

NO. HHD-CV-10-5034960-S

THOMAS C. FOLEY, ET AL	:	SUPERIOR COURT
	:	
Plaintiffs,	:	
	:	
v.	:	JUDICIAL DISTRICT OF HARTFORD
	:	AT HARTFORD
STATE ELECTIONS ENFORCEMENT	:	
COMMISSION, ET AL.	:	
	:	
Defendants.	:	July 12, 2010

**STATE DEFENDANTS’ OPPOSITION TO PLAINTIFF’S *EX PARTE* APPLICATION FOR TEMPORARY INJUNCTION AND ORDER TO SHOW CAUSE**

The defendants, the State Elections Enforcement Commission (“SEEC”), Albert P. Lenge, Executive Director of the SEEC, Nancy Wyman, the State Comptroller, and Denise L. Nappier, the State Treasurer (collectively “State Defendants”), hereby submit this opposition to the *ex parte* application for a temporary injunction and order to show cause filed by the plaintiffs, Thomas C. Foley and Foley for Governor, Inc. (“Plaintiffs”). Plaintiffs’ application should be denied because Plaintiffs: (1) are not likely to prevail at trial; (2) will not suffer irreparable harm if the temporary injunction does not issue; and (3) the balancing of the equities do not favor the issuance of a temporary injunction in the circumstances of this case.

**I. BACKGROUND ON THE CITIZENS ELECTIONS PROGRAM (“CEP”) AND LEGAL PRINCIPLES CONCERNING PUBLIC FINANCING.**

A. *The CEP.*

In 2005, the Legislature passed and Governor Rell signed the legislation that included the Citizens Elections Program (“CEP”), set forth in Conn. Gen. Stat. § 9-700 et seq. The CEP established a voluntary public campaign financing system for qualifying candidates for statewide offices and for the General Assembly offices of state senator and state representative. It was enacted as part of a comprehensive campaign finance reform package in response to widely

publicized high level corruption scandals that fueled the widespread perception among citizens that moneyed special interests were buying influence from the state's elected officials. See Sec. Indus. & Fin. Mkts. Ass'n. v. Garfield, 469 F. Supp. 2d 25, 28-29 (D. Conn. 2007).

All candidates have an opportunity to qualify for funding under the CEP. To do so, major party candidates must first demonstrate sufficient public support for their candidacy by obtaining ballot access and collecting qualifying contributions to demonstrate public financial support. All candidates who participate in the CEP agree at the outset of their campaigns to limit their campaign expenditures, restrict the use of personal and borrowed funds, subject themselves to personal liability for misused funds, and permit rigorous audits of their campaign both before and after an election. Conn. Gen. Stat. § 9-700 et seq.

Candidates gathering qualifying contributions must do so in increments of no more than \$100 per person to his or her candidate committee, and in total amounts varying by the level of office sought to become eligible for CEP funds. Conn. Gen. Stat. § 9-704(a)-(e). A candidate for Governor must gather \$250,000 in qualifying contributions, \$225,000 of which must come from residents of the state. *Id.* § 9-704(a)(1); and candidates for other statewide offices (including Lieutenant Governor) must gather \$75,000 in qualifying contributions, \$67,500 of which must come from residents, *Id.* § 9-704(a)(2).

When candidates qualify for a primary, major parties are required to hold primary elections under certain mandatory procedures. Major party candidates can participate in a primary only after demonstrating a certain level of party support. Conn. Gen. Stat. §§ 9-400, 9-415. Major party candidates participating in a primary election may become eligible for CEP funding for their primary. See id. §§ 9-702(a), 9-705(a)(1), (b)(1), (e)(1), (f)(1), § 9-415.<sup>1</sup>

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<sup>1</sup> All primary grant funds that are either unspent or were expended for general election purposes are deducted from a candidate's general-election grant. *Id.* § 9-705(j)(2).

B. Legal Principles About the CEP To Guide the Court.

Thus, the Legislature and Governor Rell, in enacting and signing the CEP, reformed the way the state elects candidates to state offices. This reform goes to the very essence of our democracy, promoting public confidence in the public officials who serve the citizens of the State. See Nixon v. Shrink Mo. Gov't Pac, 528 U.S. 377, 390 (2000) (campaign finance legislation necessary because “[d]emocracy works only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.”) (internal quotation marks omitted.).

