

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

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**GREEN PARTY OF CONNECTICUT, ET AL.** : **NO. 3:06-CV-1030 (SRU)**  
:   
**Plaintiffs,** :   
:   
**v.** :   
:   
**JEFFREY GARFIELD, ET AL.,** :   
:   
**Defendants,** :   
:   
**AUDREY BLONDIN, ET AL.,** :   
:   
**Intervenor-Defendants.** : **September 5, 2008**  
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**DEFENDANTS' AND INTERVENOR-DEFENDANTS'  
MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

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Defendants Jeffrey Garfield, Executive Director of the Connecticut State Elections Enforcement Commission ("SEEC"), and Richard Blumenthal, Attorney General of the State of Connecticut, and Intervenor-Defendants Audrey Blondin, Tom Seigny, Connecticut Common Cause ("CCC"), and Connecticut Citizen Action Group ("CCAG") (collectively, "Defendants"), respectfully submit this Memorandum of Law in opposition to Plaintiffs' Motion for Summary Judgment challenging the constitutionality of the provisions of Connecticut's Campaign Finance Reform Act establishing the Citizens' Election Program ("CEP").

### **PRELIMINARY STATEMENT**

Plaintiffs seek summary judgment on their claims that Connecticut's historic CEP program imposes discriminatory and unconstitutional burdens on their First Amendment and Equal Protection rights and ask this Court to hold the statute unconstitutional. In bringing this motion on the basis of this evidentiary record, Plaintiffs are requesting that this Court invalidate an important and hard-won public financing program, enacted in response to unprecedented political corruption, on the basis of mere conjecture. Plaintiffs principally challenge two specific aspects of the CEP's design: (1) the amounts of funding grants; and (2) the qualification and eligibility criteria. However, Plaintiffs' allegations of harm are founded on a mixture of hyperbole and speculation that the factual record developed in this litigation definitively contradicts. Moreover, the aspects of the CEP that Plaintiffs challenge – grant amounts and qualification thresholds – are quintessentially areas of unique legislative competence, in which courts should accord the highest degree of deference to the legislature's judgments. Plaintiffs offer the Court no basis in fact or law for second-guessing the considered deliberations of the legislature in

enacting the program. The evidentiary record in this case reveals no foundation whatsoever for Plaintiffs' facial constitutional attack on the statute, let alone one that could justify a grant of summary judgment on their speculative and legally misguided claims.

As the Supreme Court made clear in its seminal opinion, *Buckley v. Valeo*, 424 U.S. 1 (1976), in order to support their claim of invidious discrimination, Plaintiffs must show that the challenged statute reduces nonmajor-party candidates' strength below the level they had attained prior to the advent of public financing. Even after extensive discovery, Plaintiffs did not produce any actual evidence – as opposed to unsupported speculation – to show that such a burden on their political opportunity exists, or that it is likely to exist. Plaintiffs mischaracterize the legislative history by ignoring the overriding purpose of the CEP – to combat corruption and its appearance – and suggest that the Connecticut legislature impermissibly engaged in self-dealing by seeking to enact a “permanent statutory preference” for major-party candidates. Plaintiffs additionally mischaracterize both historical election data and the operation of the CEP itself in seeking to argue that the CEP grant amounts constitute an unconstitutional subsidy to major-party candidates rather than a substitute for private funding. Finally, Plaintiffs improperly assume – merely because of Plaintiffs' own demonstrated lack of organization and popular support – that more viable nonmajor-party candidates will be unable to take advantage of the transformative benefits offered by the CEP. All of these assumptions are contradicted by clear record evidence, and Plaintiffs' attempts to base their claims of invidious discrimination on these allegations are inconsistent with both the facts and applicable law.

First, Plaintiffs’ description of the CEP and the legislative process that led to its enactment is deeply misleading. Plaintiffs suggest that major-party elected officials, fearing the threat of insurgent nonmajor-party and independent candidates, enacted the CEP to enshrine a “permanent statutory preference” for existing major parties, Pls. Mem. 1, 61, 87, thus allowing these major parties to maintain their positions in Connecticut. This picture bears no relation whatsoever to the actual state of the political situation in Connecticut. In fact, Plaintiffs and other nonmajor-party candidates have historically had little noticeable impact on elections for state office in Connecticut. The only two exceptions in modern history – Governor Lowell Weicker and U.S. Senator Joseph Lieberman – are *sui generis* among third-party candidacies, as Plaintiffs readily admit, Pls. Mem. at 32-33, 40, 80, and succeeded primarily due to resources and name recognition derived from their long periods of service as major-party elected officials. In general, far from posing a threat to major parties, nonmajor-party candidacies were struggling merely to maintain any kind of foothold in Connecticut’s political landscape. Rather than burdening the nonmajor parties’ political opportunity, the CEP would likely assist them to gain political strength.

In enacting the CEP, the Connecticut legislature was concerned with an entirely different set of priorities than political protectionism. Specifically, the legislature developed the program to combat the problems of corruption and the appearance of corruption that plagued Connecticut in recent years, earning it the unfortunate nickname “Corrupticut.” The situation reached such a point of crisis that it requires a comprehensive prophylactic: a groundbreaking full public financing system that would reduce corruption and the appearance of corruption. Designing such a public financing

program with sufficiently strong incentives to break the influence of special interest money in Connecticut politics, while avoiding the waste of public funds and incentives for frivolous and splinter candidacies that can result from poor design, required the legislature to balance a host of countervailing interests. In striking this balance, it considered electoral data and testimony from a wide range of interested parties, and also consulted the experiences of its own members, with their institutional knowledge of electoral politics in Connecticut. Plaintiffs' hyperbole and generalizations regarding the legislature's allegedly protectionist motives are devoid of factual support, and are contradicted by the extensive legislative history.

Regarding the appropriate level of grant amounts, Plaintiffs' arguments are based on their apparent misunderstanding of the operation of the statute, combined with misleading distortions of historical data. Essentially, plaintiffs argue that since many legislative races in Connecticut have historically been uncompetitive, the CEP grant amounts are unduly high and will burden the existing political opportunities of nonparticipating candidates. However, plaintiffs disregard the very provisions of the CEP that address such uncompetitive races and substantially reduce the amounts of the grants in such races. By contrasting the CEP grant amounts with historical expenditures in uncompetitive races, plaintiffs compare apples to oranges.

The CEP creates a system in which all candidates – major-party, nonmajor-party, and independent – must collect a certain number of low-dollar qualifying contributions and demonstrate a substantial modicum of public support: at either the statewide level, with respect to a particular office, or through the petitioning process. Nonmajor-party candidates can, under the law, demonstrate public electoral support that makes them

eligible on the same terms as major-party candidates for grants of CEP funds, as they have in this election and in the past. Indeed, nonmajor-party candidates who can demonstrate in a particular race a level of support equivalent to even half the support enjoyed by major-party candidates are eligible for CEP funds far in excess of what nonmajor-party candidates were previously able to raise through private fundraising.

Plaintiffs' allegations that the thresholds are impossible for nonmajor parties to meet are conclusively debunked by two crucial facts from the upcoming 2008 election: First, nonmajor-party candidates are automatically eligible for CEP funding in 14 legislative districts, based on their performance in the prior elections for that office. Second, three nonmajor-party candidates in the 2008 cycle have collected sufficient signatures to attain eligibility for CEP funding. One of these candidates, in fact, has collected sufficient signatures to make him eligible for a full grant of funds in a Senate race – the highest petitioning threshold in the CEP system for a legislative race.

Plaintiffs fundamentally mistake the purpose of Connecticut's public financing system as well as the proper scope of the constitutional guarantees of free speech and equal protection of the laws. Plaintiffs appear to believe that the state, in enacting public financing, is required to raise all nonmajor-party candidates, even nonviable ones, to the level of viable candidates, thus enabling both the candidates and their parties to skip decades of party building and cultivation of public support and goodwill. In essence, Plaintiffs' claim of invidious discrimination boils down to a complaint that major parties currently have more political power and resources in Connecticut than these particular nonmajor parties do, and a request that this Court level the playing field, either by giving Plaintiffs thousands (or even millions) of dollars in benefits to which they are not entitled

in light of their negligible public support and party infrastructure, or by preventing participating candidates from using resources for which they have qualified by virtue of their demonstrated public support and party building. However, as decades of case law concerning election regulations has made clear, the state has no constitutional obligation to remedy, at considerable expense to taxpayers, Plaintiffs' own historical inability to garner popular support.

Not only have Plaintiffs failed to demonstrate the absence of any disputed issue of material fact; they have in fact offered no concrete evidence that supports their claim of injury to protected rights. Instead, Plaintiffs offer only a web of unsupported speculation and hypothetical assumptions, combined with frequent use of the word "inevitably." This record could not possibly serve as the basis for the grant of summary judgment, especially considering the high burden of persuasion Plaintiffs bear on a facial constitutional challenge. Plaintiffs' motion for summary judgment should be denied.

## **STATEMENT OF FACTS**

### **I. Contrary to Plaintiffs' Contention, the CEP Eligibility and Qualification Requirements Do Not Enshrine a "Permanent Statutory Preference" for Major-Party Candidates, but Instead Require All Candidates to Demonstrate Substantial Public Support and Viability**

Plaintiffs' challenge to the eligibility and qualification requirements of the CEP is premised on the assertion that the structure of the CEP creates a "permanent statutory preference" for major-party candidates over nonmajor-party candidates. Plaintiffs' Memorandum in Support of Motion for Summary Judgment ("Pls. Mem.") at 1. However, there is no basis for this claim. Under the CEP, both major- and nonmajor-

party candidates must demonstrate a significant modicum of public support as well as the ability to raise public funds in order to receive a grant of CEP funds. The historical record of election results in Connecticut as well as undisputed expert testimony evidence that those nonmajor-party candidates who would not qualify for funding under the CEP do not qualify because of their lack of support, and not because the CEP creates a preference for major-party candidates. Furthermore, the evidence clearly demonstrates that nonmajor-party candidates have proven able to demonstrate the necessary substantial public support to achieve eligibility for funding under the CEP.

**A. The CEP Does Not Impose Higher and More Difficult Standards upon Nonmajor- and Petitioning Party Candidates than Upon Major-Party Candidates**

Plaintiffs' equal protection challenge to the CEP – which is based upon the premise that the CEP gives major-party candidates “a permanent statutory preference” over nonmajor-party candidates, Pls. Mem. at 1 – fundamentally mischaracterizes the CEP. In actuality, the CEP system requires all candidates – major, nonmajor, and petitioning alike – to demonstrate substantial public support before achieving eligibility for public funds. It is only because nonmajor-party candidates have been unable to demonstrate the statewide popular support required of major-party candidates that the CEP allows them to demonstrate popular support through different means. Candidates can demonstrate popular support in one of three ways.

First, a candidate can achieve eligibility by becoming the nominee of a party that received, on a statewide level, at least 20% of the gubernatorial vote or had 20% of party-enrolled voters. Conn. Gen. Stat. §§ 9-372(5); 9-702(a); 9-705(a)(e)& (f). Second, a district or statewide candidate can achieve eligibility for some CEP funding by gaining

the nomination of a nonmajor party that received at least 10% of the vote for that office in the previous election. *Id.* §§ 9-705(a), (c)(1),(g)(1). If a member of his or her party had received more than 20% of the total number of votes cast in the previous general election for the office in question, a candidate is eligible to receive the full applicable CEP grant for the general election. *Id.* A candidate of a nonmajor party is eligible to receive 2/3 of the full grant if a member of his or her nonmajor-party garnered between 15% and 20% of the vote in the previous election, and if a nonmajor-party candidate received between 10% and 15% of the vote in the previous election, a member of that party is eligible to receive 1/3 of the full grant in the subsequent election. *Id.* Third, candidates whose parties have not demonstrated prior popular support on the statewide or district level can achieve eligibility for CEP funding by collecting petition signatures totaling at least 10% of the prior vote for that office. *Id.* §§ 9-705(c)(2),(g)(2). As with the prior-vote thresholds for eligibility, a petitioning candidate is eligible for the full applicable CEP grant by collecting signatures from qualified voters in the district equal to 20% or more of the total votes cast in the previous election for the office in question. *Id.* If a candidate gathers signatures equal to between 15% and 20% of the prior vote, he or she is eligible to receive 2/3 of the full grant, and if a candidate collects signatures equal to between 10% and 15% of the votes cast in the previous election, he or she is eligible for 1/3 of the full grant. *Id.*

Claiming that the CEP imposes “additional eligibility and qualifying requirements” on nonmajor-party candidates, Pls. Mem. at 3, Plaintiffs misleadingly omit to mention the strict statewide eligibility requirements imposed upon potential major-party candidates. In addition to the 20% statewide eligibility requirements imposed upon

the party, prospective major-party candidates must satisfy statutorily imposed nomination requirements as well as *de facto* vetting by the party. *see* Declaration of Monica Youn, dated July 10, 2008 (“Youn Decl.”) Ex. 11 (Deposition of Beth Rotman, dated May 23, 2008 (“Rotman Dep.”)) at 55:5-22; Conn. Gen. Stat. §§ 9-702(a), 9-451, 9-452. The undisputed testimony of Republican and Democratic Party leaders establishes that the major parties carefully screen out mediocre, unqualified or uncommitted candidates for fear of damaging the parties’ hard-won credibility, *see* Declaration of George Jepsen, dated June 27, 2008 (“Jepsen Decl.”) ¶ 23; Affidavit of George Krivda (“Krivda Aff.”) ¶¶ 7, 14.

Thus, before they receive public funding, major-party candidates undergo a substantial screening process which provides important guarantees that they are serious candidates with significant public support. The CEP’s treatment of major parties reflects the real difficulty of obtaining major-party nomination. It is only because nonmajor parties and independent candidates are unable to meet the bar of demonstrating substantial statewide public support in the first place that either of the other two options come into play. Plaintiffs’ characterization of the two eligibility routes available to nonmajor-party candidates as “higher and more difficult” is simply incorrect and has no foundation in the factual record. Pls. Mem. at 2.

Plaintiffs’ argument that the definition of “major party” confers a permanent status is similarly unfounded. That definition – based upon shifting measures of voter enrollment and votes received in the most recent election – is inherently fluid, as is demonstrated by the gubernatorial election of 1990. In that election, the Democratic Party received only 21% of the vote and Lowell Weicker, a third-party candidate, won

the election. This showing would have entitled his party to statewide major-party status in the next election had the CEP been in force at that time, showing that the CEP may substantially augment resources available to nonmajor parties that actually have public backing. Plaintiffs' assertions that major-party status seems hopelessly out-of-reach for Connecticut's current nonmajor parties is evidence of the relative lack of support for their parties and candidates, not a result of any status created by Connecticut law.

Finally, Plaintiffs' repeated assertions that nonmajor-party candidates whose parties had failed to receive 10% of the vote in the previous election are absolutely barred from CEP eligibility is untrue. *See, e.g.*, Pls. Mem. 23, 73. The State Elections Enforcement Commission recently issued Declaratory Ruling 2008-01 ("Citizens' Election Program: Use of Nominating Petitions for Grant Eligibility"), which clarifies that candidates of nonmajor parties whose candidate in the previous regular election received more than 1% but less than 10% of votes cast for the office sought may use nominating petitions for purposes of seeking CEP eligibility. The declaratory ruling makes it clear that *every single candidate* who obtains a place on the ballot, including nonmajor-party candidates whose parties received between 1 and 10% of the vote in the previous election cycle and petitioning candidates who never previously ran for public office, have the opportunity to seek a public grant. Garfield Decl. II, Ex.14; *see also* Declaration of Jeffrey Garfield, dated September 4, 2008 ("Garfield Decl. III") ¶ at 4.

**1. Undisputed Historical Evidence Disproves Plaintiffs' Claim that Major-Party and Nonmajor-Party Candidates Are Similarly Situated**

Plaintiffs' invidious discrimination claim is premised on an argument that major-party status is not an "accurate indicator of the candidate's strength or competitiveness"

and that major-party candidates and nonmajor-party candidates are similarly situated in Connecticut. Pls. Mem. at 15-16. However, as detailed *infra*, historical election results demonstrate beyond cavil that even the weakest major-party candidates far outperform nonmajor-party candidates in Connecticut, and that nonmajor-party candidates have not come close to demonstrating the levels of popular support achieved by major-party candidates. Plaintiffs attempt to avoid this plain fact by applying a double standard – on the one hand, asserting that the CEP thresholds are too lenient because they award grants to major-party candidates who are “not truly competitive” (*i.e.*, who lost elections by a margin of more than 20%, even though they may have received as much as 40% of the vote), but on the other hand suggesting that CEP funds are too “draconian” because they fail to award grants to candidates who received only 5% of the vote. Pls. Mem. at 19-20, 64-65.

In applying this double standard, Plaintiffs spend pages of their brief focusing on a question that is utterly irrelevant to the claims at issue: whether races involving major parties have been “competitive” or “truly competitive” according to Plaintiffs’ own *ad hoc* definition – *i.e.*, whether major-party candidates have been defeated in races where the margin of victory was greater than 20%. *Id.* at 19-20, n.15. However, an inquiry into whether races have been “competitive” is a pure red herring and is irrelevant to proving Plaintiffs’ claim. A major-party candidate who loses by a substantial margin but who still receives a significant fraction of the vote is not similarly situated to a nonmajor-party candidate who gets only a few percentage points.<sup>1</sup>

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<sup>1</sup> Indeed, the Plaintiffs’ own witness, former Connecticut Governor Lowell Weicker, confirmed that in the 1<sup>st</sup> Senatorial District in Connecticut, the non-dominant major-party, the Republicans, and nonmajor parties “are not similarly situated,” reasoning that the Republicans “have advantage both as to their logistical set up, their administrative set up. And don’t forget, they can pull in Republican candidates from Washington,

The relevant issue here is whether the Connecticut legislature could properly use a minimum 20% test as a sufficient guarantee that a candidate has substantial public support. Plaintiffs' misleading numbers should not distract from the two questions central to their invidious discrimination claim: (1) based on historical data, could the Connecticut legislature justifiably predict that major-party candidates (defined as parties that received 20% of the previous gubernatorial vote or had 20% of party-enrolled voters statewide), would consistently receive 20% of the vote in any particular race they chose to contest; and (2) based on historical data, could the Connecticut legislature justifiably predict that nonmajor-party candidates would generally not be similarly situated as major-party candidates with respect to achieving 20% of the vote in any particular election for state office. The answer to both questions is "yes." These answers negate Plaintiffs' invidious discrimination claims.

