UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS AND INTERVENOR-DEFENDANTS' JOINT MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Connecticut Statutes

Other Statutes

Other Authorities

I. INTRODUCTION

Defendants and intervenor-defendants (collectively, the "defendants") have moved to dismiss Counts I, II, and III of plaintiffs' Amended Complaint.[1] These claims challenge the constitutionality of the Citizens' Election Program ("CEP") – Conn. Gen. Stat. §§ 9-700 – 718, 9-750 – 751 – a comprehensive public financing scheme enacted in 2005 and amended in 2006 by the Connecticut General Assembly. Beginning in 2008, the CEP will provide public financing for participating candidates who seek election to the General Assembly. *Id*. §§ 9-702(a). In 2010, similar funding will be available to candidates for statewide offices. *Id*.

Plaintiffs Green Party of Connecticut ("Green Party"), Libertarian Party of Connecticut ("Libertarian Party"), and S. Michael DeRosa ("DeRosa") assert that minor and petitioning party candidates will be unable to qualify for public funding while major party candidates are given an impermissible advantage that will ensure their eligibility everywhere, including districts in which they previously did not compete. Plaintiffs also allege that the CEP's funding scheme invidiously discriminates against minor and petitioning party candidates by enhancing the ability of major party candidates to campaign. In that respect, the CEP effectively increases, and correspondingly decreases, the relative strength of the all political parties. Connecticut does not have a legitimate – much less compelling – interest in stifling the speech of minor and petitioning parties. On the contrary, it has an affirmative obligation to remain strictly neutral.

By enacting the CEP, Connecticut has become one of only three states that provide comprehensive public financing programs for all state-level candidates. Arizona and Maine have created similar programs, and both of those programs have survived differently styled constitutional challenges. *See Daggett v. Comm'n on Governmental Ethics and Elections Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's clean election program against

[1] Defendants have also moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).

coercion challenge); *Ass'n of Am. Physicians and Surgeons v. Brewer*, 363 F. Supp. 2d 1202 (D. Ariz. 2005) (upholding Arizona's clean election program against coercion challenge). While defendants laud these programs as models for the CEP, the First and Fourteenth Amendment claims raised by plaintiffs were not considered by the courts in either *Daggett* or *Brewer*.[2] These issues were not presented because full public financing was available to all ballot-qualified candidates who raised a small number of $5 qualifying contributions. The CEP, in fact, is plainly not modeled on these programs and is clearly less democratic, despite the significant role third-party candidates have played in Connecticut politics. Public financing is not available to all candidates, and it is exceedingly difficult for minor and petitioning party candidates to qualify. In actuality, the Presidential financing system scrutinized in *Buckley v. Valeo*, 424 U.S. 1 (1976), is the closest analogue of judicially reviewed financing schemes. But, as explained below, *Buckley* did not endorse a public financing system that distorts the actual strength of candidates or parties. In sum, none of the precedents relied upon by defendants can negate the constitutional injuries alleged. Defendants' motion must, therefore, be denied.

Like defendants in their motion, plaintiffs in this response rely on facts not included in the Amended Complaint. This information – election results and contribution and expenditure data, some of which has been compiled by the Office of Legislative Research – is all a matter of public record and is, therefore, subject to judicial notice. *See Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir. 2000) (court may take judicial notice of public disclosures). Plaintiffs have included this information to elaborate upon the bases of the constitutional infirmities of the CEP as well as to highlight defendants' mischaracterizations of plaintiffs' claims. Such a level of specificity is not required by the pleading standards of the Federal Rules. However, if the Court concludes

[2] Similarly, the North Carolina Public Campaign Financing Fund reviewed in *Jackson v. Leake*, 5:06-CV-324-BR (E.D.N.C. Oct. 26, 2006) provides equal funding to all qualifying candidates.

that the additional information must be inserted in the Amended Complaint to be properly considered, plaintiffs request leave to amend. *See Gurary v. Winehouse*, 235 F.3d 792, 801 (2d Cir. 2000) (courts have broad discretion in granting leave to amend pleadings). Plaintiffs further request that the Court grant leave to amend rather than dismiss the claims without prejudice.

II. BACKGROUND

The CEP is a voluntary public financing scheme for state-level candidates in Connecticut. In order to participate, candidates must qualify. The qualification requirements vary based on a particular candidate's party affiliation and the office sought. Once a candidate qualifies, he must agree to certain restrictions, including, most significantly, expenditure limits. Candidates who fail to qualify for public funding (or choose not to participate) are subject to all of Connecticut's general campaign finance restrictions, including contribution limits.

A. QUALIFYING CRITERIA

The CEP creates a two-tiered qualification system for candidates based on their party affiliation. All candidates, irrespective of party affiliation, must obtain a certain amount of "qualifying contributions"[3] specific to the particular office sought. Conn. Gen. Stat. §§ 9-702(b), 9-704(a). Candidates for governor must raise $250,000 in qualifying contributions, of which at least $225,000 must come from Connecticut residents. *Id*. § 9-704(a)(1). All other candidates for statewide offices – Lieutenant Governor, Attorney General, State Comptroller, State Treasurer, and Secretary of the State – must obtain at least $75,000 in qualifying contributions, including $67,500 from state residents. *Id*. § 9-704(a)(2). State senate candidates are required to raise an aggregate of $15,000, including at least 300 contributions from residents of the district.[4]

[3] Qualifying contributions cannot exceed $100. Conn. Gen. Stat. § 9-704(a).
[4] In order for a contribution to be counted, the contribution must be at least $5. Conn. Gen. Stat. § 9-704(a)(3)(B). The same is true for contributions to candidates for state representative. *Id.* § 9-704(a)(4)(B).

Id. § 9-704(a)(3). Candidates for state representative must raise an aggregate of $5,000, including at least 150 contributions from residents of the district. *Id*. § 9-704(a)(4). Plaintiffs allege that, at the amounts set, these qualifying contributions are unduly burdensome for minor and petitioning party candidates. Am. Compl. ¶¶ 2, 10-12. Moreover, the General Assembly adopted the CEP with the knowledge that minor and petitioning party candidates have made solid showings at the polls even though few raised money in excess of these qualifying thresholds. *See* OLR Research Report, Past Performance of Petitioning and Minor Party Candidates in Connecticut, Mar. 9, 2006 (revised) (hereinafter "Past Performance"), attached as **Exhibit A**; OLR Research Report, Campaign Expenditures and Contributions in Connecticut 2000-2004 (hereinafter "Campaign Expenditures 2000-2004"), Aug. 2, 2005, attached as **Exhibit B**. Arizona and Maine require candidates to raise modest sums in $5 increments. *See*, *e.g.*, 21-A M.R.S.A. § 1125(3) (candidates for governor need only raise 2,500 contributions or $12,500).

While major party[5] candidates qualify for full public funding if they satisfy the qualifying contribution requirement, minor and petitioning party candidates must meet another requirement. The across-the-board preferred status was given to the major parties even though most elections in Connecticut, especially for the General Assembly, are not considered competitive and are frequently not contested by both major parties. *See* Office of the Secretary of the State, Election Results for State Representative, Nov. 7, 2006, *available at*, http://www.sots.ct.gov/Elections Services/election_results/2006_Nov_Election/StateRep.pdf (last visited Apr. 25, 2007) (61 of 151 races included only one major party candidate, 6 other races won by major party candidate

[5] Major party is defined as:

> (A) a political party or organization whose candidate for Governor at the last-preceding election for Governor received, under the designation of that political party or organization, at least twenty per cent of the whole number of votes cast for all candidates for Governor, or (B) a political party having, at the last-preceding election for Governor, a number of enrolled members on the active registry list equal to at least twenty per cent of the total number of enrolled members of all political parties on the active registry list in the state.

Conn. Gen. Stat. § 9-372(5).

carrying at least 80% of vote when facing major party competition); Office of the Secretary of the State, Election Results for State Senate, Nov. 7, 2006, *available at*, http://www.sots.ct.gov/ElectionsServices/election_results/2006_Nov_Election/StateSente.pdf (last visited Apr. 25, 2007) (9 of 36 races included only one major party candidate, 5 other races won by major party candidate carrying at least 80% of vote when facing major party competition). These uncompetitive elections are specifically targeted by minor and petitioning parties and are often the ones in which their candidates achieve their best electoral results. *Id*. Yet, minor and petitioning party candidates are held to a different and more stringent qualifying standard.

