UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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GREEN PARTY OF CT, ET AL	:	No. 3:06CV-1030 (SRU)
	:	915 Lafayette Boulevard
vs.	:	Bridgeport, Connecticut
	:	
	:	March 4, 2008
JEFFREY GARFIELD, ET AL	:	

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MOTION HEARING

B E F O R E:

THE HONORABLE STEFAN R. UNDERHILL, U. S. D. J.

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(9:40 O'CLOCK, A. M.)

THE COURT: Good morning. We're here in the matter of Green Party v. Garfield. Could I have appearances, please?

MR. LOPEZ: Good morning, Your Honor. Mark Lopez on behalf of the Green Party.

MR. FLYNN: Gary Flynn for the Association of Connecticut Lobbyists and Gary Williams.

MR. HSU: Josh Hsu, also for the Green Party.

THE COURT: What's your last name?

MR. HSU: Josh Hsu, H-S-U.

THE COURT: Thank you.

MR. FEINBERG: Ira Feinberg, Hogan & Hartson, for the intervening defendants, Your Honor. And next to me is my partner, Lawrence Brocchini, also for the intervening defendants.

MS. MURPHY-OSBORNE: Good morning, Your Honor. Maura Murphy-Osborne from the Office of the Attorney General representing the state officials.

MR. ZINN ROWTHORN: Good morning, Your Honor. Perry Zinn Rowthorn, also from the Office of the Attorney General for the state defendants.

Also present with us today are Jeff Garfield, Executive Director and General Counsel of the State Elections Enforcement Committee; Joan Andrews, Director of

Legal Affairs and Enforcement for the SEEC and Marianne Sadowski for the SEEC.

THE COURT: Thank you.

MR. ZINN ROWTHORN: I apologize, Your Honor. We also have Beth Rotman, the Director of Finance for the State.

THE COURT: Thank you. Let me start with a few housekeeping matters, just to make sure we've got things sorted out. Back in November of '06, the ACLU and others filed a motion for preliminary injunction in Counts Four and Five. It was docketed as Motion Number 21. That motion remains open on the docket sheet, although I believe that it has been rendered moot and I wanted to confirm on the record that, in fact, when the clerk's office terminated Number 22, which is actually the Memorandum in Support of the Motion for Preliminary Injunction, it should have terminated Motion 21.

MR. LOPEZ: That is correct, Your Honor.

THE COURT: All right, so we'll just have that corrected on the docket sheet.

Motion 68, which is the motion to dismiss, and Motion 77, which is motion for judgment on the pleadings, were argued separately and a ruling on those motions is forthcoming in the very near future.

Number 90 is a Motion to Compel which I again

believe has been rendered moot by the letter from Hogan & Hartson which was dated April 3rd, 2007, indicating that the subpoenas that are in effect the source of the Motion to Compel were being withdrawn. So I want to confirm, Mr. Feinberg, that Motion Number 90, the Motion to Compel, can be denied as moot.

MR. FEINBERG: Yes, it can, Your Honor.

THE COURT: Very well. So ordered.

All right. We have then three motions for summary judgment which are the principal business to take up today, but we also have two related motions. The first is Number 176, which is a Motion for Adoption filed by the Green Party of Connecticut adopting the Motion to Preclude Evidence. Is there any reason not to grant that?

MR. FEINBERG: Your Honor, we agreed, we have no objection to granting the motion to adopt. We certainly have objections to the motion to preclude but have no objection to their joining.

THE COURT: Very good. So, 176 is granted.

It seems to me we ought to start with the motion to preclude because that could affect the record on which I decide the summary judgment motions. Let me just begin by indicating that I've read the motion and the opposition. And I've also read, by the way, all of the moving papers on each of the summary judgment motions. I

will confess not to have read the entire record here, which is voluminous, but certainly have referred to portions of it.

All right, Motion 137. I think what I'd like to do with respect to 137 is tell you what I'm inclined to do and give each side a chance to argue that that's inappropriate. I'm inclined to deny the motion to preclude principally because, to put it in colloquial terms, it's more trouble than it's worth. The motion has some validity to it in parts. Other parts frankly I think are not valid. It's a very expansive motion that seeks to go through in effect a portion of the record almost line by line in places and the, the value of doing that, it seems to me, when we're at summary judgment stage is fairly limited.

First, because I don't have to decide today whether evidence is admitted but only whether it might reasonably be admissible. I don't have to decide the form in which it's been presented for summary judgment, whether it is in fact admissible form. Instead, what I need to do is rely only on admissible evidence and decide these summary judgment motions, and it seems to me that acting as a judge I can do that almost -- and will do that really almost as a matter of course, and to spend what would be an extremely lengthy period of time sorting through which

aspects of a particular affidavit are appropriate or inappropriate when we have a record of this volume and a challenge to so much of that record seems to me is going to be something of a waste of time. So I'm inclined to deny it notwithstanding that there are aspects of it that have some merit, and if and when I rely upon an inappropriate aspect of the record in ruling on the summary judgment motions, it seems to me that that would be grounds for someone to call that to my attention and seek to move for reconsideration on that ground.

So that's my view of the motion to preclude, and I'd be happy to hear from anybody who wants to take issue with that approach.

MR. FLYNN: Your Honor, Garrett Flynn for the Association of Connecticut Lobbyists. Our concern is that saving that gate keeper motion until later, it sounds like Your Honor might be inclined to consider evidence that would fail to raise a material issue of fact because it's not competent evidence that Your Honor should consider. I'm not sure if it's a remedy for us if Your Honor were to deny our motions for summary judgment based on a finding that evidence we've argued is not -- it's not competent. I'm not sure that that's proper. I don't think we have a remedy later if your court rules that some of their affidavits preclude summary judgment and we would argue

later, I imagine, Your Honor, that you shouldn't have considered the Stratmann declaration because it had no nexus to Connecticut law.

The problem is once we get to that stage, we've already in effect suffered the injury caused by evidence that we've objected to on the basis that it's not competent evidence. That's -- I know that there's a different standard in what would be admissible at summary judgment and what would be admissible at trial. For example, someone can't introduce their own declaration or affidavit as substantive evidence at trial but it is sufficient for a summary judgment motion. The problem with that analysis is it doesn't go so far as to permit admission of evidence that that is incompetent under the standards for expert because the form is relaxed at the summary judgment stage.

Our concerns about the evidence are set forth in the papers and I do think it's a worthwhile exercise for the court to look closely at the evidence because there are serious problems with it in terms of whether or not it creates that material issue of fact that would preclude entry of summary judgment in our favor.

You know, we have concerns about the Stratman affidavit which discuss a farm bill, a Class E bill and in a conclusory fashion there is a paragraph says "I think

this is similar to Connecticut," and I've read the bottle bill article. We are concerned about lay witnesses wondering if pieces that weren't prepared in accordance with the Daubert methodology. We have problems with percipient witnesses going and saying that "I've been at the legislature, this bill was passed" or "this bill was defeated and I think it happened because lobbyists were involved in the process." We cite the Hester v. Bic case, which said that in a case of employment discrimination it wasn't proper for employees to speculate on the cause of a discriminatory action on the basis of racial animus if they weren't involved in the process that led to the decision.

So, although it would involve a little bit more work for the court, and I'm sure I speak for all counsel that this is an enormous record and there is a lot of work, it's an important exercise because there are serious concerns in here about the evidence and whether or not it is sufficient for them to create material disputed issues of fact.

THE COURT: Well, you know, why don't those arguments go to the weight rather than the admissibility, as a general matter? It seems to me that Daubert does not very easily apply to the type of evidence that's at issue here. This is not somebody who's giving a medical opinion

or opining about whether a product is safe or using science in any meaningful way. These are, these are people's viewpoints and, as such, it seems to me that Daubert doesn't bear on their opinions in the same way that it would for a true scientific or other traditional expert. And, by the same token, the points you make attack in effect the value of the testimony.

So what I've got is, it seems to me, is a number of affidavits that in my view in principle don't violate Daubert but really for the same reasons are not especially compelling evidence. You know, it would be, it would be surprising to everyone, I think, if I said I'm going to rule on these summary judgment motions by adopting the opinions of someone who, you know, has looked at legislation and come up with their formal view about why something happened. It just --

MR. FLYNN: I don't think we would quarrel with the decision by the court if it refused to consider the evidence because it was internal, lacked foundation or anything. In fact, there were two witnesses disclosed as experts, Stratmann and Meadow. The rest of the witnesses' affidavits we object to arguably weren't subject to Daubert. Maybe they should be disclosed as experts and we can object to them. But if, for example, let's say you had a lay witness from Kansas who was pressing an opinion

about Connecticut, the influence of lobbyists in Connecticut. I think the court at the summary judgment stage could say that this affidavit fails to disclose any foundation that would entitle the affiant to make the conclusions set forth in the affidavit, and to refuse to consider it on summary judgment. I mean, again --

THE COURT: I could do that or I could also say gee, this is really weak evidence. It's arguably admissible, it's arguably relevant, but it has no force.

MR. FLYNN: Again, the distinction is I think that weak evidence might be sufficient to defeat summary judgment if the court rendered the conclusion that it was weak evidence. I think the result should be different, however, if the court found that there's no foundation in the affidavit that would show that the person was able to render the conclusion that they've rendered.

Again, our argument is, you know, we want to obtain summary judgment in our favor and defeat their motion and we don't believe they should get the result they are seeking by introducing evidence that is not, just not entitled to any weight. It's just not competent and it couldn't satisfy the gate keeper requirements of Daubert.

THE COURT: And your argument is there should have been, what, a statistical expert of some sort or --

you're basically arguing that the opinion should be more scientific than it is? That seems to be the principal argument.

MR. FLYNN: If it's going to purport to be scientific evidence, it should be scientific.

THE COURT: But who's suggesting it's scientific other than you?

MR. FLYNN: Well, I mean --

THE COURT: What they are saying is here's an expert opinion. Expert opinion can be based upon experience, it can be based on training, it can be based on a lot of things. Doesn't have to be based on scientific principles or even be a scientific opinion.

MR. FLYNN: Again, the plaintiffs are saying that the testimony of Stratman and Meadow is entitled to weight -- well, not entitled to weight, it should be expert testimony because in some way a special art is brought to bear upon the facts to reach a certain conclusion.