As such, the CEP is the paradigm of a remedial statute, which the Court is obliged to construe liberally. Comm'n on Human Rights & Opportunities v. Sullivan, 285 Conn. 208, 222 (2008). Further, as the First Circuit aptly noted:

The state need not be completely neutral on the matter of public financing of elections. When, as now, the legislature has adopted a public funding alternative, the state possesses a valid interest in having candidates accept public financing because such programs facilitate communication by candidates with the electorate, free candidates from the pressures of fundraising and, relatedly, tend to combat corruption.

Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39 (1st Cir. 1993)(citations and internal quotation marks omitted).

Programs like Connecticut’s CEP, which provide funding to candidates who voluntarily agree to certain restrictions, have been praised as enhancing First Amendment values and upheld by the United States Supreme Court and several courts of appeals. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (upholding the presidential public financing system under

Federal Election Campaign Act (“FECA”)); Daggett v. Comm’n on Governmental Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000) (upholding Maine’s Clean Election Act); see also Green Party v. Garfield, 648 F. Supp. 2d 298, 300 (D. Conn. 2009) (noting that “[g]ood motives underlie the enactment of the CEP, namely, to combat actual and perceived corruption arising out of large contributions from private sources and to encourage candidates to spend more time engaged with voters and each other on the pertinent issues, rather than spending time fundraising. Indeed, the state should be praised for its groundbreaking efforts to increase the public’s confidence in state lawmakers and to promote the integrity of the electoral system as a whole. Spurred on by a regrettable legacy of corruption that has pervaded all levels of elected office in recent decades, Connecticut is now commendably at the forefront of a nationwide movement to increase transparency in the political process.”).

The plaintiffs’ complaint in this case asserts no constitutional challenge in support of his argument for a temporary injunction. Thus, for purposes of this case, the Court should presume that all aspects of the CEP are constitutional, notwithstanding stray allusions in the Plaintiffs’ complaint to the First Amendment. (See Complaint, ¶¶ 44, 48, 52)

Finally, this Court should approach Plaintiffs’ application for a temporary injunction, brought in the midst of a campaign cycle, with an understanding that the SEEC is the agency entrusted with implementing and enforcing the CEP. The CEP is complex and, at times, somewhat ambiguous. There is very little legislative history to provide meaningful guidance on the issues presented in this case. The SEEC must therefore interpret this complicated statutory scheme in a manner that both effectuates the apparent legislative intent and also provides a workable and practical framework in which the CEP can be administered on a daily basis in the crucible of a campaign cycle. This Court should therefore accord a degree of deference to the

SEEC's interpretation of the applicable statutory provisions, especially in the procedural context of an application for a temporary injunction. See Dunham v. Kistner, No. 52 39 20, 1993 Conn. Super. LEXIS 172 at \*10 (January 22, 1993) (noting that "[e]ven greater caution must be exercised and more compelling reasons must exist for the court to issue [a temporary] injunction to a named public official or . . . agency who are presumed to have acted lawfully in the first place").

## **II. ARGUMENT**

To succeed on their application for a temporary injunction, Plaintiffs must demonstrate that: "(1) the plaintiffs have no adequate legal remedy; (2) the plaintiffs would suffer irreparable injury absent an injunction; (3) the plaintiffs are likely to prevail at trial; and (4) the balancing of the equities favored a temporary injunction." Defina v. Town of Greenwich, No. FSTCV084013478S, 2009 Conn. Super. LEXIS 2887 at \*7-8 (October 22, 2009), citing Waterbury Teacher's Association v. Freedom of Information Commission, 230 Conn. 441, 446 (1994). This brief principally addresses the legal issues related to the likelihood of the plaintiff's success on the merits, and the remaining prongs of the temporary injunction analysis will be addressed at oral argument.

### **A. JOINT CAMPAIGNING**

The plaintiff's first two arguments both relate to the unique situation -- both generally among statewide elections and under the CEP -- that arises in races for Governor and Lt. Governor. This brief addresses these issues in the reverse order of the way the plaintiffs have pleaded them.

