UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GREEN PARTY OF CT, ET AL	**:**	
	:	
v.	**:**	**3:06-CV-01030 (SRU)**
	:	
JEFFREY GARFIELD, ET AL	**:**	**June 1, 2007**

REPLY BRIEF IN SUPPORT OF INTERVENOR-DEFENDANTS' AND DEFENDANTS' JOINT MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Intervenor-Defendants and Defendants moved to dismiss Plaintiffs' constitutional challenges to Connecticut's public financing program (Counts I-III of Plaintiffs' Amended Complaint), based on the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) to uphold the presidential public financing system, and the holdings of other courts. In their opposition brief, Plaintiffs admit that "the Presidential financing system scrutinized in *Buckley v. Valeo*, 424 U.S. 1 (1976), is the closest analogue of judicially reviewed financing schemes" to the Citizens' Election Program ("CEP") challenged in this case. (Plaintiffs' Response in Opposition to Defendants' and Intervenor-Defendants' Joint Motion to Dismiss and for Judgment on the Pleadings ("Pls.' Resp.") 2.) Despite their efforts, Plaintiffs are unable to distinguish the holdings of *Buckley*, which found "no merit" in the contention that the presidential public financing program invidiously discriminates against minor and emerging parties. 424 U.S. at 90. So too, there is no merit to the claim in this case that the CEP discriminates against minor parties or petitioning candidates.

Intervenor-Defendants and Defendants should prevail on the motion to dismiss for three reasons. First, the CEP falls squarely within the reasons that led the Supreme Court to conclude that the public financing program at issue in *Buckley* does not unfairly or unnecessarily burden the political opportunity of any party or candidate—the only pertinent consideration. *See Buckley*, 424 U.S. at 95-97. Plaintiffs' attempts to distinguish the CEP are based on an inaccurate and incomplete discussion of how the CEP works. Second, Plaintiffs' other arguments, while possibly relevant to ballot access cases and embraced by the dissent in *Buckley*, were rejected by the Supreme Court as

immaterial to an invidious discrimination challenge to a public financing program. Third, Plaintiffs lack standing to assert their First Amendment challenges to the CEP's matching funds provisions and fail to allege a cognizable constitutional injury resulting from those provisions.

ARGUMENT

I. The CEP Does Not Invidiously Discriminate Against Minor or Petitioning Candidates or Parties.

A. The CEP Is Not Meaningfully Distinguishable From the Presidential Public Financing System Upheld in *Buckley v. Valeo*.

Plaintiffs focus on the ways in which the CEP differs from the public financing program considered in *Buckley* and argue that those differences make the CEP unconstitutional. *Buckley*, however, did not hold that the only constitutional public financing systems are those that mirror the presidential one. In fact, *Buckley* stands for the opposite proposition. The Court emphasized that a legislature's efforts to construct public financing programs and to protect the public fisc should be given deference. *See* 424 U.S. at 96-98, 104.

Contrary to Plaintiffs' arguments, and for the same reasons recognized by the Court in *Buckley*, the CEP does not reduce the strength of candidates of nonmajor parties below that attained without public financing, and therefore it does not work an invidious discrimination against them. *See Buckley*, 424 U.S. at 98-99. First, like the presidential program, the CEP simply provides an alternative means of financing campaigns, and does not restrict any candidate who prefers to raise money from private sources.[1] Second, major party candidates, like all candidates wishing to participate in the CEP, must agree

[1] Of course the CEP also puts no restrictions on the speech of nonparticipating candidates, whether they are major party, minor party or petitioning candidates, and therefore does not "[stifle] the speech of minor and petitioning parties" as Plaintiffs claim. (Pls.' Resp. 1.)

to a spending cap in order to qualify for the program. Accordingly, as the Court emphasized in *Buckley*, the program *enhances*, rather than *reduces*, the relative strength of minor party candidates. *Id.* at 99. Since participating major party candidates may not spend above a specified limit, other candidates choosing not to participate or not qualifying for the program will have the opportunity to spend more in relation to them. *Id.* Third, as in the general election under the presidential system, while public financing for major party candidates is a *substitute* for private contributions, it is a *supplement* for minor party candidates who receive only partial initial grants, as they are permitted to solicit private funds in addition to the public funds they receive up to the spending limit. Conn. Gen. Stat. § 9-702(c); *Buckley*, 424 U.S. at 99. Finally, as the Court in *Buckley* explained, the CEP may allow more funds to be available to nonmajor party candidates, since some major party candidates will not be soliciting private contributions. 424 U.S. at 94 n.128.

