

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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GREEN PARTY OF CONNECTICUT, ET AL : No. 3:06CV-1030 (SRU)
AL : 915 Lafayette Boulevard
vs. : Bridgeport, Connecticut
: :
: : December 9, 2008
JEFFREY GARFIELD, ET AL :
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BENCH TRIAL

B E F O R E:

THE HONORABLE STEFAN R. UNDERHILL, U. S. D. J.

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1 (9:05 0' CLOCK, A. M.)
2 THE COURT: Good morning. I thought we should
3 start with a brief discussion of logistics. I noticed in
4 some of the papers that there was the suggestion that we
5 were going from today through Friday and I hope that that
6 was a misunderstanding. I have today, tomorrow, and if
7 necessary, Thursday set aside. I cannot hear this case on
8 Friday. I hope that that does not throw a wrench in
9 anyone's plans. Okay, good. Good.

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11 clear and I need your help on this, but I want to be very
12 clear about what a trial record is, and so I think during
13 each side's case they should identify on the record the
14 exhibits, declarations, et cetera, that they are offering
15 into the record. If anybody objects to an exhibit, a
16 declaration, or whatever, that objection should be on the
17 record, I'll rule on it. But I don't want to get in a
18 situation where there's an argument after the fact whether
19 a particular declaration was or was not part of the record
20 because it was submitted in support of some other motion
21 or whatever. So I just want to be very careful and clear
22 so there's no confusion about what the record is.

23 And, my assumption, and all of you should follow
24 this, if a party designates an exhibit or a declaration or
25 whatever as part of the record and there is no objection

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1 stated on the record, I'm going to take that as if that
2 piece of evidence can be received without objection. Does
3 that make sense?

4 (No response.)

5 THE COURT: So silence is assent in this case?

6 All right.

7 The last thing I wanted to raise logistically,
8 we have a motion for summary judgment on the standing
9 issue and some concern about whether that's an appropriate
10 vehicle to raise the issue. Let me just say that standing
11 is obviously an important issue in this case and one that
12 needs to be proven, and I'm going to treat the summary
13 judgment motion in effect as an argument that plaintiffs
14 lack standing with respect to Counts Two and Three, take
15 it up if need be in what amounts to a Rule 50 proceeding,

16 and obviously standing will be part of any decision that I
17 issue in this case.

18 All right. Any questions or concerns about any
19 of that?

20 MR. ZINN ROWTHORN: Your Honor, this may be
21 slightly premature and I'm sure we'll have an opportunity
22 to get to it but there are a couple of I think points that
23 deserve some clarification at the outset. One is I think
24 we may have a different conception about what the
25 appropriate scope of this facial challenge stage is. We

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1 have limited our submission of proposed findings and our
2 evidence to really I think the appropriate material on
3 facial challenge, what the statute says, what the
4 administrative gloss on the statute is, the information
5 that was available to legislature at the time the statute
6 was passed, and how elections operated under the previous
7 system to permit I think a perspective on what the
8 political opportunities were that existed prior to the
9 passage of the CEP.

10 I think the plaintiffs, judging from their
11 proposed findings of fact, have really essentially
12 resubmitted the summary judgment record, which was both on
13 facial and as applied challenges. There's a lot of data
14 in that proposed, in those proposed findings that relate
15 specifically to the operation of the system in 2008.
16 2008, we think that's appropriate for consideration in
17 March. We haven't given Your Honor, although we have very
18 significant, we think helpful, evidence about how the
19 system operated in 2008, we haven't given Your Honor that.
20 We don't think that's appropriate at this level of the

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21 proceeding.

22 So, that's I think the first point. I think we
23 do have a little bit of an -- I think we're sort of
24 passing each other on the scope of this facial challenge
25 stage. And the second point, and this goes to your point

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1 about the objections, we do have I think a general
2 objection to the two recently submitted declarations by
3 plaintiffs. One is the supplemental declaration by
4 plaintiff Michael DeRosa. That has a lot of information
5 about the 2008 general election. But I think our
6 objection to that is not so much one that that information
7 is premature. Mr. DeRosa purports to testify on a number
8 of subjects we think he's just not qualified to testify
9 about; why other minor party candidates will do or not do
10 certain things; why major party candidates will do or have
11 done certain things; how the public will react to certain
12 changes in the law.

13 So we think his testimony should be limited to
14 matters that are within his own competence to testify
15 about, why he's done certain things, perhaps why the Green
16 Party has done certain things in the past and what his
17 intentions are. But I think that affidavit really is sort
18 of a collection of the speculation that the plaintiffs
19 have proffered throughout this proceeding, put in
20 affidavit form and submitted at this stage. We think
21 that's inappropriate.

22 The Narain affidavit and declaration, which was
23 recently submitted, we also have a problem with that, Your
24 Honor, because that largely has to do with, certain areas
25 of that, the primary areas of that have to do with the

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1 2008 election data he tested, which is something we
2 disagree on, expenditures, which is something we disagree
3 on. So, we think that's primarily premature.

4 We also, and will demonstrate in March when
5 we're back before Your Honor in the as applied stage, we
6 think those -- you know, we think on the substance of
7 what's contained in that declaration we think there are
8 just errors and omissions.

9 So, those are sort of general objections. I
10 raise them now because they were the recently submitted
11 declarations and I think that -- I think, my impression is
12 they are going to be central to plaintiff's case.

13 MR. LOPEZ: Well, Your Honor, I anticipated that
14 the Attorney General would raise this in advance. I'm
15 glad he did so we won't have to interrupt my presentations
16 for objections to basically everything in my presentation.
17 So thank you for raising that in advance.

18 And it is an important point and because it's so
19 important I did script some notes, as I had a feeling we
20 were going to be leading off with this, Your Honor.

21 I believe the defendants -- and I'm talking
22 about what's before the court today, what kind of evidence
23 comes in in the facial versus the as applied challenge. I
24 think the defendants have made a tactical and a legal
25 mistake and I think at the end of the day, after you hear

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1 my presentation, it will help task what they've done
2 today. I took a risk and narrowed the record considerably
3 in terms of their submissions and it's because, it's
4 because of a fundamental misunderstanding or
5 misapprehension about what is involved in a facial

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6 challenge. A facial challenge, Your Honor, asserts the
7 statute as unconstitutional in all its, or substantially
8 all of its applications.

9 In this case that means that the statute
10 discriminates in favor of major party candidates by
11 conferring benefits on them that are arbitrarily denied
12 minor party candidates with the result being that it
13 distorts and tilts the playing field in favor of major
14 party candidates.

15 The relevant facts to establish that go beyond
16 the plain language of the statute, although the language
17 of the statute is relevant, but also include any data or
18 information about how its implementation distorts the
19 political process. The relevant facts are not limited to
20 the statute or the status of the legislative facts at the
21 time the law was passed.

22 By necessity, Your Honor, the record in a facial
23 challenge is broader than the record in an as applied
24 challenge because the, the proofs are broader. The record
25 in Randall and McConnell, for instance, were facial

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1 challenges, Your Honor, and I can tell you -- and I think
2 the Brennan Center in most of, most of these cases are
3 certainly familiar with the record in those cases. It was
4 extensive and it was not limited to what the statute said
5 or what Congress considered. In both McConnell and
6 Randall, the court considered the law, how the law would
7 restrict speech in future elections and it considered how
8 it did restrict speech in future elections. And they took
9 contribution limits, for instance, down from \$1,000 to
10 \$100 or \$200, and the court specifically considered how
11 that would affect future elections. And so I think in

12 total what the court had before it was a three week
13 trial on a facial challenge.

14 In as applied -- and this is actually true in
15 Davis as well, which was a facial challenge which was
16 brought by one candidate, and the court looked beyond the
17 individual facts, the individual facts in that case.
18 Davis' opponent didn't take advantage of the provision,
19 even though Davis said he was going to spend enough money
20 to trigger it, and he did, and the opponent didn't take
21 advantage of it. The court nevertheless struck it down
22 facially because it considered how it would distort the
23 political process in future elections, as well as the
24 political parties.

25 And in an as applied challenge, Your Honor, the

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1 record is narrow by definition. You look at how the law
2 affects your individual plaintiff and that's challenged in
3 WRTL, Wisconsin Right to Life, which is the follow-up to
4 McConnell which was practically a summary proceeding,
5 certainly relevant to the fuller record that was
6 considered in McConnell.

7 Now, what the defendants are asking the court to
8 do is to ignore the evidence of how the benefits are
9 conferred on major party candidates. And that's not
10 necessarily intuitive from the face of the statute. It's
11 pretty apparent but there's actually facts that support
12 that, how the grants will increase the opportunity of
13 major party candidates by increasing the funding that's
14 available to them.

15 Now, we have the grant information and how, and
16 how much the funding will increase their political

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17 opportunities and how the funding is driving or
18 compelling, as the court expressed, made that observation
19 in its opinions in denying the motion to dismiss, how that
20 funding and how the statutory preference is driving major
21 party candidates into previously abandoned districts and
22 basically increasing their political opportunities. We
23 have all that evidence, we can present that evidence, and
24 the defendants have also in their summary judgment papers,
25 they have that evidence too. They just chose not to bring

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1 it forth again today. There wouldn't be any prejudice if
2 they resubmitted that evidence today but -- it's certainly
3 relevant, Your Honor.

4 THE COURT: Let me interrupt you, Mr. Lopez,
5 because it might be helpful for me to let both sides know
6 what I typically do in a court trial, bench trial, and
7 that is this: I treat the Rules of Evidence liberally and
8 don't waste a lot of time frankly on objections. And if
9 there's evidence that I hear that I later decide is
10 irrelevant or should be given no weight, I simply ignore
11 it. We don't have a jury here that can be prejudiced. We
12 have a judge. I've read already your submissions. I know
13 pretty much what it is the evidence is going to be and I
14 want to discourage what I'll call picky objections because
15 I'm just going to ignore evidence that's not helpful,
16 frankly.

17 If you have objections such as a witness is not
18 competent to offer testimony or evidence about his opinion
19 of somebody else's motivation, make that objection, but if
20 the objection is, you know, the second sentence of the
21 fourth paragraph of this declaration deals with the 2008
22 election and you shouldn't be hearing about that, I think

23 we can spend our time more usefully than worrying about
24 that.

25 And so the bottom line is I don't think I need

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1 to resolve this. The defense is in a position to put in
2 whatever they want and if you want to put in at least a
3 barebones summary of what happened in 2008 in response to
4 the plaintiff's case, that's fine. I'll decide in
5 rendering the decision whether any of that makes sense or
6 is useful or not.

7 MR. ZINN ROWTHORN: Your Honor, and I think that
8 is why I raised it at the outset, so as not to be in the
9 position of making I think a relevance objection each time
10 Mr. Lopez or someone on that side makes a reference to
11 2008, but we do have a general overarching, perhaps a
12 standing objection to anything about 2008.

13 THE COURT: Fine.

14 MR. ZINN ROWTHORN: You know, and there's -- you
15 know, one thing I think that needs to be sort of kept in
16 mind is I think part of how we ended up here with the
17 bifurcated proceeding is our, our position was that this
18 day with respect to 2008 just isn't final, it's not yet
19 reliable, and if the record is to include 2008 data, it
20 ought to be -- we ought to do that in March.

21 So there's a question about the reliability. We
22 think Randall and Davis just don't dictate that 2008
23 information should come in now. There -- it was
24 absolutely clear what the effect of the statute was in
25 both instances. There was a chill. There were

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1 limitations that were already in place. There was no

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2 dispute -- we have disputes all the way down the line
3 about what this -- about what every central aspect of
4 their claim is, and we will -- we haven't because we
5 expected this to be at a facial challenge stage and
6 limited to that -- we haven't prepared to give Your Honor
7 evidence about 2008, but we will throughout the proceeding
8 be making proffers to you about the evidence that we do
9 have and what we intend to show in March.

10 THE COURT: That's fine. Let me just note that
11 I mean both sides have been guilty of including in the
12 record things that technically would not be relevant to a
13 facial challenge, or at least somebody could make that
14 argument. For example, the affidavits about the election
15 experience in Arizona and Maine. My understanding is that
16 was not information available to or presented to the
17 legislature.

18 So, you know, just -- let's just move into the
19 evidentiary stage. If you have a significant objection to
20 raise, please raise it. I understand the position of the
21 defense with respect to 2008. I'll take it into
22 consideration but I think we, you know, we can waste a lot
23 of time being too worried about precisely what's in and
24 should be in and shouldn't be in the record, whereas I'd
25 just as soon get your help identifying, you know,

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1 precisely what documents and testimony support each side's
2 proposed finding.

3 MR. FEINBERG: Your Honor, if I might, just two
4 points, and I'll try to be very brief.

5 First, as to the 2008 data, the court needs to
6 appreciate that some of the data that is being submitted
7 by the plaintiffs is simply wrong. It's not only

8 incomplete, it's erroneous, and reach erroneous
9 conclusions, and we're going to have in March a very
10 substantial presentation. And so, you know, the court
11 should really -- cannot be basing its decision on the
12 constitutionality of the statute on data we haven't yet
13 had a chance to contradict.

14 And the second point is --

15 THE COURT: You'll have an opportunity to
16 contest that evidence. In other words, if --

17 MR. FEINBERG: But, Your Honor, we've withheld
18 our presentation because it was our understanding that the
19 proceeding had been bifurcated and that the appropriate
20 time to do that was in March --

21 THE COURT: You're correct.

22 MR. FEINBERG: It's not fair --

23 THE COURT: Slow down. You're correct, this is
24 going to be a fair proceeding.

25 MR. FEINBERG: I know that.

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1 THE COURT: My point is simply this. If
2 somebody gets up and says we offer the DeRosa declaration
3 and you want to contest it, you say we disagree with
4 paragraph four and we are prepared to offer evidence that
5 the number 32 percent should be 33 percent, whatever the
6 issue is, you can contest it even if you are not today or
7 tomorrow putting in your evidence about 2008. That's my
8 point.

9 MR. FEINBERG: May I, Your Honor?

10 THE COURT: Please.

11 MR. FEINBERG: The problem with that is that
12 since we don't have complete data yet and since we haven't

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13 focused on putting together the data, we may not be in a
14 position to contest it today, whereas we will be in a
15 position to contest it in March, and the court ought not
16 to be considering that data for purposes of this
17 proceeding, or ought to be adjourning these proceedings
18 until March so that the court can make its decision on the
19 basis of a full record.

20 THE COURT: Just let me know whenever there's
21 evidence offered that you disagree with. That would be
22 helpful. If I don't hear a disagreement, it's like any
23 trial, unopposed evidence is considered unopposed so if
24 you oppose it, at least tell me so I know that you have a
25 problem with it. Is that a difficult thing to do?

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1 MR. FEINBERG: Understood, Your Honor. The
2 problem is we bifurcated this proceeding.

3 THE COURT: Yes, we did.

4 MR. FEINBERG: And the proceeding in March is
5 when we will be prepared to go forward and to respond to
6 these claims, and as a result of that we may not be --
7 especially, I mean Mr. Lopez dumped this new information
8 and new studies and new tables on us just a few days ago.
9 We haven't had any opportunity to respond to it and we may
10 not know yet all of the errors that are in it and may not
11 be in a position today to contest his claims of what the
12 facts show when the full data may show in March that those
13 claims were wrong. That's the problem that we are facing
14 here.

15 THE COURT: All right.

16 MR. ZINN ROWTHORN: Your Honor, and what we are
17 going to be in a position today, and will do, is if
18 Mr. Lopez offers a piece of evidence in support of a

19 particular proposition or just identifies a proposition,
20 we will be able to tell Your Honor we dispute that
21 proposition on its factual merits and where we would ask
22 for the opportunity for the record to be remain open on
23 those disputed theories of fact and so we can -- until
24 March, until we can get to Your Honor with our
25 presentation.

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1 THE COURT: That's what I'm asking you to do.
2 That's what I want to know. The representation was made
3 that some of the statements are false, inaccurate,
4 incorrect. When that happens, pop up and say we think
5 it's false, inaccurate, incorrect.

6 MR. FEINBERG: We will, Your Honor.

7 One further point and that is to go to the
8 declaration that Mr. DeRosa -- which is really Mr. Lopez's
9 argument he had Mr. DeRosa put in affidavit form and sign,
10 there's huge chunks of that that is simply incompetent and
11 inadmissible, and I believe the court doesn't want
12 objections along the way so let the record be clear that
13 we think the court cannot be considering that as evidence
14 at all because it's simply -- Mr. DeRosa is not an expert.
15 He is qualified to talk about his experience and the Green
16 Party's experience. He's not qualified to testify about
17 the difficulties faced by minor parties generally or the
18 approaches of major parties or the motivations of the
19 candidate, of a candidate, a major party when there is no
20 evidence to support that.

21 So, you know, I don't want to be standing up in
22 the middle and objecting to lots of things when we really
23 do need to have an standing, very clear objection to the

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court considering any of that material. It's not a
25 question of weight, it's a question of whether it's

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1 admissible evidence, and it's not.

2 THE COURT: Well, when you say "any of that
3 material," I assume you mean Mr. DeRosa's supplemental
4 declaration.

5 MR. FEINBERG: Yes, but there also may be
6 similar type of material in earlier DeRosa declarations.
7 I haven't gone back over each of them -- this last one is
8 really quite glaring in that way.

9 THE COURT: All right.

10 MR. LOPEZ: Your Honor, I just want to emphasize
11 that the objections they are raising as to the '08
12 election results or the amount of grants that were
13 distributed, which have been known for months now -- or
14 the election results have been known for six weeks, the
15 grants have been known for months -- have nothing to do
16 with the difference between a facial as an as applied
17 challenge. If they want to get up and say we got it
18 wrong -- that's what I understand you to be saying -- they
19 should do that and they should do that if they think we
20 got it wrong. The point is they really can't come in here
21 today, Your Honor, and say that they didn't have an
22 opportunity. They've had at least -- when did we first
23 meet? October 10. They've had until October 10 to put
24 that record together. We put it together, they chose not
25 to put it together. We put it together -- actually we

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1 didn't get the data on grant results, final data from the
2 defendants until, last Tuesday night. We worked it up and
3 had it in before the court by Wednesday night and they are

4 in a better position to do it than we are.

5 THE COURT: All right. Look, this is the point.
6 We're here today on a facial challenge. We're coming back
7 in March on an as applied challenge. We ought to hear
8 your evidence on an initial challenge. If there's
9 objections to it, and there have been some already, I'll
10 hear the objections. When they put on their evidence,
11 they can put in whatever they want to put in on a facial
12 challenge. If you have objections, I'll hear your
13 objections. The point is, you know, we're a half hour
14 into this and I haven't had any evidence yet.

15 Let's just get it going. We'll have plenty of
16 time for argument about what the evidence shows, what
17 evidence is permissible, what evidence I should ignore.
18 Maybe that's what we ought to do on Thursday after really
19 long argument because that's principally what I think the
20 differences are here. You have a few things that you
21 disagree about in terms of the facts but most of the facts
22 are, I think, undisputed. So let's just be clear what
23 those facts are, which ones are disputed, and then have a
24 big oral argument at the end. That's really I think what
25 we need to do.

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1 MS. YOUN: I think, Your Honor, we agree with
2 that general approach. It's just that, with respect,
3 we're concerned that we might inadvertently waive an
4 objection that we're not yet prepared to have a basis to
5 make. For example, we received the supplemental Narain
6 declaration last night at 6:45. I haven't had a chance to
7 read that declaration yet, much less go through and, you
8 know, analyze all of the data.

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MS. YOUN: Exactly. You know, I don't think we're prepared to make a paragraph by paragraph contestation of that evidence at this time.

In addition, like as a general point about 2008, what, you know, the claim -- and this is not strictly a facial versus as applied thing; this is a question as to the ripeness of the evidence for consideration, because what Your Honor is being asked to assess here is a question of the political landscape overall and whether the political landscape has been tilted by the CEP in that it favors major parties.

Now, there was a lot of data that goes into that analysis. Some of that data is ready at this point and some of it, and some of it that favors defendant's position is not ready at this time. For example, we have the information about initial grant amount. We don't have

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the information yet about how much of those initial grant amounts were returned, how much candidates actually spent, and how candidates actually performed, which is why we're saying that the 2008 data is simply not ready to be considered at this time.

MR. LOPEZ: With respect, Your Honor, that's figuratively about return of money. You know, what does it matter if you give someone a gun, the fact that he doesn't pull the trigger -- doesn't make any difference in terms of its impact on the election, your Honor.

THE COURT: I think I understand everybody's position. Before we actually start, which I hope you'll do very quickly, let me just turn to Mr. Halloran.

MR. HALLORAN: Yes, Your Honor.
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15 THE COURT: I don't know if you have a dog in
16 this fight, today's fight or not. Let me just tell you
17 that the decision on summary judgment motion is
18 substantially drafted and I hope to issue it very quickly.
19 So you're welcome to stay. You're welcome to participate.
20 But I don't want you to feel compelled to be here or that
21 your clients feel that they are paying you to be here in
22 effect unnecessarily. So let me just be clear that I'm
23 not going to take any offense if you and your group wish
24 to --

25 MR. HALLORAN: Thank you very much, Your Honor.

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1 Not being sure, I felt it better to be here, so I will
2 take that in advice. I might not be here for the entire
3 argument.

4 THE COURT: You're welcome to be here for any
5 aspect you want. And you're welcome to do something more
6 fruitful than any aspect that you want.

7 MR. HALLORAN: Thank you.

8 THE COURT: Mr. Lopez?

9 MR. LOPEZ: Proceed?

10 THE COURT: Please.

11 MR. LOPEZ: All right. Your Honor, logistical
12 question. I'm going to put on my case. Tomorrow they are
13 going to put on their case. Is there a way you are
14 contemplating rebuttal or did you want me to sort of
15 address their proposed findings as part of my case?

16 THE COURT: I have no great preference. You
17 don't have to wait. I mean if you want to put in evidence
18 in anticipation of rebutting what you know their proposed
19 findings are, you should feel free. My interest in doing

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20 this carefully is so I understand what the evidence is,
21 but and also efficiently so we get out of here before too
22 many days of this. But I'm not going to be bothered,
23 hopefully the defense is not going to be bothered if you
24 put in evidence that technically is rebuttal evidence to
25 what you anticipate they are going to put in.

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1 So, if you need a rebuttal case, I will consider
2 permitting a rebuttal case on Thursday, but I'm hopeful
3 that we won't need a rebuttal case and we can focus on
4 arguments.

5 MR. LOPEZ: Fair enough, Your Honor. And final
6 comment, Mr. Feinberg, you know, spent a lot of time in
7 effect laying a foundation for beating up principally the
8 plaintiff in this case Mike DeRosa, who's the co-chair of
9 the Green Party. This has been their strategy throughout.
10 They basically, and if you read their proposed findings,
11 their brief, they spent at least half of their brief
12 beating up my clients; in effect calling us irrelevant and
13 frivolous and all sorts of other names. And that's not
14 the case, Your Honor. They are not frivolous. They've
15 been part of the -- they've been part of and contributing
16 to the political debate in Connecticut since 1985, and
17 they have national presence.

18 The Libertarian party as well has been part of
19 the political debate and the national debate and they have
20 for many, many years. Now, they may not have achieved the
21 same amount of success in terms of elections as the
22 Democrats have in Connecticut, but that doesn't mean they
23 are frivolous, Your Honor. And just so that, for the sake
24 of my clients, I just want to emphasize the point that,
25 you know, there's a difference between a frivolous

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1 candidate or a frivolous political point of view and a
2 sham candidate or a candidate who is not trying to get
3 across a political point of view or win votes, and there
4 are such candidates.

5 You're going to hear from I think it was
6 Ms. Youn through her affidavit or through witnesses from
7 Maine that there are such sham candidates who are just
8 trying to game the system. The Left -- you know, the Left
9 Arm party or the Left Foot party, I think there was an
10 example from Maine. I just want to emphasize there is a
11 fundamental difference between those types of candidates
12 and candidates that run on the Green Libertarian and
13 Working Families party lines. These are all very serious
14 candidates, Your Honor, and the Supreme Court has never
15 said that we can just push aside minor party candidates.

16 And, with that, I'd like to proceed with my
17 presentation. Would you like us up there or here?

18 THE COURT: Wherever you are comfortable.

19 MR. LOPEZ: Okay.

20 THE COURT: Probably makes more sense to stay
21 there. You're loaded up.

22 MR. LOPEZ: And do you mind if I sit down? It's
23 going to be a long day.

24 THE COURT: That's fine.

25 MR. LOPEZ: I would like to begin my

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1 presentation, Your Honor, with just a summary of what I
2 think are the highlights and then I'll take the court
3 through the evidence, because I think it's the best
4 opportunity for me to at least address the high points,

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the high local points.

6 THE COURT: Let me suggest this. I think I
7 would find that most useful after the record has been
8 established. In other words, I want to give both sides a
9 chance to argue what amounts to a closing argument: This
10 is what we've shown. I don't think I need an opening
11 statement as much because I'm very familiar with the
12 issues in the case and much of the record.

13 MR. LOPEZ: All right. Having said that, I
14 would just -- these comments basically summarize what I
15 thought were the high points of the court's opinion
16 denying the motion to dismiss, which I think properly
17 focus on how the CEP, on its face at least, appear on the
18 pleadings to distort the political process and the way
19 they gave unfair advantage, increased election
20 opportunities to the major officer party candidates and
21 that's where this evidence is going, Your Honor.

22 The issue of public financing, Your Honor, was
23 first raised in the Spring of, the '05 General Assembly,
24 and there were two bills that, that were proposed, SB 61
25 and HB 6670, and they are both contained as Exhibits 1 and

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1 2 in our submissions.

2 Both bills were supported by the intervening
3 organizations Common Cause and Citizen Action Group and
4 the Brennan Center, who testified in part of it as well.
5 They provided full funding for all candidates, Your Honor,
6 who raise a minimum number of qualifying contributions.
7 This was not a ground breaking idea. It followed a Clean
8 Elections model that was in place in Arizona and Maine.
9 Full funding was available to all candidates regardless of
10 party affiliation if they raise a modest amount of

11 qualifying contributions.

12 The original legislation also provided primary,
13 specifically provided primary funding for all candidates
14 seeking their party nomination. The legislation was
15 worded "minor parties" and "major parties." Many would be
16 eligible for primary funding if they were seeking their
17 parties' nomination.

18 There was no provision in the statute for
19 organizational expenditures and, in fact, the legislation,
20 as it should have -- it's proper in a public financing
21 system -- prohibited party and PAC contributions to
22 publicly financed candidates. That's how public financing
23 works in this country. You take public financing, you
24 don't take contributions from individuals, from PACs and
25 from your party.

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1 That legislation didn't make that accession.
2 There were some minor differences between the House and
3 Senate bills. The Governor, Governor DeStefano and Jodi
4 Rell, who is very anxious to get legislation on the
5 lobbying and the -- lobbying and contract provisions
6 passed, and she convened a special working group on the
7 issue of restrictions of lobbyists and contracts that were
8 not resolved in the '05 session either, which was part of
9 this comprehensive Campaign Reform Act. Governor Rell
10 convened a special working group to reconcile the
11 difference between the House bill and the Senate bill.

12 Most of the work on the working group, they met
13 11 times, Your Honor, in August and September -- if my
14 facts are right, July and August '05. Most of the work
15 focused on how we're going to regulate lobbyists and

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contractors, so the working group also focused its
17 energies and attention on the -- how to reconcile the
18 difference between the House and Senate bills on the
19 public financing piece. There were minor differences.

20 The working group as part of its deliberations
21 heard from representatives from Maine and Arizona, and
22 those are the two systems that provide full public
23 financing in legislative elections. That's kind of unique
24 in this country, providing full public financing for
25 legislative elections because of the difficulties you're

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1 seeing in this case, because of the way districts are
2 regimented.

3 What's more typical is providing full public
4 financing for statewide elections because those elections
5 tend to be generally more balanced, and there are the
6 effects -- or the jerrymandering don't come into play.

7 Now, the directors I believe from Maine and
8 Arizona tested before the working group and they
9 specifically were asked how minor parties were impacting
10 the program. Was there threat to the public fisc, was
11 there abuse of process, were they a problem in any way.
12 Most said no, and were very candid about that, and I would
13 direct the Court to Plaintiff's Findings 5 and 7,
14 Plaintiff's Exhibit 3. I'm not going to read from it but
15 that's, that's where that testimony is.

16 THE COURT: All right. Just so I'm clear, I
17 take it that at this point you've effectively offered into
18 the record Exhibits 1, 2 and 3, because you've mentioned
19 1, 2 and 3. And so because I don't hear an objection for
20 1, 2 and 3, I'm going to assume those are available for
21 consideration.

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MR. LOPEZ: Your Honor, actually --

MR. ZINN ROWTHORN: No objection.

MR. LOPEZ: -- I'm not organized -- my notes are not organized in a way that I would introduce each because

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1 I don't think every point is worth the candle of -- is
2 worth a candle. But our attention, and we had agreed with
3 defendants prior to the hearing that we would move en
4 masse our summary judgment record or all of our
5 submissions by the court due date in plaintiff's case,
6 that's Exhibits 1 through 63 plus the declarations, into
7 the record subject to objection.

8 THE COURT: Subject to objection.

9 MR. ZINN ROWTHORN: Your Honor, if I could, I'm
10 not sure that's a fully exact description of our
11 agreement. We had a logistical discussion about how we
12 physically put before the court exhibits, and the question
13 was, well, now that we're moving out of summary judgment
14 into trial, do we refile every exhibit? It seemed to be
15 wasteful and probably not what Your Honor had in mind, to
16 take everything we previously filed with respect to
17 summary judgment and then refile it as to each side as a
18 proposed trial record. Rather, they would be in there and
19 as we went along parties could reference, offer them, the
20 other side would have the opportunity -- that they
21 wouldn't waive any objections. Just would have the
22 opportunity to check I think largely as we anticipated in
23 this morning's discussion.

24 THE COURT: Yes, but what I hear Mr. Lopez is
25 saying now effectively he's moving into evidence Exhibits

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1 1 through 63. And correct me if I'm wrong but -- well,
2 let's start with that and put aside what's been marked as
3 A-9, A-10 and the Narain declaration which I'm not sure
4 how that's being marked.

5 MR. ZINN ROWTHORN: Your Honor, I'm really not
6 in a position to make objections on 63 exhibits. Your
7 Honor I think correctly identified the exhibits that were
8 being referenced as Mr. Lopez went, 1 through 3. Those
9 are legislative, basic legislative history materials which
10 I think we both have proffered in reference -- we don't
11 object to those, I think.

12 And I don't mean to make this more difficult or
13 cumbersome than it should be but I do think it's sensible
14 and more orderly to proceed as Your Honor anticipated,
15 with Mr. Lopez referencing an exhibit in connection with
16 one of his findings. At that point, you know, I think it
17 would be incumbent upon us to indicate whether we have a
18 specific objection or whether it retaliates to a general
19 topic that we think should be left open until March, or
20 that there are some premature facts that we think ought to
21 be addressed in March.

22 I mean I just -- to expect us to sort of be able
23 to rattle off our position on 63 exhibits, we're not in a
24 position to do that.

25 MR. LOPEZ: Your Honor, Exhibits 1 through 56

1 came in with the summary judgment record. We discussed
2 before the court what the objections were. We talked
3 about -- we can argue weight but we weren't going to argue
4 admissibility. 1 through 56, the defendants have had 1
5 through 56, is our opening summary judgment record, and
6 they've had possession of since July 10.

7 Exhibits -- excuse me, I take that -- 1 through
8 47 they've had since July 7th. Exhibits 48 to 56 they've
9 had since September 5th as part of our reply, as part of
10 the response to their motion for summary judgment.
11 There's never been any issue whether or not those exhibits
12 could be considered by the Court. In fact, the Court --
13 as I understood the Court, the Court was going to treat
14 the record as a trial record and it was not -- I never
15 contemplated laying the foundation and starting the
16 process over again. I don't think the defendants did
17 either for the submission of these exhibits.

18 MR. ZINN ROWTHORN: If I could suggest -- well,
19 perhaps a way out of this thicket, Your Honor, I think I
20 would be able to make objections in certain instances as
21 we go. They will be apparent to us. But if we could have
22 an opportunity after the hearing to submit supplemental
23 post hearing motion in limine where we can go back and
24 really identify with specificity which exhibits or which
25 portions of exhibits we think ought not to be considered

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1 at this stage, I just think it's going to be very, very
2 difficult and dangerous, frankly, for us to attempt to
3 identify, you know, on the fly, you know, these -- if Mr.
4 Lopez's submitting 63 exhibits at once without identifying
5 the purpose for which each -- now it's one thing to offer
6 these all as part of a summary judgment record, but now I
7 think we're in a trial proceeding where logistically it
8 would made sense, I think, to have before you as available
9 exhibits the summary judgment record, but it doesn't make
10 sense to have those as sort of admitted en masse.

