



BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW  
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1 (9:30 O'CLOCK, A. M.)

2 THE COURT: Good morning. I don't think we had  
3 a sign-in on appearances this morning so I'm going to  
4 start with asking all counsel to identify themselves,  
5 please, for the record.

6 MR. LOPEZ: I'm Mark Lopez, Mark Ladov and Kevin  
7 James for the plaintiffs.

8 THE COURT: Thank you.

9 MR. ZINN-ROWTHORN: Perry Zinn Rowthorn for the  
10 state defendants.

11 MS. MURPHY-OSBORNE: Maura Murphy-Osborne for  
12 the state defendants.

13 MS. YOUN: Monica Youn for the intervenor  
14 defendants.

15 MR. FEINBERG: Ira Feinberg for the intervenor  
16 defendants. And with us at counsel table are Jeff  
17 Garfield and Beth Rotman from the SEEC.

18 THE COURT: Very good, thank you.

19 MS. MIGALLY: Angela Migally for intervenor  
20 defendants.

21 THE COURT: Thank you. Okay. I think it might  
22 make sense to begin with the potentially tedious task of  
23 figuring out what the record is, and I think what we ought  
24 to do is determine first off what objections there might  
25 be to the evidence submitted by the plaintiffs and take up

1 any of those objections, and then do the same thing with  
2 respect to the submissions by the defendants.

3 Let me, before we turn to that, let me just  
4 inquire whether the defendants have prepared a list of  
5 exhibits of any kind. I know you've got in effect  
6 exhibits attached to your declarations.

7 MS. YOUN: Yes, we have a supplemental trial  
8 exhibit list that we can hand up at any time or that we  
9 can give Your Honor. It's all just the declarations that  
10 have already been filed.

11 THE COURT: Are the exhibits specifically  
12 individually identified on that list?

13 MS. YOUN: They are, yes. They are not numbered  
14 but they are identified.

15 (Hands Court)

16 THE COURT: That's helpful, thank you. Did you  
17 have one more, by any chance?

18 (Hands Court)

19 THE COURT: Thank you. Mr. Lopez, do you have  
20 an extra copy of your exhibits by any chance?

21 MR. LOPEZ: Your Honor, we don't have a list.  
22 We had, as we did in the first proceeding, we submit, we  
23 submit our exhibits with a cover and we picked up where we  
24 left off before so our supplemental trial exhibits pick up  
25 at Exhibit 69.

1 THE COURT: Right.

2 MR. LOPEZ: And continue through Exhibit one --  
3 122.

4 THE COURT: All right, okay. Fair enough.  
5 So -- all right, we have in effect a list in the front of  
6 your exhibit book.

7 MR. LOPEZ: Yes, Your Honor.

8 THE COURT: That's fine. Okay. All right, let  
9 me hear any objections first off to the declarations that  
10 have been submitted by the plaintiffs.

11 MR. ZINN-ROWTHORN: Your Honor, I think this is  
12 going to be a little less tedious than it was last time.  
13 We're not going to be objecting to the admission of the  
14 declarations or the exhibits. We have obviously some  
15 disputes with some of the weight that ought to be  
16 afforded, particularly the declarations, but I think as  
17 far as the submissions go we're not going to make an  
18 objection.

19 THE COURT: All right. Is that true for all the  
20 defendants?

21 MS. YOUN: That's true.

22 THE COURT: All right, very good. Thank you,  
23 that's helpful. What about going the other way?  
24 Mr. Lopez, do you have problems with the defense exhibits  
25 or declarations?

1 MR. LOPEZ: Well, excuse me, as far as the  
2 declarations are concerned, we can agree that any of our  
3 concerns go to weight and not to admissibility.

4 THE COURT: All right.

5 MR. LOPEZ: And we, therefore, agree to the  
6 admission of the proposed declarations. I just hadn't,  
7 hadn't -- I'm trying to figure out from this list when new  
8 exhibits were tendered, besides the declarations, what new  
9 exhibits were tendered for this proceeding.

10 MS. MIGALLY: Your Honor, the only new exhibits  
11 are the declarations and one medium, Green Party medium  
12 that was attached to the Migally declaration.

13 MR. LOPEZ: Then we have no objection.

14 MR. ZINN-ROWTHORN: Your Honor, I should  
15 probably point out we did file at 7:00 o'clock last night  
16 or a little before 7:00 o'clock, a declaration,  
17 supplemental declaration of Beth Rotman. I have copies.  
18 I emailed those to counsel but -- okay, so I gather there  
19 were courtesy copies submitted. I can hand up another  
20 copy.

21 THE COURT: I have copies, but you raise a good  
22 point in that the plaintiffs submitted an additional two  
23 exhibits recently as well, so I want to be sure that  
24 that's part of the record. Any objection to those  
25 exhibits?

1 MR. ZINN-ROWTHORN: We do not, Your Honor.

2 THE COURT: All right.

3 MR. LOPEZ: And we have no objection to the  
4 Proulx affidavit -- the declaration.

5 MS. YOUN: We submitted both the Rotman and the  
6 Proulx declarations last night in rebuttal so there's one  
7 from Beth Rotman and one from Zachary Proulx.

8 MR. LOPEZ: Excuse me, is the one from Beth  
9 Rotman the one that addresses deficit spending during the  
10 qualifying period?

11 MS. YOUN: That is correct.

12 MR. ZINN-ROWTHORN: Yes, expenditure line.

13 MR. LOPEZ: All right. Then we have no  
14 objection to those.

15 THE COURT: Very good. That's very helpful.  
16 Thank you all. The written record then, I take it, is  
17 complete.

18 MR. ZINN-ROWTHORN: Yes, Your Honor.

19 THE COURT: Doesn't that sound sweet?

20 (Applause)

21 THE COURT: And does either side intend to  
22 present any live testimony today?

23 MR. LOPEZ: Your Honor, it was not our intention  
24 to call our Green Party officials because their testimony  
25 has been submitted in affidavit form and their depositions

1 have been taken and I see no purpose, unless you want to  
2 question them.

3 MR. ZINN-ROWTHORN: Your Honor, we have one  
4 witness that we've disclosed, John Green from the  
5 Connecticut Working Families Party. He's not available  
6 until tomorrow morning. To be perfectly candid with the  
7 court and plaintiff's counsel, I think that's a decision  
8 that we intend to revisit at the end of today, if that's  
9 all right.

10 THE COURT: That's fine. He has a declaration  
11 in as well?

12 MR. ZINN-ROWTHORN: He has two declarations in.  
13 This would be for purposes -- the last declaration was in  
14 September and this would be for purposes of sort of  
15 updating his experience. I think the general principles  
16 that he puts forward and opinions or views I think remain  
17 sort of valid and we would rely on those, but -- so we'll  
18 revisit that and let the court and plaintiff's counsel  
19 know as soon as we look at this.

20 THE COURT: All right. As we've done before, I  
21 think it would be helpful to me and perhaps cathartic to  
22 all of you to point out whatever it is you want to point  
23 out about the record. Obviously today we're focused  
24 principally on the results of the recent round of  
25 elections, the November 2008 elections.



1           And, Mr. Lopez, I'm happy to turn to you, and in  
2 terms of format, it may, it might make sense to permit  
3 kind of as we go along direct responses so that the issues  
4 are focused rather than the defense having to keep track  
5 of all the issues it wants to raise and then somehow  
6 raising it during its term. Does that make sense to  
7 everybody?

8           MR. ZINN-ROWTHORN: It does, Your Honor.

9           THE COURT: So if you want to make a point, I'm  
10 going to turn to them and let them make the rebuttal  
11 point.

12          MR. LOPEZ: Fair enough, Your Honor. If I may,  
13 there was one pending motion that filed by the Republican  
14 Party to intervene?

15          THE COURT: Good point. Yes, there is. Anybody  
16 want to be heard about that?

17          MR. ZINN-ROWTHORN: We will want to be heard on  
18 that. We plan to file an objection to that motion. We  
19 think there's a jurisdictional problem with it, given that  
20 part of it, that part of the case is up on appeal, we  
21 think obviously there's a timeliness problem with that.  
22 My understanding is Hogan & Hartson is in the process of  
23 drafting a memorandum that will become a joint memorandum  
24 in opposition.

25          MR. FEINBERG: That is correct, Your Honor. I

1 have a draft but I need to do a little more work on it,  
2 can file it in relatively short order after these hearings  
3 are completed. But, fundamentally, A, the court doesn't  
4 have jurisdiction to grant the intervention motion after  
5 notices of appeal have been filed. That's pretty clear  
6 under 2nd Circuit law.

7 And, secondly, even if there were jurisdiction,  
8 the application is really amazingly untimely given this  
9 case has been pending for two and-a-half years and the  
10 factual record is closed, and there's really no purpose  
11 served by the interventions. And to the extent they say  
12 they have new factual matters they want to bring to the  
13 attention of the court, it's kind of too late.

14 So we will be opposing that, and on grounds that  
15 I think are very substantial and I think the reality is if  
16 the Republican Party wants to participate in this case,  
17 they can seek to intervene in the Court of Appeals or  
18 simply file an amicus brief in the Court of Appeals.

19 THE COURT: Okay. All right. I'll wait then to  
20 get that opposition and perhaps we'll have a phone  
21 conference with all interested parties once I do.

22 MR. FEINBERG: That would be fine.

23 THE COURT: Okay.

24 MR. LOPEZ: Your Honor, our position on their  
25 application, you know, charts a middle road. I'm not sure

1 what point is accomplished by them intervening solely in  
2 the Court of Appeals since the record's closed, but from  
3 my conversations with the attorneys for the Republican  
4 Party, they have a compelling story to tell about how the  
5 lobbying and contract restrictions affected their  
6 associational rights.

7 As I understand it, they never saw this coming.  
8 It wasn't until very late in the day that they realized  
9 that this was destroying their ability -- their town  
10 committees. And if that is a, if that -- if those are the  
11 facts, I think that those facts should be put in the  
12 record.

13 Now, I haven't -- I don't know the answer to Mr.  
14 Feinberg's legal point that the matter's out of your  
15 hands. But it seems to me if, under -- if the  
16 circumstances are as dire and the facts are as compelling  
17 as, as the attorneys for the Republican Party tell me they  
18 are, then it seems to me there's some equity and there's  
19 probably some authority for the court to open up the  
20 record.

21 I say that having, you know, got killed on that  
22 phase of the case, so -- but I obviously think there might  
23 be some benefits to opening up the record if that's an  
24 option for the court.

25 MR. FEINBERG: Number one, Your Honor, I mean

1 number one, A, it's not an option for the court, Notice of  
2 an Appeal having been filed and jurisdiction having been  
3 transferred to the Court of Appeals.

4 But, number two, this is not such a late  
5 breaking development. This was happening, it happened  
6 last year up through November and they had three months  
7 from the time of the election until the time the court  
8 entered judgment and did nothing until they decided to  
9 move three weeks after the court entered judgment. So  
10 it's really too late.

11 THE COURT: All right. Again, I take it we're  
12 arguing this in effect without the Republican Party  
13 present.

14 (Laughter)

15 MR. ZINN-ROWTHORN: As we will continue to do,  
16 Your Honor.

17 THE COURT: Some might suggest we should give  
18 them a shot at being heard. So that's what I intend to  
19 do. I'll get the opposition, we'll have a phone  
20 conference with anybody who wants to be on and we'll go  
21 from there.

22 MR. ZINN-ROWTHORN: One final logistical point  
23 in light of the, I think the intention of having a little  
24 bit of back and forth today, we do have some demonstrative  
25 exhibits that I think we will be probably referencing that

1 we think will be convenient to the court, parties and  
2 opposing counsel. So perhaps it would make sense to put  
3 those forward.

4 MS. YOUN: I don't know that we finalized them  
5 as of yet and I don't know if Your Honor wants them now  
6 but --

7 MR. ZINN-ROWTHORN: Okay.

8 THE COURT: Whenever it's appropriate. If you  
9 want to bring them out in response to a point or you want  
10 to save them for your case or want to give them to me now,  
11 it's okay.

12 MR. ZINN-ROWTHORN: That's fine, Your Honor.

13 THE COURT: Okay. Mr. Lopez?

14 MR. LOPEZ: Yes, good morning, Your Honor. Good  
15 morning, Counsel. Your Honor, today we're primarily going  
16 to be walking the court through our supplemental exhibits  
17 and findings. I'll try not to revisit any of the findings  
18 that were addressed satisfactorily at the December 9th  
19 hearing.

20 We are primarily going to be working, Your  
21 Honor, for your convenience with Binder 1 and Binder 2 of  
22 the four binders that we filed on March 4. Binder 1  
23 contains our declarations and data and Binder 2 is our  
24 exhibits.

25 THE COURT: And those two binders are much more

1 interesting than Binders 3 and 4.

2 MR. LOPEZ: Right.

3 THE COURT: It's an inside joke for anybody  
4 who's happened to look at Binders 3 and 4.

5 MR. LOPEZ: We submit that the plaintiffs, Your  
6 Honor, at the December 9th and 10th hearing met their  
7 burden of establishing that the CEP violates the First and  
8 Fourteenth Amendments. At that hearing we took the court  
9 through our evidence which in the main was accepted into  
10 the record.

11 A number of important documents were excluded  
12 without prejudice and we have since supplemented the  
13 record and our findings with additional evidentiary  
14 support to fill the gap. We've also supplemented the  
15 record to focus more specifically on how this law impacted  
16 our clients in the 2008 cycle, legislative cycle, and how  
17 it will affect their fortunes in the future. And I'm  
18 going to spend my time today going through that evidence.

19 For the convenience of the court, we have  
20 prepared a red line version -- oh, I thought I didn't have  
21 a copy for myself -- of our findings. And --

22 THE COURT: That's helpful. I appreciate that.

23 MR. LOPEZ: Yes, Your Honor. Okay, we also  
24 intend to lay out our legal arguments in summation, if the  
25 court wants to hear them. I know this case has been

1 briefed ad nauseum.

2 THE COURT: There's at least one legal issue  
3 that I think would benefit from further argument and  
4 that's the standing question.

5 MR. LOPEZ: Okay, and we would prefer to do that  
6 tomorrow after the conclusion of the defendant's case to  
7 the extent we don't weave in some of those arguments into  
8 our presentation, Your Honor.

9 And so I'm just briefly going to go over the  
10 legislative history again and I'll start there, Your  
11 Honor, because I think that's a way of teeing up the  
12 issues. The court didn't admit as proof, the court didn't  
13 admit our findings and our evidence about the legislative  
14 history as proof that the system was unconstitutional, and  
15 I don't think we asked the court to do that. It allowed  
16 this evidence for purposes of showing that the legislature  
17 was aware that there were serious constitutional problems  
18 with the act and that there were less restrictive and more  
19 narrowly tailored programs that would abate those  
20 problems.

21 We took the court through the legislative  
22 history of the CEP and that history shows that the  
23 legislature adopted a public financing program knowing  
24 full well that major party candidates would be the primary  
25 beneficiaries and that minor party and petitioning

1 candidates would have great difficulty meeting the  
2 qualifying criteria, including the seemingly neutral  
3 qualifying contribution requirement.

4 One important fact that we neglected to flag  
5 during the December hearing was that Governor Rell's  
6 office prepared legislation that was introduced in the '05  
7 legislative session addressed to the public financing  
8 system, addressed to public financing. At the request of  
9 the legislature, the Office of Legislative Research  
10 prepared a summary of the Governor's bill. The report is  
11 offered now as Plaintiff's Exhibit 87.

12 Without going through that bill, I think it's  
13 fair to say that the proposal tracks the original House  
14 and Senate bills and provides full public funding for  
15 minor party candidates on the same terms as major party  
16 candidates.

17 And, moving on, at the December hearing the  
18 court excluded a number of documents allegedly linked to  
19 the intervening organizations for lack of foundation and  
20 these had to do with their opposition -- their efforts to  
21 amend the CEP as it was originally adopted.

22 We have replaced references to those documents  
23 in our proposed findings to new exhibits that are not  
24 lacking in foundation and/or party admissions, and I  
25 understand the defendants now have consented to their



1 admission. This includes transcribed testimony before the  
2 legislature by the intervening parties, including  
3 testimony by Common Cause and Citizen Action Group, both  
4 of the two intervening parties here today. Both CCC,  
5 Common Cause, and Citizens Action testified in support of  
6 easing the qualifying criteria for minor parties, and  
7 closing what they refer to as the organizational  
8 expenditures loophole.

9 The relevant findings and the cites to the  
10 exhibits, excuse me, can be found in Findings 24 to 27.  
11 The transcript of the testimony was already placed in the  
12 record by the defendants as part of the legislative record  
13 that was compiled by the defendants and submitted with  
14 Secretary, Director, Commissioner Garfield -- Director  
15 Garfield's declaration in this case.

16 We've also supplemented the record to cite  
17 extensively to the March 13th, 2006, testimony of  
18 Executive Director -- of Director Garfield urging the  
19 public financing statute to be amended to ease the burden  
20 on minor parties and to close the loopholes in the law.

21 Director Garfield's written testimony is already  
22 in the record. The transcript of his testimony -- in his  
23 testimony, his live testimony, he engages in a lengthy  
24 give and take with different legislators about why he  
25 thought it was necessary to amend the law, and we would

1 direct the court to Findings 21 to 23 which have the  
2 appropriate cites.

3 For instance, when asked during his testimony to  
4 explain why he felt that the qualifying criteria were too  
5 onerous for minor party and petitioning candidates,  
6 Garfield responded that the issue, and I quote, "The issue  
7 is one of fairness and encouraging electoral  
8 competition." He testified that the three, four percent  
9 requirements that he was urging, a grant -- okay -- would  
10 set a fair bar for minor party candidates to show  
11 support. Garfield noted that minor party candidates were  
12 also required to raise qualifying contributions and stated  
13 that that's not going to be easy for candidates to do,  
14 particularly in the Senate.

15 Now, moving on to some of -- to the  
16 organizational loophole and that's the language of Mr.  
17 Garfield, he stated that he thought that the loophole or  
18 organizational expenditures would undermine the  
19 effectiveness of the expenditure limits because it allows  
20 party committees, legislative caucus and leadership  
21 committees, to make unlimited expenditures and leaves the  
22 potential for many thousands of dollars of support to be  
23 provided to qualifying candidates who are already  
24 receiving very generous grants of public dollars. He told  
25 the GAE, Government Affairs and Elections Committee, in

1 oral testimony that the exemption for organizational  
2 expenditures is a large hole that must be closed.

3 Now, we've heard a lot about the organizational  
4 expenditures, about what's wrong with them, with that  
5 provision. The objection is -- there are two arguments on  
6 this point. One is that organizational expenditures are  
7 basically a way of preserving the right of political  
8 parties and leadership PACs to continue to participate in  
9 the public debate, the political debate. And under  
10 federal law and under state law, unrelated to  
11 organizational, the organizational expenditure provision,  
12 political parties can engage in unlimited debate about its  
13 candidates and about its platform through, through  
14 independent expenditures. What is different about this  
15 case is that we're in effect talking about coordinated  
16 candidate and party activity.

17 Now, in addressing this point, Mr. Garfield was  
18 particularly concerned with the scope of the  
19 organizational expenditure provision. He drew a  
20 distinction between activities designed to promote the  
21 party -- for instance, a multiple candidate listing, and  
22 get-out-the-vote efforts -- and the organizational  
23 expenditure provision which allows candidates to directly  
24 coordinate their campaign with party and legislative  
25 leaders. And this is all summarized in Finding 22 of our

1 amended findings. The intervening organization testified  
2 to the same effect.

3 And we also flag for the court, something we  
4 didn't do in the December 9th hearing, that Secretary of  
5 State Bysiewicz also testified at that March 13 hearing in  
6 support of HP-4610 which would have eased the qualifying  
7 criteria for minor and petitioning parties and close the  
8 loopholes for organizational expenditures and exploratory  
9 committees. She also testified it was important to close  
10 the organizational expenditure and exploratory committee  
11 loopholes. I just said that. And that's in Findings 21-A  
12 and 23 of our exhibit, of our amended findings, Your  
13 Honor.

14 In fact, the transcript of the March 23rd -- the  
15 March 13th, 2006, hearings is frankly fascinating reading.  
16 The legislature heard from campaign finance reform  
17 experts, from Commissioner Garfield, from Secretary  
18 Bysiewicz and a half dozen other people all urging that  
19 the qualifying criteria of minor parties be lowered and  
20 that the organizational expenditure and exploratory  
21 committee loopholes be closed.

22 Now, at the time of this hearing, that's  
23 March 13th, 2006, three years ago, the legislature was  
24 also aware from its own research that other states had  
25 enacted clean election programs without discriminatory

1 qualifying criteria or burdensome petitioning  
2 requirements, and we have supplemented the record with an  
3 OLR research report prepared for the legislature addressed  
4 to this subject and that would be at Plaintiff's Exhibit  
5 92.

6 Now, as the court may recall from the  
7 submissions of the parties, the legislature did indeed  
8 make some minor changes to the CEP in '06. What it didn't  
9 do was ease the qualifying criteria. Director Garfield  
10 and the intervening organizations specifically changed  
11 to -- well, we can delete this. They didn't change the  
12 qualifying criteria for minor and petitioning party  
13 candidates, Your Honor.

14 THE COURT: Mr. Lopez, let me interrupt you and  
15 ask you what is the, what's the point of the legislative  
16 history? Obviously I've read the proposed findings. I've  
17 looked through the record to a fairly significant degree  
18 and I don't think that anything that you're describing is  
19 disputed. Obviously they said what they said. But what  
20 impact does that have on your case? Why does it matter,  
21 in other words, that the legislature was presented with  
22 alternatives that would have been more favorable, in your  
23 view, than what they actually enacted?

24 MR. LOPEZ: Well, Your Honor, I think the  
25 legislative history in this case is evidence of two

1 matters. It shows that the people who are charged with  
2 administrating the state's election laws, the SEEC, had  
3 very serious reservations about the constitutionality of  
4 its program, and that's a quote. Director Garfield, I  
5 believe in his written testimony says I'm familiar, I've  
6 been in this business for 25 years, I'm familiar with the  
7 constitutional principles at stake and I believe that to  
8 avoid constitutional objections, it is imperative, it is  
9 imperative for the legislature to make the changes that  
10 the SEEC is proposing. We are the agency in charge of  
11 administrating the elections and we believe it is for the  
12 legislature to make these changes if this statute is to  
13 avoid the constitutional objections that are being raised  
14 by plaintiff in this case.

15 THE COURT: Right, but you're asking me to look  
16 at someone else's opinion about whether the act is  
17 constitutional. How does that bear on my decision whether  
18 it is or isn't? In other words, I'm not going to decide  
19 this by a vote of hands, who thinks it's unconstitutional  
20 and who doesn't. How does it -- I mean --

21 MR. LOPEZ: Well, first of all, when you say --  
22 I mean every person who testified, they didn't use the  
23 words unconstitutional but they did raise a red flag that  
24 this was inviting litigation.

25 THE COURT: And they were right.

1 (Laughter)

2 THE COURT: Here we are.

3 MR. LOPEZ: Right. Unless the legislature took  
4 steps to lessen the burden on minor and petitioning party  
5 candidates. And it's also relevant, Your Honor, if you're  
6 assessing the burden on minor and petitioning party  
7 candidates. It seems to me this testimony is relevant to  
8 assess that burden.

9 Here we have the experts -- I couldn't hire a  
10 better expert than the defendant's own witnesses to come  
11 in and say that these, these qualifying criteria are too  
12 burdensome. They are too onerous. They set the bar too  
13 high, and we don't have to set this bar too high to  
14 protect the public fisc.

15 I mean, to me -- excuse me. It seems to me that  
16 that is all relevant on that, those very important issues,  
17 Your Honor. And we have more testimony on this point  
18 because they -- they, the OLR, the Office of Legislative  
19 Research, is intimately involved in this process and they  
20 kept throwing one report after another at the legislature,  
21 or preparing at the request of the legislature one report  
22 after another showing how the petitioning and qualifying  
23 criteria and prior vote total criteria would affect the  
24 ability of minor party, petitioning party candidates to,  
25 to qualify.

1           THE COURT: Right, but here's my point.  
2 Whenever anybody opposes a piece of legislation or a  
3 portion of it, it's an easy thing to come in and say we  
4 don't think this is constitutional. If it's then passed,  
5 the fact that someone said they didn't think it was  
6 constitutional doesn't mean that it's not constitutional.  
7 The question remains, you know, on the full record, is  
8 this constitutional or not as enacted.

9           MR. LOPEZ: Right.

10          THE COURT: And it just -- I understand the  
11 emotional or visceral impact of the fact that the people  
12 now enforcing the act are ones who initially opposed some  
13 of its terms but it doesn't, frankly it doesn't really  
14 help me a lot in figuring out whether this is  
15 constitutional or not to say that other people thought  
16 that it wasn't because that can be true of almost any law.  
17 You're always going to have people who testify against a  
18 law, and very often they are going to say, you know, this  
19 is beyond your constitutional power or this is going to be  
20 reversed or there's going to be litigation. And maybe  
21 they are right, maybe they are wrong.

22          MR. LOPEZ: Your Honor, I understand your point  
23 and it's a point that I've appreciated from, before I even  
24 wrote our briefs and started collecting this data. But it  
25 is historically where people start when they bring on a



1 constitutional case, and --

2 THE COURT: But usually it's in order to  
3 understand what the legislature was doing or what it meant  
4 by a particular sentence or paragraph in a statute. Here,  
5 the statute's pretty clear. We're not looking at  
6 legislative history to figure out what did the legislature  
7 mean when it passed this act. I don't think anybody's  
8 suggested anywhere that the act is vague or ambiguous.  
9 You're suggesting instead it's unconstitutional and  
10 violates your client's First Amendment rights. And so,  
11 you know, the fact that somebody predicted that it might,  
12 you know, doesn't really necessarily help me that much.

13 MR. LOPEZ: Your Honor, and we're not asking you  
14 to make that finding, you know, that Director Garfield  
15 thought the act was constitutional and, like I said, it  
16 ties it up. It's not just -- it just so happens it  
17 happened to be sitting across the room from three parties  
18 who all thought the act was constitutional, and I do  
19 think --

20 THE COURT: Unconstitutional.

21 MR. LOPEZ: -- unconstitutional, and I do think  
22 that is, you know, a legitimate consideration but of  
23 course the court isn't bound by that. But what it seems  
24 to me what the court is bound by are the, is the  
25 testimony, unless it's contradicted, but at least it's, by

1 our proffer, the testimony that the people charged with  
2 enforcing this regulation and the people who had a lot to  
3 do with enforcement, the people charged with the  
4 enforcement of the regulation, testified that the  
5 qualifying criteria were too onerous and that the  
6 loopholes were big and that the organizational expenditure  
7 provisions would defeat the purposes of the public  
8 financing program because it would allow candidates to  
9 continue to raise money and effectively run stealth  
10 campaigns.

11 Your Honor, if I didn't have the benefit of that  
12 legislative history and I had just taken the  
13 Commissioner's deposition or I had taken the Secretary of  
14 State Bysiewicz's deposition or I put them on the stand  
15 and they made these same concessions, I can't think why  
16 the court wouldn't consider that testimony on the issue of  
17 the reasonableness or unreasonableness of the qualifying  
18 criteria. And that's -- I'm not sure what more I can say.

19 MR. FEINBERG: Your Honor, could I add one thing  
20 to make clear, I don't think anyone on this side ever  
21 conceded that the statute was unconstitutional or  
22 testified to that effect. The testimony is we'd like to  
23 avoid constitutional objections, which of course we all  
24 now are faced with, but that's a very different animal  
25 than any kind of concession Mr. Lopez is talking about

1 here.

2 MS. YOUN: Can I also be heard on the issue of  
3 organizational expenditures? The organizational  
4 expenditure loophole that Attorney Lopez cited Jeff  
5 Garfield, intervenor defendants and the Secretary of  
6 State's testimony on referred to an earlier version of the  
7 statute before it was, in fact, amended to substantially  
8 narrow that loophole.

9 Garfield's declaration dated March 4th, 2009, if  
10 you look to there, it will show you that, in fact, major  
11 party organizational expenditures went down from almost  
12 \$1.5 million in 2006 to less than \$500,000 in the 2008  
13 cycle. So, the suggestion that the organizational  
14 expenditure loophole was broadened up is, I think,  
15 misplaced.

16 THE COURT: You're citing now to actual  
17 experience of the '08 election?

18 MS. YOUN: Yes, 2006 versus 2008.

19 THE COURT: Right, but --

20 MS. YOUN: But as to the changes in the law that  
21 pertain to the testimony that Mr. Lopez was citing.

22 THE COURT: Well, okay, but the actual  
23 experience in '08 doesn't refute the argument that the  
24 loophole is a potential problem. It just says in '08  
25 people didn't use the loophole as much as they might have

1 in some other situation.

2 MS. YOUN: Sure. And in our presentation, we're  
3 prepared to talk about the ways in which the  
4 organizational expenditure loophole was, in fact, narrowed  
5 to, to mean that various kinds of contributions are no  
6 longer allowed, which is exactly why this result happened,  
7 which is why the expenditures went down.

8 THE COURT: Okay.

9 MR. FEINBERG: Can I add one thought to that,  
10 Your Honor? The 2008 numbers don't necessarily show that  
11 people didn't take advantage of the loophole. They may  
12 show that the so-called loophole is not really as much of  
13 a loophole and really not much as much of a problem as the  
14 plaintiffs are contending.

15 THE COURT: Right, or it may show that people  
16 don't need the loophole if they are getting lots of free  
17 money. You can debate, and I'm sure the parties will  
18 debate what the numbers mean. I'm just, what I'm trying  
19 to focus on now is what is the significance of the  
20 legislative history.

21 Fair enough, it's testimony about the potential  
22 impact of the act. It's a prediction. It's a prediction  
23 about what the act might permit or what effects it might  
24 have and I think that's fair enough, but you're not, in  
25 other words, trying to suggest that because the

1 legislature was told this, the legislature acted with --  
2 in bad faith or there's some sort of attempt to focus on  
3 minor parties. In other words, you're not getting at the  
4 state of mind, if you can do that, of the legislature.  
5 You're just -- nor are you trying to say you're clarifying  
6 ambiguity in the statute. You're just simply trying to  
7 say this testimony was given and it's there and the court  
8 should consider it for what it's worth. Is that -- I mean  
9 am I missing something?

