UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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GREEN PARTY OF CT, ET AL	:	No. 3:06CV-1030 (SRU)
	:	915 Lafayette Boulevard
vs.	:	Bridgeport, Connecticut
	:	
	:	December 10, 2008
JEFFREY GARFIELD, ET AL	:	

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CONTINUED BENCH TRIAL

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

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I N D E X

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DONALD P. GREEN

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(9:20 O'CLOCK, A. M.)

THE COURT: I received a copy of the Defendant's, Intervenor Defendant's trial exhibit list. Appreciate that.

MS. YOUN: Your Honor, if I might, there was, I think, one thing that we neglected to include on the list, which is in addition to the affidavit of Donald Green dated June 26, 2008, there should also be the expert report and supplemental expert report of Donald Green.

THE COURT: All right. That's in connection with the entry on page three?

MS. YOUN: Yes, correct, halfway down the page.

THE COURT: All right, thank you.

Before we get started, I wanted to raise one issue kind of as a follow-up to what we talked about yesterday on the aggregation question, and I want to refer counsel to the Defendant's and Intervenor Defendants joint motion for partial summary judgment, specifically the memorandum in support. This says in further support of that motion, which is document 301-2.

MR. ZINN ROWTHORN: Your Honor, if I may, is that on October 3rd, 2008?

THE COURT: No, November 19.

MS. YOUN: Yes, Your Honor.

THE COURT: All right. At pages four to five,

there's some statements made that I just wanted to follow up on. The first is on page four of the second full paragraph, second sentence, "When such independent expenditures exceed the matching fund threshold or when the sum of the aggregate independent expenditures and expenditures made by a nonparticipating opponent exceeds the matching fund threshold, the matching funds in the amount of the excessive expenditure is awarded to the participating candidate."

And then on page five, the first full paragraph, "Sections 9, 7, 13 and 9714 can also work in combination so that the sum of nonparticipating candidate expenditures and independent expenditures may trigger the release of funds to a participating candidate." And then that gives an example that is at odds with my understanding of what

we talked about yesterday and I just want to be clear which is correct.

MS. YOUN: Sure, and I wanted to apologize for that submission, Your Honor. At the time we submitted this brief, that -- the interpretation that's set forth here is not clear from the face of the statute but is not barred from the, by the face of the statute. At that time we were under the impression that that interpretation of the statute was still a possibility. Since then, we have been informed by the SEEC that they are not in fact

going to interpret the statute to, you know, to allow for that kind of aggregation, either for independent expenditures or for excess expenditures. I think, I guess because it's a facial challenge, I think that that interpretation of the statute is still open. That's the one that they informed us they are intending to make.

MR. ZINN ROWTHORN: Your Honor, I don't want to add further confusion here. We actually had a conference call to discuss this last night because it is the state's position, the SEEC's position that with respect to excess expenditures, which really relate to a high spending opponent, and the language of the statute 9713 talks -- doesn't refer at all to aggregation. It is the SEEC's position, the SEEC hasn't had the opportunity yet to apply that but it is the SEEC's position that we have through Director Rotman, that there is no aggregation, except of one, a single candidate's aggregating a single candidate's expenditures. But you would not in that circumstance under the excess expenditure provision aggregate across candidates. Independent expenditures,

Your Honor, do involve some aggregation, there's a specific section, the last section of 9714 that does discuss aggregation.

THE COURT: All right. Help me understand from an evidentiary point of view what I have here. What

you're telling me is you have an oral representation from the SEEC that that's not how they intend to interpret the statute.

MR. ZINN ROWTHORN: You know, we can supplement the record with a declaration, if necessary, but we do think that that is the, that that is the proper construction based on the language of 9713, because it talks about expenditures or expenditure by an opponent and really the thrust of this, of this section is to deal with a high spending opponent, and there's nothing in this, there was nothing in this section that refers at all to aggregating, and I contrast, Your Honor, with 9714, sub C I believe it's two, which talked about aggregating.

So, you know, we do believe, Your Honor, that that is, you know, we are certainly happy to supplement with a declaration clarifying what we believe is the appropriate construction. That is, that excess expenditures don't aggregate across candidates but that independent expenditures do aggregate across and to these individuals, but we think that construction is the proper construction on the face of the statute, Your Honor.

THE COURT: Well, all right. Let's look at 9714(c)(2). It doesn't use the word "aggregate" but it uses the word "combined with."

MR. ZINN ROWTHORN: That's what I'm referring

to, Your Honor.

THE COURT: Right. So it says the additional monies under Subsections A, B of this section to match independent expenditures shall be granted to a qualified candidate committee who have a participating candidate opposed by a nonparticipating candidate only if the nonparticipating candidate's campaign expenditures combined with the amount of the independent expenditures exceed the amount of the applicable grant authorized.

MR. ZINN ROWTHORN: Yes.

THE COURT: Now --

MR. ZINN ROWTHORN: So that, Your Honor, is what we suggest requires aggregation under the independent expenditure reference, but we didn't see, Your Honor, anything in 9713 that uses aggregating combined with or any parallel language to suggest that there's aggregating across candidates, Your Honor, under the excess expenditure provision.

THE COURT: Well, wait a minute, what about 9713(a)?

MR. ZINN ROWTHORN: Well, there, Your Honor, it talks about expenditures made by a nonparticipating candidate. So -- and so, you know, it really only refers in all of these subsections and the subsections are largely identical, they just talk about the different

steps, excess expenditure grants, but it really just refers to, to a nonparticipating opponent's candidate's expenditure.

I mean I just don't see, Your Honor, we don't see -- you know, it would require, I guess, an inference

that we don't see in the statutory language to suggest aggregating across candidates.

(Pause)

MR. ZINN ROWTHORN: And there was also an administrative right behind which, as the expenditures are made, the candidate would use the expenditure, there is an aggregation by the SEEC and at some point that aggregation exceed the, in the first instance a 90 percent amount which would sort of set the stage for the first stage excess expenditure supplemental grant.

MR. LOPEZ: Your Honor, we would submit that the word "aggregate" would be unnecessary to the construction that the attorney general is urging, and it makes sense if you are a legislature who wants to insulate or protect the participating candidate to combine all the spending by, or to aggregate all the spending by nonparticipating candidates so that the participating candidate is never placed at a spending disadvantage. And I think that's pretty plainly -- we've always understood the statute to mean that.

So we believe that it does cross endorse, and we certainly agree with them on independent expenditures that it, that the numbers are aggregated for purposes of triggering independent expenditures.

MR. ZINN ROWTHORN: Well, Your Honor, I don't know that the legislature intended to make a participating candidate of the resources, of all of the combined opponent's resources. It makes sort of a super resourced candidate in, for example, a gubernatorial race where there could be two or three other opponents. What we've always understood this to show, and what we think the

language of the statute requires, is that we talk about a high spending opponent, and that is the language where we talk about a singular opponent in the first sentence of all these subsections by a nonparticipating candidate.

Your Honor, we -- you know, I do think it is correct, as Attorney Youn suggests, that particularly at this stage, a facial challenge stage, there ought to be a particular deference to the, you know, to the construction by the administrative body responsible for construing this. We're happy to put in that affidavit but, you know, I don't see any language here. I do suggest in cross aggregation and, you know, that is in stark contrast, I think, to 9714.

THE COURT: All right. Is there anywhere in the

statute where the legislature anticipated that the participating candidate could face a challenge by more than one nonparticipating candidate? I don't see it in these sections. Doesn't seem --

MR. ZINN ROWTHORN: Well, I think there's always, I mean that's always a reality, that there are -- I mean there's certainly nothing in the statutes that would take I think the set off limiting the number of candidates in a number of candidates.

THE COURT: No, that's not what I'm saying. Did the legislature make it clear one way or the other --

MR. ZINN ROWTHORN: Your Honor, there's nothing explicitly that talks about that, but the understanding is that one high spending opponent, nonparticipating, could trigger excess, multiple excess expenditure grants if there were, for example, two participating candidates.

So, if you had, for example, a self-funded --

THE COURT: Right.

MR. ZINN ROWTHORN: -- third party candidate, that would trigger one. Once that candidate reached the threshold, could trigger in both instances where the participating candidate's excess expenditures --

THE COURT: The question though is what happens if I have a self-funded nonparticipating candidate who's very careful and doesn't want to trigger and then you have

a minor party who comes in and spends another 30-, 40,000?

MR. ZINN ROWTHORN: It's our position, Your Honor, that you don't aggregate in that circumstance.

THE COURT: Okay. All right, but just to be clear, the aggregation provisions of 9713 --

MR. ZINN ROWTHORN: I think what we would see, given the language in 9713, I think what we see in 9713 language, for example, that might say an expenditure by a nonparticipating opponent combined with other expenditures, if we were going to be consistent language-wise across 9713 and 9714.

THE COURT: Actually I meant to focus back on 9714(c)(2). Under (c)(2), you aggregate all independent expenditures plus the nonparticipating candidate's campaign expenditures when deciding whether --

MR. ZINN ROWTHORN: Yes.

THE COURT: -- that trigger is met.

MR. ZINN ROWTHORN: That's our position, Your Honor.

THE COURT: Okay. That's helpful.

MR. ZINN ROWTHORN: Thank you, Your Honor.

THE COURT: Thank you. You mentioned

supplementing the record. Do you want to submit anything in writing that would --

MR. ZINN ROWTHORN: You know, I think that might help to clarify the record, Your Honor. We're very happy to do that. If the court is willing to receive that kind of a declaration, we'd be happy to submit it.

MR. LOPEZ: Yes, Your Honor. I guess we're getting ahead of ourselves. I can see us briefing this issue. The Attorney General actually made a dramatic change in our view, in this law unrelated to the trigger provision but having to do with the minor party candidates while qualifying at the petitioning process.

MR. ZINN ROWTHORN: That wasn't --

MR. LOPEZ: But that was done after the law was in effect for two years. It was done by declaratory ruling and under the state law declaratory rulings have binding effect. Anything short of a declaratory ruling has no binding effect on the Attorney General and, in fact, can be reputiated and can go in a different direction at any time.

I raise this, A, because there is case law. The preponderance of case law supports the idea that the statute can't be amended by representations made in court or by declarations. It has to be done by the legislature or at the very least through the rule-making process. And, if you'll recall from yesterday, I referred to a binding effect of an organizational fact sheet, I believe it was, and I was corrected by Attorney General Murphy-Osborne or Counsel Youn that that has no binding

effect on the, the agency responsible for administrating the CEP.

MR. ZINN ROWTHORN: Your Honor, just a couple points. The declaratory ruling issue with respect to petitioning wasn't initiated by the Attorney General's office. That was by the SEEC. And also in connection with some official action taken by the Secretary of State. We're not amending the statute; you are, Your Honor. What we're suggesting to you is what our administrative construction of the statute is.

You know, we may be -- and I apologize, in fact we are and I do apologize for it -- contradicting a representation made in a brief. I take responsibility for that. You know, we are happy to give you, for whatever Your Honor thinks it's worth, our official, and in this instance it would be an official statement by Beth Rotman suggesting what we believe is the proper construction, but it certainly isn't by way of amendment of the statute.

MS. YOUN: Your Honor, we do apologize for the representation that was made in the brief. One reason we find ourselves in this situation, I think it bears repeating, is because we're talking about a series of hypothetical injuries that have not occurred yet. Every statute, when it is passed, has gray areas that are, you

know, those gaps are then filled by, by the administrating agency. In this case the injuries that we're talking about, these kind of aggregation and cross aggregation hypotheticals have not occurred and, thus, the SEEC has not had occasion to issue declaratory rulings to fill these gaps. They haven't had a chance to do that yet and -- but on a facial challenge, we think that the, you

know, this court is required to construe the statute. As long as the statute is open to interpretation that does not cause a sort of injury that plaintiffs are claiming, then we are entitled to the benefit of that interpretation.

MR. LOPEZ: Well, under that logic, Your Honor, you could give the benefit of the interpretation to every provision of the statute that they argue doesn't discriminate the way it, the statute appears to discriminate on the face of the statute. And this language, I think, very -- I don't know how clear it is, because we seem to be debating it, but in my view the more reasonable construction of this is that, you know, go with this program.

You're going to hear testimony from George Jepsen today, whose declaration -- and from Senator Meyers through his declaration, that the only way public financing is going to work is if we insulate these

candidates from the chance, no matter how remote, that they are going to be placed on a spending disadvantage, and this language would be consistent with that testimony, Your Honor, and I would suggest it would be consistent with what the legislature called for.

MR. ZINN ROWTHORN: Your Honor, I don't think we would review a candidate as a spending disadvantage. If we are to look at, for example, presidential candidates who are equally funded, I think we would view a candidate at a spending disadvantage if there is one candidate who has a high spending opponent and that is what we think this refers to. And, by the way, we're not asking for the

benefit of the doubt on statutory language that is anything other than we think debatable or, in our view, clear on our side of this debate.

You know, we think this is at the very least a very, very plausible and sensible construction that we're suggesting. We do think in that instance in this context at this stage we are entitled to that presumption, Your Honor.

THE COURT: Well, I'm happy to receive the declaration, and I'll tell you, there is what appears to me on the face to be a plausible reading that the words in the aggregate refers back not to the candidate but, rather, to the words contributions, loans or other funds

have been received or that an expenditure is made or obligated to be made. In other words, their expenditure may well be that not just with expenditures but with the combination of contributions, loans, funds, expenditures and so forth.

MR. ZINN ROWTHORN: And we'll address that in the declaration, Your Honor, but that is sensible in the administrative context because it's all of those sources of funding that are reported by the, what says the high spending opponent, but we'll address that, Your Honor.

THE COURT: All right. Are the defense attorneys ready for their case?

MR. ZINN ROWTHORN: Your Honor, just to give you a little bit of a road map I think where we anticipate going, we discussed yesterday having discussion about any objections that plaintiffs may have in light of our exhibit list proffer. It was my understanding we would handle that at the outset --

THE COURT: That's fine.

MR. ZINN ROWTHORN: -- as we did yesterday, and then Attorney Dunn is going to present the testimony of our expert, Professor Green. Then I think we're going to conduct the same sort of factual recitation that Attorney Lopez did yesterday. Attorney Youn is going to handle that primarily. Others may have some input along the way.

And then I had anticipated by -- I originally anticipated doing what were in the nature of opening remarks but I think in light of our discussion yesterday, I think I'll reserve that for closing remarks at the appropriate time. And I think what that leaves on the table is I think a discussion about the pending issue about the 2008 data. So, and I as well as others -- the intervenor defendants may have some closing remarks as well but that's how we anticipate proceeding.

THE COURT: All right, that's fine. So let's start with the exhibits. Is the plaintiff prepared to indicate which exhibits you object to?

MR. LADOV: Yes, Your Honor. Our first objection was to the declaration of Jackie Thrasher. This was submitted as Document 310-3 on December 3rd. She's a member of the Arizona House of Representatives. She testified to some extent about her experience but I think the reason --

THE COURT: Go ahead, I'm listening.

MR. LADOV: So the reason that we object, and I think the reason that it's been introduced is for paragraph number eight where she speaks of an incident, an alleged incident I think in an Arizona election where

somebody who ran as a Green was really a shill for the Republican party, we think as an entrant party effort of

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bringing a newspaper report. There's no indication of personal knowledge, and we also object on the ground of relevance. We don't think an incident in Arizona of a Republican abusing the system has any relevance to our plaintiffs. And there certainly, if you look at paragraph 33 and their findings, which is what this refers back to, there's no indication that this information was before the Connecticut legislature.

MS. YOUN: If I may respond, Your Honor?

THE COURT: Sure. Give me one minute. I still haven't found this yet.

MR. LADOV: I think this was submitted as an exhibit or an amendment to their findings of fact.

MS. YOUN: It's document 303?

MR. LADOV: Or 310 actually. I'm sorry, Docket 310-3.

THE COURT: Okay.

MS. YOUN: Your Honor, I'm sorry if this isn't apparent from the -- isn't as clear as it might be from the text of this, but the affiant here or the declarant is indeed testifying from her personal knowledge. She is testifying in paragraph eight about the race that she ran in and lost to the Green Party candidate. And the quote that, you know, she was considered a shill is a quote taken from Jackie Thrasher herself and is quoted in the

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newspaper article referenced there. It's not an attempt to put in the fruit of that newspaper article, it's just referring the Court to that as well in case the Court sees

any of those facts sufficient to take judicial notice.

With respect to the relevance objection, we are not putting this in as a legislative document and we agree that it would be inappropriate to do so. This was not before the legislature. Indeed, it hadn't happened yet. However, we are putting this in on the tailoring analysis as to whether or not the tailoring of the threshold is necessary to discourage abuses of the system or participation in the CEP from candidates who have no chance of being elected to office.

THE COURT: All right. Well --

MR. LADOV: Well, Your Honor, I guess if I may --

THE COURT: Just a moment. Let me just inquire, because there was nothing that indicates she has knowledge, for example, of the second sentence. She had been a registered Republican for years until four days before she ran as a Green Party candidate. Then we have financial reports concerning qualifying contributions. So she's testifying in effect with double hearsay about what's in some financial records that I haven't seen. Then she's talking about what the Green Party itself said

which, again, is a double hearsay problem. You know, there's the newspaper article, which is a double hearsay problem.

MS. YOUN: Yes, I think the newspaper article we're happy to leave out, but I think the substance of the declaration here is that she was in this race and she did lose to this candidate. And I think that as a, as a candidate in that election, she -- I mean she knows from

her own personal knowledge that her opponent switched parties four days before the election. I think that that's a sufficient basis for personal knowledge.

MR. LADOV: Your Honor, we certainly have no evidence from this declaration that she has personal knowledge. We've had no opportunity to cross her on that, so I think that we would argue that the hearsay problems still stand and there is just no foundation here for bringing that evidence.

MS. YOUN: You know, this is --

THE COURT: Let me just say this. I'm going to overrule the objection for the following reasons. It seems to me that the statements that are made here are ones that can be confirmed or refuted through an examination of public documents in the State of Arizona, specifically required filings under their Clean Elections Act, the party registration financial reports. These are

all matters that are a matter of public record in Arizona that I can, that I can look at and confirm one way or the other the veracity of these statements.

I'm going to keep out the statement about being a shill because the only source for that is the newspaper article, and it seems to me that that that sentence needs to be excluded. But, again, the amounts received in funding can be confirmed by the public records in Arizona.

MS. YOUN: With respect to that, and I would just emphasize this is a candidate testifying to your own personal knowledge of what's happening in the race around you, even as Mr. DeRosa is able to say a Republican ran against me and received this percentage of the vote and received this amount of contributions. You know, it's

true that Mr. DeRosa may have learned that from going to the Secretary of state's website and that may not be apparent from the face of this declaration. But still, as a candidate, I believe that that does overcome hearsay because he does have sufficient personal knowledge of events in which he is intimately involved.

THE COURT: You just won.

MS. YOUN: Okay. I'll sit down.

THE COURT: The only part I'm keeping out is the statement from the newspaper which, you know -- I mean that's at least double, if not triple hearsay. Somebody

said it reportly to a reporter who reports it in the newspaper. She reads it and reports it to us, so maybe it's quadruple hearsay.

MR. LOPEZ: Your Honor, if I may be heard, from the first day that we entered into phase two, the parties entered into an agreement which we submitted to the court and which the court signed in which they agreed that they would exchange the names of their affiants and make those affiants available. We complied with those rules. Our affiant that we have tendered has been made available for deposition. On November -- on this last date we are receiving testimony from someone in Maine who I never heard of, someone in Arizona who I never heard of, someone in New Jersey who I know of from the newspapers because she ran in a high profile race, and I just want to raise the additional objection that we've never had notice of these affiants in the past.

Now, I know that we submitted Narain's declaration only last week but Narain is a paralegal in my

office and I submit that his declaration stands on, in a different relation than declarations from witnesses, like the witness from Maine, but Narain's declaration, all Narain's declaration does is confirm the data in the, the data in the Nikolaidis declaration.

So, I would ask the court in reviewing its

decision on whether or not to let these declarations in and consider them, the parties had an agreement about tendering witnesses who would testify to the merits.

THE COURT: I understand your position and I understand your frustration. The defendants will soon be arguing that I should not consider this declaration because it deals with the 2008 election, so, you know --

MR. LOPEZ: Okay.

THE COURT: -- it cuts both ways.

MS. YOUN: Certainly. And just to respond to Attorney Lopez on the agreement argument, the only reason we submitted these declarations on the date that we did is because the Court had specifically asked us to provide evidence of whether these, this kind of splinter candidacy issue had occurred in other states, and the plaintiff did not at that scheduling conference raise -- we said we would provide it, the plaintiff did not indicate that he objected to us providing this information at the court's request.

THE COURT: Okay. What's the next objection?

MR. LADOV: So, Your Honor, the next objection was to the declaration of Jonathan Wayne. This was also attached as three -- sorry, 310-2 filed on December 3rd.

THE COURT: Okay.

MR. LADOV: I think our objections are similar.

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Mr. Wayne is the executive director of the Maine Commission on Government Ethics, but, again, when you read through his declaration he appears to be relying on news reports. It's not clear what, if any, of this is personal knowledge. We don't know that there's any foundation that any of this is personal knowledge.

To the extent that he's citing information that is before the commission, we would certainly argue that, that the defendant should have provided those citations and that record, so that we would have the opportunity to take this testimony, put it into context, respond to it appropriately rather than through the hearsay news reports that they are using.

And, again, just to sort of highlight a couple of places, I mean in paragraph 11 on the last page, we had Mr. Wayne quoting Glen Cummings, the outgoing speaker of the Maine House, as quoted in a news report. So I mean there's certainly double, if not triple hearsay problems there. And I think, again, we would just object to the entire declaration as lacking foundation and as hearsay.

MS. YOUN: Your Honor, if I may respond? This is the Director of the Commission and he is submitting evidence from his own personal knowledge regarding testimony as is set out in paragraph seven that were, that was submitted to this commission in the form of hearsay.

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He's testifying about, for example, paragraph ten, the commission received testimony that Laurel Rodgers (ph) also attempted to recruit a homeless man, and the mere fact this also appears in the newspaper articles

referenced does not mean that the basis for his knowledge is those newspaper articles. Those, those references are included for the court's convenience, but they are not the foundation for this evidence.

MR. LADOV: I'm sorry, Your Honor, if I could just add a relevance objection as well, I think we'd also point out it's unclear whether the abuses that they are discussing are even relevant to minor parties. For example, paragraph nine, unless I'm missing something, they discuss Sarah Trundy (ph) who ran against an incumbent purportedly using the system. It's unclear what her party affiliation is and whether any of this evidence really speaks to the right of the government to discriminate between major and minor parties.

MS. YOUN: Your Honor, this evidence goes to the tailoring argument as to the necessity for the threshold and the way in which it opens up a system to abuses of someone's -- if a system's qualifications thresholds are not sufficiently high to deter these kinds of abuses. Now, we have never meant to cast any aspersions on the Green Party or the Libertarian party or any of

Connecticut's minor parties. You know, we don't believe that they could be -- that they are fringe or in bad faith. What we are talking about is instances of abuses in other states and the reason why we think that setting thresholds at the level they were set was well tailored by the Connecticut legislature.

MR. LADOV: I guess, Your Honor, I guess in response I would add that the Maine qualifying criteria is comparatively low compared to the Connecticut qualifying criteria for qualifying parties. If that's what they are

trying to use this to argue, then I think we argue it's more prejudicial than relevant.

MS. YOUN: That's an argument that goes to weight rather than admissibility, Your Honor.

THE COURT: Well, all right. I'm going to sustain the objection in part. I'm going to permit paragraphs one through five, the first sentence of paragraph six, the first sentence of paragraph seven, the first sentence of paragraph ten. The rest is either hearsay or irrelevant, it appears to me.

MS. YOUN: Your Honor, if I might be heard with respect to the first two sentences of paragraph eight and the first sentence of paragraph nine. Although those are, although --

THE COURT: Yes, okay, the first two sentences

of paragraph eight, that's fine.

MS. YOUN: And first two sentences of paragraph nine.

THE COURT: That's -- that's fine, too.

MS. YOUN: Oh, I'm sorry. Also the last sentence of paragraph nine. I'm sorry. Because it would have been the commission that issues such a finding.

THE COURT: That's fine. Okay. Next?

MR. LADOV: I think next, Your Honor, maybe we could just make a standing objection rather than going through all the declarations. I think along the lines of our discussion yesterday, obviously we're not going to object to any of the declarations to the extent that they are bringing in personal knowledge, but to the extent that fact witnesses are offering opinions that are beyond the

scope of their personal knowledge, we would object.

I guess by way of example, looking at the supplemental declaration of George Jepsen which was submitted on December 3rd, the -- and this is filed as Document 309-6.

THE COURT: Okay.

MR. LADOV: So we certainly would have no objections to the first, I believe two pages where he talks about his personal experience, but then on page three, all of a sudden we have him discussing the

experience of the Republican party, which he has no personal knowledge of based on the declaration, and discussing opinions about what a major party candidate could or could not do. We would simply ask the court to restrict the reading of paragraphs like that to any facts, factual statements and narrow any opinions to what would be personal experience.

MS. YOUN: Your Honor, with respect to paragraphs 10, 11, 12 and 13, this is a declaration from the former Chair of the Connecticut Democratic party. He's talking about the party resources that could be brought to bear basically to rescue a candidate in an emergency. I'm happy to have the sections of paragraph 10 that refer to the Republican party struck but I think as to the Democratic party, he is the appropriate witness and the only witness who can testify to those facts and these are well within his personal knowledge.

MR. LADOV: And I think, Your Honor, in response, we would just caution against Mr. Jepsen being permitted to testify to what major party candidates in general can or can't do. If he wants to testify to what

the Connecticut Democratic party is able to do, of course he's entitled to that.

THE COURT: In paragraph 10, I'm not going to consider his statements about the Republican party, and in general I will treat both sides' declarations the same in terms of statements apparently beyond personal knowledge or opinion statements from fact witnesses.

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MR. LADOV: And, Your Honor, I think our only other objection was to the -- it's an article about Barrack Obama. It's Document 309-2. It's referenced in paragraph 87.

THE COURT: I have it.

MR. LADOV: I think this is just hearsay. I think to the extent the Court were to take judicial notice of those facts, we would add there are a lot of reasons why then Senator Obama did not decide to participate in public financing, we would submit, and among those reasons and perhaps the main reason, he had immobilized an army of donors and raised far more money privately than he could through the public system. And we would argue the Obama/McCain race is a strong argument in favor of our position on the troubling nature of excess expenditure.

MS. YOUN: That's an argument that goes to weight rather than admissibility. This is evidence, a statement from Senator Obama himself that evidences his state of mind and the reasons that caused him not to participate in the system.

THE COURT: But it's in a newspaper article.

MS. YOUN: It's a newspaper article he authored.

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THE COURT: Okay.

MR. LADOV: But --

MS. YOUN: And it is testimony of his state of mind.

THE COURT: It's an out-of-court statement of Mr. Obama offered for the truth presumably of what his state of mind was.

MS. YOUN: I think it's offered for the fact that -- it is offered for the fact that it is common knowledge that a public financing system that doesn't provide a means to defend against independent expenditures will cause participating -- will deter candidate participation in such a program, and this is a statement of that fact having been reported.

THE COURT: Okay. You know what? I'm going to exclude this newspaper article but both sides can argue all you want about the Obama/McCain race. I don't have to close my eyes to the world in making a ruling.

MS. YOUN: Okay. We would ask Your Honor to take judicial notice of the facts in the Obama/McCain campaigns --

THE COURT: There's a lot that happened in that campaign that you almost can't not know.

MS. YOUN: Yes.

MR. LADOV: I think that's all of our

objections.

THE COURT: Okay, thank you.

MR. DUNN: Your Honor, we call Donald P. Green to testify.

THE COURT: All right. Please remain standing and raise your right hand.

D O N A L D P. G R E E N, called as a witness on behalf of the Defendants, having been duly sworn by the Court, testified as follows:

THE COURT: Please be seated, state your full name for the record and give us your business address.

THE WITNESS: My name is Donald P. Green, D-O-N-A-L-D, G-R-E-E-N. My place of business is Yale University where I'm professor of Political Science.

DIRECT EXAMINATION

BY MR. DUNN:

Q. Good morning, Professor Green.

A. Good morning.

Q. Professor, so that the lawyers can hear you, I would just ask if you could keep your voice up a little bit. You, from your first brief responses, appear to be a little bit soft-spoken. So, I know you're used to addressing large classes, so if you can just treat them like a class, I think we'll be fine. Okay?

A. I'll do my best.

Q. Okay, thank you.

Professor, you just said that your professional association is with Yale University. What position specifically do you occupy at Yale?