First, historical election results in Connecticut demonstrate that major-party candidates always receive over 20% of the vote in elections for both statewide and legislative elections. Although Plaintiffs contend (without citing any election results) that "most statewide elections in Connecticut have not been competitive in years," Pls. Mem. at 19, this assertion does nothing to dispute the crucial fact that major-party candidates have *never* received less than 20% of the vote in any statewide election for which full data is available (*i.e.*, since 1998). Declaration of Bethany Foster, dated July 9, 2008 ("Foster Decl.") ¶ 8. The lowest percentage of the vote received by any Democratic candidate for statewide office since 1998 has been 35%, while the lowest percentage received by any Republican candidate was 24%. *Id.* By contrast, the *highest* percentage

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and the President, and everybody else, to campaign. There's still an inequality there. There's no question about that." See Declaration of Angela Migally, dated Sept. 5, 2008 ("Migally Decl."), Ex. 7 (Deposition of Lowell Weicker, dated April 2, 2008 ("Weicker Dep.)) 75:2-76:13.

total received by *any* nonmajor-party candidate in a statewide race since 1998 is a mere 2.5%. In other words, the *least* successful major-party statewide candidate of the past ten years still received almost *ten times* the vote percentage of the *most* successful nonmajor-party candidate. *Id.* Against this backdrop of consistent nonmajor-party candidate failure, Lowell Weicker’s historic election as a third-party governor appears to be an outlier, rather than a harbinger of a growing third-party movement in Connecticut.<sup>2</sup>

The picture is much the same for legislative elections in Connecticut. Plaintiffs again attempt to distract this Court with irrelevancies, arguing that “most of the elections are dominated by one major party or the other.” Pls. Mem. at 15. However, the key fact remains that major-party candidates have almost always passed the 20% vote total threshold required for CEP funding. In 2004 – the election just prior to passage of the CEP – every major-party Senate candidate received more than 20% of the votes, and 95.6% of major-party candidates for State Representative received more than 20% of the vote. Foster Decl. ¶¶ 10-11. By contrast, not a single nonmajor-party Senate candidate received more than 20% of the vote, and only one of the 67 nonmajor-party candidates for State Representative received more than 20% of the vote, and that candidate took his seat as a Democrat. Foster Decl. ¶ 11. This pattern holds true over the past five election cycles for which data are available: 97.8% of major-party Senate candidates (305 out of 312) have received over 20% of the vote while 96.6% of major-party House candidates have received over 20% of the vote. Declaration of Zachary Proulx, dated September 5,

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<sup>2</sup> Plaintiffs try to spin the same facts in two opposite directions. They first cite Lowell Weicker and his “A Connecticut Party” Lieutenant Governor Eunice Groark for the proposition that nonmajor parties have had a “significant role ... in Connecticut in recent years,” Pls. Mem. at 26, but later attempt to treat A Connecticut Party’s successes in fundraising and petitioning as *sui generis* (suggesting that Weicker readily acknowledges that the level of public support for his campaign is not representative of the amount of enthusiasm for other insurgent candidates), *id.* at 34 (citing (Weicker Decl. ¶¶ 11-12, Ex. A-2)).

2008 (“Proulx Decl.”) ¶ 4. In contrast, nonmajor parties have just as consistently failed to meet the 20% threshold: on the Senate side; *not one* out of 52 nonmajor-party candidacies in the past five election cycles received 20% of the vote, and in the House, only 6 of the 179 nonmajor-party candidates (or 3.35%) received at least 20% of the vote. Foster Decl. ¶ 9. Since 1998, even *losing* major-party candidates have averaged 34.6% of the vote in legislative races, while nonmajor-party candidates have averaged only 5.4% in legislative races – *i.e.*, even *losing* major-party candidates have still outperformed nonmajor-party candidates by more than six-fold. Foster Decl. ¶ 9, 11.

Accordingly, Plaintiffs’ claim that “the use of one statewide election as a proxy for the actual support of every major-party candidate in every district will unjustifiably inflate the strength of historically weak major party candidates,” Pls. Mem. at 20, is demonstrably false. It is abundantly clear that the Connecticut legislature’s prediction that the 20% level of support for a party statewide – as evidenced either through gubernatorial vote percentages or in party-enrolled voter percentages – will generally translate into at least 20% support for that party’s candidate in all statewide and legislative races was reasonable and accurate, and that the legislature could reasonably conclude in these circumstances that it was unnecessary and superfluous to require major-party candidates to have to go through the petitioning process to demonstrate that level of popular support..

**2. Even in One-Party-Dominant Districts, the Factual Record Disproves Plaintiffs’ Assertion that Nonmajor-Party Challengers and Major-Party Challengers Are Similarly Situated, and Plaintiffs Have Been Unable To Demonstrate Any Burden on Their Political Opportunity in Such Districts**

Plaintiffs base much of their equal protection challenge on the particular example of one-party dominant districts – *i.e.*, districts in which either the voters registered to a particular major party materially exceed the number of voters registered to the other major party or districts in which one party’s candidate virtually always wins the general election. *Green Party of Connecticut v. Garfield*, 537 F. Supp. 2d 359, 376 n. 22 (D. Conn. 2008). Plaintiffs make two arguments with regard to such districts: First, Plaintiffs argue that a non-dominant major-party candidate in such a district is similarly situated to a nonmajor-party candidate in terms of competitiveness. Second, Plaintiffs claim that such districts have been particularly fertile ground for nonmajor-party successes, and that the CEP will “snuff out” such gains by “virtually compelling” major-party competition in these districts. Pls. Mem. at 62-63. The factual record, however – including both publicly available election records as well as the undisputed testimony of fact and expert witnesses – clearly disproves both of these arguments.

**a) Plaintiffs’ Assumption That Non-Dominant Major-party Candidates and Nonmajor-Party Candidates Are Equally Situated in One-Party Dominant Districts Is Contradicted by Clear Evidence in the Record**

First, the election statistics above – showing that major-party candidates nearly always achieve the 20% vote threshold, while nonmajor-party candidates consistently fail to meet this threshold – doom Plaintiffs’ argument that major-party candidates and nonmajor-party candidates are similarly situated, even in one-party-dominant districts. In attempting to evade this straightforward fact, Plaintiffs place great emphasis on this Court’s statement in its opinion denying Defendants’ motion to dismiss that if the prior-vote thresholds were imposed on major-party candidates in the next election cycle,

major-party candidates would fail to qualify for full public funding in 43% of all races for the Connecticut General Assembly – and most would not qualify to receive any public funds. Pls. Mem. at 26 (*citing Green Party*, 537 F. Supp. 2d at 380). However, the overwhelming majority of the legislative elections that comprise that figure were not races in which the major parties fielded a candidate who failed to achieve 20% of the vote; instead, that figure primarily referred to districts in which one major party had chosen not to field a candidate at all. When major parties did field candidates, however, as amply demonstrated above, they consistently fulfill the Connecticut legislature’s prediction that such candidates will receive 20% of the vote.

Even new major-party challengers in one-party-dominant districts cannot be deemed to be similarly situated to nonmajor-party candidates. *See Foster Decl.* ¶ 12, 15. In districts where a major party fielded a challenger candidate after not competing in the preceding election, new major-party challengers have consistently received more than 20% of the vote and always outperformed nonmajor-party candidates, who have just as consistently failed to receive more than 20% of the vote in such races over the past five election cycles. *Foster Decl.* ¶ 12. Since 1998, 17 out of 20 major-party Senate candidates (or 85%) who ran in districts previously uncontested by his or her major-party received at least 20% of the vote, while 86 out of 96 major-party House candidates (or 90%) under those circumstances received at least 20% of the vote. *Proulx Decl.* ¶13. Moreover, 12 of the 96 major-party House challengers won the seat outright. *Id.* Yet out of the 93 races since 1998 in which nonmajor-party candidates competed against one major-party competitor, only 5 surpassed the CEP 20% threshold. *Id.* Even in the worst-case scenario of one-party-dominant districts, the Connecticut legislature was correct to

predict that new major-party challengers would consistently surpass the CEP 20% threshold whenever the major party chose to field a candidate, and that nonmajor-party challengers would prove unable to meet this standard. Plaintiffs' argument that one-party-dominant districts are exceptions to the rule of major-party strength in Connecticut is demonstrably false.

Witnesses from both of the major parties in Connecticut have testified – and the election results explained above conclusively demonstrate – that the mere fact that a major party has chosen not to run a candidate in a particular district does not mean that the party and its candidates can be considered just as weak as a nonmajor-party candidate in that district. Major parties as a whole simply respond to different incentives when deciding whether to field candidates. Nonmajor parties often run candidates simply to increase visibility for themselves, their parties, and their platforms. Jepsen Decl. ¶¶ 19, 23-26, 28; Krivda Aff. ¶¶ 14-15, 26. Major parties, by contrast, have no reason to run candidates just to gain publicity; instead, they only run candidates where they have a realistic expectation of winning the election. Jepsen Decl. ¶¶ 19, 23-25; Krivda Aff. ¶ 14. The chance to make a “respectable” showing in a particular election is not a sufficient incentive for a major party to run a candidate in a district in which they expect to lose, especially since such a loss would diminish the party's hard-won credibility in that district. Jepsen Decl. ¶¶ 19, 23, 25; Krivda Aff. ¶¶ 14, 16, 20, 22.

Defendants' expert witness Donald Green, a professor of political science at Yale University, explains that even in districts dominated by the other major party, non-dominant major-party candidates enjoy much more widespread support than those fielded by nonmajor parties for two reasons. First, the major parties possess substantial

infrastructure that extends even to districts in which they may not recently have run a candidate. Declaration of Donald Green, dated June 26, 2008 (“D. Green Decl.”) ¶ 28. Both major parties maintain town committees in each of Connecticut’s 169 towns, involving party officers and activists. Jepsen Aff. ¶13; Krivda Decl. ¶16. Thus, even in one-party-dominant districts, major-party candidates have an organized structure in place and can call on substantial party resources to aid them in their campaigns. D. Green Decl. ¶ 28; Jepsen Aff. ¶ 27; Krivda Decl. ¶ 20. Second, the two current major parties have a base of “party identifiers” – voters who have an enduring psychological attachment to the parties and their platforms. *Id.* For example, a recent Quinnipiac University poll of 1,697 Connecticut voters found that only 3% of those surveyed identified with a party other than the Democratic and Republican parties. D. Green Decl. ¶ 28. Accordingly, it is wrong to suppose that a major-party candidate running in a district in which the incumbent was previously unopposed begins in a similar position to a nonmajor-party candidate in the same district. *See id.*; Jepsen Aff. ¶ 27; Krivda Decl. ¶ 20. Even in one-party dominant districts, major-party candidates are able to draw votes from a large base of party identifiers. D. Green Decl. ¶ 28.

Professor Green examined two examples from the 2000 election that illustrate that a candidate from a major party, even when that party has not recently fielded a candidate in a district, is not similarly situated to a nonmajor-party challenger. When major-party candidates do enter the race, they prove far more competitive than the mere voter registration records might indicate. In the town of Lyme, for example, Republicans enjoyed a 20% voter registration advantage over Democrats. However, in 2000, votes for State Representative for the open seat in that district were nearly even between major

parties, and the Republican candidate edged out the Democratic opponent by only 30 votes. D. Green Decl. ¶ 32. Conversely, in the town of Stafford, the Democrats had over a 30% registration advantage over the Republicans in 2000. However, in that year's election for State Representative, the incumbent Democratic candidate barely eked out a win with a margin of far less than 1%. *Id.* Thus, a lopsided registration advantage in a one-party-dominant district does not mean that a major-party challenger will be unable to mount a serious challenge to the incumbent, even in a one-party- dominant district.

**b) The Available Election Figures Contradict Plaintiffs' Argument That Nonmajor-Party Candidates Have Made Particular Inroads In One-Party-Dominant Districts And That The CEP Will Snuff Out Nonmajor-Party Candidates By Virtually Compelling New Major-Party Competition in These Districts**

Plaintiffs contend that nonmajor- and petitioning party candidates often “make their greatest strides” in one-party-dominant districts because they are able to “fill the competitive void.” Pls. Mem. at 62. However, the record evidence shows that the premises of Plaintiffs' arguments are unfounded, and Plaintiffs are unable to demonstrate any burden on their protected political opportunity in such districts.

First, Plaintiffs' suggestion that nonmajor-party candidates specifically target one-party-dominant districts is contradicted by the record evidence. In fact, over the past five election cycles, nonmajor-party candidates have run more frequently in races featuring two major-party candidates than in races with only one major-party candidate. Foster Decl. ¶ 12.<sup>3</sup> Moreover, even the votes garnered by nonmajor-party candidates in one-

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<sup>3</sup> Plaintiffs' reasoning is further flawed because electoral results in two-way versus three-way races are not directly comparable: for instance, a 10% showing in a three-way race is closer to victory than a 10% showing in a two-way race. Thus, by lowering the margin required for victory in a particular election, the introduction of a major-party challenger into a previously two-way race may actually benefit the nonmajor

party dominant districts may not be a sign of earnest public support. Plaintiffs' witnesses have specifically conceded that votes for their candidates in such one-party-dominant districts may represent votes not for their parties but in opposition to the dominant party – “protest votes” from voters who would vote for the other major party if given the choice. Youn Decl. Ex. 23 (Winger Dep.) at 153:4-54:4, 158:1-6; Youn Decl. Ex. 4 (Gillespie Dep.) at 222:7-23:3; Migally Decl. Ex. 1 (DeRosa Dep.) at 106:3-12. Accordingly, these vote percentages cannot be deemed to be accurate measures of public support won by a nonmajor-party.

Moreover, Plaintiffs' further assumption that the CEP will virtually compel major party competition in previously noncompetitive districts is similarly unfounded. Pls. Mem. at 63. There is no evidence of a causal relationship between the availability of CEP funding and the major parties' decision to field a candidate in a one-party-dominant district. Although there has been a net increase of two Senate seats and six House seats that are newly contested as of 2008, a substantial number of previously contested legislative seats have now become uncontested. Foster Decl. ¶ 14. Moreover, Plaintiffs cannot show that they were harmed by the major parties' decisions to compete in these races. Out of the eight newly contested legislative seats, the Libertarian Party did not run a candidate in 2006 in any of these districts, and the Green Party ran a candidate in only one of these districts in 2006. *Id.* Accordingly, Plaintiffs' predictions of particular harm from the CEP in one-party dominant districts appear to have no factual basis.

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party's showing and nonmajor parties could in fact benefit should CEP funds entice nonmajor party candidates. Moreover, a nonmajor party enjoys substantially more political leverage in a three-way election, because they can act as a spoiler for another candidate.

**c) The Operation of the CEP in Special Elections Does Not Support Plaintiffs' Claims, but Rather Rebuts These Claims**

Plaintiffs claim that in the two special elections<sup>4</sup> held thus far under the CEP involving previously noncompetitive districts, in October 2007 and January 2008, the availability of CEP funding attracted a second major-party candidate in both elections and “crowded out” the nonmajor-party candidate who had previously been the only non-incumbent alternative on the ballot. Pls. Mem. at 20-22, 62-63. Plaintiffs suggest that the CEP grants of special election funds in these races “unjustifiably inflate[d] the strength of historically weak major-party candidates by making full public financing available to them without any showing that they are competitive, much less viable.” *Id.* at 20. However, Plaintiffs’ arguments with regard to these special elections are founded upon factual assumptions that are demonstrably incorrect.

First, Plaintiffs make the unfounded causal assumption that the reason the nonmajor party did not field a candidate in these two special elections was because of the presence of the new major-party challenger. But this is demonstrably untrue. The undisputed testimony from Jon Green, director of the nonmajor party involved in these special elections – the Working Families Party – establishes that Plaintiffs’ assumptions are simply wrong. Special elections are always for open seats and are called on short notice; they thus involve a logistical effort that may be beyond the means of candidates who do not have a well-established and organized party backing them, including

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<sup>4</sup> There have actually been three special elections since the enactment of the CEP. In March 2008, Democratic candidate Thomas A. Mulligan and Republican Robert D. Russo competed for an open seat in the 22<sup>nd</sup> Senatorial District. Both candidates were eligible to receive CEP funds. Thomas A. Mulligan received a grant of \$63,750, while the grant to Republican Robert D. Russo was \$63,582. *See* [http://www.ct.gov/seec/lib/seec/forms/2008\\_specialelectionpressrelease\\_2-20-08\\_final.pdf](http://www.ct.gov/seec/lib/seec/forms/2008_specialelectionpressrelease_2-20-08_final.pdf) (visited September 5, 2008).

providing access to resources from a substantial number of voters who identify with the party's goals. In the October 2007 special election, for example, Green explains that, while a Working Families Party candidate would have been eligible for partial funding under the CEP, the Working Families Party had already immersed its resources in municipal elections that year and was unable to field its own candidate on such short notice. Green Decl. ¶ 28. Similarly, in the January 2008 special election, a Working Families Party candidate would have been eligible for partial CEP funding, but the party's previous candidate had moved out of state, and the party was unable to identify another viable candidate within the short time frame of a special election. *Id.* ¶ 29. The presence or absence of CEP funding demonstrably makes no difference to nonmajor parties when organizational considerations prevent the fielding of candidates.

Second, Plaintiffs' assumption that it was the availability of CEP funding that drew new major-party challengers in these special elections is devoid of factual support. In both of these districts, the newly open seats had been held up by long-time incumbents – Senator DeLuca was first elected in 1990 and Representative Belden, who died in office, was first elected in 1974. Proulx Decl. ¶ 10. In fact, with two exceptions, every special election for which election data are available was contested by both major parties. *Id.* ¶ 7. In these two exceptions, which occurred in House District 93 in 2001 and House District 26 in 2003, the petitioning candidates now hold the seats as Democrats. *Id.* Thus, the fact that the major parties contested these two special elections shows only that the major parties always contest special elections where an incumbent has vacated a long-held seat. Plaintiffs have no evidence, other than their ill-informed speculation, that it was the availability of public funding that incentivized the major party to field a candidate

in a special election where it otherwise would not. In fact, as representatives of Connecticut's major parties have testified, the availability of public funding is not a decisive factor in determining whether a major party will field a candidate in a race which it otherwise deems not worth contesting. Indeed, it would "make no sense" for a major candidate to run in a district based solely on the availability of public funds because that availability "would do little to change the odds." Jepsen Decl. ¶ 25. Therefore, it is "overly simplistic, speculative and premature to conclude that the CEP will compel or incentivize major parties to field candidates" where they otherwise would not. Krivda Aff. ¶ 14.

