UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TOM OGNIBENE, et al. Plaintiffs, v. JOSEPH P. PARKES, S.J., et al., Defendants.	No. 08-CV-1335 (LTS) (TDK)

AMICUS CURIAE BRIEF OF CITIZENS UNION, THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, COMMON CAUSE/NY, THE LEAGUE OF WOMEN VOTERS OF NEW YORK CITY, AND NEW YORK PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF DEFENDANTS

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INTERESTS OF THE AMICI CURIAE

Citizens Union of the City of New York ("Citizens Union") is a nonpartisan good government group dedicated to making democracy work for all New Yorkers. Citizens Union serves as a civic watchdog, combating corruption and fighting for political reform. One of America's first good government groups, Citizens Union was founded in 1897 to fight the corruption of Tammany Hall, and, in 1901, Citizens Union helped to elect Seth Low as the City's first reform mayor. In its long history as a watchdog for the public interest and an advocate for the common good, Citizens Union has spearheaded efforts for campaign finance reform, improved voting procedures, City Charter revisions, home rule for New York City, and proportional representation. By informing the policy debate, Citizens Union works to ensure fair and open elections, honest and efficient government, and a civically-engaged public. Based on its belief that an informed citizenry is the cornerstone of a thriving local democracy, the Citizens Union Foundation publishes *Gotham Gazette*, a front row seat to New York City policies and politics.

The Brennan Center for Justice at N.Y.U. School of Law ("Brennan Center") is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice.[1] The Brennan Center's Money and Politics project works to reduce the real and perceived influence of special interest money on our democratic values. Project staff defend federal, state, and local campaign finance, public finance, and campaign disclosure laws in courts

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[1] This brief does not purport to convey the position of N.Y.U. School of Law. The Brennan Center's Chief Counsel, Frederick A.O. Schwarz, Jr., was formerly a defendant in this matter in his official capacity as chair of the Campaign Finance Board. Mr. Schwarz is no longer a member of the Board and was replaced as a named defendant by the current chair, Joseph P. Parkes.

around the country and provide legal guidance to state and local campaign finance reformers through counseling, testimony, and public education.

New York Public Interest Research Group, Inc. ("NYPIRG") was formed in 1973 as a non-profit, non-partisan student directed organization to bring about policy reforms while training students and other New Yorkers to effectively participate in civic life and public policy decision-making. NYPIRG has a long history of public education, organizing and advocacy for campaign finance reform, both in New York City and New York State. In 1988, NYPIRG successfully pressed for New York City's landmark campaign finance reform law, now a national model. Over more than two decades, NYPIRG helped win major improvements in the law, which now provides greater incentives for city candidates to seek small contributions from city residents and also limits contributions from individuals doing business with city government.

The League of Women Voters of the City of New York (the "League") is a nonpartisan political organization which encourages informed and active citizen participation in government, works to increase understanding of major policy issues, and influences public policy through advocacy and education. Voting is fundamental to citizenship and the League has worked on the issues surrounding exercise of the franchise. The League was an early and staunch supporter of the New York City Campaign Finance Law because the League, at the national, state and local level, considers public campaign financing laws to be important tools to protect, extend and encourage the use of the franchise.

Common Cause/NY is the statewide chapter of Common Cause, a nonpartisan, not-for-profit advocacy organization founded in 1970 in New York by John Gardner as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders

accountable to the public interest. With 400,000 members nationwide and 20,000 members in New York State, Common Cause supports open, honest, and accountable government at all levels, working to restore ethics in government and curb the influence of special interest money in politics. Common Cause/NY has a track record of three decades of good government victories, including playing a leading role in the enactment of the City's campaign finance system in the late 1980s, the amendments of the late 1990s, and most recently, the 2007 amendments at issue in this case.

All of the *amici* have a strong interest in this case. Representatives of Citizens Union, Common Cause/NY, the League and NYPIRG delivered testimony both during the hearings that preceded enactment of the same New York City Administrative Code provisions that Plaintiffs challenge here and recently to the New York City Campaign Finance Board regarding proposed rules for independent spending in City elections. Citizens Union, Common Cause/NY and NYPIRG previously submitted a joint *amicus* brief to this Court in this action. The Brennan Center's chief counsel, Frederick A.O. Schwarz, Jr., chaired the New York City Campaign Finance Board from 2003 to 2008, and the Brennan Center has regularly provided testimony to the Board, including most recently regarding proposed rules for disclosure of independent spending in City elections. Ensuring that the government of New York City will maintain the ability to support open and accountable government by means of effective campaign finance laws is critical to the missions of these organizations.

PRELIMINARY STATEMENT

At issue here are two aspects of New York City's public financing program: one which conserves taxpayer dollars by reducing the maximum amount of public matching funds available to participating candidates running in non-competitive races, and another which releases candidates from voluntary expenditure limits in particularly expensive races. These provisions are entirely compatible with the First Amendment's robust protection of political speech.

As explained by the Defendants, and as *amici* set forth in more detail below, the provision in the City's public funding program that reduces public financing in non-competitive races—colloquially referred to as the "Sure Winner Provision"—prevents no one from speaking, imposes no burdens on any political actor's protected speech, and is entirely consistent with the First Amendment. And, as *amici* Brad Lander and Mark Winston Griffith explain in a separate *amicus* brief, the City's decision to impose or remove a voluntary spending cap on participating candidates creates no burden on Plaintiffs' First Amendment rights, and does not impede Plaintiffs' ability to participate fully in political campaigns. Accordingly, the provisions at issue here should be upheld in their entirety.

