

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

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GREEN PARTY OF CONNECTICUT, :
ET AL., : **CASE NO. 3:06-CV-1030 (SRU)**
 :
 Plaintiffs, :
 :
 v. :
 :
 ALBERT P. LENGE, ET AL. :
 :
 Defendants, :
 :
 AUDREY BLONDIN, ET AL., : **July 28, 2010**
 :
 Intervenor-Defendants. :
 :
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**MEMORANDUM OF DEFENDANTS AND INTERVENOR-DEFENDANTS
REGARDING SEVERABILITY**

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Defendants Albert P. Lenge and Richard Blumenthal, and Intervenor-Defendants Audrey Blondin, Tom Sevigny, Connecticut Common Cause and Connecticut Citizens Action Group (collectively, “Defendants”) respectfully submit this memorandum with respect to the severability issues before the Court in light of the recent decisions of the U.S. Court of Appeals for the Second Circuit.

PRELIMINARY STATEMENT

On July 13, 2010, in *Green Party of Connecticut v. Garfield*, the Second Circuit issued its rulings on Plaintiffs’ constitutional challenges to Connecticut’s Campaign Finance Reform Act (CFRA). In Docket No. 09-3760-cv(L), the Court of Appeals upheld the constitutionality of the great majority of the Citizens’ Election Program (CEP), the state’s public financing program for candidates for state office. The Court of Appeals struck down, however, one aspect of the program – its so-called “trigger provisions,” which provide supplemental grants to candidates facing a high-spending opponent or high independent expenditures, and remanded to this Court to determine whether the trigger provisions are severable from the rest of the CEP.

In Docket No. 09-0599-cv(L), the Court of Appeals upheld the CFRA’s prohibition of contributions by state contractors, but held unconstitutional the CFRA’s prohibition of contributions by lobbyists and its prohibition of the solicitation of contributions by either lobbyists or contractors. The Court similarly remanded that aspect of the case to this Court to determine whether those provisions can be severed from the rest of the CFRA.

In analyzing the severability of each of these provisions, Defendants respectfully submit that the Court must address two separate questions, as set out in greater detail below. First, the Court must consider, under the usual principles governing the analysis of a statute’s severability, whether the unconstitutional provisions may be severed from the parts of the CFRA that have

been upheld. In making that determination, the Court can properly consider Section 9-717 of the Connecticut General Statutes to the extent that it may bear on the legislative intent of the General Assembly in enacting the CFRA. But that provision is only one of many factors the Court should consider and it is not entitled to controlling weight. If the Court concludes that the unconstitutional provisions can properly be severed, then the Court should enter an initial order narrowly enjoining the enforcement of those unconstitutional portions.

Second, assuming that the Court has made an initial determination that the unconstitutional provisions may be severed from the rest of the statute, the Court must then determine the meaning of Section 9-717 as applied to the Court's initial order. In particular, the Court must decide whether – if the General Assembly has not acted within 15 or 30 days after the Court's initial order – Section 9-717 compels the conclusion that the entire statute is void because of the Court's order enjoining the enforcement of certain provisions.¹

As discussed in detail below, Defendants respectfully submit that the CEP's trigger provisions can properly be severed from the rest of the CEP, and that the CFRA's lobbyist contribution ban and the solicitation bans can be severed from the rest of the CFRA. Accordingly, as an initial matter, the Court should enter a narrow order enjoining the enforcement only of the provisions held unconstitutional by the Court of Appeals. With respect to the second issue, Defendants submit that a narrow order enjoining enforcement only of the

¹ During our conference call with the Court on July 14, all parties assumed that, under Section 9-717, the legislature had 30 days in which to act. Telephone Conference at 5:1, 6:8-12, 7:15-17, 10:5-9, 10:18-20, 10:24-25 (July 14, 2010) (Dkt. No. 404). This assumption appears to be incorrect if the injunction is entered on or after the date of the primary election, and may also prove incorrect if the injunction is entered within a 15 day period prior to the primary election. It is true that Section 9-717(b) was amended in April 2010 to generally expand the time allowed for the legislature to take appropriate action from 7 days to 30 days. But the legislature also provided a subsection (c) that seems to provide only 15 days for the legislature to act in the event of an injunction issued on or after the day of the primary election, or within a 15-day period thereof. This year's primary will be held on Tuesday, August 10th.

