election day registration). Indeed, the Supreme Court this Term noted that "our approach remains faithful to *Anderson* and *Burdick*," and applied the "flexible standard" articulated in those decisions to uphold a voter identification requirement, concluding after careful assessment of the evidentiary record that plaintiffs had failed to establish an unconstitutional burden. *Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1616 & n.8 (2008). "[E]ven assuming that the burden may not be justified as to a few voters," the Court held, "that conclusion is by no means sufficient" to warrant invalidation of an election statute serving important government interests on a facial challenge. *Id.* at 1621.

There is no reason to believe that the flexible *Anderson-Burdick* standard should not also apply to the issues in this case arising from Connecticut's public financing scheme. Indeed, this conclusion follows *a fortiori* from the cases in the ballot-access and voting restrictions area, since a public-funding restriction "is far less burdensome upon and restrictive of constitutional rights than the regulations involved in the ballot-access cases." *Buckley v. Valeo*, 424 U.S. 1, 101 (1976). As the Supreme Court in *Buckley* pointed out, the denial of public funding "does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice." 424 U.S. at 94. In addition, as the *Buckley* Court explained, public funding enhances First Amendment values rather than restricting them:

> Although "Congress shall make no law . . . abridging the freedom of speech, or of the press," Subtitle H is a congressional effort, 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. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values.

Id. at 92-93. Thus, the Court explained, public-funding systems warrant greater judicial deference than ballot-access restrictions. *See id.* at 93-94.

B. Application of the *Anderson-Burdick* Test

1. The Character and Magnitude of the Alleged Injury

Under the *Anderson-Burdick* test, strict scrutiny is not appropriate unless the challenged law imposes a "severe" burden on the Plaintiffs' First Amendment rights. Before addressing whether the burden is "severe," however, the Court must first assess whether the challenged law imposes any "burden" at all on a fundamental right. While, as this Court noted, the Supreme Court "did not clearly delineate the boundaries of the right to political opportunity" under the First Amendment, *Green Party of Conn.*, 537 F. Supp. 2d at 375 n.18, *Buckley* did expressly reject any claim of a constitutionally protected right to "the *enhancement* of opportunity to communicate with the electorate" that may flow from public funding. *Buckley*, 424 U.S. at 95 (emphasis added). The Court also rejected the notion that different rules for major and minor parties worked an unconstitutional burden on any protected right to political opportunity. *Id.* at 97 ("[T]he Constitution does not require Congress to treat all declared candidates the same for public financing purposes."); *see also Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974) (upholding differential ballot-access and nomination-funding provisions against equal protection challenge by minor parties).

The *Buckley* Court articulated the test for establishing invidious discrimination in public funding: a "showing that the election funding plan disadvantages nonmajor parties *by operating to reduce their strength* below that attained without any public financing." *Buckley*, 424 U.S. at 98-99 (emphasis added); *see also Libertarian Party of Ind. v. Packard*, 741 F.2d 981, 991 (7th Cir. 1984) (citing this standard as factual test of whether public financing system invidiously discriminates against minor parties). In so formulating the test, the Court made clear that the right to political opportunity, like other First Amendment rights, is a right against governmental impingement rather than a guarantee of an equal playing field. Thus, the challenged funding

program here may be found to work an unconstitutional burden only if it is proved to *impede* minor parties' preexisting ability to exercise their First Amendment freedoms.

If such a burden is found, then the Court must consider the "magnitude of the asserted injury." *Anderson*, 460 U.S. at 789. Plaintiffs "have the initial burden of showing that [the challenged provisions] seriously restrict the availability of political opportunity." *Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 762-63 (9th Cir. 1994) (upholding ballot restriction for minor party candidates as "rationally related to a legitimate state interest" because plaintiffs failed to demonstrate severe burden). Courts have generally struck down election statutes only on a showing that they wreaked a "heavy" or "severe" burden on the exercise of a protected right. *See Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002) ("Courts will strike down state election laws as severe speech restrictions only when they significantly impair access to the ballot, stifle core political speech, or dictate electoral outcomes.").

In evaluating the extent of the burden, the court must consider the challenged statute in the context of the totality of the state's electoral scheme. *See Burdick*, 504 U.S. at 435-37 (evaluating Hawaii's prohibition of write-in voting in context of other provisions permitting easy access to ballot); *Schulz*, 44 F.3d at 56-57 (considering alleged burden imposed by challenged provision "in light of the state's overall election scheme," in upholding New York petition requirement against Libertarian Party challenge); *Green Party of N.Y.*, 389 F.3d at 419 ("Courts are required to consider [challenged electoral] restrictions within the totality of the state's overall plan of regulation."); *Lerman v. Board of Elections*, 232 F.3d 135, 145 (2d Cir. 2000) ("The burden imposed by the challenged regulation is not evaluated in isolation, but within the context of the state's overall scheme of election regulations.").

The Court must also consider whether there is an alternative means for the plaintiffs to vindicate the protected right – for instance, the freedom to fund protected political activity privately, rather than publicly. The Supreme Court in *Crawford* recently upheld an Indiana restriction on in-person voting, despite noting that it could impose a considerable burden on some individuals, in part because the "severity of that burden" was "mitigated by the fact that, if eligible, [these] voters . . . may cast provisional ballots." *Crawford*, 128 S. Ct. at 1621; *see also Burdick*, 504 U.S. at 436 n.5 (explaining that *Anderson* struck down an Ohio law barring late independent candidacies because Ohio provided no alternative access to presidential ballot after March); *see also Jenness v. Fortson*, 403 U.S. 431, 440-41 (1971) (rejecting challenge to differential ballot restrictions for minor party candidates, because differences constituted "alternative routes"); *cf. Williams v. Rhodes*, 393 U.S. 23, 24-26 (1968) (Ohio made "no provision" for independents to appear on ballot and made it "virtually impossible" for new parties to do so).

2. Any Showing of Burden Should Be Weighed Against the State's Important Interests

Even if an election restriction is shown to burden the exercise of a fundamental right, "'important regulatory interests are generally sufficient to justify' the restriction[]." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). Only if the burden is shown to be "severe" will the state be required to show a "compelling" interest in order to justify the regulation. *Id.* Whether or not the state's choice of policy is "the most effective," absent sufficient proof of an unduly great burden, a challenged restriction should be upheld so long as the state puts forth interests that are legitimate and important. *Crawford*, 128 S. Ct. at 1619. Nor does the Supreme Court "require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons*, 520 U.S. at 364.

3. A Burden on the Exercise of a Fundamental Right May Be Justified in Light of the State's Interests

Even if a burden on the exercise of a protected right has been shown, the court should consider "the extent to which the state's interests make it necessary to burden plaintiff's rights." *Green Party of N.Y.*, 389 F.3d at 419. If the challenged restriction is reasonable and even-handed, the state's "important regulatory interests are sufficient to justify the restrictions." *Id.* Prophylactic needs may justify a particular restriction. *See, e.g.*, *Crawford*, 128 S. Ct. at 1619 (upholding voter identification requirement because of "risk" of voter fraud); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986) ("We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access.").

If a severe burden has not been shown, then "the state is not limited . . . to the least restrictive methods" of achieving its objectives. *Rogers*, 468 F.3d at 195. Rather, a restriction imposing a limited burden should be upheld if justified by "valid neutral justifications" concerning important state interests. *Crawford*, 128 S. Ct. at 1624. Such valid neutral justifications should not be disregarded even if "partisan interests may have provided one motivation" for the law. *Id.*

C. Plaintiffs Bringing a Facial Challenge to an Election Statute Face a Heavy Burden

Plaintiffs principally bring a facial challenge to the CEP's eligibility, qualification, and funding formulae.[12] However, in this year's decisions in *Washington State Grange v. Washington State Republican Party*, 128 S. Ct 1184, 1190 n.6 (2008) and *Crawford*, 128 S. Ct.

[12] While Count One of Plaintiffs' Amended Complaint also alleges that Plaintiffs are challenging the statute as applied, *see* Complaint ¶ 53, they allege no facts which would support an "as applied" challenge. Moreover, since the statute is only now being implemented for the first time this election year, there is no basis for the Court to evaluate any alleged "as applied" challenge.

at 1621-22, the Supreme Court has made clear that on a facial challenge, plaintiffs bear the heavy burden of presenting real evidence of the burden imposed by a challenged law, and cannot rely on speculation, hypotheticals or isolated instances. In *Washington State Grange*, the Court rejected the plaintiffs' facial challenge because they had not demonstrated that the First Amendment injury they feared would necessarily come to pass. Similarly, in *Crawford*, the Court stressed a plaintiff's "heavy burden of persuasion" in seeking facial invalidation of an election statute, and reminded the lower courts of their obligation "to give appropriate weight to the magnitude of that burden." 128 S. Ct. at 1621-22. As we demonstrate below in great detail, the Plaintiffs here have not come close to satisfying that heavy burden of persuasion.

D. The Challenged Connecticut Statutes Serve Important, Indeed Compelling State Interests.

In undertaking the *Anderson-Burdick* analysis, it is important to start by recognizing that the challenged provisions of the CEP – principally, the eligibility requirements applicable to nonmajor-party candidates – serve very important, in fact, compelling state interests.

First, as the legislative history demonstrates, the General Assembly's primary goal in enacting the CEP was to avoid the threat and appearance of corruption. It is "well settled" that states have a compelling interest in maintaining a program for public financing of elections in order to prevent corruption and the appearance of corruption arising from the influence of private money on elected officials. *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996); *see Buckley*, 424 U.S. at 96 ("public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest"); *RNC v. FEC*, 487 F. Supp. 280, 284-85 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 995 (1980). The Connecticut legislature also sought to free candidates and elected officials from the burdens of political fundraising, so that they could devote more time to their duties and to their constituents.

Garfield Decl. I Ex. 28, at 43 (statement of Sen. Handley). It is equally "well settled" that the government's interest in reducing the time that politicians have to spend raising campaign contributions rather than engaging in dialogue on matters of public importance is also a compelling justification for public funding. *Rosenstiel*, 101 F.3d at 1553; *see also Buckley*, 424 U.S. at 90-91 ("public financing . . . [is] a means to reform the electoral process . . . to free candidates from the rigors of fundraising"); *RNC*, 487 F. Supp. at 284-85.