Amici submit this brief to demonstrate that binding precedent—and logic—compel the conclusion that the Sure Winner Provision is constitutional. In attempting to avoid this conclusion, Plaintiffs' lone argument is that the Sure Winner Provision supposedly cannot be distinguished from the triggered matching funds struck down by the Supreme Court in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), and by the Second Circuit Court of Appeals in *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010), *cert. denied sub nom. Green Party of Conn. v. Lenge*, 131 S. Ct. 3090 (2011). Plaintiffs are mistaken. The Second Circuit made the precise distinction between matching fund triggers

and sure winner provisions in *Green Party* when it upheld a Connecticut law analogous to the Sure Winner Provision at the same time it struck down the state's triggered matching funds.

The Second Circuit upheld Connecticut's sure winner law because there are constitutionally salient differences between such provisions and the types of triggered matching funds that have been held to impose unconstitutional burdens on speech. Unlike matching fund triggers, which aimed to equalize spending in political races, the Sure Winner reduction does not have the intent or effect of "leveling the playing field." Instead, the Sure Winner Provision exists solely to save public money in objectively non-competitive races. The constitutional concerns raised by *Bennett* and *Green Party* are, therefore, absent here.

The Court should follow the Second Circuit's analysis in *Green Party* and uphold the Sure Winner Provision – not only because *Green Party* is binding precedent, but because the Second Circuit was correct as a matter of logic, law, and fact. Withholding public campaign funds from otherwise-eligible but overwhelmingly dominant candidates imposes no burdens on political speech, is fully consistent with the First Amendment, and helps promote the compelling public interest in open and accountable government.

STATEMENT OF FACTS

The Sure Winner Provision, N.Y.C. Admin. Code § 3-705(7), was implemented to improve the fiscal responsibility of New York City's highly successful public financing program by limiting unnecessary grants in non-competitive elections. The provision limits the amount of money given to a participating candidate to twenty-five percent of the otherwise available public funds until one of the various indicia of competitiveness is met. Once one of the competitiveness thresholds is satisfied, the Sure Winner Provision allows the participating candidate to access the full amount of public funds earned. The provision does not penalize self-funded candidates. It does not provide "rescue" or "bonus" funds, but simply requires that certain competitiveness

requirements be met before participating candidates become eligible for the amount of public funds the candidate would otherwise be eligible to receive.

The legislative history of § 3-705(7) confirms that the provision is meant to limit public expenditures in non-competitive races, not to "rescue" candidates facing self-financed or any other opponents, or to provide supplemental funds to candidates facing high-spending opposition. The City's voluntary public financing program was enacted in 1988 to enable and encourage New York City citizens to compete for public office regardless of their personal wealth or access to large contributions and to reduce the appearance of corruption created by reliance on large donations. 1988 N.Y.C. Legis. Ann. 13. The Sure Winner Provision was first added to the public financing program in 2003 and later amended in 2007 to its current form. Both enactments were intended to protect the public fisc, and neither had the intent nor effect of discouraging the exercise of First Amendment freedoms.

The Introduction of the Sure Winner Provision in 2003

Prior to the 2003 amendment, candidates were ineligible to receive public funds if they ran unopposed, but could receive the full amount of public funding even if they faced merely "token opposition." N.Y.C. Campaign Fin. Bd., *An Election Interrupted . . . An Election Transformed: The Campaign Finance Program and the 2001 New York City Elections*, Part I, at 159 (2002) ("C.F.B. 2001 Report"). The Campaign Finance Board ("the Board"), tasked with administering New York City's campaign finance laws, noted that it was "wasteful of government resources to provide public matching funds to candidates who have only minimal opposition." *Id.* at 159. Because of this waste, the Board "urge[d] the City Council to consider what levels of opposition are meaningful" to prevent overwhelmingly dominant candidates from receiving full public grants. *Id.* at 160. The impetus behind the Sure Winner Provision, therefore, was not to amplify the voice of candidates facing high-spending opposition, or to in

any way amplify the voices of publicly funded candidates relative to their opposition. Rather, it was simply to avoid the investment of limited public resources where they were entirely unnecessary to further the goals of the public financing program.

With Local Law 12 of 2003, the New York City Council enacted the first Sure Winner Provision with the express intent to "halt[] unnecessary expenditures of public matching funds." 2003 N.Y.C. Legis. Ann. 91. The law limited public funds to twenty-five percent of the total allowed unless the participating candidate or her opponent satisfied certain conditions. *See* N.Y.C. Campaign Fin. Bd., *Public Dollars for the Public Good: A Report on the 2005 Elections* 78 (2006) ("C.F.B. 2005 report"). This partial award reduces the public cost of the program while still allowing participating "sure winner" candidates sufficient funding to conduct voter outreach without relying on potentially corrupting private fundraising. The law established certain additional objective criteria, such as whether an opposing candidate also qualified for public funds, to determine whether a particular candidate was eligible for the full amount of matching funds instead of a reduced amount of public matching funds. *See* 2003 N.Y.C. Local Law No. 12, § 6. A participating candidate could also submit a statement of need to restore eligibility for the maximum amount of public matching funds, and the Board had no discretion to deny the request. *See* 2003 N.Y.C. Legis. Ann. 94 n.* ("The Board does not have the discretion to deny such a request.").