Third, the showings of the major-party candidate in these two elections merely reinforce the point that, when major parties do compete, public support for these candidates is plain. Plaintiffs unjustifiably assume – based only on the fact that the non-dominant major party chose not to field a candidate in the past several elections in these districts – that the strength of a non-dominant major-party candidate in these districts would be just as low as a nonmajor-party candidate. Based on both election results and voter enrollment statistics from these districts, the facts prove Plaintiffs' assumptions are wrong. In Senate District 32, 23.2% of active registered voters are Democrats while 30.3% are Republicans – a difference of only 7.1%. Proulx Decl. ¶ 11. In 2002 Democratic candidate Patricia L. Reilly, whom Plaintiffs mention for her anomalously low expenditures – received 35.6% of the vote in the 2002 race. The Democratic challenger in the January 2008 special election received 39.5% of the vote, well in excess of the CEP threshold of 20%, as well as the Working Families Party candidate's prior showing in that district of 10.8%. *Id.* Similarly, in House District 113, 22.2% of active

registered voters are Democrats, while 24.8% of active registered voters are Republican. In that district, the Democratic challenger in the October 2007 special election received 35.4% of the vote. *Id.* ¶ 12. Accordingly, major-party strength in these districts is in no way comparable to that of nonmajor-party candidates.

Fourth, Plaintiffs assume that major-party expenditures in these two special elections would have been much lower had it not been for the CEP grant amounts, arguing that “[t]ens of thousands of dollars in new money came into the race, not as a result of the popularity or strength of the candidates, but as a result of public financing which changed both the debate and the dynamic of the election.” *Pls. Mem.* at 21. Once again, Plaintiffs have no support for their assumption, and the historical election data plainly contradict it. The CEP special election Senate grant of \$63,750 is lower than average major-party expenditures in Senate special elections from 1998 to 2006, which total \$71,626. *Proulx Decl.* ¶ 9. Similarly, the CEP special election House grant of \$18,750 closely corresponds to average major-party expenditures in House special elections from 1998 to 2006, which total \$18,565. *Id.*

Confusingly, Plaintiffs attempt to base a prediction of what would have been spent in these two special elections absent CEP funding on two different sets of statistics: (1) the amount spent by a major-party challenger against the longtime incumbent in the 32nd Senate District, and (2) the amount spent by the incumbent against a nonmajor-party challenger in the 113th House District. *Pls. Mem.* at 20-21.<sup>5</sup> But these inconsistent figures are completely inappropriate here, and say nothing about what a major-party challenger would spend contesting a newly open legislative seat in Connecticut.

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<sup>5</sup> Although Plaintiffs cite the anomalously low figure of \$2,000 that incumbent Richard Belden spent to defeat a Working Families Party candidate in 2006, they fail to mention that in each of his three previous races against Democratic challengers, Belden spent in excess of \$14,000. *Proulx Decl.* ¶ 10.

Accordingly, even the isolated and anomalous examples of special elections that Plaintiffs cite do not support their claim that major-party and nonmajor-party candidates are similarly situated both in terms of strength or probable expenditures.

For those nonmajor-party candidates who are able to demonstrate popular support in a particular district or for a particular election that is equal to – or even a fraction of – the level of support enjoyed by major-party candidates, the CEP provides automatic eligibility for funding. Based on the 2006 election, nonmajor-party candidates are eligible for CEP funding in 14 legislative districts in Connecticut. Foster Decl. ¶ 19. In two of those districts, a nonmajor-party candidate is automatically eligible for a full CEP grant, on the same terms as major-party candidates. *Id.* Furthermore, Connecticut’s liberal fusion balloting policy allows nonmajor parties to gain eligibility for CEP funding in future elections based on their cross-endorsement of major-party candidates. J. Green Decl. ¶ 9, 17.

**B. The CEP Petitioning Thresholds Are Readily Achievable for Viable Nonmajor-party Candidates**

**1. Plaintiffs’ Insistence That the Statewide Petitioning Levels Are Set at Unachievable Levels Betrays Their Lack of Understanding of the Realistic Requirements for a Successful Bid for Statewide Office in Connecticut**

Plaintiffs repeatedly insist that “[t]here is almost no scenario under which a nonmajor party or independent candidate could realistically satisfy the petitioning requirements for statewide office.” Pls. Mem. at 28. Plaintiffs support this assertion with the self-serving declarations of their own witnesses, while ignoring the testimony from multiple witnesses, both fact and expert, that the petitioning thresholds are readily achievable by any candidate with sufficient organization and commitment.

In order to be eligible for a full grant for the gubernatorial election through the petitioning route, a candidate would have to submit 224,682 signatures. Declaration of Herald Hubschman, dated June 26, 2008 (“Hubschman Decl. I”) ¶ 6. Plaintiffs assert that “Petitioning requirements on this scale requires a professional and sustained effort that involves hiring paid petitioners or preferably, a firm that specializes in collecting signatures,” Pls. Mem. at 29, but this claim is disproven by the testimony of their own witness, Lowell Weicker – the only nonmajor party candidate ever elected as governor in Connecticut. Weicker’s campaign was readily able to collect over 100,000 signatures using only volunteers over a period of only two months – the CEP petitioning period is seven months long – and Weicker testified that his volunteers would easily have been able to collect more signatures had it been necessary. Youn Decl. Ex. 22 (Weicker Dep.) at 16:1-17, 17:18-18:2; Weicker Decl. ¶ 15.

This testimony shows that a nonmajor party candidate with real support in the electorate could readily qualify for CEP funding through the petitioning route. Multiple witnesses, including Weicker, testified that a viable gubernatorial campaign must expect to recruit hundreds, if not thousands, of volunteers. Hubschman Decl. I ¶ 12; D. Green Decl. ¶¶ 16-17; Migally Decl. Ex. 7 (Weicker Dep.) 93:1-11, 104:11-105:9. Weicker’s campaign was able to recruit 1500 volunteers. Weicker Decl. ¶ 15, Ex. A-2. Defendants’ expert Harold Hubschman, president of a political consulting firm that has engaged in multiple petitioning drives collecting hundreds of thousands of signatures, estimates that a team of 300 volunteers could acquire the requisite number of signatures for a full CEP gubernatorial grant with about 12 days of work. Hubschman Decl. I ¶ 12. Surely 12

days of work is not an unreasonable amount of effort for a return of \$3 million in public funds.

Plaintiffs' testimony as to the difficulties and expense incurred by the Green Party in its 2006 statewide petitioning effort – to the extent that it is credible – does not show that the requirements of the statute are unreachable; rather, it serves only to demonstrate the lack of organization and public support for the Green Party and its campaign. It is also worth noting that all of the examples cited by Plaintiffs involve petitioning periods many times shorter than the CEP's generous seven-month petitioning period. The first example Plaintiffs cite is the 2004 Green Party petition drive to obtain ballot access for Ralph Nader. Pls. Mem. at 31. Plaintiffs claim that it took 100 volunteers and 10 paid petitioners to collect 12,000 signatures over a three-week period. Pls. Mem. at 31-32. However, as a matter of arithmetic, those numbers work out to barely 100 signatures per person. As Defendants' petitioning expert explains, that target should have been reachable with one day of serious effort per person. *See* Hubschman Decl. ¶ 8 (“In my experience, a reasonably trained volunteer or paid solicitor can realistically be expected to collect about 20 signatures per hour in a good location, or about 100 signatures for a five-hour petitioner day.”). Clifford Thornton, the Green Party's gubernatorial candidate, submitted a declaration claiming that in 2006, it took 60 part-time volunteers and approximately 5 or 6 full-time volunteers over eight weeks to collect over 13,000 signatures. Thornton Decl. ¶¶ 6-7. With more than 2 months' time to complete the petition drive, completing the task requires submission of approximately 200 signatures per person. *See id.*

It strains all credulity to suggest that this number of people took that long to collect such a small number of signatures. Hubschman calculates that the target should have been achievable with three or four days work per person. Declaration of Harold Hubschman, dated August 28, 2008 (“Hubschman Decl. II”) at ¶ 14. If it did indeed take the Green Party that long to meet its petitioning target, it raises serious questions about the Green Party’s basic competence and organization, *Id.* ¶ 16, but says nothing about the alleged difficulty of satisfying the CEP’s requirements for viable, organized nonmajor-party candidates.<sup>6</sup>

Plaintiffs also substantially inflate the costs involved in hiring paid petitioners. Plaintiffs claim that a nonmajor party would expect to pay petitioners \$4 per signature to gather signatures for CEP eligibility purposes, Pls. Mem. at 29-30, but this claim is wholly unjustifiable. The \$4 figure is the amount that a well-financed candidate might have to pay for last-minute large-scale petitioning efforts, *see, e.g.*, Hubschman Decl. II ¶ 8, but it is not the typical amount required in less pressured situations. Plaintiffs’ own affidavits confirm that Plaintiffs are aware that the industry standard for paid petitioners is as low as one dollar per signature, a rate corroborated by the deposition testimony of Plaintiffs’ own witnesses. *See* Declaration of S. Michael DeRosa, dated July 7, 2008 (“DeRosa Decl.”) ¶ 38 (“Paid petitioners are typically paid between \$1 and \$2 per signature); Thornton Decl. ¶ 14 (“My understanding is that if the candidate organizes

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<sup>6</sup> Moreover, Plaintiffs’ suggestion that the Green Party’s 2006 campaign manager Ken Krayske was paid \$12,000-\$14,000 to coordinate the statewide petitioning effort is misleading. *See* Pls. Memo. at 32, 37. That dollar figure represents the entire amount Krayske was paid – from late May through early November 2006, to work full-time on a wide range of functions as the statewide campaign “go-to person,” including fundraising, organizing, and campaign management, while the petitioning drive lasted only through early August. Migally Decl. Ex. 6 (Deposition of Clifford Thornton, dated February 20, 2008 [“Thornton Dep.”]) 50:23-51:7; *see also* Migally Decl. Ex. 5 (Deposition of Kenneth Krayske [“Krayske Dep.”]) 54:3-55:4, 65:7-66:12 (campaign coordinator/manager); *id.* 77:1-78:5, 79:5-81:3, 83:4-85:24 (fundraising/publicity/logistics).

and manages the petition drive and contracts with individual petitioners directly, the going rate is \$1 to \$2 per signature.”); *see also* Declaration of Ralph Ferrucci, dated June 22, 2008 (“Ferrucci Decl.”) ¶ 13 (“The going rate is \$1-2 for each raw signature.”); Youn Decl. Ex. 5 (Krayeske Dep.) 72:11-24; Hubschman Decl. ¶ 17. Accordingly, the required amount of qualifying contributions for a gubernatorial race – \$250,000 – would be sufficient to pay hired petitioners to collect all of the signatures necessary for CEP eligibility; especially since statewide candidates running together on a slate can use a single petition, and combine qualifying contribution amounts to finance a single petition drive. Garfield Decl. III ¶ 6. Moreover, because the CEP does not establish a starting date for the gathering of qualifying contributions, a forward-thinking nonmajor-party candidate can gather such contributions before the beginning of the petitioning period in order to have resources on hand to fund the petitioning effort.

Plaintiffs also rely heavily on the statement of their expert Richard Winger, that “[i]n the entire history of the United States, no independent candidate has ever successfully met a petition requirement greater than 134,781 signatures,” Pls. Mem. Ex. A-6 (Declaration of Richard Winger, dated June 11, 2008 (“Winger Decl.”)) ¶ 21, but this testimony is highly misleading, and does not stand for the proposition Plaintiffs advance, *i.e.*, that *nonmajor-party* candidates would be unable to meet such a threshold. As Winger admitted at his deposition, this statement applies only to *independent* candidates, not to nonmajor party candidates. Migally Decl. Ex. 8 (Deposition of Richard Winger, dated February 29, 2008 (“Winger Dep.”)) at 233:4-18. Contrary to Plaintiffs’ claims, a third party has successfully met petitioning thresholds of more than 275,000 and of 450,000 signatures, as Winger acknowledged. *Id.* at 226:17-227:5, 233:19-234:2.

Moreover, ballot initiative requirements in various states commonly require hundreds of thousands of signatures for ballot placement. For example, California requires 433,971 signatures (5% of the previous gubernatorial vote) to qualify a statutory initiative measure for placement on the ballot and 694,354 signatures to qualify a constitutional initiative. Proulx Decl. ¶ 29.<sup>7</sup> Yet organizers of petition drives in California routinely are able to meet these signature requirements and put various initiative measures on the ballot.

## **2. The Factual Record Shows that the Petitioning Thresholds for Legislative Districts Are Set at Realistic, Achievable Levels for any Viable Candidate**

There should also be no doubt that the petitioning thresholds set by the CEP for legislative races are also readily achievable. Based on the 2006 election results, candidates for legislative races can achieve eligibility for thousands or tens of thousands of dollars in CEP funds through petitioning by collecting, on average, a few hundred or a few thousand signatures. The following tables present the maximum, minimum, and average number of signatures a House or Senate candidate must collect to achieve eligibility for various levels of CEP funding, as well as the average number of signatures required for each day of the nominating petitioning window:<sup>8</sup>

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<sup>7</sup> Numerous other states have similar requirements, many of which are comparable to the CEP petitioning requirements for eligibility. In order to place an initiative on the ballot in Arizona, for example, one must petition for 10% of the previous votes cast for Governor, which this year amounts to 153,365 signatures. To place a constitutional amendment on the ballot, 15% of the previous votes cast for Governor are required. Proulx Decl. ¶ 28. In Florida, 8% of the previous votes cast for President are necessary to qualify a proposed constitutional amendment, or 611,009 signatures. *Id.* ¶ 30. Michigan requires 10% of the previous votes cast for Governor to qualify a constitutional amendment (380,126 signatures), and Washington requires 8% of the gubernatorial vote to qualify a statute initiative (224,880 signatures). *Id.* at ¶¶ 31-32.

<sup>8</sup> The 2008 nominating petitioning window ranged from January 2, 2008 to August 6, 2008, for a total of 218 days. Proulx Decl. ¶ 22.

**Table 1: 2008 Petition Signature Requirements – House Districts<sup>9</sup>**

	<b>Votes in 2006</b>	<b>10%</b>	<b>Sigs. / day</b>	<b>15%</b>	<b>Sigs. / day</b>	<b>20%</b>	<b>Sigs. / day</b>
<b>Lowest Turnout</b>	1,254 (HD 4)	125	0.6	188	0.9	251	1.2
<b>Highest Turnout</b>	10,934 (HD 16)	1,093	5.0	1,640	7.5	2,187	10.0
<b>Average Turnout</b>	6,325	633	2.9	949	4.4	1,265	5.8

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<sup>9</sup> Connecticut Secretary of the State, “Vote for State Representatives 2006,”  
<http://www.ct.gov/sots/cwp/view.asp?a=3188&q=392566> (visited September 3, 2008).

**Table 2: 2008 Petition Signature Requirements – Senate Districts<sup>10</sup>**

	Votes in 2006	10%	Sigs. / day	15%	Sigs. / day	20%	Sigs. / day
<b>Lowest Turnout</b>	10,131 (SD 23)	1,013	4.6	1,520	7.0	2,026	9.3
<b>Highest Turnout</b>	39,337 (SD 26)	3,934	18.0	5,901	27.1	7,867	36.1
<b>Average Turnout</b>	27,158	2,716	12.5	4,074	18.7	5,432	24.9

D. Green Aff. ¶ 15. Petitioning expert Hubschman estimated that in order to obtain eligibility for the *full* CEP grant in the most competitive State Representative Districts, a team of 10 volunteers could collect the requisite number of signatures by petitioning merely for four Saturdays, and the candidate could collect the requisite signatures working alone, collecting over 38 days, or about three days of every two weeks of the seven-month period. Hubschman Decl. I ¶ 9. For such an effort, the candidate would be eligible for \$25,000 in CEP funds. Similarly, to obtain eligibility for the full CEP grant of \$85,000 in the most competitive State Senate District, a team of 30 volunteers could collect the requisite signatures in a period of four days. Hubschman Decl. I ¶ 10.

In fact, the attainability of the CEP petitioning thresholds has already been amply demonstrated. Three nonmajor party candidates and one petitioning candidate have collected enough signatures to qualify for some CEP funds. A candidate for the Working Families Party has already collected sufficient signatures to attain eligibility for a full CEP Senate grant, and one Working Families Party candidate has already collected enough signatures to attain a 2/3 House grant. Green Decl. II ¶¶ 7-13. A candidate for the Independent Party has already collected sufficient signatures for a 1/3 House grant. Declaration of Jeffrey Garfield, dated September 4, 2008, (“Garfield Decl. III”), ¶ 5. Lastly, a petitioning candidate has collected sufficient signatures to to qualify for a 2/3

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<sup>10</sup> *Id.*

CEP House grant. *Id.* ¶ 9. Through steady and organized effort, these nonmajor party candidates have gained eligibility for thousands of dollars in CEP funding, an amount far in excess of what nonmajor-party candidates have previously been able to raise through private fundraising.<sup>11</sup>

In continuing to insist that the CEP petitioning thresholds are so high as to “virtually shut out” nonmajor-party candidates, Plaintiffs grossly exaggerate the difficulties involved in petitioning efforts. Pls. Mem. at 59. For example, Plaintiffs complain that “[i]ndividuals often will not know whether they are registered to vote in a particular district.” Pls. Mem. at 36. However, this alleged difficulty is easily remedied by the simple expedient of carrying a map of legislative districts when petitioning.<sup>12</sup> Furthermore, Plaintiffs insist without any corroborating evidence that door-to-door petitioning is “only feasible when a candidate needs 100 or so signatures; it is far too time-consuming and ineffective when thousands or even hundreds of signatures are needed.” Pls. Mem. at 36. However, successful candidates for state legislative seats routinely knock on thousands or even tens of thousands of doors in their districts in the process of normal campaigning. Jepsen Decl. ¶ 20. This is not a diversion from the normal campaigning that a candidate would expect to do; quite the contrary, it is an integral part of any viable campaign. That the Plaintiffs consider this canvassing process “too time-consuming,” Pls. Mem. at 36, is testament to their unrealistic expectations of

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<sup>11</sup> Plaintiffs consistently assume that no nonmajor-party candidate will ever exceed the lowest level of public funding, the 1/3 grant amount. Pls. Mem. 38-42, 50, 73-81. Many of their assertions about the difficulties that a nonmajor party may face flow from this simplistic but unfounded assumption. Nonmajor-party candidates who qualify for a full grant would, by definition, derive far more benefit from the program and could use even sporadic success in that endeavor as a means to establish a more permanent foothold as a significant nonmajor party.

