UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GREEN PARTY OF CT, ET AL	**:**	
	:	
v.	**:**	**3:06-CV-01030 (SRU)**
	:	
JEFFREY GARFIELD, ET AL	**:**	**February 15, 2007**

MEMORANDUM OF LAW IN SUPPORT OF PROPOSED INTERVENORS-DEFENDANTS' AND DEFENDANTS' JOINT MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTRODUCTION.....1

CONNECTICUT CITIZENS' ELECTION PROGRAM.....3

STANDARD OF REVIEW.....8

ARGUMENT.....9

I. Plaintiffs' Claims That the CEP's Treatment of Minor Party and Petitioning Candidates Violates the First and Fourteenth Amendments Should Be Dismissed as a Matter of Law.....12

A. It is Constitutional to Treat Major and Minor Party Candidates Differently in Public Financing Systems.....12

B. Connecticut's Citizens' Election Program Does Not Unconstitutionally Discriminate Against Non-Major Party Candidates.....15

1. Plaintiffs' Claims Regarding Non-Major Party Candidates Are Foreclosed by the Supreme Court's Decision in *Buckley v. Valeo*.....16

2. Plaintiffs Lack Standing to Challenge Qualifying Criteria for Petitioning Candidates and Public Funding for Primaries.....22

II. Plaintiffs' Claims Against the CEP's Matching Funds Provisions Should Be Dismissed for Failure to Allege a Cognizable Constitutional Injury.....24

A. The CEP's Matching Funds Provisions Do Not Violate the Rights of Nonparticipating Candidates.....25

B. Plaintiffs' Challenge to the Alleged Effect of the Matching Funds Provisions on Independent Spenders Should Be Dismissed.....30

1. Plaintiffs Lack Standing to Make Such a Challenge.....30

2. Providing Matching Funds Based on Independent Spending Does Not Violate Those Spenders' Constitutional Rights.....31

CONCLUSION.....34

TABLE OF AUTHORITIES

Cases

Allen v. Wright, 468 U.S. 737 (1984)..... 23

American Party of Texas v. White, 415 U.S. 767 (1974).....24

Ass'n of Am. Physicians and Surgeons v. Brewer, 363 F. Supp. 2d 1202 (D. Ariz. 2005), appeal docketed, No. 05-15630 (9th Cir. 2005), *hr'g* (9th Cir. Feb. 12, 2007).....10, 27-28, 32-33

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

Crist v. Comm'n on Presidential Debates, 262 F.3d 193 (2d Cir. 2001)..... 23

Daggett v. Comm'n on Governmental Ethics & Election Practices, 74 F.Supp. 2d 53 (D. Me. 1999), *aff'd*, 205 F.3d 445..... 27 n.21

Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000).....10, 25-28, 30, 32-33

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994).....32-33 & n.25

DeMuria v. Hawkes, 328 F.3d 704 (2d Cir. 2003)..... 9

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004)..... 22

Flast v. Cohen, 392 U.S. 83 (1968)..... 23

Gable v. Patton, 142 F. 3d 940 (6th Cir. 1998)..... 25, 29 n.23

Hirsch v. Arthur Andersen & Co., 72 F.3d 1085 (2d Cir. 1995)..... 9

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).....23

Island Software & Computer Serv., Inc. v. Microsoft Corp., 413 F.3d 257 (2d Cir. 2005).....9

Jackson v. Leake, Civil Action No. 5:06-CV-324-BR, Order (E.D.N.C. Oct. 26, 2006)..... 10, 25, 27-28, 32-33

John B. Hull, Inc. v. Waterbury Petroleum Products, Inc., 588 F.2d 24 (2d Cir. 1978).....23

Kaplan v. Board of Education, 759 F.2d 256 (2d Cir. 1985)..... 12

Libertarian Party v. Packard, 741 F.2d 981 (7th Cir. 1984).....13, 20

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)..... 23

Mangiafico v. Blumenthal, 471 F.3d 391 (2d Cir. 2006).....9, 18

McConnell v. FEC, 540 U.S. 93 (2003)..... 11, 26-27

Nat'l Comm. of the Reform Party of the United States v. Democratic Nat'l Comm., 168 F.3d 360 (9th Cir. 1999).....13, 20

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).....11-12

Papasan v. Allain, 478 U.S. 265 (1986)..... 9

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

Secretary of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984)..... 23

SIFMA v. Garfield, 3:06-CV-2005 (SRU), Memorandum of Decision re: Motion For Preliminary Injunction (D. Conn. Jan. 9, 2007).....1, 12

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).....9

Thompson v. County of Franklin, 15 F.3d 245 (2d Cir. 1994)..... 10

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997)..... 19

United States v. Vazquez, 145 F.3d 74 (2d Cir. 1998)..... 23

Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993).....12 n. 11

Statutes

26 U.S.C. § 9004(a)..... 14, 16-17

26 U.S.C. § 9033(b)(3)..... 16-17

2006 Conn. Pub. Act No. 06-137.....2 n.1, 8

Conn. Gen. Stat. § 3-62h.....26 n.20

Conn. Gen. Stat. § 3-69a.....26 n.20

Conn. Gen. Stat. § 9-372..... 4 n.5 & n.6, 20 n.16

Conn. Gen. Stat. § 9-415.....4

Conn. Gen. Stat. § 9-451.....4, 24

Conn. Gen. Stat. § 9-452.....4, 24

Conn. Gen. Stat. § 9-453t.....18

Conn. Gen. Stat. § 9-600 *et seq.* (formerly § 9-333 *et seq.*)..... 2 n.1

Conn. Gen. Stat. § 9-601 (formerly § 9-333a).....22 n.19

Conn. Gen. Stat. § 9-610 (formerly §9-333*l*) 9 n.10

Conn. Gen. Stat. § 9-611 (formerly § 9-333m) 8

Conn. Gen. Stat. § 9-612 (formerly § 9-333n) .....8, 9 & n.10

Conn. Gen. Stat. § 9-613 (formerly § 9-333o)..... 8

Conn. Gen. Stat. § 9-615 to 9-617 (formerly § 9-333q to 9-333s)..... 8

Conn. Gen. Stat. § 9-619 (formerly § 9-333u) 8

Conn. Gen. Stat. § 9-700 *et seq.*.....2 n.1

Conn. Gen. Stat. § 9-702..... 3-5, 8, 17

Conn. Gen. Stat. § 9-703.....3 & n.4

Conn. Gen. Stat. § 9-704..... 3-4, 8, 17

Conn. Gen. Stat. § 9-705.....4-6, 8, 16-17, 21 n.17

Conn. Gen. Stat. § 9-713..... 6 n.7, 7, 8 n.9, 24-25, 29

Conn. Gen. Stat. § 9-714..... 6, 7, 8 n.9, 24-25, 32

Conn. Gen. Stat. § 9-718.....22 n.19

Conn. Gen. Stat. § 9-750.....26 n.20

Conn. Gen. Stat. § 9-751.....26 n.20

Other Authorities

13 Wright & Miller, Federal Practice and Procedure § 3522..... 23

Bylaws of the Libertarian Party of Connecticut, *available at*
http://www.lpct.org/pr/BylawsOfTheLibertarianPartyOfConnecticut.pdf.....24

Connecticut State Library, "Roster of Governors of Connecticut," *available at*
http://www.cslib.org/gov/index.htm..... 19 n.15

DeRosa for Senate '04, "Statement of Receipts and Expenditures," Apr. 23, 2005
available at http://12.178.75/sots/filings/2005/7/2005_2652.pdf.....22 n.18

Federal Election Comm'n, "Public Funding of Presidential Campaigns: Eligibility
for Public Funds," *available at* http://www.fec.gov/pages/brochures/
pubfund.shtml#Eligibility.....17 n.12

Fed. R. Civ. P. 12.....3 & n.3, 9, 23-24, 31

Fed. R. Evid. 201(f)..... 9

Green Party of Connecticut Bylaws, *available at* http://www.ctgreens.org/bylaws.shtml..... 24

Secretary of the State of Connecticut, "Election Results for State Representative:
11/07/2006-General," *available at* http://www.sots.ct.gov/ElectionsServices/
election_results/2006_Nov_Election/StateRep.pdf..... 18 n.13

Secretary of the State of Connecticut, "Election Results for State Senator:
11/07/2006-General," *available at* http://www.sots.ct.gov/ElectionsServices/
election_results/2006_Nov_Election/StateSente.pdf.....18 n.13

Secretary of the State of Connecticut, "Election Results for First Senate District"
available at http://209.101.151.73/statementofvote/Reports/SS_1.html..... 19 n.14

State of Connecticut Elections Enforcement Commission, "Title 9 – 2006,
New Chapters Parts and Sections, *available at* http://www.ct.gov/seec/lib/seec/
t09__additions.pdf.....2 n.1

INTRODUCTION

This case is about the culture of corruption that seeped into Connecticut's halls of power and the thoughtful responses made by conscientious lawmakers to fix a broken political system. These anti-corruption and democracy enhancing reforms, patterned after constitutional models from other jurisdictions, are challenged by Plaintiffs.