A. I'm the A. Whitney Griswold Professor of Political Science. I also direct Yale's Institution for Social and Policy Studies.

Q. What is the Institution for Social and Policy Studies?

A. It is a -- it is a policy institute resurgence founded in 1968 to foster cross discipline collaboration

in the social sciences.
Q. How long have you been a professor at Yale University?
A. This is my 20th year.
Q. And is all of that the Political Science Department?
A. Yes.
Q. And how long have you been the director of the Institute?
A. I'm in my 13th year.
Q. And, by the way, what's the highest educational degree that you hold?
A. I hold a Ph.D in Political Science from the University of California, Berkeley.
Q. And when did you obtain that degree?

A. In 1988.
Q. So, if my arithmetic is correct, is it the case that pretty much from your studies at the University of California you came to Yale University?
A. That is correct.
Q. And since that time, you've taught and done research at Yale, is that correct?
A. Yes.
Q. Has any of that research been in the areas of elections and American elections in particular?
A. Yes, almost all of it. My specialty is American politics with a special reference to campaigns, elections and public opinion.
Q. And in the course of that research and teaching, have you had occasion to focus at all on campaign expenditures and their effect on American elections?
A. Yes, I've written extensively on that topic.

MR. DUNN: Your Honor, we have proffered Professor Green as an expert and would ask that he be permitted to testify as an expert in this action.

THE COURT: I don't understand there to be any objection to that. Any objection to his expert qualifications?

MR. LOPEZ: Well, Your Honor, I was going to voir dire the witness when given the opportunity, but I'm

happy to wait and sort of conduct my voir dire as I go through his expert -- as I go through my examination. I don't know how the court wants to proceed.

I'm a little concerned about throwing the door open and letting him testify to anything and everything because I don't think he's qualified to testify to everything he's testifying to in his report. But, rather than have that fight now, I thought I'd go through it as I got to those areas in his report.

THE COURT: It seems to me there's two issues. One is do you want to voir dire about his expert qualifications; that is his qualifications to testify as an expert presumably in the area of the effect of campaign funds on elections? Is that the proffer?

MR. DUNN: I'm sorry -- the effect on, on elections and the effect of campaign financing and funding on elections.

THE COURT: Okay. Do you want to voir dire his qualifications to testify as an expert on that subject is question one. Question two is do you want to cross examine him about whether he really has any experience that bears on the issue. That seems to be the cross

examination, not voir dire.
MR. LOPEZ: That's the second, Your Honor.
THE COURT: All right. So I take it you're not
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objecting then to his qualifications as an expert?
MR. LOPEZ: I am not.
THE COURT: All right. He's qualified as an
expert on the issue proffered.
BY MR. DUNN:
Q. Professor Green, did you prepare and submit a report
in connection -- well, first of all, were you retained in
connection with this matter?
A. Yes, I was.
Q. Who retained you?
A. The Brennan Center.
Q. And, in general, what was your understanding of the
nature of your retention?
A. That I would write a report and then perhaps I would
testify.
Q. And did you, in fact, prepare a report that you
understand has been submitted in this action?
A. Yes, I did.
Q. And did you then prepare a supplemental report at my
request?
A. Correct.
Q. And an affidavit, declaration that you submitted as
well?
A. Correct.
MR. DUNN: May I approach, Your Honor?
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THE COURT: Sure. It's not necessary to ask.
MR. DUNN: Okay.

BY MR. DUNN:

Q. Professor Green, I'm going to show you a copy of what appears to be your declaration dated June 26, 2008, and a copy of what purports to be the expert report of Donald P. Green and the supplemental expert report of Donald P. Green.

MR. DUNN: Your Honor, for your convenience and that of your clerk, I have copies and I have provided copies to Mr. Lopez as well.

THE COURT: All right, thank you.

MR. DUNN: It's my understanding these are already in evidence, Your Honor, and that they were admitted without objection.

THE COURT: Yes, I should just indicate, as we did yesterday, all of the exhibits listed on the defendants' and intervenor defendants' trial exhibit list that were not subject of an objection that was sustained are admitted as full exhibits.

BY MR. DUNN:

Q. Professor Green, you can keep those in front of you and refer to them as appropriate in connection with my questioning because they are in evidence.

In connection with your work in this matter, did you

form any opinions concerning the effect of the Connecticut Citizens Election Program on third or minor parties?

A. Yes, I did.

Q. And, in general, could you tell us what the opinion was that you formed in that regard concerning that program and its effect on third or minor parties such as the plaintiff Green Party?

A. My basic conclusion is that the CEP is likely to benefit minor parties for a variety of reasons having to do with the kinds of resources that it provides for minor party candidates to which they might not otherwise have access. Number one.

Number two, it provides a series of electorial incentives for those candidates which enables minor parties to build, and presents in a variety of various constituents enabling subsequent candidates to, again, achieve CEP grants and have access to substantial financial resources.

And, finally, I concluded from the way in which the CEP is structured that it provides voters with an incentive to support minor party candidates who might not otherwise win their votes. Due to the strategic incentives that our plurality rule, first-past-the-post electorial system creates incentives that currently give voters tremendous incentive to vote only for one of the

two top candidates. Under the CEP, voters now have an incentive to provide some modicum of support for minor party candidates who they might support in order to get them past qualifying thresholds for grants; 10 percent, 15 percent, 20 percent, as the case may be. These votes might not otherwise go to those minor party candidates because the logic of our electorial system gives voters incentive to support only the candidates that are likely to finish first or second.

Q. So, are you saying that the existence of the thresholds to qualify under the CEP actually provide incentives that aid minor parties?

A. Yes.

Q. Can you explain why that would be?
A. Well, the idea would be suppose a voter were inclined to support a minor party candidate but felt that the minor party candidate was only likely to get, say, ten percent of the vote. In that case, the voter might be inclined to support one of the two major party candidates running in the same race, again in a three candidate competition. The underlying logic of our plurality rule system subject to something called Duverger's Law, which says in any kind of single member constituency that is selected, selects leaders according to plurality rule, voters are driven to support only the top two candidates on the grounds that no

one wins anything under our system for finishing anything other than first, and so there's tremendous pressure to transfer votes to one of the two top candidates in hopes of putting them over the top in a plurality system.
Q. And are you saying that the thresholds themselves provide incentives to voters as opposed to candidates?
A. Yes, they actually provide incentives to both but the idea would be now voters have an incentive to provide some electorial support as far as an intermediate goal beyond having the plurality votes. Having merely ten percent of the votes enables candidates who might otherwise receive nothing to receive some kind of a reward from the political system.
Q. In addition to the thresholds for obtaining qualification by voting, there are also petitioning thresholds in the statute; are you awere of those?
A. Yes, I am.
Q. And have you -- do you believe that the existence of

those thresholds are a benefit or a detriment to minor parties?
A. Well, I think that they impose some costs on minor parties but I think that those are outweighed by the benefits that they create. Essentially the CEP creates a program by which petition campaigns for candidates who did not qualify based on past vote totals are subsidized, they

are subsidized to a very generous extent. So that now minor party candidates have not only the incentive but also the wherewithal to fund outreach campaigns, enabling them to reach out to voters, to give their names out to voters, to canvass voters. And in so doing, in so gathering petitions and perhaps even qualifying contributions along the way, they are likely to run more viable campaigns in the general election.

So, I think that the petitioning provision of the law actually creates a healthy set of incentives for third party candidates because it subsidizes their outreach efforts and gives them a kind of structure within which to run credible campaigns.

Q. The statute has been attacked in this litigation because of the levels at which the thresholds are set. Have you had an opportunity to consider the reasonableness or achievability of the thresholds either from an electorial standpoint or a petitioning standpoint?

A. Yes, I have.

Q. And what conclusion have you reached in regard to the -- and the threshold, for the record, I think are known to be 10 percent, 15 percent for one-third, two-third grants, and then 20 percent for a full grant. Do you understand that?

A. Yes, I do.

Q. And what is your opinion concerning the reasonableness and the achievability of those thresholds?
A. Well, there are two issues here. Reasonableness on the one hand, achievability on the other. Let me speak first to the question of reasonableness.

There's a strong policy interest in making the thresholds high enough to prevent two kinds of adverse consequences. One would be nonserious candidates running in ways that -- and spending public money in ways that embarrass the public financing system and prevent it from maintaining the degree of legislative support that would be necessary in order to sustain funding at reasonable levels.

But, more importantly perhaps, there's a strong public interest in preventing stalking horse candidates, candidates who run under minor party labels because minor parties typically do not have primaries. They typically appeal to a kind of vetting system that would strain out such candidates, run what are effectively major party campaigns under minor party labels in the hope of dividing major party support.

And so, while the CEP is sometimes construed as, for example, by one of the plaintiff's expert witnesses, Mr. Gillespie, as being a kind of, the expression is that of a major party duopoly, in fact, that provision, the 10

percent, 15 percent, 20 percent logic is really guided by the sense that major, that each major party has that the other major party is the subject of suspicion. They are

much more worried about major parties behaving as a stalking horse candidate in the guise of a major party candidate than the major parties themselves.

That's my sense as an observer of politics and a reader of the statute. So, that that's the reasonableness side of the question.

With respect to the practicality side of the question, my view is that when you look at the powerful financial incentives that the CEP offers candidates and you think about the market for consulting services, on the one hand, or the ability to use those financial resources to develop on-the-ground campaign efforts, I think, and you consider the, that even at ten percent the threshold in absolute empirical terms is very, very minimal, I don't see any practical problems.

Let me just kind of talk aloud about the math here. If I were running for state senate in this state, I would be eligible to get $85,000 grant if I could raise $15,000 in qualifying contributions, and if I were to achieve a 20 percent petitioning threshold. Now, 20 percent petitioning threshold is not very much. Petitions, it's less than 10,000 petitions. In fact, it's in typical

districts less than say 7,500 or even 5,000 in some cases.

So, let's suppose I were to set about raising $15,000 and getting, say, a comfortable margin of 15,000 petitions on the grounds that I want to be extra-conservative. Well, I effectively have $85,000 to do plus the $15,000 that I raised through qualifying contributions. So, $100,000 is my, is the pot of money that I have to, to either hire a consultant or hire a team of activists, pay my supporters, who are volunteers or paid professionals to

achieve this goal. And it seems as though, viewed from that standpoint, even if those people are somewhat risk averse, it couldn't possibly be so averse that they would be willing to have that for $50,000, then I would have $50,000 that I wouldn't otherwise have.

So, it seems like a fantastically good deal from the standpoint of minor party candidates, which I think the record would show have seldom had access to appreciable campaign finance.

Q. So, are you saying that your belief is that the effect of this scheme, the statutory scheme, will be to increase the amount of resources available to minor parties and minor party candidates?

A. Yes, dramatically, and I know that once the law's upheld, there will be a cottage industry of consultants, activists whose main role will be to facilitate these

kinds of qualifying campaigns.

Q. Let me return for a minute to the issue of the thresholds. Are you aware generally of thresholds that have been set in Connecticut and elsewhere for ballot access?

A. Yes, I am.

Q. And are you aware that it's the case that the thresholds in the CEP are 10 or 15 times higher than the thresholds for ballot access? I think it's 1 percent for ballot access and 10, 10 or 20 percent for campaign financing. Are you aware of that?

A. That is correct. And I think that ballot access provision also says that it can't be higher than 7,500 signatures regardless.

Q. Well, in light of that relationship, does that have an impact on your view of whether the thresholds for campaign finance are reasonable or, put another way, could you explain the difference to the Court between the, what you consider the criteria for ballot access thresholds and campaign finance thresholds?
A. Yes, I can explain it, and I would say that the two kinds of activities, ballot access on the one hand, campaign finance on the other, have very different kinds of public policy rationales.
In the case of ballot access, one wants to at very

low cost provide the public, provide the public with the widest array of choices. There is effectively no down side to having multiple candidates on ballot. I suppose that someone could complain about ballot clutter but that seems to be a minor disadvantage.
On the other hand, with respect to something like the Citizen Election Program, you have a, you have a system that is inherently fragile, as are all public financing programs. They rely on legislative authorizations. They rely on public trust. And to the extent that you have candidates who are seen to be abusing the system by running joke candidacies, by running simply to advertise their realty agency, doing the kinds of things with public money that might be, strictly speaking, allowed by the CEP but would nevertheless run counter to the spirit of running the kind of vigorous Democratic, small Democratic electorate system, one jeopardizes the entire structure.
And so, for that reason I could well understand why it is that a legislature would want to make the threshold substantially higher in the case of a public financing

system.
Q. Within, within -- is there a range of what might be considered to be reasonable in terms of the tension that's created there?
A. Yes. I don't think that, you know, one can say

ex ante that ten percent is the true minimum or maximum threshold. I think it could be 9, it could be 11. I think there's a certain degree of ambiguity. But I would say that 10 percent from an absolute standard of, say, political science is considered an overwhelming defeat and to be able to do no better than 10 percent is not saying much.
Q. So, are you saying that a politically viable organization and a politically viable candidate should be expected to achieve more than that?
A. Yes, substantially more. I would think that a candidate who could not show that he or she could garner 25, 35 percent of the vote would not achieve the intermediate objectives of electability either, either by unseating an incumbent or by creating the impression that he or she were sufficiently viable, so when the seat becomes open when the incumbent retires, he or she would be the presumptive favorite in that district. And so I think that 20 percent is a very low threshold in the sense of an outward expression of electability.
Q. You yourself have described as "safe seats" seats where an incumbent has won an election by 20 percent or more. Is that generally your definition?
A. Yes, it's the typical definition when people talk about safe versus marginal sense in political science.

Q. So, if you have a candidate who runs against a candidate in a safe seat, so that I am the challenger who has lost by 20 percent, is there a material difference in your view whether I got 30 percent of the vote, 40 percent of the vote or 14 percent the vote?
A. Yes. Yes, substantially for the reason I just mentioned. If you lose dismally with 14 percent of the vote, as you just mentioned, you probably do not signal that you are enough of a credible threat to the incumbent that the incumbent ought to amend his or her ways in the spirit of democratic accountability; nor do you signal to the incumbent that he or she might be better off retiring rather than running a vigorous reelection campaign; nor do you signal to your potential opponents as would be challengers that you are the presumptive candidate should the seat become open.
Q. So, are you saying that even if you lose to someone in a safe seat, you lose by a margin of more than 20 percent, you could nonetheless signal all those things by running a credible race and achieving a certain level of votes?
A. That is correct. And it's subject to the usual caveats about the national tides and whether it's a good year for your party and that sort of thing. But all things being equal, that is correct.

Q. Now, Professor, the plaintiffs in this case have claimed that the CEP discriminated unfairly in a number of ways in favor of entrenched major parties. Are you aware of those claims?
A. Yes.

Q. One such example is that minor parties but not the major parties are required to make a specific showing in each district before their candidates qualify.
A. Yes.
Q. Do you consider that to be a reasonable distinction or do you understand a basis for that distinction?
A. Yes, I do.
Q. And could you explain the rationale for that as you understand it?
A. Well, there's a fundamental distinction between major parties on the one hand and minor parties on the other, and I think the Connecticut rules recognize that distinction when they say that you either have to achieve 20 percent of voter registration with a political party or you have to achieve 20 percent in a gubernatorial contest.

The distinctions between major and minor parties are really quite considerable. When one thinks about major parties vis-a-vis minor parties, one is talking about fundamentally different levels of party activists. The depth of the organization is radically different. The

range of the donor network is vastly more extensive in the context of a major party. But, more importantly, or at least as importantly, major parties enjoy the difference of wide spread identification among voters.

So I've written extensively about something called "party identification" which is an age old topic in political science. It refers to the longstanding attachment that voters feel toward one of the political parties. It's not simply an American phenomenon or even a cross-nationality phenomenon, it's a historic phenomenon

as well, and those kind of attachments run very deep. They are necessarily reflected purely in terms of registrations. It could be a person who thinks of themselves as a Democrat or a Republican or even a Green without necessarily registering for those parties, but, nevertheless, those kinds of attachments manifest themselves in election after election.

And one of the things that fundamentally differentiates the two current major parties, the Democratic and the Republican parties, from any of the current minor parties is that the level of the party attachment is fundamentally different. It's vastly greater among major parties. And this has the important implication of -- that when we're talking about lopsidedly partisan districts, districts in which one party enjoys an

overwhelming registration edge over the other, we have to remember that even though the incumbent tends to win by overwhelming majorities, there often is much greater latent support, latent or underlying support for the lesser of the two major parties than there is for any minor party.

In fact, it's very often a massive difference and one sees that difference most vividly when those same voters are asked to vote for a given candidate such as a gubernatorial candidate or a presidental candidate, a senatorial candidate, and you very often find that the level of support for, say, a Jodi Rell or a Bill Clinton is far greater than what you would surmise you simply could account for as the division of partisan votes in a, say, State House contest. Why? Because a few different things are going on in the context of the State House

context.

The major party candidate, often the lesser of the two major party candidates, think strategically about whether it's in their career's interest as politicians to run in that district and very often they will not run and that will tend to overstate the amount of partisan support for the incumbent's party.

Q. Now, it appears to be a fact in Connecticut that party registrations are declining in terms of total

numbers, that more and more people are registering unaffiliated. Are you aware of that?

A. Yes.

Q. And do you think that that is indicative of a lessening of what you describe as party attachment or reason to question whether there is sufficient party attachment to justify the presumption of threshold qualification for the major parties regardless of their actual performance in the state election?

A. I think party registration can be quite misleading as a gauge of party attachments, and one sees that, for example, when one compares the distribution of the party attachments as measured in opinion policy, quite reputable opinion policy in Connecticut over time, as opposed to the distribution of party registration categories which include decline to state. There are many reasons why a person in this day and age might decline to state, including, not the least of which is the desire to duck the torrent of direct mail, the onslaught of unsolicited phone calls and the other sorts of things that attach to party registration.

Q. Well, there are legislative districts in this state where the registration of the lesser of the major parties, generally the Republican party, is less than 20 percent. Are you aware of that?

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A. Yes.
Q. And in some such districts, in some districts, in such districts, the Republican party has also not on occasion been able to garner 20 percent of the vote in a legislative election. Are you aware of that?
A. Yes, although it is a fairly rare phenomenon.
Q. And is it your view that nonetheless, even in such districts it's reasonable for the legislature to presume a sufficient level of interest and credibility for the major parties do not require them to meet the same requirements as the minor parties?
A. Yes, because the Republican party in this instance as part of its party's strength has two enormous resources that its minor party counterparts do not enjoy. One, a state and indeed nationwide network of donors and activists who might be called upon to work for a candidate, and the other is latent levels of party identification. In the electorate there are correspondingly lower levels of recognition of the Green Party and the Working Group Party and the whatever.
So, if someone thinks about those instances where, for example, in the neighborhood near me in New Haven, if it were the case that a well qualified and thoughtful, say, African American Republican were to run a credible campaign in a district that was, that in terms of

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registration were overwhelmingly Democrat, he or she might

perform quite well and far better perhaps than that same candidate would under the label of the Green Party or some other party, in part because he or she would be able to draw on these extensive party resources.

Q. Now, when a minor party runs in a race and there is no second major party candidate, if there's only the minor party candidate and the incumbent, an entrenched incumbent, it appears from some of the data that the minor party will do better than if it runs against two major party candidates. Are you aware of that?

A. Yes.

Q. What accounts for that phenomenon in your view?

A. Well, there a few things. One is party identification and the other would be Duverger's Law. To the extent that a voter is, say, a Republican in an overwhelming Democratic district and the choices are between a Democrat and, say, a Green Party candidate, that Republican may feel more inclined to vote for the Green Party candidate simply because he or she does not identify with the Democrats. On the other hand, if a Republican were to run in that same district, that Republican would receive this voter's vote.

So, it's not a mystery, it's not even the slightest bit surprising that kind of dynamic should play out when

one looks at a succession of elections in which one moves from a major party candidate versus a minor party candidate through a three way contest which includes both minor party candidates and major party candidates.

Q. So, you're saying that the vote that the minor party candidate gets in the two way race is not necessarily

indicative of the support alone for the minor party candidate but is indicative of other things as well?

A. Correct.

MR. DUNN: I don't think I have anything more, Your Honor.

THE COURT: All right. Cross?

CROSS EXAMINATION

BY MR. LOPEZ:

Q. Hi. Nice to see you again.

A. Nice to see you. It's a pleasure to be here.

Q. Professor Green, do you still have your report in front of you?

A. Yes, I do.

MR. LOPEZ: Your Honor, do you have a copy of the report?

THE COURT: I do.

BY MR. LOPEZ:

Q. Now, Professor Green, have you ever been elected to public office?

A. No.

Q. And how long have you been teaching?

A. Twenty years.

Q. And during that time have you always worked full-time?

A. Yes.

Q. And have you ever taken a sabbatical?

A. Yes.

Q. And during any of those sabbaticals, did you ever work on a political campaign?

A. I often work with political campaigns but never on a political campaign. I don't work for money with -- I

don't work as a consultant for political campaigns. I have on many occasions, including sabbaticals, worked in collaboration with campaigns doing scientific research on their outreach persuasions, political mobilization efforts.

Q. Have you ever run for office?

A. No.

Q. Now, have you ever acted as a campaign manager?

A. No.

Q. Have you ever otherwise worked in a senior capacity, a paid capacity, on a political campaign?

A. No. As I say, I never take money for the work that I do with political campaigns.

Q. Have you ever helped raise money for a political campaign?

A. Well, again, I've worked with campaigns that have engaged in fund raising efforts doing scientific studies of the ways in which different kinds of outreach efforts lead to different levels of donor response. So, in that sense I guess it's kind of a halfway yes and halfway no.

Again, I don't do it for money but I have worked in a, I guess, a quasi consulting capacity insofar as I've worked with actual fund raising in drafting their direct mail appeals, drafting their phone appeals and engaging in the statistical effectiveness of their different outreach efforts.

Q. Well, let me ask you it differently. Have you ever been hired or retained for the express purpose or explicit purpose of raising money for a political campaign or political party?

A. No.
Q. Now, the work that you've done in connection with -- the work that you've just described, help formulating fund raising strategies, was that done as an academic exercise or as a consulting service to the campaign to assist them in raising money?
A. Well, again, I'm extremely careful not to work as a campaign consultant because I do, I try to do scientific

research with members of both parties or all parties. And so the case that I'm thinking of is a case of a Republican incumbent governor who's running for reelection and I was working with the reelection campaign, again not for money, but simply experimenting with different ways in which they were packaging their fundraising campaign in terms of direct mail, in terms of phone calls, in terms of events, and examining it scientifically, using a randomized experimental design, which kinds of efforts were most remunerative.
Q. When you were doing this, you were doing this on behalf of which governor?
A. This is Rick Perry in Texas. This was the 2006 reelection campaign.
Q. And were you doing that from Yale?
A. Well, in the sense that I would shuttle back and forth to Austin, yes.
Q. Were you doing this in your official capacity as the director of the institute that you work with?
A. Well, again, I'm not sure how to describe what, whether research counts as an officiality. This work did eventuate in academic papers as a certain part of my, the kind of things that I present when I'm, when I'm at Yale.

So I think the answer is yes.
Q. What I'm trying to get at is the difference between

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your academic work and professional fund raising work and I'm -- I don't know the answer.
A. I'm not trying to be cagey or obtuse. I'm just saying in my particular case and the case of many of the students with whom I work, many of the colleagues with whom I work, we study political campaigns on the ground. We work with political campaigns we help and randomize their outreach, their voter mobilization efforts and then we conduct surveys or look at voter turnout roles or look at the number of dollars that come in by way of donations in order to gauge their effectiveness. So we're not paid political consultants but we're working, you know, at the desk next to a paid political consultant.
Q. Who pays for this? Do you receive a grant? Do you receive remuneration of any sort?
A. No.
Q. And how do you pick which candidates you are going to do this on behalf of?
A. They invite us. And so in the case of the Rick Perry for Governor campaign, I received a phone call one day, would you like to come and work with us and study our campaign. I was happy to do it.
Q. And what year was that campaign?
A. It was 2006.

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Q. When did you complete that study?
A. At the end of 2006.

Q. Have you done any similar work on behalf of any of the gubernatorial candidates in Connecticut?
A. No.
Q. Have you done any similar work on behalf of any of the other candidates who have sought political office in Connecticut?
A. Yes.
Q. And who would that be, who and how often?
A. I've worked with Bill Asgota (ph) in his 2004 reelection campaign, I think also in his 2000 election campaign. I helped randomize his phone call campaign in order to gauge the effectiveness on the voters in his district. Did it affect their support for him, did it affect their voter turnout. He also ran a multi wave direct mail campaign and I helped direct a study of that.
Q. And you published your findings in this case?
A. Yes.
Q. Any other Connecticut, any other candidates of statewide office you can think of that you provided this service for?
A. No.
Q. Were there -- how about legislative candidates --
A. Well --

Q. -- in Connecticut, sir?
A. Bill Anapskovitch (ph) was a --
Q. What was his name?
A. Bill Anapskovitch.
Q. That's the state senator who was seated?
A. Exactly.
Well, we worked with a Maryland candidate but not the, not a state legislative candidate.

Q. Do you or have you ever -- do you currently or have you ever held a position in the Democratic or Republican party in Connecticut?
A. No.
Q. Have you done any of this type of research that you just described on behalf of any minor party candidates?
A. Yes, actually I think the, that the 2001 -- we worked with Acorn in collaboration, I believe, I believe it was with the minor party. I think it was the Working Group Party. My memory is a little murky but it was in Bridgeport. It was here. It was a local voter outreach campaign. We examined the effects of Acorn's voter mobilization efforts on voter turnout in the low income community.
Q. I'm a little -- it's still vague in my mind. Are there restrictions on your political activities when you are in your capacity as the, as the head of the department

you're in, the institute that you're running?
A. Well, I'm part of a 51(c)(3) organization and as part of that organization I do not use anything like university funds or university resources to advance a candidate or a cause. And, indeed, you could argue that what I'm doing is not advancing the candidate or cause since this is my role, is to take out, to extract a control group from the people whom they would otherwise target. So, whether I'm helping or hurting the campaign is a matter of some disagreement.
Q. Is it correct to say that under the, that the IRS rules that govern 501(c)(3) and that govern your grant or your funding or your department, that you're prohibited

from providing direct -- from engaging in direct political activities on behalf of candidates?
A. That's right.
Q. And your testimony is that you don't?
A. Exactly, I don't.
Q. And would that be true with respect to activities on behalf of political parties and political committees as well?
A. Yes.
Q. And your testimony is that you have not --
A. Correct.
Q. -- engaged in political activities?

A. That is right. By political activities, I mean -- I assuming you mean income contributions and not making income contributions to the campaigns.
Q. Understood. Have you ever helped -- well, can I assume -- withdrawn.
Can I assume you've never helped qualify a candidate for the ballot in your personal capacity?
A. That is correct.
Q. Or professional capacity?
A. Correct.
Q. Have you ever helped qualify a referendum or question for the ballot?
A. No.
Q. Have you ever written any articles or other publications about the process of petitioning for the ballot?
A. No.
Q. Have you written any articles or other publications about the process of qualifying an issue or a referendum

for the ballot?
A. No, although, you know, again the kinds of things that I have studied extensively look very much like the outreach efforts that they can use in the context of a petitioning campaign or qualifying campaign, door-to-door canvassing, political events, direct mail solicitations,

phone call campaigns --
Q. Thank you.
A. -- radio, TV.
Q. Thank you. Now, if I can refer you to your report I'm going to be asking you questions from your report, sir.
Is it your opinion -- or let me rephrase that. Is it your opinion, Professor, that the CEP will provide resources to major party candidates in less competitive districts?
A. In all districts, yes.
Q. And it's also your opinion that the CEP does create a significant incentive for major party candidates to challenge what would otherwise be uncontested incumbents?
A. Yes.
Q. And I take it from your writings that you see that as a positive?
A. Yes, I think that Democratic accountability is the cornerstone of our system of government, and so to the extent that one encourages credible candidates to step forward and challenge incumbents in what would otherwise be an uncontested race, there's a positive benefit for government outputs and the legitimacy of our system of government.