Stratman, we are meant to believe, is someone who has done research on the effects of compaign contributions and the perceptions of them on public opinion. We know that Stratman has no first-hand knowledge of the facts in this case. He's not from Connecticut. He's not here. So what entitles him to come

to the court and say that this is the conclusion that the court should credit? If, in fact, he's claiming to be an expert, that his review of the evidence reaches a certain conclusion and that it's entitled to weight, our argument is that if there's no nexus between what he says and Connecticut or the facts in this case, you know, it may be that within the scope of Rule 7 of the 700 series of the Federal Rules of Evidence it's not helpful to the trier of fact because it has no relationship to Connecticut.

But the court does have, even at the summary judgment stage we would submit, Your Honor, a gate keeper function not to consider evidence that doesn't have a proper foundation or doesn't have any relationship to the facts at issue in a case.

THE COURT: Right. But the problem with that argument, at least one problem with that argument, it seems to me, is the Connecticut legislature is not restricted to an examination or consideration of public opinion only in Connecticut, or acts, occurrences that occur only in Connecticut as they affect public opinion in Connecticut. So, for example, if somebody stands on the floor of the legislature and says, you know what, we have to be concerned about the Jack Abramoff problem. Now, as far as I know, Mr. Abramoff never set foot in the State of Connecticut, never affected anything, any legislation that

affected Connecticut, et cetera, et cetera. Does that mean that any consideration of the public perceptions as a result of the Abramoff affair are thrown out?

MR. FLYNN: Well, I think there's a distinction between the evidentiary record of what the legislature considered in this case and what an expert who's been retained after passage of the legislation is going to present to the court to say, oh, you could have also done it for these reasons or you could have done it for that, when it's really trying to construct a basis for the legislation that's separate and apart from what the legislature itself considered. If Your Honor suggests that Connecticut can consider things outside of Connecticut and all that, then the affidavit of Stratman is superfluous and so is Meadows. There's no need to consider them, and they were not, as far as I can tell, I don't believe that they conducted polling for the benefit of the legislature.

THE COURT: Right, but what you're doing now is you're backing into the point that I just made. You're saying, well, even if maybe they are sufficient to be considered, they have no value. They have no weight. Give them no weight, Judge. You think it can't be, it can't be that it has to be more scientific to be admitted. It can't be that it has to have a direct connection to

Connecticut to be considered. And your argument is this isn't something that the legislature had, so it has limited value. Fair enough, it has limited value. That's a great argument. That's a great argument but it doesn't mean that I can't consider it. It doesn't mean that a jury couldn't consider it. It just means it doesn't have as much value as something that the legislature's fully considered. And that's, that's a different thing than precluding the submission of it or precluding the consideration of it in summary judgment. It's saying it's essentially worthless, Judge, give it the weight it's worth. And that's -- you know, I'm happy to hear that argument but, you know, to go through line by line and say well, gee, you know, this particular sentence of the affidavit, you know, arguably is not sufficiently supported by foundation so I'm going to strike that sentence or the first clause of that sentence or whatever, just -- I don't sense that that's really what we ought to be spending our time on.

MR. FLYNN: I'm mindful -- I don't want to take up too much of the court's time, but if the court is going to say that an issue is weight as opposed to competence or admissibility, then I think that that analysis leads you away from whether this is a record susceptible to summary judgment and that's at this stage of the proceedings what

we're concerned about.

THE COURT: I'm not sure I follow your statement.

MR. FLYNN: Well, if, if -- again, you know, their facts are entitled to the light most favorable to them to the extent that they are, you know, they are disputed. And so if we go and say that the evidence that they are submitting, okay, I find, as the court, this is entitled to very little weight, they could legitimately argue that, well, weight's a question for trial, summary judgment is defeated.

THE COURT: Well, that's true, if it goes to a material issue, which seems to me is the big question here.

MR. FLYNN: Well, I think the issue whether it goes to a material issue is going to be addressed in the contesting of the constitutional discussion, but as far as the preclusion motion, again, if there's no competence for the person to state the opinion, then I mean, again, there's a question of whether or not foundation becomes so low that it's a matter of weight or admissibility. But in this case if people, who are really speculating about the causes of why rulings get passed or don't get passed, or have -- or sponsor advocacy pieces masquerading as scientific evidence, you know, if those are preventing,

you know, summary judgment, then we believe that's improper.

THE COURT: That may be my problem. It may be that I just don't see these issues as being especially material to the summary judgment. You know, I mean why the bottle bill didn't pass, very interesting question, but it's not clear to me that it's a material issue in this case. I don't think if we get to trial on this that either side is going to be trying to convince the jury that the bottle bill didn't pass for X Y Z reasons. I mean maybe I'm wrong but -- I'm willing to be convinced that I'm wrong but my sense is that's not an especially material issue in this case. And so I really, I really feel like the motion to preclude is, it's just calling for lots and lots of effort on something that in the end isn't going to matter.

MR. FLYNN: Well, I think it might be more productive than to have the discussion about what matters.

THE COURT: It may be, but I'm just telling you that my sense is that the motion to preclude as a general matter ought to be denied. If there is in the record some material that has little weight and goes principally to immaterial issues, I don't feel the need to sort it out, frankly.

MR. FLYNN: Right.

THE COURT: I don't feel there's any great problem with it being officially in the record and not officially struck, and that's why I'm suggesting that if we get to the point where I issue a decision in this case and I'm citing to an affidavit that you think doesn't have proper foundation, therefore, it's become material because I'm relying upon it, you know, bring it to my attention and I'm happy to take it up because then it does matter, something I've actually taken a look at, whereas --

MR. FLYNN: Okay.

THE COURT: -- I don't mean to disparage the way this matter's been handled but I think a lot of this record in the end isn't going to matter, and so my inclination is to deny it without prejudice to your right to bring back before me the fact that I've relied on improper evidence in entering a summary judgment motion. Am I missing something? Anybody else want to be heard on this?

MR. FEINBERG: I would just like to say just a few words, Your Honor, about this. I mean we fully agree this motion should be denied and I have a great deal of confidence that the court will give the evidence that's been presented on both sides the weight that it deserves, and I think most of the arguments that are being made do go really to the weight of the evidence rather than to

their admissibility. I don't think there's any question at all that the expert affidavits that were submitted qualify as expert opinion and the court can consider it for whatever value it is.

The one point that I really wanted to make though is that some of the challenge that's coming from the motion to preclude relates to the use of, in our case, Andy Sauer, common cause, and other people, Jonathan Pelto, Senator DeFronzo all submitted statistical information summarizing what's in the public record about campaign files and what an analysis of campaign contribution shows and that point is the one substantive point that I just wanted to say we think that is perfectly appropriate evidence under Rule 1006 to summarize matters that are in the public record, present them in a form that is, that the court can deal with them.

I think frankly it's the only sane way to try to deal with evidence of that kind and, frankly, both sides have done it. Mr. Halloran did it himself without any kind of authentication at all. He submits a bunch of records and tells the court what the records show. The ACLU did the same. Arthur Miller submitted an affidavit which stated that the ACLU had spent a lot of time pouring through campaign finance records in order to present the conclusions in a way that the court can consider, and we

did as well, and that type of evidence we think is perfectly appropriate. And that's the one substantive point I do want to make.

THE COURT: Let me just say, I think that's appropriate. It's what we're all going to be doing here, whether it's done in a brief or an affidavit or argument of counsel or whatever, I mean public records are public records. I can consider them. And somebody that's gone to the trouble or saving me the trouble of culling out pertinent information from a mass of records, I'm happy to see that.

There are also obviously some personal observations of some of you, your affiants that appear to me to be certainly very appropriate evidence in the case. I don't understand there to be opposition to either of those aspects, is there?

MR. LOPEZ: There is, Your Honor. I have two quick points. I want to introduce my general agreement with the court's instincts here about the difference between weight and admissibility, but we're here today because we think we're entitled to the injunction we're seeking and we're hopeful that it issues, and we're very concerned that the opinion testimony of the defendant's lay witnesses is going to provide the grounds to prevent the entry of summary judgment in our favor. They have

cast aspersion after aspersion, their witnesses, upon lobbyists and contractors. Accepting those facts as true, that can be an obstacle to the granting of summary judgment. I just say that, Your Honor.

The other point I wish to make concerns the 1006 summaries. Of course, the parties can rely on the 1006 summaries. Our biggest concern is the admission of hearsay and it concerns the reports prepared by the Connecticut common cause unrelated to this litigation. They are inflammatory. They are advocacy pieces. And I've been at many litigation matters where hearsay is just not admitted. And there are three very damaging reports if you accept the conclusions for purposes of summary judgment, that they just don't meet the standards for consideration on summary judgment as 1006 summaries. They weren't prepared as 1006 summaries, they were prepared prior to this litigation.

Those are my two points.

THE COURT: Right. The arguments that you're talking about, again, my instinct is this -- and I know the 2nd Circuit has talked about motions to strike being appropriate and so forth. When I have a piece of evidence like those articles which basically set forth what amounts to an argument, you know, my practice essentially is to treat them as a brief. You know, it's not necessarily

evidence in the traditional sense. It's more like somebody has made an argument in a persuasive manner, as all of you are going to try to do today, as all of you have done in your briefs. So in effect, the briefs were even longer than they were in this case and those arguments were added in. There you go, somebody's view about this issue. And the risk that this court or any other court would treat that as kind of pure, traditional evidence, I think is very slight.

MR. FEINBERG: Just a comment about the common course of reports, Your Honor. They are advocacy pieces, there's no question about that. But, two things. First of all, there is some statistical information in there which we think is adequately explained as to how it was derived. It's derived from public records. We think the statistics are appropriate for the court to consider.

THE COURT: That's my very point. To go through a motion to strike and to strike a sentence about an opinion but not to strike a sentence about statistics, it seems to me is not worth the effort, because I can go and I can find the public records myself, determine whether the statement about the, about the statistical analysis of the public records is accurate or not, and I'm not really relying in any meaningful sense on that information.

MR. FEINBERG: I agree with that, Your Honor.

The other point I wanted to make is that these records were in a sense part of the legislative history of the statute. Exhibit Number 1, the one about the corruption begins at the campaign trail was released in early -- early in the process. It was before the legislature. Mr. Sauer testified about it in the hearings before the GOP committee. Several representatives mentioned it during the course of the proceedings. And so it does have a certain relevance in that context as well, although still the court would give it whatever value it thinks it deserves.