As this Court recently observed, the campaign finance reform measures at issue in this case, "as a whole, promote[] several substantial state interests, especially considering recent events in this state's history." *See SIFMA v. Garfield*, 3:06-CV-2005 (SRU) (D. Conn. Jan. 9, 2007), Memorandum of Decision re: Motion for Preliminary Injunction, at 19. Indeed, political corruption has been a cause for great concern for the citizens of Connecticut in recent years. In 2004, Governor of Connecticut John Rowland resigned and ultimately was sentenced to jail for political corruption, including accepting gifts from state contractors, steering approximately one million dollars to state contractors, and giving a local air charter company a lucrative tax break in exchange for a trip to Las Vegas.

Campaign finance improprieties and other pay-to-play vagaries have factored into other recent political scandals in Connecticut. In 2003, State Treasurer Paul Silvester pled guilty to racketeering and money laundering involving contracts to invest State pension funds. Treasurer Silvester steered exorbitant "finder's fees" to friends, relatives, and political cronies who illegally funneled some of the money back to Treasurer Silvester, his friends, and into his failed campaign and the campaigns of others that same year. Most recently, in 2005 State Senator Ernest E. Newton II admitted to diverting $40,000 in campaign contributions for personal use over five years, accepting a $5,000 bribe in exchange for helping the director of a job training agency secure a $100,000 grant, and filing false tax returns. On top of these statewide scandals,

mayors of two large Connecticut cities, Waterbury and Bridgeport, have also come under federal investigation for campaign finance corruption. In Bridgeport, city contracts were doled out in exchange for campaign contributions.

These many episodes of political corruption rightfully shook Connecticut citizens' faith in the integrity of their democracy. In late 2005, the Legislature and the new Governor worked together to craft a law to reform the state's political processes. Responding to concerns about actual and perceived corruption, Connecticut enacted the Citizens' Election Program (or "CEP"), a voluntary public financing system modeled on similar programs for elections in Maine, Arizona, and for the United States presidency. In addition to enacting the CEP for candidates for statewide and legislative office, the legislation also closed loopholes in the campaign finance system in Connecticut by enacting contribution restrictions on state contractors, lobbyists and their families. Plaintiffs challenge many aspects of this holistic political reform, including several aspects of the Citizens' Election Program.

Despite the laudable goals of Connecticut's Citizens' Election Program, and the case law rejecting challenges to similar programs, Plaintiffs here challenge particular provisions of the Law[1] as violating the First and Fourteenth Amendments.[2] Proposed Intervenors-Defendants and

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[1] "The Law," as used in this memorandum, refers to sections 9-600 to 9-623 (formerly sections 9-333a to 9-333y) and 9-700 to 9-718 (2005) of Connecticut's General Statutes, as amended by 2006 Conn. Pub. Act No. 06-137. The Law has been re-codified in January 2007 such that statutes formerly numbered § 9-333 et seq. are now numbered § 9-600 et seq. *See* State of Connecticut Elections Enforcement Commission, "Title 9 – 2006, New Chapters Parts and Sections, *available at* http://www.ct.gov/seec/lib/seec/t09__additions.pdf (effective Jan. 1, 2007). Plaintiffs refer to the old codifications throughout their Amended Complaint. We will indicate in each affected citation in this memorandum both the present and former citations.

[2] The cases of *Green Party of Connecticut v. Garfield*, No. 3:06-CV-01030 (SRU) and *Association of Connecticut Lobbyists LLC v. Garfield*, No. 3:06-CV-01360 (SRU) have been consolidated. Plaintiffs in the *Association* case have not challenged any provisions of the CEP. Accordingly, for the purpose of this memorandum, "Plaintiffs" shall only refer to the seven Plaintiffs in the *Green Party* case.

Defendants respectfully move herein to dismiss Counts I-III of Plaintiffs' Amended Complaint, which challenge the qualification and grant distribution formulae under the CEP for minor party and petitioning candidates and the possible distribution of additional funds for participating candidates. These Counts fail to state a claim upon which relief can be granted and therefore should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure,[3] and Proposed Intervenors-Defendants and Defendants are entitled to judgment on the pleadings on these Counts under Rule 12(c).

CONNECTICUT CITIZENS' ELECTION PROGRAM

Connecticut's campaign finance laws permit eligible candidates running for statewide or legislative office to choose whether to participate in the CEP or to conduct privately financed campaigns. Those eligible candidates who wish to participate agree to abide by spending limits and are called "participating candidates."[4] Conn. Gen. Stat. §§ 9-702(b), (c), 9-703(b).

In order to protect the public fisc, the CEP does not distribute funds to any and all candidates, but rather allocates funds based on demonstrations of public support. To qualify for public funds, participating candidates must collect a certain number of qualifying contributions in amounts of $100 or less from individuals to demonstrate that the candidate has a broad level of public support. *Id.* §§ 9-702(b), 9-704. The number of qualifying contributions required

[3] Plaintiffs lack standing for Count I as it applies to petitioning candidates and as it applies to claims related to eligibility for public funds for primaries for non-major party candidates. (Am. Compl. ¶ 53.) Plaintiffs lack standing for Counts II and III as they apply to independent spenders. (Am. Compl. ¶ 55.) Therefore, Proposed Intervenor-Defendants and Defendants move to dismiss these portions of Counts I, II and III for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).

[4] "A candidate who so certifies the candidate's intent to abide by the expenditure limits under the Citizens' Election Program set forth in subsection (c) of section 9-702 shall be referred to in sections 9-700 to 9-716, inclusive, as a 'participating candidate' and a candidate who so certifies the candidate's intent to not abide by said limits shall be referred to in sections 9-700 to 9-716, inclusive, as a 'nonparticipating candidate.'" Conn. Gen. Stat. § 9-703(b).

varies depending on the office that the candidate seeks. *Id.* § 9-704. These qualifying contributions are retained by the candidate's qualified candidate committee and can be spent during the election cycle for permissible, campaign-related purposes. *Id.* §§ 9-702(c), 9-704. With the exception of qualifying contributions, *id.* 9-704, eligible participating candidates from major parties[5] may raise no private contributions; rather, they receive lump-sum grants of public funds with which to conduct their campaigns ("original grant"). *Id.* §§ 9-702, 9-705.

Minor party[6] and petitioning candidates must satisfy certain supplementary criteria to become eligible to be participating candidates. *Id.* §§ 9-702(b), 9-704, 9-705(c), (g). In order to be eligible to receive any public funds, a minor party candidate must demonstrate that a candidate from her party garnered 10% of the vote in the previous election for the same electoral office. *Id.* § 9-705(c)(1), (g)(1). A petitioning candidate must gather signatures equal to 10% of the total votes cast in the last election for the same office. *Id.* § 9-705(c)(2), (g)(2). Moreover, only major party participating candidates who face a primary election are eligible to receive public funds for the primary season. *Id.* §§ 9-702(a), 9-705(a)-(g), 9-415. Minor party and petitioning candidates are not required by law to face primary elections, and they are only eligible to receive public funds for the general election. *Id.* §§ 9-702(a), 9-451, 9-452.

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[5] "'Major party' means (A) a political party or organization whose candidate for Governor at the last-preceding election for Governor received, under the designation of that political party or organization, at least twenty per cent of the whole number of votes cast for all candidates for Governor, or (B) a political party having, at the last-preceding election for Governor, a number of enrolled members on the active registry list equal to at least twenty per cent of the total number of enrolled members of all political parties on the active registry list in the state." Conn. Gen. Stat. § 9-372(5).

[6] "'Minor party' means a political party or organization which is not a major party and whose candidate for the office in question received at the last-preceding regular election for such office, under the designation of that political party or organization, at least one per cent of the whole number of votes cast for all candidates for such office at such election." Conn. Gen. Stat. § 9-372(6).

