

RETURN DATE: July 27, 2010

THOMAS C. FOLEY and FOLEY FOR GOVERNOR, INC.,

Plaintiffs,

v.

STATE ELECTIONS ENFORCEMENT COMMISSION; ALBERT P. LENGE, in his official capacity as Executive Director and General Counsel of the State Elections Enforcement Commission; NANCY WYMAN, in her official capacity as State Comptroller; DENISE L. NAPPIER, in her official capacity as State Treasurer; FEDELE 2010 JOINT GUBERNATORIAL CAMPAIGN COMMITTEE; FEDELE 2010; and BOUGHTON FOR CT 2010,

Defendants.

SUPERIOR COURT

JUDICIAL DISTRICT OF HARTFORD

AT HARTFORD

JULY 12, 2010

BRIEF OF PLAINTIFFS FOR HEARING ON TEMPORARY INJUNCTION

The Plaintiffs, Thomas C. Foley and Foley for Governor, Inc., hereby respectfully submit the following brief in support of their application for a temporary injunction barring the approval of the Fedele 2010 campaign committee by the State Elections Enforcement Commission (“SEEC”) to participate in the Citizens’ Election Program (“CEP”), the disbursement of funds to Fedele 2010 from the Citizens’ Election Fund (“CEF”) and the Fedele 2010 campaign committee from spending any funds already disbursed to it. Specifically, this brief addresses: (1) the reasonable probability of success on the merits; and (2) the irreparable harm that the Plaintiffs will suffer in the absence of a temporary injunction.

As a general matter,

[a] temporary injunction is a preliminary order of court, granted at the outset or during the pendency of an action, forbidding the performance of the threatened acts described ... until the rights of the parties ... shall have been finally determined by the court. . . . The primary purpose of a temporary injunction is to maintain the status quo until the rights of the various parties can be sorted out, after a hearing on the merits.

In order for the court to issue a temporary injunction, the applicant must establish (1) a reasonable probability of success on the merits at a final hearing; (2) irreparable injury unless the injunction is granted; and (3) no adequate remedy at law. If irreparable injury is demonstrated, the trial court ought to issue the temporary injunction, unless it is clear that the plaintiff will not prevail at the trial on the merits.

Danso v. Univ. of Connecticut, 50 Conn. Supp. 256, 261-262 (Conn. Super. Ct. 2007) (Sferrazza, J.).

I. The Plaintiffs are very likely to succeed on the merits of their complaint because the plain language of the relevant CEP statutes makes it clear that the SEEC erroneously approved the application of the Fedele 2010 campaign committee to participate in the CEP.

The SEEC made three statutory interpretation errors when it approved the Fedele 2010 campaign committee and awarded it a supplemental matching grant:

First, the SEEC misconstrued Conn. Gen. Stat. § 9-704(a)(1), which governs the amount and permissible sources of qualifying contributions required for a gubernatorial candidate to participate in the CEP. In order for Fedele to reach the CEP's statutory threshold, the SEEC improperly allowed the Fedele campaign to include donations made to the Boughton campaign, *prior* to the joint campaigning declaration by Fedele and Boughton, even though, in many cases, the combined total of those donations exceeded the \$100 statutory limit. This violated both the letter and purpose of § 9-704(a)(1).

Section § 9-704(a)(1) requires a candidate for governor who wishes to participate in the CEP to raise \$250,000 in qualifying contributions and further requires the candidate to "return the portion of any contribution or contributions from any individual, including said candidate,

that exceeds one hundred dollars, *and such excess portion shall not be considered in calculating such amounts . . .*” § 9-704(a)(1)(A) (emphasis added). Section § 9-704(a)(1) likewise permits contributions made to a candidate for Lieutenant Governor to be counted towards the \$250,000 gubernatorial threshold, but only if the candidate for Lieutenant Governor “*is deemed to be jointly campaigning . . .* under subsection (a) of section 9-709” with the gubernatorial candidate.” § 9-704(a)(1)(B)(ii) (emphasis added). Pursuant to § 9-709(a), a candidate for Lieutenant Governor is so deemed “*upon* a declaration by the candidates that they shall campaign jointly.” § 9-709(a) (emphasis added).¹