The original Sure Winner Provision was perceived as relatively ineffective at restraining unnecessary public expenditures. In commenting on the law's initial formulation, the *New York Times* lamented that "candidates ha[d] . . . become tremendously efficient at filling enormous war chests – much of it with taxpayer money from matching funds – even when they don't have a real race on their hands," adding that "[a]ny revisions to the law need to eliminate such

frivolous public financing." Editorial, *Competitive City Elections*, N.Y. Times, Oct. 3, 2004, *available at* http://www.nytimes.com/2004/10/03/opinion/opinionspecial/campaignfinancea.html. The *Times* was far from alone in reporting that candidates who faced uncompetitive races were accumulating public funds.[2] Others complained that more funds than necessary had gone to candidates who were inevitably going to—and did—win by substantial margins. *See, e.g.*, Editorial, *City Campaign Finance Shuffle*, Crain's N.Y. Bus., Nov. 10, 2003, at 8.

The 2007 Amendments

Thus, the concerns that led to the passage of Local Law 12 of 2003 continued in the following years. The first page of the Board's 2003 post-election report expressed concern about "subsidizing sure winners." N.Y.C. Campaign Fin. Bd., *2003 City Council Elections*, Vol. 1, at 1 (2004) ("C.F.B. 2003 Report"). Two years later, the Board again noted, "[t]o many political observers, one of the most troubling aspects of the Program is the fact that public funds are spent to subsidize the campaigns of 'sure winners.'" C.F.B. 2005 Report at 131. The Board urged the City Council to set out more clearly a basis on which the Board could deny a request for the full matching funds if the election was not competitive. *Id.* ("To ensure that excessive amounts of taxpayer dollars are not spent in races without serious competition, the Board recommends revising the Program to eliminate Statements of Need . . . .").

Numerous individuals and organizations, including Common Cause New York, New York Civic, New York Public Interest Research Group ("NYPIRG"), the League of Women

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[2] One incumbent candidate, for example, claimed he wanted the full grant amount to fight "the entrenched political machine." Mark Berkey-Gerard, *Campaign War Chests*, Gotham Gazette, Nov. 3, 2003, http://www.gothamgazette.com/article/fea/20031103/202/617. The full grant was provided, and the incumbent went on to win the primary election with 84 percent of the vote; his opponent spent a mere $1,130. *Id.*; N.Y.C. Bd. of Elections, Primary Election September 9, 2003, at 53-55, http://vote.nyc.ny.us/pdf/results/2003/primary/2003primaryrecapsall.pdf.

Voters of NYC, Citizens Union, and City Council members voiced concerns that excessive public money was still being wasted on races in which publicly funded candidates faced no meaningful competition. Campaign Fin. Bd. 2005 Post Election Hearing, Part 1, 70-72, 113-28, 136-39, 153 (2005); *id.*, Part 2, at 26-27, 61-64, 84-85, 107. Citizens Union emphasized the need for restraints on funding to candidates in uncompetitive races, saying "Establishing fair and effective requirements aimed at curbing the outlay of public funds to candidates facing minimal opposition is a prudent and necessary cost-saving provision. . . ." *Id.*, Part 2, at 61. NYPIRG Senior Attorney Gene Russianoff denounced providing full funding in uncompetitive races as a "big waste." *Id.*, Part 1, at 137. The League of Women Voters stated, "Voters and taxpayers must have confidence that the system is . . . [benefitting the public] rather than . . . the war chests of incumbents who have little opposition . . . ." *Id.*, Part 1, at 153.

The City Council took note of the "public scrutiny" and the calls from "editorial boards" and "good government groups" for "stricter standards for receipt of public funds" when passing the 2007 amendments to the Sure Winner Provision. 2007 N.Y.C. Legis. Ann. 228. Testimony at the hearings on Local Law 34 of 2007 confirms the intent to curb unnecessary expenditure of public funds in uncompetitive races. The Mayor's Office noted that spending public money on non-competitive elections is "often cited as an example of wasteful spending." Hearing on N.Y.C. Local Law No. 34 of 2007 before the N.Y.C. Council Comm. on Governmental Operations (June 12, 2007) (statement of Anthony W. Crowell, Counselor to the Mayor). The Board's testimony noted that "the provisions meant to limit the amount of matching funds provided to participating candidates with nominal opposition should provide taxpayers with greater protection against the waste of public resources." Hearing on N.Y.C. Local Law No. 34 of 2007 before the N.Y.C. Council Comm. on Governmental Operations (June 12, 2007)

(statement of Amy Loprest, Executive Director, N.Y.C. Campaign Fin. Bd). Citizens Union also stated that the purpose of the amendment was to "mak[e] it more difficult for incumbents to receive matching funds in noncompetitive elections." Hearing on N.Y.C. Local Law No. 34 of 2007 before the N.Y.C. Council Comm. on Governmental Operations (June 12, 2007) (statement of Doug Israel, Director of Public Policy and Advocacy, Citizens Union). Significantly, the purpose was never to discourage expenditures by non-participating candidates or to "level the playing field." As Citizens Union commented, the proposed 2007 amendments were "*not* the place to take up [the] issue" of "candidates participating in the program who face a well-funded or self-funded opponent." *Id.* (emphasis added).