Plaintiffs' contentions that the CEP does *not* contain these characteristics are based on an incomplete and inaccurate explanation of how the CEP works, and the type of speculation rejected in *Buckley*. Plaintiffs claim that "all major party candidates will be able to qualify," for the CEP (Pls.' Resp. 8 n.10), and that funding for major party candidates corresponds to the highest spending elections. (Pls.' Resp. 6.) They further contend that the CEP is more favorable to major party candidates than the presidential system because the CEP "enhance[s] the status of major party candidates in areas where they have not made any historical showing of support" because of the different definition of "major party" under Connecticut and federal law. (Pls.' Resp. 22-23.)[2] In summary,

[2] Plaintiffs further argue that the program "essentially excludes minor and petitioning party candidates." (Pls.' Resp. 20). That argument is addressed in Part I.B.2, *infra*.

Plaintiffs essentially argue that the CEP provides major party candidates with automatic and virtually unlimited funds to propel those candidates, consequently hindering minor party and petitioning candidates. (*See* Pls.' Resp. 1, 8 n.10, 16, 19.) These assertions are baseless, however, and are contradicted by the terms of the CEP and by judicially noticeable facts.

When describing the criteria for major party candidates to qualify for the CEP (but notably *not* when describing what nonmajor party candidates must do to qualify), Plaintiffs ignore the most crucial component for receiving funds under the CEP—the requirement that a candidate collect a minimum number of qualifying contributions, or small contributions designed to indicate support (rather than to finance a campaign). This aspect of the CEP makes the program indistinguishable from the presidential program. Under the presidential program, major party candidates qualify for public financing only after raising $5,000 in each of at least twenty states in increments of $250 or less (i.e., at least $100,000 from a broad base of supporters), *see* Federal Election Commission, *Public Funding of Presidential Elections* (Apr. 2007), *available at* http://www.fec.gov/pages/brochures/pubfund.shtml#anchor688095, while under the CEP, major party candidates similarly must collect a minimum number of qualifying contributions, a number that Plaintiffs argue is not easy to collect. (*See* Pls.' Resp. 20.)[3] Accordingly, in both systems, a major party candidate is unable to receive public money if her party has historic support, but she individually does not. Moreover, whether a party is considered a major or minor party under the CEP is completely dependent on prior

[3] Moreover, even if major party candidates were able to qualify more easily for public financing under the CEP than under the presidential program, that fact alone would not make the CEP unconstitutional. The relevant inquiry is whether a public financing program unfairly or unnecessarily burdens the political opportunity of certain candidates or parties. *Buckley*, 424 U.S. at 94-96.

voter support, which can change at any time. Conn. Gen. Stat. § 9-372(5) to (6); *see also Jenness v. Fortson*, 403 U.S. 431, 439-40 (1971) (concluding that Georgia statute that gives automatic ballot access only to candidates of parties obtaining a certain percentage of the vote "in no way freezes the status quo," but rather "recognizes the potential fluidity of American political life"). Accordingly, contrary to Plaintiffs' argument, there is no "permanent statutory preference" given to any party (Pls.' Resp. 22), and major party candidates *cannot* automatically qualify for funds.

Plaintiffs' next argument, that participating candidates obtain amounts of money far above and beyond historical spending, is based on their inaccurate description of how the CEP is structured (as well as misapprehensions of other states' public financing programs). Contrary to Plaintiffs' argument, the amount of funds distributed under the program is dependent upon the level of competition in the race at issue. Plaintiffs allege that "a qualifying major party candidate [for Senate] is eligible to spend as much as $135,000 from the outset"—calculated by adding together $15,000 in qualifying contributions, $35,000 for a contested primary, and $85,000 for a contested general election. (Pls.' Resp. 28.) But that assertion is incomplete at best. The $135,000 figure assumes that every major party candidate faces a major party challenger in both the primary and general elections, which by Plaintiffs' own admission is rare in legislative races in Connecticut. (Pls.' Resp. 4, 6-7.)

A close study of the mechanisms of the CEP and historical spending reveals that the CEP was carefully structured to protect the public fisc as well as to make the program a realistic and attractive funding alternative to candidates. Under the CEP, the largest public grants are reserved for those participating candidates facing competitive races,

while uncontested races are either not funded or funded at a low level.[4] For example, major party candidates who do not face a primary election receive *no* public money for the primary season. Conn. Gen. Stat. § 9-705(a)(1), (b)(1), (e)(1), (f)(1). Moreover, in the general election, unopposed major party participating candidates receive 30% of the base public grant, and major party candidates whose only opponent is an eligible minor party or petitioning candidate who has not received aggregate contributions of any type equal to or exceeding the applicable amount of qualifying contributions receive only 60% of the base public grant. Conn. Gen. Stat. § 9-705(j)(3) to (4). Accordingly, Senate candidates who face no primary and an uncontested general election race would receive only $25,500 (30% of $85,000) in public funds for the election cycle, in addition to the $15,000 the candidate would have to raise in qualifying contributions. According to Exhibits B and D to Plaintiffs' Response, this $40,500 budget is quite comparable to—or even less than—the historical spending in uncontested Senate races. (Pls.' Resp. Ex. B, D.) The results are similar for the House.[5]

Plaintiffs next complain that the CEP showers major party candidates with arbitrarily large sums of money, arguing that the $135,000 budget for participating candidates in *competitive* races for the Senate is far greater than the *average* past expenditure in Senate races. (Pls.' Resp. 28.) Even if this is true, Plaintiffs' point is

[4] While in footnote 9 of the facts section of their Response Plaintiffs acknowledge that the CEP fund distribution depends upon the level of competitiveness of the race, the text of their facts and argument sections contain statements that disregard this understanding. (*See, e.g.*, Pls.' Resp. 6 ("[M]ajor party candidates nominated during their parties' primaries are guaranteed full distribution of the general election funds . . . .").)

