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.	:	

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION

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INTRODUCTION

This Court previously dismissed Counts II and III of Plaintiffs' Amended Complaint for failure to state a First Amendment claim. *See Green Party of Connecticut v. Garfield*, 537 F.Supp.2d 359, 392 (D. Conn. 2008). Those counts separately challenge the trigger provisions for excess expenditures and independent expenditures on the grounds that they pay matching funds to publicly financed candidates so that they can counter speech intended to defeat them.[1] Relying on the majority of cases that have rejected similar challenges, the Court rejected the argument that the trigger provisions burdened or penalized speech. *Id.* at 392. That conclusion has been called into question by *Davis v. Federal Election Commission*, 128 S.Ct. 2759 (2008).

Plaintiffs submit that *Davis* provides controlling support for the First Amendment claims alleged 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 Citizens' Election Program ("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.

The defendants respond that *Davis* involved discriminatory contribution limits and that the decision does not establish that trigger provisions necessarily burden speech.

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[1] Although the Court dismissed Counts II and III, the legitimacy of the trigger provisions nevertheless remained applicable to plaintiffs broader First and Fourteenth Amendment claim asserted in Count I because the triggers work together with the other provisions of the statutory scheme to increase the relative advantage of major party candidates and to marginalize plaintiffs' political opportunities. *See Garfield*, 537 F. Supp. 2d at 367 n.9, 377.

The defendants reject the application of *Davis* in the context of public financing programs that use a similar trigger mechanism. They argue, in the alternative, that the use of triggers in this context is narrowly tailored to serve the state's compelling interest in encouraging candidates to participate in the CEP and forgo private financing. The defendants' final argument is that plaintiffs lack standing because they cannot establish that their action would trigger matching funds.

The defendants' response is based on a narrow and erroneous understanding of *Davis* which fails to recognize the gravity of the burden on First Amendment rights at issue in this case. The fact that different interests are asserted in this case cannot avoid the conclusion that the means chosen to advance those interests are no longer permissible after *Davis* because triggers function as a *de facto* expenditure limit. The defendants must realize that expenditure limits have been considered presumptively invalid since *Buckley v. Valeo,* 424 U.S. 1(1976) was decided.

The trigger provision for independent expenditures is suspect under *Davis* for the additional reason that it is discriminatory. The trigger protects publicly funded candidates from attacks on their campaign by giving them the resources to respond, while at the same time allowing them to reap the benefit of unlimited independent (and party) spending used to attack their privately financed opponents. That type of discrimination cannot be reconciled with *Davis* and is hardly evidence of narrow tailoring.

Finally, the argument that plaintiffs lack standing has already been rejected and the defendants have asserted nothing new that would justify a different conclusion. *Garfield*, 537 F. Supp.2d at 366-367, n.9. Their argument simply expresses their disagreement with the Court's holding. That is not grounds for reconsideration.

ARGUMENT

I. After *Davis*, Matching Fund Provisions are no Longer Permissible because they Unconstitutionally Burden the First Amendment Rights of Candidates, Political Parties, and Independent Groups

The CEP pays matching funds so that publicly financed candidates can counter speech intended to defeat them. Matching funds provisions thus require privately financed candidates, political parties, and independent groups to either agree to limit their expenditures or risk triggering the disbursement of public funds to the candidate they oppose.[2] In this way, matching funds provisions impose a penalty on any privately funded candidate, political party or group who robustly exercise their First Amendment rights. Many candidates and political organizations may choose to speak despite the matching funds, but, when they speak, they "shoulder a special and potentially significant burden." *Davis v. FEC,* 128 S. Ct. 2759, 2772 (citing *Day v. Holahan,* 34 F.3d 1356, 1359-1360 (8th Cir. 1994)).[3]

The defendants argue that *Davis* does not warrant reconsideration of the dismissed claims and that the logic of the majority of cases upholding matching fund

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[2] Supplemental grants are also triggered under a lesser known, but more invidious provision that uniquely takes aim at non-major party candidates. In elections where the only opponent is a single major party candidate (which are the elections targeted by minor party candidates), the grants to the major party candidates are significantly increased if a minor party candidate enters the race and raises or spends more than $5,000 in House elections, or $15,000 in Senate elections. Conn. Gen. Stat. § 9-705(j)(4). In a Senate election, for instance, the grant amount to the major party opponent is increased from $51,000 to $85,000. In House elections, the grant is increased from $15,000 to $25,000. It makes no difference whether the minor party candidate qualified for public funding or not. This provision will discourage nonparticipating minor party candidates from spending up to the limit. (DeRosa Decl. ¶ 54, Pl. Ex. A-1).