The emphasized word “upon” is crucial because it makes chronology a determinative factor – i.e., only *after* a candidate for Governor and Lieutenant Governor declare their intent to campaign jointly are they, in fact, so deemed and may contributions made to the latter count as CEP qualifying contributions of the former. Construing § 9-704(a)(1)(A) to permit contributions made to a candidate for Lieutenant Governor prior to such a joint declaration to count as qualifying contributions for a candidate for Governor – the position taken by the SEEC with respect to the Fedele campaign – would read “upon” out of § 9-709(a). This violates one of the basic principles of statutory construction. See *PJM & Associates, LC v. Bridgeport*, 292 Conn. 125, 138 (2009) (“[b]ecause every word and phrase of a statute is presumed to have meaning . . . a statute must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant”) (brackets deleted; ellipses in original).

¹ The word “upon” also modifies the time when the “party-endorsed” candidates for both offices are deemed to be campaigning jointly under § 9-709(a). In that scenario – which does not apply here because the Plaintiff Foley, and not Fedele, is the Republican “party-endorsed” candidate for Governor – the two candidates are so deemed upon the happening of certain, specific events. See § 9-709(a).

Moreover, under this particular set of facts, the SEEC's position allows the Fedele campaign to violate the underlying purpose of § 9-704(a)(1), namely, to limit qualifying contributions to \$100 per individual donor. The parties have stipulated that approximately more than 200 donors made contributions to the Fedele and Boughton campaigns which, in total, exceed \$100 – and that this excess amount, a total of approximately \$23,000, was included by the SEEC in Fedele's qualifying contributions. This undercuts a primary purpose of the CEP – clear from the plain language of § 9-704(a)(1) – which is to limit participating candidates to \$100 per donor. See § 9-704(a)(1). A court should avoid any construction of a statute that would frustrate the legislature's purpose in enacting it. See *State v. Pentland*, 296 Conn. 305, 314 (2010).

Second, the SEEC misconstrued § 9-709 by approving the application of Fedele and Boughton to campaign jointly because the plain language of § 9-709 makes it clear that a “party-endorsed” candidate for Lieutenant Governor may not form a joint committee with a candidate for Governor who is not “party-endorsed”. Section 9-709 provides two scenarios under which a joint campaign committee may be formed: The “party-endorsed” candidate for Lieutenant Governor and the “party-endorsed” candidate for Governor are deemed to be campaigning jointly

upon the earliest of the following: (1) The primary, whether held for the office of Governor, the office of Lieutenant Governor, or both; (2) if no primary is held for the office of Governor or Lieutenant Governor, the fourteenth day following the close of the convention; or (3) a declaration by the party-endorsed candidates that they will campaign jointly. *Any other candidate for nomination or election to the office of Lieutenant Governor shall be deemed to be . . . [campaigning] jointly upon a declaration by the candidates that they shall campaign jointly.*

§ 9-709 (emphasis added).

The key language, which is contrary to the SEEC's position, is "[a]ny other". This phrase divides the world of joint campaigning between the "party-endorsed" candidate for Lieutenant Governor and "any other" candidate, i.e., one who is not "party-endorsed". While the latter may campaign jointly with a non-"party-endorsed" candidate for Governor, the former may not. Any other construction would eliminate the distinction between "party-endorsed" and "other" candidates for Lieutenant Governor and run contrary to the plain language of § 9-709.

Third, the SEEC misconstrued the statutes governing supplemental matching grants when it approved the Fedele campaign's request for a \$937,500 supplemental grant based on the Plaintiffs' April 1, 2010, financial filings. Section 9-713 provides:

If the State Elections Enforcement Commission determines that contributions, loans or other funds have been received, or that an expenditure is made, or obligated to be made, by a nonparticipating candidate who is opposed by one or more participating candidates *in a primary campaign or a general election campaign*, which in the aggregate exceed one hundred per cent of the applicable expenditure limit *for the applicable primary or general election campaign period*, as defined in subdivision (1) of subsection (b) of section 9-712, the commission shall process a voucher not later than two business days after the commission's determination and the State Comptroller shall draw an order on the State Treasurer for payment, by electronic fund transfer directly into the campaign account of each such participating candidate, not later than three business days after receipt of an authorized voucher from the commission.

