UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MODERATE PARTY OF RHODE ISLAND,	:	
	:	
Plaintiff	:	
	:	
v.	:	C.A. No. 10-265-S
	:	
PATRICK C. LYNCH, in his official capacity as Attorney General for the State of Rhode Island, and FRANK CAPRIO, in his official capacity as General Treasurer for the State of Rhode Island,	:	
	:	
Defendants	:	

MEMORANDUM IN SUPPORT OF
MOTION FOR TEMPORARY AND/OR PRELIMINARY INJUNCTIVE RELIEF

Introduction

This memorandum of law is submitted by Plaintiff Moderate Party of Rhode Island ("MPRI") in support of its Motion for Temporary and/or Preliminary Injunctive Relief against Defendants Patrick C. Lynch, in his official capacity as Attorney General for the State of Rhode Island (the "Attorney General"), and Frank Caprio, in his official capacity as General Treasurer for the State of Rhode Island (the "General Treasurer") (sometimes collectively, the "Defendants").

MPRI seeks injunctive relief to enjoin the enforcement of specific provisions of Rhode Island General Laws § 44-30-2(d)(2) by which the General Treasurer distributes funds contributed by Rhode Island taxpayers to political parties. The current statutory distribution scheme impermissibly favors the established political parties and unfairly excludes other new or fledgling political parties – including those, like MPRI, which have been fully and lawfully recognized by the State for inclusion in this year's electoral process. In effect, if the statutory

formula is followed this year, the State would be financially subsidizing the Democratic and Republican parties with taxpayer funds, while excluding the MPRI, in the midst of an election cycle. Because this statutory formula and its implementation in this election year cannot survive constitutional scrutiny, this Court should grant the injunctive relief sought herein.

Background

MPRI is a new political party which was formally recognized by the State of Rhode Island on August 18, 2009 after a prior decision of this Court and after compliance with all other applicable requirements. Along with the Democratic and Republican parties, MPRI is currently one of three political parties with official state recognition. MPRI challenges Rhode Island General Laws § 44-30-2(d)(2) based on its inequitable treatment of those three recognized political parties.

The statutory provision at issue here is as follows:

> (1) There shall be allowed as a credit against the Rhode Island personal income tax otherwise due for a taxable year, commencing for the tax year 1988, a contribution of five dollars ($5.00), or ten dollars ($10.00) if married and filing a joint return, to the account for the public financing of the electoral system. The first two dollars ($2.00), or four dollars ($ 4.00) if married and filing a joint return, shall go to a political party as defined in § 17-12.1-12 to be designated by the taxpayer or to a nonpartisan account if so indicated up to a total of two hundred thousand dollars ($200,000) collectively for all parties and the nonpartisan account. The remainder shall be deposited as general revenue.
>
> (2) The credit for the public financing of the electoral system shall appear on the face of the state personal income tax return. The tax administrator shall annually forward by August 1, all contributions to said account to the state general treasurer and the treasurer shall annually remit by September 1, the designated partisan contributions to the chairperson of the appropriate political party and the contributions made to the nonpartisan general account shall be allocated by the state general treasurer to each political party in proportion to the combined number of votes its candidates for governor received in the previous election, after five percent (5%) of the amount in the account is allocated to each party for each general officer elected in the previous statewide election. Each political party may expend moneys received under this provision for all purposes and activities permitted by the laws of Rhode Island and the United States, except that no such

> moneys shall be utilized for expenditures to be directly made or incurred to support or defeat a candidate in any election within the meaning of chapter 25 of title 17, or in any election for any political party nomination, or for political party office within the meaning of chapter 12 of title 17. The remaining funds shall be allocated for the public financing of campaigns for governor as set forth in §§ 17-25-19 – 17-25-27.

R.I. Gen. Laws § 44-30-2(d). Styled a "contribution," any such voluntary allocation of funds by taxpayers is offset with a credit, resulting in no impact to the bottom line liability of the contributing taxpayer. In other words, contributing taxpayers do not see an increase in their tax bills, nor are their refunds reduced.[1]

MPRI does not herein challenge the aspect of the statute whereby taxpayers may specifically designate some funds ("Designated Funds") to a political party of their choice.[2] Rather, MPRI challenges that portion of the statutory scheme whereby funds that are not specifically designated to a named party go into a "nonpartisan account" (the "Nonpartisan Account") and are then distributed by the General Treasurer pursuant to a statutory formula.