As a general matter, the CEP only permits a candidate's candidate committee to make expenditures to promote the nomination or election of the candidate who established the

committee. Conn. Gen. Stat. § 9-607(g)(1). Of course, by law, candidates for Governor and Lieutenant Governor must appear together on the ballot in the general election so that voters cast a single vote for both candidates. Conn. Const., Art. Fourth, § 3; Conn. Gen. Stat. § 9-181.

Where a Governor candidate and Lieutenant Governor candidate will share the same ballot line and receive single votes as a unit for the general election, the law allows each committee to make expenditures that promote the election of the other candidate. General Statutes § 9-607(g) (1) (A) (i); § 9-616 (a).

With the concept of a “joint committee,” the CEP recognizes the eventuality that is unique to these two offices – that the two candidates will shall the same ballot line – along with the practicality that often candidates for these two offices will seek to associate themselves jointly even before the general election. The Plaintiffs’ challenges to the SEEC’s application of the CEP provisions that address joint committees are simply flawed.

**i. Joint campaigning of endorsed and non-endorsed candidates under § 9-709**

Plaintiffs’ claim that Conn. Gen. Stat. § 9-709 prohibits a party-endorsed candidate for Lieutenant Governor from forming a joint campaign committee with a candidate for Governor who has not received an endorsement from the party is not supported by the language or purpose of § 9-709 and is unlikely to prevail at trial.

First, it is important to note that § 9-709 does not address at all the means by which joint campaign committees for Governor and Lieutenant Governor *qualify for public financing*. Rather, that section addresses how such a joint committee’s *expenditures* will be considered. This is made plain by the first sentence of subsection (a), which provides: “For purposes of **this section, expenditures** made to aid or promote the success of both a candidate for nomination or election to the office of Governor and a candidate for nomination or election to the office of

Lieutenant Governor jointly, **shall be considered expenditures** made to aid or promote the success of a candidate for nomination or election to the office of Governor.”

Section 9-709(a) goes on to provide:

The *party-endorsed* candidate for nomination or election to the office of Lieutenant Governor and the *party-endorsed* candidate for nomination or election to the office of Governor **shall be deemed** to be aiding or promoting the success of both candidates 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 aiding or promoting the success of such candidacy for the office of Lieutenant Governor and the success of a candidate for nomination or election to the office of Governor jointly upon a declaration by the candidates that they shall campaign jointly. (Emphasis added.).

Thus, by its very language, § 9-709(a) addresses two issues: (1) a specific time by which two candidates for the offices of Governor and Lieutenant Governor, both of whom have received their party’s endorsement, must and will be deemed to be campaigning jointly; and (2) the time and manner in which “any other candidate[s]” who wish to campaign jointly will be deemed to have done so. Section § 9-709 does not anywhere describe which candidates can or cannot campaign and qualify for a CEP grant jointly, but merely addresses when those candidates who do desire to campaign jointly shall be deemed to in fact be doing so. See Conn. Gen. Stat. § 9-709(a) (two party-endorsed candidates “shall be deemed” to be campaigning jointly upon earliest of three prescribed occurrences).

Notwithstanding the plaintiffs’ challenge, the legislature has not defined “any other candidate” to mean any other “non-endorsed candidate,” nor in any way manifested its intent to prohibit an endorsed candidate and a non-endorsed candidate from campaigning jointly under the CEP. Contrary to the unsupported inferences drawn by Plaintiffs, there is no reason to conclude

that it intended to do so *sub silentio* given that the “any other candidate” provision merely represents the default position when one or both candidates have not been endorsed by the party. In fact, § 9-704(a)(1)(B) is the only statutory provision that addresses the extent to which two candidates may qualify jointly for a CEP grant. That section makes no reference at all to whether either such candidate has been endorsed by his or her party.

Thus, based on the language and purpose of § 9-709, there is no reason whatsoever to conclude that a party-endorsed candidate for Lieutenant Governor may not campaign jointly with a candidate for Governor who has not yet received the party’s endorsement.