THE COURT: Very well. To that extent it's not hearsay because presumably it's being offered for the fact it was said rather than that it is true. I mean I don't have to determine that everything said to the legislature is true or false for purposes of whether this is hearsay. I mean the point is if it was said, something was said to the legislature, it was said to the legislature and it comes in as a nonhearsay statement, it seems to me.

Again, I just think the motion to preclude fails for just an almost irrational effort that would be, in the end, meaningless because I don't think there's significant disagreement about what the court can and can't consider. I think we all know the ground rules. It's just not going to be a problem here.

So, I'm going to deny 137 without prejudice to coming back and suggesting to me that I've improperly relied on evidence in rendering a ruling on these summary judgment motions.

All right, let's get to the main event. I think I'd like to start with questions of the standard of review. And I'd like to suggest that a good argument can be made that the -- because what we have here is a ban as opposed to a limit, that strict scrutiny may apply. So let me hear from anyone who wants to suggest otherwise.

MR. FEINBERG: I guess that would be me, Your Honor.

THE COURT: Probably.

MR. FEINBERG: Shall I come up to the podium here?

THE COURT: Wherever you're comfortable. Doesn't matter to me. You rely principally on Buckley, among others.

MR. FEINBERG: Well, actually I would say we rely on McConnell rather than Buckley.

THE COURT: Fair enough. But you don't have, do you, any, any case that I'm required to follow, that is 2nd Circuit or Supreme Court, that has applied less than strict scrutiny to a ban as opposed to a limit?

MR. FEINBERG: There aren't very many cases that

involve a ban and so I guess the answer to that question is no, there is no controlling case that is that precisely on point. The only two cases that I am aware of that involve a ban are the District Court case out of California which upheld that a ban on lobbyist contributions -- actually there's three cases really. The Alaska case that involved a similar ban which has a very narrow exception for lobbyists and contributions, and a case in Louisiana involving the ban on contributions by casino employees.

THE COURT: And the California Supreme Court case.

MR. FEINBERG: And the California Supreme Court case, which was decided very -- which went the other way.

THE COURT: Right.

MR. FEINBERG: But which was decided very early on and before the Supreme Court really made it clear what the Buckley standard really means. The standard, we contend, Your Honor, and I think the Supreme Court precedent supports us fully, that the right standard here is the closely drawn standard and specifically not strict scrutiny, and that is specifically what the Supreme Court in McConnell said. It's what the Supreme Court in the Nixon v. Shrink, the Missouri case, said and there is really nothing, there's nothing you can get from the

supreme court decisions that suggest that the court should apply strict scrutiny here. The Supreme Court has drawn a clear distinction between contribution restrictions and other types of campaign finance restrictions like expenditure limits. Buckley held the expenditure limits to be unconstitutional because the court felt that strict scrutiny had to be applied but distinguished contribution limits and did so for constitutional reasons. Contributions are not speech. They are not entitled to the same protection. The court set this out in Buckley and the court reinforced it in Shrink Missouri Government and in McConnell that --

THE COURT: They are not speech.

MR. FEINBERG: There is only a very marginal element of speech involved in making a contribution.

THE COURT: They are symbolic speech. In other words, what matters is the fact that you can make a contribution, not that the amount is any particular amount.

MR. FEINBERG: There is a small element of symbolic speech involved in making a contribution, that is correct.

THE COURT: Right.

MR. FEINBERG: But the Supreme Court has held that even significant interference with that right to make

a contribution are permissible under the First Amendment because of the larger interests involved in attempting to control corruption and the appearance of corruption in campaign finance. That's what the court has held in McConnell and even in the most recent decisions, the Wisconsin Right to Life case, Chief Justice Roberts in his plurality opinion was very careful to distinguish between the issues and contribution limits and made clear that contribution limits are not subject to the same standard. And there's no reason to apply a different standard here just because it's a ban rather than, rather than a limited amount.

THE COURT: Well, isn't the reason for doing it the fact that the ability, if there's a ban, to engage in symbolic speech is restrained. Whereas if the limit is $30 or $50 or $100 or $1,000, it doesn't matter so much if the Supreme Court's willing to give the legislature a lot of leeway in terms of deciding how much is too much, but what we don't have is a case that says we're going to prevent you from engaging in that symbolic speech and we can do that only if, or if our measure is merely closely drawn.

MR. FEINBERG: But the Supreme Court cases don't support the notion that just because there's some element of speech involved, that means the state can't

constitutionally prohibit it. The Supreme Court's cases made clear that they recognize there's a certain element of interference with First Amendment rights that's justified by other considerations. I mean the act of making a contribution has some speech component but it's really very modest.

And people can more substantively, can still participate in the political process in any number of other ways. They can advise candidates. They can make speeches. They can publish opinions and write an article for, an op head piece for the newspaper supporting a candidate. They can put signs up on their lawns. They can make phone calls to get out to vote. They can do all manner of things in support of a campaign. The one thing they can't do is they can't make a contribution. That's a very small component of First Amendment, of First Amendment value.

And, in fact, the Supreme Court in Buckley made clear that the greater interest is not the speech component of the contribution but the associational interest of affiliating yourself with a campaign. But even there, the ability to affiliate in many different ways makes clear that the strict scrutiny standard does not apply. There are reasons for applying a ban here that make all the sense in the world and that, you know --

THE COURT: That may be true but why isn't this an argument that you survive strict scrutiny rather than that strict scrutiny doesn't apply?

MR. FEINBERG: Well, we do think we survive strict scrutiny but it's certainly a much higher test and we think it's the wrong test. Plaintiffs, you know, plaintiffs in their papers conceded at some point that if the test here is the, is not strict scrutiny, it's the closely drawn standard that there are burdens of demonstrating to the court that what was done here was, is minimal. And so, you know, I think the standard for review question is crucially important here. We should win on any standard of review, I agree with that, but if it's closely drawn, I think this is a relatively easy case and it should be closely drawn.

What I started to say is that no matter what number you come out with -- I mean if the legislature had said, okay, we're going to cut contributions by lobbyists down to $100, the problem is, the way the system works, there would be any number of PACs that would set up and then that $100 would be, okay, contribution to five different PACs that are $100 each, and maybe the lobbyist's spouse would also contribute and suddenly we're looking at a $1,000 contribution. And one of the things that the legislature had in mind here, and this provides a

compelling state interest if that becomes the test, Your Honor, is the need to make a very strong, firm statement that we are not going to permit lobbyists to continue to try to influence the political process through campaign contributions and an absolute prohibition was critical to delivering that firm message to the public, that any message short of that would not be sufficient to demonstrate that we're serious about stopping this untoward political influence that lobbyists obtain through their contributions and through their ability to gather contributions from others.

THE COURT: One problem I have with the cases that have considered bans is that they don't have a great deal of analysis for why they are applying the closely drawn standard rather than strict scrutiny standard. What analysis can you point me to that would help me come to your point of view?

MR. FEINBERG: I think it's the analysis that the court goes through in Buckley and the analysis that the Supreme Court goes through in McConnell. In Buckley where the court emphasizes how limited the First Amendment interests really are when you're talking about campaign contributions as opposed to expenditures or something else, and in McConnell where the court makes clear that even a substantial interference with First Amendment

rights can be accomplished because of the -- can be permitted because of the important interests there are being served by the legislation at issue. And the Supreme Court in McConnell emphasizes the urgent need to address corruption and the public perception of corruption as ultimately having severe consequences for our democratic system of government. And when the public policies at stake here are that great, the court made it clear that the legislature, A, should be given substantial deference to take actions that are perceived to be necessary; B, to take prophylactic measures that are necessary to make sure that the problem doesn't occur.

And that deference, the Supreme Court has emphasized, in this area is inconsistent with the kind of standard of review that you're talking about, Your Honor, because a strict scrutiny standard of review is the antithesis of the kind of deference the Supreme Court has held is appropriate in this area. In fact, the Supreme Court in McConnell says very clearly that being in view of the policies that are at issue here, there is no room for a strong presumption against constitutionality of the type that strict scrutiny would imply.

So, I think the theoretical analysis goes back to the limited nature of the First Amendment interests at stake and the very substantial interests on the other

side. And there is -- you know, there really is no Supreme Court precedent that says that a, that a ban is subject to a different limit. In fact, Your Honor, I think it's the Beaumont case, the Supreme Court was addressing an absolute ban on corporate contributions and held this a ban on corporate contributions was constitutional, so that's -- it's not individual contributions but nevertheless it was a ban and the Supreme Court explicitly held that the, that the fact that it was a ban and not a limit did not affect the standard of review. The standard of review remained the same. It did affect the evaluation of the policies in looking about how closely drawn it was, but the Supreme Court in Beaumont specifically rejected the position that I think Your Honor was proposing.

THE COURT: Well, even McConnell talks about the communicative value of large contributions, and mainly their ability to facilitate the speech of the recipients.

MR. FEINBERG: And if the question that you're posing is here we're not talking about large contributions, we're talking about relatively modest contributions, I think the answer to that --

THE COURT: We're talking about zero contributions.

MR. FEINBERG: Well, but you're proposing limiting, a limit as opposed to a ban of contributions. And --

THE COURT: I'm not proposing anything. I'm not the legislature.

MR. FEINBERG: Understood.

THE COURT: I'm just simply saying I'm evaluating the constitutionality of a ban and trying to figure out why isn't a ban different in kind from a contribution limit and if it's twist in kind; that is, if it's a prevention of speech rather than any restriction on speech, why shouldn't the higher standard apply?

MR. FEINBERG: You know, I've tried to give the theoretical explanations for why, but I'm going to try to see if I can find what the Supreme Court said in 2003 in Federal Election Commission v. Beaumont. Because the court says, and this is 539 US at page 161, "Second, NCRL," that's the National Committee Right to Life, I think, "argues that application of the ban on its contributions should be subject to a strict level of scrutiny." This argument, however, overlooks the basic premise we have followed in setting First Amendment standards for reviewing political financial restrictions. "The level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or

political association."

"Going back to Buckley, restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression."

"While contributions may result in political expression by a candidate or association, the transformation of contributions into political debate involves speech by someone other than the contributor. This is the reason that instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, 'a contribution limit involving "significant interference" with associational rights' passes muster if it satisfies the lesser demand of being 'closely drawn' from a 'sufficiently important interest.'"

