09-3760-CV(L)

09-3941-cv(CON)

BRIEF AMICUS CURIAE FOR FRIENDS OF SUSAN 2010, INC. IN SUPPORT OF DEFENDANT-APPELLANT AND URGING REVERSAL

David R. Makarewicz
Updike, Kelly & Spellacy, P.C.
One State Street
Hartford, Connecticut 06123
860-548-2600

William M. Bloss
Koskoff Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
(203) 336-4421

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
STATEMENT OF INTEREST OF AMICUS CURIAE 1
ARGUMENT 2
A. Principles of equity permit the Court to keep the CEP in place for 2010 even if the CEP is found unconstitutional 3
B. The Court should not enjoin the CEP for the 2010 elections because of the proximity of Election Day 2010 and the necessity of early fundraising 9
C. Enjoining the CEP for 2010 gives an unfair advantage to self-financed candidates 14
CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES

Baker v. Carr,
369 U.S. 186 (1962) 3, 4, 5, 6
Davis v. FEC,
--- U.S. ----, 128 S.Ct. 2759 (2008) 16
Reynolds v. Sims,
377 U.S. 533 (1964) 4, 5, 6, 9
Railroad Commission of Tex. v. Pullman Co.,
312 U.S. 496 (1941) 4, 5
Williams v. Rhodes,
393 U.S. 23, 35 (1968) 6, 7
Green Party of Connecticut v. Garfield,
648 F.Supp.2d 298 (D.Conn.,2009) 2, 6, 9, 13, 16
Roman v. Sincock,
377 U.S. 695, 711-712 (1964) 7
Ely v. Klahr,
403 U.S. 108, 113-15 (1971) 8
Cosner v. Dalton,
522 F. Supp. 350 (E.D. Va. 1981) 8
Martin v. Venable,
401 F. Supp. 611 (D. Conn. 1975) 8

STATUTES AND RULES

Conn. Gen. Stat. §9-702 10
Conn. Gen. Stat. § 9-704 13

OTHER AUTHORITIES

Quinnipiac University Connecticut Poll (November 10, 2009), available at
http://www.quinnipiac.edu/x1296.xml?ReleaseID=1393 1
Mark Pazniokas, *Bysiewicz Enters Race For Governor*,
Hartford Courant, October 2, 2004 at B1 ..... 12, 13
Christopher Keating, *Foley Commits $2 Million Of Own Money On Run For Governor*, Hartford Courant, December 19, 2009 15

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus, Friends of Susan 2010, Inc.[2] is the exploratory committee formed by Susan Bysiewicz, former Connecticut state representative and currently Connecticut's Secretary of the State. Recognizing the importance of removing the influence of special interest money from the political process, she has been an ardent advocate of campaign finance reform as both a legislator and Secretary of State. As a legislator, she championed several bills seeking clean election programs and, as Secretary of State, has personally debated, supported and advocated for campaign finance reform efforts, including the Campaign Finance Reform Act ("CFRA").

Ms. Bysiewicz was a potential candidate for Governor and Secretary of State in 2006 and is the frontrunner to win the 2010 Democratic primary for governor. *See* Quinnipiac University Connecticut Poll (November 10, 2009), available at http://www.quinnipiac.edu/x1296.xml?ReleaseID=1393. Through Friends of Susan 2010, Inc., Ms. Bysiewicz has relied on and acted

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

[2] Friends of Susan 2010, Inc. has no parent company and there is no publicly held company that has a 10% or greater ownership interest in Friends of Susan 2010, Inc.

lawfully in accordance with the provisions of the Citizens Election Program ("CEP") as she has been exploring running for statewide office in 2010. On December 16, 2009, Ms. Bysiewicz stood with a bipartisan field of potential candidates for statewide office in 2010 to pledge to participate in the CEP. Thus, Amicus has a demonstrated interest in the issues raised by this proceeding.