Responding to these concerns, in 2007, the City Council enacted "stricter standards for receipt of public funds," bringing the Sure Winner Provision to its current incarnation. 2007 N.Y.C. Legis. Ann. 228. By "improving the definition of 'non-competitive elections,'" the Council hoped to "rein in the use of matching funds in noncompetitive elections." 2007 N.Y.C. Legis. Ann. 215, 228. The amended law required candidates who wished to access full public funds on the basis of a Statement of Need to certify and provide documented evidence that one of seven conditions was true about the candidate's opponent.[3] The law also removed the automatic provision of full funding to candidates whose opponents qualified for public funds. 2007 N.Y.C. Local Law No. 34 § 22. After the amendment, the major way for a participating

[3] The conditions are various and include: (i) a non-participating candidate or a limited participating candidate with the ability to self-finance; (ii) a candidate who has received significant endorsements; (iii) a candidate who has had significant media exposure in the year preceding the election (iv) a candidate who has received 25 percent or more of the vote in an election within the last eight years; (v) a candidate whose name is similar to the candidate's so as to result in confusion among voters; (vi) a candidate who is a chairman, president, or district manager of a community board; (vii) a candidate whose close family member holds or has held elective office in the area within the past ten years. *See* 2007 N.Y.C. Local Law No. 34, § 22 (codified at N.Y.C. Admin. Code § 3-705(7)(b) (amended)).

candidate to automatically qualify for the full amount of matching funds, without having to file a Statement of Need, was for the opponent's expenditures or contributions to total twenty percent of the applicable expenditure limit. This condition applied regardless of whether the opponent was a participant or not. The public funds would also be given automatically in the case of a primary or special election with no incumbent.

The legislative history is clear that the provisions of § 3-705(7) are intended to limit public spending on non-competitive races. They are not intended to provide a "rescue" or a "bonus" to candidates facing self-financed opponents any more than it is intended to provide a "rescue" or "bonus" to candidates facing opponents with a similar name. N.Y.C. Admin. Code § 3-705(7)(b)(5). The main provision which allows full public funding applies with equal force to candidates who face opponents that participate in the program and candidates who face traditionally financed and self-financed opponents. N.Y.C. Admin. Code § 3-705(7)(a).

The Sure Winner Provision has had the desired effect—increasingly so after its amendment in 2007. As initially enacted in 2003, it helped limit the use of public funds. C.F.B. 2003 Report at 48 ("The decline in participants receiving the maximum in 2003 can be explained by a variety of factors, including . . . the changes in the Act that limit the public funds a participant can receive unless s/he is opposed by an opponent who receives public funds or meets certain fundraising or spending levels."). In 2005, some candidates received less funding as a result of the Sure Winner Provision, saving the city $135,000. C.F.B. 2005 Report at 79. And in 2009, after it was amended to require candidates submitting a Statement of Need to satisfy specific criteria, the Sure Winner Provision potentially saved the city almost $600,000.[4] The

[4] The maximum public funding for a city council candidate in 2009 was $88,550. N.Y.C. Campaign Fin. Bd., *New Yorkers Make Their Voices Heard: A Report on the 2009 Elections* 23 (2010) ("C.F.B. 2009 Report"). Three-fourths of this amount was not subject to possible

candidates ineligible for full public funding all posted landslide victories, underscoring that spending public money in those races would have been wholly unnecessary.[5]

ARGUMENT

Voluntary public campaign financing is constitutional, as many cases confirm. *E.g.*, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011); *Buckley v. Valeo*, 424 U.S. 1, 86 (1976); *Green Party of Conn. v. Garfield*, 616 F.3d 213, 228 (2d Cir. 2010) (observing that *Buckley* dismissed the First Amendment challenge to public financing "out of hand"). Public financing "use[s] public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley*, 424 U.S. at 92-93; *Green Party*, 616 F.3d at 227. Just last year, the Supreme Court reaffirmed that "governments 'may engage in public financing of election campaigns' and that doing so can further 'significant governmental interest[s],' such as the state interest in preventing corruption." *Bennett*, 131 S. Ct. at 2828 (quoting *Buckley*, 424 U.S. at 57 n.65, 92-93, 96). The underlying interest in preventing corruption, which *amici* have sought to advance in many contexts, has also been recognized by the courts in this very case. *Ognibene v. Parkes*, 671 F.3d 174, 186 (2d Cir. 2011), *cert. denied*, 2012 U.S. LEXIS 4749 (June 25, 2012).

Just as the constitutionality of enacting a public financing system is not in doubt, neither is the state's authority to condition the receipt of public funds on objective and fairly-applied

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distribution as a result of the Sure Winner Provision, equaling $66,412.50 per candidate. Multiplying this value by the nine candidates subject to the Sure Winner Provision yields $597,712.50, the amount that could have been distributed had these sure winner candidates received the maximum public grant otherwise available.