[5] House candidates with uncontested primary and general elections would receive only $7,500 in public money for the election cycle, in addition to $5,000 the candidate must raise as qualifying contributions. According to Exhibit D to Plaintiffs' Response, the average expenditure for an uncontested House candidate in 2004 was $10,148. (Pls.' Resp. Ex. D.)

irrelevant because it compares apples to oranges. A Senate candidate would receive $135,000 only if he had two contested elections, but the *average* Senate race has an uncontested primary.[6] As the Supreme Court has recently recognized, the more relevant comparison is the comparison between the funding in competitive races under the old and new regimes. *See Randall v. Sorrell*, 126 S. Ct. 2479, 2496 (2006) (concluding that "information about *average* races, rather than *competitive* races, is only distantly related" to determining the cost of running an effective campaign against an incumbent, since competitive races are significantly more costly than the average race); (*see also* Pls.' Resp. Ex. B, D (indicating that past competitive races in Connecticut are often twice as expensive (or more) than the average race).)

When the relevant comparisons are used, it is clear that Plaintiffs' claims do not hold water. For example, in 2004, the average expenditure in an open Senate seat was $128,871, and the average expenditures in a race where the challenger won the Senate seat was $167,837. (Pls.' Resp. Ex. D.) These figures are in line with the $135,000 provided under the CEP to a publicly funded candidate who faces a contested competitive election. As participation rates in the presidential public financing program demonstrate, the benefits of a public financing program cannot be realized if the grants are not comparable to the cost of relevant races and, as a result, no one participates as a result. *See* 2007 Op. Fed. Election Comm'n No. 3 (Mar. 1, 2007), *available at* http://saos.nictusa.com/aodocs/2007-03.pdf ("Press reports indicate that certain

[6] Office of the Secretary of State of Connecticut, List of Primaries, Candidates and Winners for Offices Decided at the August 8, 2006 State Primary, *available at* http://www.sots.ct.gov/ElectionsServices/election_results/2006_Nov_Election/ListofPrim-06.pdf; Office of the Secretary of State of Connecticut, State Senator Republican Primary August 10, 2004, *available at* http://www.sots.ct.gov/ElectionsServices/election_results/2004_Nov_Election/2004PrimaryReports/2004PrimaryStateSenate.pdf.

candidates and potential candidates for the 2008 presidential election have decided that, if they become their parties' nominees, they will choose not to receive public funds in the general election . . . ."); Campaign Finance Inst. Task Force on Financing Presidential Nominations, *So the Voters May Choose* 2-3 (2005), *available at* http://cfinst.org/president/pdf/VotersChoose.pdf (documenting overwhelming participation of presidential candidates from 1976-2004 in public financing program).

In fact, the only area in which it appears likely that the distribution of funds under the CEP will be significantly higher than historical spending is the distribution of funds to minor party candidates. As historical numbers have shown, even partial public financing will bestow significant monetary benefits to minor party candidates who qualify. (*See* Memorandum of Law in Support of Proposed Intervenors-Defendants' and Defendants' Joint Motion to Dismiss and for Judgment on the Pleadings ("Opening Brief") 21-22.) Accordingly, the CEP does not invidiously discriminate against Plaintiffs, as it will likely *enhance*, rather than burden, their political opportunity.

Plaintiffs also are incorrect regarding how the distribution of funds under the CEP compares to other states. They claim that "[t]he CEP starts at the ceiling and then goes through the roof," while distributions under the Maine and Arizona programs are based on average expenditures. (Pls.' Resp. 29.) Neither of those statements is true—in fact, Connecticut's program is similar to Maine's in adjusting distribution amounts for contested and uncontested elections. As discussed on page 6, Connecticut starts with base distributions, but then *reduces* those amounts if races are uncontested, and the distributed amounts correlate closely to historical spending in similar races. Maine has flat distribution amounts for Governor. Me. Rev. Stat. Ann. tit. 21-a, § 1125(8). For

other elections, the amount distributed for contested elections is based on the average for *contested* elections, while the amount for *uncontested* elections is based on the average for *uncontested* elections. *Id.* And Plaintiffs have no basis for stating that distributions in Arizona are based on average spending—the statute cited, Ariz. Rev. Stat. Ann. § 16-952, does not address that issue. Plaintiffs apparently want distribution amounts for any type of race to be based on the average for all races, so that low spending in uncontested races would bring down the distribution amounts dramatically. Not only is this contrary to how other states' systems work, it makes little sense. The legislature is not required to adopt a distribution formula that most pleases some minor parties.