11 Your Honor, we would, I think -- well, some of

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12 those objections are going to be plain and clear to us as
13 we go. Some of those, I have to go back and look at what
14 1 through 63 are. And I think we ought to have an
15 opportunity after the fact to submit, submit something
16 supplementing whatever objections we make, you know, in
17 court.

18 THE COURT: Okay. Well, we probably should have
19 had a pretrial conference, but I guess it was my implicit
20 understanding that even in a summary trial of this kind,
21 if there's an objection to an exhibit, that a party would
22 be prepared to offer that objection. I can understand the
23 concern of, you know, putting in 1 through 63 en masse,
24 but would there be a problem going through these one by
25 one? Is there an objection to 4? Is there an objection

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1 to 5? I need to know what the objections are sooner
2 rather than later.

3 And the issue of a motion in limine, that would
4 make sense in terms of facial versus as applied. Don't
5 consider 2008. If you want to raise that in a motion,
6 that's fine. You've effectively preserved that objection
7 already but if, for example, Exhibit 17 is one that, for
8 whatever reason, there's an objection to, I think I'd like
9 to hear that now.

10 MR. ZINN ROWTHORN: Well, maybe the way to do it
11 then, Your Honor, is Mr. -- I can have a set of
12 Mr. Lopez's exhibits before me and he can go through one
13 by one and say this is what it is, this is the purpose for
14 which I offer it, and I think at that point I'll be able
15 to, I'll do my best to formulate a position and if we want
16 to -- I think that's fairly time-consuming but if
17 that's -- you know, we could do it that way.

18 I don't know, for example, really a lot of this,
19 I think -- well, I don't know, for example, what purpose
20 Mr. Lopez is offering all of these 63 exhibits, but if
21 that is how you want to do it -- I really did anticipate
22 something really like Your Honor was discussing at the
23 outset where we would go along, a party would make a
24 factual, essentially a proffer of a fact and say this is
25 supported by X Exhibit or Y Exhibit. You would look to

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1 the other side, we would say, you know, we object to X or
2 Y or we object to that part of X or Y. Or we would say no
3 objection to X or Y.

4 MR. LOPEZ: Your Honor, we have declarations --
5 I could have misunderstood, I thought we were going to
6 treat the declarations as opening testimony instead of
7 calling witnesses. This was meant to be a hybrid
8 proceeding and --

9 THE COURT: Yes.

10 MR. LOPEZ: I don't know where the defendants
11 got this misimpression that they, that everything was open
12 for, that this was -- well, they want to make this a big
13 proceeding. It's supposed to be a truncated hybrid
14 proceeding based on the submitted summary judgment record.
15 And the court established a deadline for supplementing the
16 record. We met that deadline, Your Honor.

17 THE COURT: Let's do this. We're going to take
18 a morning break. Mr. Lopez, why don't you proceed.
19 During the morning break, the defendants can look through
20 the exhibits and let me know if they have trial exhibits
21 as opposed to facial versus applied objections to these
22 exhibits and, if so, we'll take up the objections that

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23 they have to the exhibits.

24 My understanding was closer to Mr. Lopez's; that
25 is, unless I heard to the contrary, that the exhibits

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1 clearly offered by a party were going to be admitted
2 unless there was some objection. So my assumption was
3 that I would come in and if there was an objection to
4 Exhibit 56, I would hear objection to Exhibit 56 at some
5 point today. And, conversely, tomorrow, when Garfield's
6 declaration is identified as part of the trial record, if
7 there's an objection to Garfield's declaration or exhibits
8 attached to it, I would hear about that as well. Any
9 problem proceeding that way?

10 MR. ZINN ROWTHORN: No, Your Honor.

11 THE COURT: Okay. All right, let's do that.

12 MR. LOPEZ: Your Honor, if I could return to my
13 presentation, we were talking about the Working Group
14 which was convened in the Summer of '05 by the Governor
15 and which included the bipartisan group of legislators.
16 The purpose was to reconcile the differences between the
17 House and Senate bills as concerned restriction on
18 lobbyists and state contractors and as concerned public
19 financing. As part of the Working Group deliberations,
20 they did specifically invite representatives from the
21 other clean election states that provide full public
22 financing for legislative candidates, and that is somewhat
23 novel. Most programs focus on the statewide programs, and
24 in both these states, in Maine and Arizona, Your Honor,
25 full public financing is available to all parties who

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1 satisfy the qualifying contribution requirements
2 regardless of party affiliation.

3 And just compare what's going on in Connecticut
4 with Maine. For instance, if you want to run for a
5 Governor and SEEC public financing in Maine, you have to
6 collect \$12,500 in five-dollar contributions. And I think
7 in Arizona you have to collect \$20,000 in five-dollar
8 contributions. The Maine program just this last session
9 bumped it up because two independents qualified and some
10 people got in tithers over that. And so they bumped it up
11 from 12,500 to 16,500 to run for Governor to qualify for
12 public financing regardless of party affiliation.

13 In Connecticut, of course, you have to raise
14 \$250,000 or a minimum of 2,500 people to qualify for
15 public financing. Now, what's important about the
16 testimony of the officials from Maine and Arizona is that
17 they were specifically asked by the legislators whether or
18 not this posed a threat to the integrity of the public
19 financing program or, rather, a threat to -- imposed a
20 burden on the public fisc. And both specifically said,
21 and I direct the court to Findings 5 and 7 and the exhibit
22 that is referenced there, that it hasn't been a problem at
23 all.

24 And, candidly, if you review the Working Group,
25 the minutes of the Working Group deliberations and the

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1 minutes -- and the Working Group report, there really is
2 no discussion of the burden that minor parties and
3 independent parties would impose on, on the public fisc or
4 the integrity of the public financing program.

5 And when the Working Group issued its final
6 report to the Governor in September or October of '05, the
7 Working Group did not make any recommendation. It really

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wasn't on the table. They simply didn't address the issue
9 whether minor parties and major parties should be
10 different. They did their best effort to reconcile the
11 two bills and the two bills provided for the same
12 treatment of all parties regardless of party affiliation.

13 Now, the bill that was ultimately signed by the
14 Governor -- let me back up. The legislature decided not
15 to follow the recommendations of the Working Group
16 concerning an introduction of public financing program.
17 The bill that actually emerged from the General Assembly
18 in the '05 special session that was called in October, and
19 the one that was ultimately signed by Governor Reil, we
20 know it did not provide full funding for minor party
21 candidates. It established different qualifying
22 criteria for major and minor party candidates and it
23 provided partial funding for minor party candidates based
24 on a -- well, presumptively qualified major party
25 candidates based on the major party status, and for minor

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1 party candidates it established a different set of
2 criteria. They would receive a partial grant if they
3 received 10 or 15 percent of the vote. And if they didn't
4 satisfy that, then they can go and try to qualify through
5 an alternative process of petitioning for financing. If
6 they gather ten percent of the signatures or ten percent
7 of the signatures of the people who voted in the last
8 relevant election in the district or the state or if they
9 gathered 15 percent, they needed that to get one-third
10 grant or two-thirds grant, and if they hit the 20 percent
11 number, they would get a full grant.

12 Now, the CEP eliminated, specifically eliminated
13 the new legislation, specifically took out funding for

14 minor party candidates. It's no longer in the
15 legislation. Now, the Commissioner -- is it the
16 Commissioner? Secretary -- Commissioner Garfield
17 submitted a declaration saying minor parties can get
18 funding in the primary if they run in a primary, but
19 that's not what the legislation says. Commissioner
20 Garfield doesn't have the authority to make that
21 declaration. There would have to be a declaratory ruling
22 that would, that would have the effect of law.

23 MR. ZINN ROWTHORN: I'm just going to register
24 an objection to Mr. Lopez's testimony about the extent of
25 Mr. Garfield's authority as Commissioner -- as Executive

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1 Director of the State Election Committee. I think it's
2 inaccurate.

3 THE COURT: All right. It's a legal issue in
4 any event presumably.

5 MR. ZINN ROWTHORN: Yes.

6 MR. LOPEZ: The CEP or the bill that was signed
7 by the Governor eliminated the restrictions on party and
8 legislative PAC activity. Under the previous bills,
9 political parties and PACs couldn't contribute to publicly
10 financed candidates, but through a legislative slight of
11 hand, contributions from party and leadership committees
12 that were prohibited under the original legislation were
13 now permitted under the auspices of a newly created term
14 called Organizational expenditures, which in effect allow
15 leadership PACs and political parties to raise money from
16 the individuals and other special interest groups and PACs
17 at the full limits that apply to nonparticipating
18 candidates and then turn around and spend that money in

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19 direct coordination with candidates.

20 In most states, and under the regulatory regime
21 that exists in most states, including Connecticut, but for
22 this exemption for organizational expenditures,
23 coordinated expenditures are treated as contributions that
24 would normally be prohibited to a publicly financed
25 candidate, but not here.

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1 Now, I'll return to that issue later because it
2 is significant, at least in our view and in the view of
3 the, the -- other people in this courtroom.

4 Now, following -- after the bill emerged after
5 the bill was signed, there was a human cry. There was a
6 lot of criticism of the bill because it treated major and
7 minor parties differently, because it set the bar so high
8 for minor parties to qualify for public funding and new
9 parties and because of the organizational loophole.

10 In response to this criticism, Governor Rell,
11 who was in touch with Commissioner Garfield, asked him to
12 come up with recommendations on how to improve the bill --

13 MR. ZINN ROWTHORN: I think -- and I haven't
14 been objecting, I'm going to try not to object about the
15 description, I think, of the basic fundamentals of the
16 program, but when there's an assertion about Governor
17 Rell's motives or some other thing that is not apparent on
18 the face of any -- or it is not apparent what Mr. Lopez is
19 basing that on, I think it ought to be cited. And then
20 I'll have an, we'll have an opportunity to look at that
21 and indicate whether we agree with that or not. But if
22 it's just, I mean clearly it's just a description of the
23 basics of the program, that's something I think is fair
24 game but I think we ought to be able to --

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MR. LOPEZ: In response to that particular

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1 assertion, I would direct the court to Plaintiff's 5.
2 It's the statement of Jeffrey Garfield, and I would ask
3 the Court to -- if it's before you, I'd ask the Court to
4 turn to the third paragraph, and I can read it or you can
5 read it for us but I think it's consistent with my
6 representation.

7 MR. ZINN ROWTHORN: I disagree that it's
8 consistent with the representation. I think the document
9 speaks for itself but I think that actually puts -- her
10 particular concerns are not -- the ones that Mr. Lopez
11 represents aren't reflected in that paragraph.

12 MR. LOPEZ: Well, Your Honor, what's your
13 preference? There's three or four paragraphs I'd like to
14 read to the Court from this document I think that are very
15 relevant. But I can see why it's a waste of time to --

16 THE COURT: Okay. As a technical matter,
17 Mr. Lopez did not indicate what the Governor's concerns
18 were. He said in response to this criticism. We don't
19 know -- I don't see anything that says that she asked
20 Garfield to study it in response to the criticism. That's
21 an inference, I take it, you're drawing from the facts and
22 that's fine.

23 MR. ZINN ROWTHORN: And that's the inference
24 that I don't see reflected and I think we just disagree
25 with.

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1 MR. LOPEZ: Well, Your Honor, if you want to
2 belabor this point, I can point the court to other
3 evidence in the record where the government groups who are

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4 sitting here today were very displeased with this bill and
5 mounted full lobbying efforts immediately after its
6 signing to undo it and --

7 THE COURT: I think --

8 MR. ZINN ROWTHORN: Your Honor, we're going to,
9 we're going to object to the relevance of all of that. I
10 don't think it matters what the present officer's previous
11 position with respect to this bill, or what
12 Commissioner -- or what Mr. Garfield may have once said
13 about this bill. In March we'll present Mr. Garfield and
14 he'll be able to tell you he had those concerns back then,
15 they weren't borne out. I mean -- I just don't think
16 that's relevant testimony.

17 THE COURT: Well, I do think it's an issue that
18 we need to have argument on. We don't have to have it
19 today but I wrote down a question, what is the
20 significance of the bills that were not passed and of the
21 Working Group recommendations not followed. It's not
22 obvious to me in deciding the constitutionality of this
23 act that it's especially significant that there was
24 another proposal not passed that you think would have been
25 less objectionable. The fact that there is a better

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1 alternative doesn't mean that the one that was passed is
2 unconstitutional.

3 MR. LOPEZ: Fair enough, Your Honor, but
4 actually you nailed the word that I was going to say.
5 Alternative. You know, part of the analysis is whether
6 the legislature had alternatives that were less
7 burdensome on the rights of third parties, and it seems to
8 me the fact that the legislature considered alternatives
9 and rejected them is probative of the fact that the

10 legislature is aware of what restrictive alternatives are,
11 and this particular document --

12 MR. ZINN ROWTHORN: Excuse me, we'll have that
13 discussion, I'm sure, at some point, but our position is
14 not going to be a surprise to Mr. Lopez or Your Honor.
15 What was considered and even what's been passed in other
16 states isn't relevant to Your Honor's consideration of the
17 facial constitutionality of the CEP. You have to look at
18 it and say what was actually passed, whether that's
19 constitutional or not.

20 MR. LOPEZ: And, Your Honor, the documents I'm
21 going to turn to, with the documents you have before you,
22 and I'm willing to scroll through at least another --
23 well, right through Exhibit 11, the relevance of these
24 documents, Your Honor, is that the Commissioner
25 recommended to legislature in the '06 General Assembly,

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1 and I quote, "I urge the legislature in the strongest
2 possible terms to address each of the issues that I raise
3 in this bill," close quote, about the what I believe is
4 the constitutional gloss in this legislation.

5 And I don't understand why the defendants would
6 make the case that that is not relevant. It clearly shows
7 what the defendants, and subsequently in tandem with the
8 intervening organization, felt were the constitutional
9 flaws in the program. Now, I would direct the court to
10 paragraph one, two, three, four, five, six -- seven, which
11 appears on page two, so the second full paragraph on page
12 two.

13 THE COURT: Of Exhibit --

14 MR. LOPEZ: Of Exhibit 5.

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THE COURT: Yes, I have it.

MR. LOPEZ: First three quarters of that paragraph address the qualifying criteria. And just to summarize, I mean to paraphrase, Commissioner Garfield believes that the system's constitutionally suspect. Based on his experience of 20-odd years as Commissioner and based on his experience of Buckley and the relevant case law, Your Honor, he believes that the qualifying criteria for minor and independent party candidates should be taken down to 5 percent to qualify them for a full grant, the same grant that their major party opponents

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would qualify for. A partial grant would be triggered at 3 percent. You need 3 percent in the last election or you went and got signatures from 3 percent of the population.

MR. ZINN ROWTHORN: Your Honor, if I might, that is extremely misleading. First of all, we think it's irrelevant at this stage what Mr. Garfield felt at a particular moment in time back before this statute was permitted to operate and before it was amended in some respects to address his concerns.

You know, he was primarily concerned, Your Honor, with the possibility that minor parties, nonmajor party candidates would not be able to qualify. We know and we'll be able to demonstrate, it's already been referenced in the record, that that was not the case, that there was participation.

His view was a concern that there -- I mean he's not infallible with respect to that and he will, he'll sit up there or wherever and admit that his concerns have proven not to be actually valid. And in other respects --

THE COURT: Let's not -- you'll have a chance to

21 say all that through him tomorrow. I'm not -- just
22 because I'm hearing it, I'm not accepting --

23 MR. ZINN ROWTHORN: I understand, Your Honor,
24 and I just think it is a little dangerous the way the
25 characterization is made, and it's actually our intention

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1 to put that before Your Honor in March. But --

2 THE COURT: All right.

3 MR. ZINN ROWTHORN: Yes, we do have a
4 fundamental disagreement there.

5 MR. LOPEZ: Your Honor, I don't mean to
6 mischaracterize, if that's what my opponent is implying.
7 I'm happy to read the text. It's powerful text. I think
8 it makes our case.

9 THE COURT: I've read it.

10 MR. LOPEZ: You've read it, all right. So,
11 Judge, I would ask you then -- so just on the qualifying
12 criteria, Commissioner Garfield believed the qualifying
13 criteria was Constitutionally suspect under Buckley.

14 If you scroll down through that same paragraph,
15 one, two, three, four, five, six lines from the end of
16 that paragraph, it begins "The disparate treatment of
17 minor petition parties." In that text, he expresses
18 his -- what his reservations were about or what his
19 objections to the organizational expenditure provisions
20 were, because of the possibility, because of the --
21 because it unfairly favors major parties. They are the
22 only ones in the legislative issued committees. And this
23 loophole, as it's been referred to by the plaintiffs and
24 by the defendants consistently in this case, has a
25 potential to undermine the purposes of the program because

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1 it allows the money that's supposed to be prohibited from
2 coming into the political process to actually continue to
3 come in through the back door.

4 Now, earlier in this statement, on the first
5 page in the final paragraph, he raises a separate
6 objection to the organizational expenditure provision
7 which has to do with the breadth of the organizational
8 expenditure loophole. In his view the organizational
9 loophole in effect allows leadership and caucus and party
10 leaders to fund candidates or the campaigns of candidates
11 who run, who accept public financing, because it allows so
12 many different types of coordinated expenditures,
13 including some as basic as running a broadcast ad or
14 sending out a mailing or providing office space or
15 consultation -- or the aids to a campaign, you know, your
16 chief of staff, that kind of stuff. And he raised, I
17 think, legitimate objections, and those objections are
18 still relevant because the law has changed to address
19 that.

20 MR. ZINN ROWTHORN: To the contrary, Your Honor,
21 the law has been changed to address the organizational
22 expenditure of what's been characterized as loophole. It
23 has been narrowed. So I -- I mean that's apparent to me.

24 THE COURT: And that will be your case tomorrow.

25 MR. ZINN ROWTHORN: Okay.

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1 MR. LOPEZ: So, now, Secretary Garfield, I don't
2 know if he was making these recommendations directly with
3 the approval of the Governor or not, but they can answer
4 that question. He was then, I think -- well, he's an
5 agent of the Governor so I think we can add the weight --

6 THE COURT: Why does it matter?

7 MR. LOPEZ: Because -- okay, fair enough, Your
8 Honor. To answer your question, I think it matters
9 because if the Governor thinks it's -- or the Attorney
10 General thinks it's constitutionally suspect, then I think
11 the court can be comfortable in reaching the same
12 conclusion, I think.

13 Now, Secretary Garfield wasn't acting alone.
14 The intervening organizations, Common Cause and Citizen
15 Action Group and the Brennan Center, not as lawyers but as
16 policy makers, coordinated a public relations campaign and
17 a lobbying effort to make the changes that Commissioner
18 Garfield was urging before the legislature. And their
19 submissions are contained in Exhibits 6 through 11. They
20 are also contained in the transcript, which I don't have
21 in my exhibits, but the transcript is attached to
22 Secretary Garfield's declaration of the March 2006 hearing
23 before the, before the legislature where the General
24 Assembly took up these proposed changes. And their
25 testimony, without going into it in detail, you know,

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1 basically is consistent with the changes in the law that
2 were sought by Secretary Garfield.

3 They went one step further and they asked the --
4 "they" being Citizen Action and Common Cause, asked the
5 legislature to reinstate the availability of primary
6 funding for minor party candidates because of the value of
7 primary funding during the primary period.

8 And I would just note, Your Honor, that under
9 the federal system, any candidate, regardless of party
10 affiliation, who's seeking his or her party nomination is

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12 eligible for party funding and we provide data in the
13 record showing how minor parties over the years have
14 received funding in the primaries.

15 MR. ZINN ROWTHORN: Your Honor, just for the
16 record, we do have a relevance and hearsay objection to
17 the statements referenced by intervenor groups. You know,
18 I don't know exactly what the purpose is for which they
19 are offered, particularly at this stage, but -- you know,
20 and we can address them substantively when it's our turn.
21 But, you know --

22 THE COURT: Just to be clear, which exhibits are
23 you talking about?

24 MR. ZINN ROWTHORN: Well, I think he's
25 referenced 6 through 11.

THE COURT: Right. Why isn't, why isn't the

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1 hearsay problem avoided by the fact that these statements
2 were made? Isn't --

3 MR. ZINN ROWTHORN: Well, if it's offered for
4 the fact they were made -- well, I'm not sure then what
5 the relevance is.

6 THE COURT: The legislature was told X Y Z. The
7 legislature had before it X Y Z information. Why isn't
8 that --

9 MR. ZINN ROWTHORN: Well, these were statements
10 after the passage of the legislation. This is part of the
11 problem of this heavy reliance on these sorts of
12 statements that Mr. Lopez wants to suggest people's
13 opinions about --

14 THE COURT: All right. Number 6 is from
15 Garfield to the Commissioners. Are you objecting to
16 Number 6?

17 MR. ZINN ROWTHORN: Well, there's also -- if I
18 could ask Mr. Lopez to tell me, I thought we were now
19 moving into the statements of the Brennan Center and
20 Common Cause.

21 THE COURT: Well, yes, that looks to me like
22 that's 7.

23 MR. ZINN ROWTHORN: Okay. Part of the problem
24 of the exhibits --

25 THE COURT: Eight --

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1 MR. ZINN ROWTHORN: -- I have, I think they are
2 numbered differently. Seven, eight -- all right, nine,
3 ten and 11. I have Exhibit 7 is a Clean Up Connecticut
4 press release. Exhibit 8 is a repeat. Exhibit 9 is
5 Suzanne Novak's written testimony. You know, those
6 exhibits -- you know, Exhibit 10 is her oral testimony.
7 Exhibit 11, I think, is the Brennan Center memo. Those I
8 thought were the exhibits that were now being referenced.

9 THE COURT: Yes, I thought you said 6 through
10 11, but --

11 MR. ZINN ROWTHORN: I may have misspoken, Your
12 Honor.

13 THE COURT: Yes, I agree, 7 through 11. Why
14 does hearsay bar the testimony?

15 MR. ZINN ROWTHORN: Because apparently, Your
16 Honor, they are being offered for the truth of the
17 assertion that this statute is unconstitutional in some
18 respect.

19 THE COURT: I don't understand that to be the
20 offer. I understand the offer to be the legislature was
21 told that whoever was testifying had concerns about the

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22 constitutional ity.

23 MR. ZINN ROWTHORN: If that's simply the fact
24 without any additional weight, as is being suggested, that
25 that's what it's due, then sure, that's essentially a

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1 public document. But, you know, I understand the proffer
2 to be much more meaningful than that. Your Honor ought to
3 be convinced, you know -- the statement was that these
4 statements, that these opinions about the
5 constitutionality of the statute ought to convince Your
6 Honor that the statute's unconstitutional.

7 THE COURT: Well, I understood the --

8 MR. ZINN ROWTHORN: That's a proof offer that's
9 in the fact of a statement offer.

10 THE COURT: Mr. Lopez said when I asked him
11 what's the relevance, he said the legislature had before
12 it alternatives and the fact that the legislature was
13 here, these documents make the legislature aware of
14 concerns about the constitutionality of the proposed
15 legislation. Seems to me it's not hearsay.

16 MR. ZINN ROWTHORN: Then Mr. Lopez ought to be a
17 little more precise then because some of the discussion, I
18 think the main points in the discussion had to do with the
19 qualifying criteria. Those issues were decided in 2005.
20 The legislature did decide to amend the organizational
21 expenditure provisions in 2006, so they did have some
22 alternatives before the legislature in 2006 with respect
23 to those provisions and, in fact, those provisions were
24 changed. So then I think the question is what relevance
25 do these statements have?

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1 But -- Your Honor, I would disagree with the
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2 purpose for the offer. I think the statement was if the
3 Governor thinks the Attorney General thinks Secretary
4 Garfield thinks that this statute is not constitutional,
5 then Your Honor should also conclude that it's
6 unconstituti onal .

7 THE COURT: All right. Let me hear why 7 and 8
8 are not hearsay.

9 MR. LOPEZ: Oh, first of all, 7 would be an
10 admi ssi on, I think, unless I'm overlooking -- you see this
11 Clean Up Connecticut campaign is a coalition of groups
12 that -- and the pressure is released by Andy Sauer. Andy
13 Sauer is the Expective Director of either Common Cause or
14 Citizens Action Group. In fact, he submitted a
15 declaration in this case. So it seems to me he wrote
16 this, or at least he distributed it. It's an admi ssi on.
17 Both Common Cause and Citizens Action are part of this
18 coalition. You can run down this list and I think that's
19 probative of something as well, that there are all sorts
20 of good government groups here that normally would support
21 public financing.

22 THE COURT: But there's no party to this case
23 that made these statements in 7 and 8, is there?

24 MR. LOPEZ: Yes, there is. Andy Sauer is the
25 Executive Director of Common Cause.

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1 MS. YOUN: He actually isn't anymore, and he was
2 submitted as a declarant in this case because I believe
3 the plai nti ffs had uncovered a document in this, in the
4 legislature history on which they wanted to depose him.
5 They asked for his deposition and we submitted a
6 declaration in response to that.

7 MR. LOPEZ: Well, Your Honor, both Common Cause
8 and Citizen Action Group are listed as members of the
9 Clean Up Connecticut campaign which was organized for
10 purpose of seeking amendments to the law.

11 THE COURT: Right. But, look, if I'm a member
12 of the Connecticut Bar Association and they issue a press
13 release and then I'm in litigation, that's not an
14 admission against me because I'm a member of the
15 Connecticut Bar Association. This is not, this is not a
16 statement of a party opponent.

17 MR. LOPEZ: Well, Your Honor -- I don't know why
18 they are doing this. I can direct the Court -- first of
19 all, I don't want to give up on this document, but there
20 was a hearing by the the GAE, a Government Administration
21 and Elections Committee.

22 THE COURT: Right.

23 MR. LOPEZ: And it was held on March 13, 2006.
24 It's attached to the declaration of Jeffrey Garfield as
25 Exhibit 4. And Common Cause testified --

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1 THE COURT: Okay, put their testimony in.

2 MR. LOPEZ: All right. So the testimony -- they
3 testified to the changes. They also submitted testimony,
4 I believe, and they were examined on it and they testified
5 in support of relaxing the qualifying criteria and closing
6 the organizational loopholes.

7 THE COURT: All right.

8 MR. LOPEZ: Now, they've raised the objection
9 -- I'm not sure -- I'm just not sure that I'm, I'm not
10 overlooking something, because I'd hate to lose these
11 exhibits because I do think they are important.

12 But 9 and 10 -- I mean that would be 8 and 9. I

13 don't know what else to say. Andy Sauer was the executive
14 director, one of the intervening parties in this case.
15 The intervening parties put their views into play. They
16 could have stayed on the sidelines. They are here. They
17 came to court and said let me be heard and now I'm asking
18 the Court to listen to them. He made this statement. And
19 under those circumstances I think the hearsay objection is
20 baseless, Your Honor.

21 THE COURT: All right. What about 11?

22 MR. LOPEZ: Well, same. This is a statement
23 that's on the letterhead of the Brennan Center but it's --
24 and we offer the Brennan Center, not because they are
25 parties to this case, not even because they are counsel in

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1 this case, but because they hold themselves out as
2 authorities on the subject of campaign finance reform.
3 But you'll notice under the -- actually Number 11 -- what
4 am I talking about -- I take that back. I was confused
5 here.

6 This is being sent to -- Dear Jeff, Karen and
7 Tom -- this is a party, this is, this is from Jeff
8 Garfield's office so he's a party opponent.

9 THE COURT: It's to him.

10 MR. LOPEZ: Oh, then it's from the defending
11 parties in the case.

12 MS. YOUN: Your Honor, we're not a party.

13 MR. LOPEZ: Well, the intervening parties.

14 MS. YOUN: We're not an intervenor in this case.
15 We are counsel in this case.

16 MR. ZINN ROWTHORN: Your Honor, this is not --
17 this I think is distinct from -- it was written testimony

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and oral testimony by the Brennan Center before the
19 legislature. I think that --

20 THE COURT: I understand.

21 MR. ZINN ROWTHORN: -- this is a letter.

22 THE COURT: I understand.

23 MR. ZINN ROWTHORN: Okay. I mean I can't see
24 any valid claim that this ought to come in.

25 MR. LOPEZ: Well then, Your Honor, I think I can

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1 admit this just as information that was considered by the
2 legislature. It's not offered for the truth but it was
3 available to the legislature as part of the legislative
4 record.

5 MR. ZINN ROWTHORN: I don't think it was, Your
6 Honor. Again, this is a letter between counsel and
7 individuals. This isn't a legislature document.

8 MS. MURPHY-OSBORNE: And the fact that it may
9 have been in a file in the SEEC does not mean it ever made
10 it before the legislature.

11 THE COURT: On the present record I'm going to
12 sustain the objections to Exhibits 7, 8 and 11 as hearsay
13 documents. If you want to come back later and offer
14 evidence that this was, in fact, presented to the
15 legislature and they considered it, then I'll reconsider
16 it.

17 I'm going to overrule the objection to Exhibits
18 9 and 10 substantially because 9 and 10 are part of the
19 record of the information presented to the legislature in
20 connection with consideration of the legislation and/or
21 amendments to it.

22 MR. ZINN ROWTHORN: Thank you, Your Honor.

23 MR. LOPEZ: All right. Well, having exhausted

24 that, Your Honor, then I would just for purposes of -- to
25 make sure the record covers this subject, I would just

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1 direct the Court again to the transcript of the testimony
2 before the Government Administration Elections that
3 occurred on March 13, 2006 in which the, the intervening
4 organizations in effect testified to the same thing that
5 they, that's outlined in the documents that have been
6 excluded.

7 I would also direct the Court to the minutes of
8 the Working Group hearing that was transcribed by Hogan &
9 Hartson because they weren't transcribed by the
10 Government. I'm not casting aspersions. There were no
11 minutes maintained and Hogan & Hartson, I believe,
12 transcribed the minutes. They are part of the record.
13 The defendants have introduced them as part of the record
14 as Garfield -- there's no table of contents here but I
15 believe they are Garfield 3 and 4, or 2 and 3. And the
16 Brennan Center 1, 2 and 3, Your Honor, and the Brennan
17 Center and Common Cause and Citizen Action all testified
18 in support of public financing. That is, Your Honor, this
19 follows a pattern, follows the models adopted in Maine and
20 Arizona.

21 MR. ZINN ROWTHORN: Your Honor, we do not have
22 an objection except a relevance objection that I
23 referenced earlier about the admission of the legislative
24 materials, and I think that's Your Honor's ruling, that
25 legislature materials come in, extra legislature materials

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1 don't. What I would suggest is we do have a basic
2 relevance objection to previous bills and some of that

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4 material I think comes as previous legislative proposals
5 that didn't pass.

6 THE COURT: All right. Well, I'll overrule that
7 objection and I'll hear it and if it doesn't have any
8 bearing, then I'll just ignore it.

9 MR. ZINN ROWTHORN: Thank you, Your Honor.

10 MR. LOPEZ: If I could return to the subject of
11 the '06 General Assembly. Despite the testimony of
12 Commissioner Garfield and the intervening organizations,
13 the legislature did not relax the qualified criteria.
14 When they failed to do this, Your Honor, despite the
15 absence of any testimony that participation by minor
16 parties threatened to burden the public fisc, there is
17 nothing in that March 06 transcript that addresses the
18 problems of, the burdens that minor parties might impose
19 on the public fisc.

20 The concern that was expressed by the
21 legislature was limited to the manipulation of the system
22 by major parties who would, in effect, game the system by
23 running straw candidates, and there were examples of
24 this -- very few, one or two or three over ten years in
25 Maine and Arizona, but that's what, that's the universe of
26 abuse that's out there, Your Honor.

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1 But the legislature, and we quote this in our
2 factual submissions, the legislature was concerned about
3 the gaming of the system by major party candidates, by
4 running straw candidates which may or may not include the
5 manipulation of minor party candidates. And I would
6 direct you to findings 32 and 33 on that point.

7 Now, the legislature did make some minor
8 amendments that are relevant to these proceedings, but in

9 our view they are relevant for no other purpose than to
10 show that the legislature's changes or amendments to the
11 law were more window dressing than substantive. They
12 addressed some minor details that did not remedy the --
13 did not remedy the guts of the problem, the problems
14 raised by Commissioner Garfield.

15 So, for instance, instead of completely closing
16 the organizational expenditure loophole, they narrowed it
17 for legislative and caucus committees by placing a cap on
18 how much each committee could spend. These committees can
19 nevertheless aggregate their expenditures in a way that
20 allows them to drive tens of thousands of dollars into
21 candidate campaigns together with the state's 169 town
22 committees and other party committees.

23 In Senate races, for instance, there are each,
24 each side of the aisle, the Democrats and the Republicans
25 can raise, their three leadership/caucus committees, they

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1 can raise unlimited amounts of money and they do, but they
2 can each directly distribute under the guise of
3 organizational expenditures, which are no different than a
4 contribution, up to \$10,000 each, to a publicly financed
5 candidate.

6 Party committees can do this and town committees
7 can do this, and in fact did do this. And town committees
8 provide the, according to George Jepsen who was deposed in
9 this case and was former General of the Democratic party,
10 they delivered thousands of dollars' worth of services
11 coordinated with candidates; literature drops, phone
12 banking, the mail, mailings.