[5] The median 2009 sure winners who were subject to the cap received about 89% of the votes. C.F.B. 2009 Report at 119. The ineligible candidate who received the smallest vote share garnered 74.6% of the votes, *id.*, winning the election by over a 49 point margin, *See* N.Y.C. Bd. of Elections, Statement and Return Report for Certification, General Election 2009, Member of the City Council – 25th Council District 4, *available at* http://vote.nyc.ny.us/pdf/results/2009/General/7.21Queens25CouncilRecap.pdf.

eligibility criteria. Such criteria are needed to help a public financing program "distinguish[] between plausible candidacies and hopeless candidacies." *Green Party*, 616 F.3d at 226 n.6 (citing *Buckley*, 424 U.S. at 96). Based on this distinction, a public financing system may appropriately calibrate the amount of money available to candidates with minimal—or, as is the case here, *overwhelming*—public support. *See Buckley*, 424 U.S. at 97 (upholding federal law that provided disparate funding to major-party and minor-party candidates); *Green Party*, 616 F.3d at 231, 239 (upholding Connecticut public financing law that set different funding levels for major-party and minor-party candidates). This is why the Second Circuit upheld a Connecticut public financing law that, like the Sure Winner Provision, reduces grants to major-party candidates with nominal or minor-party opponents, but restores the full public financing grant if the minor-party candidate receives contributions above a certain threshold. *See* Conn. Gen. Stat. § 9-705(j)(3), (4); *Green Party*, 616 F.3d at 239-41 (affirming constitutionality of Connecticut's criteria for distributing public funds, including Conn. Gen. Stat. § 9-705(j)). New York City's Sure Winner Provision fits squarely within this authority and should be upheld by this Court.

I. The Sure Winner Provision Is an Eligibility Criterion that Permissibly Limits a Candidate's Receipt of Public Funding.

Plaintiffs grossly mischaracterize the Sure Winner Provision as providing "extra rescue funds," beyond the "usual matching funds" or "ordinarily" available funding, to certain participating candidates.[6] In reality, this provision is simply one of a series of eligibility criteria designed to establish whether a participating candidate warrants full public funding. The legislative history recited above makes clear that *all* publicly financed candidates are eligible for full funding *unless* their race fails to meet one of the indicia of competitiveness specified in the

[6] *See, e.g.*, Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment ("P. Mem.," Docket # 135), at 4.

Sure Winner Provision. Far from being an unconstitutional attempt to "level the playing field," as Plaintiffs allege (*e.g.*, P. Mem. at 9), the Sure Winner Provision simply reduces public expenditures in races that are so uncompetitive as to reduce the public's interest in fully funding candidates.[7]

The history and details of the funding system bear this out. In 2001, the maximum public funding a City Council candidate could receive was $75,350. In 2002, this amount was automatically increased to $82,500 to account for inflation over the past four years. C.F.B. 2003 Report at 33. *See also* N.Y.C. Admin. Code § 3-706(1)(e) (2002), *amended by* 2004 N.Y.C. Local Law No. 58; 2007 N.Y.C. Local Law No. 34. Were Plaintiffs' portrayal of the public funding program accurate, it would mean that by enacting the Sure Winner Provision in 2003 the City Council actually *lowered* the maximum public funding to $20,625—25 percent of $82,500—and then added a bonus matching funds provision to allow candidates to receive up to an additional $61,875. But the City Council did *not* amend the part of the ordinance that sets the maximum public funding amounts at the time it enacted the Sure Winner Provision.[8] Plaintiffs' theory thus strains credulity, particularly where a contemporaneous report stated that the amendment was "an effort to protect the public fund from unnecessary expenditures" and was "in no way attempting to repeal the matching funds provisions." Report of the Governmental

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[7] Plaintiffs hardly address the contours of the relief they seek. Ironically, if the Court declared the Sure Winner Provision unconstitutional, as requested, the effect would be that the full public grant would be available to every participating candidate. The fact that Plaintiffs are effectively asking for a remedy that would increase public campaign funding shows how far Plaintiffs' claim is from presenting any valid analogy to cases in which ostensible efforts to "level the playing field" were at issue.

[8] *See* 2003 N.Y.C. Local Law 12 (failing to amend the dollar amounts in N.Y.C. Admin. Code § 3-706(1)(a)). The maximum public financing grant is set by N.Y.C. Admin. Code § 3-705(2)(b) to fifty-five percent of the current expenditure limit found in § 3-706(1)(a). The expenditure limits are in turn automatically adjusted by § 3-706(1)(e) every four years.

Affairs Division: Proposed Int. No. 171-A and Proposed Int. No. 313-A, at 11-12 & n.* (Jan. 29, 2003). The only reasonable explanation, then, is that in adopting the Sure Winner Provision, the City Council merely added a new eligibility criterion to the public financing program.

In other words, New York City simply exercised its authority to establish reasonable conditions and eligibility criteria for receiving public matching funds. When viewed appropriately in this light, the Sure Winner Provision is comparable to the numerous other types of conditions imposed upon publicly financed candidates in different systems, which may reduce or increase the size of a public financing grant based on an objective and nondiscriminatory evaluation of a candidate's level of public support. There are numerous examples of such criteria: public financing programs have conditioned the size of a candidate's full or partial grant on the candidate's ability to collect voter signatures,[9] the candidate's ability to collect small donor contributions,[10] whether a candidate's party exceeded a threshold level of support in the previous election,[11] and (as is the case here) whether or not a candidate faces a competitive opponent.[12] Tying the distribution of funds to these eligibility thresholds is a necessary and

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[9] Conn. Gen. Stat. Ann. § 9-705(c)(2), (g)(2).