In order to obtain a one-third general election grant, a minor party[6] candidate must belong to a minor party whose candidate for the same office received at least 10% of the votes cast in the preceding election. Conn. Gen. Stat. §§ 9-705(c)(1), (g)(1). A petitioning party candidate must obtain nominating signatures from at least the number of district or state voters equivalent to 10% of the total number of votes cast in the preceding election for the same office. *Id*. §§ 9-705(c)(2), (g)(2). As a practical matter, these requirements will categorically deny public funds to almost all minor party and all petitioning party candidates. For example, a minor party candidate who received 9.9% of the votes cast in the preceding election would not be eligible for funding in the next election. He could not qualify by petition either because candidates nominated by a minor party are prohibited from appearing on a ballot by nominating petition. *Id*. § 9-453t. Plaintiffs also allege that the 10% signature requirement is, as a practical matter, unattainable. Am. Compl. ¶¶ 2, 24, 27. Minor and petitioning party candidates are ineligible for post-election funds, irrespective of their actual success, if they do not qualify on the front end.

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

B. GRANTING OF FUNDS

The CEP also draws significant distinctions between major party and minor and petitioning party candidates with respect to the funds it provides. First, only major party candidates are entitled to funds for primary campaigns,[7] Conn. Gen. Stat. §§ 9-705(a)(1), (b)(1), (e)(1), (f)(1), and the grants for primary campaigns are significant – gubernatorial candidates receive $1.25 million, other statewide candidates receive $75,000, candidates for state senate receive $35,000, and candidates for state representative receive $10,000.[8] *Id*. §§ 9-705(a)(1), (b)(1), (e)(1), (f)(1). Second, major party candidates nominated during their parties' primaries are guaranteed full distribution of the general election funds – $3 million for gubernatorial candidates, $750,000 for other statewide offices, $85,000 for state senate candidates, and $25,000 for candidates for state representative. *Id*. §§ 9-705(a)(2), (b)(2), (e)(2), (f)(2). When combined with qualifying contributions, the prescribed funding corresponds to the highest spending in statewide races and spending in only the most competitive legislative elections. *See* OLR Research Report, Campaign Expenditures by Statewide Office Candidates (hereinafter "Statewide Office Expenditures"), Aug. 17, 2005, attached as **Exhibit C**; OLR Research Report, Campaign Expenditures – 2004 Legislative Races, Feb. 23, 2005, attached as **Exhibit D** (median candidate expenditures in 2004 – House: $14,588.64; Senate $61,948.76). The competitive races for General Assembly seats are not representative, and, as a result, qualifying major party candidates are guaranteed access to funding that far exceeds typical levels of expenditure. *See* Campaign Expenditures 2000-2004 (**Ex. B**.). This fact is particularly true with respect to races

[7] Section 9-705, which designates the amount of the grants, specifically refers only to major party candidates when designating the amount of the grant for primary elections. *See* Conn. Gen. Stat. § 9-705.

[8] The CEP makes an exception for major party candidates in one-party dominant districts. *See* Conn. Gen. Stat. §§ 9-705(e)(1)(A), (f)(1)(A). If the percentage of the electors in the district served by the office who are enrolled in the candidate's major party exceeds the percentage of the electors in the district who are enrolled in another major party by 20 percentage points, then the primary grant is $75,000 for senate and $25,000 for representative. *Id*.

for state representative and senate that were uncontested or nominally contested as between the major parties.[9] As a comparison, the model "clean election" programs noted by defendants specifically correlate grants with average past expenditures. *See, e.g.*, 21-A M.R.S.A. § 1125(8). With respect to the statewide races, the guaranteed grants purport to equalize the funding of major party candidates, even though these races are generally uncompetitive. *See* Statewide Campaign Expenditures (**Ex. C**).

A qualified minor or petitioning party candidate is not eligible for primary funding and is not guaranteed a full general election grant, even though he is required to raise the same amount of money in qualifying contributions. Minor party candidates receive a percentage of the general election grants based on the party's performance in the preceding election for that office: one-third for 10% to 15% of the votes; two-thirds for 15% to 20%; and a full grant for more than 20%. Conn. Gen. Stat. §§ 9-705(c)(1), (g)(1). In an identical manner, petitioning party candidates receive a percentage of the full grant based on the number of signatures they obtain. Only those who obtain signatures from at least 20% of the number of district (or state) voters who cast votes in the preceding election are given a full grant. *Id*. §§ 9-705(c)(2), (g)(2). Plaintiffs allege that the 10% signature requirement is unattainable. Am Compl. ¶¶ 2, 24, 27.

Participating major party candidates are prohibited from raising funds other than qualifying contributions. Conn. Gen. Stat. § 9-702(c). Because participating minor and petitioning party candidates are not guaranteed a full grant, those who receive less than a full grant are allowed to raise additional, private funds in order to make up the difference between the partial general election grant they received and the full general election grant provided to

[9] Major party candidates must participate in a contested primary in order to receive the primary grant. Conn. Gen. Stat. § 9-705. In addition, major party candidates receive a reduced general election grant if they are unopposed or if their only competitor is a minor or petitioning party candidate who has not met the qualifying contribution threshold. *Id*. § 9-705(j)(3), (4).

major party candidates. *Id*. Minor and petitioning party candidates, however, are not permitted to raise funds to match the primary grants provided to major party candidates. *Id*. Moreover, only those minor and petitioning party candidates who qualify for a pre-election grant are eligible for post-election funding, irrespective of their success in the general election. Those who do not receive a full grant are eligible to receive a supplemental payment, based on their results in the election so long as they incur "a deficit in the first statement filed after the general election . . . ." *Id*. §§ 9-705(c)(3), (g)(3). Finally, minor and petitioning party candidates who fail to qualify for public financing are limited to raising a *single* maximum contribution during the *entire* election cycle. A minor or petitioning party candidate seeking election for state representative cannot accept more than $250 per person, whereas nonparticipating major party candidates can accept up to $500 (combining primary and general elections). *Id*. § 9-611(a)(5).

C. EXPENDITURE LIMITS

All participating candidates[10] agree to expenditure limits in exchange for the public grants. Conn. Gen. Stat. § 9-702(c). The expenditure limits, however, are tempered in a number of ways that diminish their significance. *See* Am. Compl. ¶ 2. First, the CEP will dramatically increase average spending since the initial grants are based on expenditures from the most expensive past elections. Second, because candidates will continue to raise and spend large sums of money through the "organizational expenditure" provisions, private funding will remain integral to the campaigns of some publicly financed candidates. Third, participating candidates are released from the limits by the matching fund provisions.

[10] Throughout this brief, plaintiffs use the terms "participating" and "nonparticipating" candidates when analyzing the matching fund provisions. *See* Conn. Gen. Stat. §§ 9-713, 9-714. Unlike in other public finance cases, these terms do not refer to those candidates who do and do not choose to participate, respectively. Because all major party candidates will be able to qualify and because the rewards of the CEP are so rich, Democrats and Republicans, by and large, will be the "participating" candidates. Because most minor and petitioning party candidates are either categorically excluded or will be unable to qualify, "nonparticipating" candidates are the third-party candidates.

The CEP includes a large loophole for organizational expenditures made on behalf of participating candidates. Under Connecticut law, an organizational expenditure is a expenditure by a party committee, a legislative caucus committee, or a legislative leadership committee for the benefit of a candidate. Conn. Gen. Stat. § 9-601(25). These funds can be used for a variety of purposes including television and radio advertisements, direct mailings, campaign events, and political advisors. *Id.* Under the CEP, there are no restrictions on organizational expenditures made on behalf of candidates for statewide offices. Those made on behalf of participating candidates for state senate and state representative are limited to $10,000 and $3,500, respectively, during the general election. *Id.* § 9-718. However, these spending caps are insignificant because they apply on a committee-by-committee basis. Each separate entity can contribute up to the limit. Due to their cumulative effect, these contributions could quickly equal the general election grants for participating major party candidates. Additionally, the General Assembly permitted this exception with the knowledge that it would benefit major party candidates far more appreciably. Major parties have well-funded caucus, central, leadership, and town committees. Less prominent parties have relatively paltry centralized funding apparatuses.

The expenditure limits are not strictly binding because candidates may be released from the limits by the so-called "trigger provisions." *See* Conn. Gen. Stat. §§ 9-713, 9-714. Participating candidates are given matching funds for two different reasons. First, they are given matching funds when a nonparticipating candidate spends money in excess of the relevant grant (primary or general) for the office sought. *Id.* § 9-713. Participating candidates are entitled to receive up to four grants, each worth 25% of the applicable grant. *Id.* When the participating candidate has the 25% grant, he is not free to spend it in full; instead, he may only spend the

amount that would match the spending of her nonparticipating opponent, dollar for dollar.[11] *Id*. Also, all spending by nonparticipating minor and petitioning party candidates counts toward the general election limit. *Id*. § 9-713(a). Thus, matching funds are triggered even though spending by a minor or petitioning party candidate has not necessarily exceeded the combined pre-primary, primary, and general election spending of his participating major party opponent. For example, in a race for state senate, excess expenditure matching funds are triggered if the nonparticipating minor or petitioning party candidate's spending exceeds roughly 63% ($85,000 of $135,000) of the participating major party candidate's total spending.