Under the CEP, eligible participating major party candidates are given an original grant in a set amount for the general election ("full grant"). *Id.* § 9-705(a)-(g). The amount of the funds distributed to participating minor party candidates is based on likely public support, measured by the percentage of votes a candidate from that minor party received in the previous election for the office sought. The public grant for a minor party candidate whose predecessor received at least 20% of the vote is equal to the full original grant that a major party receives; the public grant for a minor party candidate whose predecessor received between 15% and 20% of the vote is equal to two-thirds of the grant for a major party candidate; and the public grant for a minor party candidate whose predecessor received between 10% and 15% of the vote is equal to one-third of the grant for a major party candidate. *Id.* § 9-705(c)(1), (g)(1).

Similarly, the grant an eligible petitioning candidate may receive depends on the level of public support he can demonstrate through the number of signatures gathered. *Id.* § 9-705(c)(2), (g)(2). Specifically, a petitioning candidate who gathers signatures equal to 20% or more of the total vote in the previous election receives a full grant; a petitioning candidate who gathers signatures equal to between 15% and 20% of the total vote in the previous election receives two-thirds of that amount; and a petitioning candidate who gathers signatures equal to between 10% and 15% of the total vote in the previous election receives one-third of that amount. *Id.* § 9-705(c)(2), (g)(2).

Except for qualifying contributions, participating major party candidates are not permitted to raise additional private funds during the election. Eligible participating minor party or petitioning candidates who receive less than a full grant, however, are allowed to raise additional private funds in order to make up the difference between the partial grant and a full grant. *Id.* § 9-702(c). Therefore, in the general election, each participating candidate, whether

major party, minor party, or petitioning, may spend up to the same amount. Moreover, participating minor party and petitioning candidates who make a strong showing during that general election may receive a supplemental payment of public funds after the election. *Id*. § 9-705(c)(3), (g)(3).

To encourage participation, and to promote its goals of providing fair and more competitive elections, the CEP contains mechanisms – "trigger" provisions – to protect participating candidates from being grossly outspent by nonparticipating opponents or independent spenders. The trigger provisions authorize payment of "additional moneys," or "matching funds," to participating candidates when funds spent by nonparticipating opponents, independent spending by the opponents' supporters, or some combination thereof, exceed the spending limit for the office sought. *Id.* §§ 9-713, 9-714.

The first type of trigger provision enables participating candidates to receive up to four additional grants, each worth 25% of the original grant, once an opposing nonparticipating candidate's spending exceeds the participating candidate's original spending limit. *Id.* § 9-713(a)-(d). To carefully monitor and moderate the distribution of additional public funds to participating candidates, the "25% grants" of additional moneys are released first into a state escrow account after a series of "escrow triggers" are passed. *Id.* § 9-713(a)-(d).[7] Only when the nonparticipating candidates' spending hits separate "payment triggers" is money released

[7] When nonparticipating candidates' spending reaches the amounts specified in the statute – amounts equal to 90%, 115%, 140%, 165%, respectively, of the original grant (the "escrow triggers") -- then money is placed into the state escrow account. However, the additional 25% grants are released to the participating candidate from escrow only when the nonparticipating candidate spends amounts equal to 100%, 125%, 150% and 175% of the original grant, respectively (the "payment triggers"). Conn. Gen. Stat. § 9-713(a)-(d).

from the escrow account to the participating candidate. *Id.* § 9-713(a)-(d).[8] Once the participating candidate has the 25% grant in hand, however, she is not free to spend the full 25% grant. *Id.* § 9-713(a)-(d). Rather, she may spend only the amount that would match her nonparticipating opponent's spending, dollar for dollar. *Id.* § 9-713(a)-(d). These provisions enable participating candidates to respond to high-spending opposition, although matching funds triggered by an opponent's spending are capped at the *lesser* of (a) 100% of the public grant for the office sought or (b) the amount the opponent spent. *Id.* § 9-713(g). Accordingly, if nonparticipating candidates continue to raise and spend funds in excess of twice the original grant, opposing participating candidates will receive no additional public funds.

To provide participating candidates with sufficient funds to respond to independent expenditures urging their defeat, the CEP also enables participating candidates faced with such independent expenditures to receive some additional funds. Contrary to Plaintiffs' characterizations (Am. Compl. ¶ 39), however, participating candidates receive *no* public money to respond to independent spending until the money spent in opposition to them (independent spending and nonparticipating opponent spending combined or separately) is more than the original grant. Conn. Gen. Stat. § 9-714(c)(2). Matching funds for independent expenditures do not go through escrow and are delivered directly to the participating candidate on a 1-to-1 basis.

[8] Plaintiffs misunderstand the mechanics of the trigger provisions in mistakenly contending (Am. Compl. ¶¶ 3, 33-37) that each 25% grant is fully available for participating candidates to spend all at once. In fact, this money is first held in escrow, and then, once released, is available for spending by the participating candidate only in proportion to spending by an opposing candidate.

Id. § 9-714(a), (b)[9] Matching funds to respond to independent expenditures are capped at 100% of the original grant for the office sought. *Id.* § 9-714(c).

Candidates who are not eligible for or do not qualify for the CEP, as well as those who prefer to use private funds for their campaigns, are free to raise an unlimited amount of private contributions. Such candidates face no expenditure limits and are subject to reasonable contribution limits. *Id.* § 9-611 (formerly § 9-333m), § 9-612 (formerly § 9-333n), § 9-613 (formerly § 9-333o), § 9-615 (formerly § 9-333q), § 9-616 (formerly § 9-333r), § 9-617 (formerly § 9-333s), and § 9-619 (formerly § 9-333u).

In Counts I through III of Plaintiffs' Amended Complaint, Plaintiffs assert First Amendment and equal protection challenges against Sections 9-702(b), 704, 705(c), 705(g), 713, and 714 of Connecticut's General Statutes, as amended by "An Act Concerning the Campaign Finance Reform Legislation and Certain Election Law and Ethics Provisions," approved June 6, 2006. 2006 Conn. Pub. Act No. 06-137. Specifically, Plaintiffs challenge the CEP's (a) qualifying criteria and grant distribution formulae for minor party and petitioning candidates in Count I, and (b) the distribution of additional funds triggered by spending by either nonparticipating candidates or independent spenders in Counts II and III. As discussed below,

[9] The two types of matching provisions, and eligibility for funds from them, are interconnected. For example, if a nonparticipating candidate has spent an amount equal to 60% of the original grant and an independent spender has spent an amount equal to 50% of the original grant, then the opposing participating candidate is entitled to a 10% match for the independent expenditures under Section 9-714. However, if a nonparticipating candidate has spent an amount equal to 125% of the original grant and an independent spender has spent an amount equal to 50% of the original grant, then the participating candidate will receive two supplemental matches: (1) a Section 9-713 match for 25% of the original grant that goes through the escrow process and (2) a Section 9-714 match for 50% of the original grant that will be paid directly to the candidate. The maximum match available under the CEP would be 100% of the original grant for the Section 9-713 match and 100% of the original grant for the Section 9-714 match for a combined maximum match of 200% of the original grant.

Plaintiffs fail to state a claim with respect to these challenges and Proposed Intervenors-Defendants and Defendants are entitled to judgment on the pleadings for Counts I-III. [10]

STANDARD OF REVIEW

Proposed Intervenors-Defendants and Defendants move for relief under Federal Rules of Civil Procedure 12(b)(6), 12(c) as well as 12(b)(1). A motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure should be granted if Plaintiffs can prove no set of facts to support their claims and entitle them to relief. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). Although the court should accept as true all well-pleaded allegations when considering a motion to dismiss, *see id.*, the court need not accept legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1095 (2d Cir. 1995). Moreover, courts may look beyond the pleadings and take judicial notice of indisputable facts, such as matters of public record. *See Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006)*; Island Software & Computer Serv., Inc. v. Microsoft Corp*., 413 F.3d 257, 261 (2d Cir. 2005); Fed. R. Evid. 201(f) ("Judicial notice may be taken at any stage of the proceeding.").

The standards applicable to a motion for judgment on the pleadings under Rule 12(c) are the same as that for 12(b)(6) motions. *DeMuria v. Hawkes*, 328 F.3d 704, 706 n.1 (2d Cir. 2003) ("the legal standards for review of motions pursuant to Rule 12(b)(6) and Rule 12(c) are indistinguishable."). Moreover, the standard of review for a motion under Rule 12(b)(1) and Rule 12(b)(6) are similar, but the party asserting jurisdiction of the court has the burden to

[10] The Law that created the CEP also contained other reforms that Plaintiffs have challenged. These include contribution and solicitation restrictions on state contractors, communicator lobbyists and their families. *Id.* § 9-610(h) and (i) (formerly §9-333*l*(h) and (i)), § 9-612 (g)-(j) (formerly § 9-333n(g)-(j)). Proposed Intervenors-Defendants and Defendants have not moved to dismiss those claims.

establish jurisdiction. *Thompson v. County of Franklin*, 15 F.3d 245, 249 (2d Cir. 1994) ("[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.").