The full text of Section 9-717 is reprinted in each of the Court of Appeals' decisions.

trigger provisions is not an order “prohibit[ing] or limit[ing] the expenditure of funds from the Citizens’ Election Fund,” within the meaning of Section 9-717, and therefore does not activate that provision. Section 9-717 was intended to permit candidates to go back to the traditional means of fundraising for political campaigns if the entire public financing system were struck down – it was not intended, and should not be read, to destroy the entire package of reforms simply because one relatively minor aspect of the system was held to be constitutionally flawed. Accordingly, even if the legislature fails to take timely action, the constitutional portions of the statute should remain in effect.

A R G U M E N T

I. The Trigger Provisions and Invalidated Contribution and Solicitation Bans are Severable.

A. Federal Courts are Required to Adopt the Narrowest Possible Remedy Consistent with Legislative Intent.

When a portion of a state statute is held unconstitutional, whether the unconstitutional provisions can be severed so as to leave the remainder of the statute intact is a matter of state law. *Virginia v. Hicks*, 539 U.S. 113, 121 (2003); *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (*per curiam*); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 389 (2d Cir. 2000). And, in fashioning appropriate injunctive relief, the Court must be aware of the important federalism concerns at stake. As the Supreme Court recently emphasized in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006):

[W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact.

(citations omitted). When the validity of a state statutory scheme is at issue, basic principles of federalism elevate the importance of narrowly tailored relief, lest the federal government

unjustifiably thwart the will of the state legislature. *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir. 1986) (“[A]ppropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief.” (quoting *Rizzo v. Goode*, 423 U.S. 362, 379 (1976))); *Ass’n of Surrogates v. New York*, 966 F.2d 75, 79 (2d Cir. 1992) (“Discretion to frame equitable relief is limited by considerations of federalism, and remedies that intrude unnecessarily on a state’s governance of its own affairs should be avoided.”).

Accordingly, in *Ayotte*, the Supreme Court identified three principles which should inform the Court’s approach to fashioning a remedy: “First, we try not to nullify more of a legislature’s work than is necessary, for we know that ‘[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.’ . . . Accordingly, the ‘normal rule’ is that ‘partial, rather than facial, invalidation is the required course’” 546 U.S. at 329 (alteration in original) (citations omitted). Second, the Court should refrain from “rewrit[ing] state law.” *Id.* (quoting *Virginia v. American Booksellers Ass’n*, 484 U.S. 383, 397 (1988)). Whether the offending provisions can be severed depends in part on “how easily we can articulate the remedy” that would leave the balance of the statutory scheme intact. *Id.* And “[t]hird, the touchstone for any decision is legislative intent After finding an application or a portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?” *Id.* at 330 (citations omitted); accord *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 873 (2d Cir. 2008).

B. Connecticut Law Provides for a Strong Presumption of Severability.

Connecticut law includes a strong presumption in favor of the severability of statutes when a portion of the statute has been held invalid. Over sixty years ago, the Connecticut legislature enacted a general severability provision, which states:

If any provision of any act passed by the General Assembly or its application to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of such act.

Conn. Gen. Stat. § 1-3. The Connecticut Supreme Court has consistently held that this provision demonstrates the legislature's intent that invalid provisions of statutes are presumed to be severable from the valid provisions. *State v. Bell*, 931 A.2d 198, 235 (Conn. 2007) (quoting *State v. Menillo*, 368 A.2d 136, 139 (Conn. 1976)); *Payne v. Fairfield Hills Hosp.*, 578 A.2d 1025, 1030 (Conn. 1990); *State v. Golino*, 518 A.2d 57, 63 (Conn. 1986); *In re Robert H.*, 509 A.2d 475, 481-82 (Conn. 1986). To overcome this presumption, it must be shown (1) that the remaining valid provisions of a statute cannot operate without the invalid provisions, and (2) that the legislature would not have adopted the statute without the invalid portion. *Bell*, 931 A.2d. at 235 (quoting *Menillo*, 368 A.2d at 139). By framing this two-part test in the negative, state law intentionally places the burden of proof on those opposing severance to demonstrate that the invalid provisions cannot be severed. As the Connecticut Supreme Court stated in *Bell*, the Court's guiding maxim is to "strive to interpret a statute so as to sustain its validity, and give effect to the intention of the legislature." *Id.*²

