

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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GREEN PARTY OF CT, ET AL	:	No. 3:06CV-1030 (SRU)
	:	915 Lafayette Boulevard
vs.	:	Bridgeport, Connecticut
	:	
	:	June 6, 2007
JEFFREY GARFIELD, ET AL	:	

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MOTION TO DISMISS

B E F O R E:

THE HONORABLE STEFAN R. UNDERHILL, U. S. D. J.

A P P E A R A N C E S:

FOR THE PLAINTIFF:

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(Continued)

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1 (10:10 O' CLOCK, A. M.)
2 THE COURT: Good morning. We're here in Green
3 Party of Connecticut v. Jeffrey Garfield. Could I have
4 appearances, please?
5 MS. NOVAK: Suzanne Novak for intervenor
6 defendants, from the Brennan Center. We'll be arguing on

7 behalf of intervenor defendants and defendants.

8 THE COURT: Thank you.

9 MR. FEINBERG: Ira Feinberg, Hogan & Hartson,
10 for the intervening defendants.

11 MR. ZINN ROWTHORN: Good morning. Perry Zinn
12 Rowthorn for the defendants. I'd also like to mention
13 that present today in court are Beth Rotman who's the
14 Director of Public Financing for the State of Connecticut;
15 Joan Andrews, the Director of Legal Enforcement for the
16 State Election Enforcement Commission; and Marianne
17 Sadowski.

18 MS. MURPHY-OSBORNE: Maura Murphy-Osborne for
19 Jeffrey Garfield and other state defendants.

20 THE COURT: Thank you.

21 MR. LOPEZ: Good morning, Judge Underhill. Mark
22 Lopez for the plaintiffs. I'll be arguing this morning.

23 THE COURT: Thank you.

24 MR. MILLER: Good morning. Jonathan Miller for
25 the plaintiffs.

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1 MS. REDMAN: Renee Redman, ACLU of Connecticut
2 for the plaintiffs.

3 THE COURT: All right, thank you. We're here
4 obviously on the motion to dismiss, and let me begin by
5 telling you I've read through the papers and tried to
6 familiarize myself with the arguments, and I think what
7 I'd like to do is really take up the arguments count by
8 count. We also have obviously the independent question of
9 standing and perhaps we should start with that.

10 MS. NOVAK: May it please the court, my name is
11 Suzanne Novak and I represent intervenor defendants in

12 this case. Today I'm arguing on behalf of intervenor
13 defendants and defendants, Jeffrey Garfield and Richard
14 Blumenthal on their joint motion to dismiss and for
15 judgment on the pleadings. This case is about the state
16 of Connecticut's historic and reasoned efforts to both
17 combat real and perceived corruption in the State of
18 Connecticut and to give viable candidates an opportunity
19 to have their message heard through constitutional and
20 alternative campaign financing program. Plaintiffs claim
21 that the Citizens Election Program, or the CEP, is
22 unconstitutional. Those claims fail to state a claim and
23 should be dismissed.

24 My argument today consists of three points.
25 First, the CEP does not disadvantage nonparty -- nonmajor

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1 parties by trying to reduce their political strength below
2 that attained without any public financing but, rather, it
3 provides to enhance their strength.

4 Second, plaintiffs' objections to the
5 differential treatment and potential differential effects
6 on nonmajor party candidates under the CEP have been
7 firmly rejected by the Supreme Court.

8 Third, plaintiffs do not have standing to
9 challenge the matching proceedings as they relate to
10 independent expenditures and they can state no cognizable
11 constitutional injury resulting from such provisions.

12 Your Honor, it's my understanding that
13 plaintiffs have refashioned their claims from the
14 complaint in their, in their response to the motion to
15 dismiss and I'm prepared to argue why those claims should

16 be dismissed as they have refashioned them. And my
17 understanding from the complaint were there were specific
18 operation provisions that they argued were
19 unconstitutional. In their brief, they indicated that it
20 was the system in total that works in invidious
21 discrimination against nonmajor party candidates and
22 that's what Counts One and Two constituted. Those were
23 their complaints there. And that Count Three was a
24 separate complaint about the independent expenditure
25 provisions matching funds based on independent

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1 expenditures, and then that worked a constitutional
2 violation of their First Amendment rights.

3 So that's my understanding, that's how I plan to
4 proceed. I don't know if plaintiffs have a differing view
5 of their claims.

6 THE COURT: I'm sure we'll hear about it in a
7 bit.

8 MS. NOVAK: Okay. The invidious discrimination
9 claim was considered and rejected by the Supreme Court in
10 Buckley v. Valeo. The CEP here is very similar to the
11 presidential public financing system that was upheld in
12 Buckley v. Valeo, against an invidious discrimination
13 claim under the equal protection clause. As plaintiffs
14 admit in their brief, the CEP closely reviewed the
15 presidential public financing system. The court in
16 Buckley recognized the role of major parties in American
17 life and that it's not only constitutional but it's
18 advisable to treat major party candidates different than
19 nonmajor party candidates, and both the presidential system
20 and the CEP do that.

21 As the court in Buckley also explained, public
22 financing does not work to burden any party. Rather, it's
23 an opportunity for enhancement for those that qualify.
24 Therefore, an inability to qualify or a failure to qualify
25 does not subtract from nonparticipating candidates'

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1 ability to get their message out, even if it allows
2 additional Americans into the system. As the Supreme
3 Court noted, nonmajor party candidates have achieved great
4 success in American life through private financing, an
5 option that will always be available to all candidates.
6 And that is true in Connecticut as well, both that they
7 have achieved success in private financing and that that
8 opportunity will always be available to them.

9 Accordi ngly, Buckley upheld the presidential
10 public financing system because it did not disadvantage
11 nonmajor parties by operating to reduce their strength
12 below that attained without public financing.

13 THE COURT: Of course, the plaintiffs here claim
14 there are significant differences between the presidential
15 campaign funding program upheld in Buckley and the CEP.
16 And certainly, at least in the footnote in Buckley, the
17 court acknowledged that there might be other factual
18 circumstances under which individual discrimination could
19 be found to attain in a public financing system.

20 MS. NOVAK: That is correct, Your Honor.
21 Buckley did note that there could be factual circumstances
22 that could lead not only to another system but -- the
23 presidential public financing system to be struck down, but
24 it also emphasized that those conditions, what would show

25 that it might work a constitutional violation were the

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1 kind of circumstances that can only be viewed after the
2 system was allowed to go into effect and to see the
3 effects of that, which is the case here.

4 As we argue, most of the plaintiffs' claims rely
5 on unfounded speculation and what might happen once the
6 system goes into effect, and we certainly argue that the
7 system should be allowed to be implemented and see how it
8 works before any such constitutional violation can be
9 viewed.

10 But, more importantly, and to get to Your
11 Honor's first point, the CEP does not significantly differ
12 from the presidential public financing system. There were
13 important aspects of the presidential public financing
14 system that the court honed in on to say why it was
15 constitutional and those all exist in the CEP.

16 THE COURT: Let me press you on that point.

17 MS. NOVAK: Sure.

18 THE COURT: The presidential public financing
19 system had a provision, didn't it, for the post election
20 receipt of campaign funds which does not appear in the
21 CEP?

22 MS. NOVAK: That is correct, Your Honor. But,
23 in fact, the CEP is more advantageous for candidates who
24 do not meet that initial threshold than the presidential
25 public financing system. In Buckley, the plaintiff's

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1 complaint that unless they received, achieved the
2 5 percent threshold, 5 percent vote in the past election,
Page 7

3 they could not get any funds before the election and,
4 therefore, would not be able to run their campaign.

5 The court -- and this is at page 101 of
6 Buckley -- the court rejected that argument. Plaintiff
7 said we need an alternative path, you have to allow
8 candidates who achieve less than 5 percent of the vote to
9 get some funding beforehand. And the court said that's
10 not true in this context because it's an alternative
11 financing system, so you don't have that alternative path.
12 But if you do -- if you run in the election and you do
13 well, you're entitled to some post election funding, even
14 if you didn't get funding before.

15 THE COURT: And, therefore, the discrimination
16 is not total.

17 MS. NOVAK: Right, it's not total. But then
18 plaintiffs also argued, well, post election funding can
19 only be for loans and how are we going to get loans if we
20 didn't have any funds before? The court said that's not
21 our problem. If you have support, you'll be able to get
22 loans. Here in the CEP, they actually, all candidates
23 have an opportunity to get pre-election funding. Unlike
24 the presidential system, any candidate can go out and try
25 to gather the sufficient number of signatures to petition

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1 to get funding, which is something that the plaintiffs in
2 Buckley wanted.

3 So, here in the CEP, everybody is available and
4 can get pre-election funding, where in the presidential
5 system, they could not. And so the post election funding
6 for those that didn't qualify at all was to make up for

7 that absence of an alternative path. Here there is
8 actually an alternative path for everybody to pursue.

9 THE COURT: The percentages in the CEP are
10 significantly higher than the 5 percent requirement in the
11 presidential funding plan.

12 MS. NOVAK: That is correct, Your Honor. As
13 Buckley noted, "The choice of the percentage requirement
14 that best accommodates the competing interests involved
15 was for Congress to make. Without any doubt a range of
16 formulations would sufficiently protect the public fisc
17 and not foster factionalism, and would also recognize the
18 public interest in the fluidity of our political affairs."
19 It is very clear from Buckley they gave deference to the
20 legislature to determine what would be the appropriate
21 level percentage-wise to qualify for public financing.

22 And the court also made clear, which is
23 important in this case, that if a party cannot raise funds
24 privately, there are legitimate reasons not to provide
25 public funding which would effectively facilitate hopeless

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1 candidates. Here, plaintiffs do not shy away from the
2 fact that non-major party candidates in Connecticut really
3 do not raise a lot of money, and so if none were able to
4 qualify for public financing, Buckley says that that's
5 okay. It's okay to try to protect the public fisc. It's
6 important to remember that this is an alternative
7 financing program; it is not a program to try to equalize
8 the status of the parties.

9 There are several goals with the public
10 financing program but one of them is really to separate
11 the fund raising, the private fund raising from the

12 contributions that go in and the possible corruption,
13 either real or perceived, that results from policies made
14 once somebody is in office. For candidates who are not
15 raising money, that danger is not there. This is for
16 candidates that raise money to give them an alternative
17 way to be able to run their campaigns as they did before
18 without having that danger of the quid pro quo.

19 It's also to alleviate them from the burdens of
20 fund raising so that they don't spend all their time fund
21 raising, and it is to allow candidates who have a basis
22 for support but that support isn't necessarily wealthy
23 candidates, to be able to run for office. But it's
24 important to remember that, and the reason that the court
25 so easily upheld this in Buckley, is that there are

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1 countervailing burdens that fall upon anybody who
2 participates in the program; mainly that they are subject
3 to expenditure limits and they take a risk, anyone who
4 participates in a system, they think, okay, I might be
5 able to raise a lot more privately, I don't know if I'm
6 going to be able to but I'm going to decide to participate
7 in this and I'm going to forego private fund raising and
8 accept this expenditure limit. And for nonparticipating
9 candidates, this is now a benefit for them, as the court
10 found in Buckley and which is also true for the CEP, that
11 they don't have expenditure limits. They can continue
12 fund raising and they can fund raise beyond the
13 expenditure limits.

14 In addition, there's no more money in the system
15 if major candidates or any candidates participate in the

16 program, there's now more money available that might flow
17 into the coffers of now major party candidates.

18 THE COURT: Is there data showing any third
19 party candidate ever spending an amount of money that
20 exceeds the amount that would be granted to a major party
21 candidate under the public funding, the CEP?

22 MS. NOVAK: I don't have that data, Your Honor.
23 I would have to look that up. But -- generally the
24 spending is very low for major party candidates but I can
25 provide that to you after argument, if you'd like.

