Summary Judgment, September 5, 2008 (Doc. 260), at pg. 42. In House races, the average 2004 major party candidate expenditures in uncontested races was $14,503 – or nearly double the applicable CEP grant amount for uncontested races of $7,500. Declaration of Bethany Foster, dated July 9, 2008 ("Foster Decl.") ¶24; Conn. Gen. Stat. § 9-705(j)(3). House candidates facing only non-major party opposition spent an average of $17,500, which is more than the corresponding CEP grant under Section 9-705(j)(4) of $15,000. Foster Decl. ¶24; Conn. Gen. Stat. § 9-705(j)(4).

For Senate races, the OLR found that average 2004 expenditures in uncontested races was over $57,000, which is well in excess of the CEP grant amount for those uncontested races, which is $25,500. Foster Decl. ¶23; Conn. Gen. Stat. § 9-705(j)(3); *see also* Garfield Decl. II Ex. 20. There were no races in 2004 in which a non-major party Senate candidate spent more than the Senate qualifying contribution threshold of $15,000. Nevertheless, even in races where their only opponents were non-major party candidates, in 2004 major party Senate candidates still spent an average of almost

$40,000, which is comparable to the 60% grant amount for these races, $51,000. Foster Decl. ¶23.

ARGUMENT

I. The Appropriate Standard of Review is the *Anderson-Burdick* Standard

Plaintiffs – under their erroneous assumption that the matching funds provision create a *de facto* expenditure limit – assume that strict scrutiny is the applicable standard. Pls. Pre-Trial Mem. at 27. But before one can assume that a "*de facto* expenditure limit" exists that would warrant the application of strict scrutiny, one must first ascertain whether matching funds in the context of a public funding system create any burden on constitutional rights.

Because, as we show below, they do not, the starting point for First Amendment challenges to provisions of a public financing system is the "flexible standard" developed in *Anderson v. Celebrezze*, 460 U.S. 780, 786-89 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). Under this flexible standard, the Court must weigh "the character and magnitude of the asserted injury" to rights protected by the First Amendment against "the precise interests put forward by the State as justifications for the burden imposed," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Where "those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick,* 504 U.S. at 434 (quoting *Norman v. Reed,* 502 U.S. 279, 289 (1992)). "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, the State's important regulatory

interests are generally sufficient to justify' the restrictions." *Burdick,* 504 U.S. at 434 (quoting *Anderson,* 460 U.S. at 788). Unless Plaintiffs are able to demonstrate a "severe" burden on First Amendment rights – and we submit that they cannot – it is the more deferential standard under *Anderson-Burdick* that applies, not strict scrutiny.

II. Plaintiffs Lack Standing to Pursue Their Matching Funds Claims

As Defendants have already set forth in their Memorandum of Law in Support of Motion for Partial Summary Judgment, Plaintiffs' have failed to satisfy the Article III requirement of actual or imminent injury-in-fact with regard to Counts II and III.[7] *See* Defendants' Memorandum of Law in Support of Motion for Summary Judgment.[8] Plaintiffs have not demonstrated that they have any specific plans to spend beyond the matching funds threshold or to engage in independent expenditures in any identified electoral contest, and thus that they will be injured by the matching funds provisions. *See Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990) ("The litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements."). Accordingly, their claims must be dismissed.

---

[7] In an effort to circumvent their inability to establish Article III standing to raise the *Davis* claims, Plaintiffs attempt to merge the injury alleged in Counts II and III, the alleged *Davis* injury, with the injury in Count I, their diminished political opportunity claim. Pls. Pre-Trial Mem. at 42, 48. Throughout Plaintiffs Pre-Trial memo, they assert that the effect of matching funds is to create a more competitive environment that crowds them out and argue that therefore they have standing to raise the *Davis* claims in Counts II and III. As Plaintiffs admit, however, this Court has already ruled that their more general contentions go only to Count I, and do not support their claims in Counts II and III. Pls. Pre-Trial Mem. at 1 (citing *Green Party of Connecticut v. Garfield*, 537 F. Supp. 2d 359, 367 n.9 (D. Conn. 2008)). Article III does not permit this transfer of standing from one claim to another but instead requires that Plaintiffs "establish standing for each claim asserted." *Davis*, 128 S. Ct. at 2769.

[8] Although Plaintiffs claim that this Court has already ruled on standing, the Court made clear at the October 10 hearing that the issue of standing was still an open question. As the Court noted:

> It seems to me that if the claims are valid claims, there's an obligation to the plaintiffs to demonstrate standing. I didn't need to make a final determination on that point because I was dismissing the claims, but if they are revived it seems to me that the standing issue is back in play.

Transcript, October 10, 2008, at 4.

A. Plaintiffs' Attempts to Remedy the Deficiencies in Their Demonstration of Standing Fall Short of Article III Requirements of Injury-in-Fact

Plaintiffs make an eleventh-hour effort to remedy the obvious deficiencies in their showing of standing by submitting a conclusory declaration by Plaintiff Michael DeRosa. However, the requirements of Article III are not so easily glossed over. DeRosa's self-serving declaration falls far short of satisfying Article III's jurisdictional requirements. It is well settled that speculative allegations that a plaintiff may suffer an injury in the distant future in some unspecified contest will not suffice for Article III standing. *Davis,* 128 S. Ct. at 2769; *McConnell v. FEC*, 540 U.S. 93, 226 (2003); *Daggett*, 205 F.3d at 463. DeRosa's new testimony consists of nothing more. With respect to the nonparticipating candidate trigger provision, DeRosa admits that "minor party candidates have not typically raised or spent the amount of money that would trigger the excess expenditure provision…," Declaration of Michael DeRosa, dated November 18, 2008, ("DeRosa Decl. II") ¶28, and DeRosa is unable to identify any particular candidate or particular race in which a Green Party candidate has either the capability or the intention to spend amounts that would meet the triggering threshold. With respect to the independent expenditure provision, DeRosa similarly admits that "[t]he Green Party has not engaged in this type of advocacy in the past…." *Id.* ¶21.

