

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GREEN PARTY OF CONNECTICUT, <i>et al.</i>	:	
	:	
Plaintiffs,	:	
v.	:	
	:	
ALBERT P. LENGE, <i>et al.</i> ,	:	CASE NO. 3:06-cv-1030 (SRU)
	:	(Consolidated with 06-cv-1360)
Defendants,	:	
	:	
AUDREY BLONDIN, <i>et al.</i> ,	:	
	:	
Intervenor-Defendants.	:	

PLAINTIFFS’ POST-REMAND MEMORANDUM

Introduction

Plaintiffs’ challenge to the Citizen’s Election Program (“CEP”), part of the Connecticut Campaign Finance Reform Act (“CFRA”), has been remanded to this Court for a determination of whether Conn. Gen. Stat. § 9-713 and § 9-714 (the “matching fund” provisions) may be severed from the CEP. The statute contains an explicit *anti-severance* provision that renders the entire CEP inoperative if any of the funding provisions are enjoined and leaves no room to argue that the unconstitutional CEP provisions are severable. *See* Conn. Gen Stat. § 9-717. By operation of statute, when this Court enjoins the trigger provisions, it may not concurrently sever the trigger provisions from the CEP and therefore it must enjoin the operation of the entire CEP.

The legislature has established a grace period of time before the entire CEP becomes inoperative – either fifteen or thirty days – after the issuance of any injunction applicable to any part of CEP’s funding provisions. This grace period has no effect on the explicit anti-severance provision in § 9-717. The only possible relevance of the grace period is that it will allow the

State to pursue a stay of the injunction in this Court or, out of court, to enact new legislation if the stay is denied. This Court has no jurisdiction or authority to sever the unconstitutional provisions. That authority rests exclusively with the legislature by operation of § 9-717.

Therefore, the Court cannot enter a narrow order enjoining the enforcement of the matching fund provisions and leaving the rest of the statute intact, whether during the grace period or thereafter.

In addition to the issues remanded in 09-3760, the Court of Appeals in *Green Party of Connecticut v. Garfield*, No. 09-0599 (2d Cir. July 13, 2010) remanded to this Court the question of whether the contribution ban applicable to state contractors upheld by the Court, *see* Conn. Gen. Stat. § 9-612(g)(2)(A)-(B), is severable from the other solicitation and contribution restrictions that were struck down by the Court. Here again, § 9-717 is controlling and this Court has no power to sever portions of the CFRA.

Plaintiffs respectfully request that an injunction be immediately entered enjoining the enforcement of Conn. Gen. Stat. § 9-610 (lobbyists) and the solicitation restrictions applicable to state contractors contained in § 9-612(g)(2)(A)-(B). Additionally, regardless of whether or not this Court adopts Plaintiffs' anti-severance construction of § 9-717, Plaintiffs respectfully request that an injunction issue immediately regarding the matching funds provisions.

Argument

A. The CEP's Unconstitutional Provisions Are Not Severable.

Section 9-717(b) provides in relevant part that, once a court enjoins distributions from the fund for any reason, all changes made by CFRA become inoperative for the rest of the election cycle, including the CEP and the ban on contributions by state contractors. The full text of § 9-717(b) provides:

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).*

§ 9-717(b) (emphasis added).

Instead of the thirty day grace period provided in sub-section (b), the fifteen day grace period in § 9-717(c) applies if the injunction is issued after the date of the State primary or if an earlier injunction remains in place for fifteen days after the primary is held. Section 9-717(c) provides:

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).

§ 9-717(c) (emphasis added). Section 9-717(c) is the operative provision here because the primary will be conducted on August 10th and any injunction entered by the Court will issue either after the primary or shortly before it.

There is no serious basis to argue that the entry of an injunction enjoining the distribution of matching funds under § 9-713 and § 9-714 does not automatically trigger the operation of §9-717. The CEP is a funding statute; any order enjoining one of the funding provisions will necessarily have the effect of permanently “prohibiting or limiting the expenditure of funds from the CEP” until at least December 31, 2010. That is the only reasonable construction of § 9-717.

Plaintiffs cannot agree that § 9-717 becomes operative only after the expiration of the applicable grace period. We submit that the provision comes into play immediately. The Court’s ability to enter a narrow order is circumscribed by the anti-severance language contained in § 9-717 regardless of the grace period imposed by the legislature. Section 9-717 must be understood as an explicit *anti-severance* provision that reflects the legislature’s stated intent to revert to the pre-CEP rules if a court enters an injunction enjoining any of the CEP’s funding provisions.