While the issue here is one of state law, it is important to note that the Supreme Court and the Second Circuit have consistently applied similar standards when determining whether a provision of a federal statute is severable. *See Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) ("Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." (quotation omitted)); *accord Hankins v. Lyght*, 441 F.3d 96, 109

² The federal courts in this District have accepted these standards as the test for severability under Connecticut law. *See, e.g., Pacific Capital Bank v. Connecticut*, No. 3:06-CV-28, 2006 U.S. Dist. LEXIS 55627, 35 n.9 (D. Conn. Aug. 10, 2006) (citing Connecticut's two-part severability test); *Zimmerman v. Board of Educ.*, 597 F. Supp. 72, 78 n.6 (D. Conn. 1984) (acknowledging that Conn. Gen. Stat. § 1-3 establishes a presumption of severability).

(2d Cir. 2006); *Carlin Communications v. FCC*, 837 F.2d 546, 561 (2d Cir. 1988). Indeed, in *Buckley*, the Supreme Court applied a substantially similar test in holding that the Federal Election Campaign Act's unconstitutional expenditure limits could be severed from the Act's provisions establishing a valid public financing program. 424 U.S. at 108-09.

C. The Trigger Provisions are Severable.

Applying these well-established severability standards, the trigger provisions are clearly severable from the remainder of the statute. The CEP can undoubtedly still operate without the triggered supplemental grants – indeed, to date, these provisions have played only a minor role in its operation. Moreover, the Court can readily strike the trigger provisions without any need to rewrite the statutory language. Finally, nothing in the legislative history suggests that the General Assembly would not have enacted the CEP if it could not have included the trigger provisions.

1. The CEP is Fully Operational Without the Trigger Provisions.

The trigger provisions are not so intertwined with the remaining valid provisions of the CEP that their severance would prevent the CEP from operating. *Bell*, 931 A.2d. at 235. On the contrary, these provisions can be cleanly excised from the statute, leaving a fully functioning public financing program.

Although Defendants have argued that the triggered supplemental grants were an important incentive for program participation, there is no reason to believe that these supplemental grants are so indispensable that the CEP could not exist without them. In fact, thus far, the impact of the trigger provisions has been minimal. Indeed, although 231 candidates participated in the CEP in the 2008 elections, not one received additional funds as a result of an opponent's high spending. *State Elections Enforcement Commission, Connecticut – Reclaiming*

Democracy: The Inaugural Run of the Citizens' Election Program for the 2008 Election Cycle 40-47 (2009).³ Similarly, supplemental funds based on independent expenditures were awarded only once, triggering the release of a mere \$632 in additional grants. Minutes of the State Elections Enforcement Commission Regular Meeting at 4 (Oct. 15, 2008).⁴ While there have been several high-profile supplemental grants awarded during this year's gubernatorial primary elections, such supplemental grants have not been triggered in any other race. *See generally* State Elections Enforcement Commission, Commission Meeting Schedule, Agendas and Minutes, <http://www.ct.gov/seec/cwp/view.asp?a=3548&q=428944> (last visited July 27, 2010) (recording supplemental grants only in gubernatorial contest). Moreover, even in the gubernatorial race, there is a distinct possibility (depending on who wins the August 10th primary election) that there will be no remaining CEP-participating candidate, and therefore no possibility for further triggered grants, in the general election.

Most importantly, it is clear that the CEP can – and often does – successfully function without the trigger provisions. Without these provisions, candidates would no longer be entitled to receive additional funds in the event of a high-spending race or a hostile independent expenditure campaign. But candidates would still (1) qualify under the same eligibility standards, (2) receive the same initial grant and (3) be subject to the same expenditure and contribution limits. In short, they could still run effective campaigns using their base grants of public funds. Indeed, other public financing programs – including the Presidential public financing system upheld in *Buckley*, 424 U.S. at 85-109 – award only base grants without any triggered supplemental grants. *See, e.g.*, Haw. Rev. Stat. §§11-208 -229 (Hawaii), Md. Code Ann.,

³ This document is available at http://www.ct.gov/seec/lib/seec/publications/2008_cep_report_reclaiming_democracy_102709.pdf.