It would distort the doctrine of standing beyond recognition to hold that Plaintiffs have standing to bring an action based on the Green Party's assertion of behavior in which they have never before engaged – and which the historical facts show is well beyond their reach – but which they claim they might adopt at some unspecified future point. And the Libertarian Party plaintiffs do not even allege facts that would establish

their standing to challenge the trigger provisions, nor does the historical evidence provide any basis for such an argument. Plaintiffs' Pre-Trial Memorandum is riddled with speculative phrases as: "will likely attract" and "as part of its future strategy" or "would make in the future," Pl. Pre-Trial Mem. at 6, 11-14, 25, but such obvious speculation is insufficient to meet constitutional standing requirements. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) ("Such 'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the actual or imminent injury that our cases require.") (*quotations omitted*).

B. The Doctrine of Competitor Standing Does Not Establish an Exception to Constitutional Requirements of Injury-in-Fact

In an attempt to remedy their failure to meet the actual or imminent injury requirement, Plaintiffs rely on the "competitor standing" doctrine, and suggest that it relaxes the injury-in-fact requirement. Pl. Pre-Trial Mem. at 48-51. Plaintiffs' claims are baseless. The doctrine of competitor standing does not (and indeed, could not) expand standing to avoid the injury-in-fact requirement beyond the constitutionally-limited boundaries of Article III jurisdiction. Therefore, while the Second Circuit and other circuits have found injury based on a "competitor" theory, the courts have nevertheless also always made a thorough inquiry into whether plaintiffs carried their burden of showing injury-in-fact, an essential element of the "irreducible constitutional minimum of standing." *Lujan,* 504 U.S. at 560.

The "competitor" standing doctrine posits that when the government affirmatively aids one competitor over another in a concrete way, the unaided competitor may be able to show injury-in-fact for standing purposes. *See McConnell,* 540 U.S. at 230 (finding no

injury to electoral candidates where challenged provision not applied to them); *see also* 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.4 (2d ed. 2008). However, the doctrine of competitor standing does not eliminate the requirement of injury-in-fact, and does not – as Plaintiffs claim – grant automatic standing to every candidate in an election regardless of whether the candidate personally suffers concrete or imminent injury from the challenged provision. *See McConnell*, 540 U.S. at 230. Indeed, the two Second Circuit cases relied on by Plaintiffs serve only to highlight the insufficiency of Plaintiffs' attempt to demonstrate injury-in-fact. Both cases are distinguishable because the injuries asserted in those cases were found to be concrete and imminent, unlike the speculative and hypothetical conjectures provided by Plaintiffs here.

In *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir. 1989), the plaintiff was a minor party candidate for U.S. president who sued to remove the tax-exempt status of an organization sponsoring the presidential debates because of the allegedly partisan eligibility criteria for participating in the debates. *Id.* at 623, 625. The Second Circuit's decision does not represent any departure from the principles of standing ordinarily applicable; indeed, the Court began its standing analysis by reaffirming that the plaintiff must allege a "personal injury" traceable to the challenged conduct, and that, if the plaintiff "fails to satisfy the basic threshold standing requirements, then . . . we are without jurisdiction to entertain this appeal." *Id.* at 624. The Court held that Fulani had standing only because the Court was required – because of the procedural posture of the case – to accept her allegation that she was a "significant" candidate who "would have been included in the League's debates" if she

had been a member of a major party, and that this was sufficient to satisfy the injury-in-fact requirement. *Id.* at 625-26. The present case is in a different procedural posture – Plaintiffs must make a real showing of standing, as a matter of fact, and cannot rely on the allegations of the complaint, *Lujan,* 504 U.S. at 561 (at the summary judgment stage "the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,'); *see also Bennett v. Spear*, 520 U.S. 154, 168 (1997) ("a plaintiff must 'set forth' by affidavit or other evidence 'specific facts' [to demonstrate standing] to survive a motion for summary judgment') (citing Fed. R. Civ. P 56(e)), and Plaintiffs are completely unable to show any injury-in-fact.

The Second Circuit's decision in *Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002), is similarly distinguishable. There, plaintiffs were a reproductive rights organization and its attorneys who were challenging a U.S. government policy prohibiting foreign organizations that accepted U.S. government funds from performing or promoting abortion. *Id.* at 186. The challenged policy was already in place and affirmatively "prohibit[ed] foreign NGOs from collaborating with Plaintiffs," and thus, the plaintiffs were "personally disadvantaged" by the policy. *Id.* at 197 (internal brackets removed). By contrast, Plaintiffs in the instant case cannot demonstrate that they personally will be affected by the matching funds provisions they challenge. Nothing in *Center for Reproductive Law and Policy* suggests that the court could ignore Plaintiffs' failure to satisfy the constitutional requirement of injury-in-fact.

Plaintiffs also cite a First Circuit case, *Becker v. F.E.C.*, 230 F.3d 381 (1st Cir. 2000). In that opinion, the court found a third-party presidential candidate, Ralph Nader, had standing to challenge Federal Election Commission regulations allowing corporate

funding of certain debate staging organizations. *Id.* at 386. But the court did so only after finding that Nader was a "significant candidate" who could well have been able to meet the debate sponsor's eligibility criteria but for his inability to participate because of its corporate sponsorship. *Id.* Moreover, the court specifically distinguished Nader's position from the type of speculative claims of injury the instant Plaintiffs make. As the court stated: "Nor did [Nader] merely worry that 'someday' corporate sponsorship of the debates would interfere with his campaign. At the time of the filing, invitations to the debates were scheduled to be determined at a definite date, soon enough in the future to affect his present campaign plans." *Id.* at 387 n.4.