Plaintiffs next argue that the potential provision of matching funds in competitive races "exaggerate[s] the disparity between the major party and minor and petitioning candidates" and vitiates the applicable spending limits, thereby eliminating one of the main factors that led the Supreme Court in *Buckley* to uphold the presidential public financing program. (Pls.' Resp. 32.) But this argument is incorrect for three reasons. First, matching funds under the CEP are available to all participating candidates, not just to major party candidates. Second, such matching funds are accompanied by *increased* expenditure limits—not the elimination of expenditure limits—and are carefully designed to be triggered *only* when spending in a particular race by or for the benefit of one candidate is unusually high. This aspect of the CEP—which exists in public funding programs in Arizona, Maine, North Carolina and various cities—is a mechanism to *decrease*, rather than *increase*, the disparity in spending between any two candidates. This is precisely the type of careful, targeted distribution that Plaintiffs argue in favor of throughout their brief. Finally, Plaintiffs' argument is based on speculation about how

the matching funds provisions might apply in a hypothetical future situation, something that may not happen in any race. Such speculation cannot be the basis for striking down the CEP. *See infra* Part I.B.

B. The Supreme Court Has Held that Many of Plaintiffs' Complaints Do Not Undermine the Constitutionality of the CEP.

1. Plaintiffs' Arguments Are Not Germane.

Much of Plaintiffs' argument is based on unfounded speculation about how the CEP might work in particular future situations, which could be resolved only once the CEP is implemented. Plaintiffs necessarily provide no facts to support these claims. *See Buckley*, 424 at 97 n.131 ("[S]ince the public financing provisions have never been in operation, appellants are unable to offer factual proof that the scheme is discriminatory in its effect."). The Court in *Buckley* made clear, however, that such assumptions about the future cannot render a public financing program unconstitutional, stating:

> [E]xpenditure limits for major parties and candidates may well improve the chances of nonmajor parties and their candidates to receive funds and increase their spending. Any risk of harm to minority interests is speculative due to our present lack of knowledge of the practical effects of public financing and cannot overcome the force of the governmental interests against the use of public money to foster frivolous candidacies, create a system of splintered parties, and encourage unrestrained factionalism.

424 U.S. at 101.

Many aspects of Plaintiffs' arguments are based on inappropriate speculation and are without citation to any authority that indicates that such a result would work a constitutional harm. For example, Plaintiffs contend that their political opportunity will be burdened because all races will have two major party candidates qualifying for public financing, but no nonmajor party candidates qualifying. (Pls.' Resp. 27) (asserting that

the CEP will enable major party candidates "to qualify for public funding in every legislative district").[7] But it cannot be the case that increasing voter choice by providing financing to candidates with demonstrated support, a goal of public financing lauded by the Supreme Court in *Buckley*, works a constitutional harm upon Plaintiffs. *See Buckley*, 424 U.S. at 92-93 ("Subtitle H is a congressional effort . . . to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."); Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 Loy. L.A. L. Rev. 1467, 1480 (2001) ("[I]ncreased competition [resulting from public financing] is salutary in that it expands voter choice.").

Moreover, Plaintiffs' argument is based on selective and inconsistent conjecture. Plaintiffs contend that nonmajor party candidates will not be able to raise the necessary qualifying contributions, asserting that in the past "few, if any, minor and petitioning party candidates had the capacity to meet the [qualifying] contribution requirement." (Pls.' Resp. 24.) Although it is true that some of those candidates did not previously raise much money, it is not necessarily the case that they were *unable* to raise these funds. They might have chosen to devote their campaign time and resources to activities other than fundraising, or they might not have been very committed to running for office. And

[7] Plaintiffs engage in this type of unfounded conjecture repeatedly throughout their brief. *See, e.g.*, Pls.' Resp. 16-17 (asserting that the CEP provides subsidies that "distort the relative positions of the political parties," "[operate] to artificially inflate the strength of major party candidates and [diminish] the strength of minor and petitioning party candidates," and "[entrench] power in the two major parties"); Notably, Plaintiffs cite *Williams v. Rhodes*, 393 U.S. 23 (1968), a ballot access case, to support these arguments even though in *Buckley* the Court specifically rejected the analogy between restrictive ballot access regulations (direct burdens on candidates and voters) and the denial of public financing (denial of enhancement of opportunity). *Buckley*, 424 U.S. at 94-95; *see also infra* Part I.B.2.

