



September 14, 2009

Dear Leader:

On August 27, 2009, Federal District Court Judge Underhill declared that the Citizens' Election Program<sup>1</sup> ("CEP") violates the First and Fourteenth amendment rights of minor political party candidates in Connecticut. The Attorney General is appealing the decision but Judge Underhill's lengthy and well reasoned opinion will likely be upheld by the Court of Appeals because it rests on firm United States Supreme Court precedent. Once the decision is affirmed, Connecticut's public finance statute by its own terms will be unenforceable in its entirety. To save publicly financed elections and the unnecessary public expense of the appeal, this legislature can act immediately to fix the constitutional defects in CEP.

With your leadership, the legislature can pass a new campaign finance law that satisfies the critical need for integrity in elections without violating the constitutional rights of minor party and independent candidates. Under the new constitutional CEP, the following changes are required: (1) all ballot-qualified candidates who meet relatively modest qualifying criteria must be allowed to fully participate in public funding; and, (2) the additional grants to candidates triggered by either independent expenditure to defeat them or a big-spending opponent who opts out of public financing must be eliminated. Under the new CEP, the constitutionally prohibited dual standards, partial grants and triggers will be eliminated.

To meet the first goal, the new law must have the same threshold fundraising requirement for both minor and major party candidates. Under the current CEP, like major party candidates, minor or independent party candidates have to satisfy qualifying contribution thresholds to become eligible for public financing. Additionally, unlike major party candidates, the minor or independent party candidates have to satisfy at least one of two additional requirements: (a) the so called "prior success" requirement that the minor party candidate attained a specified level of success in vote-getting in the prior election and (b) the petitioning requirement that ties public financing to the minor candidate's ability to obtain relatively large percentages of signatures based on the number of votes cast in the previous election. These additional requirements in the CEP

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<sup>1</sup> Part of the Campaign Finance Reform Act ("CFRA"), Public Act 05-5, effective on January 1, 2006 and substantively amended in May 2006 (Public Act 06-137) and May 2008 (Public Act 08-02).

are unconstitutional and must be eliminated in the new version of campaign finance reform.

In putting forward its new and constitutional campaign reform law, the legislature is encouraged to lower the qualifying contribution thresholds for all candidates. The current high threshold requirements appear designed to exclude participation, especially when compared with the much lower requirements in Arizona. As Judge Underhill noted in his decision, Arizona is a larger and more populated state yet it had significantly lower threshold contribution requirements.

In arriving at his decision to declare CEP's unequal requirements for minor and major party candidates unconstitutional, Judge Underhill reviewed campaign finance reform laws and experience in Maine and Arizona, where public financing schemes operate "on a party-neutral basis – meaning major party and minor party candidates are subject to identical qualifying criteria." Neither Arizona nor Maine administrators reported any problems with "raids on the public fisc," splintered parties and unrestrained factionalism in elections, the proffered bases for including the additional qualifying criteria for minor parties. Significantly, the Maine act with its party neutral criteria survived constitutional scrutiny in the First Circuit Court of Appeals.

The other unconstitutional component of CEP is the excess expenditure and independent expenditure trigger provisions, which release additional grant money to participating candidates under certain circumstances. Circumstances triggering extra public grants to major party candidates include campaign spending by minor party candidates who have not qualified for public funds. In addition, spending by independent advocacy groups and non-candidate individuals in excess of spending by participating candidates can trigger additional funds to participating candidates. The trigger provisions create a disincentive for minor party candidates and independent groups and individuals to spend money in political races because any money they independently spend will trigger more public resources for the major party candidates.

The threat of the CEP's trigger provisions "alone is sufficient to prospectively chill First Amendment-protected expression." Judge Underhill held that these "trigger provisions place a substantial burden on the exercise of First Amendment rights and the state has failed to advance a compelling state interest that would otherwise justify that burden." Judge Underhill relied squarely on the 2008 Supreme Court decision in Davis v. FEC in which the Court held that the increased contribution limits for candidates facing high spending opponents in federal campaign finance law - the so-called "millionaires' amendment," - violated the high-spending candidate's constitutional rights.

Another part of the CFRA that should also be amended is the ban on campaign contributions by certain lobbyists, state contractors and their immediate family members.

Although this ban withstood Judge Underhill's constitutional scrutiny, there is a strong likelihood that a pending appeal will result in a finding that the ban is also unconstitutional on First Amendment grounds. For this reason, the ban on contributions should be removed from any new campaign reform scheme enacted by the legislature to ensure that the entire package survives to achieve the compelling state interest in election integrity.

We are confident that the legislature with your critical leadership will recognize the need and the opportunity to propose a new campaign finance law that will satisfy demands for integrity in elections and the First and Fourteenth amendments of the Constitution. We welcome any opportunity to meet with you to help fix the constitutional problems with the current campaign finance law.

Sincerely,

A handwritten signature in cursive script that reads "Andrew Schneider". The signature is written in dark ink and is positioned above the printed name.

Andrew Schneider