The CEP also provides matching funds for independent expenditures made in support of nonparticipating or other participating candidates. *Id*. § 9-714. Funds are triggered when the independent expenditure combined with the spending of the nonparticipating candidate exceed the primary or general election grant. *Id*. § 9-714(c)(2). Also, an independent expenditure made on behalf of a participating candidate automatically triggers funds for any other participating candidate. *Id*. § 9-714(c)(1). This second provision will lead to increased candidate spending because would-be private donors will make independent expenditures instead under the CEP. Any matching funds triggered by independent expenditures are not held in escrow and, instead, are delivered directly to the CEP candidate. *Id*. §§ 9-714(a), (b). They are likewise capped at 100% of the primary or general grant. *Id*. § 9-714(c). Finally, independent expenditures made on behalf of a participating candidate do not count toward that candidate's expenditure limits and they are not counted for purposes of the excess expenditure matching funds under section 9-713.

[11] Excess expenditure matching funds are capped at 100% of the grant. Conn. Gen. Stat. § 9-713(g).

III. STANDARD OF REVIEW

When deciding a motion to dismiss under Rule 12(b)(6)[12], the Court must accept as true all factual allegations in the complaint, liberally construe all claims, and must draw inferences in a light most favorable to the plaintiff. *See Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 44 (2d Cir. 2003). A complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims." *United States v. Yale New Haven Hosp.*, 727 F. Supp 784, 786 (D. Conn. 1990) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). In its review, the Court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." *Samuels v. Air Transp. Local 504*, 992 F.2d 12, 15 (2d Cir. 1993). *See also Blue Tree Hotel Inv. (Can.), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 217 (2d Cir. 2004) (stating that courts "may also look to public records . . . in deciding a motion to dismiss").[13]

IV. ARGUMENT

A. PLAINTIFFS HAVE STANDING TO CHALLENGE ALL PROVISIONS OF THE CEP AT ISSUE IN THIS LITIGATION

The legal principle of standing is one of several doctrines utilized to ensure that federal courts adjudicate actual cases or controversies. *See Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir.

[12] Defendants have moved for judgment on the pleadings pursuant to Rule 12(c). The standard of review for a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is the same standard applied to a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). *Ziemba v. Wezner*, 366 F.3d 161, 163 (2d Cir. 2004).

[13] Plaintiffs rely on information contained in reports prepared by the Office of Legislative Research. These reports are collections of publicly available records and information, all of which is appropriate for judicial notice. As explained above, Part I, *supra*, if the Court deems these facts inappropriate for consideration, plaintiffs request leave to amend their Amended Complaint to incorporate these and other facts referenced in this memorandum.

2003). With respect to standing, the constitution demands: (1) "an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;" (2) "a causal connection between the injury and the conduct complained of;" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotations omitted). Organizations, such as political parties, have standing to challenge conduct that impedes their ability to fulfill their purposes. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). In appropriate circumstances, an organization can also challenge conduct that injures its members. *See, e.g., Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

Defendants argue that plaintiffs lack standing to challenge all of the provisions of the CEP as they apply to petitioning parties, the primary election funding provisions, and the matching grant provisions as they apply to potential donors of independent expenditures on behalf of nonparticipating candidates. Memorandum of Law in Support of Joint Motion to Dismiss ("Joint Memorandum" or "J.M.") at 22, 24, 31. As explained below, all of their standing arguments fail. Plaintiffs have asserted constitutional injuries caused by each of the provisions that will be redressed by enjoining the relevant portions of the CEP.

1. Plaintiffs Have Standing To Challenge The Petitioning Party Provisions Because Some Green Party And Libertarian Party Candidates Must Qualify As Petitioning Party Candidates

Defendants contend that plaintiffs lack standing to challenge the provisions that apply to petitioning party candidates. J.M. at 22. They incorrectly assert that plaintiffs "can suffer no personal injury from those provisions that apply to petitioning candidates." *Id*. at 23. Candidates for the Green Party and the Libertarian Party could be either minor or petitioning party

candidates in upcoming elections. As explained below, that designation depends entirely on the preceding election's results for the particular office at issue. Thus, both parties have standing to challenge the petitioning party provisions. The same holds true for DeRosa.

Major party status applies to all state candidates from a party that either received at least 20% of the vote in the preceding gubernatorial race or constituted 20% of all registered voters at the time of that election. Conn. Gen. Stat. § 372(5). Minor party status, on the other hand, is determined on an office-by-office basis and is acquired if that particular party's candidate received at least 1% of the vote in the preceding election for the particular seat at issue. *Id.* § 9-372(6). All other CEP-eligible candidates are petitioning party candidates. *See, e.g., id.* § 9-702(a) (referring to major, minor, and petitioning party candidates). Thus, if a candidate is not considered a major or minor party candidate, he can only qualify as a petitioning party candidate.

Both the Green Party and Libertarian Party intend to field candidates during the 2008 and 2010 elections. Am. Compl. ¶¶ 10, 12. Some of their candidates will be minor party candidates and others will be petitioning party candidates. For example, in the 2006 gubernatorial election, Cliff Thornton ran for governor as the Green Party's candidate. Office of the Secretary of the State, Election Results for Governor and Lieutenant Governor, Nov. 7, 2006, *available at* http://www.sots.ct.gov/ElectionsServices/election_results/2006_Nov_Election/Gov.&%20Lt.Gov.pdf (last visited Apr. 25, 2007). He received only 10,323 votes, which constitutes 0.86% of the total votes cast in that election. *Id.* Based on the fact that Mr. Thornton received less than 1% of all votes cast in the 2006 gubernatorial election, any Green Party candidate that runs for governor in 2010 would not be considered a minor party candidate and, therefore, could only qualify for CEP funds as a petitioning party candidate. On the other hand, DeRosa obtained 1.71% of the vote for the office of Secretary of the State in 2006. Office of the Secretary of the State, Election

Results for Secretary of the State, Nov. 7, 2006, *available at* http://www.sots.ct.gov/Elections Services/election_results/2006_Nov_Election/SecoftheState.pdf (last visited Apr. 25, 2007). Thus, any Green Party candidate that runs for Secretary of the State in 2010 will be considered a minor party candidate, although he will be completely ineligible for public funding.

Plaintiffs have alleged that *both* the minor party and petitioning party provisions are unconstitutional. Since both sets of provisions will apply to future Green Party and Libertarian Party candidates, depending on the preceding election results for the particular office, plaintiffs have standing to challenge the petitioning party provisions as well.

2. Plaintiffs Have Standing To Challenge The Primary Election Grants Because They Are Categorically Excluded From Receiving Them

Defendants also question plaintiffs' standing to challenge the distribution of funds to major party candidates for primary elections. J.M. at 24. They assert that, because neither the Green Party nor the Libertarian Party holds primary elections, "they can suffer no personal injury from those provisions . . . ." *Id.* They are mistaken. The primary election grants are part-and-parcel of the invidious discrimination caused by the CEP.

The inflated primary grants for major party candidates further the discrimination of the CEP by broadening the financial gap between major party and minor and petitioning party candidates. Minor and petitioning party candidates are categorically excluded[14] and, as a result, these funds significantly enhance the ability of major party candidates to obtain superior name recognition prior to the general election. *Compare Daggett v. Webster*, 74 F. Supp. 2d 53, 63 (D. Me. 1999), *aff'd*, 205 F.3d 445 (1st Cir. 2000) (concluding that separate allocation for primaries

[14] Connecticut law only requires major parties to nominate their candidates by primary. Conn. Gen. Stat. §§ 9-381, 9-382. The Green Party and the Libertarian Party choose to nominate their candidates through an alternative means, but could hold primary elections if prescribed in their by-laws. *Id.* § 9-451 ("nomination by a minor party of any candidate for office . . . may be made in the manner prescribed in the rules of such party . . ."). The CEP, however, categorically denies primary grants to minor party candidates, even if such candidates were to be nominated through the primary process. *Id.* § 9-705.

and general election did not prejudice independent candidates because the "amounts distributed here are hardly huge . . .").[15] This disparity is made worse by the matching fund provisions, Conn. Gen. Stat. §§ 9-713, 9-714, which also apply to primary grants.