⁴ This document is available at http://www.ct.gov/seec/lib/seec/minutes_10-15-2008_final.pdf

Election Law §§ 15-101-111 (Maryland), Mich. Comp. Laws Ann. § 169.264 (Michigan), Vt. Stat. Ann. Tit. 17, §§ 2851-2856 (Vermont).

2. Nothing in the Legislative History Indicates that the Legislature Would Not Have Enacted the CEP Without the Trigger Provisions.

As discussed above, under Connecticut law it is Plaintiffs' burden to demonstrate that the trigger provisions are not severable and that the General Assembly would not have enacted the CEP without them. Plaintiffs cannot come close to satisfying that burden. The legislative history regarding enactment of the trigger provisions is sparse, and there is simply no evidence that the legislature would not have enacted the CEP without them. The limited record includes testimony regarding how similar provisions have worked in the public financing systems of other states, *see* EX-946-49, 981-82, 990 (Statement of Barbara Lubin) (discussing Arizona's system); EX-971-72 (Statement of Jonathan Wayne) (discussing Maine's system); comments regarding the appropriate grant amounts and distribution mechanisms, *see* EX-993, 1107 (Statement of Senator John McKinney) (discussing appropriate grant levels and questioning witnesses about how triggered matching funds are distributed); and concerns about the influence of independent expenditures, EX-1024-25 (Statement of Senator Andrew Roraback) (voicing concern over the influence of independent expenditure organizations and issue advocacy).⁵ But none of these comments suggests that enactment of the CEP was in any way contingent on the trigger provisions.

Accordingly, this Court should look to the fundamental purposes of the statute to determine whether severability would more closely comport with legislative intent than the

⁵ Citations are to the exhibit volumes submitted to the Second Circuit on the recent appeals, which included all of the legislative history materials previously submitted to this Court. Copies of the relevant pages are included as exhibits to the Declaration of Mimi Marziani dated July 28, 2010 ("Marziani Declaration") filed herewithin.

alternative – invalidation of the entire statute. *E.g., State v. Bell*, 931 A.2d 198, 235 (Conn. 2007) (quoting *State v. Menillo*, 368 A.2d 136,139 (Conn. 1976)). The CEP’s principal purpose was to provide a corruption-free funding alternative for candidates in state politics, thereby preventing both actual corruption and its appearance. *See* SPA-21-22 (Aug. 27, 2009 Memorandum of Decision and Order) (describing CEP’s general purpose “to combat actual and perceived corruption in state government”). The legislature thus carefully crafted CEP’s base grants to match the historical expenditures in competitive campaigns. *See* EX-1221-1225 (Statement of Campaign Finance Working Group). The legislature included the trigger provisions to incentivize participation by ensuring that candidates could receive supplemental funds in extraordinarily high-spending races – which, as illustrated above, are rare. While it is possible that some candidates might decline to participate in a public financing system without this assurance, such individual strategic decisions by candidates tell us nothing about the legislature’s intent. Simply put, there is no reason to believe that the General Assembly would have failed to make public financing available without triggered supplemental funds. Indeed, a public financing system without supplemental grants would still offer a corruption-free source of money for candidates to run competitive campaigns in most races, thereby achieving the legislature’s main goal.

In the absence of any evidence that severability is inconsistent with the legislative intent, and in light of the strong presumption of severability in Connecticut law, the Court should sever the trigger provisions rather than enjoining enforcement of the CEP in its entirety.