13 Now, on the House side, the numbers are a little

14 lower but so are the cost of the races and the
15 aggregate -- not in the aggregate but each of the three
16 leadership committees can distribute up to \$3,500 each in
17 organizational expenditures and then that amount is
18 augmented by what the party and town committees can do.

19 Now, in my -- in our view, the most cynical
20 aspect of this, not only is it an end run or a loophole
21 around the, around the expenditure limits and the supposed
22 restriction on accepting contributions, but candidates can
23 actually go out and raise this money for the leadership
24 and caucus committees.

25 So, Jon Fonfara, for instance, in the First

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1 Senate District can actually go out -- if you're a
2 publicly financed candidate, you're only supposed to
3 accept public financing if you raise a specified amount of
4 qualifying contributions, and in \$100 increments.

5 So, Fonfara takes public financing, he can
6 actually go out and raise from AT&T PAC or Sikorsky PAC --
7 he can actually go out and raise -- I'm not sure what the
8 current contribution is, maybe 500 or 1,000 or I think
9 maybe actually over 1,500. He can raise a fortune and he
10 can put on arm around those very same people that public
11 financing is supposed to redress. And --

12 MR. ZINN ROWTHORN: Your Honor, just to be
13 clear, and I don't mean to interrupt but Mr. Lopez moves
14 quickly. He can't spend that, he can't raise
15 contributions from AT&T or whatever business PAC, he's
16 limited to spending his qualifying contributions, his
17 organizational expenditure contributions and his grant
18 amounts. He can't -- I'm not sure what the point is about
19 Senator Fonfara or anybody else raising money from

20 business PACs. I think the suggestion is that he somehow
21 spends that money in furtherance of his campaign.

22 MR. LOPEZ: Well, that's not -- I'll get to
23 that, that's part of the suggestion. The suggestion is a
24 lot more direct than that. The suggestion is public
25 financing is supposed to relieve publicly financed

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1 candidates from the burden and pressures and undue
2 influences of raising private money, but under the
3 organizational expenditure loophole, they actually can go
4 out and do that.

5 MR. ZINN ROWTHORN: Well, if Senator Fonfara
6 feels burdened by raising contributions from business
7 PACs, he's certainly not required to do so.

8 MR. LOPEZ: So, to the second point, these
9 committees can then turn around and, in effect, make
10 contributions. They call them organizational expenditures
11 but because the definition is so broadly worded, they can
12 in effect make contributions directly to the candidates
13 and, in fact, speaking of Mr. Fonfara -- well, it's a
14 newspaper article but they are going to try to introduce a
15 dozen newspaper articles. I pulled a newspaper article
16 from the New Haven Advocate where Fonfara was the
17 beneficiary of at least \$4,500 in these types of
18 expenditures.

19 MR. ZINN ROWTHORN: We're going to object to
20 that article.

21 MR. LOPEZ: All right. Now, what I also find a
22 little cynical about the organizational expenditure
23 loophole is that major party candidates through public
24 funding, they have to go out and raise seed money. They

1 the balance, that would be 13,500. In part, it's business
2 as usual. They can raise it with their leadership PACs.

3 THE COURT: Why would, why would that be the
4 case? The qualified contributions are limited to \$100
5 apiece, aren't they?

6 MR. LOPEZ: Yes.

7 THE COURT: So the leadership PAC, what are
8 they, eight, six or eight? You can get six or \$800?

9 MR. LOPEZ: No, let me back up, Your Honor.
10 You're right, because under the rules that govern
11 leadership PACs and what joint candidate party activity or
12 what joint PAC -- what joint candidate PAC activity they
13 can engage in, they can -- one of the activities they can
14 engage in, excuse me, is raising money, raising the
15 qualified contributions in \$100 increments. So what can
16 happen is the legislative leadership PAC and all can hold
17 a fundraiser where everyone comes with \$100 and they can
18 help the major party candidates satisfy the seed money
19 requirement.

20 THE COURT: So, you're saying indirectly in
21 effect the leadership committees will raise the money on
22 behalf of the candidate.

23 MR. LOPEZ: Right.

24 THE COURT: Not that the leadership committee is
25 making the qualifying contributions itself.

1 MR. LOPEZ: Right.

2 THE COURT: Right.

3 MR. LOPEZ: The only requirement is the
4 candidate has to be there at the fundraiser.

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THE COURT: Right.

MR. LOPEZ: Right. So the Senate Majority Leader X can hold a fundraiser, and as long as Candidate Y is there, they can raise money together in \$100 increments to satisfy the qualified contribution requirement, and that's in the guidelines that were issued by the CEP for governing organizational expenditures by contributing PACs.

Now, the Attorney General got up here and, you know, recommended to the court that significant changes were made in the organizational expenditure loopholes, they were narrowed somewhat. They didn't address it for statewide office, so we have a situation now where Governor Reil qualifies for public financing, gets 1,500 for primary or whatever, over \$1 million for primary, \$3 million for the general. She can go out and raise another \$3 million for state central committee or any of the town committees, and that money can come right back to her.

Now, they can't call it a contribution but, Your Honor, if you read the testimony Of Commissioner Garfield,

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it is in effect a contribution. The statute is written so broadly that the party can run a civil campaign to win the candidate behind the, the facade of the public financing restrictions.

MR. ZINN ROWTHORN: Your Honor, if I could just suggest one clarification, and I think it is an important one. Even at the statewide level, organizational contributions as contributions are not identical because organizational contributions are in kind contributions,

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10 things like holding -- you know, holding a fundraiser.
11 Even at the statewide level it is not, as Mr. Lopez
12 suggests, where the leadership committees can make
13 unlimited contributions to a gubernatorial campaign. Even
14 though limits haven't been addressed yet, the nature of
15 the contributions as in kind versus monetary still apply
16 in statewide.

17 MR. LOPEZ: Your Honor, I can read you the
18 definition of organizational expenditure. You can read
19 from the statute yourself. They've issued a fact sheet on
20 it. I'm not exaggerating anything. Commissioner Garfield
21 testified that they are in fact contributions and they
22 are. The only thing they can't do that I can tell from
23 the face of the statute is engage in negative advertising.
24 They can engage in positive advertising, but the only
25 thing that I can tell from the face of the statute is

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1 those organizational expenditures cannot be used to
2 engage in negative advertising and that seems to be the
3 only restriction.

4 They can basically run the candidate's
5 campaign. And you can satisfy yourself by reading the,
6 the statute, the terms of the statute, but I would also
7 direct the court to Plaintiff's 38 which is the
8 organizational fact sheet that's issued by either the CEP,
9 which sets this all out -- it speaks for itself.

10 Now, there were two other changes made in the
11 statute beside the organizational expenditure that would
12 be addressing the organizational expenditures. The
13 statute was amended to allow minor party candidates who
14 qualified for a partial grant to try to close the gap
15 between his grant and the grant of his major party

16 opponent. Now, that's a nice start in the right
17 direction. That's how the federal system works.

18 But, for some reason, and I don't know if it was
19 oversight or if it was -- I don't know if it was benign or
20 if it was malignant, but the legislature capped the --
21 placed a cap on the number, on the amount of contributions
22 you could actually go out and collect. So if you were
23 Governor Weicker and you qualified for one-third grant,
24 which is about \$1 million, and your opponent qualified for
25 three, they are telling Governor Weicker in that situation

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1 that you have to close the \$2 million funding gap \$100 at
2 a time.

3 You know, Governor Weicker submitted an
4 affidavit saying that's nonsense, it can't be done. And
5 he went down to the Supreme Court, comes out of Vermont,
6 says contribution limits, that no -- when you are
7 dependent on private financing limits, that will
8 unconstitutionally impede the ability of the candidates to
9 run in the federal campaign. And I would suggest that the
10 better alternative, according to Governor Weicker and
11 according to the federal system, is to lift contribution
12 limits or to allow the candidate to close the gap by
13 raising money in increments that correspond to the
14 increments that apply to nonparticipating candidates and
15 then in House and Senate. I think it's 1,500 in Governor
16 races -- it would be 3,500.

17 The law was also amended in an attempt to sort
18 of relieve the burden on partially funded minor party
19 candidates to allow them to get a post election grant if
20 they actually receive more than 20 percent of the votes.

21 So, if they qualify for partial grant of one-third, if
22 they actually did a good job and got more than 20 percent
23 of the vote, they'd actually be eligible for a post
24 election grant I think that would be equal to the full
25 grant.

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1 The problem is, again, there's no explanation
2 for why the legislature -- at least no explanation in the
3 record and no explanation provided by defendants because
4 we keep raising this issue. The problem is you are
5 required to accrue a deficit -- and "deficit" is a term of
6 art, and a deficit basically means a debt for services.
7 The problem is you can't collateralize that debt under the
8 SEEC's implementing rules with the promise that you're
9 going to get a grant. And you can't borrow the money from
10 a bank.

11 Under the federal system you can borrow the
12 money from a bank. You can use your own money. You can't
13 do any of that here, so it's really very difficult to
14 incur a deficit under Connecticut's program.

15 You know, the best shot is to hope someone will,
16 you know, do some printing for you, you know, at the last
17 stages of a campaign and, you know, wink wink, like I'll
18 get the money to you if I get 20 percent. You're not
19 allowed to say that but that's sort of the conversation
20 that has to, that has to occur.

21 MR. ZINN ROWTHORN: Objection, objection.
22 Actually mischaracterizes the testimony. We would refer
23 you to, Your Honor, to Commissioner Garfield's last
24 declaration on that point. Mr. Lopez is right, you can't
25 get served goods and services from a vendor on the

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1 condition, with payment being contingent on the condition
2 that you qualify for public financing. What you can do is
3 in the last week of a campaign you need to put out some
4 legislature, you can contract with a printer to print your
5 documents, payment will be the first of next month or
6 whenever, but yet you have to pay either way whether you
7 get the public financing.

8 Now, we've put in materials from Mr. Garfield
9 and others that that's actually quite normal in campaigns,
10 that payment would be like, you know, on a credit card.
11 You get your -- I'm not saying literally on a credit card
12 but you get, you contract for services, you pay next
13 month, you have to pay either way. But to suggest that
14 it's somehow, that there was no benefit from that
15 provision with -- I know I haven't seen any evidence and I
16 haven't heard any cited today to suggest that anyone has
17 tried, you know, and has been unable to enter some kind of
18 arrangement. We've had some speculation from Mr. DeRosa,
19 which we would object to, suggesting there's no benefit to
20 that system, but we think there is a real benefit to that.

21 MR. LOPEZ: Well, first of all --

22 MR. ZINN ROWTHORN: And it ought to at least be
23 characterized accurately.

24 MR. LOPEZ: First of all -- two comments. First
25 of all, Governor Weicker has testified in, for instance,

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1 in a statewide race you need to do that in advance, and
2 you're not going to convince -- and he says this in his
3 affidavit, you're not going to convince the local radio
4 station or -- you don't put that on credit. You pay for
5 that as you go. It needs to be paid for in advance. So,

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6 that's a situation where Governor Weicker, if he wanted to
7 close the gap, could not do that.

8 I would also make the point that under the
9 federal system, the most common sense way to do this is
10 you borrow money from the bank or you loan the money to
11 your own campaign. You can't do that under this program.

12 MR. ZINN ROWTHORN: Your Honor, that is an as
13 applied argument. This is how this will affect a
14 candidate, how it has affected candidates. In March we're
15 going to tell you how SEEC actually paid a candidate
16 \$4,000 in supplemental grant under the, under the
17 circumstances that I've outlined, but that's for March.

18 But, you know, you ought not, I think, take as
19 gospel Mr. Lopez's unsupported testimony that there's no,
20 that there's basically no value to the supplemental grant
21 system. We'll show you there is value.

22 THE COURT: Well, I think it's not necessarily
23 an as applied challenge. This is an argument about how
24 the statute operates and I think that's a facial
25 challenge.

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1 MR. ZINN ROWTHORN: Well, there's the terms of,
2 the terms of the statute, and then Mr. Lopez says that's
3 what it says but, in reality, it's impossible to do, no
4 one's going to give you credit, no one's going to give you
5 services. That's as it's applied and we're going to show
6 you that it has been applied to do exactly what Mr. Lopez
7 says it can't do.

8 MS. YOUN: I would also object to the continuing
9 mischaracterization that you can't finance yourself to
10 make up for, in order to obtain post election financing.
11 You can. There's no bar in the statute to that.

12 THE COURT: Okay. You know, let me just say
13 this to both sides. I can read the statute, you know, and
14 everybody's gloss on it isn't especially helpful. What
15 I'm more interested in is what is the record evidence in
16 support of your reading, in support of your position in
17 this case.

18 MR. LOPEZ: Finally, concerning the 2006
19 amendments, the legislature did not take the opportunity
20 to amend the statute to allow for post election grants for
21 candidates who failed to qualify on the front end. So if
22 you fail to qualify for public funding because you didn't
23 satisfy the prior vote total or because you weren't able
24 to go out and satisfy the signature requirement, but you
25 nevertheless receive 20 percent of the vote, this

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1 legislation does not allow for a grant under those
2 circumstances, and to be addressed in our briefs in
3 Buckley, it does, and it's an important consideration of
4 the court's analysis.

5 Now, following the failure of the legislature to
6 adopt in significant part the recommendation of
7 Commissioner Garfield, plaintiffs initiated this action.
8 Plaintiffs essentially crafted their complaint along the
9 lines previously identified by the Commissioner and the
10 intervening organizations. They allege that the CEP was
11 discriminatory and violated their 1st and 14th Amendment
12 rights.

13 Despite the concerns expressed by the defendants
14 in this case, they in our view reflexively moved to
15 dismiss arguing that the CEP fully comported with Buckley.
16 That position, Your Honor, is flat out contradicted by the

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17 testimony of Commissioner Garfield who testified to just
18 the opposite. While the motion was pending, the defendant
19 returned to the legislature twice. In 2007 they sought to
20 close another loophole in the law concerning exploratory
21 committees. And I would direct the Court to Findings 48
22 and 50 in the attached exhibits.

23 Now, by this time --

24 MR. ZINN ROWTHORN: I'm sorry, is this a
25 reference to Exhibit, Plaintiff's 15, Your Honor, might I

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1 inquire through the Court?

2 THE COURT: I'm reading it as referencing
3 Exhibits 14 and 16.

4 MR. LOPEZ: That's right. I misspoke, Your
5 Honor. Right, it would be Exhibits 15 and 16. I
6 apologize.

7 THE COURT: 15 and 16, right.

8 MR. LOPEZ: And now by this time --

9 MR. ZINN ROWTHORN: Your Honor, we would object
10 to 15, not to 16. 16 is legislature testimony. 15 is a
11 confidential memo from Beth Rotman in their personal
12 communications to Karen Hobert Flynn and Andy Sauer. We
13 think that's akin to the Brennan Center memo that Your
14 Honor excluded earlier. It's not legislative material.
15 It wasn't considered by the legislature in any fashion and
16 it's not an official statement of the State Election
17 Enforcement Commission with respect to any matter in this
18 lawsuit.

19 THE COURT: Why is 15 not hearsay?

20 MR. LOPEZ: Beth Rotman had by this time become
21 head of the State Elections Program and she wrote this
22 memo. She's a party defendant. She wrote this memo. It

23 concerns the exploratory committee she outlines in a
24 letter. First of all, it was produced in discovery, but
25 the fact that it was confidential and wasn't considered by

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1 the legislature seems to me neither here nor there. She's
2 a commissioner. She's writing to her constituents and
3 she's raising concerns and outlining a plan for closing
4 what she believed was a significant loophole in the law.

5 And, in fact, you know, if you consider that in
6 tandem with the next exhibit, which is the testimony of
7 Commissioner Rotman, you can see that there are -- where
8 she in fact testified to the legislature seeking to close
9 this loophole or amend the law in a way that would allow
10 this loophole to be exploited, I think you can see why
11 it's both relevant and why it's not hearsay. She's a
12 party defendant.

13 MR. ZINN ROWTHORN: She's not a party defendant,
14 Your Honor.

15 MR. LOPEZ: Well -- so, this is an official
16 capacity lawsuit, Your Honor.

17 MR. ZINN ROWTHORN: It's a personal capacity
18 memorandum.

19 THE COURT: What's the basis for that
20 suggestion?

21 MR. ZINN ROWTHORN: It's not -- there was no
22 foundation and it's not a statement authorized by the
23 Commission to take a position with respect to the issues
24 set forth in the memorandum. And we produced it in
25 discovery because it was broadly responsive to a discovery

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1 request. But we certainly didn't suggest in any way,

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shape or form that it was an official statement of the
3 Commission.

4 Now, you know, there's even an argument, Your
5 Honor, that Exhibit 16 is a submission, an official party
6 statement but, you know, we're not going to object to that
7 because that was a statement put before the legislature.
8 We don't think, you know, there's much relevance to it but
9 Number 15 is just -- it's not a statement of a party
10 opponent.

11 THE COURT: Well, I'm going to sustain the
12 objection to 15 on the present foundation. If you want to
13 come in and lay a foundation that this is an official
14 document, it doesn't appear to be on its face but if you
15 want to make it, lay a foundation this is an official
16 document, then I'll reconsider that.

17 MR. LOPEZ: But, Your Honor, does it matter
18 whether it's official if it's made by one of the party
19 defendants?

20 THE COURT: She's not a party defendant.

21 MR. LOPEZ: Your Honor, Ms. Rotman is not some
22 line level employee of the Commission. She is the head of
23 the agency.

24 THE COURT: Right.

25 MR. LOPEZ: She --

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1 THE COURT: If she writes a holiday card and
2 says, boy, that law we passed really stinks, you don't get
3 that into evidence. That's her personal view.

4 MR. LOPEZ: Let me ask you this. Would it be
5 more productive -- I don't mean to be glib -- can I call
6 this witness and say did you write this memo? Would that
7 lay the foundation? It seems to me unnecessary

8 considering she never denied writing this.

9 THE COURT: Right. It's not a question of
10 whether she wrote it, it's a question of the capacity in
11 which she wrote it. Did she write this as a citizen
12 interested in election issues or did she write this as
13 part of her job?

14 MR. LOPEZ: Your Honor, I can ask her that
15 question, did she write it on company time. Is that
16 where --

17 THE COURT: There's no, there's no indication on
18 the face of the document that this is her official
19 viewpoint as opposed to her personal viewpoint. It
20 doesn't have any letterhead. She doesn't indicate, you
21 know, I'm giving you the official opinion of the --

22 MR. LOPEZ: Your Honor, could I direct you to
23 Footnote 1, page three? I mean -- I could go back and
24 study this document. This just caught my eye, one of our
25 proposed legislative changes.

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1 THE COURT: What are you looking at?

2 MR. LOPEZ: Page three of Exhibit 15, footnote
3 that appears at the bottom of the page. I think that cuts
4 against their argument that this wasn't made as an
5 official statement.

6 THE COURT: I don't think that's sufficient to
7 make the document in effect self-authenticating. If you
8 want to, if you want to call her as a witness and lay a
9 foundation that this was her, part of her official duties,
10 you're free to do that.

11 MR. LOPEZ: Your Honor, okay, I'd rather not
12 call her as a witness because -- if you turn to the

13 following page, page four on that document, she's telling
14 Sauer, Andy Sauer, the head of the Common Cause or Citizen
15 Action, I propose the following language. She didn't
16 propose this in the abstract, she proposed it to the
17 legislature, Your Honor. And then the following document
18 is her testimony that's consistent with this proposal. I
19 think the two documents taken together provide sufficient
20 indicia this is the position of the CEP.

21 MR. ZINN ROWTHORN: Your Honor, just by way of
22 proffer, the Commission, the Commission's position comes
23 through the Commission. This would look and be very
24 different if this was anything other than a personal
25 capacity document. It's not the position, this memorandum

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1 wasn't authorized by the Commission. She wasn't directed
2 by the Commission to do it. The position wasn't vetted by
3 the Commission before it was set forth. You know, she was
4 a concerned, essentially a concerned citizen addressing
5 like minded concerned citizens on a topic not on behalf of
6 the SEEC. The next document, Your Honor --

7 THE COURT: Mr. Lopez, Mr. Lopez, Section three
8 begins "During my recent testimony before the legislature,
9 I suggested two alternative solutions to the legislature."
10 Why do you need Exhibit 15 if you have the testimony?

11 MR. LOPEZ: Because frankly the testimony before
12 the legislature is more obtuse. It covers a broader range
13 of -- a broader range of issues. And nowhere is the
14 issue of exploratory committees as succinctly stated as it
15 is here. In fact, as far as I can tell it's pretty well
16 disguised in the following document and you really have to
17 read with a careful eye. And there's, there's some very
18 helpful language here from the plaintiff's point of view

19 about how expenditure limits -- the exploratory limit
20 loophole could undermine the program. It's an end run
21 around the expenditure limits and --

22 THE COURT: Well, are you trying to get in the
23 text of the proposed amendment? Is that what you're
24 searching to get in, or are you trying to get in her
25 commentary about it?

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1 MR. LOPEZ: I'm trying to get in both and I'll
2 settle for either, Your Honor. If you're willing --

3 THE COURT: Well, call the witness. Did you
4 propose what's on page 3726 and 3727 to the legislature?

5 MR. ZINN ROWTHORN: Your Honor, we don't have an
6 objection, as I said, to testimony. It really isn't the
7 position of the Commission. I think quite a bit
8 unusually, Ms. Rotman was before the legislature as an
9 expert but not as a representative of the State Election
10 Enforcement Commission with respect to that testimony.
11 But it's legislative material so we don't object to it
12 coming in, including the language that she -- that may
13 have been included and presented by her to the legislature
14 as exemplars of possible alternatives.

15 THE COURT: Fine. So I understand, the proposed
16 statutory language on 3726, which is page four of this
17 Exhibit 15 and page five of Exhibit 15, there's no
18 objection to that?

19 MR. ZINN ROWTHORN: There may be better evidence
20 on that, Your Honor.

21 THE COURT: Well, fair enough but --

22 MR. ZINN ROWTHORN: Yes, limited to that,
23 because that is -- and I have to check with Ms. Rotman

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24 whether that is accurate and complete or whether it's a
25 paraphrase that is in some way -- I assume that's -- she

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1 wrote it so, you know -- but, yes, limited to that
2 material put before the legislature but not the balance of
3 it, which is her commentary.

4 THE COURT: All right. Well, I'll admit the
5 part to which there's no objection and, Mr. Lopez, you can
6 lay a foundation for the rest if you want to try or you
7 can live with my ruling excluding it.

8 MR. LOPEZ: Can I return to that issue, Your
9 Honor?

10 THE COURT: Sure. You know what? It's probably
11 time for our morning break. Why don't we take 15 or 20
12 minutes, Mr. Zinn Rowthorn, however long you need to look
13 through the exhibits and let me know.

14 MR. ZINN ROWTHORN: Mr. Feinberg and Mr. Dunn
15 were working on that while we were proceeding. I think
16 I'll check with them but --

17 MR. DUNN: If we can have about a 20 minute
18 break, I think that would be fine, Your Honor.

19 THE COURT: All right, let's take 20 minutes.
20 Come back at approximately 15 after 11.

21 MR. DUNN: Your Honor, could I just ask one
22 question about this procedure in terms of the objection of
23 the Exhibit. Mr. Feinberg mentioned that or -- I'm sorry,
24 Mr. Zinn Rowthorn mentioned the affidavits of Mr. DeRosa,
25 there. I think probably, we're probably going to have to

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1 talk paragraph by paragraph about what he says.

2 THE COURT: Right.

3 MR. DUNN: Do you want to do that in terms of
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4 parsing what would be admitted or not admitted, because he
5 does testify to the experience he had and the experience
6 the Green Party had and we have no objection to that
7 testimony, but where he starts speculating about what the
8 effects of all this are going to be on minor parties
9 generally or what other people had in mind, those are
10 portions we're going to object to. Now, if you want to go
11 through paragraph by paragraph after the break, we can do
12 that, Your Honor. I'm wondering if there's a more
13 efficient way to do that and how Your Honor would like to
14 proceed or Mr. Lopez would like to proceed.

15 THE COURT: You're specifically discussing the
16 supplemental declaration?

17 MR. DUNN: And the original declaration which
18 contain what are really arguments, speculations and
19 conclusions as to which he's not competent to testify. He
20 can testify to what he did and what the Green Party did
21 but he can't testify as to what the impact or offer
22 conclusions about what the effect of that is on minor
23 parties in general.

24 THE COURT: I think we ought to have a brief
25 argument on the question of his competence and I think

1 that I'm capable of figuring out what's opinion and what's
2 fact.

3 So I don't think we need to go through paragraph
4 by paragraph. I'm willing to do that if anybody wants to
5 but -- it seems to be fairly time-consuming but, you know,
6 if I make a ruling, for example, that I agree with you
7 that he's not competent to offer testimony about someone
8 else's motivation, I can figure out which paragraphs

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implicate that ruling and which don't.

10 MR. DUNN: Fair enough. I think we can do that
11 by example and talk about the situation and the
12 circumstances. Obviously if he were testifying about
13 that, we would object question by question as it was
14 asked, but I think the procedure you suggested is one that
15 makes sense. You agree?

16 MR. ZINN ROWTHORN: Yes.

17 THE COURT: Okay.

18 MR. DUNN: Thank you, Your Honor.

19 THE COURT: Sure. All right, tell you what. At
20 this point why don't we come back at 11:30. Have a nice
21 break.

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

24 THE COURT: Let's turn first to the question of
25 exhibits, and before we get into the objections I'm going

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1 to ask defense counsel to help us all out by putting
2 together a sheet that says here's our record.
3 Declaration, Jeffrey Garfield, and Exhibits 1 through 35
4 which have been docketed as number 317. Declaration of
5 Tom Jones, Exhibits 1 through 4 which is docketed as
6 Numbers 227. And if you could communicate that to
7 plaintiff's counsel this evening ideally, the plaintiff
8 should be prepared to do the flip of what the defendants
9 are now going to do. That is, say, well, we have no
10 problem with this, that or the other thing but we do
11 object to whatever you object to.

12 MS. YOUN: So, just to clarify, Your Honor,
13 you're basically asking us for a table of contents for the
14 exhibits that we plan to put forward?

15 THE COURT: As a practical matter I would call
16 it an exhibit list, but same idea. A document that sets
17 forth -- I don't want to miss something. I don't want to
18 have trouble finding something. I don't want to look at a
19 declarati on and --

20 MS. YOUN: Yes, I understand, Your Honor.

21 THE COURT: -- be confused about --

22 MR. ZINN ROWTHORN: We're happy to do that, Your
23 Honor.

24 THE COURT: All right, that would be great. And
25 then, Mr. Lopez, you should be prepared to come in armed

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1 with any objections, just as the defendants are doing now,
2 armed with any objections that you have to those items of
3 evi dence. Okay?

4 MR. LOPEZ: Okay.

5 THE COURT: All right. So, let's turn then to
6 pl ai nti ff' s exhi bi ts and the defendan t' s obje cti ons to
7 them. I've already sustained objections to Exhibi ts 7, 8,
8 11 and 15 with the exception of the portion that was
9 admi tted by agreement.

10 MR. DUNN: Your Honor, I take it, as with
11 Mr. Lopez, you don't mi nd i f I stay here and i f I si t
12 whi le I do thi s and page through --

13 THE COURT: That's fi ne.

14 MR. DUNN: I thi nk the next exhi bi ts beyond the
15 ones that have been di scussed al ready we wou ld obje ct to
16 i s Exhi bi t 24, and thi s i s an exhi bi t head ed Mi nor Party
17 and Peti ti oni ng Party Can di da tes Re cei vi ng Over 10 per cent
18 of the Vote. It appears to be a summary. Our best
19 recolle cti on i s that i t' s some thi ng prepared by some

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20 affiant and submitted as an exhibit to some declaration,
21 but it's not attached to that. I don't know where the
22 information comes from.

23 THE COURT: All right. Twenty-four?

24 MR. DUNN: Twenty-four, Your Honor.

25 THE COURT: Okay. Why don't you lay them all

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1 out and then I'll turn to plaintiff's counsel.

2 MR. DUNN: The next one is Exhibit 31, Your
3 Honor. This is, this appears to be material from the
4 Green Party's website and in particular I assume they are
5 the candidates they ran, but in the first instance they
6 refer to a whole bunch of races that I think have nothing
7 whatsoever to do with those proceedings.

8 And the second, a very summary column, I'm not
9 sure I fully understand and I'm not sure where the
10 information comes from, called Status, Votees, Percentage,
11 and we have no idea what that refers to or what's
12 included. And it appears to be a tiny little
13 condensation, Your Honor, of some larger portion of
14 material that would appear on the website, if I'm
15 understanding what I'm looking at.

16 You follow what I'm saying, Judge?

17 THE COURT: I don't follow the last part. The
18 status --

19 MR. DUNN: If you look at the last portion, I
20 think what this is is it purports to be a list of the
21 candidates who have run in elections from the Green
22 Party's website, that's what I'm intuiting we're looking
23 at.

24 THE COURT: Right.

25 MR. DUNN: And in the first instance, it looks
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1 I like a lot of these candidates and candidates don't have
2 a lot to do with these proceedings because they are not
3 candidates that have anything to do with this statutory
4 scheme.

5 THE COURT: All right.

6 MR. DUNN: But if you look at the right hand
7 side, you see a column that appears to be an inch or inch
8 and-a-half wide. Status, loads, and then percentage
9 symbol.

10 THE COURT: Yes.

11 MR. DUNN: I don't know what that is, where that
12 information comes from, what it's supposed to be. And I
13 am speculating, Your Honor, that it appears to be a
14 shrinkage of a column of material to sort of fit, and I
15 don't know what's included or excluded here. So we would
16 object because it's impossible to tell from this both what
17 that is, what it refers to and what the relevance of it
18 is. We also object to it on foundation and competence
19 grounds, therefore.

20 Yes, I think generally their own website is not
21 an admissible source of information, but the next exhibit
22 we would object to is Exhibit 33. This is I think
23 material from the Washington Post's website which appears
24 to be commentary in which they are quoting Ned Lamont in
25 his conversation about the Lieberman campaign and the

1 failure of Senator Lieberman to account for cash that,
2 that he had obtained in the election. There, I think we
3 have a whole series of objections including foundation,
4 hearsay and obviously relevance since this doesn't have

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anything to do with the Connecticut state election.

6 The next exhibit is 35, Your Honor. This is, I
7 think, a report which appears to be an appendix to a
8 report relating to commentary on the New Jersey statute,
9 and it's prepared apparently by the Center for Competitive
10 Politicians, so it is clearly hearsay. It is someone
11 else's conclusions or summaries about the experience of
12 another state. I think we're getting awfully far afield,
13 it seems to me, in terms of the proposition that this is
14 evidence. There are relevance, foundation, and I would
15 suggest competence objections to that.

16 The next is Exhibit 43, which is from the New
17 York Times.com, and it's talking about Ralph Nader's
18 qualification for matching funds in federal elections.
19 This also would be hearsay and relevance. We're talking
20 about the federal scheme, not this state.

21 And along a similar vein, Your Honor, because
22 obviously the -- Exhibit 44 is actually a filing by,
23 appears to be a Federal Election Commission filing by the
24 Nader for President campaign of 2004.

25 Next is Exhibit 45 which is a press release of a

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1 Working Party's family and we would object on grounds of
2 hearsay to that.

3 Okay. And then we would, we would object to
4 Exhibit 53 which is an editorial apparently from the New
5 York Times from last August commenting on this scheme.
6 I'm not sure what the opinion of, the relevance of the
7 opinion or the competence of the opinion from the New York
8 Times is on the scheme in terms of what it's being offered
9 for. But, in any event, it is obviously both hearsay and,
10 it seems to me, irrelevant and immaterial.

11 Yes, then that brings us, Your Honor, to a
12 series of exhibits that were submitted last week, I
13 believe, accompanying on December 3rd -- yes, I'm sorry,
14 December 3rd. They accompany the declaration of what's
15 his name, Narain, Stephen Narain, Your Honor. Some of
16 these appear to be materials from the state itself, and as
17 to those, subject only to verifying their authenticity and
18 completeness, we would have no objection but we haven't
19 had an opportunity to do that. And that includes material
20 that we've already discussed with respect to the 2008
21 election where we believe the material is incomplete and
22 we would request an opportunity to both supplement and
23 provide more up-to-date information with respect to those.

24 Specifically, beyond that, Your Honor, there's
25 Exhibit 66 which --

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1 THE COURT: Before you get beyond that, what are
2 you objecting to with respect to the Narain -- all of the
3 attachments?

4 MR. DUNN: The only thing I'm objecting to is to
5 the extent what he's attached are state data. We just
6 want to verify the completeness and accuracy of what has
7 been submitted. To the extent this is 2008 data, and some
8 of it is, we have the objection that was stated previously
9 with respect to 2008 data, that we believe this is
10 incomplete and may not in some circumstances be accurate.
11 And indeed, I understand, although I have not read it,
12 Mr. Narain, in fact, filed an affidavit last night in
13 which he was forthright enough to admit that at least some
14 of the information he submitted was either inaccurate or
15 incomplete because it has been updated and changed.