Q. And is it, is it a theme in your writing that the
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government has a legitimate interest in leveling the resources of candidates to achieve the goals that you just described?
A. Yes. Although, you know, whether it amounts to leveling, I notice when you made the leveling gesture, you were bringing down one hand and raising up another. I think most of my work is oriented toward raising up the lower of the two hands.
Q. I'm just -- and I'll try to quickly jump to the chase here. There's a theme in your testimony that minor partys, that the increased competition between major and minor parties will only have a negligible, or actually you wouldn't be able to detect any impact on the relevant strength of minor parties.
A. Sorry, as a result of what?
Q. As a result of increasing the competition between major parties --
A. I see. Well, let me put it this way. I've studied the last five or six election cycles and during that time, the number of minor party candidates who have been elected is exactly as you thought, the number of minor party candidates who have been elected to legislative office is zero. The number of minor party candidates who have achieved 40 percent of the vote is exactly zero also. So it's hard in that context where not even a single
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candidate wins or even runs what we would consider to be a close campaign, it's hard to imagine a worse situation for minor party candidates.
Q. But is it your opinion that a major party candidate

in a, running in a district in which he's the inferior, running in a party dominant district and he's the inferior major party candidate, is it your opinion that that candidate will benefit from public financing?

A. The lesser of the two?

Q. Yes.

A. Yes, sir, absolutely. Because he or she will have access to public funding.

Q. And do you think that will translate into a, into a different vote total?

A. Yes.

Q. An increased vote total?

A. Well, do you mean overall voter turnout total or an increase vote total for the lesser of the two major parties?

Q. An increased vote total for the inferier major party candidate.

A. Yes, on average I expect these election outcomes to be more competitive in the sense that the lesser of the two major major parties will on average do better under the CEP.

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Q. Well, isn't it fair to conclude that a minor party candidate who receives full public funding will also see their vote total increase?

A. Yes.

Q. And how significantly would you expect it to increase? Do you think full public funding would, would perhaps make the difference in whether or not a minor party candidate graduates to major party status?

A. In the sense of getting more than 20 percent of the

vote?
Q. Right.
A. Yes, very often. I think that it will, it will help minor party candidates. I think that there will be a ceiling beyond which minor party candidates cannot go, so that, on the one hand, minor party candidates benefit enormously from the fact these resources, this money will enable them, these candidates who have very, very low levels of name recognition, to achieve a modicum of name recognition, which seems to be the biggest hurdle they face when running for office.

On the other hand, the fact that they are saddled with minor party status means that when voters see their names on the ballot and see that they are associated with a minor party and see that, you know, the voters typically do not have a view toward minor parties, that there will

be an upper limit to how much they can achieve on that ballot process.
Q. So, when you say that the impact of increased major party candidate competition, when you say that the increase of the increased major party competition on minor parties would be negligible, what you're really saying is it would be negligible only if the minor party did not receive public financing, is that correct?
A. If they did not receive -- let me think. I think I interpret your question to be would the CEP help minor parties -- my view is yes, because it provides those minor parties with access to financing resources. Your question is if it also provides access to the lesser of the two major parties, might minor parties be worse off? And my view is probably not on balance because they are, on the

one hand, getting the benefit of these financial resources to which they would not otherwise have access and these enormous, enormous advantages.

On the other hand, with more candidates in the race, there are fewer, you know, fewer votes perhaps floating around for the minor party to get because of the major, lesser of the two major party partisans now have a candidate to vote for, they now have their own parties' candidate to vote for, so those floating votes are less up for grabs.

In some sense my view is there will be more robust competition and many minor parties will be able to participate actively in that system of robust competition because they will have the financial resources that will enable them to do the kinds of things that credible campaigns can do.

Q. But that assumes, so we can agree -- first of all, that assumes, if I'm correct, that they qualify for public financing.

A. Yes, I think the qualification threshold is just de minimus. It's very, very easy to surmount, especially since the state is effectively subsidizing it.

Q. Now, you testified on direct, and it's also in your report, that when a major party candidate doesn't compete in a district, and I quote, "it's not a sign of weakness"?

A. Right.

Q. Do you stand by that statement?

A. Yes. Well --

Q. Would you agree --

A. Let me make sure, when we say it's a sign of

weakness, it's obviously not a sign of strength. It's no great achievement not to compete in that arena. However, it's a question of relative weakness materially at issue here. When a major party candidate does not compete in a lopsidedly partisan district, that is not necessarily a

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sign that a corresponding minor party candidate could do as well, if not better. In fact, it's almost always the opposite.

Q. Well, that certainly wasn't my question. My question was whether or not you stood by your statement that when a minor party candidate -- it's paragraph 36, when a major party candidate decides not to run -- that would be your declaration, paragraph 36. Let me begin over.

I just want to examine you on your statement that when a major party candidate decides not to run in a district, it's not a sign of weakness. And I would ask you, is it possible that it's a sign that that decision is made for very practical reasons, like prior vote totals, a significant gap in the Democrat and Republican registration numbers, or, more to the point, the inability to raise the amount of money that's necessary to run a campaign that's going to yield results?

MR. DUNN: Objection. Could we separate that out, Your Honor? I think there are three questions in what Mr. Lopez just asked.

THE COURT: Sure. Why don't you rephrase it.

MR. LOPEZ: All right.

BY MR. LOPEZ:

Q. When -- isn't it correct, Professor Green, when a major party candidate chooses not to run in a particular

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district, isn't it correct that one of the considerations may be that that candidate doesn't run because he cannot raise the amount of money necessary to run a competitive campaign?

A. Well, I think to some extent that is true, although if the CEP mitigates that enormously, I mean essentially the CEP makes it such that a major party candidate or a minor party qualifying candidate has access to resources that are quite substantial by historic standards, and so that candidate should be able to run without fear of not having adequate resources. But he or she may still not run because if he or she is a clear minded politician, the thought of losing so badly to an entrenched incumbent would do nothing to burnish his or her image as a likely successor in that district or likely candidate for some other office.

And so, my point in paragraph 36 was that major party candidates are strategic in their choices. They are not running to be sacrificial candidates. They are running because they want to advance their career interest as politicians and party activists.

Q. So, if I understood you correctly, it's your view that some major party candidates choose not to run because they know they are going to in effect lose by a landslide margin?

A. That is right.

Q. And it's also your testimony that the CEP provides a powerful incentive for those candidates to run?

A. Well, it does provide an incentive if they thought that with the money they could surmount the obstacles that

would otherwise prevent them from running a credible race. So, if a career oriented major party candidate were to look at the district and think, well, I might not be able to win but I might be able to win enough, win say 35, 45 percent so that I will be in contention for some subsequent election, they might go ahead and do it with CEP funding.

Q. So, I take it then your testimony is that the CEP would serve a purpose, besides funding that election, they provide the candidate with, with branding and the type of, with the type of branding that's necessary to go forward in the next election?

A. That is correct, and that's true not only for major party candidates but minor party candidates as well. I think it's probably arguably even more important for minor party candidates.

Q. Your opinion continues to assume that the minor party candidates are going to participate at the same level -- excuse me, at the same rate as major party candidates. Do you know what the participation rates were for major party

candidates this cycle?

A. No.

Q. Okay. Well, they are in the 75 to 85 percent range, sir, I'll represent.

Depending on what is going on, whether it's the House or the Senate, do you know what the participation rates were for the minor party?

A. No, I was under the impression we weren't going to talk about 2008, although I look forward to doing so in March.

Q. Can I gather from your testimony you see it as

positive that -- let me take that back.

Your testimony indicates that minor party -- this CEP is in effect going to open opportunities for minor party candidates?

A. Absolutely, yes.

Q. Can I infer from your testimony that that is a positive thing?

A. You know, I don't really have a kind of normative viewpoint on the desirability of having minor party candidates run in greater abundance. My sense is that to the extent that minor party candidates increase democratic accountability by presenting credible opponents to incumbents, there probably is some small democratic benefit.

Q. So, can I infer from that statement that you would support the efforts of the Working Family Group Party, for instance, and the Green Party, for instance, to participate, to take advantage of the public financing system?

A. I support it in the sense that I'm all for democratic accountability. If they are the agent of democratic accountability, so much the better.

Q. Okay. Well, where I'm going with this, sir, is I'm asking, would those -- would democratic accountability, would that interest be served better, sir, if the qualifying criteria were set at a 5 percent level for a full grant instead of at a 20 percent level for full grant?

A. It all depends on the kind of policy considerations that I mentioned earlier. If you have these two

overwhelming policy considerations, the sustainability of the CEP, and the interest in not providing easy access to stalking horse candidates, well, then you want to think carefully about, on the one hand, lowering the threshold so that you encourage more candidates to step forward, without lowering it so much that they can make it very easy for major parties to subvert the system.

Q. Do you have any empirical basis or any other basis to believe that lowering the standard to 5 percent, the

qualifying standard to 5 percent prior vote total or a 5 percent petition requirement would threaten the public fisc or the integrity of elections, sir?

A. When a political scientists who's been studying many campaigns and elections all his adult life is asked do you have empirical evidence of such a thing when it's kind of a fairly obvious and widespread concern, everybody who talks about public financing is immediately drawn to these two considerations:

Will the levels of public financing be sustainable given the possibility of embarrassment and will the, will the system itself be sustainable given, again, the possibility of embarrassment in the face of stalking horse candidates.

It's not, it's not for no reason there clearly are anecdotes about those kinds of instances, but quite apart from the anecdote, even if all the anecdotes were false, remember that our basic philosophy in this society since the founders has been to design our institutions so that they are resilient in the face of quite clear hypothetical deputations. So we build our system with checks and balances. We build our system with all kinds of

redundancy. We guard against all kinds of hypothetical concerns precisely because we don't want to have the situation subverted by, by something that everybody could imagine actually happening.

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A major party comes in, encourages a minor party or former major party person to run for office in the hope of dividing the vote for the other major party, and in so doing, sneaks their preferred major party candidate into office.

Q. With respect, sir, that just doesn't sound right to my clients. That sounds patronizing. You're going to take steps to protect my clients from abuse by the major parties; am I misunderstanding you?

A. It's not really -- I suppose that one could have taken the normative view they want to protect minor parties from the predation of major parties but that's really not at issue. Whether major parties can, can sneak into office, it's not -- again, it's not about protecting the minor party candidate, it's about having major party candidates use minor party candidates as a ruse in order to win election for the major party candidate.

Again, even if no minor party candidates were ever adversely affected by this kind of thinking, there would still be policy concerns about having candidates --

Q. And those concerns, if I understood you correctly, are based on hypothetical worst case scenarios?

A. Well, also a reading of the loose institutional structure of those minor parties themselves, these minor parties do not necessarily have sufficiently dense

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institutional structure to create caucuses in every district, primaries in every district. In fact, far from it, and so they are in some sense this open sieve that could easily be exploited by major parties.

Q. But Professor Green, the legislature wasn't writing on a clean slate and you're not testifying today on a clean slate. We don't have to deal with hypotheticals. Don't we have public financing systems in other states?

A. Yes.

Q. Are you familiar with the clean election models in Maine and Arizona?

A. You know, I'm not an expert on those systems. I know a little bit about them but I don't necessarily have a great deal of expertise.

Q. Would your opinion change about the, about the hypothetical concerns you identified, would your opinion change if you knew that in Maine they don't have a petitioning or prior vote total requirement and that public financing is available to all candidate regardless of party affiliation, and that there has not been a proliferation of minor party participation and there has been no threat to the integrity of the program or the public fisc?

Now that I've made that representation to you -- and

I'll make the same representation about Arizona -- does your opinion, does your opinion change about the necessity of setting the prior vote total at 20 percent versus 5 percent?

A. You know, what's strange about the representations -- first of all, I don't believe it, but supposing I did believe it, it would nevertheless not change my view about

how we should legislate going forward. You don't want to create institutions that have these gaping problems, gaping loopholes. Even if other places have yet to experience problems in part because when you think about the way in which campaign finance has evolved at the federal level, for example, there have been many years where loopholes were not exploited, but then a torrent of reflection breaks forth, and a classic case would be soft money at the federal level. The provisions didn't necessarily change, it was just eventual campaign consultants and political parties became more inventive, in much the same way you wouldn't want to create a system that has these potential for problems, this potential for problems for fear that eventual campaign consultants and political parties will find a way to get around the problem.

Q. Okay, sir, let's move on to the question of your expertise in the area of petitioning and in the area of

raising qualifying contributions.

Do you know right now how many valid signatures a petitioning party candidate would have to collect to qualify for full grant in the 2010 gubernatorial elections?

MR. DUNN: I'm sorry, I didn't her.

THE COURT: 2010 gubernatorial elections.

BY THE WITNESS:

A. I do not know offhand. It would be a very easy thing to calculate in five minutes.

Q. Well, to qualify for a full grant based on a 1.1 million voter turnout in '06, I will represent that the

candidate would have to collect 220,000 signatures.
A. Yes.
Q. Based on my representation, do you agree that you would have to collect 220,000 signatures?
A. Yes.
Q. Now, you do understand that those signatures have to be collected and submitted by, by the first week of August of the election year?
A. Yes, and they have to start I believe in January.
Q. And you understand that major party candidates don't have to collect petitions and they have until the second week of October to, to qualify for public financing?
A. Yes.

Q. Now, can you tell me what your understanding -- I think you testified on direct and maybe you were just being colloquial, but I think your testimony was that a candidate who wants to collect X number of valid signatures as a cushion would want to collect two X. Do you stand by that testimony?
A. Experts say I get an extra one-third, get an extra 25, get an extra 50 percent. So I thought I would allay all doubt about the calculation and double it. But I don't think that, strictly speaking, one needs to double it.
Q. In fact, that's the practice in the industry, isn't it?
A. I don't agree with that representation.
Q. Well --
A. I doubled it myself.
Q. On direct examination --
A. Yes, but that was for rhetorical effect.

Q. And did you have a chance when you were preparing your report to consult with Harold Hubschman, for instance?
A. No.
Q. Do you know who he is?
A. No.
Q. He's the other expert in this case hired by the defendants who also has a cushion, testified that you would collect twice as many raw as you would valid.

A. I had no interaction with him.
Q. Do you think he was wrong?
MR. DUNN: Objection. What basis would he have for an opinion of Mr. Hubschman's opinion?
THE COURT: Well, the question is does he disagree with it. I'll allow that.
MR. LOPEZ: Thank you.
MR. DUNN: Also mischaracterizes Mr. Hubschman's report.
THE COURT: That's fine. You can bring that out.
BY THE WITNESS:
A. Let me put it this way. When campaign consultants are selling services, they have an incentive to sell a lot of services. So if, for example, a campaign consultant is being paid by the number of signatures he or she is gathering, he or she has a financial incentive to tell you to get quite a few extra signatures. Whether such additional signatures are, strictly speaking, needed depends on the quality of the petition drive. If someone has a fairly strong list and a competent and high

integrity group or team doing the drive, one presumably would not need such a high cushion.

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Q. All right. I'm just -- maybe I missed it when we were talking about your qualifications but did you testify you had any experience in this area?
A. I have never conducted a petition drive but when it comes to conducting door-to-door involving campaigns, I've done plenty. It's just that the reason that I highlight a direct distinction between the two, they have many of the same dynamics. You are in some sense -- you in some sense have an easier time of it when you're doing petition drives because you don't necessarily have to go door to door. You can do it in public places. The key thing that you are risking when you don't go to door to door, you won't know for sure whether the person is a registered voter at a given address.
Q. You, sir, made some reference earlier that you had worked with Acorn?
A. Yes.
Q. And is one of the services that Acorn provides is to engage for a fee petitioning?
A. Yes, I believe, although I have never engaged them in that kind of activity.
Q. How do you know that?
A. Because you just represented it, and I also suspect that it's true.
Q. Do you know if Acorn has a relationship with the

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Working Families Party?
A. I suspect that they do based on somewhat dated information going back to 2001, although, again, I don't

keep tabs on that connection.
Q. Well, do you know what Acorn charges per signature?
A. No, I don't.
Q. Okay. Do you know if they have a subcorporation writing down which entity within Acorn, if any, engages in petition services?
A. No.
Q. Or provides petitioning services?
A. No.
Q. Now, in your deposition you think that petitioning services generally go, I think you said, for $1.50 or $2.00, is that correct?
A. Yes.
Q. All right. And that's in your declaration?
A. Yes.
Q. And what basis do you have for that?
A. I think that that's more or less the going rate. It's not something that I researched but I also think you could back it out of a canvassing calculation. If you think you're going to contact roughly 12 people an hour, if you think some proportion of those people are actually going to actually sign your petition, you're thinking

about how much you've going to pay your canvassers to do that kind of work, it seems quite profitable at $1.50.
Q. Or $2.00?
A. Or $2.00.
Q. Or the range is $1.50 to $2.00?
A. Yes.
Q. And I take it you in your professional reading and your -- well, let me put it this way. Are you familiar

with situations where, where petitioning firms can charge as much as $4.00?
A. No.
Q. If I represented to you that Harold Hubschman's firm, who is a witness for the defendants, for the defendants and the intervenors, in fact, their standard rate is $4.00 per signature, would that surprise you?
MR. DUNN: Objection. That's a mischaracterization of Mr. Hubschman's declaration and his deposition testimony.
THE COURT: Well, all right. It may be but I'll allow this question.
MR. LOPEZ: Thank you, sir.
BY THE WITNESS:
A. When I hear someone say it might be $4.00 a signature, my suspicion is that there were extenuating circumstances whereby someone has charged $4.00, such as,

for example, Joe Lieberman's drive to get onto the ballot as a minor party candidate and his defeat in the Democratic race, he needed to get a whole lot of signatures in only a matter of a few days, and so for that one might expect to pay a premium. On the other hand, if someone can do it at the leisurely pace required under the CEP, from January 1 until August, one can afford to take one's time.
Q. All right. Let's use your number, okay? Just for the sake of this examination. Let's use the round number, if you don't mind, using $2.00?
A. Okay.
Q. And I want to return to how many signatures you need if you want to qualify for a full grant if you're

governor, and I think we agreed that you would need a base or 220 valid and possibly as many as 400,000 or all of 350,000 raw, if we just do the math on that --

A. It's $700,000.

Q. That's right. And do you know how much money a candidate is allowed to spend during the qualifying period to raise, to pay for that petition drive?

A. Not offhand for governor, I don't know, or the other, for the other offices.

Q. Would your assessment of the reasonableness of that criteria change if I told you that Governor Weicker, for

instance, would be limited to spending $250,000 during the qualifying period to pay for that petition drive?

A. No, not at all, because a firm would be quite happy, I'm sure, to do it on spec. Their expected value is the probability that they'll meet the requirements times the number of dollars that they'll receive should they meet the requirement minus the risk associated with not getting paid.

Q. And would your opinion change if you were told you're not allowed to do it on spec?

A. I would be shocked if you could not do it on spec.

Q. Would your opinion change if you were told you're not allowed to do it on spec?

A. Yes, it would, but I would find it hard to believe.

THE COURT: Mr. Lopez, how much more do you have?

MR. LOPEZ: I don't know. I think I made my points. I can probably go on for another hour.

THE COURT: I don't doubt that.

MR. LOPEZ: Yes. If I could just take a minute and --

THE COURT: Why don't we do this. Why don't we take our morning break. Let's take 15 minutes, come back at 11:35, and you can finish up what you have. I have a few questions and we can hear any redirect and recross,

okay? All right, thank you. We'll stand in recess.

THE WITNESS: May I --

THE COURT: Sure. You should not discuss your testimony with counsel during the break. Thank you.

(Whereupon a recess was taken from 11:20 o'clock, a. m. to 11:35 o'clock, a. m.)

THE COURT: Mr. Lopez?

MR. LOPEZ: Right.

BY MR. LOPEZ:

Q. Sir, I was -- before we broke we were talking about the cost of petitioning and the possibility that the cost would actually exceed the amount of money you're allowed to raise and spend during the qualifying period. And we were talking about constitutional office, so the numbers were quite large. So I want to take you through the same math for legislature. I have offers where the numbers are much more modest but as a real number, as a percentage, actually they are similar, I'll represent.

But -- excuse me. So I think your testimony was that the Senate districts, the candidate would have to, if he wanted to petition, qualify for the petition process, he would have to collect and receive a full grant, he would have to collect between 5- and 10,000 signatures, is that correct?

A. That is correct.

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Q. And allowing for a cushion, he might collect somewhere between 10- and $20,000, is that correct? Depending on the district?
A. Yes, some more, some less.
Q. And using our formula at $2.00 or $1.75 a signature, can we agree that, that just as a mathematical matter, the cost would exceed the amount of money that you are allowed to spend during the petitioning process?
A. Again, I think that that's true but somewhat misleading, because you can always do something and bill for it later as a firm. And so, to the extent that they would charge you, say, $20,000 to conduct this campaign, or $15,000 to conduct the campaign and bill you after you've gotten your CEP grant, you would be, you would be well to look in terms of that transaction.
Q. And if that option you just described was, in fact, illegal, you would, your testimony -- your opinion would change about the reasonableness of the qualifying criteria?
A. Yes, if it were, but I do not believe that it is.
Q. Let me return to the subject. Let me just stay on the issue of --
A. Can I just add one thing? It is true that we are imagining this scenario whereby all of this, all of these transactions are done through campaign consultants, they

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are getting the petitions for you and doing everything without you having to lift a finger, but as I said in my reports and as I will say again now, there's absolutely no reason that these, these requirements present anything

like a series of impediments to any kind of campaign, any kind of challenger candidate of any party, the minor party in this case who seeks to run a credible campaign, because they are going to have to do these kinds of door to door canvassing efforts anyway in order to have any chance at achieving name recognition or win voter approval.

Q. The Working Family Party, you're familiar with their issues?

A. Yes.

Q. And sort of their constituency?

A. Yes.

Q. Would you consider them the type of minor party that might be able to mobilize a large group of supporters and canvassers and to go out and collect signatures without spending a lot of money?

A. Your question is might they be able to do so, and I certainly can't argue with the notion that they might be able to do so.

Q. Is it your opinion that they are the type of minor party, because of their organizational support, that could indeed meet the petitioning requirements at the

legislative level by relying on their organizational structure?

A. Yes, they could.

Q. Would it surprise you to know, sir, would it -- can you explain, can you -- let me represent to you, sir, that the Working Family Party candidates that did qualify this time, and there were two of them, both went out and hired petitioning firms. Can you think of any reason, sir, why they would have done that?

A. To make it easier for themselves. Perhaps they

lacked the kind of organizational capacity and activist support necessary to run a credible campaign.

Q. So, can I infer from your testimony that even candidates from the Working Families Party who have a much stronger organizational base than the Green and Libertarian parties in this state, would reasonably avail themselves of the services of a petitioning firm?

A. Well, I think that they might reasonably avail themselves of the services, but whether they absolutely must is really a matter of particularities. I'd have to see some specific examples. We'd also have to see some, something more about the depth of support for those parties in those areas. I don't think that it is in the spirit of the CEP to facilitate the candidacies of campaigns that have, that whereby the candidate has no

support and no activist base. This is not supposed to be a cash transfer from the state to a petition service such that these kind of candidates need not do anything in order to receive public funding.

We want candidates to have an incentive to build some depth, some capacity, some enduring presence in their constituencies in our districts.

Q. And I think you, sir, you said that petitioning provides an opportunity for candidates to go door to door, is that right?

A. Yes, not only candidates but candidate supporters.

Q. And how many contacts an hour do you think some -- a candidate could make in a door to door operation?

A. Well, obviously it depends on how chatty they are and how geographically dispersed the housing is in their

district, but I think 12 is a good number.
Q. What if they are there to persuade the voter to do more than sign a petition but they -- but to also maybe make a qualifying contribution and/or just to win the voter's support. Is it fair to say that there might be only four contacts in an hour?
A. It could be -- again, it depends on chattiness, but what one hopes for in that particular case where one does have a high quality authentic conversation with voters, is that the outreach and the communication is such that when

you succeed, you not only get that person's signature and that person's contribution, but, indeed, the signatures and contributions of people in that person's social network, so you hit the jackpot with this intensive four an hour kind of canvassing when you are able to tap into church groups, social groups of all sorts and have multiple employer effect.
Q. Of the different venues you talked about that people might go to to collect signatures, you talk about downtown and you talk about going door to door, but the second thing that you listed was group homes and I was wondering if I'm missing something. Are you talking about group homes --
A. Yes. I don't, I don't recall mentioning group homes but I'm happy to talk about group homes. That's one of the great reservoirs of voter activity. Very high turnout group, very high levels of voter registration, lots of qualified voters and an attentive audience eager for interaction.
Q. How many people live in group homes? Do you live in New Haven?

A. Yes.
Q. How many people live in group homes in New Haven?
A. I don't know offhand. I could consult the census, I suppose.

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Q. All right. So, sir, you live in New Haven. Do you know who Allen Grison (ph) is?
A. No.
Q. All right. He was elected to the City Council of New Haven last cycle.
A. Wonderful. Not familiar with my work --
Q. He might be, but he's a Green Party candidate and I raise this given your testimony on both the record and your report that Green Party candidates have had no success in this state.
A. He had no success in any state legislative race, not in the State House and not in the State Senate. Zero success there.
Q. And do you think that -- do you know who elicited Horton Sheff or Jean de Smet?
A. No.
Q. They hold City Council positions in Hartford and in Windham.
A. Well, then I stand by my claim. No victories in the State House or the State Senate, and those elections are quite significant and the fact that not one victory has occurred in the time that I've been studying is very dispositive.
Q. There was one victory, right, it was 1992, and that was Governor Weicker and then in the ensuing year --

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A. It's not a legislative election.
Q. But on the statewide level there was one victory, and that was in 1992, right?
A. Well, although I'm puzzled by the adage, that's the exception that proves the rule, I would say if that adage were applicable, it would be applicable here. Here's a governor who's a gubernatorial candidate, who's well known and has developed an entire political career as a well known, prominent member of a major political party who switches gears and runs as a minor party candidate, does very little to develop the institutional depth of a Connecticut party, that party disappears immediately after he disappears from the scene. They do not run a slate, a well organized slate of legislative candidates, and so that is a classic instance of which there are many incidents in politics of specific candidates building a party around them that really isn't a party in the conventional sense and it doesn't have any of the usual functions of a political party, and one eloquent testimony to how little it resembles a political party is how rapidly it disappears without this one individual.
Q. But the CEP isn't about financing parties, it's about financing candidates, am I wrong about that?
A. I think that that is a fairly superficial view of the CEP, that to the extent that the CEP makes it possible for

candidates to have access to resources they would otherwise not have access to, it basically subsidizes the institutional development of minor parties. So, minor parties right now have very little organizational capacity and they have very -- well, prior to the CEP they have very little organizational capacity and very little

incentive to develop enduring capacity in any particular legislative district, for example, but now they have that incentive and indeed the state in some sense subsidizes the development of that capacity.

Q. That's equally true about major party candidates trying to qualify for a public financing program to the extent that the subsidies seeking a Senate candidate could raise funds privately.

A. Your earlier question was to what extent does the CEP develop or work to the benefit of political parties and I answered that question. And then you said, well, major parties too, and I think all parties.

Q. So, I will take it from your testimony that you're asking the court -- this is what your report implies -- to discount the significance of the fact that Governor Weicker won as an independent candidate, is that a fair assessment?

A. Discount, give it no heed whatsoever. It's one of those features of our plurality rule system that enable,

it enables an independent candidate to run very often in a way that splits the ideological spectrum of voter and enables that one candidate to get a plurality, but it's not a sustainable, it's not an ascertainable situation and, indeed, it has very little to do with minor parties as such. These candidates such as Governor Weicker or such as Senator Lieberman really did very, very little to institutionalize the parties that they created.

Q. Well, maybe you can tell the Court the other states in the last 20 years where minor party candidates have won statewide office, minor party or independent candidate?

A. I think Vermont would be one. I don't know, this is the kind of, you know, Almanac consulting activity one does with the help of the internet.
Q. Do you recall perhaps in Maine there was a two term independent?
A. Yes.
Q. Angus King?
A. Yes.
Q. And in Vermont we have Bernie Sanders?
A. Yes.
Q. And in Vermont we have a Progressive/Green that is ballot qualified and runs and gets a significant percentage of the vote in the last two cycles?
A. Yes.

Q. Right. And Anthony Pollina?
A. Yes.
Q. And in Minnesota in the last ten years we had an Independent?
A. Yes, sir. Jesse Ventura.
Q. And in Alaska?
A. Don't know.
Q. We did. Am I leaving anything out?
A. Only the rational for the line of questions.
Q. Well, that's all fine and well. It's just that you have said that minor and independent party candidates are unelectable and the fact is that we just went through a list of minor and independent party candidates, including most perform too, in this state that have won statewide office, all in the last 20 years.
And in view of that, I'm wondering if you want to in any way -- and I don't expect you will, but do you want to

change your opinion at all about the viability of minor party and independent candidates?

A. No, and in fact in some way that amplifies it because in every one of the incidents, at least the ones I can think of offhand, you have candidates that are basically running on their own personal attributes, their own personal cache with voters. They are often, they often have their own sort of retinue of support that has nothing

to do with the fact that they are associated with a minor party. As a result, they are able to accumulate enough votes so that Duverger's Law does not apply to them. They are able to move to one of the top two vote-getting candidates.