In establishing a voluntary public financing scheme, the State also has a compelling interest in setting the amounts of the grants provided to candidates high enough to give candidates the incentive to opt into the system and forego their opportunity to seek private contributions. *See Rosenstiel* at 1553 ("given the importance of these interests [in establishing an election finance system free of the appearance of corruption], the State has a compelling interest in stimulating candidate participation in its public financing scheme") (citing *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993); *Wilkinson v. Jones*, 876 F. Supp. 916, 928 (W.D. Ky. 1995)).

In designing the CEP as it did, the legislature also advanced the compelling interest of "protect[ing] the public fisc" by not squandering public monies to fund "hopeless candidacies." *Buckley,* 424 U.S. at 103; *see also Anderson v. Spear*, 356 F.3d 651, 676 (6th Cir. 2004) (upholding Kentucky's denial of public funding to write-in candidates, because states have a "significant" interest in "not funding hopeless candidacies with . . . public money"). In establishing a system of public financing, the state has no obligation to level the playing field by artificially fostering candidacies that have not proven themselves to be viable in the absence of public funding. "The Constitution does not require the Government to finance the efforts of every nascent political group, merely because Congress chose to finance the efforts of the major

parties." *Buckley*, 424 U.S. at 98 (citations, and footnotes omitted); *see RNC*, 487 F. Supp. at 287 ("To require that public funding equalize . . . differences [among candidates] would distort its purpose, which is to facilitate political communication by providing an alternative to private funding with its burdens and unhealthy influences.").

Similarly, in setting CEP qualification and eligibility thresholds at levels that would weed out candidates without significant public support, the Connecticut Legislature also sought to avoid "providing artificial incentives to splintered parties and unrestrained factionalism," which the Supreme Court in *Buckley* also recognized to be an "important public interest." *Buckley*, 424 U.S. at 96 (citations and quotation marks omitted); *see also Timmons*, 520 U.S. at 367 (recognizing state's interest in combating the "destabilizing effects of party-splintering and excessive factionalism."); *Munro*, 479 U.S. at 196 (State can properly condition access to general election ballot 'on a showing of a modicum of voter support[,] . . . to avoid the possibility of unrestrained factionalism"). The Court has long recognized the danger that an electoral scheme such as Connecticut's is vulnerable to manipulation, either by major party primary losers running as independent candidates or by "a party fielding an 'independent' candidate to capture and bleed off votes in the general election that might well go to another party." *Storer v. Brown*, 415 U.S. 735 (1974). In *Buckley*, the Court held that the avoidance of such dangers justifies differential funding for major parties – who have proven widespread public support and have a track record of viable candidacies – and nonmajor-party candidates; as the Court acknowledged, "[i]dentical treatment of all parties . . . would [ ] artificially foster the proliferation of splinter parties." *Buckley,* 424 U.S. at 98.

Indeed, the legislative history of the CEP makes clear that the Connecticut Legislature was specifically concerned with preventing this type of destabilizing manipulation. As noted

above, *see* Section A of the Statement of Facts, *supra*, a number of legislators, looking to the experience of other states, expressed concern that the major parties could abuse the public financing system by deploying or exploiting "splinter" minor party or independent candidates, without any real constituency or chance of winning, as "spoilers" intended merely to take votes away from the other major party. In setting the CEP thresholds, the Legislature attempted to prevent public funds from being abused in this way, and to ensure that the CEP did not provide artificial incentives to destabilizing conduct, by requiring recipients of public campaign funds to demonstrate substantial public support.

As discussed in Section IV, *infra*, the challenged provisions of the CEP are narrowly tailored to advance these important, indeed compelling, interests without unduly burdening the interests of nonmajor parties and candidates.

III. The CEP Does Not Unconstitutionally Burden the Political Opportunity of Nonmajor-Party Candidates.

A. The CEP Does Not Reduce the Political Strength of Nonmajor Parties Below the Levels Attained Prior to its Enactment.

Under *Anderson* and *Burdick*, there is no basis for applying strict scrutiny to Plaintiffs' constitutional claims unless they can show that the CEP imposes a "severe" burden on their political opportunity. However, not only have Plaintiffs failed to demonstrate any such "severe" burden, the record is devoid of evidence that would establish *any* burden at all on their political opportunity. In fact, the undisputed testimony and evidence show precisely the opposite – rather than being burdened, nonmajor parties and candidates can expect substantial, even transformative benefits from the CEP system.

In order to establish any constitutionally cognizable burden on their political opportunity, Plaintiffs must show "that the election funding plan disadvantages nonmajor parties by operating to reduce their strength below that attained without any public financing." *Buckley*, 424 U.S. at

98-99. Plaintiffs cannot come close to meeting this standard. The undisputed evidence establishes that minor party and petitioning candidates' political strength in Connecticut – whether measured by election returns, party identification, voter enrollment, fundraising, activism, name recognition, legislative influence, or any other conceivable measure – has never come close to the strength of the existing major parties'. There is no evidence that the relatively weak position of the nonmajor parties is the result of any discrimination against them, nor that the CEP will further weaken their political strength. As a three-judge panel in this district has observed:

> [A]ny dominant position enjoyed by the Democratic and Republican Parties is not the result of improper support, or discrimination in their favor, by the State. Rather, the two Parties enjoy this position because, over a period of time, they have been successful in attracting the bulk of the electorate, so that they now have substantial followings. . . . "Success" in this endeavor, such as the major parties have achieved, . . . does not necessarily call for strict constitutional scrutiny by the judiciary so as to increase the political strength of those who have not actively attempted to advance their political views.

Nader v. Schaffer, 417 F. Supp. 837, 843 (D. Conn. 1976) (three-judge court) (upholding Connecticut's closed primary system against First Amendment and equal protection challenge by unaffiliated voters); *see also Timmons*, 520 U.S. at 362 (states have no duty to remedy the "[m]any features of our political system – *e.g.*, single-member districts, 'first past the post' elections, and the high costs of campaigning – [that] make it difficult for third parties to succeed in American politics").

Plaintiffs have adduced no facts to show that the operation of CEP will have any adverse effect on the political opportunities of nonmajor parties will be caused by operation of the CEP provisions, rather than by the different resources, capabilities and public appeal that undisputedly and demonstrably explain their relative standing prior to the enactment of the CEP. Thus, given the undisputed fact that the existing political landscape in Connecticut is dominated by the

existing major parties, Plaintiffs have failed to demonstrate that the CEP will reduce nonmajor parties' political opportunity or tilt the playing field further in favor of major parties. As discussed in detail below, Plaintiffs are simply unable to establish (1) that the CEP in any way impinges upon Plaintiffs' existing avenues for political expression or activity; (2) that the fact that other candidates may qualify for CEP funding burdens Plaintiffs' First Amendment rights; or (3) that CEP funding acts as a subsidy, rather than a substitute, for major party private fundraising.

1. The CEP Does Not Impinge Upon the Existing Political Opportunity of Non-Participating Minor Party and Petitioning Candidates

First, Plaintiffs cannot point to any evidence that the grant of full CEP funding to major-party candidates would in any way impinge upon nonmajor-party candidates' existing abilities to exercise their First Amendment rights. Every avenue by which non-participating candidates have attempted to achieve their political strength remains unchanged under the CEP.

The undisputed testimony shows that minor parties in Connecticut have simply been playing for different stakes than major parties. Whereas major parties in elections for state office have run campaigns to win, minor parties have often fielded candidates even where they have had no realistic hope of winning a particular election. Instead, minor parties have aimed for the more modest nonelectoral goals of increasing public awareness of their platforms, electing candidates to municipal rather than state level offices, and/or attracting public support for future party building. Even being outspent by the major parties by an average ratio of 238 to one in senate races and 20 to one in house races, *see* Foster Decl. ¶¶ 23-24, nonmajor-party candidates have had some success in achieving their non-electoral goals. Plaintiffs have made no showing, however, that the CEP will in any way reduce their ability to reach these goals.

As the Supreme Court observed in *Buckley*:

> Plainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, and this avenue is still open to all candidates. And, after all, the important achievements of minority political groups in furthering the development of American democracy were accomplished without the help of public funds. Thus, the limited participation or nonparticipation of nonmajor parties or candidates in public funding does not unconstitutionally disadvantage them.

Buckley, 424 U.S. at 101-102 (footnote omitted). As long as a minor party "remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen," electoral regulations that may have an adverse impact on the party are neither unreasonable nor discriminatory. *Timmons*, 520 U.S. at 361 (rejecting lower court's assumption that fusion balloting ban would hinder minor parties' First and Fourteenth Amendment rights as "a predictive judgment which is by no means self-evident"). The mere fact that a public funding system does not alter a preexisting imbalance in nonmajor parties' favor, *Buckley*, 424 U.S. at 97-98, does not mean that it "protect[s] existing political parties from competition" or that it results in "the virtual exclusion of other political aspirants from the political arena," as long as nonmajor-party candidates remain free to compete "for campaign workers, voter support, and other campaign resources." *Anderson*, 460 U.S. at 801-02. There is no evidence in the record that the CEP will burden any of those freedoms. Nor will the CEP interfere with the ways in which nonmajor parties currently exercise their First Amendment rights in Connecticut: qualifying for ballot access, raising private funds, seeking publicity, and otherwise disseminating their political message.

Moreover, although the non-electoral goals of nonmajor party candidates may be laudable, the State is not constitutionally required to expend the funds it has allocated to the CEP for the purpose of reducing corruption among elected officials in order to advance the particular non-electoral goals of the nonmajor parties and their candidates. *See Rosenstiel*, 101 F.3d at 1556 ("[I]n every race for elected office one candidate possesses certain advantages over his

opponent, regardless of whether the campaigns are publicly or privately funded, and . . . it is inconsistent with the purposes underlying a public campaign financing program to attempt to eliminate this discrepancy.") (citation omitted). As a three-judge panel, subsequently affirmed by the Supreme Court, has reasoned:

> As long as it has a legitimate public purpose a public campaign funding law should not be required to remedy pre-existing inequalities between candidates, any more than the "equal time" requirement of the 1934 Communications Act, should be altered to remedy disparities between parties or candidates using public media.

RNC, 487 F. Supp. at 287 (citations omitted) (rejecting equal protection challenge by nonincumbents to Presidential Election Campaign Fund Act, where "there is no indication that inequalities would be less under private financing"). Although it may be true that the existing major parties have been able to speak with louder voices in the political marketplace, this "strength" of the major parties has not been attributable to public funding, and the CEP is not constitutionally obligated to level the playing field.