Defendants refer the Court to *American Party of Texas v. White*, 415 U.S. 767 (1974), but that decision does not undermine plaintiffs' allegation of concrete injury. In *American Party*, the Supreme Court upheld a Texas law that provided funds to major parties in order to defray some of the costs of administering primary elections. *Id*. at 794. In this case, the funding is given directly to the candidates for the purpose of running their campaigns. All candidates, irrespective of whether they are required to run in a primary, have the same desired result. The primary funds provide major party candidates with an unfair advantage toward obtaining that goal. In addition, the Court should not follow defendants' compartmentalized view of standing. Plaintiffs have alleged that the CEP system as a whole unfairly discriminates against minor and petitioning party candidates. Plaintiffs have pointed to the funding of major party candidates during their primary elections as part of the overall scheme.

3. Plaintiffs Green Party And Libertarian Party Have Organizational Standing To Assert Claims On Behalf Of Individuals Seeking To Make Independent Expenditures

Defendants challenge plaintiffs' standing to assert claims relating to the effects of the matching fund provisions on individuals who seek to make independent expenditures on behalf of nonparticipating candidates. J.M. at 31. Plaintiffs Green Party and Libertarian Party have organizational standing to assert these claims on behalf of their members. As the Supreme Court has explained, an organization has standing to bring suit on behalf of its members when: "(a) its

[15] In Maine, all candidates who qualify for public funding prior to the primary election deadline are entitled to some primary funding. *See* Commission on Governmental Ethics and Election Practices, 2006 Candidate's Guide, at 37, *available at* www.maine.gov/ethics/pdf/2006_candidate_guide.pdf (last visited Apr. 17, 2007) (citing 21-A M.R.S.A. § 1125(8)). Un-enrolled candidates are given the grants for uncontested primary elections. *Id*.

members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. Plaintiffs meet all three conditions set out in *Hunt*. Members of these political parties who intend to make independent expenditures in support of the parties' candidates would have standing to sue. The ability to engage in political speech is germane to the purpose of political parties. And, the participation of individual members is not required because this case is a facial constitutional challenge to the provisions of the CEP.

B. COUNT I ALLEGES FIRST AND FOURTEENTH AMENDMENT VIOLATIONS BASED ON THE QUALIFYING CRITERIA AND DISTRIBUTION FORMULAS OF THE CEP

Defendants contend that the Supreme Court's decision to uphold the public financing system for Presidential candidates in *Buckley* forecloses plaintiffs' challenge to the CEP. They argue that plaintiffs' chief complaint is that the CEP treats major party candidates and minor and petitioning party candidates differently and that such a claim was rejected in *Buckley.* They mischaracterize plaintiffs' claims and extend *Buckley* too far.

The Amended Complaint alleges invidious discrimination, not simply disparate treatment. First, the CEP provides direct subsidies to major party candidates on terms that deny the same benefits to minor and petitioning party candidates and on terms that distort the relative positions of the political parties. *Contra Buckley*, 424 U.S. at 95, n.129 ("[a]s a practical matter . . . [the Presidential system] does not enhance the major parties' ability to campaign"). Second, the CEP impermissibly operates to artificially inflate the strength of major party candidates and diminishes the strength of minor and petitioning party candidates. *See Greenberg v. Bolger*, 497 F. Supp. 756, 778 (E.D.N.Y. 1980) ("in a competitive intellectual environment assistance to one

competitor is necessarily a relative burden on the other"). Third, the CEP entrenches power in the two major parties. *Buckley* and other Supreme Court precedents expressly forbid such a result. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (striking down Ohio ballot requirements because they "give the two old, established parties a decided advantage over any new parties struggling for existence . . ."). Plaintiffs' speech is also burdened by the impermissible advantage given to the major parties. *See, e.g., Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office").

1. *Buckley* Was Premised Upon Certain Fundamental Assumptions That Do Not Apply To The CEP

In *Buckley*, the Supreme Court upheld Subtitle H of the Federal Election Campaign Act, which provided for public financing of Presidential campaigns (hereinafter, the "Presidential system"). 424 U.S. at 90. By its terms, the Presidential system distinguished between major, minor, and new party candidates. *Id*. at 87. These categories were determined based on the percentage of the popular vote obtained by that party's candidate in the preceding Presidential election. *Id*. Major party candidates were entitled to a $20 million general election fund, but were required to agree not to raise any private funds or to incur expenses in excess of the grant. *Id*. at 88. Minor party candidates were entitled to a portion of the general election grant, based on their relative performance in the prior election. *Id*. In accepting these public funds, minor party candidates were required to agree to the same expenditure limits but were freed to raise private contributions up to that limit. *Id*. at 88-89. New party candidates were not eligible for

any funding at the beginning of the election cycle and were not subject to spending limits. *Id*. at 89. Both new and minor party candidates, however, were eligible for post-election grants.[16] *Id*.

The Supreme Court's holding in *Buckley* is premised on several considerations that, as developed below, are not present under the CEP. First, the Court described the "disadvantage" to minor party candidates as minimal because it was limited to "denial of the enhancement of opportunity to communicate with the electorate . . .," 424 U.S. at 95, and because they had failed to make a showing that the system categorically reduced the strength of their parties. *Id*. at 98-99. Additionally, the denial was not "total." Candidates who were ineligible at the outset of the campaign were still eligible for a post-election grant. *Id*. at 101. Second, any advantage garnered by major party candidates was offset by a "countervailing denial" – expenditure limits. *Id*. at 95. In fact, the Court viewed public financing as no real advantage to major party candidates because public funding served as a *substitute* for private contributions and minor party candidates were freed to out-raise and out-spend their opponents through private contributions. *Id*. at 99. Third, the 5% threshold for qualifying was "reasonable" in light of the fact that, since 1860, no third party had posed a credible threat to the two major parties in Presidential elections. *Id*. at 98. Based on those circumstances, the Court opined, identical treatment of all parties was unnecessary and would have fostered the proliferation of splinter parties and led to raids on the treasury. *Id*. The Court also recognized "the public interest in the fluidity of political affairs," *id*. at 96, and cautioned against the creation of public financing programs that might inhibit the growth of minor political parties. *Id*. at 104.

Defendants argue that the CEP is so similar to the Presidential system upheld in *Buckley* that they are entitled to dismissal of plaintiffs' claims under Rule 12(b)(6). J.M. at 13. To reach

[16] In order to qualify for public funding, either prior to or after the election, both minor and new party candidates had to appear on the ballot in at least ten states. *Buckley*, 424 U.S. at 89.

defendants' desired outcome, this Court would have to ignore the facts and the reasoning upon which *Buckley*'s holding rests. Defendants maintain that the differences between the CEP and the system for financing Presidential elections amount to differences in degree that have no constitutional significance. In every critical respect, however, the CEP differs in kind from the system upheld in *Buckley*. Their reliance on that decision is plainly misplaced.

Buckley does not suggests that entrenchment of the two major parties by stifling the speech of competitors is legitimate. The decision, in fact, supports plaintiffs' claims that the CEP invidiously discriminates against minor and petitioning party candidates by subsidizing major party candidates in a way that distorts their ability to campaign. The CEP provides subsidies on the basis of criteria that bear no relationship to what major party candidates would raise privately. For all of the reasons that the Presidential system did not discriminate, the CEP does – it artificially inflates the strength of major party candidates and dilutes the support for minor party candidates with its one-size-fits-all qualifying criterion, subsidizes rather than substitutes private financing of campaigns, creates no countervailing benefit for those unable to participate (or burden for those who do participate), and categorically excludes certain candidates from qualifying. *Buckley*, by its express terms, does not permit such a program.

2. The CEP Contains Unreasonable Qualifying Criteria That Unfairly Favor Major Parties, Impose Too Great Of A Burden On Minor And Petitioning Parties, And Categorically Exclude Candidates

The CEP's qualifying criteria invidiously discriminate against minor and petitioning party candidates for three principal reasons. First, the CEP categorically denies funding to many minor and all petitioning party candidates, regardless of their performance in the election. Second, minor and petitioning party candidates must satisfy onerous vote or signature requirements to which major party candidates are not subject. And third, the qualifying

contribution requirements are unnecessary, unjustifiably high, and unfair. At those levels, they provide an unfair advantage to major party candidates who can rely on their party's statewide support. In all of these respects, Connecticut has created a program that essentially excludes minor and petitioning party candidates, which is impermissible. *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 40 (1st Cir. 1993) (upholding Rhode Island's public financing program because "the choice between [participating and not] is real, uncoerced, and available to all . . .").

i. Prior Vote Totals/Signature Requirement

In *Buckley*, the Supreme Court concluded that the 5% threshold required of minor parties to qualify for pre-election funding was reasonable. 424 U.S. at 98. The Court reached this judgment based, almost entirely, on the lack of success among third party candidates in the previous 100 years of Presidential politics. *Id*. Given the marginal showing of support for these candidates and fearing an inducement to create splinter parties, the Court considered it reasonable to require a showing of a "modicum of support" before public funds were made available. *Id*. at 99. In Connecticut, by comparison, there is greater parity among the major and the minor political parties. Thus, the imposition of a heightened requirement (10% as opposed to 5%) is deserving of less deference.