Once they do that, they siphon off votes from the other candidates. The classic case would be Jesse Ventura who runs as a kind of candidate that splits the difference between the Democrat and Republican competitors. Now, they are terrible at institutionalizing minor parties so it's as though they are simply running as celebrities and in some ways they are celebrities but once they are gone, in some sense the system goes right back to the way it used to be. There aren't any new minor party registrants. There aren't any new minor party identifiers. The institutional structure of the minor parties they create remains feeble and underdeveloped, and so it has all the usual properties of minor party disarray.

Q. So, it's all in your report and you said it on direct but what I'm asking, is it your opinion that this justifies the adoption of a law that makes it harder for minor and independent party candidates to compete on the

same terms that their major party opponents compete?
A. My view is the CEP makes it easier for minor parties because it provides them with financial incentives.

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THE COURT: Abraham Lincoln did a little bit better job of making the minor party stick around.
THE WITNESS: That's right. He did a wonderful job, and one of the things about Lincoln that should be kept in mind as we think about minor parties is that, you know, the Connecticut system is not labeled any particular party, as major or minor. It doesn't consign particular parties to a system of any kind of verbiage. If we had minor party people running on slavery, I submit that they would do fairly well in the legislative elections and they would not have a record of these elections, but part of what we're talking about as the infirmities of minor parties is they tend to have very little appeal to voters.
THE COURT: Well, under the CEP the definition of a major party is essentially based upon 20 percent of the vote in the last gubernatorialal election.
THE WITNESS: Yes, and 20 percent of the registrant's longevity.
THE COURT: Fair enough. Isn't 20 percent the magic number that Republicans and Democrats virtually always hit and a minor party virtually never hits?
THE WITNESS: Well, there aren't very many instances in American history where the two parties have been upset by the third party by creating a kind of template, at least enduring realignment of voter affinity.

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So there are instances where the Wig Party gave way, there are instances where the Progressive Party made its

inroads, but by and large, the two parties we have have been around for a long time. I don't think though that it's a kind of artificial number. I think the 20 percent actually does represent more or less the minimum that any credible candidate could get and still limp along and expect to do, you know, credibly in the next election. It's -- 20 percent is a disastrous defeat, maybe not in a four-way but in a two or three-way competition, you've lost decisively, where anybody who has career aspirations would call it quits at that point.

THE COURT: Okay, but doesn't that overlook the other values of running? If you're in a current minor party, presumably you have some interest, don't you, in running for a reason other than actually winning; you want to get your message across?

THE WITNESS: Yes.

THE COURT: Or you want to develop a party name. You want to build toward becoming a viable party.

THE WITNESS: Yes, and I think all those things are valid policy objectives in getting parties to get their message out, to educate voters about their party platforms and that sort of thing. However, I would say that the CEP is justified in requiring of the minor

parties that they show some, you know, minimal level of committee to voter outreach, so asking them to have a few petitions signed is really a very small number when you talk about the time they have to gather those petitions --

THE COURT: Let me actually press you on this -- and I'm sorry to interrupt but I've got some questions and if you don't mind, I'm --

MR. LOPEZ: Can I sit down?

THE COURT: Sure.

You talked about petitions and in your initial testimony you talked about getting 16,000 signatures in order to have 700 valid and you seem to generally buy the idea that a petitioner would give twice the required number.

THE WITNESS: Certainly more than the minimum number, that's for sure.

THE COURT: All right. If we use twice, in order to qualify for a full CEP grant a petitioning candidate would have to obtain 40 percent, signatures from 40 percent of the voters who have voted in the last election, right?

THE WITNESS: Right, under that logic.

THE COURT: Under that logic. So, has any petition drive in America for any state, federal or referendum ever achieved 40 percent of the voting public?

THE WITNESS: I don't believe I can think of one offhand, but certainly there are petition drives that are able to be done with remarkable acridity over very constrained time period. You think Connecticut for Lieberman as a classic case.

THE COURT: I wanted to ask you that, too. Is it easier or harder for a minor party candidate to get signatures on a petition than for a major party candidate, even if they are quickly changing their affiliation?

THE WITNESS: Yes -- well, I guess this is a kind of question to which I don't know the answer. I think in some ways my suspicion is that if you said to a voter, look, we want to make sure that on November's

ballot you have the widest array of choice and we want to have all candidates get an equal chance to have their voices heard. We're asking you to sign a petition but you don't have to if you don't want to. It's for, say, the Green Party candidate or Libertarian candidate. If you want to make a $5.00 qualifying contribution for that person, we'd love to have it. I think if you were to do that kind of outreach effort in a nonpushy way, you could probably be very successful. It might not attract the same amount of enthusiasm if you're trying to get petitions for the Nazi Party or the Communist Party, but I think that within the range of minor parties that are on

record as benign by major party adherence, you probably could do okay.

THE COURT: But doesn't that assume that voters are indifferent between the two major parties? If I'm presented with a petition and I'm a staunch Republican and I know that my candidate is going to face a tough race, I don't want to create the possibility that another candidate's going to siphon off my candidate's votes. A three-way race, if you look at history, especially the presidental elections, you know, Clinton gets in in a three-way race, Bush gets in in a three-way race -- I mean real three-way races.

THE WITNESS: Right, but which party are you supporting, an incumbent or a challenger? Because if you're supporting a Republican --

THE COURT: That's my point. If I have -- half the voters are going to say I don't want to sign this petition because it's going to siphon off votes from my

guy. If I think that the petitioning party is closer ideologically to my party, I'm not going to sign. Why? Because it will slight my side's votes. So, when you're a minor party petitioning, don't you face the prospect of getting 40, needing 40 percent of the signatures from 50 percent -- it's virtually impossible to get 40 percent of the people who voted when really only 50 percent are

eligible to vote and realistically are going to sign your petition.

THE WITNESS: I think that logic is, some of it is counterbalanced by ideological affinity and that's one that people, major parties might feel toward other minor parties. So, for example, you have Democrats who don't look down their noses at the Working Family Party, they like their goals, they might not be so driven to think strategically about whether they're undermining their preferred platform, so they might not sign the petition for the Working Family Party. I think, I think it's -- if it's the Green Party or Libertarian Party, there isn't diffused support, latent support for those parties, but that's not really a problem. It's not the fault of the CEP, that's a fact about where those parties have positioned themselves ideologically.

THE COURT: But it's also, isn't it, it's an issue about how districts are drawn in Connecticut. There's not a lot of support for the Republican party in the City of Bridgeport, for example. Why? Because of where the lines are drawn. You have in the City of Bridgeport a very urban population that has historically been extremely strong Democratic and there may be no more support for Republican party candidates in Bridgeport than

there are for Green Party candidates in Bridgeport.

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THE WITNESS: Yes.

THE COURT: Let me switch over because I wanted to press you a little bit. It seems to me there is an inherent inconsistency in your testimony on this issue. You've said a number of times that the 10, 15, 20 percent threshold are remarkably easy to achieve.

THE WITNESS: Yes.

THE COURT: And you've also expressed a concern that those levels need to be set where they will prevent stalking horse candidates.

THE WITNESS: Yes.

THE COURT: If they are extremely easy to achieve, then they don't preclude or prevent or inhibit stalking horse candidates. What is to prevent the Republican Party from going out and saying we have a new Republican Party and we're going to run a candidate and get a Democrat to be our candidate and we're going to very easily qualify that person for full CEP funding and siphon off the Democratic purpose.

THE WITNESS: Well, I think it's certainly a logical possibility, and I don't think that the law prevents it, but I think that by making the requirements what they are makes it more difficult, and so --

THE COURT: Well, that's the problem because this also makes it more difficult for the minor parties.

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You can't have it both ways. You can't have it remarkably easy to qualify for minor parties and sufficiently difficult to prevent a stalking horse. It just doesn't

work. The choice has to be one or the other, doesn't it?

THE WITNESS: I don't know that it has to be one or the other. I think of it more as a balancing act. You have these two competing considerations and you strike a happy medium.

THE COURT: Okay. Are you aware of another public financing system that uses the thresholds as high as Connecticut does?

THE WITNESS: You know, I really haven't, you know, developed expertise on other campaign finance systems and I apologize for that.

THE COURT: You testified that there's incentive under the CEP for voters to vote for minor party candidates. Again, doesn't that assume that the voters are largely indifferent between the major parties? So the petitioning example I used a moment ago, if you look at Florida in 2000, you had Gore, Bush, Nader, and there was a big push by Nader to get 5 percent because he wanted to qualify for federal funding.

THE WITNESS: Right.

THE COURT: Do you realistically think that voters were saying, well, I'm indifferent between Bush and

Gore, I'm going to go ahead and vote for Nader and make sure he gets the 5 percent. We have a little less democratic system here.

THE WITNESS: But, in 2000 they were thinking that and that's part of why Nader did well in places like New Hampshire where he proved to be decisive. He was decisive in Florida as well. Now, he did fall short of that five percent threshold in many bases but I think that a consideration for voters, it's basically creating an

intermediate goal for voters in campaigns, that, you know, would otherwise be faced with this kind of win or take all logic with nothing else besides a victory to show for it.

So the fact that you can say, look, I'm trying to get to the ten percent threshold so that I can qualify next time, gives people who are relatively indifferent or who might like the personal attributes of the candidate running for the party, those people might be inclined to vote for the minor party candidate.

THE COURT: You testified that the CEP has great advantages for the minor parties because it effectively funds their efforts to establish themselves. Doesn't that testimony assume that the minor parties can easily qualify for funding? In other words, are there advantages to a minor party candidate who is unable, for whatever reason, to qualify for CEP funding from the fact that both major

parties automatically qualify for CEP funding?

THE WITNESS: Not obvious advantages. I think that the advantages that go to minor party candidates grew when they qualify, and so in some sense the duty of the CEP is that it provides a relatively clear structure for minor party candidates to focus their efforts on doing the things necessary to win elections, or at least win enough electoral support so they can qualify the next time around. I think under the status quo, they had no such incentives and then were in complete disarray. I think that time will show that the CEP greatly helps the minor parties get their acts together.

THE COURT: All right.

MR. LOPEZ: Your Honor, I've got three more

minutes?

THE COURT: All right, let me suggest this. I just basically interrupted. Why don't we get any redirect that we want to have and then we'll do yours in one shot.

MR. DUNN: Could I have 30 seconds, Your Honor?

THE COURT: Sure.

(Pause)

THE WITNESS: Your Honor, I'm thinking of the answer that I gave very quickly to something you said and I just wanted to qualify it a little bit. You mentioned that in Bridgeport you thought that the Republicans had

less support than Greens.

THE COURT: Well, I don't know, they might. I have no idea.

THE WITNESS: Because I was thinking that if we were to inspect that proposition carefully, I think we might find the opposite is true, that when you take a close look at votes for popular Republican candidates, Jodi Rell, for example, you might find there's no latent support for Republicans. It's just that the kind of Republicans who often stay out of lopsided local races, that the Republican expression of support for Republicans is very, very minimal in Bridgeport. They just don't have any candidate to vote for. But when they are given a candidate that's reasonably popular, that candidate is probably more viable in voters' eyes than the Green Party would be. So I guess --

THE COURT: That's very possible, but the point of my question is really this. In a legislative election in Bridgeport, where history is likely to show -- I haven't studied it but it wouldn't surprise me if the

Republicans who either haven't run or have run trail poorly. Why is the Republican candidate treated differently than a minor party candidate in terms of qualifying? Why shouldn't -- this is, I know, irrelevant to our lawsuit because I'm asking your opinion about what

the law might be and it isn't, but from a theoretical point of view, why shouldn't the Republican have to qualify under those circumstances as much as minor party would? There's no history of support, electoral support for the Republican candidate in Bridgeport.

THE WITNESS: Except that there really probably is more potential electoral support in that area than there is for minor party candidates and more than meets the eye, and the way you see that is every once in a while some well-heeled Republican will run in those constituencies and do far better than any of the minor party counterparts. Some parties are run even though they are only facing a major party opponent. If a candidate were to run in a way that's kind of ideologically proximal to the dominant major party, he or she would do fairly well, but those candidates don't grow on trees because their chance of outright victory are fairly low.

So, for example, you think of a Republican African American candidate, well connected candidate, well connected enough with the rest of the Republican party so they could draw on activists and draw on donors. They would almost certainly do better than their Green Party or Libertarian or whatever counterparts do in those districts. It's just that, you know, those are fairly rare candidates because those candidates have already

determined that their time would be better spent running for other offices.

REDIRECT EXAMINATION

BY MR. DUNN:

Q. Professor Green, Judge Underhill just asked you a question a few minutes ago about whether the, in effect when the rising tide raises the votes, whether the minor parties are benefited because major parties participate under the CEP. I want to ask a little variant on that. Are they hurt if, if you have CEP funding participation for major party candidates and you have a minor party candidate who runs but doesn't qualify, are the interests of that minor party candidate hurt by the CEP funding scheme?

A. Not necessarily. To the extent that minor party candidate is just going to get fewer votes because the two major party candidates are going to gobble up more votes, well, yes. But to the extent that the minor party candidates are committed to get the word out about the incumbent, to get the word out about the issues associated with that minor party, it could well be that having two major party contestants actually making the district competitive will engage voter interest. A typical voter

is only minimally interested in uncontested legislative districts. Those that actually are hard fought might peak voter interest.

Q. So, you're saying the effect of the CEP is to induce the non-entrenched major party to run a candidate that

doesn't necessarily hurt the interests of the minor party participant, even assuming they don't -- if they don't get funding?

A. That is correct.

Q. Obviously if they get funding, then the CEP benefits both them and the major party significantly, is that the case?

A. Yes.

Q. Suppose --

THE COURT: But what's the theory? You have two funded candidates and you've got the Green Party. Now what's the theory that the Green Party's not hurt?

THE WITNESS: The idea is the Green Party under that kind of counterfactual scenario is not getting any money because they are not part of the CEP. Now, under the CEP they are still not getting any money because they didn't qualify.

THE COURT: But now they are running, there's two instead of one, so the question is they get fewer votes? Is that what happens?

THE WITNESS: They get fewer votes. However, now that there are two candidates to campaign, to apply for funding, they are engaging voter interest in this election. You have an actual contested election. Voters are thinking this is actually an election to pay some attention to and in particular I'm hearing some things that make me question whether we should reelect the incumbent. That in my view would be the entree for a minor party candidate to make some inroads.

THE COURT: Can you back that up with empirical

evidence?
THE WITNESS: Well, you know --
THE COURT: In other words, it seems more intuitive to me when you have a very crowded field and a well funded Republican and well funded Democrat, you know, how is a minor party going to get any attention in there?
THE WITNESS: Well, one theory is you just measure it by the amount of attention they are getting, but another theory is you ask whether the message that they are spreading about the incumbent is getting, is coming into wider currency, and I think that to the extent that part of what a candidate does who's challenging an incumbent is to say stop reelecting this incumbent, take a hard look at what he or she has done in office, they join the chorus of people who are saying that and I think that

because the electorate is more interested in the campaign because it's more of an actual contested election, they are less likely to, you know, express that to their fears.
THE COURT: But if the goal is to vote out the incumbent, isn't the typical voter going to say, wow, you know, the major party opponent to the incumbent has a much better chance of actually winning than the Green Party so I wouldn't vote for the Green Party, but you know what? Since the Republicans decided to run this year, I'm voting for them because they have a chance of actually unseating this Democrat incumbent.
THE WITNESS: In some respects, that is Duverger's Law. However, the question was what about getting the message out and I think to the extent that the message is going to voters who regard this seat as something that is in play, the message is more likely than

not to get out.

THE COURT: Okay, but if they would get X votes and they are now going to get X minus 37 votes or half X votes, isn't their reputation as a party harmed? In other words, I'm not going to vote for these people, they only got 3 percent last time, whereas if there's not full funding and they are the only opponent then and they get 7 or 8 percent, they start showing up on people's radar.

THE WITNESS: I think that there's some truth in

that, but presumably that creates incentives for minor parties to do a better job of attracting voters or attracting voter support. You know, we think of what would happen if Abraham Lincoln were running, Abraham Lincoln would be running on antislavery and that would be getting, that would be propelling the incipient Republican Party into that second position. Right now the minor parties are in the third position. They can't get in the second position because their policy views are out of the mainstream.

THE COURT: All right. Let me ask you this. To what extent are your opinions today based upon political science theory versus hard data about election results? In other words, your arguments seem to be more theoretical to me. And you're taking a position and I'm playing Devil's advocate and neither of us has any data to back it up, is my sense.

THE WITNESS: Well, I think that in some of the cases like, you know, how does a petition drive work or how could you construct the financial incentives to make it over the thresholds, that's fairly empirical. I

haven't conducted controlled studies but I have a sense of what things look like on the ground there. When we're talking about the nature of say party attachments, that's also empirical. I feel as though I'm well grounded in

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terms of whether, you know, people have party attachments, whether they are fairly weak for minor parties and that sort of thing. When we're talking about moving from one regime, one policy regime to another, well, you know, the data are just now coming in for 2008, it's only in a few months that we get a sense of how things have actually changed on the ground, and we shifted from one policy to another.

THE COURT: Right, but, for example, are your opinions based on an analysis of what happened in other states when they moved to a public financing system?

THE WITNESS: No.

THE COURT: Okay.

THE WITNESS: It's not empirical in that sense.

MR. DUNN: I have just one more question.

BY MR. DUNN:

Q. We just talked about the situation where the effect of the CEP is to bring an otherwise nonparticipating major party candidate into a party dominant district. What about the situation in which that doesn't happen, where you have a party dominant district, you've got an entrenched incumbent, he or she chooses to participate in it and obtain CEP funding. You have a minor party candidate. I think we talked about the benefits the minor party candidate can achieve if they do qualify for

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benefits under the CEP. But suppose they don't? Are

their interests hurt or does it matter to them if the major party candidate is a participant or a nonparticipant or are there ways in which the interests of the minor party candidate in an entrenched district are injured or impaired by participation of their opponent?

A. I would say that on balance it's probably going to be a wash because we have to ask what would their entrenched incumbent do in the absence of the CEP. The entrenched incumbent might raise more money and might raise money that would be from different sources. So the conjecture of those two things might make it worse for the minor party in the status quo arena, it's hard to say, but I would just say on average you would expect that the, I would say that the minor party candidate is in somebody's advantage just by virtue of the fact that the incumbent party's resources are now a known quantity under the CEP, whereas one of the biggest hurdles that challengers face in all legislative elections, state or federal, is the uncertainty of how deep the incumbent's pockets are. When you're challenging and your incumbent can tap into a vast network, you can get crushed unexpectedly.

Q. And, in any event, in that situation you have the latent, if you will, advantage from the CEP of the potential for the minor party candidate to achieve the

levels of voter turnout or voter participation necessary for funding in the next campaign?

A. That is right, that is right. It does give the -- the CEP gives the minor party candidate some intermediate objectives that would create some advantages for subsequent candidates.

MR. DUNN: Nothing further, Your Honor.

RECROSS EXAMINATION

BY MR. LOPEZ:

Q. Sir, on the same point the judge was asking you questions on and Mr. Dunn was asking you questions on, if I understood you correctly, your view is that in a situation where a Republican enters, a Republican publicly financed candidate enters a Democratic dominant district that previously involved only the Dem and the minor party, your testimony is that there's no measurable injury on the minor party candidate in that situation?

A. Well, the minor party candidate is likely to receive fewer votes but the questions evolved around whether they were impaired in their ability to get their message out, and I don't think the answer is yes to that.

Q. But isn't there some significance to the fact, and think this through, isn't there some significance to the fact they got, they might and most likely will, I think we can agree, receive fewer votes?

A. I'm not sure, the question is --

Q. I mean can we agree there's some significance to the fact that they might and almost certainly will receive fewer votes?

A. I guess you can't disagree with the question is there some significance. There's some significance, but whether a minor party candidate under the old system, a candidate under the old system loses by 388 to 12 or 93 to 7 is not of great significance, even though it's now of significance under the CEP.

Q. That's precisely my point. There is a significance under the CEP, isn't there? Isn't there a difference

between losing by 11.7 percent, as Mr. DeRosa did in 2004, and losing by 66 percent as he did this year when there was a third -- when there was a second major party candidate in the race cycle?

A. You say "lose by," you mean that's his vote total?

Q. That is correct, sir.

A. Not the margin, but yes, there is a difference under the CEP under those two scenarios.

Q. And what is the difference, what's your understanding?

A. Well, the difference is that now Mr. DeRosa would be forced to petition if he wants to qualify next time around.

Q. There's another type of difference also when a second major party candidate qualifies for public funding in a briefly abandoned or noncompetitive district, isn't there?

A. I'm not sure what you're driving at.

Q. The other -- isn't it correct that providing full public funding for the second major party candidate increases the relative financial advantage that major party candidate has over the minor party candidate?

A. Still I'm not quite getting what you're driving at. Are you saying that the cumulative resources associated with the major parties is now greater?

Q. Yes, sir.

A. Yes, although I think in the context of actual political competition, that, if anything, renounces the benefit of the minor parties because these major party candidates will spend the money, you know, trying to convince voters about why the other is a bad candidate,

poor candidate, doesn't serve the public trust, et cetera, et cetera.
Q. I want to ask you to try to explain that. Maybe the judge will --
A. Well, I'll say it again.
Q. Okay.
A. You have two major parties who are contesting vigorously. They will do everything they can to increase

their standing relative to their major party opponent. They are not terribly concerned about their minor party opponent. Their minor party opponent only can attract votes if he or she can take them away from the incumbent's lopsided ante vote total. And so, in that sense, having another major party candidate criticize the incumbent actually helps the minor party.
Q. I understand your point that the increased competition provides a greater incentive to work, to work harder if you're a minor party candidate, but aren't you in fact competing in a, not only a more expensive district now but a more competitive enforcement, a more difficult environment where it's harder to be heard, where maybe it's harder to get invited to debates, where maybe you get less media coverage. Isn't this all very predictable?
A. You know, in terms of getting invited to debates, I don't know. I've seen it go both ways. In terms of the cost of actually engaging in campaigns, probably there's no effect because the kinds of campaign controls who are likely to work for each of the three candidates are likely to be very different and not overlapping.
But in terms of getting votes, it's going to be hard and the reason is that the partisans who support the

lesser of the two major parties are going to more likely vote for their own party's candidate and less likely to

vote for you. But whether that, that attempt in some sense harms the standing of the minor party all depends on the gullibility of the observer, because any observer who sees a minor party candidate get trounced, say, 88 to 12, would surely know that that 12 is a mirage, that 12 is more like a 3 if that candidate, that major party candidate actually had a major party opponent.

Q. This is at the conclusion, so let me just ask you a little bit about the qualifying criteria. You talked about petitions but there's a second component to qualifying and it concerns raising seed money or qualifying contributions.

A. Yes.

Q. You understand how the system works; if you're running for statewide you have to raise $250,000 in $100 units or less?

A. Yes.

Q. Do you have any experience that would, that you could, that could -- withdrawn.

Based on the work you've done in helping crafting fund raising strategies, your academic work you've done doing that, what's involved in raising that amount of money in units like that, that small?

A. Well, you need a -- you need to take a few different factors into consideration. First, you would need a

target donor list. You would probably have to have some sense of what kind of outreach strategy you are likely to

pursue. Would this be through direct mail solicitation, through phone calls, would this be based on events, would you be doing this door to door. You know, all of those kinds of things tend to be money losing propositions for professional fundraisers. It's only when they have a relatively well worked list of continual donors that it tends to be profitable. However, remember that the CEP does not require this kind of fundraising effort to be profitable. If you spent $50,000 on a group of people who are going to help you raise 15,000, for example, for a state senate office, you would nevertheless qualify. So I think that to the extent that even a badly run fundraising campaign can be successful, you have the wherewithal for the relatively easy path to qualify.

Q. Well, the example you just gave us, let's just talk about that. You said 50,000 to raise 15,000. Again, those are your words but is that, is that your opinion about what it would cost to raise the 15,000? That seems a little -- seems a little unreasonable to me but maybe you want to qualify that.

A. Again, to use the very, very large number, using the hypothetical that I gave before where you're basically hiring a firm to raise your qualifying contributions, say

a firm cost $50,000, you now will get an $85,000 grant plus the $15,000 they raised, so that's $100,000. They are giving them half. So it's easy to do the math, it's so overwhelming --

Q. Is it your opinion if you did hire a firm it could cost you 50,000 to raise 5,000?

A. No.

Q. What is your opinion?

A. The typical unworked list, it loses money on the order of like 20 percent, so it might end up costing you 20 percent over and above the 15,000 to raise the 15,000. You know, essentially my point is simply that it doesn't matter. The details don't matter. The thing that matters is that there will be a market that will make it profitable for groups to assist in the raising of qualified contributions.

Although I do take Your Honor's point about not making it such an easy go that there's essentially no deterrence for stalking horse candidates. And perhaps the way to prevent stalking horse candidates in this context is to make the threshold sufficiently large so that it's not so easy but also to have the watch dog organizations cull out the stalking horse candidates so they can't get away with it.

Q. So, your testimony is then, at least going through

the firm route, it would cost you at least 17,000 to raise 15,000?

A. Yes.

Q. And that's based on a 20 percent?

A. Yes. You're doing the math -- assuming your math is right.

Q. Well, I would come to a higher number. I would get to 18,000 based on a 20 percent loss rate.

A. That's fine. What's $500 between friends?

Q. Now, I'm going to talk about millions of dollars because we're going to talk about statewide office. Is it fair to say it would cost to raise $250,000 necessary to qualify for --

THE COURT: Governor.

Q. -- for Governor, you would have to raise the cost of, that would be $300,000. Can we agree on that?

MR. DUNN: Objection. Are we still talking about a fund raising consultant working with an untested list? Those are the assumptions that you want Professor Green to keep?

MR. LOPEZ: Those are -- I believe that's fair.

BY THE WITNESS:

A. Yes.

MR. LOPEZ: That's all I have, Your Honor.

THE COURT: Okay. Anything further?

MR. FEINBERG: Just a moment, Your Honor.

(Pause)

FURTHER REDIRECT EXAMINATION

BY MR. DUNN:

Q. Professor Green, if you had a finite group list or a tested list, would you expect that fundraising could be accomplished in which you raised more money than it cost you to raise the money?

A. Yes, particularly over time because as a list develops, in subsequent election cycles it would become more efficient to raise money from that group.

Q. So, if you had a party that had an existing list, they worked with a list of contributors who contributed before, presumably you could perform that fundraising function on a probable basis so it wouldn't cost you as much as you would raise?

A. Yes.

Q. So you aren't suggesting that the minor party could expect to experience what Mr. Lopez just suggested, what --
A. That's right. I'm thinking more in terms of how you perform in your first election campaign.
Q. Also, is it the case that the internet is a resource

available in today's day and age for statewide or national fundraisers?
A. Yes. When successful, it greatly increases the profit amount of those kinds of funding efforts, provided they are sufficiently well known to the district, potential donors in the district.
Q. Is the cost incrementally small compared to what you could potentially raise?
A. Yes.

MR. DUNN: Nothing further.

THE COURT: Sir, you're excused, thank you.

THE WITNESS: Thank you.

THE COURT: Do you want to break for lunch or start going? What's your preference?

MS. YOUN: My preference would be to break for lunch because this line of questioning is kind of a thorny issue.

THE COURT: Very well. Let's take about an hour and come back at 1:30. Have a nice lunch.

(Whereupon the luncheon recess was taken at 12:30 o'clock, p. m.)

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

(1:30 o'clock p. m.)

THE COURT: Let me remind counsel that at 2:00 o'clock we are going to be taking up the matter of final approval of a proposed settlement in a shareholder derivative action that I'm hopeful will not be a lengthy proceeding but we will interrupt this matter to take that up. Ms. Youn?

MS. YOUN: Thank you, Your Honor.

Prior to the break we were dealing with the testimony of an expert witness, and as Your Honor recognized, it is in the nature of expert witnesses and especially academic expert witnesses to talk about hypothetical examples and political theory, and that was very valuable, but what I think I'm going to focus on in my presentation is, instead, a more factual analysis of what is the plaintiff's burden in this proceeding and have they shown it. And specifically I think what, you know, the question that needs to be answered is what evidence of actual harm have the plaintiffs put forward that would justify ruling this statute unconstitutional, especially

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on a facial challenge.

And we listened to Mr. Lopez's presentation yesterday and, you know, at the end of the day it was my feeling that nothing the plaintiffs had put forward would

satisfy that burden.

In terms of the nature of the harms that plaintiffs were alleging, I think that there were really four categories of harm, which I mean address in turn as an introduction.