2. That Fact That Other Candidates May Qualify for Benefits Does Not Burden the First Amendment Rights of Non-Participating Candidates.

Even assuming *arguendo* that the CEP enables major party candidates to qualify for substantially more public funds than they would privately raise – and the figures demonstrate that this is not the case, *see* Foster Decl. ¶¶ 22-24 – Plaintiffs could still not thereby establish a burden on non-participating candidates' political opportunity. Benefits conferred on candidates who opt into a public funding system are "a premium earned by meeting statutory eligibility requirements rather than a penalty imposed on those who either cannot or will not satisfy the requirements." *Vote Choice*, 4 F.3d at 37-39 (upholding Rhode Island public financing system against challenge that grant amounts were so high as to be unconstitutionally coercive). Under well-established First Amendment principles, political opportunity is not a zero-sum game, such

that subsidizing one candidate "effectively reduc[es] the relative freedom of speech of a non-subsidized candidate." *Greenberg v. Bolger*, 497 F. Supp. 756, 775 (E.D.N.Y. 1980) (citations omitted); *see also Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983) (rejecting equal protection challenge to federal law subsidizing lobbying by only one category of speakers); *Buckley*, 424 U.S. at 93, n.127 ("Legislation to enhance . . . First Amendment values is the rule, not the exception. Our statute books are replete with laws providing [categorical] financial assistance to the exercise of free speech"; campaign speech is not a "scarce communication resource[]"). Plaintiffs fail to show how the provision of public funding grants to major-party candidates would in any way impede nonparticipants' freedom to raise funds for political purposes or otherwise impinge upon their First Amendment freedoms. *See Buckley*, 424 U.S. at 99 (upholding funding system treating major and minor party candidates differently in part because non-participants remained free privately to raise as much as participants received, even though "admittedly [achieving] those limits may be a largely academic matter" to nonmajor-party candidates); *see also Timmons*, 520 U.S. at 361 (upholding election provision against First Amendment challenge when minor party "remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen"). That other candidates might qualify for public grants while Plaintiffs might not suggests no impingement on any constitutionally protected opportunity.

3. CEP Funding Functions as a Substitute for Private Fundraising, Not as a Subsidy for the Major Parties.

In any event, the CEP acts as a substitute for private funding rather than as a subsidy for the existing major parties. Plaintiffs simply are unable to establish that minor and petitioning party candidates will be materially more outspent under the CEP than they were under the previous regime of private campaign funding. *See RNC*, 487 F. Supp. at 287 (rejecting equal

protection challenge to Presidential Election Campaign Fund Act where "there is no indication that inequalities would be less under private financing"); *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 467 (1st Cir. 2000) ("[a] law providing public funding for political campaigns is valid if it achieves 'a rough proportionality between the advantages available to complying candidates . . . and the restrictions that such candidates must accept to receive these advantages.'") (citation omitted).

The evidence shows that the CEP grants are do not materially exceed historical spending levels, in both competitive and non-competitive races.[13] Thus, it is simply not true that the amount of the CEP grants exceeds the amount of private fundraising that candidates have historically done in Connecticut. Moreover, as set forth in greater detail above, in previous races, minor and petitioning party candidates have consistently been outspent several hundredfold in statewide races, and by an average of 238 to one in Senate races and by 20 to one in House races. *See* Foster Decl. ¶¶ 22-24. The CEP does not materially change these ratios.

Plaintiffs argue that the expenditure limits on participating candidates are "meaningless" because of organization expenditures that may be made on behalf of participating candidates (Am. Compl. ¶ 28), but this argument is unavailing, because Plaintiffs have failed to establish how the possibility of such expenditures on behalf of participating candidates serves to reduce

[13] In 2004, the average major-party senate candidate facing major-party opposition spent over $80,000, Foster Decl. ¶ 23, and the CEP grant amounts for such candidates is $85,000. Major-party senate candidates who were unopposed spent an average of nearly $58,000, *id.*, and the CEP grant amounts for such candidates are $25,000. Major-party senate candidates who faced only nonmajor-party opposition spent an average of almost $40,000, *id.*, and the CEP grant amounts for candidates facing only nonmajor-party opponents whose expenditures are less than the qualifying contributions thresholds are $51,000. In the most highly contested senate races, average expenditures were in excess of $200,000. Garfield Decl. II Ex. 20, at 2.

In 2004, the average major-party state representative candidate facing major-party opposition spent nearly $20,000, Foster Decl. ¶ 24, and the CEP grant amounts for such candidates is $25,000. Major-party state representative candidates who were unopposed spent an average of $14,500, *id.*, and the CEP grant amounts for such candidates are $7500. Major-party state representative candidates who faced only nonmajor-party opposition spent an average of almost $17,500, *id.*, and the CEP grant amounts for candidates facing only nonmajor-party opponents whose expenditures are less than the qualifying contributions thresholds are $15,000. In the most highly contested state representative races, average expenditures were in excess of $58,000. Garfield Decl. II Ex. 20, at 2.

the opportunity of any nonmajor-party nonparticipant. First, such organization expenditures will remain freely available to nonmajor-party non-participants after implementation of the CEP, just as they were before. Any greater ability that major-party candidates have had in attracting organization expenditures does not result from the CEP, and the CEP is not constitutionally obligated to remedy it.

> Indeed, regardless of whether a campaign is publicly or privately funded, it is inevitable that some candidates will have advantages over others. To require that public funding equalize these differences would distort its purpose, which is to facilitate political communication by providing an alternative to private funding with its burdens and unhealthy influences.

RNC, 487 F. Supp. at 287. That Plaintiffs currently lack the political strength to make use of these potential sources of support does not mean that they can constitutionally require these sources to be taken away from viable candidates.

Second, it is simply inaccurate to equate organizational expenditures with direct contributions to a candidate's campaign. An organizational expenditure is one which is not under the control of the candidate's campaign. Moreover, as set forth in Section A of the Statement of Facts, *supra*, the CEP has already been amended to limit substantially the organizational expenditures that can be made on behalf of participating candidates, and to impose strict disclosure requirements on organizational expenditures.

Nor does the CEP's provision of possible matching grants erode the meaningfulness of the program's spending limits. First, as with organizational expenditures, these trigger funds should not be viewed an action by the participating candidate to "circumvent" the CEP's spending limits, since the triggering of these funds is outside of the candidate's control – only the acts of others *in opposition to* the candidate can trigger these grants. *See* Conn. Gen. Stat. §§ 9-713-9-714, 9-601(18)-(19). Moreover, plaintiffs can assert no harm from the operation of the trigger provisions because, it is not the trigger funds per se that make a particular election a

high stakes race, but instead the unilateral spending decisions of a *nonparticipating* candidate. Once a non-participating candidate independently chooses to spend campaign funds well in excess CEP spending limits (as Gov. Rowland did, spending over 6 million in his 2002 gubernatorial campaign), the election is already a high-dollar race, and any resulting injury to nonparticipating candidates – and we submit there is none – is not due to either the participating candidate or the operation of the CEP. Plaintiffs' submissions are devoid of any reasoning or evidence that would explain how providing participating candidates with sufficient funds to defend themselves against the expenditures could result in *more* of whatever unspecified harm Plaintiffs claim they will incur in high-dollar races. Moreover, the availability of trigger funds is capped at certain absolute limits, no matter how high the non-participant's or independent entity's expenditures, and the spending limits – even including maximum triggered grants – are in line with actual spending levels in the most contested races. *See* Garfield Decl. II Ex. 20, at 2. ("High" expenditure range for senate elections is over $200,000, while "High" expenditure range for house races is over $58,000).

4. The CEP Will Provide Substantial Political Benefits for Nonmajor-Party Candidates

As set forth in Section D of the Statement of Facts, *supra*, the CEP represents a revolution for nonmajor-party candidates who will, for the first time, have access to funds sufficient to allow them to run viable, competitive campaigns. *See* Youn Decl. Ex. 7 (Krayeske Dep. Ex. 5) (opining that CEP funds have transformative potential for Green Party candidates); *see also Rosenstiel*, 101 F.3d at 1557 ("Appellants fail to acknowledge the ways that the State's program actually operates to the benefit of [qualified] challengers, rather than to their detriment," by providing "a public subsidy" greater than the funds a relatively unknown candidate would be able to raise).

The grant of CEP funds has the potential to dramatically transform the prospects of nonmajor-party candidates. As Professor Green explains, the dismal electoral prospects for nonmajor-party candidates have led to an "inevitable downward spiral" in terms of public support – voters do not want to waste their money or votes on candidates with no chance of winning. D. Green. Decl. ¶ 5. However, the CEP has the potential to break that spiral by allowing candidates who demonstrate even low levels of public support – 10%, 15%, or 20% – sufficient funding to make them competitive, and therefore more attractive to voters. *Id.* ¶ 9. Moreover, for nonmajor parties, even small increases in funding can lead to significant benefits in their infrastructure and public visibility. *Id.* ¶ 11. Even at partial funding levels, then, grants of CEP funds may well transform nonmajor-party candidates in Connecticut from perpetual losers into viable competitors. For example, the Working Families Party has embraced the CEP as an integral part of its party-building strategy.

The availability of public funding to major-party candidates may also have unforeseen benefits for nonparticipating nonmajor-party candidates by freeing up sources of private funding. Once participating major party candidates are barred from accepting private contributions other than low-dollar qualifying contributions, non-participating candidates may benefit from the resulting fundraising vacuum. As the *Buckley* Court noted, "the elimination of private contributions to major-party Presidential candidates might make more private money available to minority candidates." *Buckley*, 424 U.S. at 96 n.128.

Thus, not only have Plaintiffs failed to establish how the CEP reduces the political opportunity of nonmajor-party candidates, but the evidence shows that there is a real possibility that nonmajor-party candidates' current eligibility for CEP funding shows that nonmajor-party candidates could well be better off as a result of the CEP's enactment.

5. Plaintiffs' Speculative Allegations of Harm Are Unavailing When Considered Against the Totality of Connecticut's Liberal Election Laws.