[3] In *Davis*, the Court struck down a 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," 128 S.Ct. at 2771, and a "substantial burden" on the self-financed candidates, *id.* at 2772.

provisions identical or similar to Connecticut's remains sound. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464-472 (1st Cir. 2000); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1550 (8th Cir. 1996).[4] While that argument is plausible since the trigger mechanism at issue in *Davis* did not specifically arise in the context of a public financing system, it is ultimately based on a narrow and unreasonable reading of both *Davis* and the Supreme Court's seminal decision in *Buckley v. Valeo,* 424 U.S.1 (1976), upon which *Davis* rests.[5]

The Court, in *Buckley*, held that involuntary limits on a candidate's campaign expenditures are unconstitutional. 424 U.S. at 58. This holding would be rendered meaningless if the government could effectively force privately funded candidates to abide by expenditure limits by punishing those who refuse to participate in public campaign finance schemes. *Davis* makes explicit what was implicit in *Buckley*. The decision broadly rejects the argument that the government has any legitimate interest that would justify increasing the relative ability of one group of candidates to compete by limiting the expenditures of a second group. 128 S.Ct. at 2773 (warning against governmental interference with the political process and stating that "it is a dangerous business for Congress to use the election laws to influence voters' choices").

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[4] When *Davis* was originally decided in the district court upholding the "Millionaires' Amendment," the defendants immediately brought the decision to the attention of the Court arguing that the claim rejected in that case is "very similar" to the claims raised in this case. Letter from Novak to J. Underhill of Sept. 12, 2007 at 2.

[5] The defendants acknowledge that at least one U.S. District Court has already cited *Davis* as authority for invalidating a matching funds provision. See *McComish v. Brewer*, No. CV-08-1550-PHX-ROS (D. Ariz., 2008) (Sept. 5, 2008 Letter to Judge Underhill from Ira Feinberg, opinion attached). While denying the temporary restraining order due to the late stage of the election, the Court deemed the plaintiffs had "established that the Matching Funds provision of the Act violates the First Amendment of the U.S. Constitution." *Id.*, at 7. The Court noted: "Though the Arizona Act's mechanism for funding differs, the effect, which forces a candidate to choose to 'abide by a limit on personal expenditures' or else endure a burden placed on that right, is substantially the same." *Id.*, citing *Davis* at 2772.

The defendants fail to recognize this fundamental aspect of *Davis* and limit their analysis to the discriminatory contribution limits *per se*. If the issue was that simple, the Court in *Davis* would have analyzed the case under the more deferential First Amendment standard that applies to restrictions on political contributions. Instead, the Court analyzed the challenged regulation as an expenditure limit and applied "strict scrutiny." *See Davis*, 128 S.Ct. at 2772. The defendants gloss over the importance of how the Court framed the issue, but the Court's assessment of the trigger mechanism as an expenditure limit is critical to a proper understanding of the grave First Amendment interests that are at stake in this case.

The Court was concerned with the operation of the trigger mechanism *itself* – and the *de facto* expenditure limit it imposed on candidates. The plaintiff in *Davis* maintained that § 319(a) unconstitutionally burdened his exercise of his First Amendment right to make unlimited expenditures of his personal funds because making expenditures that create the imbalance has the effect of enabling his opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of his own speech. 128 S.Ct. at 2770. The Court agreed:

> *Buckley*'s emphasis on the fundamental nature of the right to spend personal funds for campaign speech is instructive. While BCRA does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right. Section 319(a) requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.... Under § 319(a), the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics. Cf. *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 14, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) (finding infringement on speech rights where if the plaintiff spoke it could "be forced ... to help disseminate hostile views").

> 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, 128 S.Ct at 1771-2772.

The irony of the defendants' position is that, even if analyzed on their terms, the trigger provisions would fail because they discriminate in the same manner as the provision challenged in *Davis.* Independent expenditures that target the defeat of a participating candidate trigger matching payments to the candidate and effectively increase his expenditure limits. Independent expenditures targeting a non-participating candidate are not offset against the participating candidates funding or limits. The trigger provision for independent expenditures allows the publicly-funded candidate's party or other individuals to make virtually unlimited independent expenditures that directly advocate the defeat of the two challengers, as long as those expenditures are not coordinated by the candidate or his campaign. *See Garfield*, 537 F. Supp. 2d at 377. The result could easily throw the whole election out of balance by giving one candidate a decided financial advantage.[6]

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[6] Consider the circumstances of Governor Lowell Weicker if the CEP was in effect in 1990 when he was elected governor as an independent. He would have a faced a lose-lose situation. By failing to qualify,

The Supreme Court's unambiguous assessment of the punitive nature of §319(a) and its impact on speech cannot be summarily dismissed simply because the trigger mechanism under consideration in that case did not arise in the context of a public financing system. Indeed, the Court's apparent approval of the directly analogous decision in *Day v. Holahan, supra,* is persuasive evidence that the Court's holding is not limited to the facts of the case.