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1 THE COURT: I'd be curious because obviously the
2 plaintiffs are arguing that there's not a real detriment
3 here because their spending limit is so high that for the
4 typical race, it's set at an amount greater than would
5 normally be spent in those races and, accordingly, there's
6 no counterbalancing detriment. I understand in your
7 reply brief you addressed that issue but I'd be curious to
8 know whether this is a real possibility given experience.

9 MS. NOVAK: Well, I think the data in the reply
10 brief -- I won't repeat it -- does go to that point and
11 does really address it; that these, it is clear that the
12 numbers for the CEP weren't just drawn out of thin air.
13 There was obviously some study. They correspond to the
14 amounts that were spent in comparable races.

15 But the point Your Honor raises was addressed in
16 Buckley and it was also addressed in another case that
17 discussed FECA and discussed the presidential public
18 financing system, and that is Republican National
19 Committee v. the Federal Election Commission, 487 FSupp
20 280. That was a three judge panel. Plaintiffs argued,

21 well, it doesn't matter that there are these expenditure
22 limits that we can possibly exceed because we can't really
23 do it, and the court said it's not a matter of if you
24 can't really do it, it's just that you are able to do it,
25 and the system is not to make up for your disparity. If

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1 you have the support, you can go out there and raise the
2 money and you can try to raise the money, and the
3 important aspect is that this is a countervailing burden
4 on the, on the participating candidates.

5 THE COURT: But that's the issue. I mean, is it
6 really a burden if the amount is set at a point that is,
7 I'll just say generically too high?

8 MS. NOVAK: Right. I guess Your Honor could
9 raise some sort of constitutional question if they had
10 been spending \$60,000 and the limits were \$10 million, but
11 that's not, that's not this case. This case is, as the
12 reply brief I hope points out, that these limits are
13 absolutely comparable to what the spending is in
14 Connecticut, and so any claim of plaintiffs that, you
15 know, this would be too high, this would work any sort of
16 discrimination, is all based upon speculation, we'll have
17 to see how it plays out, but the historic numbers show
18 these are comparable.

19 And in that other case, the -- I'm sorry, it was
20 the Reform Party -- I'll find the case in a minute. Yes,
21 the National Committee of Reform Party, 168 F3d 360, a 9th
22 Circuit decision coming out of 1999. They argue in that
23 case that the concept in Buckley where minor party
24 candidates are allowed to continue raising up the

25 expenditure limits and that was one of the aspects of the

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1 presidential public financing system that made it
 2 constitutional. They said, well, we can never do that.
 3 So this is, this is really the type of factual showing
 4 that Buckley held in reserve and said we can bring later
 5 on, and then the 9th Circuit said, well, that's not true.
 6 That was already raised in Buckley. That's the kind of
 7 thing that the court considered and rejected. It's just
 8 that you have the minor party candidate have the
 9 possibility of doing so and that's one reason it was
 10 constitutional. Whether or not you're able to do it is
 11 not what's really relevant here.

12 And I also want to emphasize, Your Honor, that
 13 whether a party is a major or minor party is all dependent
 14 upon their support in the elections and it is very fluid
 15 and the historical races in Connecticut show that at any
 16 time what is currently a minor party can become a major
 17 party and a major party can become a minor party. We saw
 18 that in Connecticut with Governor Weicker, that he won --
 19 on Connecticut party line he won 41 percent of the vote.
 20 Automatically that would have taken a Connecticut party
 21 and made it a major party. And then for the next
 22 election, his successor would have received full public
 23 financing automatically. And then his successor, Dennis
 24 Groeg got 90 percent of the vote and Groeg's successor
 25 would have received two-thirds of public financing.

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1 And so the system allows the fluidity of
 2 American political life that the courts made sure were

3 important and it was the exactly the kind of fluidity in
4 Jenness v. Fortson, you had -- the plaintiffs there argued
5 about ballot position and it was allowed that major party
6 candidates who received a certain percentage of the vote
7 in the presidential gubernatorial election automatically
8 access to the ballot, where anyone who didn't do that
9 needed to get 5 percent signatures from the, 5 percent
10 from the registered voters. And the plaintiffs in that
11 case argued, well, that's not fair, that's a
12 discrimination against people aren't a major party. And
13 the court said that's not the case, you have this, you
14 have this mark that anybody can move into and out of and
15 once you get a certain amount of support, you will get
16 automatic place on the ballot.

17 And it's the same situation here. Minor party
18 candidates have an opportunity, as do major party
19 candidates, and enjoy the full benefits of the public
20 financing program.

21 I also want to add that public financing, as the
22 historical records have shown, certainly with averages,
23 which is what plaintiffs push at, that is public
24 financing, although it will not give a great monetary
25 benefit to major party candidates, it will give a great

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1 monetary benefit to minor party candidates. They will
2 receive amounts, even a one-third grant under the program
3 will far exceed their historical fund raising and, as one
4 of the records for the plaintiff shows, for one election
5 he raised over \$500 and under the system based upon the
6 percentage of votes he received in the last election, he

7 will receive \$28,000 from the public financing system,
8 which is 50 times greater than what he raised in the
9 following election.

10 Therefore, any benefit -- any allegations of
11 harm from the system that plaintiffs make are purely
12 speculative and certainly are disproven by the history of
13 financing and historical support in Connecticut.

14 THE COURT: Let me ask about one aspect of the
15 CEP that concerns me a little bit, and that is in
16 noncompetitive districts, districts where one major party
17 dominates and either the second major party doesn't run
18 somebody or runs very unsuccessfully, why should in those
19 districts the major party -- let me put it this way: Why
20 isn't it invidious discrimination against the minor party
21 in those districts to permit a major party candidate to
22 receive public funding even in those districts where in a
23 prior race that party either didn't run somebody or ran
24 somebody that was less than ten percent, whereas the minor
25 party candidate perhaps actually ran at maybe about eight

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1 percent and doesn't get the same advantage?

2 MS. NOVAK: Well, all candidates, everybody is
3 subject to the qualifying criteria so there is no may for
4 a major party candidate just to decide in a certain
5 district they are going to run and they automatically
6 receive public financing. They actually have to go out
7 and raise a certain number of qualifying contributions.

8 THE COURT: But if you examine that situation,
9 that would be true for minor party candidate as well.

10 MS. NOVAK: Right.

11 THE COURT: So if both of them raised the

12 necessary contributions, the minor party candidate who
13 would theoretically get 8 percent, whose party got
14 8 percent in the prior election, he's disadvantaged
15 vis-a-vis the major candidate party who either didn't run
16 or received the same number of votes.

17 MS. NOVAK: Your Honor, the Supreme Court in
18 Buckley and other cases by the Supreme Court and various
19 courts have stated that it is, it's not only
20 constitutional but reasonable to understand the place that
21 major parties have in political life, and it does not need
22 to be the same standards. It says it might even, the
23 greatest detriment could be to treat parties the same when
24 they are not the same. It is a known reality that if a
25 major party candidate runs in a district that a certain

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1 number of people are registered for that party, certain
2 number of people. Either they are registered for that
3 party, a large percentage of Connecticut voters, or a
4 large percentage of Connecticut voters voted for that
5 candidate for governor and, therefore, you have a lot of
6 party support. You are likely going to have a lot of
7 support in the electorate. Similarly, you have a major
8 party behind you that will work to help your candidacy.
9 When you achieve major party status, which means that you
10 either have 25 percent of the vote for governor or that
11 you have 25 percent of the registered voters in
12 Connecticut are registered with your party, you have a
13 significant measure and manner of support behind you.

14 Plaintiffs acknowledge this in their brief.
15 They say on page 26 and 27 of in their brief, major party

16 legislative candidates can take advantage of their party's
17 statewide popularity to compete in districts that were
18 previously uncompetitive, and any disadvantage that the
19 nonmajor party candidates would suffer, they suffer
20 because their party does not have the significant support
21 that a major party does.

22 And as the court said in Buckley, third parties
23 have been completely incapable of matching the major
24 party's ability to raise money and win elections.
25 Congress was, of course, aware of this fact of American

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1 life and, thus, was justified in providing both major
2 parties full funding and all other parties only a
3 percentage of the major party entitlement. That was in
4 '98.

5 It's the same thing here, in that we recognize
6 the role that major parties play in campaigns and it does
7 not work in invidious discrimination that minor parties
8 would need to meet a different standard. Again, when it's
9 just a matter of alternative funding, they have shown
10 success. They haven't in their legislative races in the
11 past few years, haven't won their elections but they've
12 shown some success and maybe now they will focus on trying
13 to achieve that ten percent mark and raise money to try to
14 get there.

15 But, in addition, any of these claims that
16 plaintiffs are making about that, oh, the major party
17 candidates will be able to qualify, they'll qualify so
18 easily, we won't, again are based upon speculation. And
19 Buckley really instructs that we should let the system
20 play out, see what happens. And if it seems that there is

21 some sort of work of invidious discrimination against a
22 non-major party's candidate, they can come back and show
23 those facts to the court.

24 THE COURT: Can we look to the experience of
25 other states when deciding the constitutionality of these

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1 provisions? In other words, your argument taken to its
2 logical conclusion is whenever a state passes a public
3 funding provision, you have to wait and you have to see
4 through a couple election cycles how it plays out before
5 you can determine constitutionality.

6 MS. NOVAK: I won't say that that's necessarily
7 my position, and let me clarify a little. The important
8 aspects of Buckley are present in the CEP. What Buckley
9 really focused on, which was that there are expenditure
10 limits and that claims of harm are hypothetical and there
11 are important government interests sought here and that
12 this does not stop the fluidity of political life, the
13 parties can move positions if they gain support. If those
14 factors were not present in a public financing system, we
15 offer a very different question. For example, if there
16 was no expenditure limit, if the funding for participating
17 candidates was a supplement to their funding, if you
18 didn't, you didn't substitute their funding, they were
19 allowed to continue to privately raise funding and you
20 gave them public money and there was no expenditure limit,
21 another aspect that might raise a constitutional question
22 is if you froze everything in time, you said anyone who's
23 a major party, that's a major party on this day is
24 entitled to public funding, and no party can move over the

25 years and get to that point, those would raise very

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1 different questions. But, for example, when the
 2 plaintiffs in Buckley raised the point, not being able to
 3 get any funding beforehand, they didn't get 5 percent of
 4 the vote,, a facet not present in the CEP, the court said,
 5 look, we'll deal with that. It doesn't seem to be a
 6 problem, we might deal with that later, but the important
 7 aspects of this program and why we're upholding it, that
 8 is, there's the burden, there's the expenditure limit and
 9 any harm is speculative, we have to wait, and minor
 10 parties have shown success and are still able to raise
 11 money privately, and that there are important governmental
 12 interests at stake and such speculation cannot overcome
 13 the government interests at stake here.

14 And some of the examples that Your Honor is
 15 highlighting and plaintiffs have highlighted are very
 16 narrow examples of what might happen in the future for
 17 some hypothetical candidate. That cannot and should not
 18 be enough, even if a constitutional question was raised,
 19 to strike down the whole system. In Buckley there was a
 20 debate about whether the presidential public financing
 21 system as constructed allowed funding at all for
 22 independent candidates or candidates not affiliated with a
 23 minor party, and the court acknowledged, said this might
 24 raise a constitutional question if somebody has to become
 25 affiliated with a party to qualify for public financing.

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1 But the independent plaintiff candidate here has said that
 2 he does not want to take public financing and, therefore,

3 this is not an issue for us to deal with. Let's wait and
4 see if there's anybody out there in the future.

5 Similarly, the 5 percent threshold in the
6 presidential public financing system at the time when that
7 was enacted, nobody was going to qualify under that.
8 That's clear. They say that in Buckley, that in 1972 no
9 minor party candidate reached the 5 percent threshold and,
10 therefore, no minor party candidate was available for
11 public financing in the 1976 election, but that did not
12 work a constitutional harm.

13 THE COURT: The percentages in the CEP are, as
14 noted earlier, higher than the presidential funding plan.
15 Have similar percentages been upheld as constitutional in
16 the review of any other states' publicly funded
17 contribution systems?