ARGUMENT

Programs like Connecticut's Citizens' Election Program that provide public funding to candidates who voluntarily agree to certain restrictions have been praised and upheld by the United States Supreme Court and courts in several other circuits. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (upholding the presidential public financing system under Federal Election Campaign Act ("FECA")); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's Clean Election Act); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Minnesota's public funding for elections); *Ass'n of Am. Physicians and Surgeons v. Brewer*, 363 F. Supp. 2d 1202 (D. Ariz. 2005) (upholding Arizona Clean Election Act), *appeal docketed*, No. 05-15630 (9th Cir. 2005), *hr'g* (9th Cir. Feb. 12, 2007); *see also Jackson v. Leake*, Civil Action No. 5:06-CV-324-BR (E.D.N.C. Oct. 26, 2006), Order, at 20-22 (denying plaintiffs' motion for preliminary injunction against public financing system for appellate judicial elections) (copy attached hereto as Exhibit A). These courts have concluded that public financing *furthers*, rather than *hinders*, First Amendment values and thus advances sufficiently important and significant state interests. *See Buckley*, 424 U.S. at 92-107.

In *Buckley*, the Court explained that a public funding system aims, "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. The Court further noted that:

> the central purpose of the Speech and Press Clauses was to assure a society in which "uninhibited, robust, and wide-open" public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish. Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech . . . .

Id. at 93 n.127 (citations omitted). Because public funding for campaigns promotes rather than impairs First Amendment values, *Buckley* did not apply heightened scrutiny to the public financing provisions of FECA, even though the law conditioned participation in the program on acceptance of spending limits. *Id.* at 57 n.65, 85-107.

Public financing promotes "uninhibited, robust, and wide-open public debate" not only through direct subsidies for speech but also through more indirect means. A full public funding system severs the connection between candidates hungry for cash and donors hungry for influence. In this sense, then, a public financing system serves the same interest as contribution limits, *i.e.*, combatting "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (internal quotation omitted). "Because the electoral process is the very 'means through which a free society democratically translates political speech into concrete governmental action,' . . . measures aimed at protecting the integrity of the process . . . tangibly benefit public participation in political debate." *Id.* at 137 (quoting *Nixon v. Shrink*

Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).[11]

As this Court has observed of the Law at issue in this case:

> The statute, as a whole, promotes several substantial state interests, especially considering recent events in this state's history. The statute seeks to restore public confidence in the integrity of state government and to eliminate corruption and undue influence growing from contributions given or solicited by certain special interest. The law also seeks to eliminate the appearance of corruption flowing from such contributions and to promote transparency in campaign financing and state contracting. Finally, the law attempts to respond to documented instances of corrupt dealings between state contractors, their immediate family members, and officials at the highest levels of state government. . . The Second Circuit has already found these and similar instances further a "substantial, possibly even a compelling, state interests." *Kaplan v. Board of Education*, 759 F.2d 256, 261 (2d Cir. 1985).

See SIFMA v. Garfield, 3:06-CV-2005 (SRU), Memorandum of Decision re: Motion for Preliminary Injunction, at 19-20.

Connecticut's CEP, like the presidential public financing program and those in Maine, Arizona and North Carolina, furthers First Amendment values by enlarging public discussion, preventing corruption and its appearance, and opening elective offices to a broader pool of candidates.

[11] Public funding systems also foster First Amendment interests by freeing candidates from the rigors of fundraising and permitting them to devote time to communication and debate. *See Buckley*, 424 U.S. at 96 ("Congress properly regarded public financing as an appropriate means of relieving . . . candidates from the rigors of soliciting private contributions.") (internal quotation omitted); *Rosenstiel*, 101 F.3d at 1553 (recognizing Minnesota's compelling interest in reducing "the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning"); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (upholding Rhode Island public financing law because such programs "'facilitate communication by candidates with the electorate' [and] free candidates from the pressures of fundraising") (quoting *Buckley*, 424 U.S. at 91).

I. Plaintiffs' Claims That the CEP's Treatment of Minor Party and Petitioning Candidates Violates the First and Fourteenth Amendments Should Be Dismissed as a Matter of Law.

In Count I of their Complaint, Plaintiffs allege that the CEP's qualifying requirements and distribution formulae violate the First and Fourteenth Amendments because they are different for major party candidates than for minor party candidates. (Am. Compl. ¶ 53.) Because the Supreme Court has considered and rejected Plaintiffs' arguments, Count I should be dismissed as a matter of law.

A. It is Constitutional to Treat Major and Minor Party Candidates Differently in Public Financing Systems.

In *Buckley v. Valeo*, the Supreme Court upheld the presidential public financing system against an equal protection challenge to its differential treatment of major party candidates and minor party candidates. 424 U.S. at 94-102. Two federal courts of appeals also subsequently upheld differential treatment of minor and major party candidates in public financing systems. *See Nat'l Comm. of the Reform Party of the United States v. Democratic Nat'l Comm*., 168 F.3d 360 (9th Cir. 1999) (upholding FECA's presidential public financing system against facial and as-applied challenges); *Libertarian Party v. Packard*, 741 F.2d 981 (7th Cir. 1984) (holding that minor party candidates failed to show that Indiana statutory scheme that raised revenue through sale of personalized licensed plates which was then distributed only to major party candidates unconstitutionally discriminated against them).

Like the CEP, the presidential public financing system upheld in *Buckley* treats major and minor parties differently for purposes of qualifying for and receiving public campaign funds. FECA provides funding to minor parties for the general election only if they have demonstrated a certain level of public support -- 5% of the vote in the previous election. *Buckley*, 424 U.S. at

97. Minor party candidates that qualify are given a percentage of the amount given to major party candidates, depending on the percentage of the vote the minor party garnered in the previous election. 26 U.S.C. § 9004(a)(2)(B). Both major party and minor party candidates have the same expenditure limits, but minor party candidates, unlike major party candidates, are permitted to raise private funds to make up the difference between the public funds they receive and the expenditure limit. *Buckley*, 424 U.S. at 88. Minor party candidates are also entitled to post-election funds if they receive a certain percentage of the vote in the election. *Id.* at 89.

In upholding the presidential public financing program, the Court gave great deference to Congress' choices for structuring the program and protecting the public fisc. The Court flatly rejected the essential premise of Plaintiffs' argument in this case—that Connecticut's public financing system must treat major and minor party candidates identically; as the Court explained, "the Constitution does not require [the legislative body] to treat all declared candidates the same for public financing purposes." *Id.* at 97. The Court recognized that Congress may legitimately require "some preliminary showing of a significant modicum of support" as an eligibility requirement for public funds, noting that "Congress' interest is not funding hopeless candidacies with large sums of money." *Id.* at 96 (internal quotations and citations omitted). The Court noted the "obvious difference in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other." *Id.* at 99-100. The Court further held that popular vote totals in the previous election were a proper measure of popular support. *Id.*

The *Buckley* Court distinguished between burdens on gaining ballot access and burdens on obtaining public financing, rejecting the argument that the two were constitutionally analogous. It noted that the former were direct burdens on a candidate's ability to run for office

and a voter's ability to voice political preferences, while the latter were "not restrictive of voters' rights and less restrictive of candidates'." *Id.* at 94. As the Court stated,

> the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions. Any disadvantage suffered by operation of the eligibility formulae . . . is limited to the [minor or new party's] claimed denial of the enhancement of opportunity to communicate with the electorate that the formulae afford eligible candidates.

Id. at 95. The Court concluded that "Congress enacted [the public financing program] in furtherance of sufficiently important governmental interests and has not unfairly or unnecessarily burdened the political opportunity of any party or candidate." *Id.* at 95-96. In other words, minor party candidates could not complain simply that the public financing program gave them less public money, or none at all.