ARGUMENT

Friends of Susan 2010, Inc. ("Friends of Susan 2010" or "Amicus") submits this amicus brief in support of the brief submitted by defendants-appellants Jeffrey Garfield, Executive Director of the Connecticut State Elections Enforcement Commission, and Richard Blumenthal, Attorney General of the State of Connecticut, and the brief submitted by intervenors-defendants-appellants, Audrey Blondin, Tom Sevigny, Connecticut Common Cause, and Connecticut Citizen Action Group (collectively referred to as "Appellants"), to reverse the District Court's judgment in *Green Party of Connecticut v. Garfield*, 648 F.Supp.2d 298 (D. Conn. 2009) and remand the case with directions to enter judgment in favor of the defendants.[3] A campaign finance system that reduces the challenges facing

[3] Additionally, Amicus supports the Appellants' request that, in the alternative, to the extent that the Court affirms any part of the District Court's decision, the Court sever the invalid provisions in a way that will

candidates who are not relying on personal wealth or special interest money is essential for the future of clean and fair elections in Connecticut. However, the primary emphasis of this brief is to stress that the Connecticut primary is scheduled for August 10, 2010 ("2010 Primary") and the Connecticut general election is scheduled for November 2, 2010 ("Election Day 2010"). Amicus requests that if the Court upholds the District Court's judgment, in light of the lengthy reliance of Amicus and many other candidates on the process for funding elections adopted by the Connecticut General Assembly and the near impossibility of anyone other than a self-financed candidate conducting a "traditional" campaign at this late date, that the Court fashion its remedy so that any injunction does not become effective until after Connecticut's 2010 primary and general elections.

A. PRINCIPLES OF EQUITY PERMIT THE COURT TO KEEP THE CEP IN PLACE FOR 2010 EVEN IF THE CEP IS FOUND UNCONSTITUTIONAL

Even if the Citizens Election Program ("CEP") is unconstitutional in some way and the state defendants should be enjoined from operating and enforcing it, that does not mean that relief should apply to the 2010 statewide elections only a few months away. *See Baker v. Carr*, 369 U.S.

---

preserve the continued operation of the CEP. Moreover, Amicus incorporates by reference herein, the Brief for Defendants-Appellants dated November 9, 2009 and the Brief for Intervenors-Defendants-Appellants dated November 6, 2009.

186, 250 (1962) (Douglas, J., concurring); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The impact of enjoining enforcement of the CEP on statewide elections in 2010 simply cannot be overstated. Connecticut citizens considering statewide office in 2010 have already spent several years planning and executing strategies based on the future receipt of CEP public financing. Potential candidates properly and reasonably expected that the CEP, adopted after lengthy deliberations with the support of both major political parties, would further the interests of Connecticut citizens in clean elections, and that it presumptively violated no principles of the federal constitution. Quite simply, it is too late to change the rules now, at least for statewide elections to be held in a few short months.

This Court has broad discretion to fashion a remedy that treats 2010 different than future elections. As Justice Douglas stated in his concurrence in *Carr*, "any relief accorded can be fashioned in the light of wellknown principles of equity." 369 U.S. at 250. In this case, principles of equity demand that the CEP remain in place for the 2010 elections. To hold otherwise is to simply exchange one inequity for another at great cost to potential candidates, the public and Connecticut's electoral process. *See Railroad Commission of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941)

("The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction.")

When equity demands, a court should even allow an election based on an unconstitutional scheme to go forward. *See Sims*, 377 U.S. at 585. In *Sims*, the United States Supreme Court upheld a district court's decision to decline to stay an impending primary even though the primary was to be conducted pursuant to an unconstitutional reapportionment scheme. *Id*. Citing Justice Douglas' *Carr* concurrence, the Court found that under "certain circumstances" a court should balance the unconstitutional laws against factors such as the proximity of the forthcoming election, the mechanics and complexities of the state's election scheme and general equitable principles. *Id*. The Court explained:

> Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even

> though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Id. (emphasis added). For example, in an election law challenge subsequent to *Sims*, the Court allowed an unconstitutional ballot access law to remain in place for an impending election based on equitable considerations such as the physical aspects of the elections and potential confusion to the voters. *See Williams v. Rhodes*, 393 U.S. 23, 35 (1968).