Plaintiffs' unsupported assertions of harm are particularly unavailing when considered against the totality of Connecticut's electoral system, which is unusually favorable to nonmajor parties and candidates. Plaintiffs' assertion that the CEP burdens their political opportunity should be evaluated – and rejected – in the context of the totality of Connecticut's electoral scheme. *See, e.g.*, *Schulz*, 44 F.3d at 56 (applying *Burdick*'s "totality approach" to uphold differential petitioning requirement); *Green Party of N.Y.*, 389 F.3d at 419 ("Courts are required to consider [challenged electoral] restrictions within the totality of the state's overall plan of regulation."); *Lerman*, 232 F.3d at 145 ("[t]he burden imposed by the challenged regulation is not evaluated in isolation, but within the context of the state's overall scheme of election regulations"); *Prestia*, 178 F.3d at 88 (same). To the extent that the CEP burdens plaintiffs' "political opportunity" at all, any such burdens are more than offset by other provisions of Connecticut election law that are conducive to broad political participation by minor party and petitioning candidates.

For instance, the ability of nonmajor-party candidates to access the ballot in the first place is relevant to considering whether a public-funding restriction somehow burdens their exercise of political opportunity. Connecticut's ballot restrictions – petition signatures from registered voters equal to one percent of prior votes cast for a given office, *see* Conn. Gen. Stat. § 9-453d (2008) – are far less onerous than requirements that have been approved by the Supreme Court. *See Storer*, 415 U.S. at 724 (five percent of total votes in prior election); *Jenness*, 403 U.S. 431 (five percent of eligible voters as of last election). Indeed, many other states impose much higher requirements. *See, e.g.*, Ga. Code Ann. § 21-2-170(b) (2007) (requiring five percent of eligible voters as of last election for given office); 10 Ill. Comp. Stat.

5/10-3 (2008) (requiring five percent of the number of votes cast in the last election for officers of the same district); N.C. Gen. Stat. § 163-122(a)(2) (2008) (requiring four percent of total number of registered voters in district). In Connecticut, a candidate for State Representative could petition onto the ballot this year with as few as 13 signatures, and a State Senate candidate with as few as 101. *See* Foster Decl. ¶ 18. The ease of meeting these requirements is enhanced by the very generous time frame of some seven months that Connecticut permits for signature-gathering. *See* Conn. Gen. Stat. §§ 9-453b, 9-453i; Garfield Decl. II Exh. 22; *cf. Storer*, 415 U.S. at 739 (requiring some 325,000 signatures in 24 days).

Further, Connecticut has very generous laws that guarantee a minor party a place on the ballot with the most minimal of electoral showings. A party attains official "minor party" status for a given office – and thereby becomes eligible to nominate a candidate for automatic placement on the ballot under its party name in the next election, rather than the candidate being required to gather petition signatures – if its candidate obtains just one percent of the vote for that office. *See* Conn. Gen. Stat. §§ 9-372(6), 9-379. Moreover, only major parties are required to hold primary elections, subject to certain exceptions, to allow voters to resolve competitions for their general-election nominations; nonmajor parties may select their nominees by their own, internal procedures, as long as those procedures have been filed with the state. *See id.* §§ 9-415, 9-451.

Connecticut is also one of very few states that permit the practice of cross-endorsement, also known as fusion balloting, under which a candidate may appear on the ballot as the nominee of multiple parties. *See* Conn. Gen. Stat. § 9-453t; *see also* Garfield Decl. II Ex. 21, at 1-2 (noting that at least 40 states ban fusion balloting). It has no constitutional obligation to do so. *See Timmons*, 520 U.S. at 369-70 (upholding Minnesota's fusion voting ban because it does not

"unconstitutionally burden [a minor party]'s First and Fourteenth Amendment rights"). The ability to cross-endorse or obtain cross-endorsement permits a minor party to draw on supporters of other parties to promote its issue positions or its candidates in an election. *See* D. Green Decl. ¶ 12. Through cross-endorsing major-party candidates in the 2006 election, the Working Families Party has attained eligibility for partial CEP funding for its own candidates in two districts in addition to the seven districts in which its own candidate achieved eligibility. *See* Foster Decl. ¶ 6.

6. The CEP Compares Favorably to Other Public Finance Systems When Viewed in Context

Although the constitutionality of Connecticut's electoral scheme, including the CEP, should stand or fall on its own merits, *see Rogers*, 468 F.3d at 197 (holding that different choice by other states is no basis for rejecting Pennsylvania's legitimate interests in different ballot-access requirement for minor-party candidates), to the extent that the experience of other public funding systems is instructive, the Court should take into account the totality of the election laws in other states. In the Court's opinion on the motion to dismiss, the Court noted that a number of other jurisdictions offer public financing programs for certain elections, and stated that aspects of the Connecticut system compared unfavorably to the other state systems. See *Green Party of Conn.*, 537 F. Supp. 2d at 381-90. However, whether each of these programs "is . . . [substantially] party-neutral; . . . has no prior success formula, and imposes no other qualifying criteria only on minor party candidates," *Green Party of Conn.*, 537 F. Supp. 2d at 389 – and is therefore materially more favorable to nonmajor-party candidates than the CEP – is not at all clear without examining the *entirety* of these states' election-law schemes.

For example, an examination of the totality of the presidential election public funding system, *see* Subtitle H, 26 U.S.C. §§ 9001 *et seq.* (2006) ("Subtitle H"), suggests that public

funding is more far more attainable by nonmajor-party candidates, at more generous levels, under the CEP than under Subtitle H.[14] First, Subtitle H makes candidates of parties failing to win at least five percent of the vote in the prior presidential election completely ineligible for funding in advance of an election, and provides no alternative route to pre-election funding. *See* 26 U.S.C. § 9004. By contrast, the CEP system provides alternative routes to eligibility via petition signature-gathering, so that any candidate, regardless of past performance, may potentially qualify for full public funding in a given election year. Moreover, the CEP allows minor parties to attain eligibility through cross-endorsement.

Further, Subtitle H's ballot-qualification prerequisite is steep. To be eligible for any funding under Subtitle H, including post-election funding, a candidate must appear on the ballot in at least ten states, *see Buckley*, 424 U.S. at 89 (citing 26 U.S.C. §§ 9002(2)(B) & 9004(a)(3)), a requirement that incorporates the considerable hurdle of achieving ballot qualification under the different laws of numerous states.

In addition, Subtitle H sets a higher threshold than the CEP for a candidate to receive full funding. Under Subtitle H, a candidate whose party received at least 25% of the popular vote for president, nationwide, in the previous election – an extraordinarily daunting task -- receives full funding; under the CEP, the prior-votes threshold for full funding is only 20%, and can be satisfied on a district-by-district basis.

Moreover the formula for partial funding is more generous under the CEP than under Subtitle H. For instance, partial general-election funding is available to eligible minor-party candidates under Subtitle H by a proportional formula which ties the percentage of funding to the percentage of the major-party vote that the minor-party received. *See* 26 U.S.C. § 9004(a)(2)(A).

[14] Specific descriptions of aspects of the CEP mentioned in this section may be found at pp. 6-10, *supra*.

In contrast, the CEP's partial grants are a more generous. For example, under Subtitle H, an eligible nonmajor-party candidate receiving 15% of the vote would receive only about 35% of the major-party grant, as opposed to 66% of the major-party grant under the CEP. Also, the CEP, unlike Subtitle H, provides participating candidates with limited matching funds, triggered by the spending of nonparticipating opponents or independent entities.

As another example, Arizona, which offers voluntary public funding, *see Green Party of Conn.*, 537 F. Supp. 2d at 383-85, imposes ballot restrictions for nonmajor-party candidacies that are much more stringent than Connecticut's relatively liberal standards. Arizona's electoral scheme requires a nonmajor-party candidate who wishes to participate in the public funding program to jump a series of interlinked hurdles, involving strict restrictions for qualified petition signatories, primary participation, ballot access, and party affiliation on the ballot.[15] In this light, access to the general election ballot for nonmajor-party candidates in Arizona is very difficult and complex, and few minor party candidates will be able to qualify, making the arguably more beneficial aspects of its public financing scheme irrelevant to most minor party candidates.

Moreover, as noted above, Connecticut is one of the few states that permit fusion voting, which provides greatly expanded opportunities for a minor party to achieve CEP qualification by cross-endorsing a candidate of one of the major parties, as the Working Families Party has

[15] Arizona permits only candidates nominated via a party primary to appear on the general-election ballot with a party affiliation; any other candidates in the general election are unaffiliated independents. For a party to be eligible to hold a primary election, it must win at least five percent of the prior gubernatorial vote, have a certain number of registered voters, or collect a certain number of petition signatures. *See* Ariz. Rev. Stat. Ann. §§ 16-801, -804 (2008). For any candidate to participate in a primary election, she must obtain petition signatures from a certain number of registered voters who are not registered in another party and who have not already signed as many petitions as there are open seats for the given office, *see id.* §§ 16-321, -322, -314, or at least 40 days before the primary file her decision to run as a write-in candidate, *see id.* § 16-312. Besides by winning a party primary, a candidate may participate in a general election only by collecting a number of petition signatures equal to three percent of voters from the relevant jurisdiction who are not affiliated with a primary-eligible political party and who did not sign a primary nominating petition for the given office. *See id.* § 16-341(C)-(F). Candidates who are registered members of primary-eligible parties or who have filed failing nominating petitions for a primary election for the given office may not petition onto the general election ballot. *See id.* § 16-341(A)-(B).

regularly done. In contrast, Arizona does not permit fusion balloting. *See* Ariz. Rev. Stat. Ann. §§ 16-467(C), 16-311(A).

B. The Legislature's Determination Not to Provide Public Funds to Hopeless Candidacies Does Not Burden the Political Opportunity of Nonmajor-party Candidates.

1. The CEP System Requires All Candidates To Demonstrate a Significant Modicum of Public Support Before Receiving Public Funds.