18 MS. NOVAK: As far as I know, the presidential
19 system and the CEP are the only ones to actually have this
20 differential system for minor and major party candidates,
21 so it hasn't been tested anywhere else.

22 I would also like to point out that the CEP --
23 this was a historic moment in Connecticut because this was
24 the first state legislature to pass a public financing
25 program for its own seats, so it was clearly -- took a lot

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1 of care. And in passing the systems in Maine and Arizona
2 that have been in place longer, they were passed by ballot
3 measure and, when passed, were similar systems. They've
4 been improved as time went on. A judicial financing
5 system in North Carolina is a nonpartisan system so they
6 didn't differentiate on the basis of parties, but the 10

7 percent threshold, again, I think because minor party
8 candidates have not, historically have not raised money,
9 it wouldn't, I don't think it would raise a constitutional
10 question if they weren't able to qualify because this is
11 supposed to be an alternative for public financing. But
12 that is not the case here. The historical records show
13 that plenty of nonmajor party candidates have hit the 10
14 percent mark, and the legislature, I'm sure, was aware of
15 this when they set up the system and they set up the
16 system, they made sure, even though it wasn't necessary
17 but they made sure that minor party candidates could be
18 included in the system and, again, get a lot more funding
19 than they had otherwise raised.

20 But the ten percent threshold, the General
21 Assembly might have chosen the ten percent threshold
22 because the system, presidential system is different than
23 in Connecticut. In Connecticut, you have what is known as
24 cross endorsements or fusion voting where a, quote, "major
25 party candidate" is allowed to run on a minor party

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1 ticket, and so this assists, as it is supposed to, and
2 both minor party and major party candidates take advantage
3 of this. It benefits them both. It allows minor party
4 candidates to get more of the vote. And so I think in
5 Connecticut it is likely easier for a minor party
6 candidate to achieve the ten percent threshold than
7 perhaps in the presidential system.

8 But, again, the Supreme Court in Buckley has
9 said that great deference should be given to these
10 branches and it went out of its way to say that. The
11 historical numbers show that plenty of nonmajor candidates

12 would qualify for this. And, again, any harm or an
13 argument that nonmajor party candidates would not be able
14 to qualify is based upon speculation. We don't know what
15 they are going to be able to do. This is a great system
16 to try to get into and maybe it will get their feet on the
17 ground, and it's clear that they have achieved some
18 success. But they have chosen not to do much fund raising
19 in order to achieve their success and maybe they'll say,
20 okay, well, now we need to do token fund raising and we
21 need to get a certain percentage of the vote and we are
22 going to go out and do this and make sure we can qualify.
23 But, again, if the system were in effect today, plenty of
24 nonmajor party candidates would qualify for the next
25 election.

♀

26

1 THE COURT: Usually briefing on a 14th Amendment
2 claim includes prominently the level of scrutiny the court
3 should be giving to the issue. I don't think either side
4 touched that one. What level of scrutiny should I apply
5 when examining the 14th Amendment claim?

6 MS. NOVAK: I think, you know, I'm not sure the
7 nomenclature is the level of scrutiny. The court made
8 clear in Buckley that these are not direct burdens on
9 candidates, an alternative system, and, therefore, it is
10 not analyzed under what we would see as the typical
11 standard or scrutiny under a 14th Amendment claim. What
12 they said was a decisive factor for the courts to consider
13 is whether the program disadvantages nonmajor parties by
14 operating to reduce their strength below that attained
15 without any public financing. And that's at Buckley, 98,

16 99 and also at 101. Because they said right up front this
17 does not work a First Amendment or a 14th Amendment harm,
18 and because it doesn't work a harm, we don't analyze it
19 the same way. And that was the standard laid out in
20 Buckley and so that's the standard to follow.

21 And, again, the public financing system, because
22 it's a matter of financing, doesn't do anything to
23 disadvantage their strength, their achievements that
24 they've achieved with private financing, and any claims of
25 disadvantage are speculative.

♀

27

1 Plaintiffs argue that they, a harm is worked on
2 them because other candidates might be able to qualify.
3 That certainly is not the harm that is thought about
4 reducing their strength. It cannot be the case that if
5 the program achieves one of its goals, which is to permit
6 qualified candidates with public support to participate,
7 that that works a harm on minor parties, that reduces
8 their strength below what they had. They still have a
9 private financing option and if they have the support of
10 the public, they can go out and do their funding thing and
11 get their votes.

12 In fact, on plaintiff's own brief at 26 they
13 cite Williams v. Rhodes that says "Competition and ideas
14 in governmental policies is at the core of our electoral
15 process and of the First Amendment freedoms." And so, you
16 know, it can't be that enlarging speech, which is what the
17 Supreme Court in Buckley said these systems do, it can't
18 be that allowing other viable candidates into the system
19 work a harm against plaintiffs.

20 What plaintiffs want is they want to preserve

21 the status quo in the races they run in, not allow other
22 people in but they also want additional money. They don't
23 want to be treated differently, even though they have not
24 shown the ability to privately raise money. Again, a
25 public financing system is not to equalize the strengths

♀

28

1 of the parties, it is the substitute for private funding,
2 and the CEP is just not required to try to do that to
3 equalize and make their positions better.

4 If I may, Your Honor, I wanted to address Count
5 Three? Count Three, plaintiffs argue that the matching
6 funds provision that is triggered by independent
7 expenditures works a constitutional harm on them. That
8 is, the CEP is set up such that candidates receive lump
9 sums but if they are significantly out-spent by opposition
10 spending, either by nonparticipating candidate spending or
11 independent expenditures against them, that they will
12 receive additional money and plaintiffs argue that the
13 trigger that allows additional money to be given out when
14 independent expenditures are made against the
15 participating candidates works a constitutional harm on
16 them.

17 We submit, first and foremost, that plaintiffs
18 have no standing to make this claim. Plaintiffs do not
19 claim that they have made independent expenditures. They
20 do not claim that they are currently making them, nor do
21 they assert that they will be making them in the future.
22 They clearly will suffer no injury. They argue in their
23 papers that they, the independent expenditures, they will
24 be chilled from making their speech if this provision is

25 allowed to go into effect. There can be no chill if they

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1 have no intention of making this. They cannot suffer any
2 injury from this provision.

3 In addition, this provision is constitutional,
4 has been upheld by many courts in several circuits. As
5 the courts have held, the only thing that happens from
6 these trigger provisions is that somebody gets more money.
7 It does not burden anyone's speech and nobody has a right
8 to out-spend anyone else. So, therefore, you cannot
9 assert a constitutional harm from the distribution of
10 funds to someone else.

11 That is your choice. If you didn't want to
12 speak because someone else might get more money, that is a
13 choice you make on your own. And the district court in
14 Arizona dismissed a claim like this on a motion to dismiss
15 and the District Court of North Carolina also dismissed a
16 claim on a count like this, adopting that reasoning. It's
17 also notable that -- and it was upheld in Maine, the 1st
18 Circuit also adopted this reasoning which is echoed in
19 many of the courts' decisions. It went on a motion to
20 dismiss but they also said that that claim was invalid.

21 But it's also notable that plaintiffs in their
22 brief, they argue that in terms of nonparticipating
23 candidate trigger provisions, they don't argue that those
24 are constitutional, they acknowledge that trigger
25 operations are necessary to get people to participate in

30

1 the system. They acknowledge that it doesn't prevent
2 anyone from speaking. They say on page 34 of their brief,

3 "Trigger provisions do not actually limit a
4 nonparticipating candidate spending." But then they argue
5 with respect to independent expenditures that it somehow
6 limits their spending, so it's inconsistent reasoning.
7 They seem to acknowledge what courts around the nation
8 have acknowledged, that this works no harm on the speaker,
9 it just gives out money to someone else, but then they try
10 to argue for independent spending, that somehow it does
11 work a harm on the speaker.

12 Thank you very much.

13 THE COURT: Okay. Thank you. Oh, you know
14 what? Actually, Ms. Novak, I did have one other question
15 for you and that is we're here on a motion to dismiss
16 and/or motion for judgment on the pleadings.

17 MS. NOVAK: That is right, Your Honor.

18 THE COURT: What can I permissibly consider
19 ruling on either of those motions?

20 MS. NOVAK: Your Honor is required to accept
21 factual allegations as true in the complaint, except Your
22 Honor need not accept them as true if they are legal
23 conclusions couched as factual allegations, which some of
24 them are, and the court is permitted to consider
25 judicially noticeable facts such as official government

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1 documents, and those are the only type of, I believe the
2 only type of data that either plaintiffs or intervenor
3 defendants and defendants have supplied to the court. And
4 the court, it's certainly permissible for you to consider
5 those when ruling on the motion to dismiss.

6 THE COURT: So, in your view the voting results

7 information that's been attached is permissible?

8 MS. NOVAK: That is correct, Your Honor.

9 THE COURT: Okay. All right. Thank you. Mr.
10 Lopez?

11 MR. LOPEZ: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. LOPEZ: Your Honor. I represent the Green
14 Party and the Libertarian party in this matter.

15 There are many layers to this legislation and we
16 went to great lengths in our brief to try to present our
17 objections in an orderly way and I'll do my level best to
18 do that this morning as well. And I'm very tempted to
19 just jump into the fray and talk about why Buckley is
20 really very different from this case and we'll get to
21 that, but let me start out with my prepared comments.

22 I just want to emphasize this is before the
23 court under a motion to dismiss. We've pled a 1st and
24 14th Amendment discrimination, content discrimination
25 claim which we believe is apparent from the face of the

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1 complaint. It's apparent from the face of the
2 legislation, which treats major parties and minor parties
3 differently. The defendant position is so what? That
4 doesn't constitute a discrimination under the cases. We
5 disagree. But on its face, we have alleged that it does
6 and we put that, we put that forward.

7 And just this week the Supreme Court decided a
8 case reiterating the sufficiency of pleadings and that are
9 conclusory, allege a discrimination claim and put forth
10 the bare minimum facts. We could have -- this legislation
11 discriminates in many, many other ways as a practical

12 matter, and we address that in our brief. We could have
13 put that in our complaint; we didn't think the pleading
14 requirements required that.

15 We also submit that if the court believes that
16 our complaint is sufficient on the facts, and I don't
17 think the defendants believe that it is, I think their
18 position is no matter what we plead as a practical matter,
19 how the statute works, we would not be entitled to relief.
20 But if the court believes that it would be helpful to
21 expand on our complaint to specify the way we did in our
22 complaint, the way the legislation actually discriminates
23 against our clients over and above what we have alleged on
24 its face, then we would ask the court to indulge and allow
25 us to amend our complaint and not dismiss this case.

♀

33

1 Excuse me. Now, I think we can all agree that
2 on its face the legislation categorically excludes certain
3 minor party candidates. If you did not get ten percent of
4 the vote in the last election, your candidate, you're
5 categorily excluded. On its face, therefore, the
6 legislation is discriminatory.

7 The minor party candidates are also subject to a
8 different qualifying criteria than major party candidates
9 on its face. And then, in addition, the distribution
10 formula is different from minor party candidates than it
11 is for major party candidates. Minor party candidates who
12 raise the same amount of seed money and contributions
13 receive less than major party candidates. So, on its face
14 it discriminates. We've alleged it discriminates. We
15 believe that's sufficient for purposes of 12(b)(6).

16 In our view the defendants have failed to cite
17 any authority that would uphold a case that this
18 categorily excludes minor and -- minor and independent
19 party candidates, and Buckley certainly did not address
20 that, and none of the other cases tried by the defendants
21 do that as well. To be sure --

22 THE COURT: Let me make sure I understand that
23 point. What is it that you claim is exclusionary about
24 the CEP that is not addressed in Buckley?

25 MR. LOPEZ: There was a vehicle for minor

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1 parties to qualify in a particular election; either it was
2 based on past election results from the election or it was
3 based on the current showing, so here we have a
4 categorical exclusion.