16 So I think it's very clear that this is a moving
17 target and that for all the reasons we stated, these are
18 issues with respect to the operation of the system in 2008
19 and the results and candidacies in the 2008 election where
20 it is not complete and we should have an opportunity to
21 make a complete record before the Court for all of the
22 reasons that I think have been discussed previously.

23 THE COURT: All right. So then you're onto 57?

24 MR. DUNN: No, I think I'm onto 66, Your Honor,
25 I think a column from the Hartford Courant or from its

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1 website. This appears to be an opinion column, I think,
2 or an article talking about the circumstances of the
3 ballot exclusion of Mr. Barr, the Libertarian
4 presidential candidate from the election ballot, and we
5 would object on grounds of both hearsay, foundation and
6 relevance.

7 And Exhibit 68, I believe, is similarly
8 objectionable. This is a similar article with respect to
9 ballot access for the 2008 election. This one I believe
10 is, appears to be from or purports to be from the New
11 Haven Advocate. And these, these newspaper reports which,
12 again, I'm assuming are being offered for the actual
13 substance of the commentary that's contained in them,
14 would be objectionable with respect to the commentary on
15 the grounds previously mentioned with respect to the
16 Hartford Courant.

17 I have the declaration of Mr. Nikolaidis -- I
18 hope I'm pronouncing that correctly -- which was filed
19 with the court. This is Exhibit A-8, Your Honor. It was
20 filed with the court in September and there are a number
21 of tables that are attached to this comparing candidate

22 receipts with protected grants, et cetera, and we've
23 already, I think, submitted some indication that that data
24 that is contained in the tables that are attached to this
25 declaration we believe are inaccurate and to some extent

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1 incomplete. We've already had some opportunity to rebut
2 that but data continues to be compiled and we object to
3 its submission in the form that it's contained in Exhibit
4 A-8 because of the fact that it's partial data, it's
5 incomplete data, and it's data that I think we all
6 recognize has been supplemented. As I said in the
7 submission that was made previously before the Court,
8 there was some discussion about some of the defects in
9 this data but that continues to be a problem and an issue.
10 I think except for the declarations and supplemental
11 declarations of Mr. DeRosa, that is the statement of the
12 exhibits to which we would object.

13 THE COURT: And with respect to DeRosa, you're
14 objecting, as I understand, only to the extent that DeRosa
15 purports to provide an opinion about the motivations or
16 attitudes or thoughts of others?

17 MR. DUNN: Well, and conclusions that he
18 believes can be drawn. He's not an expert witness. He's
19 a percipient witness. Maybe the easiest thing to look at
20 and the most blatant example, although I can give you --
21 we have this objection with respect to Exhibit A-1, his
22 earlier declaration, but if you look at his most recent
23 supplemental declaration, Your Honor, you know, we can
24 start with paragraph three, which is on page two.

25 You know, this is really a subject for expert

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1 testimony to the extent that what Mr. DeRosa is claiming
2 is that he has knowledge of the general experience of
3 minor party candidates and how they have reacted, to the
4 extent he's talking about his specific example, and there
5 are some discussions of his specific example later in the
6 affidavit. That's fine, he can testify to what he
7 experienced personally, but he can't testify that his
8 experience is universal or that his experience reflects
9 the experience that minor parties have had or independent
10 candidates have had generally. And he can't testify to
11 conclusions that he would ask the court to draw from his
12 own experience. If he got on the stand and tried to do
13 that, we would object that he's stating conclusions, that
14 he's offering opinions for which he hasn't been qualified.

15 And this is the subject on which we have offered
16 expert testimony and we will have our expert here
17 tomorrow, Your Honor, and Your Honor can question him and
18 I will question him about some of these subjects. But
19 Mr. DeRosa is just not qualified or competent to give that
20 kind of opinion testimony. He says, you know, look at the
21 first sentence of paragraph four, the increased
22 competition will also diminish the ability of third party
23 candidates to qualify for the CEP because it will be more
24 difficult for parties to attract the prior vote total
25 threshold in the three party race, and then the two party

1 race. You know, that's a pure political scientist's
2 conclusion, Your Honor. I mean it's just not the kind of
3 thing that Mr. DeRosa is in a position to testify to.

4 He also testifies or purports to testify in
5 various paragraphs here about what was, what went on in
6 other people's minds. For example, look at paragraph ten

7 on page four of this. He talked about his opponent. It
8 turns out he had a Republican opponent and that Republican
9 opponent did not qualify for financing under the CEP. So
10 there was a Republican who ran in the race in the First
11 Senate District but that Republican did not qualify. And
12 he then says I believe the promises of public financing
13 was a significant incentive for Ms. Rhue to jump into the
14 race. He's now testifying to her state of mind. How does
15 he know what were or were not incentives for Ms. Rhue's
16 candidacy, especially in light of the fact that she did,
17 in his words, jump into the race but did not in fact
18 qualify for financing and yet, I'm assuming from reading
19 this, continued to participate in the campaign
20 notwithstanding the fact that she was not financed.

21 He says he believes the media outlets paid more
22 attention to her candidacy because she belongs to a major
23 party. Well, that just constitutes pure speculation, Your
24 Honor. That's not only opinion, it's just nothing but
25 pure speculation. This affidavit is rife with what

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1 basically amounts to argument.

2 Now, if Mr. Lopez wants to stand up on the basis
3 of percipient testimony that Mr. DeRosa has given and make
4 those arguments to the Court, he's welcome to do so and
5 he's done so in his briefs. But he can't submit an
6 affidavit and say that the plaintiff is in a position to
7 testify to these things and that this is evidence that he
8 thinks the Court should rely upon. There's just a lot of
9 this throughout the affidavit and I think that it ought
10 not to be considered.

11 THE COURT: This is what we call in Connecticut

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a New York affidavit.

MR. DUNN: Point well taken. And the reason for that is it's exactly the kind of affidavit that lawyers submit in the New York State Supreme Court.

THE COURT: Exactly.

MR. DUNN: But the Federal Court even in New York, even in New York, Your Honor, in Federal Court --

MS. YOUN: It's a New York State affidavit.

MR. DUNN: Yes, I was going to say it's a New York State affidavit.

THE COURT: Okay.

MR. DUNN: And the same would be true -- just in Exhibit A-1, I won't go through it but most of the paragraphs from 25 through 50 of Mr. DeRosa's declaration,

Exhibit A-1, suffer from the same kind of vices, Your Honor.

THE COURT: Mr. Lopez, let's just take them up one at a time.

MR. LOPEZ: Let me just address Mr. DeRosa's affidavit. I mean Mr. DeRosa is basically testifying -- we can put him on the stand or we can do it in declaration form -- he's basically testifying that the, excuse me, that the implementation of the CEP has changed the dynamics of elections in Connecticut by making all their money available to major party candidates and by increasing the opportunities to major party candidates. And he's basically testifying that the law is going to make it more difficult for minor parties like him and for other minor parties to compete in that environment. I don't think there's anything speculative about that or there's any absence of foundation.

18 We know who Mike DeRosa is. Mike DeRosa -- we
19 laid the foundation on who he is just the same way we laid
20 out the foundation for who Governor Weicker is. You don't
21 see him getting up here other than saying Governor
22 Weicker's assertions are baseless. Governor Weicker's
23 assertions track Mike DeRosa's assertions; basically said
24 this is a rigged game. This is going to be very difficult
25 for us to compete on a level playing field and our already

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1 modest resources are going to be diluted.

2 He's qualified to say this. He's head of the
3 Green Party. He's been associated with them for many,
4 many years and he's a candidate. He's got first hand
5 experience about what happened in the first legislative
6 district.

7 And, Your Honor, the defendants' affidavits,
8 they are speaking out of both sides. The defendants'
9 affidavits is -- it never occurred to me to object. This
10 is a bench trial and in these type of cases, the court
11 wants to hear how the law is going to restrict speech or
12 not restrict speech and people are going to -- you can
13 look at it from the statute and you can hear from the
14 witnesses who are going to testify about how it's going to
15 restrict speech in the real world. Their affidavits just
16 made the opposite case.

17 THE COURT: Right.

18 MR. LOPEZ: We make the case the world's going
19 to be perfect, Your Honor, it's going to be a better place
20 for everyone and they are guilty of the same sin, if you
21 figure it's a New York sin.

22 THE COURT: Very well. The point is well taken

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23 that in terms of what the witness is competent to testify
24 about as opposed to argue about, the affidavit has got
25 both. The affidavit has both facts and argument in it.

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1 MR. LOPEZ: Fair enough.

2 THE COURT: And when I consider what are the
3 facts in this case I'm going to only consider the factual
4 statements that he has personal knowledge about. For
5 example, in paragraph four, which was cited, DeRosa goes
6 on in the second sentence to say, for example, I twice
7 previously polled more than ten percent of the vote, et
8 cetera. That's a perfectly acceptable fact, he had
9 personal knowledge of it, and then you can argue, as he
10 has already done, what that means.

11 So, I'm in effect going to grant the, or sustain
12 the objection with respect to DeRosa's declarations and
13 I'm going to consider as facts only the factual statements
14 that he's competent to provide.

15 MR. LOPEZ: But, Your Honor, we've laid a
16 foundation why he's competent. Who else would present
17 this testimony? There's no rule that says I have to put
18 on an expert to say that this is going to make it more
19 difficult for -- I already put on Governor Weicker, I
20 already put on Governor Weicker and Mike DeRosa. They are
21 the heads of their parties. They are saying how it's
22 going to make it more difficult for us to compete on a
23 level playing field. I'm at a loss why they don't have
24 the competence to offer that assessment.

25 THE COURT: The distinction is this. When he

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1 testifies that I, as head of the Green Party, or the Green
2 Party as a party, are concerned these things will happen,

3 that's a factual statement. It's talking about his state
4 of mind, his concern. When he says the increased
5 competition will also diminish the ability of third party
6 candidates to qualify for the CEP, that's an opinion about
7 lots of other people.

8 MR. LOPEZ: Then, Your Honor --

9 THE COURT: That's the distinction.

10 MR. LOPEZ: That's fine. It's just that
11 theirs -- they are guilty of the same thing and they
12 shouldn't have opened this door, frankly, because
13 nothing's coming in on their side if this is being
14 carved out for us.

15 THE COURT: Tomorrow you can make your
16 objection.

17 MR. LOPEZ: But I would ask the Court -- first
18 of all, I'm not sure what your -- what part you're
19 considering. You can give it the weight you want. You
20 can consider what you think he is competent to talk about
21 and not consider what you don't think he's competent to
22 talk about. You can read --

23 THE COURT: Right.

24 MR. LOPEZ: You can read this affidavit with the
25 understanding that when he's talking about third parties,

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1 he's talking about third parties like the Green Party, who
2 are at least similarly situated. He certainly is talking
3 about the Green Party and the fact that he says minor
4 parties, it will be more difficult. You can read that to
5 mean it will be more difficult for the Green Party or I
6 can redo the affidavit and narrow it, but --

7 THE COURT: I don't think you need to do that.

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THE COURT: I mean this is the equivalent of granting a motion to strike testimony. Just imagine I heard all the testimony from the witness stand in his declaration and then there's a motion to strike, and basically what I'm doing is I'm striking the opinion testimony and permitting the fact testimony. So to the extent that he has facts about the Green Party, himself, his experience, that's all permissible and you can argue the inferences to be drawn from that fact.

MR. LOPEZ: Fine. But I think, Your Honor, just to -- we're not quite where we want to end up because I think we laid the foundation, I think, under the circumstances perfectly appropriate for the Director of the Green Party, someone who's run for office time and time again, to give testimony about how the law will affect their behavior and people who are similarly situated. He's competent to do that. And if the

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1 defendants characterize this as opinion, if it falls
2 somewhere between opinion and fact, it's lay opinion
3 about -- it's competent lay opinion based on their
4 experience. It's not at all unusual in campaign finance
5 cases for political operatives to get up there and testify
6 about how far the law's implementation will, if you will,
7 affect them.

8 In Randall, for instance, the state party chairs
9 got up and testified this is how the law is going to
10 affect our fund raising and the fund raising of political
11 parties. Candidates get up there and say this is how it's
12 going to affect our fund raising ability, expenditure
13 limits. This is how the expenditure limits are going to

14 starve our campaigns. I mean these are the people that
15 get up there and testify. There's no requirement that you
16 put up individual candidates. It makes sense to put on a
17 party operative and they have put on a party operative.
18 They put up two. That's basic. Then they put up
19 Working Party candidates who are basically offering their
20 opinion, which I don't find objectionable, which I haven't
21 found objectionable up to this point. In this program it
22 is wonderful for them.

23 MR. DUNN: I don't think, Your Honor, Mr. Lopez
24 is understanding the distinction that I'm making, that I
25 think Your Honor has caught, which is there's no objection

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1 to Mr. DeRosa or Governor Wei cker testi fyi ng to what their
2 experience was, what they di d and what happened when they
3 ran for offi ce peti ti oni ng as mi nor party candi dates.
4 That is probati ve evi dence of whi ch they have perci pi ent
5 knowl edge.

6 The problem is they are not -- to the extent
7 that Mr. DeRosa or Governor Wei cker goes ahead and says on
8 the basi s of my experi ence, I have the fol lowi ng
9 concerns -- okay. To the extent their state of mi nds are
10 relevant, and I woul d suggest perhaps Mr. DeRosa and the
11 Green Party' s state of mi nd, the effect the statute has on
12 what -- their thi nki ng about their own behavi or, maybe
13 it' s relevant. I' m not sure, Your Honor, and I thi nk it' s
14 probati ve to the extent that they demonstate to you that
15 that' s based on facts rather than specul ati on and
16 supposi ti on.

17 But I thi nk you sai d to the extent that he talks
18 about hi s own Green Party' s experi ence or how it has

19 reacted or intends to react to the statute, that's fine,
20 but when you go beyond that -- and Mr. DeRosa does, and
21 Governor Weicker does too, and we would object to Governor
22 Weicker's doing it -- and extrapolates generally to the
23 world of minor party candidates and the effect that the
24 statute is, therefore, going to have on the world of minor
25 party candidates, that is impermissible because they are

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1 not -- that is the subject for expert opinion testimony.

2 Because otherwise they are offering an opinion
3 on a subject that we're going to offer a Ph.D political
4 scientist who has spent 30 years of his life studying
5 these subjects because he is an expert who is entitled to
6 have an opinion on what the effect of this statute
7 generally is going to be on minor parties, and that is a
8 hotly contested issue.

9 Now, Mr. Lopez can stand up in front of the
10 Court and argue based on Mr. DeRosa's evidence of what has
11 happened to the Green Party as a result of this statute
12 that the court should find it's going to have certain
13 effects, but that is argument or conclusion or opinion and
14 Mr. DeRosa is not entitled to testify to that, you're
15 absolutely right, and if Mr. Lopez put Mr. DeRosa on the
16 stand and asked him for his opinion, I would object on the
17 grounds that he is not a qualified expert and I don't
18 believe -- first of all, we were never told and I don't
19 think Mr. Lopez has previously tried to qualify him as an
20 expert --

21 THE COURT: But here's the point, here's the
22 point. I agree in terms of an evidentiary issue with your
23 position, but if Mr. Lopez wants to stand up and say you
24 should draw all the inferences that DeRosa drew in giving

25 his opinions, he's permitted to do that.

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1 MR. DUNN: But that is going to depend on your
2 willingness and the persuasiveness of doing this; that and
3 your determination whether you do it is going to depend on
4 the degree to which these opinions and those conclusions
5 are buttressed by evidence.

6 THE COURT: Of course.

7 MR. DUNN: But --

8 THE COURT: Of course.

9 MR. DUNN: But Mr. DeRosa's affidavit can't be
10 that evidence because he's not competent to offer those
11 opinions. He can offer the fact of what the Green Party
12 has done.

13 THE COURT: The facts, the facts. His opinion
14 is argument.

15 MR. DUNN: Right.

16 THE COURT: I don't have to, I don't have to
17 ignore the argument because it appears in the form of a
18 declaration rather than a statement of Mr. Lopez. That's
19 my only point. If I want to treat the opinion as
20 argument, I don't see any reason why I can't do that.

21 MR. DUNN: You can treat it as argument as long
22 as it's not evidentiary.

23 THE COURT: Right.

24 MR. DUNN: Ordinarily we do not have -- again,
25 this is the equivalent of a witness on the stand. We

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1 don't have witnesses on the stand making argument, and
2 ordinarily if a question is asked soliciting such
3 argument, it's objectionable on the ground that it's

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impermissible opinion.

THE COURT: Because that would be evidence.

MR. DUNN: Because that would be evidence.

THE COURT: Exactly.

MR. DUNN: Okay.

THE COURT: So I can take argument in whatever form, that's my only point. It can be from a lawyer, it can be from a declaration, it can be from whatever.

If Mr. Lopez wants to say, you know what, I can't make the argument any better than Mr. DeRosa made it in his declaration or I made it in my brief. I don't have to have him stand up and repeat what's already in the record in the form of argument. That's my only point.

MR. DUNN: I guess that's right, he could in argument say I can't say it any better than my client said it at a speech he gave last week, and read in argument a speech that would not come into evidence. It's the same as the distinction between evidentiary exhibits and demonstrative exhibits.

THE COURT: Right.

MR. DUNN: Demonstrative exhibits are before the court, they are to aid the court in reaching its

conclusion, but they are not evidence.

THE COURT: Exactly.

MR. DUNN: And as long as we understand all the speculation that Governor Weicker and Mr. DeRosa engage in their affidavits are argument, they may be persuasive as argument but are not evidence or facts on which the court will rely, we have no problem and we understand that in effect as evidence, the motion to strike them would be granted, but as argument, you're entitled to consider

10 anything that Your Honor thinks is appropriate.

11 THE COURT: There we go. That's where I'm
12 coming out. So I don't think it's a big problem for you,
13 Mr. Lopez.

14 MR. LOPEZ: Okay.

15 THE COURT: But just to be technical about it,
16 the evidence is the evidence. The argument is the
17 argument.

18 MR. LOPEZ: Okay.

19 THE COURT: Okay? All right, let's go back. We
20 have a bunch of exhibits here. Twenty-four.

21 MR. LOPEZ: If I can just turn to the Narain
22 declaration --

23 THE COURT: All right.

24 MR. LOPEZ: -- which appears in our latest
25 volume of exhibits on page ten. Just for clarification,

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1 the DeRosa declaration, we're going to strike those
2 portions that you find he's not competent to testify and
3 accept those portions that he's going to -- that you find
4 he's competent to testify.

5 THE COURT: Exactly.

6 MR. LOPEZ: Even though there's been no proffer
7 on each and every single one, you'll make that call.

8 THE COURT: Well, the call is essentially this.
9 If it's a matter about which he has personal knowledge and
10 is competent to testify, that's acceptable. It's his
11 extrapolation about others attitudes, incentives,
12 experiences about which he does not lay out his personal
13 knowledge, that's argument.

14 MR. LOPEZ: Well, then I would just ask you,

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15 Judge, when he says minor parties, just to read that with
16 the understanding -- which is the intent, by the way --

17 THE COURT: The Green Party is a minor party. I
18 understand.

19 MR. LOPEZ: Thank you.

20 THE COURT: All right. Narain.

21 MR. LOPEZ: So, Narain's declaration appears in
22 our final group of exhibits and it's Document A-10. I
23 understand that the defendants are basically reserving the
24 right to verify the information. Their objection is
25 limited to their reservation of the rights to verify the

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1 information. And if -- I have no -- well, my only
2 objection to that, Your Honor, is that, you know, we not
3 extend this process further. They had an opportunity --
4 they've had all this information, not the way we present
5 it, but they've had this declaration for a week and they
6 are saying the same, we've had their declarations for a
7 week. We're ready to move forward. They are not. That's
8 their problem.

9 THE COURT: Okay. The understanding that I have
10 about the position with respect to Narain is they're
11 principally concerned about the inclusion of 2008
12 experience evidence which they argue is incomplete and
13 potentially inaccurate.

14 MR. LOPEZ: Okay.

15 THE COURT: So that's what I understand their
16 position to be.

17 MR. ZINN ROWTHORN: And also irrelevant at this
18 stage.

19 THE COURT: Well, I understand, in a general way
20 which it may or may not be --

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MR. ZINN ROWTHORN: Right.

THE COURT: Right.

MR. LOPEZ: I can address that.

THE COURT: What I would suggest with respect to that, because the issue, I think, is going to be the

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1 subject of greater argument, that you not waste your time
2 today on the argument about the 2008 evidence.

3 MR. LOPEZ: Well -- well, Your Honor, I've tried
4 to convince you of this. There's something --

5 THE COURT: You may be right that it may be
6 permissible to consider 2008 evidence. I'm not going to
7 decide that today. I want to think about it. I want to
8 hear arguments on both sides. So I'm reserving on that
9 question, all right? So, for right now you should proceed
10 on the assumption that this is in until it's not in. All
11 right?

12 MR. LOPEZ: Okay.

13 THE COURT: I wouldn't waste your breath or your
14 time today arguing 2008 when we're going to take it up
15 later, probably on Thursday. Okay?

16 MR. LOPEZ: Well, Your Honor, that's fair
17 enough. Just that that's sort of the legislative history.
18 The grant amounts is frankly the guts of my case. It's
19 going to show how the process has become distorted by the
20 grant amounts and that's where I was going next. Grant
21 amounts were final. Those grants were done on
22 October 15th. We knew what those grant amounts are.
23 That's the only 2008 data.

24 THE COURT: Okay, let's save that part of your
25 case for now. Let's finish doing these exhibits, okay?

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1 Where I think we are is I've ruled on DeRosa, I've
2 reserved on Narain, and I'm waiting to hear argument on
3 the remainder, starting with 24.

4 MR. LOPEZ: Your Honor, I can't respond to 24
5 right now. I'm just not -- I'd have to link that exhibit
6 to somewhere in the --

7 THE COURT: Fine. All right, so --

8 MR. LOPEZ: -- in the briefing.

9 THE COURT: So I'm going to sustain the
10 objection without prejudice. You can come back and lay a
11 foundation for that. 24 is sustained.

12 MR. LOPEZ: Thirty-one, Your Honor, a lot of
13 what we've printed, a lot of our exhibits are downloaded
14 from the Secretary of State website, from the Green Party
15 website, from other websites. They were submitted and the
16 defendants have never raised -- they certainly didn't
17 raise any objections at the summary judgment. We were
18 proceeding with the understanding that these exhibits were
19 admissible and you would give them -- the Court would give
20 them whatever weight the Court thought appropriate.

21 In this particular case, this appears to be an
22 election history of what the Green Party's done in
23 Connecticut over the last 20 years, and I mean they are
24 strictly correct that it's hearsay but I thought, you
25 know, we could test that hearsay point. This is supposed

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1 to be a truncated procedure. I can put Mike on and he can
2 lay a foundation.

3 THE COURT: Let me ask you, am I mistaken that
4 elsewhere in the record we can find the results of any
5 relevant race in which a Green Party candidate was a

6 candidate? In other words, don't we have in the record
7 the results of every House and Senate and Statewide
8 election for the last ten years?

9 MR. LOPEZ: Properly, yes, but this document
10 goes beyond that because that includes their whole -- I
11 mean the defendant's argument is that the party as a whole
12 on every level is -- it's not to be taken seriously and
13 this document is at least designed to show that they have
14 significant presence in Connecticut, not only at the
15 legislative level but at the town levels and at the
16 congressional level. You know, they're a known quantity
17 out there. And this document is meant to rebut the
18 defendant's argument that the Green Party is, in fact, you
19 know, a completely fringe organization. I mean I could
20 get this in through state records. I'd have to go back
21 into -- I don't even know where the town results are. I
22 think that's run by the state. You get the idea.

23 MR. ZINN ROWTHORN: Your Honor, I think -- to
24 answer your question, I think we have put in, and I will
25 verify this but I think we have put in the statement of

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1 the vote by the Secretary of State for 2006, 2004, 2002
2 and maybe before. That's the official document that
3 reflects the total number of votes, the percentage of the
4 votes, the candidate's identities. So, I think that's in
5 there.

6 With respect to municipal races, we haven't, I
7 don't believe, put that in. I would suggest it's not
8 relevant. The program obviously doesn't apply to
9 municipal races. And just to sort of correct the notion
10 that has been repeated a number of times, it isn't our

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12 theme or intent to suggest that the Green Party per se is
13 not serious, it's not entitled to respect, it's not
14 important in the scheme of Connecticut politics.

15 What we are saying, we have simply made a
16 factual recitation about what they have been able to
17 achieve at the state level in the races to which the CEP
18 applied.

19 MR. LOPEZ: And we offered the lower level
20 elections as evidence that the Green Party has a presence
21 in the state and they are building the party up. They've
22 won some aldermanic seats in New Haven, council seats, I
23 think it's called, in Hartford, and they are winning them
24 now and that's relevant information.

25 Now, yes, Your Honor, that can probably be found
on some official website but that would require

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1 substantial effort to recreate that in this form.

2 THE COURT: I'm going to sustain the objection
3 to 31. It is a hearsay document. I think substantially
4 the pertinent information from that document is found
5 elsewhere in the record or it's information about which I
6 can take judicial notice.

7 MR. LOPEZ: Well, okay.

8 THE COURT: And, in other words, I can take
9 judicial notice of the fact that Joyce Chen ran for City
10 Council in New Haven as a Green Party candidate and was
11 elected.

12 MR. LOPEZ: And I made that proffer, ask the
13 court to take judicial notice of that.

14 Now, if I can turn to Document Number 33, I
15 believe, which is a newspaper article, again, there was
16 no -- see, I just feel like --

17 THE COURT: I understand your frustration but
18 right now we're talking evidence and newspaper articles
19 are a class of hearsay. If there's some purpose other
20 than the truth for which you're offering this, I'd be
21 interested in hearing it.

22 MR. LOPEZ: Your Honor, the defendants had a
23 chance in their response brief to raise these objections.
24 Isn't there some point where they are waived?

25 THE COURT: Look --

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1 MR. LOPEZ: This wouldn't be admissible on
2 summary judgment either, I imagine, and --

3 THE COURT: Right.

4 MR. LOPEZ: And they --

5 THE COURT: I'm not going to treat it as waived.

6 MR. LOPEZ: Well, it's offered obviously not for
7 the truth of the matter asserted but we don't know whether
8 or not the Senator --

9 THE COURT: Lieberman.

10 MR. LOPEZ: Lieberman engaged in the conduct
11 that's alleged in this case, but this article does report
12 that there was an FEC complaint filed and this is evidence
13 that an FEC complaint was filed.

14 MR. DUNN: And what's the relevance of a
15 complaint by Mr. Lamont --

16 MR. LOPEZ: I'm prepared to address that if you
17 want to proceed to that.

18 THE COURT: All right.

19 MR. LOPEZ: The relevance is that the defendants
20 have gone to extraordinary lengths, they've hired an
21 expert to, to make the case that the petitioning

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requirements are indeed modest and perfectly within
23 people's ability of minor parties to satisfy.

24 Now, one of the disputes was how much it cost to
25 go out there and collect the required number of signatures

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1 and how many raw signatures you have to actually go out
2 there and collect to meet the valid number, and in a
3 statewide office like 70 or 75, well, the record shows
4 this doesn't -- this is part of it but the broader record,
5 the public record shows that, or the record shows -- this
6 came in through their expert -- that Lieberman paid a
7 private petitioning firm 60 grand, four dollars a
8 signature, to go out and get 7,500 valid signatures and
9 they went out and got 15,000, which is consistent with our
10 assertion you have to collect twice the number of raw as
11 necessary, twice the number of raw to meet the valid
12 requirement. Excuse me.

13 So that's -- our point is, and the evidence does
14 not contradict this, there was 60,000 to collect 7,500
15 signatures. This article raises the specter that Senator
16 Lieberman actually, actually paid a lot more money,
17 hundreds of thousands more, to bring in out-of-state
18 canvassers and use them. And I'm not offering that for
19 the truth. I'm just offering, Your Honor, that an SEEC
20 complaint was made, and I can get the FEC complaint but is
21 that any less or more subject to the hearsay objection?

22 THE COURT: I'll going to sustain the objection
23 to 74 as hearsay and irrelevant.

24 What about 35?

25 MR. LOPEZ: This appears to be a report that was

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1 prepared for the New Jersey Legislature assisting the
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2 pilot public financing program. It ran in the '07
3 legislative session. It's similar in character and nature
4 to a report submitted by the defendants concerning the
5 Maine Clean Election Act and it's attached to one of
6 their, their reports. This is a publicly available
7 document and, as I said, it was submitted for the New
8 Jersey Legislature.

9 MS. YOUN: If I might be heard on the Maine
10 Clean Election Act document, this was a specific document
11 that we laid foundation with respect to that document.
12 That was independent --

13 THE COURT: Yes, we'll hear about that. We're
14 now here on 35 and I'm going to sustain the objection as
15 to hearsay.

16 MR. LOPEZ: I'm going to say there was a finding
17 by declaration that the defendants submitted with their
18 December 3rd submissions from the New Jersey Legislature
19 talking about how the independent expenditure provision
20 came into play. I just think there's an independent basis
21 to it that attests to the accuracy of this document.

22 THE COURT: All right. Forty-three?

23 MR. LOPEZ: Forty-three is another newspaper
24 article, Your Honor, reporting on the fact that Mr. Nader
25 received public financing. It's relevant to our claim

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1 that under the federal system, which I don't think is in
2 dispute, a minor party candidate and minor party
3 nomination are eligible for public financing and that
4 fact, that provision of the law corroborates the
5 information in here and there's no reason to doubt the
6 truthfulness or the veracity of the information that's

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8 contained in here.

9 THE COURT: Well, I can look at the law though,
10 the federal law. You don't need this document, which is a
11 hearsay document, and I'm going to exclude 43.

12 MR. LOPEZ: Did they object to 45, Your Honor?

13 THE COURT: Forty-four, I believe.

14 MR. LOPEZ: Which is a letter from Mr. Nader to
15 the Chairman of the FEC which is a petition for public
16 financing.

17 THE COURT: I believe it's been challenged as
18 hearsay and possibly it's irrelevant.

19 MR. LOPEZ: And I obviously think it's relevant
20 for the point that the minor party candidates have to
21 apply and be found eligible for public financing.

22 MR. DUNN: There's no dispute that minor parties
23 are eligible for whatever they are eligible for under the
24 federal statute, and the statute and the regulations they
25 are under would be the evidence of that and the court can
take judicial notice of it.

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1 THE COURT: And is there any dispute that Ralph
2 Nader qualified for public funding under the federal
3 program in the election year 2004?

4 MR. DUNN: No.

5 THE COURT: All right, thank you. So --

6 MR. DUNN: I'm not sure why it's relevant that
7 he did, but --

8 THE COURT: I'm going to exclude 44 as hearsay.
9 Forty-five?

10 MR. LOPEZ: Number 45 is a document that's
11 downloaded from the WFP website. That was a proper
12 witness in this case. We took their candidate's

13 deposition. This document is in all likelihood attached
14 to their -- they were examined on this document and this
15 document in all likelihood was attached to their
16 deposition. It is possible that it is not attached to
17 this deposition and they were, in fact, examined on a
18 different document to --

19 MS. YOUN: Your Honor, this was not an exhibit
20 at that deposition. They had the opportunity to take the
21 deposition of the family party candidate.

22 MR. LOPEZ: I'm not sure how the court treats
23 downloaded documents, Your Honor, but, once again, I could
24 have provided the court a link to the document instead of
25 the exhibit and --

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1 MS. YOUN: It's not an authenticity objection,
2 it's a hearsay objection.

3 MR. LOPEZ: I understand. But, nevertheless,
4 it's become the practice to provide courts with links to
5 materials -- excuse me.

6 MR. DUNN: It might help if I could understand
7 what this was being offered for, Mr. Lopez.

8 MR. LOPEZ: Basically there's a strategy of the
9 WFP not to run candidates but to engage in cross
10 endorsements.

11 MR. DUNN: Not to run candidates but only to
12 engage in the fusion candidate system?

13 MR. LOPEZ: I think so. We made that argument
14 before in my brief and why this was introduced, our
15 position is --

16 THE COURT: I understand, I understand, but it's
17 still hearsay. I'm going to exclude it.

18 MR. DUNN: I also think, if that's the point,
19 it's contradicted by Mr. Green's testimony which is in the
20 record.

21 THE COURT: It's out. Fifty-three?

22 MR. LOPEZ: Fifty-three is a newspaper article
23 again from the Times in which the editorial sings the
24 praises of the public financing program, and it is
25 consistent with your Court's ruling. Would normally be

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1 hearsay except this particular article was reprinted on
2 the SEEC website for the purposes of promoting the success
3 of the CEP, and this was downloaded directly from their
4 website and I think it's still on their website.