In rejecting the plaintiffs' argument that the presidential public financing system invidiously discriminates against minor party candidates in violation of their equal protection rights, the Court in *Buckley* concluded that the plaintiffs had made "no showing that the election funding plan disadvantages non-major parties by operating to reduce their strength below that attained without any public financing." *Id.* at 98-99, 101. It found "any such concerns too speculative to overcome the important government interests" advanced by the law, describing three ways that non-major party candidates could gain advantage from the system: (1) those that did not qualify, unlike participating major party candidates, had no expenditure limits; (2) participating major party candidates could not raise private funds, while participating minor party candidates could make up the disparity in grants by raising private funds; and (3) expenditure limits for major parties and candidates could even improve the chances of non-major parties and their candidates receiving funds and increasing their spending. *Id.* at 99, 101.

Buckley further remarked that, historically, important achievements of minority political groups were accomplished through private financing, an option still available. *Id.* at 101-02.

Thus, *Buckley* unequivocally establishes that the legislature may treat minor and major parties differently for purposes of public campaign financing. Moreover, as discussed in the following section, because *Buckley* upheld a public financing system substantially identical in important respects to the CEP, Plaintiffs' Equal Protection challenge is foreclosed.

A. Connecticut's Citizens' Election Program Does Not Unconstitutionally Discriminate Against Non-Major Party Candidates.

Plaintiffs offer a litany of complaints against the structure of the provisions applied to minor party and petitioning candidates under the CEP. (Am. Compl. ¶¶ 21-25.) Plaintiffs, however, lack standing to bring these claims as they pertain to petitioning candidates or primaries. In addition, Plaintiffs' protests against the CEP's treatment of minor party and petitioning candidates are based on arguments that have been rejected by the Supreme Court in *Buckley*, arguments that misstate judicially noticeable facts, and unfounded speculation.

1. Plaintiffs' Claims Regarding Non-Major Party Candidates Are Foreclosed by the Supreme Court's Decision in *Buckley v. Valeo*.

Though some of the details differ, the CEP's public financing program resembles that of the presidential public financing program structurally. FECA provides that a presidential candidate from a minor party whose party received at least 5% of the popular vote in the preceding election and who meets the other conditions for eligibility, such as raising at least $5,000 in 20 states, is entitled to public funding. 26 U.S.C. § 9004(a)(2)(B), 26 U.S.C. § 9033(b)(3). Similarly in Connecticut's system, a minor party candidate whose predecessor candidate received 10% or more of the vote in the previous election and who has gathered the necessary qualifying contributions is eligible to receive public financing. Conn. Gen. Stat. §§ 9-

705(c)(1), (g)(1). In both systems, once the eligibility threshold is met, varying amounts are distributed based on the party's showing in the prior election. 26 U.S.C. § 9004(a)(2)(B), 26 U.S.C. § 9033(b)(3); Conn. Gen. Stat. §§ 9-702(c), 9-704, 9-705(c), (g). Minor party candidates participating in either the presidential public financing program or the CEP who receive less than the full grant amount are allowed to supplement partial grants with private contributions. *See Buckley*, 424 U.S. at 88; Conn. Gen. Stat. § 9-702(c). Finally, minor party candidates in both programs are eligible for post-election payments if they make a strong showing in the current election. 26 U.S.C. § 9004(a)(3); Conn. Gen. Stat. § 9-705(c)(3), (g)(3).

As in *Buckley*, Plaintiffs here protest that minor party candidates' eligibility for public funds for an election is linked to the past performance of the party. (Am. Compl. ¶ 23.) As discussed above, however, the Supreme Court has held that a public financing program may legitimately require "some preliminary showing of a significant modicum of support" as an eligibility requirement to receive funds and that popular vote totals in the previous election are an appropriate measure of such support. *Buckley*, 424 U.S. at 96, 99-100. While the *Buckley* Court determined that "[w]ithout any doubt a range of formulations would sufficiently protect the public fisc," it further stated that "the choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make." *Id.* at 103-04. Just as Congress set a sliding scale starting at a 5% threshold of past electoral success for minor parties in FECA,[12] here the Connecticut General Assembly has the discretion to set the

[12] Under FECA, a minor party candidate who receives between 5% and 25% of the vote in the previous presidential election is eligible for a public funds based on the ratio of the party's popular vote in the preceding presidential election to the average popular vote of the two major party candidates in that election. *See* Federal Election Comm'n, "Public Funding of Presidential Campaigns: Eligibility for Public Funds," *available at* http://www.fec.gov/pages/brochures/pubfund.shtml#Eligibility.

thresholds for receipt of public funds to protect the financial integrity of the CEP at 10, 15 and 20%.

Moreover, Plaintiffs' contention that the qualification requirements for minor party candidates to receive 10% of the vote in a previous election are "unattainable" (Am. Compl. ¶ 27) is contrary to judicially noticeable facts and therefore should be rejected. *See Mangiafico*, 471 F.3d 391, 398 (2d Cir. 2006) (finding no error in the district court's reliance on a docket sheet when considering a motion to dismiss because a docket sheet is public record of which the court could take judicial notice). At least ten minor party candidates (two candidates for state senate and eight candidates for state representative) received more than 10% of the vote in their respective races for the Connecticut Legislature in 2006, thus making them or another candidate from their parties eligible for public grants from the CEP in 2008 for those seats.[13] Moreover, a 2006 research report by the Connecticut Legislature's Office of Legislative Research entitled "Past Performance of Petitioning and Minor Party Candidates in Connecticut" reveals that from 1998-2004 twenty-four minor or petitioning candidates received at least 10% of the vote in their respective races (copy attached hereto as Exhibit B).

One dynamic that will assist in making the 10% threshold attainable for minor party candidates is the existence of "fusion voting" in Connecticut. Connecticut is one of seven states that permits "fusion voting" -- the practice of allowing two parties to support a single political candidate. Conn. Gen. Stat. § 9-453t. This system gives voters the ability to vote for a "major party candidate" on a minor party line. Though "fusion balloting" is not constitutionally

[13] Secretary of the State of Connecticut, "Election Results for State Representative: 11/07/2006-General," *available at* http://www.sots.ct.gov/ElectionsServices/election_results/2006_Nov_Election/StateRep.pdf; Secretary of the State of Connecticut, "Election Results for State Senator: 11/07/2006-General," *available at* http://www.sots.ct.gov/ElectionsServices/election_results/2006_Nov_Election/StateSente.pdf.

required under the First Amendment, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362 (1997), by offering, it Connecticut increases the chance that minor party candidates will garner the necessary 10% of the vote to be eligible for CEP funding.

In addition, Plaintiffs' vague contention that Plaintiff S. Michael DeRosa "intends to run for state political office after December 31, 2006 and will be unable to qualify for public financing under the Act" (Am. Compl. ¶ 11) is insufficient to state a valid claim. Because Mr. DeRosa does not specify the office he will seek or the year he will run, and it cannot be known if a candidate from his party will reach the threshold in the previous election enabling him to qualify for public financing, his claim is "too speculative to overcome the important government interests" underlying the CEP. *See Buckley*, 424 U.S. at 98-99. Moreover, Plaintiff DeRosa's claim is contradicted by judicially noticeable facts. He received 11.36% of the vote in his race for State Senator in the First District in 2004, more than the amount needed to qualify under the CEP.[14] There is no reason to think Mr. DeRosa or another minor party candidate is incapable of repeating this level of performance.

The likelihood of candidates being able to qualify for public funds is not limited to candidates for legislative races; rather past elections in Connecticut show that third party candidates for statewide office have demonstrated the capacity to garner large percentages of the vote. For example, in 1990 Connecticut voters elected Governor Lowell P. Weicker, Jr. on the third party ticket of A Connecticut Party.[15] If the CEP had been operative when Governor Weicker won in 1990 with 41% of the vote, then A Connecticut Party would have become a

[14] Secretary of the State of Connecticut, "Election Results for First Senate District" *available at* http://209.101.151.73/statementofvote/Reports/SS_1.html.

[15] Connecticut State Library, "Roster of Governors of Connecticut," *available at* http://www.cslib.org/gov/index.htm.

major party for purposes of the CEP, making Eunice Groark, who ran for governor in 1994 on that ticket, and all other A Connecticut Party candidates that year, eligible for *full* grants for their campaigns. Groark received 19% of the vote in 1994, which then would have entitled the A Connecticut Party gubernatorial candidate to a 2/3 partial grant in 1998.[16]

Plaintiffs also object to minor party candidates' receipt of only partial grants under certain circumstances. (Am. Compl. ¶ 25.) But this objection is also foreclosed by *Buckley*. The Court in *Buckley* wrote:

> Third parties have been completely incapable of matching the major parties' ability to raise money and win elections. Congress was, of course, aware of this fact of American life, and thus was justified in providing both major parties full funding and all other parties only a percentage of the major-party entitlement.