Plaintiffs have argued that the CEP's provisions discriminate against nonmajor-party candidates by imposing an "additional threshold," requiring nonmajor-party candidates seeking public funding to satisfy either the district level prior vote total or the signature requirements of the statute. (Am. Compl. ¶ 23). However, as set forth above, considering the "totality" of the provisions of the CEP, as required under *Burdick*, the CEP requires *all* candidates to demonstrate a threshold level of popular support, and allows that demonstration to be made in several different ways. If the candidates' party does not satisfy the criteria of having achieved the necessary showing of statewide support, the CEP allows the candidate to qualify for CEP funding in two other ways: either by virtue of the parties' vote percentage for the office at issue in the last election, or by gathering signatures. It is simply wrong to view either of these requirements as imposing an "additional threshold," for nonmajor parties; on the contrary, these provisions provide two *additional means* for nonmajor parties to demonstrate sufficient popular support to qualify for CEP funding:

For parties and candidates unable to demonstrate broad statewide public support, the provision of additional avenues to make such a showing confers a benefit on the nonmajor parties, not a constitutional burden. *See Larouche v. Kezer*, 990 F.2d 36, 38-39 (2d Cir. 1993) (criticizing district court for treating each method of ballot qualification separately, and failing to

recognize that the alternative routes provided by Connecticut law were valid, *a fortiori*, because they provided "an additional means of ballot access").

As a matter of settled law, Connecticut "may legitimately require 'some preliminary showing of a significant modicum of support,' as an eligibility requirement for public funds." *Buckley*, 424 U.S. at 96 (quoting *Jenness v. Fortson,* 403 U.S. 431, 4442 (1971) (citation omitted)). It is equally settled that the state can create different routs for major and nonmajor parties to demonstrate this quantum of public support. As the Supreme Court held in *American Party of Texas*:

> So long as the larger parties must demonstrate major support among the electorate at the last election, whereas the smaller parties need not, the latter, without being invidiously treated, may be required to establish their position in some other manner.

415 U.S. at 782-83; *see Libertarian Party of Wash.*, 31 F.3d at 766 (rational for state to presume substantial support for major-party candidate based on party's past performance while requiring individualized signatures-based showing of support of nonmajor-party candidates). The Supreme Court in *American Party of Texas* made clear that states may allow major parties to make such a showing of support based on prior vote totals, even when statewide prior vote totals are used as a proxy for a legislative candidate's support in a particular district. [16] There, the Court upheld a state election scheme under which state legislative candidates of parties whose gubernatorial candidate polled more than 200,000 votes in the last general election automatically qualified for the ballot and could be nominated by primary election only, whereas candidates whose parties fell short of that threshold were required to meet additional ballot qualifications

[16] All 50 states use statewide measures to define party status. Indeed, only two states allow political parties to define themselves as political parties within a state subdivision by relying on measures limited to that subdivision. 10 Ill. Comp. Stat. 5/7-2 (allowing political parties to become political parties on the level of the state, congressional district, county, or municipality); Ind. Code §3-5-2-30 (defining major parties, with respect to any political subdivision, as one of the two parties whose nominees received the highest or next highest number of votes in that political subdivision).

and could not be nominated by primary. Thus, under *American Party of Texas*, there is no invidious discrimination in exempting major-party *legislative* candidates from a requirement imposed upon minority parties and candidates because the major parties had previously demonstrated support on a statewide basis. *See Am. Party of Tex.*, 415 U.S. at 782-83; *see also Buckley*, 424 U.S. at 99-100. ("popular vote totals in the last election are a proper measure of public support" for the purposes of determining eligibility for public campaign funds).

The Supreme Court and other courts have consistently upheld differential treatment of candidates for both legislative and statewide office based on prior statewide vote totals, especially where, as here, alternative avenues for demonstrating public support are made available to nonmajor-party candidates. *See Am. Party of Tex.*, 415 U.S. at 782-83; *Jenness*, 403 U.S. at 439-41; *see also Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007) (upholding constitutionality of Alabama's ballot access law, which required parties receiving less than 20% of prior vote to petition for placement on ballot). Indeed, the availability of district-based eligibility criteria for nonmajor-party candidates permits candidates whose party did not meet the statewide thresholds provides a means for nonmajor parties to capitalize on any unusually great popular support at the local level. *Cf. Bang v. Chase*, 442 F. Supp. 758, 768 (D. Minn. 1977) (invalidating public funding distribution formula for legislative offices premised solely on parties' respective showings of statewide support, because formula failed to account for variations in local support).

The Supreme Court and lower courts have also upheld election regulations basing differential electoral treatment on a 20% threshold showing of popular support.[17] *See, e.g.*,

[17] Six states (including Connecticut) use a 20% threshold to define a political party or to qualify a designated political party for differential electoral treatment. *See* Ala. Code § 17-13-40 (defining political party as organization for which more than 20% of vote is cast at county at state levels), Connecticut (Conn. Gen. Stat. §9-372), Georgia (Ga. Code. Ann. §21-2-2(25)) (defining political party as any political organization whose candidate for governor or

Jenness, 403 U.S. at 439-40; *Swanson*, 490 F.3d at 902-05; *Gelman v. FEC*, 631 F.2d 939, 943 n.13 (D.C. Cir. 1980) (dismissing constitutional challenge to provision of Presidential Primary Matching Payment Account Act, requiring candidate to reestablish eligibility to receive primary matching funds by demonstrating that he received 20% of votes in post-termination primary election). In *Jenness*, the challenged ballot access regulation had set up a two-tiered system of nominating petition requirements that exempted both statewide and legislative candidates belonging to a "political party," defined as an organization whose candidates had received 20% or more of the vote at the most recent gubernatorial or presidential election. In upholding the regulation, the Court noted that the 20% definition for political party:

> in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life. Thus, any political body that wins as much as 20% support at an election becomes a "political party" with its attendant ballot position rights and primary election obligations, and any "political party" whose support at the polls 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.

Jenness, 403 U.S. at 439-40.

Like the statutory definitions considered in *Jenness* and *American Party of Texas*, Connecticut's statewide definition of major parties, rather than enshrining existing major party status, is predicated on the inherently fluid measure of public support, not on some fixed and invariable status. Current minor parties remain as free to become major parties under the CEP as they were before, and the existing major parties are just as likely to dwindle – Plaintiffs fail to

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president polled at least 20% of vote in preceding election), Kentucky (Ky. Rev. Stat. Ann. § 118.015(1)) (defining political party as an organization whose candidate received at least 20% of vote at last election in which presidential electors were selected), Mississippi (Miss. Code. Ann. § 23-15-301) (limiting funding of party primaries to parties who garnered 20% of the vote for governor or president in each of two previous elections for that office), and Ohio (Ohio Rev. Code Ann. § 3501.01(F)(1)) (defining major political party as a party whose candidate for governor or president received no less than 20% of vote cast); *see also Jenness*, 403 U.S. 431 (upholding Georgia's nominating petition requirement, holding that it did not violate Equal Protection clause to exempt parties who received 20% of prior vote from this requirement).

establish any facts suggesting otherwise. In fact, A Connecticut Party briefly enjoyed major-party status as a result of its gubernatorial success in 1990, only to revert to nonmajor-party status after the 1994 election. Thus, the fact that the CEP allows major party candidates to demonstrate popular support on a statewide basis cannot be the basis for Plaintiffs' claim of invidious discrimination.

When assessing the constitutionality of the CEP system, it is also important to bear in mind that, in addition to the showing of statewide public support required for major party status, candidates seeking a major-party nomination face both *de jure* and *de facto* hurdles that their nonmajor party counterparts need not surmount. Becoming a major party nominee is by no means a cakewalk, and Plaintiffs cannot establish that it is more difficult to fulfill CEP eligibility requirements than to attain a major party nomination for state elected office. *See Jenness*, 403 U.S. at 440 (rejecting as "a premise that cannot be uncritically accepted" that "it is inherently more burdensome" to collect petition signatures than to win a major party's nomination). First, unlike nonmajor-party candidates, major-party candidates are required to be nominated by primary unless no other candidate receives 15% of the votes of party delegates voting in this endorsement and no other candidate collects sufficient petition signatures for a primary. *See* Conn. Gen. Stat. §§ 9-415, 9-416. Accordingly, in order to gain the nomination, major-party candidates must have demonstrated substantial support from their existing party. Moreover, as the testimony of George Jepsen and George Krivda establishes, both existing major parties have informal vetting processes designed to weed out mediocre or non-serious candidates. *See* Jepsen Decl. ¶ 23; Krivda Aff. ¶¶ 7, 14. Plaintiffs' own testimony highlights the vast difference between major-party and nonmajor-party nominees – it is impossible to imagine a major party in Connecticut nominating and endorsing candidates for statewide office who were legally

ineligible to hold the office sought, as Plaintiffs have done. Sevigny Aff. ¶ 35; Youn Decl. Ex. 18 (Thornton Dep.) at 104:8-19; Youn Decl. Ex. 1 (DeRosa Dep.) at 44:10- 45:4.

Finally, there is strong factual support for the Connecticut legislature' decision to use statewide measures of popular support for the party as a proxy for a candidate's support on a district level, and not to require major party candidates to satisfy the district vote or petition signature requirements. The facts show that statewide popular support for major parties has consistently translated into high showings on a district-by-district level for major party candidates. *See Libertarian Party of Wash.*, 31 F.3d at 766 (deeming it rational for state to presume substantial support for a major-party candidate based on her party's past statewide performance). Major party candidates have almost always passed the prior-vote total thresholds required for CEP funding: In 2004, no major-party senate candidate received less than 20% of the vote; all but eight of the 180 major-party state representative candidates (or 95.6%) facing major-party opposition achieved more than 20% of the vote, and all but one (or 99.4%) received more than 10% of the vote. Foster Decl. ¶ 10. Conversely, the failure to attain these statewide measures of popular support has proven to be an equally robust predictor of district-level failure in legislative races: In that same year only one out of 24 nonmajor-party senate candidates received more than 10% of the vote, and none received more than 20%; only one of the 67 nonmajor-party state representative candidates received more than 20% of the vote, and only seven received more than 10%. *Id.* ¶ 11. Accordingly, there was good reason for the state not to require a further district-level showing of public support for major party candidates in awarding CEP funds – such a requirement would be in the overwhelming majority of cases gratuitous and would needlessly burden taxpayers and the state with additional administrative costs.

2. There is No Basis For Plaintiffs' Claims that the CEP Eligibility and Qualification Requirements Are Impossible or Overly Difficult to Meet.

Plaintiffs allege, in essence, that the Connecticut legislature intentionally set the bar too high, by setting the CEP eligibility thresholds at allegedly "unattainable" 10%, 15%, and 20% levels, in order to "ensure that such candidates will not be able to participate in the public financing system" (Am. Compl. ¶ 27). In denying the motion to dismiss, the Court necessarily accepted these allegations as true, *Green Party of Conn.*, 537 F. Supp. at 377, but the record now establishes that there is no evidence to support Plaintiffs' claims. On the contrary, analysis of the legislative history and the undisputed historical facts demonstrates that precisely the opposite is the case – nonmajor-party candidates have historically surpassed these thresholds and continue to do so under the CEP system. Rather than categorically exclude minor parties from qualification under the CEP, the Connecticut legislature provided two realistically achievable ways for nonmajor-party candidates to become eligible for public funding.