As these cases make clear, the doctrine of "competitor" standing does not establish an exception to general Article III standing. "The 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party establish that he has suffered an actual or imminent injury to this cognizable interest" – *i.e.*, that he or she is among those injured by the challenged provision. *Lujan*, 504 U.S. at 563 (quoting *Sierra Club v. Morton*, 405 U.S 727, 734 (1972)). In order to show injury-in-fact as a competitor challenging campaign finance laws, mere status as a candidate is insufficient. At the very minimum, a plaintiff claiming injury as a competitor must have been a candidate in an electoral race wherein the challenged provision was applied to her – a requirement that Plaintiffs fail to satisfy. In races where the provision has not been applied to the plaintiff, an injury-in-fact has not occurred. It was for this reason that, in *McConnell*, 540 U.S. at 230, the Supreme Court dismissed on standing grounds a challenge to the "Millionaire's Amendment" by a group of candidates, voters, and voters' advocates (the "Adams plaintiffs"). The Adams plaintiffs claimed that they "suffered a

competitive injury" because the Millionaire's Amendment placed them "at a fundraising disadvantage making it more difficult for them to compete in elections." *Id.* at 228, 230. But the Court found that they lacked standing, because "none of the Adams plaintiffs is a candidate in an election affected by the millionaire provisions – *i.e*., one in which an opponent chooses to spend the triggering amount in his own funds – and it would be purely 'conjectural' for the court to assume that any plaintiff ever will be." *McConnell,* 540 U.S. at 230 (citation omitted).

Here, Plaintiffs' allegations of injury – that, under the right mix of circumstances, at an unidentified future time, they *might* receive contributions or engage in expenditures at a level that would trigger a grant of matching funds – are even more conjectural than the claims dismissed in *McConnell*, and cannot satisfy the injury-in-fact requirement for Article III standing. Claims resting on "speculation and conjecture" are well beyond the bounds of Article III courts' jurisdiction. *See O'Shea v. Littleton*, 414 U.S. 488, 495 (1974).

III. Matching Fund Provisions That Are Part of a Public Funding Scheme Are Constitutional

The caselaw instructs that matching funds provisions, like those at issue here, do not burden the First Amendment rights of nonparticipating candidates and independent organizations, and are justified by compelling state interests. *See Leake*, 524 F.3d at 437-38; *Daggett*, 205 F.3d at 464; *Gable*, 142 F.3d at 947-49; *Rosenstiel*, 101 F.3d at 1553. Plaintiffs ask this Court to ignore this authority and hold that the *Davis* decision renders all trigger mechanisms unconstitutional, because they allegedly create *de facto* expenditure limits that burden the First Amendment rights of nonparticipating candidates.

Pls. Pre-Trial Mem. at 16-21. This argument is not persuasive, and is based on a misreading of *Davis*.

In *Davis*, the Court invalidated the "Millionaire's Amendment" of the Bipartisan Campaign Reform Act (BCRA), which raised the contribution limits of a candidate three-fold when that candidate's self-financing opponent indicated an intent to spend more than $350,000 of his personal funds. *Davis*, 128 S. Ct. at 2773. The Court found this provision to be "unprecedented," because it applied asymmetrical contribution limits to otherwise similarly situated candidates, both of whom were competing to raise private funds. *Id.* at 2770-73. The Court found that this provision burdened First Amendment rights because the discriminatory contribution limits created an advantage under the law for one candidate over his similarly situated opponent. *Id.* at 2772. The Court also held that the provision was not justified by any interest in reducing corruption or its appearance, since it regulated only a candidate's own expenditures (which created no risk of corruption) and *increased* the fundraising limits for his opponent (creating a greater risk of the appearance of corruption). *Id.* at 2773.

As explained in detail below, *Davis* does not control here. Under the CEP, participating and nonparticipating candidates are not competing to raise private funds, and thus the matching funds provisions do not create the burden created by the asymmetrical limit in *Davis*. Furthermore, matching funds do not burden Plaintiffs' First Amendment rights because Plaintiffs remain free to make as many expenditures as they are able, without limit. Finally, even if this Court believes that the CEP burdens Plaintiffs' First Amendment rights, the program's matching funds provisions are justified by compelling state interests of the highest order. The matching funds provisions are

necessary, and are appropriately tailored to achieve Connecticut's anti-corruption objective by making the program affordable while incentivizing participation.

A. *Davis* Does Not Invalidate All Trigger Mechanisms

Plaintiffs ask this Court to read *Davis* as holding that all triggered benefits to a candidate create an unconstitutional burden on her opponent. Pls. Pre-Trial Mem. at 20. Plaintiffs' overbroad interpretation would interpret *Davis* to strike down one of the key provisions of public financing systems, even though no public financing system was before the Court. Neither the legal reasoning of *Davis*, nor the context in which the case arose, support this sweeping contention. In fact, *Davis* makes clear that trigger mechanisms are constitutional so long as the benefit being triggered is itself constitutional. *Davis*, 128 S. Ct. at 2771. As the Court explained, "if §319(a)'s elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits." It was the <u>discriminatory</u> nature of the provision at issue – not the trigger mechanism *per se* – that was the basis of the Court's finding of an unconstitutional burden. The plaintiff in *Davis* had suggested that the Millionaire's Amendment was unconstitutional because "making expenditures … 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 Davis' own speech." *Id.* at 2770. Although ultimately ruling in Davis's favor, the Supreme Court rejected this line of reasoning. The Court held instead, along far more narrow lines, that had the plaintiff's personal expenditures triggered a rise in "the contribution limits for all candidates, *Davis*' argument would plainly fail." *Id.* The Court had no problem with a triggering mechanism that "enabled [an] opponent to raise more money and to use that money to

finance speech that counteracts … his opponent's speech," so long as the benefit was not applied in a manner that created a "fundraising advantage for opponents." *Id.* at 2772.