<sup>12</sup> We note that the General Assembly website offers maps of all legislative districts. For example, a printable map of Hartford’s legislative districts is available at <http://www.cga.ct.gov/maps/house/hartford.asp>.

the degree of commitment it takes to succeed in pursuing state elected office. *See* Jepsen Decl. ¶ 20.

Plaintiffs’ also assert that “relying on paid petitioners is not realistic” because “for all practical purposes, the total cost (based on the cost per signature) would exceed the \$5,000 and \$15,000 expenditure limits that apply, respectively, to House and Senate candidates during the qualifying period.” Pls. Mem. at 36-37. However, this claim has no factual foundation and is contradicted by the testimony of multiple witnesses that petition gatherers are available at the rate of \$1-2 dollars per signature. *See also supra* at I.B.1 (citing testimony of four of Plaintiffs’ witnesses that per-signature rate is in \$1 to \$2 range). Plaintiffs’ protestations of impossibility are based on nothing more than hyperbole and unfounded speculation.

The remainder of Plaintiffs’ allegations regarding the difficulty of the petitioning process is based on factors that prove nothing more than the lack of viability of Plaintiffs’ candidates. For instance, Plaintiffs complain that members of the public are often reluctant to sign Green Party and Libertarian Party petitions. Thornton Decl. ¶ 10; DeRosa Decl. 27.

This fact does not demonstrate that candidates with popular support would have any difficulty obtaining signatures, and demonstrates nothing more than the lack of support for the Plaintiffs among the general population. This lack of support is not attributable to the CEP, and the State has no obligation under the CEP to take steps to help Plaintiffs overcome that lack of support. It would be contrary to the purposes of the CEP – avoiding corruption among elected officials, or those likely to become elected

officials – to waste a substantial amount of public funds financing the campaigns of nonviable candidates.

## **II. Contrary to Plaintiffs’ Arguments that CEP Grant Amounts Exceed the Amounts that Major-party Candidates Are Able to Raise Through Private Fundraising, CEP Public Financing Grants Correspond to Past Expenditures in State Elections**

Plaintiffs suggest the CEP grant amounts “grossly distort the financial strength of major-party candidates in most cases by providing subsidies that are well in excess of the amount of money they could raise privately.” Pls. Mem. at 15-16. This is inaccurate. Instead, CEP grant amounts and qualifying contribution requirements are tailored to protect the public fisc by establishing objective thresholds for public support — even for major parties – and to adjust expenditures downward in less competitive races. Moreover, Plaintiffs’ arguments with respect to CEP grant amounts offer this Court no basis to second-guess the considered deliberations of the Connecticut legislature in setting grant amounts that would achieve a reasonable balance among the countervailing interests served by the CEP.

### **A. Statewide Races**

With respect to statewide races, Plaintiffs contend that the CEP “provides generous – even windfall – grants that far exceed what most major-party candidates have raised and spent in past elections.” Pls. Mem. at 59. In making this argument, however, Plaintiffs consistently fail to acknowledge numerous statutory qualifications and exceptions which are a crucial part of the careful balance crafted by the Connecticut legislature, and also cherry-pick isolated examples of major-party candidates who spent anomalously low amounts in particular races. *See, e.g.*, Pls. Mem. at 21 (citing examples of Democratic State Senate candidate who raised only \$12,198 and State Representative

candidate who raised only \$2,000). The picture that Plaintiffs paint is demonstrably inaccurate and cannot serve as the basis for a grant of summary judgment.

Table 1, at pages 17-18 of Plaintiffs' brief, suggests that each of the specified candidates would have been awarded at least the full CEP grant, and perhaps even triple the full CEP grant, through triggered matching funds. This is demonstrably untrue. The CEP qualifying contribution thresholds apply to all candidates, major and nonmajor party alike, and are designed to deny funding to both major-party and nonmajor-party candidates who have failed to demonstrate the necessary ability to raise private funds by collecting the requisite number of low-dollar contributions.

In support of their argument that the CEP grants unjustifiably inflate the strength of major-party candidates for statewide office, Plaintiffs primarily rely on the anomalously low expenditures of the 2006 Republican statewide candidates. However, with the notable exception of Governor Jodi Rell, none of these other Republican statewide candidates would have been awarded any CEP funds whatsoever because they failed to come close to the requisite number of contributions or the qualifying contribution threshold of \$75,000. Proulx Decl. ¶ 17. Moreover, Plaintiffs repeatedly state, erroneously, that both the Democratic and Republican candidates for lieutenant governor would have received general election grants of \$750,000 each. However, major party candidates for lieutenant governor do not receive funding for the general election – instead, CEP funding for a major party lieutenant governor candidate is included in the general election grant to the major party's gubernatorial candidate. Conn. Gen. Stat. §§ 9-702(a), 9-705(b)(1) and (2) and 9-709.

Plaintiffs inflate the size of the typical CEP grant by including in their statistics trigger funds under § 9-713 (excess expenditures) or § 9-714 (independent expenditures) as if these funds will be disbursed in every race. Pls. Mem at 59-61. However, the record shows that since the CEP came into effect, no disbursements under either § 9-713 or § 9-714 have been made. Garfield Decl. III ¶ 8. Plaintiffs provide no support for their assumption that trigger funds are likely to be disbursed in any substantial number of races.

The following table provides a corrected version of Plaintiffs' Table 1. It assumes that each statewide candidate who was eligible to receive CEP funding would have participated in the program, but unlike Plaintiffs' Table 1, it takes into account all of the applicable CEP provisions:

Statewide Office	Candidate	Party	\$ Raised in 2006 Race <sup>13</sup>	CEP Primary Grant	CEP General Election Grant	Matching Funds <sup>14</sup>
Governor	Jodi Rell	Republican	\$4,052,687	\$0	\$3,000,000	\$0
Governor	John DeStefano	Democrat	\$4,163,548 <sup>15</sup>	\$1,250,000	\$3,000,000	\$1,250,000 (primary) \$1,052,687 (general)
Governor	Dan Malloy	Democrat (lost primary)	\$3,229,916	\$1,250,000	n/a	\$1,250,000 (primary)
Lt. Governor	Michael Fedele	Republican	\$33,731 from 35 donors	n/a	n/a	n/a
Lt. Governor	Mary Messina Glassman	Democrat	\$565,033	\$375,000	n/a	\$0
Lt. Governor	Scott Slifka	Democrat (lost primary)	\$181,063 from 313 donors	n/a	n/a	n/a
Secretary of State	Richard Abbate	Republican	\$48,682 from 149 donors	n/a	n/a	n/a
Secretary of State	Susan Bysiewicz	Democrat	\$815,144	\$0	\$750,000	\$0
Treasurer	Linda Roberts	Republican	\$39,005 from 160 donors	n/a	n/a	n/a
Treasurer	Denise Nappier	Democrat	\$356,199	\$0	\$750,000	\$0
Comptroller	Cathy Cook	Republican	\$0 from 0 donors	n/a	\$0	n/a
Comptroller	Nancy Wyman	Democrat	\$469,285	n/a	\$750,000	\$0
Attorney General	Robert Farr	Republican	\$72,851 from 267 donors	n/a	\$0	n/a
Attorney General	Richard Blumenthal	Democrat	\$520,676	n/a	\$750,000	\$0

<sup>13</sup> Proulx Decl. ¶ 17.

<sup>14</sup> For purposes of argument, this column provides the amount of matching funds that each participating candidate would have received, based on opponent contributions, under the assumption that his or her opponents failed to participate in the CEP. See Conn. Gen. Stat. §§ 9-713, 9-714. In actuality, of course, a participating opponent's expenditures would not trigger matching funds.

<sup>15</sup> The SEEC filing system does not provide campaign finance reports that differentiate primary and general election expenditures by John DeStefano, Jr. According to a *New York Times* article, John DeStefano, Jr. spent "almost all of the \$4 million he had raised" during the primary. Avi Salzman, "ON POLITICS; Democrats Split Their Ticket at the Top," *The New York Times*, Aug. 13, 2006) <http://query.nytimes.com/gst/fullpage.html?res=9802E3D71F3FF930A2575BC0A9609C8B63> (visited on August 22, 2008). We assume for the purposes of this analysis, therefore, that DeStefano raised \$4 million during the primary election and \$1,163,548 during the general election, an assumption which holds for the determination of matching funds that would have been awarded to DeStefano, as well as to opponents Jodi Rell and Dan Malloy.

As one would expect, since the CEP grant amounts were geared to historical average expenditures, the CEP grant amounts roughly center on these levels.

Conspicuously absent from Plaintiffs' examination of statewide expenditures is any mention of the expenditures of nonmajor-party candidates for statewide office. As compared to the hundreds of thousands, or even millions of dollars, raised in private fundraising by major-party candidates whose fundraising exceeded the qualifying contributions threshold, all of the nonmajor-party candidates except one raised less than \$1,000 for their statewide elections campaigns over the past two election cycles and were outspent hundreds of times, or even a thousandfold, by their major-party counterparts.

The single exception – Green Party gubernatorial candidate Clifford Thornton – raised only \$27,933, or more than 100 times less than his major-party general election competitors, who each raised well over \$4 million. Foster Decl. ¶ 22. It is also worth mentioning, as set forth *supra* section II.A, that each of the Republican statewide candidates listed in Plaintiffs' Table 1 (none of whom would have qualified for CEP general election grants) received more than 20% of the vote. By contrast, only a few nonmajor-party statewide candidates over the past two election cycles received even 1% of the vote, and the highest percentage received by *any* nonmajor-party statewide candidate in that period was 2.5% of the vote. See *supra* section I.A.1.

## **B. Legislative Candidates**

In support of their argument that CEP grant amounts for major-party legislative candidates “are significantly higher than actual spending,” Plaintiffs once again make a misleading presentation of the historical data. Specifically, Plaintiffs rely upon *median* figures for both Senate and House candidate expenditures in 2004: median expenditures

for House candidates are \$14,588.64, and median expenditures for Senate candidates are \$61,948.76. Pls. Mem. at 18 (citing OLR research report, Campaign Expenditures and Contributions in Connecticut 2000-2004, August 2, 2005).<sup>16</sup>

Yet these median figures are highly misleading and do not give an accurate picture of major-party candidate expenditures – the only reason that these figures appear low is because they include the extremely low expenditures of *nonmajor-party* candidates, whose expenditures averaged only \$303 for Senate campaigns and \$925 for House campaigns in 2004. Foster Decl. ¶ 23-24. If nonmajor-party candidate expenditures are excluded from the calculation – as they should be for an assessment of whether major-party grants exceed major-party historical expenditures – then CEP grant amounts turn out to be in line with historical expenditures of major-party legislative candidates. Major-party Senate candidates spent an average of \$81,253 in 2004, and the corresponding CEP grant amount is \$85,000: and major-party House candidates spent an average of \$19,117 in 2004, and the corresponding CEP grant amount is \$25,000.

Moreover, Plaintiffs argue that “elections for state representative and state senate are generally not competitive and frequently uncontested. As a result, the grant amounts are significantly higher than actual spending.” Pls. Mem. at 18. Specifically, Plaintiffs suggest that the CEP grant amounts are in excess of historical expenditures in races in which a major-party candidate faces only “poorly-funded candidates.” Pls. Mem. at 18. However, Plaintiffs fail to mention the CEP provisions that specifically address the issue of which they complain by reducing grant amounts significantly for less competitive races, as follows: (1) general election grants are reduced to 30% of the full amount if a

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<sup>16</sup> Plaintiffs further claim these figures “actually inflate the expenditure data” because they exclude 23 candidates who filed exemptions (indicating that they did not intend to raise or spend more than \$1000). Pls. Mem. at 18-19.

candidate is unopposed in the general election, Conn. Gen. Stat. § 9-705(j); (2) general election grants are reduced to 60% of the full amount if the candidate faces only a nonmajor- or petitioning party opponent who has not raised an amount equal to the qualifying contribution threshold level for that office. Conn. Gen. Stat. § 9-705(j). Once these provisions are factored in, the reduced CEP grant amounts in these circumstances align with historical expenditures in less competitive races, including those in which a major-party candidate was unopposed and those in which a major-party candidate faced only nonmajor-party opposition. These categories of competitive and less competitive legislative races and corresponding CEP grant amounts are set forth below:

<b>2004 Average Senate Candidate Expenditures<sup>17</sup></b>		<b>CEP 2008 Grant Amounts<sup>18</sup></b>	
Major-party Senate Candidate Facing Major-party Opponent	\$81,253	Major-party Senate Candidate Facing Major-party / CEP Opponent	\$85,000
Unopposed Major-party Senate Candidate	\$57,892	Unopposed Major-party Senate Candidate	\$25,000
Major-party Senate Candidate Facing Nonmajor-party Opponent	\$39,284	Major-party Senate Candidate Facing Nonmajor Non-CEP Opponent Who Has Failed to Meet CEP Qualifying Threshold	\$51,000

<b>2004 Average House Candidate Expenditures<sup>19</sup></b>		<b>CEP 2008 Grant Amounts<sup>20</sup></b>	
Major-party House Candidate Facing Major-party Opponent	\$19,117	Major-party House Candidate Facing Major-party / CEP Opponent	\$25,000
Unopposed Major-party House Candidate	\$14,503	Unopposed Major-party House Candidate	\$7,500
Major-party House Candidate Facing Nonmajor-party Opponent	\$17,500	Major-party House Candidate Facing Nonmajor Non-CEP Opponent Who Has Failed to Meet CEP Qualifying Threshold	\$15,000

<sup>17</sup> Foster Decl. ¶ 23.

<sup>18</sup> Conn. Gen. Stat. §§ 9-705(e)(2), 9-705(j)(3), 9-705(j)(4).

<sup>19</sup> Foster Decl. ¶ 24.

<sup>20</sup> Conn. Gen. Stat. §§ 9-705(f)(2), 9-705(j)(3), 9-705(j)(4).

Historical expenditure patterns simply do not support Plaintiffs' contention that the CEP grant amounts would be a "windfall" for participating major-party candidates.

### **C. Qualifying Contribution Requirements Are Based on Historical Contribution Patterns for Viable Candidates**

Plaintiffs also challenge the CEP's qualifying contribution requirements, which apply across the board to all candidates. Plaintiffs claim that this even-handed requirement invidiously discriminates against them in two ways: first, that the Connecticut legislature set the qualifying contributions bar at a level that they knew major-party candidates would be able to meet but that nonmajor-party candidates would not; and second, that the qualifying contribution requirements are especially hard for nonmajor-party candidates to meet. However, historical election results contradict the first contention, and the factual record shows that the qualifying contribution requirements are eminently reasonable in light of the complex state interests involved in the CEP.

First, Plaintiffs complain that "[t]he qualifying threshold under the CEP is based on the proven fundraising capacity of major-party candidates that few nonmajor-party or independent candidates can match." Pls. Mem. at 39. However, in setting this universally applicable qualifying contribution requirement, the Connecticut legislature set a bar for both major-party and nonmajor-party candidates. Plaintiffs' statement that the "[n]umber of contributors to major-party legislative races in 2006 corresponds to the number of qualifying contributions required under CEP" is simply false. Pls. Mem. at 41. Only approximately 39% of major-party Senate candidates collected contributions from

the requisite 300 contributors in the past five election cycles, while approximately 30% of major-party House candidates collected contributions from the required 150 contributors in that period. Furthermore, although it is true that all of the major-party gubernatorial general election candidates since 1998 have obtained the requisite number of contributions to surpass the CEP qualifying contributions threshold, it is also true that each of these candidates was able to raise millions of dollars through private fundraising and garner a significant percentage of the vote. Proulx Decl. ¶ 15. These results are far from typical for statewide candidates generally – only 58% of other statewide major-party candidates received the requisite number of 750 contributions since 1998. *Id.*

Accordingly, the CEP qualification threshold is set to provide all candidates with a choice: in exchange for the grant of public funds, candidates must change their fundraising habits, requiring them to rely on a larger number of low-dollar contributions, rather than a few major donors or to forgo public funding. It is precisely the purpose of the CEP to incentivize participating candidates to change these habits in order to further the state’s anticorruption goals. The calculus is the same for both major and nonmajor-party candidates: if Plaintiffs do not wish to give up their large donor lifeline, they are free to forgo CEP participation and continue their current fund-raising practices.

Second, Plaintiffs contend they will have difficulty in identifying the needed number of donors to meet the qualifying contribution requirements, and that the aggregate amount of money required in qualifying contributions will “effectively shut them out of the CEP.” Pls. Mem. at 40. For example, Plaintiffs emphasize that fewer than 100 people contributed to Clifford Thornton’s gubernatorial campaign, compared to over 14,000 contributors to the major-party gubernatorial candidates. Pls. Mem. at 39,

n.36 & n.37. On the legislative level, Plaintiffs argue that candidates from the two plaintiff parties generally rely on friends, family, and a core group of party loyalists comprising only 20-30 people on the district level to fund their campaigns. Pls. Mem. at 42. These arguments are further evidence of Plaintiffs' lack of viability, organization, and popular support and are not a reason either for the state to be required to give thousands or millions of dollars to unappealing campaigns or withhold funding from viable, publicly supported campaigns.