And the court goes on to say, "It's not that the difference between a ban and a limit is to be ignored. It is just that the time to consider it is when applying the, applying scrutiny at the level selected, not in selecting the standard of review itself." And that's at page 162. And that role is consistent with the theoretical construct that the Supreme Court has applied in the area of contributions.

THE COURT: Of course the court does note that the provisions of Section 441(b) are not a complete ban, but whatever, your point is well taken.

All right. Anything further on the standard of review?

MR. FEINBERG: Well, yes. I mean I don't want to get ahead of ourselves but we would argue that the same standard of review that is the closely drawn standard also applies to the solicitation part of this as well as to the contribution -- the making the contribution aspect of the ban. I think McConnell supports that as well. McConnell upheld specifically two prohibitions on solicitation of contributions in the course of the court's opinion. This is discussed, Your Honor, in our opening brief at page 80 and 81, and again in our opposition to their summary judgment motion at pages 44 to 50, where we discuss the standard of review in some detail on the solicitation side.

I want to make one correction to what we had to say there because the plaintiffs make the point that the context in which the Supreme Court acted in McConnell in holding that the same standard -- some of the closely drawn standard review applied to the solicitation of prohibitions, they made the point that that was a different type of solicitation prohibition because it only

prohibited somebody from soliciting a contribution which the person receiving the solicitation wasn't allowed by law to make in any event, and so it wasn't -- and that was true of one of the two solicitation provisions that the Supreme Court in McConnell upheld, but it wasn't true of the other. And in our brief I said they had a valid point, but it turns out after I've looked, it was valid only as to one of the Supreme Court's holdings and not as to the holding with respect to prohibiting solicitations to the tax exempt organizations.

So, the Supreme Court in McConnell said that the same closely drawn standard applies, that there's no reason to apply a different, different standard of review to the solicitation aspect of the prohibitions and that holding applies here as well.

More generally, solicitation prohibition of the Supreme Court in another context, in the context of people going door to door and soliciting for money has value so is subject to reasonable legislation. And the important point that the Supreme Court has discussed is not the standard of review question but does the restriction on solicitation do an adequate job of separating the act of asking for money, which is entitled to much less protection, versus the persuasive or informative speech that may come along with the solicitation. And we would

submit that the statute here, which specifically excludes -- I want to make sure I get this right, Your Honor.

Yes, the statute specifically makes clear that solicitation does not include lobbyist or contract informing any person of a position taken by a public official or candidate, or providing any information about the activities of the candidate. And then the SEEC's declaratory ruling went further than that and set out very clear rulings as to what a lobbyist or contractor was permitted to do and making clear there is an awful lot of informational speech that a lobbyist can do as long as they don't explicitly request a contribution, the test that the SEEC has adopted is only barred if it's an express request for a contribution or if it can be reasonably interpreted in no other way than to be an implicit request for contribution.

And so the law and the way that the SEEC has enforced this law is a constitutionally proper way of dividing the solicitation of a contribution from other speaks that may be -- speech that may be associated with it, and for that reason the solicitation is covered by the same closely drawn standard and it's constitutional.

THE COURT: Okay. Thank you.

MR. LOPEZ: Good morning, Your Honor.

THE COURT: Good morning.

MR. LOPEZ: Your Honor, just wondering, is this going to be my only opportunity to address the court? Is it limited to the -- to your initial question?

THE COURT: I'd like to hear your response to the initial question and specifically to Mr. Feinberg's citation of the Beaumont decision.

MR. LOPEZ: All right.

THE COURT: As to, in light of Beaumont, how do you get strict scrutiny?

MR. LOPEZ: Well, in candor, Your Honor, and Mr. Feinberg will be pleased to hear this, we've never urged on the contribution piece that strict scrutiny is the standard. We have argued that this seems to be a gray area. We are clearly somewhere between the closely drawn standard, which applies to generally applicable contribution limits, and strict scrutiny. We're not quite sure where we are.

THE COURT: Strictly drawn.

MR. LOPEZ: Yes. We do know in Beaumont that there was a ban on corporate contributions and the Supreme Court did make the statement, Justice Prior did make the statement the fact it was a complete ban, the fact that it may be a complete ban would go not to a standard of review but it would go to how closely drawn it would -- it is,

and would be an important consideration and, in fact, it hasn't been an important consideration in many, many cases.

So, I'm sorry I can't be more helpful to the court about where, what the exact standard is on the contribution piece. I would suggest that it is the closely drawn standard plus, because when we have seen complete bans, the supreme court has struck down the complete ban. We know that from McConnell with the measure dealing with restrictions on juveniles, that was a complete ban, the Supreme Court applied closely drawn. I don't believe they applied strict scrutiny, and they summarily struck it down, in effect affirming a strike-down for many of the reasons that were stated by the three judge court below.

And in Landell (ph) from the 2nd Circuit, there was also another type of arbitrary distinction between a class of contributors, and this was between out-of-state voters -- or out-of-state contributers and in-state contributors and applying, I don't believe they applied strict scrutiny there either. They just struck it down as an arbitrary distinction because -- it wasn't closely drawn because out-of-state contributions can be just as corrupt as in-state --

THE COURT: Right.

MR. LOPEZ: -- contributions. And you are correct to observe that in Beaumont, the reason the statute was upheld -- first of all, we always upheld, we have always upheld restrictions on corporate contributions. We have done so for years in this country and that was simply reaffirmed. And in Beaumont the court took pains to note that it wasn't a complete ban. The reason we uphold bans on corporate contribution and labor union contributions in this country is because they are allowed to -- contributors first of all can contribute to it and then drive money into the system and they are constitutionally entitled to in that fashion. Of course, that's not possible under the Connecticut statute. The lobbyists are not allowed, with this law lobbyists are not allowed to contribute to certain PACs and political parties.

THE COURT: Help me understand, are you conceding that the closely drawn standard -- or may be closely drawn plus, as you put it -- applies to all issues in this case?

MR. LOPEZ: Oh, that's my bigger point. Absolutely not, Your Honor. The solicitation piece is clearly strict scrutiny. I don't understand frankly why we're getting so much resistance on this point. Solicitation is not the functional equivalent of a

contribution except in the very limited circumstances where the restrictions correspond to each other, much like soliciting an illegal contribution. In Connecticut, for instance, if you can only give $1,000 to the Governor, it would be a crime for the Governor to ask you to give more than $1,000. And that certainly is the import of McConnell, as I understand it, and the import of numerous solicitation cases.

I can tell you very certainly, Your Honor, that there have been dozens, or at least a half dozen or a dozen solicitation cases that have arisen in the political configuration and in the charitable context, and our understanding of those cases and certainly in the recent ones, the political ones in the appellate courts, strict scrutiny is applied.

In fact, the strongest case on this whole matter today is Vermont v. SEEC which upheld a SEEC rule prohibiting solicitation contribution by certain security dealings. They very clearly say strict scrutiny is the standard. And there have been cases involving judges, in states where they elect judges, where there's been a statute that says you can't solicit on behalf of a judge or a judge can't solicit a contribution. They apply strict scrutiny.

In fact, those regimes have been struck down

because solicitation is a speech right and it's intertwined with a request for money but also with urging the support of that candidate and you can't parse it out. The Supreme Court in WRTL -- and there's a change in the Supreme Court, Your Honor, about the way they change things and I'd like to address that if I have a chance -- but very clearly, the tide goes to speech and that seems to be the clear message that is coming from the Supreme Court these days. And when you are talking about restricting political speech, Your Honor, you're talking about a content-based restriction of the most important speech that -- well, that we can -- that can be spoken. And the Supreme Court has been vigilant to protect that speech. That's why we consistently strike down restrictions on expenditure limits.

That's why in Minnesota Republican Party v. White, where candidates were not allowed to campaign on the issues, judges weren't allowed to campaign on the issues, the Supreme Court applied restrictions to strike that down. Brown v. Hartledge (ph), candidates are not allowed to make promises that are sort of in the nature of being fraudulent, like I'll give you a tax rebate if you vote for me. Strikes it down because those are all restrictions on spoken words. And strict scrutiny is applied. They are content-based. They are presumptively

invalid. And, as far as I'm concerned, there's very little debate on what I see as a very fundamental and important point.

Contributions are a different matter. We have traditionally given the legislature deference, absolutely. When it comes to setting the difference between $1,000 and $2,000, we've always given the -- courts don't want to get into that debate but this goes much, this legislation goes much further than some line-drawing. This legislation singles out a group of contributors for special treatment. There's very little precedent for that in the Supreme Court and the precedent, there is no -- the other way, the precedent in the 2nd Circuit goes the other way and not only singles out a particular group, there's no deference in those circumstances, I would argue.

It also imposes a complete ban. My opposition, my opponents continue to minimize the significance of the difference between a ban and -- excuse me -- and a, and a limit but it's a very important difference, Your Honor. And we know it from the Supreme Court's recent decision in Randall. It's an expression of support. It implicates the right of association. Where you set the limit is not as important as having, allowing some expression through a contribution. Now you can actually set the limit so low -- if we were in here today arguing as I did the

Vermont case, Your Honor, and they had set the limits at $200 or $100 or $50, as they did in Vermont, we'd be arguing that you can reduce limits so low that the restriction actually is, for all intents and purposes, a complete ban. That's exactly what happened in Randall. The Supreme Court -- there are limits on party contributions. They can only give $200 and the government's -- it's $400 in the legislature race, $200, Supreme Court said for all -- the Supreme Court focused on the rights of the contributor, not on the right of the candidate, focused on the right of the contributor and said you have violated the rights of the contributor because you reduced those limits so low, they can't meaningfully exercise their First Amendment rights and participate.

Same thing with individual contributors. The contribution limits are all the way down to a point where they don't present a specter of corruption. The Supreme Court says where's the justification? Why are you marginalizing the First Amendment rights of these contributors?

THE COURT: Right, but here, the statute does different things than the Vermont statute did obviously, and there's not in this case a generalized limit but, rather, the limit or the ban at issue is a ban on persons

that the legislature has identified as having both a different role and a different perception in the political process than the housewife who wants to give $200 to the candidate for Governor. And you are obviously now moving away from the standard of review question, since I think your comments have come to the question of whether these measures survive the appropriate level of scrutiny.