**ii. Counting qualifying contributions from the same donor to both governor and lieutenant governor candidates -- § 9-704(a)(1)(A)**

Plaintiffs also claim that Conn. Gen. Stat. § 9-704(a) prohibits a candidate for the office of Governor who forms a joint campaign committee with a candidate for the office of Lieutenant Governor from counting individual qualifying contributions from the Lieutenant Governor’s individual campaign committee towards his own qualifying contribution requirement when the amount of those contributions, when combined with contributions that the same donor had already made to the Governor’s campaign committee or subsequently made to the joint campaign committee, exceeds one hundred dollars. This claim is belied by the plain language of § 9-704(a)(1), as well as by the rationale behind, and the built-in tradeoffs that are reflected in, the joint campaign committee concept.

Pursuant to § 9-704(a)(1), candidates for the office of Governor must receive at least \$250,000 in qualifying contributions, \$ 225,000 of which must come from in-state donors, in order to be eligible to receive a grant from the Citizens Election Fund (“the Fund”). Conn. Gen. Stat. § 7-704(a). The statute does not specifically require that the threshold \$ 250,000 requirement be satisfied with contributions from 2,500 individual donors, but does require that

“[t]he candidate committee shall 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.” Conn. Gen. Stat. § 9-704(a)(1)(A).

Plaintiffs cite this general contribution limit in their complaint as the basis for this claim. (Comp., ¶ 15).

Plaintiffs, however, conveniently ignore *the very next subsection* of § 9-704(a)(1), which is not cited anywhere in their complaint and provides: “**all contributions** received by . . . [a] candidate committee of a candidate for the office of Lieutenant Governor who is deemed to be jointly campaigning with a candidate for nomination or election to the office of Governor under subsection (a) of section 9-709, which meet the criteria for qualifying contributions to candidate committees under this section **shall be considered in calculating [the candidate for Governor’s qualifying contribution amounts]**.” Section 9-704(a)(1)(B) does not make any mention of whether the contributions from the Lieutenant Governor’s campaign committee were made by an individual who already had contributed to the Governor’s campaign committee—or who might subsequently contribute to the joint committee—but instead categorically provides that “**all**” such contributions shall count towards the Governor’s qualifying contribution requirement. The legislature obviously was well aware of the fact that many donors make contributions to both the candidates for Governor and Lieutenant Governor, and its decision not to specifically except such contributions from the pooling requirement in § 9-704(a)(1)(B) compels the conclusion that it did not intend for those contributions to be excluded from the Governor’s qualifying contribution total once a joint campaign committee has been formed.

Importantly, this interpretation of the statutory language is entirely consistent with the overall statutory scheme, and specifically with the concept of “joint campaigning” reflected in

the CEP. As the preceding discussion demonstrates, the legislature has provided a specific benefit to candidates for Governor who opt to campaign jointly with a candidate for Lieutenant Governor by allowing those two candidates to pool their qualifying contributions and thereby potentially make it easier for the candidate for Governor to become eligible to receive a grant from the Fund. In exchange for that benefit, however, the legislature has imposed certain costs on those candidates who choose to campaign jointly by limiting both the amount of the grant that the joint campaign committee may receive from the Fund; see Conn. Gen. Stat. §§ 9-704(a)(1)(B)(ii) and 9-709;<sup>2</sup> as well as the amount of permissible expenditures that the joint committee may make during any given phase of the campaign. See Conn. Gen. Stat. §§ 9-702(c) and 9-709 (requiring Lieutenant Governor to dissolve candidate committee upon formation of joint campaign committee and providing that any expenditures thereafter made to support both candidates jointly shall count towards Governor's expenditure limit).

#### **B. SUPPLEMENTAL GRANTS UNDER § 9-713**

Plaintiff's third claim—that Conn. Gen. Stat. § 9-713 prohibits the SEEC from including a non-participating candidate's expenditure of funds before the convention when calculating whether and to what extent a participating candidate is entitled to a supplemental grant during a primary campaign—is similarly without merit and likely to fail at trial.

Conn. Gen. Stat. § 9-713(a) provides, in relevant part:

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*

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<sup>2</sup> In contrast to co-defendants Fedele 2010 and Boughton for Connecticut 2010, who have filed a joint campaign committee and seek only the grant applicable to the Governor's office, Dannel Malloy and Nancy Wyman each qualified separately for the CEP and have received a full grant for the offices of Governor and Lieutenant Governor in the amounts of \$1,250,000 and \$375,000 respectively.