## **ARGUMENT**

### **III. The Applicable Legal Standards**

#### **A. Legal Standards on Summary Judgment**

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A party "may not rely simply on conclusory statements" to support a motion for summary judgment. *Ying Jing Gan v. City of New York*, 996 F.2d 522, 532 (2d Cir. 1993). The moving party "must do more than present evidence that is merely colorable, conclusory, or speculative and must present concrete evidence from which a reasonable juror could return a verdict in [their] favor." *Page v. Conn. Dep't of Pub. Safety*, 185 F. Supp. 2d 149, 153 (D. Conn. 2002) (internal quotations omitted). Furthermore, "[a] self-serving affidavit that reiterates the conclusory allegations of the complaint in affidavit form is insufficient" to successfully support a motion for summary judgment. *Reed v. Hartford Police Dep't*, No. 03-CV-2147, 2006 U.S. Dist. LEXIS 60541 (D. Conn. July 25, 2006) (citing *Lujan v.*

*Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)). Plaintiffs have failed to meet this burden, as set forth above, *supra*, section I, since Plaintiffs' claims are wholly speculative, based on distortions of the evidentiary record, or flatly contradicted by record evidence.

Plaintiffs have not come close to establishing that no issue of material fact exists, since their claims are wholly speculative, based on distortions of the evidentiary record, or flatly contradicted by record evidence. In support of their motion, Plaintiffs rely entirely on speculative affidavits by their own witnesses, for example, the affidavit of Plaintiff Michael DeRosa. Mr. DeRosa's affidavit is rife with conclusory and speculative statements unsupported by even the most charitable view of the facts. For example, he states that "a strong Green Party candidate in a competitive election might easily have expenditures that would trigger matching funds for his opponents." DeRosa Decl. ¶ 55. He stated this opinion without any support and in the face of contrary factual evidence.<sup>21</sup> Such unsupported and contradictory conjecture cannot serve as the basis for a grant of summary judgment, and this Court should give no weight to such self-serving and contradictory testimony. *Buttry v. General Signal Corp.*, 68 F.3d 1488, 1493 (2d Cir. 1995) ("It is well settled in this circuit that a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment.") (quoting *Mack v. United States*, 814 F.2d 120, 124 (2d Cir. 1987)).

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<sup>21</sup> See, e.g., Migally Decl. Ex. 1 (DeRosa Dep.) at 76:13-24, 80:21-81:2 (testifying that total fundraising for each of his three Senate campaigns ranged from \$500-\$5,500); *id.* at 124:19-126:6 (testifying that DeRosa raised less than \$500 for his 2006 campaign for Secretary of State in 2006).

**B. The Flexible Standard Articulated in *Anderson* and *Burdick*, and Not Strict Scrutiny, Applies to the Review of CEP Provisions at Issue.**

**1. Plaintiffs Fail to Apply the Governing *Anderson-Burdick* Standard to Assess the Constitutionality of Election Statutes.**

Plaintiffs do not identify a governing constitutional standard for review of alleged “restrictions on campaign-related speech” and instead simply assume that strict scrutiny automatically applies. Pls. Mem. at 53. This assumption has been specifically rejected by the Supreme Court. As the Court explained in *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992):

Each provision of a[n] [election] code, “whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects - at least to some degree - the individual's right to vote and his right to associate with others for political ends.” *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.

*Id.* at 433. Instead, the courts have consistently applied a “more flexible standard,” derived from the Supreme Court's decisions in *Anderson* and *Burdick*, under which the court must assess the existence and severity of the burden proved by Plaintiffs before determining the degree of scrutiny to apply to a state election regulation. *Id.*; see *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-70 (1997) (upholding constitutionality of Minnesota's prohibition of fusion voting despite alleged impact on minor parties), *Schulz v. Williams*, 44 F.3d 48, 56 (2d Cir. 1994) (upholding petition requirements for ballot access against Libertarian Party challenge); *LaRouche v. Kezer*, 990 F.2d 36, 39-40 (2d Cir. 1993) (upholding law requiring non-“media recognizable” presidential primary candidates to petition for ballot access); *ACORN v. Bysiewicz*, 413 F.

Supp. 2d 119, 140 (D. Conn. 2005) (upholding Connecticut's refusal to permit election day registration). As the Supreme Court recently affirmed this past term, in assessing the constitutionality of electoral regulations, "our approach remains faithful to *Anderson* and *Burdick*." *Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1616 & n.8 (2008).

Under the "flexible approach" articulated in *Anderson* and *Burdick*:

A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

*Burdick* 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). It is only in cases where the challenged law subjects the claimed burdened rights to "severe" restrictions that strict scrutiny applies (in which case the regulation must be "narrowly drawn to advance a state interest of compelling importance"). "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* at 434 (quoting *Anderson*, 460 U.S. at 788).

The Second Circuit recently reaffirmed the applicability of "the *Burdick* standard in *Price v. New York State Bd. of Elections*, 2008 U.S. App. LEXIS 18015, \*13 (2d Cir. Aug. 22, 2008). There, the court described its review as follows:

If the plaintiffs' rights are severely burdened, the statute is subject to strict scrutiny. *Burdick*, 504 U.S. at 435. If the burden is minor, but non-trivial, *Burdick's* balancing act is applied. Under this balancing test, the State's reasonable and nondiscriminatory restrictions will generally be sufficient to uphold the statute if they serve important state interests. *Id.* Review in such circumstances will be quite deferential, and we will not require "elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons*, 520 U.S. at 364

2008 U.S. App. Lexis 18015 at \* 16-17. As Defendants show in section I.C, *infra*, Plaintiffs fail to demonstrate any such “severe” burden that would require application of strict scrutiny. Under *Buckley*, the test of whether such a burden exists is whether the CEP reduces the “political opportunity” of nonmajor parties below those levels attained before public funding. *See Buckley*, 424 U.S. at 98-99; *see also Libertarian Party of Indiana v. Packard*, 741 F.2d 981, 991 (7th Cir. 1984) (applying this standard in determining whether public financing system invidiously discriminates against minor parties). Thus, rather than requiring the state to level the playing field – as Plaintiffs seek – a state election regulation works no invidious discrimination if it does not restrict the pre-existing ability of nonmajor-party candidates to exercise their First Amendment freedoms.

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

Moreover, in assessing the severity of an asserted burden, the court must consider the challenged statute in the context of the totality of the state's electoral scheme. *See Burdick*, 504 U.S. at 435-37 (evaluating Hawaii's prohibition of write-in voting in context of other provisions permitting easy access to ballot); *Schulz*, 44 F.3d at 56-57 (considering alleged burden imposed by challenged provision "in light of the state's overall election scheme," in upholding New York petition requirement against Libertarian Party challenge); *Green Party of N.Y.*, 389 F.3d at 419 ("Courts are required to consider [challenged electoral] restrictions within the totality of the state's overall plan of regulation."); *Lerman v. Board of Elections*, 232 F.3d 135, 145 (2d Cir. 2000) (same).

In making this determination, the Court must also take into account the availability of any alternative means for Plaintiffs to exercise the allegedly burdened rights. *See Crawford*, 128 S. Ct. at 1621 (holding that severity of burden on exercise of voting rights was "mitigated by the fact that, if eligible, [these] voters . . . may cast provisional ballots."); *Burdick*, 504 U.S. at 436 n.5 (explaining that *Anderson* struck down an Ohio law barring late independent candidacies because Ohio provided no alternative access to presidential ballot after March); *see also Jenness v. Fortson*, 403 U.S. 431, 440-41 (1971) (rejecting challenge to differential ballot restrictions for minor party candidates, because differences constituted "alternative routes"); *cf. Williams v. Rhodes*, 393 U.S. 23, 24-26 (1968) (Ohio made "no provision" for independents to appear on ballot and made it "virtually impossible" for new parties to do so).

Absent sufficient proof of an unduly severe burden, "a challenged restriction should be upheld so long as the state puts forth interests that are legitimate and important." *Crawford*, 128 S. Ct. at 1619. Nor does the Supreme Court "require

elaborate, empirical verification of the weightiness of the State's asserted justifications.” *Timmons*, 520 U.S. at 364. If a severe burden has not been shown, then “the state is not limited . . . to the least restrictive methods” of achieving its objectives.” *Rogers v. Corbett*, 468 F.3d 188, 195 (3d Cir. 2006). Rather, a restriction imposing a limited burden should be upheld if justified by “valid neutral justifications” concerning important state interests, whether or not the state's choice of policy is the most effective, and even if “partisan interests may have provided one motivation” for the law. *Crawford*, 128 S. Ct. at 1624.

In erroneously urging the Court to apply strict scrutiny in its review of the CEP, Plaintiffs entirely disregard the case law on invidious discrimination and instead direct this Court to a line of case law on independent expenditures that simply does not apply to the constitutionality of a public financing system. Plaintiffs cite the Supreme Court’s opinion in *Federal Election Commission v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2664 (2007), as well as a section of the *Buckley* opinion, 424 U.S. at 15, 44-45, in support of their argument that the CEP restricts campaign related speech. Pls. Mem. at 53. However, both of these citations are inapplicable here because both deal with regulation of independent expenditures, an issue that has no bearing on the constitutionality of public financing systems. It is settled First Amendment law that limits on expenditures, whether by candidates or independent organizations, involve a direct restriction on speech and are subject to the most exacting scrutiny. *Buckley*, 424 U.S. at 19. By contrast, other, more indirect restrictions on speech – such as contribution limits – have received a lower level of scrutiny than

expenditure limitations. *See id.* at 20; *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 387 (2000) (noting that restrictions on contributions require less compelling justification than restrictions on independent expenditures). Public financing systems are subject to even more lenient scrutiny than contribution limits, since, unlike either contribution limits or expenditure limits, which both burden speech to some degree, public financing systems “further, not abridge pertinent First Amendment values” because they “use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.” *Buckley*, 424 U.S. at 92-93. Thus, Plaintiffs’ citations to cases regarding the degree of scrutiny applicable to expenditure limitations are entirely inapposite to the case at hand.

**2. Plaintiffs Misapply “Traditional Equal Protection Analysis,”  
Cobbling Together Inapposite Authority That Has No Application  
in the Public Financing Context**

Plaintiffs also misguidedly argue that the CEP is separately unconstitutional under a “traditional” Equal Protection analysis. This makeshift and confused argument ignores the fact that the *Anderson-Burdick* standard applies to both Plaintiffs’ First Amendment and Equal Protection challenges. The courts have consistently held that the First Amendment and Equal Protection analysis “substantially overlaps” in this area. *See* Defendants’ and Intervenor-Defendants’ Memorandum of Law in Support of Motion for Partial Summary Judgment, dated July 11, 2008 (“Defendants’ Brief” or “Def. Mem.”) at 48-49 (citing *inter alia* *Anderson*, 460 U.S. at 787 n.7). Indeed, as this Court recognized in its ruling on the motion to dismiss, Plaintiffs’ First Amendment claim is “part and

parcel of their equal protection claim.” *Green Party of Conn.*, 537 F. Supp. 2d at 367 n.10.

Plaintiffs place great emphasis upon a line of cases striking down laws that conferred tangible benefits – such as preferential postage rates or free voter registration lists – exclusively on major parties, while withholding these same benefits from minor parties. *See, e.g., Schulz*, 44 F. 3d at 60; *Greenberg v. Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y. 1970); *Green Party of Michigan v. Land*, 541 F. Supp. 2d 912 (E.D. Mich. 2008); *Libertarian Party of Indiana v. Marion County Bd. of Voter Registration*, 778 F. Supp. 1458 (S.D. Ind. 1991). However, in all of these cases, the state demonstrated no legitimate purpose that could justify this preferential treatment. *See, e.g., Schulz*, 44 F. 3d at 60 (no state interest in distributing free voter registration lists to major parties but not to minor parties); *Greenberg*, 497 F. Supp. at 780 (“There is no need ... to restrict access to the mails [by denial of preferential postage rates to minor party and independent candidates] to insure manageability and integrity of elections.”); *Socialist Workers Party*, 314 F. Supp. at 989, 995-996 (same); *Green Party of Michigan*, 541 F. Supp. 2d at 914, 919-923 (no state interests justified Michigan’s distribution of data on voters’ political party preferences to major-party chairpersons exclusively); *Libertarian Party of Indiana*, 778 F. Supp. at 1463-64 (state interest “in not being required to distribute [voter] [r]egistration [l]ists to everyone who might request them” not sufficiently important to justify free distribution to major parties only). Accordingly, these preferential treatment cases are readily distinguishable, because the CEP, like other public funding systems,

advances governmental interests that courts have uniformly recognized as important, and even compelling. *See* Def. Mem. at 56-59; *see also* Pls. Mem. at 85, 89.

Plaintiffs also cite to First Amendment cases that have held specific subject-matter restrictions on speech to be unconstitutional. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (Massachusetts law criminalizing contributions or expenditures by national banking associations or other businesses to influence outcome of vote on any non-pecuniary questions submitted for public vote); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) (Chicago city ordinance prohibiting all picketing within 150 feet of a school except in labor dispute). But these cases are equally inapposite. Plaintiffs utterly fail to explain – much less to prove – how the CEP’s provision of public funds based on objective measures of public support could be construed as a “content-based restriction.” Both the Supreme Court and the Second Circuit have repeatedly rejected the argument that differential election regulations, as between major and nonmajor parties, based on such showings of popular support constitute viewpoint-based discrimination. *See Buckley*, 424 U.S. at 92-93, 96; *LaRouche v. Kezer*, 990 F.2d 36, 41 (2d Cir. 1993) (upholding Connecticut ballot access law requiring presidential primary candidates who failed to show that they were “media recognizable” to fulfill petitioning requirement). Instead, the governing test for whether a public financing system invidiously discriminates against nonmajor-party candidates, as established in *Buckley*, is whether the statute reduces their political opportunity below the level at which it stood prior to the enactment of the system.

**C. Plaintiffs Fail to Meet the Heavy Burden of Proving “Real” or “Substantial” Burdens On Their Rights as Is Required for a Facial Constitutional Challenge**

Plaintiffs have failed to meet the heavy burden required to successfully launch a facial challenge to the CEP. Such a facial challenge requires that Plaintiffs prove a “real” and “severe” burden on their constitutionally protected rights. *See Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191-92 (2008). In this year's decisions in *Washington State Grange*, 128 S. Ct. at 1190 (2008), and *Crawford*, 128 S. Ct. at 1621-22, the Supreme Court made clear that on a facial challenge, plaintiffs bear the burden of presenting real evidence of the burden imposed by a challenged law, and cannot rely on speculation, hypotheticals or isolated instances.

In *Washington State Grange*, 128 S. Ct. at 1190, the Court rejected the plaintiffs’ facial challenge because they had not demonstrated that the First Amendment injury they feared would necessarily come to pass. Similarly, in *Crawford*, the Court stressed a plaintiff’s “heavy burden of persuasion” in seeking facial invalidation of an election statute, and reminded the lower courts of their obligation “to give appropriate weight to the magnitude of that burden.” *Crawford*, 128 S. Ct. at 1621-22 (upholding voter protection law on its face while discounting studies and other evidence, “the accuracy of which has not been tested in the trial court”). As demonstrated above, Plaintiffs’ evidence consists entirely of misleading distortions of election records, speculative and hypothetical assertions of injury, and anomalous and unrepresentative examples.

Read together, *Washington State Grange* and *Crawford* emphasize the requirement that a plaintiff seeking to invalidate an entire statute on a facial challenge must be able to present actual evidence of real – as opposed to speculative or hypothetical – injury resulting to them from the operation of the statute. Not only does Plaintiffs’

motion for summary judgment fail to demonstrate the absence of any disputed issue of material fact regarding the existence of such a burden, it fails to establish the existence of any concrete injury to Plaintiffs whatsoever.

Instead of satisfying the “heavy burden of persuasion” required for constitutional facial challenges, *Crawford*, 128 S. Ct. at 1621-22, Plaintiffs have asserted speculative and conclusory propositions based on their theories of the impacts of the CEP and not based upon factual evidence. For example, Plaintiffs cannot credibly demonstrate that the CEP eligibility or qualifying contributions criteria, or funding formulae, reduce the strength of their protected “political opportunity” below those levels attained without public funding. *See Buckley*, 424 U.S. at 98-99. As demonstrated below, Plaintiffs’ unsupported assertions that the CEP will have the effect of “distorting” the playing field in a way that will further reduce nonmajor-party candidates’ already negligible political strength are precisely the type of hypothetical<sup>22</sup> assertion that the Supreme Court found to be insufficient to support a facial challenge.

#### **IV. Plaintiffs’ Claim of Invidious Discrimination Fails Because They Are Unable to Make the Required Factual Showing that the CEP Disadvantages Nonmajor Parties by Operating To Reduce Their Strength Below That Attained Without Any Public Financing**

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<sup>22</sup> For purposes of Defendants’ motion to dismiss, this Court had to take as true the allegations of Plaintiffs’ complaint that the CEP burdens their protected political opportunity. As a result, the Court stated: “Before the CEP, minor parties had greater political opportunity, and made their biggest strides, in noncompetitive districts. In the absence of substantial competition between major party candidates, plaintiffs allege that those districts proved to be fertile ground on which to spread their message. The CEP . . . . compels a competitive two-party race between major party candidates [] which the government finances, at exceedingly generous levels . . . . Minor party candidates will be crowded out of those races, and the CEP will snuff out the gains that minor parties have made.” *Green Party*, 537 F. Supp. 2d at 377. However, at this stage of the litigation, the factual record demonstrates that Plaintiffs’ have failed to prove these assertions and therefore have failed to meet the standard required to support a facial challenge the CEP.

As the factual record outlined above demonstrates beyond dispute, Plaintiffs have failed to make any showing that the CEP will reduce their political opportunities. In fact, even Plaintiffs’ witnesses have conceded that the political strength of nonmajor-party candidates would not be diminished because of the CEP, or have stated that they are unable to predict any change to nonmajor parties. *See* Migally Decl. Ex. 2 (Ferrucci Dep.) at 61:4-21, 104:18-105:10 (resources of major parties will merely continue to be much greater than of nonmajor parties), 105:12-25 (unable to determine whether CEP will affect the political strength of the Green Party); Youn Decl. Ex. 1 (DeRosa Dep.) at 28:7-12 (Green Party was unable to determine whether it would be able to make effective use of the CEP); *see also* Youn Decl. Ex. 23 (Winger Dep.) at 118:13-119:4 (Plaintiffs’ expert admits it is not yet possible to quantify whether the CEP has increased or lessened disparity in campaign funds between major and nonmajor parties); Youn Decl. Ex. 18 (Thornton Dep.) at 150:19-151:1 (“minor party playing field” not “more uneven” than before enactment of CEP); *see also* Sevigny Aff. ¶ 9 (“I also realize that the CEP does not leave minor party candidates in a position any worse than under the previous private campaign funding system.”). Plaintiffs’ failure to meet this burden – which is required under *Buckley* – is fatal to their constitutional claim.