§ 9-713(a) (emphasis added). Similar provisions exist for expenditures by non-participating candidates that exceed 125%, 150% and 175% of the applicable expenditure limits. See § 9-713(b)-(d).

However, § 9-700(11) expressly defines "primary campaign" as "beginning on the day following the close" of the party's convention. As such, only expenditures made during that time period may count toward the supplemental matching grant provisions of § 9-713. Here, it is undisputed that: (a) the Republican Party primary ended on May 22, 2010; and (b) the SEEC awarded a supplemental matching grant to the Fedele campaign based on the Plaintiff Foley for

Governor, Inc.'s, expenditures as of April 1, 2010. This supplemental grant therefore contradicts the plain language of the CEP.

II. The Plaintiffs will be irreparably harmed without a temporary injunction because of the immediate and irreversible impact on Foley's First Amendment rights and the increased expenditures required by the Foley campaign.

The approval of almost \$2.2 million in CEP grant funds for the Fedele campaign will harm the Plaintiffs in two ways. First, as the evidence will demonstrate, the Plaintiff Foley for Governor, Inc., will be forced to expend additional money to counteract the anticipated television, radio and print ads on which those funds will be spent.

Second, the Plaintiff Foley will be harmed because the supplemental matching grant based on his campaign expenditures violates his First Amendment rights. As Judge Underhill noted in his recent decision striking down the CEP,

[a]rguably the benefit conferred by the CEP trigger provisions is more constitutionally objectionable than increasing an opponent's individual contribution limits. In the latter scenario, the opponent must still go out and raise the additional contributions; there is no guarantee that increasing contribution limits will actually result in increased contributions. The CEP, by contrast, ensures that there will be additional money to counteract the excess expenditures by the non-participating candidate, or the independent expenditures by the non-candidate or independent political advocacy group, because the participating candidate automatically receives additional funding. By making those expenditures, the non-participating candidate or advocacy group is guaranteed to see the participating candidate's funding increase. Therefore, following the reasoning set forth in *Davis* [*v. Federal Election Commission*, ___ U.S. ___, 128 S.Ct. 2759 (2008)], the trigger provisions unquestionably burden the exercise of First Amendment rights.

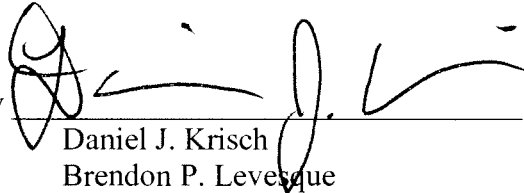
Green Party of Connecticut v. Garfield, 648 F.Supp.2d 298, 373 (D. Conn. 2009); see also *McComish v. Brewer*, 2008 WL 4629337 (D. Arizona 2008), *overruled* *McComish v. Bennett*, ___ F.3d ___ (9th Cir. 2010) (irreparable harm to plaintiffs' First Amendment rights based on "the dispensation of funds that will be used to oppose them and through the mere fact that their speech is being burdened").

Here, the supplemental matching grant awarded to Fedele will work the precise evil described by Judge Underhill – i.e., it will burden the First Amendment rights of the Plaintiff Foley by (a) forcing him to spend more money due to the opposing speech funded by the CEP grant; and/or (b) by chilling Foley’s exercise of his First Amendment rights by making him curtail his own political speech so as not to trigger additional supplemental matching grants.

CONCLUSION

For the foregoing reasons, this Court should enter a temporary injunction in accordance with the Plaintiffs’ application.

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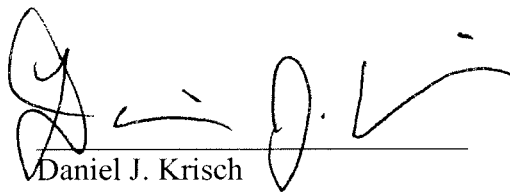
CERTIFICATION

I hereby certify that a true copy of the foregoing was emailed or faxed, and hand-delivered, on July 12, 2010, to the following counsel:

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