The first was, initially they had alleged in an earlier phase in this proceeding that the CEP will virtually compel major party competition in party dominant districts. I think that we will, you know, going forward with the 2008 election results in March, we will proffer that there was in fact no net increase in contestedness that was demonstrated after the enactment of the CEP. There was one additional House District that was contested. That was it. There simply is not any basis for this court to draw an inference that the CEP virtually compels major party, virtually compels major party competition, especially in a way that would disadvantage minor party candidates.

The second area of harm that the plaintiffs have sought to demonstrate is that major parties will not be able to qualify for CEP funding, and we think that we will

be able to demonstrate both under the prior vote threshold and under the petitioning analysis that, you know, as a matter of legislative inch hills, the legislature specifically took into account evidence that shows that minor partys would participate. And we will point Your Honor to those places in the legislative history where the legislature had before it evidence showing that 13 percent of minor party candidates would be automatically eligible for some level of CEP funding under the thresholds that

were set. And secondly, again, out of our proffer for 2008, we will able to show you in March that five minor party candidates did, in fact, quality for CEP funding, one through the far view threshold and four through the petitioning route.

Thirdly, and this really goes to the motion for reconsidering the matching fund analysis, under those particular provisions, plaintiffs have alleged that they will be chilled in a future course of action. Now, we will, when I get to that part we will demonstrate that the evidence is that plaintiffs have never before come close to engaging in this type of behavior and, as a matter of law, an affidavit of bare intent to engage in some future pattern of behavior that plaintiffs have never before engaged in is not sufficient at the trial stage for standing.

And, finally, Your Honor, toward the end yesterday, Mr. Lopez said, well, we didn't really have to allege harm to minor parties; instead, all we have to prove is a benefit to major parties in order to prevail, and I would submit to the court that that is a, that that is simply wrong as a matter of constitutional law. That would require that all public financing systems are unable to set qualification thresholds, period, much less on the basis of public support. If the mere --

THE COURT: Let me interrupt there because I understood his point to be in order to satisfy a standing requirement by showing a benefit to the major parties, there is sufficient implied or necessary harm to the minor parties to confer standing that wouldn't prevent states from enacting whatever they wanted to enact, but it would

permit minor parties in effect to challenge the constitutionality of the provisions.

MS. YOUN: Yes, I'm afraid I was unclear there when I was talking about his analysis at the end of the day. I wasn't referring to the standing argument, I was referring to an overall analysis which is is the CEP unconstitutional because it confers benefits to major parties that it's not conferred upon some minor party candidates, and I would submit that as a matter of constitutional law, that is not constitutional injury.

And I wanted to, first of all, to talk in an oral argument mode about this question of competition, because a consistent theme of the plaintiff's arguments have been that the CEP will increase competition and that this itself is a basis for this court to find this statute unconstitutional, and I would say that is a radical revision of what constitutional law tells us. And I want to kind of play this out by thinking about some analogous example, which is term limits.

Now, it's very true that in many jurisdictions, without term limits there is an entrenched incumbent in seats and minor party candidates running against this incumbent might consistently get a certain percentage of the vote and that vote would be a protest vote. Now, if a legislature or, you know, whatever the term in that jurisdiction, were to enact a term limit law that had the effect of, you know, loosening that entrenched incumbent, that race would become an open seat. It is far more likely that a major party candidate would contest that open seat. That minor party candidate in that district

that had formally been entrenched might see that, their share of the vote, the share that represented only a protest vote go down. That is not a basis for holding that term limits are unconstitutional. The mere fact that a statute has an effect of enceasing electoral competition

is not constitutional injury.

And the term limits example is specifically discussed, was specifically considered by the Sixth Circuit in Citizens for Legislative Choice v. Miller. The cite for that is 144 F.3d at 916, where they stated that the state, they upheld term limits law where the state's interest was that, quote, "lifetime term limits will foster electoral competition by reducing the advantages incumbency and encouraging new candidates. The mere fact that a statute increases competition is not a sufficient basis to hold that unconstitutional."

I would also say another example that would work the same way is if one relaxed the ballot qualification threshold. For example, a jurisdiction that currently had a 5 percent ballot qualification threshold, they were to knock that down to a 1 percent threshold. The Green Party candidate might find themselves in competition with another minor party candidate. This might decrease the Green Party candidate share of the vote because of this increased competition. That is not, again, a reason to hold that, you know, that statute had the effect of encouraging competition unconstitutionally.

THE COURT: Let me just interrupt and find out, because I really didn't understand Mr. Lopez to be raising this other than in the standing context. Is it your

argument that, you're arguing that the statute's unconstitutional because it increases competition, electoral competition?

MR. LOPEZ: No, Your Honor. The argument is that under the statute, candidates, major party candidates are given a benefit that increases their electoral opportunities and it's a benefit that is denied to minor party candidates. It's true about the trigger provisions as well, and the standing argument is limited to trigger provisions. As I understand it, they are not challenging our standing to challenge this overall --

THE COURT: Right.

MR. LOPEZ: -- but the guts of our case, and it is firmly supported by the case law, is that you can't give benefits to major party candidates and deny them to minor party candidates, and the reason this court, and the reason we distinguish Buckley is because in Buckley, a benefit wasn't at issue because there was no benefit. That was the conclusion of the court. The public funding in that context provided no advantage.

THE COURT: Okay, yes, I don't need a full argument. I wanted to qualify your position.

MR. LOPEZ: Okay. Is that clear?

THE COURT: That's helpful, that's helpful.

MR. ZINN ROWTHORN: Your Honor, could I make a

brief point? And I think it goes to Your Honor's question and to the last part of the testimony from Professor Green, there has been a suggestion throughout that the CEP incentivizes additional major party candidates who come into races previously contested by one major party and

minor parties, and that will have the effect of reducing the historic votes achieved by minor parties. I think that's been suggested as a constitutional harm, and we would take very strong issue with the notion there is some constitutional entitlement to maintain a historic level of vote percentage.

We do believe there's a constitutional entitlement to maintain historic political opportunities to go out and seek as many votes and as you can attract. It's going to be our argument, it is our argument that the CEP doesn't take away any opportunity to go out and seek a particular however many votes you can get, but it's not a constitutional harm if there is increased competition and because of that you end up getting fewer votes.

THE COURT: No, but I think the argument is the CEP does not treat equally the opportunity to obtain the benefit of public financing between major parties and minor parties. And so if a major party is automatically given the right to come into a district, not competitive and without getting petitions and without getting

contributions or showing the last election cycle you ran in, that disparity I think what is what's being challenged.

MR. ZINN ROWTHORN: Yes, and we would, of course, suggest that the distinction in the treatment is justified by, you know, the basic distinctions between the parties. But we'd also say that the real analysis for the court, Your Honor, is to look at whether the CEP as a result perhaps of having, you know, more major parties that participate leaves the minor parties in a worse position than they were historically based more on their

political opportunities, and we would say even if they can't participate, they still have the same opportunities.

Valid access, cross endorsement, generous petitioning periods, all of these things they can starkly enjoy. The CEP doesn't take away any of those things. Those are political opportunities. It's not a results analysis. In other words, the political opportunities they had, they previously got X percentage of the vote. What we're looking at is under state law, can they do the same thing by way of political opportunities that they previously were able to do. That's how we view the appropriate test under Buckley.

We're going to have a lot of discussion, I think, and we have had a lot of discussion about whether

there is a reduction in political opportunities. We think it's clear on the face of the statute, particularly at this stage there's not any political opportunities in the sense that the ability to get on the ballot, the ability to privately raise funds, the ability to do all the kinds of things previously they were able to do, we don't think anything's been taken away by the CEP.

MS. YOUN: I think that going forward from that analysis, I would say that in March at the applied stage of the proceedings, we are prepared to offer evidence that shows that, in fact, minor parties have seen an increase in political opportunity after the CEP. And, indeed, an increase in political strength, which is a different concept but one which results in the product liability litigation. As I already mentioned, there has been no increase in contestedness. Minor parties have actually

seen an increase in percentage vote totals. In the 2008 election, the minor party candidates averaged about 8.5 percent of the vote. Previously the best they had been able to do was approximately 6.5 percent of the vote on average.

THE COURT: I don't want to get ahead of ourselves. I know I basically pushed off this argument until tomorrow about the 2008 results, but aren't any 2008 data that aren't going to change sufficiently final

or reliable that I can consider them? For example, the number of candidates who enter the race, that's not going to change. We all know what that number is. The number of candidates who qualified for a grant, however much that grant may turn out to be, that's not going to change. And aren't those appropriate on a facial challenge, whereas an applied challenge, we're not looking at minor parties, we're looking at the plaintiffs. Mr. DeRosa, the Green Party of Connecticut. Was the statute unconstitutional as applied to Mr. DeRosa. That's what March is about, isn't it?

MS. YOUN: I will let --

MR. ZINN ROWTHORN: You know, I think really the appropriate scope of the facial challenge is, is really for the court to look at the face of the statute, its requirements, you know, the administrative gloss on how it would be applied, and determine whether there are any obvious constitutional harms caused by any of those provisions. And so it's not -- the question, when we say we ought not consider the 2008 data, it's not that -- I mean we have several problems, but with respect to this particular question, our concern isn't that some of that's

not final. Some of it is final. We just don't think it's relevant in this stage because we think you ought to be looking at this and saying here's the law as it existed

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with respect to minor parties' political opportunities before. Here's the CEP. Can you look at those two, examine those two and see there's a net loss for minor parties' political opportunities? We say no.

You know, and then in March, what we're going to show you is that, okay, now let's look at how it was applied to these plaintiffs and we can see that they are in no worse position than they were before.

THE COURT: Right. But at the facial challenge stage, the appropriate -- I believe, and if you've got case law that says otherwise, let me know, but it's appropriate to look at what was the reality before the law and what is the reality now that the law has had an election cycle to run. In other words, we're not, we're not deciding on a facial challenge in the abstract. Does the law say minor parties shall never be permitted to run for election in Connecticut? The only people who can run for election are Democrats and Republicans? Obviously that's going to fail as a facial matter but that's not all that a facial challenge looks at is did the legislature expressly discriminate in an illegal manner against some person or class of persons. We have to look at the way the statute operates in the general sense when deciding even a facial challenge, don't we?

MR. ZINN ROWTHORN: I think we do have to look

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at the way the statute operated really to that basic

question of what the statute requires. So, you know, for example -- and I think in this case that means the statutory language, the declaratory rulings and the position of the SEEC, as to what individual provisions mean and how they ought to be applied.

I guess my rhetorical question would be for what purpose would we be looking at that sort of external election data other than to determine whether it's had some effect on the plaintiffs. I think that's an as applied question.

And I think we also have to remember this is a facial challenge in the context of a campaign financing system, so we're really guided by the question, the harm that we're looking for is identified in Buckley. Was there a reduction of political opportunity.

On a facial challenge, I think in this case we wouldn't look to the 2008 data about how many candidates qualified, how much they -- you know, what the results were, et cetera, because that doesn't tell us whether the statute took away on its face any opportunities under Connecticut law that minor parties previously enjoyed.

THE COURT: Let me give you an example, and I'm not trying to tie this to actual data at all, but let's assume there were 150 minor party candidates that ran in

2006, and then in 2008 the act is in effect and there were 17 that ran. Now, that is pretty strong evidence that somebody has been chilled. It's not conclusive but isn't it relevant, to use your term?

MR. ZINN ROWTHORN: I think that's a very good example, Your Honor, because I would say that that may be -- there's nothing -- we would look first to the face

of the statute and say is there anything in the statute that mandates a reduction of minor party participation in elections. We would say no, clearly that's not the case. If, for example, the statute said, you know, because this is going to have some fiscal effects on the constituents of Connecticut, we're going to make public financing available but we're going to kick up the ballot access to 3 or 4 percent to reduce some of the other costs and administrative burdens on the state, we would be able to look at that statute and say clearly that on its face has an effect on minor parties' political opportunities because they previously had a political opportunity to have ballot access of 1 percent. Now they have a political opportunity only at 3 percent. That is a reduction in political opportunities.

But I would say to Your Honor if the question is why did fewer minor party participants participate, that is clearly an as applied challenge because the claim then

would be --

THE COURT: No, it has nothing to do with Mr. DeRosa. If there's 150 minor party candidates of all different parties and now there's 17, Mr. DeRosa, he can't say, wait, look at this big decrease that doesn't have anything to do with him. His challenge is I had 11.7 percent of the vote and now I've got 6 percent of the vote.

MR. ZINN ROWTHORN: Then I would say, Your Honor, it's not a facial challenge because it doesn't, there's nothing on the face of the statute that mandates a reduction to minor party participation.

And then the other -- with respect to some effect on other minor parties, it's not relevant to -- he doesn't have standing to raise that claim.

THE COURT: But your argument is the only way a statute can fail facially is if it expressly violates the Constitution, if it expressly violates it.

MR. ZINN ROWTHORN: No, my argument -- I think the test is a very high one because it's fundamentally a dangerous proposition in a democracy to look at a statute on its face and conclude that it cannot be applied constitutionally. In fact, the opposite presumption is required, that if there's a conceivable scenario in which it can be applied constitutionally, it ought to be

permitted to operate and it can't be struck down on its face.

I would say to Your Honor you can draw no facial constitutional conclusions from the fact that fewer minor party participants were in an election after the CEP's enactment or effective date than before. I think there's nothing, unless that is somehow mandated by the terms of the statute --

THE COURT: I need authority for that because in looking at the cases, my strong sense is that on a facial challenge the scope of the evidence, what actually happened before and after the statute, is broader than with an as applied challenge because with the as applied challenge, you're looking at the actual plaintiff, what happened to the actual plaintiff or plaintiffs. Now, maybe I'm wrong about that but I'm going to need your help. If your argument is that 2008 is completely irrelevant to a facial challenge, because my understanding

is the court in a facial challenge is permitted to look at the landscape before and after the statute and it's not, it's not limited to the express words of the statute that is -- that, you know, says minor parties are not permitted to express their opinion.

MR. ZINN ROWTHORN: No, I agree that the court can look at effect but I think they have to be effects

that are sort of mandated or flow sort of naturally or obviously from the face of the statute.

THE COURT: Fair enough, but now we're into arguing what, what inferences can be drawn from the 2008 experience.

MS. YOUN: And, Your Honor --

THE COURT: And so I guess my suggestion, I don't want to take too long on this and interrupt your case, but my suggestion would be don't proffer what 2008 is. If we have hard numbers on 2008 and we have five people who qualified, at least say that, without prejudice --

MR. ZINN ROWTHORN: We can do that, Your Honor, and I think, for example, you know, I mean part of the confusion here is typically I think courts would prefer to take up the smaller question of the as applied before taking up the larger question of the facial challenge. And so that you -- because I think there's a natural aversion to wanting to -- I think the law sort of counsels an aversion to making that sort of judgment on the facial basis of the statute.

THE COURT: Right.

MR. ZINN ROWTHORN: You know, and so there's a

little bit of a fiction here in some respects, that we're sort of pretending that 2008 didn't exist because we're

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looking at the facial, at the face of the statute and determining whether that's on its face unconstitutional. There are certain things that, you know, no one's going to dispute. We'll tell you that five people participated, they'll tell you that five people participated, and I think maybe the court can look at that because part of the, part of the, you know, the analysis on a facial challenge is is it conceivable that it could be applied constitutionally, and if the claim is minor parties can't participate, can't qualify, we'll say obviously that's not the case.

MS. YOUN: Your Honor, I think that in addition to the facial challenge analysis, there is a separate and prudential reason for not considering the 2008 election data in a piecemeal fashion. Buckley counsels us to look at the entirety of the political landscape when we would say that such factors as expenditures are not available to us at the time and have a major impact on how they interplay with other indicia of minor party political opportunity. I don't think that you can pull out one and make a ruling on that basis and then go back.

THE COURT: And if I understand you, agreeing with you, then I'll hold my decision and we'll issue a decision in March, but my only point for today's proceeding is I don't think you need to damages around the

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hard numbers from 2008. You're not waiving anything in my view. You can still argue that they are irrelevant but it's helpful to me to know what's disputed and what isn't,

frankly.

MR. ZINN ROWTHORN: Yes, I think fairly my point, Your Honor, is some numbers you may want to look at with respect to 2008 but, you know, we think the numbers in the areas that we have identified are still in flux and so we ought to be able to address those in March and that, I think, was one of the purposes for bifurcating this proceeding.

But what I'm concerned about is the example for -- the example that you raised, which is a pretty central and significant fact, about minor party participation decrease. And we would say you should not look at that at this stage because that's a number that you can't on the face of the statute make the necessary causal connection. We would say, we would absolutely dispute that there's anything naturally in the language of the statute that mandates that reduction in participation. There's nothing to suggest that it would, you know, because, in fact, to the contrary, it is the case that minor parties enjoy ballot access, the right to privately raise funds, the generous definition of minor party, long petitioning periods. All those things which historically

have been very generous to minor parties still are very generous to minor parties and are unaffected by the CEP in any way that you can naturally look at this and say there's a clear and obvious causal connection.

THE COURT: I understand your argument, but the only point is some of the 2008 data is hard data and, you know, if we know how many people participated, we know what, how many people petitioned, et cetera, et cetera,

let's not dance around it.

MR. ZINN ROWTHORN: Okay.

THE COURT: It's in, you've got your arguments, and if at the end of the day I agree with you, either I should consider it or it's too premature or whatever, I won't.

MR. ZINN ROWTHORN: Some data we just don't have.

THE COURT: Fair enough, fair enough. If there's critical data that we don't have, I'm not sure what that is except perhaps the amount of refunds of the grants.

MR. ZINN ROWTHORN: Organizational expenditures.

THE COURT: All right, whatever.

MR. ZINN ROWTHORN: We can identify those areas but we also do have an, I think a general relevance objection to any of those numbers because, you know, I

don't think they, they really assist Your Honor in deciding the facial constitutionality of that.

THE COURT: You may be right but, again, this is a bench trial. You know, let me take it in. If I agree that it's irrelevant or it should be given no weight, then I'll let it roll off my back.

MR. ZINN ROWTHORN: All right. I just want the record to be clear that we do have that relevance objection.

THE COURT: Sure.

MR. LOPEZ: Your Honor, if your Honor please, I didn't get a chance to argue the merits yesterday, I didn't get a chance to argue on this issue. I would just point out to the court that what I think Perry is saying

is that the court should consider this a facially neutral statute. It's not a facially neutral statute, it's a statute that discriminates on its face.

MR. ZINN ROWTHORN: That's clearly what I'm not saying; it clearly does make distinctions between major and minor, that is obvious and that is on the face of the statute. You don't need any information from the statute to make that determination. We would say that Buckley counsels that that's clearly not enough to show facial --

MR. LOPEZ: But the burden flows from that, Your Honor, and it's completely relevant to talk about what

that burden is. My colleague tries to limit the burden to -- and so does Ms. Youn -- to a reduction in political strength and that's actually not the standard. The burden is -- doesn't say a reduction in the strength of the political parties. It says does this statute burden the political opportunities. We would submit on its face, if you just read the statute, it's apparent from the face of the statute it imposes a higher burden. But now that we've had an election cycle we see how it burdens it primarily, Your Honor, by increasing the money that major party candidates have to run elections with.

THE COURT: Since we're basically fully interrupted, let me take up --

MS. YOUN: Okay.

THE COURT: -- the matter of Robert Lange v. Gilbert Bach, et al. It's not necessary for counsel to vacate. Why don't you come on forward. Counsel can stay where they are. I'm going to have a short proceeding up here in front.

(Whereupon a recess was taken from 2:00 o'clock, p. m. to 2:05 o'clock, p. m.)

THE COURT: Are counsel prepared to proceed?

MS. YOUN: Absolutely, Your Honor.

Well, Your Honor, you ended the last phase by saying don't be shy about giving me the hard facts with

the 2008 election. Here they are. There was no net increase in contested victories. There was only one more contested, there was only one net House district that was contested in the case.

Secondly, instead of seeing a decrease in vote totals, the minor party candidates who participated in the election saw their, saw their vote percentage totals go up on average by a fairly significant jump, from 6.5 percent in 2006, which was the average vote percentage obtained, to 8.5 percent in 2008.

As you, as Your Honor's already aware, five minor parties, candidates, received CEP grants, and for the coming 2010 election, 14 nonmajor party candidates will be automatically eligible for some level of CEP funding, four of them for a full grant based on their percentage showing in this election.

So I would say that in terms of the indications that plaintiffs, the indicia of political strength the plaintiffs have submitted are most important to them, all of those, they have nothing whatsoever to base an inference that the CEP has in any way diminished the political strength of minor parties.

Now, moving back to my outline and the question of whether the CEP is unconstitutional because it discriminates on its face between major and minor parties.

Now, obviously it is constitutional for a public funding statute to treat major and minor parties differently. Buckley tells us that and, in fact, the public financing system here in the CEP is less onerous in its treatment of minor parties than the one upheld in Buckley for the following reason. In Buckley, if you look at the statute there, it was only a prior vote's threshold that was available to the minor party candidate. That means that the minor party candidate is essentially unable to escape the burden of what had happened in the past election. No matter what the minor party candidate did, they could not qualify for a full grant.

Instead, the statute at issue there, which was 26 USC 9008(b)(2), dictated that the minor party candidate would receive a portion of the major party entitlement determined by the ratio of the votes received by the party's candidate in the last election to the average of the votes received by the major party's candidate. So that means in the previous election, if the major party candidates had outperformed the minor party candidates by four to one, then the minor party candidate in this race would not be able to get more than a 25 percent grant no matter what that candidate did.

And I would submit that the CEP by opening a route for minor parties to obtain full funding, and we

have seen minor parties obtain full funding under this statute, in fact increases rather than decreases the political strength of, of nonmajor parties.

Now, there was a little bit of a colloquy about

what the exact wording of the test in Buckley was, so we took the opportunity to look it up over the break. This is a pin cite 98 to 99 in Buckley. The holding there was that "Appellants have made no showing that the election funding plan disadvantages nonmajor parties by operating to reduce their strength below that attained without any public financing."

So, contrary to plaintiff's representation, Buckley did not hold that any burden placed on a minor party candidate by the operation of a public financing system would be a basis to hold the statute unconstitutional.

MR. LOPEZ: Your Honor, Buckley considered several factors how public funding there affected the relative positions of the party. That was one articulation of the issue. There are actually half a dozen. One of them I have committed to memory is how public funding in that case did not increase the ability of major parties to purchase scarce electric communication resources.

But I would also raise the additional

objection -- and I'm sorry to do this because I don't really want to interfere with their presentation; it happened to me all day yesterday -- but if they are going to talk about what, how the presidental systems work, then they have to give a complete picture. The fact that you only qualify in Buckley based on your last electoral result was offset by the fact they were eligible for a post election grant if you did well in the current election, which is not true about the CEP.

THE COURT: I'm familiar with the statute.

MR. LOPEZ: Yes.

THE COURT: But let me do encourage you to limit your interruptions because I think what we're going to do is come back tomorrow and everybody can have their day on the argument.

MS. YOUN: Now, it's true that it's not, you know, a statute cannot say only major parties get special treatment based on some discriminatory measure, but the question that's before us today, as it was in Buckley, is can the, can the state constitutionally distribute public financing on the basis of a showing of public support. And I would submit that Buckley dictates there that the answer has to be yes.

So the question for this court to determine is a question of levels, at what levels can thresholds

constitutionally be set, and I think that the court has already focused in on that question.

But I think that, you know, I wanted to address one hypothetical that was brought up by the court in its discussion with Professor Green, which was if a minor party candidate is knocking on doors in Bridgeport and is trying to get petition funding, and a Republican answers the door and says I don't want to support your candidacy because I think of you as a Nader-type figure or because, because of this sort of thing, yes, it is difficult for that minor party candidate to get a signature, but does that -- is that relevant from a constitutional perspective? Because if the minor party candidate lacks the public support that is indicated by the position, if the public does not support the candidate enough to sign

the petition, then we would submit that that candidate does not have an entitlement to public funding supplied by the state.

THE COURT: Sure, but the issue is at what level it be set.

MS. YOUN: Exactly.

THE COURT: If the legislature said no one can get public funding unless they get signatures from 51 percent of the eligible voters in the district --

MS. YOUN: Then that would be a problem.

THE COURT: -- that would be a problem. So if they said 40 percent, that would probably be a problem. So the question is is 10, 15, 20 percent a problem; that's really what we're talking about.

MS. YOUN: Let me go directly to that question and let me just find my place in the argument.

Because the 2nd Circuit has already addressed the question of at what level do petitioning thresholds become unconstitutionally difficult, and the 2nd Circuit did that in the context of the ballot access, which is LaRouche v. Kezer, and this analysis is a little bit involved and it is discussed in our Opposition to Summary Judgment brief on pages 65 to 68, but essentially what the court dictates is you can't just compare percentage. You can't just say 20 percent is higher than ten percent; therefore, this petitioning requirement is unconstitutional. What the court recognizes is that, instead, the constitutional measure of petitioning threshold is determined by basically the intersection of two factors. Yes, the percentage requirement but also the time period at issue.

The court engaged in a lengthy analysis and we engaged in a lengthy analysis in our brief that paralleled the court's analysis in LaRouche but essentially the upshot of that analysis is if you take into account

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Connecticut's extremely generous -- I think the seven months' petitioning period and the number of signatures a day that would be required to get the applicable threshold, then even the gubernatorial maximum grant petitioning threshold under the, under the CEP, is more easily satisfied than petitioning requirements that had previously been upheld in the ballot access context in both LaRouche and also in the Supreme Court's decision in Jenness v. Fortson, and we further refer to those pages in our brief.

THE COURT: What evidence did the legislature have before it in determining how difficult would it be to obtain 10, 15, 20 percent petitioning signatures?

MS. YOUN: The evidence that the legislature had before it were basically three reports commissioned I think for this purpose from the Office of Legislative Research. And in those -- first of all, to answer your question, the legislature did not specifically, I do not think, look at statistics regarding petitioning. What they did instead is look at the 10, 15 and 20 percent threshold level for the purposes of both the prior vote requirement and the petitioning requirement because both of those are measures by which minor parties can demonstrate popular support. Now --

THE COURT: Where did they come from? What

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evidence do we have about why the legislature chose those levels?

MS. YOUN: Sure. Let me just flip to that page in my outline.

So if you look at Garfield declaration 2, Exhibit 18, which is the Office of Legislative Research Report that I'm referring to --

THE COURT: I'm sorry, Exhibit 2?

MS. YOUN: It's an exhibit in Garfield, second declaration, and it is Exhibit Number 18.

THE COURT: Can you give me a date or docket number?

MS. YOUN: The date -- the particular report is Docket 236-35. The date is July 10, 2008, for the declaration date.

THE COURT: Okay.

MS. YOUN: So, if you look down on the first page of that, and going through to the second page, now this is where the, this is -- to put this in context for the Court, this is when the legislature was considering whether or not the thresholds were too high and were listening to the testimony of Jeffrey Garfield that the plaintiffs have discussed extensively in their presentation.

Now, so you'll see on the second page of this,

the first full paragraph, they break down the various vote totals obtained by minor party and petitioning candidates and you'll see that they do it at various levels. So they say that 12 minor party candidates -- I'm looking at the second to the last point of that paragraph, received between 10 and 14.99 percent, six between 15 and 19.99 and

four received over 20 percent of the vote. So if you add up those figures, you get 22 out of 168 minor and petitioning candidates in the last three elections received over 10 percent of the vote. And if you do the math on that, that works out to 13 percent of minor party candidates.

So the legislature, you know, the finding the court can make is that the legislature specifically considered evidence showing that 13 percent of minor party candidates would receive funding under the -- would automatically receive funding under the prior, prior loophole.

MR. LOPEZ: You'll notice this report is dated -- it's a 2006 report. This was obviously not considered by the legislature until after the law was passed.

MS. YOUN: Yes, and I would submit that the same is true about the Garfield testimony that Mr. --

THE COURT: You said the legislature could find

that 13 percent would automatically be received funding.

MS. YOUN: Yes.

THE COURT: The problem I have with that is we're looking at three different legislative years, and so only if all of the qualifying minor party candidates qualified in the final year would you say that they could automatically qualify -- you're saying had the law been in effect at the time?

MS. YOUN: Had the law been in effect at the time, then --

THE COURT: Okay. How many of those are repeat

candidates? In other words, of the 13 percent, how many represent repeat qualifiers?

MS. YOUN: I'm not sure that that, that that information is broken out and that certainly isn't information that the legislature had broken out for it. I can have my research associate try to compile that information while we're sitting here and see if we can come up with an answer, if that would be helpful to the Court.

THE COURT: Okay, I'd just be curious.

MS. YOUN: And I would say that we have --

THE COURT: Actually I can probably figure it out. It looks like it's set forth in Tables 6, 7 and 8.