If this Court’s injunction does not encompass the express, anti-severance intent of the CRFA, the Court runs the risk that the Defendants will continue to operate under the current CEP, with only the narrowly enjoined provisions jettisoned. In this scenario, there will have been an order from a court of competent jurisdiction that limits the expenditure of funds from the

CEP, but the rest of the CEP will continue to be operative. This result is an anathema to § 9-717 and must be pre-empted by this court's injunction.

The enlarged grace period was included exclusively for the convenience of the legislature. The legislature's reservation of power in no way limits the authority of the Court to enter an appropriate injunction enjoining the CFRA in its entirety if it determines that the unconstitutional provisions cannot be severed from the statute as a whole. This Court is responsible for effectuating the explicit *anti-severance* provision that reflects the legislature's stated intent to revert to the pre-CEP rules if a court enters an injunction enjoining any of the CEP's funding provisions. Without an injunction from this Court that expresses that the entire CEP is rendered inoperative, nothing will compel the Defendants to recognize and implement the full effect of § 9-717.

As a practical matter, therefore, the Court cannot enter a narrow order enjoining the enforcement of the matching fund provisions and leaving the rest of the statute intact – regardless of the applicable fifteen or thirty day grace period. Indeed, the grace period provided by the statute is irrelevant to the severance issue. The only purpose served by the grace period is to allow the State an opportunity to seek a stay of the underlying injunction or to enact entirely new legislation. Only a stay will prevent the other provisions of the CEP and CFRA from becoming “inoperative” through the rest of the year by operation of the statute. The existence of a grace period does not convey to the Court authority to sever the unconstitutional provisions.

Under the anti-severance interpretation of § 9-717 set forth above, the invalidation of the matching funds provision renders § 9-612 inoperative, like the rest of the CFRA, Section 9-717 specifies that § 9-612 will not be implemented during any election year when a court of competent jurisdiction on or after April 15 enjoins the expenditure of funds from the CEP. This

provision was included in the legislation to explicitly permit candidates to raise money from state contractors if public funds were unavailable.

The text of the statute and a number of other considerations, discussed below, dictate the interpretation above.

The State in its brief at the Court of Appeals argued that § 9-717 is an anti-severance provision that prohibits the court from excising certain provisions. The Intervenor's took the opposite position and urged the court to affirm (if at all) on the narrowest grounds and to leave the rest of the statute intact. The Defendants explicitly rejected that position:

Defendants do not join the argument of the intervenor-defendants ('intervenor') that were this Court to affirm the District Court's judgment it could appropriately enter a narrower injunction seeking to "sever" or "excise" the offending portions of the CEP, leaving the rest of the CEP intact and operative during the next election cycle. The general severance principles intervenors recite are uncontroversial, and some stray remarks in the legislative history might indicate that some involved supported a severance concept. *However, intervenors' argument runs headlong into the language of Conn. Gen Stat. § 9-717, which the defendants cannot agree would not be implicated even by the more narrow injunction proposed.*

*Reply Brief of Defendants-Appellants, at pp. 58-59 (emphasis added)*¹. Later in the brief the Attorney General argues correctly, we submit, that:

But § 9-717 should also be understood as the General Assembly's policy statement that the CEP was part of a delicate political compromise, which if upset by a ruling implicating the terms of the statute, the State's elected representatives desired that campaign financing revert to pre-CEP rules *for that election cycle*, while the state pursued its legal options and/or the general assembly considered striking a different compromise

¹ For the convenience of the Court, the relevant excerpts from the defendants brief are attached as Exhibit A

Id. at 61(emphasis in original).² The Defendant’s argument concludes that the federal courts have no authority or jurisdiction to direct the state how to administer the CEP or rewrite the state’s laws. *Id. at 62-63* (citations omitted).³ We agree entirely with Defendants’ position on this issue.

This interpretation of the statute is further reinforced by the legislature’s decision not to repeal or amend § 9-717 to eliminate the anti-severance language. Section 9-717 was controversial from the outset and was viewed by critics of it as a “poison pill.” In 2006, in anticipation of this or another lawsuit, numerous organizations and government agency heads testified in support of repealing § 9-717 -- including Secretary of State, Susan Bysiewicz, the then Director of the SEEC, Jeffrey Garfield, and national and local representatives from the intervenor organizations. *See e.g., Statement of Jeffrey Garfield before the Joint Committee of the GAE, March 13, 2006* (Doc. No. 232-15) (explaining that seventy-two hour period contained in “non-severability clause” for seeking a stay should be extended to allow the State to exhaust its appeals). The full transcript of the March 13, 2006 GAE hearing can be found in the record at Doc. No. 236-20. The transcript makes clear that the non-severability clause renders the statute inoperative if part of the statute is enjoined and a stay is not immediately obtained.