B. The Asymmetrical Burden Found in *Davis* Cannot Occur in the Context of Public Funding Programs

Plaintiffs attempt to draw a superficial analogy between the burdens found in *Davis* and the burden alleged here – that both are asymmetrical, and therefore "discriminatory." Pls. Pre-Trial Mem. at 16-18. Plaintiffs note that, in *Davis*, the Court held raising the contribution limits of only one candidate was unconstitutional and argue by analogy that a system that gives matching funds to only one candidate runs afoul of a similar principle. Pls. Pre-Trial Mem. at 21. Indeed, they attempt to extend this reasoning, arguing that the burden imposed in the instant case is greater because Connecticut provides funds directly to a candidate rather than raising her contribution limits. Pls. Pre-Trial Mem. at 26-27. Plaintiffs' superficial analogy misrepresents the analysis of the Court in *Davis* and ignores the distinct analytical framework governing public campaign finance regimes. When the *Davis* analysis is mapped onto public funding, it becomes apparent that the burden found by the Court in *Davis* cannot occur in a public funding program.[9]

The *Davis* Court began its analysis by acknowledging that the raising of contribution limits three-fold imposed no constitutional burden but, if applied

[9] The language of *Davis* itself indicates that it applies only to a private fundraising context and makes clear that a public funding program is different. When assessing the constitutionality of applying contribution limits asymmetrically as between candidates, the Court wrote that "[w]e have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Davis,* 128 S. Ct. at 2771. Although this assertion is true with respect to the private financing of campaigns, the Supreme Court has long contemplated that in a public financing context it is permissible to apply differing contribution limits to publicly funded candidates and privately funded candidates. *Buckley,* 424 U.S. at 23-35, 90 (upholding $250 contribution limit for public funded campaigns and a $1000 contribution limit for privately financed campaigns).

evenhandedly, would be considered a benefit. *Davis*, 128 S. Ct. at 2771 ("There is…no constitutional basis for attacking contribution limits on the grounds that they are too high"). The Court found a burden only because a permissible benefit was applied differently *and* because that asymmetrical application produced a competitive advantage for one candidate. *Id.* at 2772 ("[T]he vigorous exercise of the right to use personal funds to finance speech produces fundraising advantages for opponents in the competitive context of electoral politics").

In contrast, a provision which provides a permissible benefit asymmetrically, as in a public funding program, will not competitively advantage the publicly funded candidate over the privately funded one. In the public financing context, the Supreme Court has expressly held that it is constitutional to provide public grants to participating candidates, but not to their nonparticipating opponents. *See Buckley*, 424 U.S. at 95. There is no constitutional difference between disbursing grants to participating candidates in triggered increments according to rules known to both candidates in advance, and disbursing grants in a lump-sum at the outset. Since the initial grant to participating candidates imposes no constitutional burden on the speech of nonparticipating candidates, it follows that the provision of additional funds to participating candidates in response to opposition spending similarly does not impose any burden on the speech of nonparticipating candidates. Whether the public funding stems from the initial grant or a triggered match, the asserted injury to nonparticipating candidates is the same, and does not support any constitutional objections. *See Buckley*, 424 U.S. at 95.

The Supreme Court, from *Buckley* to *Davis*, has also affirmed that in the public funding context, it is constitutional to allow different packages of benefits and burdens,

and to include other "asymmetrical" features that would otherwise be constitutionally forbidden. *See Buckley*, 424 U.S. at 54-58, 88 (upholding constitutionality of public funding program that restricted expenditures while striking down expenditure limits for privately financed candidates); *Davis*, 128 S. Ct. at 2772 ("Congress…may condition acceptance of public funds on an agreement…to abide by specific expenditure limits even though we found an independent limit to be unconstitutional"). In particular, in a public funding program, it is constitutionally acceptable to provide participants with an "asymmetrical" grant, so long as the total provided is not so large that it renders participation in the program involuntary. *Buckley*, 424 U.S. at 95; *Vote Choice v. DiStefano,* 4 F.3d 26, 29 (1st Cir. 1993). Nonparticipating candidates have the freedom to collect private money from an unlimited amount of private donors and make unlimited expenditures. Participating candidates, on the other hand, agree to accept strict limitations on their First Amendment rights, including limits on fundraising and expenditures that would otherwise be impermissible. Participating candidates are also subject to stringent auditing and reporting requirements, as well as qualification requirements.

Thus, unlike in *Davis*, the nonparticipating candidate is not faced with an unconstitutional choice. So long as the differences between the relative benefits and burdens of participation and nonparticipation are not so extreme that they coerce participation, there is no burden on the First Amendment rights of nonparticipants. *See Daggett*, 205 F.3d at 470. The rational candidate, having knowledge of all those respective benefits and burdens – including the matching funds provisions – will choose the option that she feels will maximize her communication with the electorate. As part of

this permissible bundle of benefits and burdens, the CEP provides a total grant to participants incrementally throughout the race. In a context in which some candidates are privately funded and others are publically funded, the application of asymmetrical burdens and benefits is the norm and does not give rise to the type of discriminatory disadvantage at issue in *Davis*.

C. The *Davis* Court's Mere Citation to *Day* Does Not Overturn the Settled Consensus Among the Federal Circuits That Matching Funds Create No Burden on First Amendment Rights

As this Court recognized in its opinion on the motion to dismiss, almost every court that has considered whether matching funds in the context of a public financing scheme impose a burden or "chill" under the First Amendment has found that they do not. *See Green Party*, 537 F. Supp.2d at 391 (citing, *inter alia*, *Daggett,* 205 F.3d at 465; *Ass'n of Am. Physicians & Surgs. v. Brewer*, 363 F. Supp. 2d 1197, 1200 (D. Ariz. 2005); and *Wilkinson v. Jones*, 876 F. Supp. 916, 928 (W.D. Ky. 1995)). Most recently, the Fourth Circuit in *Leake* unanimously upheld a program of matching funds in response to expenditures made by nonparticipating candidates and independent expenditures. The Fourth Circuit specifically rejected the argument advanced by Plaintiffs here: that triggered matching funds chilled the speech of nonparticipating candidates. The Fourth Circuit reasoned, in accordance with a long line of First Amendment cases, that "the First Amendment gives plaintiffs neither a 'right to outraise and outspend an opponent' nor a 'right to speak free from response.'" *Leake*, 524 F.3d at 438-39. Relying on the logic of *Buckley*, the *Leake* court held that matching funds do not violate the First Amendment because nonparticipating opponents and independent groups "remain free to raise and spend as much money and engage in as much political speech as they desire." *Id.* at 437

(citing *Buckley,* 424 U.S. at 92-93). "To the contrary, the distribution of these funds 'furthers, not abridges pertinent First Amendment values'…" *Id.* Although the *Leake* plaintiffs argued that this reasoning was inconsistent with the Supreme Court's subsequent decision in *Davis*, the Supreme Court last month declined to review this ruling. *Duke v. Leake*, No. 08-120, 2008 U.S. Lexis 8014 (Nov. 3, 2008).