[10] Ariz. Rev. Stat. Ann. § 16-950(D); Conn. Gen. Stat. Ann. § 9-704; Haw. Rev. Stat. § 11-428(4)-(5); Me. Rev. Stat. tit. 21-A, § 1125(3); N.M. Stat. Ann. §§ 1-19A-2(I), -4(A); R.I. Gen. Laws Ann. 17-25-20(6)(ii); Vt. Stat. Ann. tit. 17, § 2854(a); W. Va. Code Ann. § 3-12-9(a);.

[11] Conn. Gen. Stat. Ann. § 9-705(c)(1), (g)(1). *See also* Minn. Stat. § 10A.31(5a) (dividing up party-based public funds based upon percentage of votes received in previous election in district).

[12] Conn. Gen. Stat. § 9-705(j)(4) (reducing grant to 60% if candidate is only opposed by minor-party or eligible petitioning candidate, but restoring the full grant if the minor-party or petitioning candidate raises money above a certain competitive threshold). *See also* Conn. Gen. Stat. § 9-705(j)(3) (reducing grant to 30% if candidate is unopposed); Fla. Stat. Ann. § 106.33 (indicating unopposed candidates are ineligible for public funds); Me. Rev. Stat. tit. 21-A, § 1125(8-A)(C) (reducing grant to 50% if gubernatorial primary candidate is unopposed); Md. Code Ann. Elec. Law § 15-109(b)(2)(viii)(1); Md. Code Regs. 33.14.02.02(B)(2) (prohibiting distribution to unopposed general election candidates); Mass. Gen. Laws Ann. Ch. 55C, §§ 4, 6 (requiring that a candidate be opposed to receive public funding); Minn. Stat. § 10A.31(7)(a)(3)

prudent part of any public financing program, and is plainly constitutional. For just as the government's "interest in not funding hopeless candidacies with large sums of public money necessarily justifies the withholding of public assistance from candidates without significant public support," *Buckley*, 424 U.S. at 96-97, so too the government's interest in not providing sure winners with large sums of public money justifies withholding public assistance in non-competitive races, *see also id.* at 97 ("The Constitution does not require Congress to treat all declared candidates the same for public financing purposes.").

Moreover, the Second Circuit has already upheld a Connecticut law that includes a provision analogous to the Sure Winner Provision. In Connecticut, a participating candidate without a general election opponent is only eligible for 30% of the usual public financing grant. *See* Conn. Gen. Stat. § 9-705(j)(3). A participating candidate with only a minor-party or "petitioning party" opponent is only eligible for 60% of the usual public financing grant. *See id.* § 9-705(j)(4). However, as under New York City's Sure Winner Provision, the law restores eligibility for full funding to the participating candidate when his or her opponent indicates the existence of a competitive race by raising money above a certain threshold. *Id.*

The Second Circuit upheld this aspect of Connecticut's public financing law—reversing a district court ruling that § 9-705(j)(4) unconstitutionally discriminated against minor-party candidates whose fundraising "triggers" a participating candidate's receipt of a full public grant. *Green Party of Conn. v. Garfield,* 648 F. Supp. 2d 298, 349 & n.59 (D. Conn. 2009), *aff'd in*

(permitting distribution of funds only if candidate was opposed in primary or general election); N.C. Gen. Stat. § 163-278.65(b)(1), (3) (indicating unopposed candidates are ineligible for public funds); N.M. Stat. Ann. § 1-19A-13(C), (E) (reducing grant to 50% if candidate is unopposed, but restoring full grant if an independent or minor party candidate later qualifies to appear on the ballot); Vt. Stat. Ann. tit. 17, § 2855(c) (prohibiting grants to uncontested general election candidates and unsuccessful primary election candidates seeking funds for the general election); W. Va. Code Ann. § 3-12-11(a)(2) (reducing grant to 25% in an uncontested primary election); *Id.* § 3-12-11(b)(2) (reducing grant to 10% in an uncontested general election).

part, rev'd in part, 616 F.3d 213 (2d Cir. 2010). The Court of Appeals acknowledged that Connecticut's public financing eligibility criteria—like New York City's—reduce a candidate's full grant "in several circumstances, such as when a participating candidate is unopposed or is opposed by only a minor-party candidate," but restore the full grant when that minor-party opponent raises money above a certain threshold. *Green Party*, 616 F.3d at 240 (citing Conn. Gen. Stat. § 9-705(j)); *see also id.* at 221 (explaining these provisions of Connecticut law). Nevertheless, the Second Circuit recognized that just as government may "distinguish[] between plausible candidacies and hopeless candidacies," *Green Party*, 616 F.3d at 226 n.6 (citing *Buckley*, 424 U.S. at 96)), and withhold funding from "hopeless candidacies," it may similarly withhold public assistance from candidates with *overwhelming* public support. Critically for this case, the court reached this conclusion even while simultaneously finding that Connecticut's matching fund triggers violated the First Amendment. *Id.* at 242.

The Second Circuit acknowledged that Connecticut treated major party candidates differently from minor party candidates and other upstart challengers. But the court derived four principles from *Buckley* to conclude that the state had not imposed an "unfair" or "unnecessary" burden on any candidate's political opportunity:

> (i) A public financing system may establish qualification criteria that condition public funds on a showing of "significant" public support. *See Buckley,* 424 U.S. at 96, 96 S. Ct. 612.
>
> (ii) There is a range of permissible qualification criteria, and although a public financing system must be tailored to avoid an unfair or unnecessary burden on the political opportunity of a party or candidate, a court must defer to a legislature's choice of criteria so long as those criteria are drawn from the permissible range. *See id.* at 103–04, 96 S. Ct. 612.
>
> (iii) In assessing whether a burden is unfair or unnecessary, the central question is whether the *plaintiffs* have shown that the system has reduced the "strength" of minor parties below that attained before the system was put in place. *Id.* at 98–99, 96 S. Ct. 612.