Id. at 98; *see also National Committee of the Reform Party*, 168 F.3d at 366 (quoting *Buckley*); *Libertarian Party*, 741 F.2d at 986-87 ("public funds may be used to subsidize the activities of some political parties but not others"). There is no constitutionally cognizable injury caused by giving a minor party candidate a lesser grant than a major party candidate.

Finally, like the plaintiffs in *Buckley*, Plaintiffs here cannot state a claim regarding the one consideration the Supreme Court determined is relevant when considering differential treatment of major and minor party candidates in a public financing program—whether or not the program "disadvantages non-major parties by operating to reduce their strength below that attained without any public financing." *Buckley*, 424 U.S. at 98-99, 101.

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[16] A party's designation as a "minor" party for the purposes of the CEP is not set by the CEP, but rather by the party's history of support. This designation can change at any election, because any political party that shows strong support at the polls has the potential to become a major party in Connecticut and have its candidates become eligible for a full grant if they collect the necessary qualifying contributions. The experience of A Connecticut Party demonstrates this fluidity. In 1994, A Connecticut Party would have been considered a major party under the CEP because Governor Weicker garnered 41% of the vote in 1990. Conn. Gen. Stat. § 9-372(5), (6). Thus, there is nothing inherent or immutable about a party's designation under Connecticut law as "minor" or "major."

Despite Plaintiffs' claims to the contrary, the CEP does not place petitioning or minor party candidates in a worse position than the previous law because public financing is not the only way to finance a campaign. Connecticut has merely created an alternative funding system through the CEP. Minor party Plaintiffs who are not eligible for CEP funding are still free to raise private funds to run their respective campaigns. In fact, as discussed in *Buckley*, minor party candidates who do not qualify for, or do not choose to participate in, the CEP may very well *gain* advantages from the CEP: (1) unlike qualified major party candidates, such minor party candidates will be permitted to raise and spend an unlimited amount of funds; and (2) expenditure limits placed upon participating major party candidates may even improve the chances of a minor party candidate receiving funds as private money that would have flowed to a participating major party candidate may be directed instead to a nonparticipating minor party candidate. *See id.* at 99, 101. And what was recounted in *Buckley* is especially true in Connecticut—historically, important achievements of minority political groups have been accomplished through private financing, an option still available to Plaintiffs. *Id.* at 101-02.

Indeed, the CEP, even with its partial grants, has the potential to provide minor party candidates with far more money than they historically have been able to raise themselves. For example, if the CEP had been operative in 2004, then a 2006 Green Party candidate for Senate in the First District would have been eligible for a partial grant worth $28,333 based on Plaintiff DeRosa's electoral performance in 2004.[17] This is nearly fifty times more money than the $573

[17] A full grant for a candidate for state senator is $85,000. Conn. Gen. Stat. § 9-705(e)(2). A candidate receiving between 10% and 15% of the vote, such as Mr. DeRosa's 11.36% of the vote, would be eligible to receive a 1/3 of $85,000, or $28,333. Conn. Gen. Stat. § 9-705(g)(1).

that Mr. DeRosa raised for his 2004 Senate run.[18] Moreover, participating minor party candidates who do not receive a full grant can make up the disparity by raising private funds, and are eligible for increased funding post-election if they make a strong showing. Accordingly, as explained in *Buckley*, the CEP enhances speech, offering minor party candidates a potential megaphone through which they can amplify their messages to the voters. Plaintiffs suffer no constitutional injury just because that megaphone may be different than the one offered to major party candidates.[19] Because, under *Buckley*, Connecticut's qualification requirements are well within the range of constitutional choices that the Legislature could make to protect the public fisc while enabling democratic elections, Count I should be dismissed for failure to state a claim.

2. Plaintiffs Lack Standing to Challenge the Qualifying Criteria for Petitioning Candidates and Public Funding for Primaries.

Plaintiffs challenge the qualifying criteria for petitioning candidates. None of the Plaintiffs, however, claims that he is, has been, or will ever be a petitioning candidate. A plaintiff must satisfy two types of standing to sue in federal court: Article III standing and prudential standing. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004). To satisfy Article III standing, Plaintiffs must demonstrate (1) an "injury in fact," which is an invasion of a

[18] *See* DeRosa for Senate '04, "Statement of Receipts and Expenditures," Apr. 23, 2005 available at http://12.178.75.75/sots/filings/2005/7/2005_2652.pdf.

[19] While Plaintiffs generally assert that they are "disadvantaged" by the organization expenditure provisions of the Law, Conn. Gen. Stat. § 9-601(25)(A)(formerly § 9-333a(25)(A)), their constitutional challenges are limited to specific statutory provisions, which do not include the organization expenditure provisions. (*See* Am. Complaint ¶¶ 53-57 and Request for Relief.) Even if they did challenge those provisions, however, Plaintiffs' contention that "the public financing system places minor and petitioning party candidates in a worse position than that they are in under the current system," because the organization expenditure provisions in the Law permit substantial or unlimited organization expenditures for participating candidates but prohibit organization expenditures on behalf of nonparticipating candidates (Am. Compl. ¶ 31), is based on a misreading of the Law. This alleged prohibition appears nowhere in the Law. Indeed, while Conn. Gen. Stat. § 9-718 limits the amount of organization expenditures participating candidates for the legislature may benefit from, all other candidates, including nonparticipating minor party candidates, can benefit from an *unlimited* amount of organization expenditures.

judicially cognizable interest which is concrete and particular, not hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) redressability, meaning the likelihood, as opposed to mere speculation, that a favorable decision will cure the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *United States v. Vazquez*, 145 F.3d 74, 80 (2d Cir. 1998). Plaintiffs bear the burden to plead and prove each of these elements. *Lujan*, 504 at 561. Under the prudential standing doctrine, Plaintiffs' injury must also: (1) fall within the "zone of interests" protected by the statute under which the plaintiffs claim arises, (2) involve the party personally, and (3) not amount to a "generalized grievance." *Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 194-95 (2d Cir. 2001) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (internal citations omitted). These standing requirements serve the same fundamental policies: avoiding adjudication of unnecessary, premature, or hypothetical issues; and ensuring sharp presentation of the issues. *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 955 & n.5 (1984); *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968).

A party may move to dismiss for lack of subject matter jurisdiction at any time during the course of an action. Fed. R. Civ. P. 12(b)(1); Fed. R. Civ. P. 12(h)(3); *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.*, 588 F.2d 24, 27 (2d Cir. 1978). Generally, litigants cannot waive subject matter jurisdiction by express consent, conduct, or estoppel. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); 13 Wright & Miller, Federal Practice and Procedure § 3522, at 66-67.

Accordingly, because they can suffer no personal injury from those provisions that apply to petitioning candidates, Plaintiffs do not have standing to make such challenges. Therefore, Proposed Intervenors-Defendants and Defendants move that this portion of Count I be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Even if they did have standing,

however, such challenges would fail to state a claim for reasons similar to those discussed *supra* in Argument Section I.B.1 regarding minor party candidates.

Plaintiffs also challenge the distribution of funds for primary elections to only major party candidates (Am. Compl. ¶ 32,) despite the absence of primary elections for any of the Plaintiffs. *See* Conn. Gen. Stat. §§ 9-451, 9-452 (requiring minor parties to nominate their candidates rather than elect them in a primary); Bylaws of the Libertarian Party of Connecticut, *available at* http://www.lpct.org/pr/BylawsOfTheLibertarianPartyOfConnecticut.pdf (indicating that Plaintiff Libertarian Party nominates its candidates); Green Party of Connecticut Bylaws, *available at* http://www.ctgreens.org/bylaws.shtml (indicating that Plaintiff Green Party nominates its candidates). Accordingly, because they can suffer no personal injury from those provisions, Plaintiffs do not have standing to make such challenges. Therefore, Proposed Intervenors-Defendants and Defendants move that this portion of Count I also be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Even if they did have standing, however, they would fail to state a claim. *See American Party of Texas v. White*, 415 U.S. 767, 791-94 (1974) (rejecting equal protection challenge to a Texas law providing public financing for primary elections to major, but not minor, parties, stating that "we cannot agree that the State, simply because it defrays the expenses of party primary elections, must also finance the efforts of every nascent political group").

II. Plaintiffs' Claims Against the CEP's Matching Funds Provisions Should Be Dismissed For Failure to Allege a Cognizable Constitutional Injury.