3. Section 9-717 does Not Demonstrate any Legislative Intent that the Trigger Provisions are Not Severable.

Section 9-717 provides that in the event a court “prohibits or limits . . . the expenditure of funds from the Citizens’ Election Fund . . . for grants or moneys for candidate committees

authorized under sections 9-700 to 9-716, inclusive” for more than 15 or 30 days (depending on the timing of the court ruling)⁶ on or after April 15th in an election year, then all of the provisions of the CFRA – including the bans on contributions from lobbyists and contractors – become “inoperative,” and the state’s campaign finance system reverts back to the pre-CFRA system. Conn. Gen. Stat. § 9-717.⁷

Plaintiffs have previously characterized Section 9-717 as an “anti-severability” provision that demonstrates the General Assembly’s intent to derail the entire campaign finance system if any provision was held unconstitutional. Telephone Conference at 7:11, 8:1 (July 14, 2010) (Dkt. No. 404); *see also* Pl. App. Br. 115-16. This reading of Section 9-717 is, however, far too broad. In fact, Section 9-717 does not answer the question of whether the trigger provisions may be severed – instead, it is addressed to an entirely different problem.

The purpose of Section 9-717 is readily apparent – it embodies the General Assembly’s concern that participating candidates have some means to finance their election campaigns in the event that an adverse court ruling makes public financing unavailable in the midst of an election campaign. In that event, Section 9-717 compensates participating candidates for the loss of public funds by allowing them to revert to the pre-CFRA means of private fundraising, including seeking contributions from lobbyists and contractors. It prevents these candidates from getting

⁶ As amended in April 2010, Section 9-717(b) extended the time in which the Legislature has to act from 7 days (as previously provided) to 30 days. However, as noted above, Section 9-717(c), as enacted at the same time, appears to provide a 15-day time period if the injunction is entered on or after the date of the primary election, and perhaps also if the injunction is entered within a 15-day period prior to the primary election.

⁷ Section 9-717 identifies with specificity the provisions of the Act which would become inoperative: the provisions establishing and funding the CEP (Conn. Gen. Stat. §§ 9-700 to 9-716, §§ 9-750 to 9-751); the contribution and solicitation bans on lobbyists and contractors and changes in contribution limits (the amendments enacted by Public Act 05-5, Conn. Gen. Stat. § 9-612 (g) to (j), and § 1-100b); and certain provisions relating to a pilot program for public financing of municipal elections (Conn. Gen. Stat. § 9-760, § 49 of Public Act 05-5).

trapped in a system where no public funds are available but in which they are bound, by their prior decision to opt into the program, to forgo private fundraising.

Section 9-717 thus has nothing to do with the severability of any particular provision of the CEP. While Section 9-717 was enacted to address what should happen if the operation of the entire CEP were enjoined, it is silent on the severability of any particular provision. Certainly nothing in the enactment of Section 9-717 or its legislative history demonstrates any affirmative legislative intent that the trigger provisions are not severable, as would be required to overcome the presumption of severability.

The legislative history of Section 9-717 is sparse. But the limited legislative history supports our contention that Section 9-717 was intended to serve as a reversion mechanism in the event that public financing was interrupted and that Section 9-717 was not meant to derail the entire campaign finance reform system if some severable portion of the CEP were found unconstitutional. *See* EX-1447 (Statement of Rep. Tim O'Brien) (explaining that Section 9-717 would be activated "if the public financing system went away"); 53 S.Proc., Pt. 3, 2010 Sess. (April 13, 2010)⁸ (Statement of Senator Gayle Slossberg) (explaining that Section 9-717 would be activated "if a court found the program to be unconstitutional" and enjoined it (emphasis added)). There is nothing in the legislative history that reflects a legislative intent that the entire CEP should fall if just the trigger provisions were held unconstitutional and only the supplemental grants were enjoined.

This is hardly surprising. At the time of CFRA's enactment, in November 2005, the Supreme Court had not yet decided *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008) and the constitutionality of trigger provisions was widely accepted. *See Green Party of*

⁸ The relevant portion of this transcript is included as an exhibit to the Marziani Declaration.

Connecticut v. Garfield, 537 F.Supp.2d 359, 391-92 (D. Conn. 2008) (granting, pre-Davis, Defendants’ motion to dismiss challenge to Connecticut’s trigger provisions); *see also North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427, 437-38 (4th Cir. 2008), *cert. denied by Duke v. Leake*, 129 S.Ct. 490 (Nov. 3, 2008) (affirming denial of preliminary injunction against trigger provisions in North Carolina’s public funding program); *Daggett*, 205 F.3d at 463-65 (finding that plaintiffs had “no right to speak free from response” and upholding trigger provisions in Maine’s public funding program). As there was no reason to be concerned about a relatively narrow challenge to those specific provisions, the legislature did not draft Section 9-717 with this problem in mind. *See* EX-405-13 (Testimony of Suzanne Novak) (identifying minor-party provisions as potentially vulnerable aspects of CEP with no discussion of trigger provisions).