5 THE COURT: From this particular election as
6 opposed to over time?

7 MR. LOPEZ: Yes.

8 THE COURT: I got you.

9 MR. LOPEZ: Okay. Now, Buckley may be the
10 closest analog, Your Honor, but it's not similar. There
11 are very significant differences between the CEP and
12 Buckley. Most important, Buckley is not a substantive
13 case, it's a funding case. It pretty much, it effectively
14 preserved the status quo. It replaced public funding --
15 it replaced private funding with public funding by --
16 there was a rough proportionality. It was a direct
17 substitute for public -- for private funding, perhaps more
18 in the nature of a subsidiary, and that's really the
19 nature of our complaint. We're here, we have -- the
20 government is subsidizing the major parties in a way that

21 bears very little connection to actual spending patterns
22 by the major parties, actual expenditures by parties or
23 their level of popular support. And you addressed, you
24 touched on this in your questions to Ms. Novak.

25 As we know, somewhere between 40 and maybe

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1 60 percent of elections in Connecticut are not competitive
2 in that you can start at the top of the ticket, go all the
3 way down the ticket on statewide elections. I think major
4 party candidates are winning by the difference between 30
5 and 70 percent. They are winning 70-30, 68-32. The
6 elections are not competitive. The amount of money being
7 raised is not, it does not correspond to the amount of
8 money that's being distributed under this program.

9 So what's going on here is the major parties are
10 being subsidized in a way that wasn't present in Buckley.
11 And we submit if that were the case in Buckley the court
12 would have treated it as a subsidy case and there would
13 have been a different set of considerations in play. For
14 instance --

15 THE COURT: Let me make sure I understand your
16 argument here. The CEP, like the presidential funding
17 program, involves the substitution or choice by a
18 candidate to accept public funds in lieu of private
19 financing.

20 MR. LOPEZ: Yes.

21 THE COURT: And so, to that extent it's not a
22 subsidy in the sense of adding to whatever a candidate
23 might be able to raise and spend from private funds. You
24 acknowledge that?

25

MR. LOPEZ: Yes.

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1 THE COURT: Except for the qualifying
2 contributions?

3 MR. LOPEZ: Well, our view is that the program
4 is so rich, it's designed to bring in all the major party
5 candidates and was designed to exclude all the minor party
6 candidates. A major party candidate would be foolhardy to
7 not opt into this program. The amount of funding he's
8 going to get is more than adequate. As we have said in
9 our briefs, it's established at the most competitive, the
10 funding is established at the most competitive elections
11 so there's going to be adequate funding.

12 In addition to that, the expenditures limits the
13 candidate is supposed to agree to are more illusory than
14 relevant because of the expenditure provisions that the
15 category contains and also of the, excuse me, the trigger
16 provisions that, in effect, release major party candidates
17 from the spending limits that they agreed to in the event
18 that they get, they face a rich third party or minor party
19 candidate.

20 THE COURT: Or a rich major party candidate who
21 has not opted into the CEP.

22 MR. LOPEZ: Your Honor, that is theoretically
23 possible but, I mean, I think the evidence will show if we
24 have an opportunity to do discovery that there would be no
25 reason for a major party candidate to opt out of this

♀

37

1 system. The subsidy is more than adequate based on
2 historical spending patterns to cover the expenses of the

3 election. And to that end, I just emphasize the
4 organizational -- unless they do it as a fiscal matter but
5 as a practical matter, the organizational expenditure
6 provision, as you probably read in the papers, is a giant
7 loophole in this law that allows candidates to work with
8 their party committees and their leadership committees to
9 raise unlimited, to raise and to spend unlimited amounts
10 of money on their campaigns. So there really are no
11 expenditure limits, so there is really no reason except an
12 ideological one to accept the financing, there's really no
13 reason to stay out of the system.

14 THE COURT: Well, we've seen it on a national
15 level where major party candidates have opted not to
16 accept the public financing, and I can imagine certainly
17 you've put forth some hypotheticals. Here's a
18 hypothetical: Wealthy businessman decides to run and
19 commit his or her public fortune to gaining office and
20 decides I don't need to be bound by these limits, I've got
21 millions and millions I can spend on this campaign out of
22 my own pocket. So, you know, it's not hard on that, in
23 that particular circumstance in electoral life --

24 MR. LOPEZ: Well, it's not rare in the
25 presidential system -- or it is rare in the presidential

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1 system but I can actually understand that happening in the
2 presidential system. Under the Connecticut system a
3 candidate is actually is going to be, theoretically that
4 is a going to be greatly reduced by the matching fund
5 provision which is going to release 100 percent matching
6 funds before the participating candidate is at any

7 spending disadvantage. Right? He's going to be getting
8 two for one matching granted up to 200 percent.

9 In addition, as I said, the organizational
10 expenditure provision will allow the party to continue --
11 not the party but can allow the candidate to continue to
12 raise money that he's not -- but the participating
13 candidate is going to continue to be able to raise money
14 for the party apparatus through its committee apparatus or
15 his or her party apparatus in unlimited amounts and that
16 money will continue to flow into, you know, into the
17 campaign.

18 I don't mean to be completely disagreeable. I
19 agree with you it's theoretically possible that someone's
20 not going to choose for financial reasons to stay outside
21 of the system but I think it's very unlikely. I think
22 what we know about the presidential system, the reason why
23 people are opting out are because the subsidies are not
24 rich enough and people in Connecticut, we believe the
25 subsidy is rich enough.

♀

39

1 I'd like to put some cases out of the way, all
2 the clean election cases. This has been the, you know,
3 this is capturing America's imagination. We have it in
4 Arizona, we see it in North Carolina, we have it in Maine.
5 I handled the Maine litigation. You have it in
6 Massachusetts. New York has some variation on it. The
7 city elections, those are classic clean election programs.
8 They are inclusive. They invite all candidates to
9 participate on an equal basis. It's not surprising they
10 were passed by ballot measure. So any ballot, you raise
11 a -- any match candidate can raise \$12,000 in seed money

12 contribution, \$12,000 contrasts to Connecticut's \$250,000.
13 Any ballot qualified candidate who raises 12,000 gets full
14 public financing and there's no equal protection
15 challenges in those cases, so those cases really are not,
16 you know, germane to this discussion.

17 The more germane case, the more analogous case
18 is Buckley. We heard a lot of discussion about Buckley
19 thus far and I guess it's been the focus of the parties'
20 briefs but -- Buckley is analogous but it's not similar in
21 many, many important ways. Buckley's premised on the
22 understanding that it's okay to discriminate between major
23 and minor parties. Because in presidential elections, the
24 major parties had a history of being competitive, had a
25 history of raising vast amounts of money. Minor parties

♀

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1 were in effect for the last 100 years, for the last 100
2 years in effect irrelevant. That was the finding of the
3 court and, therefore, Congress was justified in drawing
4 the distinctions they drew, but that's obviously not the
5 case in Connecticut. We know the minor parties have had a
6 major role here. They've won and they continue to make
7 strong showings in Connecticut in legislative elections in
8 particular and in particular in recent years. We submit
9 that justification that for treating major/minor parties
10 differently is, there's less justification in Connecticut
11 instead of more because of the competitiveness and the
12 strong showing of minor parties. There's a record of
13 support for these candidacies and it's growing. They are
14 making a push forward now as we speak to increase their
15 influence.

16 And they have to start -- you don't start at the
17 top, they start at the legislative district, at the
18 legislative level, and this legislation threatens to
19 basically cut off their momentum, to cut them off where
20 they are. And why that is, Your Honor? Because the state
21 has come in and intervened and is now going to be
22 providing what we believe are enormous subsidies to major
23 party candidates that go way beyond their level of popular
24 support and you're going to talk about those legislative
25 issues or we can talk about those legislative districts

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1 where candidates are more competitive. You know, what
2 business is it of the state to come in and start financing
3 in many cases republican candidacies that historically
4 were never funded, or in some cases democratic candidacies
5 that were historically never funded. My adversary argues,
6 well, there's no injury. That's a positive. Now we have
7 more speech. And I agree we have more speech but if they
8 are going to subsidize the noncompetitive candidate in
9 those districts, they'd better subsidize the -- it seems
10 to me on basic First Amendment law, they have an
11 obligation to subsidize third party candidates and
12 independent party candidates in that situation. And,
13 well, they are the ones who have filled the void left by
14 the major party candidate leaving that district, not
15 putting capital into that district. In those districts, I
16 think there were third party reps who ran from third
17 parties or independent parties. They ran in districts
18 where the major party, there was only one major party
19 candidate. This is where they've shown their greatest
20 strength. That's where they have made inroads. This is

21 where they are going to party polling and they want to
22 capitalize on this and build on this and this legislation
23 threatens to stop them in their tracks.

24 THE COURT: How is it a burden on the minor
25 party as opposed to an advantage to the major party? And

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1 does that make a difference?

2 MR. LOPEZ: Well, the advantage to a major
3 party, Your Honor, is they would be -- they are giving,
4 they are being given a subsidy. The whole premise in
5 Buckley, Your Honor, was the money was a substitute for
6 money -- to the money that would have been raised in the
7 market. This isn't a substitute for the money that would
8 have been made raised in the market. It may be for one of
9 the candidates, the dominant candidate, but for the weaker
10 candidate or the less dominant candidate, uncompetitive
11 candidate, it's not a substitute in any sense of the word.
12 It's a direct subsidy and that's a benefit to, it's one of
13 those benefits that comes at someone else's expense, Your
14 Honor. It's going to come at the expense, we submit, of
15 the minor party candidates in two ways.

16 And in a macro way, it's going to drown out the
17 voice of minor party candidates if all of a sudden major
18 party candidates are spending vast amounts of money that
19 they weren't previously spending. They are going to
20 dominant the debate.

21 On a micro level, we know that if you -- that in
22 each legislative district, if all of a sudden we now have
23 a noncompetitive major party candidate running in that
24 district, that's going to have an effect. We submit that

25 that will, the effect will be to dilute the strength of

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1 the minor party candidates. And we also submit, and the
2 defendants would say that's a prediction but we submit
3 that why should we have to wait until this happens? The
4 injury is now. If this happens, the minor parties will
5 have lost whatever gains they've made in those legislative
6 districts as a result, as a direct result of the state
7 coming in and subsidizing a major party candidate who
8 would have otherwise run in that district.

9 What's going on here is a distortion of the
10 playing field. And in Buckley, the central premise is the
11 status quo is preserved. Minor parties were no worse off
12 electorally or financially as a result of the public
13 financing system. Major party candidates were no better
14 off. Sure, they were relieved of the burden of fund
15 raising but, putting that aside, they were no better off
16 because their relative strengths remained the same
17 relative to each other and relative to the minor party
18 candidates, Your Honor.

19 The other burden here, the most obvious burden
20 is that there's a whole category of minor and new party
21 candidates or petitioning party candidates who are
22 categorically ineligible for public financing, anyone who
23 got less than ten percent of the vote, and we've submitted
24 that anyone, any petitioning party who's required to
25 obtain ten percent, meet the ten percent signature

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44

1 requirement, we say that's so unreasonable that no one's
2 going to satisfy it as a practical matter, and we think

3 the evidence will bear that out if we have an opportunity
4 to put on that evidence, Your Honor.

5 THE COURT: By the way, out of curiosity, what
6 is the signature requirement to appear on the ballot?

7 MR. LOPEZ: We discussed this last night. I
8 believe it's 1 percent, Your Honor, and I'm not submitting
9 that 1 percent -- you know, the state doesn't have to
10 adopt a system that, you know, gives full public financing
11 to all ballot qualified candidates. We're not here to say
12 you need to finance hopeless candidacies and we are not
13 here to say we need to encourage, you know, factionalism
14 or splinter the parties, but what we are here saying is
15 that the state can't inject itself into the playing field
16 in a way that tilts it, and that's what they've done here
17 by subsidizing the major parties over and above their
18 level of popularity, their level of actual support. And
19 it's not a zero game, it comes at a cost.