5 THE COURT: I take it it's the last sentence
6 that you're interested in?

7 MR. LOPEZ: Right --

8 THE COURT: Is that right?

9 MR. LOPEZ: For the record, no, Your Honor. I'm
10 interested in the fact that the SEEC is accomplishing its
11 goals in increasing competition in Connecticut the same
12 way that it increased the competition in Maine. I mean the
13 defendants have actually taken the position here that the
14 playing field has not changed and that the competition is
15 going to be unaffected and --

16 THE COURT: Well, yes, all right. This is again
17 a hearsay document. I'm going to exclude 53.

18 Sixty-six? Sixty-six, let me just tell you 66
19 appears to be hearsay. I don't see any reason why I can't
20 take judicial notice of Judge Hall's decision in that
21 case, which I assume is what you want me to take notice
22 of.

23 MR. DUNN: We certainly don't dispute, Your

24 Honor, that Judge Hall's decision is subject to judicial
25 notice and if that's the fact, then the fact of Mr. Barr's

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1 conclusion would be in balance with that. I don't think
2 it's in -- there's no controversy about that.

3 THE COURT: I assume what he's trying to show is
4 that Mr. Barr submitted 12,000 signatures to meet the
5 7,500 signature requirement which I believe is included
6 within Judge Hall's decision in that case.

7 MR. DUNN: Right, but what those signatures are,
8 where they came from and how they were gathered, I don't
9 know whether that's the subject of Judge Hall's decision
10 or not, whatever Judge Hall found, Judge Hall found, and
11 whatever her decision is, it is, and I certainly agree you
12 can take judicial notice but there's a lot of other things
13 here, including comments by Mr. Barr's campaign manager
14 that I think would be at least double hearsay.

15 THE COURT: I've already said it's hearsay.

16 MR. DUNN: Yes.

17 MR. LOPEZ: And I imagine, Your Honor, it would
18 be consistent with your -- to be consistent with your
19 ruling, I think 68 is the last document, that that would
20 also be hearsay just simply because it's a newspaper
21 article. But to the extent there's a relevance objection,
22 we believe there's plenty or a significant amount of
23 relevant information in this article about the
24 difficulties faced by the working family party candidate
25 who sought public financing in this case.

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1 THE COURT: Well, I'm going to exclude 68 as
2 well, as hearsay. It doesn't mean you can't prove that

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4 some other way, but not through your article. You want to
5 get Mr. Barr's affidavit? That's fine.

6 MR. LOPEZ: Very good, Your Honor. All right.
7 I think that's all.

8 THE COURT: I think that's all of the
9 objections. Oh, Nikolaidis, we didn't touch on.
10 Nikolaidis, I think is in the same camp as Narain, the
11 principal objection being the 2008 issue which we'll take
12 up in detail later.

13 MR. DUNN: What -- the inaccuracies in the
14 Nikolaidis declaration are to some extent the subject of
15 competing discussion, and the problem is if we -- we can't
16 admit Nikolaidis without understanding the degree to which
17 what is in or attached to the Nikolaidis declaration has
18 previously been the subject of dispute or is disputed, the
19 accuracy of the material that is attached there is and has
20 been disputed.

21 THE COURT: Right. I'm reserving on Nikolaidis.

22 MR. DUNN: I'm sorry?

23 THE COURT: And Narain.

24 MR. DUNN: Okay.

25 MR. ZINN ROWTHORN: Your Honor, if I may just
inquire, I believe your ruling on the DeRosa declaration

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1 also encompassed our objections to portions of the Weicker
2 declaration, is that correct?

3 THE COURT: To the extent he's offering what
4 would be expert testimony, correct.

5 MR. ZINN ROWTHORN: Thank you.

6 THE COURT: I'll treat it as argument.

7 MR. ZINN ROWTHORN: Thank you.

8 THE COURT: All right. Mr. Lopez?

9 MR. LOPEZ: Your Honor, I'm going to finish up
10 the legislative history piece of this. I don't think it's
11 going to take very long, but then I would ask the court if
12 we could break at that time if it's convenient because --

13 THE COURT: Yes.

14 MR. LOPEZ: I was going to ask the court to work
15 with the Narain data and --

16 THE COURT: You can still do that. I haven't
17 excluded it yet.

18 MR. LOPEZ: I see. Okay.

19 THE COURT: I've reserved, so you can do what
20 you want to do and then if there comes a point where I
21 exclude it, in effect, I'm going to strike it.

22 MR. LOPEZ: All right. I think I was talking
23 about the period immediately following the court's
24 decision denying defendant's motion to dismiss -- that's
25 not exactly right. I was talking about the return to the

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1 2007 legislature and the motion that is still pending and
2 we were talking about the proposals made by the CEP to
3 close the exploratory, excuse me, committee loophole, and
4 I would just explain how the -- the loophole wasn't closed
5 and the legislation didn't take any action on it.

6 Let me just explain that the significance of
7 this, it's not immediately apparent from the statute. You
8 have to understand how Connecticut campaign finance laws
9 work, which is a challenge. But basically a candidate,
10 and you're more likely to see this at the statewide level
11 based on my experience, a candidate can go into, a senator
12 can raise unlimited amounts of money and spend unlimited
13 amounts of money at the regular, at the generally

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14 applicable limits, and 40 days prior to the primary, the
15 candidate can come in, or 30 days prior to the primary the
16 candidate can come in and say I want to run as a public
17 finance candidate, and as long as -- and they are not
18 restricted from doing that. Of course, they have a
19 surplus that has to be accounted for but as long as they
20 spent all the money, that's money under the bridge. And
21 that is the reason this loophole was sought to be closed.

22 Now, we submit that that provision, like the
23 organizational expenditure provision, undermines the
24 purposes of the statute, and we're going hear from the
25 defendants and you'll hear from me later that the state

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1 alleges certain compelling state interests in this
2 legislation, and encouraging candidates to accept public
3 financing and principle interest is to remove their
4 dependence on private money. And these two loopholes
5 disserve that interest. And perhaps the exploratory
6 committee loophole isn't as cynical as the organizational
7 expenditure loophole is but it is nevertheless a
8 significant enough loophole that it merited the concern of
9 the CEP who sought the legislative change. And, as I
10 said, the legislature did not amend the statute to close
11 it out.

12 Now, in the '08 legislative session, and this
13 followed the issuance of the court's opinion, the
14 legislature did make a change in the law, and the change
15 they made actually made it easier for participating
16 candidates to receive supplemental grants based on excess
17 expenditures.

18 Under the prior law, or under the law as it
19 originally was enacted, a candidate who received a

20 supplemental grant had to escrow it, who received a
21 supplement grant triggered by the excess expenditure, had
22 to escrow it and the legislation -- and you could only
23 spend it in direct proportion to each, each dollar --
24 dollar for dollar.

25 The amended provision allows the candidates to

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1 receive a 25, a grant equal to 25 percent of the
2 supplemental grant based on the first dollar that the
3 outside candidate spends over the expenditure limit and
4 then there's no escrow requirement. They actually receive
5 it and spend it that day.

6 So, in a Senate race, for example -- I can take
7 the Governor, the Governor race; the base grant is
8 \$3 million. Governor Weicker comes along, excuse me,
9 Governor Weicker -- someone or someone similarly situated,
10 doesn't apply for public financing, he raises \$3,000,001
11 and Governor Weicker's publicly financed opponent will
12 receive immediately a grant, 25 percent, of \$750,000 and
13 can go out and spend it. And that's the kind of abuses --
14 once Governor Weicker actually raises \$3 million plus
15 25 percent, then -- the \$3,000,750, then another
16 25 percent grant is triggered. And so we have a situation
17 there where the funding is -- there is always a state
18 sanctioned funding disparity between the publicly financed
19 candidate and the privately financed candidate in the
20 circumstance that I describe.

21 And with those comments, I just want to break,
22 bring that part of my presentation to a close about the
23 legislative background.

24 THE COURT: Okay. Is everybody okay taking

1 All right. We'll have our lunch recess now. Have a nice
2 one and --

3 MR. ZINN ROWTHORN: Thank you, Your Honor.

4 THE COURT: -- see you then.

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

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

12 (1:30 O'CLOCK, P. M.)

13 THE COURT: We're missing a few. Should we go
14 ahead and start or --

15 MR. ZINN ROWTHORN: Yes, that's fine, Your
16 Honor.

17 THE COURT: All right.

18 MR. ZINN ROWTHORN: I think they are on their
19 way in.

20 THE COURT: Okay. Mr. Lopez?

21 MR. LOPEZ: Your Honor, I think our case boils
22 down to a very simple fact. Has to do with the ease with
23 which major party candidates can qualify for public
24 funding relative to minor party candidates. The ease with
25 which they can qualify will increase as a matter of fact.

1 It's not just intuitive from the face of the statute, it's
2 as a matter of fact. It will increase their electoral
3 opportunities in ways that are not earned or justified by
4 their actual political strength in the state.

5 Major party candidates presumptively qualify for
6 full public funding grants in all legislative and
7 constitutional offices in which they face another major
8 party opponent. This is true, even though a handful of
9 elections, and I emphasize only a handful of elections,
10 each cycle are considered or being played or held in what
11 in the vernacular is known as swing districts.

12 According to the defendant's own expert, who
13 we'll hear from tomorrow, and I'm referring to an expert
14 report he's given us, a safe district or an uncompetitive
15 district is where one candidate wins by 20 points. Other
16 political scientists would peg that at ten points, but
17 their expert pegs it at 20 points, a 60/40 break.

18 And I -- excuse me -- if the defendants or the
19 major party candidates in this state were held to the same
20 standards as the minor parties, based on the '06 election
21 results they would fail to qualify for 43 percent of the
22 legislative districts. These districts were previously
23 abandoned by one of the major parties or where one of the
24 major party candidates failed to even get 20 percent of
25 the vote. And I refer you to F-2 and generally that would

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1 be Plaintiff's Findings 2 and Plaintiff's Findings
2 generally 69, 73, where we break this all out, and it's
3 all probably available at the Secretary of State website.

4 By the defendant's expert's standard, a district
5 is competitive where the winning candidate prevails at
6 least at the 20 percent margin. By that definition, Your
7 Honor, 72 percent of Senate races and 83 percent of House
8 races were uncompetitive in '06. This trend and for that
9 particular finding, I refer you to the Finding 70. Again

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10 this data, this is pulled from the Secretary of State
11 website.

12 This trend continued in '08. We have the
13 election results, Your Honor. We've tabulated them.
14 Basically we've cut and pasted it from the Secretary of
15 State website, and they are contained as an attachment to,
16 to the Narain declaration which is at 810 and it would be
17 Attachments 3 and 4.

18 Now -- excuse me -- last night, we -- I hate to
19 concede this point but it's true, generally the Secretary
20 of State certifies the election results by the end of
21 November. This has been the practice in the '06, the '04,
22 the '02, the '00 elections.

23 If you go to the Secretary of State link, they
24 are in red. When we prepared the tables in the Narain
25 declaration showing what the margins were, who got what,

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1 we compared those tables about two weeks ago, the results
2 had not yet been certified. They are still not certified.
3 They should be imminently.

4 So the data recorded in the Narain declaration
5 at three and four, located on table three and four for the
6 Senate races is slightly different than what the data of
7 the Secretary of State's website shows now because it's
8 continuously being tweaked. But the --

9 MR. ZINN ROWTHORN: Your Honor, we have two
10 general objections to this Table 3. I think we've
11 highlighted them already. One is that, as Mr. Lopez
12 acknowledges, this data is still evolving.

13 Secondly, I think there's a thematic relevance
14 problem here. We've seen this and addressed it throughout
15 the briefing. Plaintiffs point to major party races where

16 one major party beats the other, say 60/40, and they say
17 that's not competitive. Of course that's not the proper
18 measurement. That's not what we are talking about here
19 because -- that's the one hand.

20 On the other hand, the claim is that minor
21 parties ought to be able to qualify for some level of
22 funding at 3, 4 or 5 percent of the vote. So -- and what
23 we're talking about is a system that grants funds at 10,
24 15 or 20 percent of the vote. Those are the relevant
25 numbers. Twenty percent is not a random number under

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1 state law. It's the number at which a party is considered
2 to be a major party.

3 So, while it is true that there are a lot of
4 races between major parties that Mr. Lopez points to, or
5 where one candidate beats another by up to 20 points or
6 more in some instances. Those races, the losing major
7 party -- we've set this out in our summary judgment motion
8 but also -- you know, and will do so again in March -- the
9 losing major party so far outstrips the performance of the
10 minor party, you know, that we really have to be careful
11 that we're comparing apples and apples. There's one.

12 On the one hand, he's saying we ought to look at
13 this notion of competitive races, you know, where a major
14 party beats another major party by 20 percent. On the
15 other hand, he's saying minor parties are making
16 significant showings at 5 percent. So, you know, that's
17 why -- that's our relevance objection.

18 I think we need to be clear on our phraseology,
19 too, when we talk about competitive and I think that is
20 fundamentally a misleading term. So we have a relevance

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21 objection and we also have the objection that we spoke
22 about earlier about some of this data being in flux.

23 THE COURT: All right. Well, I'm going to
24 overrule the relevance objection, and as I said before,
25 reserve on the other.

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1 MR. LOPEZ: So, Your Honor, you have the
2 benefits of Tables 3 and 4. If I can impose on you to
3 turn to Table 3, I'd just like to walk you through that.

4 THE COURT: I have it.

5 MR. LOPEZ: Okay. Basically this Table 3 lists
6 the election results and the election results for the '08
7 Senate election in Connecticut, and then lists their
8 percentage of votes. And halfway across the street -- I
9 mean the page, it lists major party candidates who ran
10 unopposed, the major, and the next column, which I think
11 is significant and I'd like to flag this, is major party
12 candidates who receive at least 20 percent more votes than
13 the major party opponent.

14 In this column, and then the last column is the
15 candidates who would receive CEP grants, and if you just
16 go through -- and you don't have to because I've done it
17 for you, Your Honor -- but if you would just compare the
18 major party candidates who received 20 percent grants and
19 the major party candidates who lost by more than 20
20 points, you'll come to a total, that there were nine major
21 party candidates who received full public financing grants
22 who lost by at least 20 points.

23 And the relevance of this -- you ruled on the
24 relevance but we proffer it or offer it to underscore the
25 point that there are major party candidates who are in

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1 effect running uncompetitive campaigns and later we'll
2 find out that these candidates in the past haven't raised
3 the kind of money that's anywhere near what they get under
4 the CEP funding.

5 The point of this though is to show that major
6 party candidates who receive full funding are nevertheless
7 getting, for lack of a better phrase, their head handed to
8 them. In nine of the districts where they, where they
9 ran, they lost by more than 20 points, the numbers on the
10 House side on Table 4, though there were 33 major party
11 candidates who lost by at least 20 points who received
12 full funding grants.

13 MR. ZINN ROWTHORN: Your Honor, I don't want to
14 belabor the point but I think on page 26 there's an
15 example of what I'm talking about, and in the 12th Senate
16 district, this is one of those races identified by
17 Mr. Lopez as an uncompetitive district. You know, Senator
18 Meyer received 60 percent, the Republican opponent
19 received 40 percent. I think what's being suggested is
20 that, you know, the Republican candidate in that district
21 is more similarly situated to a minor party candidate than
22 he is to the Democratic party candidate. We're talking
23 about --

24 THE COURT: Where are you looking, which page?

25 MR. ZINN ROWTHORN: I'm look at page 26, it's

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1 Table 3 of the Narain declaration. I'm sorry, it's page
2 26 of the whole document. It's page 3 of Table 3.

3 THE COURT: Okay.

4 MR. ZINN ROWTHORN: You know, I think the
5 suggestion is that you ought to, you know, on the one hand

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6 consider the minor party candidate, the potential minor
7 party candidate similarly situated to this Republican who
8 got 40 percent of the vote, you know, whereas I think what
9 the claim is, you know, is that minor party candidates
10 should be getting full funding at 5 percent of the vote.
11 It's clear to me when I look at this that you can't, you
12 can't conclude from this, and for many other reasons we
13 put before the court, that minor parties are similarly
14 situated to non-major parties in party dominated
15 districts.

16 THE COURT: All right. You're going to have
17 your day tomorrow.

18 MR. ZINN ROWTHORN: Yes.

19 THE COURT: And we're getting a lot of
20 interruptions of Mr. Lopez, and they are fine for
21 objections but if it's an opposing argument, let's save
22 that for tomorrow and I'm sure he'll show you the same
23 courtesy.

24 MR. LOPEZ: Your Honor, you know, and of course
25 the point of this evidence is to show that there are --

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1 well, we've already established that most elections in
2 Connecticut aren't competitive, yet, yet all major parties
3 are basically entitled to participate in the system and
4 they are participating in various races, and I'll cite in
5 the record where that is, but putting aside the districts
6 that continue to be abandoned, which still represent about
7 a third of the districts, of the remaining districts,
8 major parties are participating and they are losing by a
9 landslide of the majority, not according to me but
10 according to the defendant's experts and based on the
11 general view of the political scientists of the world what

12 a lopsided victory is.

13 Now, the defendants' position is that the state
14 has an interest in funding someone who gets 30 -- if you
15 scroll down, you'll see a number of candidates who got 30
16 or less than 30 percent of the vote. The state has an
17 interest in funding those candidates. That's distinct
18 from their interests in funding minor party candidates who
19 receive less than that. As a legal matter we could
20 contest that point and say the state's interest, the
21 state's interest isn't limiting the hopeless candidates
22 for noncompetitive elections. Then we have to use the
23 universe of noncompetitive elections, and I think the
24 Tables 3 and 4 show this data very nicely, or support that
25 position.

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1 I would also submit that the party registration
2 numbers are not very helpful to the state but that other
3 major party candidates can qualify or any candidate can
4 qualify for major party status. Any party can, quite
5 frankly, for major parties, based on the results of the
6 last gubernatorial election or based on the registration
7 numbers and cut off at 20 percent, the defendants attach
8 significance to that. I don't attach any particular
9 significance to that. I don't see why the government's
10 exercising its authority and leveling the playing field in
11 what is in effect a party dominant state. Why is the
12 government trying to close the gap between the Democrats
13 who hold a 65/35 advantage? I don't see that as
14 legitimate government interest.

15 But as a policy matter, I don't represent any
16 Democrats who are complaining. As a policy matter the

17 defendants want to close that gap. Our point is they have
18 to invite our clients to participate. You can't subsidize
19 one inferior group of candidates and not the other.
20 That's all that does is to ensure that the Republicans are
21 in fact a partisan party. In most cases it is.

22 THE COURT: So, your argument is that although
23 the legislature enjoys significant discretion to pick the
24 threshold level, they abuse that discretion or exercise it
25 in an unconstitutional manner in picking the 20 percent

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1 number?

2 MR. LOPEZ: That is right. By taking the
3 20 percent number, they are in fact, as it turns out,
4 conferring substantial electoral-related benefit on
5 inferior major party candidates that is unearned, and
6 under the First Amendment you can't do that. The
7 government has to remain neutral.

8 For inferior major party candidates, public
9 financing, you know, it's a proxy. It's a substitute for
10 private dollars in most cases. But for inferior major
11 party candidates who don't have any record of raising the
12 kind of money they are going to be getting under the
13 public financing system, much less running these
14 independent systems, it's a benefit. And once you think
15 of it as a benefit as opposed to a substitute, then it's
16 an easy step to conclude that the government can't
17 discriminate in how they distribute those benefits.

18 The case law is ample. It doesn't usually
19 involve the Supreme Court. Davis gives us some guidance
20 now. It talks about a benefit to one, denied to another,
21 is a constitutional burden. But the law was clear before
22 that. Buckley really isn't the case to look to on this

23 because Buckley, there is the implication in Buckley, the
24 case law in the lower court is clear, including 2nd
25 Circuit law, Your Honor, that you can't just arbitrarily

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1 give major party candidates a benefit. And I can cite you
2 to the Postal Subsidy case by Judge Weinstein in Brooklyn.
3 Major party candidates automatically got a postal subsidy,
4 fourth class mail rate. Judge Weinstein says no, that's a
5 benefit, you can't give them that benefit because you're
6 taking sides and arbitrarily denying it to minor party
7 candidates.

8 There's a case involving voter registration
9 lists that was decided by a three judge court in the
10 Southern District, where major party candidates
11 automatically got voter registration, minor party
12 candidates were denied that. The three judge court said
13 you can't give a gift to a major party and deny it to
14 minor parties who need this benefit the most. This was
15 summarily affirmed by the Supreme Court. I would say that
16 has precedential weight, it does carry precedential
17 weight.

18 Bank v. Chase, we missed that the first time
19 around you cited it because that's a home run for us.
20 It's basically this case. Bank v. Chase out of Minnesota,
21 you know, public financing was distributed through the
22 parties. The parties were distributed the money on an
23 equal basis through legislative districts. A three judge
24 court says you can't do that. That artificially inflates
25 the strength and arbitrarily inflates the strength of the

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1 weak major party candidates and gives them the advantage

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3 in the district where they would otherwise not have that
4 advantage. That case was also summarily affirmed by the
5 Supreme Court.

6 The case I was referring to from the Southern
7 District, the Social Party case, that came back to the 2nd
8 Circuit ten years later because the state tweaked the
9 statute and didn't really change the effect, and in the
10 2nd Circuit it was a very broad opinion that says you
11 can't give the voter registration to just the major party
12 candidates. You can't deny it to the group that needs it
13 the most.

14 So, you think of public financing, it's a
15 benefit, Your Honor, to those candidates who wouldn't
16 otherwise have the ability to compete. Then that brings
17 us into a game of why is the government giving them the
18 benefit, and if they are giving them a benefit, why isn't
19 the benefit being given to other, to other so-called
20 inferior candidates?

21 I wanted to talk about party registration
22 numbers. I got sidetracked. But party registration,
23 that's an alternative way to get money to achieve major
24 party status. If your Governor actually loses, to take an
25 example, 19 percent of the vote in the next term, excuse
me, you could nevertheless -- in the next cycle, the

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1 Republicans would nevertheless maintain major party
2 affiliation by virtue of the party registration numbers.
3 That's because the cut-off is at 20 percent.

4 The defendants would have us believe that the
5 Republicans and the Democrats stay on some kind of level
6 footing when it comes to party registration. Your Honor,
7 do you know the Republicans have about a 20.1 or 2 percent

8 registration number in this state? The Republicans -- the
9 Democrats are about 37. Everyone else is unaffiliated.

10 In just about half of the House and Senate
11 districts, Your Honor, and I refer you to the website for
12 the registration numbers. I have it in my findings. In
13 just about half of the Senate and General Assembly
14 districts, the Republicans don't even constitute
15 20 percent. So -- okay.

16 Look, the only realistic requirement that major
17 party candidates have to comply with in addition to
18 winning their party's nomination is that they have to
19 raise a modest, for them, amount of qualifying
20 contributions that are required under the statute.

21 George Jepsen testified in his deposition,
22 Plaintiff's Exhibit 20 at 84, 85, that this is a mere
23 formality for major party candidates because they can
24 easily tap into the party structure to raise these
25 qualified contributions. And, as explained earlier, they

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1 can actually avail themselves of the benefits of the
2 contributions from the legislative leadership committees.
3 They can help them raise that money, not contributions,
4 but they can avail themselves of the services of the
5 major leadership committees.

6 What we know about the qualifying contributions
7 is that, from the '08 cycle, is that scores of major party
8 candidates who either previously, who are running in
9 previously abandoned districts or who are running in
10 districts in which they've never been competitive, qualify
11 for public financing.

12 MR. ZINN ROWTHORN: Your Honor, that, of course,

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14 is one of the things, that is one of the areas that we
15 object --

16 THE COURT: Sorry?

17 MR. ZINN ROWTHORN: That is one of the areas we
18 object to any testimony or evidence coming out, the level
19 of competitiveness in the 2008 election.

20 THE COURT: Okay. I've reserved that.

21 MR. ZINN ROWTHORN: Thank you, Your Honor. Just
22 making it for the record.

23 THE COURT: Sure.

24 MR. LOPEZ: Now, Your Honor, in addition to the
25 ease with which major party candidates can qualify, and I
would like you to think about the qualifying contributions

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1 as a statutory preference, just the way that the major
2 party status is, and I make that argument because, as I
3 said, it is a mere formality to raise this money for a
4 major party candidate, so for all intent and purposes,
5 major party candidates, taking into consideration their
6 status of major party candidates, and taking into
7 consideration the ease by which they can raise qualified
8 contributions, are presumptively qualified to participate
9 in the public financing. And I would like, I would ask
10 the court to think about that, and I think the evidence
11 bears that out by the number of previously uncompetitive
12 major party candidates who are now competing and getting
13 full public financing grants.

14 Conversely, the burden of petitioning the prior
15 voters and the qualifying criteria of the minor candidate
16 is substantially greater and will weed out, in fact, minor
17 party candidates who stand in relatively same position as
18 other inferior major party candidates and, in fact, if

19 able to stay in, became a stronger position than the major
20 party candidate in many districts.

21 Now, I would ask the court to turn to the Narain
22 declaration, and start with Table 1, page one. All we've
23 done here, Your Honor, is list in order of who's going to
24 benefit the most from the public finance, the district,
25 the 2008 candidate, what they got in the primary, what

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1 they got in the general, what the total expenditure limit
2 would be. In fact, they are in at 20 percent from their
3 qualifying contributions.

4 And then we have a column for the '06 candidate,
5 and then we have the receipts for the '06 candidate where
6 a candidate didn't run, we would show there were no
7 receipts in '06, and then you will see what the total
8 increase, how -- our point is you'll see from the last
9 column how dramatically the CEP funding grants will
10 increase the financial resources and ultimately the
11 electoral opportunities of many major party candidates.
12 And we can just -- this particular document goes on for
13 three pages and if you -- it's just ironic that Jon
14 Fonfara is the biggest recipient on Table 1 because that
15 happens to be the district that Michael DeRosa ran in.
16 And when Michael DeRosa ran against Fonfara in '04,
17 Fonfara was only opposed by DeRosa and spent \$4,000,
18 according to the expenditure data. And you can see that
19 Fonfara is now receiving in this cycle \$138,000.

20 Now, the defendants would have you believe that
21 that's neither here nor there. It makes no difference.
22 It doesn't affect the playing field. We would take the
23 position that Mike DeRosa is now competing in a much more

24 difficult environment. You see what happened here is
25 Fonfara drew a primary opponent because the party at the

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1 time in the district, they both got \$75,000. There's
2 never been an primary in that district before so two
3 Democrats dominating the stage during the primary period
4 get \$75,000 each, got all the attention of the media, and
5 then, you know, Fonfara proceeded to the general election.
6 Fonfara also drew a major party opponent. She didn't
7 qualify for public funding, I'm not sure why, what the
8 circumstances were, but the fact that she was drawn into
9 the race triggered an \$85,000 full grant for Jon Fonfara.
10 But the net result being that Jon Fonfara heads our list
11 of the primary beneficiary or the largest beneficiary
12 under the public financing system, and it just so happens
13 the current district where my candidate was running and
14 where my candidate's relative position was much stronger,
15 if you will, prior to the introduction of this money into
16 the district.

17 MS. YOUN: Your Honor, I have an objection to
18 register about the foundation and relevance of this table.
19 You'll see that on this table, if you turn to, for
20 example, the fourth line, a district where a candidate
21 previously had not run and is now running is treated as
22 \$100,000 increase in major party expenditures. That's a
23 debatable point. Plaintiffs can present their evidence if
24 they'd like. However, where that does affect the analysis
25 is where you go down to the average, because if you're

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1 going to treat a district where a candidate previously did
2 not run as a \$100,000 increase, then logically and
3 consistently you would also have to treat a race in which

4 there used to be, in which there used to be two candidates
5 and now there's only one major party candidate, as a
6 \$100,000 decrease.

7 You have to balance out both sides of the
8 equation. That way, that's kind of -- I think we can
9 understand that from accounting practice. You know, if
10 you're going to treat an additional candidate as a
11 \$100,000 increase, you have to have a candidate who chose
12 not to run as a \$100,000 dollar decrease. Therefore, I
13 would object to the average decreases for not actually
14 reporting, not actually showing what they purport to show.

15 THE COURT: Well, you know, I think that's an
16 argument that goes to what to draw from this exhibit.

17 MS. YOUN: Okay.

18 THE COURT: Rather than admissibility.

19 MR. ZINN ROWTHORN: Your Honor, I just want to
20 emphasize here this is a primary area of where they think
21 the as applied 2008 information is misleading and I, at
22 this stage I want to point out, to give a little context,
23 in 2006 there was no Republican in the first senatorial
24 district the Green Party ran, got 5.9 percent. This time,
25 with public funding, according to Mr. Lopez, the highest

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1 increase in the state, the Green Party ran, got 5 percent.
2 2002, there was a Republican, obviously no Republican
3 campaign financing. Mr. DeRosa ran, he got 5.8 percent.

4 So I think we have to be very careful with this
5 sort of perceived wisdom that Mr. Lopez sort of takes as
6 an article of faith that increased major party spending is
7 going to have some sort of direct corrosive effect on the
8 Green Party's participation.

9
10 what this additional funding means, if anything, for the
11 Green Party, but I think it's very dangerous and
12 misleading to suggest that just by virtue of the fact that
13 there is increased funding, they are going to do worse.
14 It hasn't been borne out. And I know that's an
15 appropriate argument for March.

16 THE COURT: All right.

17 MR. LOPEZ: Happy to let you peruse the table,
18 Table 1, Your Honor. I think the first two pages show how
19 dramatically the increases are going to be for the
20 candidates who are listed on the first two pages, and it's
21 no coincidence that the increases are most significant in
22 districts that were previously abandoned or in districts
23 where candidates raised very little money at best.

24 Okay. Now, Your Honor, just turning to page 3
25 which is, shows you the flip side, the candidates who, by

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1 not participating, or who by agreeing to participate in
2 the public financing program, will see a decline in their
3 permissible expenditure.

4 Now, Your Honor, if you go down to the bottom
5 where the fall-off is the greatest, you can see how the
6 last two in District 27 and District 16 and possibly in
7 District 21, sort of, you know, are the outliers that skew
8 the average, but also you'll notice that they are
9 incumbents. In fact, you'll notice I think the last
10 one -- 11, the last 12 of all incumbents and they are all
11 strong safe incumbents and they are not participating
12 because they are all strong and safe.

13 MR. ZINN ROWTHORN: Your Honor, that is exactly
14 where we have a problem. I can hardly list the

15 suppositions that are totally unwarranted in that
16 statement.

17 THE COURT: The statement isn't evidence; it's
18 argument.

19 MR. ZINN ROWTHORN: I know, but it's a proffer
20 about the relevance of this testimony and I would suggest
21 to you that none of that is true and it's certainly not
22 demonstrated by the record.

23 THE COURT: Okay.

24 MR. ZINN ROWTHORN: Thank you, Your Honor.

25 MR. LOPEZ: But, Your Honor, I have a response.

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1 If you look at the last eight or nine candidates who are
2 strong incumbents, who did participate, at least half of
3 these candidates are running either unopposed or face
4 totally limited opposition, and they refused grants, and
5 that partly explains why the fall off is so great. If
6 they had drawn a major party opponent, the fall off would
7 be significantly less.

8 So, the real data, the important data from our
9 point of view is contained within the first few pages. I
10 won't take you through the house data because it's 151
11 districts, but if you want to just flip to Table 2, you
12 can turn to the first two pages and you can just see, it
13 just goes on and on and on about how major party
14 candidates are going to benefit under this program.

15 Now, you raise the objection, I believe, that we
16 didn't back out candidates in Senate districts, to be
17 particular, who are now in newly contested 2008 Senate
18 districts. You want us to include that data somehow from
19 the accounting principle. I don't know -- accounting

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20 principles don't govern this evidence. This evidence is
21 focused on how this is going to improve the chances of
22 major party candidates. But if you look at the Nikolaidis
23 table, if I can take you to the, it's A-8 which is the
24 bound volume --

25 THE COURT: I have it.

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1 MR. LOPEZ: If I can take you to page five of
2 the Nikolaidis declaration, which is the second
3 declaration -- no, the first declaration, and I would take
4 you down to the bottom of that, and in Part 6 and what
5 Ms. Youn wants me to do if I'm talking about accounting
6 principles, averages, and I'm not necessarily talking
7 about averages, I'm asking the court to focus on the
8 most -- on those districts where the major party candidate
9 are going to benefit the most. But if you did want to
10 back out the receipts from the '06 losers that aren't
11 competing in '08, you would be backing out someone who
12 raised \$5,000, if that person participated, they'd get 85.
13 You'd be backing out someone who raised 151, they would
14 get a net decrease and then the last fellow was 25,000 and
15 that person, 25 to five, so -- excuse me.