Injunctive Standard of Review

A party seeking temporary or preliminary injunctive relief must demonstrate that (1) it is likely to succeed on the merits; (2) there exists the potential for irreparable harm to the movant if the injunction is denied; (3) the injunction will not impose a hardship on the nonmovant which outweighs that to the movant in the absence of the injunction; and (4) the injunction will not adversely affect the public interest. See, e.g., El Marocco Club, Inc. v. Fox, 110 F. Supp. 2d 54

[1] This markedly contrasts with the other checkoff contributions offered for various causes on Schedule IV of Rhode Island tax form RI-1040, which do reduce refunds or increase liabilities due, especially given that donations to political organizations and candidates are not tax-deductible at state or federal levels.

[2] MPRI has received certain informal assurances that it will receive any funds designated for it by Rhode Island taxpayers on tax returns filed since the last distribution of Designated Funds on September 1, 2009, and hopes and assumes that it will receive any such funds.

(D.R.I. 2000) (citing Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir. 1996)); Westenfelder v. Ferguson, 998 F. Supp. 146, 150 (D.R.I. 1998).

Discussion

A. MPRI Is Likely To Succeed On The Merits; Subsidizing Some Political Parties While Excluding Newly Qualified Parties Violates The First Amendment And The Fourteenth Amendment

1. Fundamental Rights Are At Stake

This case implicates core First Amendment rights of speech and association. In this context, they are also known as a right of political opportunity. Green Party of Conn. v. Garfield, 648 F. Supp. 2d 298, 302, 333 (D. Conn. 2009), appeal docketed, No. 09-3760 (2nd Cir. Sept. 4, 2009) (First Amendment-protected right to political opportunity); Socialist Workers Party v. Rockefeller, 314 F. Supp. 984, 989 (S.D.N.Y. 1970), summarily aff'd, 400 U.S. 806 (1970) (equal opportunity for independent parties); see also Lubin v. Panish, 415 U.S. 709, 716 (1974) (minor party's and individual candidate's interests in political opportunity are intertwined with rights of voters). However denominated, these rights are fundamental. Green Party of Conn., 648 F. Supp. 2d at 332. "[F]ull participation by minor party candidates in the electoral process has long been considered a necessary component of a well-functioning, healthy democratic system, because such candidates and parties challenge established norms and serve as checks on traditional parties and their representatives in government." Id. at 333. "It is this competition in ideas, approaches and governmental policies which is at the core of our electoral process, representative democracy and *First Amendment* freedoms." Socialist Workers Party, 314 F. Supp. at 989.

MPRI does not defend these rights in a First Amendment vacuum, but also invokes the Equal Protection provisions of the Fourteenth Amendment, based on the statute's treatment of

MPRI relative to the other two established political parties. Therefore, the First Amendment and Fourteenth Amendment concerns must essentially be considered in tandem, at least in the context of this case. See Libertarian Party of Ind. v. Packard, 741 F.2d 981, 984 n.2 (7th Cir. 1984) ("In a case such as this, where a party complains of unequal government subsidization of [F]irst [A]mendment activity, there is considerable interplay between [F]irst [A]mendment and [E]qual [P]rotection principles."); Green Party of Conn., 648 F. Supp. 2d at 331 (treating First Amendment claim as part and parcel of Fourteenth Amendment claim).

2. Standard of Review

The standard of review to be used in First Amendment cases touching upon the political process is not particularly well settled. See Green Party of Conn., 648 F. Supp. 2d at 350-51; R.I. Chapter of Nat'l Women's Political Caucus, Inc. v. R.I. Lottery Comm'n, 609 F. Supp. 1403, 1415 (D.R.I. 1985) ("The [standard of review] conundrum is all the more puzzling…"). On the one hand, the U.S. Supreme Court in Anderson v. Celebrezze, 460 U.S. 780 (1983), set forth an analysis to be employed in considering the constitutionality of state election laws and their impact on the fundamental rights of political parties, candidates and voters:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson, 460 U.S. at 789. This test is a sliding scale in which the degree of scrutiny varies with the "extent of the asserted injury." Green Party of Ark. v. Priest, 159 F. Supp. 2d 1140, 1143 (E.D. Ark. 2001). At one end of that sliding scale, if the law "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the

State's important regulatory interests are generally sufficient to justify' the restrictions." Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson, 460 U.S. at 788)). Where, however, First and Fourteenth Amendment rights "are subjected to 'severe' restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." Burdick, 504 U.S. at 434 (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

Some courts, however, have confined the sliding scale to just those cases involving actual ballot access. Cases involving campaign finance laws have instead been adjudicated using the traditional framework of constitutional review, which requires courts to use exacting scrutiny when examining whether the government can show it is furthering compelling interests with laws narrowly tailored to minimize the burden on fundamental rights. Green Party of Conn., 648 F. Supp. 2d at 350-51; see also Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445, 466 (1st Cir. 2000); Greenburg v. Bolger, 497 F Supp. 756, 778 (E.D.N.Y. 1980); Socialist Workers Party, 314 F. Supp. at 989, 995.

Of the two approaches noted above, MPRI submits that strict scrutiny, rather than a sliding scale analysis, is the more appropriate standard of review for this case. See Green Party of Conn., 648 F. Supp. 2d at 350-51. Here, MPRI challenges a discriminatory campaign finance scheme which goes far beyond any necessary government effort to conduct an orderly election, for which reasonable regulations which might be tolerated under a lesser standard of review. Strict scrutiny is called for here because the unequal and asymmetrical State subsidy of political speech places the case well within the ambit of core First Amendment concerns. See Citizens United v. Federal Election Comm'n, 130 S. Ct. 876, 898 (2010) (laws that burden political speech are subject to strict scrutiny, requiring the government to prove that the restriction is narrowly tailored to further a compelling interest).

3. The Relevant Burden On MPRI Is Severe

The MPRI does not claim that it has any per se right to government subsidized support. Nor does it ask the State to underwrite or guarantee its political success. But "[w]hen the government enters the arena of political speech, however, it must do so in a way that does not alter the status quo by unfairly or unnecessarily burdening the political opportunity of disfavored minor parties." Green Party of Conn., 648 F. Supp. 2d at 334-35; see Williams v. Rhodes, 393 U.S. 23, 31 (1968) (striking down Ohio laws giving "the two old, established parties a decided advantage over any new parties struggling for existence"); Nat'l Women's, 609 F. Supp. at 1413 ("Having made the activity available to the Republican and Democratic parties, the state cannot arbitrarily deny it to less successful groups.").

The case of Greenburg v. Bolger addressed the harm done to minor parties that did not receive the benefit of discounted postal rates available to the Democratic and Republican parties. 497 F. Supp. 756. The United States District Court of the Eastern District of New York squarely held that enhancing the political access of one political party is equivalent to unfairly burdening others. Id. at 778 ("…all mitigate against the proposition that the government could facilitate access for one political party and not necessarily burden all other parties that are in competition with the benefited party."). The court specifically distinguished the case of Buckley v. Valeo, 424 U.S. 1 (1976), oft invoked in defense of public financing schemes, because the major parties received discounted postage without any conditional "sacrifice regarding receipt or expenditure of private funds." Greenburg, 497 F. Supp. at 779. Notably, Greenburg clearly stands for the proposition that conferring a public benefit on a political party without any offsetting cost or detriment is tantamount to imposing a burden on any non-benefited party.

This Court addressed similar disparate treatment of political groups in the case of Rhode Island Chapter of National Women's Political Caucus, Inc. v. Rhode Island Lottery Commission, 609 F. Supp. 1403 (D.R.I. 1985), where only qualified political parties (then the Democrats and Republicans) were exempted from state gambling laws so they could engage in fundraising raffles, but other political entities were not. The Court declared the exception unconstitutional on both First Amendment and Fourteenth Amendment grounds and permanently enjoined its implementation. National Women's, 609 F. Supp. at 1421. In doing so, the Court noted that by conferring benefits on the established and most widely known political parties, the State was correspondingly imposing a burden and an inherent disadvantage on less popular or well-known political parties or groups. Id. at 1412.

More recently, in Green Party of Connecticut v. Garfield, the U.S. District Court in our neighboring District of Connecticut struck down a campaign financing scheme which, though well intentioned, unfairly burdened minor parties. 648 F. Supp. 2d at 300-02. That court stated: "One way to calculate the burden on minor party candidates imposed by a public financing scheme is to determine whether the public financing scheme artificially enhances the political opportunity of favored *major* party candidates beyond what it would have been in the absence of public financing, thus altering the political environment in which all candidates compete." Green Party of Conn., 648 F. Supp. at 335 (citing Buckley v. Valeo, 424 U.S. 1, 95 n.129 (1976)). "Even assuming that the minor parties' absolute political strength will remain constant, the fact that the public financing scheme artificially enhances major party candidates' fundraising and campaigning abilities without any countervailing disadvantages increases major party candidates' *relative* strength to the plaintiffs' disadvantage." Id.[3] Similar to the cases

[3] See also Davis v. Federal Election Comm'n, 128 S. Ct. 2759 (2008). While the instant case is far more straightforward than those involving complex interactions between contribution limits, expenditure limits, and

discussed above, the State in this instance chose to enter the arena of political speech and to direct public funds to only some political parties, but not all, thereby imposing a severe constitutional burden upon the MPRI.

4. No State Interests Justify Excluding Newly Qualified Political Parties From a Supposedly Nonpartisan Pool

In light of the discriminatory effect upon MPRI, the State must come forward with interests sufficient to justify subsidizing support to established political parties while excluding such support or benefits to newly qualified parties. The State cannot do so, regardless of whether the Court requires such interests to be of "compelling" or "important" status.

The typical interests asserted by the government would simply be inapplicable here. There can be no suggestion, for example, that the allocation of the Nonpartisan Account to some but not all parties relates to preventing actual or perceived corruption. If anything, the perception of corruption is increased when controlling political powers use their positions to enact and enforce legislation that directs public funds to only their parties, and not others. Other routinely proffered interests issues such as stability in the political system and avoiding splintered parties, ballot clutter and confusion, are also irrelevant here.[4] That is because those

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public funding amounts, Davis undoubtedly stands for the proposition that when the government benefits one political group asymmetrically, its impact on the non-benefited group will be closely examined to ensure that the First Amendment is not offended. See id. at 2770-74. Davis also calls into question the continuing viability of numerous cases that had tolerated campaign finance schemes that allegedly hampered non-benefited parties. See Green Party of Conn., 648 F. Supp. 2d at 372 ("The state's argument that the reasoning of the *Daggett* line of cases survives *Davis* rests on too narrow a reading of *Davis*."); see also Davis, 128 S. Ct. at 2772 (citing Day v. Holahan, 34 F.3d 1356, 1359-60 (8th Cir. 1994); cf. Daggett, 205 F.3d at 465 ("We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker.").

[4] The Supreme Court held, for example, in Storer v. Brown, that a state has a "compelling" state interest in "the stability of its political system." 415 U.S. 724, 736 (1974). Yet, the Court held more recently that this interest does not extend so far as to permit a state to protect existing parties from competition from independent or third-party candidates. Anderson, 460 U.S. at 801-02. Indeed, "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms," Id. at 802 (quoting Williams, 393 U.S. at 32). There is thus a crucial difference between a legitimate interest in avoiding "splintered parties and unrestrained factionalism," Storer, 415 U.S. at 736, and an illegitimate interest "in protecting the two major political parties," Anderson, 460 U.S. at 802.

concerns are addressed by the party qualification process and MPRI has already fulfilled its obligation to demonstrate a "significant modicum of public support." It qualified as an official political party, and now stands in equal rank with the Democrats and Republicans on this year's statewide ballot. Indeed, Rhode Island's onerous party qualification requirements, vigorously defended by the State, remain among the toughest in the nation, see Block v. Mollis, 618 F. Supp. 2d 142, 144, 148-49 (D.R.I. 2009), so the State has no reason to further skew the playing field by economically subsidizing major political parties in the name of political stability.

Finally, the statutory formula surely does not help avoid the concentration of political power among a few. If anything, the statutory formula, perhaps enacted with the laudable goal of furthering a vibrant political process, merely compounds the rewards for political parties that have already shown success. In other words, it grants windfalls to the parties that least require public funds to compete politically. See Socialist Workers Party, 314 F. Supp. at 994 ("The State has shown no compelling state interest nor even a justifiable purpose for granting what, in effect, is a significant subsidy only to those parties which have least need therefor.").

In sum, the scheme attacked here cannot be defended with the usual catalogue of government interests so often summoned in ballot access cases. See National Women's, 609 F. Supp. at 1418. Nor can the State claim it is reserving financial resources for only "serious" contenders now that MPRI has gained full official recognition. No government interests justify sponsoring the political operations of some qualified parties but not others. See id. ("By conferring a fundraising benefit on the two major parties, the exception simply promotes their interests over those of their less popular opponents without serving any legally cognizable government interest.").

5. Allocation of the Nonpartisan Account Is Not Narrowly Tailored To Serve State Interests

Whether through the lens of traditional strict scrutiny, or a sliding scale analysis from Anderson, campaign finance laws must be tailored to further legitimate State interests while minimizing any constitutional threat. No matter how severe or light the burden, the State must still justify the need for the restriction when First Amendment rights are at stake.

In Socialist Workers Party v. Rockefeller, the U.S. District Court for the Southern District of New York considered a New York state election law that allowed lists of registered voters to be provided free of charge to some political parties but not others. Like the case at bar, the law used the voting results in the preceding gubernatorial election to determine which parties qualified for the government benefit. 314 F. Supp. at 995, summarily aff'd, 400 U.S. 806 (1970). That court explained:

> It is clear that the effect of these provisions…is to deny independent or minority parties which have succeeded in gaining a position on the ballot but which have not polled 50,000 votes for governor in the last preceding gubernatorial election an equal opportunity to win the votes of the electorate.[5]

Id. Applying strict scrutiny, the court struck down the discrimination, and further held:

> What [plaintiffs] seek bestowed upon any party which complies with State requirements for placing its candidates before the electorate, is the same benefit granted major political parties of not having to purchase such lists at considerable expense. Secondly, constitutional strictures merely require that the State treat all groups similarly situated alike. **The State is not required to provide lists free of charge, but when it does so it may not provide them only for the large political parties but deny them to those parties which can least afford to purchase them**.

Id. (emphasis added); accord Schulz v. Williams, 44 F.3d 48, 59-60 (2nd Cir. 1994); Green Party of Mich. v. Land, 541 F. Supp. 2d 912 (E.D. Mich. 2008); Libertarian Party of Ind. v. Marion County Bd. of Voter Registration, 778 F. Supp. 1458 (S.D. Ind. 1991); see also Libertarian Party

of N.H. v. Sec'y of State, 965 A.2d 1078 (N.H. 2008) (dismissing, on standing grounds, appeal by qualified party intervening after trial court ruled unconstitutional a state law which furnished voting information only to qualified parties).

Whatever the policy merits of the public financing scheme at issue here, the State must fashion it to best achieve its ends while staying clear of the constitutional foul line. The statutory formula set forth in § 44-30-2(d) falls woefully short. First, it skims 5% off the top of the Nonpartisan Account for each political party affiliated with a statewide general officer other than governor.[6] No new political party could ever qualify for those funds until the next election, which would take a minimum of four years. Similarly, the formula looks back to the last preceding gubernatorial election to allocate the Nonpartisan Account based on historic outcomes. Again, the statute makes no provision for the qualification of new parties in the interim. Not only must a new party wait as long as four years before even having the chance for eligibility, but, with each passing year, the distribution is founded upon increasingly stale and dated results. For 2010, Nonpartisan Account funds would be distributed based on election results from 2006, even though the MPRI qualified as a recognized party in the meantime.[7]

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[5] Notably, obtaining 50,000 statewide votes in New York is a far less onerous requirement, in percentage terms, than the 5% threshold requirement to qualify and maintain official party status in Rhode Island.

[6] Although the statute is arguably unclear on this point, the most likely interpretation is that the initial series of 5% distributions go to the party holding the statewide offices other than governor, while the remaining funds are distributed with reliance on the past gubernatorial results. In this fashion, each statewide office is "counted" once, with the governor's race bearing greater weight in the ultimate implementation of the formula. However, even if the party holding the governor's office were to receive a 5% distribution and a subsequent percentage based on the application of the formula to past results, it would not remedy the harm and the constitutional flaw at issue herein.

[7] In addition to new parties, of passing interest is the statute's failure to account for independent candidates. Coincidentally, the 2010 election will include both a new party and a viable independent gubernatorial candidate. Assuming that an independent candidate for governor receives a significant percentage of the vote, the statutory formula makes no clear provision for how that percentage is utilized or accounted for in any subsequent distribution of funds based on that outcome. Although an independent or unaffiliated candidate presumably cannot receive such "party-building" funds, the statute's failure to account for such eventualities – and indeed its dated and stereotypical assumption that elections will always be between just the two major political parties – is yet another flaw in the methodology for conferring and allocating this public benefit into the political arena.

Furthermore, the State imposes no countervailing disadvantages on the major parties in order to receive these windfalls. See Greenburg, 497 F. Supp. at 779 ("There is no possibility that the [postal] discount can, in any way, act to the advantage of the non-qualifying parties."). This is not even rational, let alone narrowly tailored to serve important or compelling State interests. Cf. National Women's, 609 F. Supp. at 1414. Blessing favored parties with public funds without any countervailing disadvantage leaves the State without any constitutional safe harbor. See Green Party of Conn., 648 F. Supp. 2d at 337 (noting that the scheme upheld in Buckley had no impact on relative party strength, that it *substituted* public funds for what parties would raise privately, and also imposed expenditure limits); cf. Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39 (1st Cir. 1993) ("Put another way, the state exacts a fair price from complying candidates in exchange for receipt of the challenged benefits.").

By not even attempting to accommodate new political parties that emerge and lawfully qualify between statewide elections cycles, the Nonpartisan Account distribution formula is not sufficiently tailored to State interests, particularly given the heightened vigilance the First Amendment demands. By choosing to subsidize political party speech, the State is constitutionally obligated to do so fairly and evenhandedly.

B. Plaintiffs Will Suffer Irreparable Harm Without Injunctive Relief

Plaintiffs will surely suffer irreparable harm without a temporary or preliminary injunction. The disputed funds are sent from the State Tax Administrator to the General Treasurer by August 1. The General Treasurer then distributes them to the parties by September 1. R.I. Gen. Laws § 44-30-2(d)(2). Distribution could arguably and permissibly

occur at any moment and, in any event, will likely occur before this case is resolved by the Court absent preliminary relief.[8]

Once the funds are distributed, it will be difficult – if not impossible – for the Court to "unring the bell" and unwind the distributions.[9] This would leave MPRI without an effective remedy. Whether MPRI were ultimately to receive additional funding or whether the other parties were denied their windfalls going forward, the relative benefits and burdens would have already been realized in this election cycle. Indeed, MPRI has already suffered some amount of irreparable harm based on the distribution of funds from 2008 tax returns, which were distributed on or about September 1, 2009, even though MPRI was officially recognized by the State before that date.[10]

Given that this is a statewide general election year, this effect would be particularly aggravated. Indeed, the MPRI could hypothetically lose its official certification after the November 2010 election, depending upon the outcome, and depending on how fast, if at all, the party could requalify by petition.[11] In that case, the harm from being excluded from this State subsidy would already have been done and would be irreversible. It is unrealistic to expect

[8] It is unclear what date the Tax Administrator uses as a cutoff before August 1. While personal income tax returns must usually be filed on April 15 each year, the deadline for 2009 returns was extended to May 11, 2010 because of the recent local flooding disaster. However, extensions of up to six months or more are routine.

[9] It is unclear whether the State or this Court could even demand that the other political parties return funds which were duly remitted to them before this Court renders judgment otherwise. Even though the Defendants might personally have a heightened political interest in this case, the other political parties are strangers to the suit, at least in a formal sense.

[10] Again, MPRI has no quarrel with the fact it received no Designated Funds from 2008 tax returns, at least from those that were filed before August 18, 2009, because it was not then an official party for taxpayers to specifically select. Yet, MPRI should have been on equal footing for access to the supposedly Nonpartisan Account. MPRI is no doubt harmed this year by the funds distributed last year to its competitors, and all the more so because 2009 was not an election year.

[11] In order for MPRI to retain its recently attained official recognition, its nominated candidate for governor must garner at least five percent of the gubernatorial vote in the 2010 election. See R.I. Gen. Laws § 17-1-2(9). Otherwise, it can attempt to requalify through petition by again satisfying the onerous five percent signature

election results to be adjusted in these circumstances, and no amount of monetary damages could compensate for the results. Thus, preliminary injunctive relief becomes especially appropriate and necessary during the current election cycle and before this year's only distribution is made.

C. An Injunction Would Pose No Harm To Defendants

While MPRI stands to suffer irreparably without injunctive relief, the Defendants would suffer no harm whatsoever by the issuance of the requested injunction. With a preliminary injunction in place, the funds would simply remain with the State until or unless some alternative and permissible distribution formula is developed or imposed. If MPRI does not ultimately prevail in this case, the State could merely release the funds and be left in no worse position. On the other hand, if MPRI succeeds in this case and the Court determines that the appropriate remedy is to permanently enjoin such disbursements, the funds would presumably stay deposited with the State as general revenue, inuring to its benefit. See R.I. Gen. Laws § 44-30-2(d)(1). Any other alternative remedy still would not harm the State because the Designated Funds and the Nonpartisan Account cannot exceed $200,000 combined. Therefore, no matter how the pie is sliced, the State will not need to appropriate any more funds than it does already. Furthermore, any impact on the administrative duties of Defendants and other State agents in the meantime would be miniscule.

D. An Injunction Would Benefit The Public Interest

Granting injunctive relief benefits the public interest. First, by treating all of the State's officially recognized political parties fairly and equally, the political playing field would become more level, which is undeniably to the benefit of all citizens. Second, while taxpayers would in no event be liable for more than the $200,000 already in place, any Nonpartisan Account funds

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requirement. See Block, 618 F. Supp. 2d at 154 n.18 ("Mr. Block's goal of being primarily a 'General Assembly' party may prove to be overly optimistic because to do so will require a petition effort in each election cycle.").

that remain in the treasury could only help relieve any budgetary pressures the State currently faces.

Conclusion

Though not required to do so, the State has chosen to enter the arena of political speech by enacting R.I. Gen. Laws § 44-30-2(d) and by effectively subsidizing the speech of political parties. By directing funds purportedly "for the public financing of the electoral system" to some political parties, but not to all of the officially recognized political parties competing in that electoral system, without sufficient justification, the State violates MPRI's First and Fourteenth Amendment rights. Citizens United, 130 S. Ct. at 899 ("[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers."). MPRI will likely prevail on the merits on this issue and the overall balance of public interests clearly favors the issuance of preliminary injunctive relief. This is particularly true given that a statewide election is just four months away and the Nonpartisan Account could be distributed at any moment between now and September 1, leaving the MPRI irreparably harmed and disadvantaged. For these reasons, this Court should temporarily and preliminarily restrain and enjoin Defendants from distributing funds in the Nonpartisan Account set up by R.I. Gen. Laws § 44-30-2(d) until such time as the case may be fully heard on the merits or otherwise resolved, or until or unless those funds can be distributed in a constitutionally permissible manner.

Respectfully submitted,

MODERATE PARTY OF RHODE ISLAND

By its Attorneys,

/s/ Mark W. Freel

Mark W. Freel, Esq. (# 4003)
Cooperating Attorney, Rhode Island Affiliate,
American Civil Liberties Union
EDWARDS ANGELL PALMER & DODGE LLP
2800 Financial Plaza
Providence, RI 02903
(401) 274-9200
(401) 276-6611 (fax)

CERTIFICATE OF SERVICE

I certify that on the 7th day of July, 2010, I electronically filed the foregoing with the court using the CM/ECF system, and also served the following by courier delivery:

Rebecca Partington, Esq.
Thomas A. Palombo, Esq.
Assistant Attorneys General
150 South Main Street
Providence, RI 02903
Tel. (401) 274-440, Ext. 2296
Fax (401) 222-2995

/s/ Mark W. Freel