In *Day,* the Eighth Circuit struck down the matching funds provision in Minnesota's public campaign finance scheme. 34 F.3d at 1366. The challenged matching fund provision was triggered by independent expenditures. The law was actually less burdensome than Connecticut's matching funds provision. Minnesota's law only matched independent expenditures, not candidate expenditures. Independent expenditures were matched by one-half the amount spent to advocate the publicly financed candidate's defeat (while also increasing that candidate's spending limits). *Id.* at 1359. Connecticut's scheme matches the independent expenditure dollar-for-dollar and increases the government funded candidate's expenditure limit by the amount of matching funds

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he gains no advantage because, regardless of how much he could have raised privately (and he did raise more than his Democratic opponent), the matching fund provision would not only have thwarted his funding advantage but would have, in effect, imposed a 25% penalty on the first dollar he spent over the applicable expenditure limit. Conn. Gen. Stat. § 9-713(a)-(f). If his opponents received a primary grant, he would be at a further disadvantage. On the other hand, if he had qualified for a 1/3 partial grant through the petitioning process (which he acknowledges he might have done given his name recognition, proven contributor base, organized ground game, and lead in the polls from the outset), he would have faced a 3:1 spending disadvantage against both major party candidates. He could not have competed under these circumstances and could not have made up the difference hobbled by the $100 limit on contributions and the restriction on borrowing. (Weicker Decl. ¶ 18, Ex. A-2). If you factor in the value of independent expenditures that might trigger additional funds to his major party opponents, he might very well have foregone his run as an independent candidate. All of these factors would have decidedly distorted the playing field and almost certainly influenced the outcome of the election.

issued. Matching funds are also triggered under the provisions that are tied to expenditures by non-participating candidates. *Id.* [7]

In *Day*, the Eighth Circuit examined the effect on independent expenditures when the government pays matching funds to the political candidates whose election the independent expenditure is designed to defeat. 34 F. 3d at 1359. Not surprisingly, the court found that the threat of triggering payments to government funded candidates caused independent groups to self-censor. *Id.* at 1360. This is because "[t]he knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech." *Id.*

The analysis in *Day* (and *Davis)* has until now been largely rejected. *See Daggett,* 205 F.3d at 464-465.[8] Indeed, this Court declined to adopt *Day*'s logic when confronted with the challenge to Connecticut's matching funding provisions. *Garfield*, 537 F. Supp. 2d at 391-92. The Court in *Daggett* upheld a matching funds provision nearly identical to the Connecticut provisions that plaintiffs challenge in this case. The First Circuit's rejection of *Day* is premised on the oft-quoted proposition that under the First Amendment, individuals "have no right to speak free from response." 205 F.3d at 464.

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[7] Supplemental grants are triggered if an opponent spends a single dollar in excess of the applicable expenditure limit. Conn. Gen. Stat. § 9-713(a)-(f). The supplemental payment is 25% of the base grant. *Id.* Additional grants equal to this amount are paid thereafter each time the opponent spends one dollar in excess of 125%, 150%, and 175% of the applicable expenditure limit. *Id.* The payments are capped at 200% of the grant amount. *Id.* § 9-713(g). By way of example, in a state senate race, a privately financed candidate who exceeds the applicable expenditure limit ($100,000) by a single dollar will trigger an additional grant equivalent to $21,500 (25% of $85,000) to his publicly financed opponent. *See also*,Conn. Gen. Stat. § 9-705(j)(4) (increasing amount of grant if minor party candidate raises as little as little as $5000 and $15,000, respectively, in elections for State Representative and State Senate).

[8] *See also Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1550 (8th Cir. 1996); *Gable v. Patton,* 142 F3d 940 (6th Cir 1998).

Plaintiffs agree that the First Amendment does not protect a right to speak free from response. But objecting to being "directly responsible for adding to" the campaign coffers of a candidate the speaker opposes is a far cry from asserting a right to speak free from response. *Day,* 34 F. 3d at 1360. The First Circuit failed to account for the true cost to candidates and political organizations of triggering matching funds when they speak out against a government funded candidate: namely, there is a chilling effect on the exercise of constitutionally protected speech when the direct result of that speech is to provide one's opponent with a large cash subsidy.