there is surely a basis for assuming that those candidates will be able to raise the limited amounts required to qualify for public financing, since in the very next breath Plaintiffs inconsistently premise their argument that the CEP will unfairly burden the political strength of minor party candidates on the unwarranted assumption that the CEP will ensure that there will be two major party candidates in every race. As Plaintiffs' highlight, there are many races in Connecticut where a major party does not field a candidate, or fields a candidate who raises very little money. (Pls.' Resp. 4-5, 7, 23-24.) Plaintiffs' speculation does not explain why or how the major parties and their candidates will suddenly have the resources to devote to raising qualifying contributions for the many races in which the major parties do not currently run candidates or raise funds, a task Plaintiffs view as unattainable for themselves. Accordingly, there is no basis for Plaintiffs' claim that nonmajor party candidates will be unable to raise qualifying contributions or their claim that all currently uncompetitive elections, where minor and petitioning party candidates usually do best, will suddenly become competitive under the CEP. Experience in Maine and Arizona indicates that such a result is unlikely. [8]

Similarly, Plaintiffs argue that matching funds for independent expenditures will lead to increased candidate spending "because would-be private donors will make independent expenditures instead under the CEP." (Pls.' Resp. 10.) But there is no basis

[8] *See* Gen. Accounting Office, *Early Experiences of Two States that Offer Full Public Funding for Political Candidates* 29, *available at* http://www.gao.gov/new.items/d03453.pdf (documenting how the number of contested races in Arizona and Maine has fluctuated from election to election and does not appear to be correlated with the implementation of the programs); Ariz. Sec'y of State, State of Arizona Official Canvass, 2006 General Election, *available at* http://www.azsos.gov/election/2006/General/Canvass2006GE.pdf ; Ariz. Sec'y of State, State of Arizona Official Canvass, 2006 Primary Election, *available at* http://www.azsos.gov/election/2006/Primary/Canvass2006PE.pdf; Dep't of the Sec'y of State of Me., Bureau of Corps., Elections & Comm'ns, Tabulations for Elections Held in 2006, *available at* http://www.maine.gov/sos/cec/elec/prior06-07.htm.

for this conclusory speculation. As the Supreme Court noted in *Buckley*, the money that would otherwise have flowed to the major party candidates' campaigns may very well end up in the campaign accounts of minor party candidates, *Buckley*, 424 U.S. at 101, or not in the electoral realm at all.[9]

2. The Level of Nonmajor Party Candidate Participation in CEP Is Irrelevant to Its Constitutionality.

Plaintiffs protest that many aspects of how the CEP treats nonmajor party candidates differently from major party candidates are unjustifiable. But as *Buckley* instructs, such claims of less advantageous treatment of minor parties are irrelevant to the program's constitutionality. In *Buckley*, the Supreme Court emphasized that public financing systems—and specifically public financing systems that differentiate between major and minor party candidates—satisfy several important government interests: (1) "eliminating the improper influence of large private contributions"; (2) "relieving major-party . . . candidates from the rigors of soliciting private contributions"; (3) protecting the public fisc by "not funding hopeless candidacies with large sums of public money"; and (4) protecting the electoral process by not providing "artificial incentives to splintered parties and unrestrained factionalism." *Id.* at 95-96 (quotation omitted). The Court explained that unlike ballot access regulations, denial of public financing does not restrict candidates' or voters' rights, but rather is a "denial of the *enhancement* of opportunity to communicate with the electorate." *Id.* at 94-95 (emphasis

[9] Plaintiffs' other complaints and assertions about the matching funds provisions are also based upon conjecture. (*See* Pls.' Resp. 32-39); *supra* pp. 9-10. Plaintiffs argue that these provisions also disadvantage minor party candidates because such candidates could spend "as little as" 63% of his opponent's expenditures and still trigger matching funds. (Pls.' Resp. 31.) But this argument is academic and based upon unfounded speculation, for Plaintiffs have shown that minor party and petitioning candidates spend much less than 63% of a major party candidate's grant under the CEP. (Pls.' Resp. 24.)

added). The Supreme Court therefore held that a claim of invidious discrimination would survive only if the public financing program "unfairly or unnecessarily burdened the political opportunity of any party or candidate," something that the plaintiffs in *Buckley* failed to show and that Plaintiffs in this case cannot show. *See id.* at 95-97; *supra* Part I.A.

Accordingly, many of Plaintiffs' arguments —as to how and why certain CEP provisions are "unnecessary," "unjustifiabl[e]," and in some circumstances "unattainable" (Pls.' Resp. 7, 19-20, 23, 25, 35)—are simply irrelevant. The Supreme Court could not have been clearer that the constitutionality of a public financing program—in contrast to constitutional challenges to laws restricting qualifying to appear on a ballot—does not turn on whether nonmajor party candidates will be able to satisfy the requirements for public funding. As the Court explained, "important achievements of minority political groups in furthering the development of American democracy were accomplished without the help of public funds. Thus, the *limited participation or nonparticipation of nonmajor parties or candidates in public funding does not unconstitutionally disadvantage them.*" 424 U.S. at 101-02 (emphasis added). As discussed above, most of Plaintiffs' assertions about the effects of the CEP constitute inappropriate speculation that cannot be the basis of a constitutional challenge at this time. *See supra* Parts I.A, B.1. But even if, for example, the 10% signature requirement for petitioning candidates to receive public funds in fact proved to be unattainable (*see* Pls.' Resp. 7), such a result would not bar the candidates from the ballot or deprive them of the opportunity to run for

office—it would only deny such candidates public funds to enhance their fundraising. Under *Buckley*, that does not work a constitutional violation.[10]

3. Connecticut's Choice of How to Measure Candidate Support for the Distribution of Public Funds Is Entitled to Great Deference.