Minor party and independent candidates have played a significant role in Connecticut politics in the recent past. In 1990, an independent candidate was elected Governor in Connecticut. J.M. at 19 (citing Connecticut State Library, "Roster of Governors of Connecticut," *available at* http://www.cslib.org/gov/index.htm). In the following election two minor party slates for Governor received a combined 30% of the vote. Past Performance (**Ex. A.**) at 3. Moreover, in the last several election cycles Green Party and Working Families Party candidates have made strong showings in many legislative elections. In 2006, 22 minor and petitioning

party candidates for state representative and three minor and petitioning party candidates for state senate candidates received at least 5% of the vote. *See* Election Results for State Representative; Election Results for State Senate. Two years earlier, there were 23 similar candidates for state representative and eight for state senate. Past Performance (**Ex. A**) at 6-9.

The General Assembly crafted the 10% requirement (as opposed to the 5% approved in *Buckley*) with the knowledge that it would categorically exclude a significant number of well-supported minor party candidates. Minor party candidates are categorically ineligible for public financing unless a candidate from their party received 10% of the vote in the previous election. Thus, a candidate whose party obtained as much as 9.9% of the vote (a considerable showing) in the preceding election cannot qualify. For example, in 2006, 12 minor and petitioning candidates for state representative received more than 5% and less than 10% of the vote. *See* Election Results for State Representative. In 2008, in spite of these strong showings, none of the minor party candidates running in the same districts will be eligible. The historical trend is even more dramatic. Between 2000 and 2004, 168 minor and petitioning party candidates ran for legislative office, and 61 received at least 5% of the vote. Past Performance (**Ex. A**) at 1. Only 22 of those 61, however, received 10% or more of the vote. *Id.*

Petitioning party candidates theoretically stand in a better position since they can qualify for funding by obtaining the signatures of qualified voters, irrespective of past electoral performance. In practice, however, they are no better off. Plaintiffs allege that the signature requirement is completely unattainable because of the difficulty and expense involved in obtaining so many signatures. Am. Compl. ¶ 24, 27.

Moreover, unlike in *Buckley*, the injury suffered as a result of failing to qualify is exaggerated by the fact that minor and petitioning party candidates who are ineligible for pre-

election grants cannot obtain any public funding following the election.[17] In *Buckley*, the Supreme Court highlighted the fact that minor and new party candidates could qualify for post-election funding, which meant, as a result, that the "claimed discrimination is not total." 424 U.S. at 102. In this case, the discrimination is total. The CEP's funding scheme embodies the concerns articulated by Chief Justice Burger in his dissent in *Buckley*: "the present system could preclude or severely hamper access to funds before a given election by a group or an individual who might, at the time of the election, reflect the views of a major segment or even a majority of the electorate."[18] *Id.* at 251 (Burger, C.J., dissenting).

Defendants nevertheless maintain that the differences between the CEP eligibility requirements and those considered in *Buckley* amount to differences in degree and should be left to the legislature to decide. This point might be a fair one if Connecticut had not gone to such extraordinary lengths to solidify the position of major party candidates in all elections. *Buckley* considered the reasonableness of using prior *Presidential* electoral results as the qualifying standard for funding for *Presidential* candidates. Under the CEP, Democratic and Republic candidates are given a permanent statutory preference for funding in all state elections based solely on their party's results in the prior gubernatorial race. *See* Conn. Gen. Stat. § 9-372(5). While major party candidates are presumptively eligible for full public funding in every legislative and statewide election, minor and petitioning party candidates are held to a different standard that requires them to qualify on an office-by-office basis.

The major political parties have been given this advantage even though their actual level of support in many elections, particularly for the General Assembly, may be less than the

[17] Minor and petitioning party candidates are eligible for public funding only if they qualify prior to the election. Conn. Gen. Stat. §§ 9-705(c)(3), (g)(3). In those instances, they receive supplements to the pre-election grant if that candidate reports a deficit and garners more votes than in the preceding election. *Id*.

[18] Neither *Buckley* nor any other case cited by defendants endorses a public finance system that categorically denies public funding to minor or petitioning party candidates.

qualifying thresholds established for their minor party counterparts. Almost half of the elections in Connecticut are not considered competitive and many are not contested by a major party opponent. In 2006, for example, 61 of the 151 (40%) races for state representative included only one major party candidate. Election Results for State Representative. On the state senate side, nine of the 36 (25%) races included only one major party candidate. Election Results for State Senate. Additionally, many major party candidates faced only token opposition from their major party competitors. Six races for state representative and five for state senate were taken by a major party candidate who captured at least 80% of the vote, even when facing another major party candidate.[19] *Id*. Minor and petitioning parties have filled the competitive void in many of these elections by providing an alternative candidate. In fact, it is particularly in these legislative districts that minor and petitioning party candidates make the strongest showings. In 2006, 11 of the 12 minor and petitioning party candidates that received at least 10% of the vote competed against only one major party candidate. *Id*. Thus, the CEP works to enhance the status of major party candidates in areas where they have not made any historical showing of support and in areas where minor and petitioning party candidates have made their greatest strides. Additionally, the CEP attempts to level the playing field in races for statewide offices, even though races are not generally competitive. *See* Statewide Office Expenditures (**Ex. C**).

ii. Qualifying Contributions

The CEP departs from *Buckley*'s understanding of permissible qualifying criteria in another crucial respect. Candidates must make a substantial financial showing by raising thousands of dollars in qualifying contributions. Conn. Gen. Stat. § 9-704. In view of the fact that prior election results – the additional threshold for minor party candidates – already provide a rough measure of support, the additional burden is unnecessary under *Buckley*'s logic.

[19] In total, 81of 187 (43%) General Assembly races in 2006 were uncompetitive by any objective standard.

Connecticut has a legitimate interest in preserving the public fisc and not funding hopeless candidacies, but those interests are already served by the vote total and signature requirements. Thus, the qualifying contribution threshold, particularly because it is set so high, only serves to frustrate the ability of minor and petitioning party candidates to qualify and, in that regard, unfairly favors major party candidates.

At the time of the passage of the CEP, the General Assembly was acutely aware of the general disparity between the ability of major party and minor and petitioning party candidates to raise private contributions. For example, in 2004, 24 minor and petitioning party candidates ran for state senate. Campaign Expenditures – 2004 Legislative Races at 4-6 (**Ex. D**). Twenty-three of those candidates were exempt from reporting their expenditures.[20] *Id*. DeRosa, the only candidate to report his expenditures, spent $150.08 on his campaign. *Id*. at 4. With respect to candidates for state representative, minor and petitioning parties fielded 66 candidates only five of which reported expenditures in excess of $5,000. *Id*. at 6-15. Along this same line, the General Assembly was also mindful that minor and petitioning parties have made substantial gains in Connecticut despite their inability to compete financially with the major parties. Thus, the adoption of a separate means-based standard occurred with the knowledge that few, if any, minor and petitioning party candidates had the capacity to meet the contribution requirement.