16 Now, the way the grants are going to increase
17 the funding for major party candidates should come as no
18 surprise to the defendants. When the legislation was
19 being considered they had the benefit of some OLR reports
20 which are included in our exhibits and I imagine in the
21 Defendant's exhibits as well. I would direct you to
22 Plaintiff's Finding 80 which contains the relevant
23 statutory or the relevant cite to the Secretary of State
24 website. And the OLR report shows that in Senate and
25 House races, median expenditures were actually tens of

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1 thousands of dollars below what the grant amounts are
2 going to be, particularly in Senate races, meaning the
3 expenditure was 61 K and the grant amount is 85 K and that
4 doesn't include primary grants, supplemental grants.

5 In House races the median expenditure was 14 K
6 and the grant amounts are at 25 K, and that 25 K doesn't
7 include the value of the fault finding contribution which
8 kicks it up another \$5,000. It doesn't include primary
9 grants and it doesn't include any supplemental grants. So
10 the median expenditures are 14,000 when actual
11 expenditures under the CEP in a House race in '08 are
12 \$30,000 and the Senate race median expenditures are
13 \$61,000, when actual expenditures, permissible
14 expenditures in '08 Senate race and future races would be
15 at least \$100,000.

16 Now, what's interesting about this OLR Report,
17 Your Honor, because it is an official report and the
18 defendants can't really object to it the way they raise
19 objection to the data we compiled, is that it doesn't
20 include expenditures by, by candidates who fail to file
21 their expenditure report because they are not required to
22 because they didn't raise \$1,000, and that encompasses a
23 big group of minor party candidates and independent
24 party candidates. In cases of major party candidates, if
25 you factor in those the spending of those candidates, you

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1 will see that median expenditures are actually
2 significantly, significantly lower.

3 I would also emphasize to the court, and this
4 came up in the testimony of George Jepsen, again who's the

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6 chair of the Democratic party, sometime in the last ten
7 years -- and I'm looking for a cite for you, it's in our
8 proposed findings -- but he testified that the reason
9 candidates raise large amounts of monies is that they are
10 raising not necessarily because that's what it costs to
11 run a campaign, you will often find strong incumbents
12 raising large amounts of money because under the prior law
13 they were able to roll over that money into ongoing
14 committees that they can control, or they could donate it
15 to other exit committees and help other candidates. You
16 can't do that anymore but the large amounts of money that
17 were raised by strong incumbents in '06 and '04, and often
18 in cases where they are uncontested, is not indicative of
19 the amount of money that's necessary to win a campaign.
20 And this data or the median expenditure data in the OLR
21 Report doesn't take that into consideration.

22 The data we've prepared reporting '06
23 expenditures doesn't take that into consideration and
24 there's really no way to take, you know, to quantify that,
25 but the Court can infer that or, you know, why is a strong
incumbent like Andrew McConnell raising \$170,000 when he's

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1 running unopposed -- excuse me -- as he was.

2 I would make the final point about the role of
3 money in legislative races, that it's going to have the
4 ancillary, maybe unintended effect of driving up
5 expenditures for candidates who previously ran opposed.
6 Take Jon Fonfara. He never really -- he didn't have a
7 major party opponent and mostly in the three or four last
8 election cycles, Jon Fonfara is in the First District.
9 That's where Mike DeRosa was in. He never really raised,
10 had to raise a lot of money to hold that seat.

11 And Fonfara is not unique. There's Senate,
12 there's -- 33 percent of the candidates run unopposed from
13 year to year. That's about 12, right? I think that was
14 the case this year as well. Those candidates historically
15 never had to raise money to hold that seat. They
16 either -- some of them raised it because they had more
17 ambition and were using the money for other purposes, but
18 a lot of them, like Fonfara, didn't raise the money. He
19 only raised \$12,000 in 2004 and \$36,000 in 2006. And what
20 public financing does here when you draw, when it compels
21 second major party candidates to leave the race, is it
22 drives up the amount of money and spending that is going
23 to occur and that's going to be available for Fonfara.

24 And, again, this is in the nature of a benefit,
25 Your Honor. That's our point. And you know, we don't

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1 know how the court's going to come down on that issue but,
2 you know, our view is it's not the role of the state to
3 provide these types of benefits. It's one thing to
4 provide candidates with money that is roughly what the
5 market would produce, but you can't destroy the market.
6 And I think Davis gives us a good lesson that -- and I
7 think the lower court cases I referred to, including the
8 2nd Circuit decision, are helpful on that point as well.

9 And, finally, I would, on this issue I would ask
10 the court to turn to finding 92 in our proposed findings,
11 which is not an exhibit, so -- and I don't know if you
12 have that before you, Your Honor. It's Finding 92.

13 THE COURT: I have it.

14 MR. LOPEZ: Just, it's a table of what's going
15 to happen in statewide elections.

16

17

MR. LOPEZ: Right. And the pattern's the same.

18

We can concede that if Governor A is in a race for

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Governor, the matching -- I mean the grants, you know, are

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somewhat lower or correspond roughly to the amount raised

21

in the previous statewide elections. But, again, that is,

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you know, that's before you factor in the potential for

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matching funds under the supplemental --

24

MR. ZINN ROWTHORN: Your Honor, this is

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obviously one of those reports that we object to. We

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1

think it's premature and inaccurate. I just want to point

2

out this chart contains a basic inaccuracy that we pointed

3

out to plaintiffs at the summary judgment stage, which is

4

that Lieutenant Governor candidates do not get a separate

5

grant but they are credited in this chart with getting

6

\$750,000 grant, which is the size of the grant for other

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statewide candidates besides Lieutenant Governor. There's

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a gubernatorial ticket, general election grant, so there's

9

some basic mistakes here.

10

You know, there's also reference to a lot of

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these 2006 statewide candidates. You know, these

12

candidates would not have, based on the number of

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contributions, in many instances would not qualify,

14

wouldn't have met the numerical, the quantum of

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contributions necessary to qualify. But the basic point

16

is it's clearly in very basic ways, you know, faulty on

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its factual assertion but it's also, we think, premature

18

and --

19

THE COURT: How is it premature? It talks about

20

2006.

21

MR. ZINN ROWTHORN: Well, there's, you know,

22 there's assertion of what they are going to get under the
23 CEP. That's premature, Your Honor. We don't know --

24 THE COURT: Okay, I don't read it that way, as
25 what they are going to get. I read it as the available,

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1 theoretically available under the statute.

2 MR. ZINN ROWTHORN: But it's akin to these
3 theory charts. They are attempting to show Your Honor
4 what the increases will be. You know, we're going to get
5 to a point in March we'll be able to tell you on the
6 legislative level what the increases will be and at some
7 point we'll be there on the statewide level, but it's not
8 possible just in a vacuum for Your Honor to determine what
9 the increase will be.

10 MR. LOPEZ: Your Honor, I'll confine my response
11 to correcting an error that Mr. Rowthorn correctly pointed
12 out. In the Lieutenant Governor race, you don't get a
13 general grant. You do get a primary grant and I actually
14 just learned that. Maybe I've been told previously, but I
15 did figure that out in the last two or three days and I'm
16 glad he flagged it so it doesn't remain in the record.

17 But Lieutenant Governors nevertheless do get a
18 primary grant of \$375,000 and that's exactly what Scott
19 Slifka got. And then if you look at the three candidates
20 who ran for Lieutenant Governor, you see the Republican
21 only raised \$33,000. The losing Democratic candidate in
22 the primary only raised \$181,000. The winning Lieutenant
23 Governor raised over \$500,000.

24 But the impact of public financing would be most
25 dramatic in the under ticket races, Secretary of State,

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1 Treasurer, Comptroller, Attorney General. And you can
2 see, particularly in the case of Republicans, how little
3 they raced in '06. Yet under this, they could potentially
4 receive hundreds and hundreds of thousands of dollars in
5 public financing grants.

6 You know, if they raised the under ticket cases
7 a modest amount of \$75,000 -- and I appreciate the
8 Attorney General's point that in the past they haven't,
9 some of these candidates haven't raised \$75,000, some of
10 these Republican candidates haven't raised \$75,000, but I
11 think the Attorney General has to concede -- if he
12 doesn't, then I would ask the court to draw the inference
13 that, nevertheless, you draw the inference that the
14 availability of getting \$750,000 in general election
15 funding and another 350, 375 in primary money is a
16 powerful incentive to go out there and raise the \$75,000
17 in qualifying contributions; if nothing else, if for no
18 other purpose than to brand the name of the Republican
19 party. It's a great investment, whether they are going to
20 win or it's going to change the next election result. It
21 probably won't but it's a good investment for the
22 Republican party to go out there and raise \$75,000, which
23 they can do through their party committees and the
24 organizational expenditures, to go out and raise \$75,000
25 in each of those under ticket races and do some branding

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1 and get your name on the ticket.

2 MR. ZINN ROWTHORN: For what it's worth, for the
3 record, we don't make that concession, Your Honor.

4 MR. LOPEZ: Okay. Your Honor, I've talked about
5 how the, how the ease with which major party candidates
6 can qualify will increase any electoral opportunity. I

7 talked about how the grants themselves would increase
8 electoral opportunities.

9 I would like to change direction and talk about
10 how the CEP has changed the dynamics in elections by
11 increasing spending and competition in previously
12 uncompetitive elections. And, you know, I start with,
13 again, with the observation, you know, why is the State
14 intervening here? We know from the policy guide that
15 accompanies the CEP -- which is in the record, they've
16 introduced it, we've introduced it -- but the purpose of
17 primary funding was to equalize the spending between
18 driven out private money from the system and equalize,
19 level the playing field, level -- increase the
20 opportunities, increase electoral opportunities for the
21 have nots in Connecticut. That happens to be, in many
22 cases, the inferior Republican party candidate, at least
23 legislative, at least in legislative races.

24 Seventy-five percent of Senatorial candidates
25 and 83 percent of the House candidates participate in the

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1 CEP. This is true even though, as I've said previously,
2 most elections in Connecticut are not competitive. 75 to
3 85 percent of the elections are not competitive, as I
4 understand, so that means that 75 to 85 percent of those
5 candidates in uncompetitive elections are getting a full
6 public funding of grants. As a result, noncompetitive
7 major party candidates are receiving full funding in
8 circumstances that do not reflect the market, that have
9 nothing to do with what the market would produce. And
10 this is borne out when you compare '06 spending with '08
11 grants, but it's most obvious in those districts where

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12 candidates have previously raised the kind of money that's
13 necessary to run a competitive campaign. As it turns out,
14 that's in most districts, Your Honor. It's only a handful
15 of districts where candidates actually raise the kind of
16 money that the CEP provides.

17 Now, this cycle alone, there were five newly
18 contested Senate elections and 32 newly contested House
19 elections in districts that were previously abandoned by
20 one of the major parties in '06. In your opinion you made
21 the observation based on a facial reading of the statute
22 that the system seemed to compel a two party race, to
23 compel a competitive two party race in districts that were
24 previously -- the data shows this and --

25 MR. ZINN ROWTHORN: Your Honor --

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1 MR. LOPEZ: -- it was supposed to work that way.
2 It did that.

3 MR. ZINN ROWTHORN: This is an area where I have
4 to highlight our objection. We think it's premature and
5 we think it's just factually flat out wrong. We have
6 demonstrated at summary judgment, will demonstrate again
7 in March, that in fact there is no greater level of
8 competition, there was no greater level of competition in
9 2008. There were as many or more newly uncompetitive
10 districts, there were competitive districts, you know, and
11 there's a lot of this. So we think it's factually wrong.

12 We'll get in March into a discussion, I think
13 that's the appropriate time to discuss, you know, whether
14 there was increased competition, why there was increased
15 competition, but I'm just going to flag that objection now
16 for the record.

17 MR. LOPEZ: You know, in terms of the source for
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18 the data I just gave you, newly contested Senate
19 elections, 32 newly contested House elections, the
20 defendants submitted an affidavit that is consistent with
21 that. It's either Rotman or it's the -- not the Rotman --
22 the Bethany Foster declaration or the P-R-0 -- Proulx
23 declaration, where they set forth how many newly contested
24 and how many Senate and House races there are.

25 You can also go, you can also take a look at the

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1 Tables 1 and 2 prepared by our paralegal which shows you
2 all the districts at the top, at the top of the charts one
3 and two that were abandoned in '06. You can also look at
4 the Nikolaidis declaration which --

5 THE COURT: But here's the question. Are your
6 numbers net?

7 MR. LOPEZ: No, but absolutely, I'm prepared to
8 address that if the court is interested.

9 THE COURT: All right.

10 MR. LOPEZ: Defendants argue that they net out
11 and there really wasn't that much change in the landscape,
12 and they are right because there were -- there are, there
13 are an almost equal number of, maybe somewhat less but an
14 almost equal number of newly uncontested elections in the
15 Senate. There are five newly contested, and in the
16 House -- I mean, excuse me, in the Senate there are five
17 newly contested elections and there are five newly
18 uncontested elections, so -- and comparable area in the
19 House.

20 But our point is that the defendants are in
21 addition mixing apples and oranges when they argue that
22 it's the net difference that makes the Constitutional

23 difference, because what's important is to look at the
24 electoral history of those newly contested elections.
25 Did public financing make a difference in the decision to

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1 participate in those new legislative elections that cycle.

2 MR. ZINN ROWTHORN: And that's exactly, Your
3 Honor, why we objected to this testimony, because you
4 don't know, I don't believe, Mr. Lopez doesn't know and no
5 one has proffered a single affidavit or witness by any
6 candidate who's competing or where there's a major party
7 that hasn't previously competed, to tell you why. And,
8 Your Honor, it's simply asking Your Honor to engage in
9 rank speculation about some very complicated political
10 decisions made by individual candidates and parties.

11 And with all due respect, Your Honor is not
12 competent to make that decision, Mr. Lopez is not
13 competent to make -- to, to indicate to you why these
14 decisions are made, you know, at a facial challenge stage,
15 particularly, Your Honor, where there are two equally
16 plausible factual scenarios.

17 You know, the obligation on the part of the
18 Court really is to give the State and the statute the
19 benefit of the doubt, and so we really do object to any
20 proffer by Mr. Lopez to suggest to you that, well, ignore
21 all the newly uncompetitive districts and focus on the
22 newly competitive districts and make some judicial finding
23 based on zero evidence about why those districts are newly
24 competitive, and that would be inappropriate, Your Honor.

25 MR. LOPEZ: I have the evidence. I'm here to

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1 give it. I keep getting interrupted. He has his day
2 tomorrow.

3 THE COURT: That is correct.

4 MR. LOPEZ: He's making argument.

5 THE COURT: That's right, you'll have some time
6 tomorrow.

7 MR. LOPEZ: So, what I've done, Your Honor,
8 tomorrow -- what I've done, Your Honor, and I'm sorry --
9 anyway, what I've done, Your Honor, in Table 5 of the
10 Nikolaidis declaration is I isolated the five newly
11 contested elections in the Senate and in the House in this
12 district, the five in the Senate and the 32-odd in the
13 House, and I looked at the competitive history and
14 financial history of those districts over an eight year
15 period of time.

16 THE COURT: Where are you now, Nikolaidis what?

17 MR. LOPEZ: That would be Nikolaidis declaration
18 eight, Table five.

19 THE COURT: Okay.

20 MR. LOPEZ: If you look at the top table there,
21 Your Honor, you can draw your own inference -- it's an
22 inference I'm asking you to draw -- that these five
23 districts are newly contested in '08, have a history of
24 either abandoned or drawn one major party but it's token
25 opposition and raises a very, very little amount of money.

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1 Now, I'd ask you to contrast that with the data
2 below it with the five newly uncontested districts in
3 which the defendants maintain sort of level, sort of
4 disprove our correlation.

5 You can just see that those districts are
6 generally more competitive. There's no money raised in
7 those elections. The vote totals were closer and --

8 MR. ZINN ROWTHORN: Your Honor, and I don't mean
9 to be difficult or to keep interrupting but there is a
10 relevance objection. You know, what conclusion, for
11 example, are we supposed to draw from the first senatorial
12 district where the Republicans contested this district
13 and -- not in 2006, but the Republicans did not qualify
14 for public campaign financing and we have no idea why she
15 entered that race? And it's entirely counterintuitive,
16 Your Honor, to suggest that competitive districts somehow
17 become uncompetitive despite the, you know, despite the
18 potential availability of public financing. You would
19 think and, you know, Mr. Lopez suggests you can make
20 whatever inference you want. Our position is you can't,
21 Your Honor.

22 THE COURT: All right, maybe I can't but it's
23 not irrelevant.

24 MR. ZINN ROWTHORN: I believe it is irrelevant
25 at a facial challenge stage, Your Honor, because what the

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1 law tells us is you are not to engage in determining
2 validity of the statute based on hypothetical, empirically
3 disputed conjectural factual scenarios and, you know, this
4 is a classic example of that. It is pure speculation to
5 suggest that 2008 became more uncompetitive or less
6 uncompetitive because of --

7 THE COURT: That's not what the exhibit says.
8 The exhibit says in District One the losers' percentage
9 was zero, the losers' receipts were zero, et cetera.

10 MR. ZINN ROWTHORN: Well --

11 THE COURT: That's relevant.

12 MR. ZINN ROWTHORN: The purpose for which it's
13 offered is to suggest to Your Honor that these changes in

14 competitiveness were due to major competitive financing.

15 THE COURT: Let's save argument for a later
16 date. I mean Mr. Lopez has a right under this procedure
17 to put in his case. You'll have a right to put in your
18 case. Let's just get to it.

19 MR. LOPEZ: Excuse me, Your Honor. With all due
20 respect to the Attorney General's position that we can
21 tell nothing about a competitive environment where minor
22 party candidates are achieving, now we do know in at least
23 these five, and 32 on the House side, those are newly
24 competitive districts that were previously either
25 abandoned or historically not competitive.

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1 We don't know why, in candor, why there are a
2 significant number of newly uncontested elections but we
3 do know, Your Honor, that it's not because those
4 candidates couldn't have raised the seed money to qualify
5 for public financing. There could have been a whole host
6 of other factors why they chose not to run in those
7 districts but it's not because they couldn't have raised
8 the seed money.

9 If you look at this, the data in the, in the
10 newly uncontested legislations going back to 2000 on both
11 the House and Senate side, there are always -- these
12 candidates were all across the board stronger and,
13 frankly, the fact that they chose not to run in this cycle
14 is neither here nor there, primarily because those weren't
15 the districts my clients are targeting. At the end of the
16 day my clients have historically been targeting these
17 newly contested elections and that's why the minority --
18 the defendants are in effect mixing apples and oranges.

19 We know why people are participating in newly contested
20 elections. We don't know why they are contesting or not
21 contesting a certain number of elections now, but it's
22 not -- frankly it's not important why they are not
23 participating in a certain number of elections now. It's
24 not important to my client's -- from my client's point of
25 view, they are competing in a more difficult environment

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1 in the newly contested elections.

2 MR. ZINN ROWTHORN: Your Honor, there are couple
3 factual assertions that I haven't heard in the citations
4 before. One is that candidates who aren't competing in,
5 in -- major party candidates who aren't competing in
6 previously contested elections aren't doing so despite the
7 fact that they could raise the seed money. We don't know
8 that. We haven't heard this and we certainly don't --

9 THE COURT: That's an inference he's drawing
10 from the second chart on Table Five of the Nikolaidis
11 declaration.

12 MR. ZINN ROWTHORN: I don't see in anything in
13 this chart, Your Honor, that would suggest -- that would
14 signal to Your Honor that --

15 THE COURT: So argue it tomorrow.

16 MR. ZINN ROWTHORN: Okay, but it's a factual
17 assertion, Your Honor.

18 THE COURT: He's making an argument about what
19 the chart shows. If you disagree with it, make the
20 counter argument tomorrow.

21 MR. ZINN ROWTHORN: I think it's actually a
22 misrepresentation about what the facts show, what the
23 charts show. It's factual, Your Honor.

24 THE COURT: If it's a misrepresentation, point
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25 it out tomorrow. You're going to have your shot tomorrow.

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1 It will be your day.

2 MR. ZINN ROWTHORN: I'm sorry to interrupt but
3 there's an assertion that the minor party contest focus
4 you have, particularly on these one party candidate races,
5 and I think the evidence would actually be that they
6 compete as often or more often in two major party
7 candidate races, that I haven't seen any aversion to and
8 it's certainly not reflected in that chart.

9 THE COURT: All right.

10 MR. LOPEZ: If I can direct you in the same, in
11 the Nikolaidis exhibits, if I can direct you to Table
12 Seven.

13 THE COURT: I have it.

14 MR. LOPEZ: This table shows the districts that
15 were targeted by minor parties in 2006. In 16 of those
16 districts, Your Honor -- let me start again. This table
17 shows the districts that were targeted by nonmajor party
18 candidates in 2006 in which they were opposed by only one
19 major party candidate. In 16 of these 22 districts there
20 was a second major party candidate who did enter the race
21 in 2008 with the net result being that expenditures went
22 through the roof in those districts relative to total
23 expenditures in those districts in 2006. And I bring that
24 to the court's attention because it's part of our proof
25 but partly in response to the objection made by opposing

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1 counsel.

2 THE COURT: These are totals for all parties who
3 run --

4 MR. ZINN ROWTHORN: And I think, just so we're
5 clear on the record, Your Honor, it's actually reflecting
6 expenditure limits, not expenditures, in 2008.

7 THE COURT: Right, but --

8 MR. LOPEZ: The first column is amount of money
9 that was total expenditures in '06 and the second or the
10 third column is net permissible expenditure limits in '08.

11 THE COURT: Total permissible expenditure by all
12 candidates, permissible expenditures.

13 MR. LOPEZ: Well, not including expenditures by
14 my party candidates.

15 THE COURT: That's what I'm trying to figure
16 out. What does this show? District One, \$365,000.
17 That's the total permissible expenditure limit for the two
18 major parties in '08.

19 MR. LOPEZ: Your Honor, could I -- it's better
20 to, I just -- my co-counsel just reminded me that we
21 updated this chart to reflect actual expenditures because
22 we have this now. This was done by Nikolaidis when we
23 were projecting expenditures, so if I can take you to the
24 Narain declaration, and that would be Table Five, Table
25 One -- or I mean in District One, there was \$265,000 spent

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1 in '08. In '06, there was only \$206,000 spent in that
2 district. The net increase --

3 THE COURT: Let me just interrupt you. The
4 footnote says, Footnote One, that it's just taking the
5 permissible expenditure limits for each major party
6 candidate. It doesn't say its actual expenditures.

7 MR. LOPEZ: All right. Your Honor, that's a
8 mistake on our part. It is actual expenditures. This, it
9 is actual expenditures because the actual expenditure data

10 is in now, and this is how much was spent in that
11 district, in District One in 2008.

12 MR. ZINN ROWTHORN: Your Honor, I would be
13 surprised if that's the case because I don't believe that
14 data is available. I think what this probably reflects is
15 a rough notion of the grants that were available to
16 participating candidates, but we don't know, again, how
17 much of those grant funds were spent, so I think we're
18 really talking about, again, expenditure limits.

19 THE COURT: Yes, I would be surprised if every
20 one of those candidates spent 100 percent to the penny of
21 their permissible expenditure money limit.

22 MR. LOPEZ: All right. I know exactly what it
23 is, Your Honor. Just take House One, District One, that
24 represents \$75,000 primary grant to Vargas, the Democratic
25 primary, the \$75,000 grant to Fonfara in the primary, and

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1 \$85,000 grant to Fonfara in the General, and then \$30,000
2 in qualifying contributions.

3 THE COURT: Right. So these are the grants, not
4 the expenditures. The \$75,000, for example, perhaps they
5 only spent \$71,264; you don't know.

6 MR. LOPEZ: Right, right.

7 THE COURT: So what you're saying is these are
8 the grants --

9 MR. LOPEZ: Yes.

10 THE COURT: -- that were provided to the
11 candidates.

12 MR. LOPEZ: Yes, Your Honor. So all this
13 information, all this grant information has to be
14 understood with the understanding that it's possible that

15 some of those candidates will return some money. But our
16 position is that's neither -- that's not particularly
17 relevant. The fact that they are given the grant is what
18 creates the disparity. It's not the -- and the fact they
19 had the resources to pay, if you will, to spend as they
20 need is what gives them the advantage, not the fact that
21 they may, in fact, not need to spend it.

22 We would point out that the funding has
23 resulted, or the CEP has resulted, as it was intended to
24 do, to lead to an increase in primaries. And it did. It
25 led to a two-fold increase in primaries, and there were

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1 four Senate primaries in this cycle, and I believe as well
2 there were four primaries in this cycle in previous years.
3 There has never been -- the largest number of Senate
4 primaries in previous years was two, and there were no
5 primaries until 2006.

6 And I would refer you not only to the Secretary
7 of State website which has election results, but also to a
8 press release that's posted on the website of the SEEC,
9 which has a section which announces very proudly that the
10 CEP has resulted in a two-fold increase in the number of
11 primaries.

12 I would also note, and I'm talking about
13 participation rates, that there is also a piece on the CEP
14 website that announces very proudly this has attracted
15 participants at a rate twice the national average.

16 So, for the defendants to argue that it's not
17 increasing competition, we submit, is belied by both
18 common sense from a reading of the statute but also by the
19 evidence.

20 And I would just like to refer the court to the
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21 Candidate Guide which is contained in our finding 105,
22 which -- Your Honor, the Candidate Guide is Exhibit 61.
23 It's 100 page document, I believe, but, you know, it's
24 acknowledged in that guide the express purpose of the CEP
25 funding is to increase -- under the Goal section, which is

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1 set out at the outset, the goal of the CEP is to increase
2 competition. And we wouldn't -- I hate to hammer this
3 point except the defense keeps saying it's not going to
4 affect competition. I know this from their summary
5 judgment papers and from their submission, the objections
6 we've heard.

7 Your Honor, before we leave the area of how the
8 grants -- we covered some of this earlier -- we would
9 emphasize they are augmented by certain, by certain
10 aspects of the statute. First of all, the base grants are
11 augmented by primary grants that are augmented by
12 supplemental grants. They are augmented by the qualifying
13 contributions.

14 Under the -- we talked earlier about the excess
15 expenditure provision, and under the excess expenditure
16 provision, in those circumstances where a minor party
17 candidate is in the mix and is running in the same
18 district as a major party candidate, a participating major
19 party candidate and a nonparticipating major party
20 candidate, excess expenditures will have the effect of
21 growing the funding gap between the minor party candidate
22 and the beneficiary of the supplemental grant. Through no
23 fault of its own, this distorts the relative positions of
24 the minor party candidate and also of the two major party
25 candidates.

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1 And I think in Governor Weicker's submission,
2 his declaration, he makes a very fair point, I believe,
3 that he, he gains no advantage by failing to qualify for
4 public funding. If he was running today or if this was in
5 effect in '92, he gains no advantage by failing to qualify
6 for public funding. And because any dollar he raises over
7 the \$3 million base grant triggers matching funds for his
8 opponent, this aspect of the law could change the results
9 of the election in his view. Because as an independent
10 candidate, it was his view that he may very well have to
11 outspend his opponent to win that election and be
12 handicapped by the excess expenditure provision. It's his
13 view that he's handicapped by the excess expenditure
14 provision.

15 I think the court covered in its opinion how the
16 excess expenditure and independent expenditures work and
17 how they had the potential to disadvantage minor party
18 candidates who are in effect innocent bystanders. There
19 are some additional aspects about the independent
20 expenditure provision that I'd like to raise with the
21 Court that were not briefed in the motion to dismiss and
22 were not considered by the Court.

23 One interesting aspect of it that was considered
24 by the Court was it's not a two-way street. Independent
25 expenditures that target a participating candidate trigger

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1 a supplemental grant, but independent expenditures that
2 target a nonparticipating candidate, that inure to the
3 benefit of the participating candidate, don't -- are in
4 effect and independent expenditures that benefit a
5 participating candidate are not offset against any of the,

6 against the candidates' permissible expenditures. I think
7 the court addressed those issues in its initial opinion.

8 As we look closer at the organizational
9 expenditure provision, we want to flag some issues. It's
10 the law -- the SEEC actually has issued a declaratory
11 ruling defining in that what an organizational expenditure
12 is. From what I can tell, it tracks the language of
13 Wisconsin Right to Life, which is the Supreme Court's
14 latest decision on what is permissible, what it is you can
15 permissibly regulate. But Wisconsin --

16 MS. YOUN: Your Honor, it actually wasn't a
17 declaratory ruling. It was a handout. It can have the
18 effect of a declaratory ruling.

19 And I just wanted a clarification. Mark, to
20 clarify, are you meaning to say organizational expenditure
21 or independent expenditure?

22 MR. LOPEZ: I'm referring to independent
23 expenditure.

24 MS. MURPHY-OSBORNE: You were saying
25 organizational expenditure. That's the source of the

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1 confusion. The independent expenditure -- Wisconsin Right
2 to Life isn't a regulation.

3 MR. LOPEZ: All right, so the regulation issued
4 by the SEEC --

5 MS. MURPHY-OSBORNE: Right.

6 MR. LOPEZ: -- defines what an independent
7 expenditure is. And from what I can see, it copies the
8 language from Wisconsin Right to Life. But you have to
9 understand Wisconsin Right to Life, you have to read it in
10 tandem with McConnell, a case about broadcast

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11 communications. The Supreme Court said you can now
12 prohibit corporations and unions from expending funds from
13 independent expenditures -- I mean broadcast
14 communications. So broadcast communications, which is a
15 term of art, in those decisions it's a communication
16 that's broadcast over radio or TV. I think the internet
17 is excluded so it's radio and TV. It mentions the name of
18 the candidate and it's made within 30 days of the General
19 or 60 days of a, 30 days of the Primary, 60 for General.

20 So, for instance, the ACLU could take out an ad
21 60 days prior to a general election about George Bush, if
22 he were running for re-election, and McConnell held that
23 statute against a facial challenge before a different
24 court and two members basically struck down the statute on
25 an as applied challenge.

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1 There's very strong language about the First
2 Amendment. How can you prevent the ACLU, Wisconsin Right
3 to Life, from talking about George Bush 60 days prior to a
4 General Election? The SEEC has defined independent
5 expenditure in a way that's consistent with WRTL but they
6 didn't limit it to broadcast communications and they
7 didn't limit it to expenditures made by corporations or
8 unions from treasury funds.

9 So we are now in a position where the Green
10 Party cannot speak in the 60 days prior to an election in
11 opposition to the Democratic candidate. Well, it can take
12 out an ad critical -- it's not a restriction if it's
13 fact-based, but if the Green Party takes out an ad
14 critical of the Democratic candidate 60 days prior to the
15 election -- vote against him, he's a bad guy -- that will
16 trigger matching funds for his Democratic opponent.

17 Now, that's not what McConnell endorsed.
18 McConnell is limited and it's got, based on a huge record
19 about the power of broadcast communications and the power
20 of corporations and unions to aggregate great wealth, and
21 Congress thought it was necessary to reign them in. And
22 in that specific context, that statute obviously goes
23 beyond that by, in fact, reigning them in.

24 So, with the premise of Davis, that triggering
25 provision has a dampening effect of speech as a de facto

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1 expenditure. They are saying I assume you agree with that
2 premise, but the SEEC read the law as it's implemented
3 prohibits the Green Party -- not only the Green Party,
4 Your Honor, prohibits -- the Green Party's not a
5 corporation. It prohibits the Green Party, prohibits Mike
6 DeRosa from taking out such an ad, prohibits nonprofits
7 from taking out such an ad and any other advocacy group
8 from taking out such an ad.

9 THE COURT: Well, it doesn't really --

10 MR. LOPEZ: You're right.

11 THE COURT: -- prohibit it. It merely means
12 that if they do it, there is a corresponding trigger of
13 money, right?

14 MR. LOPEZ: That is right. There's a
15 consequence. All I'm suggesting, Your Honor, even if you
16 don't agree with our assessment of Davis and its impact,
17 that definition of independent expenditure which may not
18 have been -- which isn't apparent from the statute. As
19 it's read, it's very different than the definition of
20 independent expenditures, that definition as opposed to
21 the conflict in McConnell and Wisconsin Right to Life.

22 Now, the grants, I said, are supplemented by --
23 the qualifying contributions, they are supplemented by the
24 primary grants. They are supplemented by supplemental
25 grants under the treasury provisions. They can also be

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1 supplemented in a very unique situation where a minor
2 party candidate is running against a major party
3 candidate. So this is how it works, Your Honor, and this
4 is in the statute.

5 Jon Fonfara in the First District, if he ran
6 unopposed, could get \$26,000. If he draws an opponent
7 like a Green Party opponent, which he has in three of the
8 four -- four of the last five elections, I guess, his
9 grant's automatically bumped to 51. If Mike DeRosa raises
10 as little as \$15,000, Your Honor, the grant's bumped again
11 another 70 percent, up to the full \$85,000.

12 Now, I suppose the logic of this provision was
13 that, well, if you raise \$15,000, you qualify for public
14 financing, at least for partial grant. And, you know, we
15 have to maintain the funding disparity between you and the
16 major party candidate, of course, but in fact, the law is
17 not limited to those situations.

18 If Mike DeRosa actually goes out and raises
19 \$15,000 but doesn't qualify, I mean because he raised it
20 in \$250 distributions or \$1,000 distributions or reached
21 into his own pocket, it still triggers this increased
22 grant.

23 And, Your Honor, there's another way the process
24 discriminates against a minor party candidate, and I'll
25 close out on how the money changes the dynamics, but there

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1 are two other ways how money does change the dynamics of

2 elections under the CEP in a way that injures minor party
3 candidates. But we touched on that before when we talked
4 about the legislative history and they basically deal with
5 the exploratory loophole which the defendants have
6 described as an end run around the expenditure limits and
7 the fund raising restrictions. And then you have the
8 organizational expenditure loophole.

9 I think we said enough about those issues. I
10 would point out though that the defendants have made a lot
11 of noise about the fact we don't have the complete data on
12 organizational expenditures for this cycle. I would tell
13 you that we do have the data from '06. I have the data
14 because the defendants submitted a declaration, Jonathan
15 Pelto's declaration, and it can be found at Finding 105
16 and 146.

17 And these leadership committees in 2006 raised
18 \$2 million, Your Honor. They can raise it in increments
19 of thousands of dollars because PACs can contribute to
20 leadership committees, I think up to \$7,500. The
21 defendants can correct me, but they can raise it from
22 other PACs and industry groups and other special interests
23 that have always participated in elections. They can
24 raise that money from those organizations. In '06 the
25 number was just \$2 million, according to the defendant's

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1 witness.

2 Now, we have some partial data which we provided
3 the Court for '08, because reports have to be submitted
4 periodically, the latest reporting period and that was
5 October 28 that reported data through October 21st. And
6 it shows -- and I have it, it's Table 7, I could be

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corrected -- Table 7 of the Steven Narain declaration
8 which we tendered last night. I have copies if anyone
9 doesn't have copies.

10 THE COURT: Okay.

11 MR. LOPEZ: Yes, sir. I would note the reason
12 we submitted this declaration is it had an unnecessary
13 table at the end that provided information that was not
14 relevant to anything so we just lopped off the last
15 column. And the point of this declaration is to show
16 through October 21st the October 289th reporting period
17 which collects data through October 21st, '08, how much
18 had been raised by these leadership committees this cycle,
19 and I think the net was \$418,000 so far.

20 And then if you look at the expended, the
21 expenditure provision of the reports that are required to
22 be submitted by the leadership committees, there's a box
23 where they have to check off for organizational
24 expenditures, and that total so far is \$137,000. So they
25 have made \$137,000, primarily Democrats this cycle through

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1 October 21st.

2 We just bring this to your attention to make the
3 point that organizational expenditures were contemplated
4 by the legislature. They came into play and they, they
5 have come into play already based on the unlimited data
6 that we have.

7 I would make two final comments about the
8 trigger provisions. One is that the independent
9 expenditure provision did come into play this cycle.
10 There was one grant, one supplemental grant that was
11 triggered by a flyer handed out by some local Republican
12 town committee that urged the defeat of a Democrat and

13 triggered an independent expenditure. That's in our
14 findings.

15 THE COURT: Looks like \$630.

16 MR. LOPEZ: Yes, sir. Yes, sir. As far as we
17 can tell, I think the defendants have corroborated this.
18 The excess expenditure provision did not come into play
19 but ironically -- and frankly, we don't think it's either
20 here nor there, the legislation contemplates that would
21 come in, it contemplates that they would trigger
22 supplemental grants -- but ironically, the defendants
23 submitted with their latest round of briefs on Counts Two
24 and Three, supplemental affidavit or new affidavits from
25 George Jepsen, from -- Senator Meyer, Ed Meyer, and from I

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1 believe George Jepsen, the same George Jepsen I keep
2 referring to, the former Chairman of the Democratic party,
3 but basically both giving their opinion about why it's so
4 essential that supplemental grants be available under this
5 statutory scheme if it's going to work.

6 They offered their opinion testimony that the
7 system would collapse if those provisions -- I don't want
8 to paraphrase. That's how I understand it, that the
9 system wouldn't work unless you had those provisions. So,
10 very clearly the defendants contemplate that these
11 provisions are going to come into play.

12 And I was hoping to take a break at this point,
13 Your Honor.

14 THE COURT: That's fine. You can take -- how
15 close are you? Are you going to be tight for time?

16 MR. LOPEZ: I think I've basically gone through
17 my exhibits. I'm now going to be sort of summarizing.

18 THE COURT: Why don't we take 20 minutes then
19 and come back at 3:25. Have a nice break.

20 (Whereupon a recess was taken from 3:10 o'clock,
21 p. m. to 3:30 o'clock, p. m.)

22 MR. LOPEZ: Good afternoon again, Your Honor.
23 Your Honor, it is immediately apparent from the face of
24 the statute that minor party candidates have to satisfy
25 additional and more burdensome requirements than major

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1 party candidates in order to qualify. They have to
2 receive -- in order to receive a full grant they would
3 have had to have, received at least 20 percent of the vote
4 in the preceding election in the last relevant district
5 that they ran in. To qualify for partial grant, a third
6 of the funding that's available for major party
7 candidates, they would have had to receive ten percent of
8 the vote.

9 As far as I know, I mean in the last election
10 cycle, '08, only one minor party candidate qualified for a
11 grant based on prior vote totals. If major party
12 candidates were held to that standard on a district by
13 district basis, Your Honor, based on '06 election stats,
14 43 percent of every one would not have qualified for
15 grants in this cycle.

16 MS. YOUN: Your Honor, I just wanted to correct
17 a misstatement. It's not that one, because that
18 comparison is otherwise misleading. Fourteen candidates
19 were eligible, minor party candidates were eligible for
20 some level of CEP funding. Based on their 2006 totals,
21 only one chose to compete this cycle.

22 THE COURT: Okay. Again, you'll have your day
23 tomorrow, so --

24 MR. LOPEZ: As I said, only one qualified for
25 public financing. Despite the defendant's argument that

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1 public financing is accessible to minor opponent party
2 candidates. As a matter of fact, I don't believe based on
3 the '06 election results, any minor party candidate would
4 have qualified for a full grant. In other words, no minor
5 party candidate had received 20 percent of the vote in
6 2006.

7 Now, candidates who do, who are theoretically
8 eligible for a grant based on their prior vote total, must
9 nevertheless raise seed money contributions. Now, on its
10 face, seed money distribution is applicable to minor and
11 major candidates at the same rate. It's 15,000 -- in the
12 House races it's 5,000. In the Senate races it's 15,000
13 and in House races it's 5,000. And individual
14 contributions are capped at \$100.

15 I've tried to -- it is our submission, Your
16 Honor, that the qualifying contribution requirement for
17 major party candidates is a mere formality because they
18 can tap into the party apparatus, and the testimony of
19 George Jepsen who testifies to this and the significant
20 rates with which they are qualifying in districts that
21 they previously didn't run in before or didn't raise money
22 in before, supports that, that premise as well.

23 For minor party candidates, the seed money
24 contribution or the qualifying contribution requirement is
25 a substantial impediment and it's a substantial impediment

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1 for, for many reasons, Your Honor. And we had introduced
2 the testimony of Governor Wei cker, Mr. DeRosa, the

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4 Libertarian party candidates, and they all -- and the
5 competing party candidate for the Senate. They all
6 testified that minor and independent party candidates rely
7 on a consolidated base of contributors to jump start their
8 campaign and to fund and to otherwise help finance their
9 campaigns in their infancy.

10 Governor -- or Cliff Thorton ran for Governor in
11 '06 under Green Line, and he raised 120. Most of it was
12 raised in increments over \$100. To impose a requirement
13 that they can only raise the money in \$100 increments
14 uniquely burdens the minor party candidate because they
15 don't have that broad based constituency. Consider
16 someone seeking statewide office. They would have to tap
17 into 25, a minimum of 2,500 contributors who gave a
18 maximum of \$100.

19 For major party candidates, that's another
20 thing. The evidence shows that's not a problem.
21 Republican, Democrat candidates have over 14,000
22 contributors to their gubernatorial campaigns. Minor
23 party candidates don't. They would have to mine for those
24 2,500 contributors and they would have to come -- they
25 would have to give \$100 apiece.

If you assume they would have that, they have a

1 mine for 5,000 new contributors, well, Your Honor, it
2 costs money to raise money. It requires a -- you don't go
3 door to door with a cup in your hand. You send out
4 mailings, you hold fundraisers, and all this costs money.

5 And Governor Weicker testified that he does not
6 believe that he could raise the -- he submits that he
7 could not raise the required number of petitions, he could
8 not collect the required number of signatures as a

9 petitioner and raise the \$250,000 in seed money
10 contributions within the expenditure limits that apply
11 during the qualifying period.

12 In other words, the gubernatorial candidate is
13 able to spend \$250,000 during the qualifying period. It
14 would cost at least \$250,000 to raise \$250,000 in \$100
15 increments unless you already have the preexisting broad
16 base of donor support that exists. But if you don't have
17 that, and that's the situation that minor party candidates
18 face and independent candidates like Governor Weicker
19 face, you have to go out there and mine for that money,
20 and there's costs associated with that and it's a
21 significant cost.

22 But add to that that you have to go out there
23 and collect petitions, and if you don't qualify based on
24 the prior vote count -- and, you know, there's a whole
25 debate going on back and forth between the defendants and

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1 the plaintiffs how much it costs to petition. At the
2 outside we submit it costs about \$4.00 a signature. On
3 the low end it's somewhere near the \$1.50, \$2.00, but
4 wherever, if the court settles the issue to qualify for a
5 partial grant you'd have to raise over 100,000 signatures
6 to run for Governor. That means 200,000 raw, according to
7 the defendant's experts, according to our experts.
8 200,000 at \$2.00 each is \$400,000. That's more than you
9 were allowed to spend during that qualifying period. So
10 you're in a dilemma. You're in a box that you can't get
11 out if you're an independent candidate or a minor party
12 candidate trying to qualify for public funding, even for a
13 one-third grant.

14 For a full grant, you'd have -- the number would
15 be 20 percent of valid signatures based on the '06
16 Governor's race. Twenty percent would be 200,000 and
17 change raw -- I mean valid, over 400,000 raw. Want to
18 bring it down a little bit to satisfy the defendants.
19 Call it 300,000 in raw, 350,000 raw to qualify for a full
20 grant. The cost of that wildly exceeds the amount of
21 money that you're allowed to spend during the petition
22 process.

23 So, in the opinion of Governor Weicker, it's a
24 nonstarter. An independent candidate like him or a minor
25 party candidate like Cliff Thorton can not qualify through

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1 the petition process because the petition process costs
2 more than the amount of money, significantly more than the
3 amount of money they can raise and spend during the
4 qualifying period.

5 And I would ask the court to also consider the
6 burden of trying to raise that kind of money in \$100
7 increments. We already knew from granting where, for
8 instance, the limits were taken down in Vermont to \$100 or
9 200 and the legislative races don't cost \$250,000, the
10 Supreme Court said if you bring the contribution limits
11 down all the way to 200 or 100, you will impede, you will
12 effectively starve that candidate of the resources
13 necessary. That legislative candidate who might only have
14 to raise \$250,000, \$25,000, the ability of that candidate
15 to raise the number because contribution limits that low
16 prevent them from amassing the resources necessary to run
17 that campaign.

18 And I would submit that the validity of the
19 finding in Randall is just as valid here. It is

20 especially when you are talking about minor and
21 independent party candidates who do not have the type of
22 party infrastructure major party candidates have.

23 If I could return to the question of qualifying
24 contributions and the unique burden it places on minor
25 party and other independent candidates, I would ask you to

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1 consider what was at issue in Buckley. Buckley, to
2 qualify for public funding in the general election, you
3 didn't have to raise qualifying contributions. You either
4 won your party's nomination if you were a major party
5 candidate or it was based strictly on prior vote total.
6 If you were a minor party candidate, that prior vote total
7 could have been established prior to the election or it
8 could be established after the election, so if you receive
9 more than 5 percent of the vote in the current election
10 you would get a grant. And if you received more than
11 5 percent in the preceding election, you would get a
12 grant. There was no requirement that you go out and
13 collect qualifying contributions.

14 Now, to get presidential primary matching funds,
15 there was a financial aspect to that. Candidates could go
16 out, candidates under the current federal system,
17 candidates who want matching funds in the primary period
18 can go out and raise money under the generally applicable
19 limits, \$3,500 right now, and in order to qualify for
20 matching funds, you had to raise \$5,000 in each of 20
21 different states. And you can raise it in amounts up to
22 \$3,500 to help you finance that process. If you
23 succeeded, the first \$250 of the money, of each
24 contribution was matched. And, thereafter, the first

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1 Compare this to Connecticut. You have to go out and raise
2 \$5,000. In one little legislative district, you have to
3 convince 50 people, at least 50 people, to give you \$100.
4 We submit that relative to the requirement in Buckley,
5 it's a much greater burden in Connecticut, excuse me, than
6 it is under the federal system. 5,000 within the
7 legislative district, 5,000 within the state under the
8 federal system. Plus, under the federal system you could
9 raise the money in \$3,000 units. Here you can only raise
10 the money in 100 units.

11 I think it's helpful to compare how it works on
12 the -- you know, what's necessary statewide as well, Your
13 Honor. You have, you have to collect \$250,000 to qualify
14 for a grant for statewide office -- for the office of
15 Governor in Connecticut, under Buckley you only had to
16 collect \$100,000 to qualify for presidential matching funds
17 and I would again submit that the burden in Connecticut is
18 a, is a burden that exceeds the burden under the federal
19 system.

20 I would also submit that the burdens are --
21 what's unique about Connecticut, Your Honor, and what's
22 unique when you compare it to Arizona or Maine, is there
23 was a petition process and a qualifying contribution
24 process that's singularly unique in order to meet the
25 qualifications of the finance systems. In most systems

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1 you raise a modest amount according to a qualification
2 system and you get the benefit. That's the way it works
3 in the presidential system. That's the way it works in
4 Arizona and Maine.

5 Here you have to jump through two hoops. You
6 have to satisfy the prior vote total or petition and you
7 have to raise the qualifying contributions. They are
8 cumulative. They are -- we submit that one or the other
9 is adequate. If you have enough popular support to go out
10 and satisfy these onerous petition requirements, which
11 are -- I'll get to -- are very expensive and onerous,
12 that's an adequate measure of public support that should
13 qualify you for public funding.

14 Now, some people would argue that a better
15 measure is your ability to raise some money, so that's how
16 most states have approached the issue. And in the federal
17 system you go out, you raise a modest amount of seed
18 money. And by modest, I mean an amount that doesn't have
19 a preclusive effect on nontraditional candidates. And
20 that has been sufficient for Congress and for most state
21 legislators that have a state public financing program.
22 There is no prior vote total or petition process
23 overlaying on the process.

24 You know, we would submit that individually
25 that -- we would submit that the qualifying contributions

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1 requirement is exclusionary because of the way -- because
2 it creates a substantially greater burden on minor party
3 candidates that it doesn't impose on major party
4 candidates.

5 And on that same point, I would compare what
6 happened in Maine and Arizona -- we talked about how much
7 money they have to raise in seed money qualifications to
8 qualify for a full grant. And in Maine, to run for State
9 Senator, you have to raise either \$500 or \$750 in

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10 qualifying contributions in small units, in small dollar
11 contributions, but that's enough to raise -- it's a more
12 democratic process. You go around -- I think the limit is
13 \$500, or you have to raise \$750 in small dollar
14 contributions, and if you do, you qualify for a full, the
15 same public funding as your major party counterpart who
16 has the same requirement.

17 So, in that situation the small dollar
18 contribution requirement, \$5.00 in effect is a proxy for
19 going around and getting signature petitions. You can see
20 how asking for \$5.00 is like asking someone to sign a
21 petition, but to ask someone for \$100, that's a horse of a
22 different color.

23 Arizona has a very -- or the House in Maine, you
24 get a full grant for the House if you have 250 in \$5.00
25 contributions. I can see why the defendants might say

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1 that will open the flood gates, we'll be overwhelmed, but
2 that's not the experience in Maine. That hasn't been the
3 experience in Arizona. And the defendants know that
4 because that was the testimony before, before the
5 legislature.

6 Now we have the benefit of a report that's been
7 introduced, not by me but by defendants as part of their
8 submissions. The State Senator Peter Mills has come down
9 and testified through a declaration on behalf of the State
10 and he's attached to his declaration his report which
11 states unequivocally the minor parties have not been a
12 drain on the system.

13 In fact, you asked at our last hearing what has
14 been the experience of other states of minor party
15 participation. The numbers are exceedingly modest. They

16 are in our proposed findings data, is downloaded directly
17 from the state website and shows that minor parties are
18 maybe 10, 15 -- more like 10 on average, minor party
19 candidates, 10 out of 300 minor party candidates are
20 participating in public financing from year to year in
21 both states and there haven't been -- modest qualifying
22 criteria have not been a substantial burden on the system.

23 Your Honor, I've said previously that there's a
24 conflict in the testimony between the defendants and the
25 plaintiffs over how substantial a burden the petition

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1 requirement actually is for minor party candidates. I'll
2 come out and say right out in this cycle I think for a
3 minor party candidate, one minor party candidate, two
4 minor party candidates and two independents qualified for
5 the petition grant for partial or for full amount. So
6 there was a total of -- no one qualified based on prior
7 vote total, so four actually qualified but they qualified
8 for the grant amount by submitting petition signatures.

9 So, four qualified, or five qualified in whole
10 or in part for the petition process or three for a partial
11 or full grant. We know that in order to do that, the two
12 Working Party candidates spent thousands of dollars and
13 many months trying to collect what seems on its face a
14 relatively modest number of signatures, some more than
15 two -- somewhere in the 2- or 3,000 range, maybe in the
16 1,500 to 3,000 range. It's in the affidavits or the
17 supplemental declaration of Beth Rotman and also the
18 declarations of their witness Jon Green, the Chair or the
19 Executive Director for the Working Families Party of
20 Connecticut.

21
22 going into checking the petitions and Ms. Rotman's
23 declaration sets forth a number of signatures that they
24 had required, they had to -- but that's it, Your Honor.
25 This cycle there were a total of --

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1 MS. YOUN: Five.

2 MR. LOPEZ: -- five minor or independent
3 candidates who qualified for public financing, at least 40
4 minor party candidates who ran strictly as minor party
5 candidates as opposed to the the cross endorsed situation.

6 Now --

7 MR. ZINN ROWTHORN: I don't know if this is the
8 appropriate time to point this out but I don't believe --
9 Mr. Lopez can correct me if I'm wrong -- that there's
10 anything in any of the declarations by the minor party
11 participants about how much money was spent in order to
12 qualify for --

13 MR. LOPEZ: It comes from two sources. There's
14 a declaration submitted by Jon Green who is the Executive
15 Director of the Working Families Party, and they qualified
16 two candidates, and he talked about the amount of money
17 that they spent per candidate. It's also publicly
18 available information under the expenditure reports that
19 are filed by the two Working Family candidates who, who
20 qualified.

21 MR. ZINN ROWTHORN: Your Honor, I think, just so
22 we're clear on what we're talking about, I think
23 Mr. Green's declaration concerns monies spent by the
24 Working Family Party in previous ballot access efforts.
25 Our materials from Mr. Green were prior to his

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1 qualifications. I think it would have been impossible at
2 that stage to get the -- to reference that.

3 MR. LOPEZ: Well, what I will note, Your Honor,
4 while I look for his declaration, that I have reviewed
5 Mr. Cicero Booker's financial disclosure and they are
6 required to be filed with the SEEC and they show how much
7 money he actually spent on a petitioning firm seeking to
8 qualify this cycle. That's another independent source.

9 MR. ZINN ROWTHORN: I'm not sure that's in
10 the --

11 MS. YOUN: Is that in the record?

12 MR. LOPEZ: No, it's not in the record but it's
13 a publicly available record.

14 Okay, so, Your Honor, this is his declaration
15 submitted by the defendants, signed by their witness Jon
16 Green. It's attached to their September 8th memorandum in
17 opposition to the plaintiff's motion for summary judgment.
18 And in paragraph nine, and I'll read it because I seem to
19 be the only one who has it.

20 In order to obtain these signatures, and he's
21 referring to Cicero Booker, who did qualify in the 15th
22 Senate District -- In order to obtain those signatures in
23 race qualifying contributions, Mr. Booker's campaign hired
24 a canvassing service for Mr. Booker candidacy. Public
25 files indicate an expenditure of \$9,232 for this

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1 canvassing service. It is my understanding that
2 represents 43 shifts of signature gathering at a cost of
3 \$70 per shift and 62 shifts of door to door canvassing at
4 a cost of \$100 per shift.

5 Now, this declaration, Your Honor, was signed on

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6 September 4. Mr. Booker, as of -- did not qualify for
7 public funding until at least October 10, maybe
8 October 15th, whenever the deadline is, he is right up
9 against the deadline. He was the last group of candidates
10 who qualified at the last moment. And he, according --
11 excuse me -- and based on our review of his filing, his
12 financial filing after this declaration was filed, he
13 actually spent close to 15,000 which is the total
14 expenditure limit under, that applies to Senate races, he
15 actually spent \$15,000 and paid \$15,000 to that canvassing
16 service. Excuse me.

17 MS. YOUN: Your Honor, I'm going to object to
18 factual representations about documents we've never seen
19 and that have never been submitted to the Court and that
20 aren't in evidence. They may be publicly available but I
21 would like to wait for them to be submitted.

22 MR. LOPEZ: I'm happy to make them, I'm happy to
23 make them available to the Court. We're relying on many
24 public documents that -- we don't download the whole
25 record for the Court because the Court can find these,

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1 that information in ready forum on the Secretary of State
2 or the SEEC website, including election results from past
3 elections, et cetera.

4 THE COURT: This one, why don't you get a copy
5 and bring it in for everybody.

6 MR. LOPEZ: Gladly, Your Honor.

7 Now, we'll gladly admit the petitioning
8 requirements at the legislative level are not literally as
9 onerous as the petitioning requirements on the statewide
10 level. Governor -- I think we've already covered about
11 the statewide but there's a difference between petitioning

12 on the House level and petitioning on the Senate level,
13 and in this cycle, only one minor party candidate
14 qualified for the petition process through the -- at the
15 Senate level, and that was Cicero Booker.

16 I had previously tried to introduce -- it was
17 struck -- an exhibit where he's complaining to the
18 newspaper about how unfair this whole process was. But we
19 don't need his testimony to demonstrate how unfair it was.
20 The facts speak for themselves. We know he spent \$15,000
21 qualifying to petition the process. That's \$15,000 that
22 his major party opponent didn't have to spend, and we know
23 from the declaration of Jon Green that, you know, at least
24 20 canvassers spent hours and hours and hours trying to
25 collect these signatures, and that's hours and hours and

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1 hours of services that major party candidates don't have
2 to retain or undertake themselves.

3 Now, in a typical, in a typical Senate district,
4 or let me -- on average, Your Honor, about 35 -- about
5 30,000 votes are cast in a Senate district. So, what that
6 means -- and that's according to the defendants over there
7 and that's based on all election year -- I mean that's
8 based on nonpresidential election year data, our data from
9 '08 and from '04 presidential election year. The turnout
10 is much greater than the petitioner requirements would be,
11 about 30 percent greater during presidential years, and we
12 set that out in, in the Narain declaration. Excuse me.

13 So, in fact, a Senate candidate would have to
14 collect somewhere in the range of 3- to 5,000 valid
15 signatures, depending on his district or her district,
16 which translates to about 7,500 raw, and our point is

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17 simple, Your Honor, that this is more comparable to what's
18 required to qualify for the ballot, to qualify a candidate
19 from a ballot in the statewide election where you're
20 required to get 7,500 signatures.

21 And the burden on a Senate candidate to collect
22 ten thousand -- excuse me, Your Honor. Okay, Your Honor,
23 I'm sorry, I have to start this little piece again and ask
24 you to turn to the Narain declaration, Table Eight -- it
25 would be Narain declaration, Table Six, Your Honor.

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1 MS. YOUN: This is the new one or the previous
2 one?

3 MR. LOPEZ: This is the Narain declaration. It
4 would be what was submitted on December 3rd. Okay?

5 Your Honor, if you just look at this chart and
6 scroll over, all the way over to the right under the
7 Senate, to get a full grant, you'd have to collect 7,732
8 raw signatures. We believe that as a practical matter
9 that's what you need to qualify someone for the statewide
10 ballot. Okay? We believe that the record will support
11 our contention that you actually have to go out and
12 collect 14, 15,000 raw to meet this 7,732 ballot
13 requirement.

14 To impose that on a district, on a Senate
15 candidate is a substantial burden that we think will
16 prevent almost all Senate candidates from qualifying
17 through the petition process. This number of required
18 signatures corresponds, as I said, to what you need to
19 qualify for statewide ballot and we presented an extensive
20 body of evidence from our Green Party, Libertarian Party
21 witnesses about what's involved in a statewide candidate.
22 It costs about \$20,000 to get those 7,500 to qualify to

23 run in a statewide ballot. It involves hundreds of
24 volunteers and hundreds of hours, and that's at the
25 statewide level.

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1 A legislative candidate at the Senate level
2 doesn't have that, those resources to draw on and I think
3 what we saw here in the '08 cycle, we saw how few -- in
4 effect, there was only one Senate candidate who qualified
5 for, for public financing, and that candidate basically
6 had to spend the whole qualifying contribution amount to
7 do that.

8 Okay. Now, if I can just ask you to scroll down
9 to the state representative. No one denies that it's easy
10 to qualify the state representative. The numbers are
11 obviously smaller and, on average, you'd have to
12 collect -- if you scroll over to the furthest category,
13 furthest column, you'd have to collect 1,700 valid and
14 34, 33 -- 3,400 raw. And we submitted evidence from our
15 witnesses making the case that that is a substantial
16 burden. You know, in a legislative district that is
17 one-fifth the size of the Senate district.

18 Now, we have to acknowledge that one, two,
19 three -- three minor party candidates did qualify at the
20 House level but three is a far cry from the 30-odd that,
21 that ran solely as qualified candidates, Your Honor.

22 THE COURT: The three that qualified, did they
23 qualify at the full level or some lower level?

24 MR. LOPEZ: Your Honor, I know that -- I can't
25 pull it up right now here. We've worked those numbers.

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1 The three that qualified at the House level, Deb Noble --

2 Transcript of 12-09-2008 Bench Trial.txt
we're trying to remember. Deb Noble qualified for
3 two-thirds. There was a fellow named through the
4 petitioning process --

5 MS. YOUN: We can look this up. Our
6 understanding is that for the Senate, two candidates
7 qualified for -- both were full grant. Both were full
8 grants.

9 MR. LOPEZ: In the Senate there was only one.

10 MS. YOUN: There were two.

11 MR. LOPEZ: Just Cicero Booker.

12 MS. YOUN: Denze --

13 MR. LOPEZ: He's the House.

14 MR. ZINN ROWTHORN: By my reckoning, Frank Rocco
15 got a two-thirds grant, Deb Noble got a two-thirds grant.
16 Cicero Booker, as discussed, had a full grant. For the
17 Senate, Frank Burgio had a one-third grant for state rep.

18 MS. YOUN: And then he received a post election
19 supplemental grant as well.

20 MR. ZINN ROWTHORN: Mr. Denze -- Mr. Denze got
21 full.

22 THE COURT: Full grant. But his grant was on
23 prior, not on the petition.

24 MS. ROTMAN: Correct, 20 percent.

25 MR. LOPEZ: Your Honor, we have the candidates,

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1 it's Defendant's Exhibit 65. Four of the five were House
2 candidates. There was only one Senate and I would
3 refer -- it's their list and it was District Number, House
4 District 71 and it's Exhibit, Defendant's Exhibit --
5 Plaintiff's Exhibit 65. Sorry.

6 MR. ZINN ROWTHORN: Mr. Denze is a House
7 candidate, Your Honor.

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MS. YOUN: Sorry for the confusion.

MR. ZINN ROWTHORN: Four of the five were House candidates.

MR. LOPEZ: So, four of the five were House candidates. And there is one error on the defendant's list of -- they provided a list to us a couple weeks ago, Your Honor, and they list Deb Noble on the 16th receiving a full grant. She actually received a two-thirds grant. The defendants have already corroborated that in the last colloquy.

MR. ZINN ROWTHORN: That is correct, Your Honor:

MR. LOPEZ: So, Your Honor, the point I would just ask the court to bookmark, if you will, from this data is there are three levels of trying to qualify for the minor party under the regime set up for minor parties. One is based on prior vote total. Only one House candidate qualified and zero Senate candidates qualified based on prior House total.

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I understand Ms. Youn's point that more were eligible but they didn't qualify, and we submit that's because their qualifying contribution requirement is an obstacle that they -- that cannot be overcome.

So, there are three, there were three other House candidates who qualified for either partial or full grants through the petitioning process. And then there was one semi-candidate, minor party candidate who qualified for full grant through the petition process.

MR. ZINN ROWTHORN: Your Honor, I don't know if this is appropriate but we object to the factual assertion that the reason that eligible minor party candidates

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13 didn't qualify was because the qualifying contribution
14 total was insurmountable. There's nothing to suggest that
15 in the record.

16 MR. LOPEZ: So, at the House level we would
17 expect to see, Your Honor, some level of minor party
18 participation because the petitioning requirements
19 relative to petitioning requirements for Senate and for
20 Statewide office are significantly less, but the data
21 shows that, as I said, only three qualified for partial or
22 full grants through the petitioning process, and out of
23 the 30-odd that in effect ran, and if you compare that to,
24 you know, the participation rates of major party
25 candidates, you see major party candidates, even hopeless

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1 major party candidates, are participating at a much larger
2 rate.

3 Now, part of the defendant's legal submission to
4 Your Honor is that people who are excluded from the system
5 gain by being excluded from the system. They have the
6 advantage of continuing to be independent, of continuing
7 to raise money privately, and I -- and that certainly is
8 one of considerations in the court's opinion in Buckley
9 and we would make the obvious point we believe that minor
10 party candidates and other candidates, any candidate, and
11 also those who stay outside the system, gain nothing from
12 not qualifying or choose not to participate. They don't
13 benefit by being excluded from the program because there's
14 no real burden on participating major party candidates.
15 The matching fund provisions and organizational
16 expenditure loopholes ensure that the major party
17 candidates never suffer a relative burden.

18 The funding that you have for minor party
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19 candidates between minor party candidates and major party
20 candidates can actually grow based on the actions of other
21 nonparticipating candidates and independent speakers, and
22 the funding gap could actually grow based on their own
23 modest efforts to be heard based on their own independent
24 expenditures or minor party candidates' expenditures.

25 Now, we have developed evidence showing how the

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1 CEP will affect minor party candidates. He would think
2 it's sufficient to show that, how the CEP will affect
3 major party candidates, we think it's sufficient to show
4 that they are being given a benefit and a benefit that's
5 denied to my candidate, and we think that crosses the
6 constitutional line in and of itself.

7 And that's because in politics, when some gain
8 and there is a benefit given to one, it is a burden on the
9 other candidate in denying the benefit. And my client
10 pointed out to me that when we first ran in 2000 or 2002
11 he spent \$5,000, he raised \$5,000, and Senator Fonfara
12 raised \$25,000 when he was at five-to-one spending, under
13 the current situation in 2000. If he had raised \$5,000 in
14 2008, Mr. DeRosa, Fonfara would have been the beneficiary
15 I believe of 180. Now, as I said, five-to-one, he's now
16 almost at a full funding disadvantage.

17 We submitted affidavit testimony from Mr. DeRosa
18 that shows how minor parties will be impacted. It will
19 increase competition, in his view will increase their
20 visibility and will increase -- I'm sorry, will decrease
21 their visibility, it will decrease their vote totals, and
22 over time it will further marginalize them.

23 It already happened this cycle, Your Honor. He

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24 competed in a district that had two major party
25 candidates; 5 percent of the vote, 6 percent of the vote.

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1 He had previously competed in this district many other
2 times when he only ran against Senator Fonfara and he
3 received over ten percent of the vote. Now, that takes on
4 significance because if he was only competing against
5 Fonfara, in '08 he would have qualified, he would have
6 crossed the first hurdle in qualifying for public
7 financing in 2010. But because of the presence of the
8 Republican candidate who entered the race this time, they
9 siphoned off 16 percent of the vote, and his eligibility
10 for public financing based on the prior vote total was,
11 was adversely affected in his view by the entrance of this
12 second major party candidate.

13 MR. ZINN ROWTHORN: Your Honor, just for the
14 record, we of course object to the speculation about what
15 would have happened if there was one candidate in this
16 last election. There's clearly no basis for the Court to
17 make any findings on that.

18 MR. LOPEZ: Well, that's not true, Your Honor.
19 We have OLR reports. We have -- we're about to get data
20 that show that minor party candidates simply get up to ten
21 percent of the vote where they run in the districts where
22 there's one major party --

23 THE COURT: If it's Mr. DeRosa's experience in
24 one of the election cycles where he ran against a major
25 party candidate, it's perfectly fine in that situation. I

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1 think Mr. Zinn Rowthorn's point is simply that nobody can
2 know what would have actually happened had there been only
3 one major party candidate that Mr. DeRosa had to oppose.