The General Assembly’s revisions to the CEP in 2006 further supports that the legislature did not intend Section 9-717 to be a general prohibition against severance of any provision of the CEP. Prior to the 2006 Amendments, the eligibility and grant requirements for non-major party candidates were interwoven throughout the CEP in a manner that would have prevented their clean excise in the event that a court found them to be constitutionally flawed.⁹ The legislature, recognizing that these provisions could be subject to constitutional challenge, redrafted the statute to group these provisions into separate sections that were more easily severable. *See* 2006

⁹ Prior to the 2006 amendments, the provisions providing general election grants gave the grants exclusively to major party candidates. The 2006 amendments struck the term “major party” and added the phrase “or who has qualified to appear on the election ballot” These amendments transformed these provisions into generally applicable party-neutral provisions, treating major and non-major party candidates the same. SPA-446-49; 2006 Conn. Acts 137, §§19(a)(2),(b)(2),(e)(2)&(f)(2) (Jan. Sess.). The provisions that establish alternate eligibility requirements for non-major party candidates (including the 10%, 15%, and 20% prior-vote or petition-signature requirements), and provide for modified grants to non-major party candidates who only achieve the lower percentage thresholds, are contained in Sections 9-705(c) and 9-705(g). SPA-298-302. As reorganized in 2006, these provisions were drafted as stand-alone provisions from the otherwise generally applicable general election grant provisions.

Conn. Acts 137, § 19. After this redrafting, if a court's injunction against the enforcement of the minor party provisions would still have activated Section 9-717 – thus bringing down the entire campaign finance system – then the legislature's action in facilitating the severance of these provisions would have been pointless. *See* EX-1448-49 (Testimony of Arn Pearson) (supporting reformatting so “if there's a problem with [the non-major party provisions], you don't lose the whole thing”); EX-1449 (Statement of Rep. O'Brien) (“[I]f the Court chooses to say that this provision is not constitutional, then they can strike down just the minor party point. And in effect what happens is that minor party and petitioning candidates revert to what applies to major party candidates.”). This demonstrates the legislature's expectation that individual provisions of the CEP could be severed without destroying the system.

The legislature's intent to preserve the public funding system is clear, even in the event that individual provisions were held unconstitutional. Accordingly, the Court should fashion a narrow injunction that excises only the trigger provisions, allowing the CEP to continue its operation.

D. The Unconstitutional Contribution and Solicitation Bans are Severable.

For similar reasons, the CFRA's bans on contributions by lobbyists and on solicitation of contributions by lobbyists and contractors – which the Second Circuit has now held to be unconstitutional – are severable from the remainder of the CFRA. There is nothing in the legislative history which would suggest that these provisions are not severable or that their unconstitutionality should have any broader effect on other provisions of the CFRA.

Indeed, on this issue there is legislative history directly on point, which shows that the General Assembly thought that this issue would be governed by the general presumption of severability under state law. During the Senate debates on the final bill, on November 30, 2005,

Senator John McKinney explicitly asked Senator Donald DeFronzo, Senate floor leader for the legislation, what would happen if a court held that “the prohibition on lobbyists . . . violated the First Amendment”? Senator DeFronzo replied that “the separability [*sic*] application that would apply would be the one in the General Statutes. So that section of the bill on the lobbyist ban would be declared unconstitutional, would be taken out of the bill, and we would go forward with the rest of the bill as it stood.” EX-4664. Thus, it was the legislature’s clear understanding that provisions of the CFRA would be severable under Connecticut law – the statute should be interpreted in accordance with their expectation.

E. The Unconstitutional Provisions are Severable, So the Court Should Enter a Narrow Injunction.

For all the reasons stated above, the provisions of the CFRA which have been held to be unconstitutional can properly be severed. Once the Court of Appeals has issued its mandate, the Court should enter a narrow injunction which merely prohibits enforcement of the particular provisions which have been held unconstitutional and leaves the remainder of the statute intact.