(Pause)

MS. YOUN: Sorry, and just to remind the court, in the 2010 election we see coincidentally an identical result which is that 14 candidates in that, in that election will be automatically eligible for CEP financing and four of those were full grant based on the percentage that they obtained.

I think another argument is, or another question is where is the legislature getting this 20 percent number and why did they pick 20 percent. And I've heard the plaintiff suggest that the fact that 20 major parties always hit 20 percent and minor parties almost never hit 20 percent signifies that the legislature intended to exclude minor parties in picking a 20 percent threshold, and I would say that the evidence this court has just considered shows that not to be the case. The legislature understood that viable minor party candidates would receive, would be able to make -- would be able to hit the

threshold.

Instead, the 20 percent was picked as a viability threshold, and the fact that major parties always hit 20 percent and minor parties seldom do reflects nothing more than the commonplace observation that major parties tend to run more viable candidates than minor parties have historically done in Connecticut.

But I would also say that the 20 percent

threshold was not developed specifically for the purposes of the CEP. Instead, it was developed from a longstanding definition of major party which has been in the Connecticut statute books for sometime, for decades at least, and that that major party definition is used for a variety of categories of differential treatment, including, for example, placement on the ballot and differential nomination procedures.

I would further submit to the court, and this is contained within our briefs again, that six states, including Connecticut, use a 20 percent threshold to define a political party in a way that creates a differentiation in electoral treatment.

And I would also say that in the case Jenness v. Fortson, which is again discussed in our brief, Supreme Court case, a 20 percent threshold -- I'm sorry, a challenged ballot access regulation that made a differential treatment based on a 20 percent showing of, I think in the most recent gubernatorial election, was upheld by the Supreme Court and I would say that similar results were also reached in the case of Swanson v. Worley and Gelman v. FEC.

But I would say the 20 percent threshold, Your Honor, and the 10 and 15 percent incremental thresholds are very important from a party building analysis and

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show, I think, that the legislature's intent was not to exclude minor parties but to encourage minor parties. Basically the legislature, I think it's fair to draw an inference, recognized that if major parties are at 20 percent and minor parties have traditionally been around here, then rather than saying you're going to have to make this entire jump, we're going to give you some incremental steps to build upon until you can reach this level, until you can reach the 20 percent level. Therefore, we're going to give you financing at the ten percent level and the 15 percent level and that financing is going to be a lot more generous than anything you've been able to achieve through your private fundraising attempts.

THE COURT: Is there legislative history that suggests the levels were set where they were in order to entrench the Republican and Democrat parties, the two major parties?

MS. YOUN: There's no -- I certainly have never seen anything in the legislative history to suggest that. I don't think that -- I mean the suggestion that the major party candidates were trying to defend themselves against minor party candidates just doesn't hold as a matter of logic. The major parties are not worried about candidates who historically have not been able to reach the

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20 percent threshold. The major parties are worried about other major parties. This idea that they are working

together to perpetuate a duopoly is I think a fiction, and one that, further, there's no support in the record for.

So, I got a little bit off my outline here so if I can just go back --

THE COURT: Let me just follow up quickly. Looking at Garfield Exhibit 18, it appears to me that in legislature races, for the 2004 races, one petitioning minor party candidate hit the 20 percent threshold, two did so in 2002 and one did so in 2000. Is that consistent with your understanding?

MS. YOUN: This is consistent with my understanding, Your Honor.

THE COURT: All right.

MS. YOUN: But I think that the way the legislature broke out the figures, it was I think the legislature's understanding that four candidates had hit the 20 percent threshold over the past three elections and that was the way they were thinking about it.

Just to finish up on the topic of the difficulty of petitioning, and this kind of goes to the larger question, are nonmajor party candidates facially barred from participating in the CEP or is there anything inherent in the CEP that would dictate that outcome, and,

you know, we just discussed the prior thresholds and to discuss the petitioning thresholds, I think it's first of all important to put the petitioning thresholds in a context. The petitioning thresholds are for candidates who have already failed to meet the prior vote thresholds, so there's already been one route for minor party candidates. They missed that chance and they are now

given another opportunity, unlike Buckley which, for example, said that prior votes were the end of the story. If you don't have that demonstration, you could never qualify.

Instead the petitioning routes gives minor parties yet another route to qualify for funds and we've seen, you know, we've seen what the actual petitioning threshold amounts are and there has been quite a bit of, there's been quite a bit of back and forth on exactly how many signatures are needed. And if the court would like to have in front of it exactly what the average petitioning requirements would be for, for the House and Senate races, then that is available in chart form at the Foster declaration, paragraph 18.

What that does suggest is the lowest turnout districts in the state rep district, you could receive a 10 percent grant by collecting 125 signatures. You could get a 20 percent grant by collecting 251 valid petition

signatures and that's going to give you $25,000 in funding. I would suggest that that's a pretty significant incentive and also a subsidy to the minor party candidates for whom an alternative has been made available.

In the state senate districts, of course, we're talking about $85,000 worth of funding, so the petitioning requirements are correspondingly higher. In the lowest turnout districts you can get a full grant for 2,000 petition signatures, and in the highest turnout districts, you can get a full grant for 5,400 signatures. And, of course --

THE COURT: Plus the contributions.

MS. YOUN: Plus the contributions, yes. And if

you -- and in terms of the incentivizing, the point that Professor Green referred to earlier, if you think about what the return on investment is for minor parties in investing to get those thresholds and how an average investment is $21 per signature at this level, I would say to you if I'm a volunteer to your group and I understand that after a certain threshold for every signature I collect for my candidate, my candidate is going to receive $21 in state funds, I'm going to get out there and I'm going to start knocking on some doors. This gives a minor party an ability to access substantial amounts of state money that have never been available to them before.

THE COURT: What was the purpose of including both petition requirement and a contribution requirement?

MS. YOUN: Sure. I think that they, I think that they demonstrate different things. The petition requirement is a -- you know, you have support for the idea of your candidacy. The public considers you a sufficiently credible candidate to decide to sign a petition that says that you should get a share of public funding.

The qualifying contributions requirement is different, is targeted toward a different thing which is not just latent public support but the CEP is intended as a substitute rather than a subsidy. The CEP is intended for those candidates who have demonstrated adequate private fund raising capability, that it's okay for the state to replace that private fund raising contribution with a grant of public funds.

THE COURT: Did the legislature have before it

evidence about what percentage of petitioning minor party legislative candidates had historically been able to raise the qualifying -- an amount of money equal to the qualifying funds?

MS. YOUN: I'm not aware what the legislature had before it. Basically the LLR reports I think that are most relevant to this court's consideration are in the

Garfield declaration we were looking at, Exhibits 18, 19, 20 -- okay, sorry, 17, 18 -- and 19. No, sorry, 18, 19 and 20. And you'll see that 19 is the OLR report on statewide candidate expenditures.

And I think that at the time the legislature was considering, there hadn't been a minor party who had run for state elections since Eunice Groark for the minor parties -- doesn't show up on that sheet.

And they did consider in the next exhibit, which is Docket 236-37, the report on campaign expenditures, they considered campaign expenditures of all candidates in legislative races, and I'm going to turn to specifically what they considered and how that corresponded to his exact expenditures when we talk about the issue of whether the, whether the CEP grant can inflate expenditures for various categories of campaign limits.

THE COURT: I'm less worried about that for the moment than getting a sense whether it is a burden or not, so I'm looking at page 4 of 16 of Document 236-37, which is Exhibit 20 to the Garfield declaration. And on the first page I see, excuse me -- on page four under Table 5, state senate candidates, the first minor party I see is Mr. DeRosa. "G" I take it is the Green Party, and his expenditures were $150.08. Do we -- let me put it this

way. Did any minor or petitioning candidate for state

senate set forth in this exhibit spend an amount equal to or greater than the qualifying contributions set forth in the CEP?

MS. YOUN: I'm not aware of that off the top of my head, Your Honor, but what I would say again is the CEP is intended as a substitute for private funds from candidates who had demonstrated an ability to raise private funds. The CEP is not required to give funds to candidates with no capacity for private fundraising.

THE COURT: Fair enough, but I'm just trying to figure out what did the legislature know when it passed this. If it knew that no candidate from a minor party had ever raised $15,000, that may be interesting information.

MS. YOUN: Yes.

MR. ZINN ROWTHORN: Your Honor, just -- and this is in the record, but prior to the enactment of the CEP, there was very little incentive for minor parties who didn't have as a primary goal winning, but whose candidate system served sort of secondary goals, message development, party building. There wasn't really incentive to raise particular sums. Now there is an incentive. What the record suggests is a lot of minor parties intentionally kept their fundraising under $1,000 to relieve themselves of the administrative burdens of having to report, submit a lot of reports with regard to

expenditures. So there was an issue of a lack of expenditure and an issue of a practical reality for minor parties about trying to actually keep their fundraising

down. Most minor party candidates have, in fact, filed these, I think they're 10-B reports, SEC reports, indicating that they don't intend to raise more than $1,000 and, therefore, relieving themselves of the obligation at that point --

THE COURT: They are exempt.

MR. ZINN ROWTHORN: Exempt, right.

THE COURT: But it's interesting, it's interesting that the qualifying contribution for the lowest level of funding under the CEP is some relatively high multiple of the exempt threshold.

MR. ZINN ROWTHORN: Yes, it is, but I think the point that Attorney Youn makes is what the legislature was trying to do is have individual candidates demonstrate they had the commitment and capability to raise significant numbers of contributions, not amounts of contributions but numbers of contributions. And that's why, and that's why I think this was sort of a -- that was the demonstration they were looking for.

MR. FEINBERG: If I could add one point, Your Honor, if you are concerned about the possibility of reaching this, raising that amount of money --

THE COURT: I'm not.

MR. FEINBERG: -- five people just did it this past year.

THE COURT: I don't think the argument from plaintiffs is that it's impossible. I think the argument is that it's burdensome in a constitutional sense.

MR. FEINBERG: And it's still true, five people were able to do it readily last year.

THE COURT: That is right.

MR. LOPEZ: Your Honor, I think this is an appropriate time to interject a consideration we didn't emphasize yesterday, but it's apparent from the face of the statute not only do our folks have to go out and raise the $5,000 and the legislature knew that that would impose a substantial burden, or a burden, but they would only qualify for a third of the funding instead of a full grant. I mean our position is if they are to go out and impose what we see as a significant burden, they should qualify for the same funding as their major party opponents.

MS. YOUN: And, Your Honor, I would also turn you -- I think relevant to your determination here is Proulx declaration dated -- which is Docket Number 260-2 which is dated September 5, 2008, to a chart contained at paragraph 17 of that declaration.

THE COURT: I think I have the declaration but I don't see any charts. I may not have the exhibits here.

MS. YOUN: It's not a -- it's a chart that's contained within the text of the declaration at paragraph seven.

THE COURT: Got it.

MS. YOUN: Sorry, not paragraph seven, at paragraph 17, page seven.

THE COURT: Right.

MS. YOUN: And the point here is that the qualifying contribution thresholds were intended to change fund raising behavior, which is the point of the CEP period. The point of the CEP is that they wanted to reduce, they wanted to reduce contributions that had the

potential of being corrupting, obviously large dollar contributions, and thus they required smaller contributions from a larger number of contributors.

Now, to the extent this is a burden, this is a burden for the major parties as well as the minor parties because the major parties as well as the minor parties are used to raising their funds in increments of larger than $100, and from a few large dollar contributors rather than multiple $100 contributors. And I think you can see that looking at this chart, this was the contributions to the 2006 statewide candidates. A lot of these statewide

candidates would fail the qualifying contributions threshold and, indeed, we find that the qualifying contributions threshold is an effective way of weeding out major party candidates who have not demonstrated the capability of doing, of doing this kind of small dollar widespread fundraising that the CEP had envisioned.

MR. LOPEZ: We raised the objection, Your Honor, that that argument and that this testimony is refuted by the defendants and they should be estopped from making that argument. It's refuted by the defendant's testimony of George Jepsen where he in a filing last week makes the case this is not a burden on major party candidates at all because of their ability to raise this kind of money in small units attributable to their statewide, their statewide party apparatus.

MS. YOUN: I would say that the plaintiffs keep referring to the Jepsen declaration for the -- deposition for the proposition that the qualifying contributions are a mere formality for major party candidates. We looked at that exhibit. I mean we combed through it last night, we

cannot find those words. And, in fact, what we find is a representation from Mr. Jepsen that it's quite difficult. And you see that in this, in this particular election because of the candidate, of the major party candidates who are less viable.

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We're not going to pretend that the major parties never run bad candidates. Occasionally bad major party candidates run, but out of the three major party candidates who fail to receive 20 percent of the vote -- in this past election, one of, only one of them was able to qualify for CEP funds, the rest were not, and we would say that that qualifying contribution threshold is a good way of barring, you know, nonviable major party candidates as well as --

MR. LOPEZ: Objection, Your Honor. That representation assumes that those major party candidates sought public funding, and that fact hasn't been established.

MS. YOUN: I was not assuming that, I was making a statement and, you know, you're free to discuss the weight of that.

I'm sorry, I was in the middle of a sentence --

THE COURT: You said, "And we would say that that qualifying contribution threshold as a good way of barring, you know, nonviable major party candidates as well as --"

MS. YOUN: Nonviable other candidates. I guess I'll leave that there.

THE COURT: Did the legislature have in front of it the information set forth in this chart at pages seven

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and eight of the Proulx declaration?

MS. YOUN: What I can say -- I'm not proposing that's a legislature document. What I can say is the legislature, these are all politicians. They can be understood to have some knowledge of politics and, indeed, when you read the legislative history and the Working Group transcripts, there are a substantial discussion of what, what levels of qualifying contributions thresholds are reasonable and which can be met and what candidates. And I can let that transcript speak for itself and that transcript is before the court.

I think that the fact that the plaintiffs are basing a claim on the qualifying contributions thresholds, which are evenly applied to all candidates, kind of points to a basic constitutional deficiency in their argument, which is that an even-handed requirement could be unconstitutional if minor parties would have a more difficult time in reaching, in satisfying that requirement. And I would submit to you that, as a constitutional issue, that suggestion or that argument would be wrong.

And, for example, the Supreme Court recently said in the Lopez Torres decision, which is at 128 Supreme Court 791, basically they were talking about whether or not the candidate -- whether or not the plaintiff

candidate there had a fair shot at achieving the nomination and this is what the court had to say there. "Our cases invalidating ballot access requirements have focused on the requirements themselves and not on the manner in which political actions function or function

under those requirements."

The court then goes onto say, "It is hardly a manageable constitutional question for judges, especially judges in our legal system where the traditional electoral practice gives no hint of even the existence, much less the content of a constitutional requirement for a fair shot at party nomination."

What this goes on to say is to the extent that the minor parties' difficulty in reaching those thresholds is a result of their own relative political weakness at having a party infrastructure, at having engaged in decades of party building activity and the candidates that run and then their appeal to the public, that is not a constitutional deficiency in the requirements. That is simply a factor of preexisting political landscape, and under Buckley those kinds of arguments should not give rise to claim of constitutional injury.

THE COURT: Why shouldn't major parties who have not had a history of success in a particular district not face the same requirements as the minor parties who

haven't shown a history of success in that same district?

MS. YOUN: Yes, and I know that Your Honor kind of teed up that question in your motion to dismiss ruling when you were talking about the major party definition which is predicated on a 20 percent statewide showing of popular support, you know, by either party, in the prior gubernatorial elections whether that can be treated as a proxy for popular support on a district by district basis for particularly new and major party entrants into that district, and shouldn't we consider

those new major party entrants to be similarly situated to minor party candidates so the differential treatment won't give rise to an equal protection violation.

Now, we would say that factually the treatment of major parties or the treatment of that statewide proxy works in almost every case. There is no -- and if I can just turn to that page of my outline -- and even in one party dominant districts, the weaker major party candidate, the major party loser almost always receives the 20 percent showing that is the threshold for CEP eligibility. They almost always make that, that showing. That's true in, I think that's true across the board for major party candidates in over 95 percent of the cases.

THE COURT: Right. There's about as many cases where a major party doesn't hit 20 percent as there are

cases where minor parties do hit 20 percent.

MS. YOUN: Exactly.

THE COURT: It's the magic number.

MS. YOUN: It's the magic number. And I think that the --

THE COURT: If the legislature wanted to discriminate -- I'm not saying that they wanted to but if they wanted to, they couldn't have found a better number than 20 percent.

MS. YOUN: Well, Your Honor, I think that that, you know, that argument is assuming that the 20 percent number carries no significance or no constitutional or valid significance of its own. But what we are saying is that only goes to show that the major party candidates have traditionally, you know, have historically run viable, electorally viable candidates, and the non-major

party candidates have not.

That viability line could be drawn at a number of levels and I can tell you it would still be -- it might be 90 percent of major party candidates rather than 95 percent of major party candidates, but I can tell you that the major party candidates are still going to be up here and the minor party candidates are still going to be down here, and the question of where you draw that line in between is classically one for legislatural discretion.

THE COURT: The question though is why draw the line? If the Republicans either don't run or run at 15 percent in an urban district and the Green Party runs at 11 percent in that same district, are they really -- aren't they similarly situated with respect to that district?

MS. YOUN: In the first place, I would say that that district has never existed. I don't think that the major party and the major party candidates have ever come that close in a legislative history. But in the second --

THE COURT: Well, you're not counting where the major party doesn't run, where they get zero and then minor party runs and gets 5 or 8 or 10 percent.

MS. YOUN: But I would say that even in, even in -- okay, where you have a district with an entrenched incumbent and there has been no challenger from the other party, when you have a new major party candidate enter that race --

THE COURT: Shouldn't the statute say for all the reasons you've been arguing that major parties are required to show they can raise a lot of money from a lot

of different people and they can get a lot of petitions signed and so forth? Why shouldn't the major party have to go through --

MS. YOUN: The major party still has to show

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that. It needs to raise a lot of money from a lot of people. They have the same qualifying contribution requirements to which the --

THE COURT: But they don't have to get a single signature.

MS. YOUN: Well, neither do the minor parties who have previously demonstrated prior vote support.

THE COURT: Right, but hypothetically we're talking about a district where a major party hasn't run, so their vote total is zero.

MS. YOUN: I would say that their vote total should not be considered to be zero because if you look historically at the record of even these new major party entrants, even the subset of the weakest major party candidate they are looking at, they still receive over 20 percent of the vote in over 85 percent of senate races and over 90 percent of House races, and that's set out in our Proposed Findings of Fact, paragraph 172. The record is just not there on which to base the factial inference that these candidates are similarly situated to minor party candidates.

MR. FEINBERG: Your Honor, if I could add a word here, the short answer to your question is, no, they are not similarly situated and, no, the legislature didn't have to require the major parties to go through the

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exercise, the pointless exercise of gathering all those

signatures, but the legislature could properly presume that the major parties had sufficient strength in any district in this state to easily accomplish that 20 percent requirement.

That's the point of the affidavits submitted from the heads of the major parties. That's the point of the expert affidavits that we submitted from Professor Green and his testimony today, that the major parties have an infrastructure in every district in the state, that they have a solid party establishment on the ground, that they have a lot of fundamental base level of support, and that they would be, they would be able to satisfy that requirement.

And then, if they were forced to do so by the statute, then the SEEC would have to verify all those signatures and all of this the legislature could properly conclude was a pointless exercise because of, because they would be able to satisfy it and the qualifying contribution limit was enough to make sure that the particular candidate had the level of support necessary to qualify its --

THE COURT: So as I understand the argument, it's that the legislature could reasonably presume the major parties are major parties, and could reasonably

presume that the minor parties will never be major parties and that only --

MR. ZINN ROWTHORN: No.

THE COURT: -- and that only major parties should be funded.

MR. ZINN ROWTHORN: No, Your Honor.

THE COURT: 20 percent is a major party definition.

MR. ZINN ROWTHORN: It's a predictive judgment that major parties in almost all instances when they choose to run, wherever they choose to run, will perform like major parties, and the stats demonstrate that to be true.

THE COURT: And we're only going to fund fully major parties, 20 percent is the definition of a major party.

MR. ZINN ROWTHORN: It is the definition of a major party. It's a definition of a major party that exists in a lot of areas in state law, including, by the way, ballot access, statewide proxy. If I choose as a Republican to run in the first district in Hartford, I don't have to, I don't have to gather signatures because I'm presumed already to have that statewide proxy applied to me in that district. But it's not an exclusion, Your Honor, it's predictive judgment about what major parties

will do. It almost always is accurate but it's not an exclusion because, as we know from this cycle, minor parties can also behave like major parties but typically they don't.

THE COURT: Right, but to get full funding under the act, you have to perform as a major party.

MR. ZINN ROWTHORN: Yes -- I apologize, yes, because we have made a judgment that you don't have to be a major party but you have to perform at a certain level which we have defined as major party performance level. That's not an exclusion of minor parties, it doesn't sort of permanently enshrine some status for major parties or

minor parties, but it says that's the level at which we take a statewide proxy, the demonstrations that are sufficiently credible to deserve full funding, now minor parties could also get there.

THE COURT: Would it matter if the legislature were motivated to enshrine these two parties as the only major parties, if the legislature said we're going to set these levels at a point where the Republicans and the Democrats get free elections and will always be the two parties --

MR. ZINN ROWTHORN: I'm not sure necessarily that the motive would matter but if the effect was to permanently enshrine and stratify the major versus minor

in party distinction, I think that would matter, and the Supreme Court has said that.

MS. YOUN: In fact in Jenness v. Fortson where they said, in that case they were upholding a 20 percent definition of a political party that imposed differential nominating petition requirements on candidates who had made that showing and candidates who had not made that showing based on the most recent gubernatorial or presidential election, therein the court said the 20 percent definition for political party, quote, "in no way freezes the status quo but implicitly recognizes the potential fluidity of American political life." I'm still quoting. "Thus, any political body that wins as much as 20 percent support at an election become a 'political party' with its attendant ballot position rights and primary election obligations, and any 'political party' whose support falls below that figure reverts to the

status of a 'political body' with its attendant nominating petition responsibilities and freedom from primary election duties. We can find in this system nothing that abridges the rights of free speech and association secured by the First and Fourteenth Amendments."

MR. LOPEZ: I would raise the objection that counsel has more than once referenced the ballot access cases. You'll recall in their motion to dismiss that they

took the position the ballot access cases are irrelevant and I, respectfully, I don't think they can have it both ways.

I would also point out, Your Honor, ballot access is decided under a different and lower standard, a standard they seem to have applied, than the standard that governs the CEP which we say is governed by classic First Amendment analysis from the Supreme Court's Campaign Finance case.

I would like to address Mr. Zinn Rowthorn's, well, whole discussion about how strong major parties presumptively are. Just this last election cycle, April, just looking particularly at the Senate data, three Republicans, including one from Mr. DeRosa's district, all upheld less than 20 percent despite their best efforts.

And, again, in reference to -- they can't find the testimony -- in Mr. Jepsen's deposition about how easy it is for major party candidates to qualify, the qualifying contributions, there is an extended discussion of, and I'm happy to provide the cites for that --

THE COURT: Why don't you do that. What's the cite?

MR. LOPEZ: The discussion begins at the very

least, Your Honor, at page 87 and continues on through 93 and there may be more but I wanted to focus on what was

going on here.

THE COURT: Okay.

MS. YOUN: My point with respect to the Jepsen declaration and I would -- deposition, and I would submit to the Court that if the Court reads the relevant pages the court will see that Mr. Jepsen is making the point that it is quite difficult for major parties to meet the qualifying contribution requirements, but also that the mere formality language which is presented in defendant's proposed findings of fact as a quote does not appear before.

MR. LOPEZ: If I quoted that, that is a mistake. Did I quote that, put that in quotation marks?

MS. YOUN: Yes.

MR. LOPEZ: Then I withdraw that.

MS. YOUN: Yes.

MR. ZINN ROWTHORN: Your Honor, just briefly, you know, just on this notion that permanent enshrinement, the Weicker example is sui generis for a couple reasons, as Professor Green discussed, but it does demonstrate that in Connecticut there is nothing permanent or stratified about major versus minor. The Connecticut party was a major Connecticut party statewide in 1992 and 1994 as a result of 1990.

THE COURT: Well, I'm not sure about '94.

Eunice Groark got less than 20 percent.

MR. ZINN ROWTHORN: Well, it wasn't in the

following one. It was, you know, as a result of Governor Weicker's success the first two after.

THE COURT: Got you.

MR. ZINN ROWTHORN: You know, and the other point just with respect to, just to take an example, Mr. Lopez cites the first editorial district. I think it's interesting to note that district in 2002, there was a Republican. There wasn't a Republican in 2000 or 1998. That Republican got 23 percent. So there I think if you were looking there, the predictive judgment would be correct, if a Republican decided to contest that district, the Republican would behave and perform like a major party. You know, the Republican this time around without the benefit of public financing got slightly under 20 percent but pretty close, I think within the realm where we'd say the legislature was not far off.

Those are the only points I had in response.

MS. YOUN: Your Honor, I would say that the, the quotation I read from Jepsen says that in order for -- the legislature is not required to blind itself to the existence of political parties and present only candidates of parties that exist. We have set forth extensive evidence in Jepsen and in Krivda's declarations that the

major parties have town committees in every town in Connecticut, et cetera, all of these other indicia of decades of, the results of decades of party building efforts. And we're saying that the legislature is entitled to look at those and take those into account and make their predictive judgments on funding.

But I would also say just as a clarification to whether the minor parties have to perform like major

parties in order to, in order to meet, get full CEP funding, they only have to perform like major parties in terms of viability. They do not have to make the sort of statewide showing that a major party candidate has to make in order to maintain major party status. They don't have to get 20 percent of the gubernatorial vote. They don't have to get 20 percent of the vote in the state. All they have to do is make a 20 percent viability showing.

And in that particular election, this was not forcing a minor party to become major party candidates or to act like them and to require them to meet some sort of statewide level. All they are saying is they have to be credible candidates in that district. And the Connecticut legislature, as many other states have done before it, have determined that 20 percent is an acceptable threshold showing of viability.

THE COURT: Well, no other state has put

20 percent for a public funding requirement. The highest I'm aware of anywhere else is 5 percent.

MS. YOUN: Yes, but we're not talking about an enormous sample here, as Your Honor is aware.

THE COURT: Fair enough. The federals use five, Maine uses five, Arizona uses five. Who am I forgetting -- Minnesota.

MS. YOUN: They are on a statewide system.

THE COURT: Fair enough. So at the time this act was passed, the federal model and the two viable state models were five percent for a full funding and Connecticut chose 10 percent for one-third funding.

MS. YOUN: Well, I would say --

THE COURT: Do we have set forth anywhere the rationale for that legislature decision?

MS. YOUN: First of all, I would say for the presidental system, it was not five percent for full funding, it was five percent for five percent funding in the presidental system, as we have previously explained.

MR. LOPEZ: Your Honor, in Arizona it was, there is no prior vote total requirement. You just have to raise, if you want to run for governor, you just have to raise, I think $16,020 respectively and it's not 5 percent of the funding. I thought you said it was, earlier it was 25 percent of the funding.

MS. YOUN: It's whatever the ratio they have been outspent, they had been out performed by in the prior election. I'm sorry --

MR. LOPEZ: $85 million, 25 percent of $85 million.

MS. YOUN: No, that's not true. That's only in the very rare --

THE COURT: This is the point. The highest vote total percentage required by the federal system is five percent. That's the point.

MS. YOUN: As a starting point. And I would also say that those, there is nothing in Buckley that says that five percent has to be, I don't know if you would call it a ceiling for acceptable regulation and, in fact --

THE COURT: Agreed.

MS. YOUN: -- Buckley explicitly claims such a suggestion. We don't have -- Maine and Arizona were not passed by legislatures. We don't know what the

motivations behind those statutes were. We do have pretty extensive testimony on what the motivation of the Connecticut legislature was. The motivation of the Connecticut legislature was not necessarily to massively increase electoral opportunities across the board. What the Connecticut legislature was obsessed with was a

particular history of corruption and scandal that had plagued this state in the years before the statute was passed. That was what the state was thinking about and, you know, there are volumes of legislative history about this.

In doing so, the Connecticut legislature enacted a program that took out unprecedented sums of money. The reason they had done that was because they wanted to root out corruption among elected officials. So the money that the Connecticut legislature took for this purpose is only being used to forward that anti-corruption objective to the extent that it's going to candidates who are likely to be elected.

So, the idea of raiding the public fisc is one that I think has been, has been discussed quite a bit in this forum but I would say that it's not that the CEP would run out of money or that the State of Connecticut would go bankrupt if it decided to fund minor party candidates at the same terms. The question is is the legislature entitled to tailor a statute to achieve the purposes for which these millions of dollars were set aside from the State of Connecticut.