**A. Major- and Nonmajor-Party Candidates Were Not Similarly Situated Prior to Passage of the CEP, and the CEP Does Not Exacerbate This Disparity**

As demonstrated above, the undisputed facts regarding historical vote totals, voter identification, and party infrastructure demonstrate that even in one-party-dominant districts, major-party challengers and nonmajor-party candidates are not similarly situated for CEP eligibility or funding purposes. *See, e.g., supra* Statement of Fact section I.A.1

& 2. It is clear instead that in recent years nonmajor parties have barely registered on Connecticut's political landscape, in terms of public support, organizational capacity and resources, even in one-party-dominant districts, which Plaintiffs claim have been their most favored habitat. *Cf.* Buckley, 424 U.S. at 97 (“[t]hird parties have been completely incapable of matching the major parties’ ability to raise money and win elections.”). The truth is that Connecticut's nonmajor parties have been struggling to maintain any presence at all in the electoral realm for many years, long before enactment of the CEP. *See, e.g.*, Foster Decl. ¶¶ 5, 8-9 (citing official election results).

In *Nader v. Schaffer*, a federal district court in this circuit upheld Connecticut's closed primary system against equal protection challenges. The court noted that “any dominant position enjoyed by the Democratic or Republican Parties is not the result of improper support, or discrimination in their favor, by the State.” 417 F. Supp. at 843. As in *Nader*, if major parties enjoy a dominant position in Connecticut, it is not the result of the state law and therefore such law is not invalid. Undisputed evidence demonstrates that the strength of Connecticut's nonmajor parties before the CEP went into effect was negligible, and that this negligible strength is explained by factors unrelated to public funding; most importantly, by lack of public support for the causes and issues raised by the parties. Official election results show that prior to implementation of the CEP, the strength of Connecticut's nonmajor parties in the electoral realm, with one notable exception in 1990, has been almost nonexistent. Foster Decl. ¶¶ 5, 8-9.

The record demonstrates that the nonmajor parties are plagued by poor organization, in-fighting, lack of electoral purpose, and insincere candidacies. The Green Party does not have a formal budget, any paid staff, or a headquarters; and it has had only

a handful of part-time volunteer staff. *See* Youn Decl. Ex. 3 (Ferrucci Dep.) at 22:18-23:5; Sevigny Aff. ¶¶ 13, 33; Youn Decl. Ex. 18 (Thornton Dep.) at 51:17-54:2; Youn Decl. Ex. 5 (Krayeske Dep.) at 58:12-16. Schisms within the Green Party have impeded party-building and have even resulted in the withdrawal of some 10% of its active membership in recent years; its statewide activities were stymied in the early 2000s by chronic absenteeism at party meetings and resultant failures to reach a quorum. Sevigny Aff. ¶¶ 25, 27-30. The record establishes a similar lack of organization on the part of the Libertarian Party, which has no paid staff or physical infrastructure. Youn Decl. Ex. 12 (Rule Dep.) at 113:19-25. Several former Green Party candidates have testified to campaigning without a winning strategy or intent. *See, e.g.*, Affidavit of Thomas Sevigny, June 30, 2008, ¶¶ 36-37 (testifying that he had no expectation of winning elections when he ran twice as Green Party State Senate candidate and once as State House Representative candidate, but instead ran to attain ballot access for party and to increase party name recognition); Youn Decl. Ex. 1 (DeRosa Dep.) at 113:11-114:7 (testifying to a number of goals in his State Senate candidacy not dependent on electoral victory: to gain publicity for his views on the war and the environment, as well as to retain ballot access for that office for the Green Party); *see also* Youn Decl. Ex. 12 (Rule Dep.) at 44:10-45:6 and 78:1-18 (Libertarians "don't feel compelled to put a lot of effort into campaigns"). It is moreover impossible to imagine a major party in Connecticut, with basic vetting procedures of candidates, nominating and endorsing candidates to run under its banner for statewide office who were legally ineligible to hold the office sought, as Plaintiffs have done. Sevigny Aff. ¶ 35; Youn Decl. Ex. 18 (Thornton Dep.) at 104:8-19; Migally Decl. Ex. 1 (DeRosa Dep.) at 44:10- 45:4. Against such a factual backdrop,

the advent of the CEP is far more likely to enhance the strategic opportunities for nonmajor parties than to diminish them, because, as the evidentiary record demonstrates, the nonmajor plaintiffs in Connecticut have much to gain from the CEP's provision of financial incentives to achieve better organization, and very little to lose. Plaintiffs have failed to meet the heavy burden of demonstrating that the CEP has diminished their political opportunity. Their motion for summary judgment should be denied.

**V. Plaintiffs' Purported Inability to Qualify for CEP Funding Does Not Establish That the CEP's Qualification and Eligibility Requirements Invidiously Discriminate Against Nonmajor-Party Candidates**

Plaintiffs argue that, taken together, the qualifying criteria (including prior-vote totals, petitioning requirements and qualifying contributions) for nonmajor parties and independent candidates "will effectively prevent minor party candidates from participating in the CEP." Pls. Mem. at 73. Plaintiffs argue that the CEP's requirements are "so difficult to satisfy that they cannot realistically be complied with." *Id.* Plaintiffs' claim of invidious discrimination is predicated upon the assumption that they will be ineligible for CEP funds, but the reasons for this inability to achieve eligibility are telling. Essentially, Plaintiffs lack the organization and support to achieve the popular vote totals or to meet petitioning or qualifying contribution requirements. Plaintiffs' claim that they are unable to qualify for CEP funds is based on the limitations of their particular organizations, funds and popular support and is not a function of state action.

As set forth in the Defendants' Memorandum in Support of Defendants' Motion for Partial Summary Judgment ("Def. Mem.") (*see* III.B.2, pp. 80-84), there is no evidence to support Plaintiffs' claims of infeasibility. Even partial CEP funding opens up transformative political possibilities for nonmajor-party candidates by allowing them to

access unprecedented levels of funding. The mere fact that some nonmajor parties may not possess the requisite resources to qualify for public funding does not mean that a public funding system is discriminatory. The Supreme Court has stated that “the limited participation or nonparticipation of nonmajor parties or candidates in public funding does not unconstitutionally disadvantage them.” *Buckley*, 424 U.S. at 101-02 (*footnote omitted*). Furthermore, a public funding system is permissible so long as it has not “disadvantage[d] nonmajor parties by operating to reduce their strength below that attained without any public financing.” *Buckley*, 424 U.S. at 98-99. The limited resources of Plaintiffs predated the passage of the CEP and may in some cases be inherent to their organizations’ character and lack of public appeal. The CEP has done nothing to reduce the strength of Plaintiffs below the level attained without public financing.

Consideration of the CEP in its totality, as required under *Burdick*, confirms that the CEP permits *all* candidates to demonstrate a threshold level of popular support,<sup>23</sup> and allows that demonstration to be made in several different ways, including through a prior vote for the individual office, petitioning statewide measures of support, or major-party status. *See Burdick*, 504 U.S. at 435-37; *Schulz*, 44 F.3d at 56-57 (2d Cir. 1994). In *LaRouche v. Kezer*, 990 F.2d 36, (2d Cir. 1993), the Second Circuit considered a Connecticut ballot access regulation permitting presidential primary candidates not

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<sup>23</sup> As the Defendants’ Memorandum in support of summary judgment details, *see* section III.A.5, the Court must also take into account, in assessing the constitutionality of the CEP, the broader context of the State’s unusually lenient electoral treatment of minor parties and petitioning candidates. For example, Connecticut’s ballot restrictions – requiring petition signatures from registered voters equal to one only percent of prior votes cast for a given office, *see* Conn. Gen. Stat. § 9-453d (2008) – are much more favorable than requirements that have been approved by the Supreme Court. *See Storer*, 415 U.S. at 724 (5% of total votes in prior election); *Jenness*, 403 U.S. 563 (5% of eligible voters as of last election).

“generally and seriously recognized according to reports in the national or state news media” to collect petition signatures for ballot qualification. *Id.* at 37. The Court held that where a regulation sets forth the process for candidates to qualify for ballot access through petitioning, and a court determines this process to be constitutional, any *additional* means for achieving ballot access need only bear “some rational relationship” to the “government's compelling interest” in protecting “the integrity of its political processes from frivolous or fraudulent candidacies . . . by requiring candidates to produce evidence of their public support.” *LaRouche*, 990 F.2d at 38-39, n.1. The Second Circuit, in reversing the lower court, explained:

Our disagreement with the district court regarding the media recognition statute concerns its separate analysis of each statutory method for getting on the ballot. It thus examined the media recognition route as though it stood alone and found it constitutionally wanting. It then examined the petition alternative as though it stood alone and concluded that it passed constitutional muster. However, if the petition alternative would be constitutional standing alone, the additional method of a media recognition test is not in any sense an unconstitutional burden. To the contrary, because it is not constitutionally required, the media recognition test, whether or not vague, increases the opportunities to get on the ballot and reduces the burdens on candidates.

*Id.* at 39. The Court thus concluded that, under the approach set forth in *Burdick*, if either alternative would be constitutional standing alone, the other must be viewed as simply *broadening* the opportunities for ballot access and is *a fortiori* constitutional. *Id.*

Plainly, the CEP, like the system upheld in *LaRouche*, offers *additional* avenues to parties and candidates unable to otherwise demonstrate statewide public support. These two alternative means to make such a showing of requisite support confer a benefit on nonmajor parties, rather than imposing any constitutional burden. The CEP, in structure and fact, does not exclude nonmajor-party or independent candidates from

qualifying for funds. Instead, the legislature provided two achievable ways for nonmajor-party candidates to become eligible for public funding; namely, achieving 10 or more percent of the vote in the prior election for the same office or collecting an equivalent number of petition signatures. As set out further below, any disparate treatment is not invidious, but instead is based on well-reasoned legislative distinctions.

**A. The Prior-Vote Percentages Are a Reasonable Measure of Candidate Viability for Candidates Who Cannot Demonstrate Prior Statewide Support for Their Party**

Plaintiffs suggest that in setting the CEP prior-vote eligibility thresholds, the Connecticut legislature invidiously discriminated against nonmajor-party candidates by intentionally setting the bar out of reach of anyone but the major parties. However, the factual record in this case conclusively disproves Plaintiffs' mischaracterization of the purposes and effects of the prior-vote thresholds. Analysis of the legislative history, the deposition transcripts and the historical election results demonstrates that nonmajor-party candidates have historically surpassed the prior-vote thresholds and will in all likelihood continue to do so under the CEP. When assessing the attainability of the CEP eligibility threshold in 2006, the Connecticut legislature specifically considered data from the previous three election cycles showing that 22 nonmajor-party and petitioning legislative candidates won more than 10 percent of the vote and would have been automatically eligible for full or partial CEP funding (had the CEP been in place), and of those 22 candidates, 6 won at least 15 percent of the vote which would have made them eligible for a 2/3 grant and 4 won at least 20 percent of the vote which would have made them eligible for a full grant. *See* Garfield Decl. II Ex. 18 (OLR Report 2006-R-0163, March 9, 2006

[“Past Performance of Petitioning and Minor Party Candidates”]). Also, the legislature was aware in setting the thresholds that Lowell Weicker’s 1990 gubernatorial victory would automatically have made A Connecticut Party candidates eligible for full CEP funding in all statewide and legislative races in the next election. *See* D. Green Decl. ¶ 14. Accordingly, the Legislature was fully aware that nonmajor and petitioning candidates could and would be eligible for CEP funds based on prior-vote thresholds. Indeed, based on election results from 2006, nonmajor-party candidates are already eligible for full or partial CEP funding in 15 legislative district races in Connecticut (subject to the requirement for collecting qualifying contributions, which both major- and minor-party candidates must satisfy). Foster Decl. ¶ 19.

Plaintiffs further argue that the 10-percent eligibility thresholds “fall outside the permissible range” of popular support demarcated by the legal standards reviewed in *Buckley*. Pls. Mem. at 76-77. However, in contrast to the more flexible eligibility alternatives in the CEP, the only means for candidates to qualify for funding under Subtitle H of the presidential public financing system upheld in *Buckley* was based on prior national vote totals. In addition to this threshold, candidates were also required to appear on the ballot in at least ten states, *see Buckley*, 424 U.S. at 89 (citing 26 U.S.C. §§ 9002(2)(B) & 9004(a)(3)), which required candidates to overcome the considerable hurdle of achieving ballot qualification under the different laws of at least that many states. The *Buckley* Court therefore approved minor-party qualification requirements that, as in Connecticut’s, require nonmajor parties to manifest some signs of serious electoral intent and a level of organizational acumen that would justify a grant of public funds. *Buckley*, 424 U.S. at 96-98. Moreover, in approving the five-percent threshold in

*Buckley*, the Supreme Court emphasized that, “[w]ithout any doubt a range of formulations would sufficiently protect the public fisc and not foster factionalism...” *Id.* at 103-104.

**B. The CEP Petitioning Thresholds Fall Within the Constitutional Range of Guidelines Articulated by the Second Circuit and the Supreme Court and Are Readily Achievable by Reasonably Diligent Candidates**

In light of the precedents set forth in the preceding section, Plaintiffs’ allegations that they will be unable to meet the CEP’s petitioning thresholds are immaterial and cannot be the basis for a grant of summary judgment. Plaintiffs’ arguments regarding the petitioning thresholds fall into two categories. First, Plaintiffs argue that the CEP petitioning thresholds are more stringent than those previously held permissible by federal courts in the ballot access context. However, these comparisons are inapposite, since eligibility thresholds in the public financing context – which convey a speech-enhancing benefit – are entitled to greater legislative deference than ballot access thresholds, which place much more severe burdens on candidates who fail to meet the thresholds. *See Buckley*, 424 U.S. at 93-94.

Moreover, the CEP petitioning thresholds would pass constitutional muster even in the ballot access context under the standard developed by the Second Circuit. Given that petitioning thresholds incorporate percentages that are based on differing populations (such as registered voters, party-enrolled voters, and voters in a specific prior election) and widely varying time periods, it is inaccurate to compare the difficulty of various petitioning requirements based merely on the bare percentage number – i.e., 5% versus 10%. Also relevant in evaluating the “burden” of petitioning criteria is the time span allowed for collecting petition signatures. Recognizing this factor, the Second

Circuit in *LaRouche* provided a metric that allows a court to compare a particular petitioning requirement against those petitioning requirements already found achievable by reasonably diligent candidates by other courts, including the Supreme Court. *LaRouche*, 990 F.2d at 41. Under this metric, even the highest CEP petitioning thresholds – that required for the gubernatorial election – easily passes muster.

In *LaRouche*, the Second Circuit upheld the constitutionality of a Connecticut ballot access law requiring non-“media recognizable” presidential primary candidates to gather one percent of the party’s registered voter signatures within 14 days, *see LaRouche*, 990 F.2d at 41; Conn. Gen. Stat. 9-465, 9-467. In holding that the law was constitutional, the Court, looking to Supreme Court case law, determined whether the petition requirement percentages were achievable, after specifically considering “the percentage of potential voters that must sign the petition, the number of volunteers needed, and the minimum number of signatures to be obtained each day.” *LaRouche*, 990 F.2d at 41. In making this determination, the Second Circuit looked for guidance to the Supreme Court’s holdings in *Storer*, 415 U.S. at 740, and *American Party of Texas v. White*, 415 U.S. 767, 781-783 (1974). The ballot-access law upheld in *Storer* required independent presidential and vice-presidential candidates to collect signatures totaling five percent of the vote of the last presidential general election in California (or 325,000 signatures) within a mere 24 days. *See LaRouche*, 990 F.2d at 40-41 (citing *Storer*, 415 U.S. at 740). The Texas law upheld in *American Party* required candidates to collect signatures totaling one percent of the total gubernatorial vote for that state in 55 days. *See LaRouche*, 990 F.2d at 40-41 (citing *American Party*, 415 U.S. at 786).

In attempting to define a metric that could reconcile these different petitioning requirements, with their wide array of variables, the Second Circuit broke down the holding in *Storer* as follows:

The Court [*in Storer*] held that, absent other restrictions of no pertinence here, this [signature requirement] was not excessive [:] “Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,542 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day. On its face, the statute would not appear to require an impractical undertaking for one who desires to be a candidate for President.

*LaRouche*, 990 F.2d at 40-41. From this, the Second Circuit calculated that gathering fourteen signatures a day would require candidates in California to recruit 0.02% of the total California voter pool to serve as canvassers. *Id.* Applying this same calculation, the Second Circuit determined that gathering fourteen signatures per day would require candidates in Connecticut to recruit only .005% of the total pool to serve as canvassers. *Id.* Thus, the Second Circuit held that the Connecticut statute was constitutional because it “effectively requires less than half the volunteer effort that was acceptable to the Court in *Storer*.” *Id.*

The Second Circuit applied a similar analysis to the holding in *American Party*, and found that the petitioning requirement upheld in that case would have required that signatures be obtained “at the rate of 400 per day ... or four signatures per day for each 100 canvassers.” *Id.* Since the Connecticut statute required only slightly more than that number, and Connecticut – although it has a smaller population than Texas – is more densely populated, the Second Circuit found the requirements at issue constitutional. *Id.*

The petition levels required for CEP eligibility are far less demanding than those upheld in *Larouche*, *Storer* and *American Party*, all of which concerned restrictions on

ballot access, which the constitution guarantees to a far greater extent than public campaign financing. Therefore, the CEP's eligibility criteria clearly pass constitutional muster. Achieving CEP petition thresholds would require a gubernatorial candidate to collect 112,347 signatures for a 1/3 grant, or 224,693 for a full CEP grant. Proulx Decl. ¶ 20. The petitioning period in Connecticut for the current election cycle was 218 days, from January 2nd to August 6th, in total. *Id.* ¶ 22. At a rate of 14 signatures per day, it would take 1,000 petition circulators only eight days to collect enough signatures to qualify a gubernatorial candidate for a 1/3 grant. *Id.* ¶ 21. It would take 37 petitioners, each collecting 14 signatures per day of the petitioning period, to collect the signatures required for a 1/3 gubernatorial grant. *Id.* at 23. Thirty-seven petitioners, if they worked every day of the petitioning period, would only amount to 0.0015% of eligible circulators in Connecticut. *Id.*<sup>24</sup> Even for a full grant, the corresponding percentage is only 0.0031%. *Id.* Both of these figures are lower than the petitioning thresholds upheld in *Larouche*, and significantly lower than the petitioning requirement upheld by the Supreme Court in *Storer*.