In *Rhodes*, the court rejected the ballot access law as violative of the Equal Protection Clause because it favored major parties at the expense of two Ohio minor parties: the Independent Party and the Socialist Labor Party. *Rhodes* was cited favorably and examined by Judge Underhill to support his holding that a State "may not design a public financing scheme that effectively treats hopeless major party candidates more favorably than hopeless minor party candidates." *See Garfield* at 109. However, even though *Rhodes* found that the absence of both minor parties was

unconstitutional, the Court fashioned a remedy that only required Ohio to permit the Independent Party to remain on the ballot in the coming elections, but not to add the Socialist Labor Party to the ballot. The Court explained why it was allowing an unconstitutional election scheme proceed in this manner:

> Certainly at this late date it would be extremely difficult, if not impossible, for Ohio to provide still another set of ballots. Moreover, the confusion that would attend such a last-minute change poses a risk of interference with the rights of other Ohio citizens, for example, absentee voters. Under the circumstances we require Ohio to permit the Independent Party to remain on the ballot, along with its candidates for President and Vice President, subject, of course, to compliance with valid regulatory laws of Ohio, including the law relating to the qualification and functions of electors. We do not require Ohio to place the Socialist Party on the ballot for this election.

Rhodes, 393 U.S. at 35; *see also Roman v. Sincock*, 377 U.S. 695, 711-712 (1964) (upon finding of unconstitutional apportionment of state legislative seats, "[a]cting under general equitable principles, the court below must now determine whether it would be advisable, so as to avoid a possible disruption of state election processes and permit additional time for the Delaware Legislature to adopt a constitutionally valid apportionment scheme, to allow the 1964 election of Delaware legislators to be conducted pursuant to [the unconstitutional provisions], or whether those factors are insufficient to

justify any further delay in the effectuation of appellee's constitutional rights"); *Ely v. Klahr*, 403 U.S. 108, 113-15 (1971); *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981) (three-judge court, by Butzner, J.).

Following *Sims*, in *Martin v. Venable*, 401 F. Supp. 611 (D. Conn. 1975), Judge Newman held that a local council apportionment scheme violated federal equal protection principles. However, he refused to enjoin an upcoming local election under that unconstitutional scheme. Judge Newman noted that "the disruption of election machinery already in operation ought not to be lightly undertaken." *Id.* at 621. To be sure, the constitutional challenge in *Martin* was filed closer to the election at issue than in this case; however, it involved a much smaller election – a single town – than the multiple statewide and General Assembly elections at issue here.

Just as equitable considerations have compelled the Courts to permit election schemes that violated the Equal Protection Clause to proceed through a single election, equitable considerations should compel this Court to permit the CEP to remain in place through the next election. The proximity of Election Day 2010, the complexities of Connecticut campaign finance laws, the presumption of constitutionality upon which statewide

candidates relied, and general equitable principles overshadow any constitutional burdens that the CEP imposes on minor-party candidates.

B. THE COURT SHOULD NOT ENJOIN THE CEP FOR THE 2010 ELECTIONS BECAUSE OF THE PROXIMITY OF ELECTION DAY 2010 AND THE NECESSITY OF EARLY FUNDRAISING

Weighing the equities in this case demonstrates that this is one of the "unusual" cases in which the court should withhold the issuance of an injunction for the upcoming elections, even if the Court holds that the CEP is unconstitutional. *Sims*, 377 U.S. at 585. The close proximity of Election Day 2010 creates unprecedented challenges for potential candidates who have been relying on the CEP's public financing provisions. Election Day 2010 is only about 10 months away. Worse, the 2010 primaries are only about 7 months away. Thus, potential candidates who have been preparing to participate in the CEP and relying on a future influx of grant money will be irreparably prejudiced if the CEP is pulled out from under them at this late date. For example, there is simply no longer time for a candidate for Governor to raise enough private money to even approximate the more than $4,000,000 raised by each candidate in 2006. *See Garfield*, 658 F.Supp.2d at 328.

Comparing the strategies of potential candidates for statewide office in 2010 with the strategies executed for the 2006 elections demonstrates the

disastrous effect that this last-minute altering of Connecticut campaign finance laws will have on the candidates who have been proceeding in good faith reliance on the CEP. Potential candidates that delayed fundraising and forming an exploratory or candidate committee in reliance on the CEP will, through no fault of their own, suddenly find time, money and donors in dramatically short supply.