In Counts II and III, Plaintiffs challenge the constitutionality of the CEP's matching funds provisions, Conn. Gen. Stat. §§ 9-713 and 9-714, based on alleged effects of those provisions on nonparticipating candidates and their supporters. (*See* Am. Compl. ¶¶ 54, 55.)

The matching funds provisions, which are triggered by opposition spending, help to ensure that participating candidates -- who are otherwise constrained by a spending limit -- are not grossly outspent by their privately funded opposition. Specifically, opposing nonparticipating candidate spending (or obligations to spend) over the spending limit triggers "additional moneys" to be distributed to participating candidate. Conn. Gen. Stat. § 9-713. The CEP also provides participating candidates with additional moneys under certain circumstances to respond to independent expenditures that aim to defeat the participating candidate. *Id*. § 9-714. Plaintiffs' challenges based upon the alleged effects of those provisions on nonparticipating candidates and their supporters should be dismissed as a matter of law.

A. The CEP's Matching Funds Provisions Do Not Violate the Rights of Nonparticipating Candidates.

Courts considering the validity of public election financing systems have uniformly rejected challenges to triggers based on spending by nonparticipating candidates. *See Daggett*, 205 F.3d at 464; *Rosenstiel*, 101 F.3d at 1553; *Gable v. Patton*, 142 F.3d 940, 947-49 (6th Cir.1998); *Jackson v. Leake*, Order at 20-22. In *Gable*, the Sixth Circuit noted that providing public matching funds to participating candidates who faced high levels of spending by nonparticipating candidates was necessary to "assuage the wholly legitimate fears of participating [candidates] that they will be vastly outspent due to their agreement to accept spending limits." 142 F.3d at 947. In *Rosenstiel*, the Eighth Circuit also upheld a trigger provision based on nonparticipating candidate spending against a First Amendment challenge, recognizing that such triggers "avert a powerful disincentive for participation in [the state's] public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit." *Rosenstiel*, 101 F.3d at 1551; *see id.* at 1552 (noting that

Minnesota's public financing program, "promotes, rather than detracts from, cherished First Amendment values"). *Daggett* embraced the reasoning of these cases in upholding Maine's trigger for matching funds based on nonparticipating candidate spending. *See Daggett*, 205 F.3d at 468-70.

Plaintiffs' argument that distributing matching funds to participating candidates violates the First Amendment rights of nonparticipating candidates because it is triggered by spending by nonparticipating candidates or their supporters is unconvincing and has been consistently rejected by the courts. Plaintiffs argue that ensuring that the voices of participating candidates are not drowned out by wealthy candidates and independent spenders amounts to "penalizing" nonparticipating candidates and restricting their speech. (*See, e.g.*, Am. Compl. ¶¶ 4, 35-40.) Plaintiffs do not and cannot claim, however, that the CEP limits what they can spend in any way. Neither nonparticipating candidates nor independent spenders are subject to any expenditure limitations whatsoever.[20]

Plaintiffs' allegation itself demonstrates that if the Plaintiff candidates are reluctant to spend money in their campaigns, then that reticence would stem not from the operation of the CEP but from their own states of mind -- their desire not to spend money when others can also do so. *Cf. McConnell*, 540 U.S. at 228 ("Their alleged inability to compete stems not from the operation of § 307, but from their own personal 'wish' not to solicit or accept large contributions,

[20] Plaintiffs also complain that the CEP forces an unconstitutional choice on nonparticipating candidates of "either curtailing their own speech or effectively subsidizing their participating opponents' speech." (Am. Compl. ¶ 35.) No part of the CEP, however, requires Plaintiffs to pay for matching funds for their opponents. The CEP, including the distribution of matching funds, is funded by unclaimed property and voluntary contributions. Conn. Gen. Stat. §§ 3-62h, 3-69a, 9-750, 9-751. Even if it were funded through general appropriations based on taxpayer money, however, Plaintiffs' claim would fail. *See Buckley*, 424 U.S. at 92 (rejecting argument that appropriation from general revenue would inflict constitutional violation on taxpayers).

i.e., their personal choice."). Moreover, as recognized by various courts, Plaintiffs cannot state a claim even if their reluctance to spend when others can respond could be traced indirectly to the CEP.

In rejecting a similar argument in a challenge to matching funds based on independent expenditures in Maine's Clean Election Act, the Court of Appeals for the First Circuit stated that the complaint about Maine's triggers "boil[ed] down to a claim of a First Amendment right to outraise and outspend an opponent." *Daggett*, 205 F.3d at 464. The court explained:

> Appellants misconstrue the meaning of the First Amendment's protection of their speech. They have no right to speak free from response—the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources. The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures.

Id. (internal quotations and citations omitted);[21] *see also Brewer*, 363 F. Supp. 2d at 1201-03 (granting motion to dismiss challenge to Arizona's public financing program and expressly adopting *Daggett*'s reasoning in holding that trigger mechanisms and matching funds provisions are constitutionally permissible); *Jackson v. Leake*, Order at 20-22 (finding *Daggett*'s reasoning regarding matching funds persuasive).

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[21] This reasoning echoed a similar analysis by the district court in *Daggett*. With respect to those attacking matching funds, the district court said:

> Their view of free speech is that there is no point in speaking if your opponent gets to be heard as well. The question is not whose message is more persuasive, but whose message will be heard. The general premise of the First Amendment . . . on the other hand, is that it preserves and fosters a marketplace of ideas. . . . In that view of the world, more speech is better. . . . This "marketplace of ideas" metaphor does not recognize a disincentive to speak in the first place merely because some other person may speak as well.

Daggett, 74 F. Supp. 2d 53, 58 (D. Me. 1999) (citation omitted), *aff'd*, 205 F.3d 445.

Plaintiffs make precisely the same argument that the courts in *Daggett, Brewer* and *Jackson* resoundingly rejected. Although they tiptoe around the argument, at bottom, Plaintiffs argue that they prefer not to speak at all, if in doing so they must engage their opponents on the merits, rather than with the sheer power to outspend them. In Plaintiffs' view, more speech is not better -- rather, they want only their speech to reach the voters. In essence, Plaintiffs attempt to argue that Connecticut may not choose to use its own resources to improve the quality of public discourse; rather, Plaintiffs claim a right to monopolize the marketplace of ideas. These arguments have no validity under the First Amendment. Allegations so incompatible with First Amendment values cannot state a constitutional claim.[22]

Plaintiffs make two arguments that are even more untenable regarding how the matching funds provisions allegedly violate the constitutional rights of nonparticipating candidates. They argue that those provisions are unfair and give a financial advantage to participating candidates and that these provisions amount to an incumbent protection device because they: (1) provide matching funds in greater amounts than have been spent by nonparticipating candidates; and, (2) do not distribute matching funds to nonparticipating candidates when independent spending is made in support of participating candidates. (Am. Compl. ¶¶ 35, 37, 39-40.) These arguments fail for several reasons, most notably Plaintiffs' misunderstanding of how the CEP's matching funds provisions operate.

[22] Plaintiffs also argue that distributing matching funds based on the speech of independent spenders inflicts a constitutional harm upon nonparticipating candidates (Am. Compl. ¶¶ 4, 40), but this argument is utterly without merit. A nonparticipating candidate does not have a constitutional right to independent spending on her behalf, and cannot claim a constitutional harm arising from whether or how significantly an independent spender supports her. The CEP does not restrict the spending of anyone besides participating candidates; independent spenders are free to spend as much as they would like supporting or opposing any candidate in any race.