Help me understand why, first off, there isn't an extremely strong, if not compelling interest on the part of the legislature to do what it did. And, second, why the restrictions on speech aren't so limited that they don't survive. In other words, Mr. Feinberg is making the point you can do whatever you want to argue that a particular candidate should be supported, but what you can't do is at the end of that speech say, so send some money in. What is so wrong about that with respect to the groups that have been targeted by this legislation, lobbyists and contractors?

MR. LOPEZ: Just on the solicitation piece, just try to imagine how this works, Your Honor. I'm a lobbyist. I cannot advise my clients about which candidates to support, financially support. I cannot advise my friends, I cannot advise my neighbors. I cannot participate in PAC --

THE COURT: Take this -- let's figure that out.

MR. LOPEZ: Right.

THE COURT: Why can't you do that?

MR. LOPEZ: Because, because --

THE COURT: Why can't you say Barack Obama or Hillary Clinton or John McCain, whoever happens to be running in Connecticut, is the best candidate since sliced bread and here's why, and I think you should support them any way possible.

MR. LOPEZ: You can do that, but what you can't do is send out a fund raising piece, which you have a constitutional right to do. You can't engage your neighbor in conversation where you go and pass the hat and try to raise money. Your Honor, the state has an interest in preventing -- this isn't an anti bundling measure. You know what I mean by bundling?

THE COURT: Of course.

MR. LOPEZ: I was warned yesterday not to be too colloquial. But the state has an interest in preventing bundling. That's the real evil here. It seems to me from what I've read of the legislature record, as it turns out, the evidence just doesn't support the claim that lobbyists engage in meaningful bundling. They are actually bit players in the process of political campaigns. But the state could have passed the bundling statute --

THE COURT: Let me -- let's just take a minute

on that point. The legislature doesn't have to be right, do they? I mean I can make a very good argument that Congress has been wrong about a lot of statutes it's passed; how I'm supposed to sentence people, whether this this is a violation of law or not, so forth and so forth. And I can -- I'm sure somebody taking the time and trouble to look at the legislature record could show that nobody proved to Congress that what they ended up doing was appropriate, right, consistent with facts or whatever. But that doesn't, that doesn't matter, does it? In other words, to uphold this legislation, I don't have to find that the legislature correctly believed X Y Z.

MR. LOPEZ: I believe that if you -- I think it's perfectly within your discretion to consider whether or not the legislature made correct judgments about the the need for, for their, the medicine that it took. At the end of the day all these cases boil down to whether or not -- I'm not seriously here arguing that the legislature doesn't, that the states assert an interest if they are true. Because in this area of law, we have a question of perception and we have a question of actual corruption and -- but I'm not seriously arguing that the state has no basis for being concerned about how the public perceives the role of lobbyists and contractors in financing campaigns. As it turns out, those perceptions are

misinformed, Your Honor, and we can establish that.

But this case isn't going to turn on that, Your Honor. This case is going to turn on the application of constitutional standards and you do, as you know, have to resolve that issue, whether this law on the contribution side is closely tailored to achieve those legislative goals and, on the solicitation side, whether the law is narrowly tailored to achieve the legislative goals and whether or not there are less restrictive means to accomplish that.

I can tell you right now on the solicitation side, Your Honor, I mean right off the top of my head, I can think of two less restrictive means that are -- that would solve this problem. One is an anti-bundling statute, and two is transparency. The state doesn't even require a lobbyist to disclose the money that they raise. I mean we were dismayed to learn that. We would have thought there'd be a record of all the money that is raised by lobbyists and all, but -- Congress has such a law, other states have such a law. Connecticut doesn't have such a law. That's an example of a less restrictive measure.

And then I would imagine if the state had adopted an anti-bundling measure, I'm not sure we'd be having this conversation today, because that seems to me,

you know, a narrowly tailored type of legislation.

THE COURT: But you're asserting that bundling is the, quote unquote, real problem here. As I understand the arguments and the record, one of the things that the legislature was trying to do was to address public perception about the role of lobbyists in the creation of public policy in the state.

MR. LOPEZ: And, Your Honor, this law certainly accomplishes that goal, but they have taken a sledge hammer to the problem, Your Honor, and it's this court's responsibility, it seems to me, to figure, to break apart the means and the ends approach that is accomplished here.

THE COURT: All right. I know the analogy does not apply perfectly by any means, but in another decision-making context, there are absolute limits, ethical limits, and if I have a share of stock in a defendant corporation, a share, I can't hear that case. Why? Not because the outcome of that litigation is going to have any material impact on my share of stock such that I might get 15 or 20 cents out of the litigation but, rather, because there's an appearance of impropriety in my hearing that case. There's a concern that it doesn't look like the right outcome will be reached in those circumstances. What is wrong with a legislature saying in effect the same thing with respect to persons who are

seeking to influence legislation? We're going to have, in effect, the equivalent of no appearance of impropriety. I mean isn't that what they are doing with this legislation? And can they do that -- if that's really what they are trying to do, can't they do this in a more narrowly drawn way than what they've done?

MR. LOPEZ: And they can, Your Honor, and I'm not just hypothesizing. There's case law on point, on the lobbyist side. I think there's about six decisions -- maybe five, maybe six -- and they primarily deal with in-session limits.

THE COURT: But the fact that other people have done other things doesn't mean this law is unconstitutional. I mean I have a friend in Texas who's an elected judge and lawyers who make contributions to his campaign appear before him. I mean, you know, if Mr. Feinberg took me out to dinner last night, spent a couple hundred bucks on me, I'm sure that I could assure that it wouldn't affect the outcome of this case. And every other judge in this district would say the same thing. A dinner isn't going to affect the outcome but I would be proffering this case to another judge.

MR. LOPEZ: But I'm not pointing to other states as examples, Your Honor. I could do that as well. I'm pointing to decisions that uphold narrowly tailored

restrictions based on narrowly tailored provisions in the law that are absent in the Connecticut law. And those, and those narrowoly tailored provisions specifically factor into the analysis, the defendants have come here today and the analysis employed by those courts is consistent with constitutional First Amendment juris prudence.

The defendants have come here today without a single case that supports restricting solicitation by lobbyists. Not a single case. On the contractors side, not a single case except Blount, SEEC v. Blount, the securities industry case. Blount is distinguished on the very basic fundamental grounds that contractors that are awarded competitively aren't covered by the restriction. That's a big part of our legal argument, that most contracts in Connecticut are awarded competitively. There's no justification for regulating the principals associated with contractor's contracts that are awarded competitively. Only a handful, a handful of contractors are awarded outside the competition process. They are mostly in the construction context and they've gotten a lot of attention because it was abused.

THE COURT: But what you're saying is there wouldn't be any actual impact if there were different law. That is, most of these contracts are bid out. You know,

the lowest qualified bidder gets it, so there won't be any impact. But what that ignores, doesn't it, is the perception of the way business is done in the state, and isn't the legislature entitled to address those? The Supreme Court has said so over and over, the perception of corruption in the process. And that's really what I think, you know, your arguments don't sufficiently address is the decision by the legislature to adopt no appearance of impropriety standard here, and what's wrong with doing that?

MR. LOPEZ: Your Honor, because the First Amendment is lower against that type of legislation, against legislation that is not closely or narrowly tailored to achieve the legislature's ends, and this law is not, Your Honor. That's, that's --

THE COURT: Let me ask you, what is a less narrowly tailored way? What's another way of addressing the perception problem besides what the legislature's done?

MR. LOPEZ: New York, to much fanfare on January 1st, introduced new play-to-pay -- are you familiar with play-to-pay? You know, the play-to-pay regulations went into effect and previously individuals could give contributions between $2- and $4,000 to a candidate for executive office, and the new play-to-pay

regulations went into effect and they said contractors with contracts over $500,000 that are not awarded competitively cannot give the $5,000 anymore. They can give $500. That's a less restrictive measure. Same -- didn't apply, didn't restrict the contractors' right to solicit contributions. Didn't restrict the right to contribute or solicitation on behalf of political committees or PACs, as this case does, or political parties as this case does. Didn't restrict the right to organize PACs as this law does.

THE COURT: But also didn't eliminate the issue. It reduced the influence. Connecticut's taken the position we want to wipe out, we want to eliminate -- and for good reason, given the history of the state -- we want to eliminate that problem in our state. Period. And if we have contributions permitted, if we have bundling permitted, if we have, whatever, solicitation permitted, in our view as legislature, the perception problem is going to exist. If Mr. Feinberg can take me out to dinner and spend $200 but not $500, you're still going to be concerned, aren't you? It seems to me you would be.

And Connecticut has said no more. It's been too much for the people who have lost confidence in the government and the only way to restore that confidence is to say no more.

MR. LOPEZ: Your Honor, fair points all, except that there's -- there's the other side of the equation. The First Amendment acts as a limit on the ability of the legislature to address what even it perceives --

THE COURT: Yes.

MR. LOPEZ: -- as serious problems. And when you apply a strict scrutiny in the electorial context, the state almost never meets that standard. Just flat out the law, Your Honor.

Now, on the contribution side, I will grant that there's more discretion but, as I said, the half dozen or so lobbying cases do not support a program as broad as this program. The main problem, it seems to me -- excuse me. The problem of lobbyists contributing to candidates is it appears that favors will be returned, but that logic doesn't extend when a candidate, when a lobbyist contributes to, or a lobbyist's spouse contributes to a political action committee or when a lobbyist contributes to a political party. And the danger of corruption flowing from a $100 or $200 contribution, Your Honor, is just -- it's untethered from reality.

And that led the Supreme Court in Randall to strike down contribution limits when everyone in the world thought that legislatures had carte blanche to bring, to regulate in the area of contributions without judicial

oversight, the Supreme Courtly rejected that flat-out and said there's a point where you can go so low, and I would submit, well, it is so low because it's a complete ban, you can go so low that at some points the state's interests are not advanced except in the most exaggerated sense. Of course, it's the state's interests. When you take contribution limits down to $200, the state's concerns about the appearance of corruption are addressed but the, the Supreme Court said, at the end of the day was not persuaded by that because they did not find a $200 contribution had a potential to corrupt, and we can advocate -- if I can talk about my clients for a second?