Plaintiffs offer many complaints about how the CEP measures public support for candidates to determine to whom and in what amounts the State should distribute public funds. These arguments, however, were decisively rejected by the Supreme Court in *Buckley*. For example, like the plaintiffs in *Buckley*, Plaintiffs here protest the manner by which the State of Connecticut decided to measure candidate support for purposes of eligibility. Oddly, the manner they protest—the collection of qualifying contributions to demonstrate support—very much resembles the method *preferred* by the plaintiffs in *Buckley*. In any event, the Court clearly indicated that legislatures should be afforded discretion to choose among the various alternatives for measuring support. 424 U.S. at 99-100 (holding that the government need not provide candidates an alternative means to become eligible for pre-election funding). And the CEP's requirement that a candidate raise a certain number of token contributions—like the test of whether candidates can gather a certain number of signatures, approved by the Court in *Buckley*—is a reasonable and reliable way of measuring public support, and one that has in fact been adopted in many jurisdictions. *See* Ariz. Rev .Stat. Ann. § 16-946; Me. Rev. Stat. Ann. tit. 21-a, § 1122(7); 2007 N.J. Sess. Law Serv. Ch. 60 (West); N.C. Gen. Stat. § 163-278.62(15);

[10] Plaintiffs' argument that they will suffer the injury claimed—a "distort[ion of] the actual strength of candidates or parties" (Pls.' Resp. 2)—from the possible failure to qualify for public funds or some sort of funding differential is questionable given their own descriptions about themselves. Plaintiffs repeatedly emphasize that the strength of minor party candidates in Connecticut is *not* dependent upon their ability to raise and spend money. (*See, e.g.*, Pls.' Resp. 4 ("[M]inor and petitioning party candidates have made solid showings at the polls even though few raised money in excess of these qualifying thresholds.").)

Albuquerque, N.M., Charter art. XVI, § 3(P); New York, N.Y., Admin. Code § 3-703(2); Portland, Or., Code § 2.10.070; *Buckley*, 424 U.S. at 99-100.[11]

Plaintiffs protest the CEP's requirement that nonmajor party candidates must have achieved a particular vote percentage in the previous election and also raise the requisite qualifying contributions in the current election cycle, pointing out that in contrast, major party candidates must only achieve the latter. (Pls.' Resp. 3-5.) The Supreme Court held, however, that different qualifying criteria for major and nonmajor party candidates is permissible. *Buckley*, 424 U.S. at 97-98. Indeed, the Court found differing requirements for major and nonmajor party candidates to be logical and fiscally prudent. *Id.* ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . .").[12] Moreover, the Court upheld the presidential public financing program, which similarly requires nonmajor party candidates both to have achieved a particular vote percentage in the previous election and also to qualify to appear on the ballot in at least ten states. *See Buckley*, 424 U.S. at 89. Finally, the CEP's requirements for determining whether a party is deemed a major party under the CEP essentially incorporates in themselves a measure of prior public support, thus making

[11] There is no basis (and, notably, no citation) for Plaintiffs' statement that the imposition of a 10% requirement for qualifying for public funds under the CEP, as opposed to a 5% requirement under the presidential program, or the requirement that all candidates obtain qualifying contributions "is deserving of less deference." (Pls.' Resp. 20.) And of course, as Plaintiffs demonstrate, *any* threshold will exclude some candidates that a lower threshold would permit. (*See* Pls.' Resp. 21.)

[12] The Supreme Court in *Buckley* held that Congress was justified in providing both major parties full funding and all other parties only a percentage of the major-party grant because "[t]hird parties have been completely incapable of matching the major parties' ability to raise money." 424 U.S. at 98; (Opening Brief 14-16.) The Connecticut General Assembly here was similarly justified in adopting a comparable structure.

both major and nonmajor party candidates subject to two sets of qualifying requirements. Conn. Gen. Stat. §§ 9-372(5) to (6), 9-700(8) to (9).

Some of Plaintiffs' other arguments against the use of the collection of a minimum number of qualifying contributions as a prerequisite for the distribution of government funds make little sense. For example, they argue that such a requirement is unnecessary because nonmajor party candidates have achieved significant support and success in Connecticut. (Pls.' Resp. 20.) On the very same page of their Response, however, Plaintiffs contradict themselves, by arguing that the program "essentially excludes minor and petitioning party candidates," because they don't have enough support to attain the qualifying contribution requirements. (*Id.*)[13]

Finally, Plaintiffs argue that the qualifying contributions requirement "puts at serious risk a candidate with a potentially large, but poor constituency." (Pls.' Resp. 25.) This argument is perplexing, because in fact the CEP does just the opposite. While the private fundraising system rewards candidates who have wealthy supporters, the qualifying contribution aspect of the CEP rewards with lump sum grants those candidates who are have a certain *number* of supporters, regardless of their wealth. *See, e.g.*, Marty Jezer & Ellen Miller, *Money Politics: Campaign Finance and the Subversion of American Democracy*, 8 Notre Dame J.L. Ethics & Pub. Pol'y 467, 493 (1994).