Contrary to Plaintiffs' mischaracterization of the matching funds provision, there are no unfair advantages created by the CEP for participating candidates. For example, Plaintiffs claim that "[w]henever the non-participating candidate comes within ten percent (10%) of the amount allocated the participating candidate, the state widens the funding gap back to thirty-five (35%) of the original grant." (Am. Compl. ¶ 35). This is simply a misreading of the Law. Whenever a nonparticipating candidate comes within ten percent of the amount allocated to the participating candidate, it triggers an additional 25% of the grant to be placed into *escrow*, not to be spent by the candidate. Conn. Gen. Stat. § 9-713(a)-(d). This 25% grant is not released out of the escrow account to the participating candidate until the nonparticipating candidate actually spends over 100% of the original grant. Moreover, once the 25% grant is released from escrow, the participating candidate can only spend an amount equivalent to the nonparticipant's spending in excess of the original grant amount. In other words, if the nonparticipating candidate spends 101% of the original grant, this spending triggers a release of a 25% grant from escrow to the participating candidate, but the participating candidate may spend only 1%—not 25%—more. The CEP was carefully crafted to prevent the type of problems that Plaintiffs protest.[23]

Moreover, there is no basis for Plaintiffs' assumptions (Am. Compl. ¶ 37) that participating candidates will necessarily be incumbents and that the matching funds will guarantee them a financial edge. Both incumbents and challengers have the option of

[23] Nor does it follow that if matching funds were triggered by spending less than the participating candidate's expenditure limit, or distributed on something other than a 1-to-1 basis, that the CEP would be unconstitutional. For example, in *Rosenstiel*, the Eighth Circuit upheld triggers by nonparticipating spending at 20 and 50 percent of the expenditure limit. 101 F.3d at 1547, 1551 (upholding triggers even though program's benefit-restriction ratio is not in "perfect equipoise"). And in *Gable*, the Sixth Circuit upheld a Kentucky statute under which, once a trigger was reached, participating candidates could raise unlimited private contributions and receive a two-for-one public grant match for them. *See* 142 F.3d at 947-49.

participating as CEP candidates. In addition, participating candidates agree to limited matching funds, restrictions on private fundraising, and expenditure ceilings. A nonparticipating candidate, whether an incumbent or challenger, is free to raise and spend money far in excess of the matching funds and expenditure limits, giving him a financial advantage over an opposing participating candidate. Whether an eligible candidate would be "better off" participating or not participating in the CEP often cannot be known. As the *Daggett* court explained:

> [The public financing program] does not provide an unlimited release of the expenditure ceiling--it allocates matching funds for the participating candidate of only two times the initial disbursement. Thus, a non-participating candidate retains the ability to outraise and outspend her participating opponent with abandon after that limit is reached. Further, the non-participating candidate holds the key as to how much and at what time the participant receives matching funds.

Daggett, 205 F.3d at 468; *see also Rosenstiel*, 101 F.3d at 1551 & n.6 (amendment that instituted lifting of expenditure limits when nonparticipating spending reached a trigger amount benefited nonparticipating candidates because it gave them control over possibility and timing of lift). Plaintiffs may not like the structure of how and when matching funds are distributed, but such dislike does not necessarily translate into a financial benefit to participating candidates, nor a constitutional violation to nonparticipating candidates. Because the matching funds provisions do not infringe upon Plaintiffs' constitutional rights, but rather enhance the public discourse during elections, Plaintiffs fail to state a claim in Counts II and III as to nonparticipating candidates.

B. Plaintiffs' Challenge to the Alleged Effect of the Matching Funds Provisions on Independent Spenders Should Be Dismissed.

Plaintiffs also argue in Counts II and III that the CEP's matching funds provisions violate the First Amendment rights of the supporters of nonparticipating candidates. (Am. Compl. ¶¶

38-39, 54-55.) Plaintiffs argue that the CEP "deters independent expenditures in support of political candidates." (*Id*. ¶ 38.)

1. Plaintiffs Lack Standing to Make Such a Challenge.

Plaintiffs challenge the alleged effects of the matching provisions on independent supporters of nonparticipating candidates, even though none of the seven Plaintiffs alleges either that he or she has made an independent expenditure in the past or that he or she plans to make an independent expenditure in the future. (Am. Compl. ¶¶ 10-17.) Because Plaintiffs can suffer no personal injury from those provisions, and therefore lack both Article III and prudential standing to make that challenge, *see supra* Argument Section I.B.2, those aspects of Counts II and III should be dismissed. Therefore, Proposed Intervenors-Defendants and Defendants move that these portions of Counts II and III be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).

2. Providing Matching Funds Based on Independent Spending Does Not Violate Those Spenders' Constitutional Rights.

Even if Plaintiffs had standing to challenge the alleged effects of the matching funds provisions on independent spenders, that challenge fails to state a claim for the same reasons it fails with respect to nonparticipating candidates. First, Plaintiffs mischaracterize the relevant matching funds provisions. Second, matching funds based on independent spending, like those based on nonparticipating candidate spending, enhance, rather than hinder, speech. *See* Argument Part II.A, *supra*.

Plaintiffs again inaccurately state how the matching funds provisions work with respect to independent expenditures. Plaintiffs allege that "[w]henever an independent expenditure is made with the intent to defeat a candidate who is participating in the public financing system, the

participating candidate receives an additional grant equal to the amount of the independent expenditure." (Am. Compl. ¶ 38.) This is untrue. First, independent matching funds become available to the participating candidate only once the amount spent by the independent spender, either combined with the amount spent by a nonparticipating candidate or independently, totals an amount larger than the original grant. Conn. Gen. Stat. § 9-714(c)(2).[24] Moreover, once the independent expenditure matching funds of Section 9-714 become available to the participating candidate, the match is dollar for dollar, capped at 100% of the original grant. Any and all independent spending that occurs after this cap is reached is not matched.

Courts have consistently held that the distribution of matching funds based on independent spending does not inflict a constitutional harm. *See Daggett*, 205 F.3d at 464 ("comfortably . . . conclud[ing] that the provision of matching funds based on independent expenditures does not create a burden on speakers' First Amendment rights"); *Brewer*, 363 F. Supp. 2d at 1201-03 (granting motion to dismiss challenge to trigger mechanisms and matching funds provisions based on independent spending); *see also Jackson v. Leake*, Order at 20-22 (denying plaintiffs' motion for preliminary injunction against challenged matching funds provisions based on independent spending).

Moreover, the Eighth Circuit's decision in *Rosenstiel* casts doubt on the continuing validity of its earlier decision in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), the only case that "equates responsive speech with an impairment to the initial speaker," *Daggett*, 205 F.3d at 465. Analyzing the impact of *Rosenstiel* on *Day*, the *Daggett* court noted:

[24] For example, therefore, when a nonparticipating candidate has only spent an amount of private funds equal to 50% of the original grant and an independent spender launches a massive media campaign against the participating candidate for a cost equal to 49% of the original grant, then the participating candidate gets zero dollars ($0) to respond to the independent spender because the total money spent against him is 99% of the original grant.

> Although *Day* involved independent expenditures while *Rosenstiel* regarded candidate expenditures, the logic of the two cases is somewhat inconsistent. In *Rosenstiel*, the fact that a candidate's expenditure triggered the release of his opponent's spending limitation did not burden his First Amendment rights; yet in *Day*, the fact that a non-candidate's spending triggered matching funds burdened the speaker's First Amendment rights. . . . [T]he continuing vitality of *Day* is open to question.

205 F.3d at 464 n.25 (rejecting *Day*'s reasoning); *see also Brewer*, 363 F. Supp. 2d at 1201-03 (rejecting *Day*'s reasoning and adopting reasoning of *Daggett*); *Jackson v. Leake*, Order at 20-22 (adopting *Daggett*'s reasoning). Because firmly established jurisprudence recognizes that public funding programs, and their trigger and matching funds provisions, promote First Amendment values, *see supra* Argument Part II.A., this Court should likewise reject *Day*'s superseded and discredited logic.[25]

Consistent with the First Circuit in *Daggett* and the district courts in *Brewer* and *Jackson*, this Court should find that the matching funds provisions are not unconstitutional burdens on speech, but are rather mechanisms through which the state of Connecticut furthers the functionality of the CEP, thus expanding the range and quality of campaign and political discourse. Consequently, Counts II and III should be dismissed in their entirety.

CONCLUSION

[25] Moreover, a law may not be found unconstitutional merely because it chills speech. Even if such chill is proven, the statute is nevertheless constitutional if the burden on speech is justified by a compelling state interest. *Day* did not invalidate Minnesota's trigger simply because it impaired speech; the trigger was held invalid only because the court found no interest sufficiently compelling to justify imposing that burden. Minnesota argued in *Day* that the matching funds provision was necessary to encourage participation in the state's public financing program. Because participation rates were nearly 100 percent even *before* enactment of the matching funds provisions, however, the Eighth Circuit found that argument unpersuasive. But when another trigger *was* shown to be an integral part of the state's public funding system, as it later was in *Rosenstiel*, the Eighth Circuit upheld those provisions under the First Amendment. *See Rosenstiel*, 101 F.3d at 1555 (concluding that public financing provisions did not burden First Amendment rights, but that even if they did, they survived strict scrutiny.) The CEP's triggers are an integral part of the system.

For all the reasons stated herein, this Court should grant Proposed Intervenors-Defendants' and Defendants' motion to dismiss Counts I, II and III of Plaintiffs' Amended Complaint for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction in part, and for judgment on the pleadings as to all three of these Counts.

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Respectfully submitted,

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CERTIFICATION

I hereby certify that on February 15, 2007, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

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