Plaintiffs have spent, or intend to spend, money on their campaigns and on speech advocating the defeat of a government funded candidate. Although the defendants are dismissive of plaintiffs' claims, they have no evidentiary basis to question the accuracy or sincerity of the testimony that minor party candidates will be discouraged from participating in elections by the rich subsidies provided to major party candidates under the CEP. DeRosa Decl. ¶¶ 57-58, Ex. A-1. The trigger provisions for excess expenditures, both under Conn. Gen. Stat. § 9-705(j)(4) and under Conn. Gen. Stat. § 9-713(a)-(f), supply an added disincentive that will discourage candidates from raising or spending money. DeRosa Decl. ¶¶ 54-55. A Green Party candidate for State Senate, for instance, knows at the outset that, if he raises as little as $15,000, this may trigger a full grant to his opponent. Conn. Gen. Stat. § 9-705(j)(4). *See note 2, supra.* Thereafter, the first dollar that the minor party candidate raises in excess of the full grant amount triggers an additional 25% payment to his opponent. Conn. Gen. Stat. § 9-713(a)-(f). *See note 7, supra.*

The defendants minimize the harm to plaintiffs by arguing, in effect, that neither minor party candidates nor their supporters have the financial strength to trigger the matching fund provisions. That is contradicted by the defendants' own submissions. *See* Supp. Decl. of J. Green (describing thousands of dollars raised by two WFP candidates who are trying to qualify for public financing through the petition process). Moreover, that argument fails to account for the possibility that minor party and petitioning candidates could raise that type of money in the right circumstances involving a candidate with broad appeal or a self-financed candidate seeking office on the Green or Libertarian Party ballot line. "[T]he fact that minor party candidates have not achieved substantial success in past elections does not mean that the CEP cannot, as a matter of law, burden their political opportunity in future elections." *Garfield* 5 37 F.Supp.2d at 379. The Court need not look further than the election of Governor Weicker and Senator Lieberman and the similar success of Independent statewide candidates in other States (including Maine and Vermont) to know that the public can become dissatisfied with the major parties. Even at the local level, minor party candidates are increasingly being elected to office in Connecticut. See Factual Section, Plaintiffs' Memorandum in Support of Motion for Summary Judgment.

The trigger provision for independent expenditures will also discourage political parties and independent groups from supporting alternative candidates. DeRosa Decl. at ¶¶ 54-56. An independent group would have to think twice about paying for a mailing or running an ad critical of a candidate if it triggered additional funds for the candidate it opposed. The defendants erroneously assume that expenditures made by independent groups attacking a major party candidate are completely unrelated to the support of minor

parties – that minor parties, in effect, would be only marginally impacted. There is no factual basis for that assertion. An ad attacking one candidate necessarily benefits all his opponents.

A labor union or the AARP, for instance, might run a negative ad campaign against an incumbent candidate whose healthcare policies they strongly oppose. The defendants cannot say definitively that a Green or Libertarian Party candidate is not the beneficiary of those attacks on his or her opponent. Minor party candidates benefit from any attack on the *status quo*. Independent groups may decide, however, that the effort is not worth the candle if the result of those expenditures will be the disbursement of public funds by a government agency directly to the candidate those expenditures were designed to help defeat.[9] Thus, the burden on political speech is even more readily apparent in the plaintiffs' case than in *Davis* because there is an immediate and automatic disbursement of funds to the candidate the speaker opposes.[10]

The burden on speech that this Court struck down in *Davis* was the mere opportunity to raise more money under increased contribution limits (and the suspension of the party coordinated expenditure limits). *Davis,* 128 S. Ct. at 2765. Unequal contribution limits are certainly a benefit, but not nearly the same benefit as a check cut by the government directly to your opponent's campaign. Under matching funds

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[9] In fact, the SEEC recently promulgated regulations that define independent expenditures so that this provision is more easily triggered. (SEEC 2008 CEP Regulations, § 9-714-1, Ex. 36). It substantially expands the definition beyond explicit words such as "vote against," "defeat," or similar bright-line words, in favor of words that will encompass almost any communication that can be viewed as promoting the defeat of a participating candidate – including any criticism of the candidate.

[10] The defendants have even less basis to argue that the Green and Libertarian Parties, themselves, may limit expenditures urging the defeat of an opposing candidate because of the knowledge that it could result in more financing for major party candidates. The defendants scoff at the suggestion, but that response is not sufficient to rebut plaintiffs' evidence on the issue. DeRosa Decl. ¶ 58, Ex. A-1. Both the Green and Libertarian Party could easily benefit from an infusion of cash that would allow them their use of independent expenditures.

provisions, the harder a privately financed candidate works at fundraising, the more his government funded opponent benefits. Matching funds give government funded candidates a free ride on their privately financed opponents' coat-tails. No less is true of independent expenditures made by the candidate's party or by independent groups. The result is those privately funded candidates and their parties and groups that might support them face two choices, both bad: accept expenditure limits by running for office with government funds or suffer the punitive provisions of the public campaign finance scheme.