20 THE COURT: But you're focusing now on the
21 district by district analysis. You have to acknowledge,
22 don't you, that the major parties have substantial popular
23 support statewide given the voter registration roles, the
24 party registration roles, the success, long term success
25 of major parties in both the federal elections and

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1 statewide state elections. You know, there's a history
2 here just as there was a history in the situation the
3 court was considering in Buckley.

4 MR. LOPEZ: Not nearly as compelling as the
5 history in Buckley, Your Honor. You've just had the third
6 party candidate win the -- Senator Lieberman won on his

7 own ticket. Senator Weicker, Governor Weicker won on his
8 ticket. The histories are a little different. I just
9 think there's reason to treat the parties more similarly
10 in Connecticut than there is on a federal level election,
11 and that's one of the reasons you don't see public
12 financing at the congressional level. It's very, very
13 difficult to come up with an equitable formula because
14 there's really no justification.

15 For instance, in -- well, in Connecticut there's
16 parity in all of your congressional districts but in
17 Oklahoma there's no reason to fund the Democratic
18 candidate equal with the Republican candidate in
19 circumstances where the Republican is either running
20 unchallenged for the last 30 years or is picking up or is
21 winning by being paid --

22 THE COURT: To what extent are you complaining
23 about judgments made by the legislature as opposed to
24 constitutional violations? In other words, Buckley
25 acknowledged that there's significant discretion on the

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1 part of the legislators to make these types of calls. One
2 reason I can think of immediately for subsidizing, as you
3 would put it, the less competitive major party candidate
4 in a particular district is to shake up the power of the
5 incumbency. You know, the incumbents have tremendous
6 staying power, and if you look at Senator Lieberman, for
7 example, he was the incumbent. Yes, he was a third party
8 candidate but he was the incumbent, and I think what you
9 find is that the races in which there hasn't been any
10 significant associated major party participation are those
11 where the, where there's a strong incumbent in office, and

12 why isn't a legitimate interest on the part of the state
13 to shake that up?

14 MR. LOPEZ: It is, Your Honor, first of all, not
15 only is that a legitimate interest, but from what I
16 understood the arguments of my adversary, all of the
17 states objectives here are legitimate. It's a question of
18 how you go about achieving them. You can't do it in a way
19 that burdens third parties. So you can come up with a
20 system that doesn't burden third parties or that doesn't
21 artificially distort -- I don't know if I have to say
22 "artificially" -- that doesn't distort the playing field.
23 That's not role of the government. The role of the
24 government in managing elections or in managing, you
25 know -- let me finish my sentence. The role of the

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1 government is to remain neutral and they are not remaining
2 neutral here. They made a decision. It wasn't done based
3 on ballot measure, it was done based on legislation and
4 that urges caution. The caution is that system of
5 deference, it was the legislature that decided to come up
6 with a system that improves the standing of the major
7 parties and in the process hurts the chances of minor
8 parties. In Buckley the minor parties weren't hurt. That
9 was essential to the court's conclusion. They were in no
10 worse position than they would have been if there were no
11 public financing system. Not true here, Your Honor. They
12 are making great inroads in Connecticut starting at the
13 legislative district, and this system not only fails to
14 recognize that but it has the potential to thwart those
15 efforts by injecting into the system large amounts of

16 money for previously unfunded candidates from the major
17 parties. You may not agree with it but that's our, that's
18 the guts of our, of our objection here, in addition to the
19 fact that this system, unlike Buckley, does indeed
20 categorically exclude independent and major party
21 candidates who can't meet the qualifying criteria that
22 their major party candidates are not subject to.

23 THE COURT: Let me ask you the question I asked
24 Ms. Novak which is what level, by what standard am I
25 judging the 14th Amendment claim?

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1 MR. LOPEZ: The reason we didn't raise it in our
2 brief, Your Honor, we thought that issue was more reserved
3 for summary judgment, but very clearly, strictly speaking,
4 if you accept that this law in effect is a subsidy based
5 on the popularity of the point of view, then it clearly
6 comes within the rules that prohibit content based and
7 viewpoint base distribution. You can think of the 14th
8 Amendment claim or the 1st Amendment claim and the
9 standard of scrutiny would be the same, that would be
10 strict scrutiny. Now --

11 THE COURT: To what extent is a content based --
12 I mean the statute isn't looking at any particular point
13 of view and facing that point of view. Arguably it's
14 facing an established party over a less established party.
15 But --

16 MR. LOPEZ: The courts have treated these kinds
17 of speaker based distinctions as conduct based, forcing
18 people out. You know, the corporation gets treated
19 differently than non-corporations for purposes of
20 expressing themselves, and the court said that content

21 based discrimination, just off the top of my head, so I
22 would think of this as speaker based discrimination that
23 is based on the popularity of the speaker's message. I
24 mean consider, excuse me, consider a situation where the
25 government decided that the New York Times -- actually

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1 there's a case on this. The Minneapolis Star is going to
2 get, is not going to have to pay taxes on its -- they are
3 going to get their tax passed, they are not going to have
4 pay taxes on their receipts. And then they deny the same
5 tax relief to a socialist paper, or not just to socialist
6 papers but to a paper that has less circulation. So we
7 have a law that gives the major newspapers a tax break but
8 doesn't give the tabloids the same tax break. Our
9 Consumer Writers Project v. Random comes to mind. You
10 can't do that when you're giving out subsidies, whether
11 it's in the form of tax relief or direct subsidy, you
12 can't base it on the popularity of the speaker's message,
13 because of the danger that that in turn is based on the
14 content of the speaker's message.

15 There was one point I meant to make at the
16 outset, Your Honor, which I didn't, which is under the
17 defendant's theory, it would be okay to fund the Democrats
18 and not Republicans and simply let the market work. The
19 argument would be that the Republicans are free to raise
20 the money they've raised in the past and that their
21 ability to raise money will simply be a reflection of
22 their popular support and they are no worse or better off
23 than if there was no public financing system. That's the
24 logical conclusion of their argument, Your Honor, and we

25 would be here representing the Republicans in that

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1 situation. If the court, if Congress or the State
2 Legislature came up with a rule, came up with a system
3 that said we're going to fund only the Democrats or
4 we're only going to give public financing to the candidate
5 who won in the, in the last election, and the government's
6 argument is it must be that that's okay because public
7 financing is simply replacing market forces, and we submit
8 that that, in this case that's not true and it wouldn't be
9 true in that case as well here.

10 I think I'm, I mean -- I think I'm ready to move
11 on to --

12 THE COURT: That's fine.

13 MR. LOPEZ: -- the other counts in the
14 complaint.

15 THE COURT: Sure.

16 MR. LOPEZ: The trigger provisions, you know,
17 first of all, let me just say the trigger provisions were
18 present in the egalitarian financing programs. They are
19 necessary because they are included as a strong
20 disincentive to not participate in the funding, though in
21 those states it was set up based on historical averages so
22 the funding wasn't adequate. So to discourage people from
23 not participating in the public financing program, they
24 have had these matching fund provisions. I've seen, I
25 think in Maine it was one to one. In Connecticut it's one

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1 to one with a max of two to one. There was even a case
2 where it was five to one. If you were outside the system

3 and you exceeded your participating candidate's spending
4 limits, a five to one match was actually the trigger. You
5 know, arguably in those cases, that kind of extreme
6 measure is necessary to encourage 100 percent
7 participation. That factor is absent here because you --
8 candidates don't need any incentive not to participate, or
9 disincentive.

10 In this case, the trigger provision -- well, the
11 matching fund provision is more in the nature of piling
12 on. It's just another way of insuring that the party,
13 major party candidates are in no way, you know -- excuse
14 me, put at a disadvantage by accepting public funding. We
15 still have standing to, it seems to me, to raise that
16 objection because the matching funds, Your Honor, are not
17 only triggered by an outside candidate's spending but they
18 are also triggered by independent expenditures. So you
19 have a situation where a third party comes along and takes
20 out an add criticizing Governor Reil. That independent
21 expenditure is treated as though it was an expenditure of
22 the nonparticipating candidate and triggers matching funds
23 indications to the nonparticipating candidate of the
24 spending limits that he never agreed to, she never agreed
25 to.

♀

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1 So, I would submit we certainly have standing to
2 raise that argument as candidates. We also have standing
3 as a party to raise the argument that the independent
4 expenditure provision does indeed act to chill the
5 spending by speakers who wish to support a third party
6 candidate. And there's case law, as we put in our briefs,

7 there's competing case law. The 8th Circuit came to one
8 conclusion, the 1st Circuit and some other courts have
9 come to a different conclusion.

10 Unless you have any other questions I'm happy to
11 sit down.

12 THE COURT: Okay. Thank you.

13 MR. LOPEZ: Thank you.

14 MS. NOVAK: May I, Your Honor?

15 THE COURT: Thank you. It's always fun to see
16 how many times this happens, how many rebuttals and
17 surrebuttals.

18 MS. NOVAK: It's only number two. I only have
19 five different piles.

20 Thank you, Your Honor. First of all, I was
21 happy to hear that plaintiffs concede that the CEP serves
22 a legitimate and appropriate purpose, so I'm glad that
23 that is not in dispute.

24 It is very clear from Buckley that the CEP is
25 not subject to strict scrutiny. The court went to great

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1 lengths to explain how public financing programs differ
2 from ballot accessed statutes. Ballot accessed statutes
3 are direct burdens and, therefore, are analyzed under the
4 traditional work 14th Amendment type scrutiny, because it
5 actually prevents someone from being on the ballot,
6 prevents them from running for office and prevents people
7 from voting with them. Again, the CEP and public
8 financing programs are potential enhancements, potential
9 benefits and, therefore, the court did not analyze it
10 under traditional, certainly not under strict scrutiny but
11 not under traditional standard of review standards. I

12 mean it actually kind of left it open but it was very
13 clear what the measure was, whether it disadvantaged
14 nonparties below the level they attained from private
15 financing.

16 Plaintiffs argue that it's the government's
17 position, responsibility, they need to remain neutral
18 between major and minor party candidates. It's absolutely
19 not true. It's what the court said in Buckley, you are
20 allowed, the legislature is allowed to recognize the
21 different strengths, the different fund raising
22 capabilities and the different electoral results between
23 major and minor party candidates. Of course, the state
24 could not do and did not do the hypothetical that
25 plaintiffs suggested, which was they could provide public

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1 financing for Democrats -- or not Republicans -- I forget
2 which way he said it -- because that would be singling out
3 a political party. What you have here is the CEP is
4 objective criteria that is fluid and any party could
5 qualify for. So it's certainly not the case that they
6 have singled out what are the major party candidates today
7 and provided them with benefits. They've set objective
8 criteria that are reasonable and based on past success and
9 any party can achieve it.

10 Plaintiffs argue that there has been momentum,
11 there's been great momentum, inroads gained by major party
12 candidates. The history in Connecticut, which the General
13 Assembly should have and apparently did take note of,
14 shows to the contrary. For example, as we discussed
15 earlier, the Connecticut party, this third party, won

16 41 percent of the vote and became the Governor of this
17 state. However, that party doesn't even exist today. It
18 shows the fluidity of political affairs. If they would
19 have said at that time anyone running under a Connecticut
20 party, no matter how many votes they get, will get full
21 public financing, that obviously would be quite a waste of
22 state resources to continue funding that party. So it
23 shows that basing it on, as the court in Buckley said,
24 basing it on past electoral results makes sense.

25 Now, the inroads that they have gained, minor

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1 party candidates, there is not one sitting legislature in
2 Connecticut that is a member of a minor party. They have
3 not fund-raised to the level, they have not won elections.
4 Currently in Connecticut, just like Buckley, "Third
5 parties have been completely incapable of matching the
6 major party's ability to raise money and win elections."
7 That was Buckley at 98. But the quote from Buckley at 94,
8 95 which is, "The inability, if any, of minor party
9 candidates to wage effective campaigns will derive not
10 from a lack of private funding but from their inability to
11 raise private contributions." How can these elections
12 become more competitive because of the existence of public
13 financing? It is not the reason. If it happens -- again,
14 it's speculation -- it is not going to be the reason that
15 non-major party candidates don't win, because they didn't
16 win now. And it's not going to be -- the reason that
17 they, that they don't possibly obtain the percentage of
18 the vote that they did now, it will be because they
19 historically haven't fund raised and because when it came
20 down to voting, the voters liked the messages of the other

21 parties better. It is not the responsibility of the CEP
22 to correct that.