4 I mean you can offer evidence and you can draw -- or ask
5 for inferences to be drawn. His point is we don't know,
6 we can't know what actually would have happened.

7 MR. LOPEZ: Fair enough. I will point the court
8 to Plaintiff's Exhibit 24 which --

9 THE COURT: Twenty-four was not admitted.

10 MR. LOPEZ: Well, then I would direct the court
11 to Finding Number -- 269.

12 Your Honor, I'm going have to do some research
13 on where Plaintiff's 24 comes from. I believe it was
14 provided to me by the Secretary -- I mean by the Attorney
15 General in response to discovery, but even if it wasn't, I
16 believe there was an OLR report and it's probably
17 somewhere in the record and I'll get it for the Court, but
18 I can confirm this information simply by looking at the
19 Secretary of State website for election results.

20 And the point I want to make, and frankly this
21 has never -- okay, and the point I want to make is that
22 between 2000 and 2006, of the 33 elections in which minor
23 party and petitioning party candidates received over ten
24 percent of the vote, 29 of those races involved parties in
25 districts that included only one major party candidate.

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1 So, I do believe that there is a significant
2 correlation based on this data that shows that major
3 party -- that minor party candidates do better in
4 districts where there are only a total of one major party
5 opponent.

6 Now, Mr. DeRosa offers his testimony that the
7 more competitive environment that he attributes to
8 availability of public financing to major party candidates

9 will make it harder for the Green Party to raise money to
10 earn media and to be taken seriously, to participate in
11 debates.

12 His testimony contained in his declaration
13 explains to the court how the CEP changes the rules for
14 how many elections are conducted in Connecticut, how
15 elections will play out in Connecticut, and he explained
16 to the court that the Green Party has to reevaluate how it
17 does business. In his view, the Green Party, what they've
18 between doing in the past will no longer be effective, and
19 he testifies that they are going to bring a renewed focus
20 to fund raising, to try to attract candidates who can
21 raise money, to try to attract self funded candidates.

22 He testifies that the parties are going to
23 become more active in campaigns by raising money and by
24 engaging in independent expenditures. He concludes that
25 this was all necessary, that their strategies have to

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1 develop if they are going to continue to remain relevant.
2 Their strategies have to evolve if the Green Party is
3 going to continue to be relevant. And he sets forth in
4 his affidavit in great detail all the steps the Green
5 Party is going to take to adapt to the new environment
6 that they are now competing in.

7 Your Honor, if I could take a minute, please?

8 THE COURT: Sure.

9 (Pause)

10 MR. LOPEZ: Your Honor, in terms of taking you
11 through our evidence, I think we've concluded. We would
12 just, we have some questions about how the court wants to
13 proceed with summation or addressing -- for instance,
14 there's the issue of -- their briefs have crossed over the

15 issue of standing on Counts Two and Three.

16 THE COURT: Well, standing is an issue that you
17 need to demonstrate, you need to prove. So, if you want
18 to offer evidence about that, you probably should.

19 MR. LOPEZ: Okay. All right, Your Honor. I'd
20 ask my colleague Mr. Ladov to address that.

21 THE COURT: That's fine.

22 MR. LADOV: So, Your Honor, I think actually
23 most of the facts are probably things that Mr. Lopez
24 already discussed, so this might be somewhat kind of a
25 combination of factual and legal argument.

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1 And so I know that you -- I don't know if you
2 want to do the whole argument now, so let us know how you
3 want us to proceed.

4 THE COURT: Okay.

5 MR. LADOV: I guess I was going to start with
6 the issue of independent expenditures because I think
7 that's actually the easiest question on standing. I think
8 based on the record we believe that there's no question
9 that we have standing to challenge the independent
10 expenditure matching fund provisions.

11 The record shows that the Green Party has made
12 independent expenditures in the past. We have testimony
13 that the Green Party intends to do so in the future.
14 These matching fund triggers will impede our ability to
15 make those expenditures and we think that's enough, that's
16 enough to show standing.

17 The evidence of past expenditures is actually
18 from the defendant's Proulx declaration, paragraph 12. It
19 documents \$2,623 in independent expenditures that were

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made in the past. I know that the defendants have
21 characterized those as expenditures made in favor of Green
22 Party candidates and so I think they would argue that they
23 would n't trigger matching funds. But I think that we
24 would argue that that sort of underestimates the scope of
25 what the CEP covers in light of the SEEC's regulations.

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1 We know that any independent expenditure which in any part
2 expressly advocates against a participating candidate can
3 potentially trigger a matching fund. Now --

4 THE COURT: So, your argument, as I understand
5 it, is in a district in which you have one participating
6 and one nonparticipating major party candidate, any
7 expenditure made by the Green Party that advocates the
8 defeat of the participating major party candidate would
9 count as an independent expenditure that would trigger the
10 matching funds?

11 MR. LADOV: Right, that is correct, Your Honor.
12 And --

13 MS. YOUN: Your Honor, that's actually an
14 incorrect characterization of the operation of the
15 statute. An independent expenditure that doesn't reach a
16 cumulative threshold will only trigger a matching fund in
17 which there are two participating candidates, not in a
18 situation where there is only one participating candidate
19 and the nonparticipating candidate makes, makes an
20 expenditure or a limited expenditure.

21 THE COURT: All right, help me understand. In a
22 district where you have three candidates, a major party
23 participant and major party not participating and a Green
24 Party, under what circumstances, if any, would, in your
25 view of the statute, would the Green Party's advocacy to

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1 defeat one or both of the competing candidates trigger a
2 matching fund?

3 MR. ZINN ROWTHORN: I think the answer is where
4 the amount of the expenditure plus the amount of the
5 expenditures by the nonparticipating candidates exceeds
6 the grant amount.

7 THE COURT: Yes, okay. So, in other words, in a
8 situation in which the two major party candidates, one
9 participating and one nonparticipating, spend the same
10 amount of money, they both spend the grant amount, then
11 the first dollar of Green Party spending that advocates
12 the defeat of the participating candidate would trigger a
13 match of 25 percent of the grant to the participating
14 candidate? No?

15 MS. YOUN: No, it's a dollar for dollar match of
16 expenditure.

17 THE COURT: You're right.

18 MR. ZINN ROWTHORN: The excess is 25.

19 MR. FEINBERG: One other thought. It doesn't
20 (sic) have to be an expenditure advocating the defeat of
21 the other candidate rather than an expenditure advocating
22 the election of the Green Party candidate.

23 MR. LADOV: Well, I guess to --

24 THE COURT: Let me make sure I got that right.
25 It does or does not have to be?

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1 MR. FEINBERG: As I understand it --

2 MS. YOUN: It has to be.

3 MR. FEINBERG: -- it has to be something that
4 advocates the defeat of the participating candidate and

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not simply something that advocates the election of Green
6 Party candidate.

7 THE COURT: I thought that was your position.
8 Both the court reporter and I heard you say "doesn't" and
9 so --

10 MR. FEINBERG: Sorry.

11 THE COURT: -- I just want to be sure that we're
12 clear.

13 MR. ZINN ROWTHORN: The SEEC has been very clear
14 on that.

15 THE COURT: All right.

16 MR. LADOV: But to respond to that point, I mean
17 taking the First District as an example, since we've been
18 doing that a lot here, we knew from Mr. DeRosa's testimony
19 that one of the arguments in favor of his candidacy is
20 he's going to see voters who are sick of Jon Fonfara.
21 He's going to go for the anybody but the Fonfara vote.
22 Certainly in his race one of his arguments in favor of his
23 candidacy is going to be if you're tired of the major
24 parties, if you want to vote out the incumbent, vote for
25 me. Obviously he's going to have a lot of parties in

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1 favor of his candidacy that have to do with his own ideas
2 and platform, but that's going to be one of his arguments.

3 So, our position is we're the Green Party, we
4 want to make independent expenditure and presuming, as we
5 just discussed, that this independent expenditure was in a
6 position that would trigger matching funds, the Green
7 Party's basically in one of three, has one of three
8 options. It can either make an independent expenditure
9 but leave out one of its best arguments, which is we
10 believe that you should vote for Mike DeRosa because we

11 believe you should vote against Jon Fonfara, it can decide
12 to make an expenditure that would include that argument
13 but that would effectively be punished by matching funds
14 granted to Mr. Fonfara, or it could decide not to make the
15 expenditure altogether because it would feel that doing so
16 would effectively then give its opponent additional funds.
17 We think that any of those three options are unacceptable
18 under the First Amendment and that certainly we'd have
19 standing based on the posture of that and our intent to
20 make such expenditures in the future to challenge that
21 position.

22 THE COURT: Okay.

23 MR. LADOV: I think on the excess expenditure
24 trigger, we would argue that we similarly have standing to
25 challenge that as well.

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1 First of all, it's certainly clear that the
2 plaintiffs have standing to challenge both of the matching
3 fund provisions as part of their main challenge and
4 that the CEP discriminates against minor party petitioning
5 candidates in violation of their First Amendment rights.
6 Within that claim, the trigger provisions operate to
7 increase the funding gap between participating major party
8 candidates and minor party candidates or shut out of the
9 system.

10 We feel that the grants exclusively favor the
11 major party candidates, resulting in a major party
12 slugfest that is going to happen when these matching funds
13 get triggered, further marginalizing our candidates. You
14 had already held, Your Honor, that the plaintiffs had
15 standing to challenge the independent expenditure matching

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16 fund trigger. As I understand, the excess expenditure
17 standing wasn't challenged at the motion to dismiss phase,
18 but you had held that we have standing at the motion to
19 dismiss stage within that argument, and we don't think
20 that there's anything that's changed to challenge that
21 position. We think that, we think the evidence in the
22 record at that stage of the proceeding is actually
23 sufficient for that and still is the case.

24 You know, as Mr. Lopez already directed, we have
25 evidence in the record from Mr., from Mr. DeRosa that the

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1 Green Party is changing its strategies, that it intends to
2 take actions that would trigger these in the future, that
3 it would be deterred from doing so. That's a fully
4 sufficient record to find standing.

5 THE COURT: Give me an example of how the Green
6 Party would be disadvantaged by that provision.

7 MR. LOPEZ: Well, as we said already, one
8 example would be that -- and this is sort of in terms of
9 their only speech being chilled indirectly if they want to
10 recruit a self funding candidate or someone who had
11 resources to run a House race on their own dime, they
12 would spend another \$30,000, they would effectively be
13 deterred from doing so, from recruiting that candidate,
14 from running that full throttle race by the fact that such
15 a, such spending would then potentially trigger these
16 excess expenditure matching funds.

17 And, in addition, we, you know, in our brief we
18 talk about the idea of competitor standing and I think
19 these all sort of tie together. I think that the
20 defendant's mischaracterize our argument when they say
21 they are trying to relax the standards for standing

22 through this argument. We certainly are not trying to
23 claim that there's no need to show an injury. The reason
24 that we bring in competitor standing cases, we believe
25 that they are one way in which courts have shown the

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1 injury under those kinds of circumstances.

2 The situation I just described is one where
3 Mr. DeRosa and the Green Party would be forced to change
4 their standing strategized on the fact that the government
5 has come in and changed the rules of the game. Courts
6 have very consistently found that that's enough to show
7 injury in a case where we're dealing with candidates who
8 are trying to figure out how to strategize for their
9 upcoming elections and it's not that the requirements of
10 standing are relaxed. I think it's a recognition that
11 fundamentally we should have a very low threshold of
12 tolerance for governments coming in and doing anything
13 that would impede the ability of political candidates to
14 run his or her race.

15 So, again, it's not that there's a relaxing of
16 the requirement for an injury. It's just that this is one
17 way of showing an injury, by showing that the government
18 has come in and changed the rules of the game. It's done
19 something that puts our candidates at a disadvantage by
20 giving a benefit to their competitors.

21 THE COURT: Okay.

22 MR. LADOV: And I think the only other point I
23 really wanted to make, Your Honor, is about, is about
24 Davis. I think that, you know, I think the defendants
25 would like to try to characterize as a floor for what we

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1 have to show to provide standing, and it's certainly not
2 the case. Davis is one set of facts where the court found
3 standing but it doesn't in any way set a bottom threshold
4 for what we need to provide in terms of standing. And I
5 think that their citation in their reply brief to
6 McConnell in this record is misleading as well.

7 They cite to McConnell, to a holding in
8 McConnell that a group called the Adams plaintiffs didn't
9 have standing to challenge the millionaires in amendment
10 but the Adams plaintiffs in McConnell were not alleging
11 anything like the kind of injury alleged by the Davis
12 plaintiff. We are. We are standing in the same position
13 as Davis and we, therefore, have standing to challenge
14 these provisions on that grounds, and our claims are
15 nothing comparable to what the Adams plaintiffs were
16 raising in McConnell.

17 THE COURT: Well, you're not quite in the same
18 shape that plaintiff was in Davis because you haven't
19 actually done what it is you claim gives you standing,
20 whereas in Davis the plaintiff had --

21 MR. LADOV: That's true, but we certainly think
22 we're closer in terms of the type of injury that we're
23 alleging, the type of behavior that is being chilled, to
24 what was happening in Davis versus the Adams plaintiffs in
25 McConnell who were really just trying to challenge

1 contribution limits going up, because they felt they
2 shouldn't have the burden of additional fund raising and
3 they were opposing the indirect more bone monopoly
4 plements. And what we're saying is our ability to, through
5 fund raising, to do what we want to do, that that's
6 chilled. That's much like Davis.

7 And I guess the other case I would bring to the
8 court's attention is Leak from the Fourth Circuit. Last
9 week the defendants cited that case for the merits, but on
10 standing it clearly shows that the evidence in the record
11 that we have submitted is sufficient to provide standing.
12 In Leak, I think as here, the defendants argued that the
13 plaintiffs had not shown a past history of making
14 independent expenditures or they argue they didn't have
15 the capacity, and the court said that for standing
16 purposes that's irrelevant, that the statements of intent
17 were fully sufficient to show the kind of chilling injury
18 that Leak plaintiffs allege and that we allege here.

19 THE COURT: What argument are you making
20 concerning the excess trigger in regards to the
21 aggregation of Green Party and major party candidate
22 expenditures?

23 MR. LADOV: I'm sorry, could you say that again?

24 THE COURT: Are you making an argument that
25 there's standing under the excess trigger because of

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1 aggregation of your anticipated expenditures with major
2 nonparty, excuse me -- major party nonparticipating
3 candidate expenditures?

4 MR. LADOV: So you're asking whether --

5 THE COURT: The aggregation of all
6 nonparticipating candidates, one major party as well as
7 the Green Party, what effect, if any, does that have on --
8 that trigger have on your standing arguments?

9 MR. LADOV: I understand the question. I have
10 to admit I'm not certain of the answer. You're asking
11 when there are two, a nonparticipating Democratic and a

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12 Green, and there's participation of each and whether our
13 aggregate expenditures could somehow trigger an excess --

14 THE COURT: Do you have standing by aggregating
15 your anticipated expenditures with those of a
16 nonparticipating candidate or not? You're not making that
17 argument, are you?

18 MR. LADOV: I don't believe so. I think the way
19 that we see it, I think there's at least, maybe at least
20 three injuries that we're claiming. The first is that it
21 would directly chill our spending where we fear that we
22 would trigger the excess expenditures and I think if
23 there's a circumstance where there was an aggregation of
24 spending by different nonparticipating candidates that
25 would trigger an excess expenditure, obviously that would

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1 be a concern of ours. I'm not 100 percent certain how
2 that would operate on the facts but obviously, you know,
3 our general concern that is we would, we intend to focus
4 our spending in districts where we can be competitive. We
5 intend to seek self-spending candidates, but those efforts
6 to try to spend more to counter our position under the CEP
7 will be inhibited by the excess expenditure triggers.

8 And, again, I think that evidence is all in
9 Mr. DeRosa's supplemental declaration where he talks about
10 changes in strategy and future plans of himself and the
11 Green Party.

12 I think a second way in which we feel that the
13 excess expenditure triggers, and really all these triggers
14 harm us. We worry they are going to deter speech and
15 expenditures by other independent parties. You know, for
16 example, as Mr. DeRosa says in his affidavit, we have the
17 fear, when Lowell Weicker says I would be prevented from

18 running for Governor as an independent candidate, that,
19 you know, that this silencing of independent voices
20 throughout the system is something that we believe inures
21 to our disadvantage.

22 And, finally, and this sort of ties into the
23 Count One claims but certainly it's also a part of our
24 Count Three claims, Count Two claim about how these
25 triggers work, is the fact that because the participating

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1 candidates are major party candidates and we're on the
2 outside, whenever these provisions get triggered, that
3 ends up disadvantaging us because it only enlarges the
4 spending gap between the participating candidates and
5 ourselves. So -- I'm not 100 percent sure I answered your
6 question.

7 THE COURT: Maybe you all can help me understand
8 how this works. In a situation where you have two major
9 candidates, one that's participating, one that's not, is
10 there a trigger provision that could be triggered by a
11 small contribution or a small expenditure by the Green
12 Party that is aggregated with contributions by the
13 nonparticipating major party candidate?

14 MR. LADOV: Certainly that's the case with the
15 independent expenditure trigger, but with the excess
16 expenditure trigger, I think -- I think, my understanding
17 is that each candidate individually, but I don't know
18 if --

19 MS. YOUN: If I can represent our understanding
20 that the excess expenditure matching fund provision can be
21 triggered by an aggregating such as Your Honor referred.

22 MR. LADOV: Okay.

23 THE COURT: So, in that instance the amount of
24 the expenditure necessary to impose the adverse
25 consequence on the agreement is actually less than,

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1 potentially less than its having to make a full triggering
2 expenditure.

3 MR. LADOV: Right, that's absolutely the case,
4 Your Honor.

5 THE COURT: All right.

6 MR. ZINN ROWTHORN: Your Honor, I don't know if
7 you include in nonexcess expenditures, but I think there's
8 one potentially useful clarification about the independent
9 expenditure provision. I may have misheard the
10 hypothetical but I thought the hypothetical was that in
11 the First District, Mr. DeRosa as a candidate would be
12 making expenditures and that it was suggested that that
13 would be an independent expenditure or that the Green
14 Party in coordination with Mr. DeRosa was making a
15 expenditure expressly advocating the defeat of the
16 participating candidate. A candidate's expenditures,
17 Mr. DeRosa's expenditures would not qualify as a
18 independent expenditure, nor would a coordinated party
19 expenditure on behalf of a nonparticipating candidate.

20 MR. LADOV: First of all --

21 MR. ZINN ROWTHORN: That goes -- I mean there's
22 a definition in the statute, nine --

23 MR. LADOV: Well, certainly I think I may have
24 said that DeRosa would spend it and obviously that had to
25 be an error. Obviously it would be need to be an

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1 independent in expenditure made by the Green Party on
2 behalf of its candidate Mike DeRosa, and so if I said

3 otherwise, I was in error.

4 MR. LOPEZ: Candidates don't make independent
5 expenditures, Your Honor.

6 THE COURT: Right.

7 MR. ZINN ROWTHORN: But then again, the party, I
8 mean unless it's completely independent and not
9 coordinated, I mean it's hard to imagine a circumstance in
10 the first district where an expenditure by the Green Party
11 on behalf of Mr. DeRosa is not coordinated with
12 Mr. DeRosa, and in the event that it is coordinated, it's
13 not an independent expenditure.

14 MR. LADOV: That's the evidence in the record,
15 Your Honor. That's the evidence that's been submitted.

16 THE COURT: Let me just --

17 MS. YOUN: Your Honor, we never characterized it
18 as such.

19 THE COURT: Let's probe this. If the Green
20 Party suddenly gets a lot of money and say you know what,
21 let's run a statewide ad that says "Throw the bum out,"
22 now, that's an independent expenditure and it would be
23 sufficient to trigger with respect to District One --

24 MR. ZINN ROWTHORN: Well, it's independent of --
25 Mr. DeRosa hasn't participated in the decision to make

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1 that expenditure.

2 MR. FEINBERG: And it has to be expressly
3 advocating the defeat of Mr. Fonfara, not just "throw the
4 gums out" generally.

5 MR. LOPEZ: What the defendants are implying,
6 Your Honor, is that Mr. DeRosa can engage in, can benefit
7 from organizational expenditures where there's a party,

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8 but the definition of organizational -- as major party
9 candidates can -- but the definition of organizational
10 expenditure excludes -- the one thing it excludes is
11 negative advertising. And so Mr. DeRosa could not
12 coordinate or could not benefit, could not work with his
13 party to engage in negative advertising. That would not
14 come within the definition of an allowable organizational
15 expenditure.

16 So, the independent expenditure provision,
17 independent only targets at this point -- I think it's
18 going to be amended to broaden it, but at this point it
19 only targets negative, what is colloquially referred to as
20 negative advertising.

21 MR. ZINN ROWTHORN: Well, just a couple points.
22 "Throw the bums out" would be too general. It would be
23 "Throw the bums out, including X."

24 THE COURT: Throw the following bums out.

25 MR. ZINN ROWTHORN: Throw the following bums

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1 out. And the second point is if there's any coordination
2 between the party and candidate, then it's excluded from
3 the definition.

4 THE COURT: All right, it's not independent at
5 that point.

6 MR. ZINN ROWTHORN: Right.

7 MR. LADOV: And, Your Honor, maybe it would be
8 helpful, there's another type of independent expenditure
9 that Mr. DeRosa talked about in his declaration where he
10 refers to the 2006 United States Congressional House race
11 where the Greens had been running a Congressional
12 candidate. They were in a position where they felt they
13 might be within the margin of victory for one candidate

14 and the other decided, due to being closer in line to the
15 Democrats, threw their support to the Democratic candidate
16 opposing Congressman Shays, and Mr. DeRosa has said that
17 in the future they plan to do more of that kind of
18 advocacy and that's the type of thing there's certainly no
19 question of coordination with a candidate.

20 If the Green Party said, and obviously this
21 would not be relevant anymore, but if the Green Party
22 issued, put out a flyer or sent out a mailing saying, you
23 know, support the Green Party, don't vote for Congressman
24 Shays, vote for so-and-so, that would be an independent
25 expenditure and that's the sort of thing they also plan to

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1 do in the future.

2 THE COURT: So in a really close race where they
3 are worried about doing what Ralph Nader did to Al Gore --

4 MR. LADOV: We would probably object to that
5 characterization but I understand.

6 THE COURT: Some people have said they would,
7 instead of running a candidate, they would -- maybe they'd
8 pull their candidate and they'd throw their advertising
9 dollars in support of the candidate that they want to win.

10 MR. LADOV: Right, Your Honor, and, again,
11 that's in Mr. DeRosa's testimony.

12 THE COURT: All right.

13 MR. ZINN ROWTHORN: Your Honor, I want to make
14 sure the record is clear about excess expenditure. We
15 were talking about the circumstances of aggregating and
16 I'm not, I'm not entirely sure when we're talking about
17 aggregating, we were talking about independent
18 expenditures or excess expenditures under 93713.

19 In a case of excess expenditures, it has -- Mike
20 DeRosa's or the Green Party's, well -- say the Green Party
21 candidate's 100 expenditure is not aggregated with a
22 nonparticipating candidate's, you know, \$84,995
23 expenditures. His, Mr. DeRosa's expenditures have to, in
24 the aggregate -- just looking at his expenditures they
25 have to aggregate an amount over the grant amount, the

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1 spending amount, which is the grant -- well, I'm sorry,
2 the grant amount plus the qualifying contributions.

3 So, with respect to excess expenditures, the
4 Green Party's expenditures didn't aggregate with somebody
5 else's expenditures, they aggregate with the candidate's
6 own expenditures. So, basically the total of that
7 candidate's expenditures must exceed the qualifying
8 contributions plus the grant amount of the participating
9 candidate. Does that make sense, Your Honor? I think
10 we --

11 THE COURT: I think I understand. You're simply
12 saying that the aggregation is not across parties.

13 MR. ZINN ROWTHORN: It's not across candidate
14 and I think we may have suggested a few moments ago it
15 was, but the intent there was that's with respect to
16 independent expenditures, which aren't candidate
17 expenditures. They are -- you know, and those are
18 whatever sources of independent expenditures.

19 THE COURT: Is that the only situation in which
20 aggregations are made either across candidate or across
21 parties?

22 MR. ZINN ROWTHORN: Well, yes, but just again
23 with the clarification that independent expenditures
24 aren't candidate expenditures.

25

THE COURT: No, fair enough.

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1 MR. ZINN ROWTHORN: Right. So that they would
2 be, for example, if the Green Green Party made an
3 uncoordinated independent expenditure of \$1,000, and then
4 plus whatever other uncoordinated independent expenditure
5 by other groups that total the spending amount, those
6 would be aggregated.

7 THE COURT: So, if the KIO makes an independent
8 expenditure that says "Throw the bum out" and then the
9 Green Party makes one very tiny, that tiny contribution
10 could be enough to get it --

11 MR. ZINN ROWTHORN: Yes, yes.

12 THE COURT: All right.

13 MR. LOPEZ: Your Honor, one other -- just on the
14 standing issue, we briefed it and I didn't understand this
15 proceeding to be for the purpose of argument, I would just
16 direct the court to the Leak case, the Fourth Circuit case
17 which ultimately comes down the wrong way for us but on
18 the standing issue it is right on point, and it cites --
19 well, we actually cite a half dozen cases for this
20 proposition and they make very clear in those cases, the
21 defendants all challenge standing because plaintiffs had
22 not engaged in the type of activity that they were
23 complaining about in the past. In fact, Leak said, they
24 said in the past you never raised this kind of money and
25 you've never spent this kind of money. Sounds like the

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1 facts in this case. And the Fourth Circuit said that's
2 neither here nor there. The Fourth Circuit said in this
3 context in the electoral context, because of the way the

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4 statute regulates campaigns, it's sufficient that you
5 allege and here we more than allege, we testified to it,
6 entered testimony on it. It's sufficient that you state
7 your intention to raise the money in the future and to
8 spend it in the future and that this law will chill your
9 aggressiveness about how you proceed, your strategies,
10 standings strategies and that's at the heart, that lies at
11 the heart of what you held the first time around on this
12 issue.

13 THE COURT: What was the procedural posture in
14 Leak?

15 MR. LOPEZ: Good point. It's very --
16 (Pause)

17 MR. LOPEZ: It's a motion to dismiss?

18 MS. YOUN: Motion to dismiss, Your Honor.

19 MR. LOPEZ: We have the opinion here, Your
20 Honor. It was, it was a good question. It was out of on
21 a motion to dismiss. This court's discussion, however,
22 was not dependent on the fact and in our briefs we submit
23 a half dozen cases to the court, circuit cases where --
24 some of which involved trigger provisions where the court
25 reached the merits simply based on plaintiff's claim that

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1 this would chill their -- affect their strategic decisions
2 about how to proceed in the future and ultimately act as a
3 deterrent on their speech, and I bring that to the
4 attention of the Court.

5 Your Honor, the one thing I didn't address was
6 narrow tailoring and mostly because I weaved, the theme
7 was weaved in and out of my presentation all along. But
8 just to bring it all together, if I may, the state's
9 interest here in the, in the public financing system, its

10 broader interests is to take money, you know, reduce
11 reliance of candidates on private money. That interest is
12 a little suspect here, because of the organizational
13 expenditure provision and the loophole for exploratory
14 committees. But even if we take that interest at its face
15 value, the state nevertheless has to justify why they are
16 treating major and minor parties differently, and at the
17 motion to dismiss stage they, they say, well, they argue
18 that Buckley allows us to do that, and I think we've --
19 we're past that point. Buckley is probably not the most
20 instructive case anymore on this case. Buckley doesn't
21 allow you to discriminate on the basis of the statute
22 between major and minor party candidates if the effect is
23 to distort the relative positions of the parties, and I
24 think we established that it does distort the relative
25 positions of the parties.

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1 Mr. DeRosa's example makes that very clear.
2 He's definitely, very definitely leaning in on more of a
3 protective environment and so are all major party
4 candidates. So what we're left with then is whether the
5 state's interest in the decision -- in the dual 12, five
6 criteria are narrowly tailored to serve the state's
7 interest. And the only interest that they've identified
8 so far is the one we see in all cases involving benefits
9 to major parties denied to minor parties, is the
10 government fisc. They failed that test, Your Honor. At
11 least based on our arguments they have failed it.

12 There's nothing in the legislative history that
13 shows that the legislature was serving the public fisc.
14 You asked about other states. Other states have programs

15 that are much easier to qualify for. The federal program
16 has a program that's easy to have, quite frankly, and the
17 fisc is not threatened under any of those circumstances.

18 You know, at the end of the day our point is
19 that the, and we have the added fact here that the public
20 fisc here is the Treasury, or the Treasurer, if you will,
21 is just as likely to be raided by the scores and scores
22 and scores of major party candidates who are getting rich
23 subsidies and who have no realistic chance, and that's
24 because they are in districts that are jerrymandered in a
25 way that they can't possibly win.

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1 In your first opinion, you took it almost for
2 granted, I think, if you will. Of course the state has
3 its interest in safeguarding the Treasury, or maybe you
4 didn't -- I take that back. Of course, the state has an
5 interest in safeguarding the Treasury but I think the
6 evidence shows that interest is a little suspect and it
7 can probably just as easily be served, you know, as a
8 matter of legal argument by lowering the qualifying
9 criteria down to 5 percent, and that's not my idea.
10 That's Commissioner Garfield's suggestion. That's his
11 recommendation in the strongest terms to avoid problems
12 under Buckley.

13 And in terms of narrow tailoring, you can
14 probably legitimately ask yourself why do we need a
15 petitioning/prior vote total requirement and a C money
16 requirement for qualifying. One or the other probably
17 would suffice. In candor, if they did adopt a system that
18 just used the qualifying contribution requirement at the
19 levels they have it, I might be here nevertheless arguing
20 that that, that that criteria sets the bar too high

21 because it is a de facto discrimination, de jure or de
22 facto, de facto discrimination but that's not the case.
23 What we have here is a system that has two many levels for
24 party candidates and at the very least, there should only
25 be one. Thank you.

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1 THE COURT: All right, thank you. Let's talk
2 about tomorrow. We're going to switch sides, if you will.
3 We're going to get a list of exhibits prepared and
4 hopefully communicated both to the court and to
5 plaintiff's counsel ideally tonight, if possible, and it
6 would be very helpful to me if you could identify the
7 docket numbers for things that have already been docketed.

8 MS. YOUN: Is there a -- would you like that
9 filed or is there an address at which we can email that to
10 the court? Unfortunately we're not in our offices right
11 now so it's a little difficult to send things.

12 THE COURT: You can certainly email that to my
13 law clerk and just any email that you send to her, you
14 ought to send to everybody else so there's no question
15 that we're getting some sort of ex parte contact. And
16 she'll give you the email after we're done.

17 I want to remind everything I've got a
18 2:00 o'clock proceeding. I am optimistic that it will be
19 very brief, but I'm not sure of that. And plaintiffs
20 should be prepared to offer any objections, evidentiary
21 objections that you have to any exhibits that have been --
22 that are going to be on the list that defendants give you.

23 And then in terms of Thursday, let's talk at the
24 end of the day but my assumption would be people are going
25 to want to talk some more about this and we'll probably

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1 come back and have what amounts to either a summation or
2 an argument and we'll go from there. We can talk about
3 that as well. I do have, again, one approximately hour
4 long proceeding in the afternoon on Thursday.

5 MR. LOPEZ: Your Honor, did you want an exhibit
6 list from us or -- exhibits that are admitted?

7 THE COURT: Your exhibits are submitted. I was
8 clear what your exhibits were because you had in effect
9 numbered them and I was clear on that. The defendant's
10 exhibits are somewhat more scattered because they tend to
11 be attached to declarations, so they are referred to as
12 Garfield declaration Exhibit 17 or whatever, so I just
13 want to be clear about the record.

14 Questions, concerns, other issues?

15 MR. FEINBERG: Your Honor, can we leave our
16 materials here?

17 THE COURT: That's fine. Feel free to leave
18 anything in the courtroom that you can't --

19 MR. ZINN ROWTHORN: We're starting at
20 9:00 o'clock?

21 THE COURT: We're starting at 9:00 tomorrow,
22 assuming that works for everybody. I can start at 9:30 if
23 that's better, if you don't expect to need the full day.

24 MR. ZINN ROWTHORN: 9:00 would be fine, Your
25 Honor.

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1 THE COURT: All right. We're we are going to
2 have the one witness, I take it, tomorrow?

3 MR. FEINBERG: Yes, Your Honor.

4 THE COURT: And when is that witness going to be
5 here?

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MR. FEINBERG: At 9:00.

THE COURT: 9:00, all right. Okay. Unless there's anything else, we'll stand adjourned.

(Whereupon the above matter was adjourned at 5:10 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

Transcript of 12-09-2008 Bench Trial.txt
my shorthand notes taken in the aforementioned matter to
the best of my skill and ability.

Susan E. Catucci, RMR
Official Court Reporter
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♀