Although the CEP became effective at the beginning of 2006, the public financing provisions were not made available for the 2006 elections.[4] *See* Conn. Gen. Stat. §9-702. However, since the CEP was applicable to the 2010 elections, Connecticut citizens considering running for statewide office in 2010 had a crucial decision to make shortly after Election Day 2006: form an exploratory committee immediately and begin actively fundraising (either on the assumption that the CEP would three years later be found unconstitutional or perhaps because the candidate had access to resources in excess of that allowed under the CEP), or forego immediate fundraising with the intention of taking CEP public financing (out of belief that the program benefitted Connecticut's citizens by helping to clean up what was generally perceived as a system in which private money played too large a role). The proximity of Election Day 2010 and the 2010 Primary makes enjoining the

[4] The 2006 general election took place on November 7, 2006 ("Election Day 2006").

CEP for this election cycle wholly unfair to any candidate who chose to follow the process for public financing more than three years ago.

Ms. Bysiewicz is an example of a potential candidate who has relied on the CEP. Anticipating applying for a CEP grant, Ms. Bysiewicz delayed the formation of Friends of Susan 2010 until January 2009, less than two years before Election Day 2010. Ms. Bysiewicz also explored running for governor in 2006. In the comparable election cycle preceding enactment of the CEP, Ms. Bysiewicz formed the Friends of Susan 2006, Inc. exploratory committee ("Friends of Susan 2006") nearly four full years before Election Day 2006. Prior to public financing, a candidate for statewide office was forced to begin exploring and fundraising this early because of the demonstrated amount of time it took for a candidate to raise enough private funds to run a competitive race.

Reliance on the CEP also impacted the timing of candidates' transition from an exploratory committee to a candidate committee. Prior to the CFRA, it was necessary to dissolve an exploratory committee early because a candidate committee could accept contributions about ten times larger than the amount permitted for the exploratory committee. In contrast, under the CFRA system in place now, once an exploratory committee is dissolved, the candidate is no longer permitted to accept any contributions

over $100, so there is no incentive to dissolve an exploratory committee early.[5] In fact, with less than a year to go until the 2010 elections, Friends of Susan 2010 is still operating as an exploratory committee. In contrast, Friends of Susan 2006 was dissolved and transitioned to a candidate committee to run for governor more than two years before the 2006 elections. *See* Mark Pazniokas, *Bysiewicz Enters Race For Governor*, Hartford Courant, October 2, 2004 at B1.[6] Other candidates were also following the same pattern. By October 2004, both John DeStefano and Dannel Malloy had also formed candidate committees for Governor for the 2006 election. *See id*.

The amount of early fundraising by the candidates in the 2006 election cycle further demonstrates that reliance on the CEP has drastically altered the candidates' actions for the 2010 election cycle. In the 2006 election cycle, both Mr. DeStefano and Mr. Malloy had already passed the $1,000,000 mark by the end of 2004. *See id*. As of July 2005, Mr. DeStefano had increased that amount to $2.2 million.[7] By that time, Friends

[5] A candidate committee could still accept qualifying contributions for less than $100.

[6] Ms. Bysiewicz's candidate committee to run for governor was formed on October 1, 2004 and subsequently transitioned to a candidate committee to run for Secretary of State on September 30, 2005.

[7] "In 2006, Jodi Rell raised $4,052,687 and her Democratic challenger John DeStefano raised $4,163,548 for both his primary and general election

of Susan 2006 had already raised $1.7 million. In contrast, due to reliance on the CEP, by July 2009, Friends of Susan 2010 had only raised $237,655.[8] This shows the fundamental difference in campaign strategy that the CEP has produced – and demonstrates the financial and practical challenges for candidates that must transition campaigns that have executed sound CEP-based strategy into a non-CEP environment several months before an upcoming primary. Nearly a year and a half before election day, Friends of Susan 2006, operating prior to the CEP, had raised more than seven times as much as Friends of Susan 2010 – because it reasonably and fairly relied on the state laws set out to reform Connecticut's election process.

The complexities of the CEP rules on qualifying contributions have also limited the fundraising of potential candidates relying on the CEP. *See* Conn. Gen. Stat. § 9-704. Candidates have had an incentive to use the exploratory committee to collect the CEP qualifying contributions. In order to do this, exploratory committees have focused on assembling a large set of donors who will donate $100 or less, rather than donors who will donate the

---

contests. DeStefano's primary challenger, Dan Malloy, raised $3,229,916." *Garfield*, 648 F.Supp.2d at 328.