THE COURT: Minor parties aren't going to win so we don't have to worry about corrupt contributions to

minor party candidates.

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MS. YOUN: The legislature is not required to address all evils at the same time. They are allowed to enact particular statutes to address particular evils.

I would suggest that the entire legislative history of the Connecticut statute leads the Court to the conclusion that the overwhelming purpose was to root out corruption among elected officials. This is largely a statute that was enacted to achieve that goal. There are other goals that it could have achieved. They weren't necessarily trying to do that at the time. We don't know that they were.

All right, let me move onto --

THE COURT: Should we take a short break?

MS. YOUN: Yes.

THE COURT: All right. Why didn't we do that. Let's take 15 minutes and come back at 3:25. Stand in recess.

(Whereupon a recess was taken from 3:15 o'clock, p. m. to 3:30 o'clock, p. m.)

MS. YOUN: Your Honor, I think the last point I made before the break, I might have given a somewhat inaccurate picture of the demonstrated motives of the Connecticut legislature. I was talking as a matter of logic that if you are, if you are enacting a program to weed out corruption among elected officials and also the

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appearance of corruption, then logically the -- you know, the well tailored way to do that would be to try to direct money to those likely to be elected.

Now, in fact, and as I've already pointed out,

the Connecticut legislature was considerably more lenient than that in actually setting these votes and, in fact, it was more lenient in its treatment of minor parties. Essentially the Connecticut legislature I've been following had been following other state legislatures before it, said, well, 20 percent is anyone with any kind of shot at winning this then is a viable and credible candidate. Now, we're not going to say that person necessarily is going to win but they've got a shot and we want to give those candidates the half shot access to these funds, and even furnish that, to the extent that minor parties that have not yet been able to build up their way to that half-a-shot threshold, we're going to give them steps that encourage party building that they can use to get to that point, as we have seen happen in this past election cycle.

I would also respond to a point in answer to Your Honor's question, well, why shouldn't the legislature impose the same requirements on new major party entrants into a previously uncontested district as it does to minor parties, minor party candidates, and I think we've

established factually that those aren't similarly situated and that, therefore, the legislature is entitled in figuring out how to distribute funds to say historically we've seen that candidates who have gotten the nomination of a major party, you know, a party that has 20 percent of support statewide, we've seen that that correlates with this kind of electoral showing and so we're going to take that as a sufficient indication of popular support.

The CEP allows you to demonstrate popular support in three ways; in the statewide level, at the district level or for candidates who aren't able to meet that threshold through petition, but additional and separate reasons why the state shouldn't impose that or had a reason not to say, okay, we'll make your candidate have to do the same thing, even though we know they are going to be able to meet this.

It is the sheer administrative burden, and there is some testimony in the Garfield declaration about numbers of petition signatures gathered but, you know, I would represent that it is a substantial burden to count and verify petition signatures. It's something that the Secretary of State is not -- it's not an insignificant burden, and if you were going to have them count thousands of petition signatures for major party entrants into new

races in order to demonstrate a level of popular support that has already been shown by other means, we would say that, you know, the administrative burden there would be relatively pointless and that the Court at this stage is not required to impose it.

THE COURT: So we're talking about in the last election cycle five races or so where a major party ran in a race where they hadn't run before?

MS. YOUN: No, I don't think so. I think the way it works out, if I recall correctly, there was a senate race so there were some districts where that became newly contested and some that came newly uncontested, so I think we're thinking about, to the best of my recollection, more like 30.

MR. LOPEZ: There was five on the Senate, Your

Honor, and 32 on the House side.

THE COURT: I'm thinking the Senate. Okay.

MS. YOUN: So we're talking about tens, if not hundreds of thousands of additional petition signatures that you would require the Secretary of State to verify in order to demonstrate popular support that we would submit the CEP already provides for a showing of popular support by a different means, and that showing has been shown to correlate to, you know, has been shown to be a reasonable showing. It's reasonable to assume that the, that the

major party candidates are going to be able to make a showing in almost every case.

MR. LOPEZ: We would object, Your Honor. That is an argument but there's certainly no -- unless I misheard the summary, there's nothing in the record that the legislature considered that in '05 or in '06 when they took up the issue.

MS. YOUN: To the extent that's an evidentiary objection, I would say it also goes to tailoring.

MR. ZINN ROWTHORN: Your Honor, the legislature was aware of the petitioning procedure which, it was the same then as it is now, where a candidate gathered petitions. Those are submitted typically to the Secretary of State. The Secretary of State divides them into towns, sends them out to the towns, registrars at the town clerk's. The registrars at the town clerk's tabulate them. They are sent back to the Secretary of State who sort of aggregates the town's count. That's in multi state districts. Certainly statewide that would be the case. So that was the procedure then and it is now.

So I think on the face of the statute, the legislature could have concluded that that's a lot of, you know, that's a lot to be done both at the state and local level.

MS. YOUN: If Your Honor doesn't have any

further questions on those topics, I'm going to move on to the question of whether the CEP could have been expected to inflate historical expenditures and also whether the 2008 election figures show that it does so.

With respect to the latter topic, I would say that we are not in a position at this point to, to assess 2008 expenditure data. The final expenditure reports have not yet even been filed and will not be filed for -- and certainly the SEEC has not had an opportunity to go through that data. So we would submit that any recommendations made by the plaintiffs at this point as to whether the CEP has, in fact, inflated major party spending either as an average or as an overall aggregate, you know, we question the relevance but would say it's certainly premature and should definitely wait until March.

THE COURT: We have all but the last seven days, don't we?

MS. YOUN: Yes, but usually the bulk of it, a huge portion of expenditures are made in the last seven days before an election, Your Honor.

THE COURT: Aren't the current figures more helpful to you if the expenditures will be lower on the data that you have now than the data that would be available?

MS. YOUN: They would be but also in terms -- we're looking at grant amounts. We have been hearing anecdotally through the SEEC that candidates are returning vast portions of the grants they were given. They wanted to, you know, they wanted to try for that but then they found it wasn't actually necessary and they didn't need to expend that level of funds.

So to the extent that the plaintiffs allege harm because their voices will be crowded out because of this major party big money slugfest, we're saying that the data as to whether that will actually happen, actually did happen in 2008, is not yet ready to be considered.

MR. ZINN ROWTHORN: Your Honor, just to clarify the record, the last report was October 28 but that covered the reporting period up to October 21st.

MS. YOUN: All right, but there is a question as to what the legislature had in front of it in terms of whether the CEP grant amounts constituted a subsidy to participating candidates rather than a substitute for previous function, because one of the assertions the plaintiffs have been making in their brief is, well, a lot of races are uncompetitive so what the CEP is going to do is it's going -- and a lot of, in uncompetitive races candidates are traditionally not necessarily spending so much money as they would in the more competitive races,

and the CEP, by awarding grants based on the most competitive races, is going to inflate expenditures of participating candidates in a way we allege will result in harm to the minor parties and we would submit that just as a matter of fact that it's untrue and it's not borne out

by the, by the, by the way in which the grant is structured.

Specifically, the plaintiffs have argued in their findings, proposed findings of fact, paragraph 13, that the Working Group found that the average cost for a Senate race is 47- to $50,000, and the average cost of House race is between 14- to $15,000, and we would say that that sort of representation is irrelevant and misleading because there is not one single CEP grant amount. There is a CEP based grant amount, but to lump together noncompetitive and competitive elections in the same average is highly misleading because the CEP reduces grant amounts by as much as 60 percent in precisely those kinds of uncompetitive races.

And I think the best way to see that is to go to the Foster declaration, paragraph 23 to 24. That's Docket 236-16. I'm sorry, that's not actually the --

(Pause)

MS. YOUN: I'm sorry, Your Honor. If Your Honor will give me a moment.

(Pause)

MS. YOUN: It should be Docket 260-1 which we've laid this out for you in the brief.

THE COURT: All right. I have a declaration of Bethany Foster, is that what you want me to look at?

MS. YOUN: Actually no, actually if you could turn to the 260-1.

THE COURT: What's that entitled?

MS. YOUN: That is the defendant's memorandum in opposition to the motion for summary judgment.

THE COURT: I think I have it.

MS. YOUN: Yes, and it's at pages 50 through 51.
THE COURT: Okay.
MS. YOUN: Okay. You should be looking at a table or two tables which are entitled 2004 Average Senate Candidate Expenditures? No.
THE COURT: I've got the wrong document then.
MS. YOUN: Your Honor, if you'll give us a moment -- I'm sorry, it's on page 42 of that brief which is page 51 of the Docket.
MR. LOPEZ: Is this the Foster declaration?
MS. YOUN: No, we're in the brief on page 42.
MR. LOPEZ: Is this the most recent brief?
MS. YOUN: No, this is the opposition to the summary judgment. I'm happy to give you a copy of the

chart.
MR. LOPEZ: Yes.
(Hands Counsel.)
THE COURT: Got it.
MS. YOUN: Okay, great. So you should be looking at two tables that correspond 2004 average, average candidate expenditures versus the corresponding CEP grant amounts, and the basis for those figures is set forth in the Foster declaration, paragraphs 23 and 24. And this just serves to demonstrate that to include uncontested races and races with only one minor party opponent and that average that the plaintiffs have cited are inaccurate.
If you actually look at what the expenditures were, then you can see that the Connecticut legislature relatively carefully tailored the grant amounts in the

30 percent reduction and in the 60 percent reduction in the grant amounts that are given to various levels of expenditures and races.

So, for example -- for example, you'll see that going to the bottom of the second chart, a major party House candidate facing a nonmajor party opponent, a minor party opponent had historically spent an average of $17,500 in 2004, and you'll see that the corresponding CEP grant amount is, in fact, less than that amount at

$15,000.

And the Connecticut legislature, in fact, had these figures in front of it and was looking at this figure in exactly this breakdown. If you look at Docket --

THE COURT: I'm sorry, not all of my documents have docket numbers on them. What is that entitled?

MS. YOUN: That's the research report which is ORL Research.

THE COURT: Which is Exhibit 17?

MS. YOUN: Yes, Exhibit 20 to the Garfield, to Garfield's second declaration.

THE COURT: Okay.

MS. YOUN: So, you can see as you page through this, the legislature was concerned in breaking out expenditures in races for different levels of contestedness enough to make sure, just to make sure they didn't, in fact, flood uncontested races or less contested races with grant amounts that were appropriate only for fully contested races.

THE COURT: Now, the chart on page 42 of the opposition to summary judgment, I take it, doesn't account

for any triggers of additional funding.

MS. YOUN: Yes, it doesn't account for triggered matching funds. If you, in fact, look to, if you continue

on in the OLR report that's in front of you now, in addition to looking at less competitive races, the legislature was also concerned to look to the most highly competitive races, which are the only races logically where matching funds are ever going to come into play and where two candidates, ones where you have a candidate, a non-participating candidate who's challenged who is spending well in excess of historical norms or excess expenditures, matching is going to come into play. So, you'll see looking here, these also correspond to the historical levels and we believe that this was what the legislature used as its basis for these amounts.

So, if you look at, for example, you'll see first, the first table they look at is campaign expenditures in races with open seats, that is a particularly contested type of election. In the Senate, the high expenditure range goes as high as $200,000, so in these most competitive races, historical expenditures were $200,000. The maximum 100 percent that triggered excess expenditure matching would be $170,000. That's twice 85,000.

Similarly, in the House you'll see that the high range of races in these open seat districts, they spent as much as $58,000. Once again the maximum excess expenditure matching fund there is $50,000. So that's

again quite well tailored.

THE COURT: Is it your interpretation of the statute that there are circumstances under which participating candidates could have 300 times the maximum grant?

MS. YOUN: Is that a question --

THE COURT: 300 percent, excuse me, 300 percent of the maximum.

MR. ZINN ROWTHORN: I think it is the case, and I think it would be a rare case, but the original grant, high spending opponent and independent expenditures.

THE COURT: Right.

MS. YOUN: I'm not aware that the legislature specifically looked at that scenario, and I'm also not aware of, I guess, any legislative finding with respect to levels of independent expenditures in previous races and whether --

(Pause)

Sorry, just trying to make sure that I hit everything -- so I wanted to, I also wanted to talk about statewide levels, which is in the previous exhibit in front of Your Honor, which would be campaign, the OLR report on campaign expenditures by statewide office candidates.

THE COURT: I'm sorry, which exhibit?

MS. YOUN: That's Garfield's second declaration, Exhibit 19, which is --

THE COURT: I have it.

MS. YOUN: Okay. Should be the previous document. So, again, here the legislature once more is also concerned with tailoring grants. They are finding that the gubernatorial average in the past three elections

is $3.8 million but that expenditures there range as high as over $6 million in both races run by Governor Rowland. You'll also see that in the statewide elections there's a much larger disparity. There are winning candidates who were spending as much as $1 million in the Secretary of State race or as high as close to $800,000 in the lieutenant governor's race.

And you're seeing losing candidates who, who are spending quite a bit less than that. And in setting the statewide amounts for a non-gubernatorial candidate at $750,000, I think this court can draw an inference that what the legislature was trying to do is to incentivize the successful statewide candidates to participate in the program by giving them an adequate substitute for their previous funding.

And you've also seen the declaration of Senator Mayer who is somebody whose historical fund raising had been well in excess of the CEP grant amounts. He

nonetheless decided to participate in the CEP but he had said that with respect to the matching funds provision, that matching funds provision was, was needed to incentivize him to participate because in an ordinary situation he had developed a sufficient network of supporters and fundraising apparatus that he would be able to use if he would have found himself targeted by, you know, by a millionare entrant into the race or by an independent expenditure organization. He had that rescue funds capability and he had said if the requirement for entering the CEP -- "I would have been helpless to respond to those sorts of attacks, then I would not have

participated or I would have been less likely to participate."

MR. LOPEZ: We would just raise one objection to the reference to the Mayer affidavit. I did have a chance to look at this, the spending packet over the history, and he did have one year and that's the year that he up-ended the fellow we heard about this morning and it was a high spending event, but since then it's a safe seat and he hasn't had to raise the kind of money that's necessary. He hasn't really had to raise money equivalent to the CEP grant. Otherwise I have no objection to that.

MS. YOUN: Your Honor, I'm not sure what information Mr. DeRosa is referring to but in paragraph

five of that declaration, we set forth that in 2006 Senator Mayer raised $120,000. In 2004 he raised nearly $200,000 for his Senate campaign. So, unless he's challenging those figures --

THE COURT: I think the distinction is raise versus spent. I assume that's the distinction.

MR. LOPEZ: No, it's possible I misspoke. I did look at this data before I came up here this week and I thought I tracked a longer period. I'll go back and look at that. I know that he spent $194,000 in the year that he won. I stand corrected on what happened in '06, but -- I won't object to it.

MS. YOUN: Any spent versus raise thing with respect to the matching funds in the incentivization is that distinction is not relevant because if you have the fund raising capability to raise rescue funds if you're targeted, you don't want to participate in the CEP if you have to give up all possibility of responding to

unexpected attacks.

I also just wanted to talk to the existence of what the plaintiff keeps calling loopholes in the CEP and specifically with respect to the organizational expenditures and coordinated expenditures, and as the plaintiff argues, that these supposed loopholes renders CEP expenditure limits meaningless because they provide

what I believe Attorney Lopez referred to as a back-door way of getting funds into the system. And I would say, first of all, the suggestion that the parties can just write a check to the CEP participating candidate is, is not the way the statute works at all.

The organizational expenditure provisions are allowed for only five statutorily specified uses. Those are, you know, to put out a listing of party candidates, to give candidates party building materials such as voter lists, to, you know, do a campaign event at which the candidate is present, you know, to hire, to allow the candidate to make use of the party's campaign consultants, and also to allow the candidate to make use of the party's offices.

THE COURT: The campaign can include a fundraiser to permit the candidate to obtain --

MS. YOUN: Obtain qualifying contributions, that is correct, and those are capped out at $3,500 for House and $10,000 for Senate contributions. And I would submit that, in response to the plaintiff's constitutional argument based on these organizational expenditures, first of all, these organizational expenditures would be equally available to plaintiffs had plaintiffs built the kind of

party that were capable of making those organizational expenditures. If they were generating voter lists, they

could then give them to their candidates. If they had office space in multiple locations, they could share them with their candidates. The fact that they are not able to take advantage of those, you know, of those provisions is not, is again not something that's specifically directed at minor parties but is a symptom of the preexisting lack of political strength of the minor parties.

And secondly, Attorney Lopez references the Pelto declaration, which I believe is Plaintiff's Exhibit 37 and 39, in which Mr. Pelto, I believe, testifies that prior to the CEP state party committees, previously raised hundreds of thousands of dollars that were used to support party candidates, but that was the status quo ante. We now under the CEP have limitations on that money coming in and we think that those limitations represent a benefit to minor party candidates under the plaintiffs' logic, rather than otherwise.

Similarly, in the recently filed declaration of Mr. Narain, he listed at Table 7, this is Docket three -- Document 307-3 in the docket, which is the Narain declaration, Plaintiff's A-10.

THE COURT: All right, okay.

MS. YOUN: I would put in the substantial caveat that these figures are, again, not final and are only based on the filings as of October 28. But still, you'll

see that, yes, the parties are still, you know, raising monies in PACs but, according to the organizational expenditures, those are quite a bit less than the parties'

fund raising capability. These organizational expenditures are to be acting as a limit on the parties, you know, on the parties being able to help out their candidates. Political parties have always existed and they have always performed functions such as sharing voter lists with candidates, and the CEP did not entirely eliminate that, but what the CEP did was to substantially narrow these, these exceptions.

Finally, with respect to the exploratory committee, you know, this is again a very hypothetical -- this was the subject of the Rotman testimony that Attorney Lopez discussed at some length yesterday about whether or not the plaintiffs would be able to, whether major party candidates would be able to linger indefinitely in exploratory committee mode and raise funds in that capacity and then only declare CEP participation at the very last minute and be able to get both the benefit of CEP funding and also the money that they raised during their exploratory committee phase.

You know, first of all, this is a highly theoretical loophole which I don't think that I've ever seen any evidence that anyone anywhere has ever done.

But, second of all, the exploratory committee loophole is itself substantially restricted by the operation of other sections of Connecticut electoral law. For example, Connecticut statute 9-604 says that once the candidate makes any public announcement that he or she is running for office, and I understand that that would include, for example, telling the Hartford Courant I'm running for office or printing a "Fonfara for Senate" bumper sticker,

et cetera, anything like that, you are required to disolve your exploratory committee and form the candidate committee and that would be the point at which CEP restrictions would kick in for participating candidates.

Also by law, the exploratory committee has to be dissolved by the time the major party is nominated, the major party nominating conventions or primaries take place, and I know that the conventions also under Connecticut law take place sometime in May.

So there's -- you know, the idea that they would be able to wait until the absolute last minute and stay in exploratory committee mode is, I think, without basis.

MR. ZINN ROWTHORN: Your Honor, if I can just add a couple more minor points with respect to that exploratory committee, which would be characterized as a loophole, first of all, it's available to any party or any candidate. A minor party candidate can form an

exploratory committee and remain in that up until 15 days after a public declaration that he or she is running for a particular office.

The second point is there are some restrictions on the amount of money that can be carried forward from the exploratory committee to a candidate committee and that's capped by the declaratory ruling of the SEEC at an amount equal to the amount of the qualifying contribution required for that office.

And there's also a possible danger in that deficits from exploratory committees carry forward to candidate committees, so it can actually cut both ways.

Thank you, Your Honor.

MS. YOUN: The point of both of those supposed

loopholes is neither of them allow the sort of end-run around the statute that, that plaintiffs have been concerned about.

And finally, I would just like to talk to the evidentiary facts that we've submitted on standing. And plaintiffs made an argument yesterday that essentially the nature of the chill injury here is the same as was asserted in Davis and that, therefore, under Davis plaintiffs have standing to pursue this claim.

Now, I think that that argument logically would swallow all standing. The sort of chill they are talking

about is some sort of future pattern of action that they allege that they intend to engage in. Now, it, like Davis, does not permit chill to swallow requirements of standing this way. It does not say that allegations of bare intent to pursue a course of action that you had not previously pursued are sufficient to infer standing, especially at the trial stage. Instead I would submit that the relevant standard is still the one that had been set forth in Lujan. I'm going to -- if I can ask the Court -- to help me find this.

(Pause)

MS. YOUN: You know, for example, the plaintiffs have cited in support of their position the analogy, an analogy of this position of plaintiffs in Leak. Your Honor very rightly asked the question, well, what the procedural posture would be, and the procedural posture of Leak was motion to dismiss. We're now at trial and I think that the following quote from Lujan is still the law and nothing in Davis did anything to change that.

It says "At the pleading stage general factual allegations of injury resulting from the defendant's conduct may suffice on a motion to dismiss. We presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no

longer rest on such mere allegations but must set forth by affidavit or other evidence specific facts which for purposes of the summary judgment motion will be taken to be true and at the final stage, those facts, if controverted, must be supported adequately by the evidence adduced at trial." That is a quote from the Supreme Court's decision in Lujan v. Defenders of Wildlife.

So this -- and an affidavit such at the one submitted by Mr. DeRosa, that is nothing more than an expression of bare intent to engage in a course of activity, does not infer standing at the trial stage and is not sufficient evidence of standing at the trial stage to confer jurisdiction on this court.

I would also state to the court that the, the ways in which plaintiffs' prior behavior have fallen far short of the pattern of behavior that would be necessary to trigger either the excess expenditure or the independent expenditure provisions of the, of the CEP are set forth very simply in defendant's statement of undisputed material fact under 561 that was filed as part of our motion for summary judgment on standing. So that's just a page or so of facts.

THE COURT: Let me ask you this. You're not contesting standing with respect to Count One, is that right?

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MS. YOUN: I'm sorry, I didn't --
THE COURT: Are you conceding standing to challenge, to make a claim in Count One?
MS. YOUN: I mean we're not conceding it. We say it's part of the plaintiff's burden to establish standing on that point as it's always the plaintiff's burden to establish standing, but we are moving for summary judgment based on the, based on plaintiff's --
THE COURT: Counts Two and Three.
MS. YOUN: -- lack of standing with respect to matching funds.
THE COURT: Okay, all right. Does the plaintiff have to have, does a plaintiff challenging constitutionality of a statute have to have each of the standing requirements with respect to each claim that the statute is unconstitutional?
MS. YOUN: Yes, I would submit that it does.
THE COURT: And does have plaintiff have to have each of the requirements of constitutional standing with respect to each argument made in support of each claim of unconstitutionality at this stage?
MS. YOUN: That's a little abstract for me. I'm not quite sure what the answer to that would be. Maybe if -- maybe if you wanted to put forward a concrete example, I could give you a better answer.

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THE COURT: Well, there have been any number of arguments advanced for unconstitutionality of various provisions of this act, and what I'm trying to sort out is what the standing requirements -- does the plaintiff have

to have standing to make an argument, does the plaintiff have to have standing to raise a claim, or is standing on a jurisdictional issue, is that satisfied if the plaintiff has standing under any theory to challenge the constitutionality? Do they -- in fact, does the court then have the authority to consider other arguments other claims, et cetera?

MS. YOUN: My understanding of standing is that it is done on a cause of action basis; that for each particular cause of action that the plaintiff is asserting, they have to establish standing for that cause of action.

THE COURT: Okay.

MS. YOUN: If anyone has any elaboration --

MR. FEINBERG: I would say, Your Honor, that the constitutional requirement is injury, in fact, in order to raise any particular claim. So there may be multiple claims within a single cause of action which are challenging multiple provisions of the statute, and I do think it's a constitutional requirement that the plaintiff does have to be able to demonstrate injury for in order to

raise that particular claim.

As to the more refined question as to whether a plaintiff who does suffer injury is entitled to advance all arguments as to why that statute may be unconstitutional, even if their arguments that they're not affected by, I'm not actually sure of the answer to that question. That's a trickier question. There may be some sort of zone of interest type analysis that also plays in here.

THE COURT: What about over breadth? If the

plaintiff has, if the plaintiff has standing to raise constitutionality as set forth in Count One, does the plaintiff have through an over breadth analysis standing to raise other aspects of the constitutionality in a First Amendment case?

MS. YOUN: I'm not sure -- my understanding is over breadth is not asserted in that case, but my understanding at the trial level is over breadth does not expand the requirements of standing, nor could it constitutionally change the Article 3 requirements of standing.

THE COURT: I'm not suggesting it changes anything. It goes back to the question of how far does the standing requirement extend. If the requirement is that the plaintiff have standing to challenge the

constitutionality of the act, that's one level of analysis. If the requirement is the plaintiff has to have standing to challenge each aspect of the act that the plaintiff alleges is unconstitutional, the trigger provisions, the magic provisions, the CEP funding provisions. And, finally, if so, does the plaintiff have to have standing in effect to make an argument how far does it reach? I'm just not sure. I think the cases are a little bit muddled on this.

MS. YOUN: It's not the clearest area of law in the best of times, and I'm made afraid I'm not able to answer your question right now, Your Honor, but if Your Honor would like briefing on the subject --

THE COURT: I'm not sure I need briefing. If you could both be prepared to talk about this a little bit

tomorrow I'd find that helpful. Any citations you have are helpful. I don't necessarily need a brief. I'd be curious what you find.

MR. LOPEZ: Your Honor, if I may, I didn't want to interrupt Ms. Youn but I did want to find out, raise two objections concerning two of the exhibits that are raised. One is Exhibit Number 20, excuse me, to Garfield Two, which we've been talking about today and we discussed that in conjunction with a table that was prepared by one of the paralegals.

THE COURT: One of your exhibits that you're talking about or no?

MR. LOPEZ: No, I'm talking about -- the table was prepared by Mr. Proulx and they know where it is in the record better than I.

MS. YOUN: It's in the footnote. It was what we were referring to which was the table on page 42 of the opposition for summary judgment brief, defendant's.

THE COURT: Yes, I have that, thank you.

MR. LOPEZ: Right, and we were having -- Ms. Youn was discussing it in connection with Exhibit 21 to the Garfield declaration, Volume 2. And it breaks out, I suppose, in a reasonably persuasive fashion how the, the numbers are somewhat tailored to what was going on in competitive elections and uncompetitive elections and then uncontested elections. I would ask, I would -- I would submit that the data is incomplete, Your Honor, and it is misleading in some respects for several reasons. Excuse me.

(Pause)

MR. LOPEZ: Could I have that sheet back I gave

you?

MS. YOUN: I don't think you gave it to me. Sorry, you did. Here.

MR. LOPEZ: That's your copy. Okay, thank you.

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We apologize.

First, it does not -- the reason that seems to be in conflict with our data about how dramatically expenditures will increase across the board for candidates under the CEP is because this data that was considered by the legislature doesn't factor in the grants that are going to be made available to newly participating candidates, and this cycle, there were almost 40 newly participating candidates and if you factor that in, the numbers would be significantly inflated and they would look more like the numbers that we presented in Tables One and Two of the Narain declaration. I would also --

THE COURT: Let me make sure I understand that point. Where would those numbers, where would those grants be factored in in this chart?

MS. YOUN: This is an historical, I think -- I think it's about what the legislature considered.

MR. LOPEZ: That's absolutely right, but they are being proffered, I believe, not only to, for the purpose of what the legislators considered but to show how carefully tailored these grant amounts are to three different types of elections, but there is another type of election and it's a newly contested election. It's exactly the type of election that we're complaining about. Excuse me.

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THE COURT: So your point is there should be a fourth category, major party senate candidate.

MR. LOPEZ: Right.

THE COURT: Facing for the first time --

MR. LOPEZ: Right.

THE COURT: -- opposition.

MR. LOPEZ: Right. And that would -- yes, sir, and that would change, and then that would -- we submit that the chart should be understood in that context and I would make two other related points about this chart, Your Honor. One is that it does seem to show that candidates who were unopposed were raising war chests. They were raising, completely unopposed, considerable amounts of money. There's nothing in this chart that indicates the money they raised they actually spent. As I explained earlier in this, in my presentation, I believe yesterday perhaps, and it's supported by testimony from Mr. Jepsen, it's very common for a safe incumbent running unopposed to build up a war chest because they are more ambitious simply because they are going to roll over into another committee that they control.

Prior to these amendments, prior to the adoption of the Comprehensive Reform Act, you could do that. You could roll the money over from your candidate committee into another committee that you controlled and this was

common practice. And I would submit that that accounts for why the expenditures were so high on the average for uncontested candidates.

I also made the point yesterday that --

THE COURT: But wait a minute. This chart is not showing what unopposed major party senate candidates

raised. It's showing what they spent.