Plaintiffs contend that the *Davis* Court's single citation to *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) overturns this entire body of established case law and creates a new concept of burden regarding First Amendment rights, the "de facto expenditure limit," without any acknowledgement by the Court of this major doctrinal shift. This is an implausible interpretation, and reads far too much into a single citation. The Court's citation to *Day* was dicta unaccompanied by any discussion or analysis; the Court merely cited *Day* for the proposition that a "potentially significant burden" could be found to exist under certain factual circumstances not at issue in *Davis*. *Davis*, 128 S. Ct. at 2772. The complex issues involved in addressing public financing systems under the First Amendment were simply not before the Court in *Davis*, and *Davis* leaves this area of constitutional case law undisturbed. The Court's recent denial of *certiorari* in *Leake* casts further doubt on Plaintiffs' overbroad interpretation of *Davis*, since the Fourth Circuit in *Leake* had explicitly rejected *Day's* holding that a "matching funds scheme created an impermissible chilling effect on speech." *Id.* at 437-38. If the Supreme Court really intended its unexplained citation of *Day* to have such great significance in the public financing arena, the Court would at least have vacated the Fourth Circuit's decision and remanded for reconsideration in light of *Davis*. The Court's failure to do so

indicates that the Court does not regard its decision in *Davis* as having any bearing on the unique issues presented by public financing schemes.

Nothing in *Davis* – including its citation to *Day* – supports Plaintiffs' speculation that the Court intended to strike down all matching funds provisions in public financing programs. Plaintiffs' interpretation disregards the fact that the Court in *Davis* repeatedly reaffirmed *Buckley*'s holding of the validity of public financing. *Davis*, 128 S. Ct. at 2772.

Day's holding is limited by its particular factual circumstances — an unusual partial public funding system that raised a candidate's spending limits dollar-for-dollar for each dollar of independent spending against the candidate and provided additional public funding to the candidate of half the amount of any spending. Moreover, in *Day*, the matching funds at issue were not needed to incentivize participation in the program, because even without the challenged provision, participation in the program was already at 97 percent. Indeed, as the Fourth Circuit recognized in *Leake*, the *Day* decision is an "anomaly even within the Eighth Circuit" and a later Eighth Circuit case, *Rosenstiel v. Rodriquez*, without overruling *Day*, limited it to its particular factual context and upheld triggered matching funds based on nonparticipating candidates' spending. *Id.* at 438.

D. Evidence From Other Jurisdictions Demonstrates That Matching Funds Have Led to More, Not Less, Political Speech

As Plaintiffs admit, Pls. Pre-Trial Mem. at 7, jurisdictions with matching funds provisions actually see an increase in political speech; suggesting, as the Supreme Court rightly held in *Buckley*, 424 U.S. at 92-93, that public funding systems enhance, rather than constrain, First Amendment speech and that there is no chill on speech in fact. For example, in Arizona, matching funds provisions were enacted in 2000. In 1998, the

election cycle just prior to their enactment, independent expenditures totaled $222,041.66.[10] In the 2008 election cycle, independent expenditures totaled $2,335,024.86.[11] This 950% increase far outstrips any effect of inflation.

The experience in Maine was no different. Maine's matching funds program was enacted in 2000. In that year, Maine reported $125,120.57 in independent expenditures.[12] In 2006, independent expenditures were reported to be $623,020.25, an increase of nearly 400%.[13] Thus, the available data lead to the conclusion that political speech of many kinds flourishes with the creation of a system of public funding.

E. The CEP's Matching Fund Provisions Serve Compelling State Interests

Even assuming *arguendo* that the CEP's matching funds provisions burden the First Amendment rights of nonparticipating candidates or independent expenditure organizations, the CEP's matching funds provisions would nonetheless pass constitutional muster because they are carefully tailored to achieve compelling anti-corruption objectives.

As Defendants have previously demonstrated, public funding systems such as the CEP further a compelling government interest in reducing corruption and the appearance of corruption. *See* Defendants' Memorandum in Support of Motion for Summary Judgment, July 11, 2008 (Doc. 236-2), at 91-92; *see also Sec. Indus. & Fin. Mkts. Ass'n*

---

[10] *See* Arizona Secretary of State Database of Independent Expenditures for 1998, *available* at http://www.azsos.gov/cfs/CompareCommitteeSummary.aspx?egid=32&cid=3 (last visited Dec. 2, 2008); Arizona Secretary of State Database of Independent Expenditures for 2008, *available* at http://www.azsos.gov/cfs/CompareCommitteeSummary.aspx?egid=32&cid=8 (last visited Dec. 2, 2008). A copy of this data is attached hereto as Exhibit 2.
[11] *Id.*
[12] Maine Commission on Governmental Ethics and Election Practices, 2007 Report on the Maine Clean Election Act, http://maine.gov/ethics/pdf/publications/2007_study_report.pdf at pages 43-44.
[13] *Id.*

v. Garfield, 469 F. Supp.2d 25, 28-29 (D. Conn. 2007)("restor[ing] public confidence in the integrity of state government and [] eliminate[ing] corruption and undue influence flowing from campaign contributions…" are compelling state interests); *Buckley*, 424 U.S. at 96 ("public financing as a means of eliminating the improper influence of large private contributions furthers a significant government interest"); *Rosenstiel*, 101 F.3d at 1553 (reducing the "possibility for corruption that may arise from large campaign contributions and a diminution in the time candidates spend raising campaign contributions" are compelling interests); *Republican Nat'l Comm. v. FEC,* 487 F. Supp. 280 at 284-85 (S.D.N.Y. 1980) (reducing deleterious influence of large contributions on political process is a compelling state interest). Defendants have also previously recounted the CEP's legislative history, which demonstrates that the primary impetus for the creation of the CEP was to combat the destructive impact that corruption and the appearance thereof had on Connecticut politics. *See* Defendants' Memorandum in Support of Motion for Summary Judgment, July 11, 2008 (Doc. 236-2), at 12-13.

