UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GREEN PARTY OF CONNECTICUT, *et al.*	:	
	:	
Plaintiffs,	:	
v.	:	
	:	
JEFFREY GARFIELD, *et al.*,	:	CASE NO. 3:06-cv-1030 (SRU)
	:	(Consolidated with 06-cv-1360)
Defendants,	:	
	:	
AUDREY BLONDIN, *et al.*,	:	
	:	
Intervenor-Defendants.	:	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

I. Introduction

This Court previously dismissed Counts II and III of Plaintiffs' Amended Complaint for failure to state a First Amendment claim. *See Order granting in part and denying in part Motion to Dismiss; granting in part and denying in part Motion for Judgment on the Pleadings.* (Entered: 03/20/2008) (Doc. No. 211). Those counts challenge the supplemental matching fund grants that are triggered by excess expenditures and independent expenditures. Relying on the majority of cases that have rejected similar challenges, the Court rejected the argument that the trigger provisions burdened or penalized speech. *Green Party of CT v. Garfield*, 537 F. Supp. 2d 359, 391-92 (D. Conn. 2008). That conclusion has been called into question by *Davis v. Federal Election Comm'n*, No. 07-320, 2008 WL 2520527 (June 26, 2008).

Plaintiffs submit that *Davis* provides support for the First Amendment claims raised in the dismissed counts and that the decision warrants reconsideration of the Court's *Order* dismissing Counts II and III. Plaintiffs further submit that they are now entitled to summary

judgment on those counts and have simultaneously moved for judgment as part of their motion on the surviving Count I claim. In the event this Court or a higher court rejects plaintiffs' main claim contained in Count I that the CEP is discriminatory as a whole, plaintiffs submit that *Davis* provides an independent First Amendment basis to invalidate the excess expenditure and independent expenditure provisions of the CEP.

II. Argument

In *Davis*, the Court by a 5-4 vote struck down a little-known provision of the McCain-Feingold campaign-finance law aimed at leveling the playing field for opponents of wealthy candidates who decide to finance their own campaigns. The so-called "Millionaire's Amendment" ruled on in *Davis* requires self-financing candidates to declare their intention to spend more than $350,000 of their own funds, and then to report when they cross that line. Opponents of the self-financed candidates are then allowed to raise money from individuals at a contribution limit that is three times that of the original contribution limit ($6,900 as opposed to the usual maximum of $2,300), among other benefits. To the majority, the law imposed an "unprecedented penalty," 2008 WL 2520527, at *9, and a "substantial burden" on the self-financed candidates, *id*. at *10.

Justice Alito, writing for the majority, said this "asymmetrical" treatment of opposing candidates "impermissibly burdens [Davis'] First Amendment right to spend his own money for campaign speech." *Id*. at *8. Justice Alito said the law forced a self-financing candidate into a Catch-22: Either the self-financed candidate could limit his or her own spending, or risk triggering a system that helps his or her opponent raise significantly more money. *Id*. at *9. That kind of government-compelled choice violates the First Amendment unless it serves a "compelling state interest." *Id*. at *10.

The Court specifically distinguished the situation in *Buckley* where the restriction on expenditures was voluntarily agreed to by the candidate:

> The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice. In *Buckley*, we held that Congress "may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations" even though we found an independent limit on overall campaign expenditures to be unconstitutional. 424 U.S., at 57, n. 65, 96 S.Ct. 612; see *id.*, at 54-58, 96 S.Ct. 612. But the choice involved in *Buckley* was quite different from the choice imposed by § 319(a). In *Buckley*, a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures. Here, § 319(a) does not provide any way in which a candidate can exercise that right without abridgment. Instead, a candidate who wishes to exercise that right has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits. The choice imposed by § 319(a) is not remotely parallel to that in *Buckley*.

Davis, 2008 WL 2520527 at * 9.

The Court rejected the government's main justification for the provision, namely that it would "level electoral opportunities for candidates of different personal wealth." The Court held that far from being a compelling governmental interest, this justification did not even rise to the level of a *legitimate* government interest – as had been held in previous Court decisions. *Id*. at *10. Significantly, the Court warned that restricting a candidate's speech "in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office." *Id*. at 11.