[13] Similarly, Plaintiffs argue that the qualifying contributions are unattainable for minor party and petitioning candidates because *raising them involves gathering financial support*, a task those candidates are not successful at. (Pls.' Resp. 23-24.) But they then argue that for major party candidates, who also must raise qualifying contributions, "the CEP subsidizes the speech of previously uncompetitive major party candidates in a way that *bears no relationship to their base of electoral or financial support*." (Pls.' Resp. 27 (emphasis added).) Plaintiffs cannot argue both that qualifying contributions represent financial support when sought by minor party candidates, but do not represent financial support when sought and collected by major party candidates.

4. It Is Not Unconstitutional for Public Funding Programs to Facilitate Activities that Largely or Only Benefit Major Parties.

Plaintiffs also argue that the CEP's provisions permitting funding for primaries and organizational expenditures provide unfair advantage to major party candidates and eliminate the effect of the spending limits. But the presidential public financing program was upheld by the Supreme Court in *Buckley*, notwithstanding the fact that it contains similar provisions that benefit only major party candidates.[14]

For example, Plaintiffs complain that "[primary] funds significantly enhance the ability of major party candidates to obtain superior name recognition prior to the general election." (Pls.' Resp. 14.) The plaintiffs in *Buckley* similarly complained that primary funding was not available to them, but the Supreme Court found this argument unpersuasive, stating that it was simply a question of choice regarding funding for Congress to make. *See Buckley*, 424 U.S. at 105 ("In not providing assistance to candidates who do not enter party primaries, Congress has merely chosen to limit at this time the reach of the reforms . . . ."). Moreover, it is not the provision of public funds that enhance major party candidate recognition—it is the fact that when at least two candidates of major parties are vying for party nomination, the parties actually *hold* primaries that will be campaigned for, with either private or public funds, while minor parties in Connecticut do not. *See Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280,

[14] That Plaintiffs' complaints are more about their general frustration with the disparities regarding money and power between major and nonmajor parties in Connecticut, rather than constitutional infirmities of the public financing program, is apparent from their brief. Plaintiffs' complaints about the unfairness of campaign financing are not limited to the CEP, but rather extends to provisions outside the realm of this lawsuit. For example, they protest that in private financing of campaigns, major party candidates are able to raise $500 from each contributor during each election cycle ($250 per election for both primary and general elections), whereas minor party candidates can accept only $250. (Pls.' Resp. 8.) However, the Amended Complaint in this case does not challenge these separate provisions of Connecticut campaign finance law.

287 (S.D.N.Y.) (three-judge court) ("As long as it has a legitimate public purpose a public campaign funding law should not be required to remedy pre-existing inequalities between candidates . . . ."), *aff'd*, 445 U.S. 955 (1980). It similarly did not faze the Court that the presidential public financing program provided $2,000,000 to major parties for nominating conventions, a pro rata share for minor party conventions, and no funding at all for independent candidates or those parties not holding a convention. *See Buckley*, 424 U.S. at 87-88. This demonstrates that CEP provisions that may benefit major parties more than minor parties or petitioning candidates, such as those allowing for organizational expenditures, do not work an unconstitutional discrimination against minor parties.

II. Plaintiffs' Claims Regarding the CEP's Matching Fund Provisions Fail to State a Claim.

A. Because Plaintiffs' Invidious Discrimination Claim Should Be Dismissed, Count II of Plaintiffs' Complaint Also Should Be Dismissed.

Plaintiffs' explain in their Response that Count II of their Amended Complaint, a challenge to the CEP provisions that permit matching funds to be distributed based on spending by nonparticipating candidates, is part and parcel of their invidious discrimination claim (Count I). (*See* Pls.' Resp. 32-37.) Count II should therefore fail for the same reasons Count I should. *See supra* pp. 9-10.

B. Plaintiffs Lack Standing to Challenge the Distribution of Matching Funds Triggered by Independent Spending.

Plaintiffs Green Party and Libertarian Party do not have standing to challenge the CEP provisions that allow independent spending to trigger matching funds to participating candidates, because they do not allege an injury that involves them

personally. *See Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 194-95 (2d Cir. 2001). Plaintiffs do not assert in the Amended Complaint that any of their members have made, make, or intend to make independent expenditures. Courts have repeatedly found plaintiffs in similar situations to lack standing. *See, e.g.*, *Russell v. Burris*, 146 F.3d 563, 566-67 (8th Cir. 1998) (finding no Article III standing to challenge limit on contributions to independent expenditure committees because plaintiffs "indicated neither that they would contribute to a specific independent expenditure committee nor that, but for the limitations of [the Act], they would form an independent expenditure committee"); *Nat'l Right to Life Political Action Comm. State Fund v. Webster*, No. Civ. 96-359-P-H, 1997 WL 703388, at *1 (D. Me. Oct. 22, 1997) (granting motion to dismiss challenge to Maine's reporting requirement for independent expenditures for lack of standing because no plaintiff asserted intention to make independent expenditures). Consequently, Count III fails to state a claim for which relief can be granted and should be dismissed.