> (iv) To determine whether the "strength" of minor parties has been reduced, a court should avoid speculative reasoning and instead focus on the evidence, if any, of the system's "practical effects." *Id.* at 101, 96 S. Ct. 612.

Green Party, 616 F.3d at 233-34.

Based on these four principles, the Second Circuit upheld Connecticut's qualification criteria and funding distribution formulae, *see generally id.* at 231-42, including Connecticut's decision to reduce grants for major-party candidates facing no opposition or only minor-party opponents, *see id.* at 240 (citing Conn. Gen. Stat. § 9-705(j)). As the *Green Party* court explained, uncompetitive minor-party candidates (who are in the exact same position as those candidates who face overwhelming odds in New York City's "sure winner" districts) were not injured by Connecticut's funding criteria, because

> if a district is uncompetitive, it is, by definition, a race in which minor-party candidates have no realistic chance of winning. Thus, it is difficult to see how the political opportunity of a minor-party candidate in such a district could be unfairly or unnecessarily burdened by providing his or her opponent with additional funds.

Green Party, 616 F.3d at 241.

Just like the minor-party candidates in *Green Party*, the Plaintiffs here lack any credible claim that they have been injured or had their political opportunity burdened by the Sure Winner Provision. The attempts to articulate such a claim in their complaint and Local Rule 56.1 statement consist of the barest legal conclusions. (*E.g.*, Docket # 137, ¶ 22.) Indeed, the Sure Winner Provision can hardly be described as a burden at all—it simply allows candidates to receive the public funds for which they would otherwise be eligible in competitive races. Additionally, the public funds only match contributions received by the participating candidate, so, unlike *Bennett*, Plaintiffs' planned spending does not directly trigger the release of any public funds. Thus, the Sure Winner Provision places no burden on speech or on political opportunity.

Neither is there any discriminatory aspect of the Sure Winner Provision. Section 3-705(7)(a), which allows for full public funding once an opponent has met the spending or contribution thresholds, applies equally to self-financed and publicly-financed opposition. Thus, it cannot operate as a discriminatory burden on self-financed candidates' political speech. The threshold is low enough that it will be reached in any race that is even faintly competitive, meaning there is little pressure, if any, to spend below the threshold to avoid the opponent's ability to receive matching funds. Section 3-705(7)(b), which qualifies a candidate for full matching funds on submission of a Statement of Need certifying one of several conditions, simply puts the publicly-financed candidate in the same position as if the Sure Winner Provision did not exist.[13] Neither of these sections burdens Plaintiffs' political speech or acts as an additional reward for participating in public financing.

In short, New York City indisputably has the authority to determine which participating candidates are eligible to receive full public financing and to distribute funds accordingly, and thus to promote accountable, corruption-free governance. That authority includes the right to reduce public financing based on an objective and nondiscriminatory evaluation of a candidate's level of public support—including, as *Green Party* holds, whether the candidate faces a competitive election.

II. The Sure Winner Provision Is Not an Unconstitutional Effort to "Level the Playing Field."

Plaintiffs argue that the Sure Winner Provision must be deemed unconstitutional under *Bennett*. But the authority cited by Plaintiffs stands for the proposition that the First Amendment

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[13] As noted above, *see supra* note 7, Plaintiffs ask the Court to declare the Sure Winner Provision unconstitutional facially and as applied, even though enjoining this statute would simply make *all* candidates potentially eligible to receive a full public grant. That Plaintiffs have not proposed an appropriate remedy for their alleged injury further suggests the absence of any burden on Plaintiffs' constitutional rights.

bars government from burdening political speech in order to "level the playing field." *See Bennett*, 131 S. Ct. at 2825 ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field.'" (citing *Citizens United v. FEC*, 130 S. Ct. 876, 904-05 (2010)); *Davis v. FEC*, 554 U.S. 724, 740 n.7 (2008) (striking down federal law that raised contribution limits only for non-self-financed candidates because "the chief interest proffered in support of the asymmetrical contribution scheme—leveling electoral opportunities—cannot justify the infringement of First Amendment interests."). Because the Sure Winner Provision has neither the intent nor the function of "leveling the playing field," that constitutional principle is not implicated here.

All of the authority Plaintiffs rely on involve laws that provide an extra benefit to candidates facing highly competitive opposition—through the "unprecedented" imposition of "asymmetrical" contribution limits in *Davis*, 554 U.S. at 729, 738-39,[14] and through matching funds provided in direct response to an opponent's high spending in *Bennett*, *Green Party*, and other cases, *see Bennett*, 131 S. Ct. at 2825 ("There is ample support for the argument that the matching funds provision seeks to 'level the playing field' in terms of candidate resources."); *Scott v. Roberts*, 612 F.3d 1279, 1281-82, 1293 (11th Cir. 2010) (referring to "excess spending subsidy" that "levels the electoral playing field" where traditionally financed opponent has "funded a substantial campaign"); *Day v. Holahan*, 34 F.3d 1356, 1361 (8th Cir. 1994) (referring to "'bonus' subsidy"); *N.C. Right to Life Political Action Committee v. Leake*, No. 5:11-CV-472-FL, slip op. 2012 WL 1825829 at *3 (E.D.N.C. May 18, 2012) ("The statute is intended to