MR. LOPEZ: Oh, but, Your Honor, if they roll it over that's listed as an expenditure. If they roll it over, that's listed as an expenditure.

THE COURT: If they --

MR. LOPEZ: They roll it over to another committee. Now, go down to what an expenditure is, it's listed as another expenditure.

THE COURT: So, your point is they gave the money away to another major party?

MR. LOPEZ: Right. It has to be accounted for somewhere. If they give it to the leadership committee, they help out another candidate. That's what safe incumbents do. It happens at the national level and it happens at this level.

THE COURT: Okay, fair enough.

MR. LOPEZ: I think the same generalization can be made about candidates who are facing token opposition from minor party candidates. And I would also emphasize

concerning this chart, as it turns out, these safe incumbents, and we went over this yesterday, Your Honor, safe incumbents are tending to opt out of the program because they get nothing from the program. You know, why does a Senate candidate want to accept 25 when he can, you know, in his sleep raise 50?

And so I think we went through a chart yesterday and it would be Table One, I believe, which showed that the people who are losing most are the people who, other people who are opting out.

I would -- that doesn't make sense. I withdraw

that, Your Honor, that last point. There was a point though --

MR. ZINN ROWTHORN: We'll stipulate to that, Your Honor.

THE COURT: I know just how you feel. I do that all the time. That's the problem with everything being down on the record.

MR. LOPEZ: And look, I mean, Ms. Youn went very quickly through the organizational expenditure, what we, what Commissioner Garfield described as a loophole. She almost had me convinced that nothing's going on here but that's not the case. You can read the statute for yourself. I mean the most compelling, I mean the most obvious thing, you can run broadcast ads on behalf of the

candidate. That's just amazing. And you can run on behalf of the specific candidate. You can give a candidate office space. You can give, you can give the candidate a campaign advisor. So when the Brennan Center or when the Attorney General referred to this as, the danger of it is that the legislative leadership committees could run campaigns, I think this is a legitimate observation.

Ms. Youn also makes the point that major party -- minor parties benefit from this equally, that's not true. In theory they benefit from organizational expenditures driven by their party but when the legislature adopted this, they knew very well that minor party candidates don't benefit from organizational expenditures driven by legislative leadership and caucus, that they don't have such committees, and that particular point was raised by Mr. Garfield in his testimony. And

was not acting on it or -- I'm sorry --

THE COURT: Right, but I mean the defendants make a good point on that argument, that the Act doesn't have to level the playing field for all candidates. If there's a candidate that's running as a Democratic or Republican and they have advantages of party structure and resources and so forth, you know, the Act doesn't really have to take that away and say that you have to act no

differently than a minor party is able to act.

MR. LOPEZ: Fair point, Your Honor. But if, if we -- that goes to the question of, you know, how this affects the playing field.

But in terms of the State's interest here, I think the fact that you have the organizational expenditure provision and it is controlled by legislative leadership committees which are historically, you know, the primary source of corrosive money in the system, according to John Chapple's declaration, then I think on the question of the legitimate analysis of the State's interests, you have to ask yourself -- or whether or not the State's interests are disserved by the organizational expenditure loophole, and then ultimately you could fairly ask yourself as well whether the organizational loophole is evidence of narrow tailoring or not. You might conclude that this law would be better or more narrowly tailored if it didn't have the organizational loophole. Excuse me.

I heard a nice presentation about Lujan but I what didn't hear anything about in that, in the quoted text was a holding or any language that suggested that a

statement of intent is not adequate to establish standing. And I would submit in a classic campaign finance, you come along and you say, Your Honor, I'm challenging this law

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that prohibits me from contributing more than $100 to a candidate. To, to establish standing, I would put in an affidavit or I would be put on a witness to say I intend to contribute more than $100 to a candidate and I can't because of this law. So that's a classic example of where a statement of intent would come in.

Now, the defendants' point is that our statement is not believable because we have not had the ability to do that in the past, and we haven't done it in the past much is their point. Although that's not true about independent expenditures but it is true about -- as respects our particular client, it is true about engaging in a type of, of spending that would trigger the magic matching fund provision.

But we do have a matching fund case out there, and I referenced the court to it yesterday, which said that the facts that are pled or actually testified to by my client are adequate. And the Court, to the extent the discussion of standing and the Court relies on a lot of standing cases that arise in the electoral context where they say a statement of intent is adequate, Lujon isn't to the contrary, Your Honor.

THE COURT: Okay.

MS. YOUN: If I might just reply on particular points. First of all, with respect to the information

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regarding candidate expenditures and the -- whether newly, newly, new major parties candidates should be included in

that, I would submit I wasn't going to get into this because I think of it as a 2008 expenditure issue on which the data is not ripe to be assessed. But to the extent that you can look at the Narain declaration and Table One and Two particularly, today I would submit that the way in which they are done is simply methodologically wrong and I tried to explain this yesterday. Wasn't as artfully crafted as I would have liked. I can say now that the way to put this is if you're going to include newly contested districts in Narain's Table One and Two, you have to include newly uncontested districts or else your average is substantially skewed. I have to include the positive side of the equation as well as the negative because the Narain Tables One and Two fail to do this. They are methodologically wrong and shouldn't be considered.

Secondly, with respect to this idea that the, the OLR research reports on campaign registrations represent war chests rather than actual expenditures, I would say give us a record as to what you think, what these -- what amount, what percentage of those amounts were war chests if you want to exclude it but otherwise this is the best data the legislature had and it's what it had when it had grant amounts that it wanted to tailor to

expenditures. It doesn't have to be perfect but they are trying to tailor historical expenditures.

Additionally, this kind of a war chest argument is in opposition to the, to the relevance of the returned funds argument that the plaintiff made yesterday. Specifically Mr. Lopez I think said, well, if you have a full grant amount, even if you don't use it, it's still

like having a loaded gun. Well, what we're saying is if you're going to talk about only actual expenditures in the district, then you shouldn't use the full CEP grant amount, whether they expend it or not. That would be analogous to the sort of war chest fund that they are talking about here that wasn't actually funded. If you're going to try to show an inflation of actual expenditures, then do actual funds not expended versus actual funds expended, not hypothetical or potentially unexpended.

Finally, with respect to the Lujan analysis, I was trying to have some pity on the court reporter and not read even more lengthy citations from case law into the record, but Lujan, 504 U.S. 564 said, "Such some day intentions without any description of concrete plan or any, even any specification of when" -- the court's emphasis -- "the some day will be, do not support a finding of the actual or imminent injury that our cases require."

THE COURT: Isn't there a slightly, slightly different standing rule with respect to campaign cases? In other words, Lujan had to do, as I recall, with the likelihood of persons visiting places outside the United States again, and the campaign cases I think are closer at least to Mr. Lopez's suggestion about the law says this and, therefore, I intend to do that.

MS. YOUN: Sure, and that's why I think in our briefing on this point we directed the court specifically to the standing analysis in McConnell and looked at, and also distinguished the situations in both Davis and in Leak. In Davis, as the court pointed out yesterday, the candidate was on the verge of making a specific

expenditure in a specific amount in a particular race that they were going to contest. It was not an overall allegation that in the future the Green Party will change its strategy to engage in a course of behavior that they've never before engaged in and, indeed, do not have the demonstrated capacity to engage in.

Second of all, in Jackson v. Leak, even above and beyond the fact that it was a motion to dismiss ruling, in that case the plaintiffs had alleged that the Act had already caused them to act differently. One plaintiff alleged that he chose not to make -- that he had already chosen not to make expenditures that he was

capable of making because of the independent expenditure provisions, and the other plaintiff alleged that they would have done so in a prior election. So what they are talking about is past injury. The idea that Davis somehow opens the door for allegations of future chill to provide an end-run around, actual or imminent injury, in fact is, I think, without foundation.

THE COURT: All right.

MS. YOUN: I'm pretty much done with the factual presentation. I know Perry was thinking of something.

THE COURT: He looks a little worn out.

MR. ZINN ROWTHORN: Yeah --

MS. YOUN: I think we all do at this point.

MR. ZINN ROWTHORN: It's been a long couple of days but perhaps we ought to discuss what's left to do. My understanding is -- I've got maybe 10 or 15 minutes of remarks, sort of broader brush than what Attorney Youn has gone through. I think it's going to be a little

anticlimactic if we all reconvene tomorrow for that, but you know, what may be left on the table is I think to close out the discussion on 2008. I think we probably have -- I don't have much more to say to that. I don't know if Mr. Lopez does or if Your Honor has further questions on that.

I think what our intention now is to do is we

have now I think affirmatively put some 2008 facts into the record in our presentation right after we had that discussion, so what we'd like to do is submit a limited additional proposed finding of fact just on those facts that we have referenced, and those are what we consider to be the final, the pieces of data from 2008 that are final. Number of candidacies, electoral results and contestedness. You know, how many districts were competitive and that increases or decreases contestedness. We could put together a very brief proposed finding of fact on that other data, particularly with respect to expenditures and organizational expenditures. We think that probably is -- I don't think we can give you something that's sufficiently reliable because it's not yet final and we would wait until March.

We talked about an additional brief, Rotman declaration on, you know, on the high spending opponent excess expenditure provision.

So, I'm not sure what's left for tomorrow other than perhaps some closing remarks. I don't know if it makes sense to try to push through today and finish. I'm prepared to do that.

THE COURT: Well, let me hear from anybody who has something they want to say tomorrow by way of

argument. My thought was if anybody feels like they

haven't had a chance to fully make their case or argue issues of law, that we could come back. Obviously it seems to me there are a number of issues in the case. Standing, standard of review, whether the plaintiffs have met the burden of proving their case, et cetera, 2008, these are at least potential issues that people may want to talk about. I have no great need frankly. I feel fairly saturated at the moment.

MR. ZINN ROWTHORN: I'm sure you do, Your Honor. You know, we have, I think, so extensively briefed these issues and discussed them at various points along the way that, you know, I think it was important to make a factual record. We may be beating the horse, I think, if we continue with many some of the legal arguments at this point. Unless Your Honor has particular issues of concern we can address, it might make sense if we can take a couple minutes and talk among ourselves to maybe make a suggestion about how to proceed.

THE COURT: That's fine. Why don't we take a ten minute recess.

MR. ZINN ROWTHORN: Thank you, Your Honor.

(Whereupon a recess was taken from 4:30 o'clock, p. m. to 4:40 o'clock, p. m.)

THE COURT: All right. Anybody want to come back tomorrow?

MR. ZINN ROWTHORN: Not us, Your Honor. Our preference would to be try to finish today.

MR. LOPEZ: With a caveat, Your Honor, I think

we can finish today as well. I would just ask that we also be allowed because yesterday there were a fair number of exhibits that were struck from our exhibit list, and we reference those in our findings and, you know, we're naked now on those findings and we would just like to submit another round of findings to substitute as --

THE COURT: Well, you actually have some exhibits that were excluded without prejudice to laying a foundation or whatever. So --

MR. LOPEZ: I don't think I can do that without putting on testimony.

THE COURT: Perhaps not, but while you were caucusing I was caucusing too, and I think I've adjusted my thinking about how to handle this case procedurally and I think the best thing to do is to start drafting a decision, not release that decision until we have the March hearing and have a single decision. I know that's perhaps a disappointment to getting this thing decided more quickly but it will permit both sides to fill in the record as they need to, either because there was no foundation or because we had incomplete data. It does away with the 2008 issue completely. It does away with

the scope of as applied versus facial because I'll decide them both at the same time. I don't have to sort through what evidence I can consider on one versus the other and if I start work now, I should be able to issue the decision promptly after the March hearing.

So, effectively, although it means delaying an appeal by about two months, it may speed up the date on which the entire case is decided. And that may be the better way to go. So let me me hear your thoughts on

that.

MR. ZINN ROWTHORN: Your Honor, that's -- I think that's acceptable to defendants and intervenor defendants. I believe that's, I think that's largely what we were proposing. I understand how we got here but I think that's largely what we were proposing when we were last together.

THE COURT: Yes, this has been very helpful to me though because by the time of the March hearing, I think I'll be fairly far along and I won't be issuing a decision two months after March but maybe two weeks after March.

MR. ZINN ROWTHORN: I agree, Your Honor. I think it's been helpful for us and I think it's been helpful also for the plaintiffs, and I think when we get to March, I think we're proceeding probably to a narrower

set of issues to address.

THE COURT: I think very narrow at this point.

MR. LOPEZ: I'm obviously disappointed, as I'm sure my client is. We think it's significant we get this done, an opinion out in January and opinion out in March.

Having said that, Your Honor, I just want to raise one reservation that has nothing to do with the Court, it has to do with further extensions and further briefing and -- I mean I want to -- if we could just have some binding representation from the defendants that we're done, that we are going, we're going to live with those dates and we're going to close the record and we're going to have that trial and, you know, there will be no further requests for extensions and we can put put this to bed in

March.

THE COURT: I'm not hearing any extensions. I think we have the vast bulk of the record that anybody wants to put in. We're really going to be finishing up. If you want to put on a witness to get Exhibit 24 back in or whatever, or if they've got that kind of clean up witness, if there's any specific evidence -- presumably you're going to want to put on Mr. DeRosa, I would assume, on as applied. Perhaps not, but --

MR. LOPEZ: But, Your Honor --

THE COURT: We have March 11th and 12th.

MR. LOPEZ: We have what? March 11th and 12th?

THE COURT: March 11th and 12th, or what I have on my calendar actually or -- is that right? Yes, I think March 11th and 12th.

MR. LOPEZ: Your Honor, is there any reason we can't -- Ms. Youn cut to the chase, she goes here it is, Your Honor, this is what we've got about '08. Is there any reason we can't do this in January or in February?

Let me raise one other issue. We've taken our best shot here. I'm not sure what else I have to say evidentiary, from an evidentiary standpoint. They've seen a preview of my case. I don't know what their case looks like. I am now at a disadvantage I'm not sure how I can cure.

THE COURT: I don't understand that. You both have put on your cases.

MR. LOPEZ: But I'm going to get a round of evidence from them and that means another round of fighting.

THE COURT: No, you're not. You're not really.

You're done, really. I assume in March most of the evidence is going to come from you. March, we're talking about the as applied challenge. In my view that's Mr. DeRosa. Of course, if he or the Green Party -- can he or can it show that, in fact, this Act is unconstitutional

as applied to them, and most of that you've put in. Maybe all of that you put in. Maybe we don't even need a hearing in March, I don't know.

MR. LOPEZ: Well, I submit I'm going to get another round of evidence from the defendants which I have to deal with --

MR. ZINN ROWTHORN: I don't think that's --

MR. LOPEZ: You're not going to work up the '08 data that you --

THE COURT: Yes, the '08 data is the only thing that's missing and the only aspect of that that's missing, as I understand it, is how much was returned and, therefore, how much was actually spent of the grants that were made. Is that it?

MR. ZINN ROWTHORN: And organizational expenditures. What I would anticipate doing is putting before Your Honor a pretty narrow set of proposed findings of fact on the as applied challenge. I think we'll be supplementing the data we talked about but really focussing in on the issues with where Mr. Jepsen and Mr. DeRosa were pre-CEP, where they are now. That's a pretty small record. I think we are probably talking about public record information.

I don't want to foreclose the possibility that something will occur to us that is relevant to as applied

that might be new but I really do believe we're talking about a very limited factual record because, as Your Honor points out, we are now zeroing in on the as applied challenge.

THE COURT: All right. And when is the '08 data going to be available?

MR. ZINN ROWTHORN: We calculated that the last reporting, I believe it was mid-January and then the first week of February, and then I think we got to March because it's going to take a pretty hefty administrative effort for them to gather all the individual reports and pull out the data, and that's why I think we were requesting March in the first instance.

So I do think when Mr. Lopez says let's do this in January, our concerns we voiced to Your Honor the last time we were together are still concerns. We'd like to have March because that allows us to have the data and without putting any undue burden from the cycle, putting that data in a final and reliable form for you.

MR. LOPEZ: And one of my concerns, Your Honor, is they get a second bite of the apple. They've seen now our evidence and it seems to me they can go to work. They only had a week to deal with these proposed findings and I only had a week to deal with theirs. Now we can go to work creating -- creating a dispute, if you will, over our

proposed findings, a dispute that could unravel all of our proposed findings. That's what I would do in their situation.

THE COURT: How are you at a disadvantage? You can go to work on their proposed findings.

MR. LOPEZ: I don't have theirs.

THE COURT: I have theirs.

MR. LOPEZ: Their proposed findings basically summarize the statute, Your Honor. Remember, they said we're not addressing these half dozen issues in these proposed findings.

THE COURT: Okay, so you'll have it two or three weeks before the hearing.

MR. ZINN ROWTHORN: Yes, Your Honor. I'm sure we'll set a deadline and we'll exchange proposed findings but, you know, this was a bifurcated proceeding. I mean Mr. Lopez put in whatever he decided to put in, and he did know there was going to be an as applied hearing in March, and so there should have been an expectation that we would have a case that he would have to, you know, confront on that as applied challenge. So this notion that it's going to be somehow surprising we're going to come forward and put a record before Your Honor as to the as applied challenge, I frankly don't understand.

MR. LOPEZ: We have nothing else to add on the

as applied challenge. I don't know what else -- I mean put a different spin on the same evidence? I don't have anything else to add to the as applied challenge for them to attack us. I've got nothing else to add. We put on our, we put on our case.

THE COURT: Okay. This is what I'm going to suggest. I still think we're going to be doing what I just said, which is I'm going to be getting to work. This is going to be a potentially massive decision in terms of findings to be made, the conclusions that have to be made.

It's going to be a lot of work. We're going to get to work on that and counsel should confer and come up with the earliest reasonable date to exchange the underlying data, to exchange proposed findings of fact and conclusions of law and anything supplemental to -- if any briefing is necessary, to exchange briefing, and either get an agreement or call me up and we'll set a schedule so that we get this done at the earliest possible date. I want to have all of this sooner rather than later because I want to be prepared at the hearing to focus on what I need to focus on.

MR. ZINN ROWTHORN: Your Honor, that works for defendants. Mr. Lopez shouldn't be surprised when our dates look like March, you know, 11th and 12th because that was -- we had already sort of calculated out from the

last reporting date, but we certainly are very prepared to have that conversation and report back in short order.

THE COURT: And if need be, we can have a pretrial conference to sort through this. I really don't see a disadvantage to the plaintiffs in the way this is playing out.

MR. LOPEZ: I would, with respect, Your Honor, I just think they are going to have a second run at my evidence and I don't have anymore new evidence.

THE COURT: You don't --

MR. LOPEZ: I guess I'm going to go back and figure something out, but --

THE COURT: That doesn't strike me as a problem. I want to get this right.

MR. LOPEZ: Fair.

THE COURT: So, if they see something they

haven't seen and they want to raise it, I'd rather have them raise it with me than raise it for the first time on appeal, because I want to make a finding of fact and I want to consider and make a conclusion on it. So if they have another run at your evidence, I don't see this as a problem. I'm going to be running at your evidence from now until a decision is done so I just don't see it as a problem. You know, this is not who gets the last word, it's what does the evidence show.

MR. LOPEZ: Can I solicit the court's assistance in making sure that I have their evidence forthwith so I can take a run at their evidence?

THE COURT: I just said, I just said I want it at the earliest possible date and you want to confer with them to get it at the earliest possible date. Let's get it done.

MR. LOPEZ: Can we limit the additional evidence coming in to the things that they've identified? I personally think that they are blowing the whole time about what's outstanding but can we at least limit it, the additional evidence that is coming in to what they have represented is outstanding and is so essential to their case?

MR. ZINN ROWTHORN: Your Honor, this is a little surprising, this discussion. I think Mark, Mr. Lopez is forgetting who has the burden here. He's brought, he's brought a facial and as applied challenge. You know, we have a trial coming up in March on the as applied challenge or whenever, you know. This motion that we should somehow be restricted about how we're going to

defend that claim is, I think it is true that the record is going to be limited but I don't want to sit here in December and define a couple limited areas in which we'll be able to defend that claim. You know, I just -- it

strikes me as a little unusual.

MR. LOPEZ: Are we bringing in new witnesses? Are we bringing in new experts? Something --

MR. ZINN ROWTHORN: Maybe, Your Honor. I don't think so but why should that notion be shocking on its face?

THE COURT: Yes, in the first instance the two of you ought to confer -- or the four of you, six of you, however many of you it's going to be -- ought to confer and see whether you can come up with a reasonable schedule. If you can't, if you have any problems, if suddenly there's five experts and you feel that you're not going to be able to prepare in time, call me up. We'll deal with it.

MR. LOPEZ: Your Honor, not to be petulant but if we were to withdraw our as applied challenge, would that aid the court at all in getting us an opinion in January?

THE COURT: I don't know. It certainly would be possible to get an earlier decision. I would still probably want to see the full 2008 evidence.

MR. LOPEZ: Well, in that case then we'll do it the way you asked us to, Your Honor.

MR. ZINN ROWTHORN: Despite present appearances, our record in conferring and coming up with agreements is

actually pretty good. So we'll have that conversation and

hopefully get back to Your Honor.

MR. LOPEZ: It's pretty good because the one time I pushed back and petitioned the court, I got slapped down.

MR. ZINN ROWTHORN: If we get back to Your Honor by Wednesday of next week, does that work for Your Honor?

THE COURT: Sure, that's fine.

MS. YOUN: And did I understand that Your Honor wants proposed conclusions of law as well as proposed findings of fact?

THE COURT: You know, I have the briefs. I have to come up with conclusions, but I don't think you need to submit any. If, you know, there are points that you feel have been raised in this proceeding that you're not sure your briefing is adequate, I won't rule out accepting another brief but I'm not going to encourage anybody to submit another brief.

MS. YOUN: Sure. I think the one open point from the hearing today that you asked about that we didn't have an answer to was that question on standing, so I don't know how you would wish us to address that, if at all.

MR. LOPEZ: They raised the issue in the posture of summary judgment so I guess that issue is out there,

your Honor. I guess I'm prepared to address it. If this is -- I'm not sure what you want further addressed. I thought we submitted our briefs, we made some argument yesterday, you heard some argument today.

MS. YOUN: I was referring to the court had a specific question which is does standing have to be

assessed on an argument by argument basis and I just don't know the answer to that.

MR. LOPEZ: Clearly it doesn't, Your Honor. The situation is a little more nuanced than that. If you phrase it the way you did, then clearly not. What does it it matter whether you -- how you argue the case?

THE COURT: Exaggerate the issue.

MR. LOPEZ: Right, exactly.

THE COURT: But I do have a, I do have a serious question whether it's a claim by claim basis.

MR. LOPEZ: Fair enough. And our response to that was we would, we could have just as easily collapsed or eliminated Counts Two or Three or collapsed them into Count One and there would be no dispute. There is no dispute that we have standing to challenge the CEP as a whole and to challenge the trigger provisions in the context of that whole because they operate in a way that would create greater disparities between major and minor parties. I think that's relatively uncontroversial. The

issue is whether we can raise a separate claim.

THE COURT: I think the defendants, I think the defendants expect you to have to prove as part of your burden of proof that you have standing, which is not surprising. They haven't conceded standing. They haven't filed for summary judgment on Count One.

MR. LOPEZ: But I don't think there's any dispute over that. I mean frankly, yes, of course, at every stage of the proceedings you have to maintain standing, have and maintain standing.

THE COURT: Trust me, standing is going to be an issue in this court and the next court and the next court,

so you should be prepared to deal with standing because as far as this case goes, it's going to get raised at every level. It's a fundamental issue in any election case. It's going to get raised so you're going to have prove it here, you're going to have to have standing -- assuming you win, you have to stand on that issue at the Court of Appeals and further up, if it goes up.

MR. LOPEZ: But is there any doubt in anyone's mind, so we don't, don't waste time on the issue, is there any doubt in anyone's mind that we have standing to challenge the discriminatory challenges of the CEP? I mean we're here saying we're left out of the system and we're worse off for it. I didn't know that anyone was

contesting our right to bring that claim.

MS. YOUN: As it's plaintiff's burden to establish standing, including injury in fact, on any causation, and I would say that the injury in fact, that's a different kind of injury. To the extent that it would be a chill argument rather than an equal protection argument, that injury in fact has to be separately established for standing purposes.

MR. LOPEZ: But in answer to your original question, Your Honor, I mean our point is that -- and this is why Monica and I both stood up two minutes ago, maybe it's been ten minutes already -- why we both stood up, if you have standing to challenge the trigger provisions in the context of the whole statutory scheme, which is the claim in Count One, it seems to me incongruous to us that you wouldn't have standing to make a different argument under the same constitutional amendment challenging the

same statutory provision. It seems to me that is a, would be a hyper technical standing requirement. And I think you asked that question, that's my answer. I addressed it in our briefs. I didn't, because of the rush, elaborate from the case law pointed out.

THE COURT: All right.

MS. YOUN: I'm not sure whether this particular citation will help the court in the standing analysis but

in Davis the court found, this is 2769, "The fact that Davis has standing to challenge 319(b) does not necessarily mean that he also has standing to challenge the scheme of contribution limitations that applies when 319(a) comes into play." "Standing is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that's sought."

The two different sections that are referenced in that, 319(a) I believe is the scheme of discriminatory contribution limitations that was at issue in Davis, and 319(b) was disclosure provisions that were at issue in Davis and standing on one did not permit standing for the other.

MR. LOPEZ: Those were two different statutory provisions. We're talking about the same statutory provision.

MR. ZINN ROWTHORN: No, we're talking about different provisions within a chapter.

THE COURT: Okay, I think I have a general understanding of the parties' positions. Let me just say this. It sounds as if it's possible that we may not have a March proceeding if the plaintiff withdraws the as

applied challenge. As things now stand, I'm going to hold open this record to permit the completion of the record to

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the extent that the plaintiff wants to resubmit or lay a foundation for exhibits that were excluded, to the extent the defendants want to issue complete 2008 data. The record of this proceeding is going to remain open for those purposes. If we get to the point where the plaintiff withdraws the as applied challenge, we'll probably have some sort of conference to figure out what anybody wants to do in terms of supplementing or completing the record before we formally close it. All right?

I'll wait to hear from counsel with respect to your proposed schedule and we'll get to work. Thank you all -- yes?

MR. FEINBERG: Your Honor, may we just have a moment?

THE COURT: Sure.

(Pause)

MR. ZINN ROWTHORN: Your Honor, I guess the open question here is, you know, I had remarks that I think were going to be directed at the facial challenge case and I think I'm prepared to make those. I think it might make sense to make those. I think Mr. Feinberg had a few remarks. I think I can restrict myself to 10 or 15 minutes. I was thinking it might make sense to wait until March but apparently there's now a possibility we won't

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get a March and have an as applied hearing. So if it makes sense to Your Honor and without trying the patience

of Your Honor and Your Honor's staff, I think we ought to, you know, perhaps do that now.

MR. LOPEZ: Your Honor, then I would suggest, I'm sorry, that we come back tomorrow. I see this turning into another hour and-a-half presentation, especially if the court has questions, and frankly this new development has, has -- is a game changer for how I would have proceeded and, frankly, how I would have dealt with remarks, and I would ask you to give us the evening so we be able to recharge.

MR. ZINN ROWTHORN: You know, maybe a fair way to do it, I mean really I'm not sure it makes sense to reconvene for 15 minutes of comments that could be made now. But, you know, maybe if there's a decision by Mr. Lopez to withdraw his as applied challenge, we can come before Your Honor for some closing argument remarks on the facial challenge.

THE COURT: I think we'll do that anyway so that's fine. Let's do that. We'll hold open the option of closing arguments for both sides until we know when the trial is going to be concluded.

MR. ZINN ROWTHORN: Thank you, Your Honor. And in the alternative, when we are before Your Honor on the

as applied, we would then be addressing in summation both aspects of the claim?

THE COURT: Right.

MR. LOPEZ: Your Honor, I thought I had -- maybe it wasn't clear. When you had said that your intention was to keep open the record to take in supplemental materials that are going to be available at least through the first week of March, that -- the suggestion of taking

off my as applied challenge lost its advantages or its appeal to us, so I don't think that we're going to be proceeding that way. I think we would, if the record is going to stay open that long, we would at least keep open our option to put more evidence on the dates that you mentioned.

THE COURT: That's fine. I've got the dates blocked out March 11th and 12th. That's fine.

MR. ZINN ROWTHORN: I think in that case, Your Honor, I'll probably be addressing Your Honor on the facial challenge as part of that proceeding.

THE COURT: That's fine. We can do what amounts to a single closing.

All right, thank you all. We'll stand adjourned.

(Whereupon the above matter was adjourned at 5:05 o'clock, p. m.)

C E R T I F I C A T E

I, Susan E. Catucci, RMR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/ Susan E. Catucci

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