[8] As of October 2009, only thirteen months before Election Day 2009, Friends of Susan 2010 had still only raised $341,112.50 and had only $227,924.48 on hand-clearly a formula for electoral challenges if the CEP is removed.

full $375 that an exploratory is otherwise permitted to accept.[9] Thus, the proximity of the 2010 elections, the challenges created by the complexities of the CFRA and basic fairness to any candidate who has operated in good faith reliance on a future influx of public financing should compel the Court to ensure that the CEP is not enjoined until after Election Day 2010.

C. ENJOINING THE CEP FOR 2010 GIVES AN UNFAIR ADVANTAGE TO SELF-FINANCED CANDIDATES

Another important equitable consideration is the unfair advantage that self-financed candidates will enjoy. With time, money and donors in short supply, if the CEP is enjoined, it is millionaires who can self-fund campaigns who will be the true winners, not minor party candidates. It is unfair to all candidates who intended to operate their campaigns under existing state law and honor the intent of the legislature by accepting financing for the Court to use its equitable powers to make their road against wealthy candidates even steeper than usual.

The presence of Ned Lamont and Tom Foley, two "Greenwich millionaire[s]," in the 2010 Gubernatorial race demonstrates the immediacy of these concerns. *See* Christopher Keating, *Foley Commits $2 Million Of Own Money On Run For Governor*, Hartford Courant, December 19, 2009.

[9] As of this date, Friends of Susan 2010 has collected nearly $115,000 from more than 1100 donors who each donated $100 or less so the donations could be counted as qualifying contributions under the CEP.

Mr. Foley has already announced that he will forego public financing and has made an initial commitment of $2 million of his own money to his campaign. *Id*. Mr. Lamont has demonstrated the same ability and willingness to fund an expensive campaign out of his own checkbook. In 2006, Mr. Lamont spent about $16 million of his own money in his race for U.S. Senate.

Whether or not the CEP is enjoined, wealthy, self-financed candidates such as Mr. Lamont and Mr. Foley, will have the ability to instantly begin expending millions of dollars despite their failure to form exploratory and candidate committees years earlier. Thus, for 2010, enjoining the CEP would create an unprecedentedly unfair playing field that would burden the right to political opportunity of non-millionaire candidates significantly more than maintaining the CEP would burden minor party candidates.

It is important to note that the Court's analysis of the use of the CEP trigger provisions to level the playing field away from high spending candidates[10] should not be conflated with the Court's analysis of the inequities that an injunction for 2010 will create between self-financed candidates and candidates that will have to raise money. The trigger provisions provide additional public financing to a participating candidate

10 *See Garfield*, 648 F.Supp.2d at 363-73.

facing a privately financed candidate making excessive expenditures. Judge Underhill held that under *Davis v. FEC*, --- U.S. ----, 128 S.Ct. 2759 (2008), the state interest in ensuring candidates "that the playing field will be leveled so that the baseline grants and expenditure limits imposed by the CEP will never hamstring their ability to mount a successful campaign against a high-spending opponent" is not sufficiently compelling to withstand strict scrutiny. *See Garfield*, 658 F.Supp.2d at 373. Even if using the trigger provisions to level the playing field against high-spending opponents is prohibited, the court should not take the extraordinary step of tilting the playing field for November 2010 further in favor of wealthy, self-financed candidates.

CONCLUSION

Amicus requests that the Court grant the relief sought by the Appellants. Even if such relief is not granted, for the foregoing reasons, Amicus requests that the Court permit the CEP to operate until after the completion of the 2010 elections.

Dated: January 5, 2010

Respectfully Submitted,

David R. Makarewicz
Updike, Kelly & Spellacy, P.C.
One State Street
Hartford, Connecticut 06123
860-548-2600

William M. Bloss
Koskoff Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
(203) 336-4421

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,278 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

_____

David R. Makarewicz
Updike, Kelly & Spellacy, P.C.
One State Street
Hartford, Connecticut 06123
860-548-2600

William M. Bloss
Koskoff Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
(203) 336-4421