[14] *Davis*, which struck the federal "Millionaire's Amendment," is also inapposite to the case at hand because the law imposed these "asymmetrical" contribution limits on two candidates who were similarly situated but for the fact that one candidate was using his own money to finance his candidacy. *See Davis*, 554 U.S. at 729, 738-39. In this case, any distinctions between the fundraising rules applied to different candidates are permissible requirements created by one candidate's voluntary acceptance of public financing.

ensure that campaigns are supported on a fair and equal basis . . . . "). This case is quite to the contrary. The facts show that the Sure Winner Provision only applies in races where there is an *absence* of credible electoral competition and where the provision of full public financing would merely dissipate limited City resources with no benefit to the public.

The Second Circuit recognized the difference between a sure winner law and the field-leveling statutes relied on by Plaintiffs when it *upheld* a Connecticut law which, as explained above, contained a provision analogous to New York City's Sure Winner Provision. Notably, the Second Circuit did so at the same time—and before the Supreme Court decided *Bennett*—that it struck down as unconstitutional Connecticut's trigger provisions, including a trigger that awarded "additional public money" to a participating candidate whose opponent spent above an "excess expenditure" threshold. *Green Party*, 616 F.3d at 244-45. Plaintiffs' argument that the Sure Winner Provision is indistinguishable from these provisions that trigger supplemental funds cannot be reconciled with the Second Circuit's decision in *Green Party*.

The City has already conceded that the actual "bonus" provisions in its public funding law, N.Y.C. Admin. Code §§ 3-706(3)(a)(ii), 3-706(3)(a)(iii), 3-706(3)(b)(ii), 3-706(3)(b)(iii), are unconstitutional under *Bennett* and *Green Party*, and it has stipulated that those provisions must be enjoined. Stipulation at 1, ECF No. 131. But unlike the New York City "bonus" provisions and the triggered matching funds in Arizona and Connecticut, the Sure Winner Provision does not have either the intent or effect of equalizing the financial resources of candidates. It instead only serves to protect scarce public resources. Instead of trying to equalize funds among two plausible candidates, the Sure Winner Provision prevents significant amounts of funds from being provided to candidates who face no real competition at all.

The legislative history makes this motivation clear. As explained above, the City enacted the Sure Winner Provision to respond to the complaint (voiced by *amici* and others) that its public financing program wasted too much money in uncompetitive races. *See supra* pp. 8–9. And the provision has worked as intended. The candidates affected by the legislation were indeed sure winners who all won their races by substantial margins. *See supra* pp. 11–12 and note 5. Indeed, even the sure winner who received the lowest percentage of votes garnered nearly three of every four ballots cast, recording an impressive 74.6% of the vote. *See supra* note 5. Awarding the sure winners access to the maximum available level of public matching funds would have pointlessly drained the public fisc. The Sure Winner Provision applies to withhold public funds only in elections that are essentially foregone conclusions, so to say that the provision "levels the playing field" simply makes no sense. The Sure Winner Provision merely identifies those elections in which full public funding would lead to unnecessary waste, and prevents such waste—nothing more.

A comparison with the various public financing provisions that actually attempted to equalize funds between the participating candidate and his or her opponent illustrates the distinction further. If the goal of the City Council was to "level the playing field," then it could have provided for dollar-to-dollar or relatively close matching instead of simply a restoration of the full amount. *Compare Bennett*, 131 S. Ct. at 2818 ("[E]ach personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent."), *Green Party*, 616 F.3d at 222 (indicating participating candidate receives up to four bonus grants whenever an opponent spent over 100%, 125%, 150%, and 175% of the participating candidate's expenditure limit); *Scott*, 612 F.3d at 1286 ("Florida provides the participating candidate a dollar for every dollar his nonparticipating opponent expends above the

statutory expenditure limit."); *Day*, 34 F.3d at 1359 ("The Minnesota Ethical Practices Board then must pay her . . . an additional public subsidy equal to one-half the amount of the independent expenditure."), *N.C. Right to Life Political Action Comm.*, No. 5:11-CV-472-FL, slip op. at 10 (E.D.N.C. May 18, 2012) ("Once the matching funds were triggered, every additional dollar spent by a privately financed candidate . . . resulted in one dollar of additional state funding to the publicly financed opponent."), *with* N.Y.C. Admin. Code § 3-705(7) ("The amount of public funds payable . . . shall not exceed one quarter of the maximum public funds payment otherwise applicable . . . unless" one of the conditions of the Sure Winner Provision is met). Instead, the Sure Winner Provision simply allows the city to see that a race may be competitive and provide the remainder of the full amount previously withheld. There is no attempt at equalization in this process.

Defendants have already taken voluntary action to eliminate the City's "bonus funds" provisions and conform to the constitutional analyses of *Bennett* and *Green Party*, which bar government action to "level the playing field" between candidates. But, as *Green Party* makes abundantly clear, that provides no basis for striking down other program eligibility and funding criteria that only exist to prevent excessive public money from being spent in uncompetitive races. The Sure Winner Provision efficiently promotes good government and is constitutional.

CONCLUSION

For all of the foregoing reasons, the Court should deny Plaintiffs' motion and grant Defendants' cross motion for summary judgment.

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