The qualifying contribution thresholds are discriminatory in two additional and important respects. First, there is the disparity in the funding. Major party candidates who satisfy the financial threshold qualify for public funding for both the primary and general elections. Minor and petitioning party candidates must satisfy the same financial threshold, but are awarded grants based on a different formula that pays them less. For instance, a major party candidate for state

[20] Candidate committees that do not receive or spend over $1,000 or are entirely funded by the candidate are not required to file financial statements. Conn. Gen. Stat. § 9-604(b).

senate who raises the required $15,000 in qualifying contributions is eligible for $120,000 in primary and general election funding. An eligible minor or petitioning party candidate must raise the same amount in the same way, but may only receive 33% of the $85,000 general election payment, or $25,757. The reduced payout is significant to minor and petitioning party candidates because they face greater obstacles to raising the qualifying contributions. Second, the qualifying contributions requirement unfairly favor major party candidates because they have well-established fundraising apparatuses. Eligible legislative candidates are not required to raise all of their qualifying contributions within the district. Conn. Gen. Stat. § 9-704. Instead, they can raise modest contributions within the district – 150 contributions of $5 for state representative and 300 contributions of $5 for state senate – and raise the remainder throughout the rest of the state. *Id*. §§ 9-704(a)(3), (a)(4). In this regard, the qualifying contributions requirement rewards candidates from parties with statewide popularity. A means-based test, under these circumstances, also puts at serious risk a candidate with a potentially large, but poor constituency.[21] Thus, for minor and petitioning party candidates, there is substantially less money available and they face the burden of raising thousands of dollars in qualifying contributions without the organizational structures in place that benefit major party candidates.[22]

Given the lack of competitiveness in many districts and the history of support for third-party candidates, there is no justification for the drastic distinctions between the qualifying criteria for major party and minor and petitioning party candidates. While minor and petitioning party candidates must demonstrate both an ability to raise significant sums of money and a

[21] The means-based test adopted in the CEP should not be equated with the system for qualifying for matching funds in the Presidential primaries. As the Court observed in *Buckley*, a means-based system was constitutionally sound for the primaries given the problems with determining the relative strength of candidates at that stage. 424 U.S. at 100, n.136.

[22] The CEP expressly acknowledges the competitive fundraising advantage for the established major political parties. Section 9-718 limits the organizational expenditures made by party, legislative leadership, caucus, and town committees made on behalf of candidates for legislative seats. Conn. Gen. Stat. § 9-718

substantial amount of support within the specific district, major party candidates need only raise the qualifying contributions. *Buckley* grants some latitude in fixing qualifying criteria, but the justification for differences must be based on proven differences in the relative positions of candidates. Because the funds will serve to subsidize the speech of previously uncompetitive major party candidates and reduce the strength of minor and petitioning party candidates, Connecticut has crossed beyond what is constitutionally permissible.

3. The CEP Subsidizes Rather Than Substitutes Private Financing Of Campaigns And Entrenches The Dominance Of Major Parties

The CEP, as a practical matter, enhances the major parties' ability to campaign because it does more than substitute public funding for what the candidates would raise privately. *See Buckley* at 95, n.129. Competition from minor and petitioning parties will be stifled by the bolstering of major party candidates in even their most uncompetitive districts. Moreover, minor and petitioning party candidates who are unable to qualify do not benefit from a corresponding advantage, given the relatively meaningless expenditure limits imposed on participating major party candidates. As explained in *Williams*, there is no justification for a system that entrenches the two dominant parties: "There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." 393 U.S. at 32.

i. Effects of Disparate Qualifying Criteria

As discussed above, major party candidates have several distinct advantages with respect to qualifying criteria. First, major party candidates are automatically eligible for public funding, no matter how dismal their party's candidate fared in the previous election. Second, major party legislative candidates can take advantage of their party's statewide popularity to compete in

districts that were previously uncompetitive by raising the vast majority of the money required from outside of the district. In effect, major party candidates will be able to qualify for public funding in every legislative district even though nearly half of all legislative races in 2006 were uncompetitive by any objective measure.

The influx of well-funded major party candidates to these uncompetitive districts will have a devastating effect on the prospects for minor and petitioning party candidates to develop strength. In most cases, it is only within the districts where there one major party candidate that minor and petition party candidates have success. For example, in 2006, 12 minor and petitioning party candidates received at least 10% of the total vote in their legislative districts. Election Results for State Representative; Election Results for State Senate. In 11 of those 12 districts, only one major party candidate ran. *Id*. There were 13 other races in which minor and petitioning party candidates received between 5% and 9.9% of the vote, and in 11 of them only one major party candidate competed. *Id*. Thus, in 85% of the districts in which minor and petitioning party candidates demonstrated a "modicum of support", they benefited from the lack of major party competition. The CEP will eviscerate these potential inroads.

In these circumstances, the CEP subsidizes the speech of previously uncompetitive major party candidates in a way the bears no relationship to their base of electoral or financial support. Inevitably, the funding will diminish the strength of minor and petitioning party candidates in the same proportion that they benefited from the absence of a major party candidate in these districts. As Chief Justice Burger explained in his dissent in *Buckley*, there are "grave risks in legislation, enacted by incumbents of the major political parties, which distinctly disadvantages minor parties or independent candidates." 424 U.S. at 251 (Burger, C.J., dissenting).

ii. Lack of Meaningful Expenditure Limits

According to *Buckley*, public financing systems that categorize candidates based on prior electoral performance must contain two essential elements. One, the public funds must provide a rough substitute for private donations. 424 U.S. at 99. Two, participating candidates must agree to limit their expenditures and assume the risk that candidates unable to qualify might gain a corresponding advantage from being free to raise and spend unlimited amounts of money. *Id*. The CEP fails in both respects. The General Assembly has provided funding that far exceeds actual spending and has gone to great lengths to eliminate the possibility that publicly financed major party candidates will suffer any corresponding disadvantage. The term "expenditure limit" is, in fact, a misnomer under the CEP due to: (1) grossly inflated primary and general election grants, Conn. Gen. Stat. § 9-705; (2) the loophole for organizational expenditures, *id*. § 9-718; and (3) provisions that release candidates from the expenditure limits and pay them additional subsidies, up to 100% of the primary and general election grants. *Id*. §§ 9-713, 9-714.

First, qualified major party candidates are eligible for public financing grants in amounts that are in no way correlated to previous expenditures made by candidates running for comparable offices. For example, a major party candidate running for state senate is eligible for $35,000 in funding for the primary and an additional $85,000 in general election funding. Conn. Gen. Stat. § 9-705(e)(1), (e)(2). These funds are distributed in addition to the $15,000 in qualifying contributions raised by the candidate. Conn. Gen. Stat. § 9-702(c) (participating candidates can use money from qualifying contributions at any time). Thus, a qualifying major party candidate is eligible to spend as much as $135,000 from the outset. The $135,000 spending limit far exceeds average past expenditures. *See* Campaign Expenditures 2000-2004, at 1-2 (**Ex. B**). During the 2000, 2002, and 2004 election cycles, candidates for state senate

averaged expenditures of $42,823, $49,342[23], and $71,603, respectively.[24] *Id*. Only seven candidates for state senate exceeded $135,000 in expenditures in 2004. Campaign Expenditures – 2004 Legislative Races (**Ex. D**) at 4-6. Thus, the grants allocated by participating major party candidates are comparable to the expenditures in only the most competitive of legislative races and, as explained above, very few races are actually competitive. In these elections, major party candidates will receive a windfall that artificially broadens their appeal by increasing the volume of their message. Minor and petitioning party candidates are denied this benefit and suffer a countervailing dilution of their message. *Buckley* specifically prohibits states from interceding in elections in this manner.

The so-called model clean election programs offer no cover for the CEP, either. Because the CEP provides grants in amounts that correspond to the most competitive races, it marks a significant departure from the incremental approach taken in other comprehensive public financing programs. The CEP starts at the ceiling and then goes through the roof. The programs in Arizona and Maine, on the other hand, establish a funding floor based on previous average campaign expenditures. *See, e.g.*, 21-A M.R.S.A. § 1125(8) (Maine's distribution to eligible candidates based on average expenditures during two preceding elections). In order to encourage candidate participation even in the most competitive and expensive districts, these programs allow for increased subsidies to ensure that participating candidates are not grossly outspent by their nonparticipating opponents. *See, e.g.*, A.R.S. § 16-952 (Arizona's provision adjusting expenditure limits and granting matching funds). In those circumstances, the public funds more directly correspond to actual expenditure levels and serve as a reasonable replacement of private

[23] For 2002, the report lists average receipts rather than expenditures. By law, candidate committees must distribute residual or surplus funds. Conn. Gen. Stat. § 9-608(e).

[24] Plaintiffs submit that these averages are inflated due to the fact that major parties chose not to run a candidate (rather than a poorly funded one) in many uncompetitive legislative districts.

financing.[25] Under the CEP, major party candidates in most elections will be guaranteed a grant that far exceeds what they otherwise would have spent.