Any limitation upon private expenditures for political speech, whether direct or indirect, is not compatible with the First Amendment's free speech guarantee. Matching funds are designed to limit both candidate speech and independent expenditures. Matching funds thus compel privately financed candidates to abide by the same expenditure limits as government funded candidates and punish those candidates or independent groups who dare to robustly exercise their free speech rights.

II. The Matching Fund Provisions are not Narrowly Tailored to Serve a Compelling State Interest

A. The State does not have a Legitimate Interest to Justify the Payment of Matching Funds to Counter Speech Intended to Defeat Publicly Financed Candidates

The Defendants' contention that public financing serves several compelling state interests is not disputed. The State unquestionably has an interest in preventing corruption or the appearance of corruption that flows from a system of large unregulated campaign contributions, and public financing serves that interest. *Buckley, supra.* The issue is whether the State's interests can be advanced by adopting the type of trigger mechanism that was invalidated in *Davis*, *supra.* After *Davis,* that issue is no longer

open to serious debate. While *Davis* did not deal with a public campaign finance system, it nonetheless has significant implications for public campaign finance systems. In particular, the Court found that:

> 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.... 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.

Id. at 2773-2774.

Although the defendants conspicuously avoid framing the issue in terms of "leveling the playing field" in elections, there is no doubt that that is the purpose of the matching fund provisions. The fact that the defendants characterize their interest in terms of "encouraging participation by candidates who fear being outspent" does not alter the fact that the trigger provisions serve that interest by "leveling the playing field."[11] The defendants are right that the availability of matching funds is intended as a "carrot." What they omit from their discussion is that the trigger provisions are also intended as a "stick" to discourage candidates from opting out of public financing by ensuring that they gain no advantage from spending freely. Given the State's acknowledged interest in limiting

[11] The facts are not helpful to the defendants. The CEP was designed with the goal of removing what the defendants perceived as the distorting and unhealthy effects of private financing and to provide a "level playing field" that would encourage competition from candidates without the resources to compete effectively. *See* A Guide for 2008 General Assembly Candidates Participating in the Citizens' Election Program at 2, *available at*: http://www.ct.gov/seec/lib/seec/CEP_GUIDE_JUNE_2008_-_FINAL.pdf (last visited August 27, 2008) (goals include "[a]llowing candidates to compete without reliance on special interest money," "curtail[ing] excessive spending and creat[ing] a more level playing field among candidates," and "[e]ncouraging competition in the electoral process.").

both excess expenditures and independent expenditures, it is clear that such systems must face significant constitutional scrutiny in light of the Court's explicit language in *Davis.*

The defendants nevertheless argue the logic of *Daggett,* 205 F.3d 445, 464-65 and other case involving trigger provisions remains sound after *Davis.* That argument finds little support in the language of *Davis* itself. The governmental purpose justifying matching funds provision is to equalize the relative financial resources of publicly and privately funded candidates. Public campaign finance schemes intend to level the playing field so that privately financed candidates do not outspend their government funded opponents. But leveling the resources of competing speakers is not a legitimate governmental purpose. Indeed, as this Court recently recognized in *Davis v. FEC,* it is a concept "'wholly foreign to the First Amendment.'" *Davis,* 128 S. Ct. at 2773 (quoting *Buckley v. Valeo,* 424 U.S. at 48-49.)

The independent expenditure provision finds even less support in *Davis,* particularly since the Court cited with apparent approval the Eight Circuit's decision in *Day,* which involved a substantially similar matching fund provision that was triggered by independent expenditures. 128 S.Ct. 2772. The only interest served by this provision is to counter speech intended to defeat the publicly financed candidate. It attempts to protect candidates from speech that is the normal grist of political campaigns by providing them with the resources to respond to their critics.[12] While the defendants may believe that the independent expenditure match is a necessary inducement, *Davis* does not allow the State to burden speech in this manner. Moreover, to the extent the payment of matching funds under this provision gives participating candidates and advantage over

[12] See note 9, *supra.* (Describing broad construction given to the independent expenditure provision by the SEEC).

their opponents or provides them with the resources to respond that they would not otherwise have, *Davis* takes a decidedly dim view of this type of government intervention into the political process. 128 S.Ct. at 2773.

Indeed, this Court has also already expressed reservations concerning this provision because expenditures targeting non-participating candidates are not factored into the funding equation. The publicly-funded candidate's party, or other individuals, can make virtually unlimited independent expenditures that directly advocate the defeat of the two challengers, as long as those expenditures are not coordinated by the Republican candidate or his campaign. *See Garfield*, 537 F. Supp. 2d at 377. The First Amendment does not allow the government to subsidize one side of the debate if it has the effect of distorting the relative ability of the candidates or their supporters to speak and be heard. *See Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . . "). The distorting effects of the trigger provision for independent expenditures constitute discrimination, and cannot be justified by the state's interest in facilitating debate among major party candidates only. The CEP cannot withstand strict scrutiny because the government can have no legitimate – much less compelling – interest in discriminating against non-major party candidates. The state might legitimately establish non-discriminatory criteria for public financing that recognize the inherent differences between major and minor parties, *id.* at 96-104, but the state's actions cross into forbidden discrimination once it increases the competitive advantage of major party candidates (and correspondingly disadvantages non-major party

candidates). *See Davis,* 128 S. Ct. at 2770-74 (Congress has no interest that would support discriminatory contribution limits that favored one group of candidates).

B. The Matching Fund Provisions are not Narrowly Tailored

The defendants maintain that the matching fund provisions are narrowly tailored to serve the State's interest in encouraging candidates to participate and that without them the success of the program would be seriously jeopardized. They conspicuously fail to cite any evidence to support this contention and rely instead on other public finance cases that have accepted the argument that the payment of matching funds is narrowly tailored to advance the state's interest. See *Rosenstiel v. Rodriguez*, 101 F.3d at1554. In fact, most courts, including this one, have not reached the issue because they have concluded at the outset that "triggers do not actually burden the exercise of political speech." *Garfield,* 537 F. Supp.2d at 392. Until *Davis* was decided, this was the prevailing view expressed in *Daggett* and other cases involving trigger provisions. 205 F.3d 445, 464-65.

Even if the state's interest in facilitating its public financing system could arguably justify some burden on plaintiffs' speech, the trigger provisions are unnecessary and not narrowly tailored to advance the state's interests. Major party candidates have ample incentive to participate in the CEP. For most candidates it is the only rational choice because they could not possibly raise the amount of money that is being handed to them on a platter. These candidates need no further encouragement to participate.

The ease with which major party candidates can qualify for public financing provides all the encouragement they need. Major party candidates – including those with absolutely no chance of winning in legislative districts and in statewide elections dominated by one party – are presumptively eligible for full public financing. A full 43%

of the legislative districts involved a winning candidate who was unopposed by another major party candidate or was opposed by a major party candidate who received less than 20% of the vote. *Garfield*, 537 F. Supp. 2d at 380.[13]

The only prerequisite they must satisfy is that they raise a minimum number of qualifying contributions. The amount of money they must raise is a fraction of the amount that they could actually raise on their own and that is actually necessary to run a campaign. *See* Declaration of Alex Nikolaidis Exh.A-8, Tables 1-4 attached thereto. For major party candidates, this is a mere formality given the ability of major party candidates to tap into the party apparatus. (Jepsen Depo., Pl. Ex. 20 at 84-85). Except in a handful of unusually competitive elections, the grant amounts significantly exceed actual campaign expenditures in past elections. *Id.* In close elections, the organizational expenditure provision augments the grants to ensure that every participating candidate is adequately funded.

The availability of public financing has opened up transformative opportunities for major party candidates. They are flocking to the system at a rate identified by the defendants at 75%-80%. (SEEC Report on CEP's Projected Levels of Candidate Participation 2008, Pl. Ex. 41 at 12-13). There will be dozens of newly contested

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[13] The results in those districts only tell part of the story. In fact, there are only a handful of state elections for legislative and statewide office that are considered "in-play" each cycle. According to the defendants' expert, a 20% margin of victory is considered an electoral landslide. (Green Supplemental Report, Pl. Ex. 21 at 1) (Defining a "safe district" as one in which a candidate wins a district by getting at least 60% of the vote, *i.e.*, by a 60/40 split). In 2006, 72% of Senate elections and 83% of House elections involved a winning major party candidate who was either unopposed by another major party candidate or who won by at least 20% of the vote. *See* Election Results for State Representative (61 of 151 races included only one major party candidate, and 65 of the other races won by a major party candidate by at least 20% of vote); Election Results for State Senate (9 of 36 races included only one major party candidate, and 17 other races won by a major party candidate by at least 20% of vote).

elections in the 2008 legislative elections.[14] (Foster Decl. ¶ 14) (Thirty-one state house races previously contested by one major party in 2006 will now be contested by both major parties in 2008; five senate races that were previously contested by only one major party in 2006 will now be contested by both major parties in 2008).[15]

There is no evidentiary basis to conclude that participation would be less if matching funds were not available. Strict scrutiny places the burden squarely on the defendants to prove that the success of the program would be actually jeopardized without the trigger provision. They cannot begin to satisfy their heavy burden by relying solely on their belief that participation rates would be less.[16]

The trigger provision for independent expenditures is suspect under *Davis* for the additional reason that it is discriminatory. The trigger provision protects the publicly funded candidate from attack on his campaign by giving him the resources to respond while, at the same time, allowing him to reap the benefit of unlimited independent (and party) spending, attacking his privately opponent without consequence. This is hardly

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[14] The CEP was adopted, moreover, in conjunction with a prohibition on all fundraising by lobbyists and state contractors. 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.

[15] As of this date, only a handful of major party candidates have opted-out of the CEP, including 4 candidates for State Senate and 37 candidates for State Representative.

[16] Moreover, even if the availability of matching funds was a factor in the decision of some candidates to participate, that would not satisfy the defendants' evidentiary burden. They would still have to show that the excess expenditure and independent expenditure provisions would actually come into play in a way that would jeopardize the success of the CEP. At this point the SEEC maintains that the provisions are unlikely to have a major impact on the success of the program. (SEEC Report on CEP's Projected Levels of Candidate Participation 2008, Pl. Ex. 41 at 8-9). If there is only a remote likelihood that supplemental grants will be triggered by excess expenditures or independent expenditures, then defendants' entire defense of the matching fund provisions is doubtful. *See Davis,* 128 S. Ct. at 2772; *Day*, 34 F.3d at 1361. (High participation rate in public financing program undermined justification for matching fund provision).

evidence of narrow tailoring and will further marginalize minor party speech. *See Garfield*, 537 F. Supp. 2d at 377.

III. Plaintiffs Face the Requisite Injury from the Operation of the Matching Fund Provision to Establish Article III Standing

The defendants do not contend that plaintiffs lack standing to challenge the matching fund provisions as part of their main claim that the CEP discriminates against minor party and petitioning candidates and their supporters in violation of the First and Fourteenth amendments. The trigger provisions are applicable to that claim because they work together with the other provisions of the statutory scheme to increase the relative advantage of major party candidates and to marginalize plaintiffs' political opportunities. Minor party candidates are essentially bystanders in this attempt to level the playing field between major party candidates. The grants are exclusively in the service of major party candidates and will inevitably work against the candidates who are unable to qualify for public financing. The major party slugfest will inevitably further marginalize the ability of minor party candidates to be heard. *See Garfield*, 537 F. Supp. 2d at 377. The burden on plaintiffs' political opportunity is an injury that flows directly from the operation of the CEP and is sufficient to establish standing. *Garfield*, 537 F.Supp.2d at 367 n.9. Whether this burden is sufficient to establish a constitutional violation goes to the merits of plaintiffs' claims, not to their standing to bring those claims. *Id.*

The defendants' argument is limited to the narrow issue of whether plaintiffs have standing to assert the separate First Amendment claims alleged in Counts II and III of the amended complaint.[17] Those claims are based on the argument that matching funds

[17] In their motion to dismiss, the defendants challenged plaintiffs' standing to assert claims relating to the effects of the matching fund provisions on individuals who seek to make independent expenditures

provisions impose a *penalty* on any privately funded candidate who triggers the excess expenditure provision and on any political party or group that triggers the independent expenditure provision. The gist of the defendants' argument is that plaintiffs have not made the requisite showing that they are injured by the matching fund provisions since there is no likelihood that their actions would trigger additional payments to their opponents. That argument has already been rejected by the Court. *Garfield*, 537 F. Supp.2d at 366-367. The defendants have asserted nothing new that would justify a different conclusion. Their argument simply expresses their disagreement with the Court's holding. That is not grounds for reconsideration.

The trigger provisions are like the proverbial "sword of Damocles; its impact is felt even when it merely hangs, it need not fall." *Garfield*, 537 F. Supp. 2d at 367. ("[T]he very fact that the trigger would prevent a potential spender from spending in the first instance constitutes the injury that gives rise to standing."). *Id.* The defendants maintain that more is required than this, but they fail to explain why the dampening effect on "potential spenders" and potential candidates and contributors is not sufficient when the express purpose of the trigger provision is to discourage spending. As this Court observed, those candidates, contributors, and groups may withhold their contributions and limit their spending because of the trigger provisions. *Id.* The fact that the potential spender or contributor has not acted does not deprive plaintiffs of standing because it is

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on behalf of non-participating candidates. They did not object to plaintiffs' standing to challenge the excess expenditure provision. They raise this argument for the first time here.

the trigger itself that may account for that person or group holding back their contribution or limiting their spending. *Id.*[18]

As we have explained previously, the trigger provisions will inevitably discourage candidates, contributors, political parties, and independent groups from engaging in constitutionally protected speech under numerous different scenarios that are real, immediate, and recurring. *See discussion, pp. 7-9, supra.* The explicit purpose of the trigger provisions is to limit excess expenditures and attack ads by political parties and independent groups.[19] If an advocacy group decides to scale back its criticism of Governor Rell's environmental or health care policies in the next election because of the trigger provision, that decision to stay silent disadvantages her Democratic and Green Party opponents alike – no less than if the Green and Democratic parties scaled back their criticism of the Governor's policies directly.

If a single contributor holds back a contribution to a Libertarian or Green Party candidate because he or she fears that it will trigger additional funding for the opposition or if a single candidate curtails his spending for that reason, the result is the same – less speech. More importantly, if a single candidate is discouraged from seeking office as an independent or on a third party line because of the perceived futility or running in the

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[18] There is a second reason why plaintiffs have standing in this case. The claims alleged in Counts II and III are essentially an alternative basis for challenging the trigger provisions that are included the broader First and Fourteenth Amendment claim alleged in Count I. Plaintiffs could have just as easily alleged a single count that encompassed all their First Amendment objections. If plaintiffs have standing to challenge the matching fund provision in the context of their broader First and Fourteenth Amendment Claim asserted in Count I, then there is no reason why plaintiffs would lack standing to make a related First Amendment argument attacking the *same* statutory provision.

[19] *See* A Guide for 2008 General Assembly Candidates Participating in the Citizens' Election Program at 2, *available at*: http://www.ct.gov/seec/lib/seec/CEP_GUIDE_JUNE_2008_-_FINAL.pdf (last visited Oct 1, 2008) (goals include: "curtail[ing] excessive spending and creat[ing] a more level playing field among candidates").

face of the trigger provision, that alone is sufficient to establish standing. Here again, we ask the court to consider the circumstances of Governor Weicker and the dilemma he would have faced if the CEP was in effect in 1992. *See note 6, supra.* A Green or Libertarian party candidate could well be in the same predicament.

The defendants read too much into the cursory discussion of standing in *Davis.* The FEC challenged the plaintiff's standing in that case because his opponent in the general election did not qualify for the "asymmetrical" (higher) limits at the outset of the litigation and did not take advantage of them when he did qualify. The Court held that plaintiffs may challenge the prospective operation of a statute that presents a "realistic and impending threat of direct injury." 128 S.Ct at 2769. It was sufficient that the statute restricted the plaintiffs' right to make unlimited expenditures on its face, even though his opponent never took advantage of the higher contribution limits. The fact that the plaintiff had filed a declaration of intent to spend more than $350,000 of his own money on the campaign was a factor in the Court's analysis only because those were the facts with which the Court was presented.

Davis does not imply disagreement with this Court's conclusion that plaintiffs have standing in this case to challenge the chilling effect on their speech and on the speech of their supporters. The statute is aimed directly at curtailing the speech of candidates who do not participate in the CEP and at independent groups that urge the defeat of participating candidates. Plaintiffs come within the regulated class of speakers whose speech is chilled. See *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383,393 (1988) ("[T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."). The fact

that the potential spender or contributor has not acted does not deprive plaintiffs of standing because it is the trigger, itself, that may account for that person or group holding back their contribution or limiting their spending. *Id.* *Garfield*, 537 F. Supp. 2d at 367. The trigger provisions have a direct impact on the willingness of contributors to support minor party candidates and on the willingness of candidates and their supporters to make expenditures that would trigger a government funded response by their opponents.[20]

CONCLUSION

Davis represents a major shift in the controlling law concerning the legitimacy of matching fund provisions in campaign finance schemes. Defendants have not presented a compelling interest for the CEP's triggering mechanisms, and the reasoning this Court used in granting plaintiffs standing to assert the dismissed counts remains equally valid, if not more so, after *Davis*. The Court stands on firm grounds to reconsider Counts II and III on the merits and to then grant plaintiffs summary judgment.

Dated: October 3, 2008

Respectfully submitted,

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[20] The defendants' entire argument rests on the premise that no minor party candidate or supporter would limit their spending or contributions. That argument assumes that no minor party candidate, group or supporter would have the resources to trigger marching payments. That argument assumes too much. The defendants fails to account for the possibility that minor party and petitioning candidates could raise that type of money in the right circumstances involving a candidate with broad appeal or a self-financed candidate seeking office on the Green or Libertarian Party ballot line. DeRosa Decl. at ¶¶ 54-56. It happens all the time in Connecticut and in other states where third party candidates have been elected or have run competitively. For an example from another state of how the CEP matching fund triggers would likely inhibit political expression in Connecticut as cost prohibitive, *see* James T. Madore, *Golisano's results in primary mixed*, N.Y. Newsday, Sept. 12, 2008, at A19; Westlaw cite 2008 WLNR 17314627. (discussing Rochester billionaire who funds $5 million committee backing candidates regardless of party affiliation if they support his platform of budgetary restraint and campaign election reform.)

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2008, a copy of the foregoing *Plaintiffs' Reply Memorandum in Support of 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
Mark J. Lopez
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