. . . 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. (Emphasis added.).

Plaintiffs rely on the language “in a primary campaign or a general election campaign” and “for the applicable primary or general election campaign period” to argue that any receipts or expenditures made by a non-participating candidate before the start of a primary campaign, which is defined as “the period beginning on the day following the close of . . . a convention held . . . for the purpose of endorsing a candidate for nomination to the office of Governor”; Conn. Gen. Stat. § 9-700(11); cannot be considered in determining whether a participating candidate in that primary campaign is entitled to a supplemental grant. Plaintiffs’ claim fails to stand up to scrutiny and will likely fail at trial.

On the face of § 9-713(a), there are essentially three elements that must be satisfied for a supplemental grant to issue: (1) the SEEC must determine that “contributions, loans or other funds have been received, or that an expenditure is made, or obligated to be made, by a nonparticipating candidate”; (2) that non-participating candidate must be “opposed by one or more participating candidates *in a primary campaign or a general election campaign*”; and (3) the aggregate of those contributions and expenditures must “exceed one hundred per cent of the applicable expenditure limit *for the applicable primary or general election campaign period*.” In contrast to the second and third elements – which relate to the non-participating candidate’s opponent and the applicable expenditure limit, both of which are specifically tied in the statute to the term “primary campaign,” there is no corresponding requirement under the first prong

that the non-participating candidate received or expended the relevant funds “during a primary a campaign” or “during a general election campaign.” Thus, the statutory references to “primary campaign” upon which Plaintiffs rely cannot be construed to have any bearing on when the funds must have been received or expended, and instead should be construed to relate only to which participating candidate is eligible to receive a supplemental grant (i.e. the primary opponent or the general election opponent) and the applicable expenditure amount that must be reached for him or her to do so.

Indeed, any other interpretation of the statutory language would lead to absurd and unworkable result that the legislature could not have intended. Kelly v. New Haven, 275 Conn. 580, 616 (2005) (“It is axiomatic that we construe a statute in a manner that will not thwart its intended purpose or lead to absurd results”). Under Plaintiffs’ construction, for example, a declared but non-participating candidate conceivably could spend an unlimited amount of money against a likely primary opponent before the party’s convention without being concerned about triggering supplemental grants for that opponent once the primary campaign has actually started. Alternatively, he or she could amass a campaign war chest of unlimited size before the primary or general election and then wait until the days immediately preceding the election before spending those funds, thereby depriving a participating candidate of a fair opportunity to obtain a supplemental grant in time to mount a meaningful response before the election. This would defeat the purpose of § 9-713 and create a loophole in the statutory scheme that the legislature could not have intended. See, e.g., Remarks of Representative Diana Urban, House Sess. Transcript, April 3, 2008; Remarks of Jeffrey B. Garfield, February 25, 2008 Public Hearing of the Joint Committee on Government Administration and Elections at pgs.

151-153; Written Testimony of Jeffrey B. Garfield, Executive Director and General Counsel of the State Elections Enforcement Commission, February 25, 2008 Public Hearing of the Joint Committee on Government Administration and Elections.

Moreover, in enforcing expenditure limits by a declared candidate *participating* in the CEP, the SEEC clearly includes amounts expended or obligations incurred even before the convention, and does not include only amounts expended or obligations incurred after the convention. See Conn. Gen. Stat. §§ 9-702(c), 9-704. Thus, to calculate a non-participating candidate's expenses or obligations only from the period *after* the convention would result in an application of the statutes that is not harmonious. Bd. of Educ. v. State Bd. of Educ., 278 Conn. 326, 333 (2006) ("It is an accepted principle of statutory construction that, if possible, the component parts of a statute should be construed harmoniously in order to render an overall reasonable interpretation").

### III. CONCLUSION

For the foregoing reasons and the additional reasons to be addressed at oral argument, Plaintiffs' *ex parte* application for a temporary injunction should be denied.

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COMPTROLLER

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**CERTIFICATION**

I hereby certify that a copy of the foregoing was mailed, first class postage prepaid, this

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