C. Providing Matching Funds Based on Independent Spending Does Not Violate the Constitutional Rights of Those Independent Spenders.

The CEP provides for the distribution of matching funds to participating candidates in those races where spending in opposition to such candidates—by their opponent or by independent spenders supporting their opponent—are unusually high. As Plaintiffs themselves concede, "[t]he matching funds provisions offer the flexibility to avoid over-funding all candidates, while ensuring that adequate funds are available to candidates facing nonparticipating competitors who seek a considerable spending advantage." (Pls.' Resp. 35.)

Plaintiffs challenge under the First Amendment the mechanisms that permit independent spending to trigger matching funds, arguing that such a trigger has a chilling

effect on such independent spenders. But as discussed in Parts II.A and B of Defendants' Opening Brief, the distribution of matching funds based on independent spending does not hinder or chill any speech. Rather, any reluctance to spend is not the result of a penalty imposed by the public financing program, but rather is the result of reticence on the part of the speakers to spend when they know that others may be able to respond. As several courts have held, Plaintiffs have no constitutional right to outspend others, and therefore fail to state a claim. *See, e.g.*, *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000); *Ass'n of Am. Physicians & Surgeons v. Brewer*, 363 F. Supp. 2d 1197, 1200-01 (D. Ariz. 2005), *aff'd*, No. 05-15630, 2007 WL 1366077 (9th Cir. May 10, 2007); *Jackson v. Leake*, 476 F. Supp. 2d 515, 529 (E.D.N.C. 2006).[15] This Court should similarly recognize that Plaintiffs suffer no cognizable constitutional injury from the CEP's matching funds provisions, and dismiss Count III.

CONCLUSION

For all the reasons stated in Defendants' Opening Brief and herein, the Court should grant Intervenor-Defendants' and Defendants' motion to dismiss Counts I, II and III of Plaintiffs' Amended Complaint for failure to state a claim upon which relief can be granted, and for judgment on the pleadings as to these Counts.

[15] The court in *Jackson v. Leake* incorporated the reasoning of its denial of a motion for preliminary injunction (which Intervenor-Defendants and Defendants supplied to the Court as an exhibit to their motion to dismiss) into its order dismissing the case. *See Jackson v. Leake*, Civil Action No. 5:06-CV-324-BR, Order (E.D.N.C. Mar. 30, 2007) (attached hereto as Exhibit A), *appeal docketed* No. 07-1454 (4th Cir. May 23, 2007).

Dated: June 1, 2007

Respectfully submitted,

/s/ Suzanne Novak
Suzanne Novak
Ciara Torres-Spelliscy
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Phone: (212) 998-6730
Fax: (212) 995-4550
suzanne.novak@nyu.edu
ciara.torres-spelliscy@nyu.edu
Novak's Federal Bar # ct23016
Torres-Spelliscy's Federal Bar # phv01373

Ira M. Feinberg
Lawrence V. Brocchini
Benjamin F. Holt
Brian C. Lavin
Jeffrey D. Ratner
HOGAN & HARTSON L.L.P.
875 Third Avenue
New York, NY 10022
Phone: (212) 918-3000
Fax: (212) 918-3100
IMFeinberg@hhlaw.com
LVBrocchini@hhlaw.com
BFHolt@hhlaw.com
BCLavin@hhlaw.com
Jdratner@hhlaw.com
Feinberg's Federal Bar # phv01662
Brocchini's Federal Bar # ct17938
Holt's Federal Bar # phv01665
Lavin's Federal Bar # phv01663
Ratner's Federal Bar # phv01664

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
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
Federal Bar # phv01374

Fred Wertheimer
DEMOCRACY 21
1875 I St. NW, Suite 500
Washington, DC 20006
(202) 429-2008
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
Federal Bar # ct07224

Attorneys for Proposed Intervenors-Defendants

[Signatures continued on next page]

/s/ Perry A. Zinn Rowthorn
Perry A. Zinn Rowthorn
Assistant Attorney General
Federal Bar No. ct19749
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

Maura Murphy Osborne
Assistant Attorney General
Federal Bar No. ct19987
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5020
Fax: (860) 808-5347
Maura.MurphyOsborne@po.state.ct.us

Attorneys for Defendants

CERTIFICATION

I hereby certify that on June 1, 2007, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

_____/s/_____
Bethany L. Foster
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW