

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GREEN PARTY OF CONNECTICUT, et
al.,

Plaintiffs,

v.

ALBERT P. LENGE, in his official capacity
as Executive Director and General Counsel
of the State Elections Enforcement
Commission, et al.,
Defendants.

No. 3:06cv1030 (SRU)

ORDER CERTIFYING QUESTION TO THE CONNECTICUT SUPREME COURT

In two previous rulings, I held provisions of Connecticut's Campaign Finance Reform Act ("CFRA") to be unconstitutional. *See Green Party of Conn. v. Garfield*, 590 F. Supp. 2d 288 (D. Conn. 2008) (upholding CFRA's ban on lobbyist and state contractor campaign contributions and solicitation of campaign contributions); *Green Party of Conn. v. Garfield*, 648 F. Supp. 2d 298 (D. Conn. 2009) (holding CFRA's qualifying criteria and distribution formulae for campaign financing, as well as the statute's excess and independent expenditure trigger provisions, to violate the First Amendment). Those decisions were recently affirmed in part and reversed in part by the Second Circuit Court of Appeals. In *Green Party of Connecticut v. Garfield*, ___ F.3d ___, 09-0559-cv(L), 09-609-cv(CON), slip op. at 27, 32 (2d Cir. July 13, 2010), the Court of Appeals held that the CFRA's ban on lobbyist campaign contributions and lobbyist and state contractor solicitations for campaign contributions violated the First Amendment. Those offending portions of the CFRA are found at Conn. Gen. Stat. §§ 9-610(g),(h) & 9-612(g)(2). In a second opinion, *Green Party of Connecticut v. Garfield*, ___ F.3d ___, 09-3760-cv(L), 09-3941-cv(CON), slip op. at 44 (2d Cir. July 13, 2010), the Court of Appeals held that the excess

and independent expenditure trigger provisions of the Citizens' Election Program ("CEP") – the public campaign finance system created by the CFRA – violated the First Amendment. Those trigger provisions are found at Conn. Gen. Stat. §§ 9-713 & 9-714. The Second Circuit ordered this court to enter a new permanent injunction consistent with its opinions, which I did by order issued today.

In both of its decisions, the Court of Appeals remanded for this court to determine whether the unconstitutional sections of the CFRA could be severed from the statute. In particular, the Second Circuit remanded for this court to determine the meaning and application of Conn. Gen. Stat. § 9-717, which defines the effect of an injunction against the sections of the CFRA establishing and governing the CEP. Subsections (b) and (c) of Conn. Gen. Stat. § 9-717 provide:

(b) Except as provided for in subsection (a) or (c) of this section, if, on or after April fifteenth of any year in which a state election is scheduled to occur, a court of competent jurisdiction prohibits or limits, or continues to prohibit or limit, the expenditure of funds from the Citizens' Election Fund established in section 9-701 for grants or moneys for candidate committees authorized under sections 9-700 to 9-716, inclusive, for a period of thirty days or more, (1) sections 1-100b, 9-700 to 9-716, inclusive, 9-750, 9-751 and 9-760 and section 49 of public act 05-5 of the October 25 special session shall be inoperative and have no effect with respect to any race that is the subject of such court order until December thirty-first of such year, and (2) (A) the amendments made to the provisions of the sections of the general statutes pursuant to public act 05-5 of the October 25 special session shall be inoperative until December thirty-first of such year, (B) the provisions of said sections of the general statutes, revision of 1958, revised to December 30, 2006, shall be effective until December thirty-first of such year, and (C) the provisions of subsections (g) to (j), inclusive, of section 9-612 shall not be implemented until December thirty-first of such year. If, on the April fifteenth of the second year succeeding such original prohibition or limitation, any such prohibition or limitation is in effect, the provisions of subdivisions (1) and (2) of this section shall be implemented and remain in effect without the time limitation described in said subdivisions (1) and (2).

(c) If, during a year in which a state election is held, on or after the second Tuesday in August set aside as the day for a primary under section 9-423, a court of competent jurisdiction prohibits or limits the expenditure of funds from the Citizens' Election Fund established in section 9-701 for grants or moneys for candidate committees authorized under sections 9-700 to 9-716, inclusive, for a period of fifteen days, or if said Tuesday occurs during a period of fifteen days or more in which period such a court continues to prohibit or limit such expenditures, then, after any such fifteen-day period, (1) sections 1-100b, 9-700 to 9-716, inclusive, 9-750, 9-751 and 9-760 and section 49 of public act 05-5 of the October 25 special session shall be inoperative and have no effect with respect to any race that is the subject of such court order until December thirty-first of such year, and (2) (A) the amendments made to the provisions of the sections of the general statutes pursuant to public act 05-5 of the October 25 special session shall be inoperative until December thirty-first of such year, (B) the provisions of said sections of the general statutes, revision of 1958, revised to December 30, 2006, shall be effective until December thirty-first of such year, and (C) the provisions of subsections (g) to (j), inclusive, of section 9-612 shall not be implemented until December thirty-first of such year. If, on the April fifteenth of the second year succeeding such original prohibition or limitation, any such prohibition or limitation is in effect, the provisions of subdivisions (1) and (2) of this section shall be implemented and remain in effect without the time limitation described in said subdivisions (1) and (2).

The meaning of those subsections is “far from clear,” as the Court of Appeals described.

See Green Party, 09-3760-cv(L), 09-3941-cv(CON), slip op. at 53. Furthermore, the issue of the CFRA’s severability presents “unsettled and significant questions of state law that will control the outcome the case,” by determining the scope and effect of this court’s injunction. *Halebian v. Berv*, 590 F.3d 195, 214 (2d Cir. 2009) (quoting *Colavito v. N.Y. Organ Donor Network, Inc.*, 438 F.3d 214, 229 (2d Cir. 2006)). Therefore, pursuant to Conn. Gen. Stat § 51-199b, I certify the following question to the Connecticut Supreme Court:

Whether the excess and independent expenditure trigger provisions, found at Conn. Gen. Stat. §§ 9-713 & 9-714, may be severed from the balance of the Campaign Finance Reform Act, or whether this court’s order enjoining those provisions has the effect, by virtue of Conn. Gen. Stat. § 9-717, of rendering the entire Citizens’ Election Program (and other provisions of the Campaign

Finance Reform Act) inoperative.

Pursuant to Conn. Gen. Stat. § 51-199b(f)(4), the names and addresses of counsel are included as a separate attachment to this order.

It is so ordered.

Dated at Bridgeport, Connecticut, this 11th day of August 2010.

/s/ Stefan R. Underhill

Stefan R. Underhill
United States District Judge

ATTACHMENT: NAMES AND ADDRESSES OF COUNSEL *

Plaintiffs' Counsel

Mark J. Lopez
Lewis, Clifton & Nikolaidis
275 Seventh Ave.
Suite 2300
New York, NY 10001-6708
(212) 419-1512
mlopez@lcnlaw.com

David McGuire
ACLU of Connecticut
2074 Park Street
Hartford, CT 06106
(860) 523-9146, ext. 212
dmcguire@acluct.org

R. Bartley Halloran
Law Office of R. Bartley
Halloran
74 Batterson Park Rd.
Farmington, CT 06032
(860) 676-3222
rhalloran@ldlaw.com

Defendants' Counsel

Perry A. Zinn Rowthorn
Attorney General's Office
55 Elm Street, PO Box 120
Hartford, CT 06141-0120
(860) 808-5020
perry.zinn-rowthorn@po.state.ct.us

Maura Murphy-Osborne
Attorney General's Office
55 Elm Street
Hartford, CT 06141
(860) 808-5020
maura.murphyosborne@ct.gov

Audrey Blondin, Common Cause of Connecticut, Connecticut Citizen Action Group, and Tom
Sevigny Intervening-Defendants' Counsel

Ira Feinberg
Hogan Lovells
875 Third Avenue
New York, NY 10022
(212) 918-3100
imfeinberg@hhlaw.com

Monica Youn
Brennan Center for Justice
NYU School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6741
monica.youn@nyu.edu

Daniel Malloy and Dan Malloy for Govern Intervening-Defendants' Counsel

James A. Wade
Robinson & Cole
280 Trumbull Street
Hartford, CT 06103
(860) 275-8270
jwade@rc.com

Nuala E. Droney
Robinson & Cole
280 Trumbull Street
Hartford, CT 06103
(860) 275-8346
ndroney@rc.com

* This list represents the primary counsel for each side; other attorneys have entered appearances in the case, although they are not listed here.