23 Now, maybe the public financing system will make
24 the minor party candidates focus on fund raising a little
25 more for various reasons. One, to obtain public financing

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1 but, two, that there's now more money in the system and
2 maybe they need to focus on this. Again it's an
3 alternative for financing and if they are not going to
4 raise money privately they are not necessarily entitled to
5 public money.

6 Again, plaintiffs argue that there's a
7 categorical exclusion of nonmajor parties. This is
8 absolutely not true. As we've discussed earlier, unlike
9 the presidential public financing system, any candidate can
10 qualify for pre-election funding as a petitioning
11 candidate, so it doesn't exclude anybody. Anybody can
12 take that route, as opposed to the presidential financing
13 system. They can't take that route, they only have this
14 hypothetical possibility of post election funding, if
15 somebody will give them a loan based upon their faith in
16 this candidate, even though they haven't shown any
17 support. And as plaintiffs highlight in their brief,
18 minor party candidates who don't receive a certain
19 percentage of the vote are considered petitioning
20 candidates. For example, if somebody wants to run in the
21 Green Party for Governor in this election, they got less
22 than 1 percent of the vote last time around, they have to
23 run as a petitioning candidate for that. So anybody,
24 there's no categorical exclusion whatsoever and certainly

25 less so than there was in Buckley.

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1 THE COURT: Do I have to accept as true the
2 allegation that the percentage signature requirement is so
3 onerous that as a practical matter there is no new
4 alternative? At the motion to dismiss stage do I have to
5 accept that allegation?

6 MS. NOVAK: Do you have to accept that
7 allegation, that it is high or what it is -- but you
8 certainly don't need to accept it. It's a legal
9 conclusion that it's so onerous it works a constitutional
10 violation so that -- it's so onerous that no one can meet
11 it. Again it's speculation. And Buckley has said when
12 you have such speculation on that, let it play out.
13 That's not a basis -- even if they were able to, to show
14 that, we need to see how it plays out.

15 Again, Buckley said even if no nonmajor party
16 candidates qualify, that is not a reason to strike down
17 the system. The reasons to uphold the system are, which I
18 will get to because I have to address plaintiff's
19 argument, is that it is a substitute and not a subsidy,
20 that there are expenditure limits, that there is still the
21 option of private fund raising, and that there are
22 important government interests that the system achieves.

23 Now, to turn to plaintiff's argument about how
24 it's not a substitute, it's a subsidy. I imagine that
25 plaintiffs are harping on this language because, as I've

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1 just discussed, they lose if it is a substitute and not a
2 subsidy. So they are arguing that it is a subsidy, but it

3 really doesn't match the definition of what a subsidy is.
4 What they are really arguing is they don't, major party
5 candidates don't deserve this, they are getting more than
6 they should. They are not arguing that it's actually a
7 subsidy. A subsidy is something that you get in addition
8 to something else, not that you shouldn't get that amount.
9 And so what they are really arguing is their other
10 argument, which is that all major party candidates will
11 qualify and that these amounts are obscenely high, which
12 isn't the case but, again, they can not get around the
13 fact that this system mirrors Buckley in that it provides
14 subsidies -- rather, substitutes financing rather than
15 provides subsidies, has expenditure limits. They can
16 raise money privately and they are important goals to
17 achieve.

18 THE COURT: In terms of the substitute argument,
19 as I understand the plaintiff's position, essentially what
20 they are saying is in uncompetitive districts where money
21 historically has not been raised by the nondominant major
22 party, it is a subsidy because as a practical matter you
23 are not really replacing privately raised funds. You are
24 promoting a major party candidate who otherwise would
25 never venture into arace against a, for example, a

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1 powerful company.

2 MS. NOVAK: But, Your Honor, respectfully we
3 argue that that means you're giving them more than they
4 deserve. Whether or not it's a substitute or a subsidy is
5 set up by the terms of the program, which is once you sign
6 up for the program and want to become a participating

7 candi date, besi des qual i fyi ng contri buti ons you are not
8 allowed to raise money privately.

9 And I will get to their argument about the
10 amounts but I also want to highlight that in the
11 presidential system, the presidential system is set up in a
12 way such that there's a different system for the primary
13 than for the general election. In the primary one, in the
14 primary elections it actually is a subsidy, it's a
15 matching fund system. Candidates raise a certain amount
16 of money for uncontributors and it gets matched by the
17 government. And many have argued, and I think rightfully
18 so, well, this is kind of a joke, the presidential system
19 that we have set up, because you're allowing all this
20 private money into the system for the primary, then all of
21 sudden they are supposed to turn off their minds and now
22 you have lump sums in the general election. And still
23 that's does not figure into the court analysis. No, no,
24 no, we're just going to look at the general election. So
25 even in that case where arguably there is a supplement and

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1 there is not a substitute, it was upheld.

2 In terms of what plai nti ffs are argui ng are
3 subsidies but I really argue that they are couching their
4 argument that these are undeserving amounts, nobody's able
5 to just get public financing. You need to get, achieve a
6 certain number of qual i fyi ng contri buti ons. The purpose
7 of that is to measure whether or not you have public
8 support. And right now in those uncompeti tive di stricts,
9 the candi date who's not runni ng for a major party doesn't
10 have a party or is not tryi ng to gain public support but
11 they might say after the system, you know what? I think I

12 can get enough support, I think I can run this race and
13 I'm going to try to get my message heard just like the
14 minor party candidate does. I might not win because this
15 district is so heavily Democratic but I might be able to
16 qualify for public financing. I might be able to get ten
17 percent of the vote and that is a benefit to the voters.
18 This is what the system -- one of the goals of this
19 system. Get more ideas out there. It's not supposed to
20 change who should necessarily win. The state doesn't have
21 an interest in that. But you're allowing someone who has
22 public support to get their message out. And we know that
23 they have the support of a major party and that they
24 might, therefore, be better able to do this in a major
25 party candidates race, whereas nonmajor candidates do not

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1 raise money and the system is set up such that if they do
2 not have competition in their election, they will not get
3 full grants. It is specifically designed to correspond to
4 comparable historical spending.

5 And plaintiffs argue, well, these are too high.
6 They are not too high because, as we discussed earlier, I
7 think the reply brief points out how they are comparable
8 or competitive in noncompetitive elections. But even
9 plaintiffs acknowledge the presidential system is broken.
10 Nobody is participating in that system anymore because the
11 amounts are too low. There is no point in having a system
12 like this if nobody participates.

13 I don't know, it certainly doesn't work a
14 constitutional violation for plaintiffs to pick the exact
15 amount of funding that they think that needs to be in

16 there so that candidates will participate but they don't
17 get too much or they won't participate. The numbers
18 correspond to historical spending. They can play out.
19 The General Assembly clearly put care in developing these
20 numbers and, whether or not plaintiffs like these numbers,
21 they did not work a constitutional violation.

22 Plaintiffs also say that major party candidates
23 would be foolhardy not to participate but, again, they
24 must raise the qualifying contributions. Why wouldn't
25 minor party candidates be foolhardy not to participate?

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1 Go out, get the -- start raising money for the first time.
2 Get ten percent of the vote and you will get a windfall of
3 money like you have never raised before if you qualify
4 under the system. So go out and get the petitioning
5 signatures and you will get it in that current election.

6 The matching fund. Matching funds have been
7 upheld all over the United States. They do not lift
8 expenditure caps. They are characterized for particular
9 elections where that spending is high now. The state had
10 the alternative, they could have thrown more money at all
11 the candidates but, just like plaintiffs argue, they are
12 trying to target it just to those races where the spending
13 is high and it is capped. They are not unlimited, which
14 is why courts around the nation have upheld them. They
15 don't lift the expenditure limits. Yes, they are higher
16 in those races but they are only higher because the
17 spending is higher in that race and they are designed, as
18 plaintiffs acknowledge, to make sure people who are in
19 competitive districts will participate.

20 They are capped, each of them, the independent
Page 53

21 expenditure provisions and the match for nonparticipating
22 candidate spending on 100 percent each, so it is certainly
23 possible, we have certainly seen all over the United
24 States that certain candidates will spend more than that.
25 You can't account for it. You can't reasonably set up a

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1 system that accounts for Mayor Bloomberg or John Corzine
2 or anything like that. So, private candidates will always
3 have, the nonparticipating candidates will always have the
4 opportunity to raise money privately and raise above the
5 expenditure limits.

6 Also, the plaintiffs discuss about how, you
7 know, easy it is for them to qualify for ballot access,
8 even though they say easy, below the 1 percent to qualify
9 for ballot access, whereas the signatures for public
10 financing is so high at ten percent. But Connecticut
11 could constitutionally and significantly reduce the number
12 of minor party candidates by increasing its ballot access
13 requirements from 1 percent to 5 percent. Five percent
14 has been upheld as constitutional. It should not be the
15 case because Connecticut has accessible, easily accessible
16 ballot access, possibly more lenient than what's
17 constitutionally necessary, that that disparity should
18 somehow play into determining that the level for achieving
19 public financing is too high. However, as the court made
20 clear in Buckley, these are not comparable. You should
21 not look at ballot access cases. What is necessarily
22 reasonable or constitutional for a minimum or maximum for
23 ballot access cases in terms of voter percentage is not
24 applicable in public financing cases. It's a different

25 animal and the legislature should have discretion in

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1 determining that amount or how to measure it, in fact.

2 Next, I want to address plaintiff's argument
3 about organizational expenditures. The provisions that
4 allow for organizational expenditures again are neutral.
5 They don't say that only major party candidates can make
6 them, and they -- and minor party candidates can as well,
7 but plaintiffs argue, yeah, but we don't really have those
8 expenditures. Well, that is not a result of the CEP.
9 That is a result of their fund raising and the support for
10 their parties. In the Republican National Committee case
11 at 287, they said that neutral site that happens to
12 benefit major party candidates more because of their
13 developed strength are constitutional because minor party
14 candidates can become major party candidates at any time.
15 They can build up their strength and be able to use the
16 organizational expenditures provision.

17 There are also limits on organizational
18 expenditures for legislative candidates and, importantly,
19 Buckley highlighted that the legislature need not address
20 all evils at the same time. And it might be since
21 organizational expenditures are not direct contributions
22 from citizens to the candidates, it might be that the
23 danger of quid pro quo between candidates and citizens was
24 the danger, to quote Buckley, may have been the problem,
25 quote, most acute to the legislative mind. They were

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1 trying to get rid of, they need not address every evil.

2 The system is designed to accomplish many
Page 55

3 results and, you know, if it doesn't accomplish one of
4 them by this, they can revisit it at some other time, but
5 it's certainly not a reason, as it wasn't in Buckley, with
6 respect to the primaries to strike down the system.

7 Plaintiffs have also argued that the
8 differential treatment for primaries is unconstitutional,
9 and intervenor defendants and defendants argue, well,
10 that's not the case in the American Party of Texas v.
11 White. They upheld the differential financing for parties
12 from major parties and not for minor parties who didn't
13 have primaries. Plaintiffs have argued that that's not
14 applicable because that's for parties and not the
15 candidates, but in footnote 130 in Buckley, they said that
16 that difference was immaterial to the constitutionality.

17 So, again, the CEP is not required to increase
18 the strength of minor party candidates. It needs to allow
19 the fluidity that minor party candidates have, if they
20 have the support and they get out there and their ideas
21 are strong, that they will be able to get the votes and
22 raise the money and be able to participate in the CEP
23 fully. But, again, I reiterate, many nonparticipating
24 candidates are able to participate in the CEP and it will
25 provide them great benefits.