THE COURT: Sure. My counsel who are here for my 11:00 o'clock proceeding, I'm going to be at least another half an hour so you're free to come back at 11:30.

UNKNOWN: Thank you, Your Honor.

UNKNOWN: Thank you.

MR. LOPEZ: Your Honor, if I could just briefly talk about my clients, there are about 800 registered lobbyists in this state. This statute targets all of them. About 50 of them, Your Honor, are considered full-time lobbyists, the type of lobbyists that's at the legislature every other day. Most don't engage in any significant lobbying. Most, 95 percent don't even meet the reporting threshold. It's $1,000 reporting threshold

for annual reporting threshold, if you've contributed to PACs, parties or candidates. Ninety-five percent of them don't even meet that threshold, much less their families or dependent children -- excuse me. And disclosure is required on families and dependent children, Your Honor.

THE COURT: But the fact that lobbyists are not making lots of contributions doesn't end the inquiry, it seems to me. Again, the point here is not that there need have been, the legislature needed to have been right that there's an actual problem. The legislature has said there is a perception problem. The people have lost confidence in government because they think government is for sale, and they said, regardless of the low contributions actually made, the only way to stamp this out is a ban. And, you know, the issue -- and I'm not saying it's an easy case, but the issue is really, is that it's constitutionally permissible. Is it compelling interests of the state, is it narrowly tailored to meet that compelling interest. And I haven't yet heard how the legislature can address the perception problem.

MR. LOPEZ: Your Honor, that's the argument made in every contribution case. And in cases involving limits, the difference between a thousand -- the legislature's given deference in cases that go beyond mere limits. The legislature's not entitled to that deference

and the legislature is required to legislate more carefully, Your Honor.

THE COURT: Of course, of course. Why haven't they satisfied that standard? What could they have done to eliminate the perception issue other than a ban?

MR. LOPEZ: Well, looking at the half dozen or so cases involving lobbyists, they should have focused on that group of lobbyists or contractors who present the actual problem of corruption, with corruption -- the state's interest has to be linked to a problem or perception of corruption and the state's remedy has to be linked to that group. And in the lobbying context, lobbyists aren't political players in the financial sense, Your Honor. That's not what the record shows. They contribute 1 or 2 percent of the gross revenues that are raised by political candidates, statewide or legislative.

Focusing on your major lobbyists, Your Honor, on the contractor's side, it focuses on those contractors who stand in a position to improperly influence the award of a contract. Your Honor, in Connecticut that's a handful of contractors because contracts are awarded on a competitive basis. It's the fast track construction contracts that create the greatest danger of abuse. Focus on them -- and, in fact, the state has. They've adopted, they've amended their fast track contracting process to remove or

at least greatly diminish the possibility of corruption.

But my point is we're talking about eight or ten contracts in a year versus the, I think -- I think Mr. Garfield has told us there are at least 10,000 contracting entities covered by this legislation. And if you do the math of the 10,000 contracting entities, multiple that by all the principals because it's just not the entity that's restricted. The entity was always restricted. You multiple by the new class of restricted principals, you're talking about 50-, 75-, 100,000 people. Take a bank, take a law firm. Directors are implicated, officers, substantial shareholders are 5 percent or more. Spouses and dependent children, partners -- it just, it gets a little out of hand, Your Honor.

And this legislation has just thrown the baby out with the bath water -- excuse me -- if you will, in an attempt to solve a problem which we know is a very small problem, Your Honor. And on the contractors side, we acknowledge there's some abuses there.

THE COURT: Yes, you're focusing on actual corruption. I'm focusing on perception of corruption, and it seems to me that the analysis is a little different. Your statistics are helpful if we're focusing on actual corruption. It's not clear to me though that the legislature was required to limit itself to cases of

actual corruption. It's entitled, isn't it, to enact prophylactic measures? It's entitled to enact measures when it has to address public perception? And the question then becomes if that's the goal, and that's a compelling interest, if that is in fact found to be a compelling interest, what could be done short of a ban? And what you keep coming back to is there's not a lot of corruption here, but if the issue is not actual corruption but perception of corruption, then it seems to me that the response by the legislature and the lawfulness of that response is analyzed differently.

MR. LOPEZ: Your Honor, on the contractors' side, there's no possibility of corruption. It's not a question of it. There's no possibility. The contracts are awarded competitively.

THE COURT: But you're assuming the competitive bidding process is pure. You're assuming that there is no ability to influence a decision whether somebody is a qualified bidder, whether the bids are in fact comparable because, you know, we know that Joe's firm does really great work and Tom's firm, you know, they did pretty shoddy work last time they did something for us so even though they are cheaper, do we really want to qualify them? And Joe did give money to the party last year, so -- that's a good thing. We're going to award him a

competitive, we're going to award him a competitive contract.

MR. LOPEZ: Your Honor, if it's helpful -- I appreciate that point. It's certainly been made by my opponents. If it's helpful, we have looked at the data because people who are associated with contracts as little as $5,000 in state are required to disclose if it's another 1 percent of the money coming into the political campaigns. This has been -- let's -- I want to say this has been an exaggerated response to a problem that -- to a problem.

THE COURT: All right. Let me get back to my earlier analogy. Mr. Feinberg took me out to dinner last name. It was a decent dinner. It wasn't the best I ever had. It was pretty nice dinner.

MR. FEINBERG: Sorry, Your Honor.

THE COURT: It probably cost him 200 bucks. That's it, 200 bucks. You know, we did have a chance to talk a little bit about his arguments and so forth and, you know, seems like he's got a pretty good case here. Don't you feel bad if it's only a couple hundred bucks? That's a small percentage of the salary that I make. You know, it's certainly a pittance in this case in terms of what's being spent on attorney's fees and so it's not really a problem that we had dinner last night.

MR. LOPEZ: Fair enough, Your Honor, but there's no competing except in a literal sense, so there's no competing First Amendment right here. If no one's going to argue -- someone's not going to come up and argue he has a First Amendment right to associate with you and take you out to dinner. I'm not familiar with that argument. It could be made theoretically but I haven't seen it made before in the context, in the scenario you've described. There isn't a First Amendment interest at stake here that has been the subject of, you know, case after case after case.

THE COURT: Right, but what that means is I have to go through the analysis. Is it a compelling interest the states identify and is the provision narrowly tailored? It doesn't mean -- just because there is a competing First Amendment interest doesn't mean one side necessarily wins or loses. There are cases in which First Amendment rights have been restricted and that restriction has been upheld by the Supreme Court. So all you're saying is, Judge, you have to go through the analysis, but what I'm trying to do is ask you why the analysis favors your side. And the fact they have to undertake the analysis doesn't answer the question. What I have to understand is why isn't the interest compelling and why isn't the solution narrowly tailored.

MR. LOPEZ: Well, again, to answer the question, it's a question of precision and there is no case law that supports such strict scrutiny on a class of contributors. I thought I made it clear there is ample case law that strikes down restrictions that identify a particular class of contributors except for corporate speakers. That's the one exception. So, just so I'm clear --

THE COURT: Isn't there a case where the legislature identified explicitly this type of perception of corruption problem and the court then struck down the response as being not sufficiently narrowly tailored? That's what I'm looking for.

MR. LOPEZ: Right. I mean there are really two cases that deal with comprehensive lobbiest regulation of the contribution, not solicitations. Just contributions directly to candidates, not to party or PACs. And those are the two California decisions. The California decision seems -- the first California Supreme Court seems on all fours. It animates all the constitutional principles we've talked about today; closely drawn, narrowly tailored, don't go too far. And some of the factors the court considered were that the definition of lobbyist was so broad that it brought within it all these basically -- whether it treats thousands of people who really didn't engage in lobbying full-time, it also brought within it

the lobbyists who never appeared before certain governmental bodies.

And, most important, in fact what the court found was it is a complete ban. They said the legislature could have achieved its goals by doing a partial ban, which is what the Alaska legislature said, upheld by the Alaska Supreme Court by imposing a partial ban. That's an example. That's our best precedent on all fours, Your Honor. And the California system that was under consideration didn't go nearly as far as Connecticut's.

Now, five years later, ten years later, the same, the amended California statute comes back to the federal court for review, and it is narrowed and in hugely significant ways and it's upheld, but it upholds an all year ban because it's an all year legislature. It upholds a total ban, but as the court knows, it only applies to full-time lobbyists, those who do 55 hours a month. It only applies to those lobbyists who appear before particular executive or legislature bodies or particular executive bodies or agencies. And it didn't, of course, apply.

And the court specifically discussed the fact that you remain free to contribute to political parties, be involved in party activities, organize a PAC, be involved in a PAC, solicit contributions. None of this,

of course, is allowed.

You'd asked me, you had mentioned the word prophylactic. Look, the prophylactic measures are not entitled to the same level of deference as measures that directly respond to the sort of governmental interests. Just last term in WRTL, the court made that abundantly clear. They basically expressed their frustration with the prophylactic type of approach to legislation regulation. If you have a problem, fix it. Don't try to plug every theoretical way to circumvent the law.

And that's Connecticut, what Connecticut has done by restricting contributions and solicitation and by extending the law and by defining principles so broadly and by extending the law to children and dependent spouses. It's all theoretically possible that the money could come back in that way, but it's not -- that possibility is not sufficient grounds to jettison the important First Amendment issues under consideration.

THE COURT: Thank you.

MR. LOPEZ: Thank you.

THE COURT: Mr. Flynn, did you have anything to add?

MR. FLYNN: Just very briefly. In the context of the Beaumont case, the discussion of the nature of the interest at issue, the court did have a footnote, it's

Footnote 8 there, which talks about the interest of the corporate contributions are sort of even more marginally protected than individual contributions. And the court took pains to notice that a ban, direct corporate contributions lead individual members of corporations to make their own contributions. Here we have a situation where individuals are prevented from making contributions so I just bring that to the court's attention.

And again, you know, we adopt the arguments of Attorney Lopez. I think what Attorney Lopez is focusing on is the closely drawn prong. You work backwards from the rights that's being interfered with. Whether or not someone has dinner with you is not something they can find something in the Constitution that says this is subject to strict scrutiny or it's a rational basis test or anything like that. What you have where you have something of, we all agree this is subject to some support for the form of heightened scrutiny, you have to look at whether or not the measure taken by the government is closely drawn.