Second, the voluntary expenditure limits of the CEP are undermined by a provision that allows CEP candidates to continue to raise and spend significant and, in some instances, unlimited amounts of money through numerous political committees. *See* Conn. Gen. Stat. § 9-718. Under this provision, candidates are freed to work closely with their party's apparatus in a way that directly advances their campaigns. *See id*. § 9-601(25) (defining organizational expenditure). Section 9-718 places some restrictions on organizational expenditures to legislative candidates ($3,500 to state representative and $10,000 to state senate), but these restrictions apply separately to the numerous caucus, leadership, and party committees that are authorized by the election laws. Thus, in the aggregate, participating candidates can benefit from organizational expenditures that can easily outpace the value of the general election grant. Inevitably, major party candidates will use the party apparatus and political committees as a conduit for campaign contributions and expenditures that would otherwise be limited by the acceptance of public financing. In that respect, these permitted expenditures will only increase the financial disparity between major party and minor and petitioning party candidates.[26] This loophole also undermines Connecticut's objective in removing the influence of private contributions from political campaigns.

---

[25] Even in the Arizona and Maine program, the public funding artificially inflates support for major party candidates in certain uncompetitive districts. From plaintiffs' perspective, these programs do not suffer from the same constitutional infirmities as the CEP, because essentially all ballot-qualified candidates can receive public funding and the funding is virtually identical for all candidates.

[26] Defendants correctly note that paragraph 31 of the Amended Complaint misstates the law. Candidates who are unable to qualify to participate in the CEP are *not* prohibited from accepting organizational expenditures. The basis of plaintiffs' objection to this provision, however, remains unchanged. The organizational expenditure loophole limits the significance of voluntary expenditure limits. Additionally, the argument that minor and petitioning party candidates remain free to receive unlimited organizational expenditures is solely academic. Major party candidates benefit from organizations expenditures from centralized party, legislative, and leadership committees. Minor and petitioning parties have no comparable apparatuses.

Third, to ensure that major party candidates are completely insulated from any corresponding disadvantage that might arise from their agreement to be bound by expenditure limits, the General Assembly has also provided for matching funds for both the primary and general elections. *See* Conn. Gen. Stat. §§ 9-713, 9-714. Section 9-713 releases participating candidates from the limits they voluntarily accept in a situation where a nonparticipating candidate spends more money than provided by the primary or the general election grant. *Id*. Spending by minor and petitioning party candidates (who have no primaries) is particularly burdened because it triggers matching funds based solely on the general election expenditure limit. Thus, a minor or petitioning party candidate for state senate could spend as little as 63% of his participating major party opponent's expenditures and still trigger matching funds.[27]

Matching funds are also triggered by independent expenditures that benefit nonparticipating candidates if their value, in combination with the candidate's own expenditures, exceeds the primary or general election grant. *See* Conn. Gen. Stat. § 9-714(c)(2). By definition, a candidate has no control, and cannot have any control, over these expenditures. However, under the CEP, they are treated as though they are either direct or coordinated expenditures. An independent expenditure made on behalf of a participating candidate automatically triggers funds for any other participating candidate. *Id*. § 9-714(c)(1). This provision will trigger more funding for major party candidates. Finally, independent expenditures made on behalf of a participating candidate do not count against the candidate's expenditure limits for purposes of determining whether a nonparticipating candidate's spending exceeds the participating candidate's limit. All

[27] Defendants are correct that paragraphs 33-36 of the Amended Complaint misstate the mechanism by which section 9-713 operates. Plaintiffs' objection to this provision, however, pertains to the fact that it eviscerates the significance of the voluntary spending limits and that it does not count spending by major and minor and petitioning party candidates equally.

of these provisions exaggerate the disparity between the major party and minor and petitioning party candidates.

Like the organizational expenditure provisions, the matching fund provisions generally serve to diminish the significance of the expenditure limit for participating candidates. The lack of a countervailing burden violates the First Amendment and Equal Protection Clause. In *Buckley*, disparate treatment of the parties was explicitly justified by the corresponding burden of spending limits imposed on candidates who received funding. 424 U.S. at 98. Candidates who were unable to qualify remained free to raise unlimited amounts of money and, therefore, outspend their participating opponents. *Id*. In this case, the system of benefits and burdens is skewed. The matching fund provisions, organizational expenditure loophole, and the top-end primary and general election grants ensure that major party candidates suffer no countervailing disadvantage from their decision to be bound by expenditure limits.

C. PLAINTIFFS HAVE ALLEGED FIRST AMENDMENT VIOLATIONS BASED ON THE MATCHING FUND AND INDEPENDENT EXPENDITURE PROVISIONS

Defendants have also moved to dismiss Counts II and III of the Amended Complaint for their failure to allege cognizable constitutional injuries to candidates. J.M. at 24. They assert that these claims are foreclosed by a number of post-*Buckley* lower court decisions that have upheld public financing systems which provide matching funds based on the expenditures of a nonparticipating candidate or independent expenditures. J. M. at 25 (citing *Daggett*, 205 F.3d 445 (1st Cir. 2000); *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998); *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996); *Jackson v. Leake*, C.A. No. 5:06-CV-324-BR, Order (E.D.N.C. Oct. 26, 2006)); *see also Brewer*, 363 F. Supp. 2d 1202. Their argument, however, proceeds from a misunderstanding of the basis of plaintiffs' claims and, therefore, a misapplication of those cases

to the CEP provisions. Plaintiffs have alleged First Amendment violations based on the matching fund provisions, Conn. Gen. Stat. §§ 9-713, 9-714, of the CEP, because the trigger provisions diminish the relative standing of minor and petitioning party candidates by unfairly exaggerating the speech of major party candidates. The provisions serve to stifle competition from minor party candidates in violation of the First Amendment.

These arguments were introduced above as plaintiffs' challenges to these provisions are intertwined with their objections to the CEP's funding scheme. Plaintiffs write separately here to address defendants' arguments regarding the post-*Buckley* cases.

1. The Matching Fund Provisions Violate Plaintiffs' First Amendment Rights By Unfairly Enhancing The Speech Of The Major Parties

The cases relied upon by defendants all involve the review of inclusive public financing programs that provide funding to all ballot-qualified candidates that raise small sums in qualifying contributions. *See, e.g.*, *Rosenstiel*, 101 F.3d at 1546 (participating candidates required to raise from $35,000 for governor to $1,500 for state representative). Plaintiffs' claims challenging the matching fund provisions are raised in the context of an entirely different style of public financing program. In the programs under consideration in the cases cited by defendants, minor and petitioning party candidates were eligible to participate, by and large, on the same terms as their major party counterparts. To encourage full participation by all ballot qualified candidates, the financing programs under consideration in those cases included provisions that conferred substantial benefits on participating candidates – including the type of matching funds provisions at issue in this case – and corresponding burdens on candidates who elected to opt out. *See, e.g.*, *Daggett*, 205 F.3d at 466-67 (discussing benefits and burdens). The cases upholding such systems are neither controlling nor particularly germane since they did not involve claims, as in this case, that the program at issue invidiously discriminated against minor

and petitioning party candidates. Given the inclusiveness and general equity of those programs, no such claims were even possible.

i. Campaign Expenditure Trigger

As explained above, section 9-713 provides for the grant of matching funds (dollar-for-dollar) to participating candidates when a nonparticipating candidate has exceeded the expenditure limit for either primary or general election. Conn. Gen. Stat. § 9-713. Participating candidates are eligible to receive up to 100% of the primary or general election grant (that he received) in matching funds. *Id*. Similar provisions were challenged in *Daggett* and the other cases cited by defendants. The alleged First Amendment violations were based on claims of coercion.[28] *E.g*. *Daggett*, 205 F.3d at 466. The plaintiffs in those cases argued that they had to pay too heavy of a price to opt out of the public financing system, based on the large disparity between the benefits and the burdens. *E.g. Rosenstiel*, 101 F.3d at 1549. These trigger funds contributed to the alleged coercion by penalizing nonparticipating candidates who spent in excess of the expenditure limits agreed to by participating candidates. *E.g. Jackson*, at 20.

The issue decided in each of those cases was whether the trigger provisions provided such a strong disincentive that the public financing schemes ran afoul of *Buckley*'s prohibition on involuntary expenditure limits. Courts have rejected these claims because the trigger provisions do not actually limit a nonparticipating candidate's spending and because candidates remain free, in actuality, to choose the financing alternative that best suited their needs. *E.g.*, *Daggett*, 205 F.3d at 472 ("Maine's public financing scheme provides a roughly proportionate mix of benefits and detriments to candidates seeking public funding . . ."); *see also Rosenstiel*, 101 F.3d at 1550. In reaching these conclusions, courts have recognized the need for such trigger provisions in

[28] The plaintiffs in these cases considered their decision to be a Hobson's choice. They believed the public funds to be insufficient, but considered the burden of not participating to be too great.

order to ensure that publicly financed candidate will be competitive and are not placed at a significant funding disadvantage. *E.g. id*. at 1551.