As set forth in Section A of the Statement of Facts, *supra*, when assessing the attainability of the CEP eligibility threshold in 2006, the Legislature specifically considered data showing that 22 out of 168 minor party and petitioning legislative candidates in the previous three election cycles had received more than 10% of the vote and would have been automatically eligible for full or partial CEP funding, had the CEP been in place at the time. *See* Garfield Decl. II Ex. 18. Indeed, four of these 22 candidates had received over 20% of the vote and would have been eligible for a full CEP grant; six others received over 15% of the vote, and would have been eligible for a two-thirds grant. *Id.* With respect to the gubernatorial thresholds, if the CEP had been in force at the time, Lowell Weicker – the only successful third-party gubernatorial candidate in Connecticut's history – would automatically have made A Connecticut Party candidates eligible for full CEP funding in all statewide and legislative races

in the next election. *See* D. Green Decl. ¶ 14. Accordingly, the Legislature was fully aware that minor and petitioning candidates could and would be eligible for CEP funds.

With respect to the prior district-level vote totals, more nonmajor-party candidates passed the 10% threshold in 2006 than had done so previously. As a result, based on 2006 election results, nonmajor-party candidates are already eligible for full or partial CEP funding in 14 legislative district races in Connecticut (subject to the requirement for collecting qualifying contributions which both major- and minor-party candidates must satisfy). Foster Decl. ¶ 19. Even partial CEP funding opens up transformative political possibilities for nonmajor-party candidates by allowing them to access unprecedented levels of funding.

With respect to the petitioning thresholds, the evidence demonstrates that these requirements are readily achievable by viable minor-party and petitioning candidates who have any realistic shot at winning an election. On the legislative level, CEP funding can be achieved, on average, by gathering only a few hundred signatures per house district (to qualify for up to $25,000), or a few thousand signatures per senate district (to qualify for up to $85,000). As the testimony of Defendants' petitioning expert Harold Hubschman establishes, this level of signatures can be easily accomplished by any serious candidate, by her own effort, through use of volunteers, or by using paid solicitors. Indeed, given Connecticut's seven-month petitioning period, a viable and committed candidate should be able to achieve these thresholds on her own simply by petitioning on weekends. Hubschman Decl. ¶¶ 8-9. Moreover, with the availability of substantial public funds as a reward, the use of paid solicitors is economically profitable. With this effort-to-reward ratio, it is no wonder that Green Party petitioning coordinator Krayeske privately opined that the CEP is "too good a prize to pass up." Youn Decl. Ex. 10 (Krayeske Dep. Ex. 8.)

At least one Working Families Party house candidate has gathered sufficient signatures to make her eligible for partial CEP funding and expects to qualify for full CEP funding. J. Green Aff. ¶¶ 22-23. Given that the Working Families Party has developed a petitioning strategy for additional candidates, we can expect more such success stories prior to the qualification deadline of October 10.

In this light, the fact that Plaintiffs profess themselves absolutely unable to meet these thresholds is irrelevant to any constitutional claim. There is no question that the signature thresholds are easily achievable by any serious candidate with minimal commitment and organizing ability, and Plaintiffs inability to reach these thresholds, even if true, proves only the hopelessness of their candidacies rather than the unattainable levels of their thresholds.

Moreover, the process of gathering signatures is not merely a wasted effort necessary to overcome a bureaucratic hurdle. On the contrary, the canvassing and voter contact involved in a petitioning drive are integral to any successful minor party campaign and necessary to establish public support, especially for a candidate whose party and qualifications are relatively unknown. Youn Decl. Ex. 22 (Weicker Dep.) at 16:23-17:2; J. Green Aff. ¶ 21; Hubschman Decl. ¶ 15. Moreover, the CEP incentivizes the petitioning effort by providing levels of funding that – even at partial grant levels – dwarf previous levels of minor and petitioning party fundraising. J. Green. Aff. ¶ 16; *see* Foster Decl. ¶¶ 22-24.

On the gubernatorial and statewide level, the petitioning totals are proportionately higher, as one would expect. These thresholds are nevertheless reasonable and attainable for anyone who purports to be a serious candidate for statewide office, especially, considering the millions of dollars in public funding at stake and the popular support and organization needed to mount a viable bid to govern a state of more than 2,044,511 registered voters. Connecticut Secretary of

the State, "2007 Registration and Enrollment Statistics," *available at* http://www.ct.gov/sots/lib/sots/2007_Registration_and_Enrollment_Statistics.pdf. In 2008, a gubernatorial candidate would have to gather approximately 110,000 signatures statewide to qualify for a partial grant of $1 million, and 224,693 signatures to qualify the full CEP grant of $3 million. *See* Foster Decl. ¶ 18. As Hubschman's testimony establishes, these petitioning thresholds are achievable by a candidate with sufficient public support and organizational capability to have a realistic shot at statewide office. Even Plaintiffs' witnesses have freely admitted that – to have a realistic chance at winning – a statewide campaign needs a large base of committed activists. Governor Weicker's campaign had close to 1,000 activists, and the Democratic and Republican Parties both can field thousands of volunteers. Youn Decl. Ex. 22 (Weicker Dep.) at 93:1-11; Jepsen Decl. ¶ 13; Krivda Aff. ¶ 21. As Hubschman explains, given a team of 300 activists, a statewide campaign in 12 days could collect sufficient signatures to be eligible for the full CEP gubernatorial grant. Hubschman Decl. ¶ 12. Moreover, since petitions can be combined for a slate of candidates, those same signatures could make the entire statewide slate eligible for CEP funding. Accordingly, the suggestion that any candidate with sufficient public support and organization to mount a viable bid for statewide office would be unable to achieve these petitioning thresholds has no basis in fact.

The fact that the Green Party – whose gubernatorial candidate received less than one percent of the vote in 2006 – claims that the gubernatorial petitioning thresholds are "virtually impossible" to achieve is simply not material. The facts demonstrate that to the extent that a viable, competitive nonmajor-party candidate had not previously demonstrated popular support in past elections, he or she would face no undue difficulty in meeting these thresholds. Although Plaintiffs are entitled to continue to run such hopeless campaigns – and nothing in the

CEP or Connecticut's liberal election laws burdens their freedom to do so – they have no constitutional entitlement to require the State of Connecticut to fund their long-shot candidacies with millions of dollars in state funds that had been allocated to combat corruption among elected officials.

C. Plaintiffs Speculative Assertions of Lower Election Returns in One-Party Dominant "Safe" Districts Do Not Establish A Burden on Their Political Opportunity.

Plaintiffs have alleged that the CEP will cause them particular harm in so-called one-party dominant districts, and in its decision on Defendants' Motion to Dismiss, this Court expressed particular concern that in such districts, the CEP "changes the dynamic of many state legislative races in a way that further marginalizes minor parties," and thereby threatens to "snuff out the gains that minor parties have made." *Green Party of Conn.* 537 F. Supp. 2d at 377. However, Plaintiffs' speculative assertions of harm in these districts were premised on certain factual assumptions that they are unable to support, even after extensive discovery: (1) that the CEP system will "virtually compel" new major-party competition, (2) that new major-party challengers and non-major-party candidates are similarly situated in such districts, and (3) that non-major parties have made particular gains in such districts, such that an erosion of such gains will unconstitutionally burden their political opportunity. *Id.*; *see also* Pls'. Resp. in Opp'n to Defs. And Int.-Defs'. Joint Mot. To Dismiss and for J. on the Pleadings, at 27. Not only are there no facts to support these assertions with any admissible facts, the evidence overwhelmingly demonstrates that they are not true. Moreover, Plaintiffs again fail to demonstrate how their assertions about the impact of the CEP in party-dominant districts, even assuming *arguendo* they were true, would demonstrate any reduction in their ability to engage in First Amendment-protected political activity. Thus, even in these one-party dominant districts, Plaintiffs cannot raise a genuine issue of material fact that would allow their claims to survive summary judgment.

1. Plaintiffs' Assumption that the CEP System Will "Virtually Compel" Major Party Competition in One-Party Dominant Districts Is Factually Unsupported and Contradicted by Undisputed Record Evidence.

In their previous filings, Plaintiffs asked the Court to assume that the prospect of CEP funding will cause major parties to field candidates in one-party dominant districts when they otherwise would not, and the Court necessarily accepted this allegation for the purposes of its ruling on the motion to dismiss. *Green Party of Conn.*, 537 F.Supp. at 377. However, this assumption can no longer stand, since the electoral facts and undisputed testimony have demonstrated that it is not true. The available electoral data shows that, in this first general election following implementation of the CEP, the number of one-party dominant districts has remained roughly the same; although non-dominant major parties will compete in some former one-party dominant districts, they are offset by a number of other districts where the major parties have chosen not to contest previously contested districts. *See* Foster Decl. ¶ 14-15. Thus, the record shows no indication that there is any causal connection between the CEP and increased major-party competition in one-party dominant districts, and no indication that the CEP has incentivized major party challengers, to any significant extent, in such one-party dominant districts.

This is not at all a surprising result. Plaintiffs' assumption that the CEP system will incentivize major-party challengers in districts the non-dominant party had previously chosen not to contest evinces a profound misunderstanding of major-party motivations and strategies. The major parties' decision not to field challengers in one-party dominant districts is not motivated by any lack of available funds. Instead, as the undisputed testimony of major-party witnesses establishes, in selecting districts in which to field candidates, major parties respond to strategic incentives, which the CEP leaves unchanged, rather than monetary incentives. *See* Jepsen Decl.

¶ 23; DeFronzo Aff. ¶¶ 7-8. The major parties have no incentive to waste party resources in time, energy and personnel in a hopeless candidacy. Jepsen Decl. ¶ 23; Krivda Aff. ¶¶ 7, 14. Accordingly, far from "virtually compel[ling]" their participation, the CEP offers no substantial fresh incentive to major party candidates, who have always had access to equivalent levels of funds through private fundraising. As Professor Green has explained, major parties simply respond to different incentives than minor parties: major parties run candidates to win elections, not to make a statement through a hopeless candidacy. While minor parties have fielded hopeless candidates in order to gain publicity for their parties and their platforms, major parties have no similar incentives to expend party resources fielding losing candidates. *See* D. Green Decl. ¶ 36.

2. New Major-Party Challengers and Non-major-Party Candidates Are Not Similarly Situated, Even in One-Party Dominant Districts.

Plaintiffs also base their claim of invidious discrimination in one-party dominant districts upon another easily-refuted assumption – that new major-party challengers and non-major party candidates are "similarly situated" in one-party dominant districts in terms of their potential competitiveness. However, undisputed facts regarding historical vote totals, voter identification, and party infrastructure demonstrate that even in one-party dominant districts, major party challengers and minor party candidates cannot be deemed to be similarly situated for CEP eligibility or funding purposes.

As Professor Green explains, and undisputed testimony establishes, non-dominant major-party challengers have two key advantages over non-major-party candidates, even in one-party dominant districts. First, overwhelmingly more Connecticut voters identify with one of the two major parties, 54 % of voters, as opposed to the mere 3% percent of voters who identify themselves with a minor party. *See* D. Green Decl. ¶ 29. Thus, even in one-party dominant

districts, there is a vastly greater pool of major party supporters than nonmajor party voters even if this latent support is not always reflected in any given race. Second, even in one-party dominant districts, the major parties' organizational capacity – including their infrastructure, party activists, and fundraising capabilities – hugely outmatch the paltry resources of minor party or independent candidates. For example, the major parties have town committees in virtually every town in Connecticut, as compared to the mere handful of local chapters that the minor parties maintain. *See id.* ¶ 30; Sevigny Aff. ¶¶ 20-23; Jepsen Decl. ¶ 13; Krivda Aff. ¶ 16.

The electoral data show that these sources of major-party strength – developed through decades of party-building – translate into far greater electoral totals for major-party challengers in one-party dominant districts than for non-major-party candidates. *See* Foster Decl. ¶¶ 12-13. Thus, the requirement of a showing of statewide public support required of major parties to be eligible for public funding under Connecticut law translates, as a practical matter, into a significant showing of public support at the district level, even in one-party dominant districts. *See Libertarian Party of Wash.*, 31 F.3d at 766 (rational for state to presume substantial support for a major-party candidate based on her party's past performance, while requiring signature-based showing of support for non-major-party candidates).

Accordingly, there is good reason for the state not to require a further district-level showing of public support for major party candidates in awarding CEP funds – such a requirement would be gratuitous and would needlessly burden taxpayers and the state with additional administrative costs. Thus, providing full funding to qualifying major-party candidates without making them go through the exercise of gathering signatures does not invidiously discriminate against non-major-party candidates, in part because such major party

challengers are differently situated in terms of their demonstrated public support and potential competitiveness.

3. The Availability of the CEP to New Major-Party Challengers Will Not "Snuff Out" the Political Gains of Non-major-Party Candidates in "Safe" Districts.

Finally, even if Plaintiffs were able to establish as a factual matter that the CEP endangers their electoral gains in one-party dominant districts – and they cannot make such a showing, as explained above – they still would be unable to establish an unconstitutional burden on their political opportunity as a matter of law. Non-major-party candidates have no constitutionally protected interest in being the only alternative on the ballot to the incumbent major party in one-party dominant districts.

In the first place, Plaintiffs cannot establish a reduction of their freedom to pursue political opportunity merely by complaining about potential exposure to greater competition for Connecticut citizens' freely-given votes. Even if the CEP results in more frequent major-party competition in these districts, the resulting benefit to voters – who will have increased opportunities to cast votes for candidates of their preferred political parties – outweighs any detriment to non-major-party candidates who, it is not disputed, would remain free to compete. *See, e.g.*, *Anderson*, 460 U.S. at 788 ("find[ing] on the ballot a candidate who comes near to reflecting his policy preferences" is important to a voter's exercise of his "most precious" right to cast a meaningful vote (internal citations omitted)). As the Supreme Court recently reaffirmed, the Constitution "does not call on the federal courts to manage the [political] market by preventing too many buyers from settling upon a single product." *New York State Board of Elections v. Lopez Torres*, 128 S. Ct. 791, 801 (2008)

Further, as both of Plaintiffs' expert witnesses admit, even the modest vote percentages received by non-major-party candidates in one-party dominant districts may substantially

overstate the actual public support for those candidates. Both of Plaintiffs' experts agree that many of the votes cast for nonmajor party candidates in races where a major-party incumbent is otherwise unopposed represent only "protest votes" from voters who identify with the non-dominant major party. Youn Decl. Ex. 4 (Gillespie Dep. 222:7-223:3; 223:7-19); Youn Decl. Ex. 23 (Winger Dep. 153:4-154:4; 158:1-6). These "protest voters," if given the opportunity, would much prefer to cast a meaningful vote for their major party of choice – with its undisputedly greater prospect of victory – than a "protest vote" for the only available alternatives. Youn Decl. Ex. 4 (Gillespie Dep. 222:7-223:3; 223:7-19); Youn Decl. Ex. 23 (Winger Dep. 153:4-154:4; 158:1-6); D. Green Decl. ¶¶ 39-40. As Plaintiffs' expert Richard Winger admits, the voter's interest in casting a meaningful vote for the candidate of his or her preference must take precedence over any particular candidate's interest in being the only alternative on the ballot to a major-party incumbent. Youn Decl. Ex. 23 (Winger 151:17-152:2; 155:14-157:1; 158:1-11). Plaintiffs cannot ask this Court to preserve their electoral totals by constraining voters' political choices.

Moreover, as Professor Green explains, nonmajor party candidates may even benefit from increased major-party competition in one-party dominant districts. An election featuring major-party competition should prove to be more fertile soil for minor parties to spread their political message than a race against an otherwise unchallenged incumbent in a one-party dominant district, for the common-sense reason that voters and media observers pay more attention to more competitive races. D. Green Decl. ¶ 40.

Plaintiffs thus cannot establish a burden on their political opportunity because they are unable to factually demonstrate – as they must under *Buckley* – that any protected political opportunity they enjoyed prior to the CEP will be reduced as a result of the CEP, including in so-

called "safe" districts. *See Buckley*, 424 U.S. at 97-99. Accordingly, the question whether the CEP will result in more major-party competition in one-party dominant districts is immaterial and cannot preclude a grant of summary judgment.

IV. Any Burden Imposed by the Challenged Provisions on Plaintiffs' First Amendment Rights Is Justified By Connecticut's Important State Interests.

As set forth above, Plaintiffs have failed to offer any evidence that the CEP system actually burdens, by reducing below levels achievable without public financing, their ability to exercise their First Amendment-protected political opportunity. *See Buckley*, 424 U.S. at 98-99 (requiring showing of "reduce[d] . . . strength below that attained without any public financing"). Even assuming *arguendo*, however, that Plaintiffs could establish some burden on their First Amendment rights resulting from the CEP's application, the challenged provisions are more than adequately justified under the flexible standard articulated in *Anderson* and *Burdick*. As explained in Section II.B.2., *supra*, in the election-law context, "the State's important regulatory interests are generally sufficient to justify" restrictions imposing limited burdens on protected rights, even restrictions that "may, in practice, favor the traditional two party system." *Anderson*, 460 U.S. at 788; *see Timmons*, 450 U.S. at 367. Indeed, even if Plaintiffs were able to demonstrate a "heavy" or "severe" burden on their political opportunity so as to require strict scrutiny – which the undisputed factual record demonstrates they cannot – the challenged provisions nevertheless should be upheld, as they are necessary to achieve the compelling interests of the people of Connecticut.

A. The CEP Eligibility Requirements Are Closely Drawn to Advance Connecticut's Compelling State Interests.

1. The CEP's Requirements That Candidates Show Demonstrable Public Support Advance Connecticut's Compelling Interests in Combatting Corruption and the Appearance of Corruption Among Elected Officials and Freeing Elected Officials from the Burdens of Private Fundraising.

First, the Connecticut Legislature's primary goal in enacting the CEP was to avoid the threat and appearance of corruption arising from the perceived influence of political contributions on elected officials and their decisionmaking. As discussed above, it is well settled that states have a compelling interest in maintaining a public funding program to avoid the reality and appearance of corruption arising from the influence of private money on elected government. *See Rosenstiel*, 101 F.3d at 1553; *Buckley*, 424 U.S. at 96. And it is equally well settled that the State has a compelling interest in relieving its elected officials of the burden of incessant fundraising, so that they can devote more time to their official duties. *See Rosenstiel*, 101 F.3d at 1553; *Buckley*, 424 U.S. at 90-91; *RNC*, 487 F. Supp. at 284-85.

Elected officials are the focus of both of these compelling interests. Thus, a public financing system only advances these interests to the extent that it grants public funding to candidates with a reasonable chance of being elected to office. As Plaintiffs' own political science expert, J. David Gillespie, admitted at deposition, the grant of public campaign funds combats corruption among elected officials only if the candidate who has received public financing is elected. Youn Decl. Ex. 4 (Gillespie Dep. 140:6-21). Accordingly, in designing a public funding system to reduce corruption and the appearance of corruption, the Connecticut legislature had a compelling interest in imposing reasonable qualification provisions that would limit the grant of campaign funds to candidates with a realistic chance of winning the election.

2. The CEP Participation Requirements Are Closely Designed to Advance Connecticut's Important Interest in Protecting the Public Fisc by Limiting Funding to Those Candidacies With Realistic Prospects of Election to State Office.

Moreover, the requirements imposed by the Connecticut legislature in enacting the CEP were also necessary and appropriate as part of its obligation to protect the public fisc. As noted above, the federal courts have consistently recognized the state's important interest in "protect[ing] the public fisc" by not squandering public monies to fund "hopeless candidacies." *Buckley*, 424 U.S. at 96, 103; *see also Anderson v. Spear*, 356 F.3d at 676.

For non-major-party candidates whose private fundraising efforts have met with little success, CEP funding is a rich prize that, in the absence of sufficiently high qualification and eligibility requirements, could foster a proliferation of candidates with little or no chance of being elected – thereby expending public funds without advancing the goals for which the CEP was enacted. Indeed, as discussed at Section B.3. of the Statement of Facts, *supra*, even the partial CEP grant amounts now readily available to many non-major-party candidates far exceed the amount of their actual fundraising, and provide a very substantial inducement to non-major-party candidates.

Such prudent stewardship of the public fisc, besides conserving the people's resources, is important to preserve public support for the public funding system itself. As the Maine Commission responsible for administering that State's public financing system has noted: "The system will lose public and legislative support if individuals who are widely perceived as 'fringe' candidates receive funding." *See* Mills Decl. ¶ 18.

Thus, the Connecticut Legislature set the CEP's prior-vote-based eligibility thresholds for non-major-party candidates at levels that would enable candidates of parties with a demonstrated ability to attract voters and run a competitive race to become automatically eligible for CEP

funding -- and to require other candidates to demonstrate a similar level of popular support through petitioning. The levels of support established by the CEP are not unreasonable. As Professor Green explains, political scientists consider an election loss with only 20% of the vote to be a landslide defeat. D. Green Decl. ¶ 27. By setting the prior vote threshold at 20% at the state and district level, and by offering partial funding to candidates with even half that total – Connecticut has ensured that candidates with even the faintest hope of electoral victory are automatically eligible for CEP funding.

The availability of the signature gathering route provides an alternative means for non-major party candidates to establish the requisite public support to warrant CEP funding. The Supreme Court has noted that the existence of such an alternative route to eligibility militates in favor of the law's constitutionality. *See Burdick*, 540 U.S. at 436 n.5 (upholding challenged ballot restriction in part because of the available of alternative means); *see also Crawford*, 128 S. Ct. at 1261 (burden on some voters mitigated by the fact that voters could cast provisional ballots).[18] Indeed, the courts have uniformly deemed petitioning to be a valid means of demonstrating the "significant modicum of public support" that a state is entitled to insist upon in its election regulations. *Jenness*, 403 U.S. at 442; *see Storer*, 415 U.S. at 732; *Schulz*, 44 F.3d at 78; *see also* Youn Decl. Ex. 23 (Winger Dep. 89:6-15) (Plaintiffs' expert acknowledging that petitioning signatures are reasonable means for state to determine which candidates deserve public campaign funds).

[18] It is instructive to note that *Buckley* upheld the presidential public financing system despite the noted lack of any alternative pre-election eligibility pathway, *see Buckley*, 424 U.S. at 101: candidates who failed to demonstrate eligibility for funding based on prior vote totals were entitled only to limited post-election funding in the event that they received a specified percentage of the vote, *id.* at 102.

3. The CEP Participation Requirements Advance Connecticut's Important Interests in Avoiding Incentives to Splintered Parties and Uncontrolled Factionalism

The qualification requirements of the Connecticut statute are also justified by State's "important public interest against providing artificial incentives to splintered parties and unrestrained factionalism." *Buckley*, 424 U.S. at 96 (citations and quotation marks omitted); *see also Timmons*, 520 U.S. at 367 (recognizing state's interest in combating the "destabilizing effects of party-splintering and excessive factionalism"); *Munro*, 479 U.S. at 196 (State can take measures "to avoid the possibility of unrestrained factionalism"): *Storer*, 415 U.S. at 735. In enacting such restrictions, a state is entitled to act prophylactically to prevent the possibility of such evils even if they have not yet manifested themselves. *See Munro*, 479 U.S. at 195-95 (State legislature entitled to take "corrective action" in advance, and is not limited to acting "reactively").

As discussed above, the legislative history makes clear that the Connecticut Legislature was concerned with preventing this type of manipulation. A number of legislators expressed concern that the major parties could abuse the public financing system by exploiting "splinter" minor party or independent candidates, who had no any real constituency or chance of winning, merely to take votes away from the other major party. *See, e.g.*, Garfield Decl. II Ex. 4, at 121 (Statement of Sen. DeFronzo); *id.* at 123 (Statement of Rep. McCluskey), 130 (Statement of Rep. Caruso). The eligibility thresholds established by the CEP were appropriately drawn to prevent public funds from being abused to foster such factionalism, by ensuring that recipients of public campaign funds actually demonstrate substantial public support. *See Timmons*, 520 U.S. at 365-66 (states have a "valid interest" in ensuring that ballot entrants "are bona fide and actually supported"); *Storer,* 415 U.S. at 735 (recognizing a state interest in discouraging "independent candidacies prompted by short-range political goals, pique, or personal quarrel").

B. The CEP Qualifying Contribution Requirements Are Likewise Closely Drawn to Advance Connecticut's Compelling Interests in Public Financing

The same state interests also justify the CEP's qualifying contribution thresholds, which apply to all candidates without exception. By setting the qualifying contribution requirements at their current levels, Connecticut has sought to ensure that public funds will go to candidates not only capable of attracting a significant modicum of public support, but also committed to running a campaign sufficiently effective to suggest a reasonable chance of winning an election. The qualifying contribution requirements advance the state's interests by providing funding only to candidates with a demonstrated ability and commitment to engage in grassroots campaigning to accumulate low-dollar contributions and to generate public support within their district. When setting the appropriate levels for the qualifying contribution thresholds, the Legislature devoted substantial consideration to determining levels that would weed out frivolous or hopeless candidates, while still being attainable by candidates with significant support among their proposed constituents. *See, e.g.*, Garfield Decl. II Ex. 2, at 18-19 (statement of Sen. Heagney; statement of Sen. McDonald). In so doing, the legislators drew on their own experiences as candidates and elected officials in Connecticut, as well as their knowledge of public financing systems in other states. *See, e.g.*, Garfield Decl. II Ex. 4, at 123 (statement of Rep. McCluskey); *id.* at 130 (statement of Rep. Caruso).

Requiring a candidate to demonstrate his or her fundraising ability, in the qualifying contribution context, further serves to advance the state's compelling interest in substituting public funds for potentially corrupting private donations. The qualifying contribution thresholds are easily achievable by any viable candidate. If a candidate is unable to raise even the CEP's threshold amounts of qualifying contributions, then there is little reason to believe that the candidate could raise private donations to the extent that would raise any concern about

corruption or the appearance of corruption. To the extent that a candidate purports to be unable to meet the CEP's qualification-contributions thresholds, that inability merely serves to prove that the candidate – who remains free to raise private funds – lies outside the scope of Connecticut's compelling interests in maintaining a public funding system. *See Buckley*, 424 U.S. at 95 n.129 ("If a party cannot raise funds privately, there are legitimate reasons not to provide public funding, which would effectively facilitate hopeless candidacies.").

C. The CEP's Grant Amounts Are Closely Designed to Advance Connecticut's Compelling Interests in Public Financing, to Incentivize Participation, and to Protect the Public Fisc

As noted above, and as courts in other circuits have readily recognized, the state has a compelling interest in incentivizing candidates to participate in a public financing program that is itself intended to serve the compelling interests of preventing corruption and permitting legislators to focus on their duties rather than fundraising. *See Rosenstiel*, 101 F.3d at 1553; *Vote Choice*, 4 F.3d at 39; *Wilkinson*, 876 F. Supp. at 928. The Connecticut legislature thus had a compelling interest in setting the amounts of the CEP's public funding grants at levels that would in fact encourage candidates to participate.

As set forth in Section A of the Statement of Facts, *supra*, in designing the CEP, the Connecticut legislature carefully considered historical campaign spending data and established CEP grant amounts at or below the level of historical spending limits in competitive elections. In fact, even matching funds, which only come into play in the highest-dollar races, when added to the base grant amounts, are not out of line with historical expenditures in the most competitive elections. *See* Garfield Decl. II Ex. 20, at 2 ("High" expenditure range for senate races is over $200,000 while "High" expenditure ranges for house races is $58,000). Moreover, the legislature recognized the need to adjust funding levels for uncontested and one-party dominant districts; *see* Garfield Decl. II Ex. 2, at 85-87; the CEP grant amounts to major parties are

reduced in elections where the election is uncontested, or contested only by non-participating non-major party candidates. Conn. Gen. Stat. § 9-705(j)(3)-(4). These realistic grant levels are necessary to incentivize participation by serious candidates, and therefore serve Connecticut's interest in avoiding the actual or perceived corruption of elected officials.

D. The Legislature Is Entitled to Deference in Setting Appropriate Thresholds

Plaintiffs provide no legal or factual basis for this Court to discard the carefully considered judgments of the Connecticut Legislature, and to substitute its own judgment as to appropriate CEP qualification and eligibility thresholds and grant amounts. In the absence of a showing of an impermissibly great burden on protected rights, the choice of the exact thresholds that will best advance the state's important interests should be left to the legislature. *See Daggett*, 205 F.3d at 466 ("such determinations are 'best left to legislative discretion and will be deferred to unless 'wholly without rationality'") (quoting *Vote Choice*, 4 F.3d at 32). In upholding a particular set of qualifying requirements in the presidential campaign financing system, the Supreme Court explicitly disclaimed any intention of setting a constitutionally mandated floor or ceiling for such requirements:

> [T]he choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make. Without any doubt a range of formulations would sufficiently protect the public fisc and not foster factionalism, and would also recognize the public interest in the fluidity of our political affairs. We cannot say that Congress' choice falls without the permissible range.

Buckley, 424 U.S. at 103-104 (citation and footnote omitted). Having failed to establish any impingement on their political opportunity, let alone a heavy one, Plaintiffs cannot raise a triable issue of fact merely by asking this Court to second-guess the Connecticut legislature's reasoned and considered choice of appropriate thresholds.

Plaintiffs have also urged this Court to find evidence of invidious discrimination in the fact that certain qualification thresholds under the CEP are higher than corresponding thresholds in the public funding systems in Arizona and Maine. While other states may impose different requirements and benefits, Connecticut has no constitutional obligation to tailor its public-funding program to reflect the judgments of other populations with different priorities. If such requirements are constitutionally permissible, "differences in their level from state to state should reflect democratic choices, not court decisions." *Daggett*, 205 F.3d at 459 (internal quotation marks and citation omitted); *see also Rogers*, 468 F.3d at 197 (different states may legitimately pursue ballot-restriction interests differently). Connecticut – with its unique history of political corruption and scandal – is entitled to pursue its own legitimate and important priorities in the design of its public funding system.

CONCLUSION

For the foregoing reasons, this court should grant the Defendants' motion for partial summary judgment, dismissing Count One of the *Green Party* Complaint.

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Respectfully submitted,

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