In this case, the trigger provisions forces the speaker to make the same impermissible choice of having to either limit his own expenditures or "endure the burden" of activating increased expenditure limits (and grants) for his major party opponents. 2008 WL 2520527, at *9. As explained below, the burden on plaintiffs is real and substantial. As a result, just like in *Davis*, these provisions must serve a "compelling state interest." *Id*. at *10.

First, the grants can be significantly increased under the excess expenditure provision. Conn. Gen. Stat. § 9-713. In the past, Green Party candidates have not typically raised or spent the amount of money that would trigger the excess expenditure provision. This does not, however, preclude the possibility of a Green Party candidate spending such an amount. In fact, a strong Green Party candidate in a competitive election might easily have expenditures that would trigger matching funds for his opponents. (DeRosa Decl. ¶ 55). The Green Party would then concentrate all its resources on this candidate if he or she had an opportunity to win a legislative or statewide seat. (*Id*.). The candidate might also be self-funded and willing to spend the money needed to effectively compete. (*Id*.). Thus, the excess expenditure provision presents the candidate with a Hobson's choice: Either limit his expenditures, or spend freely, and increase the resources available to his opponent.

Second, the grants are increased based on independent expenditures. Conn. Gen. Stat. § 9-714. This provision is triggered if the Party or one of its supporters sends out a mailing or distributes literature which urges the defeat – or is even critical – of his opponent. The cost of the expenditure could be minimal because the value of all expenditures is aggregated for purposes of the calculation. Thus, if the Trial Lawyers coordinates with several other groups and spends thousands of dollars in ads urging voters to oppose a particular candidate, the modest cost of the Green Party's independent expenditures opposing the same candidate is added to the calculation. Thus, the Green Party's independent expenditures could actually be the triggering event. (DeRosa Decl. ¶ 56).

In dismissing Counts II and III, the Court's analysis was limited to its conclusion that the matching fund provisions did not burden plaintiffs' First Amendment rights. *Garfield*, 397 F.2d at 391-92. The Court relied on a number of courts of appeals decisions which have rejected the

First Amendment claim raised here and have upheld similar matching fund provisions as a necessary "carrot" to offset the relative burden of agreeing to expenditure limits and as a "stick" to encourage maximum participation. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464-65 (1st Cir. 2000); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1550 (8th Cir. 1996); *Vote Choice, Inc. v. DeStefano*, 4 F.3d 26, 39 (1st Cir. 1993). These decisions are also called into question by *Davis*, 2008 WL 2520527, at *9, which instead adopted the reasoning of the one decision that is in conflict with the other circuit decisions. *See Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). In *Davis*, 2008 WL 2520527, at *9, the Court cited with approval to *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (concluding that a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures). *Day* is the only case to have previously invalidated a matching fund provision in the context of a comprehensive public financing system similar to the one at issue in this case. Although the logic in *Day* had been uniformly rejected by this and every other court to consider similar provisions, *see Garfield*, 397 F.2d at 391, plaintiffs would urge the Court to reconsider the precedential value of *Day* in light of *Davis*.

In dismissing Counts II and III the Court did not consider whether the trigger provisions served a compelling interest in light of its holding that plaintiffs' First Amendment rights were not burdened. After *Davis*, the sufficiency of the alleged injury is settled. The only question is whether the burden imposed on plaintiffs' rights is justified by the state's interest in facilitating its public financing system.

Plaintiffs submit that *Davis* settles that issue as well. Here the state's interest is in effect the same interest rejected in *Davis*. To facilitate its public financing system, the state is

attempting to "level the playing field" between candidates who agree to participate in the CEP and candidates who opt out. *Davis* categorically rejects this paternalistic role of government:

> The argument that a candidate's speech may be restricted in order to "level electoral opportunities" has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office… Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.

Davis, 2008 WL 2520527, at *11.

III. Conclusion

In view of the holding in *Davis*, plaintiffs submit that the matching fund provisions contained in the CEP impose an "unprecedented penalty," and a "substantial burden" on the self-financed candidates, 2008 WL 2520527, at *9-10, which could not be justified by the State's asserted interests in equalizing the resources of candidates. Plaintiffs request that the Court reconsider its *Order* dismissing counts II and III and allow those claims to proceed.

Dated: July 10, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2008, a copy of the foregoing *Motion for Reconsideration* was filed electronically. Notice of this filing will be sent by electronic mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Mark J. Lopez
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