Given that a state's interest in enacting a public financing system is compelling, it follows *a fortiori* that its interest in incentivizing sufficient participation to achieve its goals is also compelling, as the federal courts have consistently recognized. *See Rosenstiel,* 101 F.3d at 1553 ("the State has a compelling interest in stimulating candidate participation in its public financing scheme"); *Vote Choice*, 4 F.3d at 39 (state has compelling interest in creating incentives for candidates to accept public financing); *Wilkinson*, 876 F. Supp. at 928 ("Kentucky has a compelling interest in encouraging candidates to accept public financing and its accompanying limitations"). Without sufficient participation, the CEP would be unable to achieve its goal of reducing the

deleterious influence of large private money in elections. The Connecticut Legislature accordingly designed the CEP to both incentivize participation and to conserve public resources for their highest use.

The factual record, as set out in Section I.E.i. *supra*, demonstrates that the CEP's matching funds provisions are essential to incentivize candidate participation. As Sen. Meyer has testified, he would not have forgone private fundraising without an assurance that he would have access to matching funds as necessary to respond to a high-spending opponent or independent expenditure campaign. Meyer Decl. ¶7. The evidence from this year's presidential race and from the history of Michigan's and Arizona's public financing systems bolsters the conclusion that the lack of such responsive matching funds can endanger the viability of a public financing system, leaving it unable to attain its goals.

Plaintiffs cannot point to any evidence to the contrary. The record is also devoid of any evidence that would support Plaintiffs' unfounded insinuation that, in addition to acting as a "carrot," the Legislature intended the trigger provisions to act as "a 'stick' to discourage candidates from opting out of public financing by ensuring that they gain no advantage from spending freely." Pls. Pre-Trial Mem. at 28. As set forth in Factual Background Section I.E.ii.1, *supra*, the Legislature carefully tailored the grant amounts to correspond to historical expenditures in races of varying levels of competitiveness. There is no support for the claim that the grants were intended to discourage candidates from opting out or to coerce participation.

i. "Leveling the Playing Field" is Neither a Purpose Nor an Effect of the CEP's Matching Fund Provisions

Disregarding the extensive and undisputed record evidence that the primary goal of the CEP and its integral matching funds is to combat corruption and the appearance thereof, Plaintiffs suggest that the real motivation for the Connecticut Legislature's enactment of the CEP is "to level the playing field" between participating and nonparticipating candidates. Pls. Pre-Trial Mem. at 28-30. Plaintiffs do not and cannot point to any evidence in the legislative history that would support this claim. Moreover, Plaintiffs' "level the playing field" argument is based on a misreading of the holding and reasoning of *Davis*.

The *Davis* Court held the Millionaire's Amendment to be unconstitutionally discriminatory because it granted a "fundraising advantages" to one of two candidates who were competing to raise private funds in the "competitive context of electoral politics." *Davis*, 128 S. Ct. at 2772. The purpose of this differential treatment was to reduce the relative impact of the self-financing candidate's preexisting financial advantages, and the Court found this legislative purpose to be illegitimate. *Id.* at 2773. Thus, Congress's intervention distorted the landscape of private fundraising by "leveling" one candidate's preexisting advantages in order to assist his competitors.

In contrast, the CEP's matching funds work no similar distortion of the political landscape. Rather than trying to reduce one candidates' inherent preexisting advantage, they merely provide a substitute for a candidate's preexisting ability to raise emergency private funds in the event of unexpected attacks – an ability that major party candidates, with their networks of financial contributors and their party infrastructure, have always had as a matter of course. *See* Meyer Decl. ¶7. As the *Buckley* Court held, for a public

funding system to provide a substitute for private fundraising is perfectly legitimate and creates no constitutional burden.

Moreover, as a matter of fact, the CEP does not actually level the playing field – in the sense of equalizing expenditures – because the expenditures of participating candidates are capped, while those of nonparticipants and independent groups are not. These caps entail a significant sacrifice by participating candidates, because participating candidates would previously have been able to respond to unusually high-spending opponents or independent expenditure campaigns using their own private fundraising to raise funds in excess of the capped limits if necessary. Indeed, the need for the matching funds provision stems from the reality that, by forgoing all private fundraising and submitting to an absolute cap on expenditures, the participating candidate is the more encumbered one in a race. To provide a substitute for a candidate's preexisting fundraising ability does not "level the playing field," either in purpose or in effect.

F. The Definition of Independent Expenditures is Appropriately Tailored

Plaintiffs attack the independent expenditure matching funds on the grounds that they are "overbroad" under 2008 regulations promulgated by the SEEC that provide a definition of independent expenditure. As an initial matter, Plaintiffs' challenge to this regulation is outside the scope of their pleadings, since this regulation is never mentioned in their Amended Complaint. Even on the merits, however, this claim is misguided.

Plaintiffs argue that the SEEC definition is "overbroad" because it includes all "public communications," as opposed to the electioneering communications provision of the Bipartisan Campaign Finance Reform Act ("BCRA"), which was limited to broadcast communications. Pls. Pre-Trial Mem. at 36-39. This distinction is irrelevant to the case

at hand. The provision at issue, which the Court considered in *McConnell v. FEC*, 540 U.S. 93 (2003) and *FEC v. Wisconsin Right to Life II,* 127 S. Ct. 2652 (2007) ("*WRTL II*"), imposed an ban on using corporate general treasury funds for certain types of electioneering communications that constituted "express advocacy" or its functional equivalent during a "blackout period" before an election, and enforced this ban with criminal penalties. However, no part of *McConnell or WRTL II* suggests that this statutory definition could or should constrain the states' plenary power to regulate elections, including by providing a definition of "electioneering communications" that would identify an independent expenditure that would trigger matching funds in a public financing context.

Plaintiffs' argument that the CEP definition – which does no more than enable a participating candidate to respond to an attack – is "far harsher" than the criminally enforced ban at issue in *WRTL II* demonstrates the overreaching nature of Plaintiffs' assertions of "chill." Hyperbole aside, no evidence supports Plaintiffs' bare assertion that the independent expenditure matching funds will, as asserted, "deter or blunt political speech," Pls. Pre-Trial Mem. at 38, and, in fact, the evidentiary record demonstrates that such matching fund provisions have increased, rather than chilled, independent expenditures. *See* Section III.D, *supra*.

In attempting to force this case into the inappropriate analytical framework of *WRTL II*, Plaintiffs further suggest that the independent expenditure definition is not well-tailored since Defendants have demonstrated no link between the state's interest in preventing corruption and the regulation of independent expenditures. This argument also misses the point. The purpose of the SEEC's definition of "independent

expenditures" is not to ban funding sources for such expenditures, as was the case with the electioneering communications at issue in *WRTL II.* Instead, the purpose is merely to gather the necessary information to enable the disbursement of matching funds. As Defendants have already established at length, such matching funds are necessary to incentivize participation in the CEP. *See* Factual Background Section I.E.i, *supra*. It is further well-established that public financing systems are constitutionally preferred means to combat corruption – an area of constitutional law that exists independently of *WRTL II* and is not affected by it.

Plaintiffs further argue that the CEP's independent expenditure matching funds provision is not well-tailored because it allegedly "discriminates based on the identity of the speaker." Pls. Pre-Trial Mem. at 36. For purposes of campaign finance regulation, the mere evaluation and classification of communications as advocating the defeat of a candidate does not constitute speaker- or viewpoint-based discrimination. *See McConnell,* 540 U.S. at 203-07 (upholding law that set out the classification of electioneering communications). Instead, such classifications are permissible where, as here, they advance the state's compelling interest in enacting a program to combat corruption and the appearance thereof. *Id; see* Section III.E, *infra*. Contrary to Plaintiffs' suggestion, nothing in *WRTL II* addressed – much less invalidated – the entirely distinct legality of disclosure provisions for electioneering communications. *See, e.g., Ohio Right to Life Society, Inc., v. Ohio Election Commission*, Case No. 2:08-cv-00492 (09/05/2008) (noting that *WRTL II* did not disturb holding in *McConnell* that electioneering disclosure requirements are constitutional); *Citizens United v. FEC*, 530 F. Supp. 274 (D.D.C. 2008) (*cert. granted*, 2008 U.S. LEXIS 8422 (U.S., Nov. 14, 2008).

Similarly, Plaintiffs complain that the matching funds provide additional funds to reply to independently funded attacks on a participating candidate but do not require a participating candidate's grant amounts to be debited when an independent expenditure supports her candidacy. Pls. Pre-Trial Mem. at 36. As argued at length, Section __, in the constitutionally distinct realm of public financing, such a supposed "asymmetry" does not constitute discrimination against nonparticipating candidates as long as it does not render the overall mix of benefits and burdens "coercive." Moreover, Plaintiffs' offhand suggestion of such an "offset" ignores the major practical obstacles to such a "debiting" scheme – not least, the resulting lack of certainty for the campaigns participating candidates who may find large portions of funds upon which they had relied suddenly withheld due to independent expenditures outside of their control.

IV. The Reporting Requirements of the CEP Bear a Substantial Relation to an Important State Interest

In their Pre-Trial Memorandum, Plaintiffs argue that the Section 9-612(e)(2) reporting requirements relating to the independent expenditure matching funds burden minor parties. Pls. Pre-Trial Mem. at 12. Once again, however, this claim is not alleged in the complaint, *see* Pls. Am. Compl. ¶20 ("the statutory provisions that are the subject of this case are Conn. Gen. Stat. §§333l(h)-(i), 333n(g)-(j)m, 702(b), 704, 705(c) and (g), 713, and 714…"), and Plaintiffs are raising it here – at this late stage of the proceedings – for the very first time. The Court should not address this issue, because it attempts to raise a new claim that has not been pleaded and has not previously been part of this case, and upon which Defendants have had no opportunity for discovery. *See* Fed. R. Civ. P. 15. Defendants also note that the same standing deficiencies that doom Plaintiffs' claims regarding the matching funds apply with equal force to these disclosure requirements.

Even considered on its merits, however, Plaintiffs' new argument must fail. The Supreme Court has upheld independent expenditure reporting requirements mandating that disclosure occur within 24 hours, foreclosing Plaintiffs' argument here. *McConnell*, 549 U.S. at 196; *see also Leake*, 524 F.3d at 439-49. Such reporting requirements will be upheld when the information sought is "substantially related to an important government interest." *Leake*, 524 F.3d at 439 (quoting *Buckley*, 424 U.S. at 64). In *Leake*, the Fourth Circuit upheld a 24-hour independent expenditure reporting requirement on the grounds that the information sought was substantially related to three compelling interests: providing the electorate with information; deterring actual corruption and avoiding the appearance thereof; and gathering data necessary to enforce more substantive electioneering restrictions. *Id.* at 439-440. Here, Section 9-612(e)(2) is necessary for the administration of the independent expenditure matching funds, and does not impose an unconstitutional burden on Plaintiffs.

V. The Grant Reduction Provisions of Section 704(j)(4) Do Not Invidiously Discriminate Against Minor Party Candidates

Plaintiffs also argue that Section 705(j)(4) – one of a number of provisions that reduce grant amounts for less competitive races – may "chill" the expenditures of minor party candidates. Pls. Pre-Trial Mem. at 9-10, 14-15, 39-40. As an initial matter, this claim is also precluded here, because Plaintiffs failed to plead this claim in their Amended Complaint, *see* Pls. Am. Compl. ¶20, and Defendants have had no opportunity for discovery. In any event, Plaintiffs' argument with regard to Subsection 705(j)(4) is meritless. Plaintiffs' argument takes this subsection of the CEP in isolation and out of context. When considered in relation to the public funding program, it raises no constitutional problems.

First, Plaintiffs do not have standing to challenge Section 705(j)(4) because they cannot satisfy the redressibility prong of Article III standing. In order for Plaintiffs to have standing, "it must be likely, not merely speculative, that the injury would be redressed by a favorable decision." *Lujan,* 504 U.S. at 560-61. Plaintiffs do not have standing to challenge a statute when an injunction against enforcement of the statute would not remedy their alleged injury. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45-46 (1976) (patients who were denied treatment did not have standing to challenge an IRS ruling granting favorable tax treatment to hospitals because enjoining the ruling would not remedy the lack of medical treatment).

That is the situation presented here. Plaintiffs assert that Section 705(j)(4) somehow "penalizes candidates who raise even a single dollar more than [$5,000 in House elections or $15,000 in Senate elections]". Pls. Pre-Trial Mem. at 15. However, the triggered disbursements do not create a "penalty" since, without this provision, the participating candidate would receive the full grant amount. Absent Section 7-5(j)(4), Plaintiffs would be in the position of facing a major party candidate who receives the full sum in an initial grant, regardless of how much money a minor party candidate or petitioning candidate might raise. In this situation, Plaintiffs' asserted injury would not be redressed by eliminating the grant reduction provisions. Indeed, Plaintiffs attack a tailoring scheme that benefits them, and other traditionally low-spending candidates, by <u>reducing</u> the grant amounts awarded to participating candidates.

Second, on the merits, as explained in Section I.C. *supra*, the purpose of this provision is not "invidious," but results from the careful effort by the Connecticut Legislature to design a system that would avoid wasting public funds by flooding

uncompetitive races with superfluous funding. This subsection should properly be viewed, under *Burdick*'s "totality" approach, as one of the tiered levels that disburse public funding grants in increments, depending on the level of competitiveness of a given election. These tiers correspond to different levels of competitive races – those in which a participating candidate is unopposed, those in which a participating candidate faces only token opposition, and those in which a participating candidate faces more than token opposition.

Burdick's instruction is useful here, since isolating a single step of this tiered system – as Plaintiffs attempt to do – yields a distorted view of this provision and its effects. For instance, Plaintiffs never mention the first tier of the system – Section 705(j)(3) – which reduces grants to 30% of their base level where a participating candidate is entirely unopposed. Under Plaintiffs' logic, a non-major party candidate's mere decision to enter the race – which is also a First Amendment right – might be "chilled" by the resulting additional grant of funds to the participating candidate, whose funding would increase from 30% to 60% of the base grant amount as a result of this "trigger." However, this triggered disbursement, like the specific grant reduction provision Plaintiffs challenge, creates no burden on the nonparticipating candidate's First Amendment right, since the grant of funds to the participating candidate is constitutionally permissible, whether this grant is disbursed in a single lump sum or in increments on an as-needed basis. As argued above, disbursing a larger increment of a constitutionally permissible grant in a public funding context to a participating candidate when another candidate enters the race or raises a certain threshold amount does not violate the Constitution. Since participating and non-participating candidates inhabit

different fundraising spheres, each with its own mix of burdens and benefits, it makes no constitutional difference that the partial grant was triggered by the spending of minor parties. Thus, Section 705(j)(4) does not create a burden constitutionally analogous to that identified in *Davis*.

VI. Conclusion

For the forgoing reasons, the Court should reject Plaintiffs' constitutional challenges alleged in Counts II and III of the Amended Complaint.

Dated: December 3, 2008

Respectfully Submitted,

/s/ Monica Youn
Monica Youn
Angela Migally
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Phone: (212) 998-6730
Fax: (212) 995-4550
monica.youn@nyu.edu
Youn's Federal Bar # phv0162
Migally's Federal Bar # phv02872

Ira M. Feinberg
David Dunn
HOGAN & HARTSON L.L.P.
875 Third Avenue
New York, NY 10022
Phone: (212) 918-3000
Fax: (212) 918-3100
IMFeinberg@hhlaw.com
DDunn@hhlaw.com
Feinberg's Federal Bar # phv01662
Dunn's Federal Bar # ct 01658

Fred Wertheimer
DEMOCRACY 21
1875 I St. NW, Suite 500
Washington, DC 20006
(202) 429-2008
fwertheimer@democracy21.org
Federal Bar # phv01377

J. Gerald Hebert
Paul S. Ryan
CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave., NW, Suite 650
Washington, DC 20036
(202) 736-2200
jhebert@campaignlegalcenter.org
pryan@campaignlegalcenter.org
Hebert's Federal Bar # phv01375
Ryan's Federal Bar # phv01376

Stephen V. Manning
O'BRIEN, TANSKI & YOUNG, LLP
CityPlace II - 185 Asylum Street
Hartford, CT 06103-3402
Phone: (860) 525-2700
Fax: (860) 247-7861
svm@otylaw.com
Federal Bar # ct07224

Donald J. Simon
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
Suite 600, 1425 K St. NW
Washington, DC 20005
Telephone: (202) 682-0240
Facsimile: (202) 682-0249
dsimon@sonosky.com
Federal Bar # phv01374

Attorneys for Intervenors-Defendants

/s/ Perry Zinn Rowthorn
Perry A. Zinn Rowthorn (ct19749)
Maura Murphy Osborne (ct19987)
Assistant Attorneys General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Phone: (860)808-5020
Fax: (860)808-5347

Attorneys for Defendants

CERTIFICATION

I hereby certify that on December 3, 2008, a copy of the foregoing Opposition to Plaintiffs Pre-Trial Brief was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

<u>/s/ Angela Migally</u>
Angela Migally
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Phone: (212) 998-6730
Fax: (212) 995-4550
angela.migally@nyu.edu
Migally's Federal Bar # phv02872