² Although the defendants were not specifically addressing the matching fund provisions in this part of their discussion of §9-717, at an earlier point in the argument they acknowledge that “as applied to the matching fund provision at issue in Counts II and III, it would appear that any ruling striking or even severing that provision would ‘prohibit or limits the expenditure of funds.’” *Defendant’s Brief at 60*.

³ If the intervenors nevertheless believe that this court should pick and choose from among the CEP’s provisions despite the language of § 9-717, they should explain how doing so would not frustrate the intent of the legislature in the way that the Attorney General has candidly and accurately described.

The SEEC and the intervening parties in this case explicitly and unsuccessfully tried to prevent the very result that they are hoping to avoid now. Despite the concerns expressed by Director Garfield and others, the legislature left the critical anti-severance provision intact.⁴ The legislature has spoken and has, in effect, rejected the argument that the court should be given the authority to sever the unconstitutional provision and leave the rest of the CEP and § 9-612 intact. This interpretation also corresponds with the position taken by the Attorney General's office with regard to the 2006 amendments. *Defendant-Appellant's Reply Brief at 59.*⁵

Both the State and Intervenor-Defendants have vigorously defended CFRA – and particularly the CEP – as an integrated whole. Throughout this litigation they have maintained that the matching fund provisions are essential to the success and operation of the CEP as a whole. According to the Defendants' own witnesses, no sensible candidate would participate in the CEP if he would have to stand idly by when targeted by a negative advertising campaign or opposed by a high-spending opponent. *See Decl. of Sen. Edward Meyer, (Doc No. 309-3). See also Decl. of Sen. Donald Defronzo (Doc. 236-6) (discussing importance of matching fund provisions to operation of CEP).* The interrelationship between the matching funds provision and the rest of CEP is yet another factor that reinforces the conclusion that the matching fund provisions are not severable from the statute as a whole.

⁴ In 2006, § 9-717 was amended to extend the grace period from seventy-two to 168 hours (seven days).

⁵ In 2010 the legislature again took up the issue of § 9-717 and, again, declined to change the critical anti-severance language. The provision was amended to extend the seven day grace period to fifteen or thirty days, depending on the proximity of the date the injunction is issued to the date that the State primary is conducted.

Defendants are correct about the inextricable relationship of the different provisions of the CEP and the delicacy of the legislative compromise that led to its adoption. Therefore, this Court should not attempt to sever offending provisions, and thereby create a new legislative balance, when the legislature has expressly prohibited such severance. In fact, quite apart from the operation of § 9-717, we do not believe it is possible to sever two of the statute's key funding provisions and leave the other provisions of the law intact – particularly the other funding provisions establishing base grants. To sever the trigger provisions would require the Court to assume that the legislature is satisfied that the base grants are adequate. Their own evidence refutes that very suggestion. *See Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (“To sever provisions to avoid constitutional objection would require us to write words into the statute..., or to leave gaping loopholes ..., or to foresee which of many possible ways the legislature might respond to the constitutional objections we have found.”).⁶ Similarly, we do not believe it is possible to sever some of the statute's solicitation and contribution provisions and leave the contribution restriction contained in § 9-612 intact. To sever those provisions would leave a “gaping loophole” in the law that would allow state contractors to evade the contribution limits by bundling contributions from clients, friends and business associates or by hiring lobbyists as intermediaries. *Randall*, 548 U.S. at 262. The proper course is to allow the legislature to determine the appropriate solution rather than leave in place one minor provision of a broader statute that was found unconstitutional.

⁶ According to news accounts, the legislature is being called into session on July 30th to consider how to respond to the Second Circuit's decision. One of the options being considered is to repeal the matching fund provisions and to simultaneously increase the base grant amounts. See, e.g., Mary E. O'Leary, *Lawmakers to tweak campaign finance program*, New Haven Register, July 27, 2010, <http://nhregister.com/articles/2010/07/27/news/doc4c4e52bab56ca923151532.txt>.