The First Amendment violation in this case is not based on a claim of coercion. Instead, it is based on plaintiffs' exclusion from the public financing system and how the CEP operates to alter their political position relative to major party candidates. The CEP fails to maintain a rough proportionality between the benefits and burdens for major party candidates – they are richly rewarded while suffering no countervailing burden or disadvantage. Minor and petitioning party candidates, on the other hand, are unable to capitalize on the rewards and are left in an inferior political position. The trigger provisions only exaggerate the disparities.

Trigger provisions are particularly necessary in systems where the grants are based on average past candidate expenditures or are well below the actual expenditure limit. *See, e.g.*, *Daggett*, 205 F.3d at 451 (Maine's initial distribution is average amount of campaign expenditures in prior two election cycles); *Rosenstiel*, 101 F.3d at 1554, n.9 (Minnesota's public grant is no more than 50% of expenditure limits). The matching fund provisions offer the flexibility to avoid over-funding all candidates, while ensuring that adequate funds are available to candidates facing nonparticipating competitors who seek a considerable spending advantage.

In the context of the CEP, the trigger provisions are wholly unnecessary. Major party candidates are given ample incentives and can qualify for sizable grants. Except in a handful of unusually competitive elections, the grant amounts significantly exceed actual campaign expenditures in past elections. The organizational expenditure provision augments the grants to ensure that every participating candidate is adequately funded. The CEP was adopted, moreover, in conjunction with a prohibition on all fundraising by lobbyists and state contractors. Am. Compl. ¶ 5. Based on the presumed role of these groups in the private financing of

elections, spending should decline from previous levels. Under these circumstances, there is no justification for releasing participating major party candidates from the initial expenditures limits and paying them additional matching funds.

These provisions violate plaintiffs' First Amendment right by undermining the corresponding benefit supposedly offered to those candidates unable to qualify – the possibility of out-spending the participating candidate. Section 9-713 also constitutes a First Amendment violation because the matching funds are triggered under a formula that does not equate major party candidate spending with minor or petitioning party candidate spending. There is no justification for creating an imbalanced system that provides additional funds even though the participating major party candidate has not been actually outspent. Thus, the primary purpose served by the matching fund provisions is to solidify the relative position of major party candidates at the expense of minor and petitioning party candidates.

ii. Independent Expenditures

Under the CEP, independent expenditures benefiting nonparticipating candidates are treated like expenditures by that candidate and can trigger matching funds. *See* Conn. Gen. Stat. § 9-714. By definition, however, independent expenditures are expenditures over which the candidate has no control. This lack of control is a constitutionally critical difference between independent and direct expenditures. As the Supreme Court observed in *Buckley*:

> The absence of prearrangement and coordination of an [independent] expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

424 U.S. at 47.

Section 9-714 violates plaintiffs' First Amendment rights for all of the reasons set forth with respect to section 9-713. In addition, the provision is fatally undermined by the equating of

independent with direct expenditures and the fact that independent expenditures opposing nonparticipating candidates are not similarly counted against the participating candidate's expenditure limits. With respect to that second point, if a nonparticipating minor or petitioning party candidate for state senate raises the $85,000, the general election grant paid to participating major party candidates, and benefits from $50,000 in independent expenditures, the participating major party candidate will receive an additional $50,000. Conn. Gen. Stat. § 9-714(c)(2). The potential disparity created by this provision is amplified by the fact that there is no limit to the independent expenditures that might accrue to the benefit of the participating major party candidate. To take this example even further, as between participating major party candidates, independent expenditures that benefit one of the candidates could trigger matching funds to the other, even though the nonparticipating candidate may have never raised or spent a dollar. In other words, the funding advantage for participating major party candidates is widened based on action over which the nonparticipating minor or petitioning party candidate has no control.

Instead of leveling the playing field, the CEP matching fund provisions decidedly slant the playing field to the advantage of the major party candidates.

2. The CEP Trigger Provision Keyed to Independent Expenditures Burdens the First Amendment Rights of Non-Candidates

Defendants have moved separately to dismiss Count III in so far as it is alleges that the independent expenditure matching fund provision (section 9-714) violates the First Amendment rights of non-candidates who engage in express advocacy. To support their motion, they rely on *Daggett*, *supra*, and two district court decisions that have adopted the First Circuit's reasoning in that case. *See Brewer*, 363 F. Supp. 2d at 1201-03; *Jackson*, Order at 20-22. The decision in *Daggett* is in direct conflict with a decision of another Court of Appeals. *See Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994).

In *Day*, the Eighth Circuit struck down a provision of a Minnesota campaign financing scheme virtually identical to the one adopted by Connecticut. In the statute scrutinized in *Day*, an independent expenditure against a publicly financed candidate who had agreed to a spending limit as a condition of receiving government monies (a) effectively lifted the spending limit in an amount equal to the independent expenditure, and (b) effectively provided the publicly financed candidate with a sum of money equal to one-half the amount of the independent expenditure. *Id*. at 1359. This scheme was found unconstitutional in light of *Buckley*'s clear message that the state cannot burden the free political expression that independent expenditures represent. 424 U.S. at 39-51. Plaintiffs submit that the Eighth Circuit reached the right result in *Day* and that *Daggett* was decided incorrectly.[29]

In *Day*, the court first observed that the political speech of the group or individual making the independent expenditure was impaired to the same extent the scheme benefited an opposing candidate. The court explained:

> [B]y advocating a candidate's defeat (or her opponent's victory) via an independent expenditure, the individual, committee, or fund working for the candidate's defeat instead has increased the maximum amount she may spend and given her the wherewithal to increase that spending – merely by exercising a First Amendment right to make expenditures opposing her or supporting her opponent. Thus the individual or group intending to contribute to her defeat becomes directly responsible for adding to her campaign coffers. To the extent that a candidate's campaign is enhanced by the operation of the statute, the political speech of the individual or group who made the independent expenditure "against" her (or in favor of her opponent) is impaired.

34 F.3d at 1359-1360. Second, the court concluded that the statute imposed an improper chilling effect on the political speech of the person making the independent expenditure and remarked further that:

[29] Contrary to defendants' suggestion, nothing in the Eighth Circuit's decision in *Rosenstiel* questions the validity of its decision on this issue in *Day*. As the Eighth Circuit in *Rosentiel* explained, "[t]he independent expenditure provision assailed in *Day*, however, bore a strikingly different pedigree than the contribution refund at issue here." 101 F.3d at 1555.

> The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive [an additional] public subsidy . . . as a direct result of that independent expenditure, chills the free exercise of that protected speech. This "self-censorship" . . . is no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship.

Id. at 1360 (citing *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988)). *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (striking down statute that required newspapers to print replies to editorials critical of a candidate because it would blunt or reduce the paper's political and electoral coverage). Third, the court found the statute to be content-based as it singled out a particular type of speech – that advocating the defeat of a candidate and/or supporting the election of his or her opponents – for treatment afforded no other type of speech.[30] *Day*, 34 F.3d at 1361.

Connecticut's law has the same failing as the Minnesota statute that was enjoined, except that it provides a full matching subsidy. Thus, even if this Court upholds the CEP in the main, this provision should be enjoined as unconstitutional.

V. CONCLUSION

For all of the foregoing reasons, plaintiffs request that defendants and intervernor-defendants' joint motion to dismiss Counts I, II, and III of the Amended Complaint be denied. Likewise, defendants' joint motion for judgment on the pleadings should be denied. In the alternative, the Court should grant plaintiffs leave to amend Counts I, II, and III of the Amended Complaint.

[30] In striking down the trigger provision, the court did not find it necessary to reach the broader issue of whether the burden on speech was justified by the state's interest in facilitating its public financing program since it found that participation in the state's pre-existing program was already near 100%. *Day*, 34 F.3d at 1361.

Dated: April 27, 2007

Respectfully submitted,

/s/ Jonathan B. Miller
Mark J. Lopez
Jonathan B. Miller (phv #01474)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004-2400
Tel: (212) 549-2608
Fax: (212) 549-2641
mlopez@aclu.org

Renee C. Redman (ct #16604)
American Civil Liberties Union of
Connecticut Foundation
32 Grand Street
Hartford, Connecticut 06106
Tel: (860) 247-9823
Fax: (860) 728-0287
rredman@acluct.org

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2007, a copy of the foregoing *Plaintiffs' Response in Opposition to Defendant and Intervenor-Defendants' Joint Motion to Dismiss and for Judgment on the Pleadings* 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/ Jonathan B. Miller
Jonathan B. Miller
Counsel for Plaintiffs