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1 I'd also like to get back to the point that Your
2 Honor raised earlier, which was about data regarding
3 expenditures in Connecticut races and how they relate to
4 the limits, and I would like an opportunity to provide
5 that and provide it to the court. I don't know if two
6 weeks from today or -- you know, ten days from today or

7 something would be sufficient for us to provide that to
8 you?

9 THE COURT: It's fine.

10 MS. NOVAK: That's fine? Okay.

11 THE COURT: Any objection to that?

12 MR. LOPEZ: No, Your Honor.

13 MS. NOVAK: Thank you.

14 THE COURT: Thank you. Mr. Lopez?

15 MR. LOPEZ: May I reply, Your Honor?

16 THE COURT: Of course.

17 MR. LOPEZ: Your Honor, winning is not, winning
18 the election is not the test, and the amount of money
19 you've raised historically is not the test of a
20 Constitutionally permissible public financing system. The
21 test is whether or not the public financing system
22 unfairly burdens the minor party or whether or not it
23 provides an unfair advantage to the major party
24 candidates. In Buckley neither of those factors were
25 present. In this case they are.

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1 This case does not, no matter how many times the
2 defendants urge this in this case, the intervenors urge in
3 this case, the CEP does not mirror Buckley. Buckley did
4 not endorse a system that unfairly excluded minor and
5 third party candidates. Minor and third party candidates
6 in Buckley had an opportunity to participate based on
7 either their past showing or their current showing.
8 There's no justification for not providing public
9 financing to a minor party candidate like Lowell Weicker
10 who captured 41 percent of the vote. Under the
11 Connecticut system, Lowell Weicker would be ineligible for

12 any public financing.

13 THE COURT: But had the financing been available
14 at that time, he would have a choice, wouldn't he, go out
15 and obtain signatures to qualify, and if he obtained
16 20 percent of the number of people who voted in the last
17 gubernatorial election, then he would have fully
18 qualified.

19 MR. LOPEZ: Your Honor, we've alleged and I
20 think the defendants have conceded that that is -- you
21 can't -- a ten percent signature requirement of, I think
22 it's of registered voters is just not possible. It would
23 cost a fortune. It's way beyond the means of any minor or
24 third party candidate. We'll put evidence on that, Your
25 Honor, if you'll allow us, we'll put not just expert

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1 evidence but real evidence and real party leaders that's
2 not a practical possibility, and that's what we've
3 alleged.

4 THE COURT: Is there a -- in the statute, is
5 there a deadline for submitting those signatures in order
6 to qualify for the funding? In other words, could Lowell
7 Weicker have had people outside his home saying if you're
8 going to vote for me, sign this petition because this will
9 get me some money? Or is that too late? Does he have to
10 sit --

11 MR. LOPEZ: I believe it's 60 days before -- in
12 the general, I think it's 60 days, up to, for designating
13 whether you're going to be a publicly financed candidate.
14 You have to certify to the Attorney General or the
15 Secretary of State, I think it's 30 days before the

16 primary, which I think in Connecticut is 60 to 90 days
17 before the general.

18 THE COURT: Okay.

19 MR. LOPEZ: What's very important in Buckley and
20 defendants just aren't putting enough emphasis on it --
21 I'll try to -- discrimination. In Buckley they found no
22 discrimination. That's why it didn't engage in a strict
23 scrutiny analysis. As we've said previously, if it did
24 find discrimination and surely it would have engaged in
25 strict scrutiny as it has always done when it's talking

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1 about subsidies that distinguish between speakers, but the
2 discrimination in Buckley, if you will, was justified by
3 the countervailing burden of expenditure limits that
4 simply is absent here.

5 I understand our discussion, Your Honor, that
6 it's possible that someone would opt out or even -- it's
7 realistic that someone might opt out because of the danger
8 of expenditure limits, the risk of that but, please, try
9 to appreciate or I ask the court to appreciate there are
10 three factors here that make those limits, and I said that
11 in my opening, that makes these limits illusory and the
12 coordinated expenditure provision, that's a giant
13 loophole. It effectively frees the candidate from the
14 limits. The candidate can go and have a fund raiser, the
15 same fund raiser that he used to have under the old
16 system. You can have a fund raiser in Hartford, raise \$1
17 million through various legislative committees and party
18 committees, then funnel that money right back into his
19 campaign directly back to his campaign and TV advertising
20 and send out mailings and have phone backgrounds and all

21 that stuff that a campaign would normally -- that just
22 wasn't present in Buckley, Your Honor.

23 THE COURT: And your argument is that happens
24 because the candidate holds a fund raiser for the party or
25 for some committee that would then funnel the money back?

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1 MR. LOPEZ: Right, or the party can do it. The
2 candidate doesn't even have to be present. The party can
3 spend -- they are by definition coordinated. The party
4 would do it with the candidate.

5 Now, I don't know why the defendants or the
6 intervenors insist that the subsidies here are not
7 substantial. They are, off the top of my head, Your
8 Honor, average spending for an election in, you know, 36
9 Senate districts, somewhere between 40- and \$50,000? They
10 are eligible for \$135,000 in funding. That 40-, \$50,000
11 number I gave you doesn't include, I think there were nine
12 districts where one of the major parties didn't even run a
13 candidate, so if you factor in zero for those, you'd bring
14 the numbers down substantially. So I don't know, I don't
15 really understand their objection to this rich funding
16 formula.

17 I would, I would add on the primary part of
18 that, the government's position is you only get funding
19 for the primary if you face opposition. Well, we haven't
20 addressed it in our briefs since we just figured it out
21 last night in response to their reply papers, but the way
22 it works in Connecticut is that the estate, the candidate
23 for the Republican party's nominated town committees, the
24 town committee, well, they have the discretion to nominate

25 two people, it's completely within their discretion, and

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1 then they can put all their money behind one candidate.
2 So it's very easy to draw a candidate, and this system
3 provides that incentive and I think the court can have
4 every confidence that that is going to play out in the way
5 we believe it is going to play out.

6 And, finally, I would address the business of
7 the third part of why these circumstances that were so
8 important in Buckley as a countervailing burden on public
9 financing is absent here. It has to do with the matching
10 fund provisions. Under the matching fund formula, Your
11 Honor, let's take the Senate situation. The senator is
12 going to be eligible for \$125,000. This candidate, if he
13 was a major party, for 125 at a minimum he can -- if a
14 minor party raises \$85,000, which is the spending limit
15 for the general election, \$85,000, that's when the
16 matching funds get triggered. Because the major party
17 candidate's going to have the burden of the first \$15,000
18 he raised for seed money, he's going to have \$35,000
19 general -- I mean primary funding, which was spent, and
20 he's going to have \$85,000 general election funding. That
21 adds to \$125,000. My candidate, Your Honor, once gets the
22 \$85,000 mark is going to start getting penalized. Once he
23 gets to 85, it starts triggering matching funds for his
24 major party counterpart. None of this is present in
25 Buckley. Buckley didn't have a matching funding

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1 operation. To sort of compare to Buckley, who knows, I
2 think the Supreme Court frankly on these facts would come

3 out very differently than they did in Buckley. Even the
4 most conservative members, Justices Rehnquist and Berger,
5 dissented from Buckley on those facts because they thought
6 it was unfair to the third party. The court has moved in
7 a different direction. It's hard to predict where it
8 would come out. I would just comment on the conservative
9 Supreme Court back then dissented in Buckley.

10 You had asked me a question about the history of
11 the major parties in this case. Well, actually the
12 history of the major party, if I'm not mistaken, it's not
13 in our pleadings, Your Honor, but I've seen it in some of
14 the legislative history I've seen in service discovery,
15 the defendant's part of this thing, I believe the
16 Independent -- the majority of people in this state have
17 registered as Independent. I could have it wrong but if
18 it's not, then it's Democratic, then the Independents but
19 I think the Independents are in the 40 percent range and
20 the Republicans are nowhere on the radar, relatively
21 speaking and with respect. So, it's not as if the
22 Democratic and Republican parties, you know, have a total
23 dominance over the way people think in this state, by any
24 means. Thank you very much.

25 THE COURT: Thank you. Well, actually I did

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1 have a question for you.

2 MR. LOPEZ: Please.

3 THE COURT: You mention putting on evidence
4 about the difficulty of a candidate obtaining the ability
5 to qualify through a petition method. What, if any,
6 factual issues are there that would need to be decided at

7 trial? In other words, I understand your arguments and I
8 understand the defendant's arguments principally to be
9 legal arguments. Constitutional, it's constitutional,
10 it's not constitutional. Follow Buckley, don't follow
11 Buckley, or distinguish Buckley. Give me a sense of what,
12 if anything, are you going to have to add to the mix if we
13 get past a motion to dismiss.

14 MR. LOPEZ: Well, I'm not suggesting we would
15 need a trial. I think we could submit the evidence
16 through summary judgment.

17 THE COURT: Doesn't matter to me, frankly,
18 whether it comes by affidavit or by testimony.

19 MR. LOPEZ: Right. It seems to me that we would
20 put on evidence about the difficulty of petitioning. We
21 would put on evidence about the unreasonableness of
22 imposing on third parties the requirement that they raise
23 seed money contribution. Because our view is it's not a
24 measure of their, level of their support. It may make
25 sense to have a seed money requirement on distribution

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1 reimbursement for major parties because it's the only
2 barometer the state has left for itself to distinguish
3 between serious major party candidates and non-serious
4 major party candidates.

5 THE COURT: Why isn't it a basis for
6 distinguishing frivolous candidates from serious
7 candidates? In other words, if you're able to raise a
8 certain amount of money, then people take you seriously
9 and obviously you're taking yourself seriously.

10 MR. LOPEZ: Money is the only barometer of the
11 seriousness of the candidacy. They don't have to do this

12 for major party candidates. They could come up with some
13 other barometer. Remember, they've already established
14 their bona fides by being part of a major party. Then the
15 state didn't have to but they did come up with another
16 criteria which was raise what we think is a significant
17 amount of seed money. Well, or a modest amount of seed
18 money. I'll have time to address that for a second. But
19 it's not necessary for a minor party. They already
20 established they are bona fide. They spent a fortune
21 trying to get a place on the ballot. Signatures, if they
22 have ten percent, there's no need to show they have a
23 broad base. That's not required. They established their
24 bona fides. There's no jurisdiction for putting an
25 additional burden on them to raise the seed money

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1 contributions which are indeed substantial. For major
2 party candidates, it's not a burden.

3 Understand how this works, Your Honor. In the
4 Senate, under state statute a candidate has to raise
5 \$15,000, I believe it is, I think is the seed requirement.
6 He has to raise \$1,500 in the district. Guess where it's
7 going to be raised? Hartford Insurance Company -- goes
8 from the same special interests that the money has
9 historically been raised from. This is no problem for
10 them at all and it's going to be raised within the
11 legislative leadership committees, the same committees
12 that have raised hundreds, hundreds of thousands of
13 dollars in the past and funneled that money to candidates.
14 None of that is going to change, Your Honor. So the party
15 leaders and the legislative leaders are going to simply

16 refocus.

17 THE COURT: But why isn't it reasonable for the
18 state to say we're going to provide a substitute for
19 private campaign contributions but we're only going to
20 spend that money on candidates who have proven that there
21 is some alternative that we're replacing. In other words,
22 it's one thing to say, well, I got the signatures here,
23 I'm going -- I'm a real candidate and, therefore, I'm
24 getting the money, but why is it unconstitutional for the
25 state to say, well, but if you can't raise \$1,500 or

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1 whatever the limit is, you're not a real candidate in the
2 sense that we shouldn't be spending taxpayer money to
3 subsidize your campaign?

4 MR. LOPEZ: Your Honor, if you're going to use
5 money as proxy, then let me just point out that Buckley
6 didn't hold that. Buckley did not allow you to use money
7 as the proxy for third party, minor party candidates. It
8 upheld it for major party candidates in the primary. The
9 court was faced with a situation where minor or third
10 party candidates' money was used as a proxy for public
11 financing for minor. The court would have very possibly
12 come out differently because of what I think we can all
13 agree is what, you know, third party, minor party
14 candidates, working party, may have wide support at the
15 very core constituency, Your Honor, and under this program
16 in particular, you know, the requirement that a candidate
17 raise, say -- in the state senate context, our view is
18 that the legislation was adopted with the understanding
19 that the major party candidates would have no difficulty
20 raising this money with their prior apparatus, while the

21 minor party would benefit from the same advantage and it's
22 not -- and you're right, on its face it doesn't
23 discriminate but as a practical matter, it does
24 discriminate, Your Honor.

25 THE COURT: Okay.

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1 MR. LOPEZ: And in terms of evidence, Your
2 Honor, and I believe this, we would put on evidence
3 showing how the political system in fact works in
4 Connecticut and how it's going to play out. And to the
5 extent that people can engage in those predictions,
6 there's some ways that we know it's going to play out
7 which we haven't put before the court in affidavit form
8 but there are also ways that we believe it's going to play
9 out and we would put on evidence from party leaders, both
10 my clients and from the Democratic and Republican party,
11 party operatives and other political operatives about how
12 this system is going to actually play out. And we believe
13 at the end of the day that Buckley in fact is going to
14 endorse our claim and we'll ultimately prevail under
15 Buckley.

16 THE COURT: All right. Thank you.

17 MR. LOPEZ: Thank you.

18 MS. NOVAK: Your Honor, I'm down to three piles.

19 THE COURT: Okay, we're making progress.

20 MS. NOVAK: First, Your Honor asked a question
21 when the signatures would be due. They are due 25 days
22 before the primary and 40 days before the general
23 election. Plaintiffs argue that the test is whether the
24 CEP unfairly burdens nonmajor party candidates or benefits

25 major party candidates. I submit that the court can look

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1 at it that way but the Supreme Court has made it clear
2 that the test of whether it unfairly burdens, whether it
3 disadvantages them to such an extent below where their
4 political strength would be without -- with private
5 financing.

6 The plaintiffs keep focusing on the idea of a
7 potential candidate who makes a very good showing in the
8 current election and is not entitled to any money in that
9 election. First of all, this hypothetical in this very
10 narrow circumstance is something that if it happened in
11 the future, one can bring a pledge around. Certainly it's
12 not something that should be striking down the whole
13 system, especially when the idea of this happening is
14 speculation. This might never happen. There is no
15 reason, for example, that Governor Weicker, given the
16 money that he raised and the support that he had, there's
17 no reason to believe that he couldn't have gotten the ten
18 percent in petition signatures before the election.

19 THE COURT: Is it 10 percent or would it be
20 20 percent to get a full funding?

21 MS. NOVAK: It would be 20 percent for full, 10
22 percent for a third, 15 percent to get two-thirds. But he
23 had that opportunity. Now, of course, we can't know what
24 he would do and plaintiffs' idea that you can put evidence
25 before, of course, you can put evidence on. We don't know

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1 who's going to come up under this system and what they are
2 going to choose to do. Maybe somebody will try to get

3 20 percent of signatures in order to get funding for an
4 election. And as Your Honor points out, it is reasonable
5 for the ability to fund-raise to be a proxy for why public
6 money should be given as a substitute for private
7 campaigning. Plaintiffs really undermine their claims.
8 They say, well, major party candidates will be able to put
9 their whole machine behind it raising qualifying
10 contributions and their candidates will be able to
11 qualify. Well, if that's true, then they have this whole
12 machine to put behind a candidate and they would be able
13 to privately fund-raise. And the General Assembly was
14 capable of acknowledging that and setting up a system that
15 recognizes that.

16 However, plaintiffs don't explain why if major
17 party candidates have this machine that will work for
18 every candidate, why they are not working it now. Why
19 don't they raise money and run candidates in all these
20 districts and try to build up support there? Maybe they
21 don't because, let's say it's a heavily Republican
22 district and Democrats they didn't think would have a
23 chance and they didn't want to spend their time there. If
24 that's the decision they made, then they'll very likely
25 make that decision under the new system. However, we just

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1 don't know and we can't know until the system is in place.
2 There's no evidence that will become available that would
3 be able to show any sort of invidious discrimination
4 before the system is in place.

5 And the plaintiffs argue, well, they'll be able
6 to get the ten percent signatures. It's speculation.

7 It's not a practical consideration. We submit the same
8 thing, it's not a practical consideration that someone is
9 not able to get the ten percent but achieves a ten percent
10 showing in the polls or does not choose -- is not able to
11 do private financing to do that. So both of their
12 arguments, everything is based upon speculation and we
13 need to see how this plays out. Again, any of these
14 claims could be brought as a FECA claim in the future.

15 Plaintiffs also again argue about average
16 spending, but the Supreme Court has held that the term
17 "average spending" is not a good test to look at when
18 determining how much you need, a candidate needs to run in
19 a race. You need to look at how much is spent in
20 competitive versus non-competitive, open seat versus
21 incumbent, challengers, winners, and if you look at, as
22 detailed on pages six and seven in our reply brief, the
23 135 number that plaintiffs throw out really is not an
24 applicable number. You can't say that, how does \$135,000,
25 which they are eligible for if you don't take any of the

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1 factors of how the CEP works into account, how does that
2 relate to average spending? You need to look at a
3 particular race. And we have a Senate race that is
4 uncontested in both the primary and general election, they
5 would get \$25,000 for public funds for the whole cycle,
6 they'd get the \$15,000 in qualifying contributions. That
7 is a total of \$40,000 total, and the historical spending
8 in the uncontested Senate races is higher than that.
9 There are similar results. And again, it's all detailed
10 in our reply brief.

11 Finally, the organizational expenditures.

12 Organizational expenditures are defined in Connecticut
13 General Statute 9-601(25). These are not, as plaintiffs
14 stated, money that goes from party accounts into the
15 accounts of minor -- of any participating candidate. It
16 is money spent by the parties. There's no transfer of
17 funds. These aren't subsidies. They are funds spent by
18 the parties. Again, the types of funds that, additional
19 funds in Buckley -- they discussed under the presidential
20 system additional funds spent for primary, conventions,
21 all sorts of things that didn't go to other candidates
22 because they just don't have the built up machine.

23 THE COURT: But those organizational funds,
24 there's no limitation on what they can be used for. In
25 other words, could they be spent on an ad that is

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1 promoting a particular candidate as opposed to a
2 particular group of ideas or a party position? I'm trying
3 to figure out how, if there's a distinction there on the
4 organizational expenses, that would limit their effective
5 use as substitutes for a candidate's funds or individual
6 campaign funds.

7 MS. NOVAK: I'm looking, Your Honor.

8 (Pause)

9 MS. NOVAK: It has to do less with the nature of
10 a candidate for election to a public office and it has to
11 treat all candidates substantially similar. Like I said,
12 it's 9-601(25). And, again, they are limited for
13 legislative candidates' organizational expenditures. And
14 again, you know, either under the CEP or not, you know,
15 the general private system, parties make expenditures all

16 the time that benefit candidates and as it currently works
17 and under the strength of major parties, they have a lot
18 more to spend and they do a lot more for their candidates.

19 (Hands Counsel.)

20 MS. NOVAK: Yes, as long as they are not
21 coordinated they can list a candidate. Is that correct?

22 THE COURT: All right. Thank you.

23 MS. NOVAK: I forgot what the question was. I
24 think that's all, Your Honor. Unless Your Honor has
25 questions.

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1 THE COURT: All right. Anything further?

2 MR. LOPEZ: Just to apologize to the court if I
3 had led it to believe that the money actually flows back
4 into the candidate's campaign. It doesn't.

5 THE COURT: No, I didn't understand that. That
6 was the purpose of my question, was I could imagine that
7 there would be some limits on the use of political party
8 funds to propose a specific candidate as opposed to
9 promoting some general position or some party vote for
10 Democrat or vote for Republican as opposed to a vote for
11 Betty Smith or Tom Jones. That's what I was trying to get
12 at there, was how, even though it doesn't flow directly
13 back into the candidate's coffers, can those funds be used
14 to directly promote the candidate. You had certainly
15 implied that they could and I was trying to get the
16 defense point of view.

17 MR. LOPEZ: And, Your Honor, that is our
18 position, not only that but the candidate makes the money.
19 It goes into the party coffers and then the money can be
20 spent in effect by the candidate because they, contrary to

21 Mr. Zinn Rowthorn's last-minute note, the money, the
22 activities can in fact be coordinated. By definition they
23 are coordinated. Otherwise people would have, you know,
24 unlimited parties have their own First Amendment rights to
25 engage in noncoordinated expenditures. We wouldn't be

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1 objecting to that because this is a situation where the
2 candidate can raise the money and then participate in the
3 decision of how to spend the money, and that's why we call
4 it a -- and not just us, the media calls it the giant
5 loophole.

6 THE COURT: Okay.

7 MR. LOPEZ: Thank you.

8 THE COURT: All right. Good enough. Well, this
9 has been helpful. I appreciate the arguments today. Let
10 me ask a question unrelated to the motion to dismiss.
11 What is the current status of Counts Four and Five?

12 MR. LOPEZ: Yes, if I may, Your Honor. I'm glad
13 you raised that. We can maybe save a future phone call.
14 Count Four and Five involve the contribution limits.

15 THE COURT: Yes.

16 MR. LOPEZ: We are on schedule to have our
17 opening briefs due on July 13th and there's no provision
18 for when the replies would be due and responses would be
19 due. If the rules were to bind they would be 30 days. I
20 wouldn't be surprised if there's an extension.

21 THE COURT: Yes, local rule would be objections
22 21 days and replies ten days thereafter.

23 MR. LOPEZ: Okay. So that's where we are. I
24 have every reason to believe we're going to stick at the

25 very least to the July 13 date. And there is the related

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1 issue when the Attorney General moved to extend the
2 briefing deadlines, they did not simultaneously move to
3 push the dates on this phase of the case because discovery
4 starts today on phase two of the case, and it may make
5 some sense -- I'd be happy to hear from the Attorney
6 General to push those dates at least until after the
7 conclusion of the briefing on Count Four and Five, Your
8 Honor.

9 MR. ZINN ROWTHORN: Well, Your Honor, I think at
10 the time that I made the motion to extend the summary
11 judgment deadline, it didn't appear apparent that further
12 extension of the other deadlines would be necessary. I
13 still don't believe that's the case. I'm happy to talk
14 about it with Mr. Lopez and get back to the court if
15 there's some agreement that further extensions would be
16 necessary. I can tell you we're done with discovery on
17 that part of the case. I agree with Mr. Lopez that we're
18 moving towards filing our motions on time. So I don't,
19 right now I don't believe that there is a need to discuss
20 further deadlines, but we can get back to the court.

21 THE COURT: All right. The Count Four and Five
22 issue, I take it, has not been affected by any legislative
23 action. Is that --

24 MR. ZINN ROWTHORN: That is correct, Your Honor.
25 The session ends today so I don't anticipate that there

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1 will be.

2 THE COURT: Okay. Well, in terms of schedule,
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3 why don't the two of you confer and it's typically my
4 practice if you can reach an agreement, I'll allow the
5 change. If there's some dispute about how we ought to
6 proceed, perhaps a phone call would be in order.

7 MR. LOPEZ: Thank you.

8 MR. ZINN ROWTHORN: Thank you, Your Honor.

9 THE COURT: Are there other issues we should
10 talk about today? I assume that there are no significant
11 discovery disputes that have arisen?

12 MR. ZINN ROWTHORN: There are none that we're
13 aware of, Your Honor.

14 THE COURT: All right, good. Okay. Thanks
15 again. We'll stand in recess.

16 (Whereupon the above matter was adjourned at 12:15
17 o'clock, p. m.)

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C E R T I F I C A T E

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I, Susan E. Catucci, RMR, Official Court

Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

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