10 MR. LOPEZ: As to the constitutionality, as to  
11 the legal issue, Your Honor, we're not even asking you to  
12 make that finding based on the testimony but we -- and I  
13 think you are missing something. I mean, Your Honor, we  
14 didn't, I didn't even take Director Garfield's deposition.  
15 I didn't call him as a witness today.

16 THE COURT: Okay.

17 MR. LOPEZ: But he made these -- he has given  
18 his, in effect, his professional, his considered opinion  
19 that these qualifying criteria are unreasonable. And  
20 that's a factual finding the court has to make and there's  
21 no reason for the court to make that finding divorced from  
22 his testimony. I mean what more reliable testimony is  
23 there than his sworn testimony before the legislature that  
24 was considering this law?

25 THE COURT: Fair enough.

1 MR. LOPEZ: Okay.

2 THE COURT: That's I think what I'm saying. You  
3 want me to consider it for what it's worth on the merits,  
4 not indirectly to show what the legislature was thinking  
5 when it enacted the law. You're saying here's his  
6 testimony about Commissioner Garfield's view of the act.

7 MR. LOPEZ: That's right, Your Honor.

8 THE COURT: Fair enough. I got it.

9 MR. LOPEZ: At the December 9th hearing, you had  
10 made the comment, the off-hand comment that -- maybe it  
11 wasn't so off-hand but you made the comment that the  
12 legislature, based on the record it considered, could not  
13 have devised a more exclusionary system, and that's a  
14 paraphrase, Your Honor -- couldn't have devised a system  
15 that more effectively drew the line in a way that would  
16 exclude minor parties in the main and the legislative  
17 history actually supports that, that sort of -- that  
18 expression -- well, those comments, Your Honor, because  
19 the legislative history had the benefit of OLR reports  
20 that show that minor parties would almost never qualify  
21 under the petitioning and prior vote total requirements  
22 and, even if they did somehow, were able to benefit from  
23 that, they would not be able to qualify under the  
24 qualifying contribution requirements because they had the  
25 benefit of data that show that minor parties, except for

1 Governor Weicker, never raise the amounts of money that  
2 are -- for instance, if the legislature had set the bar  
3 for raising qualifying contributions to the House race at  
4 \$1,000 instead of \$5,000, we'd have a lot more minor party  
5 participants, but they set it at five and when they set it  
6 at five they knew because the OLR, the OLR gave them a  
7 report that showed that minor parties never raise that  
8 kind of money in the House races, the Senate races and in  
9 statewide races, and there are aspects of the legislative  
10 history that are relevant to this proceeding.

11 THE COURT: I agree, but you're not proffering  
12 them in the way that one would normally proffer  
13 legislative history. Legislative history generally is  
14 used to help understand the legislation. What does it  
15 mean in Subparagraph A where it says "significant"?  
16 "Reasonable"? You know, words that need some  
17 interpretation. You're not using legislative history in  
18 that way to say this is what they intended when they  
19 passed this act, I don't think. I think what you're  
20 saying is this is evidence that you, the district court,  
21 can consider, be it a legislative report, be it testimony  
22 before the legislature, this is evidence, in effect, that  
23 ought to be considered in deciding whether the act is  
24 constitutional as opposed to understanding what it means  
25 or what the legislature intended when it passed it, so

1 that the whole concept of legislative history seems funny  
2 to me. You're offering it, as I understand it, as  
3 substantive evidence in this case.

4 MR. LOPEZ: I am, Your Honor, substantive  
5 evidence about the reasonableness or unreasonableness of  
6 qualifying criteria.

7 THE COURT: Right.

8 MR. LOPEZ: And the danger of the loopholes and  
9 of the, the -- yes, and that's what I'm offering it for,  
10 and it's as if I had put Director Garfield on the stand or  
11 any of the -- or if I called the CCC people or the  
12 Connecticut Common Cause for evidence and I'm offering it  
13 for a that limited purpose and I thought we had  
14 established that frankly at the December 9th hearing.

15 THE COURT: I just want to be clear that that's  
16 what you're doing. Thanks.

17 Mr. Zinn Rowthorn, you were halfway up a couple  
18 times. Did you want to say something?

19 MR. ZINN-ROWTHORN: No, Your Honor. Thank you.

20 THE COURT: All right.

21 MR. LOPEZ: Now, Your Honor, we have a point  
22 that I expect is going to be contentious but I might as  
23 well bring it in here because it makes some sense. And  
24 it's a point we didn't make at the December 9th hearing  
25 partly because we didn't know how to present it, and we



1 since sort of massaged it and I think we can present it in  
2 a way that makes sense now.

3 The CEP as it was originally enacted, Your  
4 Honor, did not allow minor parties who did not meet the  
5 prior vote total to proceed as petitioning candidates.  
6 Under Connecticut law, petitioning candidates are a  
7 discrete subgroup of candidates. They don't have minor  
8 party status. Minor party candidates are candidates who  
9 are validly able to qualify under the valid party line who  
10 met a 1 percent threshold and they held the line.

11 Now, under the laws, as it was originally  
12 passed, and this is our contention, and as it is written I  
13 think the law is very party intensive, very clear, minor  
14 party candidates who didn't meet the ten percent prior  
15 vote total requirement couldn't receive the benefit. They  
16 were left out in the cold.

17 THE COURT: One percent, one percent.

18 MR. LOPEZ: No. Minor party candidates who did  
19 not meet the prior vote total requirement --

20 THE COURT: For the ten percent.

21 MR. LOPEZ: -- for the ten percent.

22 THE COURT: Okay.

23 MR. LOPEZ: Could not under any circumstances  
24 participate in the public financing system because the CEP  
25 could not provide for that. Now --

1 THE COURT: Okay.

2 MR. LOPEZ: -- we, our original complaint, the  
3 complaint in this case, alleges that and that minor party  
4 candidates who don't meet the prior vote total  
5 requirements are out in the cold. Our summary judgment  
6 papers which were submitted on July 10 pursue that  
7 argument, and that was an additional reason why this law  
8 was not unconstitutional, constitutional -- why this law  
9 was objectionable.

10 Now, what we have learned since the December 9th  
11 hearing is that Commissioner -- Director Garfield actually  
12 sought to amend the law to allow minor party candidates  
13 who didn't meet the prior vote total requirement to  
14 proceed as petitioning candidates. And that is -- his  
15 proposed legislation is already in the record. The OLR  
16 subsequently did an analysis of his proposed legislation  
17 and validated what the SEEC was trying to accomplish, was  
18 hoping to accomplish in the '06 legislative session, was  
19 to amend the law so that minor party candidates who didn't  
20 meet the prior vote total could proceed as petitioning  
21 candidates.

22 Just looking for a cite here, Your Honor, in the  
23 record where this OLR report is. There it is, Your Honor.  
24 We would refer you to our Exhibit Number 94 which  
25 summarizes -- excuse me. Right, Exhibit 94 which

1 summarizes HB-5610 which is the legislation that was being  
2 offered by the SEEC for amending the statute.

3 I could direct you to a specific page, Your  
4 Honor. It would be page two of six and it would be the  
5 first full paragraph on page two. Ours is 94.

6 MS. YOUN: Your Honor, if I may, the OLR report  
7 with respect to the, to the parties' performance in  
8 various races I think are between our exhibits to the  
9 Garfield declaration, number one in our OLR report.

10 I'm sorry, Your Honor, I have the wrong cite.

11 MR. LOPEZ: Your Honor, the point of our raising  
12 this is that the legislation as it was originally written  
13 did allow minor party candidates who didn't satisfy the  
14 prior vote total to qualify as petitioning candidates.  
15 That was reserved just for petitioning candidates and if  
16 you read the statute, that's what it says and to this day  
17 because the amendment was not adopted by the legislature.

18 Now, for two years we proceeded under the  
19 assumption that my candidate's going to qualify for public  
20 financing. You're going to hear today, or you have heard  
21 in the submissions of the defendants, that my, my clients  
22 somehow sat on their hands and didn't make any effort to  
23 qualify for public financing. Well, let me tell you how  
24 it played out, Your Honor.

25 We actually thought this was an anomaly of the

1 law all along and we actually sought clarification from  
2 opposing counsel. Mr. DeRosa actually went to some  
3 trainings, raised his hand and said can I participate in  
4 the CEP, and they said no because you're a minor party  
5 candidate who, who didn't meet the prior vote total  
6 requirements and --

7 MR. ZINN-ROWTHORN: Your Honor, I just have to  
8 break in. If we're going to have substantive testimony  
9 about Mr. DeRosa with respect to this --

10 MR. LOPEZ: It's in his declaration.

11 MR. ZINN-ROWTHORN: But the important point is  
12 the dates here, you know, when he was told that he  
13 couldn't participate. Because as of July 17th, 2008, it  
14 was announced to the world that individuals who had gotten  
15 one who had ballot access between one and ten percent  
16 could petition as minor party candidates to qualify and,  
17 in fact, candidates did do that.

18 THE COURT: That's through the SEEC.

19 MR. ZINN-ROWTHORN: That's through the SEEC  
20 declaratory ruling.

21 THE COURT: The petition.

22 MR. ZINN-ROWTHORN: And that's in the  
23 Declaration Ruling 2008-1. I think I understand  
24 Mr. Lopez's point is although we made the system easier  
25 for his clients and others like his clients to

1 participate, that is somehow inconsistent with the theme  
2 in this case. He's unhappy with it and I think he's going  
3 to make a procedural argument in the context in which --  
4 that that determination is somehow unlawful. We would  
5 obviously tell the court our position would be the SEEC is  
6 entitled to construe the statutes. The question was  
7 presented by candidates who wanted to participate this  
8 way. The Secretary of State and the SEEC both issued  
9 decisions that were consistent on this point that  
10 concluded in fact giving the benefit of the doubt to  
11 participation, construing the statute to permit  
12 participation under those circumstances.

13 You know, if there is a -- you know, this claim  
14 that there's a procedural claim that's it's obviously late  
15 in the day, we would think that it is one that ought to  
16 proceed, if at all, in state court, whether there was some  
17 sort of administrative problem with how this was  
18 developed, but this was very clear. Counsel knew that  
19 this was an option, other candidates knew this was an  
20 option, so --

21 THE COURT: "This" being seeking a ruling?

22 MR. ZINN-ROWTHORN: Participation through  
23 nominating petitions as a minor party candidate where your  
24 party didn't get ten percent last time but that you have  
25 ballot access. So, it would be between one and ten and

1 this opened up a -- clarified to do this avenue to  
2 participate.

3 THE COURT: As of July of '08.

4 MR. ZINN-ROWTHORN: As of July of '08, that was  
5 when it was clarified. We would say that was, you know,  
6 that that was the state of the law, it was perhaps  
7 ambiguous and the question was posed and we answered it.

8 MR. FEINBERG: It was also proposed before July,  
9 that's the date it was adopted. It was proposed a month  
10 before and it was proposed before Mr. Lopez filed his  
11 summary judgment papers. And he knew about it because we  
12 specifically brought to his attention and he nevertheless  
13 went ahead and in his summary judgment argument made an  
14 argument that completely disregarded what the SEEC's  
15 declaration ruling that was then proposed and was shortly  
16 to become final, just ignored it. He pretended his  
17 interpretation of the law was correct and the SEEC's was  
18 wrong.

19 THE COURT: Okay. Well, let me understand from  
20 Mr. Lopez what point you're trying to make.

21 MR. LOPEZ: Right, right. Your Honor, I didn't  
22 ignore anything. We had to make a tactical decision what  
23 to put in our briefs. Our briefs were due July 10th. The  
24 SEEC had not made, had not adopted the ruling. I knew  
25 they might or they might not.

1           THE COURT: Right, right, but procedurally, you  
2 know, I'm not bothered -- you know, I really don't care  
3 frankly when these things happened unless there's some  
4 substantive impact.

5           MR. LOPEZ: Right, and there is.

6           THE COURT: All right, let me hear that.

7           MR. LOPEZ: The substantive point, the  
8 defendants have, in their submissions have made the case  
9 that my client somehow sat on their rights and did nothing  
10 to participate in the CEP, and the substantive point we  
11 make from this is that our clients didn't know until  
12 July 17th that they could participate in the CEP. Then  
13 our client -- and this is in Mr. DeRosa's affidavit --  
14 went and sought, went to, went to Hartford and they asked  
15 for the petitioning papers, and he did that after  
16 August 6th. He was notified that the petitioning period  
17 closes on August 6th, so he had a very narrow window  
18 between the 17th and the 6th to meet the petitioning  
19 requirement, even assuming that he knew that he had to  
20 meet that requirement by August 6th.

21           Your Honor, major party candidates or anyone who  
22 proceeds on the prior vote total, they have until October  
23 10th to submit their application. Petitioning party  
24 candidates, in effect, have to qualify by August 6th  
25 because that's when they have to submit their petitioning

1 requirements. And then, it could take weeks before their  
2 petitions are approved and they don't get their grant  
3 until several weeks before the election, and that's  
4 exactly what happened to all the major party candidates in  
5 this case. Cicero Booker and Deb Nobel didn't get their  
6 grants until October 15, even though they submitted their  
7 petitioning signatures on August 6th, Your Honor, and  
8 that's three weeks before the election. All of the major  
9 party candidates had their money well in advance and  
10 that's sort of the box we find ourselves in.

11 So that's our substantive claim about this, Your  
12 Honor. We didn't sit on our rights. We pursued our  
13 rights vigorously.

14 Now, there is also a legal matter here, Your  
15 Honor, because I don't know how -- the defendant, the  
16 Attorney General says the declaratory ruling and they cite  
17 this in the footnote in every declaratory ruling, has the  
18 effect of law, Your Honor, but I'm not sure what effect  
19 that has on this court's ability to interpret the statute.  
20 The statute very clearly, from our point of view, does not  
21 allow minor party candidates who don't satisfy the prior  
22 vote total requirements to proceed as petitioning  
23 candidates.

24 Secretary Garfield understood the statute that  
25 way and sought to amend the statute that way. The OLR



1 understood the statute that way and sought -- and made,  
2 and put that in their report to the legislature. Then  
3 Secretary Garfield turns around and issues this  
4 declaratory ruling that comes to a different conclusion  
5 than the position he had held two years ago.

6 And I'm not sure what the court can do with  
7 that. Are you bound by the declaratory ruling? Are you  
8 bound by a declaratory ruling that is flat-out  
9 inconsistent with the plain text of the statute and in  
10 light of the evidence of the position taken by Secretary  
11 Garfield when he sought to amend the statute? Can a later  
12 administration rescind, perhaps after this hearing,  
13 rescind that declaratory ruling? What is the binding  
14 effect on this court in the face of what we submit is the  
15 plain language of the statute? And now --

16 THE COURT: Well, it seems to me, it seems to me  
17 you've either got to -- you've either got a mootness  
18 problem or you've got a ripeness problem, the way you're  
19 arguing. As things now stand the act is, has been  
20 interpreted and apparently is being enforced in a way  
21 consistent with the SEEC declaratory ruling, so the  
22 argument that the statute should be read differently seems  
23 to be mooted. It may be, as you say, some day. I mean  
24 anything is possible. The ruling may be, you know,  
25 voided. It may be superseded.

1 MR. LOPEZ: Right.

2 THE COURT: In which case at that point someone  
3 in minor party who's disadvantaged by that would have  
4 standing presumably to challenge that statute, but as  
5 things now stand it doesn't look to me like you can argue  
6 unconstitutionality based upon either the act without the  
7 interpretation of the act or argue, well, the law may be  
8 different some day in the future.

9 MR. LOPEZ: Well, you know, there's some force  
10 to that argument, but our point, Your Honor, is that  
11 voluntary sensation doesn't moot a case. And I think  
12 there's clear, like what they call litigation driven  
13 decisions don't -- are not binding on the court because  
14 they are not binding on the defendants and they can be  
15 changed at any time. And because of that, the courts are  
16 not bound by that and you don't moot out the cases and it  
17 doesn't present a mootness argument.

18 We're going to hear later today, I don't want to  
19 get into it, about another change in policy or another  
20 interpretation of the statute that came in two days ago  
21 that completely, you know, distorts our understanding of  
22 how this statute works, and this court's not bound by that  
23 because they can withdraw, and as long as they can  
24 withdraw it, Your Honor, we submit that those -- those  
25 litigation, that those interpretations are not binding on

1 the court and we're prepared to brief it because I think  
2 the law is generally, generally favorable to our point of  
3 view.

4 THE COURT: Well, that's an exception to  
5 mootness if someone can return to their old ways. I think  
6 that's the general rule. And I understand the point.

7 MR. LOPEZ: Okay. Fair enough, Your Honor.  
8 I'll move on.

9 I'm going to fast forward. There were other  
10 minor changes to the law in the '06 legislative session.  
11 We've addressed them pretty thoroughly before, but  
12 basically minor party, partially funded candidates can  
13 continue to raise contributions up to the limits, up to  
14 the expenditure limits. They can only do it in \$100  
15 increments and that's our objection. A more sensible  
16 approach and probably one that's more in line with Buckley  
17 and one that's probably Constitutionally required when you  
18 consider this act as a whole is that the minor party  
19 candidates who are partially funded should be able to  
20 close the gap by availing themselves of the generally  
21 applicable contribution limits because to do it in \$100  
22 increments is just isn't going to work, particularly for  
23 statewide office. And we put in uncontradicted evidence  
24 on that from our witnesses.

25 The other way the legislature tweaked the law

1 also had to do with partially funded minor party  
2 candidates, and it allowed partially funded minor  
3 candidates to qualify for post election grant if, say,  
4 they were funded at a third and say they actually exceeded  
5 and they got 20 percent in the general? In those  
6 circumstances, the minor party candidate would be paid --  
7 would get a supplemental grant but the grant was limited  
8 to certain deficits but, and maybe the defendants can  
9 explain this better than I, but for some reason they  
10 define deficit in a way that is really a -- I think it's  
11 more fiction than reality. You can't lend the money to  
12 your campaign, you can't borrow the money from a bank or  
13 from anyone else and you can't incur the obligation based  
14 on a promise that you will pay it if you get a  
15 supplemental grant.

16 So it seems to me you're limited to, you know, a  
17 few unpaid bills, you know, if a bill comes in and you  
18 delay paying it until after the election. And we put in,  
19 I think, uncontradicted testimony that that's not how  
20 business is done. That, you know, you pay upfront,  
21 particularly in the broadcast advertising, you talk about  
22 statewide elections, but even for things like printing  
23 services and catering services and the like. And we put  
24 that into the record, Your Honor.

25 MR. ZINN-ROWTHORN: Your Honor, just for the

1 record, that testimony is, our position is tht it's not  
2 uncontradicted. In our last reply brief we addressed  
3 that, and Commissioner Garfield's last declaration  
4 addresses that.

5 THE COURT: Addresses, just to be clear, the  
6 question of what is a deficit or --

7 MR. ZINN-ROWTHORN: Well, no. Primarily how --  
8 the allegation is that's just not how business is done,  
9 there are no way anyone can reasonably take advantage of  
10 this opportunity. The testimony is that, in fact, one  
11 could, and we think frequently do, contract for services.  
12 The contract can't be provisional upon getting the grant  
13 but payment wouldn't necessarily be due until after, after  
14 the grant is issued, as long as it's going to get paid  
15 either way, and that that -- we don't dispute the point as  
16 to broadcast services but as far as other printing  
17 expenses, last minute mailers, et cetera, that is  
18 something that clearly can be done under the system.

19 THE COURT: Okay.

20 MR. LOPEZ: But you see the Catch 22 that my  
21 colleague just inadvertently placed my client in? Say my  
22 client's a one-third, qualifies for a third grant and he  
23 engages in deficit spending that is in excess of the  
24 grant. What if he only, what if he gets less than ten  
25 percent of the vote? He's not eligible for a supplemental

1 grant. Now, how does he pay for that? Under the program  
2 rules, he can't pay for it with his own money.

3 Something's broken about this. He can't pay for it. What  
4 he would have to do was shut down his committee, file his  
5 termination report at the end of the cycle and if he, if  
6 that is unpaid at the end of his termination report? You  
7 have to close accounts, so what you do is you forgive it  
8 to yourself and then you'd be liable personally.

9 But under the program rules, under the state's  
10 definition of a contribution, forgiving a deficit on your  
11 termination report is treated as a contribution to your  
12 campaign. So our guy -- so you see the, it seems to me  
13 unless I'm not being clear, sort of the difficult road  
14 that my clients have to navigate in this if they want to  
15 try to take advantage of the deficit rule.

16 And we don't, Your Honor, take the position that  
17 there aren't some reasonable amount of small deficits that  
18 you might run up, like an unpaid bill. Sometimes it's a  
19 delay, like an electricity bill may come in a month later  
20 to your campaign office but we're talking about a pretty  
21 small universe of unpaid bills and that's the thrust of  
22 our evidence on this.

23 MR. ZINN-ROWTHORN: I think -- I don't want to  
24 dwell too much on this because I think up to this point  
25 we've been going over sort of the arguments we made at the

1 facial constitutional stage and we haven't gotten the as  
2 applied challenges yet, as far as I can tell, but what we  
3 anticipate what is permissible is that a candidate who  
4 gets a partial grant is always permitted to fund-raise up  
5 to the expenditure limit, and there's nothing that would  
6 prevent that candidate from hold -- keeping his committee  
7 open, holding a fundraiser, doing some additional  
8 fundraising within the expenditure limits within the  
9 qualifying contribution threshold to pay off those source  
10 of debts.

11 THE COURT: Right, but the problem then is you  
12 have a defeated candidate trying to raise money for, to  
13 retire a campaign debt.

14 MR. ZINN-ROWTHORN: Right, but it happens, Your  
15 Honor --

16 THE COURT: Oh, I know --

17 MR. ZINN-ROWTHORN: -- quite commonly.

18 THE COURT: I know it happens.

19 MR. LOPEZ: Your Honor, I think I'll just fast  
20 forward. I think what happened in the '07, '08  
21 legislative history is in the record, has already been  
22 discussed in the brief, so let me fast forward to '09.  
23 Because in '09, here we are, there are even more surprises  
24 in our findings about this law.

25 The SEEC, I don't know if they've introduced the

1 legislation yet and I'm not sure how they introduce the  
2 legislation. I assume they get a sponsor and proceed that  
3 way, and I'm not sure if it's been introduced yet but I  
4 know the SEEC has proposed legislation that they intend to  
5 have introduced. And it would actually expand the trigger  
6 provision, the matching -- the excess expenditure  
7 provisions? So right now under the excess expenditure  
8 provisions, supplemental grants are triggered by -- let me  
9 withdraw all that, Your Honor, because I went into the  
10 wrong phase. I'm talking about the independent  
11 expenditure provision.

12 Right now the independent expenditure provision  
13 supplemental grants are triggered by negative ads that  
14 target participating candidates. What the SEEC has  
15 proposed, and if you're a true believer in these kinds of  
16 systems, it makes some sense, but what they propose is  
17 that supplemental grants be triggered by any advertising  
18 or any communications that target -- that benefit one  
19 candidate or another. So if a, if NARAL were to take out  
20 an ad urging the election of a nonparticipating candidate,  
21 or that would, that would trigger a matching grant for the  
22 participating candidate. Right now it's limited to what  
23 NARAL took out an ad --

24 THE COURT: Criticizing.

25 MR. LOPEZ: Right, right, right. So I don't



1 know, we may know by the time you write your opinion, how  
2 this legislation is going to turn out. But --

3 MR. ZINN-ROWTHORN: Your Honor, I don't know if  
4 it needs to pointed out but there are an obviously  
5 ripeness problem with that issue, but also, just to point  
6 out the sort of Catch 22 that good faith election  
7 administrators find themselves in. The bitter complaints  
8 they were confronted with during this election cycle is  
9 that the independent expenditure provision which required  
10 an express, an expression that a particular candidate  
11 should be defeated was too marrow. People were saying  
12 these are obvious ads that we think relate to us, make our  
13 life more difficult, and they said that's not how we read  
14 it, we read it narrowly. Which is, for purposes of  
15 plaintiffs, obviously a favorable ruling.

16 Now we have a proposal that may expand that to  
17 address one problem, it's not even worked its way through  
18 the legislative process yet and we're already receiving  
19 complaints about it. This is, well, it's just, a clear  
20 ripeness problem, Your Honor.

21 MR. LOPEZ: Okay. Anyway, Your Honor, that  
22 proposal by the SEEC can be found at Exhibit 73.

23 The other development in the '07 -- in the '09  
24 legislative session arose in the context of the budgetary  
25 crisis that Connecticut is currently in. And Director

1 Garfield went to the legislature and, while the  
2 Director -- apparently there's a huge surplus of money at  
3 the CEP. They have more than \$52 million if I understand  
4 the situation correctly, and Governor Rell asked the SEEC  
5 to turn some money over to the, to the state common funds  
6 to help address the budget crisis that we're in the middle  
7 of. And Commissioner Garfield prepared two documents, one  
8 with the, one with -- one for the legislature and one in  
9 connection, one for some Office of Policy Research and  
10 they can both be found in our exhibits, Your Honor, 71 and  
11 72.

12 (Pause)

13 THE COURT: What does the deficit mitigation  
14 plan have to do with this case?

15 MR. LOPEZ: Well, Your Honor, just -- the  
16 Commissioner Garfield -- part of the defendants' defense  
17 in this case, Your Honor, is that the CEP is not going to  
18 result in increased spending, candidate spending, and it's  
19 not going to result in increased competition. That  
20 contention is, if not flat out contradicted by this  
21 testimony, at least called into question. And these  
22 documents bear on that issue.

23 Commissioner Garfield anticipates that in 2010  
24 he's going to need \$13 million to fund legislative  
25 elections. And he caveats his comments that he's making a

1 lot of conservative assumptions, including the  
2 nonparticipation of minor party candidates. And this  
3 cycle they budget a 10, I think they came in a little  
4 below that. But the point is he, as the expert, as the  
5 person in charge of enforcing this law, believes that  
6 there's going to be more money spent under the CEP in the  
7 next cycle, and that there's going -- which implies  
8 there's going to be more competition.

9 Now, on the statewide elections -- unless he  
10 made a mistake, but there's two documents here that  
11 confirm each other -- in '06, the last statewide election  
12 was approximately \$14 million spent, he comes into the  
13 legislature and testifies that we need \$39 million to fund  
14 the statewide elections, which, fair enough, but all it  
15 does is confirm, confirm our claim that the CEP is going  
16 to fund candidates at levels that they could never have  
17 achieved privately. It's going to completely distort the  
18 market and that's why we offer that, Your Honor, and if  
19 you're satisfied with that explanation, I'm going to move  
20 on.

21 THE COURT: Okay.

22 MR. LOPEZ: At this point I would ask you to  
23 turn to Binder 1.

24 Now, at the December hearing we offered a series  
25 of tables that look very much like the tables here,

1 collecting expenditure and receipt data for candidates.  
2 The defendants objected to the introduction of this data  
3 on the grounds that the final expenditure data was not  
4 final and wouldn't be available until candidate  
5 termination reports are filed in January and February of  
6 '09.

7 We've now updated the tables to correspond to  
8 final information on candidate receipts attributable to  
9 participation in the CEP. We have double-checked this  
10 against the defendant's own data which they've submitted  
11 in connection with these proceedings. Our data, our total  
12 candidate receipts attributable to participation in the  
13 CEP is, in fact, confirmed by the defendants' data,  
14 candidate receipts in the sum of qualifying contributions  
15 in CEP grants.

16 Now, both sides may disagree about the  
17 conclusions to draw from this data but there are no  
18 disagreements about the underlying facts that have been  
19 brought to my attention thus far. And I would direct the  
20 court to Narain Table 1 and 2 which can be found at Tab 13  
21 following his declaration.

22 THE COURT: I have it, yes.

23 MR. LOPEZ: Thank you, sir. These tables  
24 compare only receipts attributable to participation in the  
25 CEP with '06 receipts by that candidate or the candidate

1 who ran in his place in '06. A comparison of the grants  
2 paid in '08 with prior candidate receipts shows how  
3 dramatically the CEP has increased funding available to  
4 major party candidates.

5 There are two distinct measures of overall  
6 increased spending, of overall increased spending  
7 attributable to the CEP grants. The first measure is to  
8 simply compare '08 candidate receipts with actual '06  
9 receipts by candidates in the same districts and that's  
10 what Tables 1 and 2 do.

11 In legislative districts where the party did not  
12 run a candidate in '06, receipts are listed as zero. The  
13 increase is most significant in those House and Senate  
14 districts where major party candidates are now competing  
15 in previously abandoned districts and for those candidates  
16 competing in districts in which the weaker major party  
17 candidate raised very little money.

18 If you just scroll down here you can see quite  
19 plainly how it will dramatically increase candidate  
20 receipts for the great majority of candidates. And in  
21 fairness, we have set out the -- we have listed the  
22 candidates who would actually not benefit under the CEP.

23 Now, at the December hearing, the defendants  
24 objected to the introduction of these tables on the  
25 grounds that the reported average increase and the average

1 decrease in '08 permissible expenditure limits were  
2 distorted because plaintiff did not back out candidates  
3 who ran in '06 but not in '08. So what we've done is  
4 remove the average and then we've created a separate set  
5 of tables that show the spending of candidates who vacated  
6 seats that they ran in '06.

7 Now, these tables are -- continuing to Tables  
8 2-A and 2-B. I'm sorry, Judge, 1-A and 1-B. If you just  
9 follow the Table 1, right up after Table 1 is Table 1-A.

10 THE COURT: I think they are in 1-A and 2-A, is  
11 that right?

12 MR. LOPEZ: Right. It is Table 1-A and 2-A but  
13 if you want to look at one, just have a look at Table 1-A  
14 and this is -- we prepared this to address their concern  
15 that, to address the defendants' concern that our  
16 conclusion that overall expenditures are increasing is  
17 flawed because we didn't factor in or we didn't control  
18 for candidates who are not running in this cycle but ran  
19 in '06. And if you look at, just on the Senate side, if  
20 you look at Table 1-A, you can see that -- excuse me, that  
21 there are five such candidates and one of the candidates  
22 only raised \$5,000 so that wouldn't have any effect on our  
23 claim that spending benefits major party candidates, that  
24 the CEP benefits major party candidates, and that's true  
25 about the candidate who spent -- I'm sorry, the candidate

1 who spent \$25,000 and the candidate who spent \$65,000.

2 The point is more vividly made, Your Honor, in  
3 Table 2-A where if you scroll down that table, you'll see  
4 that almost none of these candidates raise the \$30,000  
5 that they would, they would receive if they participated  
6 in the Citizens Election Program.

7 MS. YOUN: Your Honor, we have responded to many  
8 of these points in the Proulx declaration but we also  
9 prepared demonstratives of our own averages of  
10 expenditures. We didn't exactly refute those tables  
11 because I wasn't quite sure what these tables were being  
12 put in for. But we did our own analysis of what happened  
13 in the 2008 elections with regard to expenditures which is  
14 in the Proulx declaration that was -- that's dated March  
15 10, 2009. I don't know if it would be more helpful for us  
16 to confine that to our, you know, our part of the  
17 presentation or whether you would like it to be addressed  
18 now.

19 MR. LOPEZ: Well, Your Honor, the major  
20 difference between their data and our data is they back  
21 out and return money. And our position, unless I'm wrong,  
22 and our position is it's a completely irrelevancy. Let me  
23 draw an analogy, Your Honor -- you know, at least for  
24 constitutional purposes, it's completely irrelevant.

25 Let me draw an analogy. If you gave a Democrat

1 a half hour of televised debate time on public television  
2 and you gave his Republican opponent a full hour under the  
3 statute, under a statutory scheme, the fact that the  
4 Republican opponent didn't use the whole hour or only used  
5 a half an hour wouldn't defeat the Democrat's challenge to  
6 that statutory system, either on its face or as applied.  
7 And that's how we, and that's -- I'm not sure what else to  
8 say about that.

9 MS. YOUN: Yes, I don't want to interrupt  
10 Attorney Lopez at length. You know, we have prepared our  
11 own presentation, I guess, of what happened with regard to  
12 major party expenditures in the 2008 as opposed to the  
13 2006 election, and I think that maybe Attorney Lopez would  
14 prefer just to continue on, rather than --

15 THE COURT: I think that makes sense. I mean  
16 you're not, you're not disputing the accuracy of the  
17 information contained in these tables.

18 MS. YOUN: No, I don't believe so.

19 THE COURT: So we'll take up your spin on the  
20 data during your case. Thanks.

21 Mr. Lopez, we're going to be taking a morning  
22 break at some point, so when you reach an appropriate  
23 point in your case, why don't you let me know.

24 MR. LOPEZ: Fair enough, Your Honor. Thank you.

25 Now, Your Honor, we've been making the point



1 throughout that the base grant's more in the nature of a  
2 subsidy and actually corresponds to running in a race and  
3 we think is unconstitutional, and we'll address that when  
4 we address our legal claims.

5 The defendant's data on returned grants in our  
6 view confirms this. The legislature knew all along that  
7 the grant amounts were inflated, and I would direct you to  
8 the Plaintiff's Exhibit 18 listing average and median  
9 candidate expenditures, and we went over that in December.  
10 They are inflated, Your Honor, because they don't take  
11 into account three very important factors.

12 One, they don't take into account candidates who  
13 filed exemptions. Almost all minor party candidates file  
14 exemptions, and petitioning party candidates. Major party  
15 candidates also file exemptions. This cycle alone, 14  
16 major party candidates filed exemptions. Excuse me.

17 Second, the data contained in the OLR reports  
18 that the legislature based its decision to set the grant  
19 amounts don't take into consideration privately financed  
20 candidates, and that would also include minor party  
21 candidates and weak major party candidates who don't want  
22 to bother with the reporting requirements because they,  
23 they are going to donate, they are going to finance their  
24 own campaign.

25 MR. ZINN-ROWTHORN: Your Honor, I just think

1 it's important to qualify, when we're talking about  
2 exemptions we're talking about somebody who doesn't plan  
3 to raise or spend more than \$1,000. So if you had a  
4 privately financed candidate who's going to spend a lot of  
5 money, he'd still have to engage a report.

6 MR. LOPEZ: Then I stand corrected. But  
7 privately financed candidates who don't spend more than  
8 \$1,000, the OLR reports don't take into account.

9 Now, and the third factor that the OLR reports  
10 don't take into account, Your Honor, are -- occur in  
11 elections where there was no second major party candidate,  
12 so vacated seats. And this is very significant, Your  
13 Honor, because the failure to account for vacant seats  
14 inflates the reported average cost of running an election  
15 because the total amount of candidate expenditures is  
16 being averaged out over fewer candidates.

17 For instance, in a noncontested Senate district,  
18 a Democrat who spent 50 against no opponent would have an  
19 average of \$50,000 if you don't account for the absent  
20 opponent; whereas the arrival of a low spending Republican  
21 who spent 10K would, as opposed to his, the other  
22 candidate who would have spent \$50,000, for instance,  
23 would yield an average of \$30,000.

24 So our contention is that -- and this is  
25 important to our argument about that taxes are in the

1 nature of a subsidy as opposed to inflated over-replacing  
2 private dollars with public dollars. Our contention is  
3 that the grant amount is significantly greater than even  
4 the average spending that is reported in the OLR reports.

5 Now, the grant amounts that the legislature  
6 settled on also failed to take into account the fact that  
7 major party, safe major party candidates historically  
8 raised more money than they'd need, so that they can have  
9 a surplus to distribute at the end of the election. This  
10 is exactly what happened in this cycle. The people who  
11 returned money or reported surpluses are strong  
12 incumbents, and at the last hearing I had made this claim  
13 and I drew the objection that I didn't have any evidence  
14 for this. I knew there was some evidence for it but I  
15 couldn't pull it up. And as it turns out, there is an OLR  
16 report that was considered by the legislature, and it's  
17 Plaintiff's Exhibit 84, that shows, that indeed shows that  
18 candidates do -- many candidates do have significant  
19 surpluses.

20 For example, in that report, Andrew McDonnell  
21 who is a safe incumbent, raised \$154,000 in '04 and he  
22 returned \$78,000 of it. And we've seen in their data that  
23 a number of safe incumbents have returned large amounts of  
24 grant money as well.

25 THE COURT: Wait a minute. He returned money in

1 '04?

2 MR. LOPEZ: Right. I have made the claim, Your  
3 Honor, I had made the claim at the December hearing that  
4 the subsidies are inflated because they don't take into  
5 account the actual cost of running an election because  
6 safe incumbents usually run a surplus. I had no evidence  
7 for that -- or I did have evidence for that, I couldn't  
8 pull it up. I now tender that evidence in Document 84,  
9 and in that document it shows as an example or has drawn  
10 as an example that Andrew McDonnell is one of those safe  
11 incumbents who returned more than half the money that he  
12 raised.

13 THE COURT: Well, he distributed it. He didn't  
14 return it.

15 MR. LOPEZ: Well, he distributed it to --

16 THE COURT: He distributed it to PACs and party  
17 committees and so forth, as opposed to returning it to the  
18 CEP.

19 MR. LOPEZ: Yes, sir, yes.

20 THE COURT: Right. Got you.

21 MR. LOPEZ: And that basic trend continues under  
22 the CEP. Safe incumbents didn't spend all the money they  
23 received under the CEP grants and that point frankly is  
24 not terribly controversial from our point of view.

25 Now, then I'm going to talk for about five more

1 minutes and then I'm going to take a break and I would  
2 just like to direct the court to updated Nikolaidis Tables  
3 3 and 4 which can be found --

4 THE COURT: I have it.

5 MR. LOPEZ: -- at the end of the Narain  
6 declaration. And we have prepared these tables -- if I  
7 can just ask the court to look at Table 3 -- we've  
8 prepared these tables just to show how district-wide  
9 spending is going to dramatically change under the CEP  
10 based on actual receipts. Earlier reports were based on  
11 projections, these are based on actual receipts. As it  
12 turns out, nothing changed.

13 But, so these reports, Tables 3 and 4 are just  
14 another measure of how the CEP is going to change the  
15 playing field, how it is going to make elections more  
16 expensive in certain districts. And these tables just set  
17 out, set out how it will be expensive, dramatically more  
18 expensive and how it was dramatically more expensive in  
19 '08 in the majority of legislative districts.

20 Now, Your Honor, the other helpful thing about  
21 this table, it seems to me, is we've created a column, it  
22 would be the second column from the right, called Nonmajor  
23 Party Participated in '08.

24 THE COURT: In '06.

25 MR. LOPEZ: In '06, yes, sir.

1 THE COURT: Right.

2 MR. LOPEZ: And it shows -- you can see that  
3 nonmajor parties participated in, in many of the districts  
4 that, in many of the districts that are going to show the  
5 greatest district-wide spending increase as a result of  
6 the CEP.

7 And the trends, it's hard to draw -- the trend  
8 is much more pronounced in the House races, Your Honor.  
9 If you turn to updated 4 and you turn to the column  
10 Nonmajor Parties participated in '06, you'll see that  
11 there are many more in the House. Okay.

12 (Pause)

13 THE COURT: In effect, that chart, updated  
14 Nikolaidis Table 4, suggests that minor parties  
15 participated most in the districts that had the greatest  
16 increase in funding or spending, and also those that had  
17 the greatest decrease in funding, which I take it your  
18 point is the minor parties participated most in formerly  
19 noncompetitive districts which either had now become  
20 significantly more competitive or which remained  
21 uncompetitive, even after the CEP was introduced.

22 MR. LOPEZ: Your Honor, it's not strictly --  
23 it's competitive by two measures. It's -- a lot of the  
24 increase in spending is attributable to the edge of two  
25 major party candidates, but also due to the fact these

1 used to be very cheap races, so even if there was only one  
2 major party candidate, he was only spending three grand,  
3 or six grand or eight grand, and now he's spending 30  
4 grand, or she is.

5 THE COURT: Okay. So the point is the minor  
6 party candidates are running principally in districts that  
7 were formally not competitive districts.

8 MR. LOPEZ: Yes, Your Honor.

9 MS. YOUN: I think, I think that this -- I don't  
10 think that this table purports to be a comprehensive list  
11 of all non-major party participation in 2006. I think  
12 this is just a subset of candidacies that, of major party  
13 candidates who were participants and then whatever minor  
14 party candidate happened to participate in that subset of  
15 districts.

16 MR. LOPEZ: That's right. That's fair enough.

17 MS. YOUN: All right.

18 THE COURT: Okay.

19 MR. LOPEZ: Now, Your Honor, if I could ask you  
20 to back up and if I could ask you to flip backwards to  
21 Narain Table 5 which doesn't follow updated 3 and 4.

22 THE COURT: Okay.

23 MR. LOPEZ: In order to understand how the  
24 district by district spending impacts minor party  
25 candidates, we've created a second snapshot. It sets

1       forth actual '08 candidate receipts attributable to  
2       participation in the CEP in single party districts  
3       targeted by non-major parties in '06.

4               So this lists all the single party districts  
5       that were targeted by minor parties in '06. And it lists,  
6       column three lists '06 expenditures in those districts,  
7       column four lists the net increase in expenditures in  
8       districts attributable to participation in the CEP, and  
9       then the final column denotes those districts that are  
10      newly contested -- excuse me -- by major parties in '08.

11              And the relevance of this is that, which should  
12      come as no surprise, is that minor parties are indeed  
13      competing in more expensive districts and in districts  
14      that are drawing a second major party candidate who is  
15      participating in the CEP. That's why the expenses have  
16      risen so dramatically.

17              Now, I would ask you -- and I'm only going to  
18      note another paragraph before I'm happy to take a break,  
19      Your Honor. If I could ask you to turn to Narain Table 3  
20      and 4.

21              THE COURT: Okay.

22              MR. LOPEZ: Just start with Narain Table 3. It  
23      deals with Secretary of State election results and Table 4  
24      contains Secretary of State election results of the House,  
25      Table 3 is the Senate. And we offer these tables to



1 show -- to confirm that Connecticut remains a  
2 party-dominant state. Even though under the CEP, most  
3 districts are dominated by one of the major parties. The  
4 only difference under the CEP is the state is subsidizing  
5 a lot of weak major party candidates.

6 And in your motion to dismiss, order on the  
7 motion to dismiss, Your Honor, I don't know, you know, if  
8 we provided you this number or you came to this conclusion  
9 yourself. We said 43 percent of the legislative  
10 districts, in 43 percent of the legislative districts,  
11 43 percent, major parties won't even meet their own  
12 qualifying criteria, and that actually remains true today  
13 through the analysis of the '08 election results. It  
14 might even be kept to 44. There continue to be scores --  
15 would that be the right word? Scores of uncontested  
16 districts, scores of vacated districts, and there continue  
17 to be major party candidates who are posting less than  
18 20 percent vote returns.

19 MS. YOUN: Your Honor, just a clarification with  
20 regard to Table 5. Once again, Table 5 represents not all  
21 districts in which -- or, I guess, Table 5 omits, as it  
22 indicates in footnote five, District 15 and District 146  
23 so, once again, it's not attempting to be a comprehensive  
24 picture. It is instead a subset of, that just includes  
25 districts where CEP participants competed and additionally

1 my researcher says, he informed me there was a district  
2 that was inadvertently omitted off this chart which we'll  
3 be able to explain in my presentation.

4 THE COURT: All right.

5 MR. LOPEZ: Your Honor, if I could just talk  
6 about Narain 3 and 4 which is the election results,  
7 there's some interesting data that comes out of that.  
8 There were eight Senate districts and 33 House districts  
9 where a CEP funded major party candidate lost by at least  
10 20 percent of the vote.

11 There are four Senate districts and 15 House  
12 districts where the CEP funded a major party candidate who  
13 challenged an incumbent in a party dominant district.  
14 We make this point to show that the CEP is funding very  
15 weak major party candidates.

16 There are three Senate and ten House districts  
17 where a major party candidate received less than  
18 20 percent of the vote, but would nevertheless be entitled  
19 to a full CEP grant in 2010 if they can meet the  
20 qualifying criteria; if they can meet, if they can raise  
21 the qualifying contribution.

22 The list also shows the number of districts  
23 where major parties didn't run a candidate, nine in the  
24 Senate and 62 in the House. And if you, if you take that  
25 data, the nine in the Senate and 62 in the House, and add

1 that to the three Senate and ten House districts for major  
2 party candidates that pull less than 20 percent of the  
3 vote, we get back to our 43 or 44 percent of major party  
4 candidates who wouldn't even meet their own -- the CEP's  
5 qualifying criteria if it was applied to them equally.

6 And on that note, I'm happy to take a break,  
7 Your Honor.

8 THE COURT: All right. Why don't we take a  
9 break then until about 11:30. We'll stand in recess.

10 (Whereupon a recess was taken from 11:12  
11 o'clock, a. m. to 11:30 o'clock, a. m.)

12 THE COURT: Can somebody check in the hall for  
13 Mr. Feinberg, please?

14 (Pause)

15 THE COURT: Well, Mr. Lopez?

16 MR. LOPEZ: Yes, Your Honor. Thank you. Now,  
17 we submit that there's no, we submit that there's no  
18 serious factual dispute in the record that the CEP is  
19 going to incentivize major party candidates to run in  
20 districts that they previously had neglected. The  
21 defendants' expert makes this -- that would be Don Green,  
22 who we heard from in December -- acknowledges as much in  
23 his initial report and he acknowledges in his examination  
24 in response to my questions and the questions of the  
25 court, plaintiff's experts has also testified through his

1 affidavit that the CEP is going to increase competition by  
2 drawing new major party candidates into the race.

3 And I would direct the court to Findings 94-A  
4 and 94-B, and in those findings we provide appropriate  
5 transcript cites to Don Green's testimony and to our  
6 expert reports.

7 Now, the available data supports this conclusion  
8 as well, although I don't think that what we learned in  
9 '08 is necessarily dispositive because part of our claim  
10 is that over time, this was -- the CEP will solidify the  
11 position of the two major parties and that it will  
12 diminish the position of minor party candidates. But even  
13 what we know from '08, Your Honor, I think the trend --  
14 there is a trend and I'm about to address that.

15 MR. FEINBERG: I don't mean to interrupt and  
16 Mr. Lopez should, of course, make his argument, but to say  
17 there's no serious dispute about this, Your Honor, I just  
18 want the court to understand this is one of the most  
19 disputed issues in the case. So I don't understand what  
20 Mr. Lopez is referring to when he says this is not  
21 seriously disputed.

22 Just the question of whether this law will lead  
23 major party candidates to run in districts that weren't  
24 previously -- that previously weren't contested is, we say  
25 it will not have that effect. Mr. Lopez argues it will,

1 fine, but it's a very much disputed issue.

2 THE COURT: Okay.

3 MR. LOPEZ: Well, Your Honor, it's disputed by  
4 Mr. Feinberg but it wasn't disputed by the defendant's  
5 experts and we provided the appropriate -- by the  
6 defendant's own expert, and it seems to me that that --  
7 that's evidence the court should consider. I think the  
8 court had a back-and-forth with the expert, I had a  
9 back-and-forth with the expert on this exact subject, and  
10 he wrote a report addressed to it. Because at the time  
11 when he wrote his report, the point of his report was that  
12 this, the CEP was a good thing because it would increase  
13 competition and that's good for democracies. Okay.

14 So, anyway, if I could return to my presentation  
15 about how the CEP did, in fact, affect competition in the  
16 '08 cycle, I think there is some data that supports that.

17 If Mr. Feinberg had given me another split  
18 second, I would have conceded that defendants, of course,  
19 contest that the playing field hasn't changed  
20 significantly. They argue that the level of competition  
21 nets out because the number of newly, of new major party  
22 challenges are offset by the districts that are being  
23 vacated by major party candidates. And he's right, as far  
24 as that goes, but it's a gross over-simplification.

25 Although the evidence shows that the CEP is

1 encouraging major party competition in newly entered  
2 districts, there is no evidence that the CEP is related to  
3 the decision by major party candidates to vacate or  
4 abandon the districts that they did vacate in 2008.

5 There were, there were five -- excuse me. We  
6 can agree with the defendants that the number of elections  
7 in which a second major party candidate entered the race  
8 is roughly equal to the number of districts that were  
9 vacated by one of the major parties in -- there were five  
10 in the Senate and approximately 30 in the House but that  
11 is where the comparison ends. We have isolated these  
12 districts and looked at the electoral and campaign  
13 finance history of the candidates who ran in those  
14 districts.

15 Here is where I would direct the court first to  
16 the Narain Tables 1-A and 2-A. Table 1-A is a newly  
17 vacated district by Senate candidates in '08. The court  
18 can look at these tables and satisfy itself that there is  
19 no basis to conclude that the availability of funding  
20 under the CEP was a factor in the decision to vacate these  
21 districts. Almost uniformly, each of the candidates in  
22 these prior races raise sufficient funds in '06 to meet  
23 the qualifying criteria. And that's Table 1-A and Table  
24 2-A.

25 The opposite, Your Honor --

1 (Pause)

2 MR. LOPEZ: Your Honor, the data in Table 2  
3 raise slightly more equivocal than the data in Table 1-A  
4 but the trend is there. Those, the candidates in those  
5 vacated districts by and large raise more than the \$5,000  
6 that they would have to raise to qualify for public  
7 financing. So it's hard to -- so I don't see how the  
8 defendants can maintain that candidates aren't running  
9 because they can't qualify for CEP funding. They are not  
10 running for different reasons but it's not lack of ability  
11 to qualify for CEP financing.

12 MR. ZINN-ROWTHORN: Your Honor, I think it's  
13 very important to qualify that hasn't been our position.  
14 Our position through our major party witnesses, George  
15 Griffin and George Jepsen, it's a very complicated  
16 calculus, much different than a minor party might  
17 undertake in order for the major party candidate to  
18 contest a district that it hasn't contested before. The  
19 availability of public funding is one but not a  
20 dispositive factor. That's been our consistent position.

21 So I think it's -- you know, we haven't heard,  
22 Mr. Lopez hasn't come forward with one major party  
23 candidate who is prepared to testify that the only reason  
24 I contested this district, which we hadn't contested  
25 before, is the existence of, potential existence of public

1 campaign financing. I think it's very dangerous for  
2 anybody to ask the court to make any assumptions about the  
3 motives of any person not before the court about why they  
4 chose to run or not run in a particular district.

5 What we have done instead, Your Honor, is to  
6 simply put forward the data and say there has been no net  
7 increase, in fact, a slight net decrease in the  
8 contestedness in races.

9 Beyond that, Your Honor, there is simply no  
10 basis for them to suggest and for you to conclude that the  
11 reason particular districts aren't contested or are  
12 contested comes down to the potential existence of public  
13 finance campaigning.

14 THE COURT: But the defense also hasn't  
15 suggested that the reason for the decrease in competitive  
16 districts set forth on 1-A, 2-A is caused by any aspect of  
17 the CEP.

18 MS. YOUN: Your Honor, I think what we submit is  
19 we're a little bit confused by Mr. Lopez's argument on  
20 this point because Mr. Lopez argued in his last set of  
21 briefs that where candidates, where candidates came into  
22 preexisting noncompetitive districts, it was because of  
23 the CEP but when candidates didn't come into previously  
24 noncompetitive districts and in fact abandoned previously  
25 competitive districts, it wasn't because of the CEP.



1 All we are saying, as Attorney Zinn Rowthorn has  
2 pointed out, is that there has been no net increase in  
3 contestedness. The idea that the CEP is going to cause,  
4 is enough of an incentive to cause major party candidates  
5 to change their strategic behavior is simply not borne out  
6 by the factual record.

7 MR. LOPEZ: Nothing, except for that last  
8 statement by Ms. Youn, the conclusion, is inconsistent  
9 with the point I'm making. There are a lot of factors  
10 that might lead a candidate not to seek office. The CEP  
11 doesn't appear to be one of those factors because,  
12 consistent with our claim, the CEP qualifying criteria are  
13 set at levels that can generally be satisfied by major  
14 party candidates, and that's what Tables 2-A and 1-A show.

15 Now, to address opposing counsel's second  
16 point -- I was about to. We believe that there is a  
17 causative relationship between the availability of public  
18 funding and the decision of a candidate to enter a  
19 previously uncontested race. And we think this is a  
20 common sense conclusion but we have collected some data on  
21 this, Your Honor, and I apologize because I said I was  
22 going to restrict my presentation to Binders One and Two  
23 but I would have to -- I'm going to ask the court to, to  
24 turn to the -- it's, this is a binder that was submitted  
25 in support of Plaintiff's Motion for Summary Judgment. It

1 contains Declaration A-8 and the declaration of Alexander  
2 Nikolaidis and accompanying data. If it's helpful, I can  
3 come up and show it to the court.

4 THE COURT: You might want to pass that up. I  
5 didn't bring with me the binders from the summary judgment  
6 briefing.

7 MS. YOUN: Just to clarify, are we talking about  
8 257-4 on the docket?

9 THE COURT: Table --

10 MS. YOUN: What table are you on?

11 THE COURT: Table 5.

12 MS. YOUN: Thank you.

13 (Pause)

14 MR. LOPEZ: Okay. Your Honor, Table 5 has  
15 previously been admitted into evidence and we offered  
16 this, this table, Table 5 shows the newly contested  
17 elections this cycle. And Table 6 shows the newly  
18 contested House elections this cycle. In the five -- and  
19 this would be the, on Table 5, this would be the first of  
20 the two tables.

21 In the five newly contested Senate elections  
22 this cycle, for instance, candidates, A, routinely lose by  
23 landslide margins going back to 2000. And, B, uniformly  
24 have raised a de minimus amount of money going back to the  
25 year 2000.

1           Only one candidate in these five districts going  
2 back to 2000 raised more than the 15,000 needed to qualify  
3 for CEP funding.

4           If I could ask the court to flip to Table 6, we  
5 can make similar observations on the House side.

6           THE COURT: Wait, wait, let me go back to the  
7 Senate. In newly contested 2008 Senate districts, you're  
8 saying only one candidate ever raised 15,000?

9           MR. LOPEZ: Unless I missed something. I see  
10 that in District 35 in 2002.

11           THE COURT: Okay.

12           MR. ZINN-ROWTHORN: Senate District One?

13           THE COURT: Senate District 35.

14           MR. LOPEZ: Yes, Senate District 35. That's the  
15 losing candidate. The losing candidate. Okay?

16           MR. ZINN-ROWTHORN: Oh.

17           MS. YOUN: Your Honor, just before we get too  
18 far in this, the Rotman Declaration which was filed on  
19 October 3rd, 2008, Document 274 in the record, in  
20 paragraph 16 of that, she states that the underlying data  
21 in these tables is substantially inaccurate. She says  
22 that there are, you know, for example, plaintiff's Table 5  
23 says that there are three newly uncontested Senate  
24 districts when there are five. You'll see on the bottom  
25 of this half of this chart, et cetera.

1 MR. LOPEZ: We're not offering this document for  
2 newly uncontested elections, Your Honor. That's what  
3 Narain Tables 1-A and -- 1-B do and that's based on the  
4 final election results.

5 THE COURT: I understand.

6 MS. YOUN: And also in the five newly contested  
7 Senate districts we were discussing, the districts are  
8 misidentified, so this data does not, I think, apply. The  
9 newly contested Senate districts instead should be  
10 Districts 1, 6, 24, 28 and 32, so I guess -- two out of  
11 five are wrong.

12 THE COURT: Well, there's one -- 35 should be,  
13 whatever, should be six is what you're saying.

14 MS. YOUN: It should be -- there should be six.

15 MR. FEINBERG: Six should be in there.

16 MS. YOUN: And 35 should not be in there.

17 THE COURT: Right, so the question is is the  
18 information shown for District 6 -- excuse me, information  
19 shown for District 35 accurate with respect to District  
20 6.

21 MS. YOUN: I believe so. I don't have any  
22 reason to believe that it's not.

23 THE COURT: So we just need to change the  
24 district numbers, are the only inaccuracy.

25 MR. FEINBERG: No, no.

1 MS. YOUN: No, no, that's not right. They  
2 reported the wrong --

3 THE COURT: I'm just trying to figure out what's  
4 going on.

5 MS. YOUN: I misunderstood your question. I  
6 thought that you meant with respect to the districts that  
7 are included here correctly, is the data with respect to  
8 those districts correct. No, we do not know that -- we do  
9 not believe that what is put in here as District 35 should  
10 actually be District 6 or that those numbers correspond in  
11 any way to what happened in District 6.

12 THE COURT: All right. Are Districts 1, 24, 28,  
13 and 32 accurate?

14 MS. MURPHY-OSBORNE: Your Honor, in preparing  
15 the Rotman declaration, what was reviewed wasn't the  
16 accuracy of the receipt information but just whether or  
17 not they had even been put in the correct districts in  
18 their analysis. And throughout the plaintiff's opposition  
19 and these tables that were submitted in our opposition on  
20 September 5th, there was just a series of errors that  
21 called into question the overall credibility of their  
22 conclusions because the tables contained so many errors on  
23 various points. And so as to whether or not the receipts  
24 information that's contained in that chart is accurate,  
25 that was not examined.

1 MR. FEINBERG: At the time, Your Honor, it  
2 really was being submitted for a different purpose than  
3 for trying to establish the relationship, the causation  
4 relationship Mr. Lopez is now trying to establish, so no,  
5 apparently we did not look at the accuracy of the receipt  
6 information listed there.

7 THE COURT: Okay, well, why don't do you that.  
8 Why don't you send me a letter that tells me to what  
9 extent this is accurate or inaccurate and your view of  
10 what the accurate information should show.

11 MR. FEINBERG: We'll do that, Your Honor. Thank  
12 you.

13 THE COURT: Thank you.

14 MR. LOPEZ: And if I may, Your Honor, the reason  
15 that there might be a discrepancy is that this, after this  
16 table is reported, vacancies occurred in, in some of the  
17 legislative districts or, or a new candidate entered the  
18 race very late. And this data was prepared for the, for a  
19 submission in the first week of September.

20 We can, if there are problems, we're not aware  
21 of them. We just learned there's one mistake they  
22 identified and we'll fix that and actually we've omitted a  
23 district so we'll fix that.

24 MS. YOUN: You included one district erroneously  
25 and omitted another district.

1           MR. LOPEZ: Okay. I'll have a look at that,  
2 and -- fair enough.

3           MS. YOUN: And the graphic at the bottom is  
4 missing two districts.

5           THE COURT: Why don't we do this. The letter  
6 Mr. Feinberg is going to send in, why don't you confer and  
7 see whether you can get it done by stipulation so there's  
8 no need for further factual development. The two of you  
9 can stipulate, as I'm assuming you can, because those are  
10 all public records. Let's just get it stipulated as to  
11 what the accurate information for Table 5 ought to be.

12          MR. FEINBERG: We'll do that, Your Honor.

13          THE COURT: Fine. Thanks.

14          MR. LOPEZ: And, Your Honor, if I could ask you  
15 to turn to Exhibit 6 -- I mean Table 6.

16          THE COURT: I have it.

17          MS. YOUN: What we have in the Foster  
18 declaration with respect to plaintiff's Table -- with  
19 respect to Rotman, what we have in the Rotman declaration  
20 with respect to plaintiff's Table 6 is that it lists 25  
21 newly uncontested House districts when, in fact, there are  
22 28, and Table 6 lists 32 newly contested House districts  
23 when, in fact, there are only 29. And it also includes, I  
24 guess, four -- it indicates that Districts 29, 73, 108 and  
25 127 are newly contested when, in fact, they are not.

1           THE COURT: Why don't we do the same thing with  
2 respect to Table 6 and let's get a stipulation so I know  
3 what the accurate facts are, okay?

4           MR. LOPEZ: That's fine. Anyway, if I could  
5 continue with my presentation -- and I don't think that  
6 any updates are going to change this, Your Honor.

7           On the House side many of the districts that  
8 have newly entered this cycle have been vacant cycle after  
9 cycle going back to 2000. And many of the candidates  
10 consistently lost by landslide margins and many of them,  
11 or a majority of them raised de minimus amounts of money,  
12 although some did raise enough that that would qualify  
13 them for public financing. And with that, I'm going to  
14 move on.