Second, Plaintiffs argue, as a factual issue, that the CEP petitioning thresholds are impossible for nonmajor-party candidates to meet. However, the extensive evidentiary record contradicts Plaintiffs' allegations of impossibility and demonstrates that the CEP's petitioning thresholds are readily achievable by any viable, or even reasonably diligent, nonmajor-party and petitioning candidates. Indeed, three nonmajor candidates and one petitioning candidate have already collected signatures sufficient to

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<sup>24</sup> In Connecticut, a nominating petition circulator must be a United States citizen and resident of Connecticut who is at least 18 years-old but is not on parole for a felony conviction. Proulx Decl. ¶ 19. According to recent estimates, there are 2,401,238 voting age citizens in Connecticut and 1,981 offenders on parole. *Id.* Therefore, there are approximately 2,399,257 eligible circulators in Connecticut. *Id.*

attain eligibility for CEP grants in the upcoming November elections. *See, supra*, Statement of Facts section I.B.2. On the legislative level, CEP funding can be achieved, on average, by gathering only a few hundred signatures per House District (to qualify for up to \$25,000), or a few thousand signatures per Senate District (to qualify for up to \$85,000). Hubschman Decl. I at 6. As undisputed expert and fact testimony demonstrates, these totals should be readily achievable in a matter of days by a House candidate acting alone or a Senate candidate with a small number of volunteers. *Id.* at 11.

The gubernatorial and statewide thresholds are attainable for anyone who purports to be a serious candidate for statewide office, especially considering the millions of dollars in public funding at stake and the popular support and organization needed to mount a viable bid to govern a state of more than 2,044,511 registered voters. Connecticut Secretary of the State, “2007 Registration and in Enrollment Statistics,” *available at* [http://www.ct.gov/sots/lib/sots/2007\\_Registration\\_and\\_Enrollment\\_Statistics.pdf](http://www.ct.gov/sots/lib/sots/2007_Registration_and_Enrollment_Statistics.pdf) (visited August 29, 2008). Moreover, since petitions can be combined for a slate of candidates, a single coordinated petition drive could make the entire statewide slate eligible for CEP funding. As both sides concede, even under the status quo prior to enactment of the CEP, a substantial amount of time and resources are necessary to mount a realistic bid at statewide office. *See, e.g.*, Pls. Ex. A-1 (DeRosa Decl.) ¶¶ 28, 33; *see also* Jepsen Decl. ¶ 20. That Plaintiffs lack the public support and organization to recruit and mobilize volunteers does not mean that other, more viable candidates cannot meet the statutes’ requirements or that they should be foreclosed from taking

advantage of the transformative opportunities offered by the CEP. As the Supreme Court has long recognized, “[h]ard work and sacrifice by dedicated volunteers are the lifeblood of any political organization.” *LaRouche*, 990 F.2d at 40-41 (quoting *American Party*, 415 U.S. at 787).

In this light, the fact that Plaintiffs profess themselves absolutely unable to meet these thresholds merely highlights the weakness of their parties and candidates. There is no question on the record evidence that both the signature and qualifying contribution thresholds are achievable by any serious candidate with minimal commitment and organizing ability. Plaintiffs’ claimed inability to reach these thresholds, even if true, proves only the ineffectiveness of their candidacies rather than the unattainable levels of their thresholds. Although Plaintiffs are entitled to continue to field non-electorally viable candidates – and nothing in the CEP or Connecticut’s liberal election laws burdens the freedom of the Green Party to run such candidates – they have demonstrated no entitlement to considerable amounts of state funds allocated for the purpose of reducing the corruption of elected officials.

### **C. The Qualifying Contribution Requirements Filter out Candidates Lacking Popular Support**

By setting qualifying contribution requirements, the CEP aims to filter out candidates lacking the ability to raise private funds, thus ensuring that these funds remain a substitute for private funding rather than a subsidy to candidates who have no reasonable chance of winning an election. Despite admitting that the CEP applies the same qualifying contribution requirements to both major-party and nonmajor-party candidates, Plaintiffs claim that the amount of the qualifying contribution requirement

and the \$100 cap on such qualifying contributions constitutes invidious discrimination. Pls. Mem. at 37-39. In essence, Plaintiffs' arguments are based on the premise that it will be easier for major-party candidates to qualify under this provision of the CEP because major parties have the existing organizational and other support to conduct petition and fundraising drives. *See id.*

Plaintiffs' arguments are contrary to established Supreme Court precedent. Under *Buckley*, states have no duty to remedy preexisting differences between political parties' strength or capabilities. *See Nader*, 417 F. Supp. at 843 (“[A]ny dominant position enjoyed by the Democratic or Republican Parties is not the result of improper support, or discrimination in their favor, by the State.”); *see also Timmons*, 520 U.S. at 362 (states have no duty to remedy the “[m]any features of our political system – e.g., single-member districts, ‘first past the post’ elections, and the high costs of campaigning – [that] make it difficult for third parties to succeed in American politics”).

In the instant case, Plaintiffs' challenge to the qualifying contribution requirement of the CEP is based on the argument that it may be more difficult for nonmajor-party candidates to meet these requirements than it will be for major-party candidates. However, Plaintiffs admit that this difficulty is attributable to the superior public support and infrastructure of major parties and not to any action taken by the state. Pls. Memo at 38-39. Testimony taken during discovery shows that the difficulty in raising funds or garnering supporters for nonmajor parties is attributable to disorganization, and not to the CEP. Members of both the Green Party and the Libertarian Party testified that their organizations lacked paid staff or physical infrastructure. Affidavit of Thomas Sevigny, dated June 30, 2008 (“Sevigny Aff.”) ¶¶ 12, 14-15; Youn Dec. Ex. 12 (Deposition of

Andrew Thorvald Rule, dated February 22, 2008 [“Rule Dep.”]) at 113:19-25. At the very least, Plaintiffs’ allegations regarding the allegedly unequal burden of raising qualifying contributions raises a genuine issue of material fact and therefore Plaintiffs’ motion for summary judgment should be denied with respect to their challenge to the CEP’s qualifying contribution requirement.

**D. The CEP Does Not Diminish the Political Opportunity of Nonmajor Party Candidates in One-Party-Dominant Districts**

Plaintiffs place great weight on the argument that the CEP will harm the electoral success of nonmajor-party candidates in non-competitive districts, claiming that “more than 70% of the elections in Connecticut are not considered competitive and many are not contested by a major party opponent.” Pls. Mem. at 62. Consequently, Plaintiffs suggest, nonmajor and petitioning parties fill a “competitive void” in these elections by fielding an alternative candidate. *Id.* Plaintiffs thus attempt to establish that the CEP enhances the status of major-party candidates “in areas where they have not made any historical showing of support and in areas where nonmajor and petitioning party candidates have made their greatest strides.” *Id.* Plaintiffs speculate that the CEP will “compel” major-party competition in one-party-dominant districts. *Id.* at 63.

However, this speculative argument has been contradicted by the factual record, as set forth *supra* Section 1.A.2. Even in one-party dominant thresholds, historical election results prove that major-party candidates nearly always meet the viability threshold established by the Connecticut Legislature – 20% – and nonmajor-party candidates just as consistently fail to meet this threshold. Moreover, as set forth *supra* Section I.A.2.b, Plaintiffs have utterly failed to show, as a factual matter, that the CEP

“compels” major parties to compete in formerly one-party-dominant districts, or even that the availability of public funding substantially affects the incentives of major parties in deciding whether to field candidates in particular districts. Pls. Memo. at 63. As also noted, *supra*, the undisputed testimony of Plaintiffs’ own witnesses shows that nonmajor parties in Connecticut have simply been playing for different stakes than major parties – fielding candidates without realistic hopes of winning particular elections and instead targeting non-electoral goals such as attempts to gain publicity for their views, obtain ballot access for the party and promote party name recognition. *See, e.g.*, Affidavit of Thomas Sevigny, June 30, 2008, ¶¶ 36-37; Youn Decl. Ex. 1 (DeRosa Dep.) at 113:11-114:7. Moreover, participation rates in the CEP show no causal connection between the availability of CEP funding and the major parties’ decisions to field candidates in particular districts. *See supra* Section I.A.2.c.

More fundamentally, even if Plaintiffs were able to establish that one-party-dominant districts were the most fertile ground for their candidacies, and were further able to establish as a factual matter that the CEP endangers their electoral gains in one-party dominant districts – and they have failed to make these showings – they still would be unable to establish an unconstitutional burden on their political opportunity as a matter of law. The testimony of Plaintiffs’ own witnesses proves that even the low vote totals achieved by nonmajor-party candidates in one-party-dominant districts may substantially overstate the actual level of support for such candidates and their parties. Both of Plaintiffs’ expert witnesses as well as Plaintiff Michael DeRosa have conceded that many of the votes cast for nonmajor-party candidates in such races represent only “protest votes” from voters who, if given the opportunity, would much prefer to cast a meaningful

vote for their major party of choice – with its undisputedly greater prospect of victory. Youn Decl. Ex. 4 (Gillespie Dep. 222:7-223:3; 223:7-19); *id.* Ex. 23 (Winger Dep. 153:4-154:4; 158:1-6); Migally Decl. Ex. 1 (DeRosa Dep. 105:25-106:11).

Nonmajor-party candidates cannot claim to be harmed because they are not the only alternative on the ballot to the incumbent major party in a one-party dominant district. Nonmajor parties could not claim, for example, prior to the advent of the CEP, that their political opportunity was being trampled upon in every district in which a competitive election occurred. It follows that plaintiffs should not be able to claim that their constitutional rights are harmed by the decisions of other viable candidates – including other nonmajor-party candidates – to field legitimate campaigns in any district, if those candidates are eligible and have qualified for public funding. Should any candidate attempt to turn a district from non-competitive into a competitive district by fielding his or her own candidacy, the harm asserted by Plaintiffs would be identical to that asserted here, and would be similarly baseless. The right of nonmajor-party candidates to run for election does not imply that others harm them by doing the same, and Plaintiffs have no constitutional entitlement to maintain a particular percentage of the vote.

Even if the CEP does eventually result – and Plaintiffs have adduced no evidence that it will – in more major-party competition in noncompetitive districts, the resulting benefit to voters who will experience increased opportunities to cast votes for candidates of their preferred political parties would outweigh any detriment to nonmajor-party candidates who, it is not disputed, would remain free to compete. *See, e.g., Anderson*, 460 U.S. at 788 (“find[ing] on the ballot a candidate who comes near to reflecting his

policy preferences” is important to a voter's exercise of his “most precious” right to cast a meaningful vote ) (internal citations omitted). As Plaintiffs' expert Richard Winger admits, a voter's interest in casting a meaningful vote for the candidate of his or her preference must take precedence over any particular candidate's interest in being the only alternative on the ballot to a major-party incumbent. Youn Decl. Ex. 23 (Winger Dep. 151:17-152:2; 155:14-157:1; 158:1-11).

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

Plaintiffs establish no burden on their political opportunity because they are unable to factually demonstrate – as they must under *Buckley* – that any protected political opportunity they enjoyed prior to the CEP will be reduced as a result of the CEP, including in one-party-dominant districts. *See Buckley*, 424 U.S. at 97-99. On these facts, Plaintiffs have failed to demonstrate any harm that could serve as the basis for a grant of summary judgment on a facial constitutional challenge.

**VI. Although Strict Scrutiny Is Inappropriate, the CEP Would Survive Any Level of Review Since It Is Narrowly Tailored to Advance Compelling State Interests**

As discussed *supra*, Plaintiffs fail to demonstrate any “severe” burdens to their protected constitutional rights as required to trigger strict scrutiny under the *Anderson-Burdick* standard. Even if strict scrutiny were applied, however, the CEP would still be

constitutional because the qualification and eligibility requirements correspond to the historical evidence regarding the viability of candidates and the grant amounts are narrowly tailored to reflect historical expenditures. Therefore, Plaintiffs' motion for summary judgment should be denied.

**A. The CEP's Qualification and Eligibility Requirements Correspond to the Historical Performance of Viable Candidates**

The qualification and eligibility requirements of the CEP are narrowly tailored to meet compelling state interests. The Connecticut legislature carefully crafted the eligibility requirements based upon the past historical performance of viable candidates. In setting the applicable threshold levels, the Connecticut legislature balanced a range of competing interests: on the one hand, seeking to ensure that any candidate with a realistic chance of winning could attain eligibility for CEP funding, but on the other hand attempting to avoid the waste of public funds on frivolous or splinter candidacies. The only "evidence" that Plaintiffs have adduced in support of their argument that the 10%, 15%, and 20% thresholds invidiously discriminate against nonmajor-party candidates is the truism that, based on past election results, more nonmajor-party candidates would qualify if the threshold were lower. Pls. Mem. at 64-65, 76-77. However, Plaintiffs have no factual basis to argue that a different threshold would have represented a better balance of the compelling interests advanced by the CEP.

Furthermore, the CEP's use of the major party definition as a proxy for a candidate's showing of public support on a district-by-district basis has been amply justified by an historical record that proves that a 20% showing of statewide support translates into at least 20% support for such major-party's candidate in legislative races in

more than 95 percent of all instances. *See supra* Statement of Facts section II.B.1. Accordingly, Plaintiffs have no factual basis for their argument that the use of the statewide proxy invidiously discriminates against nonmajor-party candidates.

### **B. The Grant Amounts Are Tailored to Historical Expenditures**

The CEP grant amounts are narrowly tailored to advance the state’s compelling interests in avoiding corruption. In setting these levels, the legislature had to strike a careful balance – incentivizing those candidates with a realistic chance of winning the election to forego the raising of private contributions, but also avoiding waste of public funds. The means selected by the Connecticut legislature, as amply demonstrated *supra* Section II, reflect this carefully crafted balance. The grant amounts for competitive elections are geared to past expenditures in competitive elections. In uncontested elections, grant amounts are reduced by 60%, and in elections with only low-spending nonmajor-party competition, grant amounts are reduced by 30%. Conn. Gen. Stat. §9-705(j)(3),(4). Although Plaintiffs contend that the availability of primary funding will result in undue financial advantages for qualified candidates in a general election, the CEP was designed to avoid this result: unspent primary funding is deducted from the amount of any general election grant. *Id.* §9-705(j)(2). Lastly, Plaintiffs fail to show that “unopposed” or “noncompetitive” major-party candidates would be awarded grants at all – such candidates would not be able to raise the qualifying contributions necessary to qualify for CEP funding. These provisions were together narrowly crafted to meet the State’s compelling but competing interests in protecting the fisc and incentivizing serious candidates for optimal CEP participation. Therefore, there is no evidence to support

Plaintiffs' argument that the CEP's grant amounts constitute a "subsidy" that will burden the political opportunity of nonmajor-party candidates.

**C. Expenditure Limitations on Participating Candidates Are Meaningful and in No Way Discriminate Against Candidates from Nonmajor Parties**

Plaintiffs claim that the expenditure limits applicable to participating candidates are "meaningless" (Am. Compl. 28) because "they are so easily circumvented" by certain other aspects of Connecticut's election law, including organizational expenditures, exploratory committee spending and CEP matching funds for nonparticipating and independent expenditures. Plaintiffs attempt to argue that the supposed ineffectiveness of these expenditure limits somehow results in invidious discrimination against nonmajor parties.

Plaintiffs base this argument upon two factual claims: (1) that the expenditure limits are easily circumvented by participating candidates; and (2) that the CEP will cause overall expenditures to increase. Pls. Mem. at 89. However, Plaintiffs fail to present any evidence whatsoever in support of these two factual assumptions. Since the evidentiary record clearly contradicts Plaintiffs' claims with regard to expenditure limits, Plaintiffs' motion for summary judgment must fail.

Plaintiffs cannot come close to making the required showing to prove their invidious discrimination claim that the public funding system leaves nonmajor parties worse off regarding overall expenditures. *Buckley*, 424 U.S. at 98-88. As Plaintiffs are unable to dispute that, prior to the enactment of the CEP, the political landscape was dominated by the major parties, and neither the CEP nor the statutory provisions relating to expenditure limitations do anything to further slant the playing field against nonmajor-party candidates. Plaintiffs would turn the organic advantages of a major party, with its

deeply rooted public support and resources and infrastructure developed through decades of party building, into an inequality that the state's public funding program must somehow remedy. Yet courts have repeatedly concluded that a public funding system need not and should not seek to equalize the natural advantages of some candidates and parties over others and that to do so would "distort its purpose." *RNC v. FEC*, 487 F. Supp 280, 287 (S.D.N.Y. 1980) (three judge court), *aff'd*, 445 U.S. 995 (1980); *Davis*, 128 S.Ct. at 2773 ("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."). In short, there is no evidence in the record to support Plaintiffs' claims that these provisions "disproportionately" or otherwise benefit only major-party candidates, or that they reduce the political opportunity of any candidate, participating or non-participating.

Nonmajor-party candidates who qualify for CEP funding will be in the same position to avail themselves of the benefits of the organizational expenditure provisions as any other participating candidate. Both nonmajor and major parties can organize party committees, which can make organizational expenditures to benefit candidates. For nonmajor-party candidates, it would be even more important to receive party support, given the lack of prior public support for such candidates. Against this reality, the remedy sought by Plaintiffs in many ways makes little sense, as utterly removing the ability of participating candidates to benefit from organizational expenditures would, in all likelihood, be far more harmful to nonmajor than to major-party candidates, who already enjoy more widespread public support.

Plaintiffs' conclusory dismissal of all organization expenditures as "loopholes" overlooks the legitimate role of parties in the political process. *See* Pls. Mem. at 46-48. The statutorily defined "lawful purposes" of a party committee include the symbiotic goals of "promoting of the party, [and] the candidates of the party." Conn. Gen. Stat. § 9-607(g)(1)(A)(iii). The public financing program recognizes that a party cannot be totally severed from its candidates, and puts limits on the types and amounts of benefits that a party committee can provide to its participating candidates. *See id.*, § 9-601(25) (defining the five limited types of organization expenditures); § 9-718 (imposing limits on the amounts of organization expenditures that can be provided to participating candidates).