And to address the issue here, if you just say that the government has an interest in preventing the perception of corruption and has carte blanche to enact any measure that it feels will take care of it, then you're reading out of the analysis the word closely.

THE COURT: Well, that's the issue. I mean it

seems to me it comes down to whether there is an alternative, more narrowly drawn solution to the problem, and that depends upon how you define the problem. In my analogy, if the problem is the influence of lawyers getting ex parte contact with judges, you know, then the way you resolve that is you say there shall be no ex parte contact between lawyers and judges. And you can't say you're going to solve the problem if you allow a little bit or you can take them to lunch but you can't take them to dinner or whatever, because the problem is an absolute problem. He's got my ear.

MR. FLYNN: Again, the analogy -- it's tough to work with analogies sometimes, but if we're going to carry that forward, you can say that you would have a ban on -- for example, if I had a matter before Your Honor, it would be impermissible for me to have lunch with Judge Arterton. You know, if you look at this case here, you could have lobbyists that have nothing to do with anything other than the legislature, and yet, if they have a strong feeling about who they want to support for the Governor, even in some symbolic way, they are prohibited from making that contribution.

Now, I know the argument made in the brief by the defendants is the lobbying registration rules don't require you to separate different branches of government,

that you have to seek redress for grievances. But right there, you are restricting First Amendment activity in a manner that's not closely drawn to the evil you're trying to prevent. I think you cannot read the word "closely" out of the test.

THE COURT: Well, that -- obviously, but why is it not closely drawn? What could they have done if the evil is the perception that lobbyists have undue and improper influence on legislation? What could they have done? Obviously they don't want to ban lobbyists from the legislature process. They want to ban lobbyists from expressing political opinions --

MR. FLYNN: I think Attorney Lopez's discussion was focused on the closely drawn. In other words, it's the anti-bundling statute that's the evil you're trying to prevent.

THE COURT: See, but that argument assumes that the legislature found that the perception problem is the perception of the public that bundling is bad. I don't see that as the problem that the legislature was trying to address. They weren't trying to address bundling, they were trying to address a public perception of corruption.

MR. FLYNN: You see, one of the problems with the analysis in this case is that the problem they are trying to address, which is the perception of corruption

in government, first, it's a general malaise, it's general frustration with corruption in government. There's no nexus necessarily between how they can show that an action in this lobbyist ban here would make them comfortable that the type of things that led to the Rowland scandal, that didn't involve lobbyists, isn't going to happen again. There's got to be a nexus. There has to be something. There are closely drawn interests, malaise, it's frustration, it's general, general admitted upsetment about the way that a government was conducted in some way. And in a lot of cases, the perception of corruption is a factor that courts have found to be sufficient, a factor to be considered in the analysis, but if you're going to, if you're going to apply the closely drawn element of the test, you have to show some nexus between what they are upset about and the protected activity you're trying to prevent.

And here, the perception of corruption is a general frustration and this is not closely drawn to address that. I'm not sure there's any evidence in the record that suggests people won't feel better once this happens. It's got to be closely drawn.

THE COURT: So, in your view there would have to be public opinion polls taken by the legislature in order to support a ban of this type? I don't understand the

point.

MR. FLYNN: I'm not sure that there has to be public policy but there has to be a nexus between the evil they are trying to prevent and the -- the evil you're trying to prevent and the protected activity they are restricting. And it has to be closely, it has to be -- it might not be the least restricted means but it has to be a measure. Attorney Lopez discussed the other means that could be used that would not go so far as this absolute prohibition on contribution.

THE COURT: All right. Mr. Feinberg, I know you have lots of points you want to make. Let me ask you to focus first, if you would, on the spouse and dependent ban. Why that meets the constitutional test here.

MR. FEINBERG: The justification for that ban, Your Honor, is that the dangers posed of circumvention. I mean it is quite explicitly a measure adopted to prevent circumvention of the basic prohibition on contributions by lobbyists and contractors.

THE COURT: Right, but --

MR. FEINBERG: And the rationale is that it would be a very, very easy thing for, for a lobbyist to be prohibited from making contributions, from making arrangements to have his spouse make the contribution in his stead and, therefore, be able to continue in a

slightly different form the same kind of improper influence and the same kind of, frankly, appearance of improper influence that would continue to --

THE COURT: Two questions. Why isn't that argument -- why don't you fall into Mr. Lopez's statistical trap at that point? If the actual corruption is belied by the small contributions of lobbyists, then why is it necessary to circumvent contributions that reflect the possibility of actual corruption? That's question one.

Question two is if the problem you're solving is a perception problem, where is the evidence of a public perception that corruption is being conducted by funneling contributions, $30 contributions from children and larger contributions from the spouse of the lobbyists or contractors?

MR. FEINBERG: I'll try to respond to that, Your Honor. First, as to the statistical problem that you raise, Mr. Lopez's statistical argument is nonsense, Your Honor. The notion that lobbyists are not political players in terms of making contributions in Connecticut is just complete rubbish. His own --

THE COURT: Let me put the question differently. What evidence is there that corruption has been perpetrated through contributions made by spouses or

dependent children?

MR. FEINBERG: Let me first address the, the notion that lobbyists don't make substantial contributions or don't have an important influence through their political contributions because he recites this 1 percent or 2 percent figure. First of all, his own papers acknowledge that doesn't include contribution by lobbying firm PACs, and suddenly the figure is 5 percent but it also doesn't include ad book purchases and it doesn't take into account all sorts of other things in lobbying, solicitation of lobbyist --

THE COURT: That's all in your brief. I'm really trying to figure out --

MR. FEINBERG: I understand, but I can't let it go by, Your Honor.

THE COURT: All right.

MR. FEINBERG: There's also in the papers in a particular race, Senator Defronzo presents some statistics that lobbyists had contributed up to 25 percent of individual races for the senate or for the house. There are other statistics that are in the record that show that leadership PACs in particular were overwhelmingly funded by lobbyist contributions, and the appearance of impropriety, the appearance of improper influence by lobbyists coddling or cozying up to legislature leaders by

gathering very substantial contributions for the leadership PACs, that then the legislative leaders were able to dispense to their membership. It's a system.

Now, what role do the spouses play in it? First of all, we cited the court statistics that show any number of occasions that there are -- there is in fact statistical evidence that spouses did give contributions. Jonathan Pelto's declaration includes statistics showing in the last gubernatorial election how much of the large contributions in fact had multiple contributions from the same household where the, you know, one person, where both people were contributing. Andy Sauer's statistics show, and Jeff Garfield included in his declaration showing individual situations where spouses were giving as well as the lobbyist as a way of overcoming a contribution limit that had been imposed.

THE COURT: Right, and where's the public perception that spouses and independent children and contributions are contributing to corruption in Connecticut? And what record does the legislature have that that was the case?

MR. FEINBERG: Let me go back again to the deference that the court is supposed to show to the legislature and to the expertise or the intimate knowledge that legislators have as to how the process works as a

matter of fact, which the court is required to defer to, because there are many, many statements in the legislative record that show that, where legislators said in the legislative history that it would be a very easy thing. We know how the system works. We know that this is what would happen. The Supreme Court has said that we're not entitled to take measures to avoid certain mention of the ban. We're trying to prohibit -- there are a variety of comments like that in the legislature history that show that the legislators were aware that money will find a way, like water, and if you cut off the lobbyist, the lobbyist couldn't make a contribution but maybe the spouse could do it. It's going to happen. You can bet on it. And there's plenty of factual information to support that.

Public perception, I want to speak to the question Your Honor asked. I don't think we have a record which shows that the public is specifically concerned about contributions by spouses but that's because it hasn't come up yet. It's only going to come up if this court strikes down that provision and the public will see that the system is being evaded by spouses making contributions and then there will be a public perception that the inference that the legislature was making to try to put a stop to the influence of lobbyist and contractors have been unfortunately derailed by the fact that there's

another way around what the legislature was trying to do. I mean there really is, and I agree with the court's point earlier that there really was no other way but a hard line to say, no, we're not going to permit this to go on any longer as a way of achieving the purposes the legislature was trying to achieve.

THE COURT: What you're ignoring is the question of whether the law with respect to spouses and children could be more narrowly drawn. Children are already subject to a $30 limit. What is there that would prevent the legislature from imposing a significant limit on spousal contributions that would still permit them to engage in symbolic speech or making a contribution to a candidate or soliciting money on behalf the candidate?

MR. FEINBERG: You know, I don't think that's the right analysis because the court's role here ought not to be thinking up other alternatives that the legislature might have chosen, and the closely drawn standard does not require the court to consider whether there is any less restrictive alternative. That's not part of the analysis. The court only has to consider whether the action the legislature in fact did take is reasonable closely drawn to satisfy the purposes that the legislature was trying to accomplish. So, could they have done something else? The answer is I guess I suppose that's true, but in order, in

order to accomplish the very important purpose of demonstrating to the public that the system's being cleaned up and that we weren't going to permit lobbyists or their immediate family members to continue to influence the process or lobbyists to influence the process through this alternative group. It seems to me if the legislature was justified -- and let me address McConnell for a second because McConnell did hold unconstitutional a provision of the bipartisan Campaign Reform Act which struck down, struck down a provision that prohibited minors from making contributions, but the difference was that was a statute that applied across the board to all citizens in the United States and basically deprived minors of the ability to make a contribution, whereas this is a very narrowly focused target --

THE COURT: Didn't the court strike that down in part because there wasn't sufficient legislative record to support this type of ban? And how is that different here from what is the legislative record on which the legislature acted to suggest that there is or will be a significant problem? And if minors and spouses are not prohibited from making contributions?

MR. FEINBERG: Again, there was no real substantial circumvention rationale that could be advanced in the McConnell situation. There was not only -- and the

court, that prohibition was really extraordinarily overbroad and I think it's very different from here. And here there are statements in the record as well as the experience of legislators that they are entitled to rely on. Justice Prior even in Randall made the observation that these are, these types of restrictions are ones that the legislators who are intimately familiar with the process and the way the system works have to be given a great deal of leeway to adopt measures that they think are necessary to prevent circumvention here, because they are the ones who understand how the system works and it's something that's obviously much harder for people outside to appreciate it.

THE COURT: All right.

MR. FEINBERG: I did have a bunch of other points. Want to bear with me for a few minutes?

THE COURT: Who else wants to be heard today?