15          THE COURT: All right. Let me just return to  
16 you this appendix.

17          MR. LOPEZ: Okay.

18          (Hands Counsel)

19          MR. LOPEZ: Now, most of the Narain data that  
20 we've been talking about all morning, Your Honor, measures  
21 the impact -- most of the Narain, Nikolaidis data,  
22 measures the impact of the CEP on the electoral playing  
23 field from the macro playing field as a whole. It was  
24 organized that way to support our facial challenge that  
25 the playing field is at least going to change.



1           The impact of the CEP, however, is also apparent  
2 when you look at the specific districts where minor  
3 parties competed. There are two relevant measures, it  
4 seems to us, and we have have looked -- first, we looked  
5 at the districts where minor party candidates participated  
6 in 2006 and compare the cost and competitiveness of  
7 running in those same districts in 2008.

8           We have also looked at the districts where minor  
9 party candidates actually ran in 2008 and compared the  
10 cost and competitiveness of running in those same  
11 districts prior to the implementation of the CEP. And  
12 we've reached some conclusions. They are rather lengthy,  
13 Your Honor. They can be found in our findings at 270(a),  
14 270, paren, small A, paren, through 270 -- sub H.

15           And now I'm loathe to read all that material  
16 into the record.

17           THE COURT: You don't need to. I've read it.

18           MR. LOPEZ: Okay. Well, so a conclusion from  
19 all the data, and these charts were prepared by counsel  
20 and have been submitted into the record. They are  
21 attached to the declaration of Kevin James, an associate  
22 in my office. The basic conclusion is that, is that it  
23 targets -- excuse me. The basic conclusion is that in  
24 districts that were targeted by major parties in 2008,  
25 there are actually targeted by minor parties -- excuse me.

1 The basic exclusion is that in districts that were  
2 targeted by minor parties in 2008, it was much more  
3 expensive in -- those districts were much more expensive  
4 and much more crowded than they were in 2006 in both the  
5 House and the Senate.

6 You flip it and you look at the districts they  
7 ran in in 2006, you can also see that it was much more  
8 expensive and much more crowded in 2008 to run in those  
9 districts. And predictably what we saw, for instance, is  
10 that minor parties abandoned, I believe, 18 of the 35  
11 districts, or 20 of the 35 districts that they ran in  
12 2006.

13 And if you look at that subset, you'll see how  
14 dramatically spending increased in those districts and we  
15 would suggest that that was a causal factor for them  
16 abandoning those districts.

17 When I talk about districts becoming more  
18 expensive, I'm talking about the spending by every measure  
19 just about doubled. If there was -- I might as well give  
20 you an example.

21 In the 28 House districts in which minor parties  
22 ran in '08, total receipts increased by \$400,000.  
23 Receipts increased from 900,000 in '06 to 1.3, for  
24 instance, in '08. And this, this is a trend you see back  
25 and forth.

1           And what we've done with this data is just  
2 compare, as I said. We've looked at the district's minor  
3 party who ran in '08, I mean ran in '06 and provided for  
4 the court data about how much more it would be, how much  
5 more expensive it would be to run in those same districts  
6 in '08 and it would be about twice as expensive, twice as  
7 expensive and significantly more crowded. And, in  
8 addition, we know that minor parties abandoned 18 of those  
9 districts.

10           We also know that there are a number of  
11 identical districts that they ran in. I believe there  
12 were 17 and the spending went through the roof in those  
13 districts and none of it was attributable spending by  
14 minor parties. It was attributable to the CEP,  
15 participation in the CEP by major party candidates. So it  
16 became a much more difficult environment for minor party  
17 candidates to participate. And overall there were more  
18 major party candidates running in '08 than in '06, and  
19 there were fewer minor party candidates running. And  
20 this, this is all set out in our affidavits and in our  
21 charts.

22           The defendants have submitted declarations last  
23 night that present the data in a different way but they  
24 put it in terms of percentages. The percentages didn't  
25 change but the real number of candidates did change. And

1 we bring this to your attention because you did ask at the  
2 last hearing are there fewer minor party candidates  
3 participating, are there more major party candidates  
4 participating. And we make this point not only to make a  
5 point about competitiveness to Your Honor but it's about  
6 money. There's more money being driven to the pockets of  
7 the major party candidates, and that is as much -- that  
8 is, from a constitutional point of view that is as  
9 objectionable as the fact that there is more major party  
10 competention. Because what a major party -- major party  
11 candidates, win or loss, major party candidates have this  
12 money to spend getting out their message, solidifying  
13 their position and laying the foundation for future  
14 elections, whether it's a future election in that  
15 particular district or whether it's running for city  
16 council. They've got their name out there. That benefit,  
17 that communication benefit is denied to my candidates,  
18 Your Honor -- my clients, Your Honor.

19 MS. YOUN: Yes, Your Honor, Attorney Lopez has  
20 just stated and repeated several times a factual  
21 misstatement which is that there were more major party  
22 candidates in 2008 than there were in 2006. In fact,  
23 there were one fewer. There were, there were the same  
24 number of Senate candidates and there was one fewer House  
25 candidate.

1           THE COURT: You know, let me just throw out to  
2 both of you a question that I'm a little hesitant to ask  
3 but, of the many factors that that may be affecting  
4 decisions to run in '08, is this litigation one of them?  
5 Can I factor out the concern by minor party candidates,  
6 you know what, if you have any doubt about running, don't  
7 run because it will make the numbers look better. And for  
8 major party candidates, if you have any doubt, you know,  
9 don't contest because -- or drop out because, don't use  
10 the CEP because this case is pending and we want the  
11 numbers to look as good as we can so we can keep this cash  
12 cow going. I just don't know, frankly --

13           (Several counsel stand)

14           THE COURT: I'm glad there's a response.

15           MS. YOUN: Your Honor, I think the simple fact  
16 is none of us know. There's no evidence whatsoever in the  
17 record for any of that.

18           THE COURT: Right, of course. That's the point.  
19 But I mean I'll just tell you I'm taking the 2008 numbers  
20 with a grain of salt because, you know, there's every  
21 incentive for somebody who's on the fence to make a long  
22 term decision rather than a short term decision.

23           MR. FEINBERG: I think that presupposes that  
24 candidates have, you know, of one of the major parties  
25 could be particularly concerned by -- would, A, think they

1 would have an influence on the outcome of this litigation  
2 or be particularly concerned about that.

3 THE COURT: No, it's really easy, Mr. Feinberg.  
4 The Democratic party comes to you and says, I know you're  
5 thinking about running in District 3, but you know what?  
6 You've never won in District 3 and we want to keep this  
7 money coming. And so, by the way, the party's not going  
8 to support you at all if you run in District 3. You're  
9 going to be on your own. Don't expect anything from us  
10 because you're going to mess up this litigation. That's  
11 what I'm talking about. It's not that Tom Smith says, oh  
12 gee, I'm concerned about the litigation, that there's  
13 party pressure, be it the major party or be it the minor  
14 party, to gain in the system by affecting the numbers for  
15 2008.

16 MR. FEINBERG: But, A, there's no evidence of  
17 that, and, B, I really think that overstates the  
18 centrality of this litigation in the calculations of the  
19 major parties and their candidates.

20 THE COURT: I hope you're right. Of course  
21 there's no evidence. You know, no one's going to have --  
22 no one's going to have an admission that there's an arm  
23 twist here to keep somebody out of a race in order to  
24 affect the litigation. It's not the kind of evidence  
25 you're ever going to get, but I'm just expressing some

1       skepticism about 2008 numbers because --

2               MS. YOUN: Your Honor, I think 2008, I think at  
3       least for the Democratic party was an historic election,  
4       one in which Connecticut, they managed to, you know,  
5       unseat longstanding Chris Shays. I don't think that a  
6       Democratic party state legislative candidate would be  
7       deterred from running because of some attenuated impact on  
8       this litigation. But in any event --

9               THE COURT: Well, if you're running in  
10       Ridgefield and it's 80 percent Republican registration --  
11       I'm just guessing. I have no idea what the numbers are  
12       and I don't know if Ridgefield is a Republican town. I'm  
13       just throwing this out as an example. And the Democratic  
14       party, you want the Democratic party support. They are  
15       going to say, look, do it in two years. Do it in two  
16       years.

17              MS. YOUN: Your Honor, but I mean honestly, to  
18       the extent that you want to take the 2008 election data  
19       with a grain of salt, it is plaintiff's burden here to  
20       establish injury and to establish causation, and to the  
21       extent that you're taking the 2008 election data with a  
22       grain of salt makes it impossible for them to do so. It  
23       would be their burden to prove some sort of interfering  
24       variable of the kind that you've just hypothesized.

25              THE COURT: Okay. This is just a side comment,

1 by the way. You know --

2 MR. LOPEZ: Your Honor, first of all, Ms. Youn  
3 said I had my numbers wrong about the number of major  
4 party candidates, the net number of major party candidates  
5 participating in this cycle. I was referring to the  
6 subset of the 46 House and Senate elections that minor  
7 party candidates participated in either '06 or '08, and  
8 within that subset. That's our only point of Findings  
9 280(h) that within that subset it's a heck of a -- it's  
10 prohibitively more expensive. It's much more crowded, and  
11 as a result, the minor party candidates have run away from  
12 any of those issues. None of that data is in dispute, I  
13 think, and wasn't contradicted by Ms. Youn's statements,  
14 and the court can satisfy itself by looking at our  
15 findings.

16 MR. ZINN-ROWTHORN: Just -- and I don't want to  
17 back up too much but it does relate also to that point. I  
18 think another area in which it's dangerous to try to make  
19 assumptions about people's motives for running or not  
20 running, particularly with respect to whether a minor  
21 party or a petitioning candidate would be influenced by a  
22 major party candidate's participation in the program, what  
23 we haven't been provided is any reason -- a timeline that  
24 would suggest that a petitioning candidate who may be  
25 committed to participating as early as January, is somehow



1 influenced by a decision or a qualification for public  
2 funds on a potential major party opponent, a decision that  
3 may not be made until after October 10th, or that a minor  
4 party who nominates its candidates sometime over the  
5 summer, maybe before, maybe after the major party  
6 candidacies in primaries are resolved, and certainly  
7 before a decision on grants would be issued, that those  
8 can be sort of causally connected. I think really in an  
9 overly simplistic fashion, that's been suggested.

10 This is why we continue to say, you know, you  
11 may have some concerns about what you can infer or not  
12 infer from participation in 2008 but the numbers  
13 themselves are the best evidence since we don't have the  
14 evidence that minor party candidates, petitioning  
15 candidates are making those decisions based on major party  
16 qualification.

17 In fact, you know, the best conceivable evidence  
18 here is Mr. DeRosa and the Green Party who appears not to  
19 have abandoned districts, ran more candidates than  
20 previously. You know, so I just, I really think, you  
21 know, it's -- this is very, very dangerous for us to be  
22 relying on or inferring these sort of motivational  
23 factors, Your Honor.

24 THE COURT: Well, okay. To what extent is  
25 motivation of any particular candidate an issue in this

1 case? It certainly is not an issue on the facial  
2 challenge, and it isn't obvious to me that there needs to  
3 be proof one way or the other about individual candidates'  
4 motivations on the as applied challenge.

5 MR. ZINN-ROWTHORN: Well, that appears to be a  
6 primary theme of plaintiff's case that a prospect of  
7 facing better funded major party candidates is causing, I  
8 guess it's a chill argument, we're not going to contest  
9 races. We just don't think that's at all the case.

10 And then there's another theme running through  
11 the case that the prospect for major party candidates of  
12 getting additional campaign funding from the public is  
13 incentivizing them to contest districts where they  
14 previously haven't. We don't think that's the case. So,  
15 I do think --

16 THE COURT: But that's the argument.

17 MR. ZINN-ROWTHORN: Yes.

18 THE COURT: The argument is not the plaintiffs  
19 have failed to prove that the reason Tom Smith ran in  
20 2006 and didn't run in 2008 is because he individually was  
21 motivated not to run by X Y and Z factors.

22 MR. ZINN-ROWTHORN: Sure.

23 THE COURT: They don't have to prove that.

24 MR. ZINN-ROWTHORN: No, they don't, but they  
25 made a prediction to Your Honor of certain effects and I

1 think those predictions are particularly suspect now that  
2 we have a record that suggests those effects have not  
3 occurred.

4 THE COURT: Fair enough.

5 MR. ZINN-ROWTHORN: And I think the whole focus  
6 on expenditures is a red herring. Because I think if --  
7 you know, I think the point is, you know, it's become more  
8 expensive to run, it hasn't been more expensive to Mike  
9 DeRosa or a Green Party candidate or someone who says to  
10 themselves I'm not going to raise more than \$1,000 no  
11 matter what. It hasn't become more expensive for them to  
12 run. And --

13 THE COURT: No, but it's the competition for  
14 the -- the \$1,000 doesn't go as far as it used to go, if  
15 they stop at \$1,000.

16 MR. ZINN-ROWTHORN: I disagree, Your Honor. I  
17 don't think the evidence is there, because the evidence is  
18 the Green Party -- all minor party candidates did on  
19 average better. The Green Party did on average better.

20 So I think, I do -- listen, I can't suggest to  
21 you that expenditures shouldn't be part of this case as a  
22 predictor of evidence of what may occur, perhaps with  
23 respect to the as applied. But I'm saying expenditures  
24 themselves aren't proof of harm. What do they result in?  
25 And I think that's why I think the as applied figures are

1 particularly important. We haven't seen the objective  
2 criteria of political success and opportunities discussed  
3 as they played out in 2008. We do have a general  
4 agreement that a little bit more money was spent across  
5 the spectrum, but where we significantly disagree, Your  
6 Honor, is on the so what. What has that done to the minor  
7 party. And that's where, that's where we part ways  
8 significantly. That's why we look at the 2008 numbers.  
9 We haven't seen the effect.

10 MS. YOUN: Your Honor, might I be heard just on  
11 the chill point? My timing seems to be a little off here.  
12 And I think it's true that courts commonly take into  
13 account factual evidence of whether or not an alleged  
14 chilling effect has actually occurred by comparing data  
15 such as statistics before and after, is there any evidence  
16 of a decline. And to the extent that there is not, we  
17 would submit that there's no evidence, either  
18 testimonially or in the data, of any -- that any chilling  
19 effect has, in fact, occurred.

20 THE COURT: Okay.

21 MR. LOPEZ: Your Honor, I think we're talking  
22 past each other. I just -- I try to spare everyone the  
23 trouble of going through the receipt and competition data  
24 that is contained in findings 278 through H. But they  
25 just, they should -- I don't know what part of this

1 conversation is not being appreciated.

2 The candidate receipts in those expenditures  
3 that are directly attributable -- the candidate receipts  
4 in those districts targeted by minor parties in '06 or in  
5 '08 have gone through the roof and it's all attributable  
6 to the CEP. Minor parties are competing in a very, a much  
7 more expensive environment. Their thousand dollars  
8 doesn't go as far. They say so what. They actually, and  
9 they also say sometimes minor parties do better. I say so  
10 what to that.

11 This is a subsidy case, Your Honor. Election  
12 results are not the only measure of how my clients are  
13 hurt. My clients are hurt by the fact that a Republican  
14 party candidate who didn't poll, who lost by 20 or 30  
15 points and who might not have run in that race but for the  
16 CEP, now has \$85,000 to brand his or her candidacy and the  
17 Republican Party and to in effect bank that good will  
18 which was purchased by that government money. That same  
19 subsidy is denied to my candidate and that's how my  
20 candidates are hurt, Your Honor.

21 It doesn't matter whether they are competing in  
22 more or fewer districts. They are competing in fewer  
23 districts but it doesn't matter. The injury is the fact  
24 that they are competing in a more expensive field. It's  
25 the same injury that I gave the court an analogy to about

1 the big time. If a Democrat has half an hour by statute  
2 and a Republican has an hour by statute to address the  
3 public on public T.V., the injury flows from the increased  
4 resources that the state has provided to the Republican  
5 candidate, and that's how my candidates are hurt. And my  
6 clients discuss this in their testimony and I'm going to  
7 walk the court through it.

8 Now, we have looked at, Your Honor, we have  
9 looked at all the data from a macule point of view to see  
10 how much more money is flowing into, into political  
11 campaigns in Connecticut. And we have shown how it  
12 affects scores and scores of candidates across the board.  
13 It will increase their expenditures. We have shown how it  
14 will affect districts, I have tried to show how it will  
15 affect districts in which minor party candidates have  
16 participated, and I've heard nothing here that is a  
17 contradiction to any of my data, the data we presented  
18 showing how expenditures, spending will in fact decrease  
19 in minor party districts.

20 Now, I've broken it down further for the court  
21 and for the defendants, and I'm wondering if they are  
22 reading our data, I mean our findings. But I think, I  
23 think there were four or five Green Party candidates --  
24 five Green Party candidates who ran for legislative office  
25 in 2008 and one Libertarian Party candidate -- and one

1       Libertarian candidate who ran in '08 and there was one who  
2       ran in '06 and didn't run in '08. The playing field has  
3       changed dramatically in these districts. It's become  
4       very -- in four of those six districts it's become  
5       prohibitively expensive to continue to be heard in those  
6       districts because of the effect of the CEP grants.

7               Now, I understand their argument that one of our  
8       candidates actually did great this cycle. I think he  
9       polled 19 percent, but -- against a publicly funded  
10      candidate, there was no Republican in the race or no  
11      Democrat in the race, but that's almost irrelevant. The  
12      key here is that the publicly funded candidate has been  
13      given this windfall, if you will, to spend to get his  
14      message out, and the Republican candidate who chose not to  
15      run in this particular election can nevertheless enter  
16      that race the next cycle and be given, and also be given  
17      this windfall. And that's the injury to my client, since  
18      my clients have to plan for this contingency. They have  
19      to deal in that environment.

20              MS. MURPHY-OSBORNE: Your Honor, just to clarify  
21      factually, two of the Green Party candidates ran in  
22      districts where none of the major party candidates  
23      participated in the CEP. I think it was Kenric Hanson in  
24      39th and Zack Chaves. So that statement that you made  
25      that they were impacted by the CEP in their races isn't

1 right. I just wanted to clarify that for the court.

2 MR. LOPEZ: I didn't mean to mislead the court.

3 I think I said four out of six ran in races with CEP  
4 funded candidates. The other two candidates ran in  
5 districts that there's no indication that the major party  
6 candidate couldn't have participated in the CEP. They  
7 chose to opt-out. In one of the districts the major party  
8 candidate spent -- it's a safe Democratic district in New  
9 London and the Democratic candidate decided to opt-out.  
10 There's no indication he couldn't have participated. And  
11 our clients have to plan for that contingency, that maybe  
12 next cycle -- is there something wrong with the court's --  
13 yes, maybe the next cycle they could be facing a CEP  
14 funded candidate whose receipts are significantly more  
15 than \$3,000 as they said in this cycle.

16 And also I would say in the Zak Chaves district,  
17 which is the Greenwich Senate district, both the Democrat  
18 and Republican opted out. I don't know why they opted  
19 out, but the money they raise would be less than what they  
20 would have gotten if both participated. There's no  
21 indication they couldn't have participated and they may  
22 participate in the next cycle. And if they do, my  
23 clients, you know, will have to make a decision at that  
24 point do we target that district in 2010? This is -- all  
25 of a sudden this district got very difficult for us.



1           That's the type of injury we're talking about.  
2           The injury isn't a limited -- isn't limited to election  
3           results or what they did or didn't do this cycle. It's  
4           about their plan in going forward and I'm ready to address  
5           that, Your Honor.

6           The primary challenge based by the Green Party  
7           under the CEP is the recognition that its candidates are  
8           competing in a more competitive and, more importantly,  
9           more expensive political environment. In three of the  
10          five legislative districts that the Green Party targeted  
11          in '08, the resources available to the CEP funded major  
12          party candidate were significantly greater than  
13          expenditures in '06.

14          In the first Senate district, for instance, Mike  
15          DeRosa, who's sitting here today, was opposed by John  
16          Fonfara. Fonfara is considered a safe incumbent who,  
17          nevertheless, received \$160,000 in combined primary and  
18          general election grants, in addition to the \$15,000 he  
19          raised in qualifying contributions. In '06, Fonfara  
20          raised only \$36,000. In addition, a second Democrat  
21          received a \$75,000 grant to run in the primary against  
22          Fonfara.

23          A Republican, Barbara Rhue, also entered the  
24          general election after abandoning the district in '06.  
25          Although she failed to qualify for public financing after

1 signing up for it, or didn't pursue it after signing up  
2 for it, her entry into the race drew votes from, from my  
3 candidate whose vote total took him below the ten percent  
4 that he had polled in previous elections when he was only  
5 competing against John Fonfara.

6 MR. ZINN-ROWTHORN: Your Honor, I would just  
7 like to there, I have to object. What is the foundation  
8 for the statement that a Republican candidate's entry into  
9 the first senatorial district race drew votes from Mr.  
10 DeRosa?

11 MR. LOPEZ: I can give it to you.

12 MR. ZINN-ROWTHORN: Well, we know what the  
13 numbers are between then and now. He did appear a little  
14 worse. But, you know, there's a little bit of logical  
15 leap here in a court of law to suggest that we can make  
16 that conclusion.

17 MR. LOPEZ: Perry --

18 MR. ZINN-ROWTHORN: Was the message the same?  
19 Were they going after the same sort of demographics, the  
20 same issues?

21 THE COURT: You know, it's not apparent to me  
22 frankly that vote totals, 2006 versus 2008, are especially  
23 helpful. I'll be very frank. Because every election is  
24 different. You know, in some cases, if the, if the minor  
25 party candidate is running against only a weakened

1 Republican, that is weakened in 2008, the minor party  
2 candidate may have done better in other cases. If they  
3 are running against only a Democrat, they may have done  
4 worse. There's just too many factors to try to sort out  
5 any particular race or why overall what the vote totals  
6 mean in terms of this act. I'll just be very frank.

7 MR. ZINN-ROWTHORN: Well, I don't disagree with  
8 that, Your Honor, except we have to look at something I  
9 think the test requires us to evaluate relative to  
10 something before and after. Ideally we're looking at  
11 objective factors, none of which is perfect. But, you  
12 know, we have to make some sort of evaluation. Vote  
13 totals is about as good as we can get as far as  
14 determining a candidate's strength in a particular  
15 district.

16 There are other objective factors that I think  
17 we can look to. Party enrollment numbers, for example.  
18 But, you know, what I sort of -- what we sort of object to  
19 generally is the notion that we should not, the State is  
20 not entitled to the benefit of the doubt when it comes to  
21 the question of whether the intangibles, you know, operate  
22 to the detriment of the plaintiffs, whether the  
23 expenditures will result in a detriment to the defendants,  
24 whether there are motivational factors now that exist that  
25 result in a detriment to the plaintiffs. We object to the

1 fact that we're not entitled to the benefit of the doubt  
2 in that. We think in this particular kind of case, at the  
3 facial challenge particularly, we are entitled to every  
4 benefit of the doubt on those sorts of disputed issues.

5 But then, to compound that with the fact that  
6 we're not entitled to the benefit of the doubt on the  
7 objective factors like vote totals? You know, that to me  
8 seems like a double-bind that the State finds itself in,  
9 Your Honor.

10 MR. LOPEZ: Your Honor, it's not a question of  
11 benefit of the doubt. Vote totals are really not at issue  
12 in this case. I agree with this court. This is a subsidy  
13 case. It's about whether or not the money that's being  
14 paid to major party candidates increases their electoral  
15 opportunities and increases their competitive, their  
16 electoral opportunities and their communication, their  
17 ability to communicate.

18 And, frankly, the more and more I get my arms  
19 wrapped around this case, Your Honor, I've come to the  
20 conclusion, at least in my mind, that this case is about  
21 money. And the fact that, that a major party candidate's  
22 vote, average overall vote total, a major party  
23 candidate's average vote total this cycle may not have  
24 increased or decreased is really neither here nor there.

25 The only point where it's relevant, Your Honor,

1 is a point that was conceded by the defendants' experts, I  
2 believe under your cross examination. We came to a  
3 consensus that the entry of a second major party candidate  
4 could affect, will certainly, almost certainly affect the  
5 vote total of a third party candidate in a district that  
6 was previous, in a previously single party district. And  
7 that had consequences for minor party candidates, just as  
8 it did this cycle for Mike DeRosa because it could bring  
9 him below the ten percent threshold for qualifying for  
10 public financing. And I think it happened to two other  
11 minor party candidates this cycle who were both recipients  
12 of public financing this cycle and because the second  
13 major party candidate entered the race, their vote total  
14 would make -- they decreased and would make them eligible  
15 for less money next time around if they could raise the  
16 qualifying contribution.

17 So, in that sense vote totals are important and  
18 we have the testimony of the defense expert acknowledging  
19 that. But beyond that, I'm not sure the relevance.

20 MR. FEINBERG: Your Honor, if I might, there's  
21 one other huge logical flaw in the argument that Mr. Lopez  
22 is making right now. The claim that Mr. DeRosa was  
23 disadvantaged by the entry of a second major party  
24 candidate in his race, I mean that is the argument, it  
25 dropped him below 10 percent, and that candidate was

1 Barbara Rhue, a Republican, as I understand it, who  
2 didn't participate in the CEP, so that has no causative  
3 effect whatsoever. You can't attribute the fact that  
4 Mr. DeRosa did less well this year to anything that's in  
5 the CEP if Ms. Rhue didn't participate in it. And there's  
6 no evidence that she was motivated to join the race  
7 because of that, or that she -- and she in fact did not  
8 take advantage of it, so what -- there's no, there's no  
9 beef there, if you will.

10 MR. LOPEZ: If I may just answer, this might be  
11 helpful. She did sign up to participate in the CEP.  
12 She's one of the -- she either didn't make it or she opted  
13 out.

14 MR. FEINBERG: And then she didn't follow up on  
15 it. So how much of an incentive is that supposed to be?

16 MR. ZINN-ROWTHORN: And, by the way --

17 THE COURT: The point I think is this. The  
18 argument, as I understand it, is not that in any  
19 particular race a candidate who accepted CEP funding  
20 affected the political opportunity of a minor party. I  
21 think the argument is simply this.

22 The CEP encourages major party candidates to  
23 participate where they otherwise would not. In any  
24 situation in which two major party candidates are opposing  
25 each other, the political opportunity of a minor party

1 candidate is reduced. Therefore, the CEP reduces the  
2 political opportunity of minor party candidates by  
3 encouraging participation of major party candidates where  
4 they wouldn't otherwise.

5 MR. FEINBERG: On the facial side, I think that  
6 is the argument.

7 THE COURT: Right.

8 MR. FEINBERG: And I think we disagree with it  
9 because we don't think the CEP will have that effect on  
10 major party candidates.

11 On the as applied side, Mr. DeRosa is  
12 specifically saying I was adversely affected in my Senate  
13 race by this statute. And the point is that is not true  
14 and they haven't sustained any burden of proof to  
15 establish that.

16 MR. LOPEZ: I think he has met that burden, if  
17 that's the burden. His testimony establishes that he --  
18 the entry of a second major party candidate in the first  
19 district drew votes for him. He believes it drew votes  
20 for him, drew votes for him and took him below the ten  
21 percent.

22 He also has testimony that whereas his \$1,000  
23 competed only against \$36,000 in 2006, it's now competing  
24 against 3- or \$400,000, and he's complaining -- that's an  
25 injury he's complaining about, Your Honor.

1           THE COURT: But Mr. DeRosa doesn't have a right  
2 to any particular level of electoral support. What he  
3 has a right to, if anything, is an argument about the  
4 political opportunity he has, and how the funding program  
5 of the CEP affects that. So I mean --

6           MR. LOPEZ: That -- I couldn't have said it  
7 better, Your Honor.

8           Your Honor, look, this is just too, too dry to  
9 go through -- so I would just ask the court if the court  
10 wants to satisfy itself how these six minor party  
11 candidates who ran, my clients, Libertarian and Green  
12 Party candidates, how they were affected by the  
13 implementation of the CEP this cycle, this is set forth in  
14 findings 306(g) through 306(k). It's also supported by  
15 affidavit and testimony and, summarized, just makes the  
16 point they are competing, as a whole competing in a more  
17 expensive and in some cases crowded environment.

18           But I just want to urge -- but in these  
19 findings, in our client's affidavits, they make the even  
20 more important point that going forward in 2010 and 2012,  
21 they have to factor in the fact that they are going to be  
22 competing in this very expensive or very different  
23 environment and they are going to have to plan for that  
24 and they are in the process of doing that now, Your Honor.

25           And later in my presentation I'll, I'll go into



1 some detail about what they are doing now to try to adapt.

2 All right? I am at --

3 THE COURT: This would be a good stopping point  
4 for lunch if you're --

5 MR. LOPEZ: All right.

6 THE COURT: If you're at a good break, we'll  
7 have lunch but let me throw this question out. Is there  
8 anybody who would object to my taking judicial notice of  
9 any facts that are available to me from public, that is  
10 government websites concerning electoral results,  
11 campaign financing and expenditures? In other words, let  
12 me just give you an example. If I wanted to figure out  
13 where did -- was it Barbara Rhue, was that the candidate  
14 we're talking about?

15 MR. FEINBERG: Yes.

16 THE COURT: All right. If I want to see, for  
17 example, where Barbara Rhue got her money to run, I assume  
18 I can find that on the public, that is, the government  
19 website that shows who contributed to her campaign,  
20 including whether she got party contributions or  
21 individual contributions or funded her own campaign or  
22 whatever.

23 MR. ZINN-ROWTHORN: Your Honor, you could. I  
24 think one thing we've learned over the past couple of  
25 months is that extracting data, even from objective, you

1 know, sort of filings is not a science -- it's more of an  
2 art than a science. So I think we would probably kind of  
3 want the opportunity to know what the court's questions  
4 were, because we've been, even on matters as simple as  
5 contestedness we've been in disagreement on some things,  
6 so I think it might be helpful to us to know sort of more  
7 specifically what the court is trying to determine.

8 THE COURT: Okay, I'll give you the question  
9 that popped in my head. Argument is made there's no  
10 causation between the CEP and Mr. DeRosa's election  
11 results because Ms. Rhue did not take CEP funds. I'd be  
12 curious to know what has been the pattern of party  
13 contributions to candidates not accepting CEP funds 2006  
14 versus 2008. In other words, if most of the parties'  
15 candidates are fully funded because they are taking CEP  
16 funds, those who decide not to potentially are more  
17 heavily subsidized by a party that now has more money to  
18 focus on particular races where it used to have to spread  
19 this money around. And that may be a less direct effect  
20 but it seems to me it could provide the causation that Mr.  
21 Feinberg is arguing is missing.

22 MR. ZINN-ROWTHORN: My understanding is she  
23 wasn't a significant recipient of those funds, but that is  
24 the kind of question I think we could answer for Your  
25 Honor by looking at termination reports, committee

1 reports. Some of that may already be in the record in raw  
2 form and maybe we just have to extract a particular data  
3 point here.

4 MR. FEINBERG: Your Honor, I always hesitate to  
5 tell a judge that what you're thinking of doing is not an  
6 appropriate course, but I really don't think that it is  
7 proper for the court to be kind of engaging in its own  
8 research trying to sort out factual issues like that, even  
9 from publicly available data, because there may be, for  
10 example, other considerations that really ought to be  
11 brought to bear in terms of how to evaluate that data the  
12 court may not be aware of when you're just looking at  
13 public websites.

14 So I think there's several ways the court can  
15 go. One is to ask us some questions and let us try to  
16 provide you with the information; another is to at some  
17 point now or down the road, advise the parties that you're  
18 thinking of using this data and these are the conclusions  
19 that you're thinking of drawing, do we have any objection  
20 to it at that point, so we have an opportunity to weigh in  
21 on any specific factual conclusion that the court's trying  
22 to draw from the evidence.

23 THE COURT: Well, you know, I don't need to  
24 focus on the one race, but in general I'd be interested to  
25 see what effect the CEP has had on party or party

1 oriented, party controlled -- party affiliated is probably  
2 the best word, funding sources for candidates who are not  
3 engaged in accepting CEP funds. In other words, did the  
4 Republicans funnel money to Republican candidates who are  
5 not taking CEP funds? Did the Democrats do that? I just  
6 would be curious.

7 MR. FEINBERG: Then we will try to answer that  
8 question for you in some reasonable period of time after  
9 this hearing.

10 THE COURT: Okay.

11 MR. ZINN-ROWTHORN: We will caucus and I think  
12 we'll be able to, we'll do our best to provide that. It's  
13 not many immediately apparent where we would have to --  
14 all the sources we would have to look at but we will  
15 address that question.

16 THE COURT: That would be helpful. Thank you.

17 MR. LOPEZ: Your Honor, you had -- you're going  
18 to address that specific point? Okay. Your Honor, I just  
19 didn't want to leave the court with the misimpression that  
20 we said Barbara Rhue and Fonfara's and DeRosa's senate  
21 district run received a CEP grant.

22 THE COURT: No, I understand.

23 MR. LOPEZ: She signed up for it, and that means  
24 she's bound by certain rules, but the fact that she didn't  
25 qualify --

1 THE COURT: No, it's precisely because she  
2 didn't accept CEP funds that I was wondering, well, did  
3 she receive a benefit indirectly.

4 MR. ZINN-ROWTHORN: In that case she would be  
5 bound by the contribution restrictions that anyone who did  
6 accept CEP funds, so she was in the sort of circumstance  
7 where she couldn't do what another candidate might do but  
8 also didn't get the CEP funding.

9 THE COURT: Okay, and I'm not focusing on her  
10 except that her name came up.

11 MR. ZINN-ROWTHORN: Understood.

12 THE COURT: Yes, okay.

13 MR. LOPEZ: Yes, and, Your Honor, we've gone  
14 back and forth about what the difference between facial  
15 and as applied challenge is. I just think the example I  
16 keep giving about the debate is helpful as to, I think,  
17 both facially and as applied. Remember what I said  
18 earlier, in a situation where the two speakers get  
19 different debate time, you can challenge that facially  
20 because on its face it draws a distinction that has no  
21 constitutional conflict to political speech, but the fact  
22 that the Republican didn't use his advantage under the  
23 scheme I was referring, it doesn't defeat Mike's facial  
24 challenge this time because the statutory scheme is still  
25 in place and he will have to face that disadvantage next

1 time.

2 THE COURT: I understand the difference between  
3 facial and applied.

4 MR. LOPEZ: Okay, all right. And, you know, I  
5 really don't like getting caught up on this issue of  
6 causation. I really think we've complicated the record  
7 here, everyone, because, you know, look, it's just common  
8 sense. In all the prop -- or all the -- I don't want to  
9 use the word propaganda, but in all the excitement about  
10 this public financing program, there's consensus that the  
11 point is to increase competition and to increase, and to  
12 increase the number of challenges that challenge  
13 incumbents. That's the whole point of this public  
14 financing program and that footprint is all over  
15 legislative history and all over their documents that come  
16 from the CEP.

17 We also have our experts and their experts who  
18 confirm that, of course, it's going to provide an  
19 incentive for major party candidates and it may not happen  
20 this cycle but over time it's going to happen. And that's  
21 what our clients are testifying to, Your Honor. This  
22 cycle it may not have, the effect may not have been so  
23 pronounced that it catches the court's attention. I think  
24 it was. I think they are competing in a very -- a much,  
25 much more difficult environment. But over time it is

1 going to affect the playing field or alter the playing  
2 field that they are competing on, and they are right now  
3 engaged in the process of trying to figure out how to deal  
4 with that, Your Honor.

5 For instance, do they get in the cross  
6 endorsement business? There's a lot of advantages to be  
7 engaged in the cross endorsement business. That's not  
8 what they do. Do they withdraw from electoral politics  
9 in the State of Connecticut? Do they -- because they  
10 don't feel they can compete in this enforcement? Do they  
11 focus all their attention on federal states races or maybe  
12 the statewide slate? Do they get out of legislative  
13 elections, Your Honor?

14 They are having this conversation now, Your  
15 Honor, and there's no rule that says they have to come to  
16 final conclusions now. This is a conversation or a debate  
17 that's going to be had in their executive committee over  
18 the next, over the next several months and years as they  
19 continue to evolve their policy.

20 The point is from their point of view, the game  
21 has changed and they have to now come up with a new game  
22 plan and they are doing that. And that's the injury.  
23 That's what's sufficient for purposes of Article III, Your  
24 Honor, and it's what's sufficient for purposes of the  
25 merits.

1           THE COURT: Okay. Mr. Lopez, let me just  
2 quickly inquire where are you in terms of your  
3 presentation? How much longer do you anticipate going  
4 after lunch?

5           (Pause)

6           MR. LOPEZ: I think I need the afternoon, Your  
7 Honor. I think I need --

8           THE COURT: Okay.

9           MR. LOPEZ: -- three hours? What did we take  
10 this morning? We took three hours and I got more than  
11 halfway through my presentation.

12           THE COURT: All right. Fair enough. Let's take  
13 just over an hour. Come back at 1:45. Stand in recess.

14           (Whereupon the luncheon recess was taken at  
15 12:40 o'clock, p. m.)

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## A F T E R N O O N        S E S S I O N

(1:45 O'CLOCK, P. M.)

THE COURT: Mr. Lopez?

MR. LOPEZ: Yes, sir. Your Honor, I just wanted to point out that I am here with my clients today, Mike DeRosa who ran in the First Senate District; Rich Duffy who is the Party's candidate for the Congressional District, and; Mr. Steven Fournier who is the co-chair of the Party, also the Congressional District; David Bedell who is also here today, was the party's candidate for the Stamford Registrar of Voters, and; Ben Wojan who has previously run as a candidate.

THE COURT: Thank you.

MR. LOPEZ: Your Honor, this morning I tried to present half a dozen different ways, I tried to measure the impact of the CEP on the political opportunities and competitiveness and the resources of my candidates. I think there is another measure and it has to do with cross endorsements.

Connecticut's new fusion voting rules work in tandem with the CEP to benefit the major parties, primarily the Democratic Party, by providing minor parties like the Working Families Party with a powerful incentive, cross endorsement of the major parties, and this is what has happened. The number of minor party cross

1 endorsements of major party candidates in the State  
2 legislature increased from 57 in '06 to 79 in '08. In '08  
3 the Working Families Party largely stopped running its own  
4 candidates and instead embraced a strategy of cross  
5 endorsing Democratic candidates.

6 This is all -- in 2002, for instance, the WFP  
7 ran 25 legislative candidates of their own. In '04 they  
8 ran 54 and crossed endorsed 16 major party candidates. In  
9 '08 the WFP only ran four candidates. They cross endorsed  
10 a Democrat in over 70 other districts. This is all set  
11 out in -- it can be deduced from the Secretary of State's  
12 website but it's also set out in Mr. James' declaration  
13 and the accompanying tables.

14 Now, this -- we may or may not hear from the  
15 chair of the WFP tomorrow, and so reserving on this issue,  
16 but the Chairperson has submitted two affidavits, and in  
17 those affidavits -- and they are both part of the  
18 defendant's record -- they argue that they benefit from  
19 the CEP, and presumably that's why Mr. Zinn Rowthorn was  
20 going to put Mr. Green on the stand. We can agree, Your  
21 Honor, that they indirectly benefit to the extent that the  
22 major party candidate that they support receives public  
23 financing. But to the extent the WFP maintains that it  
24 benefits directly under the CEP, the court must accept  
25 two -- three propositions.

1           First, that the WFP will get ten percent or more  
2 on the WFP line when they cross endorse a major party  
3 candidate. Second, that the WFP in the next election will  
4 break from the major party candidate and run their own  
5 candidate against the very same candidate they supported  
6 in the previous election. And, thirdly, that they will  
7 actually qualify for public financing in those  
8 circumstances.

9           This series of hypotheticals, Your Honor, it is  
10 in our view a slim reed to credit the testimony of  
11 Mr. Green in his affidavits and his position that the WFP  
12 is benefiting from public financing.

13           There is, of course the scenario where they  
14 could run their own candidates, as they did this time --  
15 they ran two of their four candidates under the public  
16 financing program -- but that, what they did in '08 is  
17 completely inconsistent and contrary to the trend of what  
18 they have done in the past, which is move in the direction  
19 of cross endorsing Democratic candidates.

20           In contrast, the Green Party, like the  
21 Libertarian party, has for now decided not to engage in  
22 cross endorsements as a matter of party policy in order to  
23 maintain its independent voice as a minor party. The  
24 decision not to cross endorse has allowed the Green Party  
25 to maintain its political independence. But it has made

1 it more difficult for the party to take advantage of the  
2 CEP because Green Party endorsed candidates are unable to  
3 benefit from the CEP's major party preference. The CEP is  
4 currently -- the Green Party, Your Honor, is currently  
5 rethinking its policies on cross endorsement.

6 The course of the increased difficulty of  
7 competing in a post-CEP environment -- and this is all set  
8 out in the declaration of Steven Fournier, who's here  
9 today. I would add that there was a Green Party candidate  
10 who submitted a declaration in this case named Kenric  
11 Hanson, who ran in the 39th House District and he received  
12 9.9 percent of the vote. And the Republican Party  
13 approached him and offered to cross endorse him and if  
14 that had occurred, it's very likely that Mr. Hanson would  
15 have polled more than 10 percent of the vote and possibly  
16 as much as 20 percent of the vote, but because he didn't  
17 agree with the position of the Republican Party, he  
18 decided not to do that.

19 But the point I make here, Your Honor, is that  
20 while the WFP may feel that benefit from the CEP, that's a  
21 much more difficult -- it's very unlikely that the Green  
22 Party candidates will benefit from adopting a policy of  
23 cross endorsing major party candidates.

24 Now, if I can move on then, Your Honor. The  
25 injury to minor party candidates that flow from competing

1 in what we believe we've shown is a more expensive and  
2 crowded environment, might be offset if the benefits to  
3 minor parties were limited to base grants. The benefits  
4 of the CEP to minor party candidates, as we know, are not  
5 limited to the general base grants amount. In at least a  
6 dozen different ways, the base grants can be doubled under  
7 the excess expenditure provisions.

8 Director Garfield testified before the  
9 legislature at this session that he expects this position  
10 to come into play with the 2010 elections and has budgeted  
11 for the likelihood that grants will be doubled, will in  
12 fact be doubled under this provision of statewide  
13 elections.

14 The base grant can also be doubled under the  
15 independent expenditure provisions and Director Garfield's  
16 2010 -- or testimony before the legislature anticipated  
17 that the independent expenditure provisions will also come  
18 into play, in fact, even greater than the excess  
19 expenditure provisions. He believed that in the statewide  
20 elections it's very likely those provisions are going to  
21 come into play.

22 He also testifies that he thinks there's going  
23 to be increased primaries in the 2010 elections, that  
24 there will be a contested Republican and a contested  
25 Democratic primary for the office of Governor, and I think

1 also for Office of Attorney General and perhaps for  
2 Secretary of State. Depends which seats are open. And  
3 that's all playing out currently.

4 The other benefits that flow to major parties  
5 outside of the grants is that the party can funnel  
6 unlimited amounts of money into its statewide candidates.  
7 There's no restriction on which party committees can  
8 funnel to its statewide candidates to fund the  
9 organizational expenditure loophole. And I'm not talking  
10 direct infusion but the coordinated political activity  
11 including something as basic as running ads that urge the  
12 election or reelection of Governor Rell. A party -- the  
13 party can, you know, the party can always do that  
14 independently but under the organizational expenditure  
15 they can actually coordinate that have strategy with, with  
16 Governor Rell and do it, and engage in that advocacy.  
17 Governor Rell can also raise money for the, for the party  
18 for this very purpose.

19 So it's sort of, there's -- this confirms, I  
20 think, what Director Garfield testified to before the  
21 state legislature. This has the potential to really  
22 undermine the purposes of the public financial system  
23 which was to remove the influence of private money from  
24 the system. And -- excuse me.

25 Now, we had prepared organizational expenditure

1 data from -- and it's submitted as part of, as part of the  
2 James declaration but it's sort of moot because we came up  
3 with a number of 250-odd thousand dollars that was raised  
4 just by the leadership tax on the Democratic side. The  
5 Democratic House and Republican House and Senate  
6 leadership actually raised about \$250,000.

7           The State actually looked at all the  
8 organizational expenditure committees for all the  
9 committees that are covered and they came up with a much  
10 larger number. I think it was approached a half million  
11 dollars, and I understand their point is this half million  
12 dollars is a lot less that was, than was raised in the  
13 past by party committees and leadership committees. But,  
14 nevertheless, a half million dollars in the first year  
15 that this program has been in place we submit is a  
16 significant amount of money that was driven into the  
17 campaigns of State, House and State senate candidates.

18           So for that proposition, as it turns out we need  
19 to look no further than the Commissioner Garfield's own  
20 declaration.

21           Now, there's also another benefit that major  
22 parties have under the system that really distinguish it  
23 from other systems, is that they can engage, they can  
24 organize exploratory committees and they can raise and  
25 spend significant amounts of money before they receive the

1 party's nomination, and this has already happened.

2 At the last hearing, an objection was raised  
3 that there's no evidence that this is happening. Actually  
4 Governor Rell and Jim Amann -- Amil? Speaker Amann have  
5 both organized exploratory committees as of last August,  
6 and that's in the record. We placed that in the record as  
7 well, Your Honor.

8 And we would direct the court to Plaintiff's 82  
9 and Plaintiff's 96 and Plaintiff's 97. These are the  
10 exploratory committee reports of the two gubernatorial  
11 candidates and the exploratory committees, and Plaintiffs'  
12 82 is a list of candidates who have formed exploratory  
13 committees in which we pointed out --

14 MR. ZINN ROWTHORN: Your Honor, I think just for  
15 the record, Speaker Amann is now out of an exploratory  
16 committee into a candidate committee, just for the record.

17 MR. LOPEZ: And just one more anecdote because  
18 the -- I'll withdraw that.

19 You know, the final aspect of this, of how the  
20 CEP is designed to lock in the benefits of major party  
21 candidates is how the grants to minor and petitioning  
22 party candidates who qualify for partial grants are made.  
23 As described, as I'll describe in a minute, minor parties  
24 have to meet a much more difficult standard to qualify.  
25 This fact alone distinguishes this system from other state



1 financing systems, which at this point are a matter of  
2 record, how the public financing system works.

3 What distinguishes Connecticut even more from  
4 those systems is that minor party candidates who satisfy  
5 the qualifying contribution requirement do not receive an  
6 equal return on their money.

7 First, they must invest a significant portion of  
8 the potential grant in qualifying expenses. Mr. Ladov is  
9 going to address that for Your Honor but I will give you a  
10 preview, that the cost can be prohibited and significantly  
11 exceed the amount of money a candidate is allowed to raise  
12 during the qualifying period, and I think that was  
13 confirmed by the testimony of Donald Green and their  
14 appropriate citations to his testimony in our findings.

15 The second factor is that a candidate who  
16 qualifies and raises the qualifying contributions may only  
17 receive a partial grant. And so a candidate for state  
18 senate makes a full grant if he raises \$15,000. A minor  
19 party candidate who qualifies based on prior vote totals,  
20 ten percent of the prior vote total, has to raise the same  
21 \$15,000 and he only gets \$28,000 or a third of the grant.

22 And I'm -- that candidate finds himself in an  
23 awkward position. If he wants to, if that candidate  
24 qualifies for a partial grant and wants to seek a full  
25 grant, our reading of the statute is that he would have to

1 revert, he'd have to give up his eligibility for that  
2 grant and revert to being a petitioning candidate and try  
3 to qualify for a full grant through the petitioning  
4 process.

5 MR. ZINN ROWTHORN: Your Honor, that may benefit  
6 from a little clarification. Just it wasn't clear to me  
7 that he was talking about someone in an election cycle  
8 who's qualified, has a grant, as opposed to making a  
9 decision at the outset early in the year. So there's no  
10 circumstance under which someone would get a grant, say  
11 I'm happy with this amount of money for my current  
12 expenditures, I'm giving it back, and then start the  
13 process again.

14 But it is true that, you know, that there isn't  
15 an opportunity for someone who is qualified for a  
16 one-third grant to circulate petitions to increase the  
17 size of that grant. That fact is true. I don't know if I  
18 added anything to that.

19 THE COURT: And what are the opportunities after  
20 the election for proceeding with a full grant? In other  
21 words, if the election turned out you get the 20 percent  
22 vote, what do you get looking backward for that last --

23 MR. ZINN ROWTHORN: Looking backward you can get  
24 some supplemental post-election funds to cover existing  
25 debts.

1 THE COURT: To cover deficits.

2 MR. ZINN ROWTHORN: Deficits.

3 THE COURT: But you can't get --

4 MR. ZINN ROWTHORN: You wouldn't get a windfall  
5 that would exceed your debts carrying the amount  
6 forwarding.

7 MR. LOPEZ: There's still some confusion in my  
8 mind about how the system works. Do you mind if I --  
9 Perry, if a minor party candidate qualifies for a  
10 one-third grant or is eligible for a one third grant --

11 MR. ZINN ROWTHORN: Based on the previous two  
12 years?

13 MR. LOPEZ: Right, based on prior proposal, can  
14 they -- do they even have the option of seeking to qualify  
15 for petition prices?

16 MR. ZINN ROWTHORN: Your Honor, I don't want to  
17 go too far out on this. I think this is a question that  
18 has -- there's been -- I don't think it's ever been  
19 squarely before the SEEC and I think I'd like to give them  
20 the opportunity to probably consider that and perhaps do a  
21 declaratory ruling, if appropriate. But -- am I right  
22 this hasn't been an issue that you've issued any guidance  
23 on?

24 MS. ROTMAN: Yes, declaratory ruling --

25 MR. ZINN ROWTHORN: This is outside of the scope

1 of the 2008-1 declaratory ruling. That was folks who  
2 weren't eligible last time but had ballot access from  
3 having received one percent, between one percent and ten  
4 percent. But this, this scenario is not one that the SEEC  
5 has issued guidance on.

6 THE COURT: All right. Let me just note that  
7 the comment wasn't picked up on the record. I don't know  
8 if you want your statement to be on the record or not.  
9 We'll be happy just to have Mr. Zinn Rowthorn's  
10 statements, so I don't -- I leave it up to you. I don't  
11 care but I just don't want anybody to be surprised that  
12 the comment wasn't picked up.

13 MR. ZINN ROWTHORN: What was conveyed just was  
14 the scenario was outside the scope of the 2008-1  
15 declaratory ruling.

16 MR. LOPEZ: And just to summarize then, if I  
17 understood Mr. Rowthorn, our reading of the statute is  
18 correct that a partially funded major party candidate,  
19 partially funded minor party candidate who qualifies for a  
20 one-third grant cannot, cannot receive full funding by  
21 engaging in additional petitioning, and I understand from  
22 Mr. Rowthorn's comments that if a minor party candidate is  
23 eligible based on prior vote total, he could -- he may or  
24 may not be able to, to jettison his eligibility, if you  
25 will, and seek full funding for the petitioning process.

1           MR. ZINN ROWTHORN: I think that's right, Your  
2 Honor. I don't know the answer to the latter scenario.

3           MR. LOPEZ: Our position is the statute does not  
4 allow you to do that.

5           THE COURT: I understand.

6           MR. LOPEZ: Now, Your Honor, our whole  
7 discussion of how the CEP sort of elevates the position of  
8 major parties really begs the question and ultimately, the  
9 ultimate issue in this case is whether the benefits to  
10 minor parties under the CEP offset the benefits that are  
11 being given to major parties. Another way of saying  
12 that -- and we can all agree that the answer to that  
13 question depends on the reasonableness of the qualifying  
14 criteria, and if the qualifying criteria are, in fact,  
15 reasonable by constitutional measure, then I think we can  
16 all agree that we don't win. Our position, of course, is  
17 that they are unreasonable.

18           Our view is that the 20 percent vote total line  
19 is an arbitrary line whose only purpose is to protect  
20 major parties and exclude minor parties. It is, the line  
21 is completely unrelated to the likelihood of a major party  
22 candidate's ability to run an effective and competitive  
23 campaign and that's because of the political landscape in  
24 Connecticut.

25           Major party candidates consistently don't

1 compete and they consistently lose by landslide margins,  
2 as defined by the defendant's own testimony. Setting the  
3 line at 20 percent is low enough to capture all major  
4 parties but it's high enough to exclude minor and  
5 petitioning parties in the main.

6 Now, we submit that the line is arbitrary for  
7 two reasons. First, it provides full funding for major  
8 party candidates who have no chance at winning the  
9 election, and this is clear from not only past elections  
10 but it's also set out in the Narain Tables 3 and 4,  
11 showing the number of CEP funded candidates who lost by  
12 20 percent or more of the vote and who competed in party  
13 nominations.

14 Second, it is -- in many cases the line is  
15 unrelated to the government's goal of removing suspect  
16 private money from the system. These uncompetitive  
17 candidates weren't raising any money in the first place.  
18 In many cases they weren't even running. The funding will  
19 also have the ancillary effect of driving up expenditures  
20 in districts that were previously low spending in  
21 comparison because of the absence of any meaningful  
22 competition.

23 Our view is that if the legislature wants to  
24 fund candidates who aren't viable, that is a legitimate  
25 policy decision, but they have to fund our candidates,

1 too, since in many races minor parties have comparable  
2 support to the lesser of the two major parties.

3 The 20 percent threshold, Your Honor, in our  
4 view is not only arbitrary but there are other rules,  
5 there are other funding rules that add to the  
6 arbitrariness of the system. First, there is no post  
7 election funding except for the small amount that you may  
8 be able to qualify for in supplemental payments that  
9 Mr. Rowthorn spoke to.

10 In addition, a minor or petitioning party  
11 candidate who didn't qualify on the front end because he  
12 didn't collect the required number of signatures or  
13 because she didn't qualify with prior vote totals is  
14 disqualified from receiving public funds, no matter how  
15 well they do in the election. And that's an important  
16 distinguishing fact from, from how presidential systems are  
17 funded and discussion about it.

18 In addition, minor party candidates are denied  
19 primary funding, and I know I've seen some testimony from,  
20 I believe from Director Garfield, that nothing in the  
21 statute prohibits minor parties from getting primary  
22 funding when they are in primaries. But the statute is  
23 actually very clear that the primary funding is only  
24 available to two major party candidates. And the court  
25 can satisfy itself of that by looking at the statute.

1           Your Honor, the second discriminatory aspect of  
2 the qualifying criteria is the qualifying contribution  
3 requirement. It is set at a level that roughly  
4 corresponds, if you will, to the ability of major party  
5 candidates to raise those amounts of money.

6           According to the defendant's witnesses, "It is  
7 within the basic competence," and that's a quote, "and  
8 ability of all major party candidates to raise the  
9 necessary qualifying contributions because of their party  
10 apparatus." This is at George Jepsen's deposition,  
11 Plaintiff's Exhibit 20, at 90 to 93.

12           He goes on to testify that "Major party  
13 candidates for statewide office can easily satisfy this  
14 requirement by tapping into the party infrastructure."  
15 And this appears at pages 80, 85 of his deposition.

16           "The State Central Committee for both the  
17 Democratic and Republican Party maintains a list of  
18 contributors and can provide other fundraising assistance  
19 to the candidate." And that's at page 29 to 31 of his  
20 deposition.

21           There is no correlation, however, between the  
22 ability of the major party candidates to raise this money  
23 and, A, to run a competitive campaign, and, B, to raise  
24 anywhere near the amount of money that is provided by the  
25 CEP. The only purpose served by this requirement is to



1 weed out minor party candidates who don't have the  
2 demonstrated fundraising ability to satisfy the qualifying  
3 contribution requirement.

4 And the legislature was aware of this. The  
5 legislature adopted a qualifying contribution requirement  
6 with the knowledge that minor party candidates almost  
7 never raise the amount of money required to qualify under  
8 the CEP. That's Plaintiff's Exhibit 18.

9 In contrast to other states, Your Honor, that  
10 had adopted public financing systems, the amount of money  
11 that a candidate must raise in Connecticut is substantial.  
12 In Maine, for instance, a candidate only has to raise  
13 \$12,500 in the race for Governor. In Arizona, the  
14 candidate only has to raise \$20,000.

15 Under the -- if the court's looking for guidance  
16 from Buckley, under the federal system for financing  
17 presidential campaigns, there is no requirement that a  
18 candidate first raise qualifying contributions.

19 Candidates who win their party's nomination automatically  
20 qualify for public financing provided, in the case of  
21 minor party candidates, that they are otherwise eligible.

22 The system for financing presidential primaries  
23 is different. Under that system, a system for financing  
24 primaries as opposed to general, under that system,  
25 candidates must raise a relatively de minimus amount of

1 money. Candidates are eligible for matching funds if they  
2 first raise \$5,000 in each of 20 states, counting only the  
3 first \$250 towards that requirement. That was the  
4 requirement in 1976 when Buckley was decided and remains  
5 the standard today.

6 Adjusted for inflation, the \$250,000 requirement  
7 in Connecticut is much more significant and much more  
8 difficult to achieve since it is limited to Connecticut  
9 residents. Adjusted for inflation, the \$100,000  
10 requirement under the federal system from 1976 is the  
11 equivalent of a \$20,000, \$23,000 requirement today.

12 If I wasn't clear, what I'm just trying to say  
13 is \$250,000 is a sight more than the \$100,000 you have to  
14 do to qualify for presidential matching funds during the  
15 primary period when you adjust it for inflation.

16 THE COURT: What you're saying is Ralph Nader  
17 had an easier time running for president as an Independent  
18 Party candidate than running for Governor as a Green Party  
19 candidate.

20 MR. LOPEZ: Absolutely. And Ralph Nader  
21 actually qualified for primary funding because under the  
22 presidential system, to qualify for funding -- all you  
23 have to do to qualify for primary funding, all you have to  
24 do is meet the same requirement as a major party  
25 candidate. There's no need for you to have a formal state

1 endorsed, state sanctioned primary, the way do you in  
2 Connecticut, or the way you do in most states. The party  
3 can hold its own primary and it can a very informal. You  
4 just to have to be seeking the new party's nomination and  
5 we introduced that into the record and replaced evidence  
6 that was excluded. There was an advisory opinion granting  
7 Ralph Nader --

8 (Pause)

9 MR. LOPEZ: We site to an FDC advisory opinion  
10 granting him, granting him primary funds and I don't think  
11 the defendants have contested it, frankly, that if the  
12 minor party candidates are eligible for primary funding  
13 under the presidential primary system, even though they  
14 don't have state sanction primaries the way we do in  
15 Connecticut.

16 And the other point I would emphasize about the  
17 presidentials is, once again, I think this is important to  
18 emphasize, is that there is no requirement that you raise  
19 qualifying contributions to be funded for the general.

20 The other important point about the financing  
21 system under the presidential system is even though -- is  
22 that although only the first \$1,250 of the contribution  
23 are, count toward meeting the qualifying contribution  
24 requirement, the candidate can, can raise the  
25 contributions up to the applicable federal limit which is

1       \$2,300 and that enables the candidate to finance the  
2       process of qualifying for the ballot and collecting the  
3       contribution and that's not true in Connecticut. You are  
4       limited to raising the money in \$100 amounts -- and --  
5       okay.

6               Now, Your Honor, that, for now -- Your Honor,  
7       just to summarize, there are three aspects of qualifying  
8       process apply to major, nonmajor party candidates that  
9       impose a real burden on nonmajor party candidates and have  
10       the effect of effectively excluding them from  
11       participation in a CEP, but at least excluding them on a  
12       discriminatory, what we allege are discriminatory terms.

13               The primary vote total, we submit, is an  
14       arbitrary requirement. We submit that the seemingly  
15       neutral qualifying contribution requirements is, in fact,  
16       an arbitrary requirement. And then there is, of course,  
17       the reasonableness of the petitioning process itself, and  
18       I've asked my co-counsel to address that subject.

19               THE COURT: All right. Thank you. Mr. Ladov?

20               MR. LADOV: Thank you. So, Your Honor, I'm  
21       going to walk through the burden of petitioning for a bit.  
22       Now, the burden of petitioning has been set out at length  
23       in our proposed findings. You can find the sections sort  
24       of beginning at paragraph 181 and going all the way up to  
25       241. We think that our findings have been validated by

1 the testimony of defense witnesses Donald Green and Harold  
2 Hubschman. So we've offered our evidence and we've also  
3 been relying on the evidence submitted by the defendants.

4 Now, at the December hearing, the defendants'  
5 expert acknowledged that the amount of money needed to  
6 qualify could easily exceed the amount of money that a  
7 candidate is allowed to raise during the qualifying  
8 period. His testimony about the reasonableness of the  
9 qualifying criteria was based on his belief that  
10 candidates could incur a deficit to defray the cost of  
11 qualifying and repay the money once they receive CEP  
12 funds.

13 Now, we think that that opinion, that you would  
14 spend half your CEP grant on qualifying is confirmed by  
15 the evidence that we put into the record regarding the  
16 enormous costs incurred by two Working Families Party  
17 candidates.

18 Now, obviously I think there's a legal dispute  
19 between the parties and whether that's permitted by the  
20 act. We believe that it's not permitted by the plain  
21 language of the statute, that it's not permitted by the  
22 regulations and, frankly, that it's not permitted by  
23 anything that we heard from the SEEC until yesterday. I  
24 think that the other side will argue otherwise.

25 THE COURT: And what is it you're saying is not

1 permitted is to reimburse the campaign for expenses that  
2 have been previously incurred in order to obtain  
3 signatures?

4 MR. LADOV: Right. We believe that and we  
5 also -- I think that the law is very clear that a  
6 candidate cannot incur expenditures over the qualifying  
7 period limit, which is limited to the amount of qualifying  
8 contributions plus \$1- or \$2,000 in your personal funds.  
9 We think simply that the law states that you cannot spend  
10 more than that amount of money and you can't incur  
11 expenditures that you're going to later pay back to.  
12 Qualify. We've always seen the regulations as a way of  
13 enforcing that, but we think it's a plain part of the  
14 statute.

15 I guess just to start with though, I just want  
16 to get into the factual evidence that's presented by the  
17 Working Families Party candidate. Now, the Working  
18 Families Party has been presented as the type of organized  
19 and successful minor party that can benefit from the CEP.  
20 Their executive director, John Green, may or may not offer  
21 testimony tomorrow. He's already offered his testimony  
22 through the written affidavits into the record.

23 He says he believes the qualifying criteria are  
24 reasonable. We simply ask that that assertion be  
25 evaluated in the light of the evidence, which shows that

1 the WFP have spent enormous amounts of money and enormous  
2 amounts of time in order to qualify for these grants. And  
3 that fact stands, whether or not it's permissible or  
4 impermissible, it's still an absolutely enormous amount of  
5 time and money that's being spent.

6 Now, in our findings, paragraph 230(a), we  
7 quoted at some length from John Green's September 4th,  
8 2008 declaration, and I'm just going to walk through those  
9 numbers for a moment just to reiterate the amount of money  
10 we can expect.

11 And, according to John Green, in order to obtain  
12 signatures and raise qualifying contributions, Mr.  
13 Booker's campaign hired a canvassing service.  
14 Approximately 20 canvassers collected signatures for Mr.  
15 Booker's candidacy. Mr. Booker's public filings reflect  
16 an expenditure of \$9,210 for this canvassing service, and  
17 then he goes on to break it down for how much per shift.

18 As Mr. Green explains, Deb Noble's campaign did  
19 the same thing. They hired approximately 22 canvassers  
20 collecting signatures. Her public financier says, he says  
21 or indicates an expenditure of \$4,020 and he breaks that  
22 down. In addition to the Working Families Party's central  
23 committee reported an organizational expenditure in the  
24 amount of \$1,105 for services provided to the campaign.  
25 And he breaks that down to 12 signature gathering shifts

1 at \$70 per shift.

2 So for Green -- according to Green, Noble spent  
3 \$4,020 on canvassing service on her own and the WFP spent  
4 another \$840, if you do the math, in organizational  
5 expenditure that was solely devoted to her petitioning  
6 services.

7 Now, that raises another huge red flag as far as  
8 we're concerned. If you look at the statute Section 9-601  
9 (25), defines organizational expenditures, and we actually  
10 put the full definition in our findings at paragraph 137.  
11 But, Your Honor, there's simply nothing in that definition  
12 of what the organizational expenditure is that possibly  
13 permits the WFP to spend \$840 to allow Deb Noble to gather  
14 petitions and qualifying contributions.

15 Organizational expenditures we think are a huge  
16 broad, loophole. Even we don't think the loophole is that  
17 broad, and I think that's supported as well by SEEC. If  
18 you, if you refer to their guidebook for participating  
19 candidates, it's been submitted as Plaintiff's Exhibit 61,  
20 on page 56 they discuss organizational expenditures.

21 So, Your Honor, I guess -- so you have the  
22 statute in front of you. If you go the SEEC's guidebook,  
23 on page 56 they discuss what is permissible and what is  
24 impermissible as an organizational expenditure, and they  
25 say organizational expenditures do not include fundraising



1 for a candidate's committee.

2 And it seems like that's exactly what the WFP is  
3 doing here. They are giving \$840 in organizational  
4 expenditures which they say is, you know, for these  
5 services which are collecting signatures and, you know,  
6 that are also collecting qualifying contributions.

7 So, that's a little bit of sidebar but I think  
8 it just points -- it's further evidence that the  
9 organizational expenditure loophole is in fact a huge  
10 loophole and it's having an impact in a variety of races.

11 MR. ZINN ROWTHORN: Your Honor, I don't know  
12 where to jump in. There's a couple points where we have a  
13 legal disagreement. One has to do with the  
14 characterization about the qualifying period contribution  
15 limit or expenditure limit. They don't exist under the  
16 law. That's -- we put in Beth Rotman's declaration in  
17 last night on that. We talk about that in some more  
18 detail.

19 You know, it's a little troubling that the  
20 defense -- or the prosecution in this case is founded on  
21 asserting that the Working Families Party violated the law  
22 in order to try to participate in the program. You know,  
23 obviously there are going to be post election audits on  
24 every candidate's committee's expenditures, but we ought  
25 to at least have the law right before we cast those kinds

1 of aspersions.

2 Now, the Working Families Party consulted with  
3 the State Election Enforcement Commission on this specific  
4 issue about whether it's okay to make an organizational  
5 expenditure to assist in gathering petition signatures and  
6 the answer was yes. Because organization expenditure is  
7 permissible organization expenditure under 9-600(25),  
8 includes --

9 THE COURT: 601, 601(25).

10 MR. ZINN ROWTHORN: 601(25), that's right.

11 Includes the retention of services of an advisor to  
12 provide assistance relating to campaign organization,  
13 financing and accounting, strategy, law and meeting.  
14 Their view on that -- what's that?

15 Yes, their view on that was, as stated to  
16 Mr. Green, that assisting a candidate in gathering  
17 petition signatures constitutes, the way it was done  
18 constituted the use of an advisor services as proven.

19 MR. LADOV: I guess, I mean -- to respond, Your  
20 Honor, I mean I think, first of all, I guess we would have  
21 a hard time understanding how a petitioning service which  
22 is the hiring of individuals who go out to door-to-door  
23 collecting signatures and contributions, we don't see how  
24 that can be advisory.

25 I think to respond to the -- something else that

1 Mr. Zinn Rowthorn said, obviously we didn't get into this  
2 piece of evidence in an effort to disparage the Working  
3 Families Party or the SEEC. We looked into this evidence  
4 because part of, part of the heart of our claim has been  
5 the CEP sets qualifying criteria so high that it is  
6 effectively impossible for minor parties to reach these  
7 criteria.

8 One of the reasons that we've been arguing that  
9 is, you know, is both because it is an enormous amount of  
10 money that we think sets this way out of reach of minor  
11 party candidates and, in addition, because we felt that  
12 that amount of money simply violates the terms of the act.  
13 And as I said before, we had never had any reason to  
14 believe that the SEEC thought otherwise until yesterday.

15 Honestly, the fact that in many ways if you look  
16 at some of the evidence we've been putting in, the SEEC is  
17 sort of bending over backwards to make this program, which  
18 we think is deeply and unsolvably flawed, better for  
19 minor parties. Mr. Lopez already talked about the fact  
20 that the SEEC went in after the law was passed and said  
21 this program excludes minor parties, we should fix this  
22 program. The legislature didn't listen. When, you know,  
23 when the SEEC saw that the law appeared to exclude minor  
24 parties from any ability to get public funding, the SEEC  
25 first asked for an amendment to the act and then went back

1 and used its authority to say we're going to interpret the  
2 law and say that the spirit of this is not to deny the  
3 minor party and to let them petition. Arguably that's  
4 what's going on here as well.

5 They are trying to figure out how to get minor  
6 parties into the system because, frankly, if you don't let  
7 minor party candidates violate this qualifying expenditure  
8 limit, there's simply no way to do it. But, Your Honor,  
9 we simply think that, first of all, that's a point at  
10 which you, the law does not go. That there's simply no  
11 way that the statute can get you to that interpretation.

12 We also think that it's an interpretation that's  
13 effectively precluded by how the SEEC has interpreted the  
14 act and the guidance it has given to all candidates  
15 previously. And then, finally, I think, you know, in a  
16 related vein, maybe that's the SEEC's interpretation now  
17 but we need to be able to tell our plaintiffs and their  
18 candidates what they can and can't do. And what they can  
19 and can't do has been, we think, crystal clear from the  
20 statute, from the regs, from the guidance.

21 All that the other side has submitted to  
22 contradict that is a declaration submitted yesterday that  
23 is, you know, a document prepared for litigation. That at  
24 the very least, we think, you know, we could not go back  
25 to our client and say in good faith you should rely on

1 this and you can do that kind of fundraising the next time  
2 around because we just don't think it's a reliable legal  
3 position to take.

4 MR. ZINN ROWTHORN: Your Honor, the consistent  
5 position appears to be, and it continues to puzzle me, is  
6 every time the State Election Enforcement Commission  
7 interprets the law to the benefit of minor parties, that  
8 it's somehow disappointing to the plaintiffs in this case.

9 We haven't submitted a declaration from Beth  
10 Rotman somehow suggesting a novel interpretation of the  
11 expenditure limit. What we have done is submitted a  
12 declaration of Beth Rotman explaining the statutory  
13 provisions from which we reached the conclusion that they  
14 have badly misstated the expenditure limit during, during  
15 they say the qualifying period. The fundamental  
16 misunderstanding on this side of the room is that there is  
17 no qualifying period expenditure limit. The expenditure  
18 limit depends, by the clear language of the statute, it  
19 differs on whether it is a -- whether the candidate is in  
20 a primary period or general election period, and those  
21 periods themselves are defined by statute.

22 A general election period commences for a  
23 candidate who is nominated without a primary, i.e. a minor  
24 party candidate, the day after that nomination and the  
25 expenditure limit in that general election period is the

1 full grant plus qualifying contributions.

2 So, to look at, you know, the filings of Cicero  
3 Booker and say, oh, he spent \$40,000 before he got a  
4 grant, misses the point. A, it's wrong on the law because  
5 we have no idea -- you know, they haven't suggested to you  
6 how much of those expenditures were during the primary  
7 period and how much were during the general election  
8 period. We know at a certain point, we put the dates in  
9 the declaration, we know at a certain point in Mr.  
10 Booker's case he was in the general election period as of  
11 August 18th, 2008, going forward for purposes of the  
12 expenditure limit.

13 So, again, Your Honor, that's the clear language  
14 of the statute. There's nothing novel about this. What I  
15 haven't heard from Mr. Ladov or anybody else in support of  
16 impugning Mr. Booker and impugning the SEEC is where in  
17 the statute that we're wrong about that.

18 But, again, Your Honor, you know, I think, I  
19 think we -- I invite Your Honor to review the affidavit.  
20 I think we ought to have our law right before we start  
21 making accusations.

22 MR. LOPEZ: Your Honor, what the defendants have  
23 done they have read out the qualifying period in this  
24 statute. As soon as -- we're all in agreement that during  
25 the qualifying period, and we have 15 SEEC documents and

1 we're going to show you some of them, Your Honor, that say  
2 during the qualifying period their State Senate candidate  
3 can only raise \$15,000 in qualifying contributions and you  
4 can donate \$2,000 to your campaign, \$2,000 to your  
5 campaign. And you can only spend, the expenditure limit  
6 during the qualifying period is \$17,000. There's no  
7 dispute about that.

8 MR. ZINN ROWTHORN: But I'd like to know from  
9 where we are reading that out. Where does --

10 MR. LOPEZ: I will tell you. Now, what they are  
11 doing is saying if you delay your qualifying effort until  
12 you get your party's nomination, we're going to read out  
13 the qualifying period and during that period you can spend  
14 unlimited -- well, you can spend up to the full  
15 expenditure limit, 85 -- or \$100,000 to qualify. You can  
16 only raise, Your Honor -- there's no dispute, it's in  
17 their affidavit, Rotman's declaration, you can only raise  
18 \$15,000. You're absolutely barred from that because when  
19 you submit your grant application, you have to certify  
20 that I only raised \$15,000 for your state -- if you're a  
21 State Senate candidate. But they are saying you're  
22 allowed to engage in the very type of deficit spending  
23 that is prohibited during the qualifying period because  
24 they say once you get your nomination, you're rolled into  
25 a new period.

1           Now, there are plenty of implementing  
2 regulations that contradict that. The statute is, in our  
3 view is vague on it but there are implementing regulations  
4 that make very clear that the, the point of the qualifying  
5 period is to prove you're bona fide so you can go out and  
6 raise this modest, so-called modest amount of seed money,  
7 qualifying contributions from different people within your  
8 district. And that's why there's an expenditure limit  
9 that corresponds to the, to the amount of money you're  
10 allowed to raise in qualifying contributions.

11           What they are doing is reading that out and  
12 saying once you're into the general election -- I mean  
13 most candidates don't start qualifying until they have  
14 their party's nomination. They don't even know -- right?  
15 So once you're into the general election, they are saying  
16 you can spend -- you can't raise whatever you want, you  
17 still have to, before you get your grant, you can still  
18 only raise \$5,000 in the House and 15,000 in the Senate.  
19 But you can spend whatever you want if you can get someone  
20 to float it.

21           Now, apparently in the case of Working Families  
22 Party, they are able to get someone to float it. Mr.  
23 Ladov can address that. But most people, most major party  
24 candidates can't get --

25           THE COURT: Minor.



1           MR. LOPEZ: -- people to float \$40,000 in  
2 canvassing services.

3           THE COURT: Most minor party.

4           MR. LOPEZ: Most minor parties can't get people  
5 to float that kind of money and, and there was a reason  
6 the Working Families Party can and Mr. Ladov can -- he's  
7 prepared, he can try to address that.

8           So that's -- look, and we cast no aspersions.  
9 You've read the statute. We didn't know they read it that  
10 way. This all came as a surprise to us. We put it into  
11 our findings. You know, you made your counterpoint. It's  
12 a point well taken and I apologize for any offense.  
13 There's no offense taken.

14           But doesn't -- isn't it almost irrelevant,  
15 Judge? Isn't the real point here that Cicero Booker spent  
16 \$40,000 collecting in -- collecting signatures and  
17 qualifying contributions? And thank God, he qualified for  
18 a full grant because it could have been a completely  
19 fruitless exercise if he had fallen short. Excuse me.

20           MR. LADOV: I guess to -- I was going to address  
21 this question of --

22           THE COURT: All right, just a moment. Let me  
23 hear if -- there's apparently a dispute factually about  
24 whether Mr. Booker spent \$40,000 on petitions.

25           MS. YOUN: Sure. I think Mr. Ladov actually had

1 the figure correct when he said, as stated on Mr. Booker's  
2 disclosures forms, the figure was somewhere around 8 or  
3 900 or \$9,000. \$40,000 that was paid included a range of  
4 candidate services which included, you know, as far as I  
5 understand it, a direct mail, get out the vote, media buy.  
6 The idea that Cicero Booker spent \$40,000 on petitioning  
7 has no support in this record.

8 MR. LADOV: Well, Your Honor, it's certainly  
9 correct that he reported about \$8,000 before October 10th  
10 when he submitted his application. On October 28th, after  
11 he had been awarded a grant, and this is Plaintiff's  
12 Exhibit 109, his findings showed that he incurred an  
13 expenditure of about \$40,000 to CSI.

14 Actually, Your Honor, if this is helpful, I  
15 actually -- I know you complained about how boring Volumes  
16 3 and 4 are. I actually did the cliff notes and made for  
17 everybody -- I just printed out the pages that we cite to,  
18 if I may approach. It's -- one is for Booker and one is  
19 for Noble.

20 So this isn't anything new. This is just, I  
21 just tried to isolate the pages because I know it's a lot  
22 of pages to go through. I just thought it might make it  
23 easier for everybody.

24 So, first of all, we know that in his  
25 October 28th report, again this is Plaintiff's Exhibit

1 109, on page 15, Booker's filings show that he incurred --

2 (Pause)

3 So this is where we first see that Mr. Booker  
4 states that he incurred on October 11th an expenditure of  
5 \$40,845 to CSI. So it was incurred before he got his  
6 grant, although submitted, this information was  
7 submitted -- to the best of our knowledge, it wasn't  
8 submitted to the SEEC until after the grant had been  
9 awarded on October 16th.

10 Now, if you look at Plaintiff's Exhibits 106  
11 and -- so Plaintiff's Exhibit 106 was the filing from  
12 January. And on page 14 of Exhibit 106, all right, it's  
13 the second page of what I gave you. It's page 14 of the  
14 full exhibit. And at the bottom of the page you can see  
15 three checks that were made out to CSI, October 22nd,  
16 October 23rd and November 3rd, and the total reported  
17 amount was \$35,145.

18 Now, this, the purpose of those checks was for  
19 door-to-door donations. For a candidate like Cicero  
20 Booker who receives a full grant, there's no purpose of  
21 door-to-door donations other than qualifying expenses.  
22 You know, unlike someone who gets a partial grant he's not  
23 permitted to raise additional contributions after he's  
24 received his grant. So all of the evidence in the record  
25 shows that he, his campaign characterized the money paid

1 to CSI, the \$35,000 paid to CSI as door-to-door donations.  
2 We don't see any way that this could be understood as  
3 being anything other than qualifying expenses.

4 I also would note, and we haven't done any  
5 research into CSI but I want to note it's located in the  
6 same offices as the Working Families Party, as ACORN. So,  
7 as Mr. Lopez mentioned, part of the problem that we see is  
8 that the candidates who have access to people who are  
9 willing to float these kinds of services on spec are able  
10 to potentially qualify by just sort of paying enough to  
11 get a CEP grant. The candidates for minor parties who  
12 don't have those sorts of institutional connections can't.

13 And apparently that's permitted by the  
14 defendants but, again, we think that it speaks to both the  
15 the burden of qualifying and the fact that it is  
16 discriminatory against minor party candidates in general.

17 In terms of this question of is there a  
18 qualifying period, I mean again, Your Honor, we are not  
19 making this up. If you look at the statute and I think we  
20 can concede certainly that the statute doesn't use the  
21 word "qualifying period;" it's in fact the SEEC that  
22 coined the term "qualifying period." You know, the  
23 statute, on the other hand, if you look at 9-702(c), and  
24 this is where the legislature set forth, you know, what  
25 the SEEC has characterized as the qualifying period, the

1 primary period and the general election period. And this  
2 is, I believe it's the first couple of sentences of the,  
3 of that section.

4 (Pause)

5 THE COURT: This being the limitation on  
6 qualifying contributions during that period, it's a limit  
7 on the expenditures while qualifying for contributions?

8 MR. LADOV: Right, that is correct, Your Honor.

9 THE COURT: Okay.

10 MR. LADOV: And, you know, again, we can  
11 certainly agree that this, the legislature doesn't say,  
12 use the word qualifying period. That's the language the  
13 SEEC used in its guidance to candidates, but we certainly  
14 think that, you know, the legislature intended to create  
15 three distinct periods at three distinct expenditure  
16 limits, and the current interpretation that's just been  
17 offered by defendants effectively writes that first period  
18 out of the statute.

19 I mean as a basic canon of statutory  
20 interpretation, we have to assume that the legislature  
21 meant something when they put this language in. And by  
22 the defendant's interpretation, they've effectively meant  
23 nothing because every period is pre-primary and  
24 pre-general election. The legislature, you know, said  
25 there's three distinct periods and I think the SEEC got it

1 right before. The first period is the qualifying period.  
2 It's the period during which, in the SEEC's language, it's  
3 the period before a primary general election that allows  
4 candidates to raise all qualifying contributions and  
5 demonstrate they have the threshold of support necessary  
6 to qualify for participation in the program.

7 And actually, Your Honor, if I can take a couple  
8 minutes to walk Your Honor through the guidebook that they  
9 put out, what we submitted into the record as Plaintiff's  
10 Exhibit 61. If you don't that have, I can -- I have a  
11 copy I can give you.

12 MS. MURPHY-OSBORNE: Mark, if I can just clarify  
13 one item on that Exhibit 109, confer to the SEEC, that  
14 Form 30 that is the Plaintiff's Exhibit 109 is a form that  
15 all candidates have to submit to the SEEC on periodic  
16 reporting, including nonparticipating candidates, and  
17 disclosure that are contained on page two of that  
18 document, for example, on line 29, those are -- that  
19 information is part of what the SEC would consider in  
20 determining whether an excess expenditure grant was  
21 required. So, in other words, candidates are obligated to  
22 list expenditures in that section for services that are  
23 yet to have been provided, so that the SEEC has the prior  
24 notice, prior to Election Day, that a candidate,  
25 participating and nonparticipating, is going to exceed the

1 expenditure limit for under the CEP for that election.

2 So, just to clarify that this line 29 that  
3 contains the \$41,000 figure isn't necessarily a  
4 retrospective payment, but it -- the candidate would be  
5 under an obligation to list that even if it was a  
6 prospective obligation under a contract.

7 MR. LADOV: Right. Although, Your Honor,  
8 there's one thing I would want to add to that. I think  
9 counsel's absolutely correct that one of the reasons that  
10 the legislature requires candidates to itemize  
11 expenditures incurred but not yet paid is for the excess  
12 expenditure provision. In fact, Section 9-711, the excess  
13 expenditure provision, says that a candidate can be  
14 penalized for expenditures that are made or incurred. But  
15 relevant to the section that we're discussing now, if you  
16 look at the law -- where is it. It's 9-706(c).

17 THE COURT: Okay.

18 MR. LADOV: And in 9-76(c), the legislature set  
19 forth what a candidate must do when they apply for a  
20 grant. And I just would note -- just want to be sure I  
21 have the right one. Right, that the application shall be  
22 accompanied by a cumulative accounting of all funds  
23 received, expenditures made, and expenditures incurred but  
24 not yet paid by the candidate. So I think, we actually  
25 believe that this supports our interpretation, that this

1 is showing that just as a candidate has to make reporting  
2 that will show whether they exceed the general election  
3 expenditure limit by incurring expenditures above that,  
4 that the same thing is happening for the qualifying  
5 period, that the candidate, when they apply for the grant  
6 need to certify that they are submitting an accurate list  
7 of all of their contributions, their expenditures made,  
8 and expenditures that were incurred but not yet paid, for  
9 the very reason that we've been discussing.

10 And I think --

11 THE COURT: There may be a response. Let me  
12 see.

13 MS. YOUN: Sure. This was actually a response  
14 to the previous question as to what was the purpose of the  
15 expenditures from Cicero Booker? I'm looking now to  
16 document 260-4 which is the declaration of John Green  
17 which was filed on September 5th, 2008, in this matter.  
18 And in paragraph, in paragraph eight, it says that, you  
19 know, as of this point, as of early September, Mr. Booker  
20 has already gathered between 300 petition signatures. He  
21 hasn't gathered more than that amount of petition  
22 signatures. It also states the price that was paid for  
23 those petition signatures was \$9,210.

24 You know, I don't see -- I see what plaintiffs  
25 are pointing to in saying that there's a line on here that



1 says A dash other door-to-door donations, but I think to  
2 infer from that that Mr. Green has perjured himself, that  
3 he has, in fact, said it was only 9,000 when it was, in  
4 fact, 40,000 is a real -- is really quite a stretch.

5 THE COURT: I don't think anybody's talking  
6 perjury here.

7 MS. YOUN: But I'm saying in the record as to  
8 what those petition signatures cost, and I don't think  
9 this \$40,000 that is being thrown around is accurate.

10 THE COURT: What are these checks for then?  
11 What's another theory for what they could be for?

12 MS. YOUN: My understanding of what Citizen  
13 Services Incorporated is, it is a branch of the Working  
14 Families Party. John Green testified in his deposition  
15 that the Working Families Party contracts with a number of  
16 candidates, Green Party -- I'm sorry, Working Families  
17 Party candidates as well as other candidates to provide a  
18 range of candidate services that include media buys, that  
19 include get-out-the-vote services, that include direct  
20 mailing services, that include all of the expenses that  
21 one would usually incur in conducting a campaign.

22 THE COURT: So then you're saying this form  
23 is --

24 MS. YOUN: I'm saying this is an  
25 all-encompassing -- this is what you pay for that range of

1 services. I'm saying that we only have it clear that  
2 \$9,000 of that \$40,000 went to petitioning, per se, as  
3 opposed to the other normal costs of conducting a  
4 campaign.

5 THE COURT: But what I'm saying is Exhibit 106,  
6 which is apparently a form submitted by Mr. Booker, is  
7 that right?

8 MR. LADOV: Yes, his candidacy.

9 THE COURT: Shows 35,000-plus in three checks  
10 that are for the purpose of door-to-door donations.

11 MS. YOUN: Yes.

12 THE COURT: Which isn't media buys, which isn't  
13 all of those other things.

14 MS. YOUN: I think that -- I mean my inference  
15 from that is if you look at the various categories on  
16 this, and it appears that there were a number of  
17 catch-alls that -- there's one that's postage. There's  
18 one that's purpose A dash other door-to-door donations.  
19 My suggestion is that is a catch-all category.

20 THE COURT: I'm sorry, what are you looking at  
21 for --

22 MS. YOUN: Sure. The line you were pointing to  
23 where it says -- right before it says door-to-door  
24 donations, it says expenditure purpose?

25 THE COURT: Right.

1 MS. YOUN: There seems to be an abbreviation of  
2 OTH, which is, I think it's fair to infer is "Other." I'm  
3 sorry, I'm looking at Document 340-13, Exhibit 5.

4 MR. LADOV: Actually, Your Honor, I don't know  
5 if this is helpful but if you look at the back of the Form  
6 30. I mean, for example, just looking at the back of  
7 Exhibit 109, the last page of one of our binders, there's  
8 a list of quoted purposes for expenditures.

9 THE COURT: That's what I'm looking for. Where  
10 is that?

11 MR. LADOV: Right, it's the last page of the  
12 form. If you have Binder 3 in front of you --

13 MS. YOUN: Do you have the docket number?

14 MR. LADOV: I'm sorry, I don't. It's in the  
15 back in any of the forms. I don't think there's a change  
16 from form to form.

17 (Pause)

18 MS. YOUN: It says any other expenditure for  
19 other advertising, including posters, stickers, streamers.  
20 I'm not sure whether that is the same category or not.

21 MS. MURPHY-OSBORNE: If you were to look at  
22 Docket 340-13, page 109, it has an example of the codes.

23 THE COURT: I still haven't found the list.

24 MR. LADOV: I'm sorry, Your Honor. If I can  
25 approach, I can just bring one up.

1 THE COURT: I got it.

2 (Pause)

3 THE COURT: All right. Thank you.

4 MR. LADOV: Well, I mean I guess -- I don't see  
5 anything that was just said that really contradicts how  
6 we've been interpreting the evidence at this point.

7 I mean the other code -- what matters here is  
8 that what Cicero Booker's campaign said was that these  
9 were door-to-door donations.

10 Now, I just want to respond, we're certainly not  
11 claiming that John Green perjured himself. John Green's  
12 declaration, as I recall, was based on his reading of  
13 public filings. At the time that he submitted his  
14 declaration in September, Cicero Booker had submitted all  
15 of the signature requirements which were due back in  
16 August.

17 Now, maybe this was confusing. We can -- you  
18 know, perhaps it's right that Booker only spent \$10,000 or  
19 the \$9,000 on collecting signatures and that's the number  
20 that John Green saw. It doesn't change the fact that it  
21 certainly looks, from Booker's own filing, that he then  
22 spent upwards of \$30,000 on what he called door-to-door  
23 donations.

24 And, in fact, that sort of fits perfectly with  
25 our understanding that the burden's on candidates, because

1 a huge amount of the burden is these, is collecting all  
2 these small donations, all up to \$15,000. If you look at  
3 Booker's filings, you'll see he's collecting a lot of  
4 five-dollar, ten-dollar donations.

5 So, collecting that many small donations  
6 obviously is a huge expense, apparently perhaps is more of  
7 an expense than collecting the signatures for his  
8 petitions but I don't see how -- it seems to us that it's  
9 pretty clear from the evidence that those expenditures  
10 were on top of his earlier expenditures.

11 And there were, I mention this in our filings,  
12 earlier payments also to CSI which I guess we're  
13 discovering was a vendor that is part Working Families  
14 Party and, you know, we sort of assumed that those CSI  
15 expenditures were for similar petitioning services, and  
16 maybe that's, you know, for the signatures, the donations.

17 Another point that this raises in terms of the  
18 problems of the law for minor parties is that you have  
19 this situation where Booker has spent, you know, upwards  
20 of \$9,000 collecting signatures which, you know, is a  
21 burden that his major party candidate opponents don't have  
22 to meet which is, we think, on its own both unnecessary  
23 and sufficient to show that he has met the threshold for  
24 qualifying, and then he sort of is forced to spend the  
25 next couple months raising donations, spending all this

1 additional tens of thousands of dollars on collecting  
2 donations rather than running his campaign.

3 And he's in this limbo, this legal limbo until  
4 October 16th when he finally gets a grant. So even though  
5 he's effectively submitted half his application on  
6 August 6th, by asking the Secretary of State to certify  
7 his petition signatures, he is in this limbo where he's  
8 really, you know, we believe, by the statute and what the  
9 SEEC has said in the past, he's really not permitted to  
10 spend additional money until two months later when he  
11 finally gets the grant. So I understand why it is that  
12 what seems to us to be this loophole has come into effect  
13 in this situation but, again, it just seems like it  
14 contradicts the guidance that the state has been giving to  
15 other candidates.

16 What I wanted to do at the risk of sort of  
17 belaboring this but I think it's important, is to go  
18 through their guidebook and give a few examples of how  
19 they have made this clear to candidates. I think -- this  
20 is our Exhibit 61. I can bring this up to the court if  
21 you don't have a copy.

22 THE COURT: That would be helpful, thank you.

23 (Hands Court)

24 MR. LADOV: It's the guidebook. I know it shows  
25 up in the record a couple times. I think it may be --

1 MS. YOUN: Your Honor, could I make one final  
2 point with regard to the Cicero Booker example and its  
3 relevance? It's pretty clear from the record that around  
4 \$9,000 was spent on petitioning.

5 Petitioning is the particular burden that is  
6 placed on minor party candidates. We don't know how much  
7 of this additional amount was spent on qualifying  
8 contributions or on anything else. But recall that  
9 qualifying contributions are not a burden you give to  
10 minor party candidates. Everyone has to hit the ground  
11 and get those five-dollar or ten-dollar donations.

12 MR. LOPEZ: Under that logic, Your Honor, the  
13 20 percent prior vote total is a burden that is given to  
14 minor party candidates too, because in some sense that's a  
15 party neutral law, too, that minor parties have and major  
16 parties have.

17 MR. LADOV: So, Your Honor, this is the guidance  
18 that the SEEC gave to candidates at the beginning of this  
19 election cycle that we think contradicts their current  
20 interpretation. If you look at page eight and nine, this  
21 is the section on spending limits.

22 MS. MURPHY-OSBORNE: What's the docket number?

23 MR. LADOV: I don't know the docket number.

24 MS. MURPHY-OSBORNE: Is it in your book?

25 MR. LADOV: It's Exhibit 61. It's in -- I'm

1       sorry, it's the supplemental trial exhibits that we filed  
2       back in November.

3               MS. MURPHY-OSBORNE:   November?

4               MR. LADOV:   Yes.

5               MS. YOUN:   I'm sorry, could you just repeat the  
6       filing and the date of the filing?   Would make this  
7       faster.

8               MR. LADOV:   Sure, it's the November 19th  
9       supplemental trial exhibits.   There would have been a  
10      series of -- I'm sorry, I'm sorry.   This was filed on  
11      September 3rd.   I apologize.   It was Exhibit 61.

12              MS. YOUN:   Okay, great.   Thank you, we have it.

13              MR. LADOV:   So, Your Honor, Section 8 and 9  
14      discuss the spending limits.   Again, this is where the  
15      SEEC defines this period as the qualifying period.   If you  
16      look sort of at the third paragraph, they say expenditures  
17      by candidate committee during the pre-primary general  
18      election period, which again they define as the qualifying  
19      period, are limited to the required amount of qualifying  
20      contributions plus any allowable personal funds the  
21      candidate provides to the candidate committee --

22              MR. FEINBERG:   I'm sorry, Mr. Ladov, could you  
23      identify where you are, please?

24              MR. LADOV:   Sure.   It's page eight.   It's the  
25      section on spending limits.   It would be eight, it's eight



1 according to the document's numbering, not according to  
2 the PDF.

3 MR. LOPEZ: It's page eight of the guide.

4 MR. LADOV: Okay. I don't mean to jump ahead.

5 Okay. So, in paragraph three, starts out  
6 "Expenditures by a candidate committee during the  
7 pre-primary general election period are limited to the  
8 required amount of qualifying contributions, plus any  
9 allowable personal funds the candidate provides to the  
10 candidate committee.

11 "Participating candidates must be careful to  
12 avoid exceeding the qualifying period expenditure limit by  
13 making or obligating themselves to make an expenditure  
14 that results in their aggregate spending total exceeding  
15 the qualified period spending limit. Excess spending will  
16 result in disqualification for receiving program grants."

17 Now, we've always interpreted that plain  
18 language to tell candidates that while you're in this  
19 qualifying period, you know, before you have submitted the  
20 grant you need to be careful not to disqualify yourself  
21 from receiving the grant by exceeding this limit.

22 Now, on page nine, they discuss the primary and  
23 general election grants and, again, you know, this is all  
24 sort of relational. You need to see the qualifying period  
25 in relationship to the subsequent, primary and general key

1 period.

2           And perhaps the most critical piece here, the  
3 very top sentence, that says "The expenditure limit during  
4 the primary campaign period and the general election  
5 campaign period is calculated by adding the amount of  
6 grant received," and then goes on to talk about the  
7 additional supplemental grant and unspent contributions.  
8 But that's the key, Your Honor, is that the SEEC told the  
9 candidates that their general election period expenditure  
10 limit was calculated based on the grant they received,  
11 which obviously means that it's not an application until  
12 after the grant has been approved.

13           In relation to that general election period is  
14 what they describe as the qualifying period, which  
15 basically, you know, tells candidates that you can't  
16 violate this, you know, \$15,000 or \$5,000-plus personal  
17 funds unless you want to potentially disqualify yourself  
18 from getting a grant.

19           On page 16 of this same document, again, this is  
20 their numbering. And in the second section where it says  
21 raising qualifying contributions, the first sentence says  
22 "Major party candidates and minor party candidates who  
23 qualify for the full grant amount may only raise  
24 contributions during the qualifying period."

25           And, again, I don't think any of this was really

1 in question before this week but that has always appeared  
2 to us to be perfectly consistent with the notion that the  
3 qualifying period is defined as the period when you are  
4 raising donations and then the general election period is  
5 the period after you receive your grant.

6 On page 47 of this document, this is a section  
7 on expenditure limits, and what the SEEC is doing here is  
8 they are giving, they are giving guidance to candidates  
9 through sort of illustrative examples of what may or may  
10 not run afoul of the law. If I also may go back to page  
11 26 and just note this chart at the bottom where they set  
12 forth those expenditure limits, the 15-, \$17,000 for State  
13 Senate and 5- to \$6,000 for State Rep.

14 MS. MURPHY-OSBORNE: I would just like, while  
15 you're on page 46, note above that the SEEC sets forth in  
16 that paragraph right above that chart that they are three  
17 discrete periods in of spending limits.

18 MR. LADOV: Right, and again, I think --

19 MS. MURPHY-OSBORNE: None of them are the  
20 qualifying period.

21 MR. LADOV: I guess our response, Your Honor,  
22 would be that that other sections of that document which  
23 we sort of feel the candidate needs to be able to read  
24 consistently as a whole, they defined the qualifying  
25 period as the pre-qualifying, pre-general election period.

1           But I would just point to the second example,  
2 the second box on page 47. And, you know, it gives an  
3 example of a candidate who's going to fall afoul of the  
4 rule and it says a participating candidate for state  
5 senator provides no personal funds and thus has a spending  
6 limit of \$15,000 during the pre-primary, general election  
7 period. Her candidate committee has spent \$10,000 of the  
8 qualifying contributions on permissible campaign expenses.

9           And then I think this is the critical sentence,  
10 says "Before the candidate applies for a grant" -- again,  
11 "Before the candidate applies for a grant, the campaign  
12 treasurer signed the contract with the company that  
13 produces typical campaign paraphernalia and places an  
14 order for \$7,500 of campaign paraphernalia. Because the  
15 campaign treasurer has obligated the campaign committee to  
16 make an expenditure that results in the committee's  
17 aggregate expenditures for the pre-primary general  
18 election period," and it says this is a total of  
19 seventeen-five, "Because this exceeded the applicable  
20 expenditure limit of 15,000, the committee has  
21 impermissibly violated the program's requirements."

22           Now, this is -- I mean this isn't even what we  
23 saw in Booker's filing. This is a candidate who is  
24 making, is incurring expenditures for campaign  
25 paraphernalia which perhaps implicitly is typical, you

1 know, we can imply general election paraphernalia, and  
2 what the SEEC told candidates was you may not do this  
3 before the candidate applies for a grant. I just don't  
4 know how much clearer they can be.

5 MS. YOUN: Your Honor, that's not what that says  
6 at all. If you look back to the, to the expenditure limit  
7 section on the previous page that Attorney Murphy-Osborne  
8 was pointing to here, it says there are three discrete  
9 periods. There is, one, the period before a primary  
10 campaign and general election campaign, is which we're  
11 referring to in shorthand on the following page as  
12 pre-primary/general election period. Two, there is the  
13 primary campaign and, three, the general election  
14 campaign.

15 The pre-primary/general election period referred  
16 to in that example is the time before the candidate is  
17 nominated. Once the candidate is nominated by the party,  
18 as we said consistently, that next day that person is  
19 allowed to -- that person's expenditure limit becomes the  
20 entire grant plus the amount of qualified contributions.

21 You know, it's possible that there is some  
22 ambiguity in this wording. It seems relatively clear, you  
23 know, to me but we also note that this guidebook cites a  
24 multiple times to the actual language of the statute which  
25 we think should definitely control here.

1           THE COURT: Well, let me ask you this. That  
2 implies, doesn't it, that there's never a period when  
3 you've been nominated but you're still trying to raise  
4 qualifying contributions.

5           MR. ZINN ROWTHORN: No, it doesn't imply that.  
6 It implies that there could be a period after your  
7 nomination in which you are considered in the general  
8 election campaign period, as that's defined by statute,  
9 and you have an expenditure limitation applicable to that  
10 period, but you are still trying to gather your qualifying  
11 contributions and you haven't yet applied for a grant.

12           Sort of the check on that, Your Honor, there is  
13 an outside expenditure limit and there is the regulation  
14 prohibiting conditional contracting for services. In  
15 other words, I'll only pay you if I get my grant.

16           I'm going to be very frank. With respect to  
17 this issue, this guidebook is not well written and I  
18 think, I don't think I'm going out on a limb to say there  
19 will be revisions for it in 2010. But the SEEC  
20 consistently gave advice to candidates with respect to  
21 this issue that is consistent with parts of this guidebook  
22 where we define three different periods, and where we say  
23 what the spending limit is for the general election  
24 campaign period.

25           There was also an enforcement decision, Your

1 Honor, that's January 16th, '09 -- I'm sorry -- yes, in  
2 which, in which the SEEC sort of defines what the  
3 expenditure limit is, you know, during the primary  
4 campaign which begins the day after the caucus or the  
5 convention where the candidate is endorsed.

6 Your Honor, we think, we think the guidance is  
7 unclear but it includes our position here. We think we  
8 ought to be, we ought to be governed by sort of the  
9 statutory language to the extent there's any ambiguity in  
10 there. You know, and I think this is also sort of one of  
11 the kind of general points we have here this is our first  
12 time around on this and I think before we get kind of  
13 locked in, you know, we should -- the state should have  
14 worked out these kinks. We think where we are now with  
15 this issue is the correct issue, we think it's not  
16 entirely inconsistent, but clearly we would concede this  
17 is confusing.

18 But we would ask Your Honor to look at the, look  
19 at the statute and look at how, you know, we're not adding  
20 any gloss to this statute in Beth Rotman's declaration,  
21 but we think we explain it well in that declaration.

22 MR. FEINBERG: Just one further point, Your  
23 Honor. Mr. Ladov said earlier on that they have to be  
24 able to give guidance to their candidates, and the problem  
25 with that argument is that the SEEC has been available, it

1 has been giving guidance to candidates, both major party  
2 candidates and minor party candidates, on a consistent  
3 basis throughout this whole process and the Rotman  
4 declaration that was submitted just the other day is  
5 consistent with the advice that's been given to candidates  
6 all along.

7 The problem that they are having is they are  
8 trying to rely on their own arguments and their own  
9 construction of the law without bothering to consult with  
10 the SEEC or what the law means or how it might be applied  
11 to their candidates.

12 MR. LADOV: If I could just briefly respond to  
13 that, Your Honor. I do think that we need to rely on the  
14 public statements of the SEEC, including this guidebook  
15 and again, frankly we never thought this was a  
16 controversial point until this week. This is an argument  
17 that we made repeatedly in December and were never  
18 corrected on to say, oh, that may be what you think but  
19 we're actually telling everybody informally that we are  
20 advising them otherwise. So I think, you know, we would  
21 just ask the court to sort of rely on the public documents  
22 and we think that's pretty clear.

23 I guess I did just want to address one other  
24 point sort of within this argument, which is this notion  
25 that the regulation 9-706-2B16 which bars the use of CEP



1 funds to pay for, quote, "Expenditures incurred but not  
2 paid for which candidates pay any portion of the  
3 outstanding liability paid contingent on the participating  
4 candidate's committee's receipt of a grant from the  
5 citizens election fund."

6 Now, the current interpretation that Ms. Rotman  
7 has put forth is essentially that this just means you  
8 can't incur expenditures by saying I will only pay you if  
9 I get a grant, rather than, you know, the contingency  
10 being that I will pay you when I get a grant. And the  
11 problem, Your Honor, is that -- and this sort of creates a  
12 Catch-22 and, again, when the legislation and it's not the  
13 SEEC and it's not their efforts to implement it, but we  
14 just think there's an unavoidable Catch-22 that the  
15 statute generates that makes it impossible to read this as  
16 saying anything other than you can't incur expenditures  
17 above your qualifying limit.

18 Because I mean, plainly, a candidate who, you  
19 know, who spends \$40,000 to qualify can only pay back up  
20 to \$17,000 of that before he gets the grant. Now, he says  
21 I will pay you back -- and we've always thought he said  
22 I'll pay you back when I get the grant but he is  
23 effectively saying I'll pay you back if I get the grant  
24 and that's a contingency and that violates the SEEC  
25 regulation.

1           But the problem, Your Honor, is there really  
2 aren't any other options. You know, especially, you  
3 know -- right, Ms. Rotman's interpretation would say I'm  
4 going to pay you back no matter what and if I don't get  
5 the grant, I'm going to find another way to pay you back,  
6 but there's no other way that the candidate -- and  
7 Mr. Lopez said this before -- the candidate cannot pay,  
8 you know, the remaining, the remainder of this \$40,000  
9 back through personal funds because that violates the act.

10           The candidate cannot pay for this on credit  
11 because that's borrowing money from bank and that's  
12 prohibited by the act.

13           The candidate cannot ask the vendor to, you  
14 know, hold off in collecting funds for this expenditure  
15 because that, under Section 9-601(a)(1), means that the  
16 vendor has either loaned or advanced the candidate the  
17 services, and that makes it a contribution under the act  
18 and that violates the CEP's contribution limits.

19           And, finally, the vendor can't forgive the debt  
20 because when the vendor does that, it becomes an in kind  
21 contribution and that's defined in this guidebook at page  
22 19. "If you forgive a debt of services, that's an in kind  
23 contribution," and that violates the contribution limits  
24 in the act.

25           And finally, as Mr. Lopez pointed out, you also

1 can't just sort of hold it until the end of your candidate  
2 committee determination and then sort of forgive it to  
3 yourself and make it a personal debt because, again,  
4 that's violating the personal funds. That is violating  
5 the act.

6 And, you know, we certainly think that creating  
7 a regulation that says you can't do something -- or that  
8 you can, you can do something that is going to inevitably  
9 place you in the position of violating the statute and  
10 violating the terms of the program, we don't see how the  
11 regulation can be interpreted that way.

12 If you take on, if you close the campaign debt  
13 and take it on yourself, that's treated as a contribution.  
14 Any money that you give to your campaign is treated as a  
15 contribution.

16 I'm actually, I think, ready to move on from  
17 this discussion unless there's any other rebuttal points.

18 MR. ZINN ROWTHORN: The only point, Your Honor,  
19 we talked about this briefly, is if you don't get a grant,  
20 you then can raise the contributions up to generally  
21 applicable contribution limits. To close it, you can also  
22 keep your committee opened, we talked about that before,  
23 to try to erase debt.

24 The other point here is to just to say there's  
25 an expenditure limit, candidates still have to impose some

1 discipline, and the check is, you know, I know how I'm  
2 doing qualifying, do I want to take on a \$40,000 debt  
3 with, you know, with no guarantee that I'm going to have a  
4 fund grant to pay for that. So we think there's a  
5 significant, you know, self-imposed check that exists, and  
6 we also strongly disagree with the notion that there are  
7 no ways to pay that debt that are permissible under the  
8 law.

9 MR. LADOV: And I guess we would just say that's  
10 a heck of a risk to take on, and to tell minor party  
11 candidates they should take on this risk in hopes of  
12 qualifying for a grant and potentially being this far in  
13 the hole, we would argue having really no legal way to pay  
14 it back, is -- if that's the guidance, then I think  
15 that --

16 MR. ZINN ROWTHORN: But there are legal ways to  
17 pay it back. They may not think they are sufficient, we  
18 think they are. But let's not mischaracterize and say  
19 there are no legal ways to pay it back.

20 MS. YOUN: Also, you know, it's not just the  
21 minor parties who have to take on that risk. Anyone who's  
22 applying for a grant and needs to gather a certain number  
23 of qualifying contributions, whether that person be a  
24 major party or a minor party, has the same level of  
25 qualifying contributions. They are all taking on a

1 substantial risk.

2 MR. LADOV: The only other point I wanted to  
3 make, and I guess this sort of specifically refers to the  
4 petitioning requirement which is the requirement that  
5 minor party candidates are obligated to comply with but  
6 major party candidates are not, I think in the December  
7 hearing, Your Honor asked a question basically saying at  
8 the local level is there really any basis for treating  
9 the, say the Republican party, and I think your  
10 hypothetical was the jerrymandering district in  
11 Bridgeport, differently than the Green Party, and I would  
12 just say at this point we think we have some evidence in  
13 the record to show there's no basis.

14 First of all, we have the testimony of Kenric  
15 Hanson, one of the Green Party candidates. His testimony  
16 is obviously in the declaration, is discussed in our  
17 findings at paragraph 79-B to 79-I, and he goes on at some  
18 length about how the Republican Party and the Green Party  
19 are on similar footing in New London and how they are both  
20 effectively minor parties trying to fight for a piece of  
21 the vote against the Democratic party's dominance.

22 I think the findings sort of speak for  
23 themselves but the only thing I would add, in the Proulx  
24 declaration we got last night he sort of tries to rebut  
25 this by saying, look, the Republican Party has polled

1 30 percent in the last few elections and this time -- and  
2 so that shows that they are presumptively stronger than  
3 the Greens. And, first of all, we certainly concede that  
4 the Green Party is a minor party and we are not trying to  
5 pretend they are getting votes beyond what they are  
6 getting.

7 But if you look at it, this is the first year  
8 that the Green Party contested the State Assembly race,  
9 and Jason Catala, the Republican Party candidate, his vote  
10 dropped from about 30 percent to about 18 percent. And,  
11 meanwhile, Ken Hanson from the Green Party entered the  
12 race for first time and as a first time candidate polled  
13 almost ten percent. And I think, Your Honor, what we  
14 would say is this shows that, you know, the Greens  
15 arguably are taking away some of the votes the Republicans  
16 were getting as the opposition to the Democrats.

17 Now, the Republicans are getting more votes than  
18 the Greens, but I think the fundamental point is that the  
19 Greens are fighting with the Republicans to get a piece of  
20 the vote and to get a piece of the public support and to  
21 get their message out to the voting public in New London  
22 and that, you know, these results as well as the testimony  
23 actually, we believe, show very well how in a town like  
24 New London the Greens and the Republicans, or the one New  
25 London Party we discussed which has actually got people

1 elected to the city council, and the Republican Party are  
2 on the same terrain and that there's no legal reason for  
3 treating them differently.

4 The other example that we want to give is  
5 actually the Independent Party of Waterbury. They get  
6 some discussion in the Garfield declaration that was  
7 submitted this week. Mr. Garfield explains that the  
8 independent party holds five seats on the 15 seat board of  
9 Aldermen in Waterbury. We look at the website he cited  
10 and discovered for the first time that Cicero Booker is  
11 actually the minority leader on the Board of Aldermen in  
12 Waterbury as the head of the Independent Party caucus.  
13 There's nine Democrats, one Republican and five  
14 Independent Party members.

15 The defendants also put into the record that the  
16 Waterbury Town Committee spent a total of \$32,969.44 in  
17 2008. And, again, I think all of this is to show that in  
18 a town like Waterbury the Independent Party is as  
19 substantial an opposition party as the Republican Party  
20 is.

21 If you look at the election results, and this is  
22 in our Narain Tables 3 and 4, you can see that this, you  
23 know, these independent party candidates who are really  
24 the only other candidates who are able to get funding  
25 under the CEP, you know, they are effectively the

1 opposition party in these districts. I believe in six of  
2 the seven districts in the House and the Senate where the  
3 Independent Party ran, and they are all in that Waterbury  
4 area, you know, they were the opposition. They were --  
5 there was only one major party candidate in the race. And  
6 if the goal of the CEP is to encourage competition,  
7 there's just fundamentally no reason why the independent  
8 party in Waterbury needs to be jumping through hoops that  
9 the Republican Party doesn't have to.

10 And the results actually show a couple of the  
11 anomalies that you get as a result of this. For example,  
12 Mr. Denze, who's the Independent Party candidate in  
13 District 71, got a full grant this time around because of  
14 his prior vote total. This time he ran against fully  
15 funded Democratic and Republican candidates. He only got  
16 12 percent of the vote, so the next time he only gets the  
17 one-third grant.

18 You know, Mr. Denze is the same politician he  
19 always was. He's the same Adlerman in the Town of  
20 Waterbury that he always was. The only difference is that  
21 the competition has changed and as a result, you know, he  
22 is, whereas in 2008 he was entitled to a full grant, the  
23 next time around he's only entitled to one-third grant  
24 unless he goes through these burdensome petitioning  
25 requirements. While I actually, I don't remember -- I



1 think it was the Democrat who was kind of the lesser of  
2 the two candidates. The Republican, I think, is the  
3 incumbent in that district. You know, the major party is  
4 also the opposition party but doesn't have to go through  
5 any of those burdens.

6 Ciccero Booker is actually another good example.  
7 I want to beat up on him a little bit, but -- you know, he  
8 holds almost 20 percent of the vote. He is certainly  
9 comparable to any number of major party candidates who are  
10 now getting about 20 percent of the vote across the State  
11 of Connecticut. He was cross endorsed by the Working  
12 Families Party and the Independent Party. As a result, he  
13 had to go through all of these burdensome requirements  
14 which, you know, we can argue about it but which we think  
15 were extraordinarily costly. The end result of all these  
16 efforts is that, as far as the CEP is concerned, the  
17 Independent Party is entitled to one-third grant next time  
18 around. The Working Families Family actually doesn't get  
19 anything because he fell just shy of the ten percent  
20 threshold on that line.

21 There's just no basis for the law to say because  
22 you're running on these party lines, you're not entitled  
23 to funding the next time around, whereas if you had had  
24 the exact same result, the exact same public presence, the  
25 exact same level of support as another candidate who was

1 cross endorsed by one of the major parties, you would be  
2 entitled to a full grant next time around. It's just  
3 arbitrary and discriminatory, as Mr. Lopez said.

4           And the final point I want to make about that is  
5 maybe -- the John Green affidavit discusses the benefits  
6 of the CEP and I think Mr. Hanson talks about this as  
7 well. The benefits of the CEP are not simply to help a  
8 candidate get elected to office, although that's obviously  
9 the primary purpose, or one of the primary purposes. But  
10 Mr. Green explains -- and I don't have the paragraph but  
11 it's in his September 2008 affidavit -- getting CEP  
12 funding helps to spread the party agenda. It helps to  
13 build the party's base. It helps to increase candidate  
14 name recognition, and maybe that's not going to -- maybe  
15 the funding isn't going to effect the outcome in this or  
16 the state assembly race, and maybe, as we discussed  
17 earlier, the prior vote totals, the current vote totals  
18 aren't the measure, but it certainly is going to effect  
19 how these parties get the message out and it's going to  
20 effect how these same candidates run the next time around.  
21 It's going to affect how well Cicero Booker or Arthur  
22 Denze are able to become known to voters for when they run  
23 for the Board of Aldermen or the Board of Ed or for  
24 another local election the next time around.

25           And so I think, just to close, there's really no

1 basis for saying that one message and one party should be  
2 subsidizing the way that the minor party should, based on  
3 any number of local elections and local races around the  
4 state.

5 THE COURT: All right, thank you. We need to  
6 take an afternoon break, at least -- but perhaps plaintiff  
7 is done. I'm not sure where you are.

8 MR. LOPEZ: No, Your Honor. I mean I'm content  
9 to have the court read the affidavits of Steve Fournier  
10 and Mike DeRosa in which they talk about how this is  
11 affecting their political strategy, how they are being  
12 hurt now and how they are modifying their conduct, how  
13 they are scrambling, how they are trying to sort it all  
14 out. And basically I was going to read or paraphrase  
15 their affidavit testimony into the record.

16 THE COURT: Well, I've read it and it's in the  
17 record, so --

18 MR. LOPEZ: Okay.

19 THE COURT: I don't want to cut you off, but on  
20 the other hand, it's been a long day, too, so --

21 MR. LOPEZ: Well, if we can take an afternoon  
22 break, Your Honor, and I can come back and I won't read it  
23 verbatim and I'll try to keep it to a paragraph or two.  
24 Fair enough?

25 THE COURT: Sure. Why don't we come back at

1 3:45. We'll stand in recess until then.

2 (Whereupon a recess was taken from 3:30 o'clock,  
3 p. m. to 3:45 o'clock, p. m.)

4 MR. LOPEZ: Your Honor, the dispute that we just  
5 spent 40 minutes having about whether you can engage in  
6 deficit spending during the qualifying period should not  
7 distract from the issue that the rule that was supposedly  
8 adopted by the SEEC was adopted in recognition of the cost  
9 of qualifying.

10 You'll recall that we, during the examination of  
11 Professor Green, Don Green, we had a whole discussion, he  
12 was under the impression that candidates could, in fact,  
13 engage in deficit spending to pay for their qualifying, to  
14 pay to meet their qualifying criteria. And he  
15 acknowledged that the cost of qualifying can, indeed,  
16 exceed the amount of money that you raise in qualifying  
17 contributions.

18 And I think the Booker case illustrates the  
19 point very well that the cost of qualifying, of meeting  
20 both the petitioning and the qualifying contribution  
21 requirements can get very expensive. And, frankly, what's  
22 most compelling about the Booker case, and the Deb Noble  
23 case, is they had to meet an August 6th deadline for  
24 submitting signatures. They didn't submit their  
25 applications for grants until October 10th. Those grants

1 those applications were approved on October 15th. So they  
2 didn't get their money until three or four weeks before  
3 the election and far later than most major party  
4 candidates received their grants.

5 And I think the court can infer from this that  
6 the, both encountered substantial difficulty in getting  
7 their application together, whether it was receiving  
8 approval from the Secretary of State's office that their  
9 signatures were valid or whether it was raising the  
10 qualifying contributions as the evidence, as the filings  
11 by Mr. Booker seems to indicate.

12 Now, Your Honor, so that's just -- I think  
13 that's just more evidence of the burden that is faced by  
14 petitioning party candidates. One final point before I  
15 move on, Your Honor, and it's funny, Attorney Youn made  
16 the concession and I may have misunderstood it but the  
17 concession is made in the deposition of John Green who's  
18 the Director of the Working Families Party, that they  
19 provide, they are -- they act as a vendor in addition to a  
20 political party and they provide candidate services.

21 And so what we have here is a situation where,  
22 and if I understood Ms. Youn correctly, CSI is a  
23 subsidiary or a branch of the Working Families Party.

24 MS. YOUN: No.

25 MR. LOPEZ: But we can establish that, Your

1 Honor, we'll establish that. But there's a relationship  
2 between CSI, which means Candidate Services, Incorporated,  
3 and ACORN --

4 MS. YOUN: Citizens Services Incorporated.

5 MR. LOPEZ: Citizens Services Incorporated,  
6 there is a relationship, Your Honor. And what we have  
7 here very possibly is a situation where the candidate is  
8 reimbursing a political committee, if you will, with, with  
9 public money. And my understanding of the implementing of  
10 the regulations is that that is also prohibited. And I  
11 would direct the court -- this is, and I would direct the  
12 court to Plaintiff's 13 which was submitted with our  
13 previous exhibits back in December.

14 THE COURT: The previous truckload.

15 MR. LOPEZ: Right. And it talks about and what  
16 it is is the program regulations for the CEP and its  
17 permissible and non-permissible use of campaign funds.

18 And in fact I didn't misunderstand this  
19 regulation and candidates are actually allowed to funnel  
20 money that's given them back to their parties, well, if  
21 that's the case, then all that does is, it seems to me, is  
22 reinforce our position that the major parties have every  
23 incentive to get minor parties -- I mean to get their  
24 candidates to run who can in turn purchase services from  
25 their parties, if that's the practice in Connecticut. It

1 seems to be the practice in WFP. I don't know if it's the  
2 practice of the Democratic and the Republican parties.  
3 Maybe they can tell us tomorrow. But if it is, it's  
4 another reason to object to this program, Your Honor.

5 MS. YOUN: Just a couple of clarifying points,  
6 Your Honor. Mr. Green testified, CSI is -- I think  
7 Attorney Lopez is correct in saying that there is a  
8 relationship obviously, but CSI does vending work for I  
9 think the Working Families party, the Democratic Party and  
10 the Republican Party. They are a general vendor.

11 Secondly, I think Mr. Lopez suggested that major  
12 party candidates get their grant monies much earlier than  
13 the October 10th deadline on which Cicero Booker got his  
14 grant money. I don't think that there's any basis for  
15 that in the record and, in fact, my understanding is many  
16 major party candidates as well, you know, didn't submit  
17 their materials until October and didn't get their grants  
18 until that time.

19 MR. LOPEZ: Well, "many" is a relative number,  
20 Your Honor. I'm sure there were some major party  
21 candidates who waited until the last minute to get their  
22 applications in but there were also many, many others and  
23 we can, you know, if the court wants that data, we can put  
24 that data into the record. It's all a matter of public  
25 record. The minutes of the SEEC meetings where they were,

1 where this occurs, they are all posted on the website  
2 unless it's been taken down, and it's a matter of public  
3 record, Your Honor. And I'll probably follow up on that  
4 because I think that is an important point.

5 And I don't know, I wish I had addressed this  
6 with Mr. DeRosa, but we got a declaration in from the  
7 Registrar of Voters or the county clerk from -- Registrar  
8 of Voters up in Hartford, and it's offered to show what a  
9 burden it is to, to verify petitions. And I don't know if  
10 he says in that, that declaration how long it takes to  
11 verify petitions once they are submitted, but I would ask  
12 that -- well, I'm going to consult with my colleagues but  
13 my understanding from earlier conversations, and I  
14 apologize it's not on the record right now, that it can  
15 take several weeks to verify petitions.

16 Okay, Your Honor, and I want to conclude here  
17 today by talking about how the CEP is affecting my clients  
18 different from the, in a way that's different from the  
19 statistical analysis that we've engaged in. Party  
20 officials, two co-chairs have met several times since the  
21 '08 election, they've met regularly in the months leading  
22 up to the election and they've come to the conclusion that  
23 the CEP will indeed increase the electoral opportunities  
24 of major party candidates by providing them with the  
25 resources to run more expensive and more competitive



1 campaigns.

2           While this may not happen in every district that  
3 the party has targeted in the past or in the future, it is  
4 a consideration in the party's strategy for targeting  
5 districts in the future. Moreover, the party has to plan  
6 for the fact that the CEP will provide major party  
7 candidates with the resources to get their message out,  
8 maintain or improve their branding, and solidify their  
9 position in the state. And this is all set forth in our  
10 affidavits.

11           And it's their view, and I think it's confirmed  
12 by the testimony of John Green, the Chair of the Working  
13 Families Party, that the availability of public funding  
14 solidifies the positions of the parties themselves, the  
15 political parties, by allowing major political parties to  
16 redirect private contributions to the party and to its  
17 party committees.

18           Now, party officials have come to the conclusion  
19 that if the party is to maintain its relative position, it  
20 must act quickly and must act now. Any delay could  
21 irreversibly damage the parties in Connecticut and lead to  
22 its decline and possible dissolution.

23           They've identified a number of strategies that  
24 could stave off the impact of the CEP on the party. The  
25 party could attempt to qualify its candidates for

1 statewide office. They have talked about this, they've  
2 discussed this. They don't think this is feasible. The  
3 qualifying contributions data and the petitioning  
4 requirements they believe are out of their reach based  
5 on their historical spending and petitioning limits.

6 Party officials believe that if they are going  
7 to try to qualify candidates in the legislative districts,  
8 realistically it's limited to one or two assembly  
9 districts where the candidates hold more than ten percent  
10 of the vote in prior elections or the petitioning  
11 requirements are very low, and that happens in some  
12 districts. I think you've seen data on this. It usually  
13 happens in off elections.

14 Let me just back up for a second. When I was  
15 talking about the burden on Mr. Booker, the burden on  
16 petitioning, Mr. Booker qualified for a full grant this  
17 cycle, had to collect 2,600 valid signatures and he  
18 submitted 5,300 as a cushion. Next cycle, he would have  
19 to collect 5,600 valid signaturers or just about twice as  
20 many, and then twice as many as a cushion. And that's  
21 because the voter turn-out is so high in this cycle.

22 Now, if I may return to -- if I may return to  
23 the Green Party's fortunes, or misfortunes under the CEP,  
24 realistically they think may be able to qualify one or two  
25 candidates in legislative districts if they can raise the

1     qualifying contributions. That's a big if. They think  
2     they are going to have a hard time finding enough  
3     constituents in those districts to contribute to their  
4     campaigns. They think they can meet the petitioning  
5     requirements but raising the qualifying contributions is  
6     more difficult.

7             So while in the '06 election, the '06 statewide  
8     election, maybe thousands or 17,000 people voted --

9             MR. DeROSA: 18,000.

10            MR. LOPEZ: 18,000 people voted on the Green  
11     Party, they don't know who those people are. Their party  
12     in all statewide is very small. They don't know the  
13     universe of people who voted for them and it's very  
14     difficult to identify those people.

15            So, again, that's true even at the district  
16     level. They may only know, for instance, a dozen or two  
17     dozen or three dozen people who might contribute to their  
18     campaign. And for them to engage in a cold fundraising  
19     campaign, could you support my candidacy, is something  
20     they are not at all sure that they can realistically  
21     accomplish, even at the House level.

22            And I think we've learned from this Mr. Booker  
23     how difficult it is. And at the Senate level they're not  
24     very optimistic that they can meet petitioning  
25     requirements or the seed money requirements.

1           Now, so what's the party going to do? Well, at  
2 the very least, they are going to target single party  
3 districts. They are going to try to avoid districts where  
4 there are two major party candidates. They are also going  
5 to try to avoid districts where there's a CEP funding  
6 candidate, because it's in those districts that it's hard,  
7 the most difficult for their voices to be heard. Excuse  
8 me.

9           MR. ZINN ROWTHORN: Your Honor, I know Mr. Lopez  
10 is entitled to make his points but I think we ought to be  
11 clear about what the factual record is on this. The  
12 resolution suggests that there is a study that has  
13 commenced about whether they will do these things, so  
14 let's not suggest, and I think it's important to make that  
15 distinction because the claim is -- I mean I think  
16 there's, we're talking about litigation-driven decisions  
17 by the party. It seems to me that this resolution right  
18 before the as applied hearing I think is intended to  
19 bolster his part of the case, but let's be clear about  
20 what it says. They have not made decisions to alter their  
21 political strategy. They are considering whether to make  
22 decisions to alter their political strategy.

23           MR. LOPEZ: Your Honor, I'm not sure exactly  
24 what resolution the Attorney General is referring to. I'm  
25 referring to our affidavits, and there is at least one,

1 maybe two resolutions associated with those affidavits but  
2 I'm basically referring to our affidavits in which our  
3 candidates say in emphatic terms we are in a pickle and  
4 this is, this is how we're going to proceed.

5 MR. ZINN ROWTHORN: I am talking about the  
6 resolution attached to Mr. Fournier's affidavit that lays  
7 out what the Green Party is doing to recess in light of  
8 the CEP.

9 THE COURT: I've seen it.

10 MR. LOPEZ: So, anyway his affidavit speaks for  
11 itself, Your Honor. It's there to lay out the future  
12 plans of the party.

13 Now, the party -- there are several alternatives  
14 available to the party. They are all under consideration.  
15 I said they could target, at the very least -- well, at  
16 the very least they might run -- at the very most they  
17 might try to field candidates in one or two legislative  
18 districts. They would want to avoid legislative  
19 districts where there's two CEP funded candidates, so that  
20 is something they are going to have to navigate.

21 They, in districts where they can't  
22 realistically fund a candidate, they are going to avoid  
23 two party districts and they are going to avoid -- or if  
24 it makes sense. I mean if that's what they can do, they  
25 are going to avoid, excuse me, districts where there are

1 CEP funded candidates.

2 For instance, in the 39th cycle, Kenric Hanson  
3 you know, ran a very satisfying campaign, a very  
4 successful campaign, because it was only, there was a  
5 non-serious Republican Party candidate who apparently,  
6 according to Mr. Hanson, wasn't very visible and there was  
7 a strong incumbent and Mr. Hanson was able to leverage off  
8 of those two facts and to get a fair bit of exposure and  
9 to do reasonably well in the poll. And there were a  
10 number of debates and overall he very pleased with his  
11 performance.

12 Now, the reality is though that none of this  
13 really reflects a long term strategy and, in effect, a  
14 long term strategy that would necessarily stave off the  
15 decline of the party in Connecticut. Over time -- party  
16 officials believe that over time that its position will  
17 decline because of the infusion of money that is flowing  
18 to major party candidates and indirectly to the political  
19 parties because of the redirection of private money into  
20 the political party system.

21 So, what is the party doing? They are  
22 rethinking their position on cross endorsements because  
23 there are some advantages to cross endorsements. I happen  
24 to think they are -- the cross endorsement strategy is a  
25 little cynical because what it requires you to do is to

1 get your ten percent by using the cross endorsement and  
2 then -- on your own line and then you have to turn around  
3 and, in my view, stab the candidate who you cross-endorsed  
4 in the back and run on your own line.

5 But they're not comfortable with that. They  
6 think it's cynical. They think it's -- and they are not  
7 that happy about cross endorsing candidates because they  
8 represent an alternative to major parties, and it's all  
9 well and good for Working Families to embrace that  
10 strategy but that's their strategy. That's an  
11 alternative. The reason they exist is because they have  
12 points of view that are different than the major parties.  
13 For that reason, at this point they haven't decided  
14 definitively on whether or not they are going to, to  
15 proceed with, proceed with cross endorsements or not.

16 Now, the more realistic alternative, Your Honor,  
17 for the party, I think, is based on the view -- well, the  
18 more realistic alternative for the party may to be get out  
19 of the business of fielding candidates in statewide  
20 elections or in legislative elections. I don't think  
21 they -- right now they plan on running candidates in the  
22 2010 statewide cycle and they will run candidates in the  
23 federal elections, but they are seriously considering,  
24 depending on how they do in their election, they are  
25 seriously considering their ability to continue to compete

1 in the post-CEP world, but they want to remain relevant in  
2 Connecticut. And the one way that they can remain  
3 relevant in Connecticut, the political party, is to engage  
4 in more advocacy, Your Honor, and that is an important  
5 point for our Count Two and Three claims. Yes.

6 The way you remain relevant if you can't compete  
7 effectively is you have your voice heard. And the party  
8 has committed itself to raising more resources so that  
9 they can engage in advocacy in support or in opposition to  
10 candidates, and that's true whether they are running in --  
11 they are running candidates themselves or whether they are  
12 just on the sidelines and not running candidates.

13 The CEP policy, the independent expenditure  
14 provision works that strategy right upfront because they  
15 are not interested in engaging in spending if the result  
16 is going to be to release public funds to the candidate  
17 who they oppose so that that candidate can deliver a  
18 counter message. If the legislature expands the  
19 independent advocacy rule to allow for supplemental grants  
20 for all advocacy, then you can also see how this strategy  
21 would be thwarting.

22 Now, we've made the point that, we've conceded  
23 that as a factual matter, the admittedly closer question  
24 in this case is whether or not minor party candidates are  
25 engaging in the kind of candidate expenditures that would



1 trigger an excess expenditure grant. As a factual matter  
2 we can concede that they have not raised an amount of  
3 money that would trigger excess expenditures. They never  
4 have. Excuse me. And frankly, any -- if they could raise  
5 that kind of money, they probably would try to participate  
6 in the public financing system.

7 The problem for them, however, is, Your Honor,  
8 is the limits on how you raise money. They think they  
9 would have more success with attracting a self-finance  
10 candidate to stay outside the system than they would with  
11 a candidate who might try to meet the qualifying  
12 contribution requirements.

13 So, if they wanted to get a lock on this group  
14 or if they want to, to run on their line for Governor in  
15 2010, they believe that the excess expenditure provision  
16 thwarts that strategy, because any independent spender,  
17 you know, would come into the election or come into the  
18 decision knowing that, that there is a matching fund  
19 provision that will prevent, prevent you from leveraging  
20 your personal wealth to gain any electoral advantage.

21 And you know, in candor, there's no one on the  
22 radar right now, but they are out there everyday looking  
23 for that person, Your Honor. And they are looking for a  
24 candidate who can self-fund, or they are looking for any  
25 candidate who can bring resources to bear on the election

1 and the excess expenditure provision in line with the  
2 other provisions of the statute. Just make it more  
3 difficult to recruit candidates and in general to recruit  
4 candidates for that purpose and to generate enthusiasm  
5 about those candidates.

6 Now, finally, Your Honor, there are two other  
7 aspects of this statute, of the triggering excess  
8 expenditures statutes, that haven't been given a lot of,  
9 been given a lot of attention in this case, but our  
10 clients are plainly covered by it and they plainly have to  
11 comply with the provisions and they have to deal with  
12 disclosure, Your Honor.

13 Under the excess expenditure provision, once any  
14 nonparticipating candidate triggers it, all  
15 nonparticipating candidates have to engage in weekly  
16 disclosures. You'll recall we got into a big debate in  
17 December about whether the expenditures of all  
18 nonparticipating candidates are aggregated for purposes of  
19 the triggering provision, and I think Mr. Garfield has  
20 answered that question they are not. But the disclosure  
21 proceedings still apply so my candidates, even though they  
22 are not triggering it, are required to file -- within 24  
23 hours?

24 MR. DeROSA: 48.

25 MR. LOPEZ: 48 hours a disclosure report

1 detailing every expenditure so during the last two weeks  
2 of the election they have to a file, like all other  
3 candidates. But that's burden on them that's untethered  
4 from any risk that they are triggering excess expenditure  
5 provisions. They are covered by it and they certainly are  
6 objecting to it and they certainly seem to have a reason  
7 to raise that objection.

8 MR. ZINN ROWTHORN: Hold on. A candidate who  
9 files a 1-B indicating they are not going to raise or  
10 spend more than \$4,000 doesn't have to make a disclosure  
11 and that's in most instances the Green Party candidate.

12 MR. LOPEZ: But not in all instances and not in  
13 all instances in this cycle.

14 MR. ZINN ROWTHORN: Okay.

15 MR. LOPEZ: Okay. And the law applies until  
16 it's rescinded or until the legislature changes or until  
17 this court renders this unconstitutional.

18 And the other provision, the other aspect of the  
19 trigger provisions has to do with disclosure for  
20 independent expenditures. We would all agree that  
21 independent expenditures are aggregated and that the first  
22 dollar that my client has in independent expenditures  
23 would result in matching funds to his publicly financed  
24 opponent. But over and above that, my client is required  
25 to, even if he is engaging in -- he's required to --

1 (Pause)

2 Oh, the party, even if it doesn't have a dog in  
3 the fight, even if he doesn't have a candidate in the  
4 race, is required to engage in expedited reporting, even  
5 though it may not even have a candidate in the race. And  
6 so the expedited reporting is, is his own risk in the same  
7 way that the expedited reporting is for purposes of the  
8 excess expenditure provisions.

9 And with those remarks, unless you have any  
10 questions, I've concluded for today.

11 THE COURT: Just on that last point what you're  
12 saying is the independent expenditure trigger has been  
13 triggered, the Green Party has to make reporting, even if  
14 it's not running a candidate?

15 MR. LOPEZ: I don't think it even has to be  
16 triggered, Your Honor. I think that -- somehow I left  
17 this out of my notes.

18 THE COURT: Make this last point again because  
19 I'm not sure I follow what you're saying.

20 MR. LOPEZ: All right.

21 (Pause)

22 MR. LOPEZ: Sorry, Your Honor. Excuse us.

23 THE COURT: Take your time.

24 (Pause)

25 MS. MURPHY-OSBORNE: Your Honor, while they are

1 looking for that information, we have some rebuttal points  
2 on that resolution that was just referenced and some of  
3 the Fournier and the Hanson facts. So I didn't know if you  
4 wanted us to do that now in direct rebuttal or roll it  
5 into our presentation tomorrow, which do you refer?

6 THE COURT: When you say "rebuttal" you mean  
7 what he said is not factually accurate or you dispute the  
8 significance of it?

9 MS. MURPHY-OSBORNE: Partially that and then  
10 also if you wanted our assistance in pointing you, we've  
11 submitted their full depositions and if you wanted our  
12 assistance in pointing to you the points in the deposition  
13 that we feel contradict some of the statements in the  
14 declaration and in the resolution, we were advised that  
15 there was a possibility that there would be witnesses  
16 today and so we didn't learn until lunchtime that they  
17 weren't. So we were prepared to raise those points,  
18 but --

19 THE COURT: Maybe do that tomorrow.

20 MS. MURPHY-OSBORNE: All right.

21 THE COURT: Thanks.

22 MR. LOPEZ: Your Honor, our declaration was  
23 prepared to answer after the deposition intentionally and  
24 just the way it would be if our client was to testify  
25 today. I hope we've said nothing inconsistent. I concede

1 some very basic points, like we don't have the money right  
2 now to engage in independent expenditures. We can agree  
3 on that --

4 MS. MURPHY-OSBORNE: Just a couple things about  
5 Hanson, for example. I think Attorney Ladov said that in  
6 that district there had been Republicans who had run in  
7 the past but actually -- and maybe I misheard what you  
8 said, but the actual record was that Republicans have run,  
9 I think, in almost every election since 2000 and they only  
10 had gotten approximately 29 percent. There might have  
11 been one cycle where they didn't.

12 MR. LADOV: I think what I said, or what I  
13 certainly intended to say, it was the first time the Green  
14 Party had jumped into that race. I don't remember saying  
15 anything about prior Republicans. If I did, it was in  
16 error, other than to refer to the Proulx declaration which  
17 said the Republicans had been running and was getting  
18 30 percent. If there was something prior, it may have  
19 been in error that we received from the witness but I  
20 don't --

21 MS. MURPHY-OSBORNE: Mr. Lopez had characterized  
22 Mr. Hanson as being really pleased with his performance in  
23 this past election, when in fact he testified that he felt  
24 his performance was actually weak and he wasn't satisfied  
25 with it. So, there were some direct contradictions.

1 MR. LOPEZ: I must have stepped out of the room  
2 then because he was much more enthusiastic when I prepped  
3 him.

4 (Laughter)

5 MR. LOPEZ: So, I apologize about that statement  
6 if that's the case.

7 Okay. So, disclosure of the independent  
8 expenditures is mandatory even if they would not trigger  
9 the payment of matching funds. Independent expenditures  
10 must be disclosed within 24 hours if made within 20 days  
11 of an election. And that would be Plaintiff's Exhibit 46  
12 at page 8.

13 THE COURT: Okay, but you're saying if the Green  
14 Party makes an independent expenditure, it doesn't have a  
15 candidate in the race but buys an ad for some other  
16 purpose, you'd have to disclose that in a report.

17 MR. LOPEZ: That's right.

18 THE COURT: Okay, but that's --

19 MR. LOPEZ: That applies to everybody.

20 THE COURT: That applies to everybody, that's  
21 not singling out --

22 MR. LOPEZ: That applies to all independent  
23 speakers.

24 THE COURT: Okay.

25 MR. LOPEZ: And I guess that makes some sense

1 for the independent expenditure provision because the  
2 state's trying to keep track of independent expenditures  
3 for purpose of payment of matching funds. But if you  
4 think the matching fund provision, the -- you can reach  
5 the disclosure requirement. My clients are covered by  
6 that and you can reach the disclosure requirement. And --

7 THE COURT: I thought you were saying that if  
8 somebody else made independent expenditure, that somehow  
9 minor parties were required to do something by way of  
10 reporting.

11 MR. LOPEZ: If I said that, I didn't mean to say  
12 that.

13 THE COURT: Fair enough.

14 MR. LOPEZ: On excess expenditures minor parties  
15 are required to engage in this expedited reporting, even  
16 if they are not a threat to trigger --

17 THE COURT: Right.

18 MR. LOPEZ: -- excess expenditure payments.

19 MR. ZINN ROWTHORN: Your Honor, this may be  
20 apparent to everybody, but there isn't a claim in this  
21 case based on a disclosure requirement. There are  
22 challenges to the independent expenditure and excess  
23 expenditure provisions that are sort of in the nature of a  
24 chill claim, but there isn't just a straightforward we  
25 object to the disclosure. That is not in this case.



1 MR. LOPEZ: We briefed it, Your Honor.

2 MR. ZINN ROWTHORN: I don't mean in the  
3 complaint. It's not in the amended complaint, it's not in  
4 there.

5 MR. LOPEZ: The words disclosure aren't in there  
6 but the --

7 MR. ZINN ROWTHORN: There's -- okay.

8 MR. LOPEZ: We challenge the statute that  
9 imposes a burden on our First Amendment rights. There's a  
10 dozen things about this statute that aren't specified in  
11 the complaint because the statute as a whole, the burden  
12 is --

13 THE COURT: But you're talking about the Claim  
14 Number One now, right? Claims Two and Three are more the  
15 chilling of the speech. Claim One is the burden on equal  
16 opportunity.

17 MR. LOPEZ: I don't believe -- do we use those  
18 words, Your Honor?

19 THE COURT: That was how I always thought of it.

20 MR. LOPEZ: I thought we challenged -- well, why  
21 don't we look.

22 MR. FEINBERG: What Mr. Zinn Rowthorn raised as  
23 a point, that they didn't challenge this aspect of the  
24 statute. To the best of my knowledge that's right,  
25 they've never challenged this until trying to submit it

1 now after two years-plus of litigation.

2 THE COURT: All right. So, the issue in terms  
3 of whether they've challenged it or not is not necessarily  
4 whether those words are used in the complaint. The  
5 argument --

6 MR. ZINN ROWTHORN: Even in substance, Your  
7 Honor, this isn't a disclosure based claim. In other  
8 words, the stand-alone we object to having to disclose,  
9 that's -- I don't read that even expansively to suggest  
10 that.

11 THE COURT: If the complaint says this burdens  
12 our political opportunity, period, the statute burdens our  
13 political opportunity, then they can raise expenditure  
14 limits, they can raise petition requirements, they can  
15 raise reporting requirements, why couldn't they?

16 In other words, in discovery why didn't you say  
17 tell us every way in which you think that the statute  
18 burdens your political opportunity and they would come  
19 back.

20 MR. ZINN ROWTHORN: I think we did.

21 THE COURT: All right.

22 MR. ZINN ROWTHORN: And this is literally, you  
23 know --

24 MR. LOPEZ: I have the --

25 MS. YOUN: Your Honor --

1           THE COURT: Let's go one at time. That works  
2 really well.

3           MS. YOUN: The complaint specifies subsections  
4 of the CEP that it is challenging. Count One of the  
5 complaint talks about the qualifying criteria in the  
6 distribution formulas. It specifies subsections nine,  
7 two, four, five -- and five. Two is the matching fund  
8 provision. Three is the independent expenditure provision  
9 which cites to specific statutory subsections. Count Four  
10 is lobbyist ban. Count five is a contract ban.

11           Now, had we known that plaintiffs were going to  
12 raise just disclosure, pure disclosure, we would have  
13 taken discovery on the burdens of disclosure. We would  
14 have -- that's simply not within the complaint. The  
15 complaint's very clear as to what it covers.

16           MR. LOPEZ: Your Honor, nine-dash -- we  
17 challenge 9-714 and 9-713 broadly and the disclosure  
18 requirements are -- 9-712. Oh my goodness, all right.  
19 Excuse me.

20           (Pause)

21           MR. LOPEZ: Well, okay, Your Honor. Our  
22 complaint challenges specifically 9-713 and 9-714. The  
23 disclosure requirements are contained in 9-712 --

24           MR. ZINN ROWTHORN: 9-612.

25           MR. LOPEZ: In both. It's addressed in 9-712,

1 but we have challenged the CEP as a whole under Count One,  
2 but even under Count Two and Three, Your Honor, we have  
3 put this issue into play in our previous submissions and  
4 we briefed it, and they've had notice of this and I don't  
5 recall them raising any objection to this. And my  
6 understanding is that, absent prejudice, that, you know,  
7 the complaint is deemed amended to, to --

8 MS. YOUN: Your Honor, I'm reading now from  
9 Document 309 which is our memorandum of law in opposition  
10 to plaintiff's pretrial memorandum on counts two and  
11 three. This is after the close of discovery.

12 We say in their pretrial memorandum -- I'm on  
13 page 37 of our brief -- "Plaintiffs argued that the  
14 Section 9-612 reporting requirement relating to the  
15 independent expenditure matching funds burden minor  
16 parties. This claim is not alleged in the complaint."  
17 And this -- and they first mentioned it in their pretrial  
18 memorandum after the close of discovery.

19 THE COURT: Let me just suggest that if the  
20 plaintiffs lose on the other issues, it's not likely that  
21 they are going to win --

22 MR. LOPEZ: On disclosure.

23 THE COURT: -- on disclosure and reporting  
24 requirements.

25 MR. LOPEZ: Well, I'm trying to protect our

1 rights on the standing issue because we've clearly been  
2 covered by those, Your Honor. I mean I can't think of a  
3 more crystal clear -- I don't know what they would say  
4 about standing.

5 MS. YOUN: So you would certainly have standing  
6 in that case.

7 MR. LOPEZ: No, because I don't think, Your  
8 Honor -- there are many different aspects of this  
9 provision, and the fact that we just specified one -- in  
10 Counts Two and Three, the fact that we just specified  
11 9-714 and -13 instead of -12 when both said, when 9-713 in  
12 fact refers to 9-712, I don't think -- we briefed it,  
13 they've had the benefits of the brief. The courts have  
14 had the benefit of our briefs, and there's no reason for  
15 the court not to reach that issue, because clearly if  
16 9-713 are unconstitutional, then so is 9-712 and any other  
17 reporting requirements that are linked to it. I don't  
18 think I can add anything to that, Your Honor.

19 THE COURT: All right. So, is plaintiff  
20 resting?

21 MR. LOPEZ: I did reserve, well, two things, I  
22 was hoping to put on some supplemental testimony about how  
23 long it takes to get your petitions approved, unless we  
24 can reach a stipulation that it takes several weeks or  
25 months.

1 MS. YOUN: It's hard, Your Honor, because it  
2 depends on the particular --

3 MR. LOPEZ: Well, you put on -- you have a  
4 witness. You submitted his declaration. Can we reach a  
5 stipulation or do I have to put on my own -- do you want  
6 to hear -- I don't know the answer to this. Excuse me.

7 (Pause)

8 MS. MURPHY-OSBORNE: I don't know if this would  
9 be of any assistance, but we brought here today  
10 Mr. Hanson's petition, entire petition signature packet  
11 that reflects the date on which he would have submitted it  
12 to the town registrar and the date on which they, they  
13 would have certified and validated the number of  
14 signatures. So, that's for Mr. Hanson that we did have  
15 evidence that Mr. Hanson himself personally concluded his  
16 own petition signature gathering on August 2nd, because he  
17 certified that all the signatures on there were accurate  
18 to the best of his knowledge. So that would have been the  
19 last day he could have circulated that particular petition  
20 page, and he submitted the pages to the town registrar --  
21 they are dated by the town register and the town clerk on  
22 August 5th and August 7th. So the second was a Saturday,  
23 August 2nd was a Saturday, so August 4th would have been  
24 the first business day they could have been submitted to  
25 the town, and it looks like it was about a two, two to

1 three day turnaround.

2 MR. LOPEZ: I just talked to my client and, Your  
3 Honor, he advises me that by statute it has to be done  
4 within two weeks and there's penalties if it's not done.  
5 So, and he also tells me that in Hartford where  
6 apparently the burden described by the defendant's witness  
7 is so great, even there it only takes two or three days.  
8 We are willing to enter to a stipulation it takes two or  
9 three days.

10 MS. MURPHY-OSBORNE: No, between --

11 MR. ZINN ROWTHORN: We're not going to stipulate  
12 to any of those facts. I think it is so situational as to  
13 the towns, what's going on in the town, who the registrars  
14 are in the town, whether it's a town clerk or the town  
15 registrars, so I think Mr. Lopez should offer some  
16 evidence on the particular circumstances affecting his  
17 party's candidates and how long it's taken to have their  
18 petitions.

19 MR. LOPEZ: Your Honor, we rest but for  
20 rebuttal.

21 THE COURT: Okay, thank you.

22 MR. LOPEZ: Plaintiffs rest.

23 THE COURT: All right, let's talk a little about  
24 tomorrow. What's the defense's intention? You're going  
25 to have witnesses?

1 MR. ZINN ROWTHORN: We are going to have  
2 discussion about -- we need to make a decision about  
3 whether to call John Green. There's been some testimony  
4 about the Working Families Party; the question for us this  
5 evening is whether we're going to, we need to put somebody  
6 on to rebut that. We're considering whether to call  
7 Beth Rotman on this issue, about whether, whether the SEEC  
8 did, in fact, as we know to be the case, provide advice  
9 that was, that we think is inconsistent with what her  
10 declaration says. So that's, so the answer is we're going  
11 to have make the decisions as to witnesses overnight.

12 And if we don't have witnessed, Attorney Youn is  
13 going to make a presentation consistent with sort of what  
14 she did last time and what Mr. Lopez has done, and I would  
15 ask for the opportunity to make some closing remarks.

16 THE COURT: Yes. In terms of closing remarks I  
17 guess I'd like to hear from both sides and principally  
18 about the standing issue but whatever issues you want to  
19 raise are fine. How much time do each of you want for  
20 your closings?

21 MR. ZINN ROWTHORN: I think I need 20 minutes to  
22 do a closing. I'll ask for half an hour just to be safe.

23 MR. LOPEZ: That's fair, Your Honor.

24 THE COURT: Yes, 30 minutes. Okay. There  
25 shouldn't be any problem in getting your presentation



1 completed, including testimony?

2 MS. YOUN: No.

3 THE COURT: All right. A lot of your points  
4 have been made today presumably, some of them.

5 MS. MURPHY-OSBORNE: Your Honor, at the outset  
6 of the proceedings you had indicated you were interested  
7 in hearing from the plaintiffs on the standing issue, and  
8 at this point the defendants, in order to preserve their  
9 rights, would like to make a motion for judgment as a  
10 matter of law in light of the fact that the plaintiffs  
11 have rested in this case. And primarily the basis for our  
12 motion, while we're making it orally now, if you would  
13 like additional briefing on these issues related to  
14 standing, we're happy to do it after the close of the  
15 hearing, but we are, you know, making our motion for  
16 judgment as a matter of law at this point since it is  
17 required by the Federal Rules under Rule 52.

18 MR. FEINBERG: On the grounds of standing.

19 MS. MURPHY-OSBORNE: Primarily on the grounds of  
20 standing. On all counts, as to Count One and Count Two  
21 and Three, we're renewing essentially our standing  
22 arguments that are briefed amply in Hartford.

23 THE COURT: All right, well, I'll reserve on  
24 that motion and decide what we're going to do. Thanks.

25 All right. Anything else we can do today?

1                   All right. Feel free to leave whatever you want  
2 in the courtroom. And we'll see you tomorrow at 9:30.

3 Thank you. We'll stand adjourned.

4                   (Whereupon the above matter was adjourned at 4:35  
5 o'clock, p. m.)

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## C E R T I F I C A T E

I, Susan E. Catucci, RMR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

**/S/ Susan E. Catucci**

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