**1. The CEP Places Strict Limits on the Private Fundraising of Participating Candidates and Significant Restrictions on Funds that May Be Spent by Outside Organizations on Behalf of Participating Candidates**

The CEP prohibits participating candidates from engaging in private fundraising, except in low-dollar increments up to the qualifying contribution limit. However, in every election, the candidate is not the only one with an interest in his or her campaign. Outside organizations may lawfully expend funds on behalf of the candidate to advance their own agendas, with or without the candidate's knowledge or consent.

Connecticut law classifies these expenditures into three separate kinds, each of which the CEP treats differently: First, coordinated expenditures (outside expenditures made with the prior knowledge of a candidate or an agent of the candidate) are treated like private contributions, and are prohibited for participating candidates. Conn Gen. Stat. §§9-601b, 9-702(c). Second, organizational expenditures (expenditures made by

party organizations such as party committees, legislative caucus committees, or legislative leadership committees) are only permitted for certain specified purposes subject to strict disclosure requirements and regulations: (1) a party candidate listing that is limited in content and “cannot promote the defeat of any candidate or solicit funds on behalf of any candidate”; (2) party-building documents and materials given to party candidates; (3) campaign events at which the candidate must be present, provided that funds raised cannot be used as qualifying contributions; (4) campaign advisors; and (5) use of office space or equipment that does not result in additional cost to the committee; the law also imposes monetary limits, per committee, on organization expenditures of \$10,000 for a State Senate participating candidate and \$3,500 for a State Representative participating candidate, as well as recordkeeping and disclosure requirements to enable enforcement of these limits. Conn. Gen. Stat. § 9-718. Party organizations are barred from engaging in fundraising on behalf of a participating candidate apart from \$5 qualifying contributions<sup>25</sup> and from making in-kind contributions that are not among the specified purposes. *See* Conn. Gen. Stat. §§ 9-601(25), 9-718.

Plaintiffs contend that these committee limits are rendered less meaningful by the fact that the rules allow the aggregation of funds and could add up to substantial support for a participating candidate. Pls. Mem. at 107. Even with such aggregation, however, Plaintiffs are unable to show that they will be worse off after the enactment of the CEP than before it: critically, Plaintiffs’ motion lacks any analysis of organizational

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<sup>25</sup> While Plaintiffs condemn the alleged “cynicism” of allowing party organizations to fundraise for qualifying contributions through campaign events, they misleadingly omit to mention that such contributions can amount to sums of no greater than \$5; that they must be collected personally or by a campaign representative rather than by the organization, and may only be gathered in conjunction with a personal appearance of the participating candidate. *See* Conn. Gen. Stat. §§ 9-601(2), 9-601(25), 9-718; *see also* Pls. Ex. 38, (“SEEC Organizational Expenditures Fact Sheet”) at 7.

expenditure levels prior to the CEP or after it. Plaintiffs’ motion contains no evidence or reasoning that would demonstrate that – in comparison with the level of support available to major-party candidates prior to its enactment – the CEP and its concomitant expenditure regulations will increase the available funding for major-party candidates. Without such a showing, Plaintiffs’ claim that these program changes will increase overall expenditures is pure speculation and cannot serve as the basis for a grant of summary judgment. General fundraising activity by such committees, contrary to prior law, is essentially banned on behalf of participating candidates, as is the use of entry fees to party events as qualifying contributions. *See* Conn. Gen. Stat. § 9-601(25), 9-718, Pls. Ex. 38, (“SEEC Organizational Expenditures Fact Sheet”), at 7.

For participating candidates, it seems just as likely that these limits and additional requirements will greatly reduce the party-sponsored fundraising activity that occurs for major-party candidates when compared to the level of party fundraising activity that occurred for most major-party candidates before the CEP.

## **2. Supplemental Grants Are Needed for Proper Functioning of Program and Do No Harm to Candidates of Nonmajor Parties**

Under the CEP, participating candidates receive supplemental matching funds only if the trigger is met; that is, when the amount of an opposing nonparticipating candidate’s campaign expenditures plus the amount of any independent expenditure advocating the defeat of the participating candidate exceeds the applicable grant amount. Only the actions of those outside the control of the participating candidate – either a non-participating candidate or an independent expenditure group – can trigger the release of matching funds. This structure makes it very clear that additional money will be released

by the State only once a high level of expenditures has already been made by a non-participant against a participating candidate.

Plaintiffs' brief fails to explain how such a situation would disadvantage nonmajor-party candidates, and offers no support for their assumption that such a situation is likely to arise. Should nonmajor-party candidates fail to qualify for funds in a district, and the race is a high-spending race in which funds are triggered, it seems highly unlikely that any marginalization of a nonmajor-party candidate can be related to the operation of the CEP given that the high-spending originates from a decision by a non-participating candidate or outside group.

Alternatively, in a race with two participating candidates, only the independent expenditure provision could be triggered, meaning that both participating candidates' direct and coordinated spending will remain below the basic expenditure limits on public funds, and may well be below pre-CEP levels of total spending. Maintaining some limits on candidate spending, as opposed to none in the absence of the CEP, is very likely to allow nonmajor-party candidates further prominence in a district and should improve the visibility of nonmajor candidates whether or not they qualify for public funds.

Enactment of the CEP has not altered the ability of nonmajor-party non-participants to expend organizational funds in support of candidates, while it does benefit nonmajor-party participants by making available supplemental grants in competitive races. To the extent that the CEP may "free up" additional funds that would have gone to state candidates for independent expenditures or other races, plaintiffs fail to show why nonmajor parties will not benefit from the wider availability of public money for campaign-related speech. *Buckley*, 424 U.S. at 95-96 n.128. Any failure that nonmajor

parties may have in persuading potential donors or independent organizations of the salience of their cause or candidates is surely not a failing of the CEP.

Importantly, nonmajor-party candidates would likely be primary beneficiaries of the supplemental grants for independent expenditures and opponent expenditures as participants – a substantial new benefit that could flow to them after a mere showing of 10% in previous vote or petition support. Nonmajor-party candidates are therefore uniquely positioned to be made substantially more competitive in elections by the supplemental grants available under the CEP after a minimal showing of public support when compared to well-vetted major-party candidates.

Indeed, Plaintiffs contradict themselves in suggesting, on the one hand, that a “strong Green party candidate” would spend funds sufficient to trigger the excess expenditure provision, Pls. Mem. at 106, but contending elsewhere that it is an impossibility for any nonmajor-party candidate to qualify for public funds through petitioning or other means. *Id.* at 88-96. Should a nonmajor candidate be able to mount such a competitive race that it would trigger the excess spending provision, it seems highly likely that such a candidate would also muster the organizational acumen to qualify for full, or at least partial, funding and would commensurately also receive the benefits of supplemental funds to enhance the viability of his or her campaign.

Moreover, the most recent participation figures suggest that the CEP may actually make high expenditure races less likely to occur in Connecticut. The higher the number of participating candidates, the less likely it is that matching funds will be triggered by a non-participating candidate’s expenditures. Accordingly, the fact that approximately

75% of major-party candidates have chosen to participate in the CEP<sup>26</sup> – where grant amounts are based on average, not on high-level, expenditures, *see supra* Section II, means that nonmajor-party candidates need worry less that a given race will escalate into a high-dollar blowout. The system is also well-tailored to achieve its desired ends. Both trigger provisions for independent expenditures and nonparticipating candidates are capped and in line with actual spending in competitive races. See Garfield Decl. II Ex. 20, at 2.

### **3. The Exploratory Committee Provision Actually Benefits Nonmajor Parties**

Candidates considering a campaign can form and use exploratory committees to investigate whether they should become a candidate in the days prior to an election (25 days prior to the primary or 40 days prior to a general election). Plaintiffs speculate that major-party candidates may abuse this supposed loophole to “double dip” – keeping their campaign in the inchoate, exploratory phase to maximize their private fundraising, then waiting until the last minute to form a candidate committee and receive grants of public funds. Pls. Mem. at 48-49. Plaintiffs have not been able to cite a single instance of such an abuse occurring in a public financing system anywhere. Surely, such a perversion of the Clean Elections System would cause a public outcry and resulting backlash against the bad-faith candidate. Moreover, the real and valid reasons behind exploratory committee provisions – which allow potential candidates the flexibility to gauge their level of public support before committing to a particular race – must, on a facial constitutional challenge, outweigh Plaintiffs’ speculative parade of horrors.

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<sup>26</sup> Proulx Decl. ¶ 33.

Moreover, Plaintiffs fail to prove – or even to explain – why the exploratory committee provision will disproportionately “increase the financial advantage of major-party candidates.” Nonmajor-party candidates could similarly establish exploratory committees and conduct fundraising under those auspices; if their fundraising appears less successful provided with such a vehicle, it is certainly no fault of the CEP. More importantly, Plaintiffs’ contention that a candidate could form an exploratory committee and delay forming a candidate committee until the deadline to file an affidavit of intent to abide by the Program's spending limits (25 days before a primary or 40 days before a general election) is unsupported by the law.

The timing of when a candidate is required to dissolve an exploratory committee and form a candidate committee cannot be arbitrarily decided by the candidate – it is established by the law. A candidate is required to dissolve his or her exploratory committee within fifteen days of making any public declaration of the intent to seek election to a particular office, and, in any event, never later than the candidate’s endorsement at a convention, caucus or town meeting, or when he or she has petitioned onto the primary ballot. Conn. Gen. Stat. §§ 9-604(c), 9-608 (f). The statute provides that “[t]he time and place of meeting of a state or district convention . . . shall be convened not earlier than the ninety-eighth day and closed not later than the seventy-seventh day preceding the day of the primary for such office.” Conn. Gen. Stat. § 9-383. The deadline for petitioning onto the primary ballot is 34 days preceding the primary. Conn. Gen. Stat. § 9-405(a)(1). Both deadlines are well in advance of a primary. An endorsement or ballot access in turn requires that an exploratory committee be dissolved

within 15 days.<sup>27</sup> Therefore, this dissolution must occur for major-party candidates *months before* the affidavit of intent deadlines for a general election campaign might impact a non-major party candidate and may occur even earlier if a public declaration is made.

In addition, the law specifically regulates the financial carry-overs from the exploratory committee. A candidate dissolving an exploratory committee must report all surplus assets of the exploratory committee. It also must report any contracts entered into by a candidate's exploratory committee which affect the candidate committee, to assure that the candidate committee pays its part of any expenditures from which it will reap benefits. Conn. Gen. Stat. § 9-608(f)(A).

**VII. Any Constitutional Infirmity in the CEP Can and Should be Redressed by a Narrow Remedy that Preserves the Operation of the CEP as a Whole, Avoids Disruption and Respects the Intent of the General Assembly**

As Defendants have shown, Plaintiffs have failed to demonstrate any basis for their summary judgment claims. However, to the extent that this Court determines the CEP to be constitutionally infirm in any respect or potential application, it should structure a remedy narrowly so as to preserve as much of the compelling interests

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<sup>27</sup> Section 9-608(f) provides that:

If an exploratory committee has been established by a candidate pursuant to subsection (c) of [section 9-604](#), the campaign treasurer of the committee shall file a notice of intent to dissolve it with the appropriate authority not later than fifteen days after the candidate's declaration of intent to seek nomination or election to a particular public office, except that in the case of an exploratory committee established by a candidate for purposes that include aiding or promoting the candidate's candidacy for nomination or election to the General Assembly or a state office, the campaign treasurer of the committee shall file such notice of intent to dissolve the committee not later than fifteen days after the earlier of: (1) The candidate's declaration of intent to seek nomination or election to a particular public office, (2) the candidate's endorsement at a convention, caucus or town committee meeting, or (3) the candidate's filing of a candidacy for nomination under [section 9-400](#) or [9-405](#).

embodied in the CEP as possible and to avoid unnecessary disruption of candidates' campaigns and state elections.

Courts generally apply a restrained, narrow approach in remedying constitutional infirmities in statutes. As the Supreme Court explained in its unanimous decision in *Ayotte v. Planned Parenthood of Northern New England*, courts should if necessary “enjoin only the unconstitutional applications of a statute while leaving other applications in force or . . . sever its problematic portions while leaving the remainder intact.” 546 U.S. 320, 328-29 (2006) (citations omitted). The Court explained that it “tr[ie]d not to nullify more of a legislature’s work than is necessary,” and that “the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may be declared invalid to the extent that it reaches too far, but otherwise left intact.” *Id.* at 329 (internal quotation marks and citations omitted).

The Supreme Court recently reaffirmed these principles in *Crawford*, 128 S.Ct. at 1610, in rejecting a facial challenge to an Indiana voting restriction. It noted:

[P]etitioners have not demonstrated that the proper remedy — even assuming an unjustified burden on some voters — would be to invalidate the entire statute. When evaluating a neutral, nondiscriminatory regulation of voting procedure, “[w]e must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.”

*Id.* at 1623 (quoting *Ayotte*, 546 U.S. at 329). Connecticut law also urges a restrained remedial approach, providing that “[i]f any provision of any act passed by the General Assembly or its application to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act.” Conn. Gen. Stat. § 1-3.

Accordingly, if this Court determines the CEP to be constitutionally flawed in any respect, it should provide an order limited to the narrowest possible remedy to avoid

interference with the Connecticut General Assembly's hard-won reforms and to protect compelling interests of unique historical importance to the citizens of Connecticut.

The Courts should also bear in mind, in crafting a remedy upon any finding of constitutional infirmity of the CEP, that any injunction limiting the expenditure of CEP funds for a period of 168 hours or more entered after April 15 of a general election year renders the entire CEP inoperative for the remainder of that year. *See* Conn. Gen. Stat. § 9-717(a). In the event of such an injunction, the laws governing campaign finance laws prior to the effective date of Act – including those governing lobbyist and state contractor contributions – would govern. *Id.*<sup>28</sup> Defendants respectfully urge the Court, if it deems it necessary to craft a remedy affecting the operation of the CEP, to avoid triggering the sweeping effects of the injunction under § 9-717. Defendants also respectfully request leave to more fully to address the question of proper remedy if necessitated by any ruling of unconstitutionality in this case.<sup>29</sup>

### **VIII. Conclusion**

For the foregoing reasons, Intervenor-Defendants respectfully request that this Court deny Plaintiffs' motion for summary judgment.

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<sup>28</sup> In the event of such an injunction, any candidate who had already received a CEP grant is permitted to retain and spend the grant, unless prohibited by a court from doing so. *See* Conn. Gen. Stat. § 9-717(b).

<sup>29</sup> As previously discussed among the parties and the Court during a status conference on April 9, 2008, Defendants would ask that any order issued prior to the November 4, 2008, election that affects the operation of the CEP be stayed pending appeal to avoid electoral and campaign disruption.

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Respectfully submitted,

/s/ Monica Youn

Monica Youn  
Angela Migally  
BRENNAN CENTER FOR JUSTICE  
AT NYU SCHOOL OF LAW  
161 Avenue of the Americas, 12<sup>th</sup> Floor  
New York, NY 10013  
Phone: (212) 998-6730  
Fax: (212) 995-4550  
[monica.youn@nyu.edu](mailto:monica.youn@nyu.edu)  
[angela.migally@nyu.edu](mailto:angela.migally@nyu.edu)  
Youn's Federal Bar # phv0162  
Migally's Federal Bar # phv02872

J. Gerald Hebert  
Paul S. Ryan  
CAMPAIGN LEGAL CENTER  
1640 Rhode Island Ave., NW, Suite 650  
Washington, DC 20036  
(202) 736-2200  
[jhebert@campaignlegalcenter.org](mailto:jhebert@campaignlegalcenter.org)  
[pryan@campaignlegalcenter.org](mailto:pryan@campaignlegalcenter.org)  
Hebert's Federal Bar # phv01375  
Ryan's Federal Bar # phv01376

Donald J. Simon  
SONOSKY, CHAMBERS, SACHSE,  
ENDRESON & PERRY, LLP  
Suite 600, 1425 K St. NW  
Washington, DC 20005  
Telephone: (202) 682-0240  
Facsimile: (202) 682-0249  
[dsimon@sonosky.com](mailto:dsimon@sonosky.com)  
Federal Bar # phv01374

*Attorneys for Intervenors-Defendants*

[signatures continue on next page]

Ira M. Feinberg  
David Dunn  
David M. Posner  
HOGAN & HARTSON L.L.P.  
875 Third Avenue  
New York, NY 10022  
Phone: (212) 918-3000  
Fax: (212) 918-3100  
[IMFeinberg@hhlaw.com](mailto:IMFeinberg@hhlaw.com)  
[DDunn@hhlaw.com](mailto:DDunn@hhlaw.com)  
[DMPosner@hhlaw.com](mailto:DMPosner@hhlaw.com)  
Feinberg's Federal Bar # phv01662  
Posner's Federal Bar # ct 19305  
Dunn's Federal Bar # ct 01658  
Fred Wertheimer  
DEMOCRACY 21  
1875 I St. NW, Suite 500  
Washington, DC 20006  
(202) 429-2008  
[fwertheimer@democracy21.org](mailto:fwertheimer@democracy21.org)  
Federal Bar # phv01377

Stephen V. Manning  
O'BRIEN, TANSKI & YOUNG, LLP  
CityPlace II - 185 Asylum Street  
Hartford, CT 06103-3402  
Phone: (860) 525-2700  
Fax: (860) 247-7861  
[svm@otylaw.com](mailto:svm@otylaw.com)  
Federal Bar # ct07224

/s/ Perry A. Zinn Rowthorn  
Perry A. Zinn Rowthorn  
Maura Murphy Osborne  
Assistant Attorneys General  
55 Elm Street  
P.O. Box 120  
Hartford, CT 06141-0120  
Tel: (860) 808-5020  
Fax: (860) 808-5347  
[Perry.Zinn-Rowthorn@po.state.ct.us](mailto:Perry.Zinn-Rowthorn@po.state.ct.us)  
[Maura.MurphyOsborne@po.state.ct.us](mailto:Maura.MurphyOsborne@po.state.ct.us)  
Zinn Rowthorn's Federal Bar # ct19749  
Murphy Osborne's Federal Bar # ct19987

*Attorneys for Defendants*