The suggestion that the legislature might be amenable to this Court changing the terms of the statute—and the functioning of the legislature’s campaign finance scheme—is belied by the plain language of § 9-717. The only relevance of the grace period, therefore, is to allow the State an opportunity to seek a stay of the underlying injunction. There is nothing in the text of § 9-717 that would indicate that if the stay is denied the legislature has authorized the Court in the alternative to allow the remainder of the CEP to continue. On the contrary, § 9-717 signals the legislature’s clear intent that it does *not* want the Court to re-write the statute by severing unconstitutional provisions. The legislature has reserved that task for itself and has, in effect, asked that the Court not to interfere. The entry of an *Order* narrowly addressed to the matching fund provisions would frustrate the legislature’s reasons for adopting § 9-717 in the first place. The legislature has ignored its critics and refused to repeal or substantively amend the so-called “poison pill” provision, knowing full well what was at stake in the event of an adverse ruling in this case.

B. The Legislature Cannot Limit the Court’s Authority to Enjoin the Operation of the CEP and Section 9-612 in their Entirety.

Even if the Court does not strictly regard § 9-717 as an anti-severance provision, there is an additional reason why it would be inappropriate to enter a narrow injunction addressed only to the matching fund provisions. Any order enjoining the matching fund provisions will necessarily have the effect of permanently “prohibiting or limiting the expenditure of funds from the CEP” until at least December 31, 2010 – a period much longer than provided by the applicable fifteen or thirty day window. However narrow a remedy this Court might seek to impose, enjoining the CEP’s matching fund provisions would trigger the full force of § 9-717 because the injunction is permanent and there is no basis to speculate that it will not be in effect after the applicable window has closed.

There is no basis to believe the defendants can establish their entitlement to a stay of any *Order* entered by the Court. At this point of the litigation, the Court of Appeals has already affirmed this Court on Counts II and III. Further, there is no basis to speculate that anything will occur after the entry of a permanent injunction that would affect the enforceability of that injunction.

The argument that § 9-717 is not triggered until after the expiration of the applicable fifteen or thirty day window assumes that the injunction is interim or temporary in nature. Plaintiffs have prevailed on Counts II and III and are therefore entitled to the entry of a permanent injunction enjoining the enforcement of § 9-713 and § 9-714. A permanent injunction is a final *Order* that by its terms is enforceable as long as it remains in effect. The entry of that *Order* is the triggering event for purposes of § 9-717 since its duration is not limited.

If the legislature in fact intended the enlarged grace period in §9-717 to be applicable to a permanent injunction, the legislature was attempting to sidestep the authority of this Court to permanently enjoin the CEP and to declare it unconstitutional. In effect, the legislature has granted the State an automatic stay of §9-717 for fifteen or thirty days even though there is no basis to speculate that the underlying permanent injunction will not be fully in force at the end of the grace period. The legislature does not possess this authority, any more than it could write a statute that allowed it to delay compliance with a properly entered injunction. That authority is reserved in the Court.

Defendants may argue that the thirty day window was adopted by the legislature to give it an opportunity to amend the statute, that argument does not alter the analysis. The legislature's efforts to fix the statute during the fifteen day window would not delay the entry of the underlying injunction or avoid triggering § 9-717 once the mandate issues. Moreover, it strikes

us that the defendants' argument necessarily places the cart before the horse. There is no way to know how the legislature will respond to the injunction. All we know now is that it was the intention of the legislature that the CEP and other CFRA provisions be suspended until the end of the year.

CONCLUSION

For the reasons stated above, plaintiffs submit that § 9-917 renders the CEP inoperative and respectfully request the entry of an injunction barring its operation. Further § 9-717 dictates that restrictions imposed on state contractors contained in § 9-612 cannot be implemented in light of the injunction against the trigger provisions. Therefore, Plaintiffs request that the Court enter an appropriate injunction enjoining the operation of those provisions.

Dated: July 28, 2010

Respectfully submitted,

/s/ Mark J. Lopez
Mark J. Lopez
Lewis, Clifton & Nikolaidis, P.C.
350 Seventh Avenue, Suite 1800
New York, New York 10001-6708
Tel: (212) 419-1512
mlopez@lcnlaw.com

David J. McGuire
American Civil Liberties Union of
Connecticut Foundation
2074 Park Street
Hartford, Connecticut 06106
Tel: (860) 523-9146, ext. 212
dmcguire@acluct.org

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2010, a copy of the foregoing *Plaintiffs' Post-Remand Brief* was filed electronically. Notice of this filing will be sent by electronic mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ David J. McGuire
David J. McGuire
Counsel for Plaintiffs