MS. MURPHY-OSBORNE: Your Honor, I have just a few points that I'll make but I'm happy to make at the conclusion of Attorney Feinberg's.

THE COURT: Mr. Feinberg, I'm happy to hear you as briefly as you're able, and simply comment that I have read the briefs carefully.

MR. FEINBERG: I will try to be very brief.

THE COURT: Sure.

MR. FEINBERG: Number one, Mr. Lopez, who referred several times to ample case law that describes similar restrictions and he mentioned five or six cases, I don't know what cases he's talking about. There is no -- it's not in his brief, let's put it that way. There is no case law that would be on point here that says these prohibitions are unconstitutional.

He says that the Blount case applies strict scrutiny in ultimately upholding SEEC regulation prohibiting the making or soliciting of contributions. In the municipal bond industry context it is true the court applied strict scrutiny, but after an extended analysis, the court said it couldn't decide what standard of review to apply. It applied strict scrutiny only because that avoided the necessity of deciding the issue of the standard of review. It assumed strict scrutiny was the test, applied it, said these regulations are satisfied. The court could well decide to do that here, but Blount is certainly not authority for what the court, for holding that this, that strict scrutiny applies here.

More generally, Mr. Lopez is wrong that there is a wealth of authority that says that strict scrutiny must apply since there are solicitation requirements here. To the contrary, McConnell says that strict scrutiny does not apply to solicitation requirements of this kind and

there's really no support for his claim that there's all this authority that says solicitation restrictions are subject to strict scrutiny. In Randall, I mean Mr. Lopez makes the point that the courts have always upheld restrictions on corporate contributions, which is true. What's more important is that the courts have always upheld prohibitions on individual contributions with the single exception of Randall. And Randall went off on a very different rationale that is totally at odds with what Mr. Lopez described, because Randall did not say that the First Amendment rights of contributors were being adversely affected because the contribution limits were low. It focused on the ability of candidates to finance an election campaign and said the combination of those low contribution restrictions and various other provisions that imposed limits on what parties could do that related to how in kind contributions of time and services were, should be counted. The whole system combined to make it, to have the adverse impact on the ability of candidates to finance a campaign.

We have no such argument here. You couldn't make any such argument here. And Lopez -- excuse me, Randall simply does not support the proposition that the court was concerned about the First Amendment rights of contributors that were being adversely affected by low

contribution rates.

I think the rest of my arguments are in my brief, Your Honor.

THE COURT: Very good. Thank you.

MR. FEINBERG: Okay.

THE COURT: Ms. Murphy-Osborne?

MS. MURPHY-OSBORNE: Your Honor, just a few points. Just first Attorney Lopez makes much of the fact that there is no case that's directly on point with the legislation that's at issue in this litigation, and the state would concede that, yes, in fact this is a historic piece of legislation and that it was a result of, first of all, a tremendous and traumatic history of political corruption, and also in some instances, decades of work by advocates of clean government here in Connecticut. And as such, it's not something that should be lightly discarded.

Secondly, I'd like to address the point that Attorney Lopez was making in that the legislature in his view took a sledge hammer to the problems in this particular case and, to use his words, plugged every hole that was possible in terms of stopping lobbyists and state contractors from meaningful participation in the political process. And that is completely incorrect.

As our papers demonstrate, there are a multitude of avenues in which lobbyists and state contractors can

continue to be involved in the political process. They can have a house party. They can do all the many things that we detailed in our papers. And this gets to the plaintiff's extreme reliance on the Tromberg (ph) case which is completely distinguishable from this solicitation ban in that the lobbyists and state contractors have so many other avenues that, that soliciting other people to make contributions isn't something that is so essentially intertwined with they own political activity and their own political speech on the facts presented here.

Now, with respect to Attorney Lopez' attempt to answer your question about how could the legislature have more narrowly addressed the public perception problem, I think he failed to answer that question, but his attempts to do so are inadequate and I just want to demonstrate that his description about the contracting process here in the State of Connecticut, while it is laudable, his view of how contracts work and that very clear, objective standards are always employed. As Your Honor's question indicated, that is not in a practical matter always the case and that there's a lot of subjectivity involved in the contracting process and there's a lot of opportunities for people to impact that process in a less than objective manner, and we demonstrate that in our papers.

Attorney Lopez indicated that the legislature

could have acted more narrowly by really trying to get to the heart of the problem by really dealing with the state contractors who really were trying to manipulate the contracting process, or by really targeting in on those lobbyists, and in his calculation I guess there's 50 of them so, you know, I think that sort of belies his statistical point. If there's these 50 people who are giving 3 percent of the contributions in the state, that's a pretty big influence, but that's another point.

So these, the legislature should have made a class of I guess super lobbyists and those are the people that should be banned. Well, first of all, we would be here in this courtroom on another constitutional challenge if the state decided to use some type of subjective criteria in determining, you know, who were the black hat lobbyists and who were the white hat lobbyists. Obviously in this litigation the lobbyists that are plaintiffs are people who represent a lot of public interest groups and maybe aren't the big money lobbyists, but it would be very problematic for the state to get into the business of creating classifications and distinctions between various lobbyists. And moreover, if what the legislature was trying to do, as it was, was to address a public perception problem, that distinction among classes of state contractors and classes of lobbyists isn't something

that the public is likely to appreciate and to take any comfort from. The public isn't going to understand that,, oh, we've made this class of lobbyists ban because they really are influencing the public policy discussion in the state with their contributions. But this class of lobbyists, i.e. Betty Gallo, is not influencing the public policy discussion through her contributions.

So, that type of measure that is proposed by Attorney Lopez isn't something that really would ultimately address the public perception problem. Attorney Flynn kind of indicated that really what the legislature was addressing here was, in his words, were a general malaise among the citizenry regarding just politics in general. What was the legislature to do, just throw up its hands and say, well, I guess that's just the way it's going to be? Obviously that doesn't answer the fact that it wasn't something that you could scientifically quantify or in some way define clearly. Doesn't mean that the legislature is in some way forestalled from trying to do something about it.

So -- and moreover, I think the record does demonstrate more than just a generalized malaise. Clearly Sauer's affidavit describes being in a room with a bunch of school children and taking the position on school choice that they didn't agree with and being asked either

by the teacher -- or maybe by a child, I don't know, I don't recall right at this moment -- you know, who did you take money from? And Senator DeFronso talks about being confronted by his constituency about money and politics and people being really turned off.

So, it's really not just a generalized unspecified malaise, and as the Supreme Court's decisions have made clear, the legislators are entitled to deference in this area because of their unique position in the political system and they have an expertise that they acquire from simply going around and speaking with their constituents.

Another point to bring up is with respect to Attorney Lopez's reference to the New York City system. Here we have now in Connecticut a public financing system that, that in some ways is going to prevent a lot of people from giving just because candidates will become participating candidates. So, in New York they don't have, they don't have that same public financing system, so I don't think that's an apt analogy.

And that's it. Thank you.

THE COURT: All right, thank you. Anything further?

MR. LOPEZ: Your Honor, five minutes, please?

THE COURT: Sure.

MR. LOPEZ: Thank you. New York does have public financing, by the way, and it has the highest participation rate of any public financing program that I'm aware of.

The public finance is an interesting phenomenon. In Connecticut we've just seen a study is available on the State Election Enforcement Commission that predicts there's going to be at least 80 percent participation of all candidates, and that in affect means all major parties. I mean, because if you take 5 percent, that's the minor party candidates, that tells you the scheme of this law is necessary, as we have seen. It was adopted in the context of public financing. It was, the state -- most of the money being driven through the system, about 25 percent came from book ads which allowed the corporations to circumvent the direct ban on corporate contributions. That's been eliminated by statute. The candidates were allowed to have multiple PACs and this is standard practice. For each candidate, five PACs. If he was abusing the system, he raised money through those PACs. That's no longer permitted under Connecticut law.

Finally, you know, it has to be understood most of the money going into the political process historically came from PACs, who can still contribute money and from individuals, okay?

The 50 -- okay, I make those points to show maybe the fears here are exaggerated. Maybe we don't need a law as restrictive as this one. The 50 number I was talking about, the 50 lobbyists who were considered real full-time lobbyists, I'm talking about the 50 people who wear badges, who are in the legislature everyday during session. They are not necessarily the people who contribute any significant amount of money. As far as I know from the data, there might be three or four major lobbying firms in the state that can contribute any significant amount of money.

Last point. You know, your question is so valid and what makes this case so hard and where do you draw the line? The restricted classes, sometimes you can't draw the line in those First Amendment cases because the lines are arbitrary or it's not worth the candidate -- and what you do in that situation, Your Honor, is you bring down the contribution limits so you remove the threat of corruption that can flow from a reasonable contribution limit. You don't say all people are -- you know, a whole class is restricted from contributing. You bring it down, and that's what happened with McConnell, bring it down to $30, bring it down to $50, bring it down to $100, wherever the legislature's comfortable or a court can be comfortable knowing that that amount of money is going to

solve the corruption problem or won't be an issue of corruption. Sometimes you can't draw the line and you don't. You just bring it down. You just impose reasonable limits and that should solve the problem. That's an example of a less restrictive alternate.

And, sure, your basic point about perception and strong medicine was needed, or at least that's what the government's basic point is but I think you've also expressed that concern, that can't be the end of the analysis, Your Honor, because if that was the case, we would lose, there would be -- plaintiffs would never win in a contribution case and, yet, plaintiffs prevail all the time in contribution cases.

And I think there's a lot to be learned from the last two terms from the Supreme Court. Mr. Feinberg and I respectfully disagree with why the Supreme Court struck down the limits in Randall. I know for an absolute certainty on the party limits, yes, they just stayed their political parties. You can't limit them to $400. That's about their rights, that's not about the candidate's rights. And we know in -- well, I'll leave it at that argument. Thank you, Your Honor.

THE COURT: All right, thank you. Thank you all. This is a very interesting case, obviously, and one I'm not going to try and resolve today. I'll get you

something in writing as quickly as I can, as I said before. I'm hopeful I have a decision on the motion to dismiss very quickly and this one will take some time. Thank you all. We'll stand in recess.

(Whereupon the above matter was adjourned at 11:50 o'clock, a. m.)

C E R T I F I C A T E

I, Susan E. Catucci, RMR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

_____

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