II. Section 9-717 does Not Require the Court to Enjoin the Operation of the Entire CEP or the Enforcement of Other Provisions of the CFRA.

Assuming that the Court initially determines that the unconstitutional provisions are severable and enters a narrow order enjoining only those provisions, a question remains: What is the effect of that injunction if the General Assembly fails to act within the time period specified in Section 9-717? Defendants respectfully submit that the narrow injunction we suggest above will not trigger the application of Section 9-717. Thus, there will be no need for the Court to enter any broader order even if the legislature fails to act.

As noted above, Section 9-717 provides that, in the event a court “prohibits or limits . . . the expenditure of funds from the Citizens’ Election Fund . . . for grants or moneys for candidate

committees authorized under sections 9-700 to 9-716, inclusive,” for more than 15 or 30 days, all of the provisions of the CFRA – including the bans on contributions from lobbyists and contractors, as well as the provisions establishing the CEP – would become “inoperative.” In determining how this provision should be applied, this Court must ascertain the meaning of the above quoted language from the CEP.

Under Connecticut law, “[t]he process of statutory interpretation involves a reasoned search for the intention of the legislature.” *Wiseman v. Armstrong*, 850 A.2d 114, 118 (Conn. 2004) (citation omitted). The Court must seek to determine “the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply.” *Rivers v. City of New Britain*, 950 A.2d 1247, 1254 (Conn. 2008). When the language of a statute is ambiguous, the Court must look to “the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to [the law’s] relationship to existing legislation and common law principles governing the same general subject matter.” *Id.* (citation and quotation marks omitted). Moreover, as the Connecticut Supreme Court recently reaffirmed,

[i]n construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended. [W]e [also] must avoid a construction that fails to attain a rational and sensible result that bears directly on the purpose the legislature sought to achieve. If there are two possible interpretations of a statute, we will adopt the more reasonable construction over one that is unreasonable.

Aspetuck Country Club v. Town of Weston, 975 A.2d 1241, 1249-50 (Conn. 2009) (alterations in the original, citations and quotation marks omitted).

Here, the relevant language of Section 9-717 is fundamentally ambiguous. It is unclear whether the phrase “prohibit[ing] or limit[ing] the expenditure of funds from the Citizens’ Election Fund . . . for grants or moneys for candidate committees authorized under sections 9-

700 to 9-716, inclusive,” is meant to apply to any injunction affecting any one penny of public funding or whether it only encompasses an order effectively enjoining the public financing program as a whole. But given the demonstrated legislative purpose and intent, the latter interpretation is the best. Under this reading of Section 9-717, only an order prohibiting or limiting the release of all (or substantially all) funds from the CEP would activate the full reversion. An order enjoining just the trigger provisions – and thereby preventing only a limited, contingent portion of the CEP’s funding – would leave Connecticut’s system largely intact and would not have the disproportionate result of dismantling all of Connecticut’s hard-won reforms.

As discussed above, Section 9-717 was intended to provide participating candidates with the means to finance their campaigns in the event of an adverse court ruling cutting off public funds. Clearly this rationale would only be implicated by an injunction that broadly enjoined the disbursement of all (or substantially all) funds from the CEP. This rationale, however, has little force when the Court is addressing a much more limited order enjoining only the supplemental grants triggered in the most expensive races. There is simply no meaningful rationale for applying Section 9-717 so as to tear down the entire edifice of the CEP because of a largely tangential legal issue affecting relatively few candidates and a tiny percentage of CEP funding. Such an extreme interpretation, divorced from any plausible statutory purpose, would surely “fail[] to attain a rational and sensible result that bears directly on the purpose the legislature sought to achieve.” *Aspetuck Country Club*, 975 A.2d at 1249-50.

Conclusion

For the reasons described above, Defendants respectfully submit that the Court should enter a narrow order enjoining the enforcement only of the provisions held unconstitutional by the Court of Appeals. As we argue above, a narrow order of this kind was not intended to

activate Section 9-717. Accordingly, even if the legislature fails to take timely action, the constitutional portions of the statute should